



Australian Government
The Treasury



Review of Part 5 of the Food and Grocery Code of Conduct

Report

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Recommendations

1. The Government should consider amending the Code to:
 - a) enable Code Arbiters to mediate, and
 - b) provide for suppliers being able to contact and seek preliminary information from Code Arbiters without making a formal complaint.
2. The Government should consider amending the Code to:
 - a) enable the Independent Reviewer to conduct an evaluation of Code Arbiters' complaints handling processes, to determine whether complaints have been handled in accordance with the Code and the Code Arbiters' complaints handling procedure, and
 - b) enable the Independent Reviewer to require the provision of the Code Arbiters' complaint files as part of conducting this evaluation.

1. Introduction

The Food and Grocery Code of Conduct (the Code) is a prescribed voluntary code under Part IVB of the *Competition and Consumer Act 2010* (Cth). The objectives of the Code are to promote transparency and certainty in commercial dealings between the parties and provide an effective process for resolving disputes without the need to resort to legal action.

The Code contains rules about how supermarkets (also known as retailers) and wholesalers of grocery products in Australia must deal with their grocery suppliers (which includes food manufacturers and farmers). Woolworths, Coles, ALDI, and Metcash Food & Grocery (Metcash) are signatories to the Code and are bound by it.

The code was introduced in 2015 under the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*. The Code was reviewed in 2018 by Mr Graeme Samuel AC, which led to the introduction of the current dispute resolution framework in October 2020.

The Code regulations require two reviews to be undertaken. The first review was to start within two years of the commencement of the 2020 amendments, to examine the effectiveness of the new dispute resolution provisions. Another review is required to start within three years of the amendments commencing and would examine the effectiveness of the remaining provisions in the Code.

On 30 September 2022, the Assistant Minister for Competition, Charities and Treasury, the Hon Dr Andrew Leigh MP, released the terms of reference for the first review. In accordance with section 5 of the Regulations, this report will review the operation of the dispute resolution provisions in Part 5 of the Code. The review will address the following terms of reference:

- The effectiveness of the provisions in Part 5 of the Code in meeting its purpose of providing an effective, fair and equitable dispute resolution process for raising and investigation of complaints and resolving disputes arising between retailers or wholesalers and suppliers.
- Any barriers that may be preventing suppliers from fully utilising the dispute resolution arrangements in Part 5 of the Code.
- If appropriate, options or alternative approaches for improving the dispute resolution provisions in Part 5 of the Code.

The formal review process began in October 2022, with the consultation paper being released on 5 December 2022. The paper gave stakeholders an opportunity to provide input into the review and submissions closed on 1 February 2023. A total of 19 submissions (including 6 confidential submissions) were received and have been considered below.

This report will specifically focus on a review of the dispute resolution provisions in the Code to determine if they remain effective. The review of the remaining provisions in the Code will be undertaken from October 2023 as required by Section 5 of the Code.

2. Dispute resolution framework

The new dispute resolution framework

In October 2020, a new dispute resolution framework was introduced into the Code, based on the recommendations from Graeme Samuel's *Independent Review of the Food and Grocery Code of Conduct 2018*, which found that the dispute resolution framework in the Code at the time had not been working effectively for suppliers and signatories. The intention was to embed a process that settled disputes in a timely and cost-effective manner, while allowing the parties to maintain ongoing and healthy commercial relationships.

The new framework replaced the role of the then Code Compliance Manager, an internal function that previously sat within the retailer or wholesaler's legal team, which was responsible for investigating complaints and resolving disputes arising between the supplier and the retailer or wholesaler.

The current framework instead consists of Code Arbiters appointed by each of the signatories, whose role is to consider and resolve the complaints of suppliers, and an Independent Reviewer, who is able to consider supplier requests to review Code Arbiter's processes for dealing with complaints.

The framework does not prevent suppliers and signatories from pursuing any other dispute resolution process they prefer, including third-party mediation or arbitration, lodging a complaint with the Australian Competition and Consumer Commission (ACCC) or litigation through the courts, although there are some restrictions to pursuing dispute resolution processes in parallel to the framework.


Function of the Code Arbiter

The function of the Code Arbiter is to deal with complaints that arise in relation to the conduct of retailers and wholesalers towards suppliers, to the extent that conduct is regulated by the Code. Suppliers are able to direct their complaints to the relevant Code Arbiter, who must take all reasonable steps to investigate and resolve the complaint, including consideration of whether the retailer or wholesaler has acted fairly in dealing with the supplier.

After investigating the complaint, the Code Arbiter must determine what (if any) action should be taken by the retailer or wholesaler in response to the complaint. Remedies open to the Code Arbiter include making binding determinations on the retailer or wholesaler, which may include the awarding of compensation of an amount up to \$5 million or a variation to the grocery supply agreement with the supplier. The Code requires that signatories engage a person as a Code Arbiter only in that capacity, that is, the person cannot hold other positions in the organisation to maintain separation. However, smaller signatories may be exempt from this rule if they possess limited market share.

Functions of the Independent Reviewer

The primary function of the Independent Reviewer is to consider supplier requests to review Code Arbiters' processes in dealing with complaints, where the supplier is dissatisfied with the steps taken by the Code Arbiter. If the Independent Reviewer decides to conduct an independent review of the Code Arbiter's processes, they must take all reasonable steps to consider the request and complete the review, setting out the recommendations (if any) made to the Code Arbiter and the reasons for the recommendations.



The Independent Reviewer also has functions to identify emerging and systemic issues in the grocery supply chain relating to the operation of the Code and can publish non-binding guidance material relating to compliance with the Code. To support these functions, the Independent Reviewer must conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of the Code and collaborate with stakeholders across the grocery supply chain.

Assessing the framework's performance

In assessing the performance of the framework, a number of criteria can be considered.

One criterion is the extent to which suppliers may have a need to use the framework, that is, whether issues are being experienced by suppliers with the retailers or wholesalers they supply. The nature and extent of issues experienced is key to understanding whether the number of suppliers making use of the framework is reasonable.

Another criterion is whether the framework has provided an accessible way for suppliers to seek to resolve disputes between themselves and the retailers and wholesalers. Factors that may influence accessibility include:

- Whether there is adequate visibility, awareness and understanding of the process.
- The ease with which suppliers are able to navigate the process, including to initiate contact with the Code Arbitrator.
- Any concerns with the costs, time and resources needed to undertake the process.
- Other barriers to suppliers undertaking the process, such as fear of damaging the commercial relationship, fear of retribution for having made a complaint, or concern that confidentiality may not be maintained.

Are issues being experienced by suppliers?

Submissions, survey responses and publicly available data on the take-up of the dispute resolution framework were considered to ascertain whether suppliers are experiencing issues in their commercial dealings with the retailers or wholesalers they supply.

Responses to the 2022 annual survey of suppliers, conducted by the Independent Reviewer, indicate the majority of suppliers consider that the Code, including the dispute resolution functions, are working well and that issues being experienced in the commercial relationship between retailers, wholesalers and suppliers are unlikely to be systemic issues. The survey results showed 68 per cent of suppliers had not experience any issues with the retailer or wholesaler they supplied during the 2021–22 year. Of the suppliers that identified they had experienced one or more of the 20 issues listed in the survey, only a small number of suppliers identified they had experienced any one of the 20 issues listed. These results suggest issues experienced by suppliers are more likely to be isolated cases, rather than an indication of systemic issues in the industry. Key 2022 survey results, including the proportion of suppliers that identified with one or more of the 20 issues listed, are published in the Independent Reviewer's *Annual Report 2021–22*.¹

1 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, pp 15–16, <https://grocerycodereviewer.gov.au/sites/grocerycodereviewer.gov.au/files/2022-12/p2022-348107-ar.pdf>

Another possible indication that issues experienced by suppliers are affecting a minority of suppliers is the low number of complaints brought to Code Arbiters for investigation. There have been 5 supplier complaints investigated and concluded by Code Arbiters since the implementation of the framework in 2020.²

Only the Code Arbiter appointed by Coles has conducted and concluded formal investigations of supplier complaints since the framework was implemented. For the 3 complaints investigated by the Code Arbiter appointed by Coles in the 2020–21 year, 2 were in relation to the delisting of a product and another on the contractual requirements for undertaking an audit. For the 2 complaints investigated in the 2021–22 year, one was in relation to accounting practices and the other freight charges levied.³

Code Arbiters informed the review that a small number of other complaints had been received however, these could not be further investigated through the dispute resolution framework because of one of the following reasons:

- the complaint was dismissed as it was found to be misconceived or lacking in substance,
- the complaint could not be investigated further by the Code Arbiter because the supplier did not wish to have their identity disclosed to the retailer or wholesaler, or
- the complaint was outside the scope of the Code Arbiter’s functions (e.g. the complaint was made by a consumer).

Stakeholder views

Signatories, suppliers and other stakeholders all noted that the implementation of the Code has resulted in significant improvements for the commercial relationships between suppliers, retailers and wholesalers. However, stakeholders’ views on the extent of issues still being experienced by suppliers, and what this meant in terms of assessing the performance of the dispute resolution framework, were varied.

Signatories considered the few complaints being brought to Code Arbiters indicated that the Code is working well and viewed the largely positive responses in the Independent Reviewer’s 2022 annual survey as consistent with the information also available to them.⁴

Supplier groups however considered the low number of complaints a cause for concern. They argued the number of complaints investigated by Code Arbiters is in stark contrast to the number, nature and level of grievances and concerns being raised by suppliers directly with the supplier groups.

2 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 8, <https://grocerycodereviewer.gov.au/sites/grocerycodereviewer.gov.au/files/2022-12/p2022-348107-ar.pdf>

3 Food and Grocery Code Independent Reviewer, Annual Report 2020-21, p 10, https://grocerycodereviewer.gov.au/sites/grocerycodereviewer.gov.au/files/2021-11/p2021-229034_0.pdf; Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 10, <https://grocerycodereviewer.gov.au/sites/grocerycodereviewer.gov.au/files/2022-12/p2022-348107-ar.pdf>.

4 ALDI Stores, Submission, p 1; Woolworths Group, Submission, p 6.

For example, the National Farmers' Federation Horticulture Council's submissions stated:

it cannot be credibly claimed the Code is working so well that there are so few instances where its dispute resolution processes are required, or that the internal dispute handling processes of Code signatories are so effective that only 5 complaints over 2 years have needed to be escalated to a Code Arbiter.⁵

The ACCC also submitted that the number of complaints does not accurately reflect the challenges encountered by suppliers during their daily commercial dealings. The ACCC pointed to its work on the 2020 Perishable Agricultural Goods Inquiry as an indication that the number of complaints is an underrepresentation of the dissatisfaction and disagreement felt by suppliers in their commercial dealings with the signatories.⁶

Barriers to suppliers using the dispute resolution framework

Evidence provided to the review suggested many suppliers don't consider there are barriers to using the dispute resolution framework should they need to use it. However, a number of stakeholders identified potential barriers, either because there were concerns raised by suppliers with supplier industry groups, or because stakeholders were concerned about certain aspects of the framework impeding suppliers' willingness to bring forward a complaint.

The Independent Reviewer's 2022 annual survey provided some insight into suppliers' views. When asked to consider whether there were any impediments to raising a complaint with the Code Arbiter, the majority (58 per cent) of suppliers either didn't consider there were any impediments to raising an issue or that the issues weren't serious enough to require investigation by a Code Arbiter. However, of the suppliers that considered there were impediments, many identified fear of damaging commercial relationships, fear of retribution and concerns around confidentiality being maintained, as their key concerns.⁷

There were indications that a lack of awareness of the Code's dispute resolution framework among suppliers may also be a barrier to suppliers raising a complaint with the Code Arbiter. The 2022 survey responses show that across the industry only 40 per cent of suppliers were aware of who the relevant Code Arbiter was and how to contact them. This is despite Code Arbiters and signatories providing several examples in their submissions of initiatives and events specifically intended to raise supplier awareness of the functions of the Code Arbiter and the profiles of the individuals occupying the positions.⁸

The survey responses also show there may be issues with suppliers acquiring the contact information of Code Arbiters. Signatories have advised that Code Arbiter's contact details are contained in the mandatory Grocery Supply Agreement and are available on signatories' supplier portals. However, the degree of visibility and ease of navigation to find the information relevant to suppliers, such as the contact details of Code Arbiters, is unclear. Notably, Code Arbiters don't appear to have their own dedicated websites and the publicly available information about them appears to be limited to media releases announcing appointments, the publication of the Code Arbiter's complaints handling procedure and the annual reports published on the signatories' website.

5 National Farmers' Federation Horticulture Council, Submission, p 2.

6 Australian Competition and Consumer Commission, Submission, p 3.

7 Food and Grocery Code Independent Reviewer, Annual Survey 2021-22.

8 Food and Grocery Code Independent Reviewer, Annual Survey 2021-22.

Stakeholder views

Stakeholders generally considered that the dispute resolution framework had provided a more accessible pathway for suppliers to raise complaints and seek to resolve disputes with the signatories compared to previous arrangements. For example, ALDI Stores (ALDI) submitted that the implementation of the current framework has resulted in positive outcomes for both suppliers and the retailer where disputes have arisen, without the need to resort to legal action.⁹

However, a number of stakeholders noted potential barriers to suppliers bringing forward complaints, which indicate the framework may not be working as effectively as it could be. For example, while Woolworths Group (Woolworths) considered that the framework has operated effectively since its implementation, it also suggested the arbitration process may be perceived by suppliers as too adversarial and could be a contributing factor in the few complaints being brought forward by suppliers.¹⁰

Coles Supermarkets Australia (Coles) also supported the continuation of the framework, but submitted concerns with specific provisions going to the purpose and performance of the functions of the Code Arbiter and Independent Reviewer, and noted that stakeholders could benefit from greater clarity on these roles in the Code.¹¹

Some stakeholders indicated strong support for particular aspects of the current framework while identifying other areas that may need improvement. For example, stakeholders noted that the Government appointed Independent Reviewer, Mr Chris Leptos AO, has excelled at developing, harnessing, and building positive relationships with suppliers to understand and escalate systemic issues.¹² However, some stakeholders considered the Independent Reviewer should have a broader range of powers, for example, binding complaint resolution powers.¹³

Reflecting the responses to the 2022 annual survey by the Independent Reviewer, some supplier groups attributed concerns with elevating a complaint to the Code Arbiter to a fear of damaging commercial relationships, fear of retribution by the signatory and concerns with the independence of the Code Arbiter. Supplier groups suggested changes be made to the provisions in the Code to increase suppliers' confidence in the framework.¹⁴

9 ALDI Stores, Submission, p 1.


10 Woolworths Group, Submission, p 1, pp 5–6.

11 Coles Supermarkets Australia, Submission, pp 1–5.

12 Australian Small Business and Family Enterprise Ombudsman, Submission, p 1.

13 Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission 9; Food South Australia, Submission, p. 3.

14 AUSVEG, Submission, p 3; Food South Australia, Submission, p 3; Australian Competition and Consumer Commission, Submissions, p 2; Australian Small Business and Family Enterprise Ombudsman, Submission, p 1; Dispute Resolvers, Submission, pp 3–4; Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 2.



Supplier groups also reported that suppliers, particularly small to medium-sized enterprises, were concerned about the time and resources required to undertake the process and a perceived lack of controls in place for managing potential retribution.¹⁵ Further, while supplier groups had worked hard to increase suppliers' knowledge of the complaints process, they argued its complexity has contributed to a lack of proper understanding of the process and the protections provided to the suppliers that use it.¹⁶

Mr Leptos noted that while he supports the current framework, including the role of the Code Arbiters under it, he agreed that steps could be taken to increase awareness and supplier confidence in the regime.¹⁷

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO), the Hon Bruce Billson, also broadly supports the current framework, but notes that there are opportunities to enhance the alternative dispute resolution provisions to increase small business supplier confidence in the Code, which will be discussed later in this report.

Proposed changes to the framework

The stakeholders that considered the current dispute resolution framework is not working as effectively as it could be held differing views on how the framework could be improved. These views ranged from providing more time for the framework to mature,¹⁸ to amending the Code to address key concerns or replacing it with an alternative model altogether.¹⁹

Supplier groups that recommended alternative models to the current Code Arbiters and Independent Reviewer model, suggested shifting the functions of the Code Arbiters to the Independent Reviewer to form a new singular and independent function. This proposal argued that such a move could help remove any perception from suppliers that Code Arbiters are, to an extent, loyal to the signatory which appointed them. It was also noted that this approach could help streamline the dispute resolution process and make it easier for suppliers to navigate.

The ACCC held similar views and proposed replacing the current framework with an alternative independent dispute resolution process that doesn't involve the selection or appointment of people for dispute resolution roles by the signatories.²⁰

15 National Farmers' Federation Horticulture Council, Submission, p 3; Food South Australia, Submission, p 3.


16 Food South Australia, Submission, p 3; AUSVEG, Submission, p 3; Dispute Resolvers, Submission, p 3; Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 8.

17 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, pp 21–22.

18 Woolworths Group, Submission, pp 1–2.

19 Australian Competition and Consumer Commission, Submission, p 4; AUSVEG, Submission, pp 4–5; Australian Small Business and Family Enterprise Ombudsman, Submission, p 2; Dispute Resolver, Submission, p 5; Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 10; Woolworths Group, Submission, pp 4–5.

20 Australian Competition and Consumer Commission, Submission, p 4.



Other stakeholders supported amending the framework to broaden the functions of the Code Arbiter to allow more flexibility to resolve disputes and ensure the independence of the Code Arbiter function. For example, Woolworths noted that while the introduction of an informal mechanism (where signatories have all agreed to allow their Code Arbiters to engage with suppliers prior to a formal complaint being lodged) appears to have gone some way towards countering perceptions that the framework may be too adversarial, the informal mechanism could be further supported by providing Code Arbiters with the power to conduct mediation or conciliation during the early stages of the dispute.²¹

The Code Arbiter appointed by Metcash, Mr Martin Shakinovsky, similarly supported the prospect of broadening the Code Arbiter functions to allow suppliers to request the Code Arbiter conduct mediation processes, stating in his submission:

Bearing in mind that for ongoing relationships, a negotiated settlement is generally preferable to an independent decision maker imposing an outcome on a recalcitrant party, as a Code Arbiter I submit it would be beneficial to suppliers and retailers/wholesalers for Code Arbiters to have powers of conciliation/mediation. It would enable Code Arbiters where permissible, to resolve issues justly, quickly at low cost and with as little formality as possible, and thereby would add greater value to the intent of the legislation and to industry participants.²²

Some stakeholders, including the National Farmers' Federation Horticulture Council, AUSVEG and the Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee (Law Council of Australia, SME Committee), recommended introducing greater transparency and checks around the appointment and engagement of Code Arbiters to ensure complete independence in their role and counter any perceptions by suppliers as to whether due process is being given by Code Arbiters.²³

A number of supplier groups also suggested additional investments by the Australian Government to raise awareness and training for suppliers on the Code generally, and on the dispute resolution framework specifically, to help address the issue of suppliers' lack of understanding of the framework and existing protections in the Code for suppliers that raise a complaint.²⁴

21 Woolworths Group, Submission, pp 4–5.

22 Mr Martin Shakinovsky, Submission, p 3.

23 National Farmers' Federation Horticulture Council, Submission, p 3; AUSVEG, Submission, p 4; Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 6.

24 AUSVEG, Submission, p 4; Food South Australia, Submission, p 4; National Farmers' Federation Horticulture Council, Submission, p 3.

Conclusion

The review considered the feedback provided by stakeholders on the dispute resolution framework in the Code. Based on the evidence available, the review considers that the framework is functioning reasonably well and meeting its objective to provide suppliers with an avenue to resolve issues in a cost effective, timely manner, with protection from retribution.

Although there is some evidence that suppliers may be hesitant to progress disputes to Code Arbiters, this issue can be addressed through specific changes within the existing framework.

The Independent Reviewer's 2021–22 annual survey indicates that significant disputes (beyond the usual tensions at play in commercial relationships) are experienced only by a relatively small number of suppliers.

The review is not convinced that major changes are required to the dispute resolution framework at this point in time. The review also notes that it is unclear whether any of the suggested alternative models would produce better outcomes for the parties, without significant trade-offs. Other models could result in a more adversarial and litigious relationship between the parties, which could damage ongoing commercial relationships. Further, the current framework was not fully implemented and operational until March 2021 – following the appointment of all Code Arbiters and the Independent Reviewer. Overall, there is broad ongoing support within the industry for allowing the current framework more time to work. Therefore, the review has made recommendations and suggested actions in this report to address concerns around accessibility, build suppliers' awareness and confidence, and ensure the functions of the Code Arbiter and Independent Reviewer are performing as intended. Should evidence arise that an alternative model would improve outcomes for suppliers and signatories this should be considered in future reviews of the Code.

Key Findings

Evidence available to the review does not show that there are significant problems with the current dispute resolution framework in the Food and Grocery Code and that it is functioning workably.

The review does not recommend major changes to the framework at this time. The review makes a number of recommendations to improve accessibility and supplier confidence in using the dispute resolution framework, and to ensure the Code Arbiter and Independent Reviewer functions are performing as intended.

3. Function of the Code Arbiter

Code Arbiter function and process

The function of the Code Arbiter is to deal with complaints that arise in relation to the conduct of retailers and wholesalers towards suppliers, to the extent that the conduct is regulated by the Code.

When Code Arbiters receive a complaint, they must take all reasonable steps to investigate the complaint, except where they deem the complaint vexatious, trivial, misconceived or lacking in substance, and conclude the investigation within 20 business days.²⁵

When investigating the complaint, the Code Arbiter must take into consideration whether the retailer or wholesaler has acted lawfully and in good faith in their dealings. The Code Arbiter may also consider whether the retailer or wholesaler has acted fairly in their dealings with the supplier.²⁶

After investigating a complaint, the Code Arbiter must determine what (if any) action should be taken by the retailer or wholesaler in response to the complaint. In their determination, the Code Arbiter may consider proposed remedies that include compensation to the supplier of an amount up to \$5 million or that the grocery supply agreement be varied. If the supplier accepts the remedy proposed by the Code Arbiter, the Code provides for the Code Arbiter to enter into an agreement on behalf of the retailer or wholesaler, which the retailer or wholesaler must comply with.²⁷

The Code Arbiter may be required to reconsider the complaint and make a new determination following a recommendation from the Independent Reviewer's review of the Code Arbiter's complaints handling process.²⁸

New directions to Code Arbiters

In response to concerns raised by the Independent Reviewer that suppliers were unable to engage with the Code Arbiters unless a formal complaint was lodged, signatories expanded the directions for Code Arbiters to be able to 'informally' receive and deal with complaints outside of the Code's process. The intention was to provide suppliers with the ability to seek information on the dispute resolution process prior to making a formal request for the Code Arbiter to investigate their complaint. It was also intended to provide Code Arbiters with the flexibility to help resolve disputes without a binding arbitration and to take on a monitoring role for systemic issues arising in the industry.

25 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 35(3).

26 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 35(8).

27 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, cl 36 and cl 36A.

28 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, cl 36(B).

Supplier protections when advancing a complaint

The Code protects suppliers from potential retribution by a retailer or wholesaler in response to having made a complaint to the Code Arbiter. One of the ways it does this is by requiring the Code Arbiter to not disclose the identity of a supplier that has made a complaint to the retailer or wholesaler, except with the supplier's express consent to do so. The Code Arbiter must also observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint.²⁹

The Code also protects suppliers by requiring signatories to act in good faith in their dealings with a supplier and provides a non-exhaustive list of factors which may be taken into account in determining whether a signatory has acted in good faith. These Code provisions were expanded in 2020 to a list of 8 factors, including:

- whether the signatory has not acted in a way that constitutes retribution against the supplier for past complaints and disputes
- whether the signatory has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier.³⁰

Code Arbiter investigations

The Code requires Code Arbiters to annually prepare a report setting out the number of complaints received for investigation during the year.³¹ These reports confirm that 5 supplier complaints have been brought to and investigated by a single Code Arbiter, Mr Jeff Kennett AC, appointed by Coles.

Mr Kennett's reports for the 2020–21 and 2021–22 financial years indicate that 4 of the matters were resolved to the satisfaction of both the supplier and signatory, while the satisfaction of one matter was unknown at the time of the report's publication.³²

The review received feedback from Code Arbiters that, since the implementation of the new directions to allow them to discuss suppliers' concerns on an informal basis, the Code Arbiters have been approached by a number of suppliers and held several informal discussions. However, as these directions operate outside of the Code's provisions and only came into effect during the current financial year, there is no publicly available information to ascertain the number of suppliers using this new mechanism.

Stakeholder views

Code Arbiter function and independence

Stakeholders generally thought the introduction of the dispute resolution provisions were an improvement on past provisions, however views differed on whether the provisions were meeting their objective to allow suppliers to raise and resolve disputes safely.

29 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 34(3) and (4).

30 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 6B(3).

31 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 36(d).

32 Coles Code Arbiter, Annual Report 2020-21, pp 1–3; Coles Code Arbiter, Annual Report 2021-22, pp 1–2.

Woolworths believed the dispute resolution process, supported by the signatories' direction enabling the Code Arbiters to be engaged by suppliers on an informal basis, is capable of providing fast, independent and fair outcomes. Woolworths considered the provisions provide a strong incentive for signatories to act in accordance with the Code, given the potential compensation awards of up to \$5 million and likely reputational damage following mandatory public reporting of formal complaints.³³

However, Woolworths also suggested that the limited functions available to the Code Arbiter may be a deterrent for suppliers wishing to raise a complaint.

Suppliers may wish to approach the Code Arbiter for assistance, but may be reluctant to use the formal complaints mechanism if they do not want to engage in a perceived quasi-litigious process.³⁴

To address this issue, Woolworths suggested providing suppliers with the option of requesting the Code Arbiter to mediate or conciliate a dispute between itself and the supplier.

Mediation or conciliation may instead offer the parties with a more collaborative approach which may be more appealing to suppliers.³⁵

Mr Martin Shakinovsky, the Code Arbiter appointed by Metcash, held similar views on the limitations of arbitration, arguing that negotiated settlements are generally preferable for maintaining ongoing commercial relationships compared to 'an independent decision-maker imposing an outcome on a recalcitrant party'.³⁶

Mr Shakinovsky submitted that it would be beneficial to suppliers, retailers and wholesalers for the Code Arbiters to have powers of mediation and conciliation as it would enable Code Arbiters, where permissible, to resolve issues quickly and with little formality.³⁷ Mr Shakinovsky also noted that the power to mediate or conciliate would be helpful in the context of the current directives from signatories to engage in informal discussions with suppliers outside of the arbitration process.³⁸

Some stakeholders raised concerns that Code Arbiters were not truly independent of the retailer or wholesaler that appointed them and that the perceived lack of independence is impacting suppliers' willingness to come forward with complaints. A number of stakeholders made suggestions to address these issues.³⁹

The National Farmers' Federation Horticulture Council proposed a number of changes to improve the independence of Code Arbiters, including requiring supplier input and involvement in selection and performance review processes for Code Arbiters, as well as transparency around remuneration and potential conflicts of interest with the signatory.⁴⁰

33 Woolworths Group, Submission, p 5.

34 Woolworths Group, Submission, p 9.

35 Woolworths Group, Submission, p 9.

36 Mr Martin Shakinovsky, Submission, p 3.

37 Mr Martin Shakinovsky, Submission, p 3.

38 Mr Martin Shakinovsky, Submission, p 3.

39 National Farmers' Federation Horticulture Council, Submission, p 2–3; AUSVEG, Submission, p. 4; Australian Competition and Consumer Commission, Submission, p 4; Food South Australia, Submission, p 4; Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 6.

40 National Farmers' Federation Horticulture Council, Submission, p 3.

AUSVEG suggested removing the provision allowing Code Arbiters to be engaged by a retailer or wholesaler in another capacity if the retailer or wholesaler's market share is less than 15 per cent, to better ensure impartiality by the Code Arbiter.⁴¹

In their submission, Woolworths disputed these fears, stating that when a formal complaint is raised, suppliers' initial interactions with the Code Arbiter do not involve the signatory and that signatories do not have visibility over formal complaints made to the Code Arbiter without the supplier's express consent.⁴²

Other stakeholders suggested changes that would improve outcomes from the Code Arbiter's processes. For example, Coles submitted that the Code should be amended to clarify that determinations which include proposed remedies made by the Code Arbiter, apply only to the extent that the Code Arbiter considers that there has been a breach of the Code. Coles also suggested requiring the Code Arbiter report any identified alleged breaches of the Code, and any other matters the Code Arbiter takes into account as part of their investigation, at the conclusion of their investigation.⁴³

The informal process

Many stakeholders were supportive of the expanded directions by signatories enabling the Code Arbiters to be engaged by suppliers on an 'informal' basis.⁴⁴ However, views varied on the extent to which the directions have empowered suppliers to raise concerns with the Code Arbiter, with some stakeholders providing feedback that the initiative is having a meaningful impact, while others report scepticism that suppliers' key concerns, such as the risk of retribution, have not been addressed.

ALDI submitted that the new informal process is enabling greater engagement between suppliers and ALDI's Code Arbiter and has been a welcome initiative and enhanced the existing process.⁴⁵

Woolworths noted the introduction of the informal complaints process, combined with recent proactive outreach by the Independent Reviewer and Code Arbiter appointed by Woolworths, Helen McKenzie, has contributed to an increased number of suppliers raising issues with Ms McKenzie. Woolworths considered that while it has taken some time for suppliers to familiarise themselves with the dispute resolution process since it was introduced in 2020, the roles of the Code Arbiter and Independent Reviewer were becoming more embedded in the fabric of the industry, with supplier engagement flowing more freely and effectively.⁴⁶

The Law Council of Australia, SME Committee, considered the main benefit of the informal process is that it provided suppliers with another option to raise a complaint, noting that often complainants wish to find out more information on an informal basis, such as how a complaint will be dealt with, confidentiality maintained and possible sanctions, before deciding to lodge a formal complaint.⁴⁷

However, Food South Australia submitted that even with the informal process enabling suppliers to approach Code Arbiters, the connection between the signatories and the Code Arbiters still provides a perceived risk to suppliers in terms of potential retribution.⁴⁸

41 AUSVEG, Submission, p 4.

42 Woolworths Group, Submission, p 3.

43 Coles Supermarkets Australia, Submission, p 1.

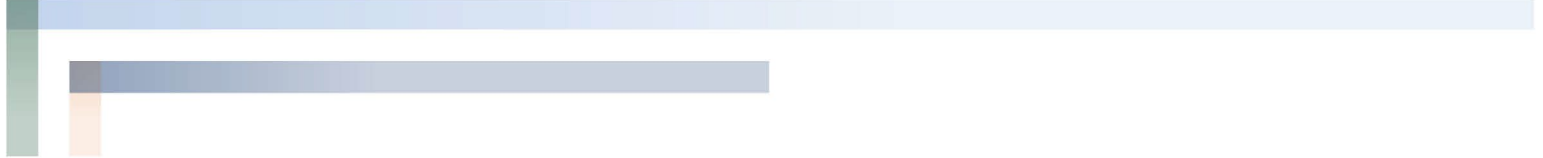
44 ALDI Stores, Submission, p 1; Woolworths Group, Submission, pp 1–2.

45 ALDI Stores, Submission, p 1.

46 Woolworths Group, Submission, pp 1–2.

47 Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 3.

48 Food South Australia, Submission, p 4.



The ACCC did not support the current informal process, submitting that it may raise concerns that the Code Arbiters could breach the Code by being engaged in a capacity other than as the Code Arbiter. They also raised that the absence of provisions in the Code requiring formal documentation to be maintained by Code Arbiters as part of the informal process may limit the ACCC's and Independent Reviewer's ability to ensure the Code Arbiter's processes have occurred as they should.⁴⁹

In his *Annual Report 2021–22*, Mr Leptos outlined certain deficiencies he saw in the operation of the Code and suggested a number of changes, including to embed the additional directives from the signatories into the Code. This would in effect provide suppliers with the ability to raise concerns with Code Arbiters without having to meet the minimum requirements in Clause 34 for referring a complaint to the Code Arbiter.⁵⁰ A number of stakeholders supported this recommendation in their submission to the review.⁵¹

Confidentiality provisions

The Law Council of Australia, SME Committee submitted that it did not believe there are appropriate protections in place for suppliers bringing a complaint to the Code Arbiter as there are no sanctions which would apply to the signatories in the event adverse action or retribution is taken against a supplier. The Law Council of Australia, SME Committee noted that the absence of penalties contrasts with the provisions for similar conduct in the *Competition and Consumer Act 2010 (Cth)*, which provides that intimidation is a criminal offence with associated penalties.⁵²

Some stakeholders raised concerns that the provisions requiring Code Arbiters to obtain consent from the supplier before identifying them as the complainant to the retailer or wholesaler were undermining the intended outcomes of the dispute resolution framework in the Code.

Mr Martin Shakinovsky held the strongest concerns, arguing that the anonymity provisions are detrimental to a fair and equitable process, as well as impractical. Mr Shakinovsky suggested removing the anonymity provisions to ensure a fair and transparent process and, where needed, introducing other safeguards to better protect suppliers against retribution after they came forward with a complaint.⁵³


49 Australian Competition and Consumer Commission, Submission, pp 4–5.

50 Mr Chris Leptos AO, Independent Reviewer, Annual Report 2021-22, p 21.

51 National Farmers' Federation Horticulture Council, Submission, p 2; AUSVEG, Submissions, p 5.

52 Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, pp 2–3.

53 Mr Martin Shakinovsky, Submission, pp 1–2.



The Explanatory Statement accompanying the 2020 amendments to the Code, explains that while Code Arbiters would have limited ability to fully investigate a complaint or provide a proposed remedy where the supplier did not consent to disclosing their identity to the retailer or wholesaler, the confidentiality provisions were important for suppliers to be able to come forward with a complaint to a Code Arbiter without fear of retribution, while enabling the Code Arbiters to commence an investigation based on the information available at that time.⁵⁴

Conclusion

The feedback from stakeholders indicates that overall the Code Arbiter role is operating as intended, based on the limited complaints received to date. However, the feedback provided by stakeholders suggests that there are barriers to suppliers accessing, or having confidence in, the Code Arbiter process.

The review considered the concerns raised by stakeholders and suggests amendments to the Code that should help address these concerns, including to expand the Code Arbiter function to allow Code Arbiters to mediate a dispute between the parties. This will enable suppliers to undertake a more conciliatory dispute resolution process with the involvement of the Code Arbiter at an early stage. Suppliers would not be required to have a complaint mediated by the Code Arbiter as a precondition for requesting arbitration (suppliers could make a direct request to the Code Arbiter for arbitration). Rather, this will be an additional option available to suppliers that will help bridge the gap between making an initial Code Arbiter inquiry and lodging a full formal request for arbitration. The review also considers it appropriate for Code Signatories to be required to participate in this process in good faith in cases where the supplier makes a request to the Code Arbiter to mediate.

The review also suggests bringing into the Code the new directions enabling suppliers to approach Code Arbiters to seek or provide information about their concerns with the signatory. The review considers that this will allow suppliers to better understand the options available to them and ensure that the protections in the Code, such as the requirement to seek the suppliers consent before disclosing the identity of a supplier to the retailer or wholesaler, will be extended to these informal discussions. The supplier will also be able to better assess their comfort in undertaking a formal dispute resolution process, including to consider feedback from the Code Arbiter on whether their complaint is likely to be considered a valid complaint that may result in a proposed remedy.

By providing suppliers with the option of requesting the Code Arbiter mediate, in addition to also having the option to request a formal arbitration decision, suppliers will ultimately have more choice over how and when a complaints process is undertaken. The review considers that these changes are consistent with the original objectives of the Code Arbiter function and will help alleviate some of the remaining concerns held by suppliers. The review also supports retaining the current confidentiality provisions and protections in the Code.

54 Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020, Explanatory Statement, <https://www.legislation.gov.au/Details/F2020L01281>.



Key Findings

The review received several proposals to improve the operation of the Code Arbiter function. The review finds while overall the Code Arbiter function is operating well, there are issues of accessibility and utility for suppliers. The review considers that amendments to the dispute resolution provisions in the Code would improve the accessibility and utility of the provisions for suppliers.

Recommendations

1. The Government should consider amending the Code to:
 - a) enable Code Arbiters to mediate, and
 - b) provide for suppliers being able to contact and seek preliminary information from Code Arbiters without making a formal complaint.

4. Functions of the Independent Reviewer

Independent Reviewer functions and processes

Independent review function

The primary function of the Independent Reviewer is to consider requests from suppliers to review the Code Arbiter processes in dealing with complaints.

Suppliers may request the Independent Reviewer conduct a review of the Code Arbiter's process in dealing with the complaint if the supplier has directed a complaint relating to a matter of concern to the Code Arbiter and the supplier is dissatisfied with the steps taken by the Code Arbiter.

The Independent Reviewer must consider the independent review request and decide within 10 business days of the request being received whether or not they will conduct an independent review.⁵⁵

The Independent Reviewer may choose to not conduct a review, including in circumstances where the supplier has accepted a Code Arbiter's proposed remedy, the supplier's request is considered vexatious, trivial, misconceived or lacking in substance, or the request does not relate to the Code Arbiter's process in dealing with the complaint.⁵⁶

If the Independent Reviewer decides to conduct an independent review, they must take all reasonable steps to consider the review request and complete the review within 20 business days of providing notice to the supplier of intent to conduct the review. Notice must also be provided to the signatory and Code Arbiter.

In conducting a review, the Independent Reviewer may request information relating to the original complaint from the supplier, Code Arbiter and the signatory. The Independent Reviewer must notify the supplier and Code Arbiter that the review has been completed within 5 days of completing the review. The notice may set out any recommendations made to the Code Arbiter, such as whether it is recommended that the Code Arbiter reconsider the original complaint (provided the supplier has not accepted a proposed remedy in relation to the original complaint at the time of notification). The signatory must also be provided a copy of the notice.⁵⁷

The Independent Reviewer must observe the same confidentiality requirements as those observed by Code Arbiters to not disclose to the retailer or wholesaler the identity of a supplier that has made an independent review request, except with the express consent of the supplier.⁵⁸

The Independent Reviewer has reported receiving one review request, for which a review was conducted, since the introduction of the dispute resolution framework.⁵⁹

55 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 37C(1).

56 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 37C(2).

57 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, cl 37D.

58 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 37B(3).

59 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 10.

Other functions

Other functions of the Independent Reviewer are to identify and address emerging and systemic issues in the grocery supply chain relating to the operation of the Code, conduct an annual survey of suppliers and signatories to the Code on matters relating to the operation of the Code, and publish non-binding guidance material relating to the operation of the Code.⁶⁰

In performing these functions, the Independent Reviewer is required to act collaboratively with stakeholders in the grocery supply chain, including with Code Arbiters, signatories, suppliers and relevant industry representatives.⁶¹ The Independent Reviewer must also be provided with a copy of the Code Arbiters' annual report detailing the number, nature and outcomes of complaints received each year for their information (copies must also be provided to the signatory and ACCC).⁶²

Since these functions commenced the Independent Reviewer has undertaken 2 surveys in relation to the 2020–21 and 2021–22 financial years and met with key stakeholders in the industry, including the Code Arbiters, signatories, supplier representatives as well as individual suppliers through a 'deep dives' series.⁶³

The Independent Reviewer has yet to publish further guidance material relating to the Code.

Independent Reviewer's independent review

The Independent Reviewer, Mr Chris Leptos AO, has received one request from a supplier to review the complaints handling process conducted by a Code Arbiter since the implementation of the dispute resolution framework. The Independent Reviewer's *Annual Report 2021–22* provides some details of the process and outcomes for the review.⁶⁴

The request was made by a supplier for a review of the complaints handling process by the Code Arbiter appointed by Coles, Mr Jeff Kennett AC, in relation to a dispute between the supplier and Coles.

Mr Leptos considered the request and determined that a review should be conducted.

Mr Leptos recommended the Code Arbiter reconsider the matter brought by the supplier on the basis that it was not clear the signatory had provided reasonable notice to the supplier of a delisting of products or provided genuine commercial reasons as part of that notice, as required by the Code. Mr Kennett informed Mr Leptos that while he had considered the recommendations, he believed a thorough investigation had been conducted and that the findings would remain unchanged. The matter was not reopened for further investigation.

60 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 37A(1).

61 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 37A(2).

62 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, clause 36D.

63 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 4.

64 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 10.

Stakeholder views

Independent review function

Many stakeholders were appreciative of the work of Mr Leptos in performing the functions of the Independent Reviewer and supported the continuation of the Independent Reviewer's functions within the dispute resolution framework.

Stakeholders reported valuing the insight provided by the Independent Reviewer's annual surveys, and publication of key findings in the annual report.⁶⁵

ALDI considered the role of the Independent Reviewer appropriate and effective in ensuring a means of review of the Code Arbiter's processes. ALDI also believed the role provides adequate transparency and accountability to ensure the framework is applied effectively, for example, by providing feedback on areas that signatories are performing well and highlighting issues of concern to enable them to be addressed.⁶⁶

The ACCC considered that the functions of the Independent Reviewer were essential to ensuring some checks and balances on how Code Arbiters and signatories deal with complaints. In particular, the requirement for the Independent Reviewer to conduct the annual survey and publish the annual report was an important source of intelligence on the difficulties suppliers face in their dealings with the signatories.⁶⁷

Coles, as the only signatory to have been party to a review conducted by the Independent Reviewer in relation to a complaint brought by a supplier, raised significant concerns with the provisions directing the independent review process. Coles' primary concern was a lack of clarity in how the Independent Reviewer was to engage with the Code Arbiter, supplier, and signatory as part of the review process, as well as what was in or out of scope of a review and the type of recommendations that the Independent Reviewer should be allowed to make.⁶⁸

Coles proposed the Code be amended to clarify the scope of the independent review process and provide for signatories to have an opportunity to provide relevant information for consideration during the review process. Coles also proposed the Independent Reviewer be required to develop and publish a complaints handling procedure, as the Code requires of Code Arbiters.⁶⁹

65 ALDI Stores, Submission, p 1; Food South Australia, Submission, p 4; Australian Competition and Consumer Commission, Submission, p 4.

66 ALDI Stores, Submission, p 1.

67 Australian Competition and Consumer Commission, Submission, p 4.

68 Coles Supermarkets Australia, Submission, p 3.

69 Coles Supermarkets Australia, Submission, p 34.

Mr Martin Shakinovsky also considered that the Code did not provide sufficient guidance as to what the Independent Reviewer should consider when conducting a review and that further clarification may be needed, stating:

It is not clear whether this review is intended only to consider whether there has been a technical compliance with clause 35, or whether the review should involve a deeper consideration of the decision-making process, including matters such as procedural fairness/natural justice, bias and apprehended bias, and adequacy of reasons. These are distinct exercises involving different considerations...

...As it appears the Independent Reviewer's role under clauses 37B-D is merely to consider the Code Arbiter's process, this ruling would appear to represent a manifestation of the confusion pertaining to this review role.⁷⁰

Mr Shakinovsky also held concerns that the Independent Reviewer could make decisions without all the relevant information as there is no requirement for the Independent Reviewer to seek information from, or disclose information to, the other parties to the review, or to provide a right of reply, which may undermine the fairness of the review process.⁷¹

In his *Annual Report 2021–22*, Mr Leptos agreed that greater clarity in the dispute handling provisions of the Code was desirable and that some guidelines by the Independent Reviewer could be helpful.⁷²

Other stakeholders suggested the Independent Reviewer should be able to make recommendations to the signatory. For example, the Law Council of Australia, SME Committee, considered that it would be appropriate and sensible for the Independent Reviewer to be able to make recommendations directly to the signatory and Code Arbiter on procedural issues. The Law Council of Australia, SME Committee also suggested that it should be mandatory the Independent Reviewer's recommendations be implemented by signatories and Code Arbiters.⁷³

However, Coles argued that the review is process based (as opposed to outcomes based) and the Code Arbiter owns the procedure and process in dealing with a complaint. As the signatory's only role in the process is to provide information when required by the Code Arbiter, the Independent Reviewer's recommendations should be made to the Code Arbiter and not the signatory.⁷⁴

Independent Reviewer's evaluation of Code Arbiter processes

While stakeholders generally agreed the functions of the Independent Reviewer should be maintained, some stakeholders argued the functions should be expanded to have more of an oversight role over Code Arbiters.⁷⁵

70 Mr Martin Shakinovsky, Submission, pp. 4–5.

71 Mr Martin Shakinovsky, Submission, p 4.

72 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 10.

73 Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 9.

74 Coles Supermarkets Australia, Submission, p 3.

75 Food South Australia, Submission, p 4; Australian Competition and Consumer Commission, Submission, p 4; Australian Small Business and Family Enterprise Ombudsman, Submission, p 1.

While supporting the continuation of the review function, Mr Leptos criticised his inability to access Code Arbiters' closed complaint files to evaluate the adequacy and consistency of Code Arbiters' processes in accordance with the complaints handling procedures published by the Code Arbiters. Mr Leptos proposed in his *Annual Report 2021–22* that the Code be amended to provide broader oversight of Code Arbiters' handling of complaints by authorising the Independent Reviewer to access the complaint files held by Code Arbiters as part of an evaluation process.⁷⁶

A number of stakeholders supported Mr Leptos' proposal to be provided the authority to access complaint files to conduct evaluations on Code Arbiters' complaints handling processes, including AUSVEG,⁷⁷ the National Farmers' Federation Horticulture Council⁷⁸ and ASBFEO. ASBFEO argued that:

Empowering the reviewer to complete thorough quality control evaluations to identify deficiencies and recommend corrective actions, will help to build stakeholder confidence, reduce systemic risks, and promote continual improvement. To support effective operation of the code and [alternative dispute resolution] processes, the reviewer should have adequate powers to access stakeholder's files.⁷⁹

Woolworths supported the Independent Reviewer having the proper authority to evaluate the Code Arbiters' dispute resolution processes, and to compel the provision of relevant information to enable that review.⁸⁰

Coles did not support this proposal, arguing that it would undermine the integrity and confidentiality of the dispute resolution process, which already provides for review at the instigation of the supplier by the Independent Reviewer. Coles stated in their submission:

It is Coles' view that no additional disclosure of confidential material should be provided where the supplier does not require it. Should Treasury contemplate an amendment providing the Independent Reviewer express powers to review closed files, Coles recommends the provision contain information such as the purpose for when such a review may be conducted, how the review would be conducted, the scope of information to be provided, the role of stakeholders including the supplier, Code Arbiters and signatory in that review, whether resulting impact to the outcome of the original finding may occur and how confidentiality will be managed.⁸¹

The Law Council of Australia, SME Committee was also of the view that the Independent Reviewer has an appropriate role in evaluating the Code Arbiters' dispute resolution processes and that no changes are required.⁸²

76 Food and Grocery Code Independent Reviewer, Annual Report 2021-22, p 21.

77 AUSVEG, Submission, p 5.

78 National Farmers' Federation Horticulture Council, Submission, p 2.

79 Australian Small Business and Family Enterprise Ombudsman, Submission, p 1.

80 Woolworths Group, Submission, p 8.

81 Coles Supermarkets Australia, Submission, pp 4–5.

82 Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee, Submission, p 9.

Conclusion

The review noted stakeholder concerns with the independent review process in the Code and the potential for outcomes which are inconsistent with the original objectives of the Independent Reviewer's functions. The review considers the provisions in the Code are sufficiently clear – independent reviews must consider the Code Arbiters' process in dealing with a complaint and not the substance of the complaint. This could include consideration of whether the Code Arbiters have conducted their investigation in accordance with the Code and followed the process in the Code Arbiters' complaints handling procedure. Where appropriate, the Independent Reviewer may make recommendations to the Code Arbiters to improve their processes. They may also recommend the Code Arbiters reconsider the original complaint in light of the findings on the investigation process. Given this, it is also appropriate that the Independent Reviewer make recommendations to the Code Arbiters and not the parties to the original complaint.

The review considers there is an appropriate level of flexibility in how the Independent Reviewer gathers information relating to the original complaint. Engagement with the Code Arbiters or the parties to the original dispute should be conducted as needed to fully consider the review request and complete the review. As such, the review does not support amending the Code to require a minimum level of engagement at this time.

While the Independent Reviewer does have insight to the Code Arbiters' complaints handling processes when a supplier requests a review, the Independent Reviewer does not have a specific function to oversee or evaluate Code Arbiters' processes more generally. Several stakeholders indicated they would support the Independent Reviewer having a broader oversight role with the power to require Code Arbiters to provide their closed complaint files for inspection. Stakeholders considered the introduction of these specific oversight powers could provide greater transparency and comfort to suppliers that the Code Arbiters' processes are truly independent, follow due process, and that outcomes are consistent. The review agrees that these benefits are likely to eventuate if the Independent Reviewer is provided with the authority to inspect Code Arbiters' closed complaint files and conduct evaluations which enable feedback to be provided to the Code Arbiters on the processes used. The Independent Reviewer's access to information should include any information that was considered by the Code Arbiters in dealing with a complaint as part of a formal complaint investigation process (it should not include information obtained as part of the Code Arbiters' initial 'informal process' or during the mediated process). The amendments should ensure the scope of evaluations is consistent with the existing functions of the Independent Reviewer and that stakeholders have certainty in the frequency of evaluations, how confidential information will be treated throughout the evaluation process, and how findings coming out of an evaluation will be conveyed.

Key Findings

The review considers the provisions in the Code sufficiently outline matters in scope for an independent review. The review also supports retaining the current flexibility in the Code allowing the Independent Reviewer to decide how they will conduct their review process.

The review noted general stakeholder support for the Independent Reviewer to be able to conduct evaluations of Code Arbiters' complaints handling processes and as part of this role be able to access the closed or historical complaint files held by Code Arbiters.

Recommendations

2. The Government should consider amending the Code to:
 - a) enable the Independent Reviewer to conduct an evaluation of Code Arbiters' complaints handling processes, to determine whether complaints have been handled in accordance with the Code and the Code Arbiters' complaints handling procedure, and
 - b) enable the Independent Reviewer to require the provision of the Code Arbiters' complaint files as part of conducting this evaluation.

5. Other issues

Submissions also raised a number of other issues and suggestions for enhancing the operation of the dispute resolution process under the Code. Proposals included changes to improve the accessibility of the third-party mediation and arbitration option under the Code and reducing timeframes for the resolution of disputes involving fresh produce.

Access to third-party mediation and arbitration under the Code

In addition to the Code's main dispute resolution framework that involves the Code Arbiters and Independent Reviewer, there is also the additional option of third-party mediation and arbitration.

This feature under the Code allows a supplier to take their complaint to a third-party mediator or arbitrator for resolution. The advantage of having this process under the Code is that once a supplier activates these provisions, it is compulsory for the retailer or wholesaler to participate in mediation or arbitration and take part in good faith.⁸³

The Code does not contain rules on how the mediation or arbitration must be conducted. Rather, it refers the parties to conduct the process in accordance with general rules of mediation and arbitration in Australia by reference to the Resolution Institute Arbitration Rules 2016.⁸⁴

This dispute resolution option has been a feature of the Code since it was first introduced in 2015. However, the review is not aware of any instances since the Code's introduction where suppliers have utilised these provisions to trigger mediation or arbitration in relation to a dispute with a retailer or wholesaler. The 2018 Samuel review of the Code noted that there had not been any uptake of mediation or arbitration under the Code.⁸⁵

Stakeholder views

Dispute Resolvers, an organisation that has previously been appointed as a mediation adviser responsible for managing the dispute resolution functions under various industry codes, suggested the Code adopt a more comprehensive set of mediation and arbitration procedures. Dispute Resolvers also favoured replacing the current dispute resolution framework, consisting of the Code Arbiter and Independent Reviewer functions, with the compulsory mediation or arbitration process.⁸⁶

Dispute Resolvers also noted that the current process only allows suppliers to seek mediation or arbitration separately. It was suggested that the process could be improved by allowing for a more flexible practice of "med-arb", where parties can move back and forth between these processes to potentially produce faster and cheaper resolution.⁸⁷

ASBFEO suggested that its support services could help complement and enhance the functions of the Code – via the confidential provision of impartial information, dispute triaging, timely facilitation of


83 Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Sch 1, sub-cl 38(3).

84 Resolution Institute, Resolution Institute Arbitration Rules 2016, <https://resolution.institute/Web/Web/Public-In-Dispute/Rules-and-Regulations/Resolution-Institute-Arbitration-Rules-2016.aspx>.

85 Professor Graeme Samuel AC, Independent Review of the Food and Grocery Code of Conduct 2018, p 37.

86 Dispute Resolvers, Submission, p 5.

87 Dispute Resolvers, Submission, p 5.



mediation and arbitration administrative functions, dispute de-escalation and stakeholder relationship management, and alternative dispute resolution case data collection. ASBFEO notes that it currently provides similar services for the Franchising, Dairy and Horticulture Codes.⁸⁸

Conclusion

The review does not recommend that the third-party alternative dispute resolution provisions should replace the current dispute resolution framework, consisting of the Code Arbiter and Independent Reviewer functions, as the only dispute resolution mechanism under the Code. Rather, these provisions should continue to be available to help complement the framework and allow suppliers to choose the alternative dispute resolution option that best suits their needs.

The review supports the view that allowing a degree of flexibility between mediation and arbitration may benefit the parties in resolving their disputes more quickly and efficiently. Hence, the review has recommended that the Code Arbiter function be amended to allow them to mediate as well.

The review notes that measures could be taken to make it easier for parties to utilise this alternative dispute resolution option. For example, consideration could be given to providing the ASBFEO with a more active role in assisting the parties to approach and navigate this process. The ASBFEO could draw on its experience in undertaking its alternative dispute resolution role in other codes to make this option easier and more streamlined for the parties.

The review does not consider that changes to the Code provisions are necessary to implement this measure. Rather, the ASBFEO and the Independent Reviewer could work collaboratively to develop guidelines to help provide suppliers with a clearer understanding of the process for activating these provisions so that they can make more informed decisions on the alternative dispute resolution options available to them.

⁸⁸ Australian Small Business and Family Enterprise Ombudsman, Submission, p 2.

The impact of timeframes on suppliers of fresh produce

A number of stakeholders cited concerns that the legislated timeframes for the dispute resolution process may be too long for suppliers of fresh produce.

ASBFEO submitted that the unique risks to suppliers of perishable goods aren't being accounted for, such as the risk of product spoilage. ASBFEO supported amending the timeframes for the Code's dispute resolution process to take into account the particular risks for suppliers of fresh produce.⁸⁹

AUSVEG similarly proposed that the Code should take into consideration the systems and needs of perishable goods suppliers beyond what it currently does, including providing for more suitable timeframes throughout the dispute resolution process.⁹⁰

Conclusion

The review considered the calls from ASBFEO and a number of supplier groups to amend the dispute resolution provisions (and other provisions in the Code) to better account for the unique needs of suppliers with fresh produce. While the review has not made findings on whether such changes are needed, the review suggests that the next review of the Food and Grocery Code consider whether the Code is as accessible and useful to suppliers of fresh produce as suppliers of non-perishable products.

Key Findings

The review finds that the third-party dispute resolution provisions in the Code complement the Code Arbiter and Independent Reviewer functions by providing a greater degree of flexibility in how suppliers may choose to seek to resolve disputes with retailers or wholesalers. There is scope to improve suppliers' access to third-party mediation and arbitration through a range of non-legislative measures, such as by providing ASBFEO a more active role in assisting suppliers to navigate the process or through the issuing of further guidance on third-party alternative dispute resolution processes.

The review does not make a finding on whether the dispute resolution provisions in the Code should be amended to account for the unique characteristics of fresh produce suppliers. Rather, it suggests the next review of the Food and Grocery Code consider more broadly whether the Code is accessible and useful to suppliers of fresh produce as suppliers of non-perishable products.

89 Australian Small Business and Family Enterprise Ombudsman, Submission, p 1.

90 AUSVEG, Submission, p 4.



Appendix 1. Submissions

ALDI Stores (ALDI)

Australian Small Business and Family Enterprise Ombudsman (ASBFEO)

Australian Competition and Consumer Commission (ACCC)

AUSVEG

Coles Supermarkets Australia (Coles)

Dispute Resolvers

Food South Australia

Law Council of Australia, Business Law Section, Small and Medium Enterprise Committee (Law Council of Australia, SME Committee)

Mr Jeremy Rockliff MP, Premier of Tasmania

Mr Martin Shakinovsky

National Farmers' Federation Horticulture Council

The Hon David Littleproud MP

Woolworths Group (Woolworths)