

EXPLANATORY STATEMENT

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes — Food and Grocery) Regulation 2014

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations under the Act.

Section 51AE of the Act provides that the regulations may prescribe an industry code under the Act. The Code can be prescribed as either mandatory or voluntary. For a voluntary industry code, the regulations must specify the method by which a corporation agrees to be bound by the Code and the method by which it ceases to be bound.

This regulation provides for the making of a voluntary industry code that can bind retailers in the grocery supply chain. The purpose of the regulation is to:

- regulate standards of business conduct in the grocery supply chain to build and sustain trust and cooperation throughout that chain;
- ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between the parties;
- provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers and suppliers; and
- to promote and support good faith in commercial dealings between retailers and suppliers.

How the Code operates

Retailers choose to ‘opt-in’ to the Code. The Code is then binding on that retailer and can be enforced by the Australian Competition and Consumer Commission (ACCC) or by right of private action.

If the ACCC or an aggrieved party takes court action and the court finds that the prescribed code has been breached, the court can order a range of remedies, including injunctions and damages.

As an ‘opt-in’ Code, it is only binding on those members of the industry who formally agree to be bound by the Code.

What is governed by the Code

When a retailer agrees to be bound by the Code, the retailer must deal with their suppliers in accordance with the Code, including ensuring that they offer suppliers a contract that meets the Code’s requirements for a ‘grocery supply agreement’.

Grocery supply agreements must clearly state contractual terms and conditions, in order to minimise ambiguity. However, specific terms and conditions remain subject

to negotiation between each retailer and supplier subsequent to formation of the contract.

The Code also sets out general standards of conduct for retailers. Retailers may only delist a supplier's product for genuine commercial reasons and must pay suppliers within a reasonable timeframe. The Code provides that retailers must not directly or indirectly require suppliers to fund the retailer's costs of a promotion. A retailer must accept all fresh produce delivered in accordance with fresh produce standards and quality specifications, and these standards must be provided to suppliers in clear, unambiguous and concise written terms. The retailer must also respect the intellectual property rights (including in relation to branding, packaging and advertising) held by suppliers. There are a number of exceptions to these general standards of conduct and these are discussed in detail below.

The Code establishes a general duty for retailers to deal with suppliers lawfully and in good faith.

The Code also sets out options for the resolution of disputes in relation to conduct covered by the Code and provides for compliance and reporting obligations.

How the Code operates in the context of other laws and regulations

The regulations are not intended to, and do not operate to, exclude any person or the ACCC from enforcing any rights, or seeking any remedies available in respect of the conduct of any retailer bound by the Code (or the provisions of any agreement entered into by a retailer bound by the Code).

The regulations are made under the Act and cannot override any provision of the Act or any other legislation. In particular, the dispute resolution mechanisms in the regulations do not preclude any supplier from raising any complaint or dispute directly with the ACCC without first utilising any procedure provided under the Code.

The Code governs different matters to the other industry codes prescribed under the Act. However, in the event of any conflict of the provisions of this Code with the mandatory Horticulture Code of Conduct or the mandatory Franchising Code of Conduct, the provisions of the other Code take precedence, to the extent of the conflict.

Attachment A — Details of the Competition and Consumer (Industry Codes — Food and Grocery) Regulation 2014

Introductory provisions

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Competition and Consumer (Industry Codes — Food and Grocery) Regulation 2014*.

Section 2 – Commencement

This section provides that the provisions of the Regulation commence the day following registration. Regulations are registered following the approval of the Governor-General. The regulations are then subjected to Parliamentary scrutiny. This means that the Regulations are tabled in the Parliament; the Regulations can then be disallowed within 15 sitting days of tabling. If the Regulations are disallowed by the Parliament the Regulations cease to have any effect from the date of disallowance.

Section 3 – Authority

This section provides that the Regulation is made under section 51AE of the Act, pursuant to section 172, which gives the Governor-General the power to make regulations under the Act.

Section 4 – Code of Conduct

Section 4 provides that the Code is prescribed as an ‘opt-in’ code as provided for under section 51AE of the Act.

The Code can be enforced by the ACCC or by right of private action.

If the ACCC or an aggrieved party takes court action and the court finds that the prescribed Code has been breached, the court can order a range of remedies, including injunctions and damages.

An ‘opt-in’ code is only binding on those members of the industry who formally agree to be bound by the Code. This Code provides that only retailers can be bound by the Code, and the Code does not bind suppliers or impose any obligations on them.

Schedule 1

Part 1 – preliminaries

This Part sets out the objects of the Code, explains key definitions used throughout the Code, and provides for the application of the Code, including transitional arrangements.

Clause 1 - Name

This clause provides that the name of the Code is the *Food and Grocery Code of Conduct*.

Clause 2 - Purpose

The purpose of this Code is:

- a) to help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and
- b) to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties;
- c) to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers and suppliers; and
- d) to promote and support good faith in commercial dealings between retailers and suppliers.

Clause 3 - Definitions

This clause provides definitions for the key terms used throughout the operative provisions of the Code.

Groceries is defined in the Code to include a range of retail products, including food, cleaning products, drinks (other than alcoholic drinks), toiletries, and other household goods. The definition of **groceries** does not extend to cover alcoholic drinks.

A **grocery supply agreement** is a contract (or any other type of agreement) for the supply of groceries from a supplier to a retailer. The definition under the Code includes any documents that make up the agreement and any documents that are made under the agreement. Grocery supply agreements entered into by retailers bound by the Code must meet the requirements set out in Part 2 of the Code and discussed in more detail below.

A **supermarket business** is a business where a person sells a range of foods to consumers. This includes the sale of: bread, breakfast cereals, butter, eggs, flour, fruit, vegetable, milk, meat, rice, sugar and packaged food. A business does not need to sell this entire range of goods to be considered a supermarket business, it will qualify as a supermarket business if it sells most of these goods. However, as this definition is focussed on food, the term supermarket business does not include more generalised retailers, such as department stores, general retail stores and general discount stores. Where a person carrying on a supermarket business in Australia also carries on other businesses, the Code applies to the supermarket business carried on by that person.

A **retailer** is defined as a corporation carrying on a supermarket business in Australia, which undertakes the retail supply of groceries or a corporation acting as a wholesaler in the grocery sector, that is, buying groceries from suppliers, in order to resell those goods to a supermarket business. The definition of retailer only applies to a corporation to the extent that it carries on a supermarket business, it does not apply to any other business operations conducted by the same corporation.

Supplier means a person who sells or is seeking to sell groceries to a retailer. This is a broad definition which includes the supply of all groceries, not just foodstuffs. The definition does not specify country of origin and so includes international suppliers to Australian retailers as suppliers for the purposes of the Code. Because the definition of a supplier includes a person actively seeking to sell groceries to a retailer, any new contracts, and the process of negotiating any new contracts, will be caught under the Code.

Importantly, while a supermarket business and hence a retailer is required to sell a range of food products, it can also sell any of the range of other grocery items. A grocery supply agreement is a contract to supply any of these different groceries, not just food items.

The Code also defines a range of other terms, including buying team, code compliance manager, de-list, own-brand product, promotion, senior buyer, shrinkage, and wastage.

Clause 4 – Application

The Code operates on an ‘opt-in’ basis, and retailers become bound by the Code when they give written notice to the ACCC. Once a retailer is bound by the Code, the retailer must abide by all the requirements of the Code or be liable to the remedies available through ACCC enforcement of the Code (including damages and injunctions). However, there are transitional provisions for agreements entered into before the commencement of the Code.

Retailers can also cease to be bound by the Code by giving the ACCC written notice that they are withdrawing from the Code. However, this does not allow a retailer to avoid any obligations it incurred while it was bound by the Code.

In the event of any conflict of the provisions of this Code with the mandatory Horticulture Code of Conduct or the mandatory Franchising Code of Conduct, the provisions of this voluntary Code do not apply, to the extent of the conflict.

Clause 5 – Retailer must offer to vary existing agreements

Retailers must offer suppliers the option to vary their existing agreements to conform with this Code. This offer must be made within six months of the retailer becoming bound by the Code.

If the supplier accepts that offer then the retailer must vary the agreement to conform with the Code within six months of the supplier accepting the offer.

Clause 6 - Transitional application

This clause provides transitional arrangements for grocery supply agreements entered into by retailers before the Code commenced (pre-existing grocery supply agreements). The Code will not apply to the supply of groceries under pre-existing grocery supply agreements immediately. The time that the Code will apply will depend on whether a retailer opts-in to the Code within the first six months of the Code commencing.

- If a retailer opts-in within the first six months after the Code commences, the Code will apply to all pre-existing grocery supply agreements from 12 months after the Code commenced.
- If a retailer opts-in more than six months after the Code commences, the Code will apply to all pre-existing grocery supply agreements from six months after the retailer opted-in.

In either case, if the retailer varies a pre-existing grocery supply agreement so that it complies with the Code within 12 months after the Code commences, the Code applies from when the agreement is so varied.

This transitional application of the Code is supported by a requirement for retailers to offer suppliers the option to vary these agreements to conform to the requirements of the Grocery Code within six months after the retailer is bound by the Code, as outlined in the discussion of clause 5 above.

Part 2 – grocery supply agreements

Part 2 of the regulations govern the terms and conditions of any grocery supply agreement that a retailer enters into after agreeing to be bound by the Code, it also governs variations of agreements. This includes any existing grocery supply agreement that the supplier has requested be updated (under Clause 5).

Clause 7 – grocery supply agreements must be in writing and retained

Retailers are required to ensure that grocery supply agreements are in writing and there is a record keeping obligation, which means that retailers must retain records of the agreement for a minimum of 12 months after the agreement expires. The requirement to keep records encompasses both documents comprising the agreement and documents required to be made under the agreement.

These records fall under the information gathering powers of the ACCC. These powers are set out in section 51ADD of the Act, and provide that the ACCC can require corporations to provide it with information or documents required to be produced under an industry code.

Clause 8 – matters to be covered by the agreement

Grocery supply agreements are required to include terms which cover all of the following key matters.

- any requirements the retailer has in respect of the delivery of the groceries;
- any circumstances in which the retailer may reject the groceries;

- the period within which the retailer must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed;
- if the agreement is intended to operate for a limited time only—the term of the agreement;
- in clear terms, any quantity and quality requirements relating to the groceries; and
- if the agreement provides for termination by one or more parties to it—the circumstances in which it may be terminated.

The Code does not stipulate what these terms and conditions must say, it simply provides that they must be included in all grocery supply agreements.

Clause 9 – payments for shrinkage

Shrinkage is a defined term under the Code, meaning the loss of products between point of manufacture or purchase from a supplier and the point of sale by a retailer, and arising from factors such as shoplifting, employee theft and administrative error.

The Code provides that retailers must not include provisions in grocery supply agreements which would require suppliers to make payments for shrinkage or in any other way demand that payments be made.

However, it is still possible for retailers to discuss with suppliers the issue of shrinkage and ways to mitigate risk and occurrence of loss of stock.

Clause 10 – unilateral variation of agreement

Retailers cannot unilaterally vary a grocery supply agreement (that is, vary the terms without the supplier’s agreement). However, if the original grocery supply agreement with the supplier allows for the retailer to vary the agreement and sets out clearly the circumstances where a variation may be made then a variation may be possible. For a variation to be valid it must be made in accordance with the terms of the agreement and the supplier must be given reasonable notice.

The variation can only deal with a change in the amount of goods to be supplied if the original grocery supply agreement specifies a methodology to determine the level of variation.

Clause 11 - retrospective variation of agreement

In order for the original grocery supply agreement to allow for a retrospective variation, the grocery supply agreement must clearly set out the changes in circumstance that allow for the variation and this change must be beyond the retailer’s control, for example an act of God. If the variation involves a quantitative adjustment to the terms of supply, a variation cannot be made unless it is in accordance with the basis or methodology for calculating the adjustment.

Part 3 – conduct generally

Part 3 governs a retailer’s broad conduct towards suppliers under the Code. Part 3 requires a minimum standard of behaviour in relation to delisting products, payments

to and from suppliers, intellectual property matters, changes to supply chain procedures, allocation of shelf space and product quality and standards. It also covers business disruption and protection of confidential information.

Clause 12 – payments for wastage

Wastage is a defined term under the Code, as groceries that are unfit for sale, for example, this would include fresh foods that have spoiled, or that are beyond their use-by date.

Retailers are generally prohibited from requiring suppliers to make a payment for wastage which occurs at the premises of the retailer. This includes directly or indirectly requiring such a payment and covers wastage which occurs at the premises of a contractor or agent of the retailer.

However, there is an exception, if the wastage is caused by the negligence or default of the supplier (where negligence and default are clearly defined in the relevant grocery supply agreement) and the basis of the payment is also set out in the grocery supply agreement.

The retailer has the onus of proving all the elements of the exception to demonstrate that wastage was the fault of the supplier.

Clause 13 – limited circumstances for payments as a condition of being a supplier

Retailers are generally prohibited from requiring suppliers to make payments in order to have products stocked by the retailer.

However, retailers are able to require payments for promotions. Promotions are defined in Clause 3 as, any offer for sale (whether or not that is accompanied by some other benefit to a consumer) at an introductory or reduced price, agreed between the parties, for a specified period.

Retailers can also require payments in relation to new grocery lines – for groceries that have not been stocked in at least 25 per cent of the retailer's stores for the 365 days prior to the request for payment. If this is the case the payment must also reflect a reasonable estimate of the costs and risks that the retailer undertakes in stocking the products. What constitutes a 'reasonable estimate' is determined by the retailer.

If a dispute arises about a payment, then the retailer has the onus of proving that it is a situation where requiring a payment is permitted.

Clause 14 – payments for better positioning of groceries

Retailers are generally prohibited from requiring suppliers to make payments to obtain a better position for their products or an increase in the shelf space allocated to their products.

However, payments can be required where:

- a) the grocery supply agreement mandates that a payment be made; and
- b) sets out the circumstances for the payment; and
- c) the payment is reasonable and reflects both the additional benefits to the supplier and the costs and risks to the retailer.

The retailer has the onus of proving all of these matters in any dispute over payment.

This clause means that if a grocery supply agreement provides for such payments, then a retailer can require payments for better positioning of groceries, even if the supplier did not request that the groceries be better positioned or have additional space allocated to their product.

Clause 15 – delisting products

Retailers can only delist a grocery product where permitted by a grocery supply agreement and for genuine commercial reasons.

An example of a circumstance that would amount to a genuine commercial reason the goods not being at the required standard set out in the grocery supply agreement, in terms of either quality or quantity. Isolated, short-term fluctuations in supply would not normally comprise a genuine commercial reason for delisting.

The product not meeting commercial sales or profitability targets, as set in the relevant grocery supply agreement, or an ongoing failure to meet delivery requirements as agreed would also constitute genuine commercial reasons.

Delisting a product as a punishment for making a complaint does not constitute a genuine commercial reason and is not permitted under the Code.

The Code does not prevent a retailer from declining to extend an existing grocery supply agreement or declining to enter into a new agreement following the end of a fixed term agreement.

If there are genuine commercial reasons for delisting, then a retailer must provide reasonable notice in writing which sets out the reasons for delisting, and also the retailer must inform the supplier that they have a right of review by the retailer's senior buyer, who must provide written notice of the basis for and outcome of the review.

However, a retailer does not have to provide reasonable notice to a supplier where time is of the essence (including product safety issues) or where there have been ongoing problems with supply where the retailer has been out of stock or had significantly reduced stock. Importantly these factors only remove the need for written notice; they cannot in and of themselves be used as a reason to delist a good unless they are also specified as a genuine commercial reason for delisting in a grocery supply agreement.

Clause 16 – payments to suppliers

Retailers are required to pay suppliers for the products they deliver within the time frame set by the grocery agreement. The payment must also be made within an objectively reasonable timeframe.

Retailers are generally prohibited from setting off any amount against a supplier's invoice.

However, set-off is permitted where it is provided for in a grocery supply agreement.

Set-off is also permitted if they have the written agreement of the supplier, noting that retailers cannot force suppliers to consent to set-off an amount.

The Code limits the circumstances in which retailers are able to require payments from suppliers. Retailers are generally prohibited from requiring payments toward the costs of:

- a) a buyer's visit to the supplier;
- b) artwork or packaging design;
- c) consumer or market research;
- d) the opening or refurbishing of a store; or
- e) hospitality for the retailer's staff.

However, there is an exception if the relevant grocery supply agreement allows for payments in these circumstances.

Clause 17 – promotional and in-store support

Retailers are broadly prohibited from requiring a supplier, directly or indirectly, to fund the retailer's costs of promotion, unless this is provided in the grocery supply agreement between the retailer and the supplier, and the retailer gives the supplier reasonable notice before the promotion.

If a retailer orders a product from a supplier at a promotional wholesale price as provided for in the relevant grocery supply agreement, they must ensure that the quantity of the order is calculated transparently. Retailers must also not over-order, and if they do over-order they must pay the supplier the difference between the promotional wholesale price and the full wholesale price for the quantity of the product that has been over-ordered.

If a retailer makes an order for a product from a supplier for a promotion, the retailer must get the supplier's written consent if the retailer wishes to cancel the order or reduce the order by more than 10 per cent. Written consent by the supplier is not required if the retailer gives the supplier reasonable written notice of the cancellation or reduction or the retailer compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

Clause 18 – product quality and standards

Retailers must provide fresh produce standards and quality specifications to suppliers in clear written terms. Retailers must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications.

Retailers can only reject fresh produce if the produce fails to meet relevant fresh produce standards or quality specifications. This must be done within 24 hours, with written notice provided within 48 hours. Retailers cannot reject produce after they have initially accepted it.

Retailers must state any labelling, packaging or preparation requirements for a grocery product to their suppliers in clear, unambiguous and concise written terms. If changes are required, the retailer must provide reasonable notice (unless those changes are required by law) taking into consideration existing stock held by suppliers (where known) and any agreement as to stock coverage in the relevant grocery supply agreement.

Retailers must make any claims for damaged products or shortfalls within a reasonable time (at most 30 days) after delivery of the goods.

Clause 19 – change to supply chain procedures

The Code broadly prohibits retailers from making any major changes to supply chain procedures during the course of a grocery supply agreement, unless they give the supplier reasonable written notice or compensate the supplier for any net resulting costs, losses or expenses incurred resulting from a lack of reasonable notice.

If a supplier waives their right to compensation, no compensation is required.

Clause 20 – business disruption

Retailers are not allowed to threaten disrupting suppliers' business or termination of a grocery supply agreement without reasonable grounds for doing so.

Clause 21 – intellectual property rights

Retailers must respect suppliers' intellectual property rights in relation to suppliers' products, for example with respect to branding, packaging, and advertising. Retailers must not infringe suppliers' intellectual property when developing their own brand products.

If there is a dispute resolution process to resolve any dispute in relation to intellectual property, the dispute resolution process must consider any relevant actions of the supplier. This acts as a 'clean hands' provision to ensure that the mediator or arbitrator can consider all the issues of fairness and justice in relation to the conduct of both parties in any intellectual property dispute.

Clause 22 – confidential information

Retailers must not use confidential information given to them by suppliers, such as confidential information relating to product development, proposed promotions or pricing, for a purpose beyond that agreed with the supplier.

Retailers must establish systems to ensure confidential information is not misused.

Information is not confidential if it is publicly available or comes into the possession of the retailer independently of the supplier and the retailer does not use the information beyond its agreed purpose.

Retailers will hold confidential information on a 'need to know' basis and are only allowed to disclose the information to employees or agents who need the information to fulfil the agreed purpose.

Clause 23 – transfer of intellectual property rights

If a retailer is negotiating the supply of an own brand product, from a supplier of an equivalent grocery product, the retailer may not require suppliers to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent own brand product, either directly or indirectly.

Retailers are, however, allowed to hold intellectual property in an own brand product and they can hold an exclusive right to sell an own brand product.

If an own brand product was developed, formulated or customised for the retailer, then the retailer may insist on holding the intellectual property or exclusive right to retail sale as a condition of the supply of that own brand product. For example, if a

retailer designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then it may be reasonable for a retailer to wish to jointly hold intellectual property rights to that product.

Clause 24 – allocation of shelf space

If they enter an agreement together, retailers must provide to or publish for suppliers all product ranging and shelf space allocation principles. There are no conditions on the content of these principles, so it would be possible to have principles that clearly favour own brand products. Retailers must uphold these principles and keep them up to date, and apply them without discrimination.

If retailers wish to do a product range review, they must tell potentially affected suppliers by written notice the purpose of the review, and the key criteria governing ranging decisions. After any range review, retailers and suppliers are allowed to discuss its outcomes for a reasonable period of time, with retailers providing reasons for their decisions if requested.

This clause does not limit the rights and obligations under the de-listing clause of the Code (Clause 15). So even if a range review might suggest delisting a product, any delisting would have to be in accordance with the provisions of Clause 15.

Part 4 – other duties

Part 4 sets out general obligations for retailers to comply with in their dealings with suppliers.

Clause 25 – obligation to deal lawfully and in good faith

Retailers must deal with suppliers lawfully and in good faith at all times.

This is a broad obligation which involves conducting trading relationships without putting suppliers under duress.

It also requires retailers to respect suppliers' needs for certainty in trading, particularly in relation to production, delivery and payment.

Retailers must also explicitly recognise the need to act lawfully and in good faith with suppliers in their agreements.

Clause 26 – provision of contact details

Retailers must make suppliers aware of the contact details of retailer's buyers, senior buyers, and their code compliance manager. These details must be kept up to date and include position titles and contact telephone numbers.

Part 5 – dispute resolution

Part 5 provides options to facilitate the resolution of conflicts between retailers and suppliers and also provides avenues for formal dispute resolution through mediation and arbitration in order to resolve disputes arising in relation to matters covered by the Code.

Clause 27 – information and documents

If a supplier makes a complaint under the Code, they are to provide details (subject to appropriate confidentiality protections) of the complaint, the conduct underlying the

complaint, the provisions of the Code that are alleged to have been breached, and the remedy sought.

A retailer does not have to respond to a dispute unless these details are provided by a supplier to the retailer.

Clause 28 – code compliance manager

Retailers must appoint a code compliance manager. The code compliance manager must have access to necessary resources, documents relating to the retailer's Code obligations, and the retailer's buying team to discuss obligations under the Code.

The code compliance manager must be independent of, and not managed by, any member of the buying team.

The code compliance manager must act in accordance with a written complaints handling procedure developed by the retailer. This procedure must be reviewed annually, and updated as necessary, with the retailer providing the current version to the ACCC.

Clause 29 – direct referral of complaints

Suppliers can direct complaints under the Code to the code compliance manager. Complaints must include their identification and contact details, and the details of the conduct giving rise to the complaint, including the provision of this Code relevant to the complaint, together with any documents or other information that would assist the investigation of the complaint.

The code compliance manager must take reasonable steps to investigate the complaint, and conclude the investigation within 20 business days.

If the code compliance manager decides that the complaint is vexatious, trivial, misconceived or lacking in substance they do not have to conduct an investigation. If the code compliance manager reaches this conclusion they must give written notice to the supplier.

Details of action taken (if any) as decided by the code compliance manager must be given to the supplier in a summarised form within five business days following the conclusion of the investigation. A timetable for action (if any) must also be provided.

The code compliance manager must keep a record of the complaint, and investigations and actions taken for at least three years. This means that the ACCC can require these records under the information gathering powers in section 51ADD of the Act.

Clause 30 – internal review

If a supplier is not satisfied by a retailer's investigation of their complaint, or has not been given a summary of action taken following the complaint, they can give the retailer a written request to elevate the dispute to senior managers.

The written request must specify the nature of the dispute, relevant provision of the Code, suggested action to settle the dispute, and the outcome sought by the supplier. If these details are provided, retailers must elevate the dispute and attempt to resolve the dispute in good faith within 20 days.

If a supplier has been notified that the code compliance manager has decided that the complaint is vexatious, trivial, misconceived or lacking in substance the supplier may seek an internal review of that decision.

Clause 31 – mediation or arbitration

A supplier can seek mediation or arbitration of a complaint under the Code. If any process has previously been taken under Clause 29 – direct referral of complaints – or Clause 30 – internal review – these must have been completed prior to mediation or arbitration taking place.

If mediation or arbitration takes place, the retailer must participate in good faith if the supplier has acted in good faith, with the onus on the retailer to prove if this has not occurred. However, if the supplier seeks mediation and arbitration at the same time, a retailer is required only to participate in one at a time.

Clause 32 – conduct of mediation and arbitration

Mediation or arbitration for the purposes of the Code must be conducted in accordance with the rules of the Institute of Arbitrators & Mediators Australia.

If not agreed by the parties within 10 business days of a supplier referring the matter, the mediator or arbitrator will be appointed by the Institute in accordance with their rules.

A retailer is considered to take part in the mediation or arbitration if they are represented by a person who has authority to enter into an agreement to settle the dispute on behalf of the retailer.

A retailer acts in good faith if they approach the resolution of the dispute in a reconciliatory manner, including by attending and participating in meetings arranged at reasonable times, making their objectives for the process clear up front, and observing confidentiality obligations.

Further, good faith also means that they must not apply pressure to resolve the dispute by not taking or refusing to take action, including refusing to accept goods or to make payments.

All costs of any mediation or arbitration (and which party is to bear those costs) are to be determined under the rules of the Institute of Arbitrators and Mediators Australia.

Part 6 – compliance and reporting

This Part sets out the requirements for retailers to ensure they have appropriate mechanisms in place in order to comply with the Code.

Clause 33 – duty to train staff with respect to this Code

Retailers must train their buying team on the requirements of the Code, and provide them with a copy of the Code, within six months of their becoming bound by the Code. Any person who becomes part of the buying team must receive training, and a copy of the Code within 20 business days.

The retailer must provide annual retraining to its buying team on the requirements of the Code.

Clause 34 – reports by code compliance managers

Code compliance managers must prepare a periodical report setting out the number of complaints received for investigation in the reporting period, the nature of the complaints received, the time taken to investigate each complaint, the outcomes of the investigations, and if it was resolved to the complainant's satisfaction.

The report must be prepared within 30 business days after the end of the period for each six month period beginning 1 January and 1 July. These reports will qualify as documents that the ACCC can require under the information gathering powers in section 51ADD of the Act.

Clause 35 – keeping of records and providing information to the ACCC

Where code compliance managers are required to keep any documents under the Code, the documents must be made available to the ACCC at least every six months and on written request from the Commissioner.