

# **Independent Review of the Food and Grocery Code of Conduct**

Final Report

SEPTEMBER 2018

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# Foreword

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Australians are well known for our desire to give people a ‘fair go’ and we expect nothing less when it comes to the way our supermarkets (also known as retailers) do business with their suppliers within the grocery supply chain.

We want the companies and family-owned businesses behind the brands and products to be treated fairly by the major retailers and wholesalers that have greater bargaining power. This ensures that suppliers are able to invest and innovate to give consumers the best choice, quality and value at the checkouts.

Strong community expectations is the reason why Coles, Woolworths and the Australian Food and Grocery Council came together to create the Food and Grocery Code of Conduct (the Grocery Code). In 2015, the Australian Government prescribed the Grocery Code into law under the *Competition and Consumer Act 2010*.



The Grocery Code sets out the rules by which the retailers and wholesalers should play by when dealing with suppliers – to increase commercial transparency, impose minimum standards of business practice and provide equitable dispute resolution.

The Grocery Code is unique in that it is an industry-led initiative and the only voluntary prescribed industry code of its kind. ALDI, Coles, Woolworths and About Life have become signatories and are bound by the Grocery Code, which is enforced by the Australian Competition and Consumer Commission.

Now three years on, the Government has appointed me to review the operation of the Grocery Code to determine whether it has worked effectively to achieve its goals.

This Review has placed stakeholder consultations at the very heart of the process. I have met with and listened to a range of stakeholders across our food and grocery community – including with suppliers, retailers and wholesalers, industry bodies, leading academics, regulators and other government agencies. They have all shared with me their experiences with the Grocery Code.

My overall assessment is that the Grocery Code has made a positive contribution to improving the relationship between retailers and suppliers. The broad industry feedback is that the major retailers are treating their suppliers much better now under the Grocery Code. It has helped drive cultural change within these organisations and has been effective in addressing harmful behaviours that had previously been reported by suppliers in the past.

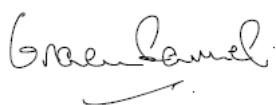
However, there still remains room for improvement and the Review has identified specific areas of the Grocery Code that should be changed to support the industry on its journey towards achieving higher standards of business dealings.

The industry has nurtured an enviable international reputation for offering the very best in fresh, innovative and premium quality food offerings. Australian supermarkets, manufacturers and suppliers are well placed to seize enormous opportunities in emerging Asian markets, with its ever

increasing proportion of middle-class consumers. To realise these opportunities we need to work together to drive sustainability and growth at home.

On 2 July 2018, I released a draft report that contained 14 draft recommendations designed to improve the operation of the Code. These draft proposals were tested with the industry, which provided valuable insights into the possible commercial implications. Many of the draft recommendations received broad support from the industry, while others stimulated rigorous and robust debate on the most suitable approach. This has allowed for refinements to be made to the recommendations in this final report.

I would like to extend a warm thanks to all of the people that contributed to the Review and generously provided their time to meet with myself and my team. Your experiences and stories will help shape policy to deliver a vibrant, diverse and competitive grocery retail sector.

A handwritten signature in black ink, reading 'Graeme Samuel' with a stylized flourish underneath.

Professor Graeme Samuel AC

# List of Recommendations

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## Recommendation 1

The Grocery Code should remain as a prescribed voluntary code.

The Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.

## Recommendation 2

The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.

## Recommendation 3

The current coverage of products under the Grocery Code should remain unchanged.

## Recommendation 4

Enhance the current obligation to act in good faith (clause 28), including the addition of indicators of acting in good faith that are easy to understand and apply; and to introduce the concept of 'fair dealings' as guiding principles for the Code Arbiters.

The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.

## Recommendation 5

The Code Compliance Manager should be replaced with an independent Code Arbitrator, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.

**Recommendation 6**

The Government should appoint an Independent Reviewer to:

- review the Code Arbiters' determinations for consistency with the requirements of the Grocery Code (at the request of a supplier); and
- work collaboratively with Code Arbiters, signatories and the ACCC, meeting regularly to discuss issues under the Grocery Code.

**Recommendation 7**

The ACCC should also consider adopting a collaborative approach with signatories, Code Arbiters and the Independent Reviewer to encourage more active compliance with the Grocery Code.

**Recommendation 8**

The Grocery Code should be amended to give suppliers the right to request further details on the reasons for delisting decisions, following the initial receipt of a signatory's reasons.

The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.

**Recommendation 9**

It should be clarified that the term Grocery Supply Agreement, as defined in clause 3 of the Grocery Code, applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.

**Recommendation 10**

Clause 10 of the Grocery Code should be amended so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.

**Recommendation 11**

Clause 14 should be amended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.

**Recommendation 12**

To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply only to fruit and vegetables.

**Recommendation 13**

A new provision relating to price rise processes should be introduced to:

1. prevent signatories from requiring a supplier to disclose commercially sensitive information;
2. require that signatories take no longer than 30 days to consider a price rise request from a supplier, unless circumstances exist that justify a reasonable extension that is negotiated with and agreed to by the supplier; and
3. require that signatories report on the times taken to make a price rise decision, to be published in the Code Arbiters' annual reports.

**Recommendation 14**

There should be a review of the Grocery Code within three to five years of implementation of any changes as a result of this Review.

# Executive Summary

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On 2 March 2018 the Government announced the independent Review of the Food and Grocery Code of Conduct (Grocery Code). The purpose of the Review is to assess the impact of the Grocery Code in improving the commercial relations between grocery retailers, wholesalers and suppliers. The Grocery Code established minimum standards of conduct to address a range of undesirable behaviours from retailers and wholesalers during their dealings with suppliers.

The Review recognises that the Grocery Code is generally working well. The broad feedback has been that dealings between the signatories and their suppliers have improved significantly in the past three years since the Grocery Code was introduced. However, there are particular areas that have not delivered the intended policy outcome. The recommendations of this final report specifically target those areas to improve the operation of the Grocery Code.

The three main areas for improvement include:

1. **Retailers and wholesalers with significant market power should become signatories**

The voluntary Grocery Code has achieved good coverage across the industry – the three major supermarkets in Australia have become signatories to the Grocery Code. Other industry participants with significant market power, including those in wholesaling, should also become part of the Grocery Code. It is in the industry's best interest to maintain a single voluntary code, however, a separate targeted mandatory code may be necessary to capture key players that refuse to participate in this industry-led initiative.

2. **Good faith and fair dealings**

The Grocery Code should be enhanced to ensure that suppliers receive both fairness in process and fairness in outcome during their commercial dealings. This can be achieved by making the current good faith provision clearer and easier to apply in practice. New principles of fair dealings will also be introduced to guide Code Arbiters during their dispute resolution role.

3. **Grocery Code Arbiters**

The dispute resolution mechanisms in the Grocery Code have been underutilised by suppliers, due to a fear of retribution for making complaints. A Code Arbiter in each signatory with the power to resolve individual complaints, make binding decisions and award compensation can dramatically improve outcomes for suppliers. On top of this, any supplier dissatisfied with the Code Arbiter process can refer their case to a government appointed Independent Reviewer to check the integrity of the dispute resolution process.

These proposed reforms aim to benefit the food and grocery industry by promoting sustainability, encouraging new entrants into the market and fostering greater competition. It will help deliver long term benefits to consumers.

The final report also recommends a number of other amendments to the Grocery Code to ensure it works effectively for the food and grocery industry.

# 1. Introduction

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## The Food and Grocery Code of Conduct

The Grocery Code is a voluntary industry code of conduct that is prescribed for the purposes of Part IVB of the *Competition and Consumer Act 2010* (CCA). The Grocery Code governs certain conduct by the supermarkets (also referred to as retailers) and wholesalers in their dealings with suppliers, with the aim to improve standards of business conduct in the food and grocery industry.

The Grocery Code was developed in response to public concerns about the conduct of retailers and wholesalers towards their suppliers. The Grocery Code is an industry-led initiative that was jointly developed by Coles, Woolworths and the Australian Food and Grocery Council (a supplier representative organisation). Following a period of public consultation, the Government agreed to prescribe the Grocery Code under the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*.

The purpose of the Grocery Code is to:

- help to regulate standards of business conduct in the grocery supply chain and 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 parties;
- provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and
- promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.<sup>1</sup>

The Grocery Code is voluntary – it only applies to retailers or wholesalers that have elected to be bound by giving written notice to the Australian Competition and Consumer Commission (ACCC), which is responsible for enforcing the Grocery Code. A signatory can also withdraw from the Grocery Code by writing to the ACCC. Suppliers are automatically protected by the Grocery Code when dealing with a signatory.

The three largest retailers, ALDI, Coles Supermarkets Australia Pty Ltd (Coles) and Woolworths Group Limited (Woolworths), as well as a small retailer, About Life Pty Ltd (About Life), have all become signatories to the Grocery Code.

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1 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 2

## The Review

The *Competition and Consumer (Industry Codes–Food and Grocery) Regulations 2015* require that the Government commence a review of the Grocery Code within three years of its operation.<sup>2</sup>

The then Assistant Minister to the Treasurer, the Hon Michael Sukkar MP, announced the commencement of the Review on 2 March 2018 and appointed Professor Graeme Samuel AC as the independent expert to lead the Review.<sup>3</sup>

The Grocery Code's regulations require the Review to assess the impact of the Code in improving commercial relations between grocery retailers or wholesalers and their suppliers. The Review must address:

- a) the extent to which retailers and wholesalers have become bound by the code;
- b) levels of compliance with the code by retailers and wholesalers bound by the code;
- c) whether the purposes of the code (see clause 2 of the code) are being met;
- d) the extent to which the code assists in addressing any imbalances in the allocation of risks between retailers, wholesalers and suppliers;
- e) whether there are any further measures that would improve the operation of the code with respect to the matters mentioned in paragraphs (c) and (d);
- f) the interactions between the code and the Horticulture Code of Conduct;
- g) how the code compares with overseas regulation of commercial relations between retailers, wholesalers and suppliers;
- h) whether the code should be mandatory or voluntary;
- i) whether the code should include civil penalty provisions;
- j) whether retailers, wholesalers and suppliers should be bound by the code, and if so, to what extent;
- k) whether the code should be repealed or amended and, if so, the timing of any such repeal or amendment; and
- l) the products that should be covered by the code.

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2 *Competition and Consumer (Industry Codes–Food and Grocery) Regulations 2015*, s 5

3 Sukkar, M (Assistant Minister to the Treasurer) 2018, *Review of the Food and Grocery Code of Conduct*, media release 2 March 2018

## Consultation process

The Review has consulted extensively with Grocery Code signatories, suppliers, industry experts, and small business representatives. The Review received feedback from over 50 individual stakeholders in a range of forms, including written submissions, face-to-face meetings and via teleconference.

The Review conducted initial public consultations on the issues from 23 March 2018 to 30 April 2018. Consultation was broad and sought stakeholders' views on whether the Grocery Code has improved commercial relationships between retailers or wholesalers and their suppliers over the past three years.

On 23 May 2018, the Review presented to the Food and Grocery Australia 2018 conference outlining the key considerations of the Review.

On 2 July 2018, a draft report containing 14 recommendations was released and open to public consultation until 1 August 2018. This tested the Review's findings from its consultations and preliminary recommendations. The Review received 32 written submissions on the draft report and held a number of follow up discussions with stakeholders. Feedback from consultations on the draft report helped to shape the final recommendations of this final report.

**All stakeholder submissions and feedback to the Review have been treated as confidential and will not be made public**, unless explicit consent was provided for the submission to be published. These confidentiality arrangements were intended to encourage stakeholders to take part in the Review, and to provide their full and frank opinions.

Stakeholders who have consented to their submissions to the Review being published include:

- the Australian Competition and Consumer Commission;
- the NSW Small Business Commissioner;
- Derek Minus, Mediation and Arbitration Centre;
- Professor Caron Beaton-Wells and Jo Paul-Taylor, University of Melbourne;
- the Australian Manufacturing Workers Union;
- Food South Australia;
- NSW Farmers' Association;
- the Law Council of Australia;
- the Western Australian Small Business Development Commission; and
- AUSVEG.

A copy of these submissions can be found via the Review website at [www.treasury.gov.au/review/food-and-grocery-code-of-conduct-review/](http://www.treasury.gov.au/review/food-and-grocery-code-of-conduct-review/).

## 2. Overview of Australia's Food and Grocery Industry

### Supermarkets (retailers) and wholesalers

The supermarket and grocery industry in Australia is highly competitive, yet concentrated. The four largest businesses, Woolworths, Coles, ALDI and Metcash Ltd (Metcash) make up over 80 per cent of industry revenue, with the two major supermarkets, Woolworths and Coles, holding over 65 per cent of the market combined (Chart 1.1).<sup>4</sup>

Figure 2.1: Food and Grocery Retail Sector Market Share for financial year 2017–18



\*Other includes Costco, Australian United Retailers (including Foodworks brand) and independent supermarkets  
Source: IBISWorld Pty Ltd, Treasury workings

In 2017–18, industry revenue is expected to grow by 2.2 per cent, below its estimated annual rate of 3.0 per cent over the past five years.<sup>5</sup>

Increased price competition continues to play a key role. There has been a considerable effort from both Coles and Woolworths to substantially reduce prices and promote everyday low prices, such as Coles' 'Down Down' or Woolworths' 'Prices Dropped', largely in response to the continued growth of ALDI as well as the threat of new market entrants that are expected to aggressively price discount. This has placed significant pressure on small, independent retailers.

While the major supermarkets' market shares have remained relatively constant, there has been mixed results for profitability. Woolworths' turnover is estimated to grow by about 4.7 per cent in

4 Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

5 Ibid

2017–18,<sup>6</sup> due to increased food sales and improved gross margins.<sup>7</sup> In contrast, Coles' revenue growth is estimated at the below-industry rate of 1.3 per cent in 2017–18.<sup>8</sup> This largely reflects Coles absorbing lower margins, particularly in fresh produce and meat and increased sales of low margin private-label products.<sup>9</sup>

ALDI has grown rapidly over the past three years and is a major source of competitive pressure. Consumers continue to react favourably to ALDI's business model of low cost, private label products. This has allowed ALDI to become the third largest market competitor, ahead of Metcash. Its estimated market share grew from about 7 per cent in 2014–15 to over 9 per cent in 2017–18.<sup>10</sup>

Metcash's market share is currently estimated at about 7 per cent, its lowest level over the past five years.<sup>11</sup> Metcash is Australia's only nationwide wholesaling business and has retail agreements with a majority of IGA and Foodland IGA branded independent retailers across Australia.<sup>12</sup> With increased price competition, independent retailers and Metcash have faced a steady decline in their turnover over the past five years. This, coupled with Metcash's position as a monopoly wholesaler of grocery products, has encouraged some independent retailers to begin to consider alternative wholesale arrangements and rival supply chains.<sup>13</sup> This will increase competition for Metcash and provide a further access point to the market for suppliers.

Of the other retailers, Costco and Amazon continue to grow, with intentions to increase presence in Australia. The arrival of international discount food and grocery retailers, Lidl and Kaufland, is also imminent. The increasing consumer demand for convenience and quality products has encouraged new entrants and modes of grocery consumption into the market including home delivered meal preparation kit offerings, such as Hello Fresh and Marley Spoon.

It is expected that competition will remain strong, with the major supermarkets fighting to maintain market share in the face of new market entrants. These businesses have the potential to significantly disrupt the market and will force the existing Australian supply, wholesaler and retail businesses to rethink how they compete to satisfy consumers going forward.

Increased competition in grocery retailing and wholesaling may benefit suppliers by opening new channels to get their products to the market. However, it is also likely that major retailers and wholesalers will respond to new competitors by placing greater pressure on their suppliers in order to defend market share.

As the industry heads towards a future of heightened competition and potential for greater commercial tension between trading parties, it is important to maintain an effective Grocery Code to support healthy commercial relationships and guard against abuses of bargaining power.

6 Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

7 Woolworths Group Limited 2017, *Woolworths Annual Report 2017*, <https://www.woolworths.com.au/annual-report/2017>

8 Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

9 Wesfarmers 2017, *Wesfarmers 2017 Annual Report*, <https://www.wesfarmers.com.au/docs/default-source/default-document-library/2017-annual-report.pdf?sfvrsn=0>

10 Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

11 Ibid

12 Metcash Limited 2018, *Food*, <https://www.metcash.com/our-businesses/food/>

13 Mitchell S 2018, 'Metcash facing IGA retailer rebellion', *Australian Financial Review*, 8 April 2018, <http://www.afr.com/business/retail/metcash-facing-iga-retailer-rebellion-20180405-h0ydh0>

## Suppliers

On the supply side, food and grocery manufacturing businesses range from multinational corporations with a host of brands to small family-owned businesses with a single product line. While not all industry participants supply directly to retailers or wholesalers, the industry is made up of approximately 31,000 businesses involved in food and beverage manufacturing (8,500), grocery manufacturing (1,600) and fresh produce growing (20,700).<sup>14</sup>

The industry generated a total of \$127.4 billion in turnover and employed about 320,000 people in 2016–17.<sup>15</sup> Despite this, the food and grocery manufacturing industry is not growing, with turnover down 0.3 per cent in 2016–17 compared to the previous year.<sup>16</sup>

The latest results can in part be attributed to increased production costs and lower margins. Low wage and household consumption growth, coupled with heightened retail price competition, have limited suppliers from raising prices in line with their higher overheads. Food and grocery manufacturers will need to diversify and seek new opportunities in overseas markets to create new revenue streams.<sup>17</sup>

## Commercial dealings between the parties

The process for suppliers to get their products on the shelves of supermarket or independent stores can often be complex and involve ongoing interactions or negotiations on range of matters. This process varies depending on who the supplier deals with, but it can also vary between suppliers dealing with the same retailer or wholesaler.

The analysis below provides insights into the typical commercial dealings between the parties. It highlights the different points during the trading process where tensions may arise and where the Grocery Code can play an important role.

### Coles and Woolworths

Coles and Woolworths deal directly with all their suppliers, with the exception of fresh produce products that are generally supplied through agents or similar. They have their own distribution and logistics systems, without the need for a wholesaler or other aggregator. Retailers can stock around 20,000 to 25,000 products at any one time. Product groups are generally divided by category-type (such as biscuits, health food, confectionary or toiletries) and are managed by a single buying team on a day to day basis.

Both Coles and Woolworths have similar approaches to buying from suppliers. In a typical engagement, a supplier would approach the retailer to stock their product. A member from the retailer's buying team then engages with the supplier to negotiate trading terms and conditions. As part of this, the buyer and the supplier would agree on matters such as price and quantity forecasts. The buyer will inform the supplier of the number of stores their products will be ranged in.

14 Ernst & Young 2017, 'Australian Food and Grocery Council: State of the Industry Report 2017', <https://www.afgc.org.au/2017/10/state-of-the-industry-2017-report/>

15 Ibid

16 Ibid

17 Ibid

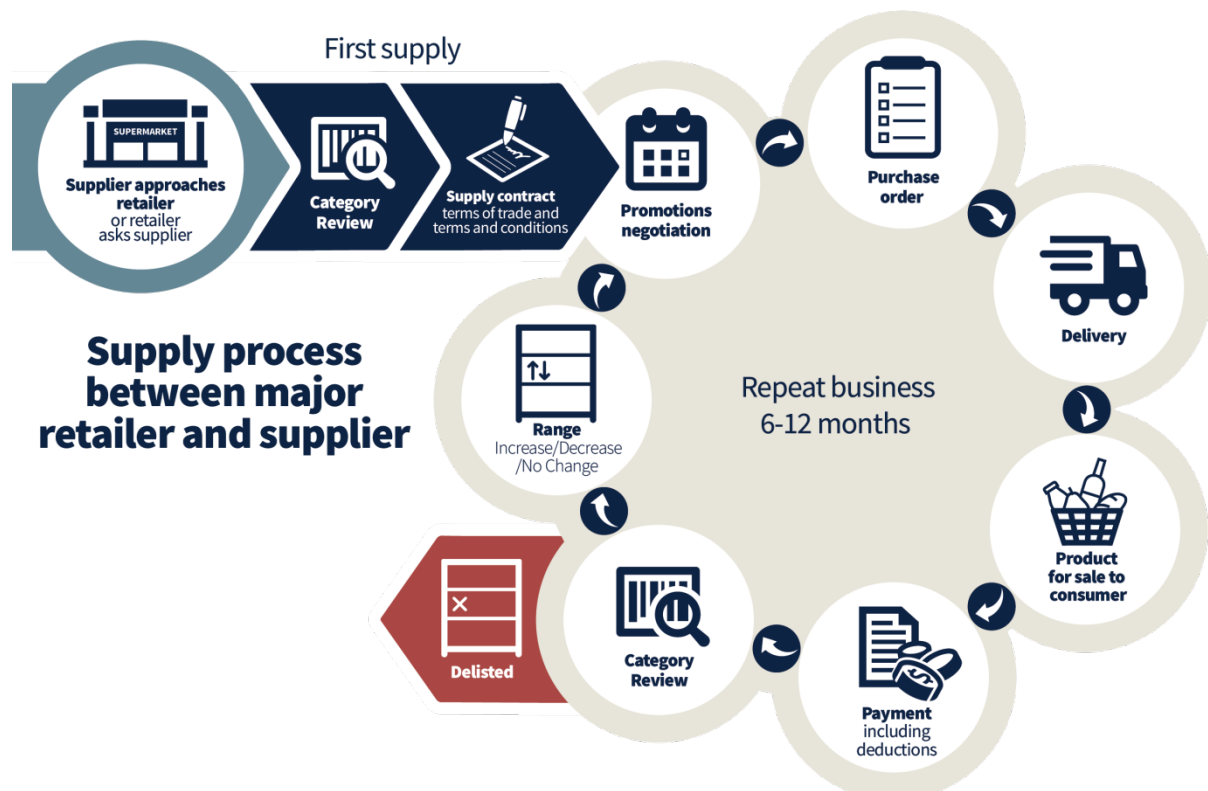
Once general agreements are in place, the retailer will issue a purchase order to a supplier for fulfilment within an agreed time period. The supplier then needs to deliver their product to the retailer's distribution centre, after which they will be paid (net of deductions) based upon their agreement. There is no fixed term of supply or agreed quantity that must be fulfilled. Rather the supplier continues to fulfil purchase orders for as long as the retailer chooses to stock their product.

Coles and Woolworths carefully consider their product listings to ensure that they continue to meet their customers' expectations and demands. They generally do this through a product range review (also referred to as category review), which occur on either a regular or ad hoc basis. The range review provides an assessment of the performance of the supplier's product and an opportunity for them to pitch new products.

Following a range review, a retailer will either decide to delist a supplier's product from a category, increase supply or to continue current levels, as a result of changes to shelf space allocation or the number of stores the product is listed in. The buyer and supplier may also begin renegotiations on matters such as margins, new products, promotional campaigns, shelf space allocation or distribution.

Coles and Woolworths have implemented these systems to remain responsive to their customer's changing expectations. Commercial flexibility is a key concern that must be balanced against the expectations of suppliers, who need a degree of certainty to be able to invest and plan for their business.

**Figure 2.2 – Typical supply process between major retailer and supplier**



## ALDI

ALDI's business strategy of low price, private branded products has a very different buying process with its suppliers. ALDI will issue a tender for the supply of one of its private label products and suppliers will present their best offer. The successful applicant will then negotiate with ALDI's buyer.

The negotiation will focus on price, the quantity of the product to be delivered, the duration of supply and the conditions of supply. There are no negotiations in regard to shelf-space allocations or related payments, given ALDI's limited product lines. Once terms are agreed to the buyer and supplier have effectively finalised their Grocery Supply Agreement and there will generally be no further variations. Once the duration of the agreement expires, ALDI will either renegotiate the agreement or put out a new tender. However, the incumbent supplier will be given a chance to compete against the best offer made by a competing supplier.

Stakeholder feedback suggests that supplying to ALDI is a relatively straightforward process compared to Coles or Woolworths. The Review has not heard any evidence of suppliers being required to undertake range reviews mid-contract.

Figure 2.3 – Typical supply process between ALDI and supplier



## Metcash

Metcash is a wholesale distribution business, which sells food and grocery products to over 1600<sup>18</sup> independent retailers. The independent retailers with supply agreements with Metcash are required to source a certain proportion of the retailer's products through the wholesaler (around 50 to 80 per cent).

Stakeholders' feedback to the Review outlined that the supply process to Metcash was largely straightforward, with less discussions about consumer facing supply aspects, such as positioning on shelf. Negotiation largely is based on price, quantity and distribution of product across its wholesale supply channels. The independent retailers then order products from Metcash. This process generally repeats itself on an ongoing basis, unless Metcash decides to delist a supplier's product. Metcash is currently not a signatory to the Grocery Code and therefore, some suppliers may not have written supply agreements in place.

In addition, Metcash also negotiates with suppliers for promotions. Negotiation focuses on a discounted price and quantity for a specific time period, which is then sold on at the agreed reduced wholesale price to retailers. It also develops and publishes the IGA sale catalogue and suppliers may be involved in negotiations to have their products featured.

18 Metcash Limited 2018, *Our Businesses*, <https://www.metcash.com/our-businesses/>

Figure 2.4 – Typical supply process between wholesaler and supplier



## Role for the Grocery Code

Australia's food and grocery industry is characterised by a high degree of market concentration by two major retailers. The major retailers possess significant bargaining power and many suppliers may have relatively limited options to get their product to the market on a broad or national basis.

The current market structure in Australia lends itself to the potential for powerful retailers and wholesalers to engage in conduct that may go beyond hard bargaining. Suppliers may find it difficult to negotiate fair trading terms or have little choice but to accept particular terms due to fear of losing contracts. Suppliers may also be reluctant to raise complaints or enforce their rights due to fear of retribution – such as having their product delisted and removed from the shelves.

Further, suppliers may be vulnerable to undue pressure at numerous points throughout the trading relationship. This presents opportunities for margins to be squeezed and inappropriate costs and risks being shifted on to suppliers. Such behaviours that occur unexpectedly or reoccurring can cause serious detriment to suppliers. It can also have broader implications for community welfare by eroding the supplier base and dampening incentives for innovation and investment. This can have flow on negative impacts on workers, communities and consumers.

The Review believes there is a continuing role for the Grocery Code to set the outer boundaries that regulate retailer or wholesaler behaviour at these critical pressure points during the commercial relationship. The Grocery Code serves as an important check on superior bargaining power through its objectives of increasing transparency, certainty and access to fair dispute resolution procedures for suppliers.

### 3. Changes in Business Culture – where are we now?

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The Grocery Code was created by the industry in response to community concerns that the major retailers were mistreating their suppliers, particularly in the wake of the ACCC's court action against Coles for unconscionable conduct (see **Appendix A** for further details).

While the introduction of the voluntary Grocery Code was considered a step in the right direction, some stakeholders were doubtful about whether it would be effective in changing retailer (wholesaler) behaviours. The Government agreed to give the Grocery Code a chance to work and required that a review be conducted after three years.

The focus of this Review has been to consult with the industry, particularly suppliers and their representatives, to test whether the Grocery Code has been effective and signatories have improved conduct when dealing with suppliers. The Review met with a number of large multi-brand suppliers and small family-owned businesses in different regions of Australia, as well as industry representatives and government bodies that support them.

The broad feedback from stakeholders is that the Grocery Code has contributed to a significant improvement in retailer-supplier relations over the last three years.

Coles and Woolworths have taken positive action and made changes to implement the Grocery Code requirements. They have revised their Grocery Supply Agreements, employed code compliance teams, and engaged in extensive training in the Grocery Code for their buying teams.

*"We have made a material investment in face to face training for some 700 members of our team to ensure they understand and comply with the Food and Grocery Code of Conduct. This training is supported by comprehensive operational manuals, refresher courses and compulsory online training and assessments, and of course our core Group values of "doing the right thing" and "actively listening and learning".*

**- Claire Peters, Managing Director, Woolworths Supermarkets**

As a result, suppliers have reported significantly less issues with retailer practices that previously troubled the industry, including:

- demands for profit gap payments to boost the retailer's earnings and profit margin;
- unilateral and retrospective variations of agreement;
- deductions off a supplier's invoice without their knowledge;
- demands for shrinkage payments for losses (such as theft) that occurs on the retailer's premises; and
- unreasonable rejection of fresh produce.

The ACCC has conducted two annual compliance checks on the signatories since its introduction. While the ACCC did identify some compliance issues during this process (such as in relation to delisting notices), the signatories were found to be broadly compliant with the Grocery Code and the ACCC has not taken any enforcement action during the past three years.<sup>19</sup>

In addition to compliance with the Grocery Code, the major retailers have implemented additional initiatives to improve and measure the effectiveness of their supplier partnerships.

For example, Woolworths utilises an independent supplier survey called 'Voice of Supplier' to measure feedback on whether suppliers are being treated fairly and equitably. Woolworths has also made changes to the key performance indicators for its buyers to shift focus towards building cooperative supplier relationships.

*"It is encouraging to see the "Voice of Supplier" survey support our group sustainability commitment to build trust by engaging with our suppliers in a fair and equitable manner. The many supplier acknowledgements such as – "Having dealt with Woolworths for nearly three years I see a real shift in culture (for the better) across all departments and Woolworths stakeholders" – gives us comfort that we are moving in the right direction."*

**- Brad Banducci, CEO Woolworths Group**

Coles has created a Coles Nurture Fund to support the growth of innovative small suppliers and introduced an independent arbiter to resolve complaints in accordance with a Supplier Charter.

*"Coles believes our August 2014 Coles Supplier Charter, with its own Independent Arbiter, the Hon Jeff Kennett, AC, set in place a new and improved industry standard for governing commercial relationships between grocery retailers and suppliers, including swift escalation of disputes within the buying team, confidential access for suppliers to a dispute resolution manager and the option for escalation to the independent arbiter."*

**- John Durkan, Managing Director, Coles Supermarkets**

These initiatives by the retailers complement the objectives of the Grocery Code to strengthen retailer-supplier relationships.

The Review found that generally the Grocery Code has contributed to a change in business culture within the major retailers, which has been led by senior management of both organisations. However, the Review did hear of allegations of continuing problematic behaviours occurring at the retailer's buying level during their direct dealings with suppliers.

During the Review, suppliers shared their experiences of what may be considered as inappropriate buyer behaviour, including alleged instances of unfair tactics and arbitrary decision making with little regard for the potential damage to the supplier's business (these issues will be explored further below).

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19 Australian Competition and Consumer Commission 2018, ACCC Submission to the Food and Grocery Code of Conduct Review, pg 8

It is important to note that not all supplier complaints were made equally against both the major retailers. The Review also heard positive experiences of buyers working cooperatively and bargaining firmly but fairly with the supplier. It was suggested that often the major retailer that is facing a financial downturn may come under pressure to improve performance, which may in turn lead to undue pressure from buyers being placed on suppliers – creating the conditions and incentives for unfair conduct.

The recommendations in this final report aim to maintain effective minimum standards for commercial conduct. There is an opportunity to make a number of improvements to the Grocery Code so that it can continue to serve as a practical tool for resolving day-to-day issues that emerge during dealings between suppliers and retailers or wholesalers.



## 4. Coverage of the Food and Grocery Code of Conduct

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As the Grocery Code is a voluntary code, it only applies to the conduct of a retailer or wholesaler after they have chosen to be bound by it. To date there have been four signatories, all of which are retailers. The wholesaling sector has not become bound by the Grocery Code and this has been a point of concern for some stakeholders in the industry.

This chapter evaluates the current industry coverage of the Grocery Code and considers whether this has been effective to achieve its purposes.

### Retailers

ALDI became the first signatory to the Grocery Code when it opted to be bound on 19 May 2015. ALDI was soon joined by About Life Pty Ltd, Coles and Woolworths, who agreed to be bound by the Grocery Code within months of it taking effect. There have been no further retailer signatories since 2015.

ALDI, Coles and Woolworths are the three largest food and grocery retailers and have a combined market share of over 75 per cent<sup>20</sup> in the food and grocery retail industry. They also deal directly with processors and importers, rather than wholesalers, automatically extending the protections of the Grocery Code to around 4000 suppliers<sup>21</sup> in Australia.

There are other retailers that have not become signatories to the Grocery Code. These businesses have a combined market share of 15.9 per cent<sup>22</sup>. Of these retailers, Costco Wholesale Australia Pty Ltd (Costco) and Australian United Retailers Limited (FoodWorks Supermarkets) have the highest individual market shares of 1.6 per cent and 1.4 per cent, respectively.<sup>23</sup>

### Wholesalers

Metcash is Australia's largest national wholesaler. It buys from a variety of different suppliers, such as farmers, food and grocery manufacturers and importers, and then on sells the products to independent retailers (largely IGA branded retailers).

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20 Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

21 Estimate based on feedback to the Review and publically available sources, including Woolworths Group Limited 2008, 'The Facts About Grocery Retailing at Woolworths', <http://library.corporateir.net/library/14/144/144044/items/287977/FactsAboutGroceRetailingatWoolworths.pdf> and Ernst & Young 2017, 'Australian Food and Grocery Council: State of the Industry Report 2017', <https://www.afgc.org.au/2017/10/state-of-the-industry-2017-report/>

22 Includes About Life. Cloutman N 2018, 'IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia', IbisWorld Pty Ltd

23 Ibid

Metcash conducted a 12 month trial of the Grocery Code following its introduction to determine whether it would be suitable for its business model before signing up. Metcash publicly stated that it would comply with all provisions of the Grocery Code without formally becoming a signatory. Following the trial period, Metcash declined to sign up to the Grocery Code.

The Review received complaints from suppliers concerning the conduct of Metcash, including alleged unilateral demands, forensic accounting practices to offset amounts owed without the supplier's consent, failure to comply with promotional terms, and requiring payments above reasonable costs to conduct study tours.

While Metcash may only hold a relatively small share in the market (of around 7 per cent) it plays an important role and is of strategic significance for smaller local suppliers. Suppliers consider Metcash an important access point to the market, particularly for smaller suppliers with innovative niche products. Often these suppliers establish their brand and consumer following through the independent retailers before expanding further through the major retailers. Metcash has significant bargaining power when dealing with its suppliers.

Metcash has to date decided not to sign up to the Grocery Code, claiming that it would have unintended consequences for their associated independent retailers. For example, it is claimed that any costs associated with additional red tape imposed on the wholesaler may be passed on to independent retailers, further reducing their ability to compete with the major retailers.

The Grocery Code does not regulate the relationship between a wholesaler and its retailer customer. It only regulates the relationship that exists between a wholesaler and its suppliers – it does not cover the entire supply chain. The Review has examined the nature of the relationship between retailer-wholesaler-supplier. The Review is not satisfied that if Metcash were a signatory to the Grocery Code, in its current form or amended as per the Review's recommendations, there would be any significant adverse consequences for their independent retailer customers.

Following the release of the Review's draft report, Metcash has recently indicated a preparedness to become a signatory to the Grocery Code, subject to certain modifications to take account of its wholesale model. The Review supports this proposed approach and encourages Metcash to continue discussions with the Government to communicate its next steps to become a signatory to Grocery Code. In the event that Metcash does not follow through with its intention to sign up voluntarily, the Government should consider introducing a targeted mandatory code to apply to Metcash and other key players with significant market power (discussed further below).

## Wholesaler-retailer relationships

It has been further suggested that the Grocery Code should include additional provisions to regulate the relationship between a wholesaler and its retailers. However, the tension between wholesaler and retailer is quite distinct from the set of issues relating to suppliers. Extending the coverage of the Grocery Code in this way is likely to add unnecessary complexity and dilute the key purposes of the Grocery Code in dealing with issues specifically affecting suppliers.

Independent retailers also have a number of untested avenues available to them to resolve misconduct by a wholesaler. For example, they may be able to access the unfair contract term provisions of the Australian Consumer Law, or bring proceedings under the amended misuse of market power provision in section 46 of the CCA (in relation to establishing alternative wholesale arrangements or rival supply chains) or the 'unconscionable conduct' provisions of the Australian Consumer Law.

Importantly, there are also opportunities for independent retailers to come together to collectively bargain to leverage their combined buying strength when negotiating with the wholesaler, taking advantage of the collective bargaining facilitated authorisation provisions under the CCA. By coming together, as a collective buying group, they also open up the possibility of establishing alternative supply arrangements or rival supply chains, both through direct dealings with suppliers and by establishing arrangements with logistics suppliers for warehousing and delivery services.

These avenues have to date not been tested by independent retailers. The Review considers that they should seek to utilise all the avenues available to them under the CCA prior to any further Government intervention in this segment of the industry. Retailers are particularly encouraged to work with the ACCC to explore using collective bargaining in negotiations with their wholesalers, suppliers and logistics organisations.

## A mandatory or voluntary code

The Review was tasked with assessing the proportion of retailers and wholesalers that have become signatories to the Grocery Code. The purpose was to determine whether the current industry coverage was hindering the Grocery Code's ability to make a positive impact across the market. In turn, this may provide a strong rationale for the Grocery Code to be made mandatory to extend its reach and coverage.

A number of submissions to the draft report supported remaking the Grocery Code into a mandatory code with a turnover threshold to capture all large retailers and wholesalers in the market. Some stakeholders argued that a mandatory code would create a level playing field – all parties engaging with suppliers in the food and grocery market should have to adhere to the same regulations.

Others suggested that a mandatory code that applies to new entrants may prevent problematic behaviour from developing in the first place. This is particularly a point of concern for suppliers wary of new entrants to the market with a reputation for being aggressive price discounters. Stakeholders also pointed out that a mandatory code avoids the risk of signatories withdrawing in the future.

The Review notes that these are all valid benefits associated with a mandatory code. However, the Review must determine what evidence there is to suggest that the current coverage is deficient, and whether a mandatory model is required to bring more retailers or wholesalers on board. Further, the Review must consider what the advantages of a voluntary code may be lost when moving to a mandatory one. These issues will be examined in further detail below.

### Current coverage is sufficient to drive positive outcomes across the industry

In other industries, a mandatory code can be an effective solution for applying regulation to a large number of industry participants in order to achieve positive outcomes across that industry. However, as the food and grocery industry in Australia is highly concentrated, this broad coverage can equally be achieved through a voluntary code approach – which has captured most of the market (around 75 per cent) by virtue of the three largest retailers in Australia becoming signatories.

Further, the Review has examined whether there is evidence of harm to suppliers being caused by other retailers or wholesalers in the market that may justify a response by the Government to compulsorily capture them under the Grocery Code.

Based on the feedback from stakeholders, the Review did not identify other participants in the market that were engaging in undesirable behaviours, yet were not regulated by the Grocery Code (with the exception of Metcash). There was no evidence of systemic egregious behaviour from other retailers that would justify the need for a mandatory code to capture all large retailers. Some suppliers were positive when commenting on their dealings with other retailers, for example, Costco received praise for following its contracts and providing suppliers with a high level of transparency.

The Review does not believe there is benefit from capturing smaller retailers under the Grocery Code, as it would impose disproportionately more regulatory costs on small organisations. In that context, About Life should consider whether it is appropriate for them to continue to be part of the Grocery Code, should the changes proposed by the Review be implemented. A small retailer should consider whether the additional compliance costs outweigh the benefits.

The Review's opinion is that the combined coverage of the existing signatories and Metcash's participation will be adequate for addressing the key problems in the current market. At this point in time, the Grocery Code regulates the appropriate participants in the sector – those that have raised the most concerns in terms of poor behaviour (or those who wish to demonstrate best practice).

The Review also considers it is too early to evaluate if new entrants should be bound by the Grocery Code. While several new entrants have flagged their intent to operate in Australia, it is still early days. There does not appear to be any immediate benefit from pre-emptively extending the Grocery Code to capture them. However, this is not to say that new entrants should not become signatories to the Grocery Code at some point in the future.

The Government could consider whether it would be appropriate to establish a threshold test for retailers or wholesalers to determine the point at which they would be expected to become a participant in the Grocery Code (whether under a voluntary or targeted mandatory model).

The concept of significant market power could be defined by reference to market share – for example, when a retailer or wholesaler reaches a market share of 5 per cent or more (calculated by reference to turnover). However, the Review also notes that quantitative measure may not necessarily be demonstrative of significant market power, particularly in circumstances where there are a number of participants in the market which offer alternative routes for suppliers to bring their products to the market. The Government should consult with the industry prior to implementing any threshold test to apply under the Grocery Code.

## Voluntary code opens the door to more dispute resolution options

A key success story for many other industry codes has been the adoption of effective dispute resolution mechanisms within the industry.

The Review has identified a critical need for improving the current dispute resolution framework in the Grocery Code. In particular, there was strong stakeholder support for an independent entity, such as an adjudicator or ombudsman, to be able to hear supplier complaints and make binding decisions, including compensation orders for suppliers (this is discussed in more detail in the Dispute Resolution section).

The Review's recommended new Code Arbiter position in each signatory organisation is a powerful new role that will guarantee binding outcomes on signatories. Through signing up to the Grocery Code, the signatories have provided their consent to be bound by the dispute resolution framework. Under the Review's recommendation, signatories have agreed to be bound by the determination of a

Code Arbiter. Where parties agree to submit to a determination by a third party, the decision maker does not exercise judicial power, but rather a power of private arbitration.

However, if compulsory arbitration with binding decisions was implemented under a mandatory code framework, constitutional issues may arise. Forcing retailers or wholesalers to be subject to determinations about the existing legal rights and obligations, such as whether an entity has failed to conduct negotiations in good faith, is generally regarded as an exercise of judicial power. The compulsion of an entity to be bound by conclusive determinations on the law is a function exclusively reserved to the courts. If a mandatory Grocery Code were to give this function to an arbiter, it may be invalid as it risks infringing the separation of powers doctrine under the Constitution.

This is why binding arbitration is available for disputes under the current voluntary Grocery Code but not for other mandatory codes such as the Franchising Code and Horticulture Code, which are limited to mediation processes only.<sup>24</sup> This factor alone is a compelling reason for retaining a voluntary code instead of moving to a mandatory one.

## Culture

The Grocery Code, as a voluntary prescribed code, has presented a unique opportunity for the food and grocery industry to take responsibility for finding a solution to its own problems. It has symbolised a collaborative approach between the different groups in the industry and the Government to find the right regulatory balance.

Mandatory codes are considered to be a more government interventionist approach – where it has been deemed necessary for the Government to step in and impose industry specific rules. Voluntary codes allow industry participants to have greater involvement in the design, implementation, promotion and industry educational aspects – allowing them to become an integral part of the regulatory solution.

The Review has found the Grocery Code has fostered strong cultural change and has achieved sustained improvements in retailer behaviour. Signatories have been strong supporters of the Grocery Code and its implementation. The Review found it was important to encourage participants to continue with this cultural change to ensure further improvements in the relationship between suppliers and retailers.

## Targeted mandatory code of conduct

The draft report recommended that a separate targeted mandatory code of conduct be introduced to apply to all major participants (including Metcash) that refuse to become or remain signatories to the Grocery Code. At a minimum, the separate targeted code would contain much of the same provisions as under the voluntary Grocery Code, including any amendments as a result of the Review.

However, given that a targeted mandatory code may contain weaker dispute resolution mechanisms (as constitutional limitations may not allow for an arbiter model) it is possible that such a code may require additional prescriptive provisions. More stringent regulation may be required to make up for the lack of binding arbitration that may otherwise be able to deal with a wider ambit of issues.

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24 Note: other prescribed mandatory codes such as the Sugar Code contain binding arbitration, but this is in respect to pre-contractual arbitration. Determinations are made on future rights and obligations, not existing ones.

A number of submissions to the draft report expressed concerns with creating two industry codes to regulate the same industry. They noted that it may lead to regulatory complexity and uncertainty. The Review agrees that a single code is preferable for the industry and that it should remain voluntary. The voluntary code has the advantage of fostering greater industry buy-in and ownership by the signatories, which is vital to supporting robust and sustainable changes in business culture.

While a single voluntary code is the preferred outcome, the Review continues to recommend that the Government consider introducing a separate targeted mandatory code if recalcitrant industry participants do not voluntarily sign up to the Grocery Code. Ideally, in the context of current industry participants, the Review would like to see Metcash become a signatory within a short period after the response of government to this final report.

The Review notes that the current Grocery Code contains generous transitional arrangements (of up to 12 months for retailers and 24 months for wholesalers) before the bulk of the Grocery Code provisions begin to apply to new signatories. These arrangements were initially intended to allow new signatories time to change their business practices to comply with new regulations.

Given that the Grocery Code has been in operation for three years, the Government should consider whether the current transitional arrangements remain appropriate for new signatories. While it may be important to give new signatories time to transition their existing suppliers on to code compliant Grocery Supply Agreements, the Review considers that other key provisions, such as those relating to good faith and dispute resolution, should apply immediately to new signatories.

### Recommendation 1

The Grocery Code should remain as a prescribed voluntary code.

The Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.

## Extending all provisions to wholesalers

Currently Part 3 of the Grocery Code, which governs a range of general conduct, only applies to retailers. Part 3 establishes processes that retailers must follow and prohibits them from engaging in a number of behaviours unless certain criteria are met, such as the written agreement of their supplier. This is to ensure that retailers provide their suppliers with a minimum level of transparency and certainty in their dealings.

The Review considers that there is no clear policy rationale for restricting the application of Part 3 to retailers only as such conduct is also relevant to dealings between wholesalers and suppliers. The prohibited behaviours, such as requiring unreasonable payments for shrinkage, are just as financially damaging for a supplier regardless of whether they are supplying to a wholesaler or retailer. Wholesaler signatories should also be required to meet a minimum level of transparency and provide their suppliers with a higher degree of commercial certainty.

The Review recommends that the Grocery Code be amended to extend all the provisions to major wholesalers, with exception of the customer facing provisions (such as those relating to shelf space) which are not relevant to the wholesaling model. The Review notes that Metcash has undertaken work to identify a limited number of suggested modifications to Part 3 for wholesalers. The Review encourages Metcash to continue this dialogue with the Government as part of its commitment to becoming a signatory to the Code.

## Recommendation 2

The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.

## What products should be covered by the Grocery Code?

Currently the Grocery Code has a defined list of products that are considered to be ‘groceries’<sup>25</sup>. Only suppliers of these products are covered by the Grocery Code. The current definition encompasses most products sold within supermarkets, with the notable exception of alcoholic beverages.

Alcoholic beverages sold by retailers are generally stocked in store or in bottle shops adjacent to the retailer’s grocery business. They may be bought by a separate business unit but the same levels of concentration can be observed in these retailing businesses as in the broader food and grocery sector. For example, the bottle shop lines of Coles and Woolworths are estimated to account for over 60 per cent of the domestic retail sale of liquor in 2017–18.<sup>26</sup> This concentration is expected to increase, as Coles and Woolworths continue to expand their store networks.<sup>27</sup>

Despite this high level of concentration, the Review did not identify systemic issues of unfair conduct by retailers or wholesalers against producers of alcoholic beverages. This may be attributed to the different market structures of the various alcoholic beverage industries. For example, the beer manufacturing market is predominantly supplied by two large multinational firms with significant countervailing bargaining power.

Retailers are also not the primary means for beer manufacturers to reach the domestic market, with wholesalers (including in-house) accounting for almost half the market.<sup>28</sup> Selling directly to hospitality venues also accounts for almost a third of the craft beer market, with distributors another stable alternative option.<sup>29</sup> Wine producers also have access to other revenue streams, such as export markets (particularly rapid growth in the Chinese market), with major retailers making up only 23.4 per cent of the total wine market.<sup>30</sup> Spirit manufacturers also face a similar situation, with retailers accounting for under half of the market, with the rest being made up of wholesaling, hospitality and export markets.<sup>31</sup>

These diverse market structures limit the ability of the major retailers to exert their market power. There are either a small number of significant producers or a number of alternative revenue streams. For example, wine producers may simply withdraw supply when faced with pushback from the major retailers and expand their sales through other markets, such as through tourism or hospitality channels.

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- 25 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 3
  - 26 Thomson J 2018, ‘IBISWorld Industry Report G4123 Liquor Retailing in Australia’, IbisWorld Pty Ltd
  - 27 Ibid
  - 28 Thomson J 2018, ‘IBISWorld Industry Report C1212 Beer Manufacturing in Australia’, IbisWorld Pty Ltd
  - 29 Cloutman N 2017, ‘IBISWorld Industry Report OD5071 Craft Beer Production in Australia’, IbisWorld Pty Ltd
  - 30 Thomson J 2018, ‘IBISWorld Industry Report C1214 Wine Production in Australia’, IbisWorld Pty Ltd
  - 31 Thomson J 2017, ‘IBISWorld Industry Report C1213 Spirit Manufacturing in Australia’, IbisWorld Pty Ltd

The Review considers that the current scope of the Grocery Code remains appropriate given the different market structure of the alcoholic beverage sector. Expanding the Grocery Code to include alcohol may add undue complexity, as new specialised provisions may be required to address conduct not found more broadly across other food and grocery categories. Accordingly, the Review believes that the current definition of 'groceries' does not warrant change.

### Recommendation 3

The current coverage of products under the Grocery Code should remain unchanged.



## 5. Enhancing Good Faith

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The relationship between retailers and wholesalers and their suppliers is often characterised as a partnership. Both parties work together to put the right products on the shelves that meet the consumers' needs in a fast-paced and dynamic market.

This partnership is governed by agreements that are relational contracts. While these agreements attempt to set out the terms governing ongoing business dealings, it is very difficult to reduce all the interactions between the parties into well-defined contractual obligations, much less ensure that all future contingencies are covered.

This means that in practice, much of the interactions between a retailer or wholesaler and suppliers take place 'off contract'. In a relationship that involves a significant imbalance of bargaining power there is an important need for general principles of trust, fairness and good faith to underpin day to day commercial dealings.

### Current provision

When Coles, Woolworths and the supplier representative organisation, the Australian Food and Grocery Council (AFGC) jointly developed the Grocery Code in 2014, they agreed to enshrine good faith as one of the fundamental objectives of the Grocery Code as well as provide a separate operative provision of good faith.

The operative component in clause 28 of the Grocery Code outlines an obligation on retailers (and wholesalers) to deal lawfully and in good faith with suppliers.<sup>32</sup> The provision lists three non-exhaustive matters that may be taken into account in considering a breach of good faith, including whether:

- dealings have been conducted without duress;
- dealings have been conducted in recognition of the need for certainty on the risks and costs of trading for suppliers, and
- the supplier has acted in good faith.

### Stakeholder views

Stakeholders strongly support the need for the Grocery Code to mandate good faith in the industry. However, suppliers and others expressed a lack of confidence in the ability of the current good faith provision to address specific instances of alleged misconduct or unfair dealings by the signatories.

In particular, suppliers raised concerns that the current good faith provision is too difficult to apply in practice. They noted that there is significant uncertainty in the industry regarding the meaning of good faith. The term is open to broad interpretation, which often leads to conflicting views among stakeholders.

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32 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 2

Suppliers commented that they had a greater ability to enforce their rights under Grocery Code provisions that contained well-defined obligations on retailers compared to complaints of good faith.

Some suppliers felt that they had been subject to conduct that was not in good faith but were hesitant or reluctant to invoke the good faith provision. They were unsure of how they could demonstrate that their complaint could meet the requisite thresholds and were concerned that it could be easily dismissed by the retailer.

A supplier stated that:

*“The [retailer’s] buyer hasn’t done the right thing by us. It isn’t fair, it just seems wrong, but whether we can prove that it’s not in good faith or unconscionable conduct, we just don’t know.”*

Stakeholders noted that the current good faith provision does not contain enough definitions to assist in its interpretation or application. Stakeholders also felt that there was a lack of guidance material available to help them understand how the provision may be relevant in particular scenarios or could possibly be applied to their dispute.

It is important to note that the Review is not suggesting that there have been systematic breaches of good faith by the signatories. The broad feedback from across the industry indicated that there has been significant improvement in the conduct of retailers over the last three years. However, the Review received a range of complaints from suppliers alleging instances of problematic behaviours that persist at the buying level.

## Problematic behaviours

The Review met with a range of stakeholders during consultations. Many shared their experiences of dealing with the signatories that they believed should have raised concerns about whether the buyer has acted in good faith. For example, the Review heard claims that:

- A retailer’s buyer had threatened a supplier with delisting, reducing their ranging and offering poorer shelf space unless the supplier enter into an agreement that offered the retailer higher margins.
- A supplier had over 70 per cent of their business dedicated to supplying a single retailer and invested to up-scale production based on the buyer’s commitment to increase orders. A sudden change in buying personnel resulted in an extreme cut-back in distribution of the supplier’s product. No recognition was given to previous commitments and little regard was given to the detrimental impact on the supplier’s business.
- A supplier had persistent difficulties in receiving written communications from a retailer’s buyer during a dispute, raising concerns that this was done intentionally to avoid keeping records of any potential Grocery Code breaches.
- Retailers not giving suppliers meaningful prior notice to delisting, instead relying on blanket approaches that flag entire categories or product lines for potential delisting.
- A supplier was given only two weeks’ notice prior to a range review, without adequate time to prepare data to respond to the retailer’s delisting decisions or pitch new products.

- Suppliers being pressured to cycle promotional activities at the same dollar value every year without any regard given to the potential costs or benefits to the supplier.
- Late cancellations of orders that the supplier had already procured and paid for from overseas.
- In relation to price rises:
  - retailers refusing to accept a price rise for a supplier's product (to cover increased input costs such as raw materials, wages and electricity), but then subsequently increasing the retail price to secure additional margin for themselves;
  - retailers requiring suppliers to list cost increases with reference to commercially sensitive information, such as ingredients within their product. Suppliers are concerned with disclosing their recipes and intellectual property, particularly if the retailer has a competing home brand product; and
  - suppliers who withhold supply in response to a price rise dispute experiencing retribution from the retailers by having other product lines delisted and receiving significantly reduced orders.

### Is the answer more prescription?

A possible approach for addressing these types of issues in the industry could be to expand the range of behaviours that are regulated by the Grocery Code. However, there are significant risks in a prescriptive approach as it will limit commercial flexibility and the freedom to contract between parties. This can lead to inefficiencies and restrict the industry's ability to adapt to changes in market dynamics, which ultimately may harm Australian consumers. Further, prescriptive provisions often will not take account of the commercial exigencies associated with a particular supplier's business.

The Review does not believe it is appropriate for the Grocery Code to specifically address every type of transaction between the parties. An overly prescriptive code may fuel further tensions in an industry by imposing unnecessary red tape that may incentivise parties towards finding legalistic ways to navigate around the provisions. This can be counterproductive and stymie efforts to create broader cultural change in the industry.

The Review supports a principles-based approach that aims to set overarching values to form the foundations of retailer and wholesaler-supplier relationships. This would offer a more flexible solution by setting principles that are capable of capturing emerging issues in the food and grocery industry – without the need for continual amendment to the Code.

## Enhancing good faith

It is clear that the original architects of the Grocery Code (Coles, Woolworths and the AFGC) had envisaged good faith to play a major role in strengthening commercial relationships in the grocery sector.

*"Coles has worked hard to embed a strong culture of fair dealings with our suppliers. We devote a lot of time and resources in mentoring team members to do the right thing."*

**- John Durkan, Managing Director, Coles Supermarkets**

From the evidence and feedback received during the Review, it appears that the current good faith provisions have not lived up to industry expectations. While the good faith principles in the Grocery

Code have gone some way towards setting broad expectations of fair dealings, there is a need to enhance the role and utility of this important fairness obligation.

In the draft report, the Review had recommended a new provision of fair dealing to replace good faith. Some stakeholders supported this proposal, while others raised concerns that such a provision would introduce a new, novel and untested legal concept that could lead to further uncertainty. They highlighted that good faith is a concept developed in common law, which has the benefit of judicial guidance and interpretation behind it.

The Review understands the ACCC has also instituted proceedings against two different franchisors that involve allegations of breaches of good faith under the Franchising Code of Conduct. These cases will help clarify the application of good faith under the Franchising Code and may assist with the understanding of how good faith applies more broadly under prescribed industry codes.

On balance, the Review considers that there is merit in retaining good faith. However, the evidence presented has demonstrated that the current good faith provision is not fulfilling its role within the Grocery Code. Clearer guidance is required so that retailers and wholesalers, as well as their suppliers, are able to understand and readily apply the provision.

The Review recommends amending the current good faith provision to make it clearer and easier to apply in practice. This may be done by including well established indicators of what constitutes acting in good faith. In line with other industry codes, this could include references to acting honestly, cooperatively and not arbitrarily. It should also specify that acts of retribution against a supplier for raising complaints would be considered a breach of good faith. Good faith should also become the primary provision and be repositioned to the front of the Grocery Code.

During the debate on good faith and fair dealings, it is was clear that stakeholders broadly support a Grocery Code that ensures that suppliers are afforded both fairness of process (good faith) and fairness in outcomes (fair dealings).

The Review considers that there is a role for fair dealings principles to act as guidance for the Code Arbiter as outlined in the Dispute Resolution section.

## Principles of fair dealing

New fair dealing principles will help guide the Code Arbiter to assess a supplier's complaint or any alleged misconduct by signatories. It would include a test of fairness and a list of guideline indicators such as clear references to equity, honesty, reasonableness, cooperation and other values that encapsulate fair dealing. While there may be some overlap with good faith, the intention is for these principles to go further than good faith and require the Code Arbiter to turn their mind to whether the retailer's actions or decisions produced a fair outcome for the supplier in all the circumstances.

This will require the Code Arbiter to consider the exigencies of the supplier – such as the supplier's size, supply chain constraints, production process and proportion of the supplier's business dedicated to supplying the retailer or wholesaler. According to stakeholder submissions, these key circumstances pertaining to the supplier are things that are typically known or ought to be known by the retailer or wholesaler.

It is important that Code Arbiters have due consideration to the 'full story' so that they make determinations that align with common sense and generally accepted community expectations. This should apply to all suppliers, both large and small.

## Enhanced Australian Competition and Consumer Commission guidance

The ACCC currently develops guidance material to assist industry participants with understanding the obligations under the Grocery Code. The feedback from stakeholders stated that, while this material has been helpful in explaining what the law is, the current guidance material does not clearly explain how the law can be interpreted or applied in specific circumstances. Some stakeholders noted that the material is generally pitched at a high level and covers broad concepts without the level of detail necessary for practical application.

The Review recommends that the ACCC be tasked with developing guidance material that explores a range of scenarios and examples that may constitute a breach of good faith. This guidance material should be the subject of regular update and improvement.

### Recommendation 4

Enhance the current obligation to act in good faith (clause 28), including the addition of indicators of acting in good faith that are easy to understand and apply; and to introduce the concept of 'fair dealings' as guiding principles for the Code Arbiters.

The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.



## Model principles

An example of what new fair dealing principles could potentially look like has been provided below.<sup>33</sup>

### Model Fair Dealings Principles

The Code Arbiter must have due regard to the principles of fair dealings when making determinations in relation to disputes between Retailers or Wholesalers and Suppliers.

#### 1. Fair Dealings

- a) A Retailer or Wholesaler must at all times deal with its suppliers fairly.
- b) In determining whether a Retailer or Wholesaler has acted fairly, regard may be had to whether the Retailer or Wholesaler has:
  - i) acted honestly;
  - ii) acted reasonably and equitably;
  - iii) acted cooperatively to achieve the purposes of the grocery supply agreement;
  - iv) acted without exerting duress on the Supplier;
  - v) paid due regard to the interests of the Supplier, including the Supplier's need for certainty regarding the risks and costs of trading;
  - vi) acted in accordance with the legitimate and reasonable expectations of the Supplier;
  - vii) not acted arbitrarily, capriciously, unreasonably, opportunistically, recklessly or with ulterior motives; or
  - viii) acted in a way that constitutes retribution against the Supplier for past complaints or disputes.
- c) In determining whether a Retailer or Wholesaler has contravened clause 1(a), regard must be given to the nature of the relationship between the parties and the individual characteristics of the Supplier that were known or ought to have been known by the Retailer or Wholesaler. This includes consideration of whether the Supplier has acted fairly.
- d) To avoid doubt, the obligation to act fairly does not prevent the Retailer or Wholesaler from acting in its own legitimate commercial interests.

<sup>33</sup> Model provision informed by the submission from Professor Caron Beaton-Wells and Jo Paul 2018, Food and Grocery Code of Conduct Review, and other sources

## 6. Dispute resolution

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Dispute resolution is a common feature of prescribed industry codes of conduct. The Grocery Code contains dispute resolution procedures to give suppliers clear pathways for escalating and resolving their dispute in a low cost and timely manner.

This chapter provides an overview of the current processes and considers how the features of a proposed alternative process can be used to enhance the Grocery Code's prescribed procedures.

### Grocery Code framework

Part 5 of the Grocery Code provides a dispute resolution framework that aims to 'provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers'<sup>34</sup>.

The Grocery Code is not intended to be exhaustive or restrictive, with suppliers and signatories able to pursue any other process they prefer, such as utilising the retailer's internal dispute resolution process, lodging a complaint with the ACCC or taking legal action.

#### Code Compliance Manager

The Grocery Code requires signatories to employ a Code Compliance Manager (CCM), who is responsible for investigating and resolving complaints from suppliers. The CCM is a unique feature of the Grocery Code and is designed to allow industry to manage and resolve its own disputes. Each signatory is required to employ a CCM at their own cost. The CCM typically sits in the organisation's legal team.

The CCM must respond to a supplier's written complaint, either by investigating or elevating the complaint to senior management. If the supplier makes a complaint, the retailer or wholesaler must attempt, in good faith, to resolve the complaint within 20 business days. The CCM must also prepare a report twice a year that contains general information regarding complaints received during that period.

#### Mediation and arbitration

Division 3 of the Grocery Code provides a framework for suppliers to seek mediation or arbitration of a complaint or dispute. It establishes a framework for the industry to improve suppliers' access to justice, within a timely and cost effective manner. The division does not limit a supplier's right to pursue other avenues of dispute resolution, and they are able to commence mediation and arbitration outside of the Grocery Code's framework.

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34 Grocery Code Explanatory Statement, Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

A signatory is required to participate in mediation or arbitration should a supplier decide to use the Grocery Code's framework. The Grocery Code also prescribes timeframes for both parties to agree on a mediator or arbitrator (10 days), after which the decision must be referred to an independent party, the Resolution Institute (previously Institute of Arbitrators and Mediators Australia), to make the appointment. Mediation or arbitration must be conducted in accordance with the rules of the Resolution Institute<sup>35</sup>.

## Internal dispute resolution

Coles and Woolworths have both publicly committed to developing positive relationships with their suppliers. As part of this commitment, both retailers have implemented internal complaints handling and dispute resolution avenues for suppliers, outside the Grocery Code requirements.

### Woolworths

Woolworths' third party complaints line, Speak Up, allows suppliers to confidentially make a complaint to an independent body, currently Deloitte<sup>36</sup>. Speak Up documents the complaint and sends a report to a nominated independent Woolworths representative to escalate. The Speak Up service offers confidentiality to the complainant, however details are disclosed to the relevant persons in the event of further investigation of the complaint.<sup>37</sup>

*"Woolworths believes in a supplier's right to speak up if they are concerned about their relationship with us. We recognise that concerns may arise from time to time given the scale and diversity of our supply chain and commercial activities. Accordingly, set against our overarching objectives for mutually beneficial and long-term supplier relationships, we want suppliers to feel comfortable and safe to raise these concerns with us."*

**- Claire Peters, Managing Director, Woolworths Supermarkets**

The screenshot shows the 'Woolworths vendors' website. The top navigation bar includes 'Home', 'Getting Started', 'Topic Centre', 'News', and 'Contacts'. The 'Topic Centre' is selected. Below the navigation bar, there is a search bar and a 'Go' button. The main content area is titled 'DISPUTE RESOLUTION - WHAT TO DO IF YOU ARE NOT SATISFIED'. It contains text explaining the dispute resolution process, including a link to the 'Vendor Speak Up policy'. The left sidebar shows a 'NAVIGATION' menu with options like 'Doing Business with Woolworths', 'Homebrand', 'Woolworths Select', 'Specialist Brands', 'Vendor Guide and Trading Terms', 'Accounts and Finance', 'Home Improvement', 'Product Maintenance Forms', 'Woolworths Liquor Group', 'Thomas Dux', 'Non-Trade Goods and Services', and 'FoodCo Ownbrand'.

35 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 39

36 Woolworths Group Limited 2018, *Dispute Resolution – What to do if you are not satisfied*, [https://www.wowlink.com.au/wps/portal/topic\\_centre?WCM\\_GLOBAL\\_CONTEXT=/cmgt/wcm/connect/Content%20Library%20-%20WOWLink/WOWLink/Topic%20Centre/DoingBusiness/VendorGuide/Disputes](https://www.wowlink.com.au/wps/portal/topic_centre?WCM_GLOBAL_CONTEXT=/cmgt/wcm/connect/Content%20Library%20-%20WOWLink/WOWLink/Topic%20Centre/DoingBusiness/VendorGuide/Disputes)

37 Woolworths Group Limited 2016, *Vendor Speak Up Policy*

## Coles

Coles have appointed an independent arbiter, The Hon Jeff Kennett AC, to consider complaints by suppliers. Mr Kennett is required to make a determination on the basis of the supplier's complaint and any evidence he may need to obtain. Determinations are binding on Coles but not the supplier. Mr Kennett may decide to award the payment of compensation to suppliers or make changes to Grocery Supply Agreements to prevent the issue from reoccurring (Kennett model).<sup>38</sup>

The Review understands that Mr Kennett is engaged by Coles on an ongoing basis and all suppliers have access to Mr Kennett as they see fit. However, Mr Kennett is limited to hearing only disputes that arise under the Coles' Supplier Charter, which outlines Coles' commitment to deal in good faith, with transparency around ranging, delisting and Grocery Supply Agreements.<sup>39</sup> Mr Kennett does not make determinations of specific Grocery Code-related issues outside the Supplier Charter. However, there is some overlap in principles.

*"Encouraging suppliers to come forward with any grievances or concerns, knowing their complaints will be dealt with in confidence and carry no risk of retribution, is intrinsic to the architecture of the Coles Supplier Charter, and consistent with the principles of the Code."*

**- John Durkan, Managing Director, Coles Supermarkets**

Accessing the Independent Arbiter	
Who is the Independent Arbiter?	The Hon. Jeff Kennett AC has been appointed by Coles as the Independent Arbiter under the Coles Supplier Charter Framework.
What will the Independent Arbiter do?	<p>If you believe Coles has not complied with the <a href="#">Coles Supplier Charter</a>, or are dissatisfied with a response received by the Dispute Resolution Manager or Coles Senior Management under the Internal Review Protocol, in accordance with the <a href="#">Coles Supplier Charter Framework</a>, you can elect to have Mr Kennett investigate your dispute.</p> <p>You will need to provide sufficient information in good faith to allow the dispute to be investigated properly and effectively, including details of the outcome sought.</p> <p>You will have the opportunity to provide any relevant documents or information to Mr Kennett. Mr Kennett's decision will be binding on Coles (but not on suppliers) in all disputes except where financial settlement over \$5 million is sought, in which case Mr Kennett will seek to mediate an agreed outcome between the parties.</p> <p>Mr Kennett will use his best endeavours to resolve your dispute within 20 business days of being notified.</p> <p>Your dispute will be managed confidentially.</p>
What happens if I disagree with the Independent Arbiter's decision?	Nothing precludes you from referring your complaint to the ACCC or utilising any rights under any applicable industry codes or commencing legal proceedings.
How can I contact the Independent Arbiter?	<p>You can lodge a contact with Mr Kennett by emailing <a href="mailto:jkennett@ausresolve.com">jkennett@ausresolve.com</a> or by calling (03) 9421 0977</p> <p>Referral to the Independent Arbiter and any associated investigation will be at no cost to suppliers.</p>



38 Coles 2018, *Complaints Handling Procedure*, <https://www.supplierportal.coles.com.au/csp/wps/portal/web/SupplierRelations/SupplierCharterAndGroceryCode>

39 Coles 2018, *Supplier Charter*, <https://www.supplierportal.coles.com.au/csp/wps/portal/web/SupplierRelations/SupplierCharterAndGroceryCode>

Feedback from both Coles and Woolworths has highlighted intentions to continue improving their dealings with suppliers, and where this is not achieved, resolve disputes internally rather than relying on a legal process.

## Feedback to the Review

Stakeholders have stressed the importance of the buyer-supplier relationship for achieving good business outcomes for all parties. Suppliers generally expressed a preference for resolving disputes through commercial negotiations at the buyer level, as suppliers aim to maintain effective working relationships with their respective buying teams.

Although signatories have actively trained their team members on the requirements of the Grocery Code, the Review heard a number of alleged instances where suppliers felt their complaints or disputes were not resolved satisfactorily by buyers. Suppliers believed that these problems may have been exacerbated by frequent changes in the personnel of buying teams that result in lost accountability for previous decisions.

Stakeholders reinforced the need for an effective dispute resolution framework in the Grocery Code.

### Grocery Code Framework

The Review has found that very few suppliers elevated a dispute to a CCM. This is reflected in previous CCM reports provided to the ACCC, which show ‘a very low number of complaints made by suppliers to supermarkets, such as one complaint received or none at all’<sup>40</sup>.

The Review heard that suppliers generally consider the CCMs will be biased towards the retailer when assessing a complaint and lacking the degree of independence, separation and authority necessary to adequately resolve their disputes. Some stakeholders were also concerned that the CCM could dismiss a supplier’s complaint if the CCM was satisfied that it is ‘vexatious, trivial, misconceived or lacking in substance’<sup>41</sup>.

Further, a number of stakeholders considered the current framework ineffective as it did not guarantee an outcome of disputes. It was noted that while the Grocery Code requires the CCM to determine what action (if any) should be taken in response to the complaint, there is no requirement for the signatory to carry out the recommended action.

A number of submissions noted there is no requirement for the CCM to protect their confidentiality, including from the supplier’s buying team. The CCM was also not considered sufficiently senior in the signatory’s management to mitigate the risk of retribution from buying teams. Some suppliers stated that if buyers knew that a supplier had initiated a formal complaint against them, then they may take retaliatory action. Such retribution could manifest in many ways, including lower trading terms, reduction in shelf space allocation or limited distribution.

Stakeholders also cited the lack of transparency of the CCM’s activities, including the nature of complaints raised and their outcomes. It was suggested that if more suppliers were aware of outcomes from the CCM process, this would help to encourage suppliers to raise similar complaints and pursue dispute resolution.

40 Australian Competition and Consumer Commission 2018, ACCC Submission to the Food and Grocery Code of Conduct Review, pg 16

41 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 31-35

The assignment of the CCM to a signatory's legal team did not ease these concerns, which conveyed notions of legal compliance above the equitable resolution of disputes.

The Review is not aware that any disputes have undergone mediation or arbitration since the introduction of the Grocery Code. It is understood that this is due to a fear of retribution associated with escalating complaints against retailers. The Review also heard there is a general lack of awareness by suppliers about the availability of mediation or arbitration as a dispute resolution option.

## Internal dispute resolution

The Review has found that some suppliers have achieved positive dispute resolution outcomes from the Kennett Model at Coles, with some stakeholders providing examples where they have sought satisfactory outcomes including changes to contracts or compensation. The Review did not hear of any evidence of retribution by the buying team towards the supplier following a determination by Mr Kennett.

Stakeholders praised the following characteristics of this model:

- Confidentiality, with suppliers able to raise complaints without fear of retribution.
- Common sense approach to the issues and treatment of suppliers, rather than a legalistic approach based on the letter of the law.
- Focus on obtaining a remedy for the supplier, with binding decisions on Coles for payment of compensation or changes to the supplier's contracts.
- Executive-level management buy-in and support.

Other stakeholders remained concerned that internal processes give too much discretion to the retailers and that the complainants risk reprisal from buyers. The Review heard from stakeholders who were sceptical about the independence of Mr Kennett, with some saying that they would not use the option because he was employed by Coles or felt that this option was restricted to small suppliers only. Others mistakenly thought that Coles' independent arbiter was limited to dealing with compensation payments to suppliers following the ACCC court action and was no longer available.

Many stakeholders consulted during the Review were unaware of Woolworths' Speak Up or had indicated they would not consider using the service, due to perceived negative ramifications for doing so.

The Review considers internal dispute resolution integral to the purpose of the Grocery Code. An industry led response to issues helps to drive positive cultural change. It also provides a feedback loop to senior management on buyer's treatment of suppliers, making them accountable for maintaining positive supplier relations.

## Other alternatives

Suppliers are also free to seek assistance from third party avenues that are outside the framework of the Grocery Code. These include the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and state based small business commissioners. These entities can provide assistance to suppliers that may be in disputes and can also provide access to mediation and arbitration. There are also industry representative organisations, such as the AFGC, Food South Australia and NextGen

Grocery Code training services that also provide advice and education materials on the Grocery Code to their members.

The Review has found that these bodies are a valuable source of advice and guidance to suppliers. Stakeholders expressed a high level of confidence when raising issues with these bodies and seeking their guidance on the Grocery Code. Stakeholders noted reasons for this included an ability to maintain confidentiality and an unbiased understanding of the issues. These organisations, however, do not have an established role under the Grocery Code. For example, the ASBFEO was launched to assist and advocate for small business and family businesses as reflected in its legislation<sup>42</sup>.

These organisations play a key role providing advice and guidance to suppliers looking to engage dispute resolution under the Grocery Code and they should continue to promote their services.

## Addressing a lack of trust and fear of retribution

Stakeholders have highlighted that suppliers are not willing to use the Grocery Code dispute resolution framework due to lack of trust that they will obtain an effective outcome and that they will risk retribution from buyers. Stakeholders recommended a wide range of changes to the Grocery Code dispute resolution framework, from incremental improvements to the current framework to implementing a new independent dispute resolution body. The Review considers these options and presents an approach, which aims to satisfy all stakeholders' concerns with the least cost to industry and the taxpayer.

### Option 1: Status quo

The Review considered whether the existing arrangements were adequate in order to effectively settle disputes between parties. Retailers considered that their existing mechanisms were sufficient to cover any complaints that arose.

Feedback from retailers stated that disputes are generally resolved at the buyer level and therefore the low number of complaints does not indicate issues with the current framework. Some other stakeholders also suggested that there was low industry awareness of the CCM's role and that suppliers were uncertain about how a CCM could help with complaints.

Stakeholders suggested that clause 41 of the Grocery Code should be amended to broaden the information required in the CCM's reports to include all complaints received from suppliers, regardless of whether further action is taken. It was also suggested that these reports be made public to help improve awareness of the role. It is argued that increased transparency will help to overcome barriers for suppliers to pursue disputes under the Grocery Code, if they are aware of others in a similar situation.

Addressing the lack of trust is difficult and is likely to require a significant degree of cultural change by signatories, with the positive messages from senior management being converted into better buyer behaviour when dealing with suppliers. In looking at keeping the existing arrangements, the Review considered whether the evidence was sufficient – was there enough fear of retribution to consider changing the current arrangements? The Review considered there was a sufficient level of fear of retribution among suppliers to justify the need for improving dispute resolution procedures within the Grocery Code.

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42 Australian Small Business and Family Enterprise Ombudsman Act 2015

## Option 2: A new centralised dispute resolution body

The Review received a number of submissions to the draft report recommending that an independent body that sits outside of signatory organisations should be established to arbitrate disputes and make binding decisions.

The Review considered a range of options to establish such a body and tested these options against legal and policy frameworks. While such a body does have some merit, it also contains significant drawbacks.

Some stakeholders suggested that employing an independent third party to conduct dispute resolution would ensure a consistent interpretation of the Grocery Code without bias. A number of stakeholders suggested that an independent arbitrator could comprise a person with industry knowledge or a panel with both supplier and signatory representation.

The Review felt this option would go some way to achieving objective independence in hearing disputes. Feedback from stakeholders suggested that it would be trusted by suppliers to ensure confidentiality.

However, calls for an independent body are largely based on a perception of the operation of the United Kingdom (UK) model for dealing with grocery disputes. There is a misconception with the UK model and the Groceries Code Adjudicator (GCA), who has been effective in improving conduct in the UK food and grocery industry.<sup>43</sup> The UK GCA is the sole regulator for the Groceries Supply Code of Practice (GSCOP), equivalent to the ACCC in Australia.<sup>44</sup> It also has powers to arbitrate disputes between suppliers and large retailers (further discussion of the UK model is at **Appendix B**).

While the UK GCA has the power to arbitrate disputes between large retailers and suppliers, this function is rarely employed. Instead, the UK GCA directs suppliers to the Code Compliance Officers (CCO) in each retailer (with similar responsibilities as Australia's CCMs), as the primary avenue for dispute resolution.

*"The GCA does not act as a complaints handling body, nor can it advise on individual disputes where a supplier seeks a view on whether a regulated retailer has breached the Code... Instead, the GCA encourages suppliers to approach CCOs directly because they can deal with issues quickly and, where needed, discreetly."*

### - UK Groceries Code Adjudicator, Annual Report and Accounts 2018<sup>45</sup>

The UK GCA's success is not a result of its function as an adjudicator of disputes. Rather, this dispute resolution role remains the responsibility of UK retailers, and it is there that the UK GCA has been able to improve the relationship between the parties to generate positive outcomes across the industry.

As mentioned above, the UK GCA undertakes an equivalent role to the ACCC as the enforcer of the GSCOP. However, the UK GCA has chosen to undertake a broader role to help educate the industry to

43 Department for Business, Energy & Industrial Strategy 2017, *Statutory Review of the Groceries Code Adjudicator: 2013-2017* (UK)

44 UK Groceries Code Adjudicator 2018, *Annual Report and Accounts*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718541/GCA\\_Annual\\_Report\\_and\\_Accounts\\_2017-18\\_web\\_accessible\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718541/GCA_Annual_Report_and_Accounts_2017-18_web_accessible_version.pdf)

45 Ibid, pg 12

encourage and improve compliance with the GSCOP. The UK GCA holds meetings with the retailers, including CCOs and executive-level management, to discuss issues and make recommendations to improve compliance. In the Australian context, this would represent an extension of the ACCC's current role, though it does provide limited guidance material.

Stakeholders called for an independent body to have a number of functions similar to the UK GCA, including: working with signatories to encourage greater compliance with the Grocery Code; publishing interpretive Grocery Code guidance material; assisting suppliers with Grocery Code related issues and providing confidential advice on potential breaches; and liaising with the Government on systemic issues in the industry. This feedback is considered in the following chapter on compliance and enforcement.

While an independent body would help provide impartiality, institutionalising the dispute resolution process would likely result in a more formal and legalistic approach to the resolution of disputes. It is likely to be complex, costly and time consuming. Procedural frameworks will likely need to be developed, such as rules around the production of evidence, the legal standing of the determinations and a participants' right of appeal. The Review considers that this option would likely result in the 'look and feel' of an adversarial court process.

Establishing and running an independent office will also involve significant initial and ongoing operational costs. It is estimated that administration of a Government ombudsman-style office could cost from about \$2 to \$4 million per annum<sup>46</sup>. Further, the cost of conducting arbitrations can also be relatively high.<sup>47</sup> These issues are highlighted by the UK GCA, which has noted the financial and time costs of adjudications.

*"I have accepted two new arbitrations this year. These are costly and very time consuming for the parties involved, typically taking over 12 months."*

**- UK Groceries Code Adjudicator, Annual Report and Accounts 2018<sup>48</sup>**

Some costs to the taxpayer could be mitigated by way of an industry levy. However, there is a risk these costs may be passed onto consumers. Therefore the Review considered any additional costs associated with amendments to dispute resolution framework should be minimised where possible.

While suppliers wanted independent dispute resolution, there was also a strong preference to maintain a positive relationship with buyers. The Review considered that relying on a third party to resolve disputes would likely not improve this relationship nor would it incentivise signatories to pursue cultural change to improve treatment of suppliers. The Review was concerned that an independent dispute body would shift the responsibility for resolving complaints away from the

46 Estimated costs modelled based on funding received by the Australian Small Business and Family Enterprise Ombudsman, as per Commonwealth Budget statements from 2014-15 and 2016-17 and the 2017-18 industry levy applied to fund the United Kingdom Groceries Code Adjudicator, found in UK Groceries Code Adjudicator 2018, *Annual Report and Accounts*, pg 62, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718541/GCA\\_Annual\\_Report\\_and\\_Accounts\\_2017-18\\_web\\_accessible\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718541/GCA_Annual_Report_and_Accounts_2017-18_web_accessible_version.pdf).

47 The Resolution Institute's tribunal arbitrator fee cap is \$25,000 for a dispute in the amount up to \$250,000. This is a sliding cap and increases in proportion to the amount under dispute. More information can be found at Resolution Institute 2016, 'Resolution Institute Arbitration Rules 2016', <https://www.resolution.institute/documents/item/1844>

48 UK Groceries Code Adjudicator 2018, *Annual Report and Accounts*, pg 7, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718541/GCA\\_Annual\\_Report\\_and\\_Accounts\\_2017-18\\_web\\_accessible\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718541/GCA_Annual_Report_and_Accounts_2017-18_web_accessible_version.pdf)

signatory – in effect outsourcing the management of commercial relationships to the Government or third party.

The Review also noted that suppliers generally avoid approaching external parties such as the ACCC, despite its independence, unless the relationship is unsalvageable or they are facing business failure. The Review considers a central independent body in its own right would likely not help to overcome suppliers' fear of retribution.

The Review considers that while an independent dispute resolution body has some merits – it is not the most appropriate outcome for the industry at this time. The Review's position is that this option would not sufficiently remove the fear of retribution, does not afford industry an opportunity to maintain business relationships, be potentially costly, and would result in a legalistic consideration of disputes.

### Option 3: Improvements to the current framework

The Review explored whether the Grocery Code framework can be improved to adopt some of the beneficial elements of an independent dispute resolution body in a more efficient and effective way, without the need to create an additional independent office at a cost to the industry or the taxpayer and avoid an overly-legalistic dispute resolution process for suppliers.

The Review considers that signatories should maintain responsibility of dispute resolution, with the Grocery Code prescribing overarching requirements such as independence and impartiality. This gives an opportunity for signatories to genuinely resolve disputes in the interest of maintaining relationships with suppliers. Effectiveness of this approach has been demonstrated by the Kennett model at Coles. Mr Kennett sat outside the organisation and had authority from Coles' senior management to make binding determinations of disputes. Mr Kennett's determinations surpass the buyer's authority and therefore mitigated the risk of retribution. Further, feedback from other signatories also demonstrated intentions to improve their internal dispute resolution frameworks to address the issues highlighted by the Review.

The Review considers that independence of the dispute resolution process could be achieved through taking the CCM role outside the signatory organisation. However, the majority of feedback noted that as long as the CCM sat within the signatories' organisation, the concerns about impartiality, either real or perceived, would remain. The Review acknowledges these concerns and considers that the Grocery Code should contain obligations on signatories to ensure independence during the dispute resolution process, which will be enforceable by the ACCC.

A major concern for stakeholders was that the CCM did not have authority to require a signatory to take remedial action to resolve a dispute. The Review considers that an effective dispute resolution framework should include the ability for binding decisions to be made to resolve issues between the parties.

A number of suppliers stressed a preference for dispute resolution to be governed by common sense and fairness, rather than a legalistic approach. As discussed previously, a number of stakeholders considered the concept of fairness as being easier to comprehend compared to the current good faith provision. Stakeholders clearly prefer a common sense approach to resolving disputes, which was stated as a positive characteristic of the Kennett model.

A dispute resolution process that focuses solely on a legal interpretation of the Grocery Code will not encourage suppliers to make a complaint or elevate a dispute. This is a particular issue for smaller suppliers that generally do not employ a lawyer or are unable to afford legal assistance to help with

the interpretation of the Grocery Code. There is scope for the Grocery Code to ensure a consideration of fairness when resolving disputes. This could be achieved through including fair dealings guiding principles in the Grocery Code, as discussed in the previous chapter.

Given these considerations, the Review believes that amendments to improve the current Grocery Code framework as the most appropriate response. This approach provides an opportunity for the industry to demonstrate leadership in improving dispute resolution mechanisms in a way that works for suppliers. If a future review of the Grocery Code finds that the signatories have been unable or unwilling to support effective dispute resolution processes for suppliers, there may be a case for additional government intervention, such as in the form of a centralised dispute resolution body.

## Recommended changes to dispute resolution

The Review considers that a number of changes are required so that the framework allows suppliers to: have the confidence to elevate disputes; confidentially test complaints; receive a binding outcome from dispute resolution; and be assured that the outcome is in line with the principles of the Grocery Code.

### Proposed new Code Arbiter

The Review recommends that the Grocery Code be amended to replace the CCM position in each retailer or wholesaler with an independent Code Arbiter, who will have the primary responsibility to resolve supplier/retailer or wholesaler disputes on a case-by-case basis and monitor for retribution following a complaint or dispute resolution process. Code Arbiters would be required to receive complaints, investigate and make a determination of the signatory's behaviour and appropriate remedy.

The Grocery Code should require the Code Arbiter to:

- hear all supplier complaints, considering the new fair dealings guiding principles, with an aim to achieve a resolution;
- make a determination on what remedies (if any) are appropriate to rectify the harm caused to a supplier (including changes to contract or compensation);
- maintain confidentiality of complainants in the first instance (and where confidentiality cannot be maintained, such as for investigation purposes, the Code Arbiter must notify the supplier of other options); and
- monitor whether the signatory (including senior management and buyers) has complied with the determinations of the Code Arbiter and follow up whether any post-complaint retribution has occurred.

Failure of a Code Arbiter to perform their functions in accordance with these provisions will be a breach of the Grocery Code and retailers (or wholesalers) may be subject to ACCC enforcement action. In extreme examples this could trigger the ACCC to use their powers under the CCA to seek an undertaking for the replacement of the Code Arbiter.

The proposed Code Arbiter model allows more flexibility and consideration of broader questions of fairness, rather than the strict application of the law that would be adopted through formal arbitration. Code Arbiters would be required to consider the new fair dealings guiding principle,

which provides scope for the supplier's individual circumstances to become an important factor in determining fair outcomes.

The model also incorporates binding dispute resolution, which is a key benefit of a voluntary code. This feature extends beyond the current dispute resolution mechanisms in other prescribed industry codes of conduct under the CCA, including Horticulture, Franchising and Oil, which only have mediation available. For further consideration of the other industry codes of conduct, see **Appendix D**.

## Accountability

The Review also recommends the Grocery Code ensure public accountability of signatories' behaviour and the activities of the Code Arbiter. The requirement for the CCMs to prepare six monthly reports under clause 41 of the Grocery Code should be improved with a requirement for the Code Arbiters to prepare and publish broader information about dispute resolution activity on an annual basis. Reporting should include summary non-identifiable information about:

- all complaints received by the Code Arbiter;
- whether complaints were investigated (if not, reasons for why); and
- what determination was made and action taken (if none, reasons for why).

Broadening the reporting requirements under the Grocery Code also provides an opportunity for more transparency of the signatories' compliance more generally. The Review considers that there is a benefit for the Code Arbiters' reports to also include whether any action has been taken by the signatory to improve compliance with the Grocery Code in response to the key issues identified by the Code Arbiter.

The Code Arbiter should also be responsible for undertaking independent supplier surveys, based on a standard set of questions, to be published and used as a scorecard of its treatment of suppliers. The Review notes that Coles and Woolworths already conduct supplier surveys, which should be conducted independently by the Code Arbiter.<sup>49</sup> This provides a mechanism for suppliers to give feedback about the signatory with confidence that their identity would not be shared with the signatory.

Further, the Review identified a need for retailers and wholesalers to be accountable for price rise discussions and its implications for suppliers, including how long negotiations take. The Review considers the signatories should be held to account against a best practice benchmark of 30 days. This reporting should also be included in the Code Arbiters' annual reports. This will allow the public to scrutinise the typical duration of price discussions with suppliers between retailers or wholesalers.

Increased transparency aims to hold signatories publicly accountable for their treatment of suppliers. This data will be beneficial for suppliers when considering whether to do business with signatories, for consumers to better understand the supplier's experience when dealing with a retailer or wholesalers and for the ACCC to improve and better target compliance and enforcement activity.

<sup>49</sup> See for example Coles 2017, *Always Open Survey*, <https://www.supplierportal.coles.com.au/csp/wps/portal/web/SupplierRelations/AlwaysOpenSurvey> and 'Voice of Supplier' Woolworths', *2017 Corporate Responsibility Report*, <https://www.woolworths.com.au/home/prosperity-founded-on-trusted-relationships/working-with-our-business-partners.html>

## Independence

While the Code Arbiters will be employed by the signatory, the Grocery Code would require specific conditions governing their terms of employment to ensure a workable degree of independence and impartiality. This would include:

- making a binding determination on the retailer (but not the supplier);
- having access to all relevant information and records of the signatory, for the purposes of conducting a thorough investigation;
- sitting outside of the organisation, including senior management, buying teams or legal departments;
- being employed for a fixed term and unable to be terminated on the grounds of making decisions that are unfavourable towards the signatory; and
- being accessible to all suppliers via phone, email or in person (where appropriate), regardless of the supplier's business size.

Retailers and wholesalers will have the flexibility to design individual Code Arbiter models that meet the needs of their organisation and suppliers, as long as it adheres to the provisions of the Grocery Code. For example, the Arbiter could comprise of a panel or an individual.

Flexibility in the design of the respective Code Arbiter allows signatories to build upon the current frameworks, including the Kennett and Vendor Speak Up models that have been implemented by Coles and Woolworths. This maintains industry ownership of issues while giving suppliers confidence to take advantage of these services. Codifying the principles that underpin these current models will ensure the longevity of these arrangements and the commitment by signatories to provide fair, accessible and impartial dispute resolution processes.

The Review considers that the proposed Code Arbiter model strikes the appropriate balance between maintaining the status quo and calls for establishing a new central dispute resolution body. A comparison of the proposed Code Arbiter model with the existing CCM responsibilities, the Kennett model and UK GCA is at **Appendix E**.

The Review also recognises there will be increased costs for industry as a result of the recommended changes to the dispute resolution framework. However, this is a relatively cost effective alternative to establishing a new office for a central dispute resolution body. The Review estimates that a full time equivalent salary for the Code Arbiter would be approximately \$230,000<sup>50</sup>. Across the current signatories this totals to \$920,000, compared to establishing a new independent office at a cost of around \$2 to \$4 million (see previous analysis).

Moreover, remuneration of the Code Arbiters will be determined by the signatories, providing scope to develop a funding model that best suits the organisation, for example on a fee per engagement basis or as a special contractor. Signatories will also be able to repurpose existing resources allocated to the CCM role, partly offsetting the additional cost.

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50 Based off the UK Groceries Code Adjudicator salary payments in 2017-18, as cited in UK Groceries Code Adjudicator 2018, *Annual Report and Accounts*, pg 62, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718541/GCA\\_Annual\\_Report\\_and\\_Accounts\\_2017-18\\_web\\_accessible\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718541/GCA_Annual_Report_and_Accounts_2017-18_web_accessible_version.pdf)

## Recommendation 5

The Code Compliance Manager should be replaced with an independent Code Arbiter, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.

### Independent Reviewer

Submissions to the draft report criticised the lack of independence of the Code Arbiter model, noting it does not mitigate perceived bias in the dispute resolution process. To address this, the Review recommends that there be an Independent Reviewer, appointed by the Minister, to oversee the dispute resolution process. The Review considers this an appropriate ‘check and balance’ on Code Arbiters appointed by retailers or wholesalers.

If a supplier has taken a dispute to the Code Arbiter and is unsatisfied with the way it was handled, they will be able to request the Independent Reviewer to review their case. This aims to give suppliers confidence to make complaints and engage in dispute resolution, knowing there is a third party to help when issues may arise.

The role of the Independent Reviewer is not to re-prosecute the case or to make a new determination. Rather, the Independent Reviewer function is to check the overall integrity of the process and to ensure that the Code Arbiter has carried out their duties properly in accordance with the requirements of the Grocery Code.

The Independent Reviewer would consider whether a Code Arbiter had: considered good faith and fair dealings, including the supplier’s commercial exigencies; kept confidentiality; and monitored for post-complaint retribution.

The Independent Reviewer would be empowered by the Grocery Code to access the Code Arbiter’s documents and case notes for the determination in question. If the Independent Reviewer suspects that the Code Arbiter has not acted in accordance with the requirements of the Grocery Code, they must advise the Code Arbiter of the issues and refer the matter back to the Code Arbiter for reconsideration.

If the Independent Reviewer was concerned that a Code Arbiter was not acting properly in accordance with the Grocery Code, they would be able to report a serious breach to the ACCC.

Ideally, the Code Arbiter would be a person of public standing, with knowledge of the industry and the Grocery Code. They should be able to review a Code Arbiter’s case notes in a short timeframe, ensuring that the process is not overly drawn out for suppliers.

The Independent Reviewer would also be well placed to work with the Code Arbiters and the ACCC to develop best practice approaches. It should participate in periodic meetings with all Code Arbiters to workshop key issues and develop strategies to improve compliance with the Grocery Code.

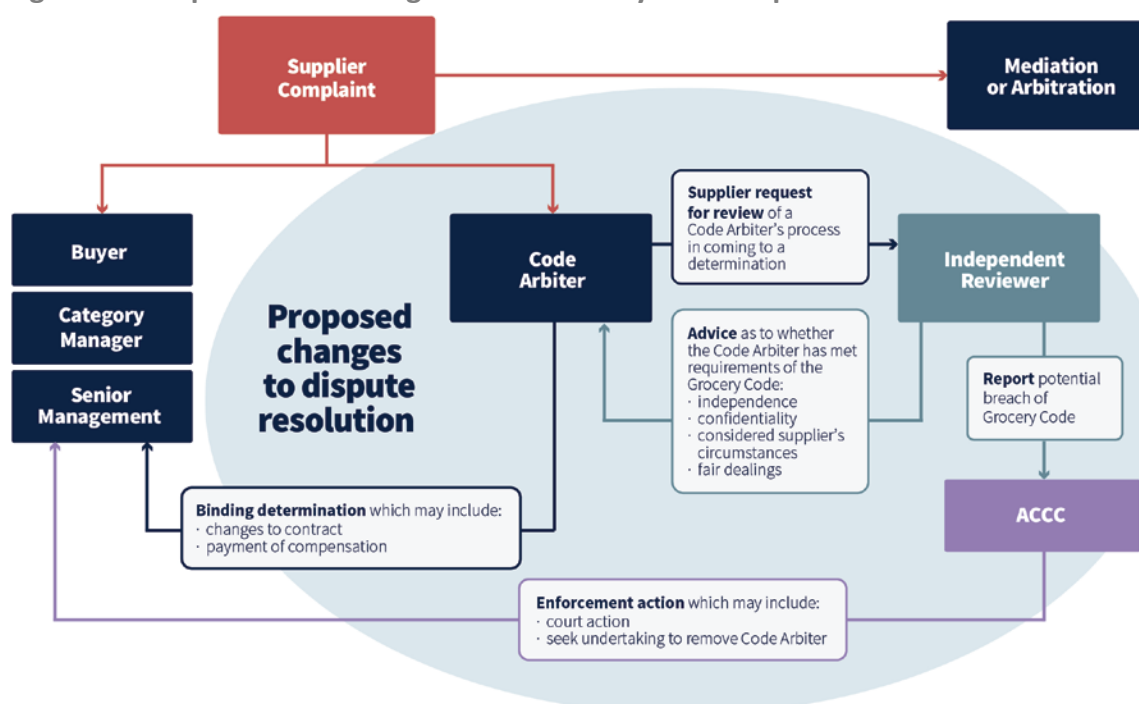
This incorporates the successful aspects of the UK GCA model, including increased accountability through transparency and more active oversight of the dispute resolution process. It also provides the basis for a more collaborative relationship between signatories, the Independent Reviewer and the ACCC to achieve compliance with the Grocery Code.

## Recommendation 6

The Government should appoint an Independent Reviewer to:

- review the Code Arbiters' determinations for consistency with the requirements of the Grocery Code (at the request of a supplier); and
- work collaboratively with Code Arbiters, signatories and the ACCC, meeting regularly to discuss issues under the Grocery Code.

Figure 6.1 Proposed new changes to the Grocery Code Dispute Resolution Framework



## 7. Compliance and Enforcement

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The ACCC is responsible for regulating the Grocery Code, which falls under Part IVB of the CCA. A breach of the Grocery Code is a breach of the CCA<sup>51</sup>. The ACCC can take enforcement action against signatories that breach the Grocery Code, including by seeking court imposed injunctions or accepting administrative undertakings from retailers (or wholesalers) to remedy wrongdoing.

The ACCC generally does not investigate and resolve individual complaints made by suppliers. The ACCC identifies systemic issues and pursues action under the CCA<sup>52</sup> that deliver broad public benefit outcomes in accordance with its Compliance and Enforcement Policy<sup>53</sup>.

The ACCC's oversight and enforcement role has proved influential in the effectiveness of the Grocery Code. Stakeholders indicated that they have had success in enforcing their rights by using the language of the Code during disputes – in particular, questioning whether certain conduct may be in breach or fall short of the 'spirit of the Grocery Code'. The signatories have taken their compliance with the Grocery Code seriously and this is due largely to the ACCC's role as the regulator.

The ACCC has information gathering powers under the CCA that allow it to compel businesses to provide information, documents and evidence. Under section 155 of the CCA, the ACCC can require a party to provide information, produce documents or attend an ACCC examination if it has 'reason to believe' that a party is capable of providing such information in relation to an ACCC investigation into a potential contravention of the law.

In addition to this general power, the ACCC also has information gathering powers that apply specifically to prescribed industry codes under section 51ADD of the CCA. This power allows the ACCC to conduct 'compliance checks' by requiring signatories to produce any information or documents that they are required to keep, generate or publish under the Grocery Code.

### Australian Competition and Consumer Commission compliance checks and reporting requirements

The ACCC has conducted two rounds of compliance checks on ALDI, Coles and Woolworths since the Grocery Code was introduced.<sup>54</sup> The main area of ACCC concern in 2016 related to delisting practices, including instances where suppliers were given short notice periods prior to delisting, insufficient reasons for delisting and not properly informed of their right to have delisting decisions reviewed. The second round of compliance checks in 2017 showed some improvements generally, however, some retailers were still falling short of their delisting requirements. The outcomes of the ACCC's compliance checks suggest that no other significant compliance issues were identified for the major retailers.

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51 *Competition and Consumer Act 2010* (Cth), s51ACB

52 Australian Competition and Consumer Commission 2018, *Complaints & Disputes*, <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/complaints-disputes>

53 Australian Competition and Consumer Commission 2018, *About Us*, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

54 Australian Competition and Consumer Commission 2018, Submission to the Grocery Code of Conduct Review, pg 8–9.

Some signatories to the Grocery Code noted that the ACCC's annual compliance checks impose significant costs on business. In some cases, identifying and retrieving documents such as notices in emails must be conducted manually. This can be resource intensive and time consuming for signatories, particularly large organisations that consist of hundreds of buyers interacting daily with numerous suppliers.

It was noted that the ACCC's annual compliance checks generally involve a request on signatories to produce copies of documents across 11 different categories as listed under section 42 of the Grocery Code (such as GSAs, a range of notices and reports).

Some stakeholders question whether the ACCC's current approach is efficient and effective for maintaining and promoting compliance with the Grocery Code. Further, stakeholders mentioned that outcomes of the ACCC's compliance checks are not published so it is difficult to ascertain whether the benefits of the reporting exercise outweigh the compliance costs on signatories.

In the ACCC's submission to the draft report, it suggested that the concerns regarding the compliance burdens associated with its audit activities may be overstated. It was noted that 'the ACCC takes a targeted approach to its audits under the Code in order to minimise the extent of any burden. The documents that the ACCC typically request are limited in volume.'<sup>55</sup> The ACCC indicated that its audit work has contributed to embedding and improving a culture of compliance with the Grocery Code.

The Review has identified some notable differences in the ACCC's approach for conducting compliance checks under the Grocery Code compared to other prescribed industry codes. For example, the ACCC conducts compliance checks on franchisors under the Franchising Code of Conduct. Franchisors are often selected for compliance checks based on the volume and severity of the complaints made by their franchisees to the ACCC.<sup>56</sup> In such cases, the ACCC has a firm understanding of the alleged misconduct of the franchisor, which gives it the ability to be targeted and strategic in the documents that it requests from franchisors under its section 51ADD power. The ACCC can seek specific evidence from the parties to test the veracity of claims to establish whether a breach has occurred. In contrast, there is a distinct lack of complaints being brought forward by suppliers under the Grocery Code.

The Review considers there is an opportunity for the Grocery Code to help address this lack of data, through enhanced reporting and surveying requirements, which will allow the ACCC to play a broader role in ensuring compliance with the Grocery Code.

## A more collaborative approach

The Review does not believe that annual compliance checks that require the signatories to produce the full gamut of documents should be the only means for the ACCC to encourage compliance with the Grocery Code.

55 Australian Competition and Consumer Commission 2018, Submission to the Grocery Code of Conduct Review, pg 9

56 Australian Competition and Consumer Commission 2018, Inquiry into the operation and effectiveness of the Franchising Code of Conduct, pg 19

Instead the Review recommends that the ACCC enhance its educative and oversight role to help strengthen its relationship with signatories and suppliers. This will be aided significantly by the proposed new Independent Reviewer. The Review recommends that the ACCC maintain an open dialogue with the Independent Reviewer and each signatory, via the Code Arbiters, by engaging in regular meetings to discuss trends in supplier complaints and actions taken by the retailers (wholesalers) to rectify them.

This model has been proven effective in the UK, where a key focus is to work collaboratively with the large retailers to help them understand issues from the supplier's perspective. The UK GCA encourages large retailers to actively implement changes to help improve treatment of suppliers and overall compliance with the GSCOP.

*"The GCA has increasingly put the spotlight on cultural and behavioural patterns in the retailers. These regularly come up in discussions with regulated retailers as part of the collaborative approach...the GCA continually reinforces the need for retailers to engage with the spirit of the Code and has spoken particularly about what this means to buyers and other groups set up to improve compliance..."*

**- UK Groceries Code Adjudicator, Annual Report and Accounts 2018<sup>57</sup>**

In addition, the Review believes that there is an opportunity for the ACCC to streamline its compliance activities by utilising the proposed annual report by the Code Arbiters as a primary source for assessing general compliance with the Grocery Code.

This allows the ACCC to call for confidential submissions from suppliers to test claims in the Code Arbiter's report and gives suppliers an opportunity to present their side of the story. This may allow the ACCC to use its compliance checks powers to strategically examine particular issues arising from supplier complaints through the Code Arbiter model.

### Civil pecuniary penalties vs compensation for suppliers

A number of submissions, including the ACCC's submission, called for the introduction of civil pecuniary penalty provisions to act as a deterrent against breaching the Grocery Code. Two of the seven mandatory prescribed industry codes under the CCA include civil pecuniary penalty provisions. However, these provisions were implemented following reviews which found evidence of persistent non-compliance by industry participants.

The current limit on pecuniary penalties for prescribed industry codes is 300 penalty units (currently \$63,000), which is relatively small compared to the signatories' financial status. To have any deterrent effect, these penalties would need to be increased many times over to be considered more than a minor expense. However, imposing high penalties may run counter to the underlying purpose of industry codes to provide a light touch regulatory framework for addressing industry specific problems. Penalties may act as a strong disincentive for existing signatories to continue to participate in the voluntary Grocery Code and may deter new signatories from signing up.

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<sup>57</sup> UK Groceries Code Adjudicator 2018, *Annual Report and Accounts*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718541/GCA\\_Annual\\_Report\\_and\\_Accounts\\_2017-18\\_web\\_accessible\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718541/GCA_Annual_Report_and_Accounts_2017-18_web_accessible_version.pdf), pg 16

Further, civil pecuniary penalties can only be imposed by a court; this requires the ACCC to often undertake costly and lengthy legal proceedings. If the ACCC is successful, the pecuniary penalties awarded are ultimately allocated to the Government's consolidated revenue. The supplier that suffered wrongdoing will not receive compensation unless they pursue their own legal action.

The Review does acknowledge that the implementation of civil pecuniary penalty provisions will grant the ACCC the ability to issue infringement notices without the need for court action. However, these are likely to be an even weaker deterrent than the penalties. Infringement notices are limited to a maximum of 50 penalty units (currently \$10,500), which is smaller than civil penalties. Payment of the notice is also not regarded as admittance to breaching a civil penalty provision.

The Review has carefully considered the merits of civil penalties and has determined that it is not suitable for the Grocery Code. Of more relevance to suppliers is the capacity of the Code Arbiter to require any appropriate form of remediation by a signatory in response to a dispute – including fulfilment of purchase orders and compensation for loss or damage. Compensation restores the supplier, allows the retailer to take responsibility to rectify wrongdoing and most importantly – it helps repair trust and allows the parties to maintain existing commercial relationships going forward.

Suppliers have also displayed a strong willingness to find a commercial solution to any issues faced in their dealings with wholesalers or retailers. A Code Arbiter with the ability to award compensation will continue to support suppliers to seek a commercial solution, something which civil pecuniary penalties cannot assist with.

It is also important to note that substantial pecuniary penalties and infringement notices are already available to the ACCC to address serious and egregious misconduct by retailers and wholesalers against suppliers. Retailers and wholesalers are prohibited from engaging in unconscionable conduct under the Australian Consumer Law, which attracts penalties of up to \$1.1 million (for corporations). For example, in 2014 the ACCC took action against Coles for engaging in unconscionable conduct in its dealings with suppliers, which resulted in the Federal Court making orders by consent that Coles pay \$10 million in pecuniary penalties and refunds totalling \$12 million to suppliers.<sup>58</sup>

### Recommendation 7

The ACCC should also consider adopting a collaborative approach with signatories, Code Arbiters and the Independent Reviewer to encourage more active compliance with the Grocery Code.

58 Australian Competition and Consumer Commission 2018, ACCC Submission to the Food and Grocery Code of Conduct Review, pg 10

## 8. Other Areas for Improvement

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The Review has received several submissions that proposed detailed refinements to the provisions of the Grocery Code. Submissions were broad ranging and varied from calling for small technical amendments to recommending more fundamental changes to the operations of the Grocery Code.

The Review has carefully considered all feedback provided by stakeholders and has concluded that some amendments are warranted. These amendments are intended to address areas where the Grocery Code has not been working as intended.

### Delisting and range reviews

Delisting and range reviews are significant events for a supplier and can have a range of outcomes. This can include successfully listing new products, receiving expanded shelf space for their current products or increasing the number of stores in its distribution. A range review may also lead to a product being delisted and being removed from the shelves of a retailer.

The process of a range review and resulting decisions should be transparent and based on commercial principles. Suppliers should be given genuine notice and a reasonable explanation for delistings. Retailers should also have the right to determine what products are put on their shelves and adjust their product listings to meet their consumers' preferences and demands.

The Review heard instances of where a retailer's buyer may not have acted appropriately during the range review process. Suppliers alleged that some buyers were not open to discussing their decisions, would fail to honour the decision of their predecessor and behaved in an unprofessional manner. Suppliers were also reluctant to raise complaints when dealing with such a buyer as it would likely negatively impact future dealings.

For example, one supplier told the Review that:

*"the range review was a horrible experience and the buyer was unprofessional. They would not let me finish the presentation without heckling me the entire time. They also would cite so-called sales statistics at me that were inconsistent with the same statistics we had obtained from the retailer's source. It just didn't make sense and I came away feeling confused and belittled."*

The Review is of the view that the proposed recommendations to introduce guiding principles of fair dealings and the new Code Arbiters should assist in resolving unfair conduct that may arise during the range review process.

The Review also observed a concern amongst a number of suppliers that the major supermarkets held their own branded products to a different standard, particularly that they were more lenient with their sales and margin targets. This appears to be an issue as clause 26 of the Grocery Code requires retailers to apply its product ranging principles without discrimination in favour of its own brand products.

## Delisting a product

Clause 19 of the Grocery Code requires retailers to provide reasonable written notice to the supplier of their decision to delist. This notice must include the reasons for the delisting and inform the supplier that they have the right to request the decision be reviewed by the retailer's senior buyer. The Grocery Code also requires a delisting to occur in accordance with the terms of the Grocery Supply Agreement and for genuine commercial reasons.

During the consultations, suppliers noted that some retailers would often place large segments of a category on notice for a possible delisting, prior to their range review process and the actual delisting decision taking place. However, only a small portion of these products would end up being delisted. When a final delisting notice was issued to affected suppliers, this was generally done in a compressed timeframe.

While this may technically satisfy the requirements of clause 19 of the Grocery Code, it did not provide suppliers with meaningful notice to plan for their business and make alternative commercial arrangements prior to the delisting taking effect.

Some stakeholders were concerned that this practice was used as an intentional negotiation tactic. Some claimed that products were being placed on notice for a potential deletion in an attempt to coerce suppliers to offer better terms. The Review does not consider that this method of blanket notification delivers the policy intention of the Grocery Code. The Review considers that the proposed improvements to the good faith provision will allow the Grocery Code to better address and prevent these types of behaviours.

Some suppliers also raised concerns that they had not received sufficient reasons for delisting, as required under clause 19 of the Grocery Code. The ACCC also raised these concerns with the signatories, noting that some delisting notices lacked detail about the reasons behind delisting. This made it difficult to determine whether the delisting was actually due to genuine commercial reasons.

For example, written reasons given to some suppliers have included 'poor commercial performance' or 'not meeting expectations' with no other information of substance or explanation given in the delist notice.<sup>59</sup> It was also alleged that, in some instances, this reasoning would be inconsistent with the sales data the supplier had obtained from the signatory.

The Review considers that the intent behind this provision is to ensure that suppliers are being delisted for genuine commercial reasons and not as punishment for making a complaint or driving a hard bargain. The Review agrees that there is room for improvement and that retailers should provide more meaningful and detailed reasons for delisting to adequately satisfy their obligations under the delisting provisions of the Grocery Code.

As part of the Review's proposed recommendations to introduce a Code Arbiter in each signatory organisation, the contact details for this new dispute resolution role should be provided on each delisting notice so that suppliers can lodge a complaint if they believe adequate reasons have not been provided.

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59 Australian Competition and Consumer Commission 2018, ACCC Submission to the Food and Grocery Code of Conduct Review, pg 15

## Significant limiting of distributions

During consultations, Woolworths shared with the Review some of its approaches for complying with the Grocery Code. Woolworths had recognised that a significant reduction in the distribution of a supplier's product across its stores can be akin to delisting – both decisions can have major financial implications for suppliers. Acting in the interests of its suppliers, Woolworths voluntarily applied the same Grocery Code requirements for delisting (including the requirement to give written notice and reasons) to its decisions that involved a significant reduction in distribution.

*“We see the Grocery Code as providing important minimum standards of business conduct and Woolworths will continue to put in place initiatives that go well beyond it.”*

**- Brad Banducci, CEO Woolworths Group**

The Review supports this approach and recommends that the delisting requirements in the Grocery Code be extended to apply to decisions by the retailer (or wholesaler) to reduce the distribution of a supplier's product.

### Recommendation 8

The Grocery Code should be amended to give suppliers the right to request further details on the reasons for delisting decisions, following the initial receipt of a signatory's reasons.

The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.

## Grocery Supply Agreements – Clear or complex?

Grocery Supply Agreement (GSA) is a defined term under Clause 3 of the Grocery Code intended to capture all documents that relate to the supply of groceries. The objective of requiring GSAs to be in writing is to ensure that the terms and conditions of grocery supply were clear and well understood by both parties.

The Review understands that in practice there is no single document that is defined as a GSA. The retailer defines a GSA as a combination of trading terms and terms and conditions for doing business.<sup>60</sup> However, there are in fact a range of documents including: freight agreements; promotion agreements; supplier portal documents; and purchase orders. These other documents may vary every time a supplier fulfils a purchase order or pays an invoice.

Some stakeholders are concerned that the retailers do not typically consider these documents as being part of a GSA. There is uncertainty whether such documents may be subject to the protections offered by the Grocery Code in relation to unilateral and retrospective variations.<sup>61</sup>

<sup>60</sup> NextGen, Food & Grocery Code of Conduct Review Submission, pg. 15

<sup>61</sup> Ibid

The Review believes that all agreements that relate to the supply of groceries between the parties should be regarded as the GSA. The definition of GSA is broad – it should cover all such documents, not the narrow interpretation currently adopted by some signatories. The Review is also not aware of any commercial reasons why agreements, such as freight and promotional agreements would not relate to the supply of groceries.

A limited interpretation by retailers is not workable and does not provide suppliers with certainty regarding the coverage and application of the Grocery Code. The Review recommends that it be clarified that the Grocery Code's protections apply to all agreements between the parties that relate to the supply of groceries.

### Recommendation 9

It should be clarified that the term Grocery Supply Agreement, as defined in clause 3 of the Grocery Code, applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.

## Opt outs from the protections of the Grocery Code

Suppliers and others also queried the effectiveness of prescribing a Grocery Code that enables the parties to opt out of key protections through written agreement. While retailers acknowledged these concerns, they suggest that the Grocery Code was structured in such a way to provide a road map to negotiations and that an opt out of each protection may only occur if certain conditions are met. For example, to opt out of the protection against payments for wastage the retailer must, amongst other things, take reasonable steps to mitigate the costs and the payment must be reasonable. The burden of proof for these exempting factors rests with the signatory, not the supplier.

A number of these opt out provisions were also implemented in the interest of both suppliers and signatories to provide the industry with commercial flexibility. There was little evidence provided to the Review to demonstrate that these provisions are being widely abused by signatories or implemented under duress. It is apparent that there is a high bar that must be met to utilise the opt out provisions in the Grocery Code and the Review supports maintaining this current structure.

### Retrospective variation

The Review heard that some signatories have chosen to self-regulate by voluntarily implementing a ban on the practice of varying an agreement with retrospective effect. Further, retrospective variations may also fall short of the Unfair Contract Terms protections for small businesses under the Australian Consumer Law.

The provisions around retrospective variation should be amended so that the behaviour is subjected to an outright ban by removing the current opt-out arrangements.

### Recommendation 10

Clause 10 of the Grocery Code should be amended so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.

## Payments for wastage

The retailer must not directly or indirectly require a supplier to make any payments to cover wastage (such as spoiled or damaged products) on the retailers' premises unless the GSA sets out the circumstances in which the supplier will be expected to make a payment and other conditions are met.

Suppliers can negotiate with retailers to pay for the actual costs of wastage or may elect to pay a flat rebate charge to simplify administrative and accounting practices. Stakeholders have alleged that there have been instances where suppliers have improved their packaging and supply chain processes to reduce actual wastage but have not been able to renegotiate terms with retailers to reduce this charge. It was claimed that renegotiating wastage would risk a renegotiation of all trading terms and conditions by the retailer. This left some suppliers hesitant in raising the issue with retailers due to fears it may jeopardise their other established trading terms.

The Review considers that such an approach sends the wrong signals to the industry and does not encourage suppliers to invest in driving down the actual volume of wastage. It is recommended that provisions in the Grocery Code governing the payment of wastage should be amended to clarify that suppliers have the right to renegotiate their wastage payments without being required to renegotiate the other terms of their GSA.

### Recommendation 11

Clause 14 should be amended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.

## Fresh produce standards and quality specifications

The Review has been informed that the current drafting of clause 21 relating to fresh produce standards and quality specifications is unclear. It may be broadly interpreted to apply to all fresh produce such as meat, fish and dairy.

The policy intent of these provisions is to require retailers to set out clear quality specifications for suppliers. The Grocery Code also requires retailers to follow consistent procedures for rejecting produce within reasonable timeframes to help reduce risk and uncertainty for suppliers.

The draft report had suggested that these provisions may also apply across all fresh produce categories. However, stakeholder submissions have raised key differences for meat, fish and dairy that appears to make it impractical and unnecessary for such requirements to apply.

While the retailers often have separate quality specifications for fruit and vegetables (including grading, size, shape and colour) they usually do not set similar specifications for other products (such as meat and dairy). Instead, some of these products have their standards set by government legislation, rather than by the signatories.

Stakeholders also pointed out that often the 24 hour rejection procedures in the Grocery Code is not appropriate for other produce because quality concerns may not become evident until several days

after it is delivered. For example, an issue with a dairy product may not be evident until after a few days when bacteria may start to grow.

Accordingly, clause 21 should be amended so it is clear that it applies only to fresh fruit and vegetables.

### Recommendation 12

To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply only to fruit and vegetables.

## Difficulties in the price increase process

The Review received an overwhelming number of complaints from suppliers in relation to the retailers' process for negotiating an increase in the price of goods. Suppliers may experience an increase in a range of costs associated with producing their products, including increases in raw material costs, labour costs and electricity/utility costs. To cover these costs and preserve suitable margins, suppliers may be required to increase the price of their product.

In the grocery retail industry, the retailer plays a significant role in controlling supplier's wholesale prices, by way of their acceptance or rejection of the supplier's price point. In practice, the retailer acts as the gatekeeper to pricing changes and will only purchase a product at a price that has been approved or permitted by them.

Retailers have suggested that they have a duty to their customers to understand and verify price increases to ensure their customers have access to the most competitive prices. They point out that the verification process often involves assessing input costs against relevant commodity price movements to bring objectivity and integrity to the process. Further, they note that competitive demands on suppliers are a key driver of efficiency and innovation, which benefit consumers by placing downwards pressure on prices.

Suppliers are concerned that this process can be overly onerous and requires them to disclose commercially sensitive information, prior to the retailer considering a proposed new price. This can involve a line-by-line break down of all of the ingredients of a product, which may further reveal quantities and methods that go into producing a product. It may also extend to requiring a supplier to disclose the contact details of their raw input providers. Some suppliers regard these demands as akin to them being forced to share trade secrets or intellectual property, which is particularly concerning when the retailer also has a competing own-brand product. While retailers have stated that they have adopted strict protocols to protect confidential information, suppliers remain unconvinced that this is always the case.

Suppliers have noted that the verification process is often conducted by a third party audit firm, elected by the retailer. Suppliers are required to pay substantial fees for the assessment, which may take three to twelve months. At its conclusion, they purport that the final decision by the third party is not binding on retailers and may be only be regarded as a starting point for negotiations. In other instances, price rises were accepted by the retailer on the condition that the cost was off-set, in whole or in part, by some other means by the supplier.

Some suppliers reported instances where they have been unsuccessful in requesting a price rise for their product but later found that the retailer had increased the retail price on the shelves to capture additional profit for themselves.

The Review does not believe that the current verification process being used by retailers is leading to the best outcomes for suppliers or consumers. Ideally, suppliers should only be obliged to justify their prices to consumers, who would be able to respond accordingly to price signals. While the Review heard of some instances where leading brand suppliers were able to resist engaging in the retailer's price rise process, the vast majority of suppliers – both large and small – felt compelled to participate in these processes as the only means for engaging the retailer on the issue of price.

Ultimately, the Review found that the price rise process was contributing to the distinct lack of trust between the parties. The Review does not believe that the Grocery Code should play any role in regulating the price of food and grocery products. However, there is an opportunity for the Grocery Code to set the outer boundaries on retailer conduct during the price rise process to help restore trust and confidence between the parties – it is essentially a matter of fair dealing.

The Review believes that the Grocery Code should be amended to include a new provision on the price rise process to better allocate the distribution of risk between the parties.

The draft report had proposed that this new provision should only prevent retailers or wholesalers from forcing suppliers to disclose confidentially sensitive information, relating to trade secrets or intellectual property, where the retailer or wholesaler has a competing own-brand product. While a number of submissions to the draft report supported this provision, this was largely considered as being too narrow. Instead the majority of stakeholders supported this recommendation to be broadened to apply to all products. Stakeholders noted that while the retailer or wholesaler may not be a current competitor, they were still a potential future competitor.

As such the Review believes the best outcome is for the provision to apply to all products, even where there is no competing own brand product. This will ensure that there is no commercial risk to suppliers from engaging in the retailers or wholesalers price process.

The draft report also proposed that the Grocery Code should enforce a 30 day time limit for the price rise process conducted by a retailer or wholesaler. However, it was recognised that there may be circumstances where a 30 day decision is not possible, therefore the Grocery Code should also allow for parties to negotiate and agree to an extension as part of their GSA.

While some submissions to the Review noted 12 weeks would be preferable, others considered that 30 days has been achieved by industry previously. Based on feedback from stakeholders, the Review maintains that 30 days should be considered industry best practice for price negotiations.

To ensure accountability, the Review also considers that retailers and wholesalers should be obliged to publicly report how long the average price rise process takes, including the longest and shortest time. It is proposed that the Code Arbiter would publish this information in their annual report, as recommended in the Dispute Resolution chapter of this report.

The Review considers that the primary responsibility for setting the wholesale price for a product should rest with the supplier of the product – if that leads to a retail price that is unacceptable to the consumer, the sales of the product will suffer. Conversely, retailers and wholesalers also have the right to act within their own legitimate commercial interests, which includes the decision whether to reject or accept stocking a supplier's product on the basis of price.

Negotiations relating to price rises should be conducted in good faith, as per the current requirements of the Grocery Code. This should be strengthened to allow that suppliers have access to the proposed Code Arbiter to raise complaints regarding price rise negotiations and discussions.

The Review's proposal to regulate price rise negotiations in the Grocery Code aims to provide a minimum standard of conduct for signatories when dealing with suppliers about price. This aims to ensure that one party does not bear an uneven portion of risk, relative to the other party, due to an imbalance of bargaining power. A future review of the Grocery Code should consider the effectiveness of the proposed new provisions and whether further regulation of the price rise process may be required.

### Recommendation 13

A new provision relating to price rise processes should be introduced to:

1. prevent signatories from requiring a supplier to disclose commercially sensitive information;
2. require that signatories take no longer than 30 days to consider a price rise request from a supplier, unless circumstances exist that justify a reasonable extension that is negotiated with and agreed to by the supplier; and
3. require that signatories report on the times taken to make a price rise decision, to be published in the Code Arbiters' annual reports.

## Future Review

The Review recommends that there be a future review of the Grocery Code within three to five years of implementation of the proposed recommendations. This will allow industry and the Government to assess whether the proposed changes have been effective.

In particular, the recommended changes to the dispute resolution framework are relatively unique and they should be evaluated to determine if they are working effectively for the industry.

During the next review, if it was found that the retailer or wholesaler appointee Code Arbiter model had failed to deliver a fair and equitable dispute resolution mechanism, it may be appropriate for the Government to then consider the case for further intervention.

### Recommendation 14

There should be a review of the Grocery Code within three to five years of implementation of any changes as a result of this Review.

## Appendix A: Journey to the Grocery Code

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In 2000, the Joint Select Committee on the Retailing Sector inquiry made recommendations about the impact of concentration in the supermarket and grocery industry to promote fair trading practices and good commercial relationships across the supply chain. In particular, it recommended an industry code of conduct to regulate vertical relationships in the retail grocery supply chain, with an independent dispute resolution mechanism suppliers could use to ensure speedy resolution of disputes.<sup>62</sup>

The then Government formed the Retailer Grocery Industry Code of Conduct Committee (RGICC) to develop an industry-led solution. The RGICC developed the Produce and Grocery Industry Code (PGI code), a non-prescribed voluntary, industry run code that was complemented by a Government-funded ombudsman mediation service.<sup>63</sup> The PGI code was criticised for a number of weaknesses, including its lack of specificity in provisions and ineffectiveness to enforcement.<sup>64</sup>

In 2008, the previous Government directed the ACCC to conduct a public inquiry into the competitiveness of retail prices for food and groceries (ACCC Grocery Price Inquiry 2008). This was in response to public concerns that Australia's highly concentrated supermarket and grocery industry had resulted in significantly higher price inflation of food and grocery products, compared to the headline inflation rate.<sup>65</sup> The inquiry established that the effects of competition had generally been working to the benefit of the consumer.

While the ACCC Grocery Price Inquiry 2008 was not tasked with evaluating the effectiveness of the PGI code, evidence to the Inquiry stated that 'the use of the dispute resolution procedure has been relatively small and has decreased in recent times. The Committee cannot determine if this is because the PGI code has genuinely improved relationships, or industry participants are becoming more proficient and comfortable with internal and other dispute resolution procedures.'<sup>66</sup>

In 2014, the ACCC instituted proceedings against Coles for unconscionability in its dealings with small suppliers, following media reports of inappropriate conduct against suppliers.<sup>67</sup> The ACCC successfully proved in the Federal Court that Coles had acted unconscionably in the way it implemented, and unilaterally demanded, payments and ongoing rebates from its suppliers, as part of its Active Retail Collaboration program (refer to case study below).

The ACCC later instituted similar proceedings against Woolworths, though the Federal Court did not find that it had acted unconscionably. Despite this, there remained pressure from the ACCC and the

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62 Joint Select Committee on the Retailing Sector 1999, *Fair Market or Market Failure? A review of Australia's retailing sector*, Department of the Senate

63 Produce and Grocery Industry Code Administration Committee 2008, *Submission to the ACCC Grocery prices inquiry*

64 Beaton-Wells C and Paul-Taylor J 2018, 'A Code of Conduct for Supermarket-Supplier Relations: Has it worked?', Melbourne Law School

65 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, ACCC

66 Produce and Grocery Industry Code Administration Committee 2008, *Submission to the ACCC Grocery prices inquiry*, pg 4.

67 Beaton-Wells C and Paul-Taylor J 2017, 'Problematising supermarket-supplier relations: duel perspectives of competition and fairness', *Griffith Law Review*

public in regards to upholding ethical or social expectations of fairness in commercial relationships, particularly in regards to the supermarket and grocery industry.<sup>68</sup>

In response, the Australian Food and Grocery Council (AFGC), the leading industry body for grocery suppliers, and Coles and Woolworths worked together to prepare an industry code of conduct for prescription by the Government. The negotiations aimed for the creation of a minimum set of standards for the industry to better embed a culture of fairness when dealing with suppliers.

The Government used this as the foundation of the Grocery Code, which was prescribed as a voluntary industry code of conduct under Part IVB of the *Competition and Consumer Act 2010* (CCA). This recognised the food and grocery industry's interest in developing a joint solution to resolving industry-specific problems.

### Case Study – The Active Retail Collaboration (ARC) Program

In 2011 Coles decided to implement a continuing rebate into the trading terms of some of its suppliers. These rebates were supposedly for benefits that were resulting from improvements Coles had made to its supply chain.

The rebate, including its dollar value, was not negotiated beforehand with suppliers. Coles instead demanded more than \$12 million in payments from around 200 of its suppliers.

A number of suppliers declined to make these payments when Coles began to demand them. Coles took a number of retaliatory actions in response, including:

- ceasing to provide suppliers support from Coles replenishers;
- providing ranging information on condition of the supplier paying the rebate first;
- considering payment of the rebate as part of ranging reviews; and
- ceasing contractual negotiations that were already underway.

In 2014, the ACCC instituted two proceedings against Coles alleging that it engaged in unconscionable conduct towards suppliers in breach of the Australian Consumer Law (ACL). This included Coles using unfair tactics to illegitimately obtain payments under its ARC program and other payments claimed as 'profit gaps'.

On 22 December 2014, the Federal Court of Australia made declarations by consent in the two proceedings instituted by the ACCC that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers.

- The Court ordered Coles to pay combined pecuniary penalties of \$10 million and costs.
- Coles also undertook to enter a court enforceable undertaking with the ACCC to establish a formal process to provide options for redress for over 200 suppliers.

Pursuant to Coles' undertaking with the ACCC, Mr Jeff Kennett was appointed by Coles as an independent arbiter to administer the arbitration process and assess supplier refunds of payments made to Coles under its ARC program.

On 30 June 2015, Mr Kennett made a public statement instructing Coles to refund over \$12 million to its suppliers. This amount was in addition to the \$10 million penalty.

68 Beaton-Wells C and Paul-Taylor J 2017, 'Problematising supermarket-supplier relations: dual perspectives of competition and fairness', *Griffith Law Review*

## Appendix B: International Comparisons

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Issues in the food and grocery market relating to relationships between retailers, wholesalers and suppliers are not unique to Australia. Other countries, such as the UK, Ireland and Canada also experience relatively high concentration of retailers in their food and grocery industries.

As part of this Review, international experiences and developments in relation to trading relationships in food and grocery markets have been considered and are discussed below.

### United Kingdom (UK)

In 2010, the then UK Competition Commission (UKCC) established the mandatory Groceries Supply Code of Practice (GSCOP), which replaced the former Supermarkets Code of Practice. The GSCOP covers the ten major supermarket chains ‘large retailers’ operating in the UK and all other retailers with groceries turnover in excess of £1 billion per year.<sup>69</sup>

The GSCOP includes provisions about fair dealing (including an obligation on retailers to deal with suppliers in good faith), prohibitions on retrospective changes to terms of supply, procedures for customer complaints and de-listing. It places the burden of proof on retailers in regards to requests for additional supplier payments and includes provisions on compliance and enforcement activity, as well as dispute resolution and binding arbitration procedures.

The GSCOP dispute resolution system imposes obligations on retailers to appoint a code compliance officer, maintain written records of all agreements with suppliers, and supply information to the Competition and Markets Authority (formerly the Office of Fair Trading) as required. The code compliance officer is required to resolve any disputes initiated by a supplier and provide an annual report about its activities.

A key aspect of the dispute resolution framework under the GSCOP is the oversight of an ombudsman role. Upon introduction of the GSCOP, the large retailers in the UK were given some time to set up a voluntary Supermarket Ombudsman, however the self-regulatory approach was not successful.

In June 2013, the Groceries Code Adjudicator (GCA) was established as an independent regulator to enforce compliance with the GSCOP and ensure large supermarkets treat their direct suppliers lawfully and fairly. The GCA’s statutory functions include<sup>70</sup>:

- provide advice and guidance to both suppliers and large retailers;
- investigate issues to determine whether there has been a potential breach of the GSCOP;
- arbitrate disputes between the large retailers and suppliers;
- impose sanctions, including fines, and other remedies for breaches of the GSCOP; and

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69 UK Competition Commission 2016, *Groceries (Supply Chain Practices) Market Investigation Order 2009*, <https://www.gov.uk/government/publications/groceries-supply-chain-practices-market-investigation-order>

70 UK Government, July 2017, *Statutory Review of the Groceries Code Adjudicator: 2013-16*

- publish an annual report on the GCA's activities.

The GCA does not resolve complaints or provide guidance to suppliers on a case by case basis, rather it compiles information from suppliers and makes recommendations to the large retailers. The GCA rarely undertakes investigations or formal arbitrations.<sup>71</sup> Instead, the GCA opts to take this collaborative approach to resolve issues, with arbitration and investigation powers used only after all other avenues have not achieved a resolution.

A key strategic objective of the GCA is to educate and provide guidance to the large retailers about how to operate within the GSCOP, based on confidential information and complaints from suppliers. The threat of arbitration or investigation plays a key role to ensure the large retailers are responsive to the GCA's recommendations, as costs associated with undertaking arbitration or investigation are borne by the relevant large retailer through an increase in its annual levy.

The GCA holds meetings with stakeholders to discuss issues and makes recommendations to improve compliance, including code compliance officers and executive-level management of the large retailers. A recent example discussed at a quarterly code compliance office meeting included delays in payments. The GCA recommended a finance-to-finance contact line be provided to suppliers for discussions that would not affect the commercial relationship between the retailer's buyer and the supplier.<sup>72</sup> It appears that the large retailers are generally accepting of the GCA's recommendations.

The GCA also actively engages with media and publishes a number of communication materials about its activities. Further, it conducts an annual survey on compliance with the GSCOP, which is used as a public scorecard between the large retailers and to highlight persistent issues.

In 2017, the UK completed its first statutory review of the GCA, which assessed the performance and effectiveness under its current remit. The *Statutory Review of the Groceries Code Adjudicator: 2013-2016* (GCA Review) found that the GCA had been effective in exercising its jurisdiction in investigation and enforcement powers, as well as making resolution problems easier between the large retailers and suppliers, without the need for formal arbitration.<sup>73</sup> Further, it found general improvements in relationships between retailers and suppliers, as well as a reduction in unfair trade practices compared to before 2013.

Despite this, the GCA Review also found that issues still persist in the UK grocery sector, including lack of awareness and misunderstanding of the GSCOP as well as a reluctance for suppliers to use the dispute resolution system due to fear of retribution. The GCA continues to work to improve these issues by increasing awareness of its activities and improving culture of compliance with the GSCOP. The next statutory review of the GCA will commence in 2019.

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71 The GCA has undertaken four arbitrations and one investigation as at mid-2017, according to the Department for Business, Energy & Industrial Strategy 2017, *Statutory Review of the Groceries Code Adjudicator: 2013-2017* (UK)

72 Grocery Code Adjudicator 2018, Meeting record: March 2018 meetings with Code Compliance Officers

73 Department for Business, Energy & Industrial Strategy 2017, *Statutory Review of the Groceries Code Adjudicator: 2013-2017* (UK)

## European Union (EU)

In 2013, seven organisations agreed on a voluntary framework, called the Supply Chain Initiative (SCI), to implement and enforce a set of voluntary Principles of Good Practice. The SCI aims to increase fairness in commercial relations along the food supply chain, while ensuring contractual freedom and competitiveness.<sup>74</sup> It provides a list of examples of fair and unfair practices in vertical trading relationships and dispute resolution mechanisms. Signatories include the food and drink industry, manufacturers, retailers, and agricultural traders.<sup>75</sup>

The SCI dispute resolution framework provides companies to resolve disputes by a number of avenues, similar to the current Code in Australia. This includes elevating a dispute to senior management, using an internal dispute resolution process or engaging in mediation or arbitration.<sup>76</sup> Commercial retaliation against any company for using these mechanisms is considered a breach of the Principles.

The SCI has been criticised for its limitations in regards to a lack of penalties for non-compliance and that there is no option of lodging confidential complaints and therefore dispute resolution options have not been effectively used in practice.<sup>77</sup>

In April 2018, the European Commission, in response to reports of persistent unfair trading practices, proposed to ban a set of unfair trading practices in the food supply chain, aiming to ensure fairer treatment of small and medium size enterprises.<sup>78</sup> It also proposed effective enforcement provisions, such as sanctions imposed by national regulatory authorities.<sup>79</sup> This aims to complement the existing industry-led SCI framework.

The proposal is similar to the existing Grocery Code in Australia, which aims to ban late payments for perishable food products, last minute order cancellations, unilateral or retroactive changes to contracts and forcing the supplier to pay for wastage. Similarly, other practices such as additional payments or promotions would only be permitted subject to agreement between the parties.<sup>80</sup> It is proposed that these bans become European law (or a directive), which will require Member States to designate a public authority to implement the proposal.

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74 The Supply Chain Initiative 2018, *About the Initiative*, <http://www.supplychaininitiative.eu/about-initiative>

75 The Supply Chain Initiative 2018, *About the Initiative*, <http://www.supplychaininitiative.eu/about-initiative>

76 Supply Chain Initiative 2018, *Rules of Governance and operation*, [http://www.supplychaininitiative.eu/sites/default/files/sci\\_rules\\_of\\_governance\\_and\\_operations\\_-\\_02\\_february\\_2018.pdf](http://www.supplychaininitiative.eu/sites/default/files/sci_rules_of_governance_and_operations_-_02_february_2018.pdf)

77 Hogan P 2018, *Proposal for a Directive on unfair trading practises in business-to-business relationships in the food supply chain*, European Committee on Agriculture and Rural Development, [http://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/AGRI/DV/2018/04-12/P8\\_TA20160250\\_EN.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/AGRI/DV/2018/04-12/P8_TA20160250_EN.pdf)

78 European Commission 2018, *Tackling unfair trading practices in the food supply chain*, fact sheet 12 April 2018

79 European Commission 2018, *European Commission acts to ban unfair trade practices in the food supply chain*, media release 12 April 2018

80 Ibid

## Ireland

Ireland, like Australia, has had a concentrated but competitive food and grocery sector for several years with several large retailers such as Tesco. Similar concerns emerged in their sector of suppliers being unfairly dealt with by retailers and wholesalers.

In 2016, Ireland implemented the Grocery Goods Regulations to create greater certainty and transparency for food and grocery suppliers dealing with retailers and wholesalers. The Grocery Goods Regulations cover similar matters as the Grocery Code in Australia, including payments by suppliers and variations to agreements.<sup>81</sup>

The Grocery Goods Regulations is a targeted mandatory regulation, applying only to 'grocery goods undertakings' that have a turnover of over €50 million<sup>82</sup>. It also does not provide for dispute resolution procedures or an equivalent to the CCM. Rather, the Irish model relies on the Competition and Consumer Protection Commission to enforce the Regulations.

Enforcement is achieved through the use of penal provisions for failing to comply with certain provisions and annual compliance reporting to the Competition and Consumer Protection Commission.<sup>83</sup>

The Irish Farmers Association (IFA) has recently called for an industry-specific independent regulator, similar to the UK GCA. The IFA states that the farmers supplying to retailers have no confidence in the Competition and Consumer Protection Commission to uphold the current regulations.<sup>84</sup>

## Canada

Canada, unlike Australia, does have a number of leading retailers in its food and grocery sector. Despite this, there is a high degree of market concentration amongst its largest retailers, such as Loblaw and Sobeys, similar to the situation in Australia. This has led to allegations of retailers using market power to pressure suppliers, particularly in the face of increasing price competition.

Public calls for an industry code of conduct to address these issues have been ongoing, though the Canadian Parliament has yet to implement a code of conduct. It will be interesting to see the form this code takes, should the Canadian Parliament decide to introduce one.

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81 *Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016* (Ireland)

82 Competition and Consumer Protection Commission 2016, *Grocery Regulations Q&A*, Competition and Consumer Protection Commission 2016, *Grocery Regulations Q&A*, <https://www.ccpc.ie/business/help-for-business/grocery-regulations/>

83 Competition and Consumer Protection Commission 2016, *Grocery Sector Regulations*, <https://www.ccpc.ie/business/help-for-business/grocery-regulations/>

84 Edwards E 2018, 'IFA calls for independent regulator to protect producers', *The Irish Times*, 12 April 2018, <https://www.irishtimes.com/news/consumer/ifa-calls-for-independent-retail-regulator-to-protect-producers-1.3459930>

# Appendix C: Interactions with the Horticulture Code of Conduct

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## Different codes deal with different problems in an industry

Industry codes are designed to address specific issues within an industry and sometimes this can mean that certain industry players are covered by more than one code. For example, farmers can benefit from both the Grocery Code and Horticulture Code.

While both of these codes extend protections to farmers, it is important to distinguish the nature of the relationships and underlying problem that each code was designed to fix.

The Grocery Code covers all producers that supply directly to retailers (or wholesalers). It was developed to tackle misconduct that stems from the significant imbalance in bargaining power between large retailers and their suppliers (including farmers). Major retailers hold the key to accessing national markets and there has been evidence of buyers engaging in a range of unfair behaviour that can harm suppliers.

The Horticulture Code applies to growers of fresh fruit and vegetables that trade with wholesale traders operating in the central markets. The key issue that this code deals with is a lack of transparency on the price and quality of produce during commercial transactions between the parties.

These problems include growers sending produce to traders without any agreement as to price or terms of trade – on the expectation that growers will receive a fair price. With a lack of visibility of the sale transaction or access to market information, growers can find themselves vulnerable to ‘price skimming’ practices by traders.

While both codes regulate important components of the food and grocery supply chain, they each deal with quite distinct relational issues and power imbalances. For example, growers can more readily switch traders to get their produce to market, whereas suppliers to a major supermarket retailer face much fewer options.

## Is the operation of two codes causing an uneven playing field?

Some stakeholders have raised concerns with the potential for an uneven playing field caused by subjecting one part of the industry to the mandatory Horticulture Code and another to a voluntary Grocery Code. There have been claims that a mandatory code imposes red tape burdens on the central market system and makes it uncompetitive compared to growers supplying directly to retailers. Similar concerns were recently raised by central market representatives in a report by the South Australian Economic and Finance Committee.<sup>85</sup>

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85 South Australian Economic and Finance Committee, *From the Paddock to the Plate—A Fair Return for Producers*, 28 November 2017.

While the Review recognises the perceived inequity in terms of a voluntary and mandatory application of the law, the Review does not believe that it is creating imbalances across the industry. Rather, each code is addressing a separate set of problems. As the major retailers have become signatories to the Grocery Code they have become bound by it in the same manner as if it were a mandatory code. This has established broad consistency across the sector, with this Review making recommendations for other key players, such as Metcash, to also become bound by the Grocery Code.

## Are there inconsistencies between the codes?

During the Grocery Code's development in 2014, some stakeholders suggested that the provisions that regulate the rejection of fresh produce should be harmonised with similar obligations contained in the Horticulture Code.

While the Review notes that there are some slight differences in the procedures for rejecting fresh produce outlined in each code, growers did not raise any concerns regarding any inconsistency or increased costs of doing business.

In conclusion, the Review found that the interaction between both codes is minimal with very few areas of overlap. Both codes operate independently to address separate relational issues between different parties in the food and grocery supply chain.

## Appendix D: Dispute Resolution in Industry Codes

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Some stakeholders have called for the Grocery Code dispute resolution framework to align with other prescribed industry codes of conduct, including Franchising, Horticulture and Oil codes of conduct. The dispute resolution framework across the three codes varies slightly. Table 1.1 provides a high level comparison with the proposed new Code Arbiter model.

A key point of difference across the three other codes compared to the Grocery Code is the appointment of a mediation advisor, who is responsible for appointing a mediator when requested by a party to a dispute to do so. This is designed to improve access and affordability of mediation services for code participants. For disputes under the Oil Code, the mediation advisor can also make non-binding determinations in the first instance.

Although the prescribed industry codes are constructed using a common framework, they exist to address industry-specific issues and therefore are designed in various ways.

The Horticulture Code was designed to ensure transparency of transactions between produce growers and traders and to ensure disputes were treated in a fair and equitable way. Key issues specific to this industry include a lack of written contracts, ambiguity about whether a trader was acting as a merchant or an agent for the grower, lack of access to information, uncertainty about produce ownership and need for effective dispute resolution process. The 2015 Review of the Horticulture Code found that mediation and the mediation adviser was not utilised by the industry. There was also low use of the Horticulture Assessors who can quickly assist parties to a dispute regarding produce quality. Following the Review, the Government determined that there is no change to current dispute resolution framework, opting for more substantial amendments to other code provisions.

Franchisors and franchisees fundamentally have a different commercial relationship, as they must collaborate to build the value of the franchise system. The Franchising Code's dispute resolution framework is designed to incentivise parties to approach disputes in a reconciliatory manner. The Franchising mediator advisor allows this to occur by providing access to more affordable mediation. The 2013 Review of the Franchising Code found that mediation is effective as these parties have an incentive to approach it in a reconciliatory manner.

The Oil Code of Conduct permits the dispute resolution adviser to make non-binding determinations or some disputes as well as to provide a mediator. Non-binding determinations are intended to provide quick resolution to disputes on the right of supply of declared petroleum products. This recognised the need for low cost and timely resolution of these disputes given the material impact they may have on the customer. Mediation is also provided for so that disputes may be mutually reconciled.

Stakeholders have sought that the Grocery Code dispute resolution framework be aligned with the other three Codes to include the allocation of mediation and arbitration services. Appointing a mediation advisor to act as a concierge to recommend the appropriate mediator or arbitrator for disputes under the Grocery Code is unlikely to have any benefit. The Review has not heard any concerns from suppliers about affordability or access to mediation or arbitration services. The Review also found that there is unwillingness of suppliers to use these services to resolve disputes.

	Franchising Code	Horticulture Code	Oil Code	UK Groceries Supply Code	Grocery Code – with proposed amendments
<b>Maintain internal complaints handling and dispute resolution</b>	✓	✗	✗	✓ Code Compliance Officers	✓ Code Arbiters
<b>Requirement for determination of disputes</b>	✗	✗	✗	✗	✓ Code Arbiters
<b>Mediation – facilitated negotiation between parties for legally binding outcome</b>	✓ Mediation advisor to appoint mediator	✓ Mediation advisor to appoint mediator	✓ Mediation advisor to appoint mediator	✗	✓ Self-appointed, governed by Resolution Institute rules
<b>Arbitration – independent third party determines a legally binding outcome</b>	✗	✗	✗	✓ Through UK Groceries Code Adjudicator	✓ Self-appointed, governed by Resolution Institute rules
<b>Preliminary independent advice or assessment of complaints</b>	✗	✓ Horticulture Assessors can be appointed to investigate and report on disputes on agreements	✗	✗ Directs suppliers to Code Compliance Officers	✓ Through Code Arbiters, who must maintain confidentiality in the first instance

## Appendix E: Code Arbiter Comparison

	Code Compliance Manager (CCM)	Kennett Model	UK Groceries Code Adjudicator (GCA)	Code Arbiter
<b>Position</b>	Independent of the signatory's buying team.	Employed by retailer. Sits outside of organisation.	Employed by Government (industry levy). Independent office.	Employed by retailer for a fixed term (i.e. cannot be terminated for making an undesirable determination). Sits outside of organisation.
<b>Information gathering powers</b>	Grocery Code requires ability to obtain any information needed to investigate disputes.	Able to obtain any information needed to investigate disputes.	Does not investigate for arbitration purposes. Empowered to undertake an investigation if the GCA has reasonable grounds to suspect breach of the UK code of conduct.	Grocery Code requires ability to obtain any information needed to investigate disputes.
<b>Dispute Resolution</b>	Must investigate dispute or elevate dispute to senior management and make a determination about what (if any) action has or should be taken by the signatory.	Must consider all relevant information and to make a determination about what (if any) action must be taken by Coles to remedy the situation.	Empowered to undertake formal arbitration. Does not act as complaints handling body, instead directs suppliers to internal equivalent of CCM.	Must consider evidence brought forward by the supplier and investigate (only where required) to make a determination about what (if any) action must be taken by the signatory. This includes considerations of fair dealings.
<b>Outcomes</b>	None specified.	Determinations are binding on Coles and may include: Financial compensation Changes to contracts	Determined by way of formal arbitration.	Determinations are binding on the signatory and may include: Financial compensation Changes to contracts Any other action necessary to rectify the misconduct
<b>Timeframes</b>	Must conclude investigation within 20 days and provide a summary to the supplier about the action taken within 5 days after the conclusion of the investigation	Time frames to make a determination are not specified. Any action required to be taken by Coles as part of a determination must be initiated within 10 days.	Not specified. Adjudications can take up to 12 months to complete.	Must investigate and make a determination within 20 days. Any action required to be taken by a signatory as part of a determination must be initiated within 5 days.

	Code Compliance Manager (CCM)	Kennett Model	UK Groceries Code Adjudicator (GCA)	Code Arbiter
<b>Confidentiality</b>	No requirements specified.	Must use 'best endeavours' to keep the identity of the complainant confidential from Coles, except to the extent that it is necessary to investigate the dispute effectively or to enable the implementation of the final determination. The complainant must be given the option to withdraw its complaint.	Must not make unauthorised disclosure of information relating to arbitration. Does not investigate for arbitration purposes.	Must maintain complete confidentiality of complainant in the first instance. Disclosure of information is allowed only where necessary to further consider the case and where complainant has provided consent. Prior to disclosure of information to the signatory, the complainant must be given the opportunity to withdraw its complaint.
<b>Reporting requirements</b>	Prepare annual report on activities, including summary information about: Cases investigated and resolved by the signatory.	None specified.	Prepare an annual report outlining the GCA's activities, including disputes referred to arbitration under the UK code.	Prepare annual report on activities, including summary information about: Number of all complaints received Nature of complaints Resolution action taken Conduct annual survey of supplier perceptions about compliance with the Grocery Code, based on a set of common principles.
<b>Transparency requirements</b>			Must publish the annual report.	Must publish: Annual report Outcomes of survey
<b>Oversight and enforcement</b>	If a supplier is not satisfied with the outcome of the CCM's investigation, they may request in writing that the matter be elevated to senior levels of management. ACCC to review CCMs' reports during audit activity.	Bound by contract with Coles.	Responsibilities as per the <i>UK Groceries Code Adjudicator Act 2013</i>	Grocery Code sets out requirements for the Code Arbiter when considering a supplier complaint. Bound by contract with signatory. Non-performance of a Code Arbiter is a breach of the Grocery Code. The ACCC, can use powers under the CCA to force removal of the Code Arbiter. ACCC to review the Code Arbiters' reports on an annual basis.

	Code Compliance Manager (CCM)	Kennett Model	UK Groceries Code Adjudicator (GCA)	Code Arbiter
<b>Independent review of process</b>	None specified.	None specified.	None specified.	Suppliers can seek a review of a Code Arbiter's determination by the Independent Reviewer. The Independent Reviewer can report suspected breaches of the Grocery Code to ACCC.