



Food and Grocery Code of Conduct Review

ACCC Submission to Draft Report

8 August 2018

Overview

There is a persistent and significant bargaining power imbalance between retailers or wholesalers (hereafter, Supermarkets) and suppliers in the Australian food and grocery sector. A Supermarket's decision whether or not to stock a supplier's product and in what quantity often means the difference between a supplier's business continuing to operate or closing its doors. The Food and Grocery Code of Conduct (the Code) is one way to address this imbalance and therefore the ACCC considers that it is essential that the Code is both retained and improved.

However, the Code is only one of a number of regulatory responses intended to address the structural issues in the grocery sector, and it cannot be expected to resolve all of the issues between Supermarkets and suppliers.

In the ACCC's experience, suppliers' contracts with the Supermarkets remain essential to the suppliers' ongoing viability, and suppliers remain fearful of taking any steps that jeopardise that relationship, including making complaints to the ACCC, the Code Compliance Managers or another dispute resolution body.

For example, the ACCC's 2014 unconscionable conduct action against Coles Supermarkets Pty Ltd (Coles) was particularly difficult to investigate because suppliers feared commercial consequences if they were seen to be assisting the ACCC. Maintaining a commercial relationship with Coles was essential to the continued viability of their business. In order to mitigate these concerns, the ACCC took the unusual step of not using any of the information provided by those suppliers as evidence, instead relying on information compelled from Coles. Any proposals to amend and strengthen the Code should, in the ACCC's view, focus on a model that will ensure suppliers are not dissuaded from approaching those charged with investigating, resolving or administering their complaints. The ACCC considers that the independence of those roles from the Supermarkets is critical to this issue.

The ACCC supports many of the recommendations in the Draft Report and recognises they will go some way to improving relationships between suppliers and Supermarkets. However, there are some key recommendations that the ACCC opposes:

- **Recommendation 1** – The ACCC opposes Recommendation 1. The ACCC considers that the Code should be remade as a prescribed mandatory code that applies industry wide, meaning that it applies to all major Supermarkets, and comparable future industry participants. The distinction between a mandatory and voluntary code becomes in effect meaningless if, as the Draft Report proposes, a targeted code to apply to a major industry participant refusing to be bound by the Code is introduced, in addition to a voluntary code for those that are willing to be bound by it. While the Code was primarily developed as a response to conduct by the two major supermarkets, a goal of the Code is to achieve industry-wide change while maintaining a competitively neutral playing field. Therefore, the ACCC considers a single mandatory code is the most appropriate regulatory option and an additional targeted Code directed at one major wholesale participant distracts from the overarching principles that should be applied to the industry.
- **Recommendation 5** – The ACCC opposes Recommendation 5. The ACCC considers that the actual and perceived lack of independence of the Code Adjudicators, given that they would be employed by the Supermarkets, would make this model ineffective as suppliers will be reluctant to raise issues with them. The ACCC supports a model where those considering and determining disputes between suppliers and the Supermarkets are, and are perceived to be, fully independent from the Supermarkets.
- **Recommendation 6** – The ACCC opposes Recommendation 6. The ACCC does not consider it to be appropriate for it to have an oversight role beyond the existing enforcement and monitoring responsibilities under the Code. The ACCC does not have a

role in monitoring dispute resolution mechanisms in other codes or industries. Further, the proposed oversight of Code Adjudicators has the potential to undermine the ACCC's actual or perceived independence.

- **Recommendation 7** – The ACCC opposes Recommendation 7. Section 51ADD is an important tool that allows the ACCC to monitor and audit signatories to various codes for compliance with those codes. Submissions to the Review appear to have conflated the audit power with the broader information gathering powers in section 155 and other provisions of the *Competition and Consumer Act 2010* (CCA). Section 51ADD has a different purpose. It is a particularly important tool in the grocery sector where suppliers are reluctant to identify themselves and complain to the ACCC about potential breaches of the Code for fear of retribution. The ACCC considers it critical that the provision is maintained in its current form because it allows the ACCC to test compliance without revealing the identity of any complainant. This is consistent with its application in other codes.
- **Penalties** – The ACCC disagrees with the Draft Report's findings that penalties should not be available for breaches of the Code. The ACCC considers that penalties are necessary to promote and enforce compliance with the Code, and while the Code in its current form has made some in-roads into managing the power imbalance between suppliers and Supermarkets, the introduction of penalties will strongly deter conduct that breaches the Code. This additional incentive is necessary for substantial cultural change in the grocery sector.

While they are not the primary focus of this submission, the ACCC has also provided comments on Recommendations 4, 8, 10 and 13. In particular, the ACCC notes that these recommendations may not fully resolve the issues identified by the Draft Report.

In relation to the remaining recommendations, the ACCC makes the following comments:

- Recommendation 2 – the ACCC supports this recommendation.
- Recommendation 3 – the ACCC supports this recommendation.
- Recommendation 9 – the ACCC supports this recommendation.
- Recommendation 11 – the ACCC supports this recommendation, however, the ACCC notes that this outcome could also be achieved by banning wastage payments generally and removing the 'opt-out' in clause 14.
- Recommendation 12 – the ACCC supports this recommendation.
- Recommendation 14 – the ACCC supports this recommendation. The ACCC considers that it would be most appropriate to review the Code after three years rather than four or five. This would ensure any amendments to the Code made after this Review are working effectively and provide an early opportunity to review and adjust any that are not working as intended.

Key Issues

Recommendation 1 – introduce a separate targeted mandatory code to apply to major participants that refuse to become signatories

The ACCC opposes Recommendation 1.

The ACCC considers that the practical consequence of implementing Recommendation 1 would be to make the purported ‘voluntary’ Code mandatory in all but name while adding the unnecessary regulatory burden and uncertainty of two industry codes applying to the same sector. Therefore, as set out in the ACCC’s submission of 11 May 2018,¹ the ACCC considers that the Code should be remade as a prescribed mandatory code that applies to all major Supermarkets, and comparable future industry participants.

Whether the Code is voluntary or mandatory should depend upon what is the most appropriate regulatory option, not the disposition of any particular firm toward the regulation. The Code was initially introduced as one of a number of measures to address concerns at the time that Australia’s two major supermarkets were taking advantage of their superior bargaining position to the detriment of suppliers. The ACCC considers that the Draft Report’s focus on making the Code mandatory for Metcash is too narrow and that a mandatory Code should consistently address problematic behaviour by market participants across the industry. A mandatory code would also address the risk that the larger signatories could withdraw from the current Code at any time.

The Draft Report states that a voluntary code ‘provides greater scope for retailers and wholesalers to establish innovative solutions that best suit the industry to resolve its own problems’.² The ACCC does not accept this statement. The purpose of the Code is to protect suppliers, not to inhibit Supermarkets from innovating, problem solving or engaging in robust competition. Further, while a Supermarket remains a signatory to the Code, it is, effectively, a mandatory Code for that Supermarket. To the extent that the Code does have the unintended consequence of stifling innovation, it has this effect whether it is voluntary or mandatory.

The Draft Report found that the current signatories ‘remain highly supportive of the Code and have given no indication that they intend to withdraw or opt-out in the future’.³ However, the ability to withdraw from the Code means there is an ongoing risk of withdrawal because of changes in management, tightening of the Code and future compliance and enforcement activities under the Code. The ability to withdraw at any time is also likely to impact a supplier’s willingness to press their concerns under the Code and dilute the effectiveness of the Code in acting to address the imbalance of bargaining positions. The ACCC notes the Draft Report’s finding that Coles’ revenue growth is below industry rate, ALDI and Costco continue to grow and Amazon, Lidl and Kaufland are entering the industry⁴. These developments will increase the incentives for Supermarkets to place undue pressure on their suppliers.⁵

The ACCC and the Draft Report have identified a number of deficiencies in the Code that require it to be amended to better achieve its purposes. If these amendments are made, current signatories may be more likely than they presently are to reconsider their decision to be bound by the Code. In addition, any current or future industry participants will be less likely to volunteer to be bound by the Code. Making the Code mandatory would remove these risks and provide greater certainty to both suppliers and to new Supermarket entrants.

¹<https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Food%20and%20Grocery%20Code%20of%20Conduct%20Review%20-%202011%20May%20....pdf>

² Draft Report, p 20.

³ Draft Report, p 19.

⁴ Draft report, p 10.

⁵ Draft report, p 10.

In making the Code mandatory, the ACCC also recommends amending the Code to ensure that the definitions of 'retailer' and 'wholesaler' are appropriately targeted. A mandatory targeted Code would:

- i. ensure that all major Supermarkets are subject to the Code
- ii. ensure that only Supermarkets of sufficient size are covered by the Code, and
- iii. remove the risk that current signatories will decide to no longer be bound by the Code at some future time.

Recommendation 5 – The code compliance manager should be replaced by an independent Code Adjudicator

The ACCC opposes Recommendation 5. Instead, the ACCC submits that a model for independent resolution of disputes between suppliers and Supermarkets be introduced.

Coles' arbiter model

The Draft Report places significant weight on the purported success of Coles' arbiter model where the Hon Jeff Kennett AC was the appointed arbiter.

The ACCC recognises that the Kennett model was effective in promptly compensating affected suppliers in the unconscionable conduct proceedings against Coles, and understands that Mr Kennett's continuing role has resulted in positive outcomes for a number of suppliers. However, these outcomes do not necessarily indicate that the model proposed is suitable as a broader dispute resolution mechanism for Code complaints.

It is likely that the outcomes achieved by the Kennett model are in part due to Mr Kennett's prominence and particular experience, rather than the structure of the model itself. There is no guarantee that the effectiveness of that model could be replicated and gain the confidence of all suppliers. The ACCC notes the Draft Report found that current Code dispute resolution models (including the Kennett model) are perceived by some suppliers as not sufficiently independent to prevent reprisal or biased decision making.

Lack of independence of the Code Adjudicator

The ACCC is concerned that the Code Adjudicators proposed under Recommendation 5 would lack both actual and perceived independence and would not overcome suppliers' fears of making complaints in relation to the Code. The Code Adjudicators are not independent given the proposed employment relationship between them and the Supermarkets.

The ACCC is not convinced that the related proposal that Code Adjudicators be 'unable to be terminated on the grounds of making decisions that are unfavourable towards the signatory'⁶ in any way guarantees their independence. Even if a Code Adjudicator intended to act independently, the Draft Report is silent on how Code Adjudicators would be protected from remuneration changes, non-renewal of their contracts or other adverse action by their employer Supermarket. At a fundamental level, the ACCC does not consider that Supermarket-employed Code Adjudicators could ever be truly independent from their employers.

The ACCC is also concerned that in these circumstances suppliers would, rightly, not consider the proposed Code Adjudicators to be independent, increasing their reluctance to elevate complaints to them. Suppliers will therefore be left with no effective dispute resolution mechanism.

In addition, it is likely that the separate Code Adjudicators for each Supermarket will make different and potentially contradictory decisions when considering similar scenarios.

⁶ Draft Report, p.35

Consistency and certainty are particularly important, given that Recommendation 5 proposes to give Code Adjudicators the power to make binding decisions and award compensation to suppliers. In contrast, a single, industry-wide independent adjudicator would make consistent decisions for a supplier experiencing similar issues across multiple Supermarkets, thus improving supplier trust and certainty in the process.

Until suppliers have an effective dispute resolution mechanism in which they have trust and confidence, the problems arising from the imbalance of bargaining power between suppliers and Supermarkets that the Code is designed to tackle will, in the ACCC's view, not be adequately addressed.

Limitations placed on confidentiality under the proposed Code Adjudicator model

The ACCC is also concerned that under this recommendation a supplier complainant will be put in the position where it must waive confidentiality in order for the Code Adjudicator to investigate their complaint. The requirement to waive confidentiality is likely to increase the reluctance of suppliers to make complaints or have their complaints investigated.

Alternatives to the proposed Code Adjudicator model

The Draft Report notes that bargaining power imbalances in the grocery sector are not unique to Australia and refers to alternative adjudicator models in other jurisdictions such as in the United Kingdom.⁷

The ACCC considers that suppliers would be more likely to seek assistance from an adjudicator if the adjudicator were fully independent. The ACCC submits that Australia should consider the adoption of a model similar to some aspects of the United Kingdom model.

For example, the ACCC considers that a preferable model would be the appointment of a single independent adjudicator, either as an individual or panel, empowered to:

- investigate complaints;
- monitor conduct following the making of a complaint to ensure there is no commercial retribution against the supplier;
- make binding decisions about individual disputes; and
- award compensation.

This would have the benefit of ensuring the independence of the adjudicator, which will encourage suppliers to seek its assistance, and give suppliers the confidence of a consistency in approach across the industry.

⁷ Food and Grocery Code Review Draft Report, Appendix B – International comparisons

Recommendation 6 - The role of the ACCC should be expanded to:

- have oversight responsibility of the Code Adjudicators, including regular meetings to discuss issues under the Grocery Code and
- review the Code Adjudicator's annual reports and seek confidential submissions from suppliers as part of the ACCC's core compliance activities for the Grocery Code

The ACCC opposes Recommendation 6.

Just as the ACCC considers that Code Adjudicators employed by the Supermarkets are inappropriate, the ACCC considers it would be inappropriate for it to be tasked with oversight of the activities of those Code Adjudicators. This role would conflict with the ACCC's function as an independent regulatory agency with responsibility for enforcing the Code. There is a risk that suppliers may consider the proposed oversight role involves the ACCC actively or tacitly controlling or approving of the activities of Supermarket-employed Code Adjudicators when this is not the case. Any actual or perceived reduction in the independence of the ACCC will further reduce suppliers' willingness to bring alleged breaches of the Code to our attention.

For similar reasons, the ACCC does not support being *required* to publish or consult on the annual reports of the Supermarket-employed Code Adjudicators as it may give the impression that the ACCC endorses the content. Should the adjudicator model proposed in the Draft Report be adopted, the Code should provide an obligation on adjudicators to publish their own annual reports.

The ACCC also opposes any proposal to restrict its investigatory powers to matters raised by Supermarket-employed Code Adjudicators. If Recommendations 6 and 7 are given effect to, they would severely hamper the ACCC's ability to investigate breaches of the Code, and would weaken the effectiveness of the Code.

Recommendation 7 – Proposed changes to ACCC information gathering powers and referral to Code Adjudicators

The ACCC opposes Recommendation 7.

The ACCC considers that the Code's effectiveness would be severely undermined if restrictions are placed on the ACCC's power to audit the Supermarkets for their compliance with the Code. As discussed above, suppliers are unwilling to report infringing conduct so the ACCC's ability to gather information from the Supermarkets as to their compliance with the Code provides an alternative.

The audit powers under section 51ADD of the CCA are a crucial Code compliance tool. Section 51ADD only enables the ACCC to access documents that the Code requires signatories to keep, generate or publish and examine those documents for Code compliance. This includes analysis of highly relevant documents such as grocery supply agreements that record commercial terms between signatories and suppliers.

Limiting the ACCC's ability to review such documents would:

- significantly hinder our ability to audit Code compliance;
- lessen the incentives of signatories to comply with the Code; and
- erode the willingness of suppliers to raise alleged breaches of the Code.

As already noted, the Draft Report finds that the grocery sector is one where suppliers are fearful of raising complaints for fear of retribution. In these circumstances, an effective audit power is especially important as it allows the ACCC to obtain preliminary information that it can use to identify problematic conduct without suppliers needing to identify themselves or make a complaint.

In addition, the proposed restrictions are at odds with, and fail to take account of, the fundamental reasons why the section 51ADD compliance check powers exist. The rationale for inserting section 51ADD into the now CCA was explained in 2009 by the then Commonwealth Government in 2009 in response to a Parliamentary Review into franchising:

At present, franchisees wishing to complain about franchisors not complying with the Franchising Code may fear reprisal from franchisors. The ACCC's random audit powers will strengthen franchisor compliance with the Franchising Code, while relieving franchisees of the fear or retaliation against them for complaining to the ACCC about franchisor behaviour.

The ACCC will be given the power to request copies of documents or other information from persons subject to an industry code. The ACCC will not be required to have any belief about compliance with the Franchising Code before conducting an audit. To minimise compliance costs, the power will be restricted to information that is required to be kept under a prescribed industry code. For example, the ACCC will be able to request a franchisor produce a copy of its disclosure document. The Franchising Code provides that such a document must be kept, and allowing the ACCC to request copies of disclosure documents, at random, will enable it to ensure compliance with the Code's obligations. The ACCC's random audit powers will relieve franchisees of the risk of retaliation against them for complaining to the ACCC about franchisor behaviour.

Where the documents obtained by the ACCC uncover information that justifies further investigation, the ACCC will be able to use its existing and additional investigative powers (for example, its power to obtain information, documents and evidence under section 155 of the Trade Practices Act, or the power to issue substantiation notices) to pursue the matter forward and, if warranted, take enforcement action.⁸

The Explanatory Memorandum to the 2010 amendments to the CCA states:

This investigative power will assist the ACCC where significant imbalances in bargaining power between industry participants makes less powerful participants hesitant to report instances of contraventions of industry codes by more powerful industry participants to the ACCC, for fear of retaliatory action by those more powerful participants. This investigation powers allows the ACCC to monitor compliance with applicable industry codes without relying on complaints by other industry participants.⁹

These principles and reasoning directly apply to this review of the Food and Grocery Code of Conduct.

The Draft Report's proposal that the ACCC role change to work collaboratively with the Supermarket-employed Code Adjudicators is inconsistent with its enforcement role. Maintaining the ACCC's independence and discretion to exercise the audit power is essential. Otherwise, the ACCC's effectiveness in ensuring and strengthening Code compliance would be undermined and it is likely that some suppliers would consider that the ACCC's independence may become compromised. This could further lessen the willingness of suppliers to raise alleged breaches of the Code.

⁸ See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/franchising/index, p 10, November 2009.

⁹ Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, p 414.

Section 51ADD compliance checks

The ACCC notes submissions to the Draft Report that ACCC audits of obligations under the Code impose significant costs on business, with signatories in some cases having to identify and retrieve documents such as notices in emails manually.

The ACCC understands that signatories have submitted to the Review that the ACCC's compliance checks require signatories to produce large volumes of documents. This is not the case.

Under section 51ADD the ACCC cannot compel Supermarkets to provide any documents that they are not required to keep, generate or publish under the Code. Further, clause 42 of the Code sets out the limited set of documents that are required to be kept by signatories.

The transparency of these provisions, including disclosure of all the documents which can be audited, has provided signatories with sufficient opportunity to organise their internal information technology and compliance systems such that documents that are required to be retained under the Code should be able to be efficiently retrieved without burden.

In addition, 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 requests are limited in volume.

The ACCC has been transparent with the major signatories about when it will conduct its audits under the Code, and at the conclusion of the 2016 compliance checks, the ACCC advised the major signatories that it would continue to conduct checks annually.

The ACCC considers that its work in auditing compliance with the Code has contributed to embedding and improving a culture of Code compliance. Since the Code came into effect the ACCC has conducted two rounds of audits. The first was conducted on the major signatories in 2016. This check identified a number of concerns relating to compliance with the Code, mainly in relation to delisting practices. The ACCC engaged with the signatories on its findings and provided them with an opportunity to respond. Some signatories have been particularly responsive and to various degrees have changed their conduct or improved processes to address the ACCC's concerns in relation to delistings.

The second round of audits was conducted in 2017 and allowed the ACCC to assess not only the general level of compliance but also whether the previous commitments made by the signatories to address certain conduct were being implemented. Overall, the ACCC has observed a general improvement in the level of compliance. The ACCC considers that this can be attributed in part to the audit powers working as intended.

Section 155 powers

Submissions to the Review on the audit powers under section 51ADD may be confusing or conflating the power with other information gathering powers under the CCA, including section 155 (used in relation to enforcement or merger investigations) and section 95ZK (used in relation to market studies and inquiries). The ACCC recognises that some of the signatories to the Code have received multiple statutory notices from the ACCC in recent years, and the importance of minimising regulatory burden in these circumstances.

However, the audit powers under section 51ADD are different to those under sections 155 and 95ZK and are used for different purposes. Section 51ADD is an audit and compliance monitoring power, specifically designed for prescribed codes. In the context of the Code, it enables the ACCC to check whether signatories are complying with certain obligations without having to rely on complaints from suppliers, which is particularly important given the hesitation of suppliers to report alleged breaches.

In contrast, sections 155 and 95ZK enable the ACCC to seek a broader range of information documents and evidence, (subject to various statutory tests). Further guidance on how the ACCC uses s155 is available at <https://www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers>.

Penalties

The ACCC does not agree with the Draft Report's conclusion that civil pecuniary penalties should not be available for breaches of the Code.

As stated in our submission of 11 May 2018, the ACCC considers that penalties would promote and enforce compliance with the Code. While the Code in its current form has made some in-roads into managing the power imbalance between suppliers and signatories, the introduction of penalties would be a significant incentive for substantial cultural change, and be consistent with the approach for other enforceable codes such as the Franchising and Horticulture Codes of Conduct.

The availability of infringement notices for breaches of the Code would also allow the ACCC to effectively deal with less serious conduct such that litigation would be reserved for serious breaches.

The Draft Report suggests that civil pecuniary penalties should not be available because imposing penalties would not compensate suppliers that suffered loss from the infringing conduct. However, the ACCC submits that providing for civil pecuniary penalties does not preclude providing for compensation and vice versa. Compensation may be appropriate to address isolated disputes, whereas penalties will act to deter a broader culture of non-compliance, and have a more pervasive positive impact on behaviour across Supermarkets.

Other Issues

Recommendation 4 – Introduce a new primary provision of fair dealings to replace the current obligation to act in good faith (clause 28). The new provision should contain indicators of fair dealings and ACCC to develop guidance materials

The ACCC does not support Recommendation 4.

The ACCC acknowledges the Draft Report's findings that it can be unclear how the current overarching good faith obligation applies in specific individual disputes under the Code. However, the ACCC does not consider this problem would be remedied by replacing the good faith provisions with the concept of fair dealing, which is even more underdeveloped than the concept of good faith in Australian case law.

In May 2017 the ACCC instituted court proceedings against two different franchisors, alleging breaches of the good faith obligation in the Franchising Code of Conduct for the first time since the good faith provisions were introduced in 2015. The ACCC expects these cases to contribute to the development of judicial authority as well as industry understanding on how the good faith obligations apply across industry codes. Given these likely developments, the ACCC considers it would be preferable to defer consideration of the introduction of a fair dealing obligation at this stage. This issue could be reconsidered when the Code is next reviewed.

If a new fair dealing provision were introduced, it would need to be carefully drafted to avoid unintended consequences for suppliers. The ACCC notes that part (e) of the model fair dealings provision provided in the Draft Report suggests that the matters outlined in part (b) may be considered in determining breaches of any other provision in the Code. The ACCC agrees with the underlying principle that the fair dealing provision, if introduced, should underpin the entire Code. However, the ACCC considers that there is some risk that the factors set out in part (b) of the model provision could be relied on as a quasi-defence to potential breaches of other obligations under the Code, effectively making breaches more difficult for the ACCC or suppliers to prove.

Recommendation 8 – The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews

The ACCC supports recommendation 8.

The ACCC has similar concerns to those expressed in the Draft Report about the delisting and range review process. The ACCC considers that Recommendation 8 should be expanded to better address the whole range of issues identified in Draft Report relating to delisting of products.

One of the purposes of clause 19 of the Code is to allow suppliers to appropriately respond to a delisting decision. The response could include winding back production or pursuing new distribution channels. The practice of placing large segments of a category on notice for delisting during a range review process and then issuing a final delisting notice in a short timeframe undermines this purpose. This practice removes suppliers' ability to respond in any meaningful way as they lack certainty to make key decisions. The ACCC recommends further consideration be given to amendments to give suppliers greater certainty around delisting.

The ACCC's submission of 11 May 2018 recommended that Supermarkets be required to give sufficiently detailed reasons in a decision to delist a product. Detailed reasons would assist a supplier to meaningfully respond to the decision to delist and ensure that the Supermarket's reasons for delisting meets the 'genuine commercial reasons' requirement under the Code.

The ACCC notes the Draft Report's suggestion that the contact details of the proposed Supermarket employed Code Adjudicator be provided on each delisting notice. While the ACCC supports this initiative in principle, it remains concerned that suppliers may be reluctant to seek further explanation about a delisting from the Code Adjudicator for fear of retribution.

Recommendation 10 – Ban on variations to grocery supply agreements that have retrospective effect

The ACCC notes Recommendation 10, which bans variations to Grocery Supply Agreements that have retrospective effect. The ACCC is supportive of removing the opt-out provisions for retrospective agreements, as it provides greater certainty for suppliers in making commercial decisions about their business. However, the ACCC remains concerned that under this recommendation, Supermarkets can still opt-out of a number of other protections under the Code. The ACCC recommends that Recommendation 10 should go further and remove all opt-outs from the Code.

While the opt-out structure is intended to provide commercial flexibility, the ACCC considers that it does not adequately account for the differences in bargaining power between Supermarkets and suppliers. The ACCC understands that it is difficult for suppliers to meaningfully negotiate on these terms with Supermarkets.

In particular, the ACCC considers that Supermarkets should not be able to opt-out of the prohibition against unilateral variation of grocery supply agreements. Suppliers need to be confident that they can plan their business relying on the terms of the contract they have signed with the Supermarket. The Supermarkets' ability to unilaterally vary terms of a grocery supply agreement without the consent of the supplier could have commercial consequences for the supplier that they cannot plan for or avoid.

This is particularly important because the additional protection offered to small business suppliers under the unfair contract terms regime are unlikely to apply where there is reliance on opt-out clauses under the Code¹⁰ especially in circumstances where, but for the opt-out clause in the Code, a clause that allows one party to unilaterally amend a contract is likely to be an unfair contract term.

In respect to the other 'opt-out' provisions under the Code, if they are not removed, the ACCC recommends that the Review consider how they can be improved. For example, the Code does not require a signatory to advise a supplier in writing of why a payment under a particular 'opt-out' provision is reasonable. Amending the Code to require Supermarkets to provide written notice of why a payment under an included 'opt-out' clause is reasonable would help to promote certainty and transparency for suppliers.

The Supermarkets should be required to keep those notices under clause 42 of the Code. This would allow the ACCC to assess whether the payments are reasonable and compliant with the Code.

Recommendation 13 – A new provision relating to price rise processes should be introduced to:

- prevent a retailer from requiring a supplier to disclose commercially sensitive information where the retailer has a competing own-brand product
- require that retailers take no longer than 30 days to consider a price rise request made by a supplier, unless circumstances exist that justify a reasonable extension that is agreed to by the supplier

The ACCC supports Recommendation 13 subject to the following:

- The Supermarket is prevented from requiring a supplier to disclose commercially sensitive information in any price process (without this being limited to where the Supermarket has a competing own brand product) as commercially sensitive information could be just as useful to Supermarkets in their consideration of future own brand products.
- The Supermarket must not exclude from a price rise discussion relevant input costs. Utilities and labour are likely to be two of the most significant components of most or all suppliers' costs. Preventing suppliers from including these in a price rise negotiation is unreasonable.
- The Supermarket is prevented from requiring the supplier to implement a price mitigation strategy following any agreement to increase a supplier's price of product.
- The Supermarket is prevented from requiring a supplier to have its costs and price rise proposal audited by an accounting firm selected by the Supermarket at the supplier's cost. This audit process is expensive and time consuming. Even where the outcome of the audit is supportive of the price rise there are times when the Supermarket still does not permit a price rise.

¹⁰ Unfair contract term protections do not apply to clauses expressly permitted by law (section 26(1)(c) of the ACL)