

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

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Draft Report  
June 2018

## Foreword

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 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 supermarkets 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 supermarkets 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 Pty Ltd 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.

During my review I met with a range of stakeholders, including supermarkets (signatories and non-signatories), wholesalers, suppliers, industry bodies, leading academics, regulators and other government agencies. They have all shared with me their lived experiences with the Grocery Code and insights into the challenges for the future.

My overall assessment is that the Grocery Code has made a positive contribution to improving the relationship between supermarkets and suppliers. It has helped drive cultural change within our major supermarkets and has been effective in addressing harmful retailer behaviours that had previously been reported by suppliers in the past. The Grocery Code signatories should be commended for embedding a collaborative culture with suppliers within their large organisation and taking action from the very senior levels of leadership.

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. Our regulatory settings must be balanced and effective to allow businesses to compete on their merits.

This Draft Report provides me with an opportunity to test my views with all the stakeholders I have had the pleasure of meeting with and to seek views from those that I have yet to hear from. The Draft Report contains draft recommendations that will form the basis of my final recommendations to the Government. I believe that these draft recommendations will provide the light-touch regulatory changes necessary for the industry to secure its own future.

I would like to extend a warm thanks to all of the people that contributed to the review and provided their generous 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.

I look forward to hearing further from the industry and other interested parties as I continue to progress this review.

A handwritten signature in black ink that reads "Graeme Samuel". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Professor Graeme Samuel AC

## Contents

Foreword.....	2
Executive Summary.....	5
Introduction .....	6
Overview of Australia’s food and grocery industry .....	9
Changes in business culture – where are we now? .....	14
Coverage of the Food and Grocery Code of Conduct .....	17
New fair dealings provision.....	22
Dispute resolution.....	29
Compliance and enforcement .....	39
Other areas for improvement.....	43
Appendix A – Journey to the Grocery Code.....	51
Appendix B – International comparisons.....	53
Appendix C – Interactions with the Horticulture Code of Conduct .....	57
Appendix D – Code Adjudicator comparison .....	59

## Executive Summary

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 has generally been 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 draft recommendations of this Report specifically target those areas to improve the operation of the Grocery Code.

The three main areas for improvement include:

1. **Major wholesaler Metcash should become a signatory** – Metcash Ltd, Australia’s only national wholesaler, has not signed up to the Grocery Code. The Review identified ongoing issues between the wholesaler and its suppliers. Metcash should become a signatory to the Grocery Code to improve its dealings with suppliers and provide access to equitable dispute resolution processes.
2. **New fair dealings provision** – the current good faith provision in the Grocery Code has been difficult to apply in practice and limited in its usefulness. The Review recommends reframing this provision to focus on fair dealings between the parties. This new provision will allow the assessment of fairness to be considered within the context of the supplier’s individual circumstances.
3. **An independent adjudicator** – the dispute resolution mechanisms in the Grocery Code have been under utilised by suppliers, largely due to fear of retribution for making complaints. An independent adjudicator in each signatory with the power to resolve individual complaints, make binding decisions and award compensation will dramatically improve outcomes for suppliers. Public reporting by the adjudicator and an ongoing monitoring role by the Australian Competition and Consumer Commission (ACCC) will increase transparency and give suppliers confidence in enforcing their rights.

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

## Introduction

### 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 ACCC. 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 ACCC is responsible for enforcing the Grocery Code.

The three largest retailers, ALDI, Coles Supermarkets Australia Pty Ltd (Coles) and Woolworths Limited (Woolworths), as well as a small retailer, About Life Pty Ltd, 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 Government committed to review the Grocery Code three years after its commencement to ensure it was working effectively and achieving its purposes as a voluntary code (the Review).

The Assistant Minister to the Treasurer, the Hon Michael Sukkar MP, announced the commencement of the Review on 2 March 2018, with the appointment of Professor Graeme Samuel AC as the independent expert to lead the Review and deliver a report to Government within six months<sup>2</sup>.

The Grocery Code's regulations require the Review to assess the impact of the Code in improving commercial relations between grocery retailers, wholesalers and 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;
- l) the products that should be covered by the code.

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2 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 conducted consultations from 23 March 2018 to 30 April 2018. Further, on 23 May 2018, the Review presented to the Australian Food and Grocery Conference outlining the principles which are detailed in this Report. Consultation was broad and sought stakeholders' views on whether the Grocery Code has improved commercial relationships between retailer (or wholesaler) and supplier over the past three years. The Review received feedback in a range of forms, including written submissions, face-to-face meetings and via teleconference.

Feedback was received from 34 stakeholders. These comments have informed the development of this Report and its draft recommendations to the Government.

**All stakeholder submissions and feedback to the Review have been treated as confidential and will not be made public**, unless explicit consent has been provided for the submission to be published. These confidentiality arrangements aim 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; and
- Professor Caron Beaton-Wells and Jo Paul, University of Melbourne.

A copy of these submissions can be found on the Review website at

[www.treasury.gov.au/review/food-and-grocery-code-of-conduct-review/consultation/](http://www.treasury.gov.au/review/food-and-grocery-code-of-conduct-review/consultation/).

### Call for Submissions on the Draft Report

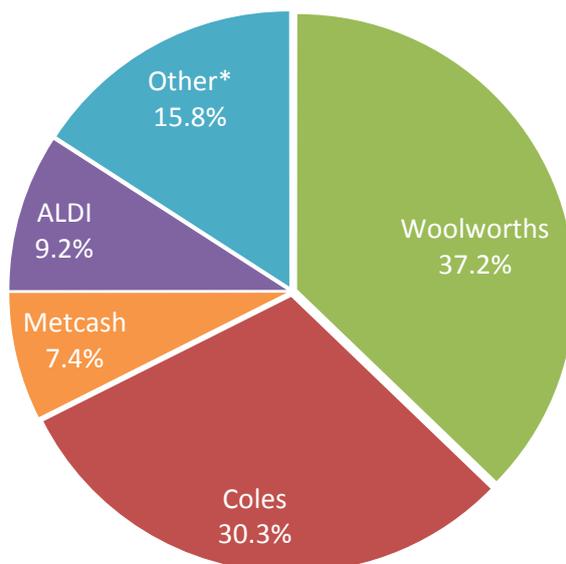
- The Review is now seeking written submissions from interested parties on the Draft Report and draft recommendations.
- Have your say on whether or not you support the draft recommendations or explain why you believe other changes may be necessary to improve the effective operation of the Grocery Code.
- The Review is particularly interested in comments from signatories and others about the estimated additional compliance costs that may be associated with the draft recommendations.
- All written submissions received will be considered confidential and will not be published unless consent has been received. Submissions close on **1 August 2018**.

## Overview of Australia's food and grocery industry

### Supermarkets 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>3</sup>

Chart 1.1 – 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>4</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' 'Price Dropped', largely in response to the continued growth of ALDI as well as 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' dominant market shares have remained relatively constant, there has been mixed results for profitability. Woolworths' turnover is estimated to grow by about 4.6 per cent in 2017-18,<sup>5</sup> due to increased food sales and improved gross margins.<sup>6</sup> In contrast,

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

4 Ibid

5 Ibid

6 Woolworths Group Limited 2017, *Woolworths Annual Report 2017*, <https://wow2017ar.qreports.com.au/>

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

Metcash's market share is currently estimated at about 7 per cent, its lowest level over the past five years.<sup>10</sup> Metcash is Australia's only nationwide wholesaling business, however has retail agreements with a majority of IGA and Foodland IGA branded independent retailers across Australia.<sup>11</sup> With increased price competition, independent retailers and Metcash have faced a steady decline in their turnover over the past five years. Questions have also been raised about whether its traditional wholesale model remains suitable for adapting to changes in consumer habits. This has encouraged the independent retailers to seek other wholesale alternatives.<sup>12</sup> This will increase competition for Metcash and provide a further access point to market for suppliers.

Of the other retailers, Costco continues to grow, with intentions to increase its presence in Australia and build upon its nine stores.<sup>13</sup> The arrival of international discount food and grocery retailers, Amazon, Lidl and Kaufland, are becoming more imminent. Also, 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 for them 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 their suppliers to defend market share.

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

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

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

10 Ibid

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

12 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>

13 Costco Wholesale Australia Pty Ltd 2018, *About Us*, <https://www.costco.com.au/about-us>

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.

## 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 participants supply directly to retailers or wholesalers, the industry (comprising food and beverage, fresh produce, groceries and tobacco) is made up of approximately 30,000 businesses that generated a total of \$127.4 billion in turnover during 2016-17.<sup>14</sup> The industry employed about 320,000 people and contributed over \$30 billion to the Australian economy in 2016-17.<sup>15</sup>

However, 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 be attributed to increased production costs that have lowered suppliers' 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 are instead being forced to diversify and seek new opportunities in overseas markets to create new revenue streams.

## Supermarket-supplier interactions

Coles and Woolworths deal directly with all their suppliers. 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 a trading terms and terms and conditions. As part of this, the buyer and the supplier would agree on matters such as price, distribution (number of stores and location) and quantity forecasts.

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,

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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

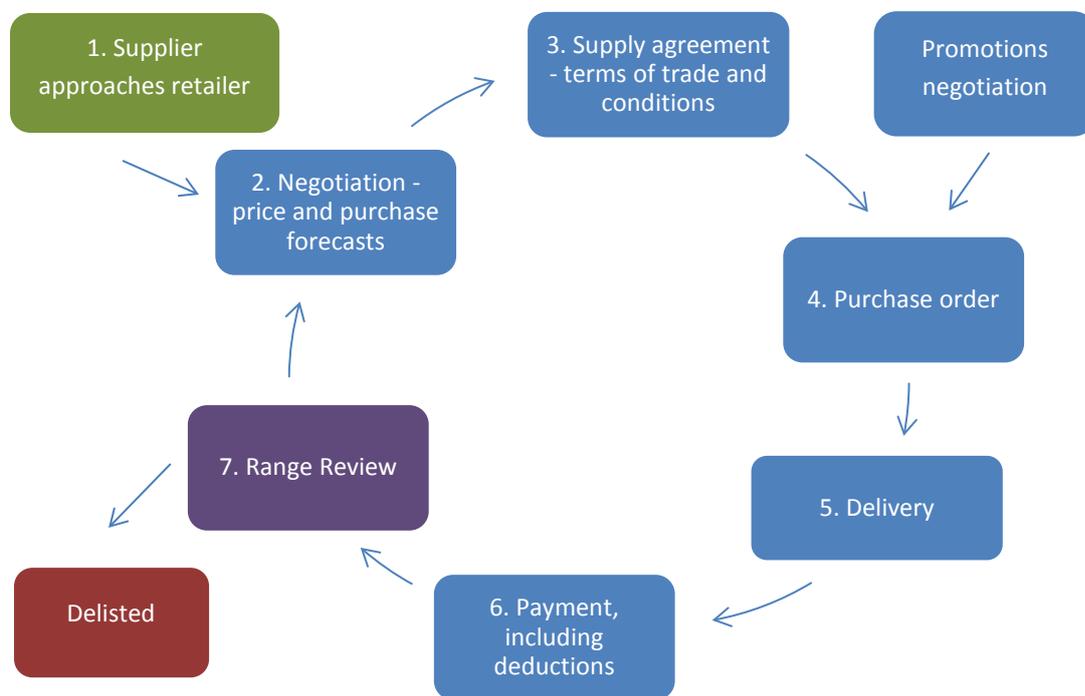
16 Ibid

which occur on either a regular or ad hoc basis. The range review provides an assessment of the sales 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 or to continue stocking it. 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 1.1 – Typical supply process between major retailer and supplier

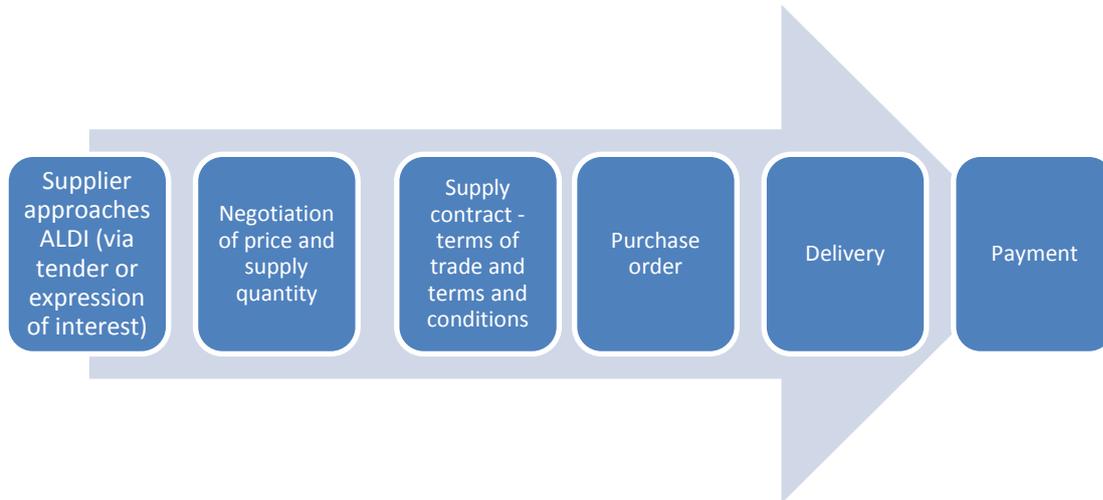


ALDI's business strategy of low price, private branded products has a very different buying process with its suppliers. ALDI will issue a tender for the supply of one of its private label products and suppliers will present their best offer. The successful applicant will then negotiate with ALDI's buyer.

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 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 1.2 – Typical supply process between ALDI and supplier



The commercial dealings between retailers (wholesalers) and suppliers are often complex and vary considerably between suppliers. There are many points during the trading process where things can go wrong. The imbalance in bargaining power between the parties can lead to situations where suppliers may feel compelled to accept unfair behaviour from the retailer due to fear of losing their contracts. Such behaviour that occurs unexpectedly or recurrently can cause serious detriment to suppliers.

The Review believes there is a continuing role for the Grocery Code to set minimum standards of fair dealings during all interactions between the parties. This is discussed further in the section on a new fair dealings provision.

## Changes in business culture – where are we now?

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 a major retailer for unconscionable conduct (details on the events that led to the Grocery Code is at **Appendix A**).

While the introduction of the voluntary Grocery Code was considered a step in the right direction by the industry, some stakeholders remained doubtful at the time 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 retailers have indeed followed through on their promises. 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 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 much fewer 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 in the past three years.<sup>17</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 (KPIs) 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 adjudicator 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 overall the Grocery Code has contributed to a change in business culture within the major retailers, which has been led by senior management within both organisations. However, the Review did identify some continuing problematic behaviours that occur at the retailer's buying level during their direct dealings with suppliers.

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

It is important to note that not all supplier complaints were made equally against both the major retailers. The Review heard positive experiences of buyers working cooperatively and bargaining

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

firmly but fairly with the supplier. 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 being placed on suppliers – creating the conditions and incentives for unfair conduct.

The draft recommendations in this Draft Report aim to maintain an effective baseline for commercial conduct. There is an opportunity to make changes to the Grocery Code so that it can serve as a practical tool for resolving day-to-day issues that emerge during dealings between suppliers and the retailers or wholesalers

## Coverage of the Food and Grocery Code of Conduct

The current Grocery Code allows both retailers and wholesalers to become signatories. This acknowledges that wholesalers also buy from food and grocery suppliers and may engage in similar problematic behaviour as their retailing counterparts. However, the Grocery Code does not automatically apply to these industry participants.

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 fact that the wholesaling sector has not become bound by the Grocery Code has been a point of concern for some stakeholders in the industry.

There is a view amongst some stakeholders that wholesalers are continuing to engage in problematic behaviours that are similar to those previously raised against retailers. Other stakeholders consider the coverage of the Grocery Code as a point of fairness – all parties engaging with suppliers in the food and grocery market should have to adhere to the same regulations.

This chapter evaluates the current coverage of the Grocery Code and considers whether it has bound enough of the industry 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>18</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 a significant number of suppliers. The Grocery Code effectively covers the industry's key players, and by virtue a significant portion of the market, despite being a voluntary industry code of conduct. Other retailers, such as Australian United Retailers Limited (FoodWorks Supermarkets), have a combined market share of only 15.9 per cent<sup>19</sup>, with the highest individual share (1.6 per cent<sup>20</sup>) being attributable to Costco Wholesale Australia Pty Ltd (Costco).

The Review did not find evidence of misconduct or systemic egregious behaviour that would warrant extending the Grocery Code to capture all retailers. Some suppliers were positive when commenting on their dealings with Costco noting that they followed their contracts and provided a high level of transparency. The Review does not believe that the benefits from capturing smaller retailers under the Grocery Code would outweigh the regulatory costs. 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

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

19 Ibid

20 Ibid

proposed by the Review be implemented. A small chain should consider whether the additional compliance costs outweigh any benefits.

However, it is clear a role exists for the Grocery Code; it must be maintained so that there is a common understanding of what the minimum standard of behaviour is in their industry and major retailers are reminded of what is expected from them.

## Wholesalers

Metcash, the largest national wholesaler, 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 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 issues relating to unilateral demands, forensic accounting practices to off-setting amounts owed without the supplier's consent, failure to comply with promotional terms, and requiring payments above reasonable costs to conduct study tours.

Metcash is the only national wholesaler and with its market share of around 7 per cent, and its position as the intermediary between suppliers and the independent retail service, in particular the IGA branded retailers, possess a degree of bargaining power. Suppliers also noted that Metcash is an important access point to the market, particularly for smaller suppliers with innovative niche products. Often these suppliers establish their brand with the independent retailers before expanding further through the major retailers.

### *Wholesaler-retailer relationships*

The Review understands that 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 red tape burdens imposed on the wholesaler may be passed on to independent retailers, further reducing their ability to compete with the major retailers. The Review has examined the nature of the relationship between retailer-wholesaler-supplier to determine the extent to which the Grocery Code should apply. The Review is not satisfied that if Metcash were a signatory to the Code, there would be any significant adverse consequences for the independent retailer customers of Metcash.

Metcash, as a wholesaler, buys from a variety of different suppliers, such as farmers, food and grocery manufacturers and importers, then on sell the products to independent retailers. Metcash has significant market power when dealing with their suppliers and independent retailers.

The Grocery Code, as currently drafted, 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 has been suggested that the Grocery Code should be extended to cover the relationship between a wholesaler and its retailers. The tension between wholesaler and retailer is quite distinct from the set of issues relating to suppliers. Extending the coverage of the Grocery Code further down the

supply chain is likely to add unnecessary complexity and dilute the key purposes of the Grocery Code in dealing with issue 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 or the 'unconscionable conduct' provisions of the Australian Consumer Law. There are also opportunities for independent retailers to come together to collective bargain to leverage their combined buying strength when negotiating with the wholesaler, taking advantage of the collective bargaining facilitated authorisation provisions under the CCA.

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.

### **A Mandatory or Voluntary Code**

The Grocery Code is the first and only voluntary prescribed code of conduct for the purpose of Part IVB of the CCA. As a voluntary code, retailers and wholesalers can choose whether or not they wish to be bound by it. However, once a retailer or wholesaler signs up, they are bound by all the obligations in the Grocery Code as if it were a mandatory code, which is enforceable by the ACCC.

The Review found that the current signatories, particularly Coles and Woolworths, remaining highly supportive of the Grocery Code and have given no indication that they intend to withdraw or opt-out in the future. Therefore, the Review sees little benefit in converting the voluntary Grocery Code into a mandatory code, as it already applies to most of the industry by virtue of the major retailers being signatories.

However, there remains the issue of recalcitrant key players in the industry, such as Metcash, that have refused to sign up voluntarily to the Grocery Code. The Review did not find evidence that Metcash's trial approach to the Grocery Code has been effective, nor does it believe that Metcash becoming a signatory will result in unintended consequences for independent retailers.

The Review believes the optimal solution is for Metcash to voluntarily become a signatory to the Grocery Code. Its suppliers would then be afforded the protections of the Grocery Code. While Metcash has previously indicated support for the Grocery Code, there is a need for it to convert this goodwill into a solid commitment by becoming a signatory.

### **Targeted Mandatory Code of Conduct**

The Review acknowledges that there were calls from a few stakeholders, including the ACCC, to remake the Grocery Code as a mandatory code for all wholesalers and retailers. However, the Review considers that the best option is for the Grocery Code to remain voluntary.

A voluntary code has the advantage of fostering industry buy-in and ownership by the signatories, which is vital to supporting robust and sustainable changes in business culture. A voluntary code also

provides greater scope for the retailers and wholesalers to establish innovative solutions that best suit the industry to resolve its own problems.

A voluntary Grocery Code remains preferable, so long as all significant market players remain a signatory. As mentioned above, the absence of Metcash has remained a point of concern for some suppliers. Ideally, the Review would like to see Metcash become a signatory within 30 days of the release of the Final Report. The Review notes that the current Grocery Code contains generous transitional arrangements that give new signatories time to change their business practices to comply with the Grocery Code.

In the event Metcash continues to remain outside of the Grocery Code, the Review recommends that the Government introduce a separate mandatory code of conduct containing the same substantive terms as the current Code (together with any amendments adopted as a consequence of Government accepting recommendations in this Report) with targeted application to Metcash (and any other major market participant that should, but refuses to, become signatories to the existing voluntary code). In this scenario, a voluntary code would remain for existing and future signatories but a separate mandatory code would be created to apply to major market participants that should, but refuse to, become signatories to the existing voluntary Code. Clearly Metcash would be a party to which this procedure would apply. The obligations contained within the targeted mandatory code would mirror those contained in the voluntary Grocery Code (with some exceptions in respect of wholesalers as discussed below), to ensure suppliers are afforded equal protection with dealing with retailers and wholesalers.

#### **Draft Recommendation 1**

The Government should introduce a separate targeted mandatory code to apply to major participants that refuse to become signatories to the voluntary Grocery Code.

#### ***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, may be just as financially damaging for a supplier if engaged in by a wholesaler as a 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 as well.

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.

### **Draft 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>21</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 the major supermarket chains account for approximately 80% of the domestic retail sale of wine.<sup>22</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 structure of the alcoholic beverage industry. For example, the beer market is predominantly supplied by two large multinational firms with significant countervailing bargaining power. 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% of the total wine market<sup>23</sup>. This limits the ability of Coles and Woolworths to exert their market power as wine producers may simply withdraw supply and expand sales through other markets, such as through tourism or hospitality channels.

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 to complexity, as new specialist 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.

### **Draft Recommendation 3**

That the current coverage of products under the Grocery Code remains unchanged.

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21 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 1, cl 3

22 Cloutman N 2018, ‘IBISWorld Industry Report G4111 Supermarkets and Grocery Stores in Australia’, IbisWorld Pty Ltd

23 Ibid

## New fair dealings provision

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-pace 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 the retailer or wholesaler and supplier 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 on good faith

The grocery industry has recognised that concepts of good faith and fair dealings lie at the very heart of the retailer or wholesaler-supplier relationship. When Coles, Woolworths and the AFGC jointly developed the Grocery Code in 2014, they agreed to enshrine good faith as one of the fundamental objectives of the Grocery Code<sup>24</sup> 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. 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 and fair dealings 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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24 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 that problematic behaviours 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-scaled 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, electricity etc.), 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.

### **Fair Dealings**

It is clear that the original architects of the Grocery Code (Coles, Woolworths and the AFGC) had envisaged good faith and fair dealings 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.

The Review recommends enhancing the current good faith provision and reframing it as a new ‘fair dealings’ provision. This fair dealings provision should be elevated to become the primary provision in the Grocery Code and repositioned to the front of the Grocery Code.

The new fair dealings provision will serve two key purposes:

1. To provide a test of fairness that can be readily applied to all types of retailer and wholesaler-supplier conduct, with the ability to be tailored to take into account the unique factors and individual circumstances that exist in the relationship between the parties, and
2. To outline fundamental principles of fairness upon which all other provisions in the Code are to be interpreted.

### **Principles of fair dealing**

The Review recommends that the new provision of fair dealings include clear guideline definitional content to better assist industry participants, regulators and courts to determine the meaning of fairness. This guideline definitional content should be easily interpreted and understood by industry, passing a ‘common sense test’ without the need for complex legalistic interpretation.

The indicators of fairness contained in the new provision will build upon the well-established principles of good faith that have been developed by the common law and legislation (including good faith principles in other prescribed industry codes).

For example, the list of guideline indicators should include clear references to equity, honesty, reasonableness, cooperation and other values that encapsulate fair dealing beyond the current narrow focus on duress.

The new provision could include a non-exhaustive list of matter those responsible for enforcing compliance with the Grocery Code may have regard to for the purposes of determining whether the retailer or wholesaler has dealt with their supplier fairly.

It should be noted that the obligation to act fairly should not prevent a retailer or wholesaler from acting in their commercial interests. Further, the supplier’s conduct should also be considered when assessing fairness.

## **Fairness in the context of a supplier's unique circumstances**

The question of what constitutes fair dealings should not be considered in isolation. It must be considered in the context of the unique characteristics of the supplier and the nature of their relationship with the retailer or wholesaler.

The Review recommends that the new fair dealings provision require consideration to be given to 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 fairness to be considered with reference to the 'full story' to allow decisions to be made that align with common sense and generally accepted community expectations. This should apply to all suppliers, both large and small.

## **Enhanced ACCC guidance**

The ACCC currently develops guidance material to assist industry participants with understanding the obligations under the Grocery Code. The feedback from stakeholders has been that while this material has been helpful in explaining what the law is, it often does not clearly explain how the law can be interpreted or applied. Some stakeholders noted that the material is often 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 fair dealings.

This guidance material should be the subject of regular update and improvement, drawing upon the information and data obtained as part of the proposed annual reporting requirement to the ACCC by the new Code Adjudicator (discussed in further detail in the next chapter).

## **Fair dealings to play a role in all Grocery Code provision**

The Review has expressed a need to enhance the current good faith provision in order for it to become an effective standalone provision for enforcing fair commercial behaviour.

The Review believes that many of the complaints and disputes raised by suppliers can be attributed to a fundamental break down in fair dealings.

There is a greater role for the proposed fair dealings provision to be a lens through which all of the other provisions in the Grocery Code are to be interpreted. That is, when a signatory is assessing their conduct in relation to a specific provision of the Grocery Code they should also turn their mind to whether the conduct also satisfies the obligation of fair dealings more generally.

For example, a signatory that is delisting a supplier's product will need to consider if the notification they have provided could be considered fair dealings.

This approach will embed the values of fair dealing across all of the issues dealt with by the Grocery Code in a consistent and robust manner. This is intended to foster further change in business culture

and to emphasise the importance of fair dealings as the backbone of supply chain relationships in the grocery industry.

#### **Draft 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 that are easy to understand and apply to the particular circumstances of the parties.

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 Provision**

An example of what the new provision could potentially look like has been provided below.<sup>25</sup> The purpose of providing a model provision is to provoke discussion and feedback on whether the design is capable of delivering the intended policy outcomes.

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25 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

## Model Fair Dealings Provision

### (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.
- e) The matters outlined in clause 1(b) may be considered in determining breaches of any other provision in the code.

## Dispute resolution

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.

### Dispute resolution under the Code

Part 5 of the Grocery Code provides a formal framework for dispute resolution that is intended 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>26</sup>.

The Grocery Code requires signatories to employ a Code Compliance Manager (CCM), who has the responsibility for investigating and resolving complaints from suppliers. There is also a process for suppliers opting to engage in arbitration or mediation by an independent third party under the Grocery Code. 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 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.

The Review has found that very few suppliers consider elevating a dispute higher than the buying team and rarely engage a CCM or senior management. 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>27</sup>.

Stakeholders expressed a willingness to resolve disputes through commercial negotiations at the buyer level. However, although all signatories have actively trained their team members on the Grocery Code, the Review heard a number of instances where suppliers felt their complaints or disputes were not resolved satisfactorily by buyers. These problems were exacerbated by frequent changes in the personnel of buying teams that result in lost accountability for previous decisions.

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

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

### **Lack of trust and fear of retribution**

Overwhelmingly, the Review heard there is a lack of trust in relation to retailers' ability to resolve complaints. Stakeholder feedback stated that many suppliers are reluctant to pursue dispute resolution through the CCM, due to a fear of retribution and lack of trust in the process.

They noted there is no requirement for the CCM to protect their confidentiality, including from the supplier's buying team. Stakeholders suggest that if buying teams were made aware of a complaint during the CCM's investigation, 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 perceived the CCMs as biased towards the retailer and lacking the degree of independence, separation and authority necessary to adequately deal with their complaints. 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. Further, the CCM was not considered sufficiently senior in the signatory's management to mitigate the risk of retribution.

Stakeholders also called for increased 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.

### **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.

A signatory is required to participate in mediation or arbitration should a supplier decide to use the Grocery Code's framework. However, this does not extend to a complaint or dispute that the mediator or arbitrator considers vexatious, trivial, misconceived, lacking in substance or out of an act of bad faith. 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 (Institute of Arbitrators and Mediators Australia) to make the appointment. Mediation or arbitration must be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia<sup>28</sup>.

The Review has not received evidence that any disputes have been taken to mediation or arbitration since the introduction of the Grocery Code. This may be due to a fear of retribution associated with escalating complaints against retailers, as well as a preference for resolving complaints through commercial negotiations.

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28 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Sch 2, cl 39

## Internal dispute resolution

In addition to the Grocery Code, Coles and Woolworths have also developed internal complaints handling and dispute resolution avenues for suppliers, which demonstrate their commitment to developing positive relationships with suppliers.

Woolworths' third party complaints line, Speak Up, allows suppliers to confidentially make a complaint to an independent body, currently Deloitte<sup>29</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>30</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 main content area is titled 'DISPUTE RESOLUTION - WHAT TO DO IF YOU ARE NOT SATISFIED'. It contains the following text:

Woolworths prides itself on having thousands of dedicated and satisfied Trade Partners who have never had to use the Dispute Resolution scheme. However, Woolworths does provide a process model for Dispute Resolution that encourages resolution of incidents before they become issues. To find out more, refer to the Vendor Guide and the [Vendor Speak Up policy](#).

**About the Vendor Speak Up Program**

The Vendor Speak Up service is a channel for Woolworths trading partners to raise suspected breaches of law or of accepted business practices, policies or procedures directly with a party that is external to Woolworths and can bring a fresh and independent perspective to the matter.

To guarantee independence, an external provider (currently Deloitte) is responsible for its operation.

The Speak Up service functions through a confidential telephone, internet, email, mail and fax service. Telephonic submissions made to the Speak Up service will be dealt with by call centre operators who are specially trained to gather and record sensitive information. All concerns are then documented and a report is sent to a nominated independent Woolworths representative to escalate.

Typically, Deloitte will provide you with progress reports in respect of Woolworths' investigations based on feedback received from Woolworths, and a report of the outcome and of any internal or external remedial actions by Woolworths arising from the complaint.

Only disputes or complaints involving a suspected breach of law or of accepted business practices, policies or procedures by Woolworths may be escalated to the Speak Up service.

Dissatisfaction or disagreements of an interpersonal nature or business disputes that do not breach any law or accepted business practices, policies or procedures **cannot** be escalated to Speak Up.

Coles have a Supplier Charter, which outlines their commitment to deal in good faith, with transparency around ranging, delisting and grocery supply agreements.<sup>31</sup> Complaints or disputes under the Supplier Charter can be referred to Coles' Independent Arbiter, The Hon Jeff Kennett AC, to consider (Kennett model). 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

29 Woolworths 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)

30 Woolworths Limited 2016, *Vendor Speak Up Policy*

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

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.<sup>32</sup>

***“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 Arbitrator	
<i>Who is the Independent Arbitrator?</i>	The Hon. Jeff Kennett AC has been appointed by Coles as the Independent Arbitrator under the Coles Supplier Charter Framework.
<i>What will the Independent Arbitrator do?</i>	<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>
<i>What happens if I disagree with the Independent Arbitrator's decision?</i>	Nothing precludes you from referring your complaint to the ACCC or utilising any rights under any applicable industry codes or commencing legal proceedings.
<i>How can I contact the Independent Arbitrator?</i>	<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 Arbitrator and any associated investigation will be at no cost to suppliers.</p>



Feedback to the Review by the senior management of both organisations also supports this position, communicating a priority to continue improving their dealings with suppliers, and where this is not achieved, resolve disputes internally rather than relying on a formal legal process.

The Review has found that some suppliers have achieved positive dispute resolution outcomes from utilising the Kennett Model at Coles, with some stakeholders providing examples where they have used this process and sought satisfactory outcomes, such as changes to contracts or compensation.

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

Further, there has been no evidence of reprisal from the buying team to the supplier after 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 the Coles for the payment of compensation or changes to the supplier's contracts; and
- executive-level management buy-in and support of the position.

Despite this, other stakeholders remained concerned that internal processes give too much discretion to the retailers and that complainants risk reprisal from buyers.

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 also 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.

## Dispute resolution alternatives

Suppliers with complaints and disputes with retailers are also able to pursue 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 Australian Food and Grocery Council (AFGC), Food South Australia and NextGen Grocery Code training services that also provide advice on the Grocery Code and education materials 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>33</sup>.

Some stakeholders have suggested establishing an independent adjudicator or ombudsman, referring the United Kingdom Government's Grocery Code Adjudicator (UK GCA). The UK GCA is an independent regulator that enforces compliance with the Supply Code of Practice (GSCOP) and ensures large supermarkets treat their direct suppliers lawfully and fairly. The UK GCA is empowered by its legislation to arbitrate disputes between retailers and suppliers, investigate suspected breaches of the GSCOP by a retailer and enforce the findings of its investigation, by way of

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33 *Australian Small Business and Family Enterprise Ombudsman Act 2015*

recommendations, publishing of information or financial penalties.<sup>34</sup> This model has been effective in enforcing the UK GSCOP and improving conduct within the UK food and grocery industry<sup>35</sup> (further discussion of the UK model is at **Appendix B**).

However, there is some confusion as to the role of the UK GCA. In reality, the UK GCA has responsibility for enforcing the code in the UK; in Australia this responsibility lies with the ACCC. The Code Adjudicator in the UK does also have a role in mediation and arbitration, but there is scant resort to this process. In the UK, the primary focus for dispute resolution is the Code Compliance Office embedded in each retailer – with much the same responsibilities as is demonstrated in the Kennett model. Given this, the Review sees it more appropriate to adapt some of the UK GCA’s beneficial elements to Australia’s current coregulatory framework, without the need to create an additional Government bureaucracy at a cost to the industry (see **Appendix D** for a comparison of the UK GCA model with the proposed Code Adjudicator model).

#### **Lessons Learned – UK Adjudicator Model**

The UK Grocery Code Adjudicator (GCA) has the equivalent role to the ACCC in Australia, with an additional function of mediation and arbitration that is only used in extreme cases.

The current GCA’s approach focusses on achieving broad cultural and procedural changes amongst the largest retailers in the UK by:

- working closely with the large retailers, meeting regularly to discuss Code related issues and make recommendations to improve compliance with the Code, based on feedback from suppliers;
- improving transparency and accountability of signatories’ performance under the code, through supplier surveys and feedback; and
- more active oversight of large retailers, which provides a credible threat of action if there is a breach of the UK code.

### **Recommended improvements to dispute resolution**

The Grocery Code’s current dispute resolution framework has proven to be inadequate for resolving disputes in the industry. 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 will be in line with the principles of the Grocery Code.

The Review recommends building on the existing industry practices as a first step. The Kennett model at Coles has been trusted by a large number of suppliers, as evidenced by their confidence in making complaints and their satisfaction with the outcomes they have received. However, there

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34 *Groceries Code Adjudicator Act 2013* (UK)

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

remains a perception among some suppliers that the Kennett model is not sufficiently independent to prevent reprisal or biased decision making.

Evidence from consultations has demonstrated a need for strengthened governance arrangements to help ensure the Grocery Code dispute resolution framework maintains confidentiality and independence in order to give suppliers the confidence to use the process.

### Code Adjudicators

It is recommended that the Grocery Code be amended to replace the CCM position with an independent Code Adjudicator to be embedded in each retailer or wholesaler.

The Review proposes that the Grocery Code contain a list of attributes and criteria that an independent Code Adjudicator must fulfil. Retailers and wholesalers will have the flexibility to design individual Code Adjudicator models that meet the needs of their organisation and suppliers, as long as it adheres to the principles set out in the Grocery Code.

Clause 32 of Grocery Code should be amended to require that a Code Adjudicator must:

- be able to consider any complaint from a supplier and make a decision that is binding on the retailer (but not the supplier). In particular, this includes complaints relating to the new fair dealings provision recommended by the Review.
- have access to all relevant information and records of the signatory, for the purposes of conducting a thorough investigation;
- be independent of the signatory and sit outside of senior management, buying teams or legal departments;
- be employed for a fixed term and unable to be terminated on the grounds of making decisions that are unfavourable towards the signatory;
- be accessible to all suppliers via phone, email or face-to-face (where appropriate), regardless of business size or location;
- maintain confidentiality in the first instance (and where confidentially cannot be maintained, such as for investigation purposes, the complainant may choose to waive this right or withdraw their complaint);
- monitor whether the signatory (including senior management and buyers) has complied with the decisions of the Code Adjudicator, particularly in relation to whether any retribution had occurred;
- publish an annual report with a summary of all cases received and outcomes; and
- conduct an annual independent survey of supplier's experiences in relation to day-to-day dealings with the signatory, as well as through the dispute resolution mechanism.

The Review regards this Adjudicator model an industry-led solution, which builds upon the current Jeff Kennett and Vendor Speak Up models that have been implemented by Coles and Woolworths. Codifying the principles that underpin these current models will ensure the longevity and an ongoing commitment by signatories to provide fair, accessible and impartial dispute resolution processes.

## Annual reporting

Accountability should be driven through increased transparency of signatories' complaints handling and dispute resolution activity, but confined to a requirement for each Code Adjudicator to conduct and publish independent supplier surveys and report annually on its activities (rather than six-monthly under the previous CCM provision). Reporting of complaints that are elevated to the Independent Code Adjudicator will focus on those matters which have not been able to be resolved satisfactorily at buyer or buyer supervisor level.

The annual reports should include summary information of:

- all complaints received by the Code Adjudicator;
- whether complaints were investigated further or elevated (if not, reasons for why);
- what determination was made and action taken (if none, reasons for why);
- key issues based on supplier feedback and surveys; and
- 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 Adjudicator.

The recommendation for further public reporting by Code Adjudicators (both annual reports and surveys) is based upon the UK experience and recommendations of the ACCC. Transparency of the Adjudicators' activities through the annual reporting requirements will help suppliers to have confidence in the process. Further, improved annual reports aims to assist the role of the ACCC and allow better oversight of the Adjudicator. This is discussed in more detail below.

The Review also notes that Coles and Woolworths already conduct supplier surveys.<sup>36</sup> The Review considers there would be merit in providing that the Grocery Code should require surveys to be conducted independently (by a third party outside the signatory organisation) based on a set of common principles. This would provide an industry scorecard for each signatory and allow public scrutiny to encourage continued improvements in behaviour.

### Draft Recommendation 5

The Code Compliance Manager should be replaced with an independent Code Adjudicator, 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.

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36 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://wow2017cr.qreports.com.au/home/prosperity-founded-on-trusted-relationships/working-with-our-business-partners.html>

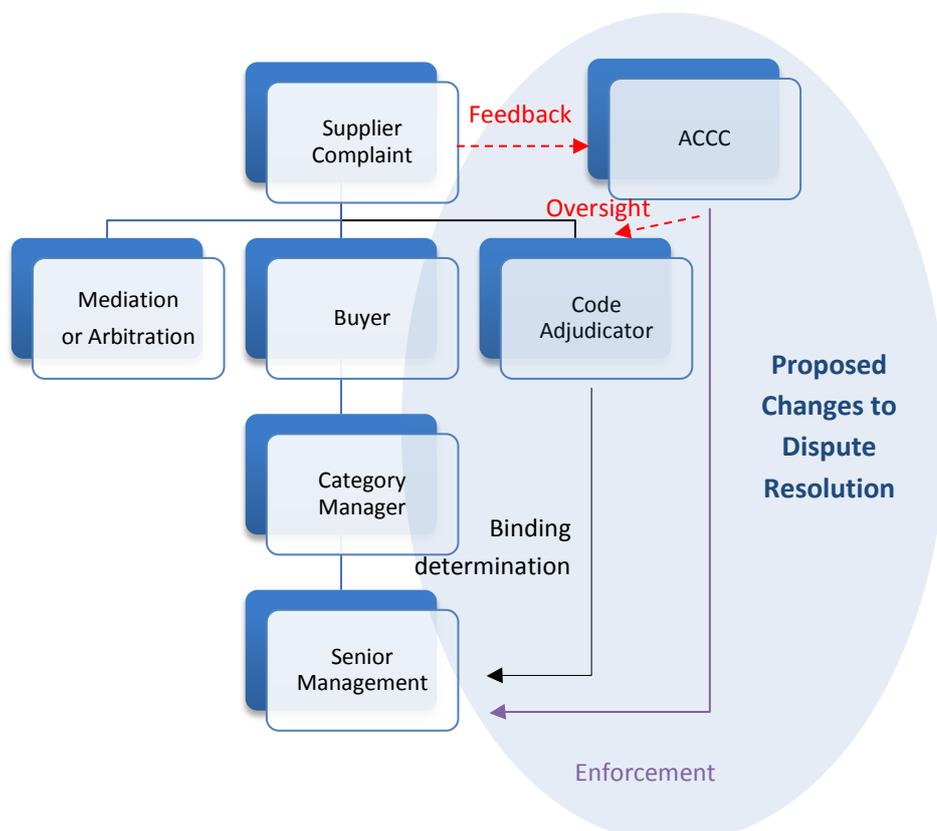
## Oversight and enforcement: the role of the ACCC

The Review has found that the ACCC's role as the regulator is a critical element of the Code. However there is scope for the ACCC to play a more active role in the industry. The ACCC is well placed to provide the sector with educational material and further guidance to inform suppliers and help ensure cultural change within signatory organisations continues.

While the Code Adjudicators would be employed by the signatories, their activity would be monitored by the ACCC. This would include meeting periodically with all Adjudicators to workshop key issues and develop strategies to improve compliance with the Grocery Code, particularly the new proposed fair dealings provision. This recommendation is based on the UK model.

The ACCC should also be required to assess the Code Adjudicator's annual reports. These reports would be published by the ACCC and would thus enable the ACCC to seek confidential submissions from suppliers about the performance of the Code Adjudicator, in response to the Code Adjudicator's published reports. The submission process will also help the ACCC gather regular information on the industry's compliance with the Grocery Code, enhancing its ability to monitor compliance and identify systemic breaches. This should ensure the ACCC conducts its compliance checking activities in a more efficient manner, targeting certain information highlighted from their assessment of annual reports and supplier feedback (discussed in further detail below).

Code Adjudicators will also be expected to perform their functions in accordance with the proposed changes to of the Grocery Code. Failure to do so will be deemed a breach of the Grocery Code and the ACCC will be able to take enforcement action. In extreme examples this would trigger the ACCC to use their powers under the CCA to seek an undertaking for the replacement of the Adjudicator.



**Draft Recommendation 6**

The role of the ACCC should be expanded to:

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

## Compliance and enforcement

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>37</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>38</sup> that deliver broad public benefit outcomes in accordance with its Compliance and Enforcement Policy<sup>39</sup>.

The ACCC's oversight and enforcement role has proved influential in the effectiveness of the Grocery Code. Stakeholders indicated that they can have 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.

### ACCC 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>40</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 major compliance issues were identified for the major retailers.

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37 *Competition and Consumer Act 2010* (Cth), s 51ACB

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

39 <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

40 *ibid*, pgs 8-9.

The 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 a resource intensive and time consuming process for signatories that are 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 all of the latest documents listed under section 42 of the Grocery Code, which includes 11 different categories of documents (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.

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. 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. In the absence of supplier complaint data to guide the ACCC's request for documents, a wider net has been cast in efforts to identify possible instances of non-compliance.

The Review does not believe that the ACCC's current approach to annual compliance checks is leading to the best outcomes for the industry. An examination of a broad set of documents at a single point in time is unlikely to be able to paint an accurate picture of whether the signatories have dealt fairly with all suppliers over an extended period of time. The current practice is administratively burdensome for signatories with very limited scope for the ACCC to identify and address any systemic breaches of the Grocery Code.

## **A collaborative approach with the regulator**

The Review does not believe that annual compliance checks requiring the signatories to produce the full gamut of documents should be standard practice for the reporting process under the Grocery Code.

Instead the Review recommends that the ACCC enhance its educative and oversight role to help strengthen relationships between retailers (wholesalers), suppliers and also the regulator. The Review recommends that the ACCC maintain an open dialogue with each signatory, via the Code Adjudicator, by engaging in regular meetings to discuss trends in supplier complaints and actions taken by the retailers (wholesalers) to rectify them.

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 Adjudicator 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 Adjudicator's report and gives suppliers an opportunity to come forward give 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 Adjudicator model.

### **A more targeted approach**

The Review recommends changing the way that the ACCC conducts its compliance check activities under the Grocery Cod by imposing stricter conditions before documents are to be sought from signatories using powers under section 51ADD of the CCA.

The new process should require the ACCC to:

1. have reason to believe that the signatory has information or documentation that relates to a potential breach of the Grocery Code;
2. raise the matter with the relevant Code Adjudicator prior to exercising its section 51ADD powers to determine whether the issue can be satisfactorily resolved by the retailer or wholesaler;
3. give notice under section 51ADD of the CCA requesting that the retailer or wholesaler provide a copy of the information or documentation that the ACCC believes may relate to the potential breach of the Grocery Code.

This proposed approach will ensure that compliance checks are targeted and reserved for addressing identifiable and serious potential breaches of the Grocery Code. This helps to bring compliance checks under the Grocery Code into line with the ACCC's practices and procedures for other prescribed industry codes.

It should be noted that the ACCC can continue to rely on powers under section 155 of the CCA to gather information for the purposes of investigating a breach of the Grocery Code (or CCA) where it deems appropriate.

### **Civil pecuniary penalties vs compensation for suppliers**

The ACCC argues that the implementation of civil pecuniary penalty provisions would act as the deterrent against these behaviours. 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.

Further, civil 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. Of more relevance to suppliers is the capacity of the Code Adjudicator to require any appropriate form of remediation 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 preserve existing commercial relationships to move forward.

It is important to note that substantial pecuniary 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.<sup>41</sup>

**Draft Recommendation 7**

The ACCC should change its approach to conducting annual compliance checks on signatories and should only rely on its section 51ADD information gathering powers after certain conditions are met, including that matter has been raised with the Code Adjudicator and deemed not to have been resolved satisfactorily.

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

## Other areas for improvement

The Review has also received several submissions, including from the ACCC, which 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. A range review may result in a supplier having their new products listed, 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 right to determine what products are put on their shelves and allowed the flexibility to adjust their product listings to meet their consumers' preferences and demands.

The Review heard instances of where the retailer's buyer had not 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 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 also 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 recommendation changes to introduce a fair dealings provision and Code Adjudicator should assist in resolve unfair conduct that may arise during the range review process.

### Ranging reviews with private label products

The Review observed a real concern amongst suppliers that major supermarkets held their own branded products to a different standard, that they were more lenient with their sales and margin targets. This would appear to be an issue with the Code 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 alleged that retailers placed large segments of a category on notice for a possible delisting during their range review process. They would then issue a final delisting notice to affected suppliers 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. The Review does not consider that this method of blanket notification delivers the policy intention of the Grocery Code.

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 to possibly try to coerce suppliers to offer better terms.

Suppliers also raised concerns that they were not being given 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 substances or explanation given in the delist notice.<sup>42</sup>

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 changes to introduce a Code Adjudicator, 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.

### *Significant limiting of distributions*

During consultations, Woolworths shared with the Review some of its best practice 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

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

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.

#### **Draft 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.

### **Grocery Supply Agreements – Clear or complex?**

‘Grocery Supply Agreement’ (GSA) is a defined term under the Grocery Code intended to capture all documents that relates 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>43</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>44</sup>

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 and should not be subject to the narrow interpretation favoured by retailers.

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.

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43 NextGen, Food & Grocery Code of Conduct Review Submission, pg 15

44 Ibid

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.

#### **Draft Recommendation 9**

It should be clarified that the term 'Grocery Supply Agreement' 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 supplier 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 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.

#### **Draft Recommendation 10**

Clause 10 of the Grocery Code should be amended to 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' premise 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 a 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 renegotiate terms with retailers to reduce this charge. It was claimed that renegotiating wastage would be viewed as a renegotiation of trading terms by the retailer. This left 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.

#### **Draft 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 narrowly interpreted to apply only to horticultural produce such as fruit and vegetables (a discussion of the interactions between the Grocery Code and Horticulture Code is at **Appendix C**).

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

The Review is not aware of any reason why clause 21 should not be interpreted to apply to other fresh produce such as meat, fish and dairy. A number of the obligations and protections that the clause imposes would appear to benefit any provider of fresh produce to a signatory. It would also assist signatories to minimise disputes as having clear fresh produce standards will ensure both parties share the same expectations.

Accordingly, clause 21 should be amended so it is clear that it applies to all fresh produce and groceries.

#### **Draft Recommendation 12**

To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply to all fresh produce, including fruit, vegetables, meat, seafood and dairy etc.

## Difficulties in the price increase process

The Review received consistent 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, suppliers do not determine the price of their products alone. The retailer plays a significant role in controlling prices through 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 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. Suppliers are being asked to share all input costs with retailers. This can involve a line-by-line break down of all of the ingredients, 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 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. Other times 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 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 major of suppliers – both large and small – felt compelled to participate in it 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 groceries. 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.

First, retailers or wholesalers should be prevented 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.

Secondly, the price rise process conducted by the retailer or wholesaler should take no longer than 30 days, unless extenuating circumstances exist that justify an extension that is agreed to by the supplier. Limiting the timeframe for a price rise process and for decisions to be made in a timely manner will help give suppliers greater certainty to plan for their business.

The Review considers that the primary responsibility for setting a supply price for a product should rest with the supplier of the product – if that price leads to a retail price that is unacceptable to the consumer, the sales of the product will suffer. However, the Review has stopped short of applying a specific clause to this effect in the Code. With the changes to the Code described above, there should be an improvement in price dealings between retailers and suppliers.

Furthermore, negotiations relating to price rises, this aspect of the retailer or wholesaler and supplier relationship will invoke the new fair dealing provisions. Suppliers will have access to the proposed Code Adjudicator to raise complaints on this matter.

The ACCC could also play a role in issuing guidelines to ensure that price rises are being fairly considered under the strengthened fair dealing provision referenced earlier in the report. However, should this issue remain live over the next period of the Code, a future Review should consider further action to ensure suppliers are able to receive price rises on their products.

### **Draft Recommendation 13**

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

1. prevent a retailer from requiring a supplier to disclose commercially sensitive information where the retailer has a competing own-brand product; and
2. 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.

## **Future Review**

The Review recommends that there be a review of the Grocery Code within three to five years of implementation of the proposed changes. This will allow the industry and 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 Independent Adjudicator model had failed to deliver a fair and equitable dispute resolution mechanism, the Government may consider the case for further intervention, for example, in the form of a single government appointed Adjudicator.

### **Draft 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

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>45</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>46</sup> The PGI was criticised for a number of weaknesses, including its lack of specificity in provisions and ineffectiveness to enforcement.<sup>47</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>48</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 of industry participants are becoming more proficient and comfortable with internal and other dispute resolution procedures.'*<sup>49</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>50</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).

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

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

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

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

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

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

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 public in regards to upholding ethical or social expectation of fairness in commercial relationships, particularly in regards to the supermarket and grocery industry.<sup>51</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 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 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 supplier. 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.

This behaviour, which the Court deemed was repeated and deliberate, was seen as an abuse of Coles' bargaining power from its significant market share. It was found by the Court's to be unconscionable under the CCA and Coles committed to an enforceable undertaking to make amends. This included appointing Mr Jeff Kennett AC to act as an independent arbiter to oversee a claims process for affected suppliers.

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

## Appendix B – International comparisons

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>52</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, the burden of proof on retailers for ‘requests’, and compliance and enforcement, including 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 the code compliance officer’s 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 Grocery 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>53</sup>:

- provide advice and guidance to both suppliers and large retailers;
- investigate issues to determine a 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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52 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>

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

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

The GCA generally 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 has undertaken four arbitrations and one investigation as at mid-2017.<sup>54</sup> The GCA opts to take this collaborative approach to resolve issues, with the options for arbitration and investigation used after all other avenues have not resolved the issue.

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>55</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>56</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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54 Department for Business, Energy & Industrial Strategy 2017, *Statutory Review of the Groceries Code Adjudicator: 2013-2017* (UK)

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

56 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>57</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>58</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>59</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 a confidential complaints and therefore dispute resolution options have not been effectively used in practice.<sup>60</sup>

In April 2018, the European Commission, in response to reports of persistent unfair trading practices,<sup>61</sup> 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. It also proposed effective enforcement provisions, such as sanctions imposed by national regulatory authorities.<sup>62</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 agreement between the parties.<sup>63</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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57 The Supply Chain Initiative 2018, *About the Initiative*, <http://www.supplychaininitiative.eu/about-initiative>

58 Ibid

59 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)

60 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)

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

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

63 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 Good Regulations cover similar matters as the Grocery Code in Australia, including payments by suppliers and variations to grocery.<sup>64</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>65</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>66</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>67</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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64 *Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016* (Ireland)

65 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/>

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

67 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

### 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 powerful retailers and their suppliers (including farmers). Major retailers hold the key to accessing national markets and can engage in a range of bullying 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>68</sup>.

While the Review recognises the perceived inequity in terms of a voluntary and mandatory application of the law, we do not believe 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

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

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 – Code Adjudicator comparison

	<b>Code Compliance Manager (CCM)</b>	<b>Kennett Model</b>	<b>Code Adjudicator</b>
<i>Position</i>	Independent of the signatory's buying team.	Independent of Coles.	Independent from the retailer. Employed for a fixed term (i.e. cannot be terminated for making an undesirable determination).
<i>Accessibility</i>	Contact details must be communicated to suppliers.	Contact details must be communicated to suppliers.	Contact details must be communicated to suppliers.
<i>Information gathering powers</i>	Able to obtain any information needed to investigate disputes.	Able to obtain any information needed to investigate disputes.	Able to obtain any information needed to investigate disputes.
<i>Dispute Resolution</i>	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 <u>must be</u> taken by Coles to remedy the situation.	Must consider evidence brought forward by the supplier and investigate (only where required) to make a determination about what (if any) action <u>must be</u> taken by the signatory.  This includes considerations of fair dealings.
<i>Outcomes</i>	None specified	Determinations are binding on Coles and may include: <ul style="list-style-type: none"> <li>• Financial compensation</li> <li>• Changes to contracts</li> </ul>	Determinations are binding on the signatory and may include: <ul style="list-style-type: none"> <li>• Financial compensation</li> <li>• Changes to contracts</li> <li>• To take any necessary action to rectify the misconduct (eg. place orders)</li> </ul>
<i>Timeframes</i>	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.	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.

	<b>Code Compliance Manager (CCM)</b>	<b>Kennett Model</b>	<b>Code Adjudicator</b>
<i>Confidentiality</i>		<p>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.</p> <p>The complainant must be given the option to withdraw its complaint.</p>	<p>Must maintain complete confidentiality of complainant and details of the complaint from the signatory, in the first instance.</p> <p>Disclosure of information is allowed only with the complainant's consent and it is where necessary for investigation or determination purposes.</p> <p>Prior to disclosure of information to the signatory, the complainant must be given the option to withdraw its complaint.</p>
<i>Reporting requirements</i>	<p>Prepare annual report on activities, including summary information about:</p> <ul style="list-style-type: none"> <li>Cases investigated and resolved by the signatory.</li> </ul>		<p>Prepare annual report on activities, including summary information about:</p> <ul style="list-style-type: none"> <li>Number of all complaints received</li> <li>Nature of complaints</li> <li>Resolution action taken</li> </ul> <p>Conduct annual survey of supplier complaints about the signatory's compliance with the Grocery Code, based on a set of common principles.</p>
<i>Transparency requirements</i>			<p>Must publish:</p> <ul style="list-style-type: none"> <li>Annual report</li> <li>Outcomes of survey</li> </ul>
<i>Oversight and enforcement</i>	<p>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.</p> <p>ACCC to review CCMs' reports during audit activity.</p>	Bound by contract with Coles.	<p>Bound by contract with signatory.</p> <p>ACCC to review Adjudicators' reports on an annual basis.</p> <p>Suppliers should be invited to make confidential submissions to the ACCC on the annual reports.</p> <p>Non-performance of an Adjudicator is a breach of the Grocery Code, therefore ACCC can use powers under the CCA to force removal and/or reappointment of Adjudicator.</p>