

## **EXPLANATORY STATEMENT**

**Issued by authority of the Assistant Minister for Competition, Charities and Treasury**

*Competition and Consumer Act 2010*

*Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024*

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part IVB of the Act provides for industry codes, which regulate conduct among participants in an industry. Specifically, section 51AE of the Act provides that the regulations may prescribe an industry code under the Act and declare the industry code to be a mandatory or voluntary industry code.

The purpose of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Regulations) is to introduce a mandatory industry code to address an imbalance in bargaining power between large grocery retailers or wholesalers and their suppliers, to support a competitive and sustainable food and grocery sector.

The Regulations replace the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the voluntary Food and Grocery Code) and implement the Government's response to various statutory reviews of the voluntary Food and Grocery Code.

The voluntary Food and Grocery Code was originally developed by industry and aims to improve standards of business conduct by retailers and wholesalers (supermarkets) towards suppliers in the food and grocery industry. The voluntary Food and Grocery Code sets minimum obligations and standards for behaviour of supermarkets towards their suppliers, including an obligation to act in good faith.

The voluntary Food and Grocery Code also provides avenues for dispute resolution: a supplier complaints process, mediation and arbitration. A supermarket must participate in these processes at the request of a supplier and would be bound by a determination made to resolve a complaint or arbitration.

However, due to the voluntary nature of this Code, it only applies to supermarkets that sign up to it, and there are no civil penalties to penalise non-compliance. There are four signatories to the voluntary Food and Grocery Code: ALDI, Coles, Metcash and Woolworths.

The voluntary Food and Grocery Code will sunset on 1 April 2025.

Several statutory reviews have considered the operation of the voluntary Food and Grocery Code, most recently the Independent Review of the Food and Grocery Code (the Review) in 2024. Broadly, the Review considered the voluntary Food and Grocery Code was not effective in achieving its objectives due to its voluntary application, the absence of civil

penalties which are present in other industry codes, and insufficient protections and dispute resolution mechanisms for suppliers. The final report of the Review, released 24 June 2024, made 11 recommendations to improve the Code.

On 24 June 2024, the Government agreed to implement all recommendations of the Review.

The mandatory Food and Grocery Code introduced by the Regulations replaces the voluntary Food and Grocery Code and implements the recommendations of Review. It applies to supermarkets with annual Australian revenue exceeding \$5 billion and has strong civil penalty and dispute resolution provisions to improve accountability and address suppliers' fear of retribution for exercising their rights under the Code.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on 1 April 2025.

The Regulations are subject to disallowance, and will sunset on 1 April 2035.

Details of the Regulations are set out in Attachment A.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-07551) and agreed that the Review, supplemented by further analysis to quantify the net impact, has been certified as a process equivalent to an Impact Analysis. The certification and analysis is available here: <https://oia.pmc.gov.au/published-impact-analyses-and-reports/independent-review-food-and-grocery-code-conduct>.

The measure is estimated to have a low impact on compliance costs.

**Details of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024***

**Part 1 – Preliminary**

Part 1 sets out machinery provisions, including the commencement provision, authorising legislation provision and definitions relevant to the regulations.

**Division 1 – Preliminary**

Section 1 – Name

This section provides that the name of the regulations is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Regulations).

Section 2 – Commencement

The Regulations (other than Part 2 of Schedule 2) commenced on 1 April 2025.

Part 2 of Schedule 2 to the Regulations commence immediately after the commencement of the rest of the Regulations or at the same time as Schedule [TBC] of the *Treasury Laws Amendment (Fairer for Families and Farmers) Act 2024* commences (whichever occurs later). However, Part 2 of Schedule 2 does not commence at all if that Act does not occur.

Section 3 – Authority

The Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Schedules

This section clarifies that legislation that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule has effect according to its terms.

Section 5 – Simplified outline

The simplified outline provides a succinct overview of the Regulations to assist readers. However, readers should rely on substantive provisions as the outline is not intended to be comprehensive.

**Division 2 – Definitions**

General definitions

Section 6 defines terms used in the Regulations, including updated definitions from the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2015* (the voluntary Food and Grocery Code). Other relevant terms are defined in the Act.

In the Regulations:

- *Act* means the *Competition and Consumer Act 2010*.

- **ADR practitioner** means a mediator or arbitrator.
- **ADR process** means mediation or arbitration.
- **buying team** means the employees of a large grocery business whose role includes direct involvement in buying grocery products or immediate management responsibility for an employee whose role includes direct involvement in buying grocery products.
- **category manager** means an employee of a large grocery business who is responsible for a category of grocery products at the large grocery business. For example, a category manager may be responsible for the supply and financial performance of dairy products.

A category of grocery products is broader than a group of grocery products. For example, milk is a group within the category of dairy products.

- **Code** means the industry code set out in Part 2 of the Regulations. A reference to the 'Code' in this Explanatory Statement is a reference to Part 2 of the Regulations.
- **Code Mediator** means a Code Mediator appointed by a large grocery business in accordance with the Code.
- **Code Supervisor** means the Code Supervisor appointed under the Code.
- **evidential burden**, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
- **fresh produce** means fresh fruit, vegetables and mushrooms. This definition aligns with the meaning of fresh produce as a category of groceries defined in subsection 5(1) of New Zealand's *Grocery Industry Competition Act 2023*.
- **grocery product** includes the main categories of perishable and non-perishable goods sold by grocery retailers and wholesalers, but does not include food or non-alcoholic drinks that are sold for in-store consumption, and alcoholic drinks.

The definition includes food, such as fresh produce, meat, seafood, eggs, bakery products, dairy products, pantry goods and packaged food (including chilled and frozen food), and non-alcoholic drinks. It also includes household goods (including electrical appliances, kitchenware, and cleaning products), personal care products (including toiletries, cosmetics, first aid and non-prescription pharmaceutical products), and stationery products (such as greeting cards), magazines and newspapers. Other items typically sold by supermarkets are also covered, including tobacco, pet related products, plants, clothing and toys.

This list is not exhaustive and other products which would fall into the ordinary meaning of a grocery product would be captured by this definition.

The definition has been updated to reflect modern categories of grocery products in Australia and is modelled in part on the definition of 'groceries' in subsection 5(1) of New Zealand's *Grocery Industry Competition Act 2023*.

- **grocery supply agreement** means any agreement between a large grocery business and a supplier that relates to the supply of grocery products to or for the purposes of a supermarket business (whether or not this agreement is the principal agreement between them relating to the supply of grocery products) and includes any document comprising the agreement or made, from time to time, under the agreement.

Under the voluntary Food and Grocery Code, this definition excluded agreements between a large grocery business and a supplier that is also a wholesaler. The definition has been updated to include agreements between a large grocery business and any supplier (whether or not that supplier is a wholesaler, but note the definition of 'supplier' excludes large wholesalers). This gives effect to the Review's recommendation that the Code should apply to regulate the conduct of large grocery businesses towards all of their suppliers.

A grocery supply agreement may cover a one-off supply of grocery products, a limited term arrangement or an ongoing arrangement.

- **incentive scheme** means any arrangement by a large grocery business to reward an employee for meeting targets set by the large grocery business in relation to the supply or financial performance of a grocery product, or a category or group of grocery products.
- **large grocery business** means a large retailer or a large wholesaler. Large grocery businesses are required to comply with the relevant obligations under the Code and may be subject to civil penalties under the Code for non-compliance.
- **own brand product** (also known as a private label product) means a grocery product produced, processed or manufactured by or for a large grocery business, or that carries a name or trade mark owned by, or licensed to, a large grocery business.
- **promotion** means any offer for sale at an introductory or reduced price, or involving non-standard sales activity, agreed between a large grocery business and a supplier that is intended to last only for a specified period. It may be accompanied by some other benefit to a consumer.
- **retailer** means a corporation to the extent that it carries on a supermarket business in Australia, and to the extent that it carries on a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia.
- **senior buyer**, in relation to a supplier, means the employee within a buying team of a large grocery business who manages other employees who buy from the supplier. This definition is about the employee's function, rather than their role title.
- **shrinkage** means a loss of grocery products that occurs after a large grocery business has taken possession of them, and arises from theft, other loss or accounting error.
- **supermarket business** means a business if the main purpose of the business is the retail sale of grocery products to consumers, and a substantial proportion of those grocery products is food which is not for in-store consumption.

This definition helps to distinguish large grocery businesses which have obligations under the Code from other retailers or wholesalers which may sell some grocery products but which are not subject to the Code (such as a chemist, newsagent or pet store).

- **wastage** means grocery products that are unfit for sale.
- **wholesaler** means a corporation to the extent that it carries on a business of purchasing grocery products from suppliers, for the purpose of resale to a person carrying on a supermarket business in Australia.

The definitions of **acceptance period**, **allowable contrary provision**, **delists**, **evidential burden**, **large retailer**, **large wholesaler**, **original complaint**, **proposed remedy**, **retribution**, **review request** and **supplier** are explained at relevant points in the Explanatory Statement.

#### Meaning of supplier

Section 7 provides that a **supplier** is a person carrying on (or actively seeking to carry on) a business of supplying grocery products for retail sale to consumers by another person, whether or not that other person is the person being supplied.

This definition is updated to clarify that a person who is a wholesaler may be a supplier. As intermediaries in the grocery supply chain, wholesalers may perform dual roles; first, purchasing grocery products from suppliers, and second, on-selling (supplying) these grocery products to retailers. For example, a wholesaler is a supplier in circumstances where a wholesaler enters into a grocery supply agreement with a retailer for the supply of grocery products to the retailer. However, a wholesaler is only a supplier when they are acting in the capacity of a supplier.

A large wholesaler may not be a supplier, even if it otherwise meets the definition of supplier. This approach is taken because large wholesalers have sufficient market power in the food and grocery industry, so do not require the protections of the Code that smaller suppliers do.

#### Meaning of retribution

Several new provisions in the Code relate to protecting suppliers from retribution. These provisions implement recommendation 3 of the Review.

Section 8 sets out a list of actions by a large grocery business against a supplier that may constitute retribution, as recommended by the Review. It is not intended to be an exhaustive list.

**Retribution** includes, but is not limited to, any of the following actions:

- delisting a grocery product of the supplier;
- requiring the supplier to make excessive contributions towards promotional or marketing costs for the supplier's grocery product;
- rejecting fresh produce from the supplier;

- changing the location of the supplier's grocery product in store or online to the detriment of the supplier;
- delaying restocking the supplier's grocery product in store or online;
- varying, terminating, or electing not to renew an agreement with the supplier for the supply of an own label product;
- reducing the volume of stock ordered from the supplier;
- varying, terminating, or electing not to renew a grocery supply agreement with the supplier.

However, there will be cases where such an action will **not** amount to retribution. This is the case if the large grocery business:

- had genuine commercial reasons for taking that action;
- did not act because the supplier exercised, or indicated that it may exercise, a right under the Code against the large grocery business; and
- did not act because the supplier was or may have been able to exercise a right under the Code against the large grocery business.

An action taken to pre-empt or punish a supplier exercising its rights, which may have implications for the large grocery business, is not a genuine commercial reason.

Exercising a right under the Code would include, but is not limited to, a supplier raising a concern, making a complaint, initiating mediation or arbitration, or exercising a right to enforce an obligation of the large grocery business under a grocery supply agreement (in accordance with that agreement).

The large grocery business bears the evidential burden of proving an action is not retribution. This refers to the burden of adducing or pointing to evidence that suggest a reasonable possibility that the action is not retribution.

Consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, placing this evidential burden on the large grocery business is appropriate as the matters relevant to proving that an action is not retribution are peculiarly within its knowledge, and are not readily available to other parties or the prosecution.

#### Meaning of large retailer and large wholesaler

Section 9 provides that a retailer or wholesaler is a **large retailer** or **large wholesaler** if the total covered revenue of the retailer or wholesaler, and each related body corporate of the retailer or wholesaler, as set out in those entities' annual accounts, exceeds \$5 billion for the previous financial year. Annual accounts are those prepared in accordance with generally accepted accounting principles. Section 4A of the Act sets out when a body corporate is deemed to be related to another body corporate.

Revenue is considered covered revenue if it relates to the carrying on of a supermarket business in Australia, or a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia. Consequently, only the revenue made in carrying on a business relevant to the corporation's capacity as a retailer or wholesaler is relevant in determining whether the corporation is a large retailer or large wholesaler.

This implements recommendation 2 of the Review, to ensure the Code applies to retailers and wholesalers above the \$5 billion revenue threshold.

Large retailers and large wholesales are *large grocery businesses*, which have obligations, and may be subject to civil penalties, under the Code. The Code applies only to large grocery businesses to address the market power imbalance between those businesses and suppliers (noting that suppliers exclude large wholesalers). Smaller retailers and wholesalers are excluded because they do not hold the same market power and would be disproportionately burdened by compliance costs if the Code applied to them.

### **Division 3 – Mandatory industry code and review**

Section 10 prescribes the Code as an industry code for the purposes of Part IVB of the Act and declares the Code to be a mandatory industry code.

This implements recommendation 1 of the Review to remake the voluntary Food and Grocery Code as a mandatory industry code. The Review found that the effectiveness of the voluntary Food and Grocery Code was undermined by the possibility of signatories withdrawing their agreement to be bound at any time. In addition, the Review found that only a mandatory industry code could address the heavy imbalance in market power between large grocery businesses, such as supermarkets, and smaller suppliers in Australia's highly concentrated food and grocery industry.

Section 11 requires the Minister to cause a review of the Code to start within five years of the commencement of the Code. This review must assess the impact of the Code in improving commercial relations between retailers, wholesalers and suppliers.

The Minister must also cause a written report of the review to be prepared and tabled in Parliament.

### **Part 2 – Food and grocery industry code**

Part 2 sets out the Code, and contains six Divisions:

- Division 1 concerning preliminary matters such as the Code's application;
- Division 2 concerning the good faith obligations of large grocery businesses;
- Division 3 concerning the form, content and variation of grocery supply agreements;
- Division 4 concerning obligations and standards relating to the conduct of large grocery businesses towards suppliers;
- Division 5 concerning complaint and dispute resolution procedures under the Code; and



- Division 6 concerning compliance with the Code by a large grocery business, including training and record-keeping obligations.

## **Division 1 – Preliminary**

### Food and Grocery Code of Conduct

Section 12 provides that Part 2 of the Regulations sets out an industry code that relates to the industry of food and grocery products.

Section 13 sets out the purposes of the Code, which are to:

- regulate standards of business conduct in the grocery supply chain, and build and sustain trust and cooperation throughout that chain;
- ensure transparency and certainty in commercial transactions in the grocery supply chain, and minimise disputes arising from a lack of certainty around 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 large grocery businesses and suppliers;
- promote and support good faith in commercial dealings between large grocery businesses and suppliers;
- encourage suppliers to exercise their rights under this Code, including by making reasonable requests of, referring legitimate complaints against, and seeking resolution of disputes with, large grocery businesses; and
- protect suppliers from retribution from large grocery businesses.

The purposes of the Code have been updated to implement the Review’s recommendation that it should address protecting suppliers from retribution, but otherwise remain substantively unchanged from the voluntary Food and Grocery Code.

### Interaction with other industry codes

Section 14 sets out how the Code interacts with other industry codes. The Code does not apply to the extent that it conflicts with the industry code set out in Chapter 2 of the *Competition and Consumer (Industry Code—Franchising) Regulations 2024* (the Franchising Code), Schedule 1 to the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (the Horticulture Code), and Division 2 of Part 2 of the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (the Dairy Code).

This means that those three Codes would apply in the limited circumstances where there is conflict with this Code, and otherwise all Codes continue to apply on their own terms. For example, if a person is a large grocery business and a trader as defined by the Horticulture Code, then the Horticulture Code applies to the extent they are a trader and undertaking activities regulated by the Horticulture Code, and this Code (the Food and Grocery Code) applies to the extent they are a large grocery business undertaking activities regulated by this Code.

Those three Codes regulate specific industries that may overlap with the food and grocery industry, so in the event of any conflict with the Code, it is appropriate for those industry codes to apply.

### Civil penalty provisions of the Code

The Review found the voluntary Food and Grocery Code's effectiveness to be limited by the absence of financial penalties for contraventions of the Code. Introducing penalties is necessary to deter non-compliance by large grocery businesses, and provide more options for enforcement, including the availability of infringement notices.

Section 51AE of the Act sets out the maximum amounts of civil penalties and infringement notices which can be imposed for breaches of an industry code, including this Code.

Section 15 clarifies that where a provision of the Code (whether a section or subsection) includes a reference to 'civil penalty' in the foot of the provision, it is a civil penalty provision for the purposes of Part IVB and section 76 of the Act.

Civil penalties are specified within relevant provisions of the Code. Each penalty reflects the potential seriousness of a contravention of the relevant provision, with the ultimate aim to deter contravention.

Subject to enactment of primary legislation, this Code will have two tiers of civil penalties, according to the importance of the obligation and gravity of the consequences of contravention. This is a proportionate approach similar to the Franchising Code, as recommended by the Review.

Part 2 in Schedule 1 to the Regulations contains amending items which establish the two-tier regime, increase the maximum amounts of civil penalties, and provide separate penalties for bodies corporate and individuals using a ratio that is consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Further detail is provided below, in the final section describing *Application provisions and consequential amendments*.

### Australian Small Business and Family Enterprise Ombudsman

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) plays a role in dispute resolution under various industry codes made under Part IVB of the Act.

Section 16 provides that the functions of the ASBFEO include keeping lists of ADR practitioners who can provide services of mediation or arbitration for the purposes of the Code, including for a grocery supply agreement.

### **Division 2 – Good faith**

Section 17 sets out an overarching obligation that a large grocery business must always deal with suppliers lawfully and in good faith. This obligation is aimed at building trust and improving standards of conduct, and extends to all aspects of the relationship between large grocery businesses and suppliers. A large grocery business is prohibited from entering into a grocery supply agreement that purports to limit or exclude this obligation.

The requirement for a large grocery business to deal with suppliers in good faith *within meaning of the unwritten law as in force from time to time* links the concept to common law jurisprudence as it evolves over time. This approach ensures the meaning of good faith remains up to date with expectations of contemporary business practices and conduct.

Without limiting the scope of the obligation or relevant considerations, in determining whether a large grocery business has acted in good faith, account may be taken of whether the supplier acted in good faith towards the large grocery business, and whether the large grocery business:

- acted honestly and cooperated to achieve the purposes of the relevant grocery supply agreement;
- did not act arbitrarily, capriciously, unreasonably, recklessly, with ulterior motives or in a way that constitutes retribution against the supplier;
- conducted the trading relationship with the supplier without duress and with recognition of the need for certainty regarding the risks and costs of trading (particularly in relation to production, delivery and payment);
- observed confidentiality requirements relating to information disclosed or obtained relating to complaint or dispute with the supplier.

This provision has been updated from the voluntary Food and Grocery Code to include retribution in the consideration of whether a large grocery business has acted in good faith, as recommended by the Review.

### **Division 3 – Grocery supply agreements**

Division 3 of the Code regulates general matters related to grocery supply agreements. Specifically, it includes requirements in relation to the form, content and variations of these agreements. The purpose of this Division is to improve certainty and transparency for businesses in the food and grocery industry.

The Division has been updated from the voluntary Food and Grocery Code to ensure grocery supply agreements cover dispute resolution, to provide additional requirements in relation to agreements that relate to fresh produce and in relation to exceptions to certain protections of the Code. These updates are intended to implement parts of recommendations 5, 7 and 8 of the Review.

#### **Grocery supply agreement must be in writing**

Section 18 provides that a large grocery business must not enter into a grocery supply agreement unless it is in writing. This obligation should be read in conjunction with the recording keeping obligations set out later in the Code, which require large grocery businesses to keep the original (or a copy) of each grocery supply agreement to which they are a party. These obligations extend to any document comprising the agreement and any document made from time to time under the agreement that forms part of the agreement.

Written agreements reduce the inherent risk associated with oral agreements, which in turn reduces the possibility of disputes and assists with efficient dispute resolution.

## Matters to be covered by the agreement

Section 19 prescribes certain matters that must be included in a grocery supply agreement. The section prohibits a large grocery business from entering into a grocery supply agreement unless the agreement covers these matters. The Code does not prescribe how these matters are to be covered, to maintain flexibility for negotiation between the commercial parties to determine the details.

### *General requirements*

A grocery supply agreement relating to the supply of grocery products must specify any requirements for the delivery of the grocery products, any circumstances in which the grocery products may be rejected (other than fresh produce, for which there are specific requirements in relation to when such products may be rejected), the period within which a supplier must be paid for the grocery products, the circumstances in which any payment (or part of payment) may be withheld or delayed, the term of the agreement (if intended to operate for a limited time only), and the circumstances in which the agreement may be terminated (if termination is provided for under the agreement).

Further, the agreement must specify, in clear terms, any quantity or quality requirements for the grocery products. Despite this, additional or different quantity or quality requirements relating to the grocery products may be agreed to, in clear written terms, by the parties to the agreement.

### *Dispute resolution*

A grocery supply agreement is required to provide that the large grocery business must attend mediation of a dispute with the supplier, if a mediator is appointed for that mediation, under Subdivision C of Division 5 of the Code (which relates to ADR processes). Under that Subdivision, a mediator will be appointed if a party to the agreement notifies the other party that it wishes to have a dispute resolved by mediation. Therefore, mediation to resolve a dispute is only mandatory under the agreement if one party requests it.

The agreement may also provide that the parties may attend arbitration of a dispute, under Subdivision C of Division 5. This is included to clarify that the parties may agree to participate other forms of alternative dispute resolution processes, other than mediation. For example, the agreement may require a party to participate in arbitration, under that Subdivision, if mediation is unsuccessful and one party requests it.

### *Requirements relating to reasonable exceptions to Code protections*

The Code protects suppliers from certain conduct of a large grocery business. However, certain protections may be displaced by a provision of a grocery supply agreement, where reasonable and the relevant requirements of the Code for an exception to the protection are satisfied. In these cases, the agreement enlivens an exception to a protection of the Code and the protection does not apply. This approach is taken so the parties are not restrained by the Code from agreeing on the terms of an agreement where reasonable in the circumstances.

This section lists protective provisions which may be displaced by a provision of a grocery supply agreement and provides additional requirements for the agreement if parties agree to displace one of those listed protections of the Code.

A large grocery business is prohibited from entering into a grocery supply agreement that includes a provision contrary to a protective provision of the Code, unless the agreement identifies the contrary provision of the agreement and the protective provision of the Code, and states that the contrary provision is an exception to, and removes the protection of, the protective provision. An explanation as to why the contrary provision is reasonable must also be included in the agreement.

A provision of a grocery supply agreement that is contrary to a protective provision of the Code listed in this section is an ***allowable contrary provision*** if it meets these requirements.

These requirements protect suppliers by ensuring they understand when and why a large grocery business wishes to displace a protection of the Code through the grocery supply agreement. It implements recommendation 7 of the Review to increase the transparency of exceptions to the Code provided for in agreements, including by explaining in the agreement why an exception is reasonable.

Section 74 provides that these requirements will only apply to grocery supply agreements entered into on or after the day the Code commences. This approach is designed to improve standards and conduct over time, without unduly burdening industry by requiring existing agreements to be renegotiated and rewritten.

#### *Additional requirements for fresh produce*

The Review noted that, due to the perishability and volatility of fresh produce, suppliers of fresh produce are particularly vulnerable to the risk of uncertainty in relation to shifts in price and requested volume of that fresh produce by large grocery businesses.

Consequently, the Code has been updated with additional requirements for grocery supply agreements that relate to the supply for fresh produce, to provide those suppliers with more certainty.

A grocery supply agreement that relates to the supply of fresh produce must also specify the price of the fresh produce, or the method or formula to be used to determine that price. This does not prevent the agreement from specifying a mechanism to negotiate on a regular basis the price of fresh produce supplied under the agreement, as long as the mechanism is reasonable. This ensures that grocery supply agreements can remain flexible in response to shifts in supply and demand of fresh produce.

A grocery supply agreement is not required to specify the forecasted amount of fresh produce to be supplied under the agreement. However, a large grocery business must exercise due care in forecasting the amount of fresh produce that is to be supplied under the agreement.

#### Variations of the agreement

The Code prohibits unilateral or retrospective variations of a grocery supply agreement. However, the Code provides for an exception to this prohibition with respect to unilateral

variations, whereby a large grocery business may unilaterally vary the agreement in limited circumstances.

A varied agreement would still need to meet the requirements of a grocery agreement set by sections 18 and 19, namely that it be in writing and cover certain matters.

#### *Unilateral variations*

Section 20 prohibits a large grocery business from varying a grocery supply agreement without the written consent of the relevant supplier, except in certain cases. This prohibition is intended to increase transparency and certainty for suppliers in relation to their rights and obligations under an agreement, while maintaining flexibility for the agreement to change over time.

#### *Exception for unilateral variations*

A large grocery business may unilaterally vary a grocery supply agreement if the agreement includes a provision that expressly provides for the variation, sets out clearly the changed circumstances in which the variation can be made and, if the variation involves a quantitative adjustment to the terms of supply, sets out the basis or methodology for calculating the adjustment. That provision must be an allowable contrary provision if the agreement is entered into on or after the Code's commencement day. Further, the variation must be in accordance with the agreement and reasonable in the circumstances. Without limiting what may be considered in determining what is reasonable, regard must be had to whether the variation is for a purpose that benefits both the supplier and large grocery business, and to any benefits, costs and risks for the parties to the agreement. These considerations provide a balanced approach where the interests of both parties are relevant. However, a variation that is detrimental to the supplier may not be considered reasonable unless it can be justified on balance of the circumstances.

Before making the variation, the large grocery business must give the supplier written reasonable notice of the variation, the terms of the variation and the reasons for making the variation.

As recommended by the Review, the large grocery business must prove, on the balance of probabilities, the matters set out in this section that permit the variation, since the default position is that a variation of this kind is prohibited. However, in relation to determining whether a variation was reasonable in the circumstances, a person that alleges the variation causes detriment to a supplier has the onus of establishing that matter. This is because that person (rather than the large grocery business) would be uniquely positioned to know and have evidence of the detriment suffered.

#### *Retrospective variations*

Section 21 prevents a large grocery business from varying a grocery supply agreement with retrospective effect, even if the agreement allows for variation of the agreement.

### **Division 4 – Conduct generally**

Division 4 of the Code sets standards of conduct for a large grocery business towards a supplier in relation to payments to and from suppliers, retribution, and other aspects of their commercial dealings or relationship. The conduct requirements seek to address the

potential power imbalance between large grocery businesses and suppliers, and recognise suppliers' need for certainty in order to plan appropriately, invest, innovate and expand.

The Division includes new provisions to address incentive schemes and retribution, as recommended by the Review. Otherwise, the general obligations in each provision remain largely unchanged from the equivalent provisions of the voluntary Food and Grocery Code.

The Code has been updated to ensure the Division applies to protect all suppliers, including suppliers who are also wholesalers (to the extent that they are acting as a supplier).

### ***Exceptions to protections***

The Code provides exceptions to certain protections in Division 4, which can be enlivened where reasonable in the circumstances and parties satisfy other requirements to rely on the exception.

For instance, certain protective provisions allow parties to agree to an exception in their grocery supply agreement. In this case, the parties must satisfy any requirements to enliven the exception as well as the requirements of Division 3 for their agreement.

The Code has been updated to require that certain matters be considered in determining whether relying on an exception is reasonable, to ensure that whether the purpose of the exception benefits the supplier and the likely and actual impacts of the removal on the supplier are taken into account, as recommended by the Review. This approach maintains protection for the supplier but provides flexibility for parties to agree on terms of a grocery supply agreement which suit their circumstances.

A large grocery business that wishes to rely on an exception must, in general, prove on the balance of probabilities the exception applies. Placing this burden on the large grocery business is appropriate as it is the business that seeks to displace a default protection of the Code, and these matters would be peculiarly within the knowledge of the large grocery business. However, the large grocery business is not required to prove whether removal of a protection causes or caused detriment to a supplier, as such matters are not peculiarly within its knowledge. Similarly, a large grocery business does not have the onus of proving an exception applies with respect to the protections relating to funded promotions, accepting fresh produce, and changes to supply chain procedures. This provides a balance approach which is consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

### ***Subdivision A – Paying suppliers***

Section 22 requires a large grocery business to pay a supplier for all grocery products delivered and accepted in accordance with a grocery supply agreement, within the time frame set out in the agreement and within a reasonable time after receiving the supplier's invoice for the products. For example, if an invoice nominates a date for payment, it would generally be reasonable to pay the supplier by that date.

The large grocery business must not set off any amount against a supplier's invoice or remittance unless the supplier has provided written consent to the set-off of the amount.

The large grocery business is also prohibited from requiring a supplier to consent to set off such an amount.

Set-off refers to deducting an amount from what is payable to the supplier under an invoice or remittance. For example, if the large grocery business requires payment from the supplier for wastage, it must not deduct the amount of that payment against what the large grocery business owes the supplier under the supplier's invoice or remittance, unless the supplier has consented to the deduction.

However, the large grocery business may set-off an amount against a supplier's invoice or remittance, if the grocery supply agreement includes a provision that provides for the amount to be set-off and the set-off is reasonable in the circumstances. Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risk for the parties to the agreement and whether the set-off is for a purpose that benefits the supplier and the large grocery business. The provision of the agreement must be an allowable contrary provision if the agreement is entered into on or after the Code commences.

### ***Subdivision B – Requiring payments from suppliers***

This Subdivision protects suppliers from large grocery businesses using their market power to require certain payments from suppliers, except where such payments are reasonable in the circumstances. Protections apply in relation to payments for:

- shrinkage;
- wastage;
- stocking or listing grocery products;
- better positioning of groceries;
- funding the ordinary business activities of the large grocery business; and
- promotions.

#### Shrinkage and wastage

The Code prohibits a large grocery business from requiring payment from a supplier for shrinkage and wastage, where the groceries have been supplied to the large grocery business and therefore the associated risks and costs in relation to shrinkage and wastage should also be transferred to the large grocery business.

#### *Shrinkage*

Section 23 prohibits a large grocery business from entering into a grocery supply agreement under which a supplier is required to make payments as compensation for shrinkage, or otherwise require such payments. Shrinkage is defined to mean a loss of grocery products that occurs after a large grocery business has taken possession of them and arises from theft, other loss or accounting error.



There is no exception to this restriction, which is subject to a civil penalty. However, this does not prevent the large grocery business from raising, discussing or agreeing with a supplier's proposals and procedures to mitigate the risk or occurrence of shrinkage.

### *Wastage*

Section 24 prohibits a large grocery business from directly or indirectly requiring a supplier to make any payment to cover any wastage of groceries incurred at the premises of the large grocery business, a contractor or agent of the large grocery business, or any other entity that is a large grocery business. Wastage refers to the state of groceries that are unfit for sale, for example, where fresh produce has spoiled or packaged products are beyond their use by date.

This prohibition is a civil penalty provision. However, there is an exception to this prohibition if the grocery supply agreement includes a provision that clearly articulates the circumstances (which could include negligence) in which the supplier will be required to make payments to cover wastage of the supplier's grocery products incurred at the aforementioned premises, and the basis for the payments. That provision must be an allowable contrary provision (defined above, in Division 3) if the agreement is entered into on or after the Code commences. In that case, a large grocery business may require such a payment if the wastage occurs in the circumstances set out in the agreement, the payment is made in accordance with the agreement and is reasonable in the circumstances, and the large grocery business takes reasonable steps to mitigate those costs. The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception.

Without limiting what may be considered in determining whether the payment is reasonable, regard must be had to:

- the benefits costs and risks for the supplier and the large grocery business, including the costs to the large grocery business incurred by the wastage; and
- whether the payment is for a purpose that benefits both the supplier and the large grocery business. An example of this is where the supplier has grocery products with a short use-by date, which the supplier would ordinarily not be able to sell, and which a large grocery business is willing to buy if some of the risk is shared with respect to costs of wastage.

However, if the supplier seeks to negotiate to vary the agreement in relation to payments of this kind, the large grocery business must not (in the course of negotiations or as a precondition to enter into the negotiations) seek to negotiate other variations unrelated to these payments. This provision carries a civil penalty, designed to prevent the large grocery business using variations of other terms as a bargaining tool in the negotiations.

### Condition of stocking or listing products

Section 25 prohibits large grocery businesses from requiring payment from a supplier as a condition of stocking or listing grocery products, subject to certain exceptions which the large grocery business must establish apply on the balance of probabilities in order to rely on. This prohibition is a civil penalty provision.

One exception to this prohibition is if the payment is made in relation to a promotion, and is in accordance with requirements in relation to funding promotions set out in section 28.

The other exception is if:

- the grocery supply agreement includes a provision that provides expressly for the payment to be made, and that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences); and
- the payment is made in respect of grocery products that have not been stocked, displayed or listed by the large grocery business during the preceding 365 days in 25 per cent or more of its stores (in the case of retailers) or distribution centres (in the case of wholesalers), and is reasonable in the circumstances.

Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risks for the supplier and the large grocery business, and whether allowing the payment benefits both parties.

The purpose of this exception is to balance the risk a large grocery business may bear in stocking, displaying or listing a product that has not been stocked, displayed or listed for a long period of time in its stores or distribution centres, against the financial burden imposed on a supplier.

#### Shelf space

Section 26 only applies to large retailers. It does not apply to a corporation to the extent that it is a wholesaler because it is not relevant to the type of supermarket business carried on by wholesalers.

The section prohibits a large retailer from requiring a supplier to make any payment to secure better positioning or an increase in allocation of shelf space for a grocery product. This prohibition is a civil penalty provision.

However, this prohibition does not apply if a provision of the grocery supply agreement expressly sets out the particular circumstances in which the payment may be required, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences), and the payment is made in accordance with the agreement and is reasonable in the circumstances. For example, the agreement may provide for a supplier to make a payment in relation to the promotion of the supplier's product (noting that promotions are also subject to other obligations under the Code). The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception to the prohibition.

Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risks for the supplier and the large grocery business, and whether allowing the payment benefits both parties.

#### Ordinary business activities

Section 27 limits the circumstances in which a large grocery business may require payments from suppliers to fund any activity undertaken by the large grocery business in

the ordinary course of carrying on a business as a large grocery business (an ordinary business activity).

Large grocery businesses are prohibited from directly or indirectly requiring a supplier pay any of the costs of any ordinary business activity. Such activities include, but are not limited to, a buyer's visit to the supplier, artwork or packaging design, consumer or market research, the opening or refurbishing of a store or hospitality for the large grocery business' staff.

However, this prohibition does not apply if a provision of the grocery supply agreement expressly provides for the payment, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences), and the payment is made in accordance with the agreement and is reasonable in the circumstances.

Any likely or actual benefits, costs and risks for the supplier and the large grocery business must be considered in determining whether the payment is reasonable, as well as whether the payment is for a purpose that benefits both parties. This does not limit what may be considered.

The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception. Otherwise, a civil penalty may apply for contravention of the prohibition.

#### Promotions

Section 28 sets out the circumstances in which a large grocery business may require payment from a supplier for a promotion. A large grocery business is prohibited from directly or indirectly requiring a supplier to fund any part of the promotion, and may be subject to a civil penalty if it does not comply with this section.

This prohibition does not apply if a provision of the grocery supply agreement expressly provides for the funding, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences) and the funding is reasonable in the circumstances.

Without limiting what may be considered in determining whether the funding is reasonable, regard must be had to any likely or actual benefits, costs and risks for the supplier and the large grocery business for the promotion and whether the funding is for a purpose that benefits both parties.

The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception to the prohibition.

#### ***Subdivision C – Other conduct***

Subdivision C covers conduct by a large grocery business unrelated to requiring payments from suppliers. It relates to:

- incentive schemes;
- retribution, including policies and procedures to protect against retribution;

- circumstances in which large grocery businesses can delist certain products;
- funded promotions;
- fresh produce standards and quality specifications, rejection of fresh produce by large grocery businesses and fresh produce labelling, packaging and preparation requirements;
- changing supply chain procedures;
- threats of business disruption or termination of agreements;
- obligations with respect to the intellectual property rights of suppliers, including in relation to transferring those intellectual property rights;
- confidential information of suppliers;
- product ranging and shelf space principles;
- price increases, including providing information about price increases to suppliers and the Code Mediator;
- freedom of association of suppliers; and
- providing contact details to suppliers.

Many of these provisions were included in the voluntary Food and Grocery Code in identical or similar forms. However, this Subdivision also introduces new provisions that are intended to implement the recommendation of the Review to address suppliers' fear of retribution. These provisions complement the updates to the purposes of the Code and large grocery business' overarching obligation to act in good faith, which now also address retribution.

#### Incentive schemes

An incentive scheme refers to any arrangement by a large grocery business to reward an employee (or group of employees) of that entity for meeting targets set by the business in relation to the supply or financial performance of a grocery product or a category of a grocery product.

Section 29 requires an incentive scheme of a large grocery business that applies to a buying team or category manager (see definitions, above) to be consistent with the purposes of the Code and any obligations the large grocery business under the Code. For example, an incentive scheme must be consistent with the purpose of the Code to protect suppliers from retribution, and the large grocery business' overarching obligation to act in good faith in dealing with suppliers.

An incentive scheme is not consistent with a purpose of, or obligation under, the Code if the scheme requires, or directly or indirectly incentivises, a buying team or category manager to act in a way which is contrary to the purpose or obligations.

This is a new civil penalty provision which implements a recommendation of the Review, which found that incentive schemes may lead to retributory conduct by employees of a large grocery business. For example, a buying team that receives a bonus for achieving a certain target for the volume of supply for a particular grocery product may be incentivised to pressure a supplier to reach that target by using or threatening an action that constitutes retribution.

The intention of this provision is to ensure incentive schemes are designed to operate consistently with the Code, so that a scheme does not lead to a breach of the Code or prevent a supplier exercising a right under the Code. There is no requirement for an incentive scheme to benefit suppliers in the course of commercial negotiations.

### Retribution

The Review found that fear of retribution by a large grocery business was impeding suppliers, particularly small suppliers, from exercising their rights under the Code (including under grocery supply agreements). Various provisions have been introduced or updated throughout the Code to address this issue and provide greater protection to suppliers.

In particular, section 30 prohibits large grocery businesses from engaging in retribution against suppliers. The meaning of retribution, including a non-exhaustive list of actions which constitute retribution, is given in Division 2. This is a new provision, subject to civil penalties.

Section 31 requires a large grocery business to have written policies and procedures to review the commercial decisions made by a buying team or category manager in relation to a supplier that exercised (or indicated that it will or may exercise) or was able to exercise (or may have been able to exercise) a right under this Code against the large grocery business. The purpose of the review must be to determine whether any of the actions that were taken constitute retribution against the supplier. This is also a civil penalty provision.

Along with the new provision governing incentive schemes, these provisions aim to change any culture within those businesses that encourages, accepts or otherwise indirectly rewards retributory conduct towards suppliers.

### Delisting products

Section 32 concerns delisting supplier's grocery products. A large grocery business delists a supplier's grocery product if it is removed from the range of grocery products of the large grocery business, or the large grocery business reduces the distribution of the product across the stores or distribution centres of the large grocery business, and that reduction has or is likely to have a material effect on the supplier.

A large grocery business may only delist a supplier's grocery product in accordance with the terms of the grocery supply agreement and for genuine commercial reasons. Contravention of this section may attract a civil penalty.

#### *Genuine commercial reasons*

Genuine commercial reasons for delisting a product include, but are not limited to, failure of the supplier to meet agreed quality or quantity requirements with respect to the product,

failure of the supplier's product to meet the commercial sales or profitability targets as notified to the supplier in (or in accordance with) the agreement, or persistent failure to meet delivery requirements as notified to the supplier from time to time in accordance with the agreement. However, isolated, short-term fluctuations in supply may not constitute a genuine commercial reason for delisting.

Delisting as punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason. Such action would constitute retribution by the large grocery business.

#### *Notice to supplier*

Reasonable written notice must be provided to the supplier of the large grocery business' decision to delist the supplier's grocery product, otherwise a civil penalty may apply.

The notice must provide the genuine commercial reasons for delisting the product, inform the supplier of their right to have the decision reviewed by the senior buyer for the supplier and to refer a complaint to the Code Mediator about the decision, and include the contact details of the Code Mediator.

The notice must be given before delisting the product, unless delisting the product is time sensitive (including for product recalls, withdrawals or safety issues) or there are persistent issues with supply that have resulted in the large grocery business being out of stock or stocked at significantly reduced levels.

#### *Senior buyer role*

In response to a written request from the supplier, the relevant senior buyer is required to promptly:

- provide a statement of the genuine commercial reasons for the delisting, or information (including additional information) relating to the delisting; or
- review any decisions regarding the delisting and provide a written notice of the outcome of that review to the supplier (including the basis of large grocery business' decision).

Failure to do so may attract a civil penalty.

A decision not to extend a grocery supply agreement following the expiry of a fixed term agreement is not a decision to delist a product, but may be considered retribution in certain circumstances.

#### Funded promotions

Section 33 applies if a supplier agrees to make a payment to a large grocery business in support of the promotion of a product, known as a funded promotion. In such a case, the large grocery business may hold the funded promotion only after giving the supplier reasonable written notice.

If the large grocery business orders a grocery product from a supplier in connection with funded promotion at a promotional price, it must ensure that the basis on which the

quantity of the order is calculated is transparent. Further, the large grocery business must not over-order, and if it sells any over-ordered product other than at or below the promotional resale price, it must pay the supplier the difference between the supplier's promotional price and the supplier's full price of the product. These requirements apply whether the promotional price is calculated by way of discount, rebate, credit, allowance or otherwise.

Where an order has been placed with a supplier for a grocery product in connection with a funded promotion, the large grocery business must not, without the supplier's consent, cancel the order or reduce the volume of the order by more than 10 per cent (for an order placed by a retailer) or 20 per cent (for an order placed by a wholesaler). However, this prohibition does not apply if the large grocery business gives the supplier reasonable written notice of the cancellation or reduction, or compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the large grocery business failing to give reasonable notice of the cancellation or reduction.

These requirements are all subject to civil penalties, to deter non-compliance and protect suppliers.

### Fresh produce

Section 34 applies only in relation to fresh produce, rather than grocery products in general. Broadly, it provides that a large grocery business must clearly specify to the supplier any standards or quality specifications in relation to fresh produce, and set out the circumstances in which the large grocery business is permitted to not accept fresh produce delivered in accordance with the grocery supply agreement. These requirements, discussed in more detail below, are subject to civil penalties.

#### *Standards and quality specifications*

A large grocery business is required to specify to the supplier, in clear, unambiguous and concise written terms, any fresh produce standards or quality specifications. These standards or specifications must be reasonable. Without limiting what may be considered in determining reasonableness, regard must be had to whether the same standards or quality specifications apply to all suppliers that supply that kind of produce to the business.

#### *When fresh produce can be rejected*

A large grocery business must accept fresh produce delivered in accordance with a grocery supply agreement unless the produce fails to meet the relevant standards or quality specifications. In such a case, the large grocery business must reject the produce within 24 hours of it being delivered to the large grocery business. However, a large grocery business cannot reject produce that it has already accepted.

Written reasons for the rejection must be provided to the supplier within 48 hours.

#### *Labelling, packaging and preparation requirements*

Communication of any labelling, packaging or preparation requirements for fresh produce must be made to the supplier in clear, unambiguous and concise written terms. Reasonable written notice of any required changes to those requirements or standards (unless the change is required immediately by law) must be provided to the supplier, taking into

consideration known existing stock held by suppliers and any agreement as to stock coverage in the relevant grocery supply agreement.

Any claim by the large grocery business for damaged fresh produce or shortfalls, or any similar claims, must be made within a reasonable time of (and, in any event, no later than 30 days after) delivery of the fresh produce to the large grocery business (or a nominee of the entity).

#### Supply chain procedures

Section 35 prohibits a large grocery business from directly or indirectly requiring a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement with the supplier. Non-compliance may attract a civil penalty.

This prohibition does not apply if reasonable written notice of the change is given to the supplier, or the supplier is compensated by the large grocery business for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the failing to give reasonable notice of the change. However, the supplier may waive a right to compensation.

This section has effect subject to the large grocery business' obligations in relation to unilateral variations of grocery supply agreements set out earlier in the Code. In other words, the exception in this section may only apply if the obligations in relation to unilateral variations are satisfied.

#### Business disruption

Section 36 provides that a large grocery business must not threaten a supplier with business disruption or termination of a grocery supply agreement without reasonable grounds.

#### Intellectual property rights

Section 37 provides that a large grocery business must respect the intellectual property rights held by suppliers in relation to grocery products, including rights for branding, packaging and advertising. For clarity, this provision does not create, confer or extend any intellectual property rights in or of the supplier.

Further, in developing or producing own brand products (see definitions above), the large grocery business must not infringe intellectual property rights held by a supplier in relation to grocery products.

These requirements are civil penalty provisions.

The actions of the supplier in relation to the intellectual property rights of the large grocery business may be taken into account in relation to any dispute relating to a breach of this section, according to the circumstances of the case.

#### *Transferring intellectual property rights*

Section 40 prohibits a large grocery business from directly or indirectly requiring a supplier to transfer or exclusively license any intellectual property right held by the



supplier in relation to a grocery product as a condition or term or supply of an equivalent own brand product of the large grocery business.

This civil penalty provision does not prevent large grocery business from holding intellectual property in one of its own brand products, or holding an exclusive right to sell an own brand product. Further, it does not prevent the large grocery business from making the holding of such a right by the business a condition or term of supply by the supplier of the own brand product, to the extent the product, recipe or formulation of the product was developed or formulated, or is customised, by or for the large grocery business. For example, if a large grocery business designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then the large grocery business may wish to hold intellectual property rights in that product.

#### Confidential information

Section 38 contains civil penalty provisions which apply if a supplier discloses confidential information to a large grocery business in connection with the supply of grocery products.

A large grocery business must not use such information other than for the purpose it was disclosed for, and may only share the information with employees or agents of the business who need to have it in connection with that purpose. The large grocery business must also establish and monitor systems to ensure that its employees and agents comply with this requirement, and create a written summary of such systems.

Confidential information could relate to product development, proposed promotions or pricing. Information that is publicly available, or that came into the lawful possession or knowledge of the large grocery business independently of the supplier does not constitute confidential information.

#### Product ranging, shelf space allocation and range reviews

Section 39 requires a large grocery business to publish or provide to all suppliers with whom it has a grocery supply agreement, its product ranging principles. If the larger grocery business is a retailer, it must also publish or provide its shelf space allocation principles. Further, large grocery businesses must uphold these principles, keep them up to date, and apply them without discrimination (including without discrimination in favour of its own brand products).

If a large grocery business wishes to conduct a product range review, it must provide suppliers who might be affected with written notice of the purpose of the review and the key criteria governing ranging decisions. This notice must be provided within a reasonable time before the review is conducted. Further, after the product range review is conducted, a large grocery business must allow a reasonable period to affected suppliers to discuss the outcomes of the review, including the rationale for the final decisions of the business.

The section does not limit the rights and obligations in relation to delisting grocery products of the supplier, set out earlier in the Code.

Civil penalties may apply for non-compliance with any of these obligations.

#### Price increases

The Code sets out large grocery businesses' obligations with respect to price increases by suppliers, which are civil penalty provisions. It is not intended to affect the rights of a supplier to determine the price of grocery products it supplies.

#### *Obligations with respect to suppliers*

Section 41 governs the conduct of a large grocery business when dealing with suppliers in relation to a proposed price increase, where there is a grocery supply agreement.

If a supplier informs a large grocery business in writing of a price increase, the large grocery business must provide a written response to the supplier within 30 days:

- accepting the supplier's price increase;
- accepting a price increase, but not the amount notified by the supplier; or
- not accepting a price increase.

This requirement does not apply, however, if the price increase relates to fresh produce that is supplied under a grocery supply agreement which includes a mechanism for negotiating the price of the produce on a regular basis, and any negotiations under that mechanism have been concluded within five business days after the supplier has proposed the price increase. However, it does apply if negotiations have not concluded in that time.

While a supplier retains the right to determine its own prices, if the large grocery business does not fully accept the supplier's price increase, the supplier may request the large grocery business to enter into negotiations about the price increase to negotiate a mutually acceptable outcome at any stage during this process. A large grocery business that enters into such negotiations must engage in those negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay. The purpose of this provision is to ensure the large grocery business engages with the supplier, and provides a response, in a timely fashion, not interfere in the commercial negotiations between the parties.

Importantly, a large grocery business must not require a supplier to disclose commercially sensitive information in relation to the price increase or negotiations about the price increase at any stage during the process.

#### *Notifying the Code Mediator about price increases*

Section 42 requires a large grocery business to give to its Code Mediator the following information in relation to the financial year:

- the total number of notifications given by the large grocery business to a supplier in response to being informed by the supplier of a price increase;
- the number of those notifications that were not given within the required 30-day period;
- the total number of negotiations entered into about an increase in the price of the groceries following a request by the supplier; and

- the number of those negotiations in which the large grocery business did not conclude its position on the negotiations within 30 days of being notified of the relevant proposed price increase, and in each of those cases, the number of days the large grocery business took to conclude its position.

This information must be given to the Code Mediator in sufficient time for the information to be included in the Code Mediator's annual report. This is a civil penalty provision.

#### Freedom of association

Section 43 prohibits large grocery businesses from providing an inducement to prevent a supplier from forming an association of suppliers or associating with other suppliers for a lawful purpose. Further, large grocery businesses are prohibited from discriminating, or taking any other action, against a supplier for doing so.

This civil penalty provision aims to ensure suppliers are not constrained in their freedom to associate for fear of retribution from large grocery businesses.

#### Provision of contact details

To support their commercial relationship and provide avenues to resolve issues, it is important for suppliers to have contact details of relevant persons within a large grocery business with which they have grocery supply agreements.

As such, section 44 provides that a large grocery business must make available to its suppliers up to date contact details (including position title and telephone number) of the senior buyer for the supplier, at least one other member of the buying team who roles includes buying products from the supplier (or supervising such a person), and its Code Mediator. Non-compliance with this requirement may be subject to a civil penalty.

### **Division 5 – Dispute resolution**

Division 5 sets out the complaint and dispute resolution framework of the Code.

Provisions in this Division have been strengthened to reflect the transition from a voluntary industry code to a mandatory code, address recommendations 5, 6 and 11 of the Review, and ensure greater alignment with other industry codes.

Key changes include replacing the Code Arbiter with the Code Mediator and replacing the Independent Reviewer with the Code Supervisor – including various amendments to each role.

There are multiple pathways to resolve an issue arising between a supplier and a large grocery business about matters under the Code. A supplier may seek general information from the Code Mediator to better understand the situation, or may actively try to resolve a complaint or dispute by:

- referring a complaint to the Code Mediator (which could subsequently be independently reviewed by the Code Supervisor if there are concerns about the Code Mediator's process);

- mediation by the Code Mediator or an ADR practitioner, which must be attended by the large grocery business, consistent with the grocery supply agreement; or
- arbitration by an ADR practitioner, which may be agreed to by the large grocery business (whether in the grocery supply agreement or otherwise).

These pathways ensure suppliers can choose the appropriate avenue for their particular circumstances. The Code does not allow for multiple processes regarding the same complaint or dispute to run concurrently, as this would be inefficient and costly. However, it is open to suppliers to pursue processes sequentially, for example, by referring a complaint to the Code Mediator in the first instance and then proceeding to mediation if the supplier is dissatisfied with the outcome.

### ***Subdivision A—Investigations by a Code Mediators***

#### Appointing a Code Mediator

Section 45 provides that each large grocery business must appoint a Code Mediator by written agreement.

The large grocery business must also ensure its appointed Code Mediator is not engaged by the large grocery business or a related body corporate in any capacity other than as Code Mediator.

This rule does not apply to large grocery businesses with less than 15 per cent market share. To be eligible for this exemption, a large grocery business is expected to self-assess their market share before the end of each financial year. The self-assessment can be determined based on third party industry market research and statistics.

To ensure a smooth transition when these grocery businesses grow beyond the 15 per cent threshold, the exemption continues to apply unless and until they exceed the threshold for two consecutive financial years. By the end of the financial year that the exemption ceases to apply, the large grocery business must ensure the Code Mediator is not engaged in any other capacity.

Section 46 requires the large grocery business to notify the ACCC and Code Supervisor of the Code Mediator's appointment, as well as their contact details.

The large grocery business must cover the Code Mediator's costs and ensure the Code Mediator is sufficiently resourced to perform its functions.

Failure by the large grocery business to comply with these obligations may attract a civil penalty.

#### Code Mediator's functions

Section 47 provides the functions of a Code Mediator appointed by a large grocery business are to:

- develop and maintain a complaints handling procedure;

- assist suppliers in relation to matters covered by the Code, including by providing general information about the Code and the complaint and dispute resolution processes available to the supplier under the Code;
- investigate complaints against the large grocery business, make recommendations where appropriate and facilitate agreement by the grocery business to any such recommendations;
- mediate disputes between suppliers and the large grocery business relating to matters covered by the Code; and
- keep records about and report on such complaints and disputes.

The Code Mediator's role replaces and updates the Code Arbitrator's role from the voluntary Food and Grocery Code, which focussed primarily on handling complaints. In particular, the role has expanded to hear views and provide assistance to suppliers even when there is no formal complaint made, and to mediate disputes (distinct from an independent mediation process, under Subdivision C). This ensures suppliers have access to more informal, confidential and low-cost avenues for resolving complaints and disputes.

To enable the Code Mediator to carry out its functions, the large grocery business must ensure that the Code Mediator has access to any documentation that relates to a complaint or dispute with a supplier and give the Code Mediator access to relevant buying team to discuss any concerns about their obligations under the Code. Failure to do so may attract a civil penalty.

#### *Authorising the Code Mediator to enter into agreements on behalf of the grocery business*

Similar to the voluntary Food and Grocery Code, a large grocery business may, but is not required to, authorise the Code Mediator to enter into an agreement on behalf of the business to resolve a complaint against the business about a matter covered by the Code. Such practices support efficient resolution of complaints.

This does not extend to authorising the Code Mediator to settle a dispute on behalf of the large grocery business under the Code. This limitation reinforces that in carrying out the mediation function, it is critical that the Code Mediator acts at arm's length from the large grocery business to ensure the needs of both the supplier and the grocery business are met. This supplements the general requirement in the Code that the large grocery business must not unduly influence the Code Mediator.

#### *Performance of the Code Mediator's functions*

The large grocery business must ensure that the written agreement appointing the Code Mediator includes a condition requiring the Code Mediator to comply with the Code Mediator's obligations under the Code.

If the Code Mediator breaches this condition by failing to comply with its obligations under the Code, the large grocery business must take reasonably appropriate action under the appointment agreement. If the breach is serious or the breaches are persistent, the large grocery business must terminate the appointment of the Code Mediator and appoint a new Code Mediator.

While the Code Mediator is appointed by, and its costs met by, the large grocery business, the Code Mediator must be free to perform its functions without interference or improper influence from the grocery business.

These requirements are civil penalty provisions.

#### Developing a complaints handling procedure

Section 48 provides that a large grocery business must ensure the appointed Code Mediator develops a written complaints handling procedure and acts in accordance with the procedure. This procedure must be consistent with the Code.

The large grocery business must also ensure the Code Mediator reviews the procedure annually and updates it as necessary – for example, to take into account any changes to the Code or updated guidance by the ACCC.

Copies of the procedure and any updated procedures must be given to the Code Supervisor, and the large grocery business must publish a copy of the most up-to-date procedure on their website. This will ensure suppliers have access to the relevant procedure in the event of a complaint.

These requirements are civil penalty provisions.

#### Referring a complaint to the Code Mediator

Section 49 provides that if a supplier has a complaint against a large grocery business about a matter covered by the Code, they may refer the complaint to the Code Mediator appointed by the grocery business.

To refer a complaint to the Code Mediator, the complaint must be in writing and include the following information:

- the supplier's identification details, including their business or trading name;
- the supplier's contact details (or the contact details of the person dealing with the complaint on behalf of the supplier);
- details of the conduct giving rise to complaint; and
- the provisions of the Code that are relevant to the complaint.

The provision of this information ensures the Code Mediator can properly consider and begin investigating the complaint. However, if, for example, the supplier provides the incorrect provisions of the Code that are relevant to the complaint, this does not preclude the Code Mediator from accepting the referral and proceeding to investigate the complaint.

This process for referring complaints to the Code Mediator is not available if a mediator or arbitrator has been appointed to resolve the complaint. This avoids potentially costly and inefficient complaint and dispute resolution processes running concurrently.

The Code Mediator must also comply with strict confidentiality requirements relating to the complaint. Under these requirements, the Code Mediator must not disclose the identity

of the supplier who has made a complaint to the large grocery business, except with the express consent of the supplier. The Code Mediator must also observe any confidentiality requirements relating to information disclosed or obtained in dealing with a complaint.

This provides protection for suppliers to come forward with a complaint to the Code Mediator without fear of potential retribution.

#### Investigation of a complaint by a Code Mediator

Section 50 provides that the large grocery business must ensure the Code Mediator takes all reasonable steps to investigate a complaint that has been referred by a supplier. This investigation must be concluded within 20 business days of the referral, or a longer period if agreed to by the supplier in writing. Failure to do so may attract a civil penalty.

#### *Vexatious complaints*

Section 51 sets out how a Code Mediator must deal with complaints that it decides is vexatious, trivial, misconceived or lacking in substance.

If, after investigating a complaint and making such a decision, the Code Mediator must give the supplier written notice to that effect. The notice must also set out the reasons for that decision and outline any further action that may be available to the supplier through the Code Supervisor, mediation or arbitration.

If the complaint relates to either a unilateral variation or retrospective variation of a grocery supply agreement, and the supplier's only basis for the complaint is detriment to the supplier, this alone would be insufficient for the Code Mediator to determine that the complaint is vexatious, trivial, misconceived or lacking in substance. In these cases, the Code Mediator would likely need to take further steps to investigate the complaint, such as gathering additional information.

A copy of the notice must also be given to the large grocery business. Where the supplier has not expressly consented to their identity being disclosed to the large grocery business, the Code Mediator must ensure that any information that would disclose the supplier's identity is removed from the notice.

#### *All other complaints*

Section 52 sets out how a Code Mediator is to deal with all other complaints.

For investigations of these complaints, the Code Mediator must consider the large grocery business' obligation to deal lawfully and in good faith, and may consider whether the large grocery business acted fairly in dealing with the supplier.

The inclusion of the concept of 'acting fairly' reflects that while a large grocery business may have acted in accordance with the law, it may not have acted in a way that would meet community expectations. The Code sets out what the Code Mediator may consider in determining whether a large grocery business has acted fairly in dealing with a supplier. This concept focuses on the fairness of the way in which the large grocery business has engaged with the supplier, rather than the fairness of a specific outcome. This includes whether the large grocery business:

- acted in a way that prevented the supplier from accessing the benefits of a contract or limited those benefits;
- acted in a way that would be reasonably expected by the supplier; and
- had due regard for the relationship with the supplier and the specific characteristics of the supplier.

#### Recommendations by a Code Mediator following an investigation

Section 53 provides that after investigating a complaint, the Code Mediator may make a recommendation for dealing with the complaint if satisfied that it is appropriate to do so. Depending on the circumstances, this recommendation could be:

- the payment of compensation to the supplier to rectify any loss or damage, noting the Code does not limit the amount that compensation;
- changes to the grocery supply agreement;
- another remedy; or
- that the large grocery business does not take action in response to the complaint.

Given changes to the grocery supply agreement could have broader ramifications, the Code Mediator may consult with the large grocery business and supplier before proposing such a remedy.

This provision only provides that the Code Mediator may make a recommendation. It does not give the Code Mediator the power to make binding determinations, including in relation to the payment of compensation by a large grocery business.

However, the Review indicated that the large grocery businesses that would be bound by the Code – being Woolworths, Coles, Aldi and Metcash – have agreed in-principle to be bound by a recommendation of their Code Mediator to pay up to \$5 million as remedy, where agreed by the supplier.

Within five business days after concluding the investigation, the Code Mediator must give the supplier a notice in writing setting out any recommendations, the reasons for the recommendation (or for not making a recommendation), and that the supplier may take further action through the Code Supervisor, mediation or arbitration.

If the Code Mediator's recommendation includes a recommendation that the large grocery business take action in response to the complaint (a proposed remedy), the notice must also set out that the parties can agree to the proposed remedy by providing written notice to the Code Mediator and entering into an agreement to that effect.

A copy of this notice must also be provided to the large grocery business. Where the supplier has not expressly consented to their identity being disclosed to the grocery business, the Code Mediator must ensure that any information that would disclose the supplier's identity is removed from the notice.

#### Agreeing to a proposed remedy



The proposed remedy does not remain available for the parties to accept indefinitely. Section 55 defines the *acceptance period* for a proposed remedy, which is the period in which the proposed remedy remains available, after which it will lapse.

The duration of the acceptance period depends on whether the supplier accepts the offer or refers the complaint to the Code Supervisor, and if so, whether the Code Supervisor decides to review the complaint.

- The acceptance period ends if, 20 business days after the Code Mediator proposed the remedy, it has not been accepted by both the supplier and the large grocery business, or the supplier has not referred the complaint to the Code Supervisor.
- If the supplier refers the complaint to the Code Supervisor within the 20-business day period, and:
  - the Code Supervisor decides not to review the complaint – the acceptance period ends 10 business days after the Code Supervisor has notified the supplier of that decision;
  - the Code Supervisor reviews the complaint, the acceptance period ends:
    - 10 business days after the Code Supervisor has notified the supplier that the Code Supervisor does not recommend that the Code Mediator reconsider the complaint; or
    - 10 business days after the Code Mediator has reconsidered the complaint and given written notice to the supplier about the outcome.

Section 54 provides that if the supplier and large grocery business agree to the proposed remedy within the acceptance period, the large grocery business must enter into a written agreement with the supplier to perform the proposed remedy. Failure to enter into such a written agreement may attract a civil penalty.

As noted above, under the heading *Authorising the Code Mediator to enter into agreements on behalf of the grocery business*, the Code Mediator may be authorised to enter into such an agreement on behalf of the grocery business.

The large grocery business must subsequently comply with the terms of the agreement.

This requirement is subject to civil penalties, to deter non-compliance and protect suppliers. Failure to comply with the agreement would also be contrary to section 51ACB of the Act and the remedies provided by Part VI of the Act would be available. For example, the supplier could seek an injunction under section 80 or commence an action for damages under section 82.

#### Reconsideration of a complaint by a Code Mediator

Section 56 provides that if the Code Supervisor has conducted an independent review of the complaint and recommends that the Code Mediator reconsider the complaint, the Code Mediator must do so within 10 business days.

The Code Mediator must reconsider whether action should be taken by the large grocery business in response to the complaint and notify the large grocery business, supplier and the Code Supervisor in writing of any recommendation arising from the reconsideration.

Consistent with the original consideration of the complaint, the Code Mediator must ensure that any information that would disclose the supplier's identity is removed from the notice to the large grocery business, unless the supplier has expressly consented to the disclosure.

If the Code Mediator recommends that the large grocery business take action in response to the complaint (a proposed remedy), the parties have 10 business days to accept the offer before it lapses. This is set out in section 55, which defines the acceptance period for a proposed remedy.

#### Records to be kept by a Code Mediator

Section 57 provides that if a complaint is made, the Code Mediator is required to keep the following records for at least six years:

- a record of the complaint made;
- a record of the investigations undertaken to investigate the complaint;
- a copy of any notices given because the Code Mediator was satisfied that the complaint was vexatious, trivial, misconceived or lacking in substance;
- a copy of each notice setting out the Code Mediator's response to the complaint, including any recommendations and proposed remedies; and
- a summary of any actions taken in response to the complaint.

#### Reporting requirements of a Code Mediator

Section 58 provides that for each financial year, a Code Mediator must prepare a written report about its activities in respect of its functions. The report must include:

- a description of the ways the Code Mediator has assisted suppliers, including by providing general information about the Code and complaints and dispute resolution avenues under the Code;
- the number of complaints referred for investigation;
- in general terms and without identifying a complainant – the nature of the complaints received;
- the time taken to investigate each complaint;
- the outcome of each investigation, including the number of complaints for which the Code Mediator recommended payment of compensation;
- whether or not each complaint was resolved to the satisfaction of the complainant; and

- information given to the Code Mediator by the large grocery business about price increases of grocery products supplied under a grocery supply agreement.

The report must be prepared and provided to the large grocery business, the ACCC and the Code Supervisor within 30 business days after the end of each financial year.

Within a business day of being given a copy of the report, the large grocery business must publish the report on its website.

### ***Subdivision B—Independent reviews by the Code Supervisor***

#### The Minister must appoint a Code Supervisor

Section 59 provides that the Minister must appoint a Code Supervisor by written instrument.

In deciding who to appoint, the Minister must be satisfied that the person has appropriate qualifications, knowledge or experience in procedural fairness, and has experience working in Australian industry. This is intended to ensure the Code Supervisor has broad experience in commercial dealings and negotiations.

The Code Supervisor's role replaces and updates the Independent Reviewer's role from the voluntary Food and Grocery Code.

#### The Code Supervisor's functions

Section 60 provides that the Code Supervisor's functions are:

- to consider requests to review Code Mediators' processes in dealing with complaints;
- to work collaboratively with Code Mediators, industry stakeholders and the ACCC to identify emerging and systemic issues in the grocery supply chain relating to the operation of the Code;
- to conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of the Code; and
- to report on the above matters.

Compared to the Independent Reviewer's role in the voluntary Food and Grocery Code, there are two key differences.

The first is the Code Supervisor is only required to identify emerging and systemic issues in the grocery supply chain, rather than identify and address these issues. This reflects the Review's finding that it is unrealistic to expect the Code Supervisor to be able to address these issues, as they are likely to be complex and multifaceted.

The second difference is the Code Supervisor's role does not involve publishing non-binding guidance material relating to compliance with the Code, as this would otherwise overlap with the ACCC's role in publishing guidance.

#### Requesting an independent review of a Code Mediator's process

Section 61 provides that a supplier may request that the Code Supervisor independently review the process used by the Code Mediator to consider and investigate the supplier's complaint.

This request cannot be made until the Code Mediator has investigated the complaint and notified the supplier of the outcome (either a proposed remedy or that no action should be taken by the large grocery business). This ensures the Code Supervisor's review and the Code Mediator's investigation does not run concurrently, which would otherwise be inefficient.

A request for an independent review must be in writing and include the supplier's details. The request must also explain details of the original complaint and the aspects of the Code Mediator's process that the supplier wants the Code Supervisor to review.

The Code Supervisor's role in reviewing these complaints is not to consider whether the proposed remedy is reasonable or adequate given the nature of the complaint. Rather, the Code Supervisor's role is to consider whether the Code Mediator followed due process and its complaints handling procedure.

It is open to a supplier to seek review by the Code Supervisor under this provision even where the supplier has accepted a proposed remedy. However, in these cases, the Code Supervisor may only consider the complaint as part of their function in identifying systemic issues and will not recommend that the Code Mediator reconsider the complaint.

Consistent with the confidentiality requirements that apply to the Code Mediator, the Code Supervisor must not disclose the identity of the supplier who has made a complaint to the large grocery business, except with the express consent of the supplier. The Code Supervisor must also observe any confidentiality requirements relating to information disclosed or obtained in considering the request for review and conducting the review.

#### Code Supervisor's discretion to conduct an independent review

Section 62 provides that the Code Supervisor must consider each request for an independent review by the supplier and decide within 10 business days of receiving the request whether to conduct the review.

The Code Supervisor may decide not to review the Code Mediator's process in dealing with a complaint where:

- the supplier accepted the proposed remedy recommended by the Code Mediator;
- the Code Supervisor considers that the review request by the supplier is vexatious, trivial, misconceived or lacking in substance; or
- the Code Supervisor considers that the review request by the supplier is not related to the Code Mediator's process in dealing with the complaint.

If the Code Supervisor decides not to conduct an independent review, the Code Supervisor must notify the supplier and the Code Mediator in writing and explain why.

#### Conducting an independent review

Under section 63, if the Code Supervisor decides to conduct the independent review, the Code Supervisor must notify the supplier, Code Mediator, and the large grocery business in writing.

The notice to the large grocery business must not contain any information that would disclose the supplier's identity, unless the supplier had expressly consented to it.

Within 20 business days of giving the notice to the supplier, the Code Supervisor must take all reasonable steps to complete the independent review. These steps may include requesting information relating to the original complaint from the Code Mediator, the supplier, or the large grocery business.

If a large grocery business or its Code Mediator receives such a request, they must provide the relevant information within 10 business days. Failure to do so may attract a civil penalty.

The 20-business day period to complete the independent review is paused where the Code Supervisor is waiting for the Code Mediator, supplier or the large grocery business to provide the relevant information.

Once the Code Supervisor has considered the review request, the Code Supervisor may make one or more recommendations to the Code Mediator. This may include a recommendation that the Code Mediator reconsider the original complaint, unless the supplier has already accepted a proposed remedy in relation to the original complaint.

If such a recommendation is made, the Code Mediator must reconsider the original complaint within 10 business days.

Within five days of completing the independent review, the Code Supervisor must give the supplier and the Code Mediator notice that the independent review is complete, and include any recommendations made to the Code Mediator, and the reasons for those recommendations.

The Code Supervisor must also give a copy of the notice to the large grocery business, noting the confidentiality requirements relating to the identity of the supplier.

In addition, if during this process, the Code Supervisor becomes aware that a breach of the Code may have occurred, the Code Supervisor may provide details of the breach to the ACCC. In this event, a copy of those details must also be provided to the large grocery business concerned to ensure procedural fairness. If the breach relates to an obligation of the Code Mediator, the provision of this information will also allow the grocery business to take reasonably appropriate action under the agreement in which the Code Mediator was appointed, as required by the Code.

#### Reporting requirements of the Code Supervisor

Section 64 provides that the Code Supervisor must prepare a written report about its activities in respect of its functions over the financial year. This report must include:

- any emerging and systemic issues identified in the grocery supply chain relating to the operation of the Code;

- the number of review requests and independent reviews undertaken during the financial year;
- the number of recommendations made by the Code Supervisor for the Code Mediator to reconsider a complaint;
- the results of the survey of stakeholders (discussed in the next section);
- the number of mediation and arbitration processes under the Code that commenced during the financial year (discussed under the heading *Mediation and arbitration (ADR processes)*);
- the number of mediation and arbitration processes under the Code that were terminated during the financial year; and
- any other activities undertaken by the Code Supervisor during the financial year.

The report must be prepared within 4 months of the end of each financial year (by 30 November), and a copy must be given to the ACCC. The report must also be published on the Code Supervisor's website to support broader availability and transparency of its findings.

#### Annual survey of stakeholders

Section 65 requires the Code Supervisor to conduct an annual survey of suppliers and large grocery businesses. This survey must be conducted for the purpose of:

- identifying if any suppliers fear retribution from a large grocery business;
- identifying supplier's experiences with agreeing to any exception of a kind under the Code; and
- identifying emerging and systemic issues in the grocery supply chain relating to the operation of the Code.

To ensure suppliers can access the survey and are encouraged to respond, large grocery businesses are required to distribute the survey to their suppliers. The grocery business must also inform suppliers that their response will not be given to the large grocery business, and the results of the survey cannot be used to identify them. These requirements are civil penalty provisions.

The Code Supervisor must publish the results of the survey on its website, which may be done as part of its annual report. To ensure the confidentiality of suppliers' responses is maintained, the Code Supervisor must ensure the identity of a supplier who has responded to the survey is not publicly disclosed or disclosed to the large grocery business.

#### ***Subdivision C—Mediation and arbitration (ADR processes)***

##### Starting an ADR process under the Code

As explained above, a grocery supply agreement must provide that a large grocery business must attend mediation under the Code to resolve a dispute with a supplier if requested to

do so by the supplier. A grocery supply agreement may also provide that the parties may attend arbitration under the Code of a dispute.

The Review indicated that the large grocery businesses that would be bound by the Code – being Woolworths, Coles, Aldi and Metcash – have agreed in-principle to participate in independent arbitration when requested by a small supplier and pay compensation of up to \$5 million as determined by the independent arbitrator. In this context, a small supplier is one with annual turnover of less than \$10 million or fewer than 100 employees.

Section 66 provides that if there are no other ongoing complaint or dispute resolution processes relating to the matter (including where the complaint is being considered by the Code Mediator or Code Supervisor), a party to a grocery supply agreement may start either mediation or arbitration under the Code by notifying the other party in writing of such. Under the Code, mediation and arbitration are referred to as *ADR processes*.

The parties may subsequently agree to appoint an ADR practitioner from a list kept by the ASBFEO of suitably qualified practitioners who can provide services of mediation or arbitration for the purposes of the Code.

If the parties are unable to agree on an ADR practitioner within 14 days of the notice to start an ADR process being given, the supplier may unilaterally appoint an ADR practitioner from the ASBFEO's list. The supplier must then notify the large grocery business and Code Supervisor of the appointment.

#### Taking part in an ADR process under the Code

Section 67 provides that an appointed ADR practitioner may decide the time and location in Australia for the ADR process for the dispute. The ADR process may be conducted by means of virtual attendance technology.

Each party to the dispute must attend the ADR process.

Section 68 specifies that a party is taken to attend an ADR process for the dispute if the party is represented in the ADR process by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

Parties to the dispute are also required by the Code to try to resolve the dispute.

Section 69 provides that a party will be taken to be trying to resolve a dispute if they approach the resolution of the dispute in a reconciliatory manner, including by:

- attending and participating in meetings;
- making clear what they are trying to achieve through the process at the outset;
- observing any confidentiality obligations; and
- not taking action that has the purpose of applying pressure to resolve the dispute (such as the large grocery business refusing to accept goods or make payments to the supplier).

However, a party is not required to continue trying to resolve a dispute if the appointed ADR practitioner finds that:

- the dispute is vexatious, trivial, misconceived or lacking in substance;
- the other party to the dispute is not acting in good faith; or
- the supplier has already accepted a proposed remedy and the large grocery business has acted on that proposed remedy.

If the dispute relates to a unilateral variation or retrospective variation of a grocery supply agreement, the ADR practitioner must not determine that the dispute is vexatious, trivial, misconceived or lacking in substance because the supplier's only basis for the dispute is detriment to the supplier.

The requirements relating to the parties to the dispute are civil penalty provisions.

#### Terminating an ADR process

Section 70 provides that if an ADR process has continued for more than 30 days and the dispute has not been resolved, the appointed ADR practitioner may terminate the ADR process at any time, unless they are satisfied that a resolution is imminent.

In addition, if a party asks the ADR practitioner to terminate the ADR process for the dispute and gives written reasons for the request, the ADR practitioner must terminate the ADR process to the extent it relates to that party's dispute.

If an ADR practitioner terminates an ADR process, they must issue a certificate setting out the names of the parties, the nature of the dispute, that the ADR process has been terminated before the dispute has been resolved, and the reasons for terminating the ADR process. A copy of this certificate must be given to the parties to the dispute, the Code Supervisor and the ASBFEO.

#### Costs of an ADR process

Section 71 sets out who is liable for costs relating to an ADR process.

The parties must pay for their own costs of attending the ADR process. In addition, the parties are equally liable for the costs of an ADR process under the Code, unless otherwise agreed. This includes the cost of the ADR practitioner, the cost of any room hires, and the cost of any additional input agreed by the parties to be necessary to conduct the ADR process.

### **Division 6 – Compliance**

#### Requirement to train staff

Section 72 provides that within 6 months of becoming a large grocery business under the Code, the business must provide its buying team with a copy of the Code and training on its requirements.



Anyone who subsequently joins the buying team also needs to be given a copy of the Code and training on its requirements. This needs to be done within 20 business days of the person joining that team.

The Code also requires large grocery businesses to provide ongoing training on the requirements of the Code on an annual basis and keep records about the training provided.

These requirements are civil penalty provisions.

### General record keeping requirements

Section 73 sets out the record keeping requirements on large grocery businesses, which are all subject to civil penalties.

Large grocery businesses must keep records of each grocery supply agreement (including any documents comprising the agreement) to which the business is a party. These agreements need to be kept for at least six years after the agreement ends.

In addition, large grocery businesses must keep records of various offers, notices and reasons under the Code. For example, this includes an offer to vary a grocery supply agreement and a notice of a decision to delist a product. These records must be kept for at least six years from when the document is made or given.

These record keeping requirements ensure that key events that occur during the lifecycle of a grocery supply agreement and a complaint or dispute are retained. This will assist with compliance monitoring and provide evidence in complaint and dispute resolution processes.

Under section 51ADD of the Act, if a corporation is required to keep, generate or publish information or a document under an applicable industry code, then the ACCC may require that such information be provided to it for investigation and auditing purposes. The ACCC may therefore require that the large grocery business provide these records for these purposes.

### **Application provisions and consequential amendments**

Section 74 prescribes how certain provisions relating to grocery supply agreements apply. The requirements of subsection 19(4) for an agreement to clearly identify and explain any reasonable exceptions to a protection of the Code will only apply to grocery supply agreements entered into on or after the day the Code commences. This approach is designed to improve standards and conduct over time, without unduly burdening industry by requiring existing agreements to be renegotiated and rewritten.

However, the protections of the Code which are listed in subsection 74(2) that require an exception to be provided for in the grocery supply agreement and to be reasonable in the circumstances apply from commencement of the Code to existing agreements. These are similar requirements to those that already apply under the voluntary Food and Grocery Code and should not require changes to existing agreements.

### *Schedule 1—Consequential amendments*

Item 1 in Part 1 of Schedule 1 to the Regulations repeals the voluntary Food and Grocery Code.

Part 2 of Schedule 1 to the Regulations sets out amendments to civil penalties under the Code which are subject to the enactment of primary legislation.

Section 51AE of the Act, which contains the regulation-making power to prescribe an industry code, also includes restrictions around the amount of the pecuniary penalty for a contravention of a civil penalty provision imposed by a code. For all industry codes other than the Franchising Code, this maximum amount is 600 penalty units.

The Franchising Code has two tiers of civil penalties, according to the importance of the obligation and gravity of the consequences of contravention. Under this two-tier regime, higher penalties based on the Australian Consumer Law may apply for a contravention of a core obligation, and contraventions of other obligations are capped at 600 penalty units.

A Bill is currently being developed to amend the Act to apply a similar two-tier approach to this Code. If the Bill is enacted, the amendments in Part 2 of Schedule 1 to the Regulations will commence. This will result in the following core obligations of the Code being subject to the higher tier penalty:

- subsection 17(1) – a large grocery business must deal with suppliers in good faith;
- section 18 – a grocery supply agreement must be in writing;
- subsection 19(1) – a grocery supply agreement must cover specific matters;
- subsection 29(1) – incentive schemes must be consistent with the Code;
- section 30 – a large grocery business must not engage in retribution against a supplier;
- section 31 – a large grocery business must have policies and procedures to protect against retribution;
- subsections 43(1) and (2) – a large grocery business must not prevent a supplier from associating with other suppliers or discriminate against a supplier from doing so;
- subsections 72(1), (2) and (3) – a large grocery business must train staff with respect to the Code; and
- subsections 73(1) and (2) – a large grocery business must keep records.

The penalty which a court may impose for contravention of one of these provisions by a body corporate is the greatest of \$10 million, three times the value of the benefit that the large grocery business obtained which is reasonably attributable to the contravention, or (if that value cannot be determined) 10 per cent of the annual turnover of the large grocery business during the year ending at the end of the month of the contravention.

The higher tier penalty for breach of one of these provisions by a person that is not a body corporate is \$500,000.

Items 3, 5, 6, 22 to 24, 54, 55, 75 to 79 increase the maximum penalty for a contravention of these core obligations to the higher tier penalty. The higher amount of these penalties reflects the large size of the grocery businesses which are subject to obligations under the Code, and is necessary to deter contraventions of core provisions of the Code which may cause significant harm to suppliers and damage confidence in the industry.

Items 4, 7 to 21, 25 to 53, and 56 to 74 increase the maximum amount of penalty units under other civil penalty provisions of the Code, which are not subject to the higher tier penalty. These items also provide separate penalties for bodies corporate and individuals consistent with the ratio set by the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Instead of 600 penalty units, the penalty for a contravention by a body corporate is 3,200 penalty units and the penalty for a person other than a body corporate is 640 penalty units.

EXPOSURE DRAFT