



Mandatory Food and Grocery Code: exposure draft

Submission to the Competition Policy Unit

18 October 2024

The Australian Chamber of Commerce and Industry (ACCI) appreciates the opportunity to provide comment on the exposure draft of the Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024.

ACCI is Australia's largest and most representative business association. Our members are all state and territory chambers of commerce, which in turn have 430 local chambers as members, as well as over 70 national industry associations. Together, we represent Australian businesses of all shapes and sizes, across all sectors of the economy, and from every corner of our country.

We believe that a strong and competitive food supply sector is in the interests of all Australians. A competitive environment ensures that businesses who perform well have the best chance of growing, it ensures that consumers get competitive prices, and it results in an efficient business environment that's good for the economy as a whole. With the high cost-of-living it is essential that supermarkets remain competitive and provide the lowest prices to their customers.

The Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024 are being introduced as a mandatory code to replace the voluntary Food and Grocery Code of Conduct. It is argued that the mandatory code will 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 sector already has a voluntary code of conduct, developed by the industry. This sets minimum obligations and standards for behaviour of supermarkets towards their suppliers, including an obligation to act in good faith. It also provides avenues for dispute resolution, which the supermarkets must participate in. They are bound by a determination made to resolve a complaint or arbitration. There is nothing to indicate the voluntary code is not effective in addressing these concerns. In fact, very few complaints have been brought against the supermarkets since the voluntary code was introduced.

The Explanatory Memorandum argues that due to the voluntary nature of this Code, it only applies to supermarkets that sign up to it. Yet, all four major supermarkets (Coles, Woolworths, ALDI and Metcash) are signatories to the voluntary code. The mandatory code

applies to supermarkets with annual Australian revenue exceeding \$5 billion, which comprise the same four supermarkets that are currently signatories to the voluntary code.

The new mandatory Food and Grocery Industry Code introduces strong civil penalty and dispute resolution provisions. Yet there is no indication that the supplier complaints process, mediation and arbitration of the voluntary code was not effective.

A further argument of the Explanatory Memorandum that the voluntary code is set to sunset on 1 April 2025 – *requiring the government to do something?* – could readily be remedied by extending the code for another five years. Extending the code (in the next six to twelve months) would offer the opportunity to make any necessary changes in the draft mandatory code to ensure it is meeting its objectives. This would ensure that the code is well designed and does not stifle innovation or competition within the industry.

It is unclear what is being achieved by making the voluntary food and grocery code of conduct mandatory, other than to increase the influence of government through a greater compliance burden on the supermarkets and to take a big stick to the industry through a substantial increase in penalties and fines. Introducing a mandatory code of conduct to the supermarket sector represents heavy handed regulation that can have unintended consequences. It will raise the regulatory compliance burden on supermarkets, increasing their cost of doing business (and cost to customers), and has the potential to decrease competition and inhibit innovation.

There is no recognition of the costs of adding another major layer of regulation onto an already large amount of regulation. The business community is concerned that the unending growth of red tape is hindering the ability of businesses to conduct commerce, but there is no recognition of the drag on dynamism that new government regulations impose.

We are also concerned about the prospects for regulatory contagion. Once you establish a principle that legislating codes of conduct is good for one sector, the pressure grows to extend such legislation to all sectors. When the prospect of government legislation in this area was first raised ACCI warned of this contagion risk, and within days we were proven correct as other commercial domains were suggested as suitable to receive legislated regulation. The prospect of highly interventionist government regulation extending across numerous sectors of the economy remains a matter of concern for ACCI.

Activation of the mandatory code

The draft regulation is unclear on the trigger point for compliance with the code, i.e. when, after reaching the \$5 billion turnover threshold, the supermarket becomes bound by the code.

Is a supermarket chain bound to comply with the code at the beginning of the year when revenue is forecast to exceed the threshold, or the following year – after it has publicly released its Annual Report, financial statements or tax lodgements, confirming it has exceeded the revenue threshold to trigger the code?

ACCI argue that the mandatory code should not apply until this information has been compiled and it is confirmed that the supermarket has reached the revenue threshold – i.e.

the year after the threshold has been reached, following the release of the Annual Report, financial statements or tax lodgements. This should be explicitly written in the legislation.

Interaction with other industry codes

The exposure draft does not provide clarity on how the food and grocery code of conduct will interact with other codes. The exposure draft states,

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.

The supermarkets are often one division of a diversified retail and/or wholesale business. So, if the food and grocery code is applied to the supermarket division of a business, is the business required to apply the mandatory code across all retail/wholesale divisions?

For example, Metcash's hardware and liquor business divisions generate more than \$5 billion in revenue and sell some non-alcoholic beverages or gardening supplies, which are covered under the food and grocery code of conduct. Similarly, both Coles and Woolworths have liquor divisions. However, these divisions are primarily engaged in the sale of products that are not food or groceries.

If the food and grocery code is to be also applied to these divisions of the retailers, in addition to greatly increasing the regulatory burden for these business divisions, it would create confusion as to how the code is applied. It also creates an unfair playing field, as their competitors in the other retail sectors may face less stringent regulatory requirements and penalties under other industry codes. A careful balance is needed to determine which retailers should fall under the Food and Grocery Code's penalty regime.

Retribution

The exposure draft sets out a non-exhaustive list of actions which constitute retribution. However, it's hard to distinguish between what is defined as retribution and the commercial decisions of a business. Suppliers often perceive 'frictions' in a commercial relationship as retribution. These frictions can take many forms such as reducing the volume of stock ordered, requiring a contribution for promotional activity, adjustments to on-shelf positioning, willingness to consider new product ranging or even the decision to terminate a contract. However, there are a range of legitimate commercial reasons why a supermarket may make these decisions.

Under the mandatory code, the burden of proof falls on supermarket to demonstrate that their actions are not retaliatory. This is tantamount to an assumption of guilty until proven innocent. It places a significant administrative burden on the businesses, requiring them to provide written evidence to prove that their everyday decisions are not acts of retribution.

The term 'retribution' connotes behaviour that is motivated by personal malice or ill-will, and these sorts of sweeping moral characterisations are out of place in commerce legislation.

Supermarkets should be able to undertake actions for genuine commercial reasons without it being seen to be retributory conduct. A balanced approach is needed, one that fosters a competitive market where the supermarkets can negotiate fair terms with their suppliers without tipping the scales to favour suppliers one party over the other.

Fresh produce

The Code has been updated with the additional requirements for agreements that relate to fresh produce which involve specifying the price of the fresh produce, the method or formula used to determine that price, standards or quality specifications relating to fresh produce and labelling packaging or preparation requirement for fresh produce.

It is crucial that these requirements do not become overly burdensome for either supermarkets or suppliers. If they are too complex, it may hinder the ability of both the supermarkets and their suppliers to effectively navigate the intricacies of the supply chain and access the necessary resources to remain competitive and sustainable. The goal should be to create a framework that ensures transparency and fairness without stifling efficiency or innovation within the industry.

Dispute Resolution

The process for resolving disputes must be quick, informal, confidential, low-cost and binding, with options for independent mediation and arbitration. It should have the capacity to deliver compensation and investigate systemic patterns of behaviour. This is currently provided through the dispute resolution process of the voluntary code, with a supplier complaints process, mediation and arbitration, and the supermarket bound by a determination made to resolve a complaint or arbitration

The changes under the mandatory code of conduct include replacing the Code Arbiter with the Code Mediator and replacing the Independent Reviewer with the Code Supervisor, which are superficial, notional changes that don't change the substance of the dispute resolution process. This does not provide sufficient justification to change the process or to enforce it through mandatory code.

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 it may actively try to resolve a complaint or dispute by referring a complaint to the Code Mediator or through arbitration by an ADR practitioner. This range of processes needs to be streamlined and harmonised so suppliers are not confused by the process, especially small suppliers who may struggle to navigate which pathway to use to resolve disputes.

The Code in and of itself should serve as an effective tool to reach an outcome and should act as a deterrent to questionable or unacceptable behaviour when raising an issue with a retailer. ACCI argue the voluntary code already does this.

There are also significant changes in the annual reporting requirements of the Code Mediator which require them to report the number of complaints referred for investigation, the nature of complaints, the outcome of each investigation and whether the complaint was resolved to the satisfaction of the complainant. While this change is innocuous in and of itself, it must include caveats to avoid the publication of information that is confidential commercial information and/or could identify a supplier.

In addition, the government is proposing a substantial increase in the penalty amount of an infringement notice, with a maximum penalty for breaches of 600 penalty units, which is a 12-fold increase from the current industry code. This is unfairly targeting the food and grocery sector.

ACCI believes that any penalties must be reasonable and proportionate and not single out the supermarket sector with exceptionally higher penalties than that imposed on any other sector.

In the current atmosphere there is a risk that policymakers overreact on the basis of as yet unproven allegations and implement hastily conceived but ill-considered changes. An increase in penalty of the magnitude proposed would severely impair the commercial viability of a supermarket, which would not be in the interests of industry competition and could have perverse flow-on consequences along the entire supply chain, through to the consumer.

The current public shaming of supermarkets on the basis of unproven allegations is unfair and damaging for their reputation. They deserve procedural fairness while ACCC conducts its investigation into the pricing practices of supermarkets.

Next steps

It must be recognised that retailers and supermarkets provide an essential service to all Australians. It is important that they treat their customers and suppliers fairly. Equally so, they must be free to make commercial decisions without the fear of excessive penalties, to ensure they operate efficiently, effectively and competitively, and provide the best service to their customers at the lowest prices.

We look forward to further consultation on the Mandatory Food and Grocery Code to ensure the final position that is reached is workable for the retailers, and suppliers.

Should you require any additional information or clarification of any points contained within, please contact Peter Grist, Director of Economics, Industry and Sustainability,

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The Australian Chamber of Commerce and Industry (ACCI) is Australia's largest and most representative business network. We facilitate meaningful conversations between our members and federal government – combining the benefits of our expansive network with deep policy and advocacy knowledge. It's our aim to make Australia the best place in the world to do business. ACCI membership list can be viewed at www.australianchamber.com.au/membership/current-members/

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