



Australian Government

# **STRENGTHENING COMMERCIAL DEALINGS IN THE FOOD AND GROCERY INDUSTRY**

Government Response to the Review of the Food and Grocery  
Code of Conduct

March 2019

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## Foreword

Healthy commercial dealings between our major supermarkets (retailers) or wholesalers and their suppliers guarantee that Australian consumers have the best choice and quality products on the shelves.



I am pleased to release the Australian Government's response to the independent Review of the Food and Grocery Code (the review).

The Government is committed to ensuring that the right regulatory settings are in place to improve certainty, transparency and fairness between retailers/wholesalers and their suppliers.

This response outlines changes to be made to the Food and Grocery Code of Conduct (the Grocery Code) to improve its operation and meet the needs of the industry. Our response has been informed by the independent review led by Professor Graeme Samuel AC, which has involved extensive stakeholder consultations.

The Government has accepted almost all of the 14 recommendations in his report. It presents a strong case for making specific amendments to the Grocery Code that build upon the significant progress made by the industry towards changing business culture and fostering positive commercial relationships.

The Government has listened to the industry and we intend to make a range of important changes to the Grocery Code, such as:

- enhancing the **good faith** obligations in the Grocery Code to make it clearer and more user friendly for the industry;
- strengthening the **dispute resolution** procedures to give suppliers more confidence in raising their complaints and having them resolved; and
- setting limits on acceptable conduct during **price rise** negotiations between the parties to restore trust and cooperation between parties.

I am confident that this approach will cultivate a competitive and sustainable grocery industry that will deliver benefits across the wider community.

I wish to thank Professor Samuel and his team for their productive engagement with the industry and valuable contribution towards shaping our food and grocery regulation. I would also like to thank all the businesses that gave their time during the review and Government consultations process.

I look forward to continuing to work closely with you to implement these important changes to this industry-led initiative.

The Hon Stuart Robert MP  
Assistant Treasurer

## Government response

### Government Response to the Review of the Food and Grocery Code

Review Recommendation	Government response
<p><b>Recommendation 1</b></p> <p>The Grocery Code should remain as a prescribed voluntary code.</p> <p>The Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.</p>	<p><b>Agreed</b></p> <p>The Government agrees that the Grocery Code should remain as a voluntary industry code of conduct.</p> <p>A voluntary commitment by retailers and wholesalers is the most effective way of nurturing a sustained culture of fair commercial dealings across the food and grocery industry.</p> <p>The Government believes that incumbent retailers or wholesalers and new entrants that reach a position of power and dominance in the Australian market should become signatories to the Grocery Code.</p> <p>The Grocery Code will specify thresholds, above which retailers/wholesalers would be expected to sign up to the Grocery Code. The thresholds will be set at \$5 billion in annual revenue or five per cent of market share (whichever is reached first).</p> <p>The Government is confident that this industry-led approach will deliver the best outcomes for suppliers and consumers. Metcash, Australia’s major wholesaler, has recently given an undertaking to become a signatory to the amended Grocery Code.</p>

Review Recommendation	Government response
<p><b>Recommendation 2</b></p> <p>The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.</p>	<p><b>Agreed</b></p> <p>The Government agrees that suppliers should be afforded the same protections under the Grocery Code regardless of whether they are supplying to a major retailer or wholesaler.</p> <p>The Government recognises that certain provisions in Part 3 of the Grocery Code need to be modified to better align with the wholesaling business model. For example, wholesalers will be exempt from requirements that relate to shelf space.</p> <p>Wholesalers that sign up to the Grocery Code will be given a transitional period of 12 months before provisions relating to contracting practices apply. This will allow sufficient time for wholesalers to renegotiate existing contracts with suppliers to become code compliant.</p> <p>Provisions relating to good faith will take effect immediately upon a wholesaler becoming a signatory to the Grocery Code, and access to the new dispute resolution mechanisms to take effect after six months.</p>
<p><b>Recommendation 3</b></p> <p>The current coverage of products under the Grocery Code should remain unchanged.</p>	<p><b>Agreed</b></p> <p>The Government agrees that the current scope of grocery products covered under the Grocery Code is appropriate and should remain unchanged.</p> <p>Products currently excluded from the Grocery Code, such as alcoholic beverages, often have greater avenues to distribute their products, which limits the ability of the major retailers or wholesalers to exert their bargaining power. These differences in market dynamics suggest that regulatory intervention is not warranted in all cases.</p> <p>The general fair trading provisions in the <i>Competition and Consumer Act 2010</i> will continue to offer all suppliers protection against unconscionable conduct by retailers or wholesalers.</p>

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<p><b>Recommendation 4</b></p> <p>Enhance the current obligation to act in good faith (clause 28), including the addition of indicators of acting in good faith that are easy to understand and apply; and to introduce the concept of ‘fair dealings’ as guiding principles for the Code Arbiters.</p> <p>The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.</p>	<p><b>Agreed in part</b></p> <p>The Government will amend the good faith provision under the Grocery Code by including additional indicators to help guide consistent interpretation and make it easier for industry participants to apply in practice.</p> <p>The meaning of good faith under the Grocery Code will be informed by other industry codes that contain similar provisions and the common law. The good faith provision will be relocated towards the front of the Grocery Code to reinforce its importance in underpinning fair commercial dealings.</p> <p>New guiding principles to support fairness of outcome for suppliers will also be introduced. This will be in the form of a non-exhaustive list of factors that Code Arbiters may refer to when resolving disputes between the parties (recommendation 5 refers).</p> <p>The Government notes the Review’s recommendation that the ACCC be tasked with enhancing its guidance materials.</p>

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<p><b>Recommendation 5</b></p> <p>The Code Compliance Manager should be replaced with an independent Code Arbitrator, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.</p>	<p><b>Agreed</b></p> <p>The Government agrees to changes to the Grocery Code’s dispute resolution mechanisms to ensure it is fit for purpose.</p> <p>Amendments will be made to replace Code Compliance Managers with Code Arbitrators – a new position empowered to resolve supplier complaints in an equitable and timely manner.</p> <p>Code Arbitrators will be appointed by the signatories for fixed terms and have three key characteristics:</p> <ul style="list-style-type: none"> <li>• <b>Independence</b> – must be free to make decisions that are impartial and without influence from the signatory.</li> <li>• <b>Separation</b> – must sit outside the signatory’s organisational group structure, including senior management, buying teams and legal departments.</li> <li>• <b>Authority</b> – must have the authority to make decisions that, once agreed to by the supplier, become binding and cannot be overturned by the signatory.</li> </ul> <p>Code Arbitrators will be given enhanced powers under the Grocery Code to resolve disputes, including the powers to:</p> <ul style="list-style-type: none"> <li>• receive and investigate complaints from suppliers;</li> <li>• access relevant documents and records of the signatory;</li> <li>• make decisions that are binding on the signatory</li> <li>• offer restitution such as compensation to suppliers or require changes to be made to Grocery Supply Agreements to avoid future issues; and</li> <li>• monitor the dispute for any potential retribution by retailers.</li> </ul> <p>Code Arbitrators will be required to publish an annual report on supplier complaints.</p>

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<p><b>Recommendation 6</b></p> <p>The Government should appoint an Independent Reviewer to:</p> <ul style="list-style-type: none"><li>• review the Code Arbiters’ determinations for consistency with the requirements of the Grocery Code (at the request of a supplier); and</li><li>• work collaboratively with Code Arbiters, signatories and the ACCC, meeting regularly to discuss issues under the Grocery Code.</li></ul>	<p><b>Agreed</b></p> <p>Encouraging the parties to resolve disputes commercially is the ideal outcome for the industry because it offers the best chance of preserving ongoing business relationships.</p> <p>To provide public assurance that the dispute resolution system of each of the signatories is working properly, the Government will appoint an Independent Reviewer to act as a check and balance.</p> <p>The role of the Independent Reviewer will be to ensure due process is observed during the dispute resolution process at all times. Suppliers dissatisfied with the Code Arbiters’ process can raise concerns to the Independent Reviewer, who will assess the case, determine whether further review is warranted and where appropriate make recommendations to the Code Arbiters, including that the case should be reconsidered.</p> <p>The Independent Reviewer will work with Code Arbiters, industry participants and the ACCC to identify emerging issues and make recommendations to the signatories on strategies for addressing problematic behaviours before they become systemic.</p> <p>The Independent Reviewer will produce an annual report on their activities and industry outcomes.</p>
<p><b>Recommendation 7</b></p> <p>The ACCC should also consider adopting a collaborative approach with signatories, Code Arbiters and the Independent Reviewer to encourage more active compliance with the Grocery Code.</p>	<p><b>Noted</b></p> <p>The Government notes this recommendation.</p>

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<p><b>Recommendation 8</b></p> <p>The Grocery Code should be amended to give suppliers the right to request further details on the reasons for delisting decisions, following the initial receipt of a signatory’s reasons.</p> <p>The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.</p>	<p><b>Agreed</b></p> <p>The Government supports robust delisting procedures so that suppliers can be confident that delistings occur due to genuine commercial reasons and not as punishment for making a complaint or enforcing legitimate rights.</p> <p>The delisting provisions will be amended to give suppliers the right to request additional information and details on the reasons for a delisting.</p> <p>Significantly limiting the distribution of a supplier’s product across a retailer’s stores is akin to delisting. The Grocery Code will be amended to impose similar notice and procedural requirements for significant reductions in distribution.</p>
<p><b>Recommendation 9</b></p> <p>It should be clarified that the term Grocery Supply Agreement, as defined in clause 3 of the Grocery Code, applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.</p>	<p><b>Agreed</b></p> <p>The Government will amend the Grocery Code to make it clear that the term Grocery Supply Agreement applies to all agreements between a supplier and a signatory which relate to the supply of grocery products.</p> <p>This will help ensure that the protections that apply to Grocery Supply Agreements are not circumvented by signatories purporting to make separate agreements that are not subject to the Grocery Code.</p>
<p><b>Recommendation 10</b></p> <p>Clause 10 of the Grocery Code should be amended so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.</p>	<p><b>Agreed</b></p> <p>The Government agrees to amend clause 10 of the Grocery Code so that signatories may not “opt out” of the existing ban on variations to Grocery Supply Agreements that have retrospective effect.</p>

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<p><b>Recommendation 11</b></p> <p>Clause 14 should be amended to protect a supplier’s right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.</p>	<p><b>Agreed</b></p> <p>The Government agrees that reducing wastage in grocery products is in the best interests of the industry and community.</p> <p>Clause 14 will be amended to provide suppliers with the right to renegotiate their wastage payments without being required to renegotiate other terms of their Grocery Supply Agreement.</p> <p>This will ensure that suppliers that invest in reducing wastage are able to negotiate with retailers to realise the financial savings without fear of jeopardising other agreed terms.</p>
<p><b>Recommendation 12</b></p> <p>To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply only to fruit and vegetables.</p>	<p><b>Agreed</b></p> <p>The Government agrees to amend clause 21 to provide clarity to stakeholders that the fresh produce standards and quality specifications requirements only apply to fruit and vegetables.</p>

Review Recommendation	Government response
<p><b>Recommendation 13</b></p> <p>A new provision relating to price rise processes should be introduced to:</p> <ol style="list-style-type: none"> <li>1. Prevent signatories from requiring a supplier to disclose commercially sensitive information;</li> <li>2. Require that signatories take no longer than 30 days to consider a price rise request from a supplier, unless circumstances exist that justify a reasonable extension that is negotiated with and agreed to by the supplier; and</li> <li>3. Require that signatories report on the times taken to make a price rise decision, to be published in the Code Arbiters' annual reports.</li> </ol>	<p><b>Agreed with some modifications</b></p> <p>The Government recognises that price rise negotiations have become a key source of tension in the food and grocery industry, which has led to growing mistrust and resentment between the parties.</p> <p>The current price verification process being used by retailers is not leading to the best outcomes for suppliers or consumers.</p> <p>The Government agrees to:</p> <ol style="list-style-type: none"> <li>1. Amend the Grocery Code to introduce a new provision to prevent signatories from requiring a supplier to disclose commercially sensitive information as a condition of commencing price rise negotiations.</li> <li>2. Impose a 30 day limit that commences once both parties have agreed that all relevant information has been provided for consideration of the price rise. Extensions will be made available to signatories if reasonable circumstances exist to justify it.</li> <li>3. Require that signatories report on the number of cases that have taken longer than 30 days (also to be represented as a percentage of the total number of price rise cases considered annually).</li> </ol> <p>These measures allow the parties to undertake productive and robust price negotiations, while increasing transparency and accountability to strengthen commercial relationships.</p>
<p><b>Recommendation 14</b></p> <p>There should be a review of the Grocery Code within three to five years of implementation of any changes as a result of this Review.</p>	<p><b>Agreed</b></p> <p>The Government agrees that there should be a review of the Grocery Code within three years after the amended Grocery Code has come into force.</p> <p>A three year review timeframe will allow sufficient time for any changes to become embedded in the sector.</p>