

EXPLANATORY MATERIAL

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes – Food and Grocery) Amendment Regulations 2019

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.

Section 51AE of the Act provides that the regulations may prescribe an industry code under the Act. Regulations may declare an industry code to be either mandatory or voluntary. For a voluntary industry code, the regulations must specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be bound.

In 2015, the Government made the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* (the Code) which prescribed a voluntary grocery code under the Act.

The Code was introduced to improve standards of business conduct in the food and grocery sector. The Code governs conduct by grocery retailers and wholesalers in their dealings with suppliers. It has rules relating to grocery supply agreements, payments, termination of agreements, dispute resolution and a range of other matters.

Section 5 of the Code required the Government to commence a review of the Code within three years of its commencement. The factors that were to be considered by the review are prescribed in the Code.

On 2 March 2018, the Government appointed Professor Graeme Samuel AC to review the operation of the Code. The Review conducted three rounds of industry consultation and engagement and received feedback from over 50 individual stakeholders. The *Independent Review of the Food and Grocery Code of Conduct – Final Report* (Report) was published in October 2018 and is available at www.treasury.gov.au.

Professor Samuel made 14 recommendations in the final report. Key recommendations include:

- the Code remaining voluntary, noting that the Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories;
- amending the definition of good faith to provide greater clarity, and introducing a new requirement to consider fair dealings in dispute resolution;
- improving the internal dispute resolution requirements, by replacing Code Compliance Managers with Code Arbiters for each signatory. The Code Arbiters would be empowered by the Code to make binding determinations on the signatory, including awarding compensation;

EXPOSURE DRAFT

- the Government appointing an Independent Reviewer to oversee the dispute resolution process to ensure it is conducted independently and without bias;
- ensuring that price rise negotiations are not conditional on suppliers providing commercially sensitive information to a signatory or third party; and
- requiring that a future review be conducted in three to five years' time to test the effectiveness of the Review's recommendations.

The Government released its response on 27 March 2019 which supported 13 of the 14 recommendations. The Government agreed to retain the Code as a voluntary code but expressed a strong expectation that large retailers and wholesalers should become signatories. Failure for them to do so may result in the Government introducing a mandatory code in the future.

The purpose of the *Competition and Consumer (Industry Codes – Food and Grocery) Amendment Regulations 2019* (Amending Regulations) is to amend the Code to give effect to the Government's response to the Report.

The Amending Regulations:

- apply the same obligations under the Code on wholesalers as already applies to retailers (with the exception of customer facing provisions);
- enhance the good faith obligations in the Code to make it clearer and more user friendly for industry;
- strengthen the dispute resolution procedures to give suppliers more confidence in raising their complaints and having them resolved;
- set limits on acceptable conduct during price rise negotiations between the parties to restore trust and cooperation between parties; and
- make minor changes to clarify existing amendments and improve protections for suppliers in their negotiations with retailers and wholesalers.

Details of the Amending Regulations are set out in [Attachment A](#).

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

The Office of Best Practice Regulation has acknowledged the Department of the Treasury's certification that the Review undertook a process and analysis equivalent to a Regulation Impact Statement (OBPR ref no 23950).

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

Except for items 27 and 28 of Schedule 3, the Amending Regulations commence on the day after this instrument is registered on the Federal Register of Legislation. Items 27 and 28 of Schedule 3 (conduct relating to price increase negotiations) commence three months after this instrument is registered.

ATTACHMENT A

Details of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*

Section 1 — Name

This section provides that the name of the instrument is the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*.

Section 2 — Commencement

This section provides that:

- items 27 and 28 of Schedule 3 commence three months after this instrument is registered; and
- the rest of the Amending Regulations commence on the day after this instrument is registered.

Section 3 — Authority

This section provides that the instrument is made under section 51AE of the Act.

Section 4 — Schedules

This section provides that each instrument specified in a Schedule to the Amending Regulations is amended or repealed as set out the applicable items in the particular Schedule.

Schedule 1 – Extension of Part 3 of the Code to wholesalers

Items 1, 3, 6 – clarification relating to the role of wholesaler as ‘supplier’ to retailers

As intermediaries in the grocery supply chain, wholesalers may perform dual roles – first, purchasing groceries from suppliers; and second, on-selling (‘supplying’) these groceries to retailers for sale to consumers.

These items clarify that the Code applies to wholesalers’ conduct in relation to purchasing groceries from suppliers, not their conduct in relation to ‘supplying’ groceries to retailers.

Items 2, 4-5, 7-12, 20-34, 38-40, 46 – extension of the majority of existing retailer conduct provisions to wholesalers

These items extend the majority of the existing provisions in Part 3 of the Code – which currently only relate to *retailers’* conduct with respect to suppliers – to wholesalers as well.

Part 3 sets minimum standards of behaviour in relation to a number of particular aspects of the relationship between a retailer and a supplier with a view to providing clarity for businesses and improving standards of conduct in the grocery sector. Where these provisions allow for limited exceptions to the general standard of behaviour, the retailer has the onus of proving that those exceptions apply.

EXPOSURE DRAFT

The same principles are applicable to the relationship between a wholesaler and a supplier, except to the extent that they relate to customer facing provisions that are only relevant to retailers (eg conduct relating to shelf space in retail stores).

The majority of the existing clauses in Part 3 do not include customer facing provisions. Accordingly, these clauses (outlined below) are extended to the conduct of wholesalers in the same way that they apply to the conduct of retailers.

- Clause 12—Payments to suppliers
 - This clause requires retailers and wholesalers to pay suppliers for the products they deliver within the timeframe set by a grocery supply agreement, and in any event, within a reasonable timeframe after receiving an invoice.
 - Retailers and wholesalers are generally prohibited from setting off any amount against a supplier's invoice unless the supplier has consented in writing. Retailers and wholesalers must not require a supplier to consent.
- Clause 13—Payments for shrinkage
 - This clause provides that retailers and wholesalers must not require suppliers to pay for shrinkage or to enter into a grocery supply agreement under which such payments are required.
 - Shrinkage refers to the loss of grocery products after a retailer or wholesaler has taken possession, due to factors such as shoplifting, employee theft or administrative error.
- Clause 14—Payments for wastage
 - Retailers and wholesalers are generally prohibited from requiring suppliers to pay for wastage which occurs at the premises of the retailer or wholesaler (or their contractor or agent, or another retailer or wholesaler). This is on the basis that the supplier would not normally have control over the groceries and any possible wastage once the retailer or wholesaler, or their contractor or agent, has taken delivery of the groceries.
 - Wastage refers to the state of groceries that are unfit for sale, for example, where fresh foods have spoiled, or packaged products are beyond their use-by date.
- Clause 17—Payments for retailer's or wholesaler's activities
 - This clause limits the circumstances in which retailers and wholesalers are able to require payments from suppliers for certain activities. Retailers and wholesalers are generally prohibited from requiring payments toward the costs of:
 - : a buyer's visit to the supplier;
 - : artwork or packaging design;

EXPOSURE DRAFT

- : consumer or market research;
- : the opening or refurbishing of a store; or
- : hospitality for the retailer's or wholesaler's staff.
- Clause 18—Funding promotions
 - Retailers and wholesalers are prohibited from requiring a supplier, directly or indirectly, to fund all or part of the retailer's or wholesaler's costs of promotions.
 - This clause should be also read in conjunction with clause 20 which sets out obligations on the retailer and wholesaler regarding funded promotions.
- Clause 19—Delisting products
 - Retailers and wholesalers can only delist a supplier's grocery product where permitted under the grocery supply agreement and where this occurs for genuine commercial reasons. Genuine commercial reasons for delisting grocery items include failure of the supplier to meet agreed quality or quantity requirements with respect to the product (however, isolated, short term fluctuations in supply may not constitute a genuine commercial reason for delisting). It also includes failure of the supplier's product to meet the retailer's or wholesaler's commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement. A persistent failure to meet agreed delivery requirements, as notified to the supplier from time to time in accordance with the agreement, would also constitute genuine commercial reasons.
 - This clause clarifies that delisting a product as punishment for making a complaint would not constitute a genuine commercial reason and is therefore not permitted.
 - If there are genuine commercial reasons for delisting, then the retailer or wholesaler must provide reasonable notice in writing setting out the reasons for delisting, and inform the supplier that it has a right to have the decision reviewed by the retailer's or wholesaler's 'senior buyer' (which is a defined term in the Code). However, this does not apply where time is of the essence (including product safety issues) or where there have been ongoing problems with supply where the retailer or wholesaler has been out of stock or had significantly reduced stock.
- Clause 21—Fresh produce standards and quality specifications
 - A retailer or wholesaler must provide its fresh produce standards or quality specifications to suppliers in clear, written terms. Retailers and wholesalers must accept all fresh produce delivered in accordance with the specifications. If fresh produce fails to meet relevant specifications, a retailer or wholesaler may reject it within 24 hours, provided it gives

EXPOSURE DRAFT

written notice within 48 hours. Retailers and wholesalers cannot reject produce after accepting it.

- Clause 22—Changes to supply chain procedures
 - This clause broadly prohibits retailers and wholesalers from making any material changes to supply chain procedures during the term of a grocery supply agreement, unless they give a supplier reasonable written notice, or compensate it for any net resulting costs, losses or expenses incurred by the supplier as a result of the failure to give notice.
 - A supplier may waive its right to compensation.
- Clause 23—Business disruption
 - Retailers and wholesalers are not allowed to threaten to disrupt a supplier's business or terminate a grocery supply agreement, without reasonable grounds.
- Clause 24—Intellectual property rights
 - This clause provides that a retailer or wholesaler must respect a supplier's intellectual property rights in relation to their products, for example, with respect to branding, packaging, and advertising. It also provides that retailers and wholesalers must not infringe a supplier's rights when developing their own brands.
- Clause 25—Confidential information
 - Retailers and wholesalers must protect suppliers' confidential information, such as information relating to product development, proposed promotions or pricing, and ensure it is not used for a purpose beyond that agreed with the supplier. The information may only be disclosed to employees or agents of the retailer or wholesaler on a 'need to know' basis in connection with that purpose. This clause applies to information disclosed to the retailer or wholesaler by the supplier in connection with the supply of grocery products.
- Clause 27—Transfer of intellectual property rights
 - If a retailer or wholesaler is negotiating the supply of an own brand product from a supplier of an equivalent grocery product, the retailer or wholesaler must not require the supplier to transfer or exclusively license any intellectual property right held by it as a condition or term of supply.
 - Retailers and wholesalers are not prevented from holding intellectual property in an own brand product and they can hold an exclusive right to sell an own brand product. If an own brand product was developed, formulated or customised for the retailer or wholesaler, then the retailer or wholesaler may request the holding of intellectual property in an own brand product or the exclusive right to the retail or wholesale sale of the own brand product as a condition of supply. For example, if a retailer or

EXPOSURE DRAFT

wholesaler designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then the retailer or wholesaler may wish to hold intellectual property rights in that product.

Items 13-17 – conduct relating to ‘new listings’ (clause 15)

Clause 15 deals with retailers’ conduct in relation to ‘Payments as a condition of being a supplier.’ Retailers are generally prohibited from requiring suppliers to make payments in order to have products stocked or listed by the retailer (subclause (1)), with two exceptions – this prohibition does not apply if the payment is made in relation to a promotion (paragraph (2)(a)) or products that have not been stocked, displayed or listed by the retailer in the preceding year in 25 per cent or more of its stores, known as ‘new listings’ (paragraph (2)(b)).

While this principle is applicable to both retailers and wholesalers, some aspects of this provision are customer facing and hence not relevant to wholesalers.

These items clarify that the existing exceptions in subclause (2) only apply to retailers, and introduce a new subclause (2A) to apply to wholesalers. Subclause (2A) mirrors subclause (2), but removes the customer facing aspects which are not relevant to wholesalers:

- removing references to ‘displaying’ products, while retaining references to ‘stocking’ and ‘listing’ products; and
- referring to wholesalers’ distribution centres rather than retailers’ stores.

Items 18-19 – conduct relating to positioning of groceries and shelf space (clause 16)

Clause 16 deals with retailers’ conduct in relation to ‘Payments for better positioning of groceries.’ This is a customer facing provision that is not relevant to wholesalers.

These items clarify that the existing provision only applies to retailers.

Items 35-37 – conduct relating to funded promotions (clause 20)

Clause 20 deals with retailers’ conduct in relation to ‘funded promotions.’ This provision is intended to protect suppliers from unconscionable behaviour: for example, retailers must not over-order products at a promotional (reduced) price from a supplier and then on-sell at full price (subclause (2)); and retailers must not lock in large orders from a supplier and then cancel or significantly reduce the size of the order (subclause (3)).

This principle is applicable to both retailers and wholesalers. To avoid confusion regarding how this provision applies to the different roles of retailers and wholesalers in the supply chain, the existing provisions in clause 20 will continue to only apply to retailers and a new clause 20A will apply to wholesalers.

Clause 20A mirrors clause 20, and only applies in relation to wholesalers’ conduct in relation to buying groceries from a supplier and *on-selling to a retailer*; it does not apply to the conduct of the (downstream) retailer when subsequently selling these

EXPOSURE DRAFT

products to consumers (as wholesalers generally do not have control over the retailer's pricing decisions).

Items 41-45 – conduct relating to shelf space, product range and reviews (clause 26)

Clause 26 deals with retailers' conduct in relation to allocation of shelf space, product range and reviews. Some aspects of this provision are customer facing and hence not relevant to wholesalers.

These items extend the existing requirements in this clause relating to product ranging principles and range reviews to wholesalers as well as retailers. The existing requirements relating to shelf space allocation continue to only apply to retailers.

Schedule 2 – Dispute resolution

In response to the independent Review of the Food and Code, the Government agreed to amend the existing dispute resolution mechanism to ensure it is fit for purpose.

Consistent with the Government's response the proposed amendments to the Code would:

- Replace the code compliance manager with a Code Arbiter;
- Enable the Minister to appoint an Independent Reviewer to ensure due process is followed during the dispute resolution process; and
- Retain the existing ability for a supplier to seek external mediation or arbitration.

Items 1-7 – Code Arbiter

Items 1 to 7 replace the existing requirement for a retailer or wholesaler to have a code compliance manager with a requirement for the retailer or wholesaler to instead appoint a Code Arbiter.

The Code Arbiter is responsible for investigating and proposing a resolution to a dispute or complaint raised by a supplier and must be sufficiently resourced by the retailer or wholesaler to fully perform this role.

Once a Code Arbiter has been appointed, the retailer or wholesaler must give the ACCC and Independent Reviewer the Code Arbiter's contact details.

While the Code Arbiter is appointed by, and its costs met by the wholesaler or retailer, the Code Arbiter must be free to investigate a complaint and offer a proposed remedy on behalf of the wholesaler or retailer to the supplier without interference or influence from the retailer or wholesaler.

The Code Arbiter must also be authorised to enter into an agreement on the retailer or wholesalers' behalf to settle a dispute. The Code Arbiter must not be engaged by the retailer or wholesaler in any way other than as a Code Arbiter.

EXPOSURE DRAFT

The Code Arbiter must have in place a written complaints handling procedure which is given to the Independent Reviewer. The written complaints handling procedure should be published and made available on the retailer or wholesaler's website for suppliers to access in relation to resolving disputes.

To make a complaint, the supplier must, in writing, submit details of the complaint to the Code Arbiter along with contact details for the supplier. The supplier does not need to identify which provision of the Code it considers has been breached.

When a complaint has been lodged with the Code Arbiter, the Code Arbiter has 20 business days to investigate the complaint and a subsequent five business days to propose a remedy to the supplier to resolve the complaint. The Code Arbiter may also conclude after the investigation that no action is required in response to the complaint. For all decisions that a Code Arbiter makes, including recommending that no further action is required, the Code Arbiter must include reasons supporting the recommendation.

The timeframe for the Code Arbiter to consider a complaint can be extended with the agreement of the supplier.

The Code Arbiter does not need to review a complaint if the complaint is considered to be vexatious, trivial, misconceived or lacking in substance. If this is the case, the Code Arbiter must notify the supplier in writing that the complaint will not be investigated (and explain why) and notify the supplier of other avenues to raise the complaint, including through the Independent Reviewer or external mediation or arbitration.

The Code Arbiter must review the complaint in accordance with its written complaints handling procedure. The retailer or wholesaler must ensure that the Code Arbiter has access to any documentation that relates to the complaint and give the Code Arbiter access to the retailer or wholesaler's buying team to discuss issues about the retailer or wholesaler's obligations under the Code.

When reviewing the complaint the Code Arbiter must take into consideration whether the retailer or wholesaler acted lawfully and in good faith. The Code Arbiter may also consider whether the retailer or wholesaler acted fairly.

The purpose of inserting a concept of 'acting fairly' into the Code is intended to reflect that while a party may have conducted itself within the requirements of the law, the party may not have acted in a way that would meet community expectations. The Code sets out what may be taken into account to decide if a party acted fairly. This includes whether the retailer or wholesaler:

- 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 expected by the supplier; or
- had regard for the relationship with the supplier and the specific characteristics of the supplier.

EXPOSURE DRAFT

The Code Arbiter has the authority to offer a proposed a remedy to the supplier on behalf of the retailer or wholesaler to address the complaint made by the supplier. The remedy could be for the payment of compensation to the supplier to rectify the harm caused, changes to the Grocery Supply Agreement or another remedy.

The offer must be made in writing and the retailer or wholesaler must also be made aware of the offer.

The proposed remedy does not remain available indefinitely. The availability of the remedy depends on whether the supplier refers the complaint to the Independent Reviewer and whether the Independent Reviewer will review the complaint.

- The offer will lapse if 20 business days after the Code Arbiter proposed the remedy it has not been accepted by the supplier or the supplier has not referred the complaint to the Independent Reviewer (see Diagram 1 in Attachment B).
- If the supplier refers the complaint to the Independent Reviewer within 20 business days of having been made the offer:
 - the offer lapses 10 business days after the Independent Reviewer has notified the supplier that the Independent Reviewer will not review the complaint (see Diagram 2 in Attachment B);
 - If the Independent Reviewer reviews the complaint, the offer lapses:
 - : 10 business days after the Independent Reviewer has notified the supplier that the Code Arbiter’s process was acceptable; or
 - : 10 business days after the Code Arbiter has reconsidered the complaint (in response to a recommendation by the Independent reviewer) and given notice to the supplier as to the outcome (see Diagram 3 in Attachment B).

To accept the proposed remedy offered by the Code Arbiter, the supplier must tell the Code Arbiter in writing that the offer is accepted and do so before the offer has lapsed. The Code Arbiter must enter into an agreement on behalf of the retailer or wholesaler. The retailer or wholesaler must action the agreement.

Failure to comply with the agreement would be contrary to section 51ACB of the *Competition and Consumer Act 2010* and the remedies provided by Part VI of the *Competition and Consumer Act 2010* would be available. For example, seeking an injunction under section 80 or commencing an action for damages under section 82.

The Code Arbiter may also make recommendations to the retailer or wholesaler about amending its business practices to avoid similar problems occurring in the future with other suppliers. This is not intended to be binding or enforceable but will be reported in the Code Arbiter’s annual report.

EXPOSURE DRAFT

Code Arbiter – annual report and record keeping obligations

The Code Arbiter has annual reporting obligations.

Item 7 inserts new clause 36C which requires the Code Arbiter to report annually on:

- the number of complaints received for investigation in the reporting period;
- 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; and
- whether or not each complaint was resolved to the satisfaction of the complainant.

The report must cover the period 1 July to 30 June, and be provided to the Independent Reviewer, the ACCC and the retailer or wholesaler by 1 August. Within a day of being given the report, the retailer or wholesaler must publish the report on its website.

The Code Arbiter also has record keeping obligations.

Item 7 also inserts new subclause 35(5) to require that for a period of six years, the Code Arbiter must keep:

- the record of the complaint made;
- a copy of any notices given out that a complaint was vexatious, trivial, misconceived or lacking in substance;
- a record of the investigations undertaken in response to a complaint; and
- a summary of actions taken in response to the complaint.

A retailer or wholesaler's record keeping obligations are also amended as a result of the establishment of a Code Arbiter. A retailer or wholesaler must keep a copy of the Code Arbiter's report for six years as well as a summary of the action that has or will be taken in response to a complaint (Items 17 and 18).

Item 8 – Independent Reviewer

Item 8 amends the Code to establish an 'Independent Reviewer'.

The Independent Reviewer has two key roles.

1. When a complaint is raised by a supplier with the Independent Reviewer, the Independent Reviewer may review the complaint to consider whether the process followed by the Code Arbiter afforded the supplier procedural fairness; and

EXPOSURE DRAFT

2. Monitor the sector for emerging systemic issues and report on any findings in its annual report.

The Independent Reviewer will be appointed by the Minister. In deciding who to appoint, the Minister will consider whether the person has skills and experience in applying principles of procedural fairness and has experience working within Australian industry so as to give the Independent Reviewer broad experience in commercial dealings and negotiations.

The Independent Reviewer will be appointed and in place from the day the amendments to the Code take effect. However, complaints can only be referred to the Independent Reviewer once the retailer or wholesaler has a Code Arbiter in place.

Reviewing Complaints

A supplier may raise a complaint with the Independent Reviewer about the Code Arbiter's process used to investigate and consider the supplier's complaint. A supplier cannot raise a complaint with the Independent Reviewer until the Code Arbiter has investigated the complaint and made an offer of a proposed remedy to the supplier, or the time period in which the Code Arbiter's investigation should have been completed has lapsed. In this way the two processes are not running concurrently.

A referral to the Independent Reviewer must be in writing and include the supplier's contact details. The referral must also explain details of the original complaint and the aspects of the Code Arbiter's process the supplier wants the Independent Reviewer to consider. The supplier should also provide the Independent Reviewer with relevant contact details for the supplier and details about the alleged deficiencies or problems that the supplier experienced during the Code Arbiter's process.

The Independent Reviewer's role in considering complaints is not to consider whether the proposed remedy is reasonable or adequate given the nature of the complaint rather, the role of the Independent Reviewer is to consider whether the Code Arbiter followed due process and the Code Arbiter's complaints handling procedure.

Even where the supplier has accepted a proposed remedy, the supplier can still refer the complaint to the Independent Reviewer. However, in this instance the Independent Reviewer will only be considering the complaint from Independent Reviewer's broader perspective of monitoring systemic issues and will not make a recommendation to the Code Arbiter regarding the process of investigating the specific complaint.

The Independent Reviewer is not required to review every referral. Circumstances when the Independent Reviewer may not review a complaint include:

- the supplier accepted the offer made by the Code Arbiter;
- the complaint is vexatious, trivial, misconceived or lacking in substance;
- the complaint was not related to the process followed by the Code Arbiter; and
- the complaint is unlikely to significantly assist the Independent Reviewer in determining whether a systemic issue exists.

EXPOSURE DRAFT

The Independent Reviewer has 10 business days to confirm whether or not a review will be conducted.

- If the Independent Reviewer is not going to review the complaint the Independent Reviewer must notify the supplier and Code Arbiter that the complaint will not be reviewed and explain why.
- If the Independent Reviewer will review the complaint, the Independent Reviewer must notify the supplier, Code Arbiter, and retailer or wholesaler that the complaint is being investigated.

Where the Independent Reviewer is reviewing a complaint, the retailer or wholesaler and the Code Arbiter are required to provide any information requested by the Independent Reviewer. The information should be provided within 10 business days of the request.

The Independent Reviewer has 20 business days to complete a review. The timeframe is extended where the Independent Reviewer is waiting for information from the Code Arbiter, retailer or wholesaler, or supplier. The supplier, retailer or wholesaler and Code Arbiter must be notified of the Independent Reviewer's recommendation within five business days of the review being completed.

Where the Independent Reviewer makes a recommendation to the Code Arbiter about the process undertaken, the Code Arbiter has 10 business days to consider whether to:

- adopt the Independent Reviewer's recommendation and reconsider the proposed remedy; or
- not reconsider the complaint.

Having considered the Independent Reviewer's recommendation, the Code Arbiter must notify the supplier and Independent Reviewer of their decision by the conclusion of the 10 business days.

If the Code Arbiter does reconsider the case and does decide to offer a new proposed remedy to the supplier, the supplier has 10 business days to accept or decline the new proposed remedy.

If the Code Arbiter does not reconsider the complaint, the supplier has 10 business days to accept or decline the original proposed remedy.

Monitoring systemic issues

The Independent Reviewer also has a role monitoring systemic and emerging issues in the food and grocery sector.

Item 8 inserts new clause 37E which places reporting obligations on the Independent Reviewer.

The Independent Reviewer is required to provide an annual report to the ACCC by 30 November each year on the Independent Reviewer's activities including the role

EXPOSURE DRAFT

monitoring systemic issues and the information reported by Code Arbiters. The report should cover the 12 months from the previous 1 July.

The report must also be published on the Independent Reviewer's website.

Items 9-15 – External Mediation or Arbitration

Existing clauses 38 and 39 in the Code provide that a supplier may seek mediation or arbitration with an external mediator or arbitrator.

This option will remain under the amended dispute resolution process.

Currently, a supplier cannot take a complaint to the code compliance manager and an external mediator or arbitrator simultaneously. If the supplier has referred a complaint to the code compliance manager, the supplier cannot seek mediation or arbitration of the complaint until the code compliance manager's investigation is complete, or should have been completed.

Similarly, under the amended Code, a supplier cannot take a complaint to an external mediator or arbitrator if the supplier has taken a complaint to the Code Arbiter or Independent Reviewer and that process has not been completed. This means that the Code Arbiter must have offered a proposed remedy or notified the supplier that they would not be investigating the complaint – or should have done either of these things – before the supplier can initiate external mediation or arbitration.

In cases where the supplier has referred the complaint to the Independent Reviewer, the process is considered to be completed when the Independent Reviewer:

- notifies the supplier that they will not be reviewing the complaint;
- notifies the supplier that the Code Arbiter's process is acceptable; or
- refers the complaint back to the Code Arbiter and the Code Arbiter notifies the supplier of the outcome of its reconsideration.

There is no requirement for a supplier to have raised a complaint with the Code Arbiter before seeking external mediation or arbitration.

A minor amendment is also required to clause 39 to reflect that the *Institute of Arbitrators and Mediators Australia* is now referred to as the *Resolution Institute*. There is also no need for the Minister to have the power to substitute an alternative body in place of the *Resolution Institute* and so the substitution power in subclause 39(5) is removed.

Amended dispute resolution process – Application and transitional provisions (Schedule 3 – Item 16 and Schedule 4 – item 1)

Existing signatories will need some time after the amendments take effect to put in place a Code Arbiter. Existing signatories to the Code will have six months from when the amendments commence to establish a Code Arbiter. During that six month period the code compliance manager must continue to be in place. If a Code Arbiter is put in place before the six month transitional period ends, the code compliance

EXPOSURE DRAFT

manager cannot also be in place. Any complaints that the code compliance manager is considering when the Code Arbiter commences will be transferred to the Code Arbiter.

New signatories will also have six months after becoming a signatory to have a Code Arbiter in place. In this way, retailers and wholesalers who are not already signatories can decide to become signatories and adhere to other elements of the Code without first needing to have a Code Arbiter in place. However, the retailer or wholesaler must have an internal dispute resolution process in place through which a supplier can raise a complaint.

Once established, the Code Arbiter will handle all complaints irrespective of when the conduct in question took place provided that it took place when the retailer or wholesaler was a signatory to the Code.

Complaints about new or existing signatories cannot be escalated to the Independent Reviewer until the signatory has a Code Arbiter in place.

Schedule 3 – Other amendments

Items 1-2 – expectation that large retailers and wholesalers should sign up to the voluntary Code

Regulation 4 prescribes the Code as a voluntary industry code. These items include a note to this regulation, to express the Government's view that large retailers and wholesalers – those with annual revenue of \$5 billion or more, or a market share of 5 per cent or more – should agree to be bound by the voluntary Code.

Items 3-7 – review of the revised Code

Regulation 5 provided that a review of the Code was to be undertaken three years after the Code commenced. Subregulation 5(4) prescribed a list of matters which were to be addressed in the original review. That review commenced in March 2018; the final report was released in October 2018 and resulted in the Government implementing these amendments to the Code.

Items 3-6 provide for a further review to be commenced within three years after commencement of these amendments to the Code. Specific matters to be addressed in this review are not prescribed. The Government will consult with industry in determining the terms of reference for the review.

Item 7 deletes subregulation 5(4) as it is now spent.

Items 8, 21-23, 32 – delisting products and significant reductions in distribution

Clause 19 currently governs conduct relating to a retailer delisting a supplier's product, which is defined as 'remov[ing] a grocery product from a retailer's range of grocery products.' This clause has been extended to apply to wholesalers as well as retailers (see Schedule 1, items 28-36).

A decision by a retailer or wholesaler to significantly limit the distribution of a supplier's product is akin to delisting. Accordingly, item 21 extends the definition of

EXPOSURE DRAFT

delisting to include a reduction in the distribution of a product that has or is likely to have a material effect on the supplier.

Item 22 clarifies that prior to delisting a supplier's product, the retailer or wholesaler must provide reasonable written notice to the supplier of their decision to delist the product. The written notice must include the reasons for delisting as well as information about the supplier's right to have the decision reviewed.

Item 23 inserts a requirement that retailers and wholesalers comply promptly (in writing) with any written request from a supplier for information (or additional information) and/or details on the reasons for a delisting. This applies irrespective of whether or not the retailer or wholesaler has already complied (or was required to comply) with the notification requirements under subclause (5).

Items 9-10 – definition of grocery supply agreement

These items clarify that the definition of grocery supply agreement includes any contracts or agreements between a retailer or wholesaler and a supplier that relate to the supply of groceries. This is to clarify that the definition is not restricted to the principal grocery supply agreement and documents made under that agreement. These other documents may include freight agreements, promotion agreements, supplier portal documents and purchase orders.

Items 11-16 – transitional application

Clauses 5 and 6 outline the transitional provisions applicable to new signatories (retailers and wholesalers respectively) which agree to be bound by the Code after it has commenced, where the new signatories have existing grocery supply agreement(s) in place with supplier(s). These transitional provisions do not apply to Part 1 (preliminaries) and Part 1A (good faith), which apply to both retailers and wholesalers immediately upon becoming bound by the Code. Separate transitional provisions apply to Part 5 (dispute resolution), as outlined below (item 16).

Clause 5 provides new retailer signatories with a 12 month transitional period in which to amend their existing grocery supply agreements, as necessary, to comply with the Code. Part 2 (grocery supply agreements), Part 3 (conduct generally) and Part 6 (compliance and reporting) of the Code will apply to these new retailer signatories either:

- 12 months after they become bound by the Code; or
- when the grocery supply agreements have been amended (if this occurs within the 12 month period).

Clause 6 currently provides similar transitional arrangements for new wholesaler signatories, but with a longer transitional period (24 months). Items 12-15 amend clause 6 to bring the transitional provisions applying to new wholesalers in line with those applying to new retailers by:

- extending the application of Part 3 to wholesalers; and

EXPOSURE DRAFT

- providing a 12 month transitional period for the application of Parts 2, 3 and 6 to wholesalers who become bound by the Code after the commencement of this instrument (while retaining the existing 24 month transitional period for any wholesalers which become bound by the Code before that commencement).

Clauses 5 and 6 currently also apply the 12 (or 24) month transitional period to the dispute resolution provisions in Part 5. Items 11 and 14 remove dispute resolution from clauses 5 and 6. Item 16 introduces a new clause 6A which instead applies a six month transitional period to Part 5, for both new retailer and wholesaler signatories (while retaining the existing 24 month transitional period for any wholesalers which become bound by the Code before the commencement of this instrument). All new signatories must have an internal dispute resolution process in place until such time as they appoint a Code Arbitrator.

Item 16 also introduces a new transitional provision to apply to *existing* signatories (retailers and wholesalers). The new clause 6B provides a general rule that whenever the Code is amended, existing signatories at the time the amendments commence would have a 12 month transitional period in which to amend their existing grocery supply agreements, as necessary, to comply with the amended Code. This mirrors the transitional application provisions for new signatories under clauses 5 and 6.

However, this general transitional application provision does not apply to the extent that it is inconsistent with any transitional application provisions relating to specific amendments as prescribed in Part 7 (transitional, savings and application provisions).

Items 17, 29-30 – Good faith

These items replace the existing good faith provision (currently at clause 28 in Part 4 of the Code) with an enhanced good faith provision (new clause 6A in new Part 1A).

The Code currently includes a non-exhaustive list of factors which may be taken into account when determining whether a retailer or wholesaler has acted in good faith in dealing with a supplier. In addition to the three factors currently outlined in the Code, the good faith provision has been expanded to include the following four factors which may also be taken into consideration:

- whether the retailer or wholesaler has acted honestly;
- whether the retailer or wholesaler has cooperated to achieve the purposes of the agreement with the supplier;
- whether the retailer or wholesaler has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives; and
- whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes.

Items 18-19, 25, 31 – retrospective variations to grocery supply agreements

Clause 10 of the Code provides a ban on variations to grocery supply agreements that have retrospective effect. This clause currently includes ‘opt out’ provisions, prescribing certain circumstances in which the ban does not apply.

EXPOSURE DRAFT

These items remove the 'opt out' provisions, so that grocery supply agreements cannot be amended with retrospective effect even with the agreement of both parties.

These amendments to clause 10 only apply to new grocery supply agreements that come into force on or after the commencement of these amendments, and/or existing agreements that are varied, renewed or extended after that commencement (see Schedule 4, item 1, new clause 44 of the Code).

Item 20 – payments for wastage

Clause 14 of the Code governs payments from a supplier to a retailer or wholesaler to cover any wastage of groceries incurred at the retailer's or wholesaler's premises. This item provides suppliers with the right to renegotiate their wastage payments without being required to renegotiate other terms of their grocery supply agreement. This is intended 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.

These amendments to clause 14 only apply to new grocery supply agreements that come into force on or after the commencement of these amendments, and/or existing agreements that are varied, renewed or extended after that commencement (see Schedule 4, item 1, new clause 45 of the Code).

Item 24 – fresh produce

Clause 21 of the Code governs conduct relating to fresh produce standards and quality specifications. This item clarifies that the 'fresh produce' covered by this clause only applies to fruit and vegetables. This includes fruit and vegetables that have been pre-packaged (but not tinned).

Items 26-28 – negotiating price increases

These items introduce two new provisions (clauses 27A and 27B) governing the conduct of retailers and wholesalers in relation to negotiating price increases with suppliers.

Clause 27A prevents the retailer or wholesaler from requiring the supplier to disclose commercially sensitive information, either in the course of the negotiations or as a precondition to entering into the negotiation.

Clause 27A also prescribes that the retailer or wholesaler should conclude any such price increase negotiations within 30 days following receipt of all information reasonably required to consider the case for the increase, unless both parties agree (in writing) that a longer negotiation period is justified in the particular circumstances. Both parties must agree, in writing, on the 'start day' for the negotiations (i.e. when the retailer or wholesaler has all of the information reasonably required to consider the case for the increase).

Clause 27B prescribes that retailers and wholesalers must report annually on these price increase negotiations. The following information must be provided to the retailer or wholesaler's Code Arbitrator, for inclusion in their annual reports (which will be made publicly available from the retailer or wholesaler's website):

EXPOSURE DRAFT

- the total number of price rise negotiations completed in a year; and
- the total number of cases that took over 30 days, and for those cases the number of actual days taken.

Transitional arrangements apply to these reporting requirements for the first financial year, to ensure that retailers and wholesalers are not required to report on activity which occurred prior to the commencement of the new price increase negotiation provisions (see Schedule 4, item 1, new clause 46 of the Code).

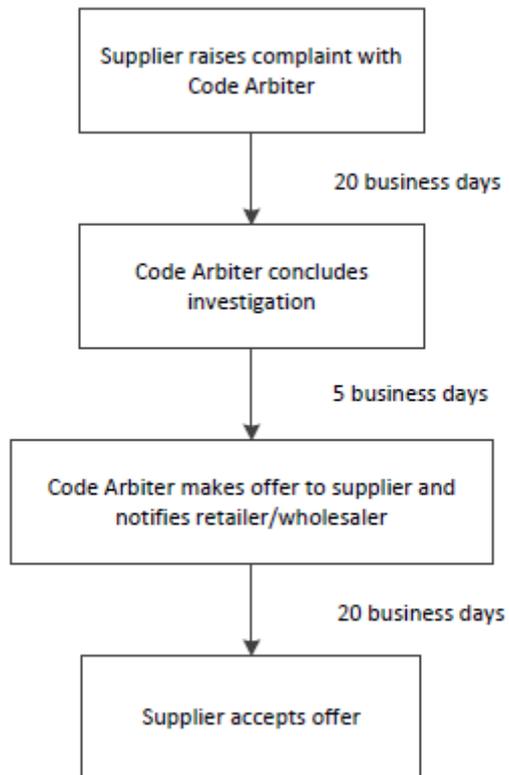
Schedule 4 – Transitional, savings and application provisions

This schedule introduces a new Part 7 – transitional, savings and application provisions. Details of the individual provisions are provided alongside the relevant amendments in Schedules 1-3, as outlined above.

DRAFT

DISPUTE RESOLUTION

Diagram 1 – Supplier accepts proposed remedy within 20 days of the offer being made by Code Arbiter



EXPOSURE DRAFT

Diagram 2 – Supplier refers complaint to Independent Reviewer – Independent Reviewer will not review

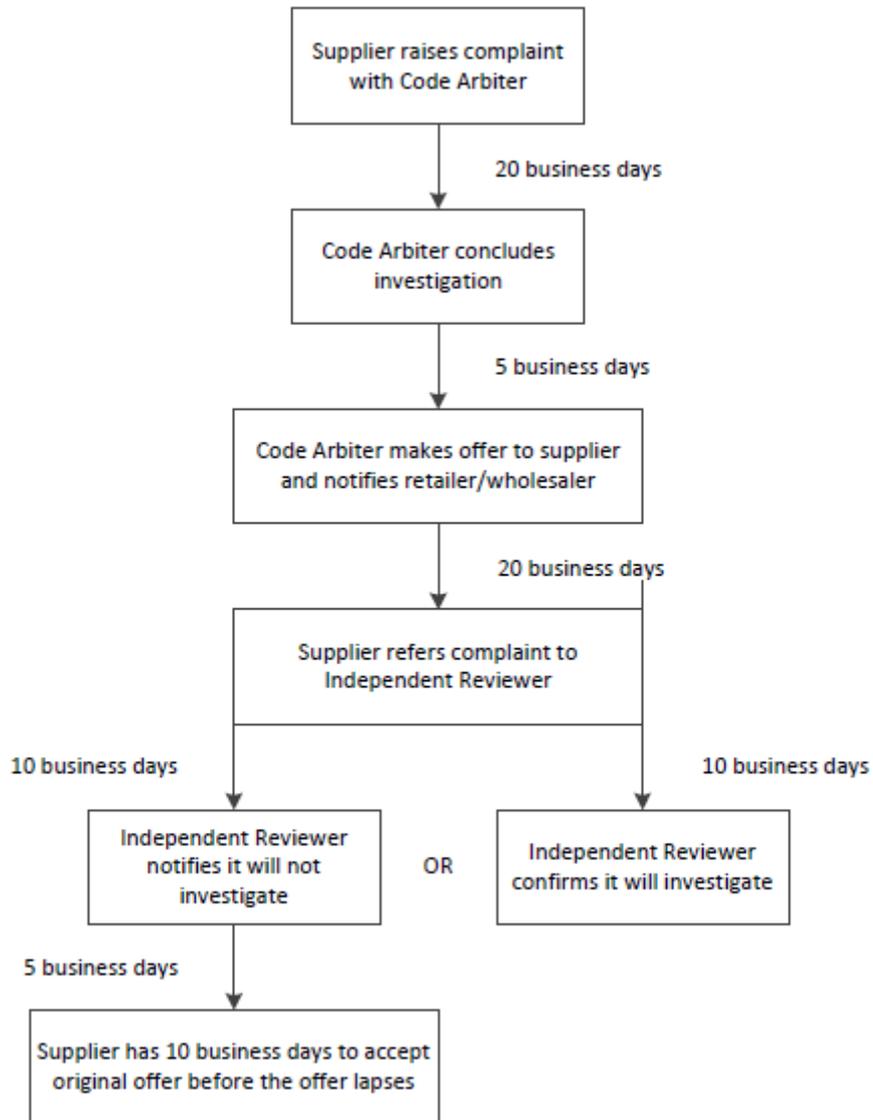


Diagram 3 – Supplier refers complaint to Independent Reviewer – Independent Reviewer reviews complaint

