



Food and Grocery Code of Conduct Review

ACCC Submission

11 May 2018

Introduction

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing and promoting compliance with the *Competition and Consumer Act 2010* (CCA), including the Australia Consumer Law (ACL) and the Food and Grocery Code of Conduct (the Code).

The Code was introduced to address the potential for anti-competitive and unconscionable conduct arising from the superior bargaining power that retailers and wholesalers have when negotiating with suppliers in the grocery supply chain in Australia. It came about following increasing public concerns expressed by suppliers and other stakeholders, the prioritisation of investigations into alleged problematic behaviour by supermarkets against their suppliers by the ACCC, and subsequent findings by the Federal Court in two cases taken by the ACCC in 2014 that Coles had engaged in unconscionable conduct in its dealings with some suppliers.

The Code is a voluntary code prescribed under the CCA. The purpose of the Code is to:

- a) introduce minimum standards of conduct to the grocery supply chain, including an obligation to act in good faith
- b) improve transparency and certainty for suppliers in their dealings with retailers and wholesalers and
- c) provide a dispute resolution process for resolving disputes between suppliers and retailers or wholesalers.

The ACCC considers that the Code has gone some way to improving the conduct of retailers and wholesalers in their dealings with suppliers. ACCC enforcement action and engagement with the supermarket sector more broadly, including court actions against Coles and Woolworths and the strong public profile given to issues in the sector, has also had an important impact on the somewhat improved engagement between supermarkets and their suppliers.

However, the Code has a number of significant shortcomings that, if addressed, would more effectively deliver the objects of the Code. The ACCC's recommendations include:

1. making the Code mandatory
2. removing the ability for retailers and wholesalers to 'opt out' of certain obligations and prohibitions under the Code
3. introducing civil penalties and infringement notices for breaches of the Code
4. introducing civil penalties and infringement notices for failure to comply with a section 51ADD notice
5. introducing a requirement for all delisting information under the Code to be provided in the same delisting notice
6. requiring retailers to provide detailed reasons when delisting a supplier's product, and
7. considering ways to encourage suppliers to make use of the Code to resolve disputes and protecting them when they do.

This submission sets out the scope, key obligations and available remedies for breaches of the Code. It discusses the ACCC's enforcement and compliance activities in the food and grocery sector and makes a number of recommendations as to how the ACCC considers the Code could be improved.

Scope of the Code

The Code regulates commercial relationships between grocery retailers or grocery wholesalers and their suppliers. It is a voluntary prescribed code. This means that the Code applies only to those retailers and wholesalers that have elected to be bound by it, but once they agree to be bound they are required to comply with it.¹

- A **retailer** is a corporation that carries on a supermarket business in Australia.²
- A **wholesaler** is a corporation that carries on a business of purchasing groceries from suppliers for the purpose of reselling to a person that carries on a supermarket business.³
- A **supplier** is a person who carries on a business of supplying groceries for retail sale by another person.⁴

The Code applies to **grocery supply agreements**: agreements between a grocery retailer or wholesaler and a supplier for the supply of groceries to, or for the purposes of, a supermarket business.⁵ A grocery supply agreement includes any document comprising the agreement, or any document made from time to time under the agreement.⁶

- **Groceries** include products such as fresh produce, meat and dairy, non-alcoholic drinks, toiletries, perfumes and cosmetics, cleaning products, toys, clothing, books, newspapers, magazines and greeting cards.⁷
- A **supermarket business** is a business under which a person sells to consumers bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and other packaged foods or most of those groceries.⁸

The Code does not apply to a grocery supply agreement to the extent that it conflicts with the Horticulture Code of Conduct or the Franchising Code of Conduct.⁹

Once signed up to the Code, a retailer has six months (and wholesalers 18 months) to offer to vary existing grocery supply agreements so that they become compliant with the Code.¹⁰ If the supplier accepts the offer, then the retailer or wholesaler must vary the agreement within six months.¹¹ If an agreement is not varied, the Code applies automatically to a retailer 12 months (and to a wholesaler 24 months) after they signed up to the Code.¹² However, the obligation to act lawfully and in good faith which is set out in Part 4 of the Code applies from the date the retailer or wholesaler signs up to the Code. A retailer or wholesaler can withdraw from participation in the Code at any time.¹³

¹ Food and Grocery Code cl 4.

² Food and Grocery Code cl 3.

³ Food and Grocery Code cl 3.

⁴ Food and Grocery Code cl 3.

⁵ Food and Grocery Code cl 3.

⁶ Food and Grocery Code cl 3.

⁷ Food and Grocery Code cl 3.

⁸ Food and Grocery Code cl 3.

⁹ Food and Grocery Code cl 4(4).

¹⁰ Food and Grocery Code cls 5 and 6.

¹¹ Food and Grocery Code cls 5 and 6.

¹² Food and Grocery Code cls 5 and 6.

¹³ Food and Grocery Code cl 4(3).

Current signatories

As of 11 May 2018, the signatories to the Code are Woolworths (from 1 July 2015), Coles (from 1 July 2015), ALDI (from 15 June 2015) and About Life (from 19 May 2015).

Key obligations under the Code

Retailers and wholesalers bound by the Code must not enter into a grocery supply agreement unless it satisfies the requirements set out in the Code.¹⁴

Minimum requirements to be included in grocery supply agreements

The Code requires that grocery supply agreements must specify:

- requirements relating to delivery of groceries
- when a retailer or wholesaler may reject groceries
- the period within which the retailer or wholesaler must pay the supplier
- when payment may be withheld or delayed
- the term of the agreement (if it is a fixed-term agreement)
- any quantity and quality requirements, and
- the circumstances in which the parties can terminate the agreement.¹⁵

Unilateral and retrospective variation

The Code prohibits retailers and wholesalers from varying a grocery supply agreement without the supplier's consent¹⁶ and from varying the agreement with retrospective effect.¹⁷

Obligation to act lawfully and in good faith

The Code requires both retailers and wholesalers to act lawfully and in good faith at all times, for example by ensuring that the supplier is not subject to duress.¹⁸

Obligations on retailers when dealing with suppliers

Certain obligations under the Code apply only to retailers and not to wholesalers. Under the Code, retailers must pay suppliers within a reasonable time after delivery.¹⁹ They are also prohibited from requiring payment from suppliers for:

- set off amounts²⁰
- shrinkage²¹
- wastage of groceries²²

¹⁴ Food and Grocery Code cl 8.

¹⁵ Food and Grocery Code cl 8.

¹⁶ Food and Grocery Code cl 9.

¹⁷ Food and Grocery Code cl 10.

¹⁸ Food and Grocery Code cl 28.

¹⁹ Food and Grocery Code cl 12.

²⁰ Food and Grocery Code cl 12.

²¹ Food and Grocery Code cl 13.

²² Food and Grocery Code cl 14.

- stocking or listing grocery products²³
- better shelf positioning or more shelf space²⁴
- retailer activities such as buyer's visits, artwork and packaging design, market research and store openings²⁵, and
- promotions.²⁶

The Code also contains obligations relating to delisting of products,²⁷ funded promotions,²⁸ fresh produce standards and quality specifications,²⁹ changes to supply chain procedures,³⁰ intellectual property rights,³¹ confidential information³² and allocation of shelf space.³³ It also prohibits retailers from threatening a supplier with business disruption or termination without reasonable grounds.³⁴

Dispute resolution mechanism

The Code provides a dispute resolution mechanism for retailers and wholesalers and their suppliers. A supplier can request mediation or arbitration of a complaint or dispute relating to a matter covered by the Code, and the retailer or wholesaler must participate in the mediation or arbitration in good faith.³⁵

Compliance and reporting obligations

Retailers and wholesalers have obligations under the Code to, amongst other things, nominate a compliance manager to receive and investigate complaints,³⁶ provide their buying team with initial training and annual retraining on the Code,³⁷ prepare written reports of complaints,³⁸ and keep copies of the grocery supply agreement during the term of the agreement and for six years after the agreement ends.³⁹

Ability to 'opt out' of obligations and prohibitions under the Code

However, the Code also allows retailers (and wholesalers in relation to unilateral and retrospective variations) to avoid certain obligations and prohibitions under the Code provided an express opt out clause is included in their grocery supply agreements and other elements are satisfied. For example, most opt out clauses contain a requirement that a given specific payment or variation is reasonable in the circumstances. The Code includes the ability to opt out of the following obligations and prohibitions:

²³ Food and Grocery Code cl 15.

²⁴ Food and Grocery Code cl 16.

²⁵ Food and Grocery Code cl 17.

²⁶ Food and Grocery Code cl 18.

²⁷ Food and Grocery Code cl 19.

²⁸ Food and Grocery Code cl 20.

²⁹ Food and Grocery Code cl 21.

³⁰ Food and Grocery Code cl 22.

³¹ Food and Grocery Code cls 24 and 27.

³² Food and Grocery Code cl 25.

³³ Food and Grocery Code cl 26.

³⁴ Food and Grocery Code cl 23.

³⁵ Food and Grocery Code cl 38.

³⁶ Food and Grocery Code cls 32-37.

³⁷ Food and Grocery Code cl 40.

³⁸ Food and Grocery Code cl 41.

³⁹ Food and Grocery Code cl 42.

- unilateral variation⁴⁰
- retrospective variation⁴¹
- payments for set-off amounts⁴²
- payment for wastage⁴³
- payment for stocking and listing⁴⁴
- payment for better positioning and additional shelf space⁴⁵
- payment for retailer activities⁴⁶, and
- payment for promotional activities.⁴⁷

Remedies for a breach of the Code

While a breach of the Code is technically a breach of the CCA,⁴⁸ the ACCC does not have the ability to effectively enforce compliance or deter breaches of the Code because financial penalties are not available. This significantly hinders the effectiveness of the Code and its deterrent effect.

A number of other codes, including the Horticulture Code of Conduct and the Franchising Code of Conduct, provide for civil penalties and infringement notices for breaches of certain clauses. Currently, these codes provide for financial penalties of up to \$63 000⁴⁹ and infringement notices are fixed at \$10 500 for body corporates and \$2 100 for individuals and other entities,⁵⁰ although the ACCC believes the penalty amount should be significantly increased. The ACCC also considers that in order to maximise compliance and deterrence penalties should apply to all obligations in each Code.

There are other actions the ACCC can currently take in regards to breaches of the Code, although, as already noted, the introduction of penalties and infringement notices would better deter breaches. These other actions include issuing public warning notices related to contraventions of the Code⁵¹ and court orders, injunctions,⁵² non-party redress,⁵³ section 87B undertakings, or administrative resolutions. Private parties can also recover damages under the CCA for a contravention of the Code.⁵⁴

ACCC information gathering powers

The ACCC has a range of tools available to monitor compliance with and investigate alleged breaches of, industry codes. These include:

⁴⁰ Food and Grocery Code cl 9(2).

⁴¹ Food and Grocery Code cl 10(2).

⁴² Food and Grocery Code cl 12(3).

⁴³ Food and Grocery Code cl 14(2).

⁴⁴ Food and Grocery Code cl 15(2).

⁴⁵ Food and Grocery Code cl 16(2).

⁴⁶ Food and Grocery Code cl 17(2).

⁴⁷ Food and Grocery Code cl 18(2).

⁴⁸ CCA s 51ACB.

⁴⁹ For example, Horticulture Code of Conduct cl 8(1), Franchising Code of Conduct cl 6(1).

⁵⁰ CCA s 51ACF.

⁵¹ CCA s 51ADA.

⁵² CCA s 80(1)(a)(ii).

⁵³ CCA s 51ADB.

⁵⁴ CCA s 82.

- where the relevant code requires a person or business to keep, generate or publish particular information, the ACCC can issue a notice under section 51ADD of the CCA requiring the business to provide that information
- if the ACCC chairperson has reason to believe that a person or business is capable of producing information or documents relating to an alleged breach of the CCA, including the prohibition on breaching an industry code, the ACCC can compel that person or business to produce that information or those documents or attend an interview.⁵⁵

Compliance and enforcement activity

Complaints and enquiries

The ACCC has received 52 contacts⁵⁶ relating specifically to the Food and Grocery Code since 1 January 2015 when the Code came into effect as well as a number of contacts related to the food and grocery supply chain more generally.⁵⁷

More broadly, the ACCC receives around 264 000 contacts from the public every year. These contacts are carefully triaged through a number of stages. The first stage is 'under assessment', where a case is considered for whether it falls within an ACCC priority area or otherwise warrants attention. Following this, a matter may be escalated to an 'initial investigation'. An initial investigation may then be escalated to an 'in-depth investigation', which generally involves conduct that warrants more serious action. The remainder of contacts are recorded in our database so we can analyse the data to establish complaint trends, identify issues and develop compliance responses.

The tables below show the total number of contacts each year, and of those contacts, the number that progressed to each investigative stage.

⁵⁵ CCA s 155.

⁵⁶ Contacts include complaints and enquiries about the Code.

⁵⁷ Up to 19 April 2018.

Food and Grocery Code contacts

Year	Total contacts	Escalated; finalised at Initial Investigation	Escalated; finalised at In-depth Investigation
2015	15	1	0
2016	25	3	1
2017	9	0	0
2018 so far	3	0	0
Total	52	4	1

Contacts from suppliers related to the food and grocery supply chain

Year	Total contacts	Escalated; finalised at Initial Investigation	Escalated; finalised at In-depth Investigation
2015	62	5	1
2016	54	7	1
2017	40	3	0
2018 so far	8	0	0
Total	164	15	2

There are two main points that may be drawn from this data. First, overall contacts in the food and grocery sector by suppliers constitute a very small proportion of overall contacts the ACCC receives. The small number of complaints could suggest a lack of knowledge by suppliers about their rights under the Code, a fear of commercial retribution from retailers or wholesalers for making contact with the ACCC, a lack of concern arising from conduct regulated under the Code, or a lack of coverage of the Code of a proportion of suppliers. Second, the low number of contacts progressed to further investigation stages indicates that the contacts received may be difficult for the ACCC to investigate and enforce. A common reason for this can be a lack of evidence in the original complaint, often due to the supplier having a fear of commercial retribution. These points are expanded on later in this submission.

Education and liaison activities

The ACCC has a team dedicated to encouraging and monitoring compliance with industry codes. The ACCC published guidelines and information to assist retailers, wholesalers and suppliers to understand their rights and obligations under the Code.

The ACCC has a web page devoted to the Code.⁵⁸ This includes information on:

- the ACCC's role in enforcing the Code
- standards of conduct and protections for suppliers
- how retailers and wholesalers can become signatories to the Code
- good faith obligations when dealing with suppliers
- grocery supply agreements and the matters they must specify, and

⁵⁸ <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

- the processes for suppliers to lodge complaints under the Code and seek to have their disputes resolved.

In addition to attending events to discuss or present information on the Code, the ACCC meets regularly with particular stakeholders, such as the Australian Food and Grocery Council, to discuss Code-related issues.

The ACCC also has a dedicated Small Business Helpline for small businesses seeking guidance and has utilised its small business information network to distribute guidance materials to subscribers.

Compliance checks

The ACCC is empowered to conduct 'compliance checks' or 'audits' of retailers and wholesalers that are signatories to the Code. Under section 51ADD of the CCA, the ACCC Chairperson can require a retailer or wholesaler corporation that is subject to the Code to provide the information or produce the documents that the corporation is required to keep, generate or publish under the Code.⁵⁹

The following documents must be kept by the retailer or wholesaler for at least six years from when the document is made or published:⁶⁰

- an offer to vary a grocery supply agreement
- a notice of variation of a grocery supply agreement
- a notice of a decision to delist a product
- a notice of the outcome of the review of a decision to delist a product
- the reasons for rejection of fresh produce
- a notice of required changes to packaging, labelling or preparation standards
- a notice of material change to supply chain procedures
- a notice of a range review
- a notice that a complaint is vexatious, trivial, misconceived or lacking in substance
- a summary of action that has or will be taken in response to a complaint and the timetable for the action, and
- a code compliance manager's report.

The ACCC may also request the following documents which a retailer is required to generate or publish under the Code:

- a notice for supplier funded promotions⁶¹
- a notice for the cancelling or reduction of a promotion⁶²
- a notice of any fresh produce standards and quality specifications⁶³
- any labelling, packaging or preparation requirements for a grocery product⁶⁴
- the retailer's or wholesaler's product ranging and shelf allocation principles⁶⁵

⁵⁹ CCA s 51ADD.

⁶⁰ Food and Grocery Code cl 42(2).

⁶¹ Food and Grocery Code cl 20(1).

⁶² Food and Grocery Code cl 20(4)(a).

⁶³ Food and Grocery Code cl 21(1).

⁶⁴ Food and grocery code cl 21(5).

- contact details of buyers and senior buyers for suppliers⁶⁶
- the retailer's or wholesaler's written complaints handling procedure⁶⁷
- a record of a complaint, a record of the investigations taken to investigate the complaint, and a summary of any action taken for 6 years.⁶⁸

Retailers and wholesalers must also keep a grocery supply agreement during the term of the agreement and for six years after the agreement ends.⁶⁹

Since the Code came into effect the ACCC has conducted two rounds of compliance checks of the major signatories to the Code – Coles, Woolworths and ALDI. The main area of ACCC concern in the 2016 compliance checks related to delisting practices. In particular, based on its checks the ACCC identified a number of issues (to varying degrees) including:

- the notice period given to some suppliers of a delisting decision
- the generic nature of reasons given to some suppliers, or lack of supporting detail, for a delisting decision, and
- the obligation for suppliers to be informed of their right to have a delisting decision reviewed by the retailer's senior buyer.

The second round of compliance checks (which commenced in 2017) show some improvement with certain retailers having made more progress than others in ensuring compliance with the Code. However, for some retailers there were still examples of delisting practices that raised concerns under the Code. This suggests that there are areas in which the Code can be strengthened. These are discussed in the 'Issues and recommendations' section below.

ACCC's approach to compliance and enforcement

The ACCC's role is to focus on those circumstances that will, or have the potential to, harm the competitive process or result in widespread consumer detriment. Therefore, the ACCC exercises its discretion to direct resources to matters that provide the greatest overall benefit for competition and consumers, and it is selective in the matters it investigates and the sectors in which it engages in education and market analysis. The ACCC rarely becomes involved in individual consumer or small business disputes. Prioritisation of the matters pursued is conducted in accordance with the ACCC's Compliance and Enforcement Policy.⁷⁰ The ACCC's 2018 priorities include ensuring small businesses receive the protections of industry codes.

The ACCC has a range of compliance and enforcement tools available to encourage compliance with the laws we enforce. In deciding which compliance or enforcement tool (or the combination of such tools) to use, the ACCC's first priority is always to achieve the best possible outcome for the community and to manage risk proportionately.

ACCC enforcement action relating to the food and grocery supply chain

Over recent years the ACCC has conducted several investigations into the food and grocery supply chain, which have arisen from Code compliance checks and from information provided by stakeholders. While not leading to formal enforcement action these matters

⁶⁵ Food and Grocery Code cl 26(1).

⁶⁶ Food and grocery Code cl 30(1).

⁶⁷ Food and Grocery Code cl 32(2)(c).

⁶⁸ Food and Grocer Code cl 36(3).

⁶⁹ Food and Grocery Code cl 42(1).

⁷⁰ <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

have involved extensive engagement with retailers during which the ACCC has made clear its concerns about potentially problematic conduct.

The ACCC has also previously taken court action under the ACL in order to address competition and consumer issues arising from the imbalance of bargaining power between grocery retailers and their suppliers. Some of these matters are outlined below. The ACCC considers that these actions and its engagement with the supermarket sector more broadly have helped to encourage the somewhat improved engagement between supermarkets and suppliers.

However, while this kind of general enforcement plays an important role, it is not a substitute for an effective and enforceable code which can set minimum standards of conduct and which provides for sanctions to deter wrongdoing. The types of conduct outlined in the case studies below demonstrate the impetus, and highlight the continued need, for a code.

Coles unconscionable conduct

In 2014 the ACCC took action against Coles Supermarkets Australia Pty Ltd (Coles) for engaging in unconscionable conduct in its dealings with some of its suppliers. The Federal Court made orders by consent that Coles pay \$10 million in pecuniary penalties and costs. Coles also provided a court enforceable undertaking to the ACCC that it would implement a program that sought to provide redress to over 200 of its suppliers. Coles returned over \$12 million to suppliers under this program.

This action was a result of two long running ACCC investigations into the Coles Active Retail Collaboration (ARC) program. The ARC program required suppliers to make payments to Coles in return for purported benefits that Coles asserted suppliers received from changes Coles had made to its supply chain; and other demands for payment made outside of grocery supply agreements. The Court found that there were a range of commercial consequences if suppliers refused to make the payments demanded, including: Coles refusing to meet with the supplier or continue contract negotiations, Coles refusing to stock new products from the supplier and withholding ranging and forecasting information, and risks to promotional activity.

This case was difficult to investigate because suppliers told the ACCC they feared commercial consequences if they were seen to be assisting the ACCC. While the ACCC had received a small number of anonymous complaints from supermarket suppliers alleging unconscionable conduct, in order to progress the investigation the ACCC Chairman took the unusual step of making a public appeal to supermarket suppliers to come forward to speak to the ACCC, giving his assurance that all such approaches would be kept confidential, to the extent permitted by law. This had not been done before by the ACCC.

To honour the ACCC's confidentiality assurance to suppliers, the ACCC did not use any evidence provided by those suppliers that came forward in response to this appeal and their information remained confidential. Instead, much of the evidence relied on was obtained from Coles using the ACCC's compulsory information gathering powers. The ACCC also approached other potentially affected suppliers.

Obtaining sufficient evidence was demanding and time-consuming. All suppliers approached by the ACCC were fearful to cooperate given that the supermarkets, in broad terms, accounted for at least 30 per cent of their sales. This meant maintaining their commercial relationship with Coles was essential to the future viability of their businesses.

Ultimately the ACCC filed two sets of proceedings in the Federal Court against Coles, alleging unconscionable conduct by Coles against a number of its suppliers. The ACCC had no cooperating witnesses, and obtaining sufficient evidence was a time consuming and resource intensive task.

Woolworths mind the gap

In December 2015 the ACCC instituted proceedings against Woolworths Ltd (Woolworths) in relation to its 'Mind the Gap' scheme. The ACCC alleged that under the scheme, Woolworths systematically sought to obtain payments from over 800 suppliers ranging from \$4 291 to \$1.4 million to urgently reduce Woolworths' expected significant half year gross profit shortfall. The ACCC further alleged that Woolworths was in a significantly stronger bargaining position than its suppliers and had no pre-existing contractual right to the payments. Woolworths sought over \$60 million in payments and ultimately captured over \$18 million in payments from suppliers pursuant to this scheme.

The ACCC alleged that the systematic conduct of Woolworths, of implementing the scheme by making the initial "ask" of a large number of the targeted suppliers, was unconscionable in all of the circumstances. Woolworths defended these practices as being a normal part of business operations in the supermarket sector.

Given the difficulties and delay that the ACCC had experienced in the earlier Coles matter, the ACCC decided to rely only on documentary evidence to make out its case, predominantly comprising material acquired from Woolworths under compulsory notices. No evidence from affected suppliers was put to the Court.

The Federal Court found that Woolworths' conduct in obtaining payments from its suppliers in these circumstances did not amount to unconscionable conduct within the meaning of the ACL. Key aspects of the Court's reasons included that:

- the Court was unable to have regard to 'all the circumstances' of the matter as required by the legislation because of the insufficient evidence provided by the ACCC, in particular the absence of evidence from the suppliers concerned, including beyond the "ask";
- the ACCC did not relate Woolworths' percentage share of grocery products sold to the products supplied by the particular suppliers so there was no basis to assume a substantial difference in bargaining power; and
- there was no evidence that those suppliers who refused to make payments were penalised by Woolworths because of their refusal.

Justice Yates also noted the complex trading relationship between Woolworths and its suppliers and that it is "always under negotiation and, depending on circumstances, constantly changing."⁷¹

While Woolworths' conduct in the circumstances alleged was not found to breach the ACL, the ACCC remains concerned that the significant bargaining power imbalance between supermarkets and their suppliers enables industry practices, such as that acknowledged by Woolworth in the proceedings, of requesting additional payment from suppliers outside of contractual arrangements. The ACCC considers such practices reinforce the importance of a strong industry code in this area with meaningful sanctions and an effective prohibition on profit gap payments.

Supermarket payment terms for small suppliers

In mid-2016 and early 2017 the ACCC investigated allegations that payment terms in Coles and Woolworths' grocery supply agreements included unfair contract terms. At the same time, the Australian Small Business and Family Enterprise Ombudsman conducted its

⁷¹ *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472, [78].

Inquiry into Payment Times and Practices in Australia, highlighting the effect that delayed payment can have on small businesses.⁷²

In March 2017 Coles announced that it would introduce 14 day payment terms for small suppliers that supply less than \$1 million of goods to Coles each year.⁷³ In April 2017, Woolworths made a similar commitment.⁷⁴ The ACCC considered that these changes addressed the unfair contract term issues we were considering and therefore closed our investigation.

Issues and recommendations

ACCC Recommendation 1: The Code be made mandatory

Issue: A voluntary Code does not adequately ensure coverage of all significant market participants, provides the ability to opt-out, and does not provide effective deterrence.

The voluntary nature of the Code means that participants can choose to not sign up to the Code or to withdraw at any time (without giving notice). This means that significant market participants may not be bound by the Code, and so the issues which the Code attempts to rectify cannot be addressed.

The ACCC considers that the Code should be made a mandatory prescribed industry code. This is likely to address the following issues:

- Some retailers in the food and grocery sector have chosen to not be bound by the Code obligations. In addition, no wholesalers have signed up. This leads to a number of transactions and supply contracts falling outside the protection of the Code and leaves suppliers at greater risk of mistreatment.
- Retailers and wholesalers may withdraw from the Code at any time. This has serious consequences for both the protections afforded to suppliers and the ACCC's ability to enforce the Code. In addition, the stronger and more meaningful the protections are in the Code, the greater the risk that current signatories to the Code will withdraw from it if the ability to do so remains.

Further, the ability to withdraw from the Code at any time provides retailers with significant bargaining power. The threat of withdrawal by a retailer is ever-present, and this reduces the ability for suppliers to assert their rights, make complaints against retailers or negotiate for terms in the agreement that may benefit them. The voluntary nature of the Code therefore entrenches the power imbalance between retailers and suppliers rather than redressing it.

If the Code is made mandatory, the ACCC encourages consideration be given to how the Code could be amended to ensure it only captures those significant market participants which the Code originally intended to capture. For example, consideration could be given to amending the definitions of 'retailers' and 'wholesalers' with respect to turnover and/or the number of employees. Consideration could also be given to whether all the obligations in the Code should equally apply to wholesalers.

⁷² See <http://www.asbfeo.gov.au/inquiries/payment-times-and-practices>

⁷³ See <http://www.afr.com/business/coles-promises-to-pay-suppliers-within-14-days-20170301-guorm7>

⁷⁴ See https://www.woolworthsgroup.com.au/page/media/Latest_News/statement-on-woolworths-supermarkets-supplier-payment-terms/

ACCC Recommendation 2: The ability to 'opt out' of certain obligations and prohibitions in the Code be removed

Issue: Allowing retailers and wholesalers to opt out of certain obligations and prohibitions in the Code does not appropriately reflect the imbalance in bargaining power between suppliers and their retailers or wholesalers that is the central rationale for the Code.

The Code was introduced to address the competition and unconscionable conduct issues of concern arising from the superior bargaining power of retailers and wholesalers when negotiating with suppliers in the grocery supply chain. Allowing these parties to opt out of those prohibitions and obligations that were introduced to give protections to suppliers only serves to undermine the Code and its effectiveness. The Code will only be effective if all key industry players are bound by the same compliance framework, and providing retailers and wholesalers with the ability to opt out of obligations and prohibitions of the Code is incongruous with the central rationale for having a Code – the potential for anti-competitive and unconscionable conduct arising from the superior bargaining power that retailers and wholesalers have when negotiating with suppliers in the grocery supply chain in Australia.

This imbalance in bargaining power is a long-running characteristic of the Australian grocery sector. For example, in the 2008 report into the competitiveness of grocery prices the ACCC found that the major supermarket chains had buyer power in relation to packaged groceries.⁷⁵ In 2008, the ACCC also formed the view that some suppliers were reluctant to provide information for fear of retribution by retailers.⁷⁶ In the ACCC's experience this remains a real and genuine fear for some suppliers that limits our ability to address conduct of concern in the sector.⁷⁷

When the Code was developed a number of obligations were identified as critical to addressing the imbalance of bargaining power between retailers and wholesaler and their suppliers and were therefore provided for in the Code. However, the ACCC's compliance checks show that the major signatories to the Code generally include a number of opt-out clauses in their grocery supply agreements. These can include allowing retailers to make unilateral variation, retrospective variation, and payments for wastage, stocking and listing – many of the key protections the Code was designed to redress. Accordingly, the ACCC considers it important to achieve the aims of the Code that parties cannot opt out of key protections provided by the Code.

In addition, other protections provided under the CCA such as unfair contract terms are unlikely to apply where there is reliance on opt-out clauses under the Code⁷⁸. The ACCC has seen, during its compliance checks, terms in grocery supply agreements which could be considered unfair under the business-to-business unfair contract term provisions but which cannot be addressed because the Code allows these terms. In addition, the ACCC has outlined some broad concerns with the unfair contract terms provisions in its submission to the Parliamentary Joint Committee inquiry into the operation and effectiveness of the Franchising Code of Conduct, and it looks forward to the upcoming review of these provisions.

⁷⁵ Report of the ACCC inquiry into the competitiveness of retail prices of standard groceries, July 2008, p 357.

⁷⁶ Ibid.

⁷⁷ See for example, the above discussion of our Coles ARC case and our Woolworths 'Mind the Gap' case.

⁷⁸ Unfair contract term protections do not apply to clauses expressly permitted by law (section 26(1)(c) of the ACL).

Remedies available for a breach of the Code

ACCC Recommendation 3: Introduce civil penalties and infringement notices for breaches of the Code

Issue: Civil penalties are not available for breaches of the Code nor can the ACCC issue infringement notices for likely breaches of the Code. This limits the ACCC's ability to efficiently and effectively enforce the law.

A Code can only effectively promote compliance and deter breaches when there are significant consequences for breaching it. As outlined above, currently the ACCC does not have the ability to apply for civil pecuniary penalties for breaches of the Code or to issue infringement notices. This severely limits the effectiveness of the Code.

The current options available to address non-compliance are limited and ineffective at achieving compliance and deterrence. The current remedies available are court orders, injunctions, non-party redress, section 87B undertakings, and administrative resolutions. In addition, private parties can recover damages under the CCA for a contravention of the Code and the ACCC can also issue a public warning notice for likely breaches of the Code.

The ACCC investigations referred to above demonstrate the resource and time requirements, and the evidence challenges, of significant enforcement action in this area under the ACL provisions. As also discussed earlier in this submission, the Franchising Code of Conduct and the Horticulture Code of Conduct both provide for penalties and the issuing of infringement notices for certain clauses. The ACCC considers, consistent with these two codes, that the current Code should be amended to include, for all clauses of the Code, civil penalties for breaches and the ability for the ACCC to issue infringement notices. Such amendments would allow the ACCC to more efficiently enforce the Code and infringement notices would allow the ACCC to quickly address breaches of the Code that may not warrant court action, where there are reasonable grounds to believe that a breach has occurred.

Information gathering tools

ACCC Recommendation 4: Introduce civil penalties and infringement notices for failure to comply with a section 51ADD notice

Issue: The ACCC's ability to ensure compliance with section 51ADD notices is limited.

Section 51ADD of the CCA is a key tool for the ACCC in seeking the information required to test compliance with industry codes. Currently, if a trader refuses or fails to comply with a section 51ADD notice, the ACCC's only option is to apply to a court for an injunction. This can be a costly and inefficient method of securing compliance.

The availability of infringement notices and appropriate pecuniary penalties would allow the ACCC to better ensure compliance with section 51ADD notices and therefore better monitor compliance with the Code.

Transparency of delisting information

ACCC Recommendation 5: Introduce a requirement for all delisting information under the Code to be provided in the same delisting notice

Issue: There is no express requirement in the Code for all information about a delisting decision, including the right of review for suppliers, to be provided to suppliers in the same written notice.

The delisting of a supplier's product by a major retailer can significantly affect the commercial interests of the supplier, especially if it is a small business. It is therefore important for suppliers to have sufficient information to understand why a delisting has occurred and the review rights available to them.

At present, the Code specifies that, prior to delisting a supplier's grocery product, the retailer must provide reasonable written notice to the supplier of the retailer's decision to delist the product, including the reasons for the delisting.⁷⁹

The Code also requires the retailer to inform the supplier of their right to have the delisting decision reviewed by the retailer's senior buyer.⁸⁰ However, there is no express language in the Code to specify that suppliers must be informed in writing of their right to have a delisting decision reviewed. These issues have given rise to an ad hoc approach as to how and when delisting information is communicated to suppliers by retailers.

When a delisting decision is communicated in writing to a supplier, the ACCC considers that the retailer should set out in the same written notice:

- the reasons for the decision, and
- information about the supplier's right of review.

Having this information in the same notice would provide more transparency and assist suppliers to understand the delisting decision and related processes. Mandating in the Code a consistent and more transparent approach to the contents of a delisting notice would also assist the ACCC to monitor compliance with the Code.

The ACCC also considers that retailers should be required to include in delisting notices more expansive or detailed reasons for delisting products. This is discussed in Recommendation 6 below.

ACCC Recommendation 6: Require retailers to provide detailed reasons when delisting a supplier's product

Issue: The reasons given by retailers for delisting products often lack sufficient detail.

Under clause 19(1) of the Code, a retailer can only delist a supplier's grocery product in accordance with the terms of the GSA and for 'genuine commercial reasons'.

Based on the ACCC's review of documents relating to the delisting decisions of the retailers in its compliance checks, the ACCC has found that the reasons given by certain retailers to suppliers for delisting products tend to be generic and lack supporting information.

For example, written reasons given to some suppliers have included 'poor commercial performance' or 'not meeting expectations' with no other information of substance or explanation given in the notice.

⁷⁹ Food and Grocery Code cl 19(5)(a).

⁸⁰ Food and Grocery Code cl 19(5)(b).

The inclusion of a requirement in the Code for retailers to provide supporting detail when delisting a supplier's product for genuine commercial reasons would assist suppliers to understand why their product has been delisted. This could include a product performance benchmark so that suppliers could see how their product has performed relative to other products.

It would also assist the ACCC to establish, as part of its compliance checks, whether the reasons for delisting a particular product were genuine commercial reasons (in compliance with the Code).

Enforcement of the Code

ACCC Recommendation 7: Consider ways to encourage suppliers to make use of the Code to resolve disputes and protect them when they do, including by extending reporting obligations

Issue: Suppliers fear retribution if they make a complaint or cooperate with an ACCC investigation. This prevents suppliers from accessing the protections afforded to them and severely impedes the ACCC's ability to enforce the law.

While the ACCC has not yet taken enforcement action under the Code, we have extensively investigated the food and grocery supply chain and taken enforcement action under the ACL.⁸¹ This has given some insight into the difficulties involved in enforcing the law against supermarket retailers.

Any law, including the Code, can only be enforced effectively if affected parties are willing to make complaints, assist with investigations into alleged breaches, and give evidence in Court if needed. One of the key difficulties faced when investigating breaches of the law and the Code by supermarkets is suppliers' fear of commercial retribution if they make a complaint to the ACCC or cooperate with an investigation.

Until suppliers are confident they can access the protections afforded to them by the Code without fear of adverse consequences, the Code will have little meaningful impact on the problems arising from the imbalance of bargaining position between suppliers and retailers or wholesalers.

Clause 41(1) of the Code requires the code compliance manager for each retailer to prepare a written report twice-yearly setting out details of the complaints received from suppliers for investigation. The ACCC has found that the reports reviewed in the 2017 compliance checks show a very low number of complaints made by suppliers to supermarkets, such as one complaint received or none at all.

The ACCC considers that the reporting obligations in the code compliance manager's report should be extended to include information on all complaints received under the Code, and not just to those described as 'for investigation'. For the complaints that have not reached the investigation stage, the compliance manager's report for each reporting period, should include details (without identifying the complainants) on the overall number of complainants the retailer has received under the Code, and the conduct giving rise to the complaint, including the clause of the Code relevant to the complaint. This would provide the ACCC with a better understanding of the types of issues affecting the supplier and retailer relationship under the Code.

The ACCC also encourages greater use by suppliers bound by the Code of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). The ASBFEO is able to

⁸¹ See the 'ACCC enforcement action relating to the food and grocery supply chain' section of this paper.

provide general information on dispute resolution, facilitate discussions between disputing parties, and provide access to external alternative dispute resolution services.

Stronger enforcement provisions, such as the introduction of civil penalties and infringement notices (discussed above), may also incentivise suppliers to bring forward their complaints.