

# Chapter 1

## Introduction and overview of the regulation

1.1 On 5 March 2015, the Economics Legislation Committee resolved, under Standing Order 25(2)(a), to inquire into and report by 31 March 2015 on the *Competition and Consumer Act 2010—Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the Regulation). On 26 March 2015, the committee resolved to extend the reporting date to 14 May 2015.

1.2 Section 172 of the *Competition and Consumer Act 2010* (the Act) allows for the making of regulations under the Act, provided they are not inconsistent with the Act. Section 51AE of the Act provides that regulations may prescribe an industry code, which can 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.

1.3 The Regulation provides for the *Food and Grocery Code* (the Code), a voluntary industry code for the food and grocery sector.

### Conduct of the inquiry

1.4 The committee advertised the inquiry on its website and wrote directly to a range of individuals and organisations inviting written submissions. Submissions closed on 13 March 2015. The committee received 13 submissions, which are listed at Appendix 1.

1.5 The committee held a public hearing in Canberra on 21 April 2015. The names of witnesses who appeared at the hearing are listed at Appendix 2.

1.6 The committee thanks all who contributed to the inquiry.

### Overview of the Grocery Code

1.7 According to the Explanatory Statement, the Code is intended to:

...improve standards of business conduct in the food and grocery sector. It is in response to concerns raised in the public debate in recent years about the conduct of retailers (in particular, supermarkets) towards their suppliers, and has arisen out of an industry response to these issues. In this sense, the Code aims to regulate commercial relations between retailers and wholesalers, on the one hand, and suppliers, on the other hand, to the extent that they are not regulated by other codes.<sup>1</sup>

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1 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*, p. 2.

1.8 The purpose of the Code, as set out in clause 2, is to:

- help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain;
- ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties;
- provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and
- promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.<sup>2</sup>

1.9 The Code includes provisions setting out certain standards of conduct of the relationship between retailers and wholesalers and suppliers, and seeks to address the potential imbalance in these relationships with respect to the allocation of risk. As the Explanatory Statement outlines, the Code:

...recognises suppliers' need for certainty to plan appropriately for their business, invest, innovate, and expand capacity or develop new product lines. Some of the requirements have limited exceptions, and place the onus on the retailer or wholesaler of proving that an exception applies in the circumstances.<sup>3</sup>

1.10 Protections for suppliers under the Code include that grocery and supply agreements must be in writing and include certain information. This information includes requirements for the delivery of groceries and when they may be rejected, payment terms, the term of the agreement if it is intended to operate for a limited time, quantity and quality requirements, and when the agreement can be terminated. This is intended to reduce the uncertainty and risk of disputes deriving from oral contracts. However, the Code does not stipulate minimum terms of these agreements—instead, parties are left to negotiate these matters.

1.11 Under the Code, retailers and wholesalers are not allowed to unilaterally or retrospectively vary a grocery supply agreement, unless an exception applies. In most cases, these exceptions need to be provided for in the written agreement, and are subject to a reasonableness test. The retailer or wholesaler must notify the supplier in writing of the variation and the basis for it. Suppliers are able to initiate a dispute resolution process on the basis of detriment resulting from a unilateral or retrospective variation. The retailer or wholesaler bears the onus of proving the exception applies in circumstances where the supplier claims that prohibited conduct has been engaged in.

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2 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 10.

3 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 2.

1.12 Part 3 of the Code includes several provisions governing a retailer's conduct toward suppliers.<sup>4</sup> In general terms, unless an exception applies a retailer must pay a supplier in accordance with the terms of the grocery supply agreement. Retailers are prohibited from requiring certain payments from suppliers, such as payments for shrinkage (that is, a loss of groceries that occurs after the retailer has taken possession), wastage that occurs once groceries have been delivered or better positioning of groceries.<sup>5</sup> As the Explanatory Statement notes, Part 3 of the Grocery Code also regulates:

...other aspects of the relationship between a retailer and a supplier, such as delisting products, funding promotions, fresh produce standards and quality specifications, changes to supply chain procedures, business disruption, confidential information, intellectual property rights and allocation of shelf space.<sup>6</sup>

1.13 With regard to the abovementioned exceptions to otherwise prohibited conduct, Treasury explained that the Code seeks to find 'a balance between prohibiting conduct and providing a level of commercial flexibility'.<sup>7</sup>

1.14 As indicated above, the Code includes dispute resolution processes, both internal and external, for a supplier to raise its concerns about a retailer or wholesaler. It is open to a supplier to choose the type of dispute resolution that best meets their needs. A supplier may make a complaint to a code compliance manager—who is appointed by the retailer or wholesaler under the Code, but is to be independent of the retailer or wholesaler's buying team—and may escalate its concerns to senior management if it is not satisfied with the outcome. A supplier can also request direct elevation of their complaint to senior management. A supplier is also able to take its complaint directly to mediation or arbitration or to the Australian Competition and Consumer Commission (ACCC). However, if a complaint has already been raised with the code compliance manager or elevated to senior management, the supplier may not seek mediation or arbitration until such procedures have been completed.

1.15 The dispute resolution process requires that a retailer or wholesaler participate in mediation or arbitration in good faith. Some limited exceptions to this requirement apply where the mediator or arbitrator 'forms the view that the complaint is vexatious,

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4 Part 3 of the Grocery Code does not apply to wholesalers.

5 For more detail, see Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 16–18.

6 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 8, pp. 18–21.

7 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

trivial, misconceived or lacking in substance, or the supplier is not acting in good faith'.<sup>8</sup>

1.16 The Code provides that in the instance a supplier seeks to pursue mediation or arbitration processes, the rules of the Institute of Arbitrators and Mediators Australia (IAMA) will apply to those processes. Subclause 39(2) provides that if the parties do not agree on the appointment of a mediator or arbitrator within 10 business days from the referral of a matter by a supplier, the mediator or arbitrator must be appointed by IAMA according to its rules. The Code further provides that the costs of mediation or arbitration will be determined under the same rules.<sup>9</sup>

1.17 As a voluntary instrument, the Code is binding on corporations that elect to 'opt-in', through notice given to the ACCC. A corporation may at any time withdraw their agreement by written notice, and thereafter is not bound by the Code. Withdrawal of such agreement does not remove any obligation under the Code that relates to conduct that occurred when the corporation was still a party to the Code.

1.18 Transitional arrangements apply for participating retailers and wholesalers that are party to a pre-existing supply agreement.<sup>10</sup>

1.19 The Code can be enforced by private action or, since a breach of the Code is a breach of the Act, by the ACCC. If court action is taken by the ACCC or an aggrieved party and the court finds the Code has been breached, the court can order a range of remedies, including injunctions and damages.<sup>11</sup>

1.20 Section 5 of the Regulation provides that the Minister administering section 51AE of the Act must cause a review of the operation of the Code to be undertaken within three years of its commencement. The review must assess the impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers. This assessment must consider certain matters, including whether the purposes of the Code are being met, levels of compliance with the Code, whether it should be mandatory or voluntary, and whether it should include civil penalty provisions.

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8 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 8–9.

9 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 26.

10 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 3, 12–13.

11 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 4.

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## Background to the Grocery Code

1.21 The industry has driven development of the Code. On 18 November 2013, Coles, Woolworths and the Australian Food and Grocery Council (AFGC; the representative body for processed food, drink and grocery manufacturers and suppliers in Australia), collectively known as the Retailer and Supplier Roundtable (RSR), provided a draft code to the government. The proposal brought forward by the RSR was for a voluntary 'opt-in' code prescribed under the Act. Parties to the Grocery Code would be legally bound by it, and as it would sit under the Act, the ACCC and private parties could take enforcement action in response to breaches.

1.22 The Treasury explained to the committee that industry codes such as the Grocery Code are:

...co-regulatory measures that are designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. This recognises that industry participants are often best placed to tailor codes to reflect the circumstances of their industry. In this case, they have come together to ask the government to prescribe a voluntary code as the most effective way to address the problems that have been identified in recent years in that sector—namely, about the conduct of retailers towards suppliers.<sup>12</sup>

1.23 The industry-led draft code was subsequently revised in consultation with the government to comply with the Act. In August 2014, the Treasury released a discussion paper and a draft code for public consultation, with the consultation process reflected in the Regulation Impact Statement (RIS) released in November 2014.<sup>13</sup>

1.24 As the RIS notes, the government has indicated that it is satisfied the Code 'will contribute towards achieving fair and efficient commercial dealing in the grocery sector, while not imposing an excessive regulatory burden'.<sup>14</sup>

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12 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

13 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 3.

14 Australian Government, Final Assessment Regulation Impact Statement, *Improving commercial relationships in the food and grocery sector* (November 2014), Attachment C to Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 1.

