

## **EXPLANATORY STATEMENT**

### **SELECT LEGISLATIVE INSTRUMENT NO. 16, 2015**

#### **Issued by authority of the Minister for Small Business**

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations under the Act, provided they are not inconsistent with 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.

#### **Purpose**

The *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (Regulation) provides for the *Food and Grocery Code*<sup>1</sup> (the Code), a voluntary industry code for the food and grocery sector made under the Act.

The object of the Act is ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’<sup>2</sup> One way it does this is by providing for the establishment of industry codes. An industry code is:

...a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.<sup>3</sup>

Industry codes are:

...co-regulatory measures, designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.<sup>4</sup>

The purpose of the Code is 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

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<sup>1</sup> *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*, Section 4.

<sup>2</sup> Section 2, *Competition and Consumer Act 2010*.

<sup>3</sup> Section 51ACA, *Competition and Consumer Act 2010*.

<sup>4</sup> *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, May 2011, Commonwealth of Australia. See:

<http://archive.treasury.gov.au/documents/2035/PDF/Policy%20Guidelines%20on%20Prescribing%20Industry%20Codes.pdf>.

about the conduct of retailers (in particular, supermarkets) towards their suppliers, and has arisen out of an industry led 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.

The purpose of the Code 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;
- to 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;
- to 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
- to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

In order to achieve its ends, the Code includes provisions setting out certain standards of conduct that cover the life cycle of the relationship between retailers or wholesalers and suppliers. It seeks to address the potential imbalance between retailers and suppliers with respect to the allocation of risks. It also 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.

The Code includes several protections for suppliers. For example, it requires that grocery supply agreements must be in writing and include certain matters. The Code also prohibits retailers or wholesalers from engaging in certain conduct (for example, they cannot unilaterally or retrospectively vary a grocery supply agreement) unless certain exceptions apply. In most cases, these exceptions will need to be provided for in the grocery supply agreement and are subject to a reasonableness test. The retailer or wholesaler will bear the onus of proving that the exception applies in circumstances where the supplier claims that the prohibited conduct has been engaged in.

The Code aims to improve transparency and clarity in commercial transactions within the supply chain by, in effect, encouraging the parties to include upfront provisions in their grocery supply agreements about a number of aspects of their relationship. This should help increase certainty.

Importantly, the Code also requires retailers and wholesalers to deal lawfully and in good faith with suppliers, thus aiming to improve trust between the parties.

The Code also provides a number of dispute resolution avenues for a supplier to raise its concerns about a retailer or wholesaler, including internal and external mechanisms (such as mediation or arbitration). This should assist the parties to resolve their differences in a fair and equitable manner.

## **Context and consultation**

The industry has driven the development of the Code. In November 2013, the major retailers and industry representatives of suppliers provided their jointly developed draft code to the Government. The original draft was subsequently reviewed and redrafted to comply with the Act. It was proposed that the Government should prescribe the Code as a voluntary industry code under the Act.

On 6 August 2014, the Treasury released a consultation paper titled 'Improving Commercial Relationships in the Food and Grocery Sector' and the draft Grocery Code for public consultation. Submissions closed on 12 September 2014. Thirty three submissions were received, including 13 confidential submissions from a range of stakeholders including: suppliers; retailers; individual citizens and consumers and legal, government and consumer based organisations.

The consultation and analysis formed part of the Government's Regulation Impact Statement.

## **Application**

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. It commences on the day after it is registered.

As a voluntary instrument, the Code is binding on a corporation that elects to 'opt-in'. A corporation may elect to be bound as a 'retailer' or as a 'wholesaler', by giving written notice to the Australian Competition and Consumer Commission (ACCC). The terms retailer and wholesaler are defined in the Code along with other terms. A corporation may at any time withdraw their agreement by written notice, and thus cease to be bound.

The Code imposes several obligations on corporations who have agreed to be bound by the Code as a retailer or as a wholesaler.

### Transitional provisions

The Code sets up a transitional regime for retailers and wholesalers that agree to be bound by the Code and are a party to a pre-existing grocery supply agreement, which was entered into before they agreed to be bound by the Code. Broadly, retailers and wholesalers will have a certain period of time to offer to vary a pre-existing grocery supply agreement to comply with the requirements of the Code. Once the offer is made, a supplier may accept it, in which case the retailer or wholesaler will have to vary the agreement within six months.

The Code will apply in relation to the supply of groceries under a pre-existing agreement when the pre-existing agreement is varied according to the procedure above, or, in any other case, after 12 months for retailers, or 24 months for wholesalers, from the time when they agreed to be bound by the Code.

### Interaction of the Code with the Act, other laws, and other codes

The Code is an instrument made under the Act and cannot override any provision of the Act or any other legislation. The Code is not intended to, and does not operate to, exclude

any person or the ACCC from enforcing any rights, or seeking any remedies, available in respect of the conduct of any retailer or wholesaler bound by the Code. For example, where a retailer or wholesaler engages in misleading conduct or acts unconscionably towards a supplier, the Australian Consumer Law would also provide a right of action.

The Code can be enforced by private action or, since a breach of a prescribed code is a breach of the Act, the ACCC. If the ACCC or an aggrieved party takes court action and the court finds that the Code has been breached, the court can order a range of remedies, including injunctions and damages.

In the event of any conflict between the provisions of the Code and those of the mandatory Horticulture Code of Conduct or the mandatory Franchising Code of Conduct, the provisions of these other Codes take precedence to the extent of the conflict.

## **Details**

An overview of the Regulation is set out in [Attachment A](#), with the details of the Regulation set out in [Attachment B](#). [Attachment C](#) is a copy of the Regulation Impact Statement in relation to the Regulation.

## **Regulation Impact Statement**

### **Policy objective**

The Regulation achieves the Government's policy objective of improving standards of conduct in the grocery sector in response to concerns raised in the public debate in recent years of potential market failures resulting from imbalances between retailers or wholesalers, and suppliers in the allocation of risks in commercial transactions.

There is an estimated total average annual regulatory cost for all businesses associated with compliance with the prescribed Code of \$0.02 million. This is the cost estimated to be borne by grocery retailers and wholesalers that are expected to agree to be bound by the Code. Industry proponents have flagged that regulatory costs may need to be revisited over coming months as they have a clearer idea of implementation requirements. This is likely to result in an increased compliance cost estimate, which will require further update in consultation with the Office of Best Practice Regulation.

Over the longer term, it is considered that the estimated cost would be outweighed by the broader benefits deriving to the grocery sector from the improvement in standards of conduct if the Code achieves its purposes.

A copy of the Regulation Impact Statement approved by the Office of Best Practice Regulation in relation to the Regulation is at [Attachment C](#).

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015***

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This Regulation provides for the making of a voluntary industry code for the food and grocery sector (*Food and Grocery Code of Conduct*), to improve transparency and certainty in commercial transactions; help regulate standards of business conduct; improve the availability of dispute resolution processes; and ensure good faith participation in the sector. It is only binding on retailers and wholesalers that ‘opt-in’ to it.

#### **Human rights implications**

This Regulation does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Regulation is compatible with human rights.

**Overview of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015***

**Section 1 — Name**

This section provides that the name of the Regulation is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*.

**Section 2 — Commencement**

This section provides that the Regulation commences the day after it is registered.

**Section 3 — Authority**

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

**Section 4 — Code of Conduct**

This section provides that the *Food and Grocery Code of Conduct* (the Code), set out in Schedule 1, is prescribed as a voluntary industry code for section 51AE of the Act.

**Section 5 — Review of Code**

This section provides that the Minister administering section 51AE of the Act must cause a review of the operation of the Code to be undertaken before the end of the period of three years after commencement of this section.

The review must assess the impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers and must address the matters set out in detail in the section. There are a number of matters that the review must assess, 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, among others.

**Schedule 1 — the Food and Grocery Code of Conduct**

There are six parts to the Food and Grocery Code:

- Part 1—Preliminary;
- Part 2—Grocery supply agreements;
- Part 3—Conduct generally;
- Part 4—Good faith etc.;
- Part 5—Dispute resolution; and
- Part 6—Compliance and reporting.

### Part 1—Preliminary

This part sets out the name and purpose of the Code, definitions of terms used in the Code, its application, and transitional arrangements for pre-existing grocery supply agreements entered into before a corporation agreed to be bound by the Code.

The Code binds a corporation as a retailer or as a wholesaler, if the corporation has agreed by written notice to the ACCC to be so bound. A corporation would be able to withdraw its agreement by the same means. A number of related terms are defined under the Code, including: ‘groceries’, ‘grocery supply agreement’, ‘retailer’, ‘supplier’, ‘supermarket business’ and ‘wholesaler’.

### Part 2—Grocery supply agreements

This part sets out minimum obligations for retailers and wholesalers bound by the Code relating to the making of grocery supply agreements. The agreements must be in writing and address certain matters, such as requirements for the delivery of groceries and when they may be rejected. The Code does not stipulate minimum terms — it leaves it up to the parties to consider and agree on these matters. The requirement to keep records encompasses documents comprising or forming part of the agreement.

Importantly, this part also governs unilateral variations and retrospective variations to grocery supply agreements. Such variations are not permitted except where the agreement allows them and clearly sets out the circumstances in which they may be made. The Code requires written notice to be given to the supplier of the variation and the basis for it. An additional requirement is that a unilateral or retrospective variation of an agreement must be reasonable in the circumstances. The onus of proof in establishing the matters required for the exception to apply lies with the retailer or wholesaler. As explained further below, suppliers are able to initiate the Part 5 dispute resolution process on the basis of detriment resulting from a unilateral or retrospective variation.

The Code aims to improve transparency and clarity in commercial transactions within the supply chain by, in effect, encouraging the parties to include upfront provisions in their grocery supply agreements about a number of aspects of their relationship. This should result in increased certainty.

### Part 3—Conduct generally

This part contains several provisions governing a retailer’s conduct towards suppliers. It sets minimum standards of conduct in relation to a number of aspects of the relationship between a retailer and a supplier, including payment terms. This is with a view to providing further clarity for businesses and improving standards of conduct in the grocery sector.

This part does not apply to a corporation that is bound by the Code as a wholesaler.

Generally speaking, a retailer must pay a supplier in accordance with the terms of the grocery supply agreement. Certain payments (for example, for wastage or better positioning of groceries) are generally prohibited unless an exception is provided for in the grocery supply agreement and the payment would be reasonable having regard to certain circumstances. The retailer would have the onus of proving the requirements for the exceptions. Payments for shrinkage would be prohibited under a grocery supply agreement and a retailer would be prevented from otherwise demanding such payments.

This part 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. By regulating a broad range of circumstances relating to the retailer-supplier relationship, the Code is intended to promote improved practices in commercial transactions, and improve transparency, whilst allowing sufficient flexibility to the parties.

There are four Divisions under this part: Division 1 deals with the application of this part; Division 2 deals with payments to suppliers; Division 3 contains provisions relating to requests for payments from suppliers (including for retailers' activities, to fund promotions, or as a condition of being a supplier); and Division 4 includes provisions relating to other conduct.

#### Part 4—Good faith etc.

This part includes a number of more general obligations applicable to corporations bound by the Code. These obligations bind retailers and wholesalers in their dealings with suppliers from the time they agree to be bound by the Code.

The most important obligation is the overarching duty to act lawfully and in good faith at all times in dealing with suppliers. The meaning of 'good faith' is the same as that at common law and is intended to build trust and improve standards of conduct. It does not apply to suppliers as they are not compelled to opt-in to the Code, which only provides for retailers and wholesalers to elect to be bound. However, the Code provides that when a court is assessing whether a retailer or wholesaler has acted in good faith, it may consider whether or not a supplier has acted in good faith.

Other obligations in this part protect suppliers' freedom of association and include requirements for the provision of relevant buyers' contact details to suppliers.

#### Part 5—Dispute resolution

This part sets out internal and external dispute resolution processes for suppliers to lodge complaints and seek to have their disputes with retailers and wholesalers resolved. The provisions seek to set up fair and equitable mechanisms for dispute resolution which should promote transparency and accountability.

Under the Code, it is open to suppliers to choose the type of dispute resolution option that best meets their needs. A supplier may make a complaint to a code compliance manager (a person appointed by the retailer or wholesaler under the Code) and may escalate its concerns to senior management if not satisfied with the outcome. Importantly, the Code sets out a requirement that the code compliance manager is independent of the retailer or wholesaler's buying team. A supplier also has the ability to request that the complaint be elevated directly to senior management for consideration.

A supplier is also able to take a complaint directly to mediation or arbitration (or to the ACCC). The only requirement is that if the 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, or should have, been completed.

Importantly, the Code requires a retailer or wholesaler to take part in mediation or arbitration in good faith. There are some limited exceptions where the mediator or

arbitrator forms the view that the complaint is vexatious, trivial, misconceived or lacking in substance, or the supplier is not acting in good faith.

With respect to disputes relating to unilateral and retrospective variations of a grocery supply agreement, a supplier's obligation to provide certain details required in order to initiate a dispute will be met by the provision of particulars of detriment to it, even though supplier detriment alone may not be sufficient to constitute a breach of the provisions relating to variations. Further, a complaint of this nature cannot be dismissed as vexatious, trivial, misconceived or lacking substance solely because the only ground raised by a supplier is detriment to it.

The rules of the Institute of Arbitrators and Mediators Australia will apply to mediation and arbitration processes commenced under the Code.

#### *Part 6—Compliance and reporting*

This part sets out the requirements for retailers and wholesalers to ensure they have appropriate mechanisms in place in order to comply with the Code. It includes obligations for retailers and wholesalers to train their buying team on the requirements of the Code. It requires the retailer or wholesaler's code compliance manager to prepare written reports on complaints twice a year and also sets out obligations about record keeping.

**Details of the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015**

***Part 1—Preliminary***

This part contains provisions setting out the name and purpose of the Code (clauses 1 and 2), definitions of terms used in the Code (clause 3), its application (clause 4), and transitional arrangements regarding pre-existing grocery supply agreements (clauses 5 and 6).

**Clause 1—Name**

This clause provides that the name of the code is the *Food and Grocery Code of Conduct* (Code).

**Clause 2—Purpose of code**

This clause provides that the purpose of the Code 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 or wholesalers, and suppliers.

**Clause 3—Definitions**

This clause includes a number of definitions of terms used under the Code. Of particular relevance are the following definitions:

- ***groceries*** are defined to include a range of retail products, including food, cleaning products, drinks, toiletries and other household goods. However, groceries do not include alcoholic drinks.
- ***grocery supply agreement*** means any agreement between a retailer or wholesaler and a supplier for the supply of groceries to or for the purposes of a supermarket business. The definition clarifies that the term includes any document comprising the agreement or made from time to time under the agreement.

- **retailer** means a corporation:
  - (a) to the extent that it carries on a supermarket business in Australia for the retail supply of groceries; and
  - (b) to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

This definition is intended to capture corporations to the extent that they carry on a supermarket business and to the extent that they are also involved in wholesaling, for example where they are integrated businesses. The Code will not apply to the corporation to the extent that it carries on other businesses. Where a retailer does not carry on any wholesaling operations, its retailing operations will be captured via paragraph (a) of the definition.

- **supermarket business** means 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 food or most of those groceries.
- **supplier** means a person carrying on (or actively seeking to carry on) a business of supplying groceries for retail sale by another person.
- **wholesaler** means a corporation to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

Corporations that carry on both grocery retailing and wholesaling activities are caught under the definition of ‘retailer’ above. The definition of ‘wholesaler’ catches those corporations that only have a wholesaling role. A corporation with predominantly wholesaling activities but some retailing operations could opt into the Code as a retailer (hence capturing both roles) or as a wholesaler (capturing only their wholesaling operations).

The Code also defines a number of other terms: ‘buying team’, ‘code compliance manager’, ‘delist’, ‘own-brand product’, ‘promotion’, ‘senior buyer’, ‘shrinkage’ and ‘wastage’. Where relevant, these will be addressed in more detail in the context of the relevant provisions of the Code.

#### Clause 4—When this code applies

This clause states that the Code binds a corporation as a retailer or as a wholesaler, if the corporation has agreed by notice to the ACCC to be so bound. This is because the Code is a voluntary instrument and, as such, only parties electing to be bound by giving notice in writing to the ACCC will be bound.

The Code has been broadly designed to address the activities of the major retailers in the food and grocery retail market. However any retailer has the option of electing to be

bound by the Code. The Code only applies to direct grocery supply relationships with the retailer or wholesaler.

A corporation bound by the Code as a retailer will be subject to the Code in its entirety, whilst a corporation bound by the Code as a wholesaler will not be bound by conduct obligations in Part 3 which are specific to retailers.

A corporation may by written notice to the ACCC withdraw its agreement. Withdrawal of such agreement will not remove any obligation under the Code that relates to conduct that occurred when the corporation was so bound. Furthermore, a corporation withdrawing its agreement may still be bound by a grocery supply agreement made under this Code (when it was bound) and its obligations may continue to bind it.

This clause also states that the Code will not apply to the extent it conflicts with the *Horticulture Code of Conduct* or the *Franchising Code of Conduct*. The rationale underlying this provision is that the Code aims to regulate commercial relationships that are not covered by other codes.

#### Clause 5—Transitional application—retailers

The transitional provision outlined in this clause set out the timing of the application of certain parts of the Code to the supply of groceries under pre-existing grocery supply agreements, that is agreements entered into by retailers with suppliers prior to agreeing to be bound by the Code.

Clause 5 requires retailers to offer suppliers the option to vary their pre-existing agreements to conform to the Code within six months of the retailer agreeing to be bound by the Code. If the supplier accepts that offer, the retailer must vary the agreement within six months.

This clause further provides that Part 2 (Grocery supply agreements), 3 (Conduct generally), 5 (Dispute resolution) and 6 (Compliance and reporting) do not apply to the supply of groceries under pre-existing agreements until either of the following occurs:

- the pre-existing agreement is varied under this clause, or
- a period of 12 months passes from the time when the retailer agrees to be bound by the Code.

The effect of this clause is to allow a period of 12 months at most for a retailer that has signed up to the Code to comply with the Code in relation to the supply of groceries relating to pre-existing grocery supply agreements. This was the result of consultation and takes into account the need to allow sufficient time to implement the Code.

The effect of this clause is also that obligations in Part 4 of the Code will apply immediately from the time a retailer agrees to be bound by the Code. Importantly, one of these obligations is the obligation to act lawfully and in good faith.

### Clause 6—Transitional application—wholesalers

This clause includes transitional provisions for corporations which have agreed to be bound by the Code as a wholesaler. These are similar to those outlined above for retailers but differ in one respect. The term within which a wholesaler will need to make an offer to a supplier to vary a pre-existing grocery supply agreement is eighteen months (rather than six months). This will have the outcome of postponing the application of the relevant parts of the Code (Parts 2, 5 and 6) by 24 months at most. As noted above, the obligations in Part 4 apply as soon as wholesalers sign on to the Code, whereas the conduct obligations in Part 3 for retailers do not apply. This outcome was the result of consultation and aims to take into account the different business models of certain large wholesalers.

### ***Part 2—Grocery supply agreements***

The purpose of this part is to improve transparency for businesses in the food and grocery sector, and ensure there is greater clarity on some key issues that have raised concerns in the sector. This is achieved by providing that a grocery supply agreement must be in writing and address certain matters, thus reducing the risk of uncertainty deriving from oral contracts. Importantly, these provisions do not set out the contents of the terms of the agreement, which are left to the parties to negotiate.

This part includes two important prohibitions providing that retailers and wholesalers cannot make unilateral or retrospective variations of a grocery supply agreement unless certain exceptions apply.

### Clause 7—Grocery supply agreement must be in writing and retained

This clause provides that retailers and wholesalers bound by the Code must not enter into a grocery supply agreement unless it is in writing. This clause should be read in conjunction with clause 42, which provides that while retailers and wholesalers are bound by the Code, they must keep the original or a copy of any grocery supply agreements that they are a party to during the term of the agreement; and for 6 years after the agreement ends. This obligation extends to any document comprising the agreement and any document made from time to time under the agreement that forms part of the agreement.

### Clause 8—Matters to be covered by the agreement

This clause provides that retailers and wholesalers bound by the Code must not enter into a grocery supply agreement unless the agreement specifies certain matters. These include, for example, requirements regarding the delivery of groceries, when groceries may be rejected, payment terms, the term of the agreement if it is intended to operate for a limited time, quantity and quality requirements of the groceries, and when it can be terminated. These terms cover important aspects of the relationship and the inclusion in a written agreement should reduce uncertainty and the risk of disputes at a later stage.

The Code does not determine the substance of these matters, which is left to the parties for negotiation.

### Clause 9—Unilateral variation of agreement

This and the following clause (relating to retrospective variations) address specific concerns about certainty and transparency that emerged during consultation, whilst at the same time allowing flexibility to the parties during the life of the agreement.

Subclause 9(1) provides that retailers and wholesalers cannot unilaterally vary a grocery supply agreement.

Subclause 9(2) states that subclause 9(1) does not apply if certain requirements are met. Such requirements include that the agreement provides expressly for the retailer or wholesaler to make the variation, and also sets out clearly the changed circumstances in which the variation can be made. If the variation involves a quantitative adjustment, the agreement also needs to set out the basis or methodology for calculating the adjustment. The variation will be allowed only if made in accordance with the agreement.

These requirements aim at encouraging parties to a grocery supply agreement to turn their mind to, in as much detail as possible and upfront, the circumstances which they envisage may affect their relationship and include them in the agreement. This should help improve certainty and transparency. It is also important to note that these obligations should be read in conjunction with the obligation on retailers and wholesalers to act in good faith (clause 28), which is aimed at building trust between the parties.

Subclause 9(2) also provides another important protection for suppliers: the variation will be allowed only if it is reasonable in the circumstances. Reasonableness will be assessed taking into account all the circumstances of the case. Subclause 9(3) lists benefits, costs and risks (if any) to the supplier and retailer or wholesaler as matters which must be taken into account for the assessment. This list, however, is not exhaustive.

Another important requirement under subclause 9(2) is that the supplier be given reasonable notice in writing of the variation. Such notice shall include the terms of the variation and the retailer or wholesaler's reasons for making the variation. This provision is important as it provides a supplier with a written record of the retailer or wholesaler's reasons underlying the proposed change to the agreement and is also aimed at ensuring accountability: the default position under the Code is that a unilateral variation is not permitted, therefore should a retailer or wholesaler opt to depart from this position, careful consideration should be given to the circumstances surrounding the matter and an explanation provided to the supplier.

Clause 9 also provides that in any dispute, the retailer or wholesaler has the onus of establishing all of the matters which would justify a unilateral variation. However, if detriment to a supplier is alleged as part of the assessment of reasonableness in a dispute, subclause 9(6) provides that the person alleging the detriment should adduce evidence to this end.

In this context, it should be noted that reference to a dispute should be read broadly so as to include a reference to court proceedings as well, and is not limited to the dispute resolution mechanisms in Part 5.

Furthermore, the reference in subclause 9(6) to a 'person' would allow the ACCC to bring evidence of detriment in potential proceedings to enforce a breach of the Code in respect of this provision.

### Clause 10—Retrospective variation of agreement

The requirements for retrospective variations are the same as those for unilateral variations with one main difference: retrospective variations are only permitted in relation to circumstances that are beyond a retailer or wholesaler’s control. The reason for this is that such variations do not provide for the future but rather have retrospective effect and thus an exception should be allowed in an even narrower set of circumstances.

### ***Part 3—Conduct generally***

Part 3 contains several provisions governing a retailer’s conduct towards suppliers. It 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 further clarity for businesses and improving standards of conduct in the grocery sector. Many of these clauses address concerns reported in recent public debate.<sup>5</sup>

Part 3 seeks to address the potential imbalance between retailers and suppliers with respect to the allocation of risks. It also recognises suppliers’ need for certainty to plan appropriately for their business and invest, innovate, expand capacity or develop new product lines. As such, many of these requirements are expressed as general standards for retailers, with limited exceptions. The general approach is that a retailer has the onus of proving that those exceptions apply.

There are four Divisions under this part: Division 1 deals with the application of this part; Division 2 deals with payments to suppliers; Division 3 contains provisions relating to requests for payments from suppliers; and Division 4 includes provisions relating to other conduct.

### *Division 1—Application of this Part*

### Clause 11—Application of this Part

This clause provides that this part does not apply to a corporation that is bound by the Code as a wholesaler. The provisions of this part are not tailored to the particular business models of wholesalers, which, for example, do not have retail shelf space.

It should be noted that the Code will be subject to a review three years after commencement (Regulation, section 5). Amongst the matters to be addressed during the review, the Regulation expressly includes consideration of: whether the Code assists in addressing any imbalances in the allocation of risks between wholesalers and suppliers; whether the purposes of the Code have been met; and whether the Code should apply to wholesalers, and if so, to what extent. It is expected that the review will identify any issues and avenues for improvement to address any concerns relating to the relationship

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<sup>5</sup> ACCC, *Report of the ACCC’s inquiry into the competitiveness of retail prices for standard groceries*, 2008; Senate Select Committee, *Inquiry into food processing report*, 2012; Food Processing Industry Strategy Group, *Final report of the non-Government members*, 2012; and the former Government’s 2013 *National Food Plan*.

between wholesalers and suppliers which may come to light after commencement of the Code.

### *Division 2—Paying suppliers*

#### Clause 12—Payment to suppliers

This clause outlines obligations relating to payments to suppliers. It requires retailers 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.

Under subclause 12(2), retailers are generally prohibited from setting off any amount against a supplier's invoice unless the supplier has consented in writing. Retailers must not require a supplier to consent. An exception to this subclause applies if the grocery supply agreement provides for the set off and the set off is reasonable in the circumstances.

In any dispute, including any court proceedings, the retailer has the onus of establishing that the requirements for the set off have been met. This onus extends to establishing that the set off is reasonable.

### *Division 3—Requiring payments from suppliers*

#### Clause 13—Payments for shrinkage

This clause provides that retailers 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 has taken possession, due to factors such as shoplifting, employee theft or administrative error. Retailers can discuss the issue with suppliers, with a view to mitigating the risk and occurrence of loss of stock.

#### Clause 14—Payments for wastage

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.

Retailers are generally prohibited from requiring suppliers to pay for wastage which occurs at the premises of the retailer (or their contractor or agent, or another retailer). This is on the basis that the supplier would not normally have control over the groceries and any possible wastage once the retailer or their contractor or agent has taken delivery of the groceries.

However, there is an exception if the grocery supply agreement sets out expressly when the supplier may be required to make such payments. This may include circumstances where the supplier's negligence caused the wastage. The grocery supply agreement also needs to set out the basis of the payment.

An important protection is that the payment must be reasonable. Reasonableness will be assessed having regard to the costs incurred by the retailer because of the wastage. In

addition, the retailer must have taken reasonable steps to mitigate those costs. These measures should afford a level of protection to a supplier receiving a request for such a payment.

This clause further provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the requirements for any such offset for wastage have been met.

#### Clause 15—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.

This prohibition does not apply if the payment is made in relation to a promotion. This provision should be read in conjunction with clause 18 which regulates payments for promotions.

There is another exception to this provision for payments that are required under the relevant grocery supply agreement and are made in respect of stock that has not been listed or stocked in the preceding year in 25 per cent or more of the retailer's stores).

This exception is also subject to a reasonableness test, which will have regard to the costs and risks to the retailer in stocking, displaying or listing the product. This provision aims to balance the risk a retailer may bear in stocking a product that has not been stocked for a long period in a significant number of its stores, against the financial burden imposed on a supplier.

This clause further provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the requirements for the retailer requesting such a payment have been met.

#### Clause 16—Payments for better positioning of groceries

Retailers are generally prohibited from requiring suppliers to make payments to obtain a better position for their products or an increase in the shelf space allocated to their products.

However, payment can be required where the circumstances for it are clearly set out in the grocery supply agreement, and the payment is reasonable having regard to the benefits to the supplier, and the costs and risks to the retailer of allocating shelf space.

This clause further provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the requirements for the retailer requesting such a payment have been met.

#### Clause 17—Payments for retailer's activities

Under this clause, the Code limits the circumstances in which retailers are able to require payments from suppliers for certain activities. Retailers are generally prohibited from requiring payments toward the costs of:

- a) a buyer's visit to the supplier;
- b) artwork or packaging design;
- c) consumer or market research;
- d) the opening or refurbishing of a store; or
- e) hospitality for the retailer's staff.

However, there is an exception if the grocery supply agreement allows for payment, and the payment is reasonable in the circumstances. The Code sets out a number of matters that need to be considered in determining reasonableness, which include: the likely benefit to the supplier and retailer from the activities, and any related costs to or contributions made by the retailer.

This clause further provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the requirements for the retailer requesting such a payment have been met.

#### Clause 18—Funding promotions

Retailers are prohibited from requiring a supplier, directly or indirectly, to fund all or part of the retailer's costs of promotions.

This clause provides an exception if the funding is provided in the grocery supply agreement, and the payment is reasonable in the circumstances, including the benefits to the supplier and retailer and any related costs to, or contributions by, the retailer.

This clause should be also read in conjunction with clause 20 which sets out obligations on the retailer regarding funded promotions.

This clause provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the requirements for the retailer requesting such a payment have been met.

#### *Division 4—Other conduct*

#### Clause 19—Delisting products

Under this clause, retailers 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 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 a retailer 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 '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 has been out of stock or had significantly reduced stock.

Once a request is received, the 'senior buyer' must review any decision to delist and provide the supplier with written notice of the outcome of the review, including the basis for the retailer's decision. To provide certainty for retailers, the Code clarifies that a decision to decline to extend a pre-existing grocery supply agreement or enter into a new agreement following the end of a fixed-term agreement, is not a decision to delist.

This clause provides that in any dispute, which may include court proceedings, the retailer bears the onus of establishing that the delisting was in accordance with the relevant grocery supply agreement and was for genuine commercial reasons. If the retailer does not provide notice of delisting in the time and form required, it has the onus of establishing that time was of the essence or that there have been persistent issues with supply.

#### Clause 20—Funded promotions

This clause is triggered where a supplier has agreed to make a payment in support of the promotion of a product. A retailer may hold the promotion after giving the supplier reasonable notice in writing.

If a retailer orders a product from a supplier at a promotional price, it must ensure that the quantity of the order is calculated in a transparent manner. Retailers must also not over-order the product at the promotional price, and if they do, they must pay the supplier the difference between the supplier's full price and the promotional price for any of those products that are sold at a price above the promotional resale price.

If a retailer makes an order for a product for a promotion, it must obtain the supplier's written consent to cancel the order or reduce it by more than 10 per cent, unless it provides reasonable written notice or compensates the supplier for any net resulting costs, losses or expenses that may result as a consequence of the failure to give reasonable notice.

#### Clause 21—Fresh produce standards and quality specifications

Clause 21 deals with produce standards or quality specifications for fresh produce and should be read in conjunction with clause 8, which sets out matters to be covered in a grocery supply agreement.

Under this clause, the Code requires a retailer to provide such specifications to suppliers in clear, written terms. A retailer must accept all fresh produce delivered in accordance with the specifications. If fresh produce fails to meet relevant specifications, a retailer may reject it within 24 hours, provided it gives written notice within 48 hours. Retailers cannot reject produce after accepting it.

Retailers must also clearly convey, in writing, any labelling, packaging, or preparation requirements. If changes are required, the retailer must provide reasonable notice (unless the changes are required immediately by law). Consideration must be given to existing supplier's stock and the grocery supply agreement.

Retailers must make any claims for damaged products or shortfalls within a reasonable time (at most 30 days) after delivery.

#### Clause 22—Changes to supply chain procedures

The Code broadly prohibits retailers 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 of giving notice. A supplier may waive its right to compensation.

Subclause 22(4) provides that this clause has effect subject to the provisions regulating unilateral and retrospective variations (clauses 9 and 10). If a unilateral or retrospective variation of a grocery supply agreement relates to changes to supply chain procedures, clauses 9 or 10 will take precedence over the application of clause 22.

#### Clause 23—Business disruption

Retailers are also not allowed to threaten to disrupt a supplier's business or terminate a grocery supply agreement, without reasonable grounds.

#### Clause 24—Intellectual property rights

There are also a number of requirements with respect to the commercial information and intellectual property of suppliers and retailers.

Subclause 24(1) provides that a retailer must respect a supplier's intellectual property rights in relation to their products, for example, with respect to branding, packaging, and advertising. To avoid doubt, subclause 24(1) does not create, confer or extend any intellectual property rights in or of the supplier.

Further, subclause 24(3) provides that retailers must not infringe a supplier's rights when developing their own brands. In a dispute relating to a breach of this clause, any relevant action by the supplier with respect to the retailer's intellectual property rights must be considered as a factor for assessment. The supplier's conduct with respect to the retailer's intellectual property rights is also a matter that a retailer may take into account in taking action in response to a supplier's complaint under Division 2 of Part 5 of the Code.

#### Clause 25—Confidential information

Retailers 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 on a 'need to know' basis in connection with that

purpose. This clause applies to information disclosed to the retailer by the supplier in connection with the supply of grocery products. The clause clarifies that certain information, including publicly available information, is not confidential information.

As a corollary, the retailer must establish and monitor systems to ensure compliance with this obligation.

#### Clause 26—Allocation of shelf space

This clause provides that retailers must publish or otherwise provide to all their suppliers their product ranging and shelf space allocation principles. Retailers must uphold these principles and keep them up to date, and apply them without discrimination.

If retailers wish to do a product range review, they must provide suppliers who may be affected with written notice of the purpose of the review, and the key criteria governing ranging decisions. A retailer must provide such notice within a reasonable time before conducting the range review. After any range review, retailers must allow a reasonable time period to suppliers to discuss its outcomes, including the basis for the retailer's final decision.

This clause does not limit the rights and obligations regarding delisting in clause 19.

#### Clause 27—Transfer of intellectual property rights

If a retailer is negotiating the supply of an own brand product from a supplier of an equivalent grocery product, the retailer 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 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, then the retailer may request the holding of intellectual property in an own brand product or the exclusive right to the retail sale of the own brand product as a condition of supply. For example, if a retailer designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then a retailer may wish to hold intellectual property rights in that product.

#### **Part 4—Good faith etc.**

This part includes a number of more general obligations applicable to corporations bound by the Code as a retailer or wholesaler in their dealings with suppliers. These obligations apply immediately from when the retailer or wholesaler agrees to be bound by the Code.

The most important obligation is the overarching duty to act lawfully and in good faith at all times in dealing with suppliers. This obligation is aimed at building trust and improving standards of conduct and extends to all aspects of the relationship between retailers, wholesalers and suppliers.

Other obligations in this part protect suppliers' freedom of association and regulate the provision of relevant buyers' contact details to suppliers.

### Clause 28—Obligation to deal lawfully and in good faith

This clause requires retailers and wholesalers to deal with suppliers lawfully and in good faith at all times. This clause provides that the obligation to act in good faith refers to ‘good faith, within the meaning of the unwritten law from time to time’. The meaning of good faith under the Code is the same as that existing at common law, as it continues to develop and evolve in Australia over time. There has been considerable jurisprudence and legal commentary surrounding this obligation, with guiding principles such as honesty, cooperation, reasonableness and fairness, often cited to assist in determining the obligation on a case-by-case basis. The clause aims to ensure that consistency is maintained in relation to the interpretation of good faith under the Code as at common law. This is a broad obligation which applies to all aspects of the commercial relationship between parties to a grocery supply agreement.

Retailers or wholesalers cannot limit or exclude the obligation to act in good faith in a grocery supply agreement. Any such provision will have no effect.

The Code also lists three matters that may be taken into account in assessing whether a retailer or wholesaler has breached this obligation. These matters relate to the dealings between a retailer or wholesaler and a supplier. In particular, clause 28 refers to whether the retailer or wholesaler has conducted the trading relationship with the supplier without duress, or whether they have conducted the trading relationship with the supplier in recognition of the parties’ need for certainty regarding the risks and costs of trading, with particular reference to production, delivery and payment. This clause also expressly provides that regard may be had to whether the supplier itself acted in good faith. These are only some of the matters that can be considered for the purpose of the assessment as the list in this clause is not exhaustive.

### Clause 29—Freedom of association

Clause 29 provides that retailers and wholesalers must not make an inducement to restrict or impair a supplier’s freedom to form an association, or otherwise associate with other suppliers, and must not discriminate or take any other action against a supplier for forming an association or associating with other suppliers for a lawful purpose.

The aim of this provision is to ensure that suppliers can exercise their freedom of association for a lawful purpose and are not discriminated against in the course of their dealings with retailers or wholesalers for doing so. This provision does not affect the operation of the provisions under the Act relating to collective bargaining.

### Clause 30—Provision of contact details

This clause provides that retailers and wholesalers must make available to suppliers the contact details of their buyers, senior buyers, and their code compliance manager. These details must be kept up to date and include position titles and contact telephone numbers.

## ***Part 5—Dispute resolution***

Part 5 provides options to facilitate the resolution of disputes between retailers or wholesalers, and suppliers. It also provides avenues for formal dispute resolution through mediation and arbitration in order to resolve disputes arising under the Code.

Generally speaking, a supplier may elect which avenue best suits it to raise a complaint with a retailer or wholesaler. A supplier may raise the issue with the code compliance manager and if not satisfied elevate it to senior management. When raising a complaint with the code compliance manager, the supplier may request that the complaint be referred to senior management for consideration. Alternatively, a supplier may access mediation or arbitration.

The provisions in this part seek to set up fair and equitable mechanisms for dispute resolution to promote transparency and accountability.

This part is divided into three divisions: Division 1 deals with preliminary matters regarding requirements for making complaints and the appointment of a code compliance manager by retailers and wholesalers; Division 2 sets out requirements for the referral of complaints to a retailer or wholesaler, including direct access to, or review by, senior management; Division 3 deals with mediation and arbitration.

### *Division 1—Preliminary*

#### Clause 31—Information and documents

Under this clause, if a supplier makes a complaint under the Code, they are to provide details (subject to appropriate confidentiality protections) of the complaint, the conduct underlying the complaint, the provisions of the Code that are alleged to have been breached, and the remedy or relief sought.

A retailer or wholesaler does not have to respond to a dispute unless these details are provided by a supplier. This clause aims to ensure that the parties can gather a clear understanding of the issues in dispute from the outset and reduce the risk of frivolous claims.

With respect to disputes relating to unilateral and retrospective variations, this clause expressly provides that a supplier's obligation to provide details of the complaint and the conduct underlying the complaint will be met by the provision of details of the detriment to the supplier. The supplier will still need to identify the provisions of the Code that are alleged to have been breached, and the remedy or relief sought.

#### Clause 32—Code compliance manager

Clause 32 requires retailers and wholesalers to appoint a code compliance manager. The code compliance manager must have access to necessary resources to perform his or her duties, documents relating to the retailer or wholesaler's obligations under the Code, and the buying team to discuss obligations arising under the Code.

Importantly, the Code sets out a requirement that the code compliance manager be independent of the buying team. This is important to avoid bias as he or she will receive complaints made by suppliers. The code compliance manager must act in accordance with the retailer or wholesaler's complaints handling procedure, which is required, among other things, to be provided to the ACCC.

## *Division 2—Complaints*

### Clause 33—Referral of complaints

Clause 33 sets out the requirements for the referral to the code compliance manager of a complaint made by a supplier under the Code. The complaint must be in writing and include certain information, set out in sub-clause 33(2), such as the supplier's identification and contact details, but more importantly details of the conduct giving rise to the complaint, the relevant provision of the Code, along with any document or information that could assist the investigation of the complaint.

### Clause 34—Immediate elevation of complaint

Clause 34 provides that a supplier may request that the complaint be elevated through senior levels of management. If the supplier so requests, the retailer or wholesaler must elevate the complaint and attempt to resolve it in good faith within 20 business days. The request should still be made through the code compliance manager. This should ensure the integrity of the compliance system.

Clause 34 provides the supplier with the option to raise the complaint directly with senior management as a first option. There may be a number of circumstances where a supplier may choose to do so: for example, a supplier may consider this course of action more appropriate where there are more sensitive commercial issues at stake.

### Clause 35—Investigation by code compliance manager

Following receipt of a complaint, provided that the supplier has not requested immediate elevation to senior management, the code compliance manager must take reasonable steps to investigate the complaint and finalise the investigation within 20 business days, unless they determine that the complaint is vexatious, trivial, misconceived or lacking in substance, in which case he or she must give written notice to the supplier to that effect. In this context, clause 35 clarifies that, with respect to disputes relating to unilateral or retrospective variations, a complaint cannot be dismissed as vexatious, trivial, misconceived or lacking substance simply because the only ground raised by a supplier is detriment to it arising from the unilateral or retrospective change.

The written notice dismissing a complaint must include the code compliance manager's reasons for being satisfied that the complaint is vexatious, trivial, misconceived or lacking substance, and advice of the options available to the supplier if not satisfied.

### Clause 36—Action following investigation

Under this clause, the code compliance manager must determine what action should be taken in relation to the complaint and give the supplier, within five business days after the conclusion of the investigation, a summary of the action that has or will be taken. A timetable for action (if any) must also be provided.

The code compliance manager must keep a record of the complaint, and investigations and actions taken for at least six years.

### Clause 37—Internal review

If a supplier is not satisfied after it has made a complaint to a code compliance manager, it may request in writing that the dispute be elevated to senior management. This clause provides for a review mechanism of a code compliance manager's handling of a complaint.

The supplier has access to internal review where it is satisfied no action has been taken in relation to the complaint, or it is not satisfied with the outcome of the investigation under a particular clause of the Code, or the complaint was dismissed as vexatious, trivial, misconceived, or lacking in substance, or the supplier was not provided with a summary of the action under clause 36. The supplier's request must specify relevant details of the dispute, including the applicable provision of the Code and the outcome the supplier is seeking. Retailers and wholesalers must attempt to resolve such issues in good faith within 20 business days.

## *Division 3— Mediation and arbitration*

### Clause 38—Supplier may seek mediation or arbitration

Another avenue available to a supplier to resolve a dispute under the Code is to seek mediation or arbitration.

This avenue is available to a supplier regardless of whether it has opted to raise the complaint with the code compliance manager or sought immediate elevation to senior management. This allows a supplier more flexibility and widens the available options to address complaints arising under the Code.

The only limitation this clause imposes on the supplier is that if a procedure under Division 2 of this part (referral to the code compliance manager, immediate elevation or internal review) has been initiated in relation to the complaint, a supplier may not seek mediation or arbitration until the process has, or should have, been completed.

This clause also requires that a retailer or wholesaler must take part in the mediation or arbitration in good faith. Clause 38 also provides that retailers and wholesalers are only required to participate in either mediation or arbitration at the one time. It will be up to the retailer or wholesaler to prove that these requirements have been met, in any dispute. This clause should be read in conjunction with clause 39, which relates to conduct of mediation or arbitration and sets out some circumstances when a retailer or wholesaler will be considered to be taking part in the mediation or arbitration and taken to be trying to resolve the dispute in good faith.

Clause 38 also clarifies that a retailer or wholesaler does not need to participate in mediation or arbitration if the mediator or arbitrator determines that a complaint is vexatious, trivial, misconceived or lacking in substance, or the supplier is not acting in good faith.

Consistently with clause 35(3) (Investigation by Code compliance manager), the Code provides that, with respect to disputes relating to unilateral or retrospective variations, a mediator or arbitrator must not consider or determine that a complaint is vexatious, trivial, misconceived or lacking in substance solely because the only ground raised by a supplier is detriment arising from a unilateral or retrospective change.

#### Clause 39—Conduct of mediation and arbitration

This clause sets out procedural requirements for conducting mediation and arbitration in accordance with the rules of the Institute of Arbitrators and Mediators Australia (IAMA), or the body from time to time appointed by the Minister to this end.

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. Subclause 39(4) provides that the costs of mediation or arbitration will be determined under the same rules.

Clause 39 also clarifies that a retailer or wholesaler will be deemed to be participating in mediation or arbitration if it is represented by someone with authority to enter into agreements or settle disputes on their behalf. This clause also clarifies the duty of good faith further in the context of dispute resolution. A retailer or wholesaler is taken to be acting in good faith if they approach the resolution of the dispute in a reconciliatory manner, including by attending and participating in meetings, having clear objectives, observing all confidentiality obligations and withholding any actions which may have the purpose or effect of applying pressure to resolve the dispute. A retailer or wholesaler may undertake a range of other behaviours to show its commitment to the process as the list is not exhaustive.

#### ***Part 6—Compliance and reporting***

This part sets out the requirements for retailers and wholesalers to ensure they have appropriate compliance and reporting mechanisms in place in order to comply with the Code. This part also creates record keeping obligations regarding retailers and wholesalers' records, which the ACCC could seek to access by giving notice under section 51ADD of the Act.

#### Clause 40—Duty to train staff with respect to this code

Under this provision, the Code sets out the training requirements for retailers and wholesalers to ensure their buying team is aware of their obligations under the Code. Within six months of being bound by the Code, a corporation must provide its buying team with a copy of the Code and training on it. The same obligation applies with respect to

staff joining the buying team from time to time. Retailers and wholesalers will have to comply within twenty business days after the person joins the team. This provision also sets out an obligation to retrain the buying team every year.

#### Clause 41—Reports by code compliance managers

This clause requires code compliance managers to prepare a periodic report setting out several matters: the number of complaints received for investigation in the reporting period; the nature of the complaints received (in a de-identified way); the time taken to investigate each complaint; outcomes and whether each complaint was resolved to the complainant's satisfaction.

#### Clause 42—Keeping records

This clause sets out obligations about record keeping for retailers and wholesalers bound by the Code. Broadly speaking, clause 42 requires a retailer or wholesaler to retain the original or a copy of certain documents for a specified period of time. This clause does not affect a provision in any other legislation imposing on a retailer or wholesaler longer record keeping retention periods. Documents may be retained in electronic form for the purposes of this provision<sup>6</sup>.

In particular, subclause 42(1) provides that a retailer or wholesaler must keep the original or a copy of each grocery supply agreement to which the retailer or wholesaler is a party while bound by this code. This includes any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement. These documents must be kept during the term of the grocery supply agreement, and for six years after the agreement ends.

Subclause 42(2) provides that a retailer or wholesaler must retain the original or a copy of certain documents for at least six years from the time when the document is created or given to another party, as required by the Code. The documents listed in this subsection are as follows:

- a) an offer to vary a grocery supply agreement made under subclause 5(2) or 6(2);
- b) a notice of variation of a grocery supply agreement given under paragraph 9(2)(d) or 10(2)(d);
- c) a notice of a decision to delist a product given under paragraph 19(5)(a);
- d) a notice of the outcome of the review of a decision to delist a product given under subclause 19(7);
- e) the reasons for rejection of fresh produce given under subclause 21(4);
- f) a notice of required changes to packaging, labelling or preparation standards given under subclause 21(6);
- g) a notice of material change to supply chain procedures given under paragraph 22(2)(a);
- h) a notice of a range review given under subclause 26(3);

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<sup>6</sup> *Electronic Transactions Act 1999* (Cth).

- i) a notice that a complaint is vexatious, trivial, misconceived or lacking in substance given under paragraph 35(2)(b);
- j) a summary of action that has or will be taken in response to a complaint and the timetable for the action given under subclause 36(2);
- k) a code compliance manager's report prepared under subclause 41(1).

These documents record a number of important events that may occur during the life cycle of a grocery supply agreement. The creation and retention of these documents will assist compliance monitoring and provide useful evidence in case of disputes.

Under section 51ADD of the CCA, if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code, then the ACCC may require that such information be provided to it for investigation and auditing purposes. The purpose of this provision is to allow the ACCC to access necessary documents to conduct its audit and enforcement functions under the Act in relation to the Code.

Regulation impact statement



Australian Government

# Improving commercial relationships in the food and grocery sector

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Final Assessment RIS

*November 2014*

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## **List of abbreviations**

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFGC	Australian Food and Grocery Council
CCA	Competition and Consumer Act 2010 (Cth)
Grocery Code	Food and Grocery Code of Conduct
IAMA	Institute of Arbitrators and Mediators Australia
IP	Intellectual Property
OBPR	Office of Best Practice Regulation
PGICC	Produce and Grocery Industry Code of Conduct
RIS	Regulation Impact Statement
RSR	Retailer and Supplier Roundtable

## **Executive Summary**

The purpose of this Final Stage Regulation Impact Statement (RIS) is to inform the Australian Government's decision with regard to implementing a *Food and Grocery Code of Conduct* (Grocery Code).

The proposed Grocery Code aims to achieve the following:

- to help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and
- to 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; and
- to 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
- to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

This RIS provides a detailed analysis of the regulatory impacts of proposed changes that underpin the policy development process. It is the culmination of a consultation process which considered a range of policy options. An Early Assessment RIS was prepared, that was also used as a consultation paper, released on 6 August 2014.

**Part A** outlines:

1. the policy problem being solved; and
2. why Government action is needed.

**Part B** outlines:

3. the regulatory options considered during consultation;
4. the likely net benefits and costs of each option; and
5. the consultation process that was undertaken.

**Part C** outlines:

6. a conclusion and the recommended option; and
7. implementation and review of the recommended option.

## **Introduction**

In recent years there has been public debate about whether the activities of the major supermarket chains are harming suppliers, including primary producers, and leading to outcomes that are not in the long-term interests of Australian consumers.

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 jointly-developed grocery code to the Australian Government.

The Grocery Code was subsequently redrafted in consultation with proponents to align the Code with the *Competition and Consumer Act 2010* (CCA) framework.

The proposal that was brought forward by these industry proponents was for the Government to prescribe the Grocery Code as a voluntary industry code under the CCA. Being a ‘voluntary’ code means that once a party ‘opts-in’ it will be legally bound by the requirements of the Grocery Code. Being ‘prescribed under the CCA’ means that the Australian Competition and Consumer Commission (ACCC) and private parties can take enforcement action under the CCA for breaches of the Grocery Code. There are a range of remedies for breaches of a prescribed industry code, including injunctions and compensation for damages.

The Government welcomed this industry-led response, which it considered to represent an important step forward for the industry. The Government sought input from interested stakeholders via a consultation process, conducted by the Treasury between 6 August 2014 and 12 September 2014.

The purpose of the Grocery Code is to help regulate standards of business conduct in the grocery supply chain; to build trust; to ensure transparency and certainty in commercial transactions to minimise disputes; and to provide an effective, fair, and equitable dispute resolution process.

The Government has stated that it must be satisfied that the Grocery Code will contribute towards achieving fair and efficient commercial dealing in the grocery sector, while not imposing an excessive regulatory burden.

The purpose of this RIS is to inform the Australian Government’s decision with regard to implementing the Grocery Code.

More broadly, the Government considers that any regulation should facilitate the efficient operation of the food and grocery sector, in turn delivering associated benefits to consumers and improving the welfare of Australians.



## Part A — What is the policy problem to be solved?

### 1. The policy problem to be solved

#### Market Overview

Comparisons across countries suggest that retail grocery markets in Australia are more concentrated than in some other advanced economies, reflecting in part its population and geographic size.

#### Estimated grocery market shares (%) by country

Largest 4 firms	Australia*	NZ*	UK*	Canada*	Ireland*	Austria*	USA^	Switzerland~
1	30+	56	27.6	29	20-25	N/A	25	32
2	≈25	44	14.1	22	15-20	N/A	17	24
3	IGA, 15-17 <sup>(a)</sup>	N/A	13.8	14	15	N/A	8	N/A
4	ALDI, 6 <sup>(a)</sup>	N/A	9.9	11	10	N/A	5	N/A
<b>Top 4 total</b>	<b>75-80</b>	<b>100</b>	<b>65.4</b>	<b>76</b>	<b>50-70</b>	<b>N/A</b>	<b>55</b>	<b>N/A</b>
<b>Top 2 total</b>	<b>55-60</b>	<b>100</b>	<b>41.7</b>	<b>51</b>	<b>35-45</b>	<b>65-70</b>	<b>42</b>	<b>56</b>

Sources: \*ACCC 2008, [Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries](#), page 48, [www.theconversation.com](#) '2013 Fact check on Grocery Market Concentration' (note this measure is 'share of food retail sector'), [www.euromonitor.com](#) 'Grocery Retailers in Switzerland'.

(a) These figures were not generated on the same basis as those shown for the largest two firms.

Source: Harper Competition Policy Review, Draft Report, 22 September 2014, page 182.

Coles and Woolworths (the 'major supermarket chains') are the largest players in the food and grocery retail market. Other major participants include ALDI, Costco and a number of independent and franchised food and grocery retailers, including those serviced by wholesaler Metcash. The smallest retailers in the food and grocery retail market are Australia's convenience stores and corner stores.

Apart from retailers, other key players in the food and grocery sector include the large number of primary producers, food and grocery processors, and manufacturers.

There is a range of different estimates of the market share of Coles and Woolworths in different grocery product groups — from approximately 70 per cent for packaged groceries to 50-60 per cent for dairy and deli products; around 50 per cent for fresh meat, and up to 50 per cent for fruit and vegetables, bakery products, and eggs.<sup>7</sup>

Due to its relatively small population, and remoteness from centres of global economic activity, Australian markets can tend towards high concentration, with two or three key players and a number of smaller competitors.<sup>8</sup> In some sectors, this gives key players significant buyer power, known as 'monopsony power' (one buyer) or 'oligopsony power' (a small number of buyers). Such firms may be able to use their buyer power to negotiate lower prices or better terms with suppliers.

<sup>7</sup> Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry, No. 56, 4 (2011), page 38.

<sup>8</sup> Rod Sims, in his 30 October 2013 speech 'Thoughts on market concentration issues', stated that "Australia has many markets that are highly concentrated, which is perhaps not surprising given the relative size of our population... supermarkets and liquor are often identified as two such markets".

If monopsony buying power is being exercised by the major supermarket chains this may have costs in terms of allocative, productive and dynamic efficiency, and could result in suppliers engaging in less product innovation.<sup>9</sup> Additionally, suppliers have raised concerns that they may be in a weaker position to negotiate produce and grocery prices with major supermarket chains than in a less concentrated market.<sup>10</sup> This is discussed under ‘Conduct Concerns’, below.

It is important to also recognise that supplier dealings with the major supermarket chains can bring financial benefits as well. For example, promotions conducted by supermarkets to generate additional foot traffic or maintain current customer numbers can also provide benefits to suppliers, by encouraging consumers to buy the promoted brand over other brands. This increases sales for the duration of the promotion and also has the potential to create longer term benefits to suppliers if consumers are enticed to switch brands on a more permanent basis.<sup>11</sup> Further, consumers and supermarkets often point to lower prices as evidence that vigorous competition between the major supermarket chains is bringing broader benefits across the economy.

### **Conduct concerns**

There has been considerable public debate in Australia in recent years about the conduct of retailers during negotiations with suppliers.<sup>12</sup> This debate has focussed on differences in bargaining power between suppliers and supermarkets (and in some cases between suppliers and wholesalers), and resultant difficulties suppliers may face in negotiating fair trading terms. There are views that grocery suppliers looking to do business in Australia have relatively limited options besides supermarkets to get their product to market, particularly on a national basis.

There have been anecdotal claims that some suppliers may have little choice but to accept disadvantageous terms for fear of losing contracts, and may similarly be unwilling to complain to the supermarkets, or other bodies to resolve issues or enforce their legal rights during the life of the agreement for fear of retribution.<sup>13</sup> Some particular concerns reported in recent inquiries include:<sup>14</sup>

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<sup>9</sup> Law Council of Australia, submission to Treasury Consultation paper ‘Improving Commercial Relationships in the Food and Grocery Sector’, 12 September 2014, page 8.

<sup>10</sup> For example: National Farmers Federation, submission to Treasury Consultation paper ‘Improving Commercial Relationships in the Food and Grocery Sector’, 12 September 2014, page 5, and AWMU, submission to Treasury Consultation paper ‘Improving Commercial Relationships in the Food and Grocery Sector’, 12 September 2014, page 5.

<sup>11</sup> ACCC, Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, 2008, page 92.

<sup>12</sup> This debate has been raised in consultations for the 2008 Report of the ACCC’s inquiry into the competitiveness of retail prices for standard groceries; the 2012 Senate Select Committee inquiry into food processing; the 2012 Food Processing Industry Strategy Group report; the former Government’s 2013 National Food Plan; and most recently, by the ACCC in relation to its current investigation of supermarket supplier issues. These issues were noted in Australia’s submission to the OECD Roundtable on Competition Issues in the Food Chain Industry in 2013.

<sup>13</sup> ACCC, Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, 2008, page 326.

<sup>14</sup> ACCC, Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, 2008; Senate Select Committee, Inquiry into food processing report, 2012; Food Processing Industry Strategy Group, Final report of the non-Government members, 2012; and the former Government’s 2013 National Food Plan.

- agreements and understandings that are not in writing or contracts which do not clearly establish the terms which govern the commercial interactions between the parties;
- unilateral or retrospective contract variation — contracts being changed by retailers without notice or at short notice or those changes being applied retrospectively without supplier consent;
- late payment by retailers of agreed prices for goods or failure to pay the full amount agreed in respect of the goods;
- unfair allocation of risk — contracts requiring payment for matters outside the control of the supplier such as damage, wastage, and shrinkage (for example, responsibility for theft and loss in store or for retailers’ accounting errors);
- pressure to agree, and threats of adverse outcomes if suppliers do not agree to requests from retailers, or if suppliers make complaints, for example, threats of:
  - de-listing of products;
  - poorer shelf positioning;
  - varying the volume of stock acquired; and
  - cancelling of supply contracts entirely.
- requiring suppliers to make payments for in-store promotions, marketing and mark-downs when these promotions are the decision of the retailer rather than the supplier;
- return of unsold goods to suppliers at the suppliers’ expense, including fresh produce that cannot be resold;
- requiring the disclosure of cost information that may be commercially sensitive to suppliers;
- requiring “profit gap” payments or other additional payments from suppliers over and above agreed trading terms to boost the retailer’s earnings and profit margins; and
- conduct associated with retailer own brand products, including in relation to intellectual property rights, the use of confidential information, product ranging and shelf-space allocation to further retailers’ own brands.

Some of these concerns have resulted in actions by the ACCC.

Concern that these types of undesirable behaviours have been present in the sector does not mean that they are present in all cases of retailer-supplier dealings or necessarily mean that there is a systematic problem of misconduct in the sector. There have also been positive, beneficial interactions between retailers and particular suppliers; and supermarkets, wholesalers, and consumers appear to be generally content with the way the market is operating in the short-term. The issues are around the extent of undesirable behaviours and what those will mean for the effective operation of the market and consumers in the longer term.

To the extent that these behaviours are present, they may result in inappropriate levels of risk being shifted on to the suppliers. If these types of retailer behaviours occur unexpectedly or recurrently, they could result in serious detriment to suppliers, particularly smaller ones. This includes: forcing suppliers to bear unnecessary costs; inhibiting the ability of suppliers to plan appropriately for their businesses; increasing variability of cash flow; and imposing additional financing costs.<sup>15</sup> In turn, this would detract from the incentive for suppliers to invest, innovate, expand capacity or develop new product lines. Ultimately, some suppliers may be forced out of business as a consequence.

There may also be long term detrimental effects for Australian consumers. Erosion of the supplier base, including deterring suppliers from investing, innovating and expanding, may result in higher long-run prices, limited product range and variety, poorer quality products, less intense competition between suppliers, and potentially fewer new products coming to the market. This outcome would not be in the long term interest of Australian consumers and may reduce the efficiency of the grocery sector.

Separately, primary producers have raised concerns that they are offered unsustainably low prices.<sup>16</sup> Issues relating to farm-gate returns are currently being considered as part of the Government's *White Paper on Australia's Agricultural Competitiveness*, which is set for completion in 2015. A Green Paper was released on 20 October 2014, with submissions closing 12 December 2014. The proposed Grocery Code does not seek to deal with the issue of the base prices that suppliers receive for their goods.

The issues being debated are not unique to the Australian food and grocery sector. There has been a similar debate in other nations, with a number of countries inquiring<sup>17</sup> into relationships in the food and grocery supply chain. A common feature of those inquiries is the finding of imbalances in bargaining power, with suppliers fearful of making complaints or declining requests from retailers out of concern of adverse consequences, including being delisted as a supplier.<sup>18</sup>

## Summary of key problems

The range of concerns that emerged during recent inquiries and reports into the grocery sector, and the feedback from stakeholders during the consultation process, suggests that the problems identified can be broadly categorised into three common themes:

1. Poor transparency and clarity in grocery supply agreements – particularly in cases where the agreement is not in writing and does not sufficiently cover basic matters, such as quantity and quality requirements in respect of grocery produce.

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<sup>15</sup> European Commission, Green paper on unfair trading practices in the business to business food and non-food supply chain, 2013.

<sup>16</sup> ACCC, Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, 2008, page 325.

<sup>17</sup> European Commission, Green paper on unfair trading practices in the business to business food and non-food supply chain, 2013.

<sup>18</sup> European Commission, Green paper on unfair trading practices in the business to business food and non-food supply chain, and Summary of Response to the European Commission Green Paper, 2013, Notes by Japan, United Kingdom to OECD Roundtable on Competition Issues in the Food Chain Industry, 2013, Finnish Competition Authority, Study on Trade in Groceries: How does buyer power affect the relationship between trade and industry?, 2012, Ireland, Joint Committee on Enterprise, Trade and Employment report: Supplier- Retailer Relationships in the Irish Grocery Market, 2010.

2. Poor business conduct and behaviour – not engaging in commercial dealing with suppliers in good faith.
3. Lack of dispute resolution mechanisms and access to justice – suppliers may be unable to have their complaints heard or addressed.

To the extent that these behaviours are present in the grocery sector they may have adverse effects on the efficiency of commercial dealings between retailers and suppliers, which may ultimately result in long term detriment to consumers.

## **2. Why Government action is needed**

The Grocery Code was proposed by industry proponents against the backdrop of this ongoing public discussion. This proposed approach aims to improve standards of conduct in the food and grocery industry and effectively address the key problems identified.

As a general proposition, industry codes of conduct should aim to address specific problems and set out clear requirements and obligations, rather than aims and ideals.<sup>19</sup> These obligations should be enforceable and consistent with the broader objectives of the CCA.<sup>20</sup>

An effective code should:<sup>21</sup>

- identify the industry participants to be covered, and the means by which participants are bound;
- identify the conduct that should be prevented or required;
- ensure that obligations cannot be avoided; and
- establish clear complaint resolution mechanisms.

More broadly, the Government considers that any regulation should facilitate the efficient operation of the food and grocery sector, in turn delivering associated benefits to consumers and improving the welfare of Australians.

The Government is keenly aware that any intervention needs to be beneficial overall, and not impose undue regulatory burden. Retailers should continue to have sufficient flexibility to negotiate good deals with suppliers that ultimately benefit consumers. An outcome that is too prescriptive or restrictive may have the unintended effect of resulting in higher retail prices for consumers. Conversely, allowing too much flexibility may mean that the issues of concern outlined above are not addressed.

The intention of any Government action is not to prevent hard bargaining and vigorous competition, but rather to ensure that market distortions do not compound and have a longer-term detrimental impact on consumers or the grocery sector more broadly.

The Government also wishes to encourage industry-led responses to resolving issues in different sectors where this is feasible. Allowing industry to lead the response to problems in a market can have several benefits, as outlined in the guidelines for developing industry

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<sup>19</sup> The Treasury, Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010 (May 2011).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

codes of conduct.<sup>22</sup> In particular, prescribing an ‘opt-in’ industry code reinforces that the Code has industry buy-in and is not overly prescriptive or burdensome. An effective code would codify good practice, provide greater transparency between affected parties, and provide more dependable commercial relationships moving forward.

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<sup>22</sup> Hon. Joe Hockey MP, Prescribed codes of conduct — policy guidelines, 1999; The Treasury, Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010, 2011; ACCC, Guidelines for developing effective voluntary industry codes of conduct, 2011.

## **Part B — Regulatory options considered and consultation process**

### **3. Regulatory options considered during consultation**

In any reform process, it is important to consider alternative courses of action when deciding how to tackle the problem at hand. This section of the RIS assesses the relative merits of three options for achieving the reasons for government action and policy objectives outlined in Part A:

- **Option 1:** Status quo — Involves maintaining the ‘status quo’ and relying upon existing laws, regulations and codes. This option would not preclude a code of conduct being implemented by the industry outside of the CCA.
- **Option 2:** Opt-in, prescribed code — Involves prescribing a Grocery Code, whereby a retailer or wholesaler chooses whether or not to be bound by the Code. Retailers and wholesalers that agree to be bound by the Code would then be legally required to comply with it.
- **Option 3:** Mandatory prescribed code — Involves prescribing a mandatory Grocery Code, whereby a retailer or wholesaler (as defined in the Code itself) would be legally bound by the Code.

The purpose of the Grocery Code is to help regulate standards of business conduct in the grocery supply chain to build trust, to ensure transparency and certainty in commercial transactions to minimise disputes, and to provide an effective, fair and equitable dispute resolution process.

It is important to analyse the impact of each of these options according to their costs and benefits. These costs and benefits may be both qualitative and quantitative, and both are considered below where appropriate.

### **4. The costs and benefits of each option**

#### **Option 1: Status quo**

##### **What does this option involve?**

A ‘do-nothing’ option would rely upon existing laws, regulations and codes and the ability of suppliers to resolve disputes with retailers. This approach would not preclude an industry Grocery Code. That is, a code which is not prescribed by regulations under the CCA and not subject to enforcement action by the ACCC.

##### **Existing Codes**

Relationships in the food and grocery sector are currently subject to the following non-prescribed and prescribed codes of conduct:

- the *Produce and Grocery Industry Code of Conduct* (PGICC) — a non-prescribed voluntary, industry run code;
- the *Horticulture Code of Conduct* — this is a mandatory code prescribed under the CCA; and

- the *Australian Wine Industry Code of Conduct* — also a non-prescribed voluntary industry code.

These codes are, however, unlikely to address all of the issues outlined in Part A of this paper:

- The Horticulture Code of Conduct and Australian Wine Industry Code of Conduct cover different relationships in the supply chain.
  - The Horticulture Code of Conduct expressly excludes relationships with processors and retailers. It regulates trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions. Horticulture produce is defined as ‘unprocessed fruits, vegetables (including mushrooms and other edible fungi), nuts, herbs and other edible plants’. It does not include nursery products. The Horticulture Code does not regulate businesses buying produce for retail sale, for export or for processing.
  - The Australian Wine Industry Code of Conduct addresses issues between grape growers and winemakers.
- The PGICC is significantly more limited than the proposed Grocery Code in terms of coverage and scope. Further, the PGICC Administration Committee has not met since 2011 and a number of parties to the PGICC have withdrawn their support.

A few submissions indicated mixed feedback in relation to the preferred status of the PGICC and the Horticulture Code. For example, the Victorian Farmers’ Federation (VFF) and National Farmers’ Federation (NFF) suggested that the PGICC be strengthened and made mandatory, while others believed that the PGICC had failed, such as Growcom. The PGICC has been criticised due to limited awareness of the code by the Australian Manufacturing Workers Union, a lack of industry support, and a lack of reporting responsibilities and protection from commercial retaliation. As the PGICC Administration Committee has not met since 2011 and it is not clear if the remaining members still support the code, the PGICC could be considered to be no longer functioning.

Some submissions called for the codes to be combined, while others preferred a separate mandatory *Horticulture Code of Conduct* and voluntary grocery code.

The proposed Grocery Code does not apply to the extent that it conflicts with the *Horticulture Code of Conduct* (that is, the *Horticulture Code of Conduct* would prevail).

### Other regulatory arrangements

Relationships in the food and grocery supply chain are also governed by:

- the economy wide provisions of the CCA, including the Australian Consumer Law (ACL);
- the common law, which governs contractual dealings (including the concept of good faith); and
- intellectual property protection mechanisms.

To the extent that the existing laws, regulations and codes outlined above do not target particular issues in the food and grocery sector —and because there is a risk that retailers and wholesalers would not fully comply with the proposed Grocery Code in the absence of prescription — the problems outlined in Part A of this paper would persist.

## **What are the qualitative costs and benefits of this option?**

### **Benefits**

This option would involve no additional regulatory intervention by the Government. Maintaining the status quo could avoid some costs to the sector and to the ACCC (for example, the costs of implementation, compliance monitoring, and enforcement action under a prescribed Grocery Code).

Retailers, wholesalers, and consumers may see benefits with the status quo in terms of commercial flexibility. Consumers and supermarkets often point to lower prices as evidence that competition between the major supermarket chains and their relations with suppliers are bringing broader benefits across the economy. Major supermarket chains, in particular, believe that commercial flexibility between themselves and suppliers allows for the sharing of risk and better commercial outcomes.

### **Costs**

Existing codes and legal frameworks are unlikely to sufficiently address concerns raised by stakeholders during the consultation process on the Grocery Code. Given the ongoing debate about supply chain issues in the sector, there are concerns from industry that the current 'status quo' arrangements have not been effective in improving the business relationships between participants.

The Grocery Code could also be implemented by industry as a non-prescribed code, although this could result in some costs to industry, for example costs of updating the current self-regulatory scheme, changes to dispute resolution processes and ongoing costs associated with monitoring of compliance. These are likely to be lower than costs associated with a prescribed code. However, a non-prescribed code would not be subject to ACCC enforcement, meaning that the ACCC would not be able to take complaints, investigate breaches and enforce compliance with the code.

The industry has taken some action in this regard. For example, Coles has released a Supplier Charter. However, suppliers and small businesses may consider a broader need for change to industry practice appropriate, backed by regulatory intervention, to address the concerns raised by suppliers about the major grocery retailers.

## **Option 2: Opt-in Prescribed Code (recommended)**

### **What does this option involve?**

#### **Model of Grocery Code**

The approach brought forward by industry proponents — Coles, Woolworths and AFGC — is for Government to prescribe the proposed Grocery Code as an industry code under the CCA that retailers and wholesalers can agree to be bound by.

The proposed Grocery Code would apply to retailers and wholesalers that agree in writing to be bound by it. Under the CCA this is referred to as a voluntary industry code that is prescribed under the regulations. However, for the purposes of this paper it is referred to as an 'opt-in' prescribed Grocery Code to avoid potential confusion with voluntary codes that are not prescribed.

Being prescribed would mean that, if a retailer or wholesaler that had agreed to be bound by the Code does not comply with it, the ACCC could take enforcement action for a breach of the CCA. A range of remedies would be available, including injunctions, and declarations.

## Structure of Grocery Code

The proposed Code has six parts, as follows:

**Part 1 — Preliminary:** sets out the Grocery Code’s purpose, definitions, application and transitional arrangements, including an obligation on retailers and wholesalers to offer suppliers the option to vary existing agreements to conform with the requirements of the Grocery Code.

**Part 2 — Grocery Supply Agreements:** sets out requirements to have and retain written agreements, matters that those agreements must cover, and prohibitions on a retailer or wholesaler unilaterally or retrospectively varying an agreement unless certain requirements are met.

**Part 3 — Conduct generally:** sets out standards of conduct, including in relation to payments (including payment terms), de-listing products, product quality and standards, intellectual property rights, and shelf space allocation.

**Part 4 — Good faith etc.** includes the obligation to act in good faith as well as obligations in relation to freedom of association and the provision of relevant contact details.

**Part 5 — Dispute resolution:** sets out the avenues that suppliers are able to take to raise complaints about conduct covered by the Grocery Code.

**Part 6 — Compliance and reporting:** sets out obligations around compliance training and reporting on compliance with the Grocery Code.

## Application and coverage

The Grocery Code applies to a ‘retailer’ or a ‘wholesaler’ that elects to opt-in, that is, agrees by written notice in writing to be bound by it.

### Retailers

The Grocery Code defines a ‘retailer’ as a corporation to the extent that it carries on a supermarket business in Australia for the retail supply of groceries and to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries. The Grocery Code applies in its entirety to a retailer who has opted in.

### Wholesalers

‘Wholesaler’ is defined as a corporation to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

Wholesalers that choose to sign up will be subject to Parts 1, 2, 4, 5, and 6 of the Grocery Code.

The definition of ‘wholesaler’ was added following consultation, in light of many stakeholders calling for greater coverage of the sector under the Grocery Code.

### Suppliers

‘Supplier’ is defined as a person carrying on (or actively seeking to carry on) a business of supplying groceries for retail sale by another person.

The Grocery Code only applies to retailers and wholesalers that opt-in and does not extend to bind the actions of suppliers. The Code is not capable of imposing legal obligations on parties that are not capable of opting-in, namely suppliers.

#### *Direct relationships only*

Importantly, not all supplier–acquirer relationships in the food and grocery sector would be covered by the Grocery Code. The coverage of the Code only extends to retailers and wholesalers in their direct relationships with suppliers. For example, the Grocery Code covers the relationship between a farmer supplying directly to a retailer or wholesaler. However, the relationship between a farmer supplying through intermediary processors before the goods are supplied to a retailer or wholesaler would not be within the scope of the Grocery Code.

#### *Transitional arrangements*

If a corporation agrees to be bound by the Grocery Code it must ensure that all new agreements entered into with suppliers after that date must comply with the Code.

The Grocery Code provides transitional arrangements for pre-existing grocery supply agreements to the effect that it will not apply to the supply of groceries under these agreements immediately. These are agreements that were entered into before the retailer or wholesaler agreed to be bound by the Grocery Code. There will be tailored arrangements for wholesalers, allowing them a longer period to comply with the requirements of the Grocery Code for pre-existing agreements, due to circumstances specific to their business model.

Importantly, good faith obligations will be the main obligation that applies to retailers and wholesalers from when they agree to be bound by the Grocery Code, along with other obligations in Part 4, such as those relating to freedom of association and the provision of contact details to suppliers.

### Creating transparency and certainty in commercial transactions

#### *Grocery Supply Agreements*

The proposed Grocery Code introduces the concept of a ‘Grocery Supply Agreement.’ This is the term given to any agreement between a retailer or wholesaler and supplier for the supply of groceries. The Grocery Code requires that such agreements must be in writing and include certain matters.

The particular terms and conditions of each Grocery Supply Agreement will be determined by negotiation between the parties in each case, and may differ between retailers and wholesalers, or between suppliers to the same retailer/wholesaler.

The Grocery Code identifies a range of fundamental matters that must be specified in any Grocery Supply Agreement:

1. any requirements the retailer or wholesaler has in respect of the delivery of groceries;
2. any circumstances in which the retailer or wholesaler may reject the groceries;
3. the period within which the retailer or wholesaler must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed;
4. the term of the agreement — if the agreement is intended to operate for a limited time only;
5. any quantity and quality requirements relating to the groceries — in clear terms; and
6. the circumstances in which it may be terminated — if the agreement provides for termination by one or more parties to it.

The Grocery Code also limits the circumstances under which a retailer or wholesaler is allowed to enter into a Grocery Supply Agreement. For example, a retailer must not enter into a Grocery Supply Agreement unless it is in writing, or must not enter into a Grocery Supply Agreement that requires the supplier to make payments as compensation for shrinkage (such as theft, loss and accounting errors that occurs after the retailer has taken possession of the groceries).

#### *Obligations*

The Grocery Code sets out a number of obligations prohibiting a retailer from engaging in certain conduct unless certain conditions are met.

The general framework is that the conduct needs to be disclosed and provided for upfront in the Grocery Supply Agreement. This is consistent with contract law, whereby parties agree to the terms governing their relationship. For example, a retailer must not require a supplier to make payments to cover wastage; however, they can do so if the payment is provided for in the Grocery Supply Agreement and certain other conditions are met.

These conditions were strengthened following consultation with the introduction of a reasonableness test. A key condition that was added is that the wastage payment be reasonable having regard to the retailer's costs incurred by the wastage. The retailer must also take reasonable steps to mitigate the costs. In this way, the Grocery Code overlays additional protections for suppliers, depending on the type of conduct engaged in by the retailer. This is discussed in more detail below.

Several submitters, including Growcom, New Zealand Food and Grocery Council (NZFGC), Australian Manufacturing Workers Union (AMWU), Australian Dairy Farmers, Law Council of Australia (LCA) raised concerns that the scope for retailers to avoid the key restrictions in the code was too broad and posed a serious risk to the efficacy of the Code. Some stakeholders, including the NFF, NSW Small Business Commissioner (NSW SBC), and ACCC saw some merit in a ‘no disadvantage test’ option. The NFF and Business SA also acknowledged that the Code should allow for commercial flexibility, but on the condition that retailers must act in good faith.

During consultation, the RSR argued that the Grocery Code represented a level of commercial flexibility that strikes the right balance between flexibility and safeguards. In its view, such flexibility is important to both suppliers and retailers to allow them to contract in a manner that is commercially practical and appropriate, and to ensure that the industry does not lose its ability to invest and innovate. It believes that any limitation to this flexibility may create ‘perverse or unintended outcomes.’

To address some of some of these concerns, changes were made to the Grocery Code, especially to the clauses allowing for unilateral and retrospective variations, to strengthen the protections for suppliers in a way that would still allow adequate flexibility for the retailer or wholesaler.

#### *Unilateral and retrospective variations*

- **Unilateral variations to Grocery Supply Agreements** — a retailer or wholesaler must not vary a Grocery Supply Agreement without the supplier’s consent unless the agreement provides expressly for the retailer/wholesaler to make the variation and other conditions are met. Importantly, the Grocery Code also introduces a requirement that the variation be reasonable in the circumstances, and provides that in making this determination regard must be had to the benefits, costs, and risks (if any) for the supplier, and retailer or wholesaler. It also provides that the supplier must be given written notice of the variation and the reasons for it.
- **Retrospective variations to Grocery Supply Agreements** — a retailer or wholesaler must not vary a Grocery Supply Agreement retrospectively unless the agreement provides expressly for the retailer/wholesaler to make the variation and other conditions are met. The Code takes a similar approach as that adopted for unilateral variations and introduces the same requirement that the variation be reasonable in the circumstances, with regard to the same matters. The requirement for written notice is also maintained. The main difference is that a retrospective variation will only be permitted where the changed circumstances, under which a variation may be allowed under the agreement, are beyond the control of the retailer or wholesaler.

#### *Improving commercial dealings between the parties*

The Grocery Code contains specific provisions to regulate forms of retailer conduct, including:

- **Payments to suppliers** — a retailer must pay a supplier for all grocery products delivered and accepted in accordance with the agreement, within the timeframe set out in the agreement and in any case within a reasonable time after receiving the invoice. There are limitations to the retailer’s ability to offset any amounts against this payment which include that the set off is provided for in the agreement and is reasonable in the circumstances.

- **Payments for shrinkage** – a retailer must not enter into a grocery supply agreement under which a supplier is required to make payments as compensation for shrinkage, or otherwise require such payments. However, it can discuss and agree on ways to mitigate the risk and occurrence of shrinkage.
- **Payments for wastage** — a retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries unless certain requirements are met. This prohibition is subject to an exemption where the payment is, among other matters, contemplated in the agreement and the payment is reasonable with regard to the retailer’s costs incurred by the wastage. Under this clause, a retailer must take reasonable steps to mitigate the costs.
- **Circumstances for payments as a condition of being a supplier** — a retailer must not require a supplier to make any payment as a condition of stocking or listing grocery products unless certain requirements are met, including that the payment is contemplated under the agreement and is reasonable taking into account certain circumstances.
- **Payments for better positioning** — a retailer must not require a supplier to make any payment to secure better positioning or an increase in allocation of shelf space unless certain requirements are met, including that the payment is contemplated under the agreement and is reasonable having regard to certain circumstances.
- **Payments for retailer’s activities** – a retailer must not directly or indirectly require a supplier to make any payment towards the costs of certain listed retailer’s activities (for instance a buyer’s visit to the supplier), unless it is provided for in the agreement, and is reasonable in the circumstances.
- **Funding promotions** — a retailer must not require a supplier to fund part or all the costs of a promotion. However, a retailer can require a supplier to fund such costs if it has been provided for under the agreement and the payment is reasonable in all the circumstances. Some of the relevant circumstances include the likely benefits to the supplier and retailer, as well as the retailer’s costs or contributions.
- **De-listing products** — a retailer may only de-list a supplier’s grocery product (that is, remove a product from the retailer’s product range) in accordance with the agreement and for genuine commercial reasons. The clause includes some examples deemed to be genuine commercial reasons for the purpose of the clause, such as failure to meet agreed quality or quantity requirements. There is requirement to give a supplier written notice of the decision to de-list, subject to certain exceptions.
- **Funded promotions** – if a retailer agrees to make a payment to support a promotion, the retailer may hold the promotion after giving reasonable written notice. There are conditions to a retailer’s ability to order products at a promotional price.
- **Fresh produce standards and quality specifications** — a retailer must provide any fresh produce standards or quality specifications to a supplier in clear, unambiguous and concise written terms. The retailer must accept all fresh produce delivered in accordance with the standards, and the retailer may only reject the produce if it fails to meet the standards. The clause sets out the circumstances when a retailer can reject fresh produce.

- There are additional requirements for labelling, packaging and preparation requirements and for making any claims for damaged grocery produce or shortfalls within a reasonable time after delivery to the retailer.
- **Changes to supply chain procedures** — a retailer must not require a supplier to make any material change to supply chain procedures.
  - However, a retailer may make material changes to the supply chain procedure where the retailer gives reasonable notice, or, in its absence, compensates the supplier for any net losses incurred as a direct result of the retailer’s failure to give reasonable notice of the change. A supplier can agree to waive its right to receive this compensation.
- **Business disruption** — a retailer must not threaten business disruption or termination of an agreement without reasonable grounds.
- **Intellectual property rights** — a retailer must not infringe the intellectual property rights held by the supplier in relation to grocery products and must comply with this obligation also in developing or producing their own brand products.
- **Confidential information** — a retailer must only use a supplier’s confidential information for the purpose for which it was disclosed, and must only disclose that information on a ‘need to know’ basis. Retailers must establish systems to ensure compliance with this obligation.
- **Allocation of shelf space** — a retailer must publish or provide product ranging and shelf allocation principles, act in accordance with them, and keep them up-to-date. Retailers must also:
  - within a reasonable time before conducting a range review, provide clear written notice of the purpose of the range review and the key criteria governing ranging decisions, and following the conclusion of a range review, allow a reasonable amount of time to discuss outcomes; and
  - apply the shelf-space allocation principles without discrimination.
- **Transfer of intellectual property rights** — a retailer must not require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent own brand product.

*Good faith in dealings between the parties*

Good faith is a concept that has been recognised in Australian common law. The principle of good faith has been developed by the courts over time and in recent years some courts have accepted the duty to act in good faith as an implied term in the performance of contracts.

While there is no definitive meaning of good faith, there has been considerable jurisprudence and legal commentary surrounding it, with guiding principles such as honesty, cooperation, reasonableness and fairness, often cited to assist in determining the obligation on a case-by-case basis.

Many of the submissions received during consultation supported the Code's inclusion of an obligation on retailers to act in good faith during all of their dealings with suppliers. During consultation, Tasmanian Farmers and Graziers Association (TFGA) submitted that the duty to act in good faith has the capacity to improve commercial relationships. Growcom noted that it could be a particularly important benefit for agricultural growers.

Some stakeholders, such as the NSW Small Business Commissioner, believed that good faith should only apply to retailers. Other stakeholders suggested that the obligation should apply equally to both retailers and wholesalers. The RSR, Costco, NFF, TFGA and the Australian Small Business Commissioner (ASBC) were among those that supported a reciprocal obligation on suppliers to ensure that no party is seen to be disadvantaged. Costco noted the need to recognise that large suppliers can often possess considerable bargaining power which may be greater than that of second tier retailers and wholesalers.

On balance, the submissions received via the consultation process were supportive of the inclusion in the Grocery Code of an obligation to act in good faith. Given the focus of the Code on improving dealings in the sector, the benefits deriving from such inclusion were assessed as outweighing any negligible costs, noting that it is an overarching obligation that already exists at common law.

In the Grocery Code, good faith is retained as an obligation on retailers and wholesalers alone. However, to address the concerns of stakeholders raised during consultation, the Grocery Code provides that when a court is assessing whether a retailer has contravened the obligation, it may consider whether or not a supplier has acted in good faith.

The definition of good faith is cast in general terms to retain the concept of good faith at common law, by providing that the retailer or wholesaler must at all times deal with suppliers in good faith within the meaning of the unwritten law. Retailers and wholesalers are also prohibited from excluding the obligation to act in good faith from a grocery supply agreement through the inclusion of an express term. A non-exhaustive list of matters to be taken into account by a court determining whether a retailer or wholesaler has acted in good faith is also included, such as whether duress was involved, and whether the trading relationship with the supplier was conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment.

#### *Freedom of association*

In addition, following consultation, a new clause was added to the Grocery Code prohibiting retailers and wholesalers from restraining suppliers' freedom to associate. The provision aims at ensuring suppliers are not constrained in their freedom to associate for fear of retaliation from retailers or wholesalers.

#### *An effective, fair, and equitable dispute resolution process between the parties*

The Grocery Code aims 'to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers and suppliers'. The processes outlined in the Grocery Code are only intended to be used when suppliers raise complaints — there is no equivalent process for retailers or wholesalers to raise complaints.

There was broad support through consultation for establishing clear and effective dispute resolution mechanisms, which have been a key benefit and recognised success story of other industry codes. A structured arrangement to allow the parties to resolve their disputes in a timely and cost effective manner without jeopardising business relationships is an important component of the proposed Grocery Code.

The draft Grocery Code sets out internal and external dispute resolution mechanisms for suppliers to lodge complaints and seek to have their disputes resolved. It is open to suppliers to choose the type of dispute resolution option that best meets their needs.

Amendments were made to the initial draft code presented by proponents to address concerns raised during consultation. These include a requirement that, if a complaint is found to be trivial, vexatious, or lacking in substance, notice in writing should be provided to the supplier. Such notice should also advise of the reasons why that conclusion was reached. If the supplier is not satisfied with the outcome, the supplier has access to internal review or mediation/arbitration processes.

There were some concerns raised by stakeholders in relation to the proposed dispute resolution arrangements during consultation. Some stakeholders perceived the proposed mechanisms to be ‘too weak’ and not ‘fair or equitable’ due to placing too much discretion in the hands of major retailers.

For example, the NSW Small Business Commissioner submitted that ‘allowing retailers to avoid attending arbitration or mediation if they determine that a supplier’s complaint is ‘vexatious, trivial, misconceived or lacking in substance’ or that the supplier has not ‘acted in good faith’ unfairly places the decision-making power in relation to commencing dispute resolution processes firmly with the retailer.’ Similarly, the WA Small Business Development Corporation noted that this threshold could create a significant barrier for suppliers seeking to resolve their disputes through either the internal or external processes provided for under the Code.

Importantly, following consultation, it was clarified that a supplier provides sufficient particulars of its complaint or dispute about a unilateral or retrospective variation of the agreement if it provides particulars of the detriment that has been or will be caused to the supplier. The supplier also needs to point to the provision of the Grocery Code alleged to be breached and the remedy sought.

#### *Referral of complaints to Code Compliance Manager*

A supplier may refer complaints relating to a matter covered by the Grocery Code to a retailer or wholesaler’s code compliance manager, who has responsibility for investigating the complaint and determining what action must be taken, if any, in response to the complaint.

#### *Referral of matter to senior management*

If the supplier is not satisfied with the outcome of the investigation by the code compliance manager, it may request in writing that the matter be elevated through senior levels of management. Importantly, with respect to disputes relating to unilateral and retrospective variations, the Code sets out that the code compliance manager must not be satisfied that the complaint is vexatious etc. only because the supplier’s only ground in relation to the complaint is detriment to it. This provision was added following consultation.

### *Mediation or arbitration*

A supplier may seek either mediation or arbitration of a complaint or dispute relating to a matter covered by the Grocery Code. Importantly, following consultation, a change was made to the Grocery Code so that a supplier is able to take a complaint directly to mediation or arbitration, and is not required to first refer the matter to the code compliance manager or senior management. The rules of the Institute of Arbitrators and Mediators Australia will apply to all mediation and arbitration processes commenced under the Grocery Code. The IAMA rules will also determine the costs of mediation or arbitration.

In providing for less adversarial mechanisms for a supplier to raise a complaint with a retailer, the Grocery Code offers a clear and more structured process that has the benefit of improving a supplier's access to justice.

Following consultation, the Grocery Code was updated to clarify that a retailer or wholesaler is not required to take part in the mediation/arbitration in circumstances where the mediator considers or the arbitrator determines that the complaint is vexatious etc., or the supplier is not acting in good faith. Importantly, it was added that, with respect to disputes relating to unilateral or retrospective variations, a mediator or arbitrator must not consider or determine that the complaint is vexatious etc. only because the supplier's only ground in relation to the complaint is detriment to the supplier.

The benefit of this approach is that it leaves to a third party the assessment of an important matter at a preliminary stage of the dispute, namely the retailer or wholesaler's allegation that a complaint or dispute is vexatious or trivial or that the supplier is not acting in good faith. This helps improve outcomes as the mediator/arbitrator is an independent party.

### *Enforcement*

Breaches of prescribed industry codes are a breach of the CCA and are subject to many of the existing remedies available under the CCA, including:

- compensation or damages for the amount of any loss or damage;
- injunctions to restrain a body corporate from engaging in conduct in breach of a code;
- declarations;
- and a range of other orders, including corrective advertising.

Business SA was reluctant to support penalties being introduced and noted that such penalties could end up being imposed on wholesalers which may filter back down the chain to smaller businesses.

Some submissions, including from small business and farming groups, private individuals, AMWU, Australian Small Business Commissioner, called for financial penalties to be applied to the Code, similar to the new Franchising Code of Conduct. Stakeholders submitted that substantial penalties (to reflect the dominant financial position of the major retailers) are necessary to deter misconduct and foster real behavioural change. Similarly, the New Zealand Food and Grocery Council noted that 'the absence of financial penalties will test the effectiveness of the draft Code's application over time.'

Following the passage of the *Competition and Consumer Amendment (Industry Code Penalties) Act 2014* there is a legislative framework in place to allow a pecuniary penalty to be imposed for a contravention of an industry code, and for regulations to be made

prescribing pecuniary penalties in respect of a contravention of an industry code. The CCA now allows the ACCC to issue an infringement notice in respect of a contravention of a civil penalty provision of an industry code. In other words, a pecuniary penalty, or an infringement notice, is not available for a breach of the code unless the code itself specifies the provision is a civil penalty provision. The Government's reforms to the new Franchising Code have introduced pecuniary penalties (up to \$51,000) and allow the ACCC to issue infringement notices (\$8,500 for a body corporate and \$1,700 in any other case) for contravention of a civil penalty provision of that code from 1 January 2015.

As the Code is based on a voluntary, industry-led model, penalties have not been included as part of the recommended option. Comparison with the model offered by the Franchising Code of Conduct may not be appropriate as the introduction of penalties under that code was been informed by many years of experience, numerous reviews at Federal and State level, and incremental legislative amendments since inception in 1998. Another relevant consideration is that the Franchising Code of Conduct is mandatory, rather than voluntary.

Rather, it has been considered appropriate with respect to the Grocery Code that the issue of whether penalties are needed should be considered as part of a broader review of the Grocery Code. It is proposed that the Code be reviewed three years after commencement with a view to assessing whether it has achieved its proposed objectives. In this context, consideration will also be given to whether or not the Code should be mandated and the higher level of compliance costs that would be entailed, should this option be adopted.

### **What are the qualitative and quantitative costs and benefits of this option?**

#### **Benefits**

##### *Creating a spirit for compliance with the Grocery Code*

- There may be a stronger commitment for signatories to comply with the spirit and substance of an opt-in code than if it is mandated, because participants in the supply chain volunteer of their own accord to address undesirable behaviours in the sector.
- Prescription of a code in a voluntary form would not preclude the Government from prescribing a mandatory code at a future time.

##### *Creating transparency and certainty in commercial transactions*

- The Grocery Code introduces the concept of 'Grocery Supply Agreements.' The Grocery Code requires that such agreements must be in writing and include certain matters to address certain aspects of the relationship between the parties. This creates transparency and certainty in commercial transactions in the grocery supply chain.
  - Part 2 of the Grocery Code governs requirements for Grocery Supply Agreements a retailer or wholesaler enters into after agreeing to be bound by the Grocery Code, and governs certain variations to such agreements. It aims to improve transparency for businesses in the food and grocery sector, and ensure there is greater clarity on some of the key issues that have caused concerns in the sector.
- The requirement for Grocery Supply Agreements to be in writing and for certain matters to be included in the agreements (for example, requirements with respect to delivery, and periods for payment) will provide greater certainty and transparency for suppliers with respect to contractual terms and conditions moving forward, more dependable relationships, and promote good practice between parties.

- For example, where previously a contract may not have included specific grocery product quality requirements, and this may have been agreed orally, Grocery Supply Agreements must now set out in clear terms, any quantity and quality requirements relating to these products.

#### *Creating trust and cooperation during commercial dealings*

- Part 3 of the Grocery Code governs a retailer's conduct towards a supplier, setting minimum standards of behaviour in relation to a number of particular areas, to provide further clarity for businesses and to improve standards in the sector. This Part ensures suppliers have improved certainty in relation to commercial dealings to plan appropriately for their business, and invest, innovate, expand capacity, and develop new product lines.
- For example, the Grocery Code sets restrictions on the retailer's conduct, such as prohibiting the retailers from requiring a supplier to make a payment to cover any wastage of groceries that occurs at its premises. Retailers can only require such a payment from suppliers if certain conditions are met, including that Grocery Supply Agreements provides for such a payment in specific circumstances such as negligence by the supplier. Another requirement is that the payment is reasonable having regard to certain circumstances and the retailer takes steps to mitigate the costs. As a result, suppliers will have greater awareness of their liability for such a payment when they enter into the agreement and will be in a better position to plan for such costs.
- Given the focus of the Code on improving dealings in the sector, an obligation of good faith has been included in Part 4 of the Code to ensure good faith during commercial dealings between retailers, wholesalers and suppliers.
- Good faith is retained as an obligation on retailers and wholesalers alone. However, to address the concerns of stakeholders, in assessing whether a retailer or wholesaler has acted in breach of its good faith obligation, a court may have regard to whether or not a supplier has acted in good faith.
- In practical terms, an obligation of good faith will require the retailers and wholesalers to deal with suppliers honestly and cooperatively and to have reasonable regard to the supplier's legitimate interests. This aims to provide additional protection for suppliers and in turn strengthen the commercial relationship between the parties.

#### *Creating an effective, fair and equitable dispute resolution process*

- Part 5 of the Grocery Code sets out internal and external dispute resolution arrangements for suppliers to lodge complaints and seek to have their disputes with retailers resolved. It is open to suppliers to choose the type of dispute resolution option that best meets their needs. This creates an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes.
  - It establishes a clear and structured low cost alternative dispute resolution process that can assist the parties to resolve disputes before they become 'toxic' and damaging to the business relationship. This may help parties to avoid the need for costly legal action.
- In practice, this aims to provide suppliers with improved outcomes, and have their complaints dealt with by the retailer or wholesaler in a structured and transparent

manner. Suppliers may be more willing to bring forward complaints and to have their disputes resolved given the retailer or wholesaler's commitment to establish such dispute resolution mechanisms. Further, it will provide suppliers with access to mediation and arbitration processes that may not have previously been available as part of the retailer or wholesaler's existing complaint handling process.

#### *Higher likelihood of compliance*

- There would be a higher likelihood of compliance, and, in turn, high likelihood of issues in the sector being addressed because prescription would result in:
  - the ACCC's audit power being able to be brought to bear;
  - a range of remedies being available to a court in the event that a breach of the Code is found; and
  - the ACCC or private parties being able to take action seeking these remedies.
- Indeed, a key purpose of prescribing an industry code of conduct is to strengthen a non-prescribed code where there is concern it has not met its objectives.<sup>23</sup>

#### *Other benefits*

- The Grocery Code may also have commercial benefits for retailers and wholesalers that opt-in with respect to their corporate goodwill, and public relations, with positive coverage in media enhancing their public image. Retailers and wholesalers may be able to leverage their participation in the Code to better promote themselves as good corporate citizens and derive a competitive advantage over others that are not signatories to the Grocery Code.
- Further, parties who opt-in may derive commercial benefits from improved relations with suppliers, providing greater certainty in their dealings.
- Many suppliers to major supermarket chains are small businesses, who will benefit from greater transparency and certainty under the Grocery Code. Transparency and certainty will provide better foundations and incentives for suppliers to invest, innovate, expand capacity, and develop new product lines. This could promote benefits for consumers with respect to greater product choice, variety, and new offerings.

The RSR put forward an opt-in prescribed code, whereby retailers and wholesalers can choose to opt-in and become bound by the Code. The RSR highlighted the benefits of this approach as an industry-led response that provides an appropriate level of regulatory intervention to address issues of concern in the sector.

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<sup>23</sup> ACCC, Guidelines for developing effective voluntary industry codes of conduct, July 2011.

Whilst several other stakeholders supported a mandatory code, other stakeholders, including supplier groups, recognised that a voluntary code (or key elements of it) could represent a worthwhile step forward for the sector. In particular, by providing added transparency and clarity of trading terms in grocery supply agreements, introducing an overarching duty on retailers to act in good faith and including dispute resolution mechanisms.

Costco and ALDI noted in their submissions that the process by which the draft Code was composed, originating from the proponents and progressed in close consultation with them, resulted in draft regulations clearly targeted and tailored to the business practices of those two companies. They noted that while they understand the motivation behind the Government moving to better regulate the relationships between the major supermarket chains and their suppliers, they expressed concern that the Grocery Code was not sufficiently tailored to their circumstances; for instance, ALDI noted that it does not have the same market power as the major supermarket chains, and does not engage in the same types of behaviours that have been raised in relation to the major supermarket chains.

As outlined later in this RIS, a broad-based consultation process was also undertaken to garner the views of a range of stakeholders, including Costco and ALDI. As the Grocery Code is proposed as an opt-in prescribed code, it is currently best suited to those that have currently indicated an intention to be bound by the code.

From a small business perspective, the Office of the NSW Small Business Commissioner noted that they support measures aimed at improving the quality of commercial relations between large retailers and smaller suppliers.

## Costs

Treasury has undertaken a detailed regulatory costing process to establish a robust assessment of the likely financial impact on businesses of adopting the preferred Option 2 – an ‘opt-in’, prescribed Code.<sup>24</sup> A key part of this process has involved the use of the Commonwealth Business Cost Calculator.<sup>25</sup>

Estimates of these compliance costs and the assumptions underlying them are included in **Attachment B**. These compliance costs would only be faced by those retailers that agree to be bound by the Code. A level of compliance costs would also be faced under a mandatory code.

Consistent with regulatory impact analysis requirements, quantification has only been undertaken in relation to changes that are expected to result in more than a nominal or minor increase or decrease in compliance costs.

### *Improving transparency and providing written notice*

A key objective of the Grocery Code is to improve clarity and transparency for suppliers during commercial dealings with retailers and wholesalers. An important procedural safeguard to support this objective is the requirement for the retailer to provide written notice to the supplier before certain conduct is engaged in.

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<sup>24</sup> Calculation of estimated compliance costs has been informed by information and data provided by the major supermarket chains to reflect current business practices, arrangements and experiences specific to the sector.

<sup>25</sup> The Business Cost Calculator is available at the Office of Best Practice Regulation website.

There are similar written notice requirements associated with other provisions in the Code, many of which are only triggered if the retailer chooses to engage in conduct that may have negative implications for suppliers.

The requirement to provide written notice is likely to impose some additional compliance costs on retailers and wholesalers. However, it is anticipated that this will only occur irregularly and on a limited basis during the commercial relationship. It is also reasonable to assume that retailers and wholesalers could streamline the process by using standard form notice documents and sending them electronically to suppliers.

As noted by the NFF, it is likely that this administrative function could be an extension of the responsibilities of an existing compliance officer and is unlikely to be resource intensive.

#### *Confidential information obligation*

The commercial arrangements that best facilitate the sale of grocery products by the retailer or wholesalers may involve the supplier disclosing confidential information such as product development and proposed promotions or prices. It is important that such confidential information is treated appropriately by the retailer and used for a proper purpose to avoid any financial harm or disadvantage to the supplier.

The Grocery Code requires retailers to establish and monitor systems to ensure that confidential information is used only for its intended purposes and accessible on a need-to-know basis only. The establishment and monitoring of such systems will likely involve some additional costs to retailers and wholesalers. However, establishing the system would likely be a one-off cost, and a review or audit of the organisation's compliance of the system would likely occur over an extended timeframe (for example, twice a year). It would also likely be an extension of an existing compliance function and is unlikely to be resource intensive.

#### *Product ranging and shelf space principles*

These are generally speaking a one-off cost, which may involve formalising and publishing existing or current principles. They are broad, long-lasting principles.

#### *Record keeping and reporting*

Under the Grocery Code, Code Compliance managers for retailers and wholesalers are required to keep records of complaints made, and must prepare a written report every six months.

#### *Dispute resolution*

Dispute resolution is expected to create a cost of developing a written complaints handling procedure, and annually updating and reviewing this procedure.

#### *Staff compliance training*

Initial compliance training for staff and new starter and re-fresh compliance training is expected to create the largest cost of the obligations under the Grocery Code. Within six months of being bound by the Grocery Code, the retailer or wholesaler must provide its buying team with a copy of the Grocery Code, and training on its requirements.

### *Other costs*

During the public consultation process, stakeholders were asked whether the initial compliance cost estimates and underlying assumptions were accurate. Very few submissions commented on the costings. The NFF noted that compliance management roles may already be an existing position in many grocery businesses and the Grocery Code would simply extend this compliance activity. The Law Council of Australia noted that the costs to retailers of considering and handling supplier complaints should also be included, in addition to the costs associated with setting up dispute resolution systems.

- The opt-in nature of the Code means there is always a risk that retailers or wholesalers that agree to be bound up-front may, at a later date, decide to cease being bound by the Code by giving written notice to the ACCC, or that retailers or wholesalers causing the types of problems the Code seeks to address do not opt-in to the Code.
  - As noted above though, if this were the case, the Government could consider the need for a mandatory code.
- Costs to Government in terms of implementation, compliance monitoring and enforcement action.
  - These costs would also be faced under the mandatory code option.
- Costs to Government in terms of implementation, compliance monitoring and enforcement action.

### **Option 3: Mandatory Prescribed Code**

#### **What does this option involve?**

Under a prescribed mandatory Grocery Code, retailers and/or wholesalers would be compulsorily bound by the Code, rather than having the option to elect whether to be bound or not. The Franchising Code of Conduct is an example of a mandatory code that is prescribed by regulations under the CCA. The consequences of breaching a mandatory code are the same as those for breaching an opt-in prescribed code.

The key difference between prescribing a mandatory code versus prescribing an ‘opt-in’ code is that a mandatory code applies to all parties that fall within the scope of the code, not just those that agree to be bound.

Several submissions received during consultation, particularly from supplier, farming groups, and legal bodies, did not support the proposed voluntary ‘opt-in’ code and instead preferred a mandatory code. The NFF, NSW Farmers Association, VFF, and Australian Dairy Farmers (ADF), all favoured a mandatory code that applied to all retailers. They raised concerns that the major supermarket chains may opt-out at a later date; other major retailers may choose not to opt-in; and that the Code does not cover the whole grocery supply chain.

However, other stakeholders recognised that an opt-in prescribed code could represent a worthwhile step forward for the sector.

The Retailer and Supplier Roundtable (RSR) strongly opposed a mandatory code, highlighting that such a move would be inconsistent with the Government’s red tape reduction agenda.

## **What are the qualitative costs and benefits of this option?**

### **Benefits**

- Relative to a non-prescribed code or a prescribed ‘opt-in’ code, greater certainty that all supply chain relationships identified as relevant for the purpose of the application of the code will be covered, because compliance would be mandatory.
  - However, if unlike an opt-in prescribed code, it would not have the benefit of implicit support by those who are bound, and retailers and wholesalers may be less supportive of it and less willing to comply because they have not voluntarily agreed to be bound and consider the ensuing regulatory burden excessive.
  - Suppliers and small businesses may, however, appreciate that all retailers they deal with would be bound by the code.
- A key benefit of a mandatory code would be that bound parties could be subjected to obligations, including penalties, which they would not accept voluntarily.

### **Costs**

- The Grocery Code was originally an initiative involving key players in the industry, but not all players. This means that it may not be appropriate to impose mandatory obligations on other players, whose interests may not have been directly considered during the initial formulation of the code. This would give rise to a much higher likelihood of unintended consequences.
  - Also, there are potentially higher costs to Government in terms of implementation, compliance monitoring and enforcement action than for an ‘opt-in’ prescribed code. This is because a larger number of businesses would be required to comply with the mandatory code’s obligations. This would affect businesses both big and small.
- Higher compliance costs if the mandatory code is given broad scope. This is because a larger number of businesses would be required to comply with the mandatory code’s obligations.

## **5. Consultation process**

### **Consultation Principles**

On 6 August 2014, the Treasury released a consultation paper titled ‘Improving Commercial Relationships in the Food and Grocery Sector’ and the draft Grocery Code for public consultation. Submissions closed on 12 September 2014.

Treasury received 33 submissions (including 13 confidential submissions) from a wide range of stakeholders including: suppliers; retailers; individual citizens and consumers, and legal, government and consumer based organisations.

### **Process used during consultation**

Seeking to capture the diversity of stakeholders affected by the proposed changes, Treasury sought broad-based engagement through a variety of mediums including face to face meetings, teleconferences, email and online platforms. Stakeholders were given the opportunity to make a full submission or provide a shorter comment through the website.

In recognition that certain stakeholders were reluctant to make public submissions which could adversely affect their existing commercial relationships, Treasury offered the option of full confidentiality and, where requested, undertook responsibility to ensure it was maintained throughout the process.

### **Key views**

Views were expressed around key issues, particularly whether the Grocery Code should be mandatory or voluntary, the level of commercial flexibility allowed under the Code, and whether good faith was a useful concept and should apply equally to all parties.

Submissions also raised the anticipated effectiveness of proposed dispute resolution mechanisms, whether pecuniary penalties were required to enforce compliance, potential for the Grocery Code to complement and conflict with other industry codes and whether its coverage should be extended to include other aspects, such as the supply of alcoholic products.

A summary of key stakeholder views for and against the recommended option, and key quotes, are provided below.

Issue	For	Against
Opt-in prescribed Code	<p>The Retailer and Supplier Roundtable, comprising Coles, Woolworths and the Australian Food and Grocery Council, support the proposed voluntary code, whereby retailers and wholesalers can choose to opt-in and become bound by the Code. Some stakeholders, such as the National Farmers Federation, New Zealand Food and Grocery Council, NSW Small Business Commissioner, Australian Manufacturing Workers Union, Tasmanian Farmers and Graziers Association, NSW Farmers Association, and the WA Small Business Development Corporation, recognised that a voluntary code (or key elements of a voluntary Grocery Code) may represent a worthwhile step forward for the sector, even if some stakeholders also supported a stronger, mandatory code.</p>	<p>Several submissions received during consultation, particularly from supplier, farming groups, and legal bodies, did not support the proposed voluntary ‘opt-in’ code and instead preferred a mandatory code. The National Farmers Federation, NSW Farmers Association, VFF, and Australian Dairy Farmers, all favoured a mandatory code that applied to all retailers. They raised concerns that the major supermarket chains may opt-out at a later date; other major retailers may choose not to opt-in; and that the Grocery Code does not cover the whole grocery supply chain.</p>
Commercial flexibility	<p>The RSR argued that these exemptions represented a level of commercial flexibility that strikes the right balance between flexibility and safeguards. The National Farmers Federation and BusinessSA also acknowledged that the Code should allow for commercial flexibility, but on the condition that retailers must act in good faith.</p>	<p>Several submitters, including Growcom, New Zealand Food and Grocery Council, Australian Manufacturing Workers Union, and Australian Dairy Farmers, raised concerns that the scope for retailers to avoid the key restrictions in the code was too broad.</p>
Good faith	<p>Many of the submissions received during consultation supported the Code’s inclusion of an obligation on retailers to act in good faith during all of their dealings with suppliers. During consultation, Tasmanian Farmers and Graziers Association submitted that the duty to act in good faith has the capacity to improve commercial relationships. Growcom noted that it could be a particularly important benefit for agricultural growers.</p>	<p>Some stakeholders, such as NSW Small Business Commissioner, believed that good faith should only apply to retailers. Other stakeholders suggested that the obligation should apply equally to retailers and suppliers.</p>

Dispute resolution	There was broad support through consultation for establishing clear and effective dispute resolution mechanisms; a key benefit of other industry codes.	There were concerns raised by stakeholders in relation to dispute resolution arrangements during consultation, with some believing the proposed mechanisms to be 'too weak' and not 'fair or equitable' due to placing too much discretion in the hands of major retailers.
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Stakeholder	Key views (quotes)
Costco	“Although Costco understands the motivation behind the Government moving to better regulate the relationships between the major supermarket chains and their suppliers, it does not agree with the proposed regulation in that it attempts to treat very different businesses in the same manner.”
ALDI	“In considering the Code, ALDI notes that it does not have the same market power as the major supermarket chains, and it does not engage in the types of behaviours that have been raised in relation to the major supermarket chains, as outlined in the Consultation Paper.”
Small Business Development Corporation, WA	“If executed well, the introduction of the Grocery Code has the potential to benefit those supplying goods directly to retailers, either as manufacturers or wholesalers. By establishing fundamental terms and minimum standards of conduct to address known problem areas, the Grocery Code may assist in rectifying the power imbalance that currently exists in many supplier-retailer relationships within the food and grocery industry.”
Dieticians’ Association of Australia	“The strength of the proposed Code is the attempt to address transparency in relationships between retailers and suppliers.”
Business SA	“Business SA provides qualified support to the concept of the proposed code as an opt-in voluntary code. It is critical that the code has ‘industry buy in’ which will only be achieved if retailers are willing to be bound by the code. However, the code must also include alcohol, particularly given the number of small businesses in the wine and beer manufacturing sectors which face similar contractual issues to other suppliers to major supermarket chains.”
Tasmanian Farmers and Graziers Association	“The TFGA agrees with the concerns in the consultation paper regarding the problems that the food and grocery sector is facing. Retailing in Australia is unique, with a higher concentration of market ownership in the sector than anywhere else. Two dominant companies control the majority of the retail space; and this degree of concentration has caused the conduct of the two main supermarkets to come in to question.”
Growcom	“Growcom supports the broad contention that there is an imbalance of bargaining power, with suppliers fearful of making complaints or declining requests from retailers out of concern for adverse consequences, including being delisted as a supplier.” “We appreciate the efforts of Government, the Australian Food and Grocery Council

Stakeholder	Key views (quotes)
	(AFGC) and the major supermarkets to address the issue however we are not convinced that the Food and Grocery Code (the Code) tabled will achieve this outcome for the fruit and vegetable sector.”
The Australian Chamber of Fruit and Vegetable Industries	“The Australian Chamber is asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).”
Australian Manufacturing Workers’ Union	“Whether mandatory or opt-in, we believe that the requirements of the Code as drafted go some way towards addressing the issues in the supply relationship. The level of detail and specificity of the prohibited conduct – conditional payments, promotional payments, intellectual property rights - shows a recognition of the problems faced by suppliers and in doing so provides the opportunity for real and targeted remedies to redress the power imbalance in their relationship with retailers. However, we have a number of strong concerns with the Code as drafted which, if implemented, would render it potentially ineffective.”
Law Council of Australia	“The SME Committee supports Option 3 being the prescribing of a mandatory Grocery Code, whereby large retailers would be legally bound by the Code. The Committee believes that the opt-in Code in Option 2 would not achieve the objective of improving retailer-supplier relationships given its proposed discretionary application to large retailers, as well as the suggested exceptions which would undermine the protections a Code is looking to otherwise afford to suppliers.”
Retailer Supplier Roundtable	“The RSR has since worked with government through 2014 to revise the November Draft Code to fulfil legislative requirements. Fundamentally, the RSR believes the Government should maintain both the spirit and the practical outcomes of the November Draft Code and avoid changes that would alter the character of this agreed industry outcome.”
NSW Small Business Commissioner	“Although the introduction of the Code in its proposed form may represent a step in the right direction in improving the commercial relations between large retailers and small suppliers, the existing imbalance in bargaining power, combined with the significant exemptions permitted by the Code, may limit the Code’s

Stakeholder	Key views (quotes)
	potential.”
New Zealand Food and Grocery Council	“NZFGC is strongly supportive of measures that assist suppliers in their negotiations and relationships with the major supermarket chains. The draft Australian Food and Grocery Code of Practice (the draft Code) is an important step towards addressing certain aspects of supermarket conduct.”
Australian Food and Grocery Council	“The SME CEO Forum consider the proposed Food and Grocery Code a good example of an industry led initiative which will result in a more balanced approach to negotiations with key trading partners. The Food and Grocery Code, as intended by the RSR, should lead to a better and more collaborative discussion on how collectively the industry can respond to shoppers and consumers and their needs.”
Australian Dairy Farmers	“ADF recognises that the proposed Code is a step forward and considers this to be a positive result of the significant media and political pressure generated by ADF, Queensland Dairyfarmers’ Organisation (QDO) and other industry organisations.”
NSW Farmers’ Association	“NSW Farmers believes the consultation paper has accurately captured the concerns of the agriculture industry with regard to impact of the market power held by the major supermarkets on their direct relationships with suppliers, including farmers, and the flow on effects to farmers providing produce to food processors or wholesalers who in turn supply the major supermarkets. NSW Farmers also believes that a mandatory code of conduct with a broader scope than proposed within the Grocery Code would be better suited to manage the market power exercised by supermarkets.”
Victorian Farmers’ Federation	“The VFF does not support the formation of a new voluntary Code. The Produce and Grocery Industry (PGI) Code should be strengthened and made mandatory.”
Office of the Australian Small Business Commissioner	“We believe that it will operate to improve the overall business environment to benefit those dealing with the major retailers as well as those in competition with them.” “The definition of “groceries” under the Code does not extend to alcoholic beverages, despite such products often being integrated into the retail business. Given the operation of supermarkets in this way, it would make sense to include these sorts of product within the Code.”

Stakeholder	Key views (quotes)
	“[M]any disputes are able to be resolved in the pre-mediation phase and it is critical that this initial phase is able to be commenced as easily and cheaply as possible to encourage early resolution of disputes.”
National Farmers’ Federation	“NFF welcomes the initiative of Coles, Woolworths and Australian Food and Grocery Council to propose a Grocery Code of conduct (practice and dealing), prescribed under a regulation to the Competition and Consumer Act (2010). The proposed Code offers the hope of a more formal, open and transparent process through which the major retailers will negotiate supplier trading terms and enable them to work together to draft Supply Agreements.”
Oxley Island Dairies	“Government in-action, and lack of legislative power of ACCC has led to Australia having one of the most concentrated supermarket sectors in the world. The lack competition in the longer term will eventually see consumers paying higher prices. Solutions include a mandatory code of conduct...increased legislative powers to the ACCC...enforceable fines.”

## **List of Stakeholders Consulted**

### **Public Written Submissions**

1. ALDI
2. Costco
3. Western Australian Small Business Development Corporation (SBDC)
4. Dieticians' Association of Australia (DAA)
5. Business SA
6. Tasmanian Farmers and Graziers' Association
7. Growcom
8. Australian Chamber of Fruit and Vegetable Industries
9. Australian Manufacturing Workers' Union (AMWU)
10. Law Council of Australia (LCA)
11. Retailer Supplier Roundtable (RSR)
12. NSW Small Business Commissioner
13. New Zealand Food and Grocery Council (NZFGC)
14. Australian Food and Grocery Council (AFGC)
15. Australian Dairy Farmers (ADF)
16. NSW Farmers Association
17. Victorian Farmers Federation
18. Office of the Australian Small Business Commissioner (ASBC)
19. National Farmers' Federation
20. Oxley Island Dairies

### **Face to Face Meetings/Teleconferences**

As part of the public submission process, Treasury had discussions with key stakeholders, including the National Farmers' Federation, Council of Small Business Australia, the Winemakers Federation of Australia, ADF, Queensland Dairy Organisation, Metcash, and conducted ongoing dialogue with the proponents of the Grocery Code.

Following the close of public consultation, Treasury conducted further targeted consultation with the proponents to refine the operation of the Code in light of feedback from consultation.



## **Part C — Recommended option, implementation, and review**

### **6. Conclusion – Recommended option**

A thorough consultation process has resulted in a number of suggestions being put to the Government for a model Code.

These suggestions have been considered according to their respective costs and benefits throughout a comprehensive consultation process. The package of changes which are put forward in Option 2, as described in Section 4, respond to problems in a manner consistent with the original objectives of the Grocery Code.

It is recommended that the Government prescribe the Grocery Code in accordance with Option 2 as described in Section 4, whereby a retailer or wholesaler elects whether or not to be bound by the Code, and is then legally bound to comply with the Code once it has opted-in.

This industry-led option has the potential to deliver positive benefits for suppliers, particularly those that are small businesses, during their dealings with retailers and wholesalers that have opted-in to the Code.

### **7. How will the chosen option be implemented and evaluated?**

The implementation of Option 2, as described in Section 4, would be achieved by the Minister for Small Business making a regulation under the CCA to prescribe the proposed Grocery Code.

Codes of conduct prescribed under the CCA are typically reviewed every five years in consultation with industry, consumers and businesses but an early review is considered appropriate in this case to assess whether the Grocery Code has achieved an improvement in commercial relationships with the intended industry participants.

Following consultation, a regulation has been added for the review of the Grocery Code three years after its commencement date. The review should aim at assessing whether the code has improved commercial relations between retailers, wholesalers and suppliers. In doing this the review should consider the following issues:

- the extent to which retailers and wholesalers have become bound by the code;
- levels of compliance with the code by retailers and wholesalers bound by the code;
- whether the purposes of the code (see clause 2 of the code) are being met;
- the extent to which the code assists in addressing any imbalances in the allocation of risks between retailers, wholesalers and suppliers;
- whether there are any further measures that would improve the operation of the code with respect to the matters mentioned in the two previous paragraphs ;
- the interactions between the code and the Horticulture Code of Conduct;
- how the code compares with overseas regulation of commercial relations between retailers, wholesalers and suppliers;

- whether the code should be mandatory or voluntary;
- whether the code should include civil penalty provisions;
- whether retailers, wholesalers and suppliers should be bound by the code, and if so, to what extent;
- whether the code should be repealed or amended and, if so, the timing of any such repeal or amendment;
- the products that should be covered by the code.

Reviewing the Grocery Code three years after its introduction recognises that an industry-led opt-in prescribed code should be given an opportunity to improve the current operating environment. This assessment would inform consideration of whether additional regulatory measures are needed, or whether the level of regulation imposed by the opt-in code is sufficient to achieve the regulatory objectives, taking into account the relative costs and benefits.

## **Attachment A: Proposed Grocery Code**

A copy of the final Grocery Code will be made available on the website for the Federal Register of Legislative Instruments.

## **Attachment B: Business Cost Calculator, regulatory burden and cost offset estimate**

Tables 1 and 2 include estimates of the compliance costs and regulatory offsets associated with prescribing the proposed Grocery Code as an opt-in code.

The compliance cost estimates assume that Coles, Woolworths, and Metcash agree to be bound by the proposed Grocery Code. Unless otherwise stated, the same assumptions have been applied in developing cost estimates for each of these businesses. (Where appropriate, different assumptions have been made for ‘larger retailers’ and ‘smaller retailers’ — the table notes the cost categories for which this has been applied.) Table 3 contains the assumptions that underlie the compliance cost estimates in Tables 1 and 2.

As part of the consultation process, views were sought on the compliance cost estimates, and the underlying assumptions that have been used to estimate them.

**Table 1: BCC and offsets**

<b>Option 2</b>		
<b>Option name</b>	Opt-in prescribed code of conduct — costs	
<b>Option description</b>	Prescription of an opt-in code of conduct via regulations under section 51AE of the CCA. Under section 51AD of the CCA, a person must not contravene, in trade or commerce, ‘an applicable industry code’. Breaches of prescribed codes are a breach of the CCA and are subject to many of the remedies available under the CCA. The ACCC is responsible for enforcing prescribed codes of conduct, hence, complaints about non-compliance that cannot be resolved through the dispute mechanisms in a prescribed code can be directed to the ACCC.	
<b>Businesses affected</b>	3	
	<b>Cost per business</b>	<b>Total cost for all businesses</b>
Start up cost	\$61,384.67	\$184,154.00
Ongoing compliance cost per year	\$1,444.00	\$4,332.00

**Table 2: Regulatory burden and cost offset estimate table**

<b>Average annual regulatory costs (from business as usual)</b>				
<b>Change in costs (\$million)</b>	Business	Community Organisations	Individuals	Total change in cost
<b>Total, by sector</b>	\$0.02	\$0	\$0	\$0.02
<b>Cost offset (\$ million)</b>				
<b>Agency</b>	Business	Community organisations	Individuals	Total, by source
	-\$0.02	\$0	\$0	-\$0.02
<b>Are all new costs offset?</b>				
<input checked="" type="checkbox"/> <b>Yes, costs are offset</b> <input type="checkbox"/> <b>No, costs are not offset</b> <input type="checkbox"/> <b>Deregulatory—no offsets required</b>				
<b>Total (Change in costs – Cost offset) (\$million) = \$0</b>				

Note: A regulatory offset has been identified from within the Treasury portfolio. This offset relates to the Franchising Code reforms.

**Table 3: Assumptions underlying estimates of compliance costs — retailers**

Compliance cost	Query	Estimate
<b>Provision of written notice</b>		
<p><b>Providing written notice</b> Occurs under the following obligations:</p> <ol style="list-style-type: none"> <li>1. Delisting.</li> <li>2. Delisting — providing written notice of final decision after review.</li> <li>3. Cancelling/reducing orders of stock for promotion — seeking suppliers' written consent.</li> <li>4. Cancelling/reducing orders of stock for promotion — providing reasonable notice of the cancellation/reduction.</li> <li>5. In the event of failure to meet fresh produce standards provision of written notice of reasons for rejection.</li> <li>6. In the event of changes to packaging, preparation etc standards, the provision of reasonable written notice, in certain circumstances.</li> <li>7. In the event of requiring changes to supply chain procedures, the provision of reasonable written notice.</li> <li>8. In the event of a range review, providing suppliers with written notice.</li> <li>9. Unilateral variations to agreements.</li> <li>10. Retrospective variations to agreements.</li> <li>11. Providing notice following referral of complaint to compliance manager if satisfied the complaint is vexatious, trivial, misconceived, or lacking substance.</li> </ol>	Time it would take to undertake the task of providing written notice.	0.25 hours <sup>26</sup>
<p><b>Labour cost associated with providing written notice</b> Occurs under the obligations listed above.</p>	Hourly rate of the staff member that would undertake the task of providing written notice.	\$30.40 per hour <sup>27</sup>
<p><b>Occurrence of provision of written notice</b> Occurs under the obligations listed above.</p>	How many times per year written notice would be provided.	30 per annum <sup>28</sup>
<p><b>Number of staff members engaged in providing written notice</b> Occurs under the obligations listed above.</p>	Number of staff members in the organisation that undertake the task of providing written notice.	1 staff member <sup>29</sup>

<sup>26</sup> Assumes a standard form of notice is adopted and emailed.

<sup>27</sup> Assumes the task of sending the email is undertaken by an administrative assistant; ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>28</sup> Assumes that an event requiring that notice be provided to any particular supplier arises once a year; assumes each retailer has a relationship with 30 suppliers.

<sup>29</sup> Assumes one staff member would be responsible for emailing of notices.

**Table 2: Assumptions underlying estimates of compliance costs — retailers (continued)**

<b>Compliance cost</b>	<b>Query</b>	<b>Estimate</b>
<b><i>Confidential information obligation compliance</i></b>		
<b>Establishing systems to ensure compliance with confidential information obligation</b> Start-up cost	Time it would take to establish these systems. Hourly rate of the staff member that would establish the systems. Number of staff members in the organisation that would undertake the task of establishing the systems.	40 hours <sup>30</sup> \$43.70 per hour <sup>31</sup> 1 staff member
<b>Monitoring compliance with above systems</b>	Time it would take to monitor compliance with above systems. Hourly rate of the staff member that would undertake the compliance monitoring. How many times per year compliance monitoring would take place. Number of staff members in the organisation that would be responsible for monitoring compliance.	2.5 hours <sup>32</sup> \$34.20 per hour <sup>33</sup> 2 per annum <sup>34</sup> 1 staff member
<b><i>Product ranging and shelf space allocation principles</i></b>		
<b>Publication of product ranging and shelf allocation principles</b> Start-up cost	Time it would take to develop and publish these principles. Hourly rate of the staff member undertaking the task. Number of staff members in the organisation that would be involved in developing and publishing the principles.	40 hours <sup>35</sup> \$43.70 per hour <sup>36</sup> 1 staff member
<b>Updating product ranging and shelf allocation principles from time to time</b>	Time taken to update the principles. Hourly rate of the staff member that updates the principles. How many times per year the principles are updated. Number of staff members in the organisation involved in updating the principles.	8 hours <sup>37</sup> \$43.70 per hour <sup>38</sup> 1 per annum <sup>39</sup> 1 staff member

<sup>30</sup> Assumes this task will take 1 week of full time work (8 hour days, 5 day week).

<sup>31</sup> Assumes someone with some form of professional/technical skills (for example, in business processes) will be required to undertake this task; ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>32</sup> Assumes that the task of checking that the organisation has complied with its systems is undertaken twice a year and takes two and a half hours.

<sup>33</sup> Assumes a manager/professional is not needed for this task; have therefore adopted ABS economy wide non-managerial hourly rate in RIS guidelines for this wage rate.

<sup>34</sup> Assumes that checking that the organisation has complied with its systems takes place twice per year.

<sup>35</sup> Assumes that it takes five days of full-time work (eight hour days) to first develop and publish these principles.

<sup>36</sup> Assumes someone with some form of professional/technical skills will be required to undertake this task (for example, marketing skills); ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>37</sup> Assumes task takes one day of full time work.

<sup>38</sup> Assumes person of similar standing updates the principles as the person that developed them in the first place.

<sup>39</sup> Assumes principles are reviewed and updated once per year.

**Table 2: Assumptions underlying estimates of compliance costs — retailers (continued)**

<b>Compliance cost</b>	<b>Query</b>	<b>Estimate</b>
<b>Record keeping and reporting</b>		
<b>Code Compliance Manager record keeping of complaints</b> <sup>40</sup>	Time it would take to keep a record of a complaint. Hourly rate of the staff member responsible for keeping records. Number of times per year record is made. Number of staff members in the organisation that would be responsible for keeping these records.	1/2 hour <sup>41</sup> \$43.70 per hour <sup>42</sup> 12 per annum <sup>43</sup> 1 staff member
<b>Code Compliance Manager reporting six-monthly</b>	Time it would take to prepare this report. Hourly rate of the staff member responsible for preparing the report. How many times per year the report will be prepared. Number of staff members in the organisation that would be responsible for preparing the report.	4 hours <sup>44</sup> \$43.70 per hour <sup>45</sup> 2 per annum <sup>46</sup> 1 staff member
<b>Dispute resolution — complaints handling manual</b>		
<b>Development of a written complaints handling procedure</b> <sup>47</sup> Start-up cost	Time it would take to develop a complaints handling procedure. Hourly rate of the staff member undertaking the task. Number of staff members in the organisation that would be responsible for developing the procedure.	24 hours <sup>48</sup> \$43.70 per hour <sup>49</sup> 1 staff member

<sup>40</sup> Costing assumes no additional costs associated with provision to the ACCC.

<sup>41</sup> Assumes it takes half an hour to make a record of a complaint.

<sup>42</sup> Assumes someone with some form of professional/technical skills will be required to undertake this task (assume it is the Code Compliance Manager); ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>43</sup> Assumes a complaint is made which requires an update to the records to be made once per month.

<sup>44</sup> Assume that it takes half a day of full-time work to pull together this report.

<sup>45</sup> Assumes someone with some form of professional/technical skills will be required to undertake this task (assume it is the Code Compliance Manager); ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>46</sup> 6 monthly preparation specified in the proposed Grocery Code.

<sup>47</sup> This must be provided to the ACCC — costings assume that there are no additional costs associated with providing this document to the ACCC.

<sup>48</sup> Assumes that it takes three days of full-time work (eight hour days) to first develop this procedure.

<sup>49</sup> Assumes that someone with some form of technical skills will be required to undertake this task (assume it is the Code Compliance Manager); ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

**Table 2: assumptions underlying estimates of compliance costs — retailers (continued)**

<b>Compliance cost</b>	<b>Query</b>	<b>Estimate</b>
<b><i>Dispute resolution — complaints handling manual (continued)</i></b>		
<b>Annual update/reviewing of complaints handling procedure<sup>50</sup></b>	Time it would take to review and update this procedure. Hourly rate of the staff member that would review and update. How many times per annum a review and update would take place. Number of staff members in the organisation that would undertake the review and update.	4 hours <sup>51</sup> \$43.70 per hour <sup>52</sup> 1 per annum <sup>53</sup> 1 staff member
<b><i>Compliance training</i></b>		
<b>Initial compliance training</b> Start-up cost	Time it would take to undertake the training. Hourly rate of those staff member(s) undertaking the training. Number of staff members in the organisation that would take part in the training.	1 hour \$34.20 per hour <sup>54</sup> 500 staff members (large) 9 staff members (small) <sup>55</sup>
<b>New starter and re-fresh compliance training</b>	Assumes that the organisations procure an online product which facilitates online training (that is, an online training module).	\$35,000

<sup>50</sup> Costings assume that there are no additional costs associated with providing this document to the ACCC.

<sup>51</sup> Assumes task takes half a day of full time work.

<sup>52</sup> Assumes someone with some form of professional/technical skills will be required to undertake this task (assume it is the Code Compliance Manager); ABS labour rates in RIS guidelines state that this is the appropriate hourly rate.

<sup>53</sup> Annual reviewing specified in the proposed Grocery Code.

<sup>54</sup> Assumes that on average, these staff members are paid a non-managerial wage; have adopted ABS economy wide non-managerial hourly rate in RIS guidelines for this wage rate.

<sup>55</sup> Number of staff assumed for the smaller organisations based on pro-rata scaling down of number of staff assumed for larger businesses. Scale down based on comparison of differences in overall staff numbers of Coles and Woolworths as compared to Metcash.