

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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4 – 6 June 2013

Question: BET 323-325

Topic: Mandatory Code

Hansard Page: Written

Senator BOSWELL asked:

323. Does the ACCC still support the negotiation of a prescribed code of conduct for the supermarket industry?
324. What do you see as the major elements needed in that code?
325. What are the differences between a mandatory code and a voluntary code?

Answer:

323. Suppliers have raised concerns with the ACCC that supermarkets are engaging in unfair conduct and are misusing their superior bargaining position in relation to supply contracts. It is the ACCC's view that should the government decide to prescribe a code that regulates the relationship between grocery suppliers and supermarket retailers under the *Competition and Consumer Act 2010* (CCA), that code needs to be effective and address the problem identified in the industry.
324. The ACCC has been providing guidance to the industry as it develops the terms of a code. The ACCC has advised industry that a supermarket code should address the concerns that have been identified in this sector, should be enforceable, provide a framework for effective dispute resolution and not preclude, or impose pre-conditions on, a participant making a complaint to the ACCC.
325. The CCA provides for two types of industry codes:
- a) mandatory industry codes and
 - b) voluntary industry codes.

In each case, the obligations which are enforceable as public law are set out in regulations.

A mandatory industry code will apply to all participants of a particular industry. For example, the Franchising Code of Conduct is a mandatory industry code that regulates the relationship between franchisors and franchisees. Neither party can 'opt out' of the Code. A contravention of a mandatory industry code will result in a contravention of s. 51AD of the CCA, and may result in enforcement action being taken by the ACCC or a private litigant.

In the case of a voluntary industry code, prescribed for the purposes of Part IVB of the CCA, industry participants may elect to be bound by the code. The CCA provides for regulations to be made which specify the method by which an industry participant agrees to be bound

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by the code and the method by which they cease to be bound. When a participant has agreed to be bound by a prescribed voluntary industry code, they must comply with its provisions or risk breaching s. 51AD of the CCA (and are responsible for their conduct from the time they were bound even if they subsequently take the steps required by regulations to cease to be bound). There are presently no voluntary industry codes prescribed under the CCA.

Therefore, the primary difference between a mandatory and a voluntary industry code prescribed under the CCA is that an industry participant can choose not to be bound by a voluntary industry code.

It is also noted that industries are free to set their own voluntary industry codes not prescribed under the CCA. These codes may set out specific standards of conduct for an industry, including how to deal with its members and customers. These codes only apply to those who sign up to them. The ACCC provides general guidance to industry on developing non-prescribed voluntary industry codes, but does not have a role in drafting or enforcing them.