

Supermarket Pricing Inquiry

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Co-operative Limited

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SUBMISSION TO

Inquiry into

Supermarket Pricing

Submission from:



The Queensland Chamber of Fruit and Vegetable Industries

Co-operative Limited (Brismark)

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1. About Brismark

Brismark, or The Queensland Chamber of Fruit and Vegetable Industries Co-operative Limited, is a member organisation which represents and supports the fruit and vegetable wholesalers who operate in the Brisbane Markets at Rocklea, Queensland's most important fruit and vegetable Central Market. Brismark is also dedicated to maintaining the relevance of the Central Market system.

In confirming the role that the Brisbane Markets has in the horticulture industry in Queensland, it is highlighted that:

- Wholesalers trade more than 700 million kilograms of fresh fruit and vegetables with a wholesale value of more than \$2 billion per year from around 7,000 growers throughout Queensland and Australia.
- Wholesalers service the independent retail, independent supermarket, food processing, hospitality, catering, food service, and food processing sectors through around 800 registered buyers who visit the site each day.
- Over 4,500 people work or do business at the Brisbane Markets each day.

All fresh fruit and vegetable wholesalers' transactions with fruit and vegetable growers are regulated by *the Horticulture Code of Conduct* which is a mandatory industry code prescribed under the *Competition and Consumer Act 2010 (CCA)*. Wholesalers (acting as either a merchant or agent) receiving produce from a grower must comply with this mandatory Code. The *Food and Grocery Code* does not apply to the extent it conflicts with the *Horticulture Code of Conduct*.

The *Horticulture Code of Conduct* does not apply to:

- retailers – businesses buying produce for retail sale;
- exporters – businesses buying the produce for export; or
- processors – businesses buying the produce for processing.

Growers are afforded substantial protections under the provisions of this *Mandatory Horticulture Code of Conduct*.



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2. Scope of Submission

Brismark welcomes the opportunity to provide this submission to the Inquiry into Supermarket Pricing. The focus of this submission is on the fresh fruit and vegetable sector. Central Market wholesalers are **suppliers** of fruit and vegetables to supermarkets and other independent retailers. They play an important role in the fresh produce supply chain. This submission provides Brismark's response to the following items being addressed by the Supermarket Pricing Select Committee:

- rising grocery prices in Queensland and discrepancies between retail and wholesale and farmgate prices, including different-sized businesses;
- the long-term trends in profits accruing along the supply chain for perishable produce, with particular regard to impediments to the profitability of primary producers;
- the conduct of retailers in negotiations with Queensland producers, and the prevalence and effects of information asymmetry between these parties;
- improvements to Queensland's policy environment to increase transparency for producers, including what data will reduce information asymmetry, and/or reduce prices for consumers; and
- any other reviews or inquiries occurring in Australia regarding this matter, with a view to complement these analyses by focusing on potential Queensland Government responses.

3. The rising grocery prices in Queensland and discrepancies between retail and wholesale and farmgate prices, including different-sized businesses

3.1 Mandatory compliance for wholesalers creates additional costs while supermarkets have a voluntary code

The horticulture sector has two distinct Codes, namely the *Voluntary Food and Grocery Code*, which caters for direct supply by growers to supermarkets, and the *Mandatory Horticulture Code of Conduct*, which pertains to traders who on-sell the produce supplied by growers. The supply chain differences being:

For businesses regulated by the *Voluntary Food and Grocery Code*:

- Operates within a "business-to-business-to-consumer" framework.
- This means that suppliers (such as central market wholesalers or growers) sell their goods to supermarkets (business-to-business), and then supermarkets sell those goods to consumers (business-to-consumer).

For businesses regulated by the *Mandatory Horticulture Code of Conduct*:

- Operates within a "business-to-business-to-business-to consumer" model.
- This means that growers sell their goods to traders (aggregators or distributors) (business-to-business) under a merchant or agent arrangement, who then sell that produce to other businesses



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(such as retailers or food service providers), with specific rules governing how prices are determined in these transactions.

The *Mandatory Horticulture Code of Conduct* imparts a compliance cost on fruit and vegetable wholesalers, thereby adding additional expenses to the fruit and vegetable supply chain, highlighting a significant compliance risk and distorting the market given the cost does not apply to the “direct supply” chain for fruit and vegetables.

The *Mandatory Horticulture Code of Conduct* has civil pecuniary penalties for non-compliance. These penalties increase the cost of compliance due to the associated risk particularly dealing with very small growers. There are no such penalties associated with the supermarkets’ self-designed *Voluntary Food and Grocery Code*. This imbalance in approach to each code clearly demonstrates an uneven playing field.

3.2 Market power imbalances

It is widely acknowledged and Brismark agrees that a significant imbalance in market power exists between supermarkets and fruit and vegetable suppliers, exacerbated by the inherent challenges presented by the perishable nature of fresh produce. Unlike non-perishable goods, fresh produce cannot be simply returned to inventory in case of oversupply or rejection by the supermarket. This inherent vulnerability underscores the pressing need for equitable and sustainable practices within the supply chain.

Central market suppliers, along with their growers, predominantly comprise small to medium enterprises, operating with turnovers significantly lower than those of supermarkets. The stark discrepancy in financial scale underscores the considerable disparity in bargaining power within the supply chain, further magnified by the unique challenges inherent in the perishable nature of fresh produce.

3.3 Declining independent retail sector

While the horticulture sector has grown in volume and value, the market share of independent fruit and vegetable stores (greengrocers) and small grocers have been declining in the retail sector relevant to the major supermarkets.

The decline in the market share of independent fruit and vegetable stores can be attributed to several factors. Firstly, major supermarkets have expanded their presence and convenience, offering a one-stop shopping experience for consumers.

Secondly, major supermarkets have significant buying power and can afford to be hyper competitive which can be challenging for independent stores to compete on price while maintaining profitability.

Additionally, major supermarkets invest heavily in marketing and advertising, which helps them attract



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customers and build brand loyalty. Independent stores often have limited resources for marketing and promotion, making it difficult for them to reach and retain customers.

Maintaining the sustainability of the independent retailing sector is paramount to ensuring its resilience and vitality, with the imperative of preventing any erosion of market share, and ideally, fostering its growth. This approach not only cultivates a competitive market environment that benefits consumers but also provides vital support and opportunities for growers/suppliers of fresh produce.

A substantial government investment in this sector has the power to revolutionize the market share of independent fruit and vegetable retailers, ensuring their competitiveness against major supermarkets. Through dedicated financial support, these retailers can thrive, contributing to market diversity, community prosperity, and sustainable supply chains. This investment opportunity is pivotal in catalyzing enduring change and securing a vibrant future for independent retailers nationwide.

Brismark urges the Government to prioritise the actions which support the existence of a competitive fresh fruit and vegetable industry, with a focus on maintaining or growing the market share of independent fruit and vegetable retailers. This call to action involves several key strategies:

- **Investment in Marketing and Advertising:** The Government is encouraged to support existing programs like "A Better Choice!" which is an initiative of Fresh Markets Australia (FMA) and Brismark to boost awareness and visibility of independent fruit and vegetable retailers among consumers.
- **Influencing or Mandating Horticulture Research and Development:** The Government should influence or mandate Hort Innovation to allocate fruit and vegetable levies towards initiatives that prioritise the growth and sustainability of independent retailers within the sector.
- **Investment in Business Education:** There is a need for investment in educational programs tailored to enhance the business skills and capabilities of independent fruit and vegetable retailers, enabling them to compete more effectively in the market.
- **Development of Employment Pathways:** The Government should work on developing pathways to encourage employment within the independent fruit and vegetable sector, thereby fostering growth and sustainability while providing opportunities for individuals to contribute to the industry's success.

Overall, these initiatives are crucial for ensuring the long-term viability and competitiveness of independent fruit and vegetable retailers, contributing to a diverse and resilient marketplace that benefits both consumers and stakeholders across the supply chain.



4. The long-term trends in profits accruing along the supply chain for perishable produce, with particular regard to impediments to the profitability of primary producers

4.1 An uneven playing field

Unlike non-perishable goods, fresh produce possesses unique characteristics such as perishability, seasonality, and susceptibility to market fluctuations, necessitating tailored regulations to mitigate associated risks. The *Voluntary Food and Grocery Code* designed by supermarkets has broad and generalised provisions which fail to adequately address the nuanced complexities inherent in the fresh fruit and vegetable sector, resulting in a one-size-fits-all approach ill-suited to the dynamic nature of the sector.

The *Mandatory Horticulture Code of Conduct* imparts a compliance cost on fruit and vegetable wholesalers, thereby adding additional expenses to the fruit and vegetable supply chain, imposing a substantial compliance burden on these businesses. Given the urgency to transport, store, and sell produce before it spoils, wholesalers face heightened pressure to swiftly comply with regulatory requirements, often necessitating expedited processes and additional resources. The need for rapid decision-making and action exacerbates the financial and administrative burdens of compliance, as businesses must invest in efficient systems, personnel training, and monitoring mechanisms to ensure adherence within tight time constraints. This time-sensitive environment further underscores the challenges inherent in managing compliance costs within the wholesaling sector.

Growers who supply directly to supermarkets operate under the *Voluntary Food and Grocery Code of Conduct* which is a design-your-own voluntary Code of Conduct. In terms of the fresh fruit and vegetable industry, an uneven playing field exists.

The Interim Report of the Food and Grocery Code of Conduct (April 2024) provides significant further elaboration in relation to these matters.

The Mandatory Horticulture Code of Conduct remains anti-competitive and discriminatory regulation where growers who supply to, and small independent retailers who purchase through, the central market supply chain with wholesalers operating under a mandatory Code (with significant penalty provisions) whereas the supermarkets operate under a voluntary code (with no penalties at all).

Brismark asserts that there is necessity for mandatory regulatory intervention in the supermarket supply chain because the supermarkets' ability to self-correct is clearly not possible and supermarket actions may not support a sustainable horticulture industry for all participants.



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4.2 Consequences of supermarket rejected produce

Supermarkets are known to reject produce for various reasons, including surplus to requirements. The subjective assessment of produce often leads to the 'dumping' of rejected produce onto the central market supply chain which can wreak havoc on multiple industry stakeholders. This practice disrupts the delicate balance between supply and demand, precipitating market inefficiencies and tumultuous price fluctuations. The inundation of rejected produce floods the market with excess goods, potentially creating a surplus that drives prices down. Such actions not only harm the profitability of growers who rely on the central market supply chain but also disrupt the equilibrium of the entire market.

Furthermore, dumping of rejected produce in established markets distorts market signals, misleading buyers and causing resource misallocation.

Central market wholesalers adopt a "whole of crop" approach when engaging with growers, emphasising a comprehensive and inclusive strategy that encompasses the entirety of the produce harvested. By taking this approach, wholesalers demonstrate a commitment to supporting growers throughout the entire lifecycle of their crops, from planting to harvesting and beyond. This entails collaborating closely with growers to understand their cultivation practices, crop yields, and quality standards. Additionally, wholesalers actively seek to utilise the entirety of each crop, minimising waste and maximising efficiency. This approach fosters a mutually beneficial partnership between wholesalers and growers, ensuring that all produce is effectively marketed and distributed to meet consumer demand. Moreover, by embracing a "whole of crop" philosophy, wholesalers contribute to sustainable agricultural practices and promote economic resilience within the supply chain.

Brismark calls for acknowledgement that 'redirecting' produce on the central market supply disrupts the delicate balance of supply and demand and causes market instability, impact grower returns and distorts market signals.



5. The conduct of retailers in negotiations with Queensland producers, and the prevalence and effects of information asymmetry between these parties

5.1 Ineffective Voluntary Code harnesses unfair practices by supermarkets

The central market supply chain operates under the regulatory framework of the *Mandatory Horticulture Code of Conduct*, underscoring the critical importance of ensuring fair and transparent practices within this sector.

Brismark strongly advocates that the existing signatories to the *Voluntary Food and Grocery Code* are the entities with market power within the fresh fruit and vegetable sector.

The effectiveness of the *Voluntary Food and Grocery Code* in addressing issues between supermarkets and their suppliers stemming from bargaining power imbalances is widely debated. While the code purports to promote fairness and transparency, Brismark argues that its voluntary nature undermines its ability to address fundamental power differentials. Larger supermarkets, with their considerable market dominance, often dictate terms to suppliers regardless of the code's provisions. Moreover, enforcement mechanisms are weak, and meaningful non-compliance penalties are missing, rendering the code ineffectual in practice. As a result, many suppliers, especially smaller ones, continue to face unfair practices such as unilateral changes to contracts, unjustified demands, and delayed payments.

Brismark asserts that, while the *Voluntary Food and Grocery Code* may serve as a token gesture towards addressing supplier-retailer relationships, it fails to meaningfully rectify the power imbalances that persist in the food and grocery (fresh fruit and vegetable) sector.

In assessing the provisions outlined under the *Voluntary Food and Grocery Code* and its suitability for the fresh fruit and vegetable sector, a critical analysis reveals numerous shortcomings that undermine its efficacy and relevance.

Furthermore, while the *Voluntary Food and Grocery Code* purports to promote fairness and transparency in dealings between retailers and suppliers, its voluntary nature undermines its enforceability and effectiveness. Without mandatory compliance requirements, major supermarkets wield disproportionate bargaining power, leveraging their market dominance to impose unfavourable terms on suppliers. This power asymmetry perpetuates a climate of uncertainty and vulnerability for suppliers within the fresh fruit and vegetable sector, rendering the purported protections afforded by the *Voluntary Food and Grocery Code* largely ineffectual.

The dispute resolution mechanisms outlined under the *Voluntary Food and Grocery Code* lack robust enforcement measures, with non-compliance penalties insufficient to deter retailer misconduct or ensure supplier recourse in cases of contractual breaches.



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In summary, the provisions delineated under the *Voluntary Food and Grocery Code* fall short of ensuring its suitability for the fresh fruit and vegetable sector. Its generic nature, voluntary compliance framework, and inadequate dispute resolution mechanisms render it ill-equipped to address the unique challenges faced by suppliers within this industry.

5.2 Fear of retribution

The fear of retribution is a palpable reality for those who supply major supermarket chains and it needs to be called out. This fear stems from the stark power imbalance favouring supermarkets, which wield significant influence over supplier livelihoods. Suppliers risk severe repercussions, including slashed orders, altered payment terms, or agreement termination/no future orders, should they dare to challenge unfair treatment or advocate for their rights.

At a macro level, overcoming the fear of retribution through regulation involves leveraging existing regulatory frameworks and implementing specific measures tailored to address the unique dynamics of the Australian market.

Here are some ways this could be achieved:

- Australian Competition and Consumer Commission (ACCC) Enforcement: Strengthen the enforcement powers of the ACCC to actively monitor and address anti-competitive behaviour in the market. This includes rigorously investigating complaints, imposing penalties for violations of competition laws, and conducting regular reviews of market concentration levels.
- Food and Grocery Code: Make mandatory and strengthen the 'good faith' provisions of the Code to explicitly add the 'prohibition of retribution' with associated penalties.
- Small Business Ombudsman: Enhance the role of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to provide support and advocacy for small businesses facing unfair treatment from larger retailers.
- The Interim Report of the Independent Review of the Food and Grocery Code of Conduct (April 2024) details a range of recommendations in relation to addressing these issues identified.

By implementing these regulatory measures within the Australian context, policymakers can help alleviate the fear of retribution among small businesses and suppliers while promoting a more competitive and fairer marketplace for all participants.



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Solutions – mandatory reporting

Potential improvement could involve mandating detailed explanations being given to suppliers for rejections based on an assessment against produce specifications. This could be coupled with the introduction of mandatory reporting by supermarkets to the Australian Competition and Consumer Commission (ACCC) of rejected produce, accompanied by categorised rejection reasons, which in turn could facilitate consolidated and regular public reporting complementing the disputes reporting that currently exists. Such transparency measures would be instrumental in revealing any systemic abuses and enhancing accountability within the sector. Objective improvement measures would then be able to be developed through consultation with the supply chain.

The ACCC should be given the power to undertake random audits of 'rejected' consignments which would include contacting the supplier – with the suppliers' identity always protected, to determine if the rejection details were correct and if the supplier felt pressured because of the market power of the retailer.

Pecuniary penalties should be introduced for not meeting reporting requirements and/or results of random audits demonstrating a misuse of market power.

Solution – disputes resolution that includes mediation.

Brismark calls for a dispute resolution process to be prescribed in a *Mandatory Food and Grocery Code* like those prescribed under the *Mandatory Horticulture Code of Conduct*, where dispute resolution mechanisms include negotiation, mediation, and arbitration. These processes aim to resolve disputes between growers and traders regarding contractual agreements, pricing, and other related matters. If parties cannot resolve their issues through negotiation, they may opt for mediation facilitated by an independent third party. If mediation fails, arbitration, where an impartial arbiter makes a binding decision, may be pursued. These mechanisms ensure fair resolution of disputes and compliance with code provisions.

6. Improvements to Queensland's policy environment to increase transparency for producers, including what data will reduce information asymmetry, and/or reduce prices for consumers

Improvements to the policy environment

- The distortion of the market should be addressed through either the introduction of mandatory regulation for the supermarket fruit and vegetable supply chain, or the removal of the existing mandatory Horticulture Code of Conduct and the resultant compliance costs borne by Central Market wholesalers.



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- Mandatory reporting to suppliers should be introduced for supermarkets with detailed explanations when produce is rejected, and mandatory reporting to ACCC of consolidated details including reasons for rejection and mandatory record keeping that could be scrutinised by the ACCC during compliance activities.
- A dispute resolution process should be prescribed in a Mandatory Food and Grocery Code like those prescribed under the Mandatory Horticulture Code of Conduct,.
- The Interim Report of the Independent Review of the Food and Grocery Code of Conduct (April 2024) details a range of recommendations in relation to addressing these issues identified.

Data to reduce information asymmetry

In late 2020, the Australian Competition and Consumer Commission (ACCC) conducted an inquiry into bargaining power imbalances in supply chains for perishable agricultural goods (PAG) in Australia. The subsequent Perishable Agricultural Goods Inquiry Report recommended that the government industries explore measures to foster price transparency to increase competition in those industries.

In response to this recommendation, the Australian Government committed funding to improve price and market transparency in PAG. Fresh Markets Australia, which is the national wholesaling sector industry body of which Brismark is a Member, was subsequently awarded a grant for a project - *Creating FreshData – a verifiable market price reporting scheme that collects, processes, stores, manages, analyses, visualises and interprets (wholesale) market sales price and produce provenance*. The project, due for completion June 2025, aims to provide growers with the ability to gauge whether prices received are competitive market prices and to deliver price signals to interpret if there is an under or over supply of produce. It envisages FreshData will provide growers with information to calibrate their investments in future supply capacity. The insights from FreshData are not intended to determine the actual price received by a wholesaler but rather a range achieved on any given day. Brismark has also progressed a similar self-funded Market Price Report project specifically for the Brisbane Markets which is expected to be launched this year.

Access to comprehensive data on supermarket purchase prices, net of payment arrangement reductions such as rebates, discounts, and early payment arrangements, is crucial for understanding pricing dynamics. This information should be thoroughly addressed in reporting to enable growers and other suppliers to assess the competitiveness of the prices they receive within their supply chain. Failure to account for these pricing dynamics may lead to inflated prices, making comparisons unreliable. This transparency would foster fair competition within the direct supply chain.



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7. Other reviews or inquiries occurring in Australia regarding this matter, with a view to complement these analyses by focusing on potential Queensland Government responses

Brismark is aware of the following reviews or inquiries that have relevance to this matter:

- The Independent Review of the Food and Grocery Code of Conduct 2024/25 was recently undertaken with the Interim Report being released in April 2024. Brismark supports the full recommendations outlined in the Interim Report.
- The Senate resolved that the Select Committee on Supermarket Prices be established to inquire into and report on the price setting practices and market power of major supermarkets. Submissions to this inquiry closed in February 2024 with the final report due for release on 7 May 2024.
- ACCC Supermarkets Inquiry 2024-25. An interim report is due to be provided to the Australian Government no later than 31 August 2024.

Independent Review of the Food and Grocery Code of Conduct

Interim Report

April 2024



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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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Foreword from Dr Craig Emerson

The Interim Report in 500 words



A heavy imbalance in market power between suppliers and supermarkets in Australia's heavily concentrated supermarket industry necessitates an enforceable code of conduct. An effective code of conduct would benefit smaller suppliers and consumers by enabling suppliers to innovate and invest in modern equipment to provide better products at lower cost.

The existing Food and Grocery Code of Conduct (the Code) is not effective. It contains no penalties for breaches and supermarkets can opt out of important provisions by overriding them in their grocery supply agreements.

I firmly recommend the Code be made mandatory and apply to all supermarkets with annual revenues exceeding \$5 billion, which at present are Coles, Woolworths and ALDI, and wholesaler, Metcash. The Code should be strengthened to better protect suppliers, with new protections against retribution, since suppliers' fear of retribution compromises the Code's effectiveness.

Effective penalties must apply for breaches of the mandatory Code. This would bring the Australian Competition and Consumer Commissions (ACCC) into code enforcement. It would be able to seek penalties for major or systemic breaches of up to \$10 million, 10 per cent of a supermarket's annual turnover, or 3 times the benefit it gained from the breach, whichever is the greatest.

In pursuing breaches, the ACCC would need to proceed through the courts. This would usually require a supplier witness who was willing to provide evidence and to stay the course of legal proceedings.

Relying on legal proceedings alone would not be an effective approach.

In seeking the best of both worlds, a low-cost alternative to court proceedings is therefore also recommended. This would involve replicating processes for independent mediation and arbitration that are in other industry codes, while also allowing for the complaint-handling provisions of the voluntary Code.

The Code Arbiters engaged by supermarkets would be redesignated Code Mediators. Suppliers could make complaints to the relevant Code Mediator. However, if a supplier were not happy with the Code Mediator, it could request an independent mediator.

Owing to constitutional limitations, arbitration must be entered into voluntarily to resolve disputes. In a mandatory Code, supermarkets will be strongly encouraged to agree to pay compensation, where recommended by the Code Mediator or determined by an independent arbitrator. This compensation could be capped at \$5 million, which is a substantial sum for small suppliers.

A Code Supervisor would replace the existing Independent Reviewer, taking on its functions, including publishing annual reports on supplier satisfaction with supermarkets.

The recommendations setting out the basic features of the mandatory Code are firm. They are listed on page 7 and will not change. In finalising its report, the Review will consult stakeholders on the other recommendations on page 8. To help guide submissions, a list of consultation questions is set out on page 9.

This report forms part of a wider array of competition policy initiatives involving supermarkets, including the ACCC's supermarket price inquiry. The Government's Competition Review is also looking at competition law reform and working with states and territories to improve competition across the wider economy.

In greater detail

The Review has held more than 40 meetings, as well as receiving 56 submissions in response to the Consultation Paper that was released on 5 February 2024. In addition, 2 roundtables were co-convened by the Review with the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Murray Watt, involving members of the National Farmers' Federation, various primary producer representative groups, meat and other agricultural processors, and the trade union movement.

The terms of reference for the Review ask whether the Food and Grocery Code (the Code)¹ should be retained as a voluntary code, made mandatory or scrapped altogether. The Review has found that the heavy imbalance in market power between the major supermarkets² and their smaller suppliers necessitates the continuation of a Food and Grocery Code of Conduct in some form. The Code should not be scrapped.

A mandatory Code that is the best of both worlds

The Review's central, firm recommendation is that the voluntary Code be made mandatory and subject to enforcement by the ACCC. The mandatory Code should apply to all large supermarkets that meet an annual revenue threshold of \$5 billion (indexed for inflation). Revenue would be in respect of carrying on business as a grocery 'retailer' or 'wholesaler' (as defined in the voluntary Code). At this stage this would capture Coles, Woolworths, ALDI and Metcash. All suppliers to these businesses would be covered by the Code.

The voluntary Code contains no penalties³ for breaches. While it provides for compensation to suppliers of up to \$5 million if a Code Arbiter finds in favour of a supplier in a dispute, no compensation has ever been awarded.

Since the commencement of the dispute-resolution provisions of the voluntary Code in January 2021, only 6 disputes have been lodged with Code Arbiters. Supporters of the voluntary Code cite this as evidence that the Code is working well, that it has greatly improved the relationship between the

1 *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* (the Code).

2 Throughout this report, the word supermarkets is used to refer to grocery retailers, including Woolworths, Coles and ALDI, and grocery wholesalers, including Metcash.

3 Throughout this report, the word penalties is used to refer to civil penalties only.

signatories to the Code and their suppliers, such that there is no reason to make the Code mandatory.

Critics of the voluntary Code point to the small number of disputes as evidence not of its success but of its failure. They nominate the fear of retribution by supermarkets as the dominant reason for so few disputes being raised by suppliers. Retribution could take many forms, including the unfavourable renegotiation of terms and conditions of supply, relocation of shelf space to less popular locations within stores, and total delisting of a supplier's products.

Whether or not such fears of retribution are justified in every case, the Review has heard compelling evidence that these fears are real for most suppliers, especially smaller suppliers, and act as a powerful deterrent to making formal complaints under the voluntary Code.

Opponents of a mandatory Code argue that the only recourse available to an aggrieved supplier would be to persuade the ACCC to run a case through the courts. This could take several years, by which time the supplier, as a key witness, would have gone bankrupt. In practice, they argue, a mandatory Code would be far less effective than a voluntary Code with its dispute-resolution provisions.

These concerns would carry great weight if no other avenues for making a complaint or resolving a dispute were available under a mandatory Code. But that does not need to be the case.

The Interim Report proposes a solution involving the best of both worlds: replicating the processes for independent mediation and arbitration in other Codes while taking the best features of the voluntary Code, improving them, and importing them into the mandatory Code.

These features include avenues for suppliers to raise issues informally and confidentially, options for mediation and arbitration, and stronger protections for suppliers.

Increased penalties and more enforcement tools

Unlike the existing voluntary Code, the recommended mandatory Code would have the strength of enforceability by the ACCC.

Penalties would apply to all substantive obligations under the mandatory Code. For serious breaches, penalties would be up to \$10 million, 3 times the value of the benefit from the breach, or 10 per cent of the annual turnover of the company, whichever is the greatest. Penalties of 600 penalty units (\$187,800 at present) would apply to less serious breaches.

These maximum penalties are the same as apply to serious breaches of the mandatory Franchising Code of Conduct.⁴ The inclusion of these larger penalties would require an Act of Parliament to amend the *Competition and Consumer Act 2010* (Competition and Consumer Act).

Under the mandatory Code, the ACCC would continue to be able to issue public warning notices, seek injunctions, initiate court proceedings, and accept court-enforceable undertakings. The introduction of penalties would allow the ACCC to issue infringement notices where it has reasonable grounds to believe the Code has been contravened. Infringement notices provide timely,

4 *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Franchising Code of Conduct).

cost-effective enforcement for more minor contraventions. In view of the size of the businesses that would be covered by the Code, the Review recommends consideration be given to increasing infringement notice amounts above 50 penalty units (currently \$15,650), which is the maximum amount that would usually apply in an industry code.

New dispute-resolution arrangements

In moving to a mandatory Code, the Interim Report recommends a best-of-both-worlds approach to dispute resolution which:

- Brings in the dispute-resolution options for independent mediation and arbitration that are used in other industry codes, such as the Dairy and Franchising Codes of Conduct; and
- Brings in the quick dispute-resolution provisions of the voluntary Code, while maintaining avenues for informal and confidential complaints.

Code Mediators, who would replace Code Arbiters, would continue to be engaged by the supermarkets and would be available to help resolve disputes. An advantage of these Code Mediators is that they would have deep knowledge of the systems and practices of the supermarket that engaged them, and have access to buyers, category managers and senior staff. However, if a supplier wanted a fully independent mediator, this option would be available and mandatory for the supermarket if requested.

Where mediation does not settle a dispute, independent arbitration could be considered as an option. Owing to constitutional limitations,⁵ arbitration cannot be imposed. However, supermarkets can voluntarily enter into arbitration to resolve disputes, as is provided for in other mandatory codes such as the Dairy Code and the Franchising Code.⁶

The Review encourages Coles, Woolworths, ALDI and Metcash to agree to pay compensation up to \$5 million as and when recommended by their Code Mediator and accepted by suppliers. Supermarkets are also encouraged to agree to arrangements whereby they pay compensation up to \$5 million as recommended through independent arbitration.

Agreement to these arrangements could be set out in grocery supply arrangements. Legally, a supermarket would be at liberty to refuse to agree to these arrangements. In so refusing, however, they would be judged harshly in the court of public opinion.

Independent reporting on supplier satisfaction and complaints

The voluntary Code provides for an Independent Reviewer to compile an annual report on supplier satisfaction with supermarkets covered by the Code. Supplier assessments of purchaser performance are provided confidentially, with no visibility to the supermarkets, and performance assessments are anonymised. The Review recommends this role be undertaken by a Code Supervisor and include information not only on formal disputes, but also informal complaints.

⁵ An explanation of the constitutional limitations is outlined in Chapter 3, pp. 25-26.

⁶ Part 2, Division 2, Subdivision F, [Dairy Code of Conduct](#); and Part 4, [Franchising Code of Conduct](#).

Additional protections against retribution

The Interim Report recommends strengthening the protection against retributive conduct, which can be achieved by including protection against retribution in the purpose of the Code and by prohibiting any conduct that constitutes retribution against a supplier.

Recognising the power of incentives (see Box 1), the Interim Report also recommends that any incentive schemes that apply to buying teams and category managers must be aligned with the purpose and contents of the Code, and that the conduct of buying teams and category managers be monitored by senior management, especially following a complaint or dispute.

Box 1: People respond to incentives

A former President of the Business Council of Australia (BCA) made a simple but powerful observation in a conversation with me. He said: “People respond to incentives.”

This was a modern-day version of Adam Smith’s observation that: “It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own self-interest.”

The relevance of these observations to supermarkets is that if the board or the senior management of a supermarket chain establishes an incentive system for their buyers and category managers that rewards maximising margins and penalises low margins, the buyers and category managers will squeeze suppliers as hard as possible.

As monopsonist buyers, they will be capable of squeezing supplier margins to the point where suppliers are unable to earn sufficient returns to enable them to invest in quality improvements and efficiency-raising equipment. Consequently, not only suppliers but also consumers end up losing from this supermarket buying behaviour.

With strong market power, the buyers and category managers can also engage in retribution against a supplier who complains about behaviour such as relegating a supplier’s product to an inferior location, slashing distribution to only a handful of stores or delisting them off the shelves altogether.

If these practices are brought to the attention of top management and the board of directors, they might be shocked that such practices occur in their organisations, or at least say they are shocked. But they shouldn’t be shocked; they will have set in place the incentives that have led to such behaviour.

Indeed, senior management and board members might be quite aware that their buyers and category managers are behaving unconscionably, but they want to retain their management positions at the supermarket chain and aspire to elevation to better-paying positions in other corporations. Institutional and individual shareholders demanding the best returns on their investments will have set these incentives in place.

The moral of this story is: if you create incentives for bad behaviour don’t be shocked if people – in this case category managers and buyers – behave badly.

Further, the Interim Report discusses ways to allow suppliers to raise disputes and issues entirely anonymously to avoid retributive conduct. For example, New Zealand has recently adopted an

encrypted channel for anonymous whistleblower complaints in the grocery industry that could be implemented in Australia, similar to channels already in place to receive information about suspected cartel conduct. In addition, processes for industry groups or other representative groups to raise issues confidentially without divulging the identity of complainants should be considered. Stakeholder views are sought on these proposals.

Consideration of strengthened protections

The voluntary Code contains many useful clauses and provisions that could be imported into the mandatory Code. These include an obligation to act in good faith, the defining features of which are set out in the Code; a requirement for a written grocery supply agreement which cannot be varied without consent; and obligations relating to specified behaviours, such as delisting of products.

However, stakeholders have identified areas where protections could be strengthened. The Interim Report discusses whether the Code would be improved by removing the ability of supermarkets to contract out of specific obligations through grocery supply agreements. It also considers stakeholder views that some of the obligations under the Code should be strengthened. The Review invites stakeholder feedback on this issue.

The Review Secretariat

My sincere thanks to the small secretariat to this review led by Anna Barker and comprising Paul Miszalski, Jenny Chiu, Vinh Le, Sarah McQuillan and Elizabeth Toussaint. While some organisational work was done in Treasury in late-2023, my work commenced in January 2024 and the Secretariat was created soon thereafter. These talented young professionals from Treasury and the ACCC have worked night and day and on weekends to ensure this Interim Report was released in good time to enable feedback and finalisation of the report by the due date of 30 June 2024.

Next steps

The process following the release of this Interim Report is to invite detailed written comments by 30 April 2024, followed by a further round of meetings with stakeholders, as necessary. To help guide submissions this Interim Report includes a list of consultation questions. However, while this is an Interim Report, the recommendations on the following page are firm and will not change.

A Final Report will be provided to the Government by 30 June 2024.



The Hon Dr Craig Emerson
Independent Reviewer
Review of the Food and Grocery Code of Conduct

Firm recommendations

Firm recommendations of the Interim Report are as follows and will not change.

- **Recommendation 1:** The Food and Grocery Code of Conduct should be made mandatory.
- **Recommendation 2:** All supermarkets that meet an annual revenue threshold of \$5 billion (indexed for inflation) should be subject to the mandatory Code. Revenue should be in respect of carrying on business as a 'retailer' or 'wholesaler' (as defined in the voluntary Code). All suppliers should be automatically covered.
- **Recommendation 3:** The Code should place greater emphasis on addressing the fear of retribution. This can be achieved by including protection against retribution in the purpose of the Code and by prohibiting any conduct that constitutes retribution against a supplier.
- **Recommendation 4:** As part of their obligation to act in good faith, supermarkets covered by the mandatory Code should ensure that any incentive schemes and payments that apply to their buying teams and category managers are consistent with the purpose of the Code.
- **Recommendation 5:** To guard against any possible retribution, supermarkets covered by the mandatory Code should have systems in place for senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.
- **Recommendation 6:** A complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC.
- **Recommendation 8:** A Code Supervisor (previously the Code Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys.
- **Recommendation 10:** Penalties for non-compliance should apply, with penalties for more harmful breaches of the Code being the greatest of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening conduct. Penalties for more minor breaches would be 600 penalty units (\$187,800 at present).

Draft recommendations

Draft recommendations are subject to feedback from stakeholders and to modification (but not removal) depending on the feedback received.

- **Recommendation 7:** The mandatory Code should include informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:
 - Adopting the dispute-resolution provisions of other industry codes, which provide for independent mediation and arbitration;
 - Allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by the supplier, and recommend remedies that include compensation for breaches and changes to grocery supply contracts; and
 - Allowing suppliers to go to the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of Code Mediator's processes; or to arrange independent, professional mediation or arbitration.

Supermarkets are encouraged to commit to pay compensation of up to \$5 million to resolve disputes, as recommended by the Code Mediator and agreed by the supplier, or as an outcome of independent arbitration.

- **Recommendation 9:** Specific obligations under the Code should set minimum standards that cannot be contracted out of in grocery supply agreements or otherwise avoided.
- **Recommendation 11:** The Government should consider increasing infringement notice amounts for the Code.

Consultation questions

To help guide submissions in response to this Interim Report, consultation questions are asked in various parts of the document and reproduced in the list below.

1. Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?
2. Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.
3. Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.
4. Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?
5. What minimum standards of conduct, if any, should be specified in the Code that should not have exceptions? If exceptions are provided for, how should these be limited? Please provide examples to support your views.
6. Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.
7. Do any of the obligations under the Code need strengthening to better protect suppliers?
8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.
9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?
10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.
11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.
12. What level of penalties should apply to breaches of the Code? Please provide reasons.
13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.
14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?
15. Does the Code adequately require covered businesses to keep information and documents for the purposes of recording their compliance and any disputes raised under the Code?

Background to the Review

On 10 January 2024, the Prime Minister, the Treasurer, the Minister for Agriculture, Fisheries and Forestry, and the Assistant Minister for Competition, Charities and Treasury, announced the appointment of the Hon Dr Craig Emerson to lead the 2023-24 Review of the Food and Grocery Code of Conduct (the Review).⁷

A Secretariat has been established within the Treasury to support Dr Emerson in undertaking the Review.

The Review and its timing are prescribed under Section 5 of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015*.

Dr Emerson is required to prepare a written report by 30 June 2024. The Final Report will include findings and recommendations drawing upon submissions and evidence received during the review process.

This Interim Report makes 11 recommendations, drawing upon submissions received and consultation undertaken to date. Eight of the recommendations are firm and will not change. Stakeholder views are invited on the Interim Report, which will further inform the Final Report.

Terms of Reference

The Terms of Reference require that the Review will:

- Assess the effectiveness of the Code provisions in achieving the purpose of the Code to improve the commercial relationship between retailers, wholesalers and suppliers in the grocery sector; and
- Consider the need for the Code, including whether it should be remade, amended or repealed.

In evaluating the purpose and features of the Code, the Review will have particular regard to:

- The impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers;
- Whether the Code's provisions should be extended to other retailers or wholesalers operating in the food and grocery sector;
- Whether the Code should be made mandatory; and
- Whether the Code should include civil penalty provisions.

⁷ The Hon Anthony Albanese MP, the Hon Jim Chalmers MP, Senator the Hon Murray Watt, the Hon Dr Andrew Leigh MP, [Appointment of Dr Craig Emerson as Independent Reviewer of the Food and Grocery Code of Conduct](#), Media Release, 10 January 2024.

Consultation process

Dr Emerson and the Review team would like to express their appreciation to all stakeholders for taking the time to share insights and views on the future of the Code, including through meetings, roundtables, and written submissions.

Consultation paper

A [consultation paper](#) was released on 5 February 2024, inviting public submissions. Fifty-six submissions have been received to date.

Roundtable events

Dr Emerson and Senator the Hon Murray Watt, Minister for Agriculture, Fisheries and Forestry, hosted roundtable events in February 2024:

- A producer roundtable on 15 February 2024 involving 17 producer groups; and.
- A processor roundtable on 21 February 2024 involving 15 processor groups.

These discussions were chaired by Mr Adam Fennessy PSM, Secretary of the Department of Agriculture, Fisheries and Forestry.

Bilateral meetings

More than 40 bilateral meetings have been conducted to date. Dr Emerson met with all signatories to the Code, the Code Arbiters, the Independent Reviewer, many suppliers (including small and large businesses and industry representative groups), consumer, worker and business representative groups, and experts and representatives from the Treasury, the ACCC and the Department of Agriculture, Fisheries and Forestry.

Request for feedback

The purpose of this Interim Report is to seek feedback on how to make the Code more effective. To help guide submissions in response to this Report, consultation questions are set out on page 9 and in the relevant chapters of the Report.

All information, including name and address, contained in formal submissions will be published on the Australian Treasury website, unless it is clearly indicated that all or part of the submission is provided in confidence.

View Treasury's [website](#) for further information.

Closing date for submissions: **30 April 2024**

Email	GroceryCodeReview@treasury.gov.au
Mail	Grocery Code Review Secretariat Market Conduct and Digital Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Inquiries can be initially directed to GroceryCodeReview@treasury.gov.au

The Review team will conduct targeted consultations with key stakeholders between the release of this Interim Report and the Final Report.

Chapter 1: Introduction

This chapter provides background to the Code, including why it came about, its scope and application, its main provisions, related regulations and laws, and previous reviews of the Code.

How did the Code come about?

The Food and Grocery Code of Conduct is a prescribed voluntary industry code of conduct – the only prescribed voluntary industry code in Australia. The Code is prescribed under Part IVB of the Competition and Consumer Act alongside other industry codes of conduct, all of which are mandatory.

The Code was implemented in 2015 to address the imbalance in bargaining power between Australian supermarket retailers and their smaller suppliers. It was developed in response to concerns and complaints about the conduct of supermarkets towards their suppliers. The purpose of the Code was to set minimum standards for behaviour by supermarkets to their suppliers, and to provide an avenue for dispute resolution that is free of the fear of retribution. The original Code was developed by Coles, Woolworths and the Australian Food and Grocery Council (representing grocery suppliers). ALDI was the first signatory to the Code. Subsequently, Coles and Woolworths signed up, followed by Metcash.⁸

Grocery suppliers, which include food manufacturers and farmers who supply grocery products to a Code signatory, are automatically covered by the Code. For a full list of products covered by the Code, see Chapter 4.

The Code covers suppliers in direct grocery supply relationships with the supermarkets. It does not regulate the entire supply chain, including the relationship between a producer and a processor, or the relationship between a producer and a wholesaler (other than Metcash).

Main provisions of the Code

The Code sets out minimum obligations and behavioural standards for retail and wholesale signatories in relation to their conduct with their suppliers.

Guiding these minimum standards is the primary obligation on signatories to deal with suppliers lawfully and in good faith. The Code provides guidance on behaviour that reflects good faith, such as acting honestly, and not unreasonably, recklessly or with ulterior motives.⁹

⁸ ACCC, *Trade and business covered by the food and grocery code*, accessed 19 March 2024.

⁹ Part 1A, *Food and Grocery Code of Conduct*.

Beyond the overarching principle to act in good faith, the Code's provisions set specific standards for:

1. Grocery supply agreements;¹⁰
2. General conduct;
3. Compliance; and
4. Dispute resolution.

The standards for grocery supply agreements set out the requirement for agreements to be in writing and retained, guidance on matters to be covered by the agreement, and rules regarding unilateral and retrospective variations to grocery supply agreements.¹¹

Regarding general conduct, the Code sets out minimum standards guiding the practical aspects of the relationship between signatories and their suppliers. This includes rules in relation to:

- Payment arrangements;
- Delisting products;
- Funding promotions;
- Fresh produce standards and quality specifications;
- Changes to supply chain procedures;
- Product ranging, shelf space allocation and range reviews;
- Business disruption;
- Intellectual property rights and their transfer;
- Confidential information; and
- Price increases.

The Code also sets out requirements for signatories to ensure they have appropriate mechanisms in place to achieve compliance with the Code. Specifically, the Code requires signatories to train staff with respect to the Code and ensure appropriate record-keeping practices are in place.¹²

The Code is scheduled to sunset (be automatically repealed) on 1 April 2025.

Related regulations and laws

The Code operates alongside the general economy-wide protections offered by the Competition and Consumer Act and the Australian Consumer Law. In particular:

10 A grocery supply agreement is the agreement between a supplier and a supermarket for the supply of groceries to a supermarket business.

11 Part 2, [Food and Grocery Code of Conduct](#).

12 Part 6, [Food and Grocery Code of Conduct](#).

- Unconscionable conduct: the Australian Consumer Law protects consumers and businesses against unconscionable conduct, which is behaviour that is so harsh that it goes against good conscience;
- Unfair contract terms: the Australian Consumer Law protects consumers and small businesses¹³ from unfair terms in standard form contracts; and
- Competition laws: a range of provisions under the Competition and Consumer Act protect against anti-competitive conduct including misuse of market power, collusion, and anti-competitive mergers.

The Code operates alongside other prescribed industry codes, covering Horticulture, Sugar, and Dairy, such that producers and some suppliers can be covered by more than one Code of Conduct. At present, the Code does not apply to the extent that it conflicts with the Horticulture Code of Conduct¹⁴ and the Franchising Code of Conduct – both prescribed mandatory industry codes.¹⁵

In implementing any changes to the Code, consideration will need to be given to how it intersects with other industry codes, including the Horticulture Code of Conduct and the Dairy Code of Conduct.¹⁶ Education and awareness programs will also be needed to ensure market participants know about their obligations under the industry codes that apply to them.

Previous reviews of the Code

In 2018, the Code underwent a statutory review led by Professor Graeme Samuel AO, former Chair of the ACCC.¹⁷ The Government accepted 13 of Professor Samuel's 14 recommendations, the most important of which were changes to the dispute-resolution processes following a finding that the existing provisions were ineffective and underutilised by suppliers.¹⁸ These changes came into effect on 2 January 2021.

In September 2022, Treasury undertook a statutory review of the dispute-resolution provisions in Part 5 of the Code, providing its advice to the Government in September 2022.¹⁹ In January 2024, the Government released the final report of the statutory review, along with the Government's response to the statutory review.²⁰ The Government supported both recommendations of the final report, which sought to strengthen the Code Arbiters' options in mediating disputes and enhance the Independent Reviewer's role in overseeing conduct and complaint-handling practices.

13 Small businesses are defined in this Review as business entities that have fewer than 100 employees or make less than \$10 million in annual turnover.

14 *Competition and Consumer (Industry Codes – Horticulture) Regulations 2017* (Horticulture Code of Conduct).

15 Subsection 4(4), *Food and Grocery Code of Conduct*.

16 *Competition and Consumer (Industry Codes – Dairy) Regulations 2019* (Dairy Code of Conduct).

17 The Treasury, *Food and Grocery Code of Conduct Review 2018 - Final Report*, 2018.

18 The Treasury, *Government response to the Independent Review of the Food and Grocery Code of Conduct*, 2019.

19 The Treasury, *Food and Grocery Code of Conduct Review 2022–23 – Final Report*, 2023.

20 The Treasury, *Government response to the Food and Grocery Code of Conduct Review 2022–23*, 2023.

Chapter 2: The Code needs strengthening

This chapter finds that owing to a heavy and persistent imbalance in bargaining power between supermarkets and their smaller suppliers, a strong Code is needed.

It finds that the Code is not effective in meeting its stated purpose. It recommends that improvements be made to the Code to allow it to better achieve its purpose. These improvements are discussed in the remainder of the Interim Report.

In highly concentrated markets such as Australia's food and grocery industry, relationships can be exploited by those with substantial market power. Many food and grocery suppliers have no choice but to deal with Coles, Woolworths, ALDI and Metcash if they are to succeed in Australia. Further, some suppliers are limited to supplying the Australian market given the absence of export opportunities; for example, owing to the perishable nature of their products.

The Code was originally introduced to lift standards of business behaviour,²¹ and foster long-term changes to business culture to drive competitiveness, sustainability and productivity in the industry.²² These issues remain relevant considerations, as market power in Australia's food and grocery industry continues to be a problem.

Persistent imbalance in market power

Australia's food and grocery industry remains heavily concentrated. The largest 3 supermarkets, with Metcash, hold a market share of more than 80 per cent (Figure 1).

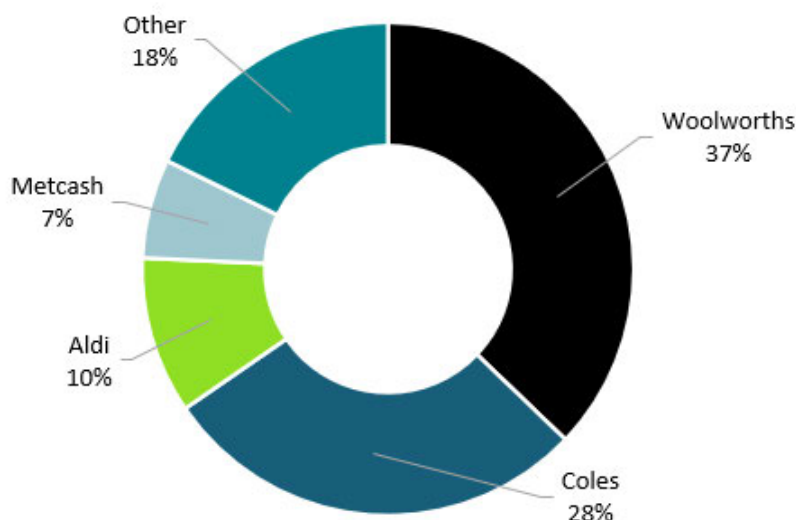
The market power disparity between suppliers and supermarkets can lead to large bargaining power imbalances. The extent of this imbalance is likely to vary depending on the relative size of suppliers, the nature of their products and the markets they are servicing. In Australia's food and grocery industry, the power imbalance is likely to be higher for smaller suppliers and for suppliers of perishable products.

There are, however, other circumstances in which suppliers could be expected to have countervailing power. Some suppliers to supermarkets are large multinational corporations. Similarly, some categories of products supplied to supermarkets come from highly concentrated industries. Yet even in these circumstances, being delisted from a major supermarket chain can have large commercial consequences given the lack of alternative avenues for selling products at scale in the Australian market.

21 ACCC (2024), *Food and Grocery Code of Conduct*, accessed 19 February 2024.

22 The Treasury, *Industry Codes of Conduct Policy Framework*, 2017.

Figure 1. Food and grocery market shares for the financial year 2022–23



Source: IBISWorld (August 2023), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 11.

In the Code’s almost decade of operation, power imbalance issues have been consistently identified in successive reviews and in stakeholder feedback.²³

In its submission to the Consultation Paper, the ACCC noted:

*The power imbalance between some suppliers and supermarkets is a form of market failure, stemming from information asymmetry and the weaker bargaining position of suppliers. There is a role for regulation to reduce the harm that can arise from this market failure.*²⁴

Stakeholder submissions confirmed that market imbalances affect suppliers differently. The National Farmers’ Federation argued that:

*The Code is failing to do its job effectively. Bargaining power imbalance and a lack of market price transparency continue to be used against farmers in their negotiations with supermarkets. The impact is most significant in perishable goods supply chains where produce must be sold within a specific period before it spoils or degrades in value.*²⁵

TasFarmers noted:

... numerous instances indicate a systemic power disparity favouring large retailers. This power asymmetry is particularly pronounced for smaller-scale suppliers and certain product

23 The Treasury, *Food and Grocery Code of Conduct Review 2018 - Final Report*, 2018, p. 6; ACCC, *Perishable Agricultural Goods Inquiry 2020*, p. 69; Food and Grocery Code Independent Reviewer, *Annual Report 2022-23*, 2023, p. 7.

24 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 1.

25 National Farmers’ Federation, Submission to the Consultation Paper, 29 February 2024, p. 6.

categories, where limited options for distribution and alternative buyers leave them vulnerable to the dictates of dominant supermarket chains.²⁶

The Premier of Queensland supported a continued role of the Code:

I have directly engaged the major supermarkets, and a number of agricultural producers and peak bodies, about this issue. It was made clear to me there are significant concerns about the ongoing viability of many producers, due to current retailer practices.

Conversations with industry suggest that imbalances in market power are heightened for producers of perishable goods. Perishables are more exposed to imbalances in market power due to limited time windows for sale, fewer alternative buyers, and often long lead times and high sunk costs. Lack of transparency in the supply chain has been cited as a key contributor to this issue.²⁷

Fruit Growers Victoria emphasised the power imbalance:

... a major power imbalance between retailers and fruit producers exists and is being abused without the likely prospect of sanction. Fruit producers are being forced to take prices for perishable food that are below the cost of production. This has long term implications for the viability of fresh food industries and Australia's capacity to be food self-reliant.

The imbalance of many sellers and too few buyers is a major driver of unethical, opportunistic behaviour from retailers. This dynamic is exacerbated by the perishable and seasonal nature of food production. Farmers are being forced into take it or leave it decisions when holding fruit that has limited shelf life.²⁸

Freshmark highlighted the vulnerability of suppliers of fresh produce:

Our members deal in products that are perishable. If an order is cancelled or rejected, produce cannot be returned to the warehouse until a new deal is done – its value diminishes every second it is sitting on a delivery dock, and a new sales channel must be urgently found. This means businesses in the fresh produce supply chain are especially vulnerable to unfair practices.²⁹

The Australian Chicken Growers' Council noted that the chicken processor market is highly concentrated with 2 processors holding 90 per cent of the market, such that there is some countervailing power, especially in relation to delisting of products. However, in practice Australian Chicken Growers' Association noted:

... this has not stopped daily thuggery and nitpicking by supermarkets towards processors who choose not to stand up for themselves in spite of their market power. As a result processors

26 TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 4.

27 Premier of Queensland, Submission to the Consultation Paper, 23 February 2024, p. 1.

28 Fruit Growers Victoria, Submission to the Consultation Paper, 24 February 2024, p. 1.

29 Freshmark, Submission to the Consultation Paper, 29 February 2024, p. 4.

*have effectively become proxies for the supermarkets, worsening the existing and well recognised power imbalance between processors and their contract growers.*³⁰

Most stakeholders have explicitly argued that a Food and Grocery Code of Conduct is still needed. Whether the Code should be made mandatory is discussed in Chapter 3 and the question of who should be subject to the Code is discussed in Chapter 4.

The Review concludes that an efficient and effective Food and Grocery Code of Conduct is needed to address persistent bargaining power imbalances between supermarkets and their smaller suppliers.

The purpose of the Code remains appropriate

The stated purpose of the Code is:

- a) 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
- b) 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
- c) 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
- d) to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.³¹

Most submissions that commented on the purpose of the Code were supportive of the stated purpose. Granite Belt Growers Association suggested that (a) be amended to remove “to help”.³² The Interim Report supports this amendment.

It was agreed in the 2 roundtables that the issue is the Code’s failure to meet its purpose, rather than the purpose itself. This is discussed in more detail below.

The Code should do more to address market power imbalances in the grocery industry

Many stakeholders suggested the Code has improved the standard of business conduct of the major supermarkets since its introduction in 2015. However, the Review has heard many examples of opportunistic behaviours persisting, such as demands for profit gap payments to boost the retailer’s profit margins, and unilateral or retrospective variations of grocery supply agreements.

30 Australian Chicken Growers’ Council, Submission to the Consultation Paper, 29 February 2024, p. 6.

31 Clause 2, [Food and Grocery Code of Conduct](#).

32 Granite Belt Growers Association, Submission to the Consultation Paper, 6 February 2024. p. 2.

The results of the annual survey of suppliers conducted by Mr Chris Leptos AO – the Code’s Independent Reviewer – suggest that conduct in the industry has improved. His 2022-23 annual report indicated that most of the suppliers that responded to the survey had not experienced any issues covered by the Code with their supermarket.³³ Further, 80 per cent of respondents indicated that their supermarket either always or mostly treats them fairly and respectfully.

However, participation rates in the annual surveys remain low. It is not clear whether this introduces any biases in the results. Moreover, the Review has uncovered examples of questionable conduct by signatories to the Code.

While conduct might have improved somewhat, most stakeholders consider the Code could do more to lift standards in the industry.

The ACCC concluded:

*We consider the policy objective of the code is not being met by the current code ... In particular, the code has not delivered trust within the supply chain, ensured transparency and certainty or significantly improved dispute resolution.*³⁴

Fresh Markets Australia argued:

*... while the Voluntary Food and Grocery Code may serve as a token gesture towards addressing supplier-retailer relationships, it fails to meaningfully rectify the power imbalances that persist in the food and grocery (fresh fruit and vegetable) sector.*³⁵

Alfred E Chave Pty Ltd, a Queensland fresh produce wholesaler, expressed concerns about a lack of transparency that has not been adequately addressed by the Code. It supported the creation of a price register to assist farmers to better understand market prices across primary industries. It also recommended that the Government commission:

*... a pilot program to improve market transparency across the fresh fruit and vegetable supply chain for a digital web-based trading platform that provides access to trusted, verifiable real-time data to all participants in the supply chain.*³⁶

A lack of transparency was also raised as an issue by the Australian Chicken Growers’ Council in relation to the poultry meat industry.³⁷ At present, consumers have little understanding of how much farmers are receiving from the prices they pay for products such as poultry meat. Transparency was also raised as a concern by TasFarmers.³⁸

33 Woolworths suppliers (65 per cent), Coles (69 per cent); Metcash (71 per cent); and ALDI (83 per cent) indicated that they had not experienced any issues with their retailer/wholesaler. See, Food and Grocery Code Independent Reviewer, *Annual Report 2022-23*, 2023, p. 14.

34 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 6.

35 Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 2.

36 Alfred E Chave Pty Ltd, Submission to the Consultation Paper, 29 February 2024, p. 11.

37 Australian Chicken Growers’ Council, Submission to the Consultation Paper, 29 February 2024, p. 6.

38 TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 10.

In its submission, eastAUSmilk, suggested pricing practices and local sourcing be addressed by the Code:

Retailers apply smaller margins to their own brands to increase sales compared to other brands. This is anti-competitive and there needs to be strong regulation to address this massive conflict of interest, always exercised by retailers in their own interests.

Dairy farmers and some processors would support inclusion in the Code of a preference of some kind being given to Australian domestic suppliers.³⁹

Overall, most stakeholders called for improvements in the Code to strengthen its effectiveness. The remainder of the report discusses how to improve the Code:

- Chapter 3 discusses whether the Code should be voluntary or mandatory;
- Chapter 4 discusses who should be subject to the Code;
- Chapter 5 considers the fear of retribution;
- Chapter 6 canvases options for dispute resolution under a mandatory Code;
- Chapter 7 considers whether obligations under the Code should be strengthened;
- Chapter 8 discusses issues arising in relation to fresh produce; and
- Chapter 9 considers higher penalties under the Code.

³⁹ eastAUSmilk, Submission to the Consultation Paper, 4 March 2024, p. 19.

Chapter 3: Why the Code should be made mandatory

This chapter finds that a voluntary Code without penalties is not effective. It firmly recommends that the Code be made mandatory.

Existing framework

As a voluntary instrument, the existing Code applies only where a supermarket elects to be bound by it, which it can do by giving written notice to the ACCC. A supermarket can, at any time, elect to withdraw its agreement to be bound by the Code by written notice to the ACCC.

The Code imposes obligations on corporations that have agreed to be bound by it and prohibits those corporations from engaging in specified conduct, subject to specific exceptions. The Code also sets out a dispute-resolution framework for suppliers and supermarkets for resolving disputes.

Some stakeholders argued that a voluntary Code is more likely to create a positive culture of compliance and collaboration between the Government and the private sector than could be achieved under a mandatory Code.⁴⁰ However, most stakeholders considered that a mandatory Code would be more effective at incentivising a culture of compliance.

The Code is enforceable by the ACCC, but with a limited range of enforcement tools that do not include penalties for breaches.⁴¹

The ACCC argues that:

It is the ACCC's longstanding view that the code cannot achieve its purposes until it is remade as a mandatory code. We consider that the voluntary nature of the code undermines its effectiveness. In circumstances where there are identified harms in a sector that require a regulatory response, as the Government has decided with the grocery supply chain, sector participants should not be able to opt in or out of that framework according to their commercial interests. Remaking the code as a mandatory code is an essential first step in strengthening the code ...

40 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 15.

41 Under the Competition and Consumer Act, the ACCC can issue public warning notices about a suspected contravention of the Code (section 51ADA); seek injunctions to compel or restrict certain conduct by a signatory (section 80); initiate court proceedings to compel a signatory to redress any loss or damage caused by the signatory's misconduct (section 51ADB); and accept court enforceable undertakings (section 87B).

*An effective code should clearly set out minimum standards of conduct to regulate behaviour. In the ACCC's view, this is necessary both to promote certainty for industry participants and ensure participants with weaker bargaining power enjoy minimum protections.*⁴²

The National Farmers' Federation strongly supported a strengthening of the Code by:

*... making it mandatory for retailers and wholesalers and introducing significant penalties for contraventions.*⁴³

Many stakeholders in their submissions to the Consultation Paper advocated that the Code be made mandatory, including Australian Dairy Farmers, Australian Chicken Growers' Council, AUSVEG and Fresh Markets Australia.⁴⁴

Professor Allan Fels AO, in a 2024 inquiry into price gouging and unfair pricing practices, supported:

*... making the grocery code of conduct mandatory. This should include both making the regulations legally enforceable by the ACCC and making membership of the code compulsory for large retailers.*⁴⁵

Making the Code mandatory was also one of the recommendations of the House of Representatives Standing Committee on Agriculture's Inquiry into food security in Australia that was published in November 2023.⁴⁶

Rod Sims, former Chair of the ACCC, has criticised the voluntary Code:

... supplier complaints inevitably end up with the supermarkets. What supplier will complain when they risk retaliation that would put their entire business at risk?

*Finally, the Code is voluntary, so the supermarkets can walk away when they wish.*⁴⁷

Similarly, the Premier of Queensland, the Hon Steven Miles MP, stated:

42 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 9.

43 National Farmers' Federation, Submission to the Consultation Paper, 29 February 2024, p. 7.

44 Submissions to the Consultation Paper from: ACCC, p. 1; Alfred E Chave Pty Ltd, p. 4; Australian Dairy Farmers, p. 2; Australian Chicken Growers' Council, p. 10; AUSVEG, p. 7; Centre for Decent Work and Industry, p. 1; eastAUSmilk, p. 3; Fruit Growers Victoria, p. 1; Freshmark, p. 5; Fresh Markets Australia, p. 3; Fruit Producers SA, p. 2; Greater Shepparton City Council, p. 2; Greenlife Industry Australia, p. 7; Maurice Blackburn Lawyers, p.2; National Farmers' Federation, p. 6; National Farmers' Federation Horticulture Council, p. 6; NSW Farmers, p. 2; Premier of Queensland, p. 1; Queensland Fruit and Vegetable Growers, p. 6; Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia, p. 1; Small Business Development Corporation, p. 4; United Workers Union, p. 4.

45 Australian Council of Trade Unions, *Inquiry into Price Gouging and Unfair Pricing Practices: Final report*, February 2024, accessed 26 February 2024.

46 House of Representatives Standing Committee on Agriculture, *Australian Food Story: Feeding the Nation and Beyond*, Inquiry into food security in Australia, November 2023.

47 Sims, Rod, Opinion piece, *Sydney Morning Herald*, 12 January 2024, accessed 3 April 2024.

As the Code Review consultation paper notes, the impetus for establishing the voluntary Code in 2015 was an imbalance of market power between supermarkets and their suppliers. This remains a key issue in the sector ...

While I expect the Code Review will make several recommendations to improve the Code ... I believe making it mandatory will help reduce the power imbalance that currently persists between producers and retailers.⁴⁸

In deciding whether to make the Code mandatory, key considerations are whether this would promote compliance and what dispute-resolution arrangements can be included in a mandatory Code. These issues are considered below.

How best to ensure compliance?

Some stakeholders noted that the voluntary Code is a ‘toothless tiger’ given that no penalties are prescribed for a breach of the Code.

Rod Sims, former Chair of the ACCC, has criticised the voluntary Code:

... there are no penalties applied if the Code is breached. Imagine if our traffic laws said the speed limit was 100km/h but if you exceed this there is no penalty. Such an approach only brings contempt for our laws.⁴⁹

The ACCC has criticised the Code as being ineffective without appropriate compliance and enforcement options:

... the weaknesses [of the] voluntary code [is] that does not provide meaningful protections to suppliers against a retailer’s or wholesaler’s misuse of its superior bargaining power and [the Code] does not provide the ACCC with meaningful compliance and enforcement tools.⁵⁰

The National Farmers’ Federation supports a strengthening of the Code by:

... making it mandatory for retailers and wholesalers and introducing significant penalties or contraventions.⁵¹

Small and Medium Enterprise Committee of the Business Law section of the Law Council said that it:

... does not consider that a voluntary Grocery Code—which does not allow for penalties where there has been a breach—can effectively address the bargaining power imbalances between supermarkets and their suppliers.⁵²

48 Premier of Queensland, Submission to the Consultation Paper, 23 February 2024, p. 1-2.

49 Sims, Rod, Opinion piece, *Sydney Morning Herald*, 12 January 2024, accessed 3 April 2024.

50 ACCC, *Submission to the 2023 Part V Review*, p. 5.

51 National Farmers’ Federation, Submission to the Consultation Paper, 29 February 2024, p. 7.

52 The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia, Submission to the Consultation Paper, 15 March 2024, p. 5.

Australian Dairy Farmers similarly submitted:

*It is clear the Grocery Code as it stands holds insufficient power and does not provide the ACCC with the authority needed to force signatories to comply with its requirements.*⁵³

In contrast, some stakeholders have pointed to improved relations between supermarkets and their suppliers as evidence of success of the voluntary Code.⁵⁴ Some have also argued that a mandatory Code would increase administrative and compliance costs and the risk of unintended consequences.⁵⁵

However, many stakeholders have argued that a mandatory code would increase supplier confidence and send a strong signal to the industry that would improve compliance and supermarket behaviour.

A mandatory Code would also invoke a broader range of enforcement options for the ACCC, which would include penalties for breaches (see Chapter 9). The prospect of enforcement action by the ACCC, coupled with higher penalties, could be expected to drive a proactive compliance culture by those businesses covered by the mandatory code.

Options for dispute resolution

The Constitution gives the exclusive power to the courts to interpret laws and to judge whether they apply in an individual case.⁵⁶ However, redress through the courts can be slow and costly. For this reason, disputes between businesses are often resolved through alternative dispute resolution processes, which can include mediation and arbitration:

- Mediation involves a structured negotiation process for settling disputes. Parties are expected to participate in good faith to try to reach resolution. To come into force, the outcome needs to be agreed between the parties.⁵⁷
- Arbitration is a process where the decision of the arbitrator is final and binding. Owing to the Constitution, parties must agree to arbitration if they wish to use it to resolve a dispute. This can be agreed in commercial contracts before a dispute arises or after a dispute has arisen. Parties to a dispute make submissions to the arbitrator, who decides the outcome.⁵⁸

While mediation can be required in a mandatory code, arbitration cannot be required without the agreement of the parties, owing to these constitutional limitations. However, both parties can agree

53 Australian Dairy Farmers, Submission to the Consultation Paper, 29 February 2024, p. 2.

54 Woolworths, Submission to the Consultation Paper, 6 March 2024, p. 1; Metcash, Submission to the Consultation Paper, 29 February 2024, p. 2.

55 Red Meat Advisory Council, Submission to the Consultation Paper, 29 February 2024, p. 2.

56 [Chapter III of the Constitution](#); Parliament of Australia, 'Infosheet 20 – The Australian system of government', accessed 3 April 2024.

57 See also Federal Court of Australia, [Mediation](#), accessed 14 March 2024.

58 See also Australian Small Business and Family Enterprise Ombudsman, '[Dairy Code](#)', *ADR Process – Arbitration*, accessed 14 March 2024.

to submit to arbitration. For example, arbitration by agreement is available in the Dairy Code and the Franchising Code.⁵⁹

At present, by signing up to the Voluntary Code, supermarkets have agreed to allow their Code Arbiters to propose a remedy to the supplier that can include compensation of up to \$5 million and/or changes to the grocery supply agreement.⁶⁰ If agreed by the supplier, the supermarket must comply with the proposed remedy.

If a mandatory Code required arbitration without the agreement of the parties, it would be open to challenge under the Constitution.⁶¹

Losing the voluntary Code's option of arbitration that is binding on the supermarkets has been put forward by some stakeholders as a weakness in moving to a mandatory Code. It has been argued that a mandatory Code would result in more litigation, which is more costly and more time consuming, which could be particularly detrimental for smaller businesses.⁶²

However, moving to a mandatory Code does not preclude dispute resolution outside of the courts, as discussed further in Chapter 6. The Interim Report notes the importance of providing a range of informal and more formal channels for dispute resolution under any Code, whether mandatory or voluntary.

Conclusion: a mandatory Code is needed

For the Code to be effective it needs to capture as much adverse conduct as possible, be subject to the credible threat of effective enforcement and penalties and not be undermined by the threat of signatories walking away from their commitments. This can be achieved only by making the Code mandatory.

This is not the first time a code would have evolved from a voluntary code to a mandatory one. The Dairy Code of Conduct is a recent example of a code that was established as a voluntary code by industry, like the Food and Grocery Code, but later made into a prescribed mandatory code.⁶³

Recommendation 1

The Food and Grocery Code of Conduct should be made mandatory.

59 Clause 46(2), [Dairy Code of Conduct](#); Clause 43A, [Franchising Code of Conduct](#).

60 Clause 36, [Food and Grocery Code](#).

61 The Treasury, [Food and Grocery Code of Conduct Review 2018 - Final Report](#), 2018.

62 Australian Fresh Produce Alliance, [Submission to the Consultation Paper](#), 4 March 2024, p. 15.

63 Department of Agriculture, Water and the Environment (2021) [Report on the first review of the Dairy Industry Code](#), December 2021, accessed 23 February 2024.

Chapter 4: To whom should the mandatory Code apply?

This chapter recommends that supermarkets with more than \$5 billion in annual revenue be subject to the Code. This would apply the Code to the existing signatories: Coles, Woolworths, ALDI and Metcash. The Interim Report recommends that all suppliers to these supermarkets be covered automatically.

What is currently covered?

The Code defines a list of product types covered under the term ‘groceries’ to include:

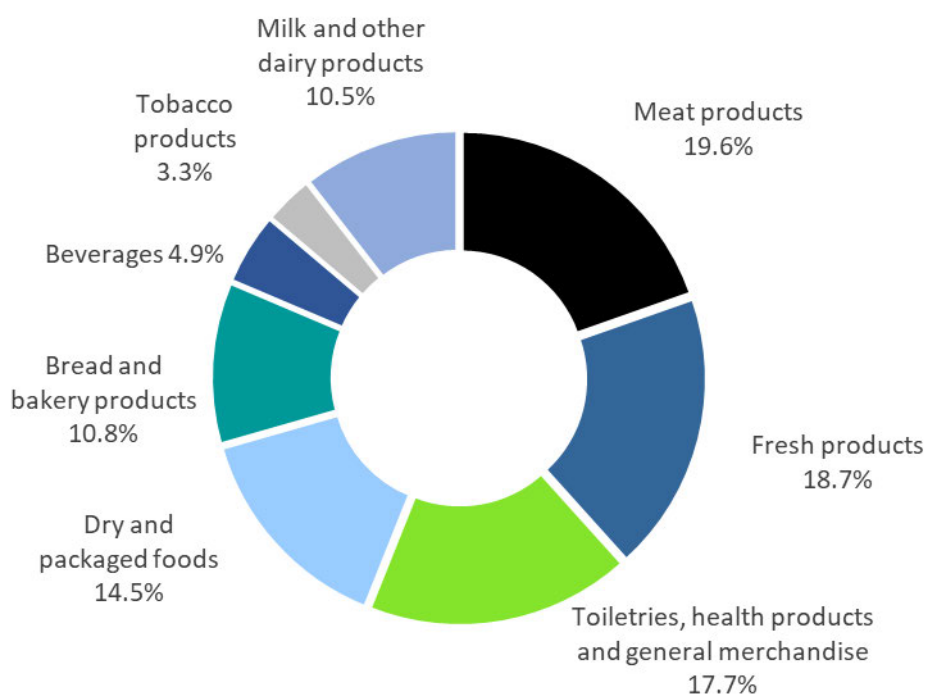
- food including fresh produce, meat and dairy items (other than dairy items sold for in-store consumption)
- pet food
- non-alcoholic drinks (other than drinks sold for in-store consumption)
- cleaning products
- toiletries, perfumes and cosmetics
- household goods, electrical appliances and kitchenware
- clothing
- “do-it-yourself” products
- pharmaceuticals
- books, newspapers, magazines and greeting cards
- CDs, DVDs, videos and audio tapes
- toys
- plants, flowers and gardening equipment
- tobacco and tobacco products.⁶⁴

The Code does not cover alcoholic beverages.

Revenue from products sold in supermarkets and grocery stores in Australia is outlined in Figure 2 below. The leading segments by value are meat products and fresh products, such as fruit and vegetables.

64 Clause 3, [Food and Grocery Code](#).

Figure 2. Food and grocery product segmentation by revenue for 2023–24



Source: IBISWorld (August 2023), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 10.

Who should be covered?

The Code currently applies to grocery retailers and wholesalers using the following definitions in clause 3 of the Code:

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.

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.⁶⁵

65 Clause 3, [Food and Grocery Code](#).

Woolworths, Coles, ALDI and Metcash have over 82 per cent of the Australian market, with the two largest supermarkets – Woolworths and Coles – having a combined market share of just over 65 per cent.⁶⁶ Estimated revenue for the largest supermarkets in Australia are outlined in Table 1.

Table 1: Top supermarket and grocery stores by estimated market share 2024

Company	Estimated 2024 revenue (\$b)
Woolworths	50.2
Coles	38.2
ALDI	13.9
Metcash	8.8
Costco	4.0

Source: IBISWorld (August 2023), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 55.

In response to the 2018 Independent Review of the Code, and following stakeholder consultation, the Government recommended that the voluntary Code specify thresholds above which supermarkets would be expected to sign up to it. In 2020, the Government added the following note to ensure large supermarkets were captured by the Code:

*Note 2: The Commonwealth has expressed the view that retailers and wholesalers that have an annual revenue of \$5 billion or more, or a market share of 5% or more, should agree to be bound by the code.*⁶⁷

If these thresholds were applied today, no additional supermarkets would be subject to the Code.

Some stakeholders suggested other thresholds should apply. For example, Woolworths suggested the Code should apply to all supermarkets with a gross annual turnover of \$1 billion or more.⁶⁸

Other stakeholders argued that the Code should apply to all supermarkets captured by the definition under the Code, not just the larger supermarkets. The Australian Chicken Growers' Association noted: "Just because you are a supplier to a 'minor' supermarket player does not mean you won't be treated unconscionably" and submitted that it would be more straightforward to apply the Code to all supermarkets.⁶⁹

Applying the Code to all participants in the market, however, would disproportionately disadvantage smaller players, since the compliance costs are likely to be fixed costs that would be harder to recover for a smaller player.

The NSW Small Business Commissioner highlighted the need to carefully consider who should be covered by the Code:

... in extending the coverage of the Code, policy consideration should be given to whether a minimum turnover threshold should be applied to exempt smaller or independent retailers to

66 IBISWorld (August 2023), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 55.

67 Section 4, *Food and Grocery Code*.

68 Woolworths, Submission to the Consultation Paper, 29 February 2024, p. 1.

69 Australian Chicken Growers' Council, Submission to the Consultation Paper, 29 February 2024, pp. 7, 10.

mitigate the risk of reversing power imbalances in favour of large or multinational grocery suppliers.⁷⁰

MGA Independent Businesses Australia submitted that it:

... would be deeply concerned if any consideration is to be given to extending the Code beyond the major players who are currently signatories to the code. Smaller retailers cannot be expected to confront and manage additional and unnecessary compliance burdens.⁷¹

A joint submission from the independent supermarket chains Ritchies, Cornetts Supermarkets and Romeo's Retail Group argued:

The Code is designed to give suppliers some protection when dealing with supermarket companies who have market power. As the consultation paper points out, the four major players hold 82 per cent of the market. Independent supermarkets do not have market power – we are simply not big enough to have that type of influence with suppliers.

Also, it would be detrimental for the Code to apply to smaller retailers as it would increase regulatory costs to the independent sector, which would only make it harder for independents to compete with the major chains. Regulatory red tape and associated costs are already a significant issue for small businesses. When you add this to the rising cost of doing business, further hurdles might not only put off new entrants to the market but may also cause existing independent retailers to exit.⁷²

Further, the Review notes that Metcash – which incurs costs in complying with the Code – services independent supermarkets including IGA and Foodworks stores. It seems duplicative to extend the application of the Code to Metcash's customers, when Metcash is covered by the Code on their behalf.

Some stakeholders warned against over-capture along the supply chain. The Australian Fresh Produce Alliance recommended:

That the definitions provided within the Code, that outline the relationships between retailers, wholesalers and suppliers be reviewed and amended to better support the purpose and intent of the Code, and not inadvertently capture growers that aggregate produce for supply.⁷³

The Interim Report considers that the policy intent has not changed, and that the Code should apply only to the larger supermarkets in Australia. This position is also supported by the ACCC:

... remaking the code as a mandatory code does not mean expanding its coverage to include all grocery retailers and wholesalers. It is important that a mandatory code does not become a barrier to entry to the supermarket sector.

70 NSW Small Business Commissioner, Submission to the Consultation Paper, 29 February 2024, p.1.

71 MGA Independent Businesses Australia, Submission to the Consultation Paper, 29 February 2024, p. 3.

72 Ritchies, Cornetts Supermarkets and Romeo's Retail Group, Submission to the Consultation Paper, 29 February 2024, p. 1.

73 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 5.

*... the ACCC considers that the code is largely intended to address issues related to major retailers and major wholesalers. As such, consideration should be given to including a turnover threshold or other clarification to ensure that smaller retailers and wholesalers are not captured.*⁷⁴

The Interim Report recommends that an annual Australian sales revenue threshold of \$5 billion (indexed for inflation) be adopted. Revenue would be in respect of carrying on business as a ‘retailer’ or ‘wholesaler’ (as defined in the voluntary Code).

Should other parts of the supply chain be covered?

Concerns were raised by some stakeholders as to whether a code of conduct should be applied further back in the supply chain, and how this might operate in practice. For example, whether the same code of conduct apply to animal producers supplying a meat processor that, in turn, supplies a supermarket. Similarly, whether farmers delivering produce to an aggregator have the same protections as farmers who conduct business directly with a supermarket.⁷⁵

The Australian Macadamia Society noted that:

*For Australian macadamia growers, and the handling and processing businesses they supply, the importance of whole of supply chain understanding and appropriate apportionment of margin is critical to ensure long term viability, continuity of supply and category growth.*⁷⁶

The Australian Chicken Growers’ Council noted that:

*... there are no fundamental issues of countervailing power between processors and supermarkets, and in fact in terms of farmer negotiation, processors are effectively acting as proxies for the supermarkets. That does not stop supermarkets “frightening” meat poultry processors, daily with increased demands (eg RSPCA accreditation, “swap” to another processor etc).*⁷⁷

eastAUSmilk did not support extending the Code to cover other relationships if that resulted in any way reducing the strength of the Dairy Industry Code.⁷⁸

The Review has heard from farmers about examples of poor conduct by aggregators and processors. However, extending the mandatory Code could result in it being unwieldy and imposing unnecessary compliance costs on an extended range of parties. It could also result in unintended consequences to the extent that these relationships are already covered by other industry codes such as the Horticulture Code and the Dairy Code.

74 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 7.

75 An ‘aggregator’ being a merchant that buys produce directly from growers or agents, and re-sells to the supermarket including those aggregators that supplement their own produce volume with volume from other growers.

76 Australian Macadamia Society, Submission to the Consultation Paper, 29 February 2024, p. 3.

77 Australian Chicken Growers’ Council, Submission to the Consultation Paper, 29 February 2024, p. 2.

78 eastAUSmilk, Submission to the Consultation Paper, 4 March 2024, p. 20.

The Review is interested in hearing whether provisions should be added to the Code to ensure that farmers who deal with aggregators or processors do not miss out on the protections provided in the Code.

Consultation question

1. Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?

Should the Code apply to retailers in other markets?

Some stakeholders requested that the Code be extended into other markets where imbalances in market power are prevalent.

Greenlife Industry Australia argued for the Code to be extended to Bunnings in relation to plants, flowers and gardening equipment (which are products captured under the Code), noting:

Bunnings is by far the biggest of the big box stores, maintaining a national greenlife market share of 70%, rising to over 80% in some regions and towns (which outstrips the combined market power of the two major supermarkets, Coles and Woolworths). In 2023, Bunnings reported a revenue increase of 4.4% to \$18.5 billion. By volume of units sold in their stores, plants are second only to tins of paint.⁷⁹

Australian Grape and Wine submitted that the Code be extended to wine retailers:

The Code should continue to address imbalances in bargaining power between major supermarkets and their suppliers. This should be extended to include wine producers who transact with similarly powerful liquor retailers and supermarket chains that sell wine.⁸⁰

Granite Belt Growers Association similarly recommended that the Code should cover “local beverage manufacturers”.⁸¹

Other stakeholders argued that new industry codes should be developed to deal with the issues occurring in specific industries, as opposed to extending the Code to other types of retailers.

The Australian Chicken Growers’ Council supported an approach which “allows the key elements of each sector to be considered separately” as has been the case for the Horticulture and Dairy Codes of Conduct and argued that there should be a code to regulate the relationship between poultry processors and poultry farmers.⁸²

79 Greenlife Industry Australia, Submission to the Consultation Paper, 29 February 2024, p. 1.

80 Australian Wine and Grape, Submission to the Consultation Paper, 29 February 2024, p. 3.

81 Granite Belt Growers Association, Submission to the Consultation Paper, 6 February 2024, p. 1.

82 Australian Chicken Growers’ Council, Submission to the Consultation Paper, 29 February 2024, p. 7.

The Australian Fresh Produce Alliance argued:

It is crucial to maintain the Hort Code as a distinct and separate regulatory instrument from the Food and Grocery Code. [The] horticulture industry presents a unique environment and challenges that warrant specialised attention and tailored regulations. The Hort Code acknowledges the specific needs and nuances of the horticulture sector, in particular with regards to the current wholesale market system.⁸³

The Review acknowledges there are market concentration issues in other retail industries in Australia, and that common issues can occur across industries, especially for perishable products.

However, the Interim Report considers that the case for extending the Code to other retail markets has not yet been made in full given that the Code has been designed to address issues specific to the supermarket industry. It follows that there could be unintended consequences from extending the Code to other retailers beyond those involved in the supermarket business.

However, as a starting point, Greenlife Industry Australia might consider approaching Bunnings to work with suppliers of nursery plants to develop proposals for a code of conduct or similar document to improve relations between Bunnings and suppliers of nursery plants. The Final Report of this review will consider this specific issue further.

Which suppliers?

Given the persistent imbalance in bargaining power arising from the market concentration in the supermarket industry, the voluntary Code, if made mandatory, would automatically cover suppliers to the supermarkets subject to the Code.

The ACCC has proposed that the Code also protect some wholesalers acting as suppliers. In its submission, the ACCC noted:

... in the horticulture industry, some growers may purchase produce from other growers to meet volume requirements. These growers would therefore be considered wholesalers under the code. There is no requirement for a written grocery supply agreement to exist for this relationship.

In this situation, the wholesaler (acting as a supplier) is likely to experience the same bargaining power imbalances but does not have the protections afforded by a written grocery supply agreement. Further, if elements of the agreement are not set out in writing because there is no requirement to have a written agreement, it will be more difficult for the wholesaler to be able to rely on the UCT [unfair contract terms] protections because the lack of a written agreement will make it harder to prove there is a standard form contract, and the terms of that contract.⁸⁴

83 Australian Fresh Produce Australia, Submission to the Consultation Paper, 4 March 2024, p. 22.

84 ACCC, Submission to the Consultation Paper, February 2024, p. 10.

The ACCC further suggested that:

*... retailers should be required to enter into grocery supply agreements when dealing with a wholesaler acting as a supplier. This will ensure that a key part of the grocery supply chain has access to the same protections available to other suppliers under the code.*⁸⁵

The Review is considering the ACCC's suggestion and seeks feedback on how the Code could be framed so that it protects those wholesalers that experience a bargaining power imbalance with a retailer.

Which products?

The 2018 Independent Review of the Code recommended that the coverage of products be unchanged, with the ongoing exclusion of alcoholic drinks, based, among other things, on the high level of product exports, particularly for wine. That said, market concentration in the liquor retail industry is high, with the 4 largest retailers – Endeavour Group, Coles, Metcash and ALDI – holding a combined market share of almost 70 per cent, with Endeavour and Coles alone having 55 per cent market share.⁸⁶

The ACCC's 2019 Winegrape Market Study noted that winemakers sell into highly concentrated domestic retail markets.⁸⁷ In 2021, the ACCC conducted a follow-up review to the Winegrape Market Study which noted again that the retail wine industry was highly concentrated.⁸⁸

The Review acknowledges there are questions about whether the wine industry should be subject to regulation beyond the voluntary industry-led code of practice that currently applies.⁸⁹ One issue that has been raised is the significance of private label products in the industry. As Australian Grape & Wine noted:

*Consumers are unable to easily identify private label or buyer own branded products. These products are thought to hold a significant and growing share of the domestic wine market and often have a look and feel reminiscent of those made by boutique wine businesses.*⁹⁰

The Review considers that wine does not readily fit into a Code that is designed to cover the supply of 'groceries', being products that are ordinarily found in supermarkets. Many suppliers of grocery products are particularly vulnerable to the supermarkets' market power because these suppliers do not have other avenues to sell their products at scale. In contrast, wine is sold in liquor stores across Australia, and in some states, wine is not available in supermarkets. Furthermore, around 60 per cent of Australian wine is exported.⁹¹

85 ACCC, Submission to the Consultation Paper, February 2024, p. 10.

86 IBISWorld, *Industry Report G4123 Liquor Retailing in Australia*, 2023, p. 10.

87 ACCC, *Wine grape market study Final Report*, ACCC, 2019, p. 121.

88 ACCC, *Wine grapes market study Follow-up review*, ACCC, 2021, pp. 7, 10.

89 *Code of Conduct for Australian Winegrape Purchases*, 23 September 2021.

90 Australian Grape & Wine, Submission to the Consultation Paper, 29 February 2024, p. 3.

91 Wine Australia, *Market insights – Australia*, accessed 19 March 2024.

For all these reasons, the Review considers it is not clear that there is a compelling case for adding wine to the products protected under the Code.

There are similar issues with other alcoholic beverages. Metcash noted the following differences between the liquor and grocery industries:

- *The beer market is predominantly supplied by two large multinational firms with significant countervailing market power.*
- *Retailers are not the primary means for suppliers of alcoholic products to reach the domestic consumption market, with wholesalers/buying groups and the on-premise market providing significant alternative routes to market.*
- *The export market provides another alternative avenue for suppliers.⁹²*

The Review considers that the extension of the Code to wine and other alcoholic beverages would require closer analysis to understand the market dynamics in the industry, and to understand whether market power issues in these industries are of the type best addressed through a mandatory Food and Grocery Code of Conduct, or another policy instrument. An important issue associated with extending the Code to these products is that it would raise questions about which other retailers that sell wine and other alcoholic beverages should also be subject to the Code.

Recommendation 2

All supermarkets that meet an annual revenue threshold of \$5 billion (indexed for inflation) should be subject to the mandatory Code. Revenue should be in respect of carrying on business as a 'retailer' or 'wholesaler' (as defined in the voluntary Code). All suppliers should be automatically covered.

Extending good faith obligations to suppliers?

Some supermarkets recommended extending the good faith obligation to suppliers, noting big variations in the size and bargaining power of suppliers.

Woolworths suggested:

We support a mandatory Code on the basis that ... the good faith obligation applies to all – retailers/wholesalers and suppliers alike ...

It is our view that the obligation to deal in good faith should have reciprocal application, particularly in relation to large suppliers, should the Code become mandatory. At the very least, whether the supplier acted in good faith should be relevant to the assessment of whether the Code has been breached and whether a penalty should be imposed.⁹³

92 Metcash, Submission to the Consultation Paper, 29 February 2024, p. 5.

93 Woolworths, Submission to the Consultation Paper, 29 February 2024, p. 11.

Similarly, Metcash submitted:

... the Code is one-way with all obligations imposed on the retailer/wholesaler with no reciprocal obligations on or allowances for actions of the supplier. If the Code is made mandatory, there should be some reciprocal obligations for the suppliers who benefit from the Code. For example, suppliers should also be required to act in good faith (which is the cornerstone principle setting expectations regarding the foundation on which the relationship be based).⁹⁴

The Review is considering whether to extend good faith obligations to suppliers under the Code, noting it would bring the Code into alignment with other Industry Codes.⁹⁵ The Review seeks stakeholder views on this.

Consultation question

2. Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.

⁹⁴ Metcash, Submission to the Consultation Paper, 29 February 2024, p. 4.

⁹⁵ Clause 8, [Horticulture Code of Conduct](#); clause 11, [Dairy Code of Conduct](#); and clause 6, [Franchising Code of Conduct](#).

Chapter 5: Fear of retribution

Many submissions to the consultation paper raised smaller suppliers' fear of retribution as a major obstacle to the Code's effectiveness.

This chapter finds that many suppliers, especially smaller suppliers, fear retribution from supermarkets if they raise complaints. This impedes those suppliers from taking steps to resolve issues, whether formally or informally, hindering the effectiveness of the Code.

The chapter recommends that the Code include additional protections against retribution. Fear of retribution is also an important consideration in the design of the dispute-resolution arrangements, which are discussed in Chapter 6.

Fear of retribution is a major obstacle to Code effectiveness

During the Review's consultation process, many stakeholders highlighted a strong fear of retribution from supermarkets if they reasonably reject a request by a supermarket's buying team, or make a complaint against it.⁹⁶ This retaliatory action could take many subtle forms, such as being offered less-advantageous trading terms, reduced volume orders, poorer shelf location, limits on distribution across stores and having products delisted altogether (see Box 2). These concerns were more prevalent among small and medium-sized suppliers.

Box 2: Potential forms of retribution against suppliers

- Delisting of a supplier's products.
- Requiring suppliers to make excessive contributions towards promotional or marketing costs.
- Rejecting fresh produce at late notice for non-commercially genuine reasons.
- Assigning inferior shelf space – products will no longer be at eye level or within easy reach.
- Causing long delays to restock suppliers' products on shelving once sold out.
- Ceasing agreements with suppliers for the supply of the supermarket's private label products.
- Varying or significantly reducing the volume of stock ordered.
- Cancelling grocery supply agreements altogether.

⁹⁶ This was mentioned in submissions to the Consultation Paper from the ACCC, p. 1; Australia Chicken Grower's Council, p. 9; Australian Council of Trade Unions, p. 1; Australian Grape and Wine, p. 5; AUSVEG, p.4; Centre for Decent Work and Industry, p. 1; eastAUSmilk, p. 15; Freshmark, p. 7; Fresh Markets Australia, p. 6 ; Fruit Growers Victoria, p. 1; Fruit Producers SA, p. 6; Granite Belt Growers Association, p. 1; Greater Shepparton City Council, p. 2; Maurice Blackburn, p. 1; National Famers' Federation, p. 6; National Famers' Federation Horticulture Council, p. 6; NSW Farmers, p. 5; Queensland Fruit & Veg Growers, p. 9; Seafood Industry Australia, p. 6; Small and Medium Enterprise Committee of the Business Law Section for the Law Council of Australia, p. 9; TasFarmers, p. 8.

The financial survival of smaller businesses is typically dependent on maintaining contracts with the major supermarkets and there is a real fear that raising complaints could jeopardise their ability to secure future contracts. For medium-sized business, the scale of their operations often dictates the need to reach their consumer base on a national level, which leaves few options apart from the major retailers with their networks of stores across the country.

The National Famers' Federation reported concerns raised by members about:

... commercial retribution against suppliers, and threats (both actual and implied) of commercial retribution against suppliers.⁹⁷

Seafood Industry Australia made similar representations.⁹⁸

For suppliers of fresh produce, the additional features of perishability and long lead times in production can create a heightened degree of dependency on the contracts they have with the major supermarkets. As identified in the ACCC's Perishable Agricultural Goods Inquiry in 2020, a supplier's bargaining power is inherently reduced where goods have a very limited window of time for harvest and delivery.⁹⁹ This can be true even for larger suppliers of fresh produce if they have limited ability to offload produce at a profit-making price where supermarkets reduce their order unexpectedly or do not accept produce for some other reason.

Granite Belt Growers Association noted that horticulture is especially susceptible to retribution:

... based upon the highly perishable nature of fresh produce, there is still widespread concern that fear and/or retribution will always be a limiting factor when it comes to appropriate enforcement.¹⁰⁰

Even in cases where suppliers are not primarily concerned about retaliation from making a complaint, there remains a general reluctance to pursue their rights under the Code as they fear putting buyers offside and potentially damaging their long-term business relationships.

Fresh Markets Australia submitted:

The fear of retribution is a palpable reality for suppliers entangled with major supermarket chain and needs to be called out. This fear stems from the stark power imbalance favouring supermarkets, which wield significant influence over supplier livelihoods. Suppliers risk severe repercussions, including slashed orders, altered payment terms, or agreement termination/no future orders, should they dare to challenge unfair treatment or advocate for their rights. This apprehension is further heightened by the limited avenues for suppliers to distribute their products independently within the tightly controlled supermarket landscape. Urgent regulatory action is imperative to shield suppliers from such retaliatory measures, securing a marketplace where equity and transparency reign supreme in fresh produce dealings.¹⁰¹

97 National Famers' Federation, Submission to the Consultation Paper, 29 February 2024, p. 6.

98 Seafood Industry Australia, Submission to the Consultation Paper, p. 6.

99 NSW Farmers, Submission to the Consultation Paper, 29 February 2024, p. 5.

100 Granite Belt Growers Association, Submission to the Consultation Paper, 6 February 2024, p. 1.

101 Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 6.

Some suppliers stated they felt compelled to accept the decisions or actions of a buyer and considered that the risk of adverse outcomes from raising a dispute would outweigh any potential benefits that could result from making a complaint against a buyer under the Code.

As noted by TasFarmers:

Suppliers, particularly smaller entities, often find themselves in a disadvantaged position when negotiating terms with dominant supermarket chains, facing pressures that include price squeezes, unilateral changes to agreements, and unfair contract terms. Despite the existence of dispute-resolution mechanisms within the Code framework, suppliers may still hesitate to challenge the status quo for fear of retribution, thereby undermining the intended purpose of the Code in levelling the playing field.¹⁰²

This often leads to suppliers being hesitant to raise any complaints, whether directly with the supermarket or through alternative channels such as the relevant Code Arbiter or the Independent Reviewer.

The ACCC submitted:

When we engage directly with suppliers and their representatives, many tell us they fear retaliation if they raise a dispute with code arbiters or the ACCC. We expect that the low level of disputes raised with arbiters and complaints received by the ACCC does not necessarily indicate that the code is adequately protecting suppliers.¹⁰³

In addition, the ACCC reported receiving very few complaints directly, and received an average of 12-13 contacts annually regarding the Code.¹⁰⁴

As stated in the 2022-23 Annual Report of the Independent Reviewer:

I expect that this [fear of retribution or adverse consequences] is experienced by suppliers to all wholesalers/retailers – this is particularly reflected in the results from this year’s survey of suppliers to Code Signatories.¹⁰⁵

Some stakeholders have also told the Review that they do not utilise the Code Arbiter service for reasons relating to the power imbalance, including lack of trust and fear of retribution.

Addressing the fear of retribution

The Review concludes that more needs to be done to address the fear of retribution within the Code. Under the voluntary Code, refraining from retaliatory conduct is included as a part of the obligation to act in good faith.¹⁰⁶ However, there are no penalties under the voluntary Code for failing to act in good faith.

102 TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 4.

103 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 3.

104 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 14.

105 Food and Grocery Code Independent Reviewer, *Annual Report 2022-23*, 2023, p. 7.

106 Subclause 6B(3)(d), [Food and Grocery Code](#).

The Review is considering the following options to strengthen the prohibition against retributory conduct:

- Bringing protection against retribution into the purpose of the Code;
- Adding a standalone prohibition against retributory conduct¹⁰⁷ and identifying a non-exhaustive list of factors that could be taken into account in determining whether a supermarket has acted in a way that constitutes retribution against the supplier; and
- Consideration of a higher penalty for a breach of this prohibition (see Chapter 8 for a discussion of penalties).

Nevertheless, a supermarket should be able to undertake actions for genuine commercial reasons without being seen to be undertaking retributory conduct. For example, if a product is not selling well, the supermarket should not be prohibited from reducing quantities purchased in future orders or relocating products onto less popular shelf space.

Ensuring buyer teams do not retaliate

Some stakeholders argued that buying teams and category managers of some supermarkets operate in a highly commercial environment where they are heavily incentivised to reduce costs and increase margins. Key performance indicators or bonus structures that focus heavily on maximising margins and profits ultimately incentivise buyers and category managers to squeeze their suppliers as hard as possible.

Suppliers might have little choice but to comply with the buyers' demands to the point where they are unable to earn sufficient returns to enable them to invest in innovation or investments to improve efficiency. As the supplier base shrinks over time, consumers end up losing variety and value for money owing to this supermarket buying team behaviour.

For example, the National Farmers' Federation Horticulture Council suggested:

While the regulatory environment in which supermarkets and their teams operate ... can definitely inform and shape these cultures, there are other perhaps more important factors influencing culture, being the modelling of behaviour by persons in leadership positions, and the values and outcomes that are recognised and rewarded.¹⁰⁸

It is recommended that the Code require the supermarkets to ensure that any incentive schemes or payments that apply to their buying teams and category managers are consistent with the purpose of the Code.

It is further recommended that to ensure buying teams are not engaging in retributive conduct, the supermarkets be required to put in place systems for senior managers to monitor the commercial decisions of their buying teams and category managers in respect of a supplier who has pursued a complaint. The Review understands that at least some supermarkets already have systems such as

¹⁰⁷ See, for example, Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 9.

¹⁰⁸ National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 15.

these in place. For example, in June 2023, Woolworths launched its Trade Partner Integrity Policy under which its:

Supermarkets Managing Director has personally committed to monitor/review the status of our commercial relationships with any supplier (referred to as a “Trade Partner”) after it has raised a complaint relating to the Code, at 6 and 12 months post the complaint being raised directly with us or, if approval has been given by the supplier, shared by our Code Arbiter.¹⁰⁹

The Review welcomes stakeholder views on the best ways to prevent retributive conduct.

Recommendation 3

The Code should place greater emphasis on addressing the fear of retribution. This can be achieved by including protection against retribution in the purpose of the Code and by prohibiting any conduct that constitutes retribution against a supplier.

Recommendation 4

As part of their obligation to act in good faith, supermarkets covered by the mandatory Code should ensure that any incentive schemes and payments that apply to their buying teams and category managers are consistent with the purpose of the Code.

Recommendation 5

To guard against any possible retribution, supermarkets covered by the mandatory Code should have systems in place for senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.

A new mechanism for making complaints anonymously

The Review is considering mechanisms for raising issues anonymously as a further way of countering the fear of retribution. One option is to provide a whistleblower process that would allow for completely anonymous complaints, whether from suppliers or staff of businesses governed by the Code, who can also play an important role in identifying breaches of the Code.

TasFarmers recommended that the Code:

Introduce robust protections for suppliers who raise concerns or report violations of the Code, including safeguards against retaliation or victimisation. This could involve establishing confidential reporting mechanisms, implementing anti-retaliation provisions, and providing legal recourse for suppliers who experience adverse consequences as a result of whistleblowing.¹¹⁰

¹⁰⁹ Woolworths, Submission to the Consultation Paper, 6 March 2024, p. 13.

¹¹⁰ TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 8.

Maurice Blackburn Lawyers pointed to existing protections in legislation for whistleblowers and argued for further protections to encourage whistleblowers to come forward:

We encourage the Review to:

- 1. recognise explicitly the enforcement role of employees who report suspected breaches by signatories*
- 2. consider the need for the Code to include provisions specifically dealing with protections for employee whistleblowers*
- 3. consider the need for broader legislative amendments to prevent alleged wrongdoers from suing whistleblowers or lawyers acting for victims of misconduct in circumstances where the whistleblower has provided incriminating confidential*
- 4. information to lawyers in litigation against the alleged wrongdoer examine the feasibility of a whistleblower reward scheme for employees who make reports that lead to successful enforcement action.*¹¹¹

The Review notes the New Zealand Grocery Commissioner has recently added this type of complaints procedure to its enforcement tools using a confidential channel with appropriate data encryption and clear instructions on how to remain anonymous in providing information.¹¹² The ACCC and New Zealand's Commerce Commission have similar processes for receiving complaints and information in relation to possible cartel conduct.¹¹³

The Review considers that implementing a similar process under the Code could assist in addressing fears of retribution for those wishing to bring a complaint confidentially, and potentially, anonymously. Complaints received through this confidential process could be provided directly to the ACCC for triaging and decision on further investigation, particularly where there are multiple complaints suggesting a systemic issue with a particular supermarket.

Recommendation 6

A complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC.

111 Maurice Blackburn, Submission to the Consultation Paper, 1 March 2024, p.2-3.

112 New Zealand Commerce Commission, *"Whistleblowing" could help focus Grocery Commissioner's work*, 8 February 2024, accessed 14 March 2024.

113 ACCC, *Cartels*, accessed 15 March 2024; New Zealand Commerce Commission, *Reporting cartel conduct*, February 2024, accessed 15 March 2024.

Chapter 6: Dispute resolution under a mandatory Code

In moving to a mandatory Code, the Interim Report recommends a best-of-both-worlds approach to dispute resolution that:

- Replicates options for independent mediation and arbitration that are used in other industry codes, such as the Dairy and Franchising Codes of Conduct; and
- Incorporates the informal and confidential complaint-handling and quick dispute-resolution provisions of the voluntary Code.

Code Mediators, who would replace Code Arbiters, would be engaged by the supermarkets and be available to assist with dispute resolution. An advantage of these Code Mediators is that they would be very familiar with the supermarket that engaged them, including buyers, category managers and senior staff.

If a supplier wanted a fully independent mediator, however, this would be available.

Where mediation does not settle a dispute, both parties could agree to independent arbitration.

Arbitration cannot be mandated, owing to constitutional limitations.¹¹⁴ Hence, the Review encourages Coles, Woolworths, ALDI and Metcash to agree to pay compensation up to \$5 million as and when recommended by their Code Mediator and accepted by suppliers, or as decided by an independent arbitrator.

A Code Supervisor would replace the Independent Reviewer, picking up its functions and providing information to suppliers and receiving informal or confidential complaints from them.

Dispute-resolution arrangements under the voluntary Code

The voluntary Code allows a supplier to seek either mediation or arbitration¹¹⁵ of a dispute relating to a matter covered by the Code. If requested by a supplier, the supermarket must take part in the mediation or arbitration in good faith.

The Code also has unique arrangements whereby each supermarket appoints and pays for a Code Arbiter whose role is to try to resolve complaints raised by a supplier. Under these arrangements, a supplier can request an investigation into an issue or complaint by the relevant Code Arbiter. The Code Arbiter can propose a remedy including compensation of up to \$5 million and/or contract

¹¹⁴ An explanation of the constitutional limitations is outlined in Chapter 3, pp. 25-26.

¹¹⁵ More information on the processes of mediation and arbitration can be found on pp. 25-26.

variations. These arrangements have been agreed by the Code signatories in voluntarily signing up to the Code.

Where a supplier has concerns about the internal dispute-handling process conducted by the Code Arbiter, the supplier can seek a process review by the Independent Reviewer. The Independent Reviewer is appointed by the relevant Minister and paid by the Government.¹¹⁶

Following an investigation, the Independent Reviewer can make recommendations to the Code Arbiter to reconsider the original complaint. The Code Arbiter, after receiving recommendations from the Independent Reviewer, can revise the proposed remedy but is not obliged to do so.

Stakeholder views on dispute resolution

Many stakeholders commented on dispute resolution under the Code. Some raised concerns about whether Code Arbiters are truly independent. Others emphasised the importance of retaining informal, confidential, and low-cost processes for resolving disputes.

The National Farmers' Federation suggested that the Dairy Code of Conduct provides a useful dispute-resolution model:

The Dairy Code of Conduct provides an example of an appropriate avenue for dispute resolution between farmers and processors. The Dairy Code of Conduct provides clear guidance and framework for dispute resolution options and provides better information for farmers to decide how to address issues in their relationship with their suppliers.¹¹⁷

AUSVEG supported a tiered approach to dispute resolution:

AUSVEG would like to see a stepped approach to dispute resolution. Firstly, there should be an internal process with the retailer through a complaint mechanism and mediation process. If this fails, or the supplier does not feel safe (through fear of commercial retribution) then an independent arbitration process should occur, and/or a pathway to report to the ACCC.¹¹⁸

Similarly, TasFarmers recommended:

... a tiered dispute-resolution framework that provides suppliers with multiple avenues for addressing grievances, ranging from informal mediation to formal arbitration or adjudication. This approach allows parties to choose the most appropriate and effective mechanism based on the nature and severity of the dispute, thereby promoting flexibility and accessibility while also ensuring that suppliers' concerns of retribution are adequately addressed.¹¹⁹

116 Clause 27, [Food and Grocery Code of Conduct](#). The Independent Reviewer, as a part-time public office holder, is remunerated in accordance with the rates determined by the Remuneration Tribunal.

117 National Farmers' Federation, Submission to the Consultation Paper, 29 February 2024, p. 19.

118 AUSVEG, Submission to the Consultation Paper, 1 March 2024, p. 16.

119 TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 8.

Seafood Industry Australia highlighted the importance of independent dispute resolution:

*The Code must provide a genuinely independent dispute resolution, so that suppliers are not deterred from using it because of concerns over confidentiality, bias, or commercial retaliation by retailers or wholesalers.*¹²⁰

In its submission, ALDI indicated it:

*... supports the existing informal and formal dispute-resolution process that enables an appropriate escalation pathway starting with fast tracking informal complaints, followed by arbitration for formal complaints and litigation as a final option.*¹²¹

The Greater Shepparton City Council supported the ACCC's recommendations for a mandatory Code with genuinely independent dispute resolution.¹²² The National Farmers' Federation Horticulture Council similarly supported independent dispute-resolution options:

*The Council recommends a more trusted, accessible and entirely independent mechanism be put in place to resolve issues between supermarkets and their suppliers.*¹²³

The Australian Small Business and Family Enterprise Ombudsman submitted:

... a shift to a mandatory code could be beneficial, provided that it would be accompanied by:

- : securing a pre-commitment by major supermarkets to arbitration*
- : establishing more robust dispute-resolution processes and an independent arbiter, to give suppliers the confidence to raise matters without the fear of losing future business*
- : preserving the ability of the Code Arbiter to provide an affordable, fast and fair remedy to small business complainants.*¹²⁴

Dispute resolution under a mandatory Code

In making the Code mandatory, the Review recommends that the dispute-resolution provisions of the Dairy Code and the Franchising Code be replicated in the mandatory Code, with a similar dispute-resolution option as available under the voluntary Code also incorporated.

120 Seafood Industry Australia, Submission to the Consultation Paper, 29 February 2024, p. 6.

121 ALDI, Submission to the Consultation Paper, 29 February 2024.

122 Greater Shepparton City Council, Submission to the Consultation Paper, 29 February 2024.

123 National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 6.

124 The Australian Small Business and Family Enterprise Ombudsman, Submission to the Consultation Paper, 15 March 2024, p. 2.

Dispute-resolution provisions from other industry codes

Most mandatory industry codes of conduct include dispute-resolution processes involving independent mediation and an ability to agree to independent arbitration.¹²⁵ Arbitration cannot be imposed on supermarkets owing to constitutional limitations.¹²⁶ However, supermarkets can agree voluntarily to arbitration to resolve disputes, as is provided for in other mandatory codes such as the Dairy Code and the Franchising Code.¹²⁷

The Review recommends that these options be replicated in the Food and Grocery Code, such that:

- **Independent mediation** would be available to suppliers.
 - If requested by the supplier, independent mediation would be mandatory for the supermarket.
 - Parties would share the costs of mediation equally, unless otherwise agreed. To give an example of costs, mediation under the Franchising Code of Conduct costs around \$4,000 (\$2,000 per party), although costs can vary depending on the complexity of the issue.¹²⁸
- **Independent arbitration** would be available to resolve disputes.
 - This option would be subject to agreement by both parties if mediation did not settle the dispute.
 - Any arbitration should be conducted in accordance with the rules of procedural fairness, to ensure the parties are fairly heard, and that the arbitrator is free from bias.¹²⁹

A list of independent mediators and arbitrators with relevant dispute-resolution expertise and grocery experience would be maintained by the Code Supervisor, who would replace the Independent Reviewer. Where parties were unable to agree on a mediator or arbitrator, the Code Supervisor could be tasked with appointing one.

Additional provisions from the voluntary Code

The Interim Report considers that much of *Part 5 – Dispute Resolution* in the voluntary Code can also be incorporated into the recommended mandatory Code. The aim is to retain the ability for quick, low-cost dispute-resolution pathways for suppliers should they so choose. Some changes are needed relating to arbitration since the Code will be made mandatory and arbitration cannot be mandated for the reasons set out above.

The Interim Report recommends that **Code Mediators** replace Code Arbiters as the first contact for suppliers if issues cannot be resolved directly with buying teams. Code Mediators would:

125 See Chapter 3, pp. 25-26 for a more fulsome discussion of mediation and arbitration.

126 An explanation of the constitutional limitations is outlined in Chapter 3, pp. 25-26.

127 Part 2, Division 2, Subdivision F, [Dairy Code of Conduct](#); and Part 4, [Franchising Code of Conduct](#).

128 Australian Small Business and Family Enterprise Ombudsman, [Franchising](#), accessed 9 March 2024.

129 For example, the Code could refer to the [Resolution Institute Arbitration Rules 2023](#), accessed 15 March 2024.

- Investigate confidential and informal complaints from suppliers, and mediate formal disputes;
- Be engaged and paid for by the supermarkets covered by the mandatory Code, such that their services would be provided at no cost to suppliers;¹³⁰
- Have access to records and the buying team, and act independently of the supermarket;¹³¹ and
- Be experienced and qualified alternative dispute-resolution practitioners and have a good understanding of Code obligations and supermarket operations.

The Review recognises that, owing to constitutional limitations,¹³² a mandatory Code cannot compel the supermarkets to resolve disputes through arbitration. However, the Interim Report strongly encourages Coles, Woolworths, ALDI and Metcash¹³³ to agree to pay compensation of up to \$5 million and make changes to their contracts to resolve a dispute as and when:

- Recommended by their Code Mediator and accepted by the supplier; and
- Determined by an independent arbitrator.¹³⁴

Under a mandatory Code, this agreement could be given effect by including these dispute-resolution mechanisms in grocery supply agreements.

A **Code Supervisor** would take on the functions of the existing Independent Reviewer. The Code Supervisor would:

- Provide advice to suppliers about obligations under the Code and options for dispute resolution;
- Conduct a review of a Code Mediator's dispute-resolution processes if requested by a supplier;
- Be able to raise issues with supermarkets, Code Mediators or the ACCC, where confidential complaints indicate systemic breaches of the Code; and
- Appoint an independent mediator or arbitrator to help resolve a dispute, where requested by a supplier.

130 Consistent with clause 31(1) and 31(3), [Food and Grocery Code of Conduct](#).

131 Consistent with clause 31(4) and 31(5), [Food and Grocery Code of Conduct](#).

132 An explanation of the constitutional limitations is outlined in Chapter 3, pp. 25-26.

133 As well as any supermarkets covered by the Code in the future.

134 This would not prevent parties agreeing to independent arbitration to resolve matters involving compensation above \$5 million.

Recommendation 7

The mandatory Code should include informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:

- Adopting the dispute-resolution provisions of other industry codes, which provide for independent mediation and arbitration;
- Allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by the supplier, and recommend remedies that include compensation for breaches and changes to grocery supply contracts;
- Allowing suppliers to go to the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of Code Mediator's processes; or to arrange independent, professional mediation or arbitration.

Supermarkets are encouraged to commit to pay compensation of up to \$5 million to resolve disputes, as recommended by the Code Mediator and agreed by the supplier, or as an outcome of independent arbitration.

Annual reporting on disputes

The Code Supervisor would continue to report publicly on compliance with the Code, anonymised supplier views of supermarkets covered by the Code, and disputes in respect of the Code. These reports would help shine a light on conduct under the Code and on the Code's effectiveness. Supplier assessments of purchaser performance would continue to be provided confidentially, with no visibility to the supermarkets. In addition, these reports should include details of the effectiveness of informal dispute-resolution arrangements, including de-identified data on the number of informal complaints and how such complaints were resolved.

Recommendation 8

A Code Supervisor (previously the Code Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys.

Improved guidance material

A lack of knowledge of the Code's provisions has been raised as an obstacle to its effectiveness. For example, TasFarmers recommended initiatives to promote supplier education and support.¹³⁵

¹³⁵ TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 4.

To ensure the new dispute-resolution arrangements are used effectively, it is recommended that the Code Supervisor provide guidance material including:

- Guidance on accessing the dispute-resolution process, and options for complaints (including confidential complaints); and
- Explicit examples of what conduct might be considered breaches of the Code, including actions that would be considered to be retributive conduct.

The Code Supervisor should ensure that education and information materials are provided in a manner that is accessible to diverse suppliers. The independent review of the Franchising Code of Conduct noted the importance of providing information that is accessible to First Nations peoples, culturally and linguistically diverse groups, and those living with a disability.¹³⁶

Consultation questions

3. Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.
4. Are there other alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

¹³⁶ The Treasury, [Independent Review of the Franchising Code of Conduct Final Report](#), 8 February 2024, p. 102.

Chapter 7: Strengthening obligations under the Code

Numerous stakeholders raised concerns about the breadth of provisions that allow supermarkets to contract out of their obligations. This chapter recommends that exceptions from specific obligations be removed or narrowed. It invites further stakeholder views on these issues. It also invites views on whether any other obligations should be strengthened.

Removing broad exceptions

The voluntary Code prohibits specified conduct in commercial dealings between a supermarket and its suppliers. However, these provisions are subject to exceptions, often related to whether the exception is set out in the grocery supply agreement between the parties and whether it is reasonable in the circumstances.

These exceptions can weaken protections for suppliers, especially the smaller suppliers who lack the market power to influence the content of grocery supply contracts.¹³⁷ As noted by the ACCC:

... The operation of these clauses effectively places the onus on the supplier to raise concerns that the requirement is unreasonable, in circumstances where there is a known significant imbalance of power and where suppliers continue to indicate that fear of damaging a commercial relationship and fear of retaliation are impediments to raising issues with the signatories.¹³⁸

The Review has heard that these provisions effectively allow supermarkets to engage in conduct that the Code ostensibly aims to prohibit.¹³⁹ The National Farmers' Federation argued:

... the ability of retailers or wholesalers to contract out of important protections in the Food and Grocery Code should be removed. The Code is intended to address the fact that retailers and wholesalers hold the bargaining power in negotiations with suppliers. Allowing them to contract out of Code obligations fatally undermines this purpose.¹⁴⁰

137 National Farmers' Federation, Submission to the Consultation Paper, p. 7; Seafood Industry Australia, Submission to the Consultation Paper, p. 6; AUSVEG, Submission to the Consultation Paper, p. 10.

138 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 8.

139 Small Business Development Corporation, Submission to the Consultation Paper, p. 3.

140 National Farmers' Federation, Submission to the Consultation Paper, p. 7.

Fruit Producers SA commented on the contracting out of obligations:

... the Code allows for many of the elements to avoid application if included “under the relevant grocery supply agreement”, subject to a reasonableness test available only through Dispute Resolution. This allows the power imbalance to be used at the time of negotiation of supply agreements.¹⁴¹

The ACCC warned:

... the ability for signatories to ‘opt out’ of certain provisions is a fundamental weakness of the code that, if retained, will continue to undermine the code’s ability to achieve its first stated purpose; that is, to help regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain ...

By comparison, the Dairy Code and Horticulture Code have comprehensive requirements for what needs to be contained in agreements between traders, growers and farmers, and dairy processors and wholesalers generally can’t opt-out of these requirements. This gives the growers and farmers greater certainty and protection.¹⁴²

The National Farmers’ Federation advised that it:

... continues to hear extremely concerning reports of supermarkets acting in contravention of the Code, including:

- *A lack of information to validate claims made by retailers to suppliers;*
- *Manipulating markets through over or inaccurate forecasting of consumer trends;*
- *Unfair and intimidating trading behaviours and negotiation tactics;*
- *Commercial retribution against suppliers, and threats (both actual and implied) of commercial retribution against suppliers;*
- *Transferring business risks and costs down the supply chain onto suppliers;*
- *Suppliers funding retailer marketing and promotion activities;*
- *Requiring suppliers to make and fund changes to their supply chain for unclear reasons;*
- *Reducing or cancelling orders, often ‘last minute’, for unfair or unknown reasons;*
- *Ineffective and a serious lack of confidence in dispute-resolution pathways; and*
- *Failure to pay suppliers in a reasonable time or in accordance with contract terms.¹⁴³*

Seafood Industry Australia made similar representations.¹⁴⁴

Stakeholders have raised specific concerns about exceptions to the following obligations:

141 Fruit Producers SA, Submission to the Consultation Paper, 29 February 2024, p. 2.

142 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 8.

143 National Farmers’ Federation, Submission to the Consultation Paper, 29 February 2024, pp. 6-7.

144 Seafood Industry Australia, Submission to the Consultation Paper, p. 6.

- Unilateral variation of grocery supply agreements;¹⁴⁵
- Delisting of products;¹⁴⁶
- Payments for wastage,¹⁴⁷ and
- Pass-through of costs, including for promotions.¹⁴⁸

Unilateral variation

Under the voluntary Code, supermarkets cannot vary a grocery supply agreement without the consent of the supplier. However, this protection does not apply if the variation is provided for in the grocery supply agreement, is reasonable in the circumstances, and the supplier is given reasonable notice.¹⁴⁹ The ACCC has argued this effectively allows supermarkets to vary contracts unilaterally.¹⁵⁰ Stakeholder views are sought on whether the exception to this prohibition is too broad and should be further limited.

Delisting of products

Under the voluntary Code, a supermarket can delist a product only in accordance with the grocery supply contract, and where the delisting is for genuine commercial reasons. Such reasons include failure of the supplier's product to meet the supermarket's quality or quantity requirements; failure to meet commercial sales or profitability targets as set out in a grocery supply agreement; and persistent failure to meet the supermarket's delivery requirements.¹⁵¹ The supermarket must provide reasonable written notice to the supplier unless "time is of the essence (including for product recalls, withdrawals or safety issues); ... or there are persistent issues with supply".¹⁵²

The Centre for Decent Work and Industry noted:

*... under the current Code, a retailer or wholesaler can delist a supplier's grocery product in accordance with the relevant contracts for 'genuine commercial reasons', which leaves the retailer significant discretion without further responsibilities and does not address the potential for the relevant agreements to reinforce unfair relations.*¹⁵³

The Review considers that while there might be legitimate reasons for delisting, especially where time is of the essence, other exceptions could be overly broad. Stakeholder views are sought on this issue.

145 Clause 9, [Food and Grocery Code of Conduct](#).

146 Clause 19, [Food and Grocery Code of Conduct](#).

147 Clause 14, [Food and Grocery Code of Conduct](#).

148 Clause 18, [Food and Grocery Code of Conduct](#).

149 Subclause 9(2), [Food and Grocery Code of Conduct](#).

150 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 8.

151 Subclause 19(2), [Food and Grocery Code of Conduct](#).

152 Subclause 19(6), [Food and Grocery Code of Conduct](#).

153 Centre for Decent Work and Industry, Submission to the Consultation Paper, 22 February 2024, p. 2.

Wastage

Under the voluntary Code, supermarkets are generally prohibited from requiring a supplier to pay for wastage of groceries at the supermarket’s premises, or at the premises of a contractor of the supermarket. However, wastage costs can be charged to the supplier where this is set out in the grocery supply agreement and the payments are reasonable.¹⁵⁴

The ACCC raised concerns that the exceptions in the voluntary Code allow supermarkets to charge suppliers for wastage while products are in the care of the supermarket.¹⁵⁵ The Review welcomes views on whether there are circumstances in which suppliers should not be charged for wastage when the products are in the care of the supermarket.

Chapter 8 further considers other issues particular to fresh produce, including practices that generate over-supply and wastage, and seeks further stakeholder comments on these issues.

Pass-through of costs

The ACCC raised concerns about multiple circumstances in which supermarkets can pass through costs to suppliers, including via provisions that allow the supermarket to deduct any amount against a supplier’s invoice or remittance if the supplier has consented in writing (clause 12). Costs that can be passed through include charges for stocking or listing products (clause 15), better shelf positioning (clause 16), promotions (clause 18), and payments for any activity being undertaken by the supermarket (clause 17).¹⁵⁶

The National Farmers’ Federation Horticulture Council argued:

*Payments by suppliers for what should be core business activities of a supermarket are particularly questionable. All practices that simply pass on costs from supermarkets, where there is no direct benefit or return achieved by the supplier or where the supplier has little or no ability to control or influence the outcome should be revisited ... Feedback received to date through the Council’s Fresh and Fair Grower and Supplier Survey signals strong support for removing the ability to contract out of some, but not all, of these practices.*¹⁵⁷

Fruit Producers SA submitted:

When dealing with suppliers of apples, pears, cherries, strawberries and other berries, supermarkets currently engage in practices such as:

- *requirement of the supplier to fund a “special” on the product, to be included in a promotion to drive more traffic to the store (and products beyond their own),*
- *requirement to contribute to the cost of general store promotion ...*¹⁵⁸

154 Clause 14(2), [Food and Grocery Code of Conduct](#).

155 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 8.

156 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 8.

157 National Farmers’ Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 22.

158 Fruit Producers SA, Submission to the Consultation Paper, 29 February 2024, p. 2.

The Granite Belt Growers Association argued that suppliers should never be required to fund promotions.¹⁵⁹

Under the Code, supermarkets must not directly or indirectly require a supplier to fund part or all the costs of a promotion. However, this does not apply if such supplier funding is provided for in the grocery supply agreement and is reasonable in the circumstances.

The Review is considering whether this prohibition should be strengthened so that suppliers are not required to fund specified promotions, such as those that are part of a price-matching exercise. Stakeholder views are invited on this.

Recommendation 9

Specific obligations under the Code should set minimum standards that cannot be contracted out of in grocery supply agreements or otherwise avoided.

Consultation questions

5. What minimum standards of conduct, if any, should be specified in the Code that should not have exceptions? If exceptions are provided for, how should these be limited? Please provide examples to support your views.
6. Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.

Strengthening other obligations

Stakeholders have raised concerns about whether particular provisions offer sufficient protections for suppliers, including in respect of:

- The process for reviewing price increase requests from suppliers.¹⁶⁰ Suppliers have argued that these provisions are not working as intended. For example, it has been suggested that some supermarkets routinely engage in delaying tactics in respect of proposed price increases. Suppliers have also raised concerns about the ability of supermarkets to request commercially confidential information from suppliers during this process, which could be problematic where the supplier competes with a supermarket's private label products.¹⁶¹
- Funding promotions.¹⁶² Suppliers have raised concerns about supermarket requests to fund promotions and discounts. While suppliers can decline to fund promotions, they fear retribution from doing so.

159 Granite Belt Growers Association, Submission to the Consultation Paper, 6 February 2024. p. 2.

160 Clause 27A, [Food and Grocery Code of Conduct](#).

161 The Review notes the protection on the use of confidential information that already exists in the Code at clause 25.

162 Clauses 18 and 20, [Food and Grocery Code of Conduct](#).

Stakeholder views are sought on whether any obligations under the Code need strengthening.

Consultation question

7. Do any of the obligations under the Code need strengthening to better protect suppliers?

Chapter 8: Issues specific to fresh produce

Numerous stakeholders raised concerns about issues that arise in respect of fresh produce, owing to its perishable nature. A key concern is the lack of certainty about price and quantity. This chapter discusses these issues and considers whether additional protections might be warranted for fresh produce. It invites further stakeholder views on these issues.

Numerous stakeholders asked the Review to consider whether additional protections should apply to suppliers of fresh produce, particularly fresh fruits and vegetables. The Review heard that the perishable nature of these products exposes them to greater vulnerability arising from market power imbalances.¹⁶³

The National Farmers' Federation Horticulture Council noted:

The market dynamics for fresh produce are quite different even to other perishable agricultural products, including dairy and meat, let alone shelf stable items such as processed foods, health, cosmetics, and cleaning products.

Both dairy and meat products are typically sold under longer-term agreements, for at least a few months, that defines both price and volume ... Not only are these other products transacted with more surety they also have better access to large and established export market.¹⁶⁴

AUSVEG argued:

... the fresh vegetable industry has specific requirements and is more susceptible to the power imbalance in retailer relationships due to the perishability of the product.¹⁶⁵

The Premier of Queensland, the Hon Steven Miles MP, submitted:

Conversations with industry suggest that imbalances in market power are heightened for producers of perishable goods. Perishables are more exposed to imbalances in market power due to limited time windows for sale, fewer alternative buyers, and often long lead times and high sunk costs. Lack of transparency in the supply chain has been cited as a key contributor to this issue.¹⁶⁶

163 National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 5.

164 National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 12.

165 AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 11.

166 Premier of Queensland, Submission to the Consultation Paper, 23 February 2024, p. 2.

166 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 9.

Fruit Producers South Australia argued for specific protections for fruit suppliers, noting the perishable nature of fruit and the lack of a viable export market for most fruit products.¹⁶⁷

Fresh Markets Australia called for:

*... a new segment within a remade Mandatory Food and Grocery Code be introduced to explicitly address the unique challenges encountered in the fresh fruit and vegetable sector. This addition would serve to tailor provisions that cater to the specific needs and dynamics of the fresh produce industry, potentially extending its applicability to encompass the broader spectrum of horticulture.*¹⁶⁸

The Australian Fresh Produce Alliance submitted:

Several improvements can be made to the Code to better deliver on its objectives for fresh produce suppliers, which are not adequately supported by the Code for several reasons... Fruits and vegetables are perishable, and as a result, typically the shelf life for produce can be as short as days ...

*There are two solutions to amending the Code to better support fresh produce suppliers. The first is to introduce 'fresh produce' clauses in all relevant areas, similar to what is attempted in Section 21A. The second option is to include a fresh produce (standalone) section, that could cover these provisions and introduce other clauses relevant to fresh produce. The recommended approach is to establish a time-limited working group, of suppliers, retailers and Government representatives to consider further how to better respond to the unique challenges for fresh produce in the Code. Further industry-wide consultation may also be warranted.*¹⁶⁹

The Victorian Farmers' Federation pointed to gaps under the voluntary Code, including:

*Section 27A of the Food and Grocery Code regarding price increases is largely redundant in practice as it only comes into effect when negotiations on price have not concluded within five days. This requirement does not reflect the timing imperatives for suppliers of fresh fruit and vegetable products which are required to be on shelves immediately, and as a consequence, growers have little ability to negotiate price.*¹⁷⁰

The Review is considering whether there should be specific additional protections where fresh produce is involved. The Review is also considering what stronger protections might be required where price negotiations occur in relation to fresh produce, in view of the perishable nature of these products.

167 Fruit Producers SA, Submission to the Review of the Food and Grocery Code of Conduct, 29 February 2024, p. 4.

168 Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 5.

169 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 21.

170 Victorian Farmers' Federation, [Submission to the Senate Select Committee on Supermarket Prices](#) (Submission 62), 2024, p. 6.

Consultation questions

8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.

Issues associated with price and quantity

Numerous stakeholders raised concerns about Code signatories purchasing much smaller volumes than agreed with suppliers, and at much lower prices than agreed. The Review heard evidence that, especially for fresh produce, suppliers have little certainty over quantity and price. To the extent that supermarkets are deliberately over-ordering, this could strategically create oversupply to the detriment of suppliers. This practice can generate wastage and has been raised repeatedly in submissions and stakeholder discussions as a key issue in the industry.

The ACCC raised concerns about the lack of protection in relation to contracted volumes:

The ACCC has heard concerns from suppliers, particularly relating to fruit and vegetables, that indicative volumes are provided but often not adhered to. In particular, concerns have been raised that the final volumes requested are often substantially lower than the indicative volumes. Should this be occurring, it can be damaging to suppliers who have excess produce that does not have a clear supply channel. Further, it also has a risk of distorting overall markets due to excess stock driving down produce prices.

The ACCC acknowledges that there can be legitimate reasons that may underpin fluctuations in the volume that a retailer can accept or the volume that a supplier could provide. These factors could include prevailing market prices, weather conditions and natural disasters. However, under current arrangements suppliers appear to largely assume the risk associated with these fluctuations.¹⁷¹

The National Farmers' Federation Horticulture Council submitted:

It is commonly reported by suppliers that they rarely if ever achieve the volumes sold into supermarkets as was originally signalled through the non-binding "forecast" figures in their Grocery Supply Agreements. It is a contention held among many growers that these figures are deliberately overstated so as to trigger oversupply scenarios which serve to spill excess product onto the wholesale market, providing a lower price benchmark and enabling supermarkets to apply even further downward pressure on the prices they'll pay ...

The production of waste along any supply chain is usually symptomatic of the market not working as efficiently, transparently and fairly as it should. In the case of fresh fruits and vegetables, the significant amount of waste created is inarguably a product of power imbalances between major supermarket buyers and smaller suppliers ...

¹⁷¹ ACCC, Submission to the Consultation Paper, 29 February 2024, p. 12.

*Supermarkets not only create waste through their practices around incontestable rejections and specifications, but also use their market power to push the cost of managing that waste back on to the suppliers.*¹⁷²

AUSVEG argued that:

*Growers have expressed concern that supermarkets are potentially overinflating supply agreements and causing oversupply conditions. Distorting supply, and consequently price, is a serious allegation but it is widely reported in Australia and also occurs in other jurisdictions such as the UK.*¹⁷³

AUSVEG recommended considering the UK Groceries Supply Code of Practice, which contains obligations for retailers to forecast their orders with due care, and not to overorder from suppliers at a discounted rate for promotions:

GSA's need to be specifically designed contracts that provide protections to growers in relation to price and volume, while also recognising crop variability that can occur due to weather...

*Growers have suggested a range of measures that may help address the power imbalance in the grower-retailer relationship. There is appetite among some growers to set a minimum floor price, with other suggestions including contracts that include x% of crop at a set agreed price, and y% of crop at a variable price. Other mechanisms include a 'tool' to provide greater transparency in relation to retailer price tendering systems. There needs to be more equity in the relationship, while also maintaining a competitive/free-market dynamic.*¹⁷⁴

The Australasian Meat Industry Employees' Union argued for "transparency of both supply purchase costs by farmers and supermarkets with appropriate enforcement mechanisms for failure to comply."¹⁷⁵

The National Farmers' Federation Horticulture Council recommended that:

- *Supermarkets be required to submit quarterly publicly reports on variances between forecast and actual fresh produce purchases on a category basis and provide to each supplier a quarterly summary of the same variance under each Grocery Supply Agreement.*
- *Significant penalties be introduced for large or persistent variances outside of an acceptable range.*¹⁷⁶

172 National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, pp. 21, 25

173 AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 21.

174 AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 21.

175 Australasian Meat Industry Employees' Union, Submission to the Consultation Paper, 29 February 2024, p. 3.

176 National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, pg. 21.

The ACCC also submitted:

A concern regularly raised with the ACCC is that there is no clarity about how prices are determined by retailers when engaging with suppliers ...

... the ACCC recommends that the review give serious consideration to including a requirement in the code that retailers must provide suppliers with a minimum price payable, subject to quality deductions, in a grocery supply agreement.¹⁷⁷

TasFarmers also raised concerns about price transparency and recommended that the Review:

Strengthen provisions within the Code related to pricing agreements and payment terms to ensure greater fairness and transparency in supplier-retailer transactions. This may include introducing guidelines or benchmarks for determining fair and reasonable pricing, as well as implementing stricter enforcement mechanisms to deter unfair practices such as late payments or arbitrary price adjustments.¹⁷⁸

The Review is persuaded that more analysis is needed on how supermarkets can better forecast orders to provide greater certainty to suppliers. Stakeholder views are sought on the best way to provide protections specific to fresh produce and to prevent risks of wastage being effectively passed mainly onto suppliers or exacerbated through over-ordering.

Consultation questions

9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?
10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.
11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.

¹⁷⁷ ACCC, Submission to the Consultation Paper, 29 February 2024, p. 11.

¹⁷⁸ TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 7.

Chapter 9: Enforcement and penalties

This chapter considers the enforcement tools and penalties that would best drive compliance and fair outcomes from a mandatory Code. It recommends including penalties for major or systemic breaches of up to \$10 million, 3 times the benefit reasonably attributable to the contravention, or 10 per cent of a supermarket's annual turnover, whichever is greatest. It also discusses the enforcement tools that will be available to the ACCC under a mandatory Code containing penalty provisions, including the use of infringement notices.

Existing enforcement tools and penalties

The voluntary Code does not include any financial penalties for breaches of its provisions. The Review finds that the absence of financial penalties undermines the Code's effectiveness in providing incentives to encourage compliance, the ACCC's ability to undertake meaningful enforcement action, and supplier confidence in the Code.

This finding is consistent with the view of former ACCC Chair, Rod Sims,¹⁷⁹ and with those of the ACCC in its submission to this review:

There is a lack of strong specific or general deterrence for breaching the code due to the absence of penalties. The availability of meaningful civil pecuniary penalties (and infringement notices) is important to enable the ACCC to promote compliance not only through the taking of enforcement action against the business but by signalling to others covered by the code that the cost of non-compliance will be significant.¹⁸⁰

The absence of any serious repercussions from a breach of the Code weakens suppliers' willingness to make a complaint or go through a dispute process.¹⁸¹

Penalties are essential

The inclusion of penalties for key provisions of the mandatory Code would incentivise increased and ongoing investment in compliance by the supermarkets subject to the Code. This would include investments in systems and processes to ensure compliance, staff training, and appropriate reporting to and involvement of senior management by supermarkets.

179 Sam Buckingham-Jones, 'Grocery review won't lower checkout prices: former ACCC chiefs', *Australian Financial Review*, 11 January 2024, accessed 13 March 2024.

180 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 9.

181 ACCC, *Perishable Agricultural Goods Inquiry 2020*, accessed 15 February 2024, p. 126.

The inclusion of penalties will also assist in addressing supplier's reticence to raise complaints, as argued by TasFarmers:

*By holding retailers accountable for their actions, suppliers can have greater confidence in the efficacy of the code in protecting their interests.*¹⁸²

The ACCC recommends that "Civil pecuniary penalties should be available for breaches of all substantive provisions of the code".¹⁸³ It notes it has successfully obtained a \$950,000 penalty for breaches of the Dairy Code of Conduct.¹⁸⁴

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia noted that the Code is not effective without meaningful penalties:

The SME Committee considers it anomalous that penalties apply under other industry codes, such as the Franchising Code of Conduct, the Horticulture Code and the Dairy Code, but not under the Grocery Code ...

*It makes sense to the SME Committee that the ACCC would not be rigorously enforcing the Grocery Code in circumstances where it does not believe it could achieve meaningful specific and general deterrence through the imposition of penalties, where breaches have occurred. Indeed, enforcement action in such circumstances may be seen as an inefficient use of the ACCC's finite resources.*¹⁸⁵

The Australian Small Business and Family Enterprise Ombudsman submitted that:

Penalties and supplier remediation for breaching the code should be proportionate, effective, and targeted deterrents to retailers and wholesalers seeking to utilise the often-significant power imbalance to the detriment of small business ...

*... Greater penalties for breaching the code would increase small business supplier confidence in their market, reward their efforts and investment, and reduce oppressive cartel behaviour.*¹⁸⁶

Metcash argued against a penalty regime "in the absence of evidence of widespread and intentional non-compliance with the Code", and that:

... changes to the compliance regime may result in a legalistic and potentially antagonistic approach which would not improve industry outcomes ... working collaboratively with suppliers, industry bodies, its Code Arbiter, the Independent Reviewer and the ACCC has produced effective outcomes for all participants. It should not be assumed that positive

182 TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 9.

183 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 1.

184 ACCC, Submission to the Consultation Paper, 29 February 2024, pp. 9-10.

185 Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia, Submission to the Consultation Paper, 15 March 2024, p. 4.

186 Australian Small Business and Family Enterprise Ombudsman, Submission to the Consultation Paper, 15 March 2024, p. 3.

*aspects of the Code and its implementation would not be lost if a penalty regime were imposed.*¹⁸⁷

Woolworths suggested that compliance is effective under the voluntary Code, such that penalties are not required:

*Code Arbiters possess very significant powers to make binding determinations on retailers, including to alter grocery supply agreements and to award compensation of up to \$5 million (and, with retailer consent, even more). In addition, the ACCC has significant enforcement powers in relation to the Code and conducts regular checks regarding our compliance. As such, introducing pecuniary penalties will not change our close attention to Code compliance... we are not opposed to the introduction of penalties, provided they are proportionate, subject to rules of procedural fairness, and reserved for issues of serious or systemic non-compliance so as not to hinder the swift resolution of lower order commercial disagreements.*¹⁸⁸

However, the Review notes the feedback from many stakeholders that the voluntary Code, which lacks any penalties, is ineffective (see Chapter 2). Further, none of the Code Arbiters under the voluntary Code have made any determinations for compensation under the Code.

The Review considers that penalties should be applied to all substantive provisions under the mandatory Code. This would align the new mandatory Code with existing industry codes in adjacent industries such as the Horticulture and Dairy Codes of Conduct. Penalties should be applied to provisions under the following parts of the voluntary Code:

- Part 1A (Good faith);
- Part 2 (Grocery Supply Agreement requirements);
- Part 3 Divisions 2 (Paying Suppliers), 3 (Requiring payments from suppliers) and 4 (Other conduct); and
- Part 6 (Compliance).

Consideration should also be given to applying penalties to dispute-resolution provisions to ensure all parties engage in the process appropriately. For example, parties to a dispute should be required to attend alternative dispute-resolution processes to seek to resolve the dispute, like the requirements of the Horticulture Code of Conduct¹⁸⁹ and Franchising Code of Conduct.¹⁹⁰

These provisions impose an obligation on the supermarkets under the Code and so would not impose penalties on suppliers. The Review notes the purpose and provisions of the Code are targeted to compliance by the supermarkets as corporate entities rather than seeking to create penalties for individuals.

187 Metcash, Submission to the Consultation Paper, 29 February 2024, p. 7.

188 Woolworths, Submission to the Consultation Paper, 6 March 2024, pp. 13-14.

189 Subclause 40(9), [Horticulture Code of Conduct](#).

190 Subclauses 41A(5) and 43B(8), [Franchising Code of Conduct](#).

Penalties would enable the use of effective enforcement tools by the ACCC in monitoring and ensuring Code compliance. In addition, the prospect of penalties for non-compliance better enables the threat of action from the regulator to act as an effective deterrent for poor conduct.

Suppliers would also still be able to bring their own proceedings for breaches of the Code. However, the Review expects the introduction of penalties to further incentivise the use of the dispute-resolution provisions of the mandatory Code.

The Review notes the ACCC has announced competition, consumer, fair trading and pricing concerns in the supermarket sector as a 2024-25 priority, with a focus on food and groceries.¹⁹¹

Introducing penalties into the industry-specific requirements of the Code would strengthen the threat of litigated outcomes where contraventions of the Code occur and operate alongside existing enforcement capabilities of the ACCC such as public warning notices, seeking injunctions and accepting court-enforceable undertakings. While any penalty amount is paid to the Commonwealth rather than to the affected suppliers, the ACCC can seek redress for suppliers in court proceedings as well as accepting court enforceable undertakings requiring redress to harmed parties as an alternative to a litigated outcome.¹⁹²

The Code's protections are also supported by the general protections offered by the Australian Consumer Law and the Competition and Consumer Act that seek to address the impact of power imbalances in bargaining relationships; for example, prohibitions against unconscionable conduct and unfair contract terms in standard form small business contracts (see also Chapter 1). The Review also notes public consultation in late 2023 on the introduction of unfair trading practices prohibitions to the Australian Consumer Law.¹⁹³ This reform could provide further protections for businesses in the food and grocery industry alongside the mandatory Code.

Penalties would unlock new enforcement tools

The effect of introducing penalties into the Code would be two-fold:

- Instigating maximum pecuniary amounts that can be sought through the courts for contraventions of the Code; and
- Giving the ACCC the power to issue infringement notices.

Pecuniary penalties

The Competition and Consumer Act sets the maximum penalty available per contravention by a corporation of a penalty provision in an industry code at 600 penalty units (\$187,800) unless there is express exception.¹⁹⁴ This exception has been made for the Franchising Code of Conduct¹⁹⁵ where

191 ACCC, [Compliance and enforcement policy and priorities](#), accessed 8 March 2024.

192 Sections 51ADB and 87B, [Competition and Consumer Act](#).

193 The Treasury, [Unfair trading practices – Consultation Regulation Impact Statement](#), accessed 27 March 2024.

194 Subsection 51AE(2), [Competition and Consumer Act](#).

195 Subsection 51AE(2A), [Competition and Consumer Act](#).

much higher penalties are available for contraventions of 4 provisions¹⁹⁶ that have been “*identified as giving rise to particularly serious adverse consequences for the parties involved as well as the franchising sector more broadly*”.¹⁹⁷

For these 4 specific provisions, the Franchising Code of Conduct sets a higher maximum pecuniary penalty per contravention. For corporations, it is the greater of:

- \$10 million;
- If the court can determine the value of the reasonably attributable benefit obtained, 3 times that value; and
- If the court cannot determine the value of the reasonably attributable benefit, 10 per cent of annual turnover in the preceding 12 months.¹⁹⁸

For a contravention of these provisions of the Franchising Code of Conduct by an individual, the maximum pecuniary penalty is \$500,000. The penalty of 600-penalty units applies to all other penalty provisions in the Franchising Code of Conduct.

The maximum penalty of 600 penalty units is not always utilised in industry codes. For example, the maximum penalty for penalty provisions of the Horticulture and Dairy Codes of Conduct is 300 penalty units (\$93,900).

Under the Dairy Code of Conduct, the maximum applicable penalty varies not only according to whether it is for a processor or individual but also according to the size of the contravening processor, with the penalty for small business entities being 100 penalty units (\$31,300) and large processors being 300 penalty units (\$93,900).

In many industry codes, such as the Horticulture and Dairy Codes of Conduct, there is no differentiation in terms of penalty amounts for contraventions of different provisions. Accordingly, there is no indication from the penalty amount as to those provisions that provide the most important protections from harm. However, the Franchising Code of Conduct’s differentiation in providing for much higher penalties for the 4 specified clauses provides such guidance.

Larger penalties would drive greater compliance

Effective penalties are required to drive a strong culture of compliance. In view of the size and turnover of the supermarkets that would be subject to the Code, compared with businesses captured under other industry codes, the maximum penalty of 600 penalty units currently allowed for industry codes appears appropriate at a minimum.

196 These 4 express provisions of the Franchising Code cover disclosure of materially relevant facts (cl 17(1) and (2)); restricting the freedom of association of franchisees or prospective franchisees (cl 33); and terms of agreement for new vehicle dealership agreements (cl 46A(1)-(3) and cl 46B).

197 Explanatory Statement to the *Competition and Consumer (Industry Codes--Franchising) Amendment (Penalties and Other Matters) Regulations 2022*, p. 2.

198 Clause 5A, [Franchising Code of Conduct](#).

The case for penalties proportional to the size of the existing Code signatories has been raised by many stakeholders.

Larger penalties might be appropriate for some provisions where breaches are likely to cause the most significant harm, and so that they are viewed as more than simply a cost of doing business. As the ACCC points out:

To be effective, the penalties available should be over and above the cost for a signatory to repay the loss or damage they caused.¹⁹⁹

As noted by the Australian Chicken Growers' Council:

One of the reasons that the Australian Consumer Law and its enforcement by ACCC is so respected by businesses generally is the sheer size of the penalties that can be handed down – businesses ignore this level of penalty at their peril. Similarly, company directors are on notice as they can also be individually fined or sanctioned.

In addition, the ACCC has a range of additional penalties available that truly strike fear into public companies – the ability to force corrective advertising, the ability to force recall, the ability to enforce publicly available enforceable undertakings and the like.²⁰⁰

Many stakeholders noted the need for penalties that act as an effective deterrent and not simply a cost of doing business. For example Queensland Fruit and Vegetable Growers suggested penalties be set at a level where they would affect shareholders.²⁰¹

The Review notes the position of Fresh Markets Authority:

FMA calls for the civil pecuniary penalty provisions based on the supermarkets turnover or linked to their percentage of market share, to be implemented within a Mandatory Food and Grocery Code.²⁰²

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia argued that:

...consistent with the Franchising Code of Conduct, civil penalties should also be available for breaches of the Grocery Code, as this will assist to achieve both specific and general deterrence in the food and grocery sector through more effective compliance and enforcement mechanisms. However, the provisions of the Grocery Code that should have penalties attached—and the appropriate size of those penalties—will require further consultation to ensure that their imposition is justified.²⁰³

The Review considers the maximum penalties for corporate entities available for the most serious breaches of the Code should be aligned with the higher maximum penalties allowed for in the

199 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 9.

200 Australian Chicken Growers' Council, Submission to the Consultation Paper, 29 February 2024, p. 11.

201 Queensland Fruit and Vegetable Growers, Submission to the Consultation Paper, 29 February 2024, p. 6.

202 Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 11.

203 Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia, Submission to the Consultation Paper, 14 March 2024, p. 5.

Franchising Code of Conduct. This would allow the ACCC to seek penalties for major or systemic breaches of up to \$10 million, 10 per cent of a supermarket's annual turnover, or 3 times the benefit from the breach, whichever is the greatest. This would better reflect the size and annual turnover of the supermarkets that would be covered by the Code. Applying these high penalties to provisions where the harm caused by non-compliance is greatest provides the opportunity to signal to the industry where it should focus its compliance efforts to ensure it prioritises safeguards that are of most value to suppliers.

Introducing penalties higher than 600 penalty units would require legislative change to the Competition and Consumer Act to make an exception for the Code as has been done for the Franchising Code of Conduct.²⁰⁴

Infringement Notices

The ACCC can issue an infringement notice where it has reasonable grounds to believe a penalty provision has been breached. The introduction of penalties to the Code would allow the ACCC to issue these notices where it has reasonable grounds to believe there has been a contravention of the Code within the last 12 months, without requiring any additional legislative change.²⁰⁵

Infringement notices provide an efficient, low-cost enforcement outcome for relatively minor contraventions instead of the ACCC needing to proceed to court proceedings. Once paid, infringement notices are recorded on the ACCC's public register and have been regularly used by the ACCC in enforcing aspects of industry codes.²⁰⁶

Generally, for industry codes, the penalty amount for an issued infringement notice is:

- \$15,650 (50 penalty units) for corporations; and
- \$3,130 (10 penalty units) for individuals.²⁰⁷

These are the amounts that would apply for infringement notices issued under Code provisions with a penalty attached.

When set at an appropriate monetary amount, infringement notices can provide a powerful incentive to ensure compliance, given the lower threshold required for the ACCC to issue such notices. The Review queries whether the current infringement notice amount is sufficient to constitute an effective remedy for the supermarkets that would be subject to the Code. The Review notes the ACCC can already issue infringement notices with higher penalty amounts under some of the laws it enforces. For example, under the Australian Consumer Law, infringement notices can be up to 600 penalty units for breaches of specific provisions by listed companies.²⁰⁸

204 Section 51AE, [Competition and Consumer Act](#).

205 Section 51ACD, [Competition and Consumer Act](#).

206 ACCC, [Infringement notices](#), accessed 28 February 2024.

207 Section 51ACF, [Competition and Consumer Act](#).

208 ACCC, [Fines and penalties](#), accessed on 29 February 2024; noting the Australian Consumer Law is contained in an Act of Parliament.

The Review will further consider arguments for increasing the infringement notice penalty amounts for breaches of the Code above 50 penalty units, in view of the size of the businesses being regulated by the Code and the type of conduct that is subject to the Code.

Recommendation 10

Penalties for non-compliance should apply, with penalties for more harmful breaches of the Code being the greatest of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening conduct. Penalties for more minor breaches would be 600 penalty units (\$187,800 at present).

Recommendation 11

The Government should consider increasing infringement notice amounts for the Code.

Consultation questions

12. What level of penalties should apply to breaches of the Code? Please provide reasons.
13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.
14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

Compliance monitoring

The Code should include the ongoing ability of the ACCC to conduct compliance checks.

In the recommended mandatory Code, the ACCC should have the power to compulsorily oblige covered businesses to produce any information and documents required to be kept, generated, or published.²⁰⁹

This process of compliance allows multiple avenues for the efficient identification and addressing of issues without the need for reasonable suspicion of a contravention and before escalating matters to formal enforcement, which would rely on a supplier making a complaint and being required to provide evidence. This makes compliance checks particularly powerful given many suppliers' fear of retribution (as discussed in Chapter 5).

Metcash submitted that:

... the compliance check process is positive and constructive. It concurs with the ACCC that the ACCC takes a targeted approach to its audits under the Code in order to minimise the extent of any burden and that its audit work has contributed to embedding and improving a culture

²⁰⁹ Section 51ADD, [Competition and Consumer Act](#).

of compliance with the Code. Through the compliance check process, MF&G [Metcash] has worked with the ACCC to further improve its policies, procedures and practices ... The current relationship with the ACCC is yielding benefits for all participants, a change in that relationship should not be assumed to improve compliance outcomes.²¹⁰

The ACCC has advised that:

Signatories have been responsive to ACCC concerns about compliance that were uncovered through these checks. They have indicated that they will implement changes to practices and processes to achieve better compliance. However, it is not an efficient use of resources for the ACCC to be facilitating signatories' compliance in this way. The code has been in place since 2015, and in our view should be embedded, understood and applied by signatories. Civil penalty provisions would act as a meaningful incentive for signatories to ensure their compliance with the code's obligations.²¹¹

The ACCC also notes there are limits to its information-seeking powers. Specifically, the ACCC cannot use its proactive compliance powers to require a Code signatory to produce information where a clause of the Code is "intended to reduce harm but does not require a trader to keep, generate or publish documents or information that demonstrates or evidences behaviour".²¹²

The Code already requires the keeping of some key records such as grocery supply agreements and in relation to various decisions and reasons. However, supermarkets are not required to keep all documents provided by suppliers or relied on by the supermarket.²¹³

The Review considers there could be documents recording Code obligations that are likely kept as ordinary business records that could be added to the Code's record keeping obligations such as:

- Documents recording systems that monitor compliance with confidential information requirements (clause 25(3));
- Retailers' ranging principles and shelf space allocation principles (clause 26(1)); and
- Documents recording training provided under the Code (clause 40).

Consultation question

15. Does the Code adequately require covered businesses to keep information and documents for the purposes of recording their compliance and any disputes raised under the Code?

In addition to compliance monitoring, the ACCC should be involved in improving education of suppliers, as well as supermarkets, about obligations under the mandatory Code. This could be similar to the training material that has been produced for the Franchising Code of Conduct.²¹⁴ Suppliers that are well informed of their protections under the Code will be better able to protect their own interests in negotiations. See also Chapter 6.

210 Metcash, Submission to the Consultation Paper, 29 February 2024, p. 7.

211 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 10.

212 ACCC, Submission to the Consultation Paper, February 2024, p. 15.

213 Clause 42, [Food and Grocery Code of Conduct](#); see for example, clause 19, [Franchising Code of Conduct](#).

214 ACCC, [Franchising free course](#), accessed 20 February 2024.

Chapter 10: Other inquiries and initiatives

The Review acknowledges many initiatives are underway that will affect the grocery industry. This chapter sets out how these relate to the Review.

Facilitating stronger competition in grocery retailing

Greater competition in grocery retailing and wholesaling would not only improve the negotiating position of smaller suppliers, but it would also deliver better prices to consumers. From the perspective of consumers and the economy at large, competition is good, but more competition is even better.

*To address wider recommendations is very important for [the] wider advance in policy reform since the current Government is appropriately establishing many reviews and inquiries in many individual areas. But it lacks a proper mechanism devoted to adding up and integrating the results.*²¹⁵

A reformed Food and Grocery Code is one of several cost-of-living and pro-competition inquiries and measures being undertaken at present. Other inquiries and initiatives are outlined briefly below.

ACCC Supermarket Inquiry 2024-25

On 1 February 2024, the Treasurer, the Hon Dr Jim Chalmers MP, directed the ACCC to undertake a 12-month price inquiry into the supermarket sector to ensure Australians are paying a fair price for their everyday groceries.

The inquiry will examine the competitiveness of retail prices for everyday groceries. Matters to be considered by the inquiry include, but are not limited to:

- The structure of the supermarket industry at the supply, wholesale and retail levels;
- Competition in the industry and how it has changed since 2008, including the growth of online shopping;
- The competitiveness of small and independent retailers, including in regional and remote areas;
- The pricing practices of supermarkets;

²¹⁵ Professor Withers and Professor McEwin (Australian National University), Submission to the Consultation Paper, 23 February 2024, p. 1.

- Factors influencing prices along the supply chain, including the difference between farmgate and supermarket prices;
- Any impediments to competitive pricing along the supply chain; and
- Other factors impacting competition, including loyalty programs and third-party discounts.

An issues paper has been published seeking views on the key issues the ACCC will consider in the inquiry. An Interim Report will be provided to the Government by 31 August 2024, with the Final Report due to be provided by 28 February 2025.²¹⁶

Parliamentary committees relating to the grocery industry

Two Senate Select Committees are underway, which might report on findings relating to the Food and Grocery Code. In addition, the House of Representatives Standing Committee on Agriculture recently completed an inquiry into food security in Australia.

Senate Select Committee on Cost of Living

On 28 September 2022, the Senate established the Select Committee on the Cost of Living, to inquire into and report on:

- a. The cost of living pressures facing Australians;
- b. The Government's fiscal policy response to the cost of living;
- c. Ways to ease cost of living pressures through the tax and transfer system;
- d. Measures to ease the cost of living through the provision of Government services; and
- e. Any other related matter.

The Select Committee is due to report by 31 May 2024.

Senate Select Committee on Supermarket Prices

On 6 December 2023, the Senate established the Select Committee on Supermarket Prices to inquire into and report on the price setting practices and market power of major supermarkets, with particular reference to:

- The effect of market concentration and the exercise of corporate power on the price of food and groceries;
- The pattern of price setting between the 2 major supermarket chains;
- Rising supermarket profits and the large increase in price of essential items;
- The prevalence of opportunistic pricing, price mark-ups and discounts that are not discounts;

²¹⁶ Australian Competition & Consumer Commission (ACCC), *Supermarkets inquiry 2024-25*, March 2024, accessed 15 March 2024

- The contribution of home brand products to the concentration of corporate power;
- The use of technology and automation to extract cost-savings from consumers and employees;
- Improvements to the regulatory framework to deliver lower prices for food and groceries;
- Frameworks to protect suppliers when interacting with the major supermarkets;
- The role of multinational food companies in price inflation; and
- Any other related matters.

The Committee is to present a final report by 7 May 2024.

House of Representatives Standing Committee on Agriculture Inquiry into Food Security in Australia

On 26 October 2022, the House of Representatives Standing Committee on Agriculture commenced an inquiry into food security in Australia. The Committee's terms of reference were to consider strengthening and safeguarding food security in Australia, including examining:

- a. National production, consumption and export of food;
- b. Access to key inputs such as fuel, fertiliser and labour, and their impact on production costs;
- c. The impact of supply chain distribution on the cost and availability of food; and
- d. The potential opportunities and threats of climate change on food production in Australia.

The Committee released its final report in November 2024.²¹⁷ Relevant to this Review, the Committee recommended that the government make the Code mandatory.

In all, the Committee made 35 recommendations to address food security in Australia including:

- Creating a comprehensive National Food Plan;
- Appointing a Minister for Food;
- Establishing a National Food Council;
- Developing a National Food Supply Chain Map;
- Measures to facilitate innovation in the production of food; and
- Measures to eliminate food waste.

Dr Emerson met with the Committee on 21 March 2024 to discuss its findings.

²¹⁷ House of Representatives Standing Committee on Agriculture, *Australian Food Story: Feeding the Nation and Beyond*, Inquiry into food security in Australia, November 2023.

Fels Inquiry into Price Gouging and Unfair Pricing Practices

On 6 February 2024, Professor Allan Fels AO released his final report of an Inquiry into Price Gouging and Unfair Pricing Practices (the Fels report), commissioned by the Australian Council of Trade Unions. The report considered price levels and the methods by which prices are set, particularly for consumers.

The report made 35 recommendations, 3 of which directly relate to either the Food and Grocery Code or the Australian grocery sector. These 3 recommendations are:

- There should be a comprehensive ACCC inquiry into competition and prices in the retail food and grocery industry;
- The Food and Grocery Code Review should be fully mandatory; and
- The Food and Grocery Review should investigate creating a price register for farmers to assist them in understanding market prices across primary industries.²¹⁸

Some other recommendations of note for the Review are:

- Price gouging should be unlawful – the Competition and Consumer Act should be amended to make it an offence to charge excessive prices.
- The power to name and shame – the ACCC should be permitted to name and shame businesses that overcharge.
- A permanent Commission on Competition and Prices – the establishment of a Competition and Prices Commission- separate from the ACCC, which has the power to unilaterally examine high prices and pricing practices.
- Abuses of market power – the ACCC should have power of its own to initiate price and market studies to stamp out unlawful and unconscionable behaviour. Professor Fels cites as examples of the abuse of market power, including in the groceries sector, the wholesale electricity market and by medical specialists.
- Mergers and divestiture – a divestiture power should be introduced into the competition law and that in merger matters, the onus should be on applicants to satisfy the ACCC and on appeal to the Australian Competition Tribunal that the merger is not anti-competitive and is in the public interest.²¹⁹

The Review has not undertaken in-depth analysis of the costs and benefits of these recommendations.

218 Australian Council of Trade Unions, *Inquiry into Price Gouging and Unfair Pricing Practices: Final report*, February 2024, accessed 26 February 2024.

219 Australian Council of Trade Unions, *Inquiry into Price Gouging and Unfair Pricing Practices: Final report*, February 2024, accessed 26 February 2024.

The Review does not support a forced divestiture power to address market power issues in the supermarket industry. The Review supports greater competition in the supermarket industry, which can be facilitated by an effective, mandatory Food and Grocery Code of Conduct, robust enforcement of Australia's competition laws by the ACCC, and wide competition policy reforms relating to planning and zoning laws (see below).

If forced divestiture resulted in a supermarket selling some of its stores to another large incumbent supermarket chain, the result could easily be greater market concentration.

If large incumbent supermarket chains were prohibited from buying the divested stores, that would leave only smaller supermarket chains and foreign supermarkets as potential buyers. Further, if these smaller chains were not interested, or were not in a position to buy, these stores would be forced to close. This would be at the cost of the jobs of the workers in those stores and of inconvenience to local shoppers who would need to go elsewhere to buy their groceries.

Advocates of forced divestiture laws for supermarkets argue that the threat of forced divestiture would be an effective deterrent to anti-competitive behaviour by supermarket chains. But the threat of forced divestiture would need to be credible to have this effect, and the problems outlined above would ensure it lacked credibility.

The National Farmers' Federation does not support a forced divestiture power:

It is not NFF policy to support divestiture of retail assets. As I mentioned, we have argued for decades that, if you get the competition policy settings right, we think the market will then function properly. So, no, it is not our policy. I know that differs from some of our members, which is fine. We are a federation, a membership body, but that is not our policy.²²⁰

This Review's recommendations to make the Code mandatory, with heavy penalties for major breaches will, alongside effective enforcement of the existing competition laws, constitute a far more credible deterrent to anti-competitive behaviour than forced divestiture laws.

CHOICE price monitoring

The Government is providing \$1.1 million to consumer group CHOICE to provide price transparency and comparison reports on a quarterly basis for 3 years. This will provide shoppers with increased transparency on the comparative costs of a basket of goods at different retailers, highlighting those charging the most and the least.

Anti-competitive planning and zoning laws

State and local government planning systems by their very nature create barriers to business entry, including through limiting the number, size and operating model and mix of businesses. The reason is

220 Australian Retailers Association, 'Greens Divestiture proposed laws could result in higher grocery prices', 20 March 2024, accessed 5 April 2024.

that planning systems seek to balance many competing objectives relating to matters as sustainability, aesthetics, and transportation.

However, it is questionable as to whether the objectives of some state and local planning systems give appropriate weighting to the interests of grocery consumers. For example, planning systems and their decision makers can potentially reject the approval of a new supermarket if it damages the interest of existing retailers, even when the benefit to consumers outweighs the detriment to incumbent retailers. It can do so overtly through rejecting a proposal based on consultation submissions. Commercial planning and zoning laws can also limit new entrants where the laws unnecessarily restrict the types of businesses that can use a particular piece of land.

The Victorian Government noted that:

Overly prescriptive planning which limits the kinds of business uses that can occur on commercially zoned land inadvertently acts as an additional barrier to new supermarket entrants by limiting the number of sites available.

Victoria introduced reforms to simplify and standardise commercial zoning in 2013 by merging five previous business zones into two broad commercial zones and subsequently introduced a mixed-use employment zone in 2018. These reforms have increased the availability of suitable land and reduced set-up costs for new supermarkets.²²¹

ALDI, a more recent supermarket entrant, managed to avoid some of these planning restrictions since it generally has smaller store layouts and was willing to open in unconventional locations. However, other potential entrants, such as Kaufland, have explicitly chosen not to proceed with entering the Australian market, despite expending a large amount of effort to navigate different planning systems to try secure viable retail sites.

Addressing these issues needs all governments to work together since planning systems are predominantly the domain of state and local governments. The Australian Government is working with state and territory governments through National Cabinet on a National Planning Reform Blueprint, addressing planning, zoning, land release and other measures to improve housing supply and affordability. While the reforms are focused on housing outcomes, a general streamlining of approval pathways in planning systems might also have flow-on benefits for business approvals.

There is an opportunity for commercial land use and planning reforms to be considered by the Treasury's Competition Taskforce as part of its work with states and territories on a revitalised National Competition Policy (more in the section below).

Competition Taskforce – getting more competition into grocery retailing

In August 2023, the Australian Government announced a Competition Review that is set to last 2 years and will provide advice to the Government on how to improve competition across the Australian economy. A 7-person Expert Advisory Panel has been appointed, featuring leading experts

221 The Victorian Government, Submission to the Consultation Paper, 6 March 2024, p. 9.

from business, government, law and economics, and will serve an important advisory role to the Taskforce undertaking the Review and to the Government.²²²

The Competition Taskforce is examining ways to make Australia's merger regime simpler, faster and more transparent. The review of merger laws will be looking at whether creeping or serial acquisitions in industries such as supermarkets, liquor and hardware are adequately captured by existing competition laws. An effective mergers regime is important for protecting against anti-competitive consolidation that can lead to increases in market power.

The Competition Taskforce is also working with state and territory governments to identify pro-competitive reforms to boost competition nationally. In December 2023, Treasurers agreed to revitalise National Competition Policy.²²³ This work will consider whether the original National Competition Policy agreements, including the Competition Principles, remain fit for the modern economy, as well as establishing a new long-term agenda of pro-competitive national reforms. Among these will be reforms to help alleviate cost of living pressures.

Previous competition reforms

ACCC Grocery Inquiry 2008

In January 2008, the then Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen, MP, requested the ACCC to hold a public inquiry into the competitiveness of retail prices for standard groceries. The ACCC provided its report to the Minister on 31 July 2008.

Introduction of the Australian Consumer Law

On 24 June 2009, the Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, introduced into Parliament a bill to commence the creation for the first time of an Australian Consumer Law – a single, national consumer law. The legislation ensured that Australia's national regulators – the ACCC and ASIC – had a broader range of more effective enforcement measures to protect and help consumers.

The reform process culminated in the Competition and Consumer Act, the first national law covering both competition policy and consumer protection. The Competition and Consumer Act covers most areas of the market: the relationships between suppliers, wholesalers, retailers, and consumers. Its purpose is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections.

The Australian Consumer Law prohibits businesses from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. Misleading or deceptive conduct is assessed against

222 The Treasury, [Competition Review](#), 2023.

223 The Hon Dr Jim Chalmers MP, [Treasurers meet in Queensland](#), 1 December 2023, accessed 25 February 2024.

whether an “ordinary” or “reasonable” member of the relevant class of people to whom the conduct was directed is likely to be misled.

The Australian Consumer Law also contains protections against unconscionable conduct, with a general ban on conduct which is particularly harsh or oppressive. To be considered unconscionable, the conduct must be against good conscience as judged against the norms of society.

With effect from November 2023, the Australian Consumer Law provides courts with the ability to declare contract terms in standard form consumer and small business contracts unfair and to impose significant penalties. A term of a contract is unfair if it causes a significant imbalance in the parties’ rights and obligations; is not reasonably necessary to protect the legitimate interests of the supplier; and would cause significant detriment to a party.

In August 2023, the Government released a consultation regulation impact statement on protecting consumers from unfair trading practices. The closing date for submissions was 29 November 2023 and the Government is currently considering the submissions received on this consultation paper.

Removal of restrictive provisions in supermarket leases

During its grocery inquiry in 2008, the ACCC identified a practice where supermarket operators would include tenancy terms that may have prevented shopping centre managers leasing space to competing supermarkets. This had the potential to impose restrictions on the number of supermarket outlets in centres and consequently limit options for consumers.

Between September 2009 and February 2010, the ACCC announced it had reached agreement with Coles, Woolworths, ALDI, Metcash, SPAR and Foodworks to phase out restrictive provisions in supermarket leases.²²⁴ At the time, the then ACCC Chair, Graeme Samuel AO, described the reform as a major breakthrough for grocery competition in Australia:

*Reducing the barriers to entry for new and expanding players opens the possibility for Australian consumers to have greater choices in where to shop, and potentially pay lower prices as a result.*²²⁵

The agreements reached with the supermarkets are in the form of court-enforceable undertakings and remain in place.

Laws to deal with creeping acquisitions by supermarkets

On 23 October 2010, the Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, introduced legislation to deal with

224 ACCC, *Supermarket agreement opens way for more competition*, 18 September 2009 and ACCC, *Further agreements address restrictive supermarket leases*, 8 February 2010, both accessed 25 March 2024.

225 ACCC, *Supermarket agreement opens way for more competition*, 18 September 2009, accessed 25 February 2024.

creeping acquisitions, in a bid to limit the market power of the major supermarkets.²²⁶ The amending legislation was designed to ensure the ACCC had the power to reject acquisitions that would substantially lessen competition in any local, regional or national market.²²⁷

The move followed a private legal opinion for one of the major supermarkets questioning whether the ACCC had the power to consider effects on competition in local markets, suggesting it could examine impacts only in the national market. The reforms clarified that the ACCC, in deciding whether an acquisition would substantially lessen competition, can examine the impact on any market – local, regional, or national.

The amendments also confirmed the ACCC's power to examine the acquisition of greenfield sites, which had previously come under question. They empowered the ACCC to review acquisitions of new sites by the major supermarket chains and to investigate whether such acquisitions could substantially lessen competition.

In summing up the parliamentary debate, Dr Emerson said “the reforms remove the requirement that a market in which the competition effects of a merger are assessed must be a substantial market. The amendments will also ensure that the courts and the ACCC can consider the totality of the competitive effects resulting from an acquisition, including those where creeping acquisition concerns have been raised within the community.”²²⁸

226 *Competition and Consumer Legislation Amendment Act 2011*, No. 184, 2011.

227 Explanatory Memorandum to the *Competition and Consumer Legislation Amendment Bill 2011*, p. 3.

228 House of Representatives, *Hansard - Competition and Consumer Legislation Amendment Bill 2010, Second Reading*, 23 June 2010, accessed 25 February 2024.