

Independent Review of the Food and Grocery Code of Conduct

Final Report

June 2024



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Foreword from Dr Craig Emerson



My central recommendation from the Review of the voluntary Food and Grocery Code of Conduct (the Code), is that the Code be made mandatory with heavy penalties for breaches. Making the Code mandatory is essential to ensuring it is effective in addressing the heavy imbalance in market power between supermarkets and their suppliers, especially their smaller suppliers.

The penalties for breaches of the mandatory Code that I am recommending are the heaviest of any industry code of conduct.

I have also recommended improved dispute-resolution processes. Although under the Constitution a mandatory code cannot impose binding arbitration on a company, Woolworths, Coles, ALDI and Metcash have given their in-principle agreement to be bound by the

outcome of the arbitration processes I am recommending. I thank them for their cooperation.

Smaller suppliers have told the review that they fear retribution from the big supermarkets if they make a complaint. I am recommending strengthened protections against retribution. I am also recommending new protections for suppliers of fresh produce.

A mandatory Code with heavy penalties

The heavy imbalance in market power between supermarkets and smaller suppliers in Australia's highly concentrated supermarket industry demands a mandatory code of conduct.

As pointed out by the ACCC in its submission to this Review, a mandatory code would benefit smaller suppliers as well as consumers by enabling suppliers to earn sufficient returns to innovate and invest in new technologies to provide better products at lower cost.

My recommendation that the voluntary Code be made mandatory would cover all grocery retailers and wholesalers with an annual turnover greater than \$5 billion. At present, this would be Woolworths, Coles, ALDI and Metcash (all signatories to the voluntary Code).

In time, Costco is likely to pass the \$5 billion threshold and be covered by the mandatory Code. If Amazon began offering a full range of grocery products including fresh fruit and vegetables, it, too, could be subject to the Code if its sales of groceries exceeded the \$5 billion threshold.

I have carefully considered arguments for other retailers to come into the Code, including the sale of nursery plants by Bunnings, the sale of wine, beer and spirits by supermarket affiliates, and of non-prescription items by Chemist Warehouse. While I understand the various representations for additional products and businesses being brought into the Code, I recommend that the Code continue to apply to supermarkets as conventionally understood as places for regular grocery shopping, as well as Metcash as the largest grocery wholesaler. This is the purpose for which the Code was developed.

My interim report recommended that in enforcing the mandatory Code, the ACCC would be able to seek penalties for major or systemic breaches of up to the highest of \$10 million, 3 times the benefit gained from the breach, or where the benefit cannot be determined, 10 per cent of turnover in the 12 months preceding the breach.

I consider these highest penalties should apply to obligations on supermarkets to deal with suppliers lawfully and in good faith; have and retain written grocery supply agreements; train staff; and keep records. Supermarkets that do not comply with the new obligations to address retribution would also be liable for these highest penalties.

I am now further recommending that the ACCC be able to seek penalties of up to 3,200 penalty units (currently just over \$1 million) for breaches of other substantive provisions in the Code. These penalties would ensure supermarkets took compliance with their obligations under the Code seriously.

In addition, under the mandatory Code, the ACCC would be able to issue infringement notices. These provide a timely enforcement tool where the ACCC has reasonable grounds to believe a contravention has occurred. I recommend infringement notice penalty amounts be set at 600 penalty units (currently \$187,800).

This penalty regime would require new legislation to amend the *Competition and Consumer Act 2010*.

Addressing the fear of retribution

Suppliers' fear of retribution has been a major obstacle to the pursuit of their rights under the Code. I am recommending that the Code be strengthened by amending how retribution is captured in the Code's good-faith provision to ensure that suppliers are protected from action taken by a supermarket in retaliation for a supplier exercising its rights under the Code.

Recognising the power of incentives (see Box 1), I also recommend that any incentive schemes that apply to buying teams and category managers must be aligned with the purpose and content of the Code, including its obligation to act in good faith, and that the conduct of buying teams and category managers be subject to ongoing monitoring by senior management following any complaint.

I further recommend that an anonymous channel be established by the ACCC to receive complaints about retribution and other breaches of the Code. The ACCC could use this information to form views about systemic Code breaches by a supermarket or a particular buyer or category manager, which could trigger an investigation, including the use of the ACCC's compulsory information-gathering powers.

I note that a decision to delist a supplier's product or relocate it to a less-favourable location elsewhere within a store would not necessarily, of itself, constitute retribution. Supermarkets can have sound commercial reasons for discontinuing supplies as new offerings come onto the market, or to change the location of an item based on sales performance. I am not seeking to guarantee all existing suppliers a profitable living at the expense of new suppliers and customers. Rather, my recommendations seek to rebalance market power between the supermarkets and smaller suppliers.

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.”

The relevance of this to supermarkets is that if a supermarket’s senior management establishes an incentive system for their buyers and category managers that rewards maximising margins, the buyers and category managers will squeeze suppliers to achieve this.

As monopsonist buyers, they can squeeze supplier margins to the point where suppliers cannot earn sufficient returns to invest in quality improvements and efficiency-raising equipment. With strong market power, buyers and category managers can also engage in retribution against a supplier who complains about this behaviour.

If these practices are brought to the attention of senior management, they might be shocked, but they shouldn’t be. They will have set in place the incentives that have led to such behaviour. Indeed, senior management might be aware that their buyers and category managers are behaving unconscionably, but they want to retain their positions and aspire to senior positions in other corporations. Institutional and individual shareholders demanding the best returns on their investments 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.

Effective dispute resolution

To prove a breach of the Code 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. Similarly, a supplier wishing to enforce its legal rights would need to identify itself and take action through the courts.

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

In seeking the best of both worlds, I recommend a low-cost alternative to court proceedings. This would involve replicating but strengthening 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. The Code Mediator could assist the supplier and the supermarket to reach settlement of a complaint and recommend a remedy.

Before a matter went to arbitration, mediation would be obligatory. A supplier could agree to mediation by the Code Mediator, but if a supplier wanted an independent mediator, this would also be available.

If independent mediation did not resolve a dispute, arbitration would be available.

Owing to constitutional limitations, binding arbitration to resolve disputes must be entered into voluntarily; it cannot be imposed by a mandatory code of conduct or by the Government or the parliament. I am pleased to have secured the in-principle agreement of Woolworths, Coles, ALDI and

Metcash¹ to be bound by a decision of their Code Mediator for compensation of up to \$5 million, where agreed by the relevant supplier. They have also given in-principle agreement, for disputes involving small suppliers, to participate in independent arbitration and be bound by a decision of an independent arbitrator for compensation of up to \$5 million. Small suppliers would be those with annual revenue below \$10 million or fewer than 100 staff.²

As a matter of course, the ACCC might take an interest in any supermarket's refusal to engage in independent dispute resolution with other suppliers where a pronounced imbalance in market power exists. The exercise of its discretion regarding enforcement is a matter for the ACCC. All alleged breaches of the Food and Grocery Code are assessed by the ACCC in accordance with the principles set out in its Compliance and Enforcement Policy.

I am also recommending that a Code Supervisor replace the existing Independent Reviewer, publishing annual reports on supplier satisfaction with supermarkets, and identifying emerging and systemic issues in the grocery supply chain relating to the operation of the Code.

Only mutually beneficial exceptions to be allowed

The voluntary Code contains provisions that enable exceptions for conduct ordinarily not allowed under the Code where these are included in grocery supply agreements and the exceptions are reasonable. I considered whether to recommend removing all exceptions, as preferred by the ACCC, but concluded this could have the unintended consequence of preventing a supermarket and a supplier reaching arrangements that were genuinely beneficial to both parties.

However, I recommend strengthening the Code to require that exceptions apply only where they are clearly mutually beneficial. For example, the existing Code prohibits a supermarket requesting a supplier to help fund an in-store promotion of the supplier's product, yet the supplier might want to do so to give the product its best chance of success.

To ensure that exceptions are agreed only where they are of mutual benefit, I recommend that all exceptions be subject to a reasonableness test that considers the benefits, costs and risks to the supplier and the supermarket in agreeing the exception. The supermarkets would bear the onus of proving that any exceptions were reasonable.

In order that suppliers understand the exceptions to which they are agreeing, I am recommending that the Code contain a new requirement for supermarkets to communicate clearly, in writing, the exceptions that are proposed in a grocery supply agreement. This would address the issue of suppliers unwittingly agreeing to exceptions.

The good-faith obligations, and other protections under the Australian Consumer Law, including protections against unconscionable conduct and unfair contract terms, would further protect against supermarkets coercing suppliers into agreeing to exceptions that are not in their interests.

-
- 1 Metcash's in-principle agreement is subject to a supplier first mediating through its Code Mediator before proceeding to independent mediation or arbitration.
 - 2 If a supplier has a turnover of more than \$10 million and fewer than 100 staff, it qualifies as a small supplier. The size of the small supplier should take account of the size of any related corporate entities, such that small companies that are part of a large corporate group would not benefit unfairly from this arrangement.

Greater protections for fresh produce

Throughout this Review, the supply of fresh produce has been identified as an industry of special vulnerability, owing to its perishability. Numerous stakeholders raised concerns about pricing, forecasting and quality requirements. To address these concerns, I am recommending that protections under the Code be strengthened to deal specifically with issues relating to fresh produce. This would include obligations on supermarkets for grocery supply agreements to specify the basis for determining prices, for supermarket forecasts to be conducted with due care and for quality standards to be reasonable.

A rational approach to the Review

In conducting this review, I have applied conventional economic analysis to the issues being investigated. Highly prescriptive legislation that inserts Government in every part of the relationship between supermarkets and their smaller suppliers would likely have unintended and undesirable consequences for suppliers and consumers.

Australian consumers deserve a viable supermarket industry. Greater competition for supermarkets would be welcome and is being considered in the ACCC's supermarkets inquiry and as part of the revitalisation of National Competition Policy. But the heavy imbalance in market power between supermarkets and their smaller suppliers needs to be addressed to ensure Australia continues to have a productive and sustainable grocery-supply industry. That is what my recommendations are designed to do.

Sixty-five stakeholder meetings and 88 formal submissions informed these recommendations. In addition, I hosted 4 roundtables 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.

I wish to express my thanks and gratitude to the small secretariat to this Review led by Anna Barker and comprising Paul Miszalski, Elizabeth Toussaint, Vinh Le, Sarah McQuillan and Jenny Chiu. These talented professionals have worked assiduously to ensure this Report was provided to the Government before the due date of 30 June 2024.

Finally, while Emerson Economics Pty Ltd has in the past performed consulting services to the Business Council of Australia, Wesfarmers and its subsidiary, Coles, I do not consider that these previous engagements represent a conflict of interest in my ability to review the Food and Grocery Code of Conduct.



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

Recommendations

Recommendation 1: The Food and Grocery Code of Conduct should be made mandatory.

Recommendation 2: All supermarkets, including online supermarkets, that meet an annual Australian revenue threshold of \$5 billion should be subject to the mandatory Code. Revenue should be in respect of carrying on a supermarket business as a ‘retailer’ or ‘wholesaler’ (as defined in the existing Code). All suppliers should be protected by the Code.

Recommendation 3: The Code should place greater emphasis on addressing the fear of retribution by:

- Including protection against retribution in the purpose of the Code;
- Ensuring that retribution captured under the obligation to act in good faith includes action taken against suppliers for exercising their rights under the Code;
- Requiring that any incentive schemes and payments that apply to a supermarket’s buying teams and category managers are consistent with the purpose of the Code; and
- Requiring supermarkets to have systems in place for their 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 4: An anonymous complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly with the ACCC.

Recommendation 5: The Code should provide parties with avenues for mediation and arbitration to resolve disputes.

- Supermarkets must appoint a suitably qualified Code Mediator who is engaged by supermarkets (replacing their Code Arbiters), and who would be available to assist with resolving disputes, where requested by a supplier.
- Avenues for independent mediation and arbitration should also be available.
 - Parties can agree on an independent mediator or arbitrator. A list of suitably qualified mediators and arbitrators should be compiled by the Treasury or the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).
 - Supermarkets must attend independent mediation if requested by a supplier.
 - Where mediation has not settled a dispute, independent arbitration can be used to settle disputes as agreed between the supermarket and supplier.

In addition, Woolworths, Coles, ALDI and Metcash have agreed in principle to be bound by a decision of their Code Mediator to award compensation of up to \$5 million, where agreed by a supplier. They have also agreed to be bound by a decision of an independent arbitrator for compensation of up to \$5 million, where requested by a small supplier. Small suppliers would be those with annual revenue below \$10 million or fewer than 100 staff.

Recommendation 6: A Code Supervisor (previously the Independent Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys, be able to identify systemic issues with the Code and be available to suppliers to provide information on options to resolve disputes and review the processes of Code Mediators.

Recommendation 7: To ensure exceptions allowed for in grocery supply agreements are reasonable and transparent:

- All exceptions should be subject to a reasonableness requirement that considers the benefits, costs and risks to the supplier and the supermarket, and protects against exceptions that are not in a supplier's interest, with the supermarket bearing the onus of proof that any exception is reasonable; and
- For all new grocery supply agreements, supermarkets should be required to provide suppliers a simple guide to any exceptions that are included in the agreement.

Recommendation 8: To address issues relating to fresh produce, the Code should require that:

- Grocery supply agreements must include the basis for determining prices;
- All forecasts of required volumes are conducted with due care; and
- Fresh produce standards and specifications must be reasonable.

Recommendation 9: Maximum penalties for more harmful breaches of the Code should be the greatest of \$10 million, 3 times the benefit gained from the contravening conduct or, where the benefit cannot be determined, 10 per cent of turnover in the preceding 12 months. Maximum penalties for other breaches should be 3,200 penalty units (currently \$1,001,600).

Recommendation 10: The penalty amount for infringement notices for contraventions of the Code should be 600 penalty units (currently \$187,800), an increase from 50 penalty units (currently \$15,650) that otherwise applies for industry codes.

Recommendation 11: The ACCC, Code Mediators and the Code Supervisor should engage in education and outreach activities to ensure that suppliers are empowered to take advantage of their rights 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).³

A Secretariat was 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*.

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.

Consultation process

Dr Emerson and the Review team wish 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.

³ 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 papers

A [consultation paper](#) was released on 5 February 2024, and an [interim report](#) was released on 8 April 2024. Eighty-eight formal submissions were received.

Roundtable events

Dr Emerson and Senator the Hon Murray Watt, Minister for Agriculture, Fisheries and Forestry, hosted 4 roundtable events in February and May 2024:

- Producer roundtables on 15 February and 1 May 2024 involving 17 stakeholder groups; and
- Processor roundtables on 21 February and 1 May 2024 involving 15 stakeholder groups.

Bilateral meetings

The Review held 65 bilateral meetings. 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 representatives from the Treasury, the ACCC and the Department of Agriculture, Fisheries and Forestry.

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. It has not changed materially since the Interim Report.

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 towards 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.⁴

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.⁵

⁴ ACCC, *Trade and business covered by the food and grocery code*, accessed 19 March 2024.

⁵ Part 1A, *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* (Food and Grocery Code of Conduct).

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

1. Grocery supply agreements;⁶
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.⁷

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 about the Code's obligations and ensure appropriate record-keeping practices are in place.⁸

The Code is scheduled to 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:

6 A grocery supply agreement is the agreement between a supplier and a supermarket for the supply of groceries to a supermarket business as defined in the Voluntary Code.

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

8 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 businesses⁹ from unfair terms in standard-form contracts;
- Collective bargaining provisions: under the Competition and Consumer Act, businesses may seek permission to come together with their competitors to negotiate with a common customer over terms, conditions and/or prices, which includes provision for a class exemption for eligible small businesses¹⁰ and
- Competition laws: a range of provisions under the Competition and Consumer Act protect against anti-competitive conduct including prohibitions of misuse of market power, collusion, and anti-competitive mergers.

The Review also notes public consultation in late 2023 on options to address potential unfair trading practices under the Australian Consumer Law.¹¹ Were a prohibition introduced, this could potentially provide further protections for small businesses in the food and grocery industry.

The Code operates alongside other prescribed industry codes 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 Conduct, the Dairy Code of Conduct and the Franchising Code of Conduct – all prescribed mandatory industry codes.¹²

In implementing any changes to the Code, consideration needs to be given to how it intersects with other industry codes, particularly the Horticulture Code and the Dairy Code. The recommendations to improve the Code are designed to work in tandem with other industry codes to improve relationships in the supermarket industry.

The Dairy Code of Conduct regulates conduct between dairy farmers and processors, imposing minimum standards of conduct and aiming to improve clarity and transparency of trade between dairy farmers and processors.¹³ The Dairy Code prescribes that the Food and Grocery Code of Conduct does not apply when it conflicts with the Dairy Code of Conduct.¹⁴

The Horticulture Code of Conduct regulates trade in horticultural produce between growers and traders to ensure transparency and clarity of transactions, and to provide a fair dispute-resolution

9 Small businesses receiving unfair contract term protections under are those that have fewer than 100 employees or make less than \$10 million in annual turnover, see ACCC, [Contracts](#), accessed 5 June 2024.

10 Businesses are required to have an aggregated annual turnover of less than \$10 million. Eligible small businesses wishing to rely on this class exemption must still give notice to the ACCC of their intentions, see ACCC, [Collective bargaining class exemption](#), accessed 30 April 2024.

11 The Treasury, [Unfair trading practices – Consultation Regulation Impact Statement](#), 31 August 2023, accessed 27 March 2024.

12 These industry codes are *Competition and Consumer (Industry Codes – Horticulture) Regulations 2017 (Horticulture Code of Conduct)*, *Competition and Consumer (Industry Codes – Dairy) Regulations 2019 (Dairy Code of Conduct)*, *Competition and Consumer (Industry Codes – Franchising) Regulations 2014 (Franchising Code of Conduct)*.

13 ACCC, [Dairy Code of conduct](#), accessed 11 April 2024.

14 Clause 10, [Dairy Code of Conduct](#).

procedure for disputes arising under the code and in produce agreements.¹⁵ For the purpose of the Horticulture Code, a trader is either an agent or a merchant:

- An agent sells produce on behalf of a grower to a person for a commission or fee; and
- A merchant purchases produce from a grower and resells but excludes merchants purchasing for the purpose of exporting or retailing.

The Food and Grocery Code prescribes that it does not apply when it conflicts with the Horticulture Code of Conduct.¹⁶ There might be limited circumstances where these conflicts occur. For example, Metcash (as the only wholesaler covered by the Grocery Code), purchasing produce either as an agent or a merchant is subject to the Horticulture Code of Conduct.

As with the voluntary Code, the Review considered it is reasonable that in these limited circumstances where there is conflict between the Horticulture Code and the recommended mandatory Food and Grocery Code, the Horticulture Code continues to apply. However, the Review considers that wholesalers (other than Metcash) that are subject to the Horticulture Code in their relationship with their supplier should still have the protections of the mandatory Grocery Code in their relationship with the supermarkets.

Education and awareness programs are important to ensure market participants are aware of 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 AC, 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 2023.¹⁹ In January 2024, the Government released the final report of the statutory review, along with the Government's response.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.

15 Clause 2, [Horticulture Code of Conduct](#). Produce in the Horticulture Code of Conduct means unprocessed fruits, vegetables (including mushrooms and edible fungi), nuts, herbs and other edible plants as defined in the [Horticulture Code of Conduct](#), Clause 7(1).

16 Clause 4(4), [Food and Grocery Code of Conduct](#).

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

18 The Treasury, [Government response to the Independent Review of the Food and Grocery Code of Conduct](#), March 2019.

19 The Treasury, [Food and Grocery Code of Conduct Review 2022–23 – Final Report](#), September 2023.

20 The Treasury, [Government response to the Food and Grocery Code of Conduct Review 2022–23](#), December 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 voluntary Code is not effective in meeting its stated purpose. Recommendations for improving the Code are discussed in the remainder of the Final Report. This chapter has not changed materially since 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 Woolworths, Coles, ALDI and Metcash if they are to succeed in Australia. Further, some suppliers are limited to supplying the Australian market by an 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

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 these imbalances 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 greater for smaller suppliers and for suppliers of perishable products.

There are, however, circumstances in which suppliers could be expected to have countervailing power. Some suppliers 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 Australia.

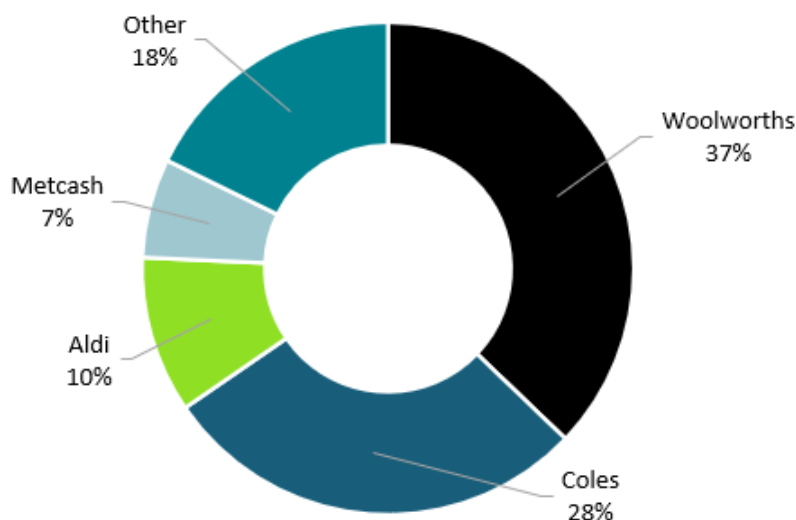
In the Code’s almost decade of operation, power imbalance issues have been consistently identified in successive reviews and in stakeholder feedback.²³

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

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

23 The Treasury, *Food and Grocery Code of Conduct Review 2018 - Final Report*, September 2018, p. 6; ACCC, *Perishable Agricultural Goods Inquiry 2020*, November 2020, p. 69; Food and Grocery Code Independent Reviewer, *Annual Report 2022-23*, 30 November 2023, p. 7.

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 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:

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

Fruit Growers Victoria emphasised the power imbalance for fruit producers, which it argues 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 ... [This imbalance] ... is a major driver of unethical, opportunistic behaviour from retailers.²⁶

Freshmark also highlighted the vulnerability of suppliers of fresh produce.²⁷

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.

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

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

TasFarmers noted that power asymmetries are:

*... particularly pronounced for smaller-scale suppliers and certain product categories, where limited options for distribution and alternative buyers leave them vulnerable to the dictates of dominant supermarket chains.*²⁸

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

*... 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.*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:

*... processors 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

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

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

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

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

Most submissions that commented on the purpose of the Code were supportive of its stated purpose. Granite Belt Growers Association suggested that (a) be amended to remove “to help”.³² The Review supports this amendment. Further amendments to the purpose, to include addressing the fear of retribution, are discussed in Chapter 5.

Most stakeholders consider 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

Some 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.

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.

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

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;*

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

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

- *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.*³⁴

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.*³⁵

Fresh Markets Australia similarly argued that the Code ‘fails to meaningfully rectify the power imbalances that persist in the food and grocery (fresh fruit and vegetable) sector’.³⁶

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;
- Chapter 9 considers penalties under the Code; and
- Chapter 10 considers measures to help ensure a successful future for the Code.

Chapter 11 provides an overview of other inquiries and initiatives occurring in the food and grocery industries.

34 National Farmers’ Federation, Submission to the Consultation Paper, 29 February 2024, pp. 6-7. Seafood Industry Australia made similar representations: Seafood Industry Australia, Submission to the Consultation Paper, p. 6.

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

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

Chapter 3: Why the Code should be mandatory

This chapter finds that a voluntary Code without penalties is not effective. It recommends that the Code be made mandatory. The chapter has not changed materially since the Interim Report.

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.

The Code is enforceable by the ACCC, but with a limited range of enforcement tools that do not include penalties for breaches.³⁷

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 ...

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.³⁸

37 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).

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

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.*³⁹

Many other stakeholders in their submissions to the Consultation Paper advocated making the Code mandatory, including Australian Dairy Farmers, Australian Chicken Growers' Council, AUSVEG and Fresh Markets Australia.⁴⁰

Professor Allan Fels AO 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.*⁴¹

Making the Code mandatory was also one of the recommendations of the report of the House of Representatives Standing Committee on Agriculture inquiry into food security in Australia published in November 2023.⁴² It was also a recommendation of the Senate Select Committee on Supermarket Prices.⁴³

Rod Sims AO, 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.*⁴⁴

However, some stakeholders, such as Metcash, argued for a voluntary Code, and did not consider the case had been made for a mandatory Code.⁴⁵

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

40 Submissions to the Consultation Paper from: ACCC, p. 1; Alfred E Chave Pty Ltd, p. 4; Australian Chicken Growers' Council, p. 10; Australian Dairy Farmers, p. 2; AUSVEG, p. 7; Centre for Decent Work and Industry, p. 1; eastAUSmilk, p. 3; Fruit Growers Victoria, p. 1; Fresh Markets Australia, p. 3; Freshmark, p. 5; 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; The 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.

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

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

43 Senate Select Committee on Supermarket Prices, *Supermarket Prices: Final report*, May 2024, accessed May 2024.

44 Sims, Rod, Opinion piece, *Sydney Morning Herald*, 12 January 2024.

45 Metcash, Submission to the Interim Report, 30 April 2024, p. 1.

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

How best to ensure compliance and achieve better outcomes for the industry?

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

Rod Sims AO, 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.⁴⁶

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

... the weaknesses [of the] voluntary code [is] that [it] 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.⁴⁷

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

... making it mandatory for retailers and wholesalers and introducing significant penalties or contraventions.⁴⁸

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council stated 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.⁴⁹

Australian Dairy Farmers similarly argued:

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.⁵⁰

46 Sims, Rod, Opinion piece, *Sydney Morning Herald*, 12 January 2024.

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

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

49 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.

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

In contrast, some stakeholders have pointed to improved relations between supermarkets and their suppliers as evidence of success of the voluntary Code.⁵¹ Some have also argued that a mandatory Code would increase administrative and compliance costs and the risk of unintended consequences.⁵²

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, including penalties for breaches (see Chapter 9). The prospect of enforcement action by the ACCC, coupled with heavier 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 federal courts the exclusive power to interpret laws and to judge whether they apply in an individual case.⁵³ 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.⁵⁴ Mediation can be an effective way to settle a dispute while preserving the commercial relationship between the parties and allowing flexibility to include issues that exist beyond the Code.⁵⁵
- Arbitration is a process whereby the decision of the arbitrator is final and binding. Commercial arbitration is a tailored, scalable and efficient form of dispute resolution.⁵⁶ A decision to use binding arbitration to resolve disputes needs to be agreed between the parties. The arbitrator then decides the outcome.⁵⁷

While mediation can be required in a mandatory code, binding arbitration cannot be imposed without the agreement of the parties. However, both parties can agree to submit to arbitration. For example, arbitration by agreement is available in the Dairy Code and the Franchising Code.⁵⁸

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

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

52 Red Meat Advisory Council, Submission to the Consultation Paper, 29 February 2024, p. 2; and Australian Chamber of Commerce and Industry, Submission to the Interim Report, 2 May 2024, p. 1.

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

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

55 The Small Business Development Corporation, Submission to the Interim Report, 30 April 2024, p. 4.

56 Chartered Institute of Arbitrators (Australia) Limited, Submission to the Interim Report, 30 April 2024, p. 1.

57 See also the ASBFEO, '[Dairy Code](#)', *ADR Process – Arbitration*, accessed 14 March 2024.

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

and/or changes to the relevant grocery supply agreement.⁵⁹ 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.⁶⁰

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, to the detriment of smaller businesses.⁶¹

However, moving to a mandatory Code does not preclude dispute resolution outside of the courts, as discussed further in Chapter 6. The Review 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 protect against adverse conduct, 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.

Recommendation 1

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

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

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

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

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: Woolworths, Coles, ALDI and Metcash. The Review recommends that all suppliers to these supermarkets be automatically covered by the Code.

What does the Code currently cover?

Which businesses have obligations under the Code?

The existing Code applies to grocery retailers and wholesalers using the following definitions:

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.⁶²

The definition of ‘supermarket business’ is important to the concepts of ‘retailer’ and ‘wholesaler’:

Supermarket business means a business under which a person sells to consumers bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and other packaged food or most of those groceries.⁶³

Any agreement between supermarkets and their suppliers is defined as a grocery supply agreement, and some of the obligations of the Code are established through these agreements.⁶⁴ However, the definition of a grocery supply agreement in the Code excludes agreements between retailers and wholesalers, exempting these agreements from obligations.⁶⁵

62 Clause 3, [Food and Grocery Code of Conduct](#).

63 Clause 3, [Food and Grocery Code of Conduct](#).

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

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

Which products are covered by the Code?

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

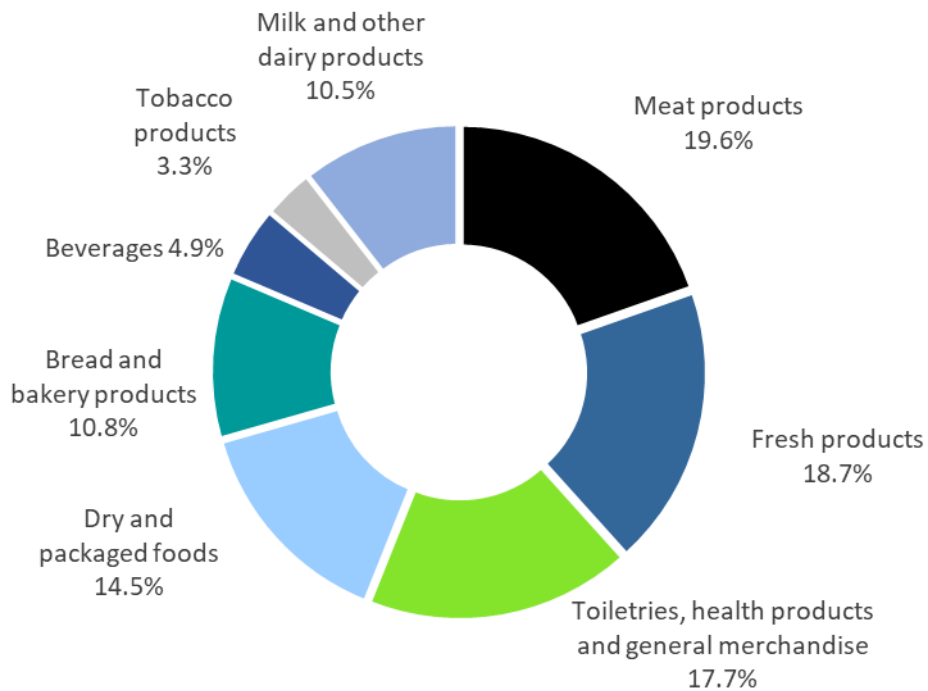
- Food including fresh produce, meat and dairy items (other than dairy items sold for in-store consumption);
- Pet food;
- Non-alcoholic drinks (other than drinks sold for in-store consumption);
- Cleaning products;
- Toiletries, perfumes and cosmetics;
- Household goods, electrical appliances and kitchenware;
- Clothing;
- “Do-it-yourself” products;
- Pharmaceuticals;
- Books, newspapers, magazines and greeting cards;
- CDs, DVDs, videos and audio tapes;
- Toys;
- Plants, flowers and gardening equipment; and
- Tobacco and tobacco products.⁶⁶

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.

⁶⁶ Clause 3, [Food and Grocery Code of Conduct](#).

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



Source: IBISWorld (May 2024), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 9.

Which businesses should have obligations under the Code?

Which types of businesses should have obligations?

The Review has considered a definition of supermarkets and other grocery stores, excluding convenience stores:

This industry comprises establishments generally known as supermarkets and grocery stores primarily engaged in retailing a general line of food, such as canned and frozen foods; fresh fruits and vegetables; and fresh and prepared meats, fish, and poultry. Included in this industry are delicatessen-type establishments primarily engaged in retailing a general line of food.⁶⁷

Several stakeholders requested that the Code be extended to cover other retail businesses in markets where market power imbalances exist.

67 IBISWorld, 'NAICS Code 445110 – Supermarkets and other grocery (except convenience) stores', accessed 11 April 2024. Throughout this report, the industry that is in this classification is referred to as supermarkets.

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:

*The issues that the Code sought to address in 2015 are exactly the same as those being experienced in 2024 by greenlife growers in their dealings with Bunnings, which is part of the Wesfarmers group. Greenlife growers' accounts of the power imbalance and its impact on their business, not to mention their personal well-being, are extensive and compelling. Bunnings has treated growers reprehensibly, for many years and without consequence. We are taking this opportunity to again emphasise the urgent need to see Bunnings covered by the Code ...*⁶⁸

Australian Grape and Wine advocated that the Code cover wine and liquor products, including retailers that meet the relevant revenue threshold. It argued that:

*The provisions in the Code line up very neatly with a vast majority of the issues raised by wine producers such as how products are delisted, the funding of promotions, quality specifications, changes to supply chain procedures, product ranging, shelf space allocation and range reviews, intellectual property rights, confidential information, and timeframes for acceptance of price increases. These types of protections would induce significant improvements to supply agreements between wine producers and liquor retailers.*⁶⁹

Woolworths advocated expanding the Code to:

*... apply to all grocery retailers and wholesalers of substantial size, including global retail giants such as Costco and Amazon now operating in Australia, and other large retailers selling "groceries" in Australia (as defined under Part 1, Clause 3 of the Code), such as Chemist Warehouse.*⁷⁰

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

The Australian Chicken Growers' Council supported an approach that "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.⁷¹

On coverage of the Code, as compared to the Horticulture Code, 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

68 Greenlife Industry Australia, Submission to the Interim Report, 7 May 2024, pp. 1-2.

69 Australian Grape and Wine, Submission to the Interim Report, 7 May 2024, p. 3.

70 Woolworths, Submission to the Consultation Paper, 6 March 2024, p. 2.

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

*acknowledges the specific needs and nuances of the horticulture sector, in particular with regards to the current wholesale market system.*⁷²

The Review acknowledges there are retailers that sell some of the products sold by supermarkets, and that such products are captured in the definition of grocery products. For example, each of Amazon, Bunnings, Chemist Warehouse, and Costco supply some types of grocery products to consumers:

- Amazon supplies groceries through its website, including packaged food and drinks, cleaning products, confectionery, and personal care products;
- Bunnings supplies a range of groceries through its stores, including pet food, cleaning products and nursery plants, flowers and gardening equipment;
- Chemist Warehouse supplies an extensive array of personal care products through its stores; and
- Costco supplies groceries through its stores, including fresh fruit and vegetables, meat, seafood, packaged food and drinks, cleaning products, confectionery, and personal care products.

However, Amazon, Bunnings and Chemist Warehouse do not supply fresh produce at present. On this basis, Amazon, Bunnings, and Chemist Warehouse do not appear to be operating a ‘supermarket business’ and would therefore not be a ‘retailer’ under the Code. However, Costco does appear to be operating a supermarket business.

Expanding the Code to cover businesses such as Bunnings, Chemist Warehouse and liquor retailers would involve a change in the policy intent of the Code. That intent is to regulate supermarkets as they are ordinarily understood.

The approach supported by the Review is consistent with that taken in comparable jurisdictions, such as New Zealand, where its code of conduct applies to supermarket businesses (rather than large retailers more generally).

The Review notes that Bunnings and Chemist Warehouse supply some ‘groceries’ as they are defined in the Code. However, families do not complete their weekly food and grocery shopping at Bunnings or Chemist Warehouse. The Review considers that Bunnings and Chemist Warehouse should not be regulated under the Code merely on the basis that they supply some grocery products.

In contrast, Costco operates a supermarket business, and so the Review sees scope for Costco to be captured under the Code in the future when its annual turnover exceeds the \$5 billion threshold recommended in this chapter. Similarly, Amazon supplies a broad range of groceries to consumers, except for fresh produce. However, the Review notes that Amazon offers ‘Amazon Fresh’ in some overseas locations. If Amazon itself started supplying fresh produce, and met the \$5 billion threshold

72 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 22.

from selling groceries, then the Review considers Amazon should be captured under the Code in the future.⁷³

It has been put to the Review that grape wine growers should be protected under the Code.⁷⁴ The Review acknowledges that there is some overlap between market concentration in the liquor retailing industry and the major supermarkets. Endeavour Group, Coles, Metcash and ALDI hold a combined market share in liquor retailing of almost 70 per cent.⁷⁵ However, alcoholic beverages do not fall under the definition of groceries and the Review notes that the Food and Grocery Code was developed specifically to address a market failure in the supermarket industry. Further, around 60 per cent of wine is sold on the export market,⁷⁶ providing an alternative outlet for the wine-producing industry. In contrast, only 5 per cent of all fresh vegetables and 16 per cent of all fresh fruits are exported.⁷⁷

If the wine, beer and spirits industry were to be covered by the Food and Grocery Code, only the Endeavour Group would pass the \$5 billion threshold for inclusion.⁷⁸

The Review considers that the Code should not be extended beyond supermarkets to cover other retailers. This is not to say that these markets are functioning well for all players in those markets. In examining the case for whether regulation is needed in other markets, consideration should be given to:

- Identifying the market failure in that market;
- Determining what types of regulatory responses might address that market failure; and
- Which of the regulatory responses would more likely result in an overall net benefit.

To the extent that an industry code is the appropriate response, consideration would need to be given as to the form of any such code, including the extension of an existing code, or a new one.

The Review considers that more work is needed to better understand the market failure that might exist in relation to the issues raised by stakeholders, and the best regulatory instruments that could be used to address any identified market failure. This work is beyond the scope of the Food and Grocery Code Review since the relationships described do not directly include supermarkets.

However, the Review considers that as a starting point, Greenlife Industry Australia and Bunnings might agree to work together to develop a document, drawing upon relevant provisions in the Code, setting out expectations relating to the supply of nursery plants. Progress in the relationship could be reviewed in 2 years' time.

73 The Review notes that third-party retailers use Amazon's platform to reach consumers. The Review considers that groceries offered by such retailers would not count towards Amazon reaching the \$5 billion threshold.

74 Australian Grape and Wine, Submission to the Consultation Paper, 29 February 2024; and Submission to the Interim Report, 7 May 2024.

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

76 Wine Australia, *Australian Wine: Production, sales and inventory report 2022-23*, 2023, accessed 22 May 2024.

77 NFF Horticultural Council, Submission to the Consultation Paper, 29 February 2024, p. 11.

78 IBISWorld, *Industry Report G4123 Liquor Retailing in Australia*, 2023, p. 51.

Similarly, the Review notes that an existing voluntary industry-led code of practice applies to wine grape producers and winemakers.⁷⁹ However, there are no arrangements in place to address market power imbalances between winemakers and retailers. Further work could be undertaken by the Department of Agriculture, Fisheries and Forestry to examine the relationship between winemakers and retailers.

Concerns were also 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, questions were raised about whether the Code should apply to animal producers supplying a meat processor that, in turn, supplies a supermarket.⁸⁰

The Australian Macadamia Society suggested 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.*⁸¹

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 (e.g. RSPCA accreditation, "swap" to another processor etc).*⁸²

eastAUSmilk did not support extending the Code to cover other relationships if that resulted in reducing the strength of the Dairy Industry Code in any way.⁸³

Extending the Code to regulate the practices of processors would be a major expansion in the Code's scope. The Review has not received compelling evidence to justify such an expansion.

Questions were also raised as to whether farmers delivering produce to an aggregator should have the same protections as farmers who conduct business directly with a supermarket.⁸⁴ This question is considered in Chapter 8.

79 [Code of Conduct for Australian Winegrape Purchases](#), 23 September 2021. This is not a prescribed code under the Competition and Consumer Act.

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

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

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

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

84 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.

What level of turnover should be the benchmark for coverage by the Code?

Woolworths, Coles, ALDI and Metcash have more than 82 per cent of the Australian market, with the 2 largest supermarkets – Woolworths and Coles – having a combined market share of just over 65 per cent.⁸⁵ Estimated revenue for the largest supermarkets in Australia is outlined in Table 1.

Table 1: Top supermarket and grocery stores by estimated revenue 2024

Company	Estimated 2024 revenue (\$b)
Woolworths	50.4
Coles	38.2
ALDI	11.3
Metcash	8.8
Costco	4.6

Source: IBISWorld (May 2024), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 54.

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.⁸⁶

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

Some 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' Council argued it would be more straightforward to apply the Code to all supermarkets:

Just because you are a supplier to a 'minor' supermarket player does not mean you won't be treated unconscionably.⁸⁷

Woolworths suggested the Code should apply to all supermarkets with a gross annual turnover of \$1 billion or more.⁸⁸ It argued that this would be more consistent with international precedent, citing thresholds of NZD\$750 million in New Zealand, and £1 billion in the UK, for the respective grocery codes in those jurisdictions.⁸⁹

⁸⁵ IBISWorld (May 2024), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 54.

⁸⁶ Section 4, *Food and Grocery Code*.

⁸⁷ Australian Chicken Growers' Council, Submission to the Consultation Paper, 29 February 2024, pp. 7, 10.

⁸⁸ Woolworths, Submission to the Consultation Paper, 29 February 2024, p. 1; Woolworths, Submission to the Interim Report, 10 May 2024, p. 3.

⁸⁹ Woolworths, Submission to the Interim Report, 10 May 2024, p. 3.

Metcash strongly disagreed:

*Metcash considers that \$1 billion in revenue does not represent significant market power at the supermarket retail level ... setting the threshold too low and extending to retailers with a smaller market share would have a detrimental impact on the independent retailer sector and affect the overall competitiveness of the sector.*⁹⁰

Metcash also proposed that supermarket retail market share (including a wholesaler's proportion of retail sales) would be a better measure of market power, and hence, a better threshold.⁹¹ The Review understands this position but maintains its recommendation for a revenue-based threshold given this is easier to apply in practice.

The NSW Small Business Commissioner highlighted the need to carefully consider which businesses 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 mitigate the risk of reversing power imbalances in favour of large or multinational grocery suppliers.*⁹²

MGA Independent Businesses Australia said 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.*⁹³

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

*... 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.*⁹⁴

The Review 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.

... 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

90 Metcash, Submission to the Interim Report, 30 April 2024, p. 2.

91 Metcash, Submission to the Interim Report, 30 April 2024, p. 2.

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

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

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

*turnover threshold or other clarification to ensure that smaller retailers and wholesalers are not captured.*⁹⁵

The Review concludes that applying the Code to all supermarkets would disproportionately disadvantage smaller players, since the compliance costs would mostly be fixed, putting them at a competitive disadvantage against large supermarkets. Further, bargaining power imbalances would be less accentuated in the case of smaller supermarkets.

Conduct of concern by supermarkets below an annual Australian sales revenue threshold of \$5 billion can still be reported to the ACCC, as the conduct may breach general competition or consumer law.

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

Woolworths suggested that a proactive reporting obligation be included in the Code, requiring retailers to notify the Treasury and the ACCC once the mandatory Code application threshold is reached.⁹⁶

The Review supports a requirement on supermarkets to notify the ACCC when they reach the revenue thresholds under the Code.

Recommendation 2

All supermarkets, including online supermarkets, that meet an annual Australian revenue threshold of \$5 billion should be subject to the mandatory Code. Revenue should be in respect of carrying on a supermarket business as a ‘retailer’ or ‘wholesaler’ (as defined in the existing Code). All suppliers should be protected by the Code.

Updating the list of products captured under the Code

The Review has received representations that products such as clothing and do-it-yourself products should be removed from the definition. Other products, such as CDs, DVDs, videos and audio tapes, appear outdated in view of technological changes since the Code was introduced in 2015.

The Review considers that the products included in the definition of grocery items should be those that consumers ordinarily purchase from supermarkets. The existing definition appears to be outdated and some of the products do not fit readily with what consumers would consider to be grocery products. In remaking the Code, the Government should consult on whether to update the list of grocery products regulated by the Code. Consideration should be given to adopting the definition of products captured under New Zealand Grocery Code, which was made in 2023.⁹⁷

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

96 Woolworths, Submission to the Interim Report, 10 May 2024, p. 3.

97 See Section 5(1) of the [Grocery Industry Competition Act 2023](#) (New Zealand).

Other issues with coverage of 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.⁹⁸

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.⁹⁹

Fresh Markets Australia argued that a mandatory Food and Grocery Code should explicitly provide the same protections to fruit and vegetable wholesalers, who are suppliers, as it does to the growers of the produce.¹⁰⁰

There is no requirement under the voluntary Code for a supermarket to enter into a grocery supply agreement with a wholesaler. This is at odds with the approach in comparable jurisdictions, where wholesale suppliers to supermarkets are entitled to the protection of a supply agreement.¹⁰¹

The Review notes that the major supermarkets rely on wholesalers extensively for the supply of fresh produce. In these circumstances, it is appropriate that these wholesale suppliers have access to a grocery supply agreement. The Review considers that the mandatory Code should protect all suppliers to supermarkets, including fresh produce wholesalers and meat processors.

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

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

100 Fresh Markets Australia, Submission to the Interim Report, 9 May 2024, p. 5.

101 See the United Kingdom [Groceries Supply Code of Practice](#); [Groceries \(Supply Chain Practices\) Market Investigation Order 2009](#); and the New Zealand [Grocery Industry Competition \(Grocery Supply Code\) Amendment Regulations 2023](#).

Should good-faith obligations be extended to suppliers?

Under the mandatory Code, supermarkets will be obliged always to deal with suppliers lawfully and in good faith. This obligation is already set out in the voluntary Code (see Box 2).

Box 2: Obligation to deal with suppliers lawfully and in good faith

Under clause 6B of the voluntary Code:

- 1) The retailer or wholesaler must at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law as in force from time to time.
- 2) The retailer or wholesaler must not enter into a grocery supply agreement that contains a provision that limits or excludes the obligation to act in good faith, and, if it does, the provision has no effect.
- 3) In determining whether the retailer or wholesaler has acted in good faith in dealing with a supplier, the following may be taken into account:
 - a) whether the retailer or wholesaler has acted honestly;
 - b) whether the retailer or wholesaler has cooperated to achieve the purposes of the relevant grocery supply agreement;
 - c) whether the retailer or wholesaler has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
 - d) whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes;
 - e) whether the retailer's or wholesaler's trading relationship with the supplier has been conducted without duress;
 - f) whether the retailer's or wholesaler's trading relationship with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
 - g) whether the retailer or wholesaler has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier;
 - h) whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.
- 4) Subclause (3) does not limit subclause (1).

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

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.*¹⁰²

Woolworths maintained this position in its submission in response to the Interim Report, particularly for large multinational suppliers. It argued that this would better align with other industry codes under the Competition and Consumer Act and prohibit unreasonable conduct of larger suppliers that have greater countervailing power against the supermarkets.¹⁰³

Similarly, Metcash advocated:

*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).*¹⁰⁴

Fresh Markets Australia also supported the extension of good-faith obligations to suppliers.¹⁰⁵

Other submissions argued against extending the good-faith obligation to suppliers.

The ACCC stated that:

The Code exists because the retailers/wholesalers enjoy a persistent and significant bargaining power imbalance. The retailers/wholesalers are well resourced, well advised and sophisticated operators that are well placed to understand and comply with the good faith obligations of the Code. While some suppliers are similarly sophisticated, many are small less sophisticated enterprises that are not well placed to understand good faith obligations.

*Extending good faith obligations to suppliers would also allow retailers/wholesalers to distract and deflect attention from their Code obligations by alleging breaches by suppliers. This is likely to undermine the central purpose for the Code – to protect suppliers.*¹⁰⁶

In a similar vein, AUSVEG stated:

*Whether a grower is acting in 'good faith' could be a difficult argument to prove given the growers' vulnerabilities to weather, pests and diseases, and other external factors that can affect crop yields or supply. Further, supermarkets can use their substantial legal power to place additional pressure on growers in relation to 'good faith' obligations, which may be variable and open to interpretation. This in turn may place additional compliance burden on already stretched business operations.*¹⁰⁷

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

103 Woolworths, Submission to the Interim Report, 10 May 2024, p. 10.

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

105 Fresh Markets Australia, Submission to the Interim Report, 9 May 2024, p. 3.

106 ACCC, Submission to the Interim Report, 30 April 2024, p. 6.

107 AUSVEG, Submission to the Interim Report, 30 April 2024, p. 8.

The Review also heard that applying the good-faith obligation to suppliers would further disincentivise suppliers from raising complaints.¹⁰⁸

The Review notes that other Australian industry codes, such as the Franchising Code, extend good-faith obligations to both sets of businesses bound by it.¹⁰⁹ The voluntary Code is different in this regard, although whether a supplier has acted in good faith is relevant in the following circumstances:

- In determining whether the supermarket has acted in good faith, a relevant consideration will be whether the supplier has acted in good faith when dealing with the supermarket;¹¹⁰ and
- Supermarkets must participate in mediation or arbitration in good faith,¹¹¹ except where the mediator or arbitrator determines that the supplier is not acting in good faith.¹¹²

Further, under the voluntary Code, Code Arbiters can cease investigating a supplier's complaint where satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance.¹¹³ This is subject to the safeguards that the supplier may request an independent review of the Code Arbiters' processes¹¹⁴ or apply for independent mediation or arbitration.¹¹⁵ The Review proposes that Code Mediators, who would replace Code Arbiters, would have the same discretion under a mandatory Code, subject to the same safeguards (see Chapter 6).

Placing a good-faith obligation on small suppliers in the mandatory Code would increase their compliance costs if they felt compelled to seek legal advice on what they needed to do to meet this obligation. Moreover, it might further disincentivise suppliers from making a complaint or exercising their rights under the Code.

The Review considers that the mandatory Code should replicate the clauses in the voluntary Code outlined above. Instead of placing an obligation on suppliers to act in good faith, a supplier's behaviour would be a relevant consideration in determining whether a supermarket has acted in good faith. A supermarket's requirement to participate in mediation would also be conditional on the supplier acting in good faith. In this way, supermarkets and suppliers are incentivised to act in good faith, without the risk of regulatory overreach from imposing a new obligation on suppliers.

This proposed approach is consistent with that in the equivalent codes in New Zealand and the United Kingdom, which do not impose a good-faith obligation on suppliers.¹¹⁶

108 NextGen, Submission to the Interim Report, 3 May 2024, p. 5.

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

110 Subclause 6B(3)(h), [Food and Grocery Code of Conduct](#).

111 Subclause 38(3), [Food and Grocery Code of Conduct](#).

112 Subclause 38(5)(b), [Food and Grocery Code of Conduct](#).

113 Subclause 35(3), [Food and Grocery Code of Conduct](#).

114 Clause 37B, [Food and Grocery Code of Conduct](#).

115 Clause 38, [Food and Grocery Code of Conduct](#).

116 See the New Zealand [Grocery Industry Competition \(Grocery Supply Code\) Amendment Regulations 2023](#) and the United Kingdom [Groceries Supply Code of Practice](#).

Chapter 5: Fear of retribution

This chapter finds that many suppliers, especially smaller suppliers, fear retribution from supermarkets if they exercise their rights under the Code or raise complaints against supermarkets. This impedes those suppliers from benefiting from the protections of the.

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 the Code's effectiveness

During the Review's consultation process, many stakeholders highlighted suppliers' fears of retribution from supermarkets if they reasonably reject a request by a supermarket's buying team or make a complaint against it.¹¹⁷ This retributory action could take many forms, such as being offered less-advantageous trading terms, reduced volumes in orders, poorer shelf location, limits on distribution across stores and having products delisted altogether (see Box 3).

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

*... commercial retribution against suppliers, and threats (both actual and implied) of commercial retribution against suppliers.*¹¹⁸

Seafood Industry Australia made similar representations¹¹⁹ as did Fresh Markets Australia¹²⁰ and TasFarmers.¹²¹

117 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 Farmers' Federation, p. 6; National Farmers' Federation Horticulture Council, p. 6; NSW Farmers, p. 5; Queensland Fruit and Vegetable Growers, p. 9; Seafood Industry Australia, p. 6; The Small and Medium Enterprise Committee of the Business Law Section for the Law Council of Australia, p. 9; TasFarmers, p. 8. It was also mentioned in the Australian Food and Grocery Council, Submission to the Interim Report, p. 3.

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

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

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

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

Box 3: Potential forms of retribution against suppliers

- Delisting 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.

NextGen provided additional examples where retribution can be very subtle:

The examples provided in the interim report are high level examples of blatant retribution and likely to be seen for what they are. In reality, retribution is far more subtle and difficult to differentiate from every day commercial decisions that a retailer might make in the course of running their business. Examples:

- *A nominal reduction in promotional slots – e.g. from 12 a year to 8*
- *Limited supplier access to the more attractive or effective promotional mechanics*
- *Lower engagement with new product submissions from the supplier*
- *Artificially increased support for the supplier's competitors*
- *Slightly less space on shelf – e.g. only a 10% reduction.*¹²²

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.¹²³ 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.¹²⁴

122 NexGen, Submission to the Interim Report, 30 April 2024, p. 5.

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

124 For example, Fresh Markets Australia, Submission to the Consultation Paper, 29 February 2024, p. 6; TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 4.

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.*¹²⁵

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

The ACCC indicated that:

*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.*¹²⁶

In addition, the ACCC reported receiving very few complaints directly.¹²⁷

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.*¹²⁸

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 retributory conduct is included as a part of the obligation to act in good faith,¹²⁹ but there are no penalties under the voluntary Code for failing to act in good faith.

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 or the supplier is unable to deliver on its commitment to supply, the supermarket should not be

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

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

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

128 Food and Grocery Code Independent Reviewer, *Annual Report 2022-23*, 30 November 2023, p. 7.

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

prohibited from reducing quantities purchased in future orders or delisting a product that is underperforming in sales.

The Review considered the following options to strengthen the prohibition against retaliatory conduct:

- Bringing protection against retribution into the purpose of the Code;
- Adding a standalone prohibition against retaliatory conduct¹³⁰ 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).

Protection against retribution in the purpose of the Code

The purpose of the Code serves as a clear indication of the Government's policy intention and allows industry participants to establish a shared understanding of the core principles that will govern commercial dealings between the parties.

The Interim Report recommended that addressing fear of retribution should be recognised in this clause. This recommendation was largely supported by stakeholders who commented on it.¹³¹

Accordingly, the Review confirms its recommendation that fear of retribution should be reflected in the purpose clause of the Code. While the purpose clause is not an operative provision that can be enforced by the ACCC, it ensures that the other provisions of the Code are interpreted consistently with this purpose and serves as a clear signal that protections against retribution should be a basic commitment of the supermarkets in their dealings with suppliers.

Clarifying the scope of retribution in the good-faith obligation

The Interim Report suggested a stand-alone prohibition against retribution. While some stakeholders supported this,¹³² others raised concerns. The ACCC considered:

*... it would be difficult to enforce any stand-alone prohibition against retribution. There are many valid commercial reasons why a business may act in a way that could be perceived as retribution. Therefore, it may be difficult to demonstrate that certain conduct amounted to retribution and to enforce a stand-alone prohibition against retribution.*¹³³

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

131 For example, this was mentioned in submissions to the Interim Report from AUSVEG, p. 5, Fresh Markets Australia, p. 12, National Farmers' Federation Horticulture Code, p. 12 and Woolworths, p. 4.

132 For example, the following submissions to the Interim Report supported a stand-alone prohibition: AUSVEG, p. 5, Fresh Markets Australia, p.12, National Farmers' Federation Horticulture Code, p. 12 and Woolworths, p. 4.

133 ACCC, Submission to the Interim Report, 30 April 2024, p. 3.

The Review notes the concerns of the ACCC, and the potential unintended consequences associated with a prohibition against retributive conduct. For this reason, the Review has considered whether there are other ways to address retribution in the Code.

In considering the various options, the Review recommends that retribution should continue to be captured within the general good-faith obligation – as a factor in determining whether a supermarket or wholesaler has acted in good faith towards its supplier. The existing good-faith obligation¹³⁴ includes retribution as a relevant factor.¹³⁵ However, this provision is limited to considering retribution against the supplier only in the context of past complaints or disputes raised.

The Review recommends that the scope of this provision be clarified and broadened to include retribution against a supplier for exercising its rights under the Code, regardless of whether it involves a complaint or dispute.

For example, if a supplier refuses to disclose commercially sensitive information during negotiations with a supermarket for a price increase,¹³⁶ retribution against the supplier for exercising this right will be within the scope of determining whether the supermarket has breached its good-faith obligation.

Clarifying the scope of retributive action to be captured under the good-faith obligation would help strengthen the operation of this important provision and would align with the revised purpose of the Code.

Realigning incentives

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 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.

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.¹³⁷

The Interim Report 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.

Woolworths supported this recommendation, noting:

134 Clause 6B, [Food and Grocery Code](#).

135 Subclass 6B(3)(d), [Food and Grocery Code](#).

136 In accordance with clause 27A(5), [Food and Grocery Code](#).

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

All members of the Woolworths commercial team are required to maintain current knowledge of the Grocery Code, attend training and operate at all times in accordance with the Code, the Woolworths Code of Conduct and Woolworths Trade Partner Charter. Feedback from Woolworths regular “Voice of Supplier” and “Voice of Team” surveys is also relevant to the assessment of buyer performance.¹³⁸

Monitoring of disputes by senior management

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 has been advised that some supermarkets already have systems such as 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 Arbitrator.¹³⁹

Requiring this type of oversight was supported by other stakeholders.¹⁴⁰ In supporting this proposal in response to the Interim report the National Farmers’ Federation noted:

... the focus of Dr Emerson on potential retribution that may occur at the buyer and category manager level, likely with less visibility by the senior management of supermarkets. Such a focus is well founded, with many reports of commercial retribution, or the fear of such, being borne out of supplier engagement at this level.¹⁴¹

The Review retains its recommendation from the Interim Report that supermarkets be required to 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. It is recommended that the supermarket keep records of this and provide this information to the ACCC or the Code Supervisor (previously the Independent Reviewer – see Chapter 6) where requested.

138 Woolworths, Submission to the Interim Report, 10 May 2024, p. 4.

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

140 See, for example, submissions to the Interim Report from Australian Chamber of Commerce and Industry, p. 2; Australian Food and Grocery Council, p. 7; Small Business Development Corporation, p. 5; ACCC, p. 1.

141 National Farmers’ Federation, Submission to the Interim Report, 8 May 2024, pp. 4-5.

Recommendation 3

The Code should place greater emphasis on addressing the fear of retribution by:

- Including protection against retribution in the purpose of the Code;
- Ensuring that retribution captured under the obligation to act in good faith includes action taken against suppliers for exercising their rights under the Code;
- Requiring that any incentive schemes and payments that apply to a supermarket's buying teams and category managers are consistent with the purpose of the Code; and
- Requiring supermarkets to have systems in place for their 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 anonymous complaints mechanism

The Review also recommends that a mechanism be established for raising issues anonymously as a further means of countering the fear of retribution. Such a mechanism would allow for completely anonymous reports to be raised directly with the ACCC, 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.¹⁴²

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:

- *recognise explicitly the enforcement role of employees who report suspected breaches by signatories*
- *consider the need for the Code to include provisions specifically dealing with protections for employee whistleblowers*
- *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 information to lawyers in litigation against the alleged wrongdoer*

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

- *examine the feasibility of a whistleblower reward scheme for employees who make reports that lead to successful enforcement action.*¹⁴³

The New Zealand Grocery Commissioner has recently added this type of reporting procedure to its enforcement tools using an anonymous channel with appropriate data encryption and clear instructions on how to remain anonymous in providing information.¹⁴⁴ The ACCC and New Zealand's Commerce Commission have similar processes for receiving complaints and information in relation to possible cartel conduct.¹⁴⁵

In response to the Interim report, the Review has heard again the importance of an anonymous avenue for reporting.¹⁴⁶ The ACCC has also supported this proposed channel.¹⁴⁷

The ACCC should develop guidance on the minimum level of detail that should be included in a supplier's report so that it is useful to the ACCC, but reports would not need to demonstrate a technical breach of the law to be considered.¹⁴⁸ Suppliers should have the option of providing their contact details (on a strictly confidential basis) if they were comfortable with the ACCC contacting them for further information.

In voicing its support for this new channel, the National Farmers' Federation noted the need for education so that suppliers know about the complaints' mechanism:

*It is important however that appropriate resources are provided to ensure producers and supply chain participants are made aware of such a compliant mechanism. The NFF has consistently stated that for complaints mechanisms to be effective, they must be appropriately known and understood by suppliers.*¹⁴⁹

Education and awareness issues are discussed in more detail in Chapter 10.

Recommendation 4

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

143 Maurice Blackburn, Submission to the Consultation Paper, 1 March 2024, pp. 2-3.

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

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

146 See submissions to the Interim Review from the Australian Fresh Produce Alliance, National Farmers Federation, National Farmers' Federation Horticulture Council, and the QUT Centre for Decent Work.

147 ACCC, Submission to the Interim Report, 30 April 2024, p. 3.

148 Hon Bob Katter MP, Submission to the Interim Report, 30 April 2024, p. 4.

149 National Farmers' Federation, Submission to the Interim Report, 8 May 2024, p. 5.

Chapter 6: Dispute resolution under a mandatory Code

In moving to a mandatory Code, the Review recommends a best-of-both-worlds approach to dispute resolution that incorporates the complaints-handling arrangements of the voluntary Code augmented by options for independent mediation and arbitration.

Code Mediators, who would replace Code Arbiters, would be engaged by the supermarkets and be available to assist with dispute resolution. However, if a supplier wanted a fully independent mediator, this service would be available. Where mediation did not settle a dispute, both parties could agree to arbitration.

Constitutional limitations prevent the Mandatory Code requiring binding arbitration to resolve disputes.¹⁵⁰ However, the Review has received the in-principle agreement of Woolworths, Coles, ALDI and Metcash to be bound by a decision of their Code Mediator to award compensation of up to \$5 million, where agreed by a supplier. Where requested by a small supplier with annual turnover of less than \$10 million or fewer than 100 employees, Woolworths, Coles, ALDI and Metcash have also agreed in principle to participate in independent arbitration and pay compensation of up to \$5 million as determined by the independent arbitrator.

A Code Supervisor would replace the Independent Reviewer. Its functions would include providing information to suppliers on options to resolve disputes, reviewing the processes of a Code Mediator, where requested by a supplier, and publishing an annual supplier survey.

Dispute-resolution arrangements under the voluntary Code

The voluntary Code allows a supplier to seek mediation or arbitration¹⁵¹ 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.¹⁵² However, this obligation is void where the mediator or arbitrator determines that the supplier is not acting in good faith.¹⁵³

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

150 Constitutional limitations are described in Appendix A.

151 Mediation and arbitration are described in Appendix A.

152 Clause 38(3), [Food and Grocery Code of Conduct](#). Clause 39(3) of the [Food and Grocery Code of Conduct](#) sets out factors to consider in determining whether a supermarket has engaged in mediation or arbitration in good faith. Considerations include whether a person with authority to settle the dispute attended the mediation or arbitration, and the supermarket's conduct in trying to resolve a dispute.

153 Clause 38(5)(b), [Food and Grocery Code of Conduct](#).

Code Arbiter can propose a remedy including compensation of up to \$5 million and/or contract variations.

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.¹⁵⁴ Following an investigation, the Independent Reviewer can make recommendations to the Code Arbiter to reconsider the original complaint.

Stakeholder views on dispute resolution

Many stakeholders commented on dispute resolution under the Code. Some raised concerns about whether Code Arbiters are truly independent, since they are appointed and paid for by the supermarkets.¹⁵⁵ Others emphasised the importance of retaining informal, confidential, and low-cost processes for resolving disputes,¹⁵⁶ especially for small suppliers.¹⁵⁷ Indeed, this was the main recommendation of the 2022-23 review of the dispute-resolution arrangements under the Code.¹⁵⁸

Numerous stakeholders expressed a preference for a tiered approach to dispute resolution including access to informal internal processes, as well as independent and more formal options, including mediation and arbitration, and litigation as a final option.¹⁵⁹

Some highlighted the benefit of retaining Code Arbiters based on their accumulated business knowledge and experience under the Code,¹⁶⁰ while others stressed the importance of access to truly independent dispute-resolution processes, to ensure suppliers are not deterred by concerns about confidentiality, bias or retribution.¹⁶¹

Some stakeholders suggested other codes provide useful models for dispute resolution, the National Farmers' Federation suggesting that the Dairy Code provides a useful model.¹⁶²

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) argued that any new dispute-resolution processes should include:

154 The Independent Reviewer is appointed by the relevant Minister and paid by the Government (see 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.

155 See, for example, submissions to the Interim Report from the ASBFEO, p. 2; Australian Food and Grocery Council, p. 10; Small Business Development Corporation, p. 3.

156 For example, Australian Food and Grocery Council, Submission to the Interim Report, 30 May 2024, p. 9.

157 For example, Woolworths, Submission to the Interim Report, 10 May 2024, p. 2.

158 The Treasury, [Food and Grocery Code of Conduct Review 2022–23 – Final Report](#), 2023, p. 26.

159 For example, ALDI, Submission to the Consultation Paper, 29 February 2024, p.3; AUSVEG, Submission to the Consultation Paper, 1 March 2024, p. 16; TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 8; Woolworths, Submission to the Consultation Paper, 6 March 2024, pp. 11-12.

160 For example, Woolworths, Submission to the Interim Report, 10 May 2024, p. 2.

161 For example, the Australian Food and Grocery Council, Submission to the Interim Report, 30 May 2024, p. 10; Greater Shepparton City Council, Submission to the Consultation Paper, 29 February 2024, p. 2; National Farmers' Federation Horticulture Council, Submission to the Consultation Paper, 29 February 2024, p. 6; Seafood Industry Australia, Submission to the Consultation Paper, 29 February 2024, p. 6.

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

- *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.*¹⁶³

The Review has concluded that an approach to dispute resolution that incorporates positive features of the voluntary Code while including options for truly independent mediation and arbitration will achieve the best of both worlds.

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, augmented by a similar dispute-resolution option as available under the voluntary Code.

The role of a supermarket-appointed Code Mediator

The Review considers that some of the dispute resolution process in the voluntary Code can be incorporated into the mandatory Code. This would retain a pathway for quick, low-cost dispute-resolution for suppliers.

The Review recommends that Code Mediators replace Code Arbiters as an option for resolving supplier disputes if issues cannot be resolved directly with buying teams. However, Code Mediators would be involved in attempting to resolve a dispute only if agreed by the supplier.

Code Mediators would:

- Investigate formal and informal complaints from suppliers;
- Assist in negotiating resolution of formal disputes, including by recommending a remedy to a dispute, where requested by a supplier;
- 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;¹⁶⁴
- Have access to records and the buying team, and be required to act independently of the supermarket, including adhering to strict confidentiality requirements;¹⁶⁵ and
- Be experienced and qualified alternative dispute-resolution practitioners and have a sound understanding of Code obligations and supermarket operations.

¹⁶³ The ASBFEO, Submission to the Consultation Paper, 15 March 2024, p. 2.

¹⁶⁴ Consistent with clause 31(1) and 31(3), [Food and Grocery Code of Conduct](#).

¹⁶⁵ Consistent with clause 31(4) and 31(5), [Food and Grocery Code of Conduct](#).

Owing to constitutional limitations, binding arbitration must be entered into voluntarily to resolve disputes; it cannot be imposed by a code of conduct.¹⁶⁶ However, the Review has secured in-principle agreement from Woolworths, Coles, ALDI and Metcash to be bound by a decision made by a Code Mediator awarding compensation of up to \$5 million, where agreed by the supplier.

These dispute-resolution arrangements would not limit the opportunity for suppliers and supermarkets to consider remedies that included variations to grocery supply agreements where both parties agreed to the variation.

Obligations should be included in the mandatory Code to ensure that supermarkets and suppliers enter into dispute resolution in good faith.¹⁶⁷ Supermarkets would not be required to persist with a dispute when the supplier's complaint was vexatious, trivial, misconceived or lacking in substance. This would be assessed by the Code Mediator, who would provide reasons for making this decision. If the supplier did not agree with the Code Mediator's decision, it could seek a review of the Code Mediator's processes by the Code Supervisor.

Availability of independent mediation and arbitration

Most mandatory industry codes of conduct include dispute-resolution processes involving independent mediation and an ability to agree to independent arbitration.¹⁶⁸ The Review recommends that these options be replicated in the Food and Grocery Code, such that:

- **Independent mediation** would be an avenue to resolve disputes.
 - If requested by the supplier, it would be obligatory for the supermarket to participate.
 - 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.¹⁶⁹
- **Independent arbitration** would also be available to resolve disputes.
 - This option would be subject to agreement by both parties if mediation did not settle the dispute.
 - To facilitate this option for small suppliers, the Review has secured the in-principle agreement of Woolworths, Coles, ALDI and Metcash¹⁷⁰ to participate in independent arbitration when requested by a small supplier with annual turnover

166 Constitutional limitations are described in Appendix A.

167 See clause 38(5), [Food and Grocery Code of Conduct](#).

168 Mediation and arbitration are described in Appendix A. Independent mediation and arbitration are provided for in the [Dairy Code of Conduct](#) (Part 2, Division 2, Subdivision F); and the [Franchising Code of Conduct](#) (Part 4).

169 The ASBFEO, [Franchising](#), accessed 9 March 2024.

170 Metcash's in-principle agreement is subject to a supplier first mediating through its Code Mediator before proceeding to arbitration.

of less than \$10 million or fewer than 100 employees,¹⁷¹ and to be bound by a determination from an independent arbitrator involving compensation of up to \$5 million to be paid to the supplier.¹⁷² The Review commends Woolworths, Coles, ALDI and Metcash for giving these undertakings.

- Any arbitration should be conducted in accordance with the rules of procedural fairness, to ensure the parties are fairly heard, that they attempt to resolve the dispute in a reconciliatory manner and that the arbitrator is unbiased.¹⁷³

Small-business suppliers have additional avenues for seeking assistance through the ASBFEO or the state-based Small Business Commissioners. This is in line with the findings of the 2022-23 review of the dispute-resolution provisions in Part 5 of the Code.¹⁷⁴

List of independent mediators and arbitrators

The Review recommends that the Treasury or the ASBFEO be responsible for compiling a list of independent mediators and arbitrators.

The Review considers that this list could contain up to 10 independent practitioners and would include practitioners capable of offering both mediation and arbitration services.

Independent practitioners on the list should be well qualified and experienced in practising the relevant alternative dispute-resolution techniques and experienced in supermarket disputes, where possible.¹⁷⁵ The list should be maintained so that it remains up to date.

Interaction between dispute resolution and enforcement

Among the factors the ACCC would consider in deciding what action to take in response to an alleged breach of the Code would be whether a supermarket has engaged in dispute resolution in good faith, including participating in independent mediation or arbitration if requested by a supplier.

The exercise of its discretion regarding enforcement is a matter for the ACCC. All alleged breaches of the Food and Grocery Code are assessed by the ACCC in accordance with the principles set out in its Compliance and Enforcement Policy.

171 The size of the small supplier should account for the size of any related corporate entities, such that small companies that are part of a large corporate group would not benefit unfairly from this arrangement.

172 This would not include giving independent arbitrators the ability to change grocery supply agreements to resolve a dispute.

173 For example, the Code could refer to the [Resolution Institute Arbitration Rules 2023](#), accessed 15 March 2024, or mirror similar clauses in other industry codes – for example, Clause 36(1), [Franchising Code of Conduct](#) and Clauses 47(4) and 48(7), [Dairy Code of Conduct](#).

174 The Treasury, *Food and Grocery Code of Conduct Review 2022–23 – Final Report*, September 2023, p. 26.

175 The following submissions noted the need for independent practitioners to have suitable qualifications, knowledge and experience Resolution Institute, Submission to the Interim Report, 6 May 2024, pp. 6-7; Woolworths, Submission to the Interim Report, 10 May 2024, p. 7.

Recommendation 5

The Code should provide parties with avenues for mediation and arbitration to resolve disputes.

- Supermarkets must appoint a suitably qualified Code Mediator who is engaged by supermarkets (replacing their Code Arbiters), and who would be available to assist with resolving disputes, where requested by a supplier.
- Avenues for independent mediation and arbitration should also be available.
 - Parties can agree on an independent mediator or arbitrator. A list of suitably qualified mediators and arbitrators should be compiled by the Treasury or the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).
 - Supermarkets must attend independent mediation if requested by a supplier.
 - Where mediation has not settled a dispute, independent arbitration can be used to settle disputes as agreed between the supermarket and supplier.

In addition, Woolworths, Coles, ALDI and Metcash have agreed in principle to be bound by a decision of their Code Mediator to award compensation of up to \$5 million, where agreed by a supplier. They have also agreed to be bound by a decision of an independent arbitrator for compensation of up to \$5 million, where requested by a small supplier. Small suppliers would be those with annual revenue below \$10 million or fewer than 100 staff.

The role of the Code Supervisor

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

- Consider requests to review Code Arbiters' processes in dealing with complaints;
- Identify emerging and systemic issues in the grocery-supply chain relating to the operation of the Code;¹⁷⁶
- Conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of the Code, in a manner that protects the confidentiality of suppliers; and
- Report annually on disputes and the results of the confidential supplier survey.

¹⁷⁶ The Review considers the Code Supervisor should identify and report on emerging and systemic issues but not have a role in addressing these issues. This is a change from the existing Code, under which the Independent Reviewer also has a function of addressing emerging and systemic issues in the grocery-supply chain relating to the operation of the Code. These emerging and systemic issues could be complex and multifaceted, and it is unrealistic to expect the Code Supervisor to be able to address such issues. The Review recommends removing this function from the Code Supervisor's role, especially because the ACCC is expected to have a greater role under a mandatory Code with penalties.

To facilitate the independent annual surveys of supermarket suppliers, the Code should include an obligation for supermarkets to assist in distributing a link to the confidential surveys to all their suppliers. It is essential that the responses to the survey are confidential.

Recommendation 6

A Code Supervisor (previously the Independent Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys, be able to identify systemic issues with the Code and be available to suppliers to provide information on options to resolve disputes and review the processes of Code Mediators.

Chapter 7: Strong and transparent obligations under the Code

Several stakeholders raised concerns that supermarkets can contract out of their obligations under the Code by making exceptions to the Code's requirements in grocery supply agreements with their suppliers. However, the Review also heard that the ability to negotiate exceptions can lead to mutually beneficial outcomes for suppliers and supermarkets, such as allowing both parties to benefit from a joint promotion of a supplier's product.

Instead of removing exceptions, the Review recommends all exceptions be subject to a reasonableness test that considers the benefits, costs and risks to the supplier and the supermarket of agreeing the exception. The supermarkets would bear the onus of proving that any exception was reasonable.

The Review also recommends new requirements for supermarkets, when negotiating grocery supply agreements, to identify clearly in writing all provisions in the Code for which there is an exception in the grocery supply agreement. This would improve supplier understanding of the exceptions they are agreeing to.

Exceptions to the Code's obligations

The voluntary Code prohibits specified conduct in commercial dealings between a supermarket and its suppliers. However, many of these prohibitions are subject to exceptions, often relating to whether the exception is set out in the grocery supply agreement between the parties and whether it is reasonable in the circumstances. The onus is on the supermarket to establish that the exception is reasonable.

Under the existing Code, if a grocery supply agreement allows for it, a supermarket can:

- Unilaterally vary a grocery supply agreement, subject to this being in writing and reasonable;¹⁷⁷
- Set off amounts from a supplier's invoice or remittance, subject to this being in writing and reasonable;¹⁷⁸
- Require suppliers to pay for wastage, subject to this being reasonable and supermarkets taking reasonable steps to mitigate these costs;¹⁷⁹

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

178 Clause 12, [Food and Grocery Code of Conduct](#).

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

- Require suppliers to make payments as a condition of being a supplier, subject to this being reasonable and applying only in respect of products that have not been stocked in more than 25 per cent of stores in the previous year;¹⁸⁰
- Require suppliers to pay for better positioning of groceries, subject to this being reasonable;¹⁸¹
- Require suppliers to contribute to the costs of a supermarket’s business activities, subject to this being reasonable;¹⁸² and
- Require suppliers to fund promotions, subject to this being reasonable.¹⁸³

Several stakeholders, including the ACCC, raised concerns that these exceptions can weaken protections for suppliers, especially smaller suppliers that are likely to have little bargaining power.¹⁸⁴ The ACCC and others argued that the ability of supermarkets to contract out of their obligations should be removed entirely from the Code.¹⁸⁵ Other stakeholders argued that particular exceptions should be removed.¹⁸⁶

The Review has considered whether some or all exceptions should be removed. In doing so, the Review has had regard to whether exceptions can be mutually beneficial and whether the existing tests adequately limit exceptions to those where they are clearly mutually beneficial.

The benefit of retaining freedom in contracting

The Code exists to set minimum standards in the context of a heavy imbalance in bargaining power between supermarkets and their smaller suppliers (see Chapter 2). The Code does this by prohibiting specified conduct by supermarkets. However, it allows for exceptions to these prohibitions where the conduct is agreed by a supermarket and a supplier in a grocery supply agreement, and where the conduct is reasonable.

Reasonableness is a well-understood legal concept that requires an objective assessment of the facts and circumstances. A member of a supermarket’s buying team might believe that a provision of a grocery supply agreement is reasonable, but that does not mean it is so. Facts must be available to support the supermarket’s contention that a provision is reasonable.

180 Clause 15, [Food and Grocery Code of Conduct](#).

181 Clause 16, [Food and Grocery Code of Conduct](#). This applies to retailers only, not wholesalers.

182 Clause 17, [Food and Grocery Code of Conduct](#).

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

184 See, for example, submissions to the Consultation Paper from the National Farmers’ Federation, p. 7; Seafood Industry Australia, p. 6. See also AUSVEG, Submission to the Interim Report, 30 April 2024, p. 10.

185 ACCC, Submission to the Interim Report, 30 April 2024, p. 9; AUSVEG, Submission to the Interim Report, 30 April 2024, p. 7; Small Business Development Corporation, Submission to the Interim report, 30 April 2024, p. 6.

186 Submissions to the Interim Report from AUSVEG, eastAUSmilk, Freshmark, Fruit Producers SA, NextGen, National Farmers’ Federation Horticulture Council and Associate Professor Bree Hurst et al. variously raised concerns with some of the exceptions in the Code.

Under the Review's proposal, the reasonableness test would require a supermarket to demonstrate that a provision in a grocery supply agreement that removes protections under the Code clearly benefits both parties. The recommended Code will not give supermarkets the licence to contract out of obligations they would otherwise have under the Code, merely on the basis that it suits them. The Code, accompanying explanatory statement and guidance material should make this clear.

Exceptions that fail the reasonableness test should not be allowed

Exceptions should not be allowed where they are not reasonable. For example, the Review considers that the Code should not allow for exceptions that:

- Require suppliers to pay for wastage¹⁸⁷ that has occurred for reasons outside a supplier's control, such as wastage from a supermarket over-ordering, a supermarket storing products inappropriately, or a power outage on the supermarket's premises;
- Require suppliers to make recurring payments to a supermarket for stocking or listing grocery products;¹⁸⁸
- Require a supplier to pay for packaging and design changes mandated by the supermarket, especially for own-brand products or where a supermarket frequently requires costly packaging and design changes;¹⁸⁹ and
- Allow supermarkets to evade paying suppliers by setting off amounts that are not clearly owed by the supplier to the supermarket.¹⁹⁰

Exceptions that are reasonable should be allowed

The Review has heard there are benefits from retaining an ability to negotiate on some of the conduct regulated under the Code. Some examples follow.

- Suppliers might want to participate in promotions on the basis that they benefit from them. Removing the ability of suppliers to agree to fund or partly fund a promotion would not benefit suppliers or supermarkets.¹⁹¹
- A supplier might have stock that has a short use-by date, which the supermarket might not wish to accept. However, if a supplier can negotiate a sharing of the risk of the product not selling before the use-by-date, by agreeing to share in wastage costs, this exception might allow a supplier to sell stock that it otherwise would have had to dispose.

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

188 Clause 15, [Food and Grocery Code of Conduct](#).

189 Clause 17, [Food and Grocery Code of Conduct](#). See also AUSVEG, Submission to the Interim Report, 30 April 2024, p. 16.

190 Clause 12, [Food and Grocery Code of Conduct](#).

191 Australian Food and Grocery Council, Submission to the Interim Report, 30 May 2024, pp. 11-12; Clause 18, [Food and Grocery Code of Conduct](#).

- A supermarket might be more willing to trial a new product if a supplier agreed to share the risk of the product failing to sell satisfactorily. The supplier might do this by agreeing to share the cost of any wastage if the product does not sell. In this way, the ability to negotiate away from the standards in the Code might allow a supplier to trial a new product in store.
- A supplier might wish to share the costs of market research where mutual benefits can be expected from this being undertaken jointly by the supplier and the supermarket, which might otherwise be prohibited under the Code. Similarly, there might be circumstances in which a supplier is happy to share in the costs of a supermarket's ordinary business; for example, to attend the supplier's premises or an industry event.

There are other circumstances in which an agreed exception can allow for a fairer sharing of risk between the supplier and supermarket. For example, if a supplier switches its packaging to a material that is more prone to faults or breakages, and this results in more wastage, it seems appropriate for the supplier to contribute to the additional wastage costs.

If such exceptions were not allowed, it is likely that supermarkets would seek to reduce this risk in other ways, such as by reducing the price they paid for a product, which could be a blunter instrument for managing the risk.

For these reasons, several stakeholders argued against removing the ability to negotiate away some of the protections under the Code.¹⁹² The Australian Fresh Produce Alliance noted that retaining flexibility to negotiate on these provisions can be mutually beneficial.¹⁹³ It further noted:

Creating minimum contract obligations within the Code will likely create a range of adverse effects and unintended consequences ... Arguably, minimum contract terms that are unable to be varied by agreement have the potential to place further downward price pressure on suppliers, removing all other options available to a supplier to negotiate an agreement that could improve their own market share and profitability.¹⁹⁴

The Review considers there can be good reasons for allowing exceptions, subject to the necessary provisos being in place to ensure that exceptions are allowed only where both parties benefit.

Whether or not the existing tests for exceptions adequately protect suppliers against exceptions that are not in their interests is discussed below.

Identifying exceptions that are reasonable

The Review considers that exceptions to obligations or prohibitions under the Code should be allowed only where they have been included for a purpose that benefits both parties. This would involve evaluating the purpose for which the exception has been intended, and any offsetting

192 For example, Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, pp. 7-8; Australian Lot Feeders Association, Submission to the Interim Report, 30 April 2024, p. 3; Metcash, Submission to the Interim Report, 30 April 2024, p. 6; Woolworths, Submission to the Interim Report, 10 May 2024, p. 9.

193 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 7.

194 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 8.

benefits or costs in other terms that have been negotiated. The evaluation should not be limited to assessing the overall benefit of the contract to both parties, noting that any supplier is likely to be better off having a contract with a major supermarket than not having one.

In the existing Code, all exceptions must be reasonable, although what needs to be considered in determining reasonableness varies by provision. In many cases there is simply a requirement that the exception is reasonable, while in others guidance is provided as to the factors that should be considered in determining what is reasonable. For example, in determining whether an exception allowing for unilateral variation is reasonable, regard must be had to the benefits, costs and risks for the supplier and the supermarket.¹⁹⁵ In all cases, if a dispute arises, the onus is on the supermarket to establish that the exception is reasonable and meets any additional requirements of the relevant provision.

The Review recommends that, in moving to a mandatory Code, all obligations that have exceptions should be subject to a requirement that they are reasonable. Reasonableness should be defined under the Code as requiring regard to be had to the benefits, costs and risks to the supplier and the supermarket of including the specific exception. It should be clear that the policy intent is that exceptions should be permitted only where they have been included for a purpose that benefits both parties.

Some stakeholders raised concerns that the current reasonableness test comes into play only if a supplier progresses to a dispute-resolution process.¹⁹⁶

The Review recommends that the mandatory Code make it clear that supermarkets bear the onus of proving reasonableness, regardless of whether the exception is challenged by a supplier through the dispute-resolution processes.

Under a mandatory Code with heavy penalties, it would ultimately be for courts to determine whether a supermarket has proven that any exceptions are reasonable. In view of the risk of substantial penalties (see Chapter 9), supermarkets are likely to take these obligations seriously.

Supermarkets cannot coerce suppliers into agreeing contracts

Stakeholders also raised concerns about suppliers feeling they must agree to exceptions or miss out on a contract. The Review is conscious that many of the Code's provisions have not been tested, but the recommendations in this Final Report should strengthen compliance with, and trust in, the Code.

To the extent that a supermarket has exercised coercion, this would likely breach the good-faith obligations under the Code,¹⁹⁷ as noted by the Australian Fresh Produce Alliance.¹⁹⁸ In particular, the good-faith obligations require supermarkets to:

195 Subclause 9(3), [Food and Grocery Code of Conduct](#).

196 For example, Fruit Producers SA, Submission to the Consultation Paper, 29 February 2024, p. 2.

197 Clause 6B, [Food and Grocery Code of Conduct](#).

198 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 8; Section 23, [Australian Consumer Law](#).

- Act honestly;
- Not act arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- Act without duress; and
- Have regard to the need for suppliers to have certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment.¹⁹⁹

In addition, the recommended new protections against retribution would ensure that supermarkets cannot engage in retribution where a supplier is exercising its rights under the Code. This will be incorporated as a factor to consider in determining whether a breach of the good-faith provisions has occurred (see Chapter 5).

If a supermarket has forced a supplier to agree an exception under duress, this would breach the good-faith obligations, attracting a substantial fine of potentially more than \$10 million (see Chapter 9).

As noted by the Australian Fresh Produce Alliance, the prohibition of unfair contract terms under the Australian Consumer Law might also have a moderating effect on the use of exceptions by supermarkets.²⁰⁰ If supermarkets push suppliers into agreeing unreasonable exceptions, they might also risk breaching the unconscionable conduct prohibitions of the Australian Consumer Law.²⁰¹

The Review considers that, as a matter of principle, nothing in the Code should limit protections that would otherwise apply under other laws.

Ensuring suppliers understand they are agreeing to exceptions

The Review considers steps should be taken to improve suppliers' awareness of exceptions under the mandatory Code. While education and awareness initiatives are important (see Chapter 10), it is also necessary to ensure that suppliers are aware of what they are agreeing to at the time they sign a grocery supply agreement. For this reason, the Review has considered ways to improve transparency of contractual arrangements.

AUSVEG supported greater transparency in relation to contractual exceptions and recommended that 'any exceptions to the Code should be clearly highlighted and identified to the supplier'.²⁰² The NFF Horticulture Council also supported greater transparency in relation to exceptions and proposed the development of guidance about the meaning of reasonableness.²⁰³ Woolworths supported

199 Subclauses 6B(a), 6B(c), 6B(e) and 6B(f), [Food and Grocery Code of Conduct](#).

200 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 8.

201 Section 21, [Australian Consumer Law](#).

202 AUSVEG, Submission to the Interim Report, 30 April 2024, p. 9.

203 National Farmers' Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, pp. 14-15.

supermarkets providing reasons to suppliers for why exceptions are considered reasonable, building on the requirements of the New Zealand Grocery Code.²⁰⁴

The Review considers that for the Code to be effective, suppliers need to understand the protections under the Code, including how exceptions can be agreed in grocery supply agreements. To facilitate this, the Review recommends that supermarkets produce clear and simple guidance on any exceptions in a grocery supply agreement. This should be provided to a supplier at the time of negotiating a new grocery supply agreement. It would assist suppliers in deciding whether to give their informed agreement to any exceptions provided for under the Code. To reduce compliance costs, this could be standardised; for example, involving a one-page information sheet with a list of exceptions to which the supplier would be agreeing by signing the grocery supply agreement.

The approach to exceptions should be reviewed in 2 years

The Review recognises that the issue of allowing exceptions to Code prohibitions in grocery supply agreements is a contentious one. The Review has sought to tighten the requirements around exceptions to ensure they are not used by supermarkets to undermine the intent of the Code. This approach is intended to allow suppliers and supermarkets to enter into mutually beneficial arrangements that would not be possible if all exceptions were prohibited.

The Review recommends that the effectiveness of the proposed approach to exceptions set out in Recommendation 7 below be examined 2 years after the mandatory Code commences. By that time more evidence will be available to evaluate how exceptions are being used in the supermarket industry. This will enable the Government to make an informed decision about whether exceptions should continue to be available, whether exceptions to some or all obligations should be removed, or whether an alternative approach should be taken to their use.

Recommendation 7

To ensure exceptions allowed for in grocery supply agreements are reasonable and transparent:

- All exceptions should be subject to a reasonableness requirement that considers the benefits, costs and risks to the supplier and the supermarket, and protects against exceptions that are not in a supplier's interest, with the supermarket bearing the onus of proof that any exception is reasonable; and
- For all new grocery supply agreements, supermarkets should be required to provide suppliers a simple guide to any exceptions that are included in the agreement.

204 Woolworths, Submission to the Interim Report, 10 May 2024, p. 9.

Chapter 8: Issues specific to fresh produce

Numerous stakeholders raised concerns about issues that arise in respect of fresh produce, including in relation to pricing, forecasting and quality. To address these issues, the Review recommends that the Code should require that grocery supply agreements include the basis for how price is determined, all forecasts of required volumes are conducted with due care, and fresh produce standards and specifications pass the test of reasonableness.

Numerous stakeholders asked the Review to consider whether additional protections should apply for suppliers of fresh produce, particularly fresh fruit and vegetables. The Review heard that the perishable nature of these products, long lead times and high sunk costs expose suppliers to extra vulnerability.²⁰⁵

Queensland Fruit and Vegetable Growers suggested that perishability can be weaponised against growers.²⁰⁶ Fresh Markets Australia²⁰⁷ and the Australian Fresh Produce Alliance²⁰⁸ proposed that the Code be amended to include a stand-alone section to deal with fresh produce. AUSVEG²⁰⁹ and NextGen²¹⁰ advocated for appropriately designed, clear and unambiguous fresh produce contracts that provide greater certainty on price, volume and trading terms. Woolworths also supported additional protections for fresh produce.²¹¹

Noting the complexity of these issues, the Australian Fresh Produce Alliance recommended establishing a time-limited working group comprising fresh produce suppliers, supermarkets and government representatives to consider how to respond in the Code to the unique challenges facing suppliers of fresh produce.²¹²

The issues raised in relation to fresh produce were associated with pricing, forecasting, and quality standards.

205 See submissions to the Consultation Paper from: AUSVEG, p. 11; National Farmers' Federation Horticulture Council, p. 5; Premier of Queensland, p. 2; and NextGen, Submission to the Interim Report, 3 May 2024, p. 10.

206 Queensland Fruit and Vegetable Growers, Submission to the Consultation Paper, 29 February 2024, p. 10.

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

208 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 22.

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

210 NextGen, Submission to the Interim Report, 1 May 2024, p. 9.

211 Woolworths, Submission to the Interim Report, 10 May 2024, p. 11.

212 Australian Fresh Produce Alliance, Submission to the Consultation Paper, 4 March 2024, p. 22.

Price-related issues

Numerous suppliers of fresh produce raised concerns about a lack of transparency in how supermarkets determine the price suppliers receive for their fresh produce.²¹³ Suppliers argued that this creates high levels of uncertainty regarding expected prices for fresh produce.

The Review understands that this is partly because prices paid for fresh produce are often determined with respect to prevailing market prices, which reflect demand and supply conditions, including impacts of weather. The Review also understands that prices for different types of fresh produce can be determined on a weekly basis, depending on their perishability, which also contributes to price uncertainty. Even then, the Review has heard that there is still a lack of clarity about the information that is being used by supermarkets to determine prices.

Several stakeholders suggested measures to improve price transparency, including:

- Guidelines or benchmarks for determining fair and reasonable pricing;²¹⁴
- A price register to assist farmers to better understand market prices across fresh produce industries;²¹⁵
- Price floors to be included in grocery supply agreements;²¹⁶
- Inclusion of the methodology for setting prices in grocery supply agreements, incorporating factors such as production costs, market demand, and broader economic conditions;²¹⁷
- Public reporting on sale price data; and²¹⁸
- Providing suppliers with real-time access to transaction data.²¹⁹

However, the Australian Fresh Produce Alliance cautioned against changes that could result in unintended consequences:

...the fresh produce market operates on what is both a dynamic and fluid supply-demand model ... [and] constraints on price will have an impact on both supply and demand. Therefore, any interference with the existing market mechanism must be approached

213 For example, TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 7.

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

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

216 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 11; AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 21.

217 Freshmark, Submission to the Consultation, 20 February 2024, p. 14 and Small Business Development Corporation, Submission to the Interim Paper, 30 April 2024, p. 7.

218 Freshmark, Submission to the Interim Report, 20 April 2024, p. 11; National Farmers' Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, pp. 16-17.

219 National Farmers' Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, pp. 16-17.

*incredibly cautiously to avoid unintended consequences for producers, retailers, and consumers.*²²⁰

The existing Code does not require grocery supply agreements to include any information or data that supermarkets rely upon in determining or accepting prices. The Review notes that greater price transparency contributes to better relationships between supermarkets and suppliers, and that this has been observed in the dairy industry. The Review considers price transparency could be improved under a mandatory Code.

While some stakeholders have proposed introducing price floors for fresh produce, the Review considers that this would incentivise supermarkets to propose an artificially low price floor, which might be meaningless and fail to improve outcomes for suppliers.

The Review recommends that where a grocery supply agreement for fresh produce does not include a price, it should include the basis for how price is determined (see Recommendation 8). This could include references to any online databases or information used by supermarkets to inform their views regarding market prices for the relevant product. If prices are set by a tender process, the grocery supply agreement could also reference that process as the basis for determining price. This would not require supermarkets to disclose commercially sensitive information. Instead, it would require them to disclose the process by which prices are set. This would provide greater transparency to suppliers and empower them to conduct a better-informed negotiation with supermarkets.

Other initiatives outside of the Code might assist with price transparency for fresh produce. The ACCC is currently undertaking a 12-month price inquiry into supermarkets. The ACCC is required to consider the approach of suppliers, wholesalers and retailers in setting prices for groceries, including the use of data analytics. Hence, the Review expects that the ACCC's inquiry will consider price transparency along the supply chain.²²¹

Some stakeholders also raised concerns with the timeframes for dealing with price-increase requests by suppliers of fresh produce under the Code.²²² However, other stakeholders noted that these provisions are not used for fresh produce since prices and quantities for fresh produce tend to be set on a weekly basis.²²³ Given this, the Review concludes that a change to the price increase process for fresh produce is not warranted at this stage.

220 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 11.

221 Many submissions to this Review noted concerns with price transparency across the supply chain. For example, Australian Chicken Growers' Council, Submission to the Consultation Paper, 29 February 2024, p. 6; Australasian Meat Industry Employees' Union, Submission to the Consultation Paper, 29 February 2024, p. 3; eastAUSmilk, Submission to the Consultation Paper, 4 March 2024, p. 19; TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 10; Woolworths, Submission to the Interim Report, 10 May 2024, pp. 11-12.

222 For example, Fruit Producers SA, Submission to the Consultation Paper, 29 February 2024, p. 4; AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 26; AUSVEG, Submission to the Interim Report, 30 April 2024, p. 10.

223 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 12; Victorian Farmers' Federation, [Submission to the Senate Select Committee on Supermarket Prices](#) (Submission 62), 2024, p. 6.

Quantity and forecasting issues

Numerous stakeholders raised concerns about Code signatories purchasing much smaller volumes of fresh produce than they had indicated or agreed with suppliers.²²⁴ The problem appears to occur through long-established practices in the fresh-produce industry whereby forecasts are signalled informally or in a non-binding way, and not adhered to later. This practice can generate excess supply and has been raised repeatedly in submissions and stakeholder discussions as a key issue in the industry.²²⁵

The NFF's Horticulture Council recommended that supermarkets be required to include forecast volumes in grocery supply agreements, and to publish quarterly reports on variations between forecast and actual fresh produce amounts.²²⁶ AUSVEG recommended considering the UK Groceries Supply Code of Practice, which contains obligations for retailers to forecast their orders with due care.²²⁷ Woolworths recommended that supermarkets be required to have reasonable grounds for long-range forecasts, and to give at least 3 days' notice in writing ahead of making any change to an existing order for fresh produce to be packed in retailer-branded packaging.²²⁸

However, Dahlsens cautioned against stringent requirements regarding forecasting in view of the unpredictability in the market, which is difficult for suppliers and supermarkets to control.²²⁹

The Review considers that improvements can be made in how supermarkets forecast fresh produce and communicate this to suppliers. While there will always be seasonal and weather-related risks associated with fresh produce, the evidence provided to the Review suggests that supermarkets might not be forecasting their fresh produce needs with due diligence and in good faith. The consequence could be that producers are also having to deal with the risks of supermarkets' forecasting errors.

To make this policy intent clear, the Review recommends that the Code be amended to explicitly require supermarkets to exercise due care in their forecasting and ordering practices (see Recommendation 8). This could be achieved by amending the good-faith provisions or by introducing a new standalone obligation on supermarkets.

Fresh produce standards

The Code sets out several obligations on supermarkets in relation to fresh produce standards and quality specifications. It provides that:

224 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 12; AUSVEG, Submission to the Consultation Paper, 29 February 2024, p. 21; Freshmark, Submission to the Interim Report, 30 April 2024, p. 7.

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

226 National Farmers' Federation Horticulture Council, Submission to the Interim report, 7 May 2024, pp. 15-16.

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

228 Woolworths, Submission to the Interim Report, 10 May 2024, p. 12.

229 Dahlsens, Submission to the Interim Report, 15 April 2024, p. 9.

- Supermarkets must provide any fresh produce standards or quality specifications to a supplier in clear, unambiguous and concise written terms;
- Supermarkets must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications;
- Supermarkets may reject fresh produce only if all the following conditions are satisfied:
 - the produce fails to meet relevant fresh produce standards or quality specifications;
 - the retailer or wholesaler rejects the produce within 24 hours after the produce is delivered to the retailer or wholesaler; and
 - the retailer or wholesaler does not reject the produce after the retailer or wholesaler has accepted the produce.
- If the supermarkets reject fresh produce because it does not meet relevant fresh produce standards or quality specifications, they must provide written reasons for the rejection to the supplier within 48 hours.²³⁰

Some stakeholders suggested that these protections are sufficient and appropriate.²³¹ However, others recommended measures to strengthen them, including by:

- Establishing a reasonableness test to apply to the quality criteria and specifications set by supermarkets;
- Allowing for a right of appeal with inspection by a technical manager;
- Providing the opportunity for rejected produce to be considered for inclusion in supermarkets' imperfect produce range; and
- Requiring supermarkets to store rejected produce appropriately until such time as the supplier can remove it.²³²

Quality criteria and specifications allow supermarkets to meet consumer expectations. Suppliers seek certainty and reasonableness in how these specifications are applied because rejection of fresh produce at the point of delivery can have severe consequences for producers. The Code is already quite prescriptive about the requirements relating to fresh produce standards and specifications and the process for rejecting produce that does not meet these clearly specified requirements. In addition, supermarkets are required to act in good faith in their dealings with a supplier, including when rejecting fresh produce.

The Review considers, however, that there is an opportunity to strengthen the Code to address the issues raised by stakeholders. The Review recommends that fresh produce standards and specifications must be reasonable (see Recommendation 8). In determining whether standards are reasonable, consideration should be given to whether supermarkets apply the same standards for the same products, regardless of the supplier. Further, supermarkets should provide reasonable

230 Clause 21, [Food and Grocery Code of Conduct](#).

231 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 13.

232 See submissions to the Interim Report from NextGen, p. 10; Woolworths, p. 11; Freshmark, pp. 8-9.

written notice to fresh produce suppliers of any changes to fresh produce standards and quality specifications.²³³

This could be incorporated into the Code by clarifying that a supermarket's obligation to act in good faith specifically requires consideration of whether the fresh produce standards and specifications applied are unreasonable, arbitrary or capricious. Alternatively, it could be included as a standalone obligation.

The Review recommends maintaining the remaining arrangements covering fresh produce quality since these require supermarkets to communicate expectations clearly and provide reasons for any rejection of fresh produce. The Review expects that moving to a mandatory Code with meaningful penalties will drive better conduct by the supermarkets, consistent with the obligations, intent and purpose of the Code. Nonetheless, the Review strongly encourages supermarkets to work with suppliers to minimise wastage, which includes identifying suitable resale options such as inclusion in the supermarket's imperfect produce range and storing rejected produce appropriately until it can be collected.

Recommendation 8

To address issues relating to fresh produce, the Code should require that:

- Grocery supply agreements must include the basis for determining prices;
- All forecasts of required volumes are conducted with due care; and
- Fresh produce standards and specifications must be reasonable.

Regulation of aggregators

Several stakeholders raised concerns about the role of fresh produce aggregators in the indirect relationship between fresh produce growers and supermarkets. Aggregators can potentially be regulated under the Code as a supplier to the supermarkets, and also under the Horticulture Code as a wholesaler of horticulture produce who deals with a grower. However, neither Code regulates the aggregator's role in the indirect relationship between growers and the supermarkets.

The Australian Fresh Produce Alliance strongly argued that the Horticulture Code and the Food and Grocery Code should remain separate instruments to avoid overlap and red tape.²³⁴ AUSVEG considered the 2 codes to be complementary:

*In the case of fresh vegetables, those growers that are not dealing directly with a retailer/supermarket are most likely covered by the Horticulture Code of Conduct and would have protections under that mechanism.*²³⁵

233 Subclause 21(5), [Food and Grocery Code of Conduct](#), requires that reasonable notice be given to changes to labelling, packaging or preparation requirements. Fresh produce suppliers should also be given reasonable notice about changes to fresh produce standards and quality specifications.

234 Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 7.

235 AUSVEG, Submission to the Interim Report, 30 April 2024, p. 7.

However, NextGen raised concerns about confusion in the application of the 2 codes.²³⁶

The Review considers that producers who sell to supermarkets via an aggregator are afforded protections via the Horticulture Code, and therefore these relationships do not need to be addressed through the Food and Grocery Code. Concerns about whether the Horticulture Code is effective in providing these protections should be considered as part of the upcoming review of the Horticulture Code.

²³⁶ NextGen, Submission to the Interim Report, 30 April 2024, p. 9.

Chapter 9: Enforcement and penalties

This chapter considers the enforcement tools and penalties²³⁷ that would best drive compliance and fair outcomes from a mandatory Code. For clauses that provide essential protections for suppliers, it recommends penalties of up to \$10 million, 3 times the benefit reasonably attributable to the contravention, or where the benefit cannot be determined, 10 per cent of a supermarket's annual turnover in the preceding 12 months, whichever is greatest. Maximum penalties of 3,200 penalty units (currently just over \$1 million) are recommended for all other penalty provisions.

The chapter also discusses the enforcement tools that will be available to the ACCC under the mandatory Code, including the use of infringement notices. The Review recommends infringement notice penalty amounts be set at 600 penalty units (currently \$187,800).

These changes will require amendment to the Competition and Consumer Act.

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, a finding supported by the ACCC.²³⁸ The absence of any serious repercussions from a breach of the Code also weakens suppliers' willingness to make a complaint or go through a dispute-resolution process.²³⁹

Penalties are essential

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

The ACCC recommends that civil pecuniary penalties should be available for breaches of all substantive provisions of the Code, consistent with other industry codes.²⁴⁰ It notes it has successfully obtained a \$950,000 penalty for breaches of the Dairy Code of Conduct.²⁴¹

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 and that it is anomalous

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

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

239 See, for example, ACCC, *Perishable Agricultural Goods Inquiry 2020*, p. 126; TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 9.

240 Namely, the Horticulture and Dairy Codes of Conduct. See ACCC, Submission to the Consultation Paper, 29 February 2024, p. 1.

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

for the Code to not have penalties unlike other industry codes such as Franchising, Dairy and Horticulture.²⁴²

Many stakeholders supported penalties for breaches of the Code.²⁴³

The Review considers that penalties should be applied to breaches of all substantive obligations of the mandatory Code, being the 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).

Penalties would also apply to breaches of the new provisions proposed by this Review in Recommendations 3, 7 and 8, as well as to the relevant obligations under the new dispute-resolution processes in Recommendation 5.

Penalties would enable the use of effective enforcement tools by the ACCC in ensuring Code compliance. This would include possible litigation alongside existing enforcement capabilities of the ACCC such as public warning notices, seeking injunctions and accepting court-enforceable undertakings. The ACCC can also seek redress for suppliers in court proceedings or it can accept court-enforceable undertakings requiring redress to harmed parties as an alternative to a litigated outcome.²⁴⁴

The ACCC has a strong suite of powers in conducting its investigations, including compulsory information-gathering powers. These enable the ACCC to obtain information, documents and oral evidence by requiring a person to appear before a member of the Commission, where it has a basis to believe the person is able to provide such evidence in relation to a possible contravention of the Competition and Consumer Act.²⁴⁵

The Review notes the ACCC has announced competition, consumer, fair trading and pricing concerns in the supermarket sector as a 2024-25 enforcement priority, with a focus on food and groceries.²⁴⁶

242 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. 4.

243 For example, ACCC, Submission to the Consultation Paper, 29 February 2024, p. 9; Sam Buckingham-Jones, 'Grocery review won't lower checkout prices: former ACCC chiefs', *Australian Financial Review*, 11 January 2024, accessed 13 March 2024; ASBFEO, Submission to the Consultation Paper, 15 March 2024, p. 3.

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

245 Section 155, [Competition and Consumer Act](#); for further information see [ACCC guidelines – Use of section 155 powers](#).

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

Penalties would unlock new enforcement tools

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

- Introducing 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 for a contravention by a corporation of a penalty provision in an industry code at 600 penalty units (currently \$187,800) unless there is an express exception.²⁴⁷ This exception has been made for the Franchising Code of Conduct²⁴⁸ where much higher penalties are available for contraventions of 4 provisions²⁴⁹ that have been “*identified as giving rise to particularly serious adverse consequences for the parties involved as well as the franchising sector more broadly*”.²⁵⁰

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.²⁵¹

The maximum penalty of 600-penalty units applies to all other penalty provisions for corporations in the Franchising Code.

Larger penalties would drive greater compliance

Compliance by the supermarkets with the Code is vital for the sustainability of suppliers’ businesses and therefore the welfare of Australian consumers. Effective penalties are required to drive a strong culture of compliance. Penalties need to be sufficiently large to change behaviour, not just seen as a cost of doing business.

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

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

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

250 [Explanatory Statement to the Competition and Consumer \(Industry Codes--Franchising\) Amendment \(Penalties and Other Matters\) Regulations 2022](#), p. 2.

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

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.²⁵²

They therefore should be set at a level that is proportional to the size and turnover of the supermarkets. Many stakeholders supported heavy penalties such as those recommended in the Interim Report to act as an effective deterrent in view of the superior bargaining power, and the size, of the supermarkets.²⁵³ Queensland Fruit and Vegetable Growers suggested penalties should be set at a level where they would affect shareholders²⁵⁴ and Fresh Markets Authority called for penalties to be linked to a supermarket's turnover or market share.²⁵⁵

A higher tier of maximum penalties for specified provisions where compliance is most important is appropriate given the size of the supermarkets. This aligns with the approach under the Franchising Code of Conduct. It also recognises the similarity in the power imbalance between a large franchisor and an individual franchisee, and the supermarkets and their often-smaller suppliers.

The ACCC supported the Interim Report's recommendations for introducing a higher tier of penalties for the Code, but suggested that the minimum penalties for all other substantive provisions be:

... no lower than 3,200 penalty units (currently \$1,001,600) for breaches of the Code ... The ACCC considers that 3,200 penalty units is materially below the proposed maximum penalty while still being high enough to incentivise compliance and materially higher than the quantum of the Infringement Notices proposed.²⁵⁶

A general penalty amount at 3,200 penalty units is more comparable with penalties under grocery codes in the United Kingdom and New Zealand.²⁵⁷

The Review accepts the ACCC's position, that a higher general penalty amount than 600 penalty units is appropriate to ensure effective deterrence of misconduct by the supermarkets. The Review considers 3,200 penalty units is more commensurate with the size of the businesses being regulated and reflects the possible serious consequences for suppliers where a breach occurs. The \$5 billion revenue threshold will mean the Code would apply only once a supermarket is well established and capable of managing the related compliance risks.

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

253 For example, submissions to the Consultation paper: Australian Chicken Growers' Council, p. 11 and Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia, p. 5; and submissions to the Interim Report: AUSVEG, p. 6; National Farmers' Federation, pp. 5-6; National Farmers' Federation Horticulture Council, p. 19; Small Business Development Corporation, p. 7.

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

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

256 ACCC, Submission to the Interim Report, 30 April 2024, p. 3.

257 The United Kingdom's [Groceries Code Adjudicator \(permitted Maximum Financial Penalty\) Order 2015](#) allows for penalties of up to 1% of turnover; Sections 127 and 129, New Zealand's [Grocery Industry Competition Act 2023](#) and [Grocery Industry Competition \(Grocery Supply Code\) Amendment Regulations 2023](#) has 2 tiers of penalties with the higher for corporate entities being the greater of \$3 million and either, the commercial benefit gained from the contravention, or where the gain cannot be readily ascertained 3% of turnover of the body and all of its bodies corporate in each accounting period in which the contravention occurred.

Introducing penalties higher than 600 penalty units would require legislative change to the Competition and Consumer Act.²⁵⁸ The maximum penalties available under the remade mandatory Code as set out in the Competition and Consumer Act would need to be amended to provide the increase in the general penalty level to 3,200 penalty units and to align the highest penalties with those permitted for the Franchising Code of Conduct.²⁵⁹

Obligations to which higher penalties should apply

In recommending in the Interim Report the introduction of higher penalties for particular clauses of the Code, the Review sought further feedback as to which provisions might attract the higher penalties. In the table below, the Review outlines the provisions it recommends be subject to the higher penalties. Each of these is supported by the ACCC's submission²⁶⁰ as well as by various other stakeholders.

The Review notes that a small number of submissions proposed that other provisions should be subject to higher penalties; in particular, the unilateral variation of contracts (clause 9).²⁶¹

The Review considered whether the unilateral variation clause and other contract term clauses in the Code should be subject to higher penalties, noting that many of them can be negated in grocery supply agreements where this is reasonable (see Chapter 7). While these clauses offer important protections for suppliers, their operation has not been tested owing to the lack of penalties in the Code. Therefore, the Review considers that the higher penalties should not be applied at this time to them.

Following the implementation of the remade Code, if it becomes apparent that higher penalties have not been applied to obligations where there have been repeated contraventions by the supermarkets, this will provide support for subsequent reviews of the Code to apply higher penalties to these provisions.

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

259 The Review notes that 3,200 penalty units is also less than the penalties available for relevant contraventions of provisions in the Australian Consumer Law and the Competition Consumer Act. See section 76, [Competition and Consumer Act](#) and section 224, [Australian Consumer Law](#).

260 ACCC, Submission to the Interim Report, 30 April 2024, p. 11.

261 See for example Australian Lot Feeders Association, Submission to the Interim Report, 30 April 2024, p. 4; and Queensland Fruit and Vegetable Growers, Submission to the Interim Report, 7 May 2024, p. 20.

Table 2 Recommended provisions for maximum penalties

<i>Provision</i>	<i>Reasoning</i>
Obligation to deal with supplier lawfully and in good faith (clause 6B)	<p>The obligation to act in good faith is vital to shaping how supermarkets behave towards suppliers, since it is an overarching obligation that applies at all times in the supplier relationship.</p> <p>Fear of retribution is a central issue to be addressed by the Code. The requirement for supermarkets to deal with their suppliers lawfully and in good faith is the primary provision in the Code to deter supermarkets from engaging in retributive conduct and the strong-arming of suppliers into agreements against their interests.²⁶²</p>
Grocery supply agreement must be in writing and retained, and matters to be covered by the agreement (clauses 7 and 8)	<p>Grocery supply agreements are foundational in the relationship between suppliers and the supermarkets in setting out key terms such as payment terms and quantity and quality requirements and have been required by the Code since its inception.</p> <p>The Review has heard some suppliers do not have written grocery supply agreements, and that agreements are difficult to understand or do not provide the level of certainty and clarity needed.²⁶³ If a supplier does not have a grocery supply agreement covering the required terms or does not understand it, then it is unlikely to be able to exercise its rights under the Code.</p>
Freedom of association (clause 29)	<p>The Code provides protections for suppliers to form associations, and for associating for a lawful purpose. This might include the use of collective bargaining arrangements, which can be a powerful tool to improve suppliers' ability to negotiate and to address information asymmetries.²⁶⁴</p> <p>However, the Review has heard that the fear of retribution disincentivises the use of collective bargaining options open to the industry.²⁶⁵ Hence, higher penalties should apply for breaches of this clause, consistent with the parallel provision in the Franchising Code.²⁶⁶</p>
Duty to train staff with respect to the Code (clause 40)	<p>It is essential to the effective working of the Code that staff such as buyers and category managers are aware of and understand the obligations placed on supermarkets in how they conduct negotiations with suppliers. Without this understanding, the risk of breaches of the Code increases, which can cause substantial losses for suppliers.</p>

262 Many stakeholders supported the good faith obligation being subject to the highest penalties. For example, submissions to the Interim Report from: Australian Lot Feeders Association, p. 4; Fresh Markets Australia, p. 11; and Queensland Fruit and Vegetable Growers, p. 20.

263 See for example AUSVEG, Submission to the Interim Report, 30 April 2024, p. 13.

264 ACCC, *Perishable Agricultural Goods Inquiry 2020*, p. 102.

265 See for example National Farmers' Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, p. 21.

266 Clause 33, *Franchising Code of Conduct*.

<i>Provision</i>	<i>Reasoning</i>
Keeping records (clause 42)	Given the importance of documentation in facilitating dispute resolution, compliance, and enforcement by the ACCC, and noting that this has long been required by the Code, a higher penalty for poor record-keeping practices is justified. Applying a higher penalty to breaches of this clause ensures supermarkets cannot avoid consequences for not complying with other provisions of the Code by maintaining poor record-keeping practices.
New protections against retribution	The Review has proposed 2 new obligations for supermarkets to protect against retributory conduct. These are to ensure any incentives for buying teams are consistent with the Code, and that there are systems to monitor the behaviour of buying teams following a dispute. These will provide new assurances to suppliers in building confidence in their relationships with the supermarket(s) they supply, including that there are not adverse consequences for seeking to use their rights under the Code including raising a complaint. Supplier confidence is essential to the effectiveness of the Code.

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 into 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.²⁶⁷

Infringement notices provide an efficient, low-cost enforcement outcome for relatively minor contraventions. Once paid, infringement notices are recorded on the ACCC's public register and have been used regularly by the ACCC in enforcing aspects of industry codes.²⁶⁸

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.²⁶⁹

When set at an appropriate monetary amount, infringement notices can provide a powerful incentive to ensure compliance given the lower evidentiary threshold that the ACCC needs only to establish reasonable grounds required for the ACCC to issue such notices. The appropriate infringement notice penalty amount should be large enough that it is not simply paid without consideration of the conduct that gave rise to the notice, but not so high that there is no perceived benefit to a contravening party from paying the notice to avoid litigation.

²⁶⁷ Section 51ACD, [Competition and Consumer Act](#).

²⁶⁸ ACCC, [Infringement notices](#), accessed 3 June 2024.

²⁶⁹ Section 51ACF, [Competition and Consumer Act](#).

The use of infringement notices has the potential to be an important deterrent in the supermarket industry in light of the circumstances described by AUSVEG:

*... growers report that minor contraventions can happen on a weekly basis and have nearly become 'a cost of doing business'. An unjustified rejection one week, unscheduled promotion the next week, cancelled order the week after and so on but when you add them up on annual basis it amounts to hundreds of thousands of dollars.*²⁷⁰

The Interim Report queried whether 50 penalty units for an infringement notice was sufficient to constitute an effective deterrent for the supermarkets. 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 notice penalty amounts can be up to 600 penalty units for breaches of specific provisions by listed companies.²⁷¹

Following from its arguments for a higher general penalty level under the Code (3,200 penalty units rather than 600 penalty units), the ACCC also recommended that infringement notices be increased to 600 penalty units (currently \$187,800), given the size and turnover of supermarkets that would be subject to the mandatory Code.²⁷²

The National Farmers' Federation's Horticulture Council also supported increasing infringement notice penalty amounts to 600 penalty units to align with the Australian Consumer Law amount for listed companies.²⁷³ Numerous other stakeholders also supported an increase in infringement notice penalty amounts from 50 penalty units.²⁷⁴ Metcash stated it did not object to 50 penalty units for infringement notices since it is an uncontested process with paid notices being recorded on a public register. It argued that increasing the amount to align with the Australian Consumer Law would be unreasonable in view of the lack of procedural fairness.²⁷⁵

Increasing the infringement notice penalty amount above 60 penalty units would exceed the guideline amount for infringement notices.²⁷⁶ However, the Review considers 60 penalty units is too low in view of the large size of the supermarkets and the potential for severe damage to the livelihoods of suppliers, especially those supplying fresh produce.

270 AUSVEG, Submission to the Interim Report, 30 April 2024, p. 12.

271 ACCC, *Fines and penalties*, accessed on 3 June 2024; noting the Australian Consumer Law is contained in an Act of Parliament.

272 ACCC, Submission to the Interim Report, 30 April 2024, p. 5.

273 National Farmers' Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, pp. 19-20.

274 For example, submissions to the Interim Report from: Fresh Markets Australia, p. 11; AUSVEG, p. 12; Australian Fresh Produce Alliance, p. 15; Australian Small Business and Family Enterprise, p. 5; Small Business Development Corporation, p. 8.

275 Metcash, Submission to the Interim Report, 30 April 2024, p. 7; Infringement notices have been a longstanding enforcement tool available to the ACCC to address concerns of a non-compliance under the Australian Consumer Law and in industry codes. The ACCC will consider issues of procedural fairness in determining the appropriate enforcement outcome in a matter according to its Compliance and Enforcement Policy. This includes whether to grant an extension for payment of, or to withdraw an infringement notice. See ACCC, *Infringement Notices: Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission*, accessed 3 June 2024.

276 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers*, May 2024, accessed 3 June 2024, pp. 56-57.

Higher infringement notice amounts also align with the Review's recommendation for increased civil penalties. Increasing both retains proportionality between these 2 types of financial penalties as part of the suite of enforcement tools open to the ACCC.

Further, the application of the Code differs from other industry codes in that supermarkets and grocery wholesalers must first meet the \$5 billion threshold to be subject to the Code.

The Review recommends increasing the infringement notice penalty amounts for all provisions of the Code to 600 penalty units (currently \$187,800). Any increase in infringement notice penalty amounts would require legislative change to the Competition and Consumer Act.

Recommendation 9

Maximum penalties for more harmful breaches of the Code should be the greatest of \$10 million, 3 times the benefit gained from the contravening conduct or, where the benefit cannot be determined, 10 per cent of turnover in the preceding 12 months. Maximum penalties for other breaches should be 3,200 penalty units (currently \$1,001,600).

Recommendation 10

The penalty amount for infringement notices for contraventions of the Code should be 600 penalty units (currently \$187,800), an increase from 50 penalty units (currently \$15,650) that otherwise applies for industry codes.

Compliance monitoring

The ACCC can conduct compliance checks of supermarkets since it has the power to oblige supermarkets to produce specific information and documents that are required to be kept, generated or published under the Code.²⁷⁷

This process of compliance allows multiple avenues for the efficient identification and addressing of issues by the ACCC 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.²⁷⁸ This makes compliance checks particularly powerful given many suppliers' fears of retribution.

However, the ACCC 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

²⁷⁷ Section 51ADD, [Competition and Consumer Act](#).

²⁷⁸ Metcash noted its support for the ACCC's approach to compliance checks. See Metcash, Submission to the Consultation Paper, 29 February 2024, p. 7.

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”.²⁷⁹

The Code already requires the keeping of some key records such as grocery supply agreements and in relation to various decisions. However, supermarkets are not required to keep all documents provided by suppliers or relied on by the supermarket.²⁸⁰

The Interim Report invited stakeholders to consider whether supermarkets should be required to keep additional information and documents under the Code. There was a general support from stakeholders for ensuring the record-keeping requirements under the Code were sufficient to ensure effective compliance checks and dispute resolution.²⁸¹

In particular, the ACCC argued:

*At a minimum, the ACCC considers that appropriate record keeping obligations should apply to those clauses that the Review considers address significant harm (in that the higher penalties apply). For example, a copy of each GSA [grocery supply agreement] entered into and records that demonstrate training staff about the Code.*²⁸²

In considering additional documents that should be kept to comply with the Code, the Review notes submissions recommending that supporting agreements to grocery supply agreements should be kept by supermarkets.²⁸³ The Code already requires that supermarkets keep copies of grocery supply agreements including “any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement”.²⁸⁴

By introducing the proposed higher penalties for breaches of the supermarkets’ obligations to have and keep copies of grocery supply agreements, the Review considers this provides added incentive to the supermarkets to review compliance with these provisions. If this proves insufficient in achieving these objectives, further reviews of the Code should reconsider the record-keeping obligation of the Code.

The Review considers that the following documents, which are already likely kept as an ordinary part of doing business, should be added to the Code’s record-keeping obligations:

- Written consent provided by a supplier to any set-off amount that is not otherwise provided for in the relevant grocery supply agreement (clause 12(2)(a));

279 ACCC, Submission to the Consultation Paper, 29 February 2024, p. 15. The Review notes that this only applies to the ACCC’s ability to conduct compliance checks, and does not limit the information, documents, or evidence the Commission can require as part of an investigation using the power under section 155 of the [Competition and Consumer Act](#).

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

281 See for example submissions to the Interim Report from: Australian Lot Feeders Association, p. 5; AUSVEG, p. 12; Queensland Fruit and Vegetable Growers, p. 22; and Fresh Markets Australia, p. 11.

282 ACCC, Submission to the Interim Report. 30 April 2024, p. 12.

283 See for example Queensland Fruit and Vegetable Growers, Submission to the Interim Report, 2 May 2024, p. 22.

284 Clause 42(1), [Food and Grocery Code of Conduct](#).

- 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 staff training provided under the Code (clause 40).

In addition, the Review considers that a record-keeping requirement should be attached to the following new recommended obligations:

- Incentive schemes for buying teams and category managers are consistent with the purpose of the Code;
- Systems are put in place for senior management supervision of supplier relationships where there has been a formal complaint; and
- Attaching a simple guide to all new grocery supply agreements about the Code protections that are being contracted out of in the agreement.

This should require that the documents created to comply with these provisions are kept to ensure there is appropriate oversight of these measures by the ACCC and the documents are available if needed in a dispute.

Chapter 10: Ensuring an effective Code into the future

This chapter considers how to ensure the Code is as effective as possible through education and awareness. It also identifies issues that the Review considers might warrant attention when the Code is next reviewed.

Implementation

The implementation of the Final Report’s recommendations will be achieved by:

- Amending the *Competition and Consumer Act 2010* to allow for higher penalties and infringement notices, and to make the Code mandatory.
- Remaking the Code as a mandatory Code incorporating many of the provisions in the voluntary Code with amendments recommended in the Final Report.

Education and awareness to ensure success

Stakeholders have consistently raised a lack of knowledge of the Code’s provisions as an obstacle to its effectiveness.²⁸⁵ This indicates a need for better education and guidance to suppliers, supermarket buyers and category managers on the application of the Code, including the intent of the reasonableness test which applies to many provisions of the existing Code.

While the Review considers that a mandatory Code with heavy penalties for breaches will incentivise supermarkets to comply with the Code, it is important for suppliers also to understand which behaviour is regulated by the Code and the avenues available to them for raising concerns and disputes.

ACCC guidance and outreach

The ACCC has a role to play in educating suppliers, as well as supermarkets, about obligations under the mandatory Code. This could involve replicating the ACCC’s training materials for the Franchising Code of Conduct.²⁸⁶

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

285 For example, Australian Fresh Produce Alliance, Submission to the Interim Report, 6 May 2024, p. 8; TasFarmers, Submission to the Consultation Paper, 29 February 2024, p. 4; AUSVEG, Submission to the Interim Report, 30 April 2024, p.3; National Farmers’ Federation Horticulture Council, Submission to the Interim Report, 7 May 2024, p. 21.

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

- Guidance on accessing the dispute-resolution process, and options for reporting conduct that might breach the mandatory Code, the Australian Consumer Law or the Competition and Consumer Act (including guidance for making anonymous reports);²⁸⁷ and
- Clear examples of the conduct that might breach the Code, including actions that would be considered retributive conduct.

The ACCC 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.²⁸⁸

Role of supermarkets, Code Mediators and the Code Supervisor

Supermarkets also have a role to play in educating their workforce about their obligations under the Code. Indeed, the Code already requires the supermarkets to train their buying team annually.²⁸⁹ This will be enforceable under the mandatory Code.

Code Mediators and the Code Supervisor also have a role in educating suppliers about protections under the Code and ways to access dispute resolution. Further, Code Mediators could usefully be involved in educating supermarket staff about their obligations under the Code.

There will also be a role for targeted educational programs directed towards particular types of suppliers. For example, Woolworths suggested a dedicated education program for fruit and vegetable suppliers should be run to increase understanding and awareness of Code protections and avenues for raising complaints and resolving issues with confidence. Woolworths also suggested that industry training might be promoted by the Code Supervisor and, in its submission to the Review, the supermarket committed to ensuring that its own fruit and vegetable suppliers are given more information about the Code.²⁹⁰

Recommendation 11

The ACCC, Code Mediators and the Code Supervisor should engage in education and outreach activities to ensure that suppliers are empowered to take advantage of their rights under the Code.

287 National Farmers' Federation highlighted the importance of suppliers being aware of dispute resolution processes, including how to access the anonymous complaints mechanism. See National Farmers' Federation, Submission to the Interim Report, p. 5.

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

289 Clause 40, [Food and Grocery Code of Conduct](#).

290 Woolworths, Submission to the Interim Report, 10 May 2024, p. 11.

Issues to consider in next review of the Code

The Review recommends that a review of the effectiveness of the Code commence within 5 years of the proposed changes being implemented. This will allow the industry and Government to evaluate if the proposed changes have been effective and to consider the impacts of other developments in the sector.

The next review of the Code should assess how effectively the amended Code is achieving its purpose in providing minimum standards for behaviour by supermarkets towards their suppliers, and in providing effective avenues for dispute resolution.

To measure whether the recommended mandatory Code has successfully made improvements, the Review recommends that the next review should, among other matters, consider whether:

- The changes to the Code to bolster protection against retribution have sufficiently addressed suppliers' fear of retribution;
- The arrangements for dispute resolution are being used effectively by suppliers to resolve disputes;
- Exceptions to obligations are working as intended;
- The changes to the Code adequately protect suppliers of fresh produce, noting that several stakeholders recommended a specific fresh produce section in the Code;
- Any additional reporting requirements are required to ensure compliance and enforcement; and
- Interactions between the Code and other industry codes of conduct are operating appropriately.

Consideration should also be given to the outcomes of other Government processes including the ACCC's Supermarket Inquiry and changes in competition policy, and whether further changes should be made to the Code to align it with any new policies.

Chapter 11: 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, 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.

As Professor Withers and Professor McEwin have observed:

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.²⁹¹

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 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 is examining the competitiveness of retail prices for everyday groceries. Matters being 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;

²⁹¹ Professor Withers and Professor McEwin (The Australian National University), Submission to the Consultation Paper, 23 February 2024, p. 1.

- The pricing practices of supermarkets;
- 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 to be provided by 28 February 2025.²⁹²

Parliamentary committees relating to the grocery industry

Two relevant Senate Select Committees have been established. In addition, the House of Representatives Standing Committee on Agriculture has 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 15 November 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. The Committee tabled its final report on 7 May 2024. There was unanimous support for making the Code mandatory.²⁹³

292 ACCC, *Supermarkets inquiry 2024-25*, March 2024, accessed 15 March 2024.

293 Senate Select Committee on Supermarket Prices, *Supermarket Prices: Final report*, May 2024, accessed 31 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 2024.²⁹⁴ Of relevance 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.

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.²⁹⁵ The report considered price levels and the methods by which prices are set, particularly for consumers. The report made 35 recommendations.

Forced divestiture

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

294 House of Representatives Standing Committee on Agriculture, *Australian Food Story: Feeding the Nation and Beyond*, Inquiry into food security in Australia, November 2023, accessed 6 April 2024.

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

can be facilitated by an effective, mandatory Food and Grocery Code of Conduct, robust enforcement of Australia’s competition laws by the ACCC, and wider 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 could result in workers having to find new jobs and inconvenience for 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.²⁹⁶

This Review’s recommendations to make the Code mandatory, with heavy penalties for major breaches, alongside effective enforcement of the existing competition laws, will 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 that planning systems seek to balance many competing objectives relating to matters as sustainability, aesthetics, and transportation.

²⁹⁶ Australian Retailers Association, [Greens Divestiture proposed laws could result in higher grocery prices](#), 20 March 2024, accessed 5 April 2024.

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.²⁹⁷

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 requires 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 these reforms are focused on housing outcomes, a general streamlining of approval pathways in planning systems might also have flow-on benefits for business approvals.

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 from business, government, law and economics, and will serve an important advisory role to the Taskforce undertaking the Review and to the Government.²⁹⁸

²⁹⁷ The Victorian Government, Submission to the Consultation Paper, 6 March 2024, p. 9.

²⁹⁸ The Treasury, *Competition Review*, 2023, accessed 25 March 2024.

On 10 April 2024, the Treasurer announced major reforms to Australia’s merger laws.²⁹⁹ From 1 January 2026, a single mandatory and suspensory administrative system for mergers will replace the current voluntary approach. The reforms will give the ACCC stronger powers to identify and scrutinise transactions that pose a risk to competition. Features of the new merger system relevant to grocery retailing include:

- All mergers within the previous 3 years by the acquirer or the target will be aggregated for the purposes of assessing whether a merger meets the mandatory notification thresholds;
- The cumulative effect of all mergers within the previous 3 years by the merger parties may be considered as part of the assessment of the notified merger; and
- Clarifying that the ‘substantial lessening of competition’ test for merger assessments includes whether the merger creates, strengthens or entrenches a position of substantial market power.

These changes respond to concerns about whether a single acquisition, which does not result in material changes in market concentration or competitive dynamics but over time forms part of a strategy of consolidation, can be appropriately assessed under the current law, and concerns about market power in concentrated sectors. The exposure draft legislation and implementation details, including the merger notification thresholds, will be subject to consultation.³⁰⁰

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.³⁰¹ 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.

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.

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.

299 The Hon Dr Jim Chalmers MP, *Merger reform for a more competitive economy*, 10 April 2024, accessed 24 May 2024.

300 The Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, 10 April 2024, accessed 24 May 2024.

301 The Hon Dr Jim Chalmers MP, *Treasurers meet in Queensland*, 1 December 2023, accessed 25 February 2024.

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. 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 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 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 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 Woolworths, Coles, ALDI, Metcash, SPAR and Foodworks to phase out restrictive provisions in supermarket leases.³⁰² At the time, the then ACCC Chair, Graeme Samuel AC, described the reform as a major breakthrough for grocery competition in Australia:

³⁰² 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.

*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.*³⁰³

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 creeping acquisitions, in a bid to limit the market power of the major supermarkets.³⁰⁴ 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.³⁰⁵

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.*³⁰⁶

Collective bargaining class exemption for small businesses

On 3 June 2021, the ACCC issued a class exemption for collective bargaining by small businesses that includes an exemption that allows businesses with an aggregated annual turnover of less than \$10

303 ACCC, [Supermarket agreement opens way for more competition](#), 18 September 2009, accessed 25 February 2024.

304 *Competition and Consumer Legislation Amendment Act 2011*, No. 184, 2011.

305 Explanatory Memorandum to the *Competition and Consumer Legislation Amendment Bill 2011*, p. 3.

306 House of Representatives, [Hansard - Competition and Consumer Legislation Amendment Bill 2010, Second Reading](#), 23 June 2010, accessed 25 February 2024.

million to complete a one-page notification without needing to separately lodge a notification or application for authorisation for collective bargaining.³⁰⁷

Competition law generally requires businesses to make independent decisions about pricing, terms and conditions, and with whom they do business. When competitors make these decisions jointly in a collective bargaining negotiation, they risk breaking competition law.

The ACCC can grant an exemption to specific collective bargaining that is in the public interest. An exemption removes the risk of breaching competition law. Collective bargaining provisions of the Competition and Consumer Act allow 2 or more competitors to come together to negotiate with a customer over terms, conditions and prices.³⁰⁸

In its Perishable Agricultural Goods Inquiry, the ACCC notes:

Collective bargaining is an arrangement where two or more businesses come together to negotiate jointly with a supplier or customer. Businesses can sometimes be better off negotiating with customers or suppliers as a group. Working together, the group might be able to negotiate better terms and conditions with larger businesses than could be achieved individually.

Collective bargaining may also strengthen the group's position by enabling members to pool financial resources, which makes legal advice and expert industry advice more affordable. In turn, this advice may enable the group to negotiate from a better-informed perspective than members might be in a position to do individually. This can help to combat some of the information disadvantages that primary producers may face in the bargaining process...³⁰⁹

The changes made to collective bargaining arrangements in 2021 allow eligible small businesses a simplified notification option.

307 ACCC, [Collective bargaining class exemption](#), accessed 30 April 2024.

308 ACCC, [Collective bargaining and collective boycotts](#), accessed 30 April 2024.

309 ACCC, [Perishable Agricultural Goods Inquiry 2020](#), 10 December 2020, accessed 30 April 2024, p. 102.

Appendix A: Glossary, acronyms and abbreviations

ACCC	Australian Competition and Consumer Commission.
Aggregator	An aggregator is 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.
Arbitration	A process whereby the decision of the arbitrator is final and binding. Parties must agree to binding 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. More information can be found in Chapter 6.
ASBFEO	Australian Small Business and Family Enterprise Ombudsman.
Code	Food and Grocery Code of Conduct as designated in the <i>Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015</i> .
Code Arbiters	Personnel engaged by supermarkets to assist with disputes under the voluntary Code.
Code Mediators	Recommended new role to replace Code Arbiters, to be engaged by supermarkets to assist with disputes under a mandatory Code.
Code Supervisor	Recommended new role to replace the Independent Reviewer. The role of the Code Supervisor role is summarised in Chapter 6.
Constitutional Limitations	Only the courts have the power to interpret laws and to judge whether they apply in an individual case. In the context of this report, this limits the ability to impose alternative options for dispute resolution such as binding arbitration. More information can be found in Chapter 6.
Dairy Code	Dairy Code of Conduct, <i>Competition and Consumer (Industry Codes – Dairy) Regulations 2019</i> .
Food and Grocery Code	Food and Grocery Code of Conduct, <i>Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015</i> .
Franchising Code	Franchising Code of Conduct, <i>Competition and Consumer (Industry Codes – Franchising) Regulation 2014</i> .
Grocery Supply Agreement	A grocery supply agreement is the agreement between a supplier and a supermarket for the supply of groceries to a supermarket business as defined in the Voluntary Code.

Horticulture Code	Horticulture Code of Conduct, <i>Competition and Consumer (Industry Codes—Horticulture) Regulations 2017</i> .
Independent Reviewer	Designated role under the voluntary Code.
Mandatory Code	Recommended new Food and Grocery Code of Conduct.
Mediation	Mediation involves a structured negotiation process for settling disputes. Parties are expected to participate in good faith to try to reach a resolution. The outcome needs to be agreed between the parties if it is to come into force. More information can be found in Chapter 6.
Monopsony	A monopsony is a market structure where there is a single entity that substantially controls the market as the major purchaser of goods and services offered by many entities seeking to sell their products or services.
Penalties	In this report, any references to penalties in the Code are to civil, rather than criminal, penalties.
Penalty Units	Penalty units are set in in the <i>Crimes Act 1914</i> . This value is indexed for inflation, and currently 1 penalty unit is \$313, although it will increase on 1 July 2024.
Review	Review of the Food and Grocery Code of Conduct (of which this is the Final Report).
Small Supplier	Small suppliers are defined in this Review as business entities that have fewer than 100 employees or have annual turnover less than \$10 million. The size of the small supplier should take account of the size of any related corporate entities.
Supermarkets	Throughout the report, the word supermarkets is used to refer to Woolworths, Coles and ALDI, and grocery wholesaler Metcash.
Voluntary Code	Food and Grocery Code of Conduct.