

# EXPOSURE DRAFT



EXPOSURE DRAFT (01/08/2014)

## **Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2014**

**Select Legislative Instrument No. , 2014**

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I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd),  
Governor-General of the Commonwealth of Australia, acting with the  
advice of the Federal Executive Council, make the following regulation.

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Dated

2014

Peter Cosgrove  
Governor-General

By His Excellency's Command

Bruce Billson [DRAFT ONLY—NOT FOR SIGNATURE]  
Minister for Small Business

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# EXPOSURE DRAFT

## 1 Name of regulation

This regulation is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2014*.

## 2 Commencement

This regulation commences on the day after it is registered.

## 3 Authority

This regulation is made under section 51AE of the *Competition and Consumer Act 2010*.

## 4 Code of conduct

For section 51AE of the *Competition and Consumer Act 2010*, the code set out in Schedule 1:

- (a) is prescribed; and
- (b) is a voluntary industry code.

Note: Only retailers can be bound by the code. For how a retailer agrees to be bound by the code, and ceases to be so bound, see clause 4 of the code.

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Schedule 1 Food and Grocery Code of Conduct

Part 1 Preliminary

Section 1

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## Schedule 1—Food and Grocery Code of Conduct

Note: See section 4.

### Part 1—Preliminary

#### 1 Name of code

This code is the *Food and Grocery Code of Conduct*.

#### 2 Purpose of code

The purpose of this 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 and suppliers; and
- (d) to promote and support good faith in commercial dealings between retailers and suppliers.

#### 3 Definitions

In this code:

*Act* means the *Competition and Consumer Act 2010*.

*buying team* means the employees of a retailer whose role includes at least one of the following:

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- (a) direct involvement in buying grocery products;
- (b) immediate management responsibility for an employee covered by paragraph (a).

**code compliance manager** means a person nominated under subclause 28(1).

**de-list** means to remove a grocery product from a retailer's range of grocery products.

**groceries** includes the following:

- (a) food including fresh produce, meat and dairy items (other than dairy items sold for in-store consumption);
- (b) pet food;
- (c) non-alcoholic drinks (other than drinks sold for in-store consumption);
- (d) cleaning products;
- (e) toiletries, perfumes and cosmetics;
- (f) household goods, electrical appliances and kitchenware;
- (g) clothing;
- (h) "do-it-yourself" products;
- (i) pharmaceuticals;
- (j) books, newspapers, magazines and greeting cards;
- (k) CDs, DVDs, videos and audio tapes;
- (l) toys;
- (m) plants, flowers and gardening equipment;
- (n) tobacco and tobacco products.

**grocery supply agreement** means any agreement between a retailer and a supplier for the supply of groceries and includes any document:

- (a) comprising the agreement; or
- (b) made, from time to time, under the agreement.

**own brand product** means a grocery product:

- (a) produced, processed or manufactured by a retailer; or

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- (b) produced, processed or manufactured for a retailer (including by a supplier); or
- (c) that carries a name or trade mark owned by, or licensed to, a retailer.

***promotion*** means any offer for sale (whether or not accompanied by some other benefit to a consumer):

- (a) at an introductory or reduced price, or involving non-standard sales activity; and
- (b) as agreed between a retailer and a supplier; and
- (c) that is intended to last only for a specified period.

***retailer*** means a corporation to the extent that it:

- (a) carries on a supermarket business in Australia for the retail supply of groceries; or
- (b) carries on a business of purchasing groceries from a supplier for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

***senior buyer***, in relation to a supplier, means the employee within a retailer's buying team who manages the buyers who buy from the supplier.

***shrinkage*** means a loss of grocery products that:

- (a) occurs after a retailer has taken possession of them; and
- (b) arises from theft, other loss or accounting error.

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

***supplier*** means a person carrying on (or actively seeking to carry on) a business of supplying groceries to a retailer.

***wastage*** means groceries that are unfit for sale.



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### **4 When this code applies**

- (1) This code binds a retailer if the retailer has agreed, by written notice given to the Commission, to be bound by this code.

Note: Clause 5 provides transitional application arrangements for grocery supply agreements entered into before this code commenced.

- (2) The retailer ceases to be bound by this code if the retailer, by written notice given to the Commission, withdraws the agreement.
- (3) This code does not apply to the extent that it conflicts with:
  - (a) the *Horticulture Code of Conduct*, or
  - (b) the *Franchising Code of Conduct*.
- (4) To avoid doubt, withdrawing agreement to be bound by this code does not remove any obligation under this code that relates to conduct that occurred when the retailer was so bound.

### **5 Retailer must offer to vary existing agreements**

- (1) This clause applies if the retailer is a party to a grocery supply agreement entered into before the retailer was bound by this code.
- (2) Within 6 months after the retailer is bound by this code, the retailer must offer to vary the agreement so that it conforms with the requirements of this code in relation to making grocery supply agreements.
- (3) If the supplier concerned accepts the offer, the retailer must so vary the agreement within 6 months after the offer is accepted.

### **6 Transitional application—agreements entered into before commencement**

- (1) This clause applies if the retailer is a party to a grocery supply agreement entered into before this code commences.

Note: For when this code commences, see section 2 (commencement).

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- (2) This code does not apply in relation to the supply of groceries under the agreement until:
- (a) if the agreement is varied under clause 5 (retailer must offer to vary existing agreements) within the period of 12 months after this code commences—the agreement is varied; or
  - (b) if the agreement is not varied under clause 5 (retailer must offer to vary existing agreements) within the period of 12 months after this code commences—the later of the following occurs:
    - (i) that period of 12 months ends;
    - (ii) the period of 6 months that begins when the retailer is bound by the code ends.

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Grocery supply agreements **Part 2**

Section 7

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

### **7 Grocery supply agreement must be in writing and retained**

- (1) The retailer must not enter into a grocery supply agreement unless it is in writing.
- (2) The retailer must keep the original, or a copy, of the following for at least 12 months after a grocery supply agreement ends:
  - (a) any document comprising the agreement;
  - (b) any document made, from time to time, under the agreement that forms part of the agreement.

### **8 Matters to be covered by agreement**

The retailer must not enter into a grocery supply agreement unless the agreement specifies the following:

- (a) any requirements the retailer has in respect of the delivery of the groceries;
- (b) any circumstances in which the retailer may reject the groceries;
- (c) the period within which the retailer must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed;
- (d) if the agreement is intended to operate for a limited time only—the term of the agreement;
- (e) in clear terms, any quantity and quality requirements relating to the groceries;
- (f) if the agreement provides for termination by one or more parties to it—the circumstances in which it may be terminated.

### **9 Payments for shrinkage**

- (1) The retailer must not:

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- (a) enter into a grocery supply agreement under which a supplier is required to make payments as compensation for shrinkage; or
  - (b) otherwise demand such payments.
- (2) Subclause (1) does not prevent the retailer from raising, discussing or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.

### 10 Unilateral variation of agreement

- (1) The retailer must not vary a grocery supply agreement without the consent of the supplier concerned.
- (2) Subclause (1) does not apply if:
- (a) the agreement:
    - (i) provides expressly for the retailer to make the variation; and
    - (ii) sets out clearly the changed circumstances in which the variation can be made; and
    - (iii) if the variation involves a quantitative adjustment to the terms of supply—sets out the basis or methodology for calculating the adjustment; and
  - (b) the variation is made in accordance with the agreement; and
  - (c) the supplier concerned is given reasonable notice of the variation.

### 11 Retrospective variation of agreement

- (1) The retailer must not vary a grocery supply agreement with retrospective effect.
- (2) Subclause (1) does not apply if:
- (a) the agreement:
    - (i) provides expressly for the retailer to make the variation; and

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- (ii) sets out clearly the changed circumstances, which must be circumstances beyond the control of the retailer, in which the variation can be made; and
  - (iii) if the variation involves a quantitative adjustment to the terms of supply—sets out the basis or methodology for calculating the adjustment; and
- (b) the variation is made in accordance with the agreement.

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Part 3 Conduct generally

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## Part 3—Conduct generally

### 12 Payments for wastage

- (1) The retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of the supplier's groceries incurred at premises of the retailer or its contractor or agents.
- (2) Subclause (1) does not apply if:
  - (a) the wastage is a consequence of the negligence or default of the supplier and the relevant grocery supply agreement sets out expressly and unambiguously what constitutes negligence or default on the part of the supplier; or
  - (b) the basis of the payment is set out in the relevant grocery supply agreement.
- (3) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

### 13 Limited circumstances for payments as a condition of being a supplier

- (1) The retailer must not require a supplier to make any payment as a condition of stocking or listing the supplier's grocery products.
- (2) Subclause (1) does not apply if:
  - (a) the payment is made in relation to a promotion; or
  - (b) the payment is made:
    - (i) in respect of groceries that have not been stocked, displayed or listed by the retailer during the preceding 365 days in 25% or more of its stores; and
    - (ii) reflects a reasonable estimate by the retailer of the costs and risks to the retailer in stocking, displaying or listing the grocery products.

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- (3) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

### **14 Payments for better positioning of groceries**

- (1) The retailer must not require a supplier to make any payment to secure either of the following for a grocery product:
- (a) better positioning;
  - (b) an increase in allocation of shelf space.
- (2) Subclause (1) does not apply if:
- (a) the payment is required under the relevant grocery supply agreement; and
  - (b) the agreement sets out the particular circumstances in which the payment may be required; and
  - (c) the payment is reasonable having regard to either or both of the following:
    - (i) the additional benefits (if any) to the supplier;
    - (ii) the costs and risks to the retailer of allocating additional or different shelf space.

Note: For example, a grocery supply agreement may provide for a supplier to make a payment in relation to the promotion of the supplier's product.

- (3) In any dispute, the retailer has the onus of establishing that the payment is reasonable as mentioned in paragraph (2)(c).

### **15 De-listing products**

- (1) The retailers may only de-list a supplier's grocery product:
- (a) in accordance with the terms of the relevant grocery supply agreement; and
  - (b) for genuine commercial reasons.
- (2) To avoid doubt, de-listing as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason.

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- (3) For the purpose of subclause (1), genuine commercial reasons for de-listing a product include the following:
  - (a) failure of the supplier to meet agreed quality or quantity requirements with respect to the product;
  - (b) failure of the supplier's product to meet the retailer's commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement;
  - (c) persistent failure to meet the retailer's delivery requirements as notified to the supplier from time to time in accordance with the grocery supply agreement.
- (4) Subclause (3) does not limit subclause (1).
- (5) Prior to de-listing a supplier's grocery product, the retailer must:
  - (a) provide reasonable written notice to the supplier of the retailer's decision to de-list the product, including the reasons for de-listing; and
  - (b) inform the supplier of the supplier's right to have the decision to de-list the product reviewed by the retailer's senior buyer for the supplier.
- (6) Subclause (5) does not apply if:
  - (a) time is of the essence (including for product recalls, withdrawals or safety issues); or
  - (b) there are persistent issues with supply that have resulted in the retailer being out of stock or stocked at significantly reduced level.
- (7) The retailer's senior buyer for a supplier must, after receiving a written request from the supplier, promptly review any decisions regarding de-listing made by the retailer and provide the supplier with written notice of the outcome of that review including the basis for the retailer's decision.
- (8) To avoid doubt, a decision by the retailer not to extend the agreement, or enter into a new grocery supply agreement, following the expiry of a fixed term grocery supply agreement is not a decision to de-list a product.



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### **16 Payments to suppliers**

- (1) The retailer must pay a supplier for all grocery products delivered and accepted in accordance with the relevant grocery supply agreement:
  - (a) within the time frame set out in the agreement; and
  - (b) in any case—within a reasonable time after receiving the supplier's invoice for the products.
- (2) The retailer must not:
  - (a) set off any amount against a supplier's invoice or remittance unless the supplier has consented in writing to the set-off of the amount; or
  - (b) require a supplier to consent to set off such an amount.
- (3) Subclause (2) does not apply if the relevant grocery supply agreement provides for the amount to be set off.
- (4) The retailer must not directly or indirectly require a supplier to make any payment towards the retailer's costs of:
  - (a) a buyer's visit to the supplier; or
  - (b) artwork or packaging design; or
  - (c) consumer or market research; or
  - (d) the opening or refurbishing of a store; or
  - (e) hospitality for the retailer's staff.
- (5) Subclause (4) does not apply if the relevant grocery supply agreement provides for the payment.

### **17 Promotional and in-store support**

- (1) The retailer must not directly or indirectly require a supplier to fund the retailer's costs of a promotion.
- (2) Subclause (1) does not apply to the extent that the relevant grocery supply agreement provides for the supplier to fund the retailer's costs of a promotion.

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- (3) If a supplier agrees to make a payment in support of the promotion of a product, the retailer may hold the promotion only after giving the supplier reasonable written notice.
- (4) If the retailer orders a grocery product from a supplier at a promotional wholesale price (whether calculated by way of discount, rebate, credit, allowance or otherwise), the retailer must:
  - (a) ensure that the basis on which the quantity of the order is calculated is transparent; and
  - (b) not over-order; and
  - (c) if the retailer sells any over-ordered product other than at the promotional retail price—pay the supplier the difference between the promotional wholesale price and the full wholesale price for the product.
- (5) If the retailer has placed an order for a grocery product with a supplier in connection with a promotion, the retailer must not do either of the following without the supplier's written consent:
  - (a) cancel the order;
  - (b) reduce the order by more than 10%.
- (6) Subclause (5) does not apply if:
  - (a) the retailer gives the supplier reasonable written notice of the cancellation or reduction; or
  - (b) the retailer compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

### 18 Product quality and standards

- (1) The retailer must provide any fresh produce standards or quality specifications to a supplier in clear, unambiguous and concise written terms.
- (2) The retailer must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications.

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- (3) The retailer may reject fresh produce only if all of the following conditions are satisfied:
  - (a) the produce fails to meet relevant fresh produce standards or quality specifications;
  - (b) the retailer rejects the produce within 24 hours after the produce is delivered to the retailer;
  - (c) the retailer does not reject the produce after the retailer has accepted the produce.
- (4) If the retailer rejects fresh produce because it does not meet relevant fresh produce standards or quality specifications, the retailer must provide written reasons for the rejection to the supplier within 48 hours.
- (5) The retailer must communicate any labelling, packaging or preparation requirements for a grocery product to a supplier in clear, unambiguous and concise written terms.
- (6) The retailer must provide a supplier with reasonable written notice of any required changes to packaging, labelling or preparation standards (unless the change is required immediately by law) taking into consideration existing stock held by suppliers (where known) and any agreement as to stock coverage in the relevant grocery supply agreement.
- (7) The retailer must make any claim for damaged grocery products or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the groceries to the retailer (or its nominee).

### **19 Changes to supply chain procedures**

- (1) The retailer must not directly or indirectly require a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement concerned.
- (2) Subclause (1) does not apply if:
  - (a) the retailer gives the supplier reasonable written notice of the change; or

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- (b) the retailer compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the change.
- (3) Paragraph (2)(b) does not prevent a supplier from waiving a right to compensation under that paragraph.
- (4) This clause has effect subject to clause 10 (unilateral variation of agreement) and clause 11 (retrospective variation of agreement).

## 20 Business disruption

The retailer must not threaten a supplier with business disruption or termination of a grocery supply agreement without reasonable grounds.

## 21 Intellectual property rights

- (1) The retailer must respect the intellectual property rights held by suppliers in relation to grocery products, including intellectual property rights in branding, packaging and advertising.
- (2) In developing or producing own brand products, the retailer must not infringe the intellectual property rights held by a supplier in relation to grocery products, including rights relating to brand names, packaging designs or advertising.
- (3) In any mediation or arbitration under this code relating to a breach of this clause, any relevant actions of the supplier concerned in relation to the intellectual property rights of the retailer must be taken into account.
- (4) In taking action under the following, the retailer may take into account any relevant actions of the supplier concerned in relation to the intellectual property rights of the retailer:
  - (a) clause 29 (direct referral of complaints);
  - (b) clause 30 (internal review).

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## Section 22

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### **22 Confidential information**

- (1) If a supplier discloses confidential information to the retailer in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions or pricing, the retailer must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the retailer who need to have that information in connection with that purpose.
- (2) The retailer must establish and monitor systems to ensure compliance with subclause (1).
- (3) To avoid doubt, information is not confidential information for the purposes of subclause (1) if the information:
  - (a) is publicly available; or
  - (b) comes into the possession or knowledge of the retailer:
    - (i) independently of the supplier; and
    - (ii) without any breach of subclause (1) on the part of the retailer.

### **23 Transfer of intellectual property rights**

- (1) The retailer must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent own brand product.
- (2) Subclause (1) does not prevent the retailer from:
  - (a) holding an intellectual property right in an own brand product; or
  - (b) having an exclusive right to the retail sale of an own brand product; or
  - (c) making the holding of a right covered by paragraph (a) or (b) by the retailer a condition or term of supply by the supplier of an own brand product, to the extent the product, recipe or formulation of the product:

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- (i) was developed or formulated by or for the retailer; or
- (ii) is customised by or for the retailer.

### **24 Allocation of shelf space**

- (1) The retailer's product ranging and shelf space allocation principles must be published or provided to all suppliers with whom the retailer has grocery supply agreements.
- (2) The retailer must act in accordance with the principles and keep them up to date.
- (3) Within a reasonable time before conducting a range review, the retailer must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of:
  - (a) the purpose of the range review; and
  - (b) the key criteria governing ranging decisions.
- (4) Following the range review, the retailer must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the retailer's final decisions.
- (5) The retailer must apply its product ranging and shelf space allocation principles without discrimination (including without discrimination in favour of its own brand products).
- (6) This clause does not limit clause 15.

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Food and Grocery Code of Conduct **Schedule 1**  
Other duties **Part 4**

Section 25

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## **Part 4—Other duties**

### **25 Obligation to deal lawfully and in good faith**

The retailer must at all times deal with suppliers lawfully and in good faith, including by:

- (a) conducting trading relationships with suppliers without duress and in recognition of suppliers' needs for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment; and
- (b) entering into grocery supply agreements that acknowledge the retailer's obligation to deal with suppliers lawfully and in good faith in accordance with this code.

### **26 Provision of contact details**

- (1) The retailer must make available to its suppliers, and keep updated:
  - (a) contact details of the retailer's buyers and senior buyers for the supplier; and
  - (b) contact details for the retailer's code compliance manager.
- (2) The contact details must include position titles and contact telephone numbers.

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Schedule 1 Food and Grocery Code of Conduct

Part 5 Dispute resolution

Section 27

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## Part 5—Dispute resolution

### 27 Information and documents

- (1) The retailer is not required to comply with this Part in relation to a complaint or dispute unless, at the time of making the complaint or notifying the dispute to the retailer, the supplier concerned provides, or offers to provide and is capable of providing, information and documents in accordance with subclause (2).
- (2) The information and documents must provide sufficient particulars of the following to enable the retailer to investigate, consider and respond to the complaint or dispute:
  - (a) the complaint or dispute;
  - (b) the conduct that is the subject of the complaint or dispute;
  - (c) the provisions of this code that are alleged to have been breached;
  - (d) the remedy or relief that the supplier is seeking.

Note: The supplier may supply any or all of the information or documents subject to appropriate confidentiality protections.

### 28 Code compliance manager

- (1) The retailer must nominate a person as the code compliance manager for the retailer.
- (2) The code compliance manager must:
  - (a) have access to:
    - (i) the resources necessary to perform his or her functions; and
    - (ii) all documentation relating to the retailer's obligations under this code; and
    - (iii) the retailer's buying team for the purposes of discussing issues relating to the retailer's obligations under this code; and



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- (b) be independent of, and not be managed by, any member of the retailer's buying team; and
- (c) act in accordance with a written complaints handling procedure that:
  - (i) has been developed by the retailer; and
  - (ii) has been provided to the Commission; and
  - (iii) is reviewed annually and updated as necessary.

### **29 Direct referral of complaints**

- (1) A supplier may direct a complaint relating to a matter covered by this code to the code compliance manager.
- (2) The complaint must include the following:
  - (a) the supplier's identification details, including business or trading name;
  - (b) contact details for the supplier, or the person dealing with the complaint on behalf of the supplier, including the name, title and telephone number of that person;
  - (c) details of the conduct giving rise to the complaint, including the provision of this code relevant to the complaint, together with any documents or other information that would assist the investigation of the complaint.
- (3) The code compliance manager must take all reasonable steps to:
  - (a) investigate the complaint; and
  - (b) conclude the investigation within 20 business days.
- (4) Subclause (3) does not apply if the code compliance manager:
  - (a) is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; and
  - (b) gives the supplier written notice to that effect.
- (5) Following the investigation, the code compliance manager must determine what (if any) action should be taken in response to the complaint.

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Part 5 Dispute resolution

## Section 30

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- (6) The code compliance manager must, within 5 business days after the conclusion of the investigation, give the supplier a summary of the action (if any) that has or will be taken in response to the complaint and the timetable for any such action.
- (7) The code compliance manager must keep the following for at least 3 years:
  - (a) a record of the complaint;
  - (b) a record of the investigations taken to investigate the complaint;
  - (c) a summary of any action taken in response to the complaint.

### 30 Internal review

- (1) This clause applies if a supplier:
  - (a) is not satisfied with the outcome of an investigation under clause 29; or
  - (b) has not been given a summary of action taken in relation to a complaint in accordance with that clause; or
  - (c) has been given notice under subclause 29(4) to the effect that the code compliance manager is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance.
- (2) The supplier may give the retailer a written request to elevate the dispute through senior levels of management.
- (3) The request must specify:
  - (a) the nature of the dispute; and
  - (b) the provision of this code relevant to the dispute; and
  - (c) the action that the supplier thinks will settle the dispute; and
  - (d) the outcome that the supplier is seeking.
- (4) The retailer must elevate the dispute and attempt, within 20 business days, and in good faith, to resolve the dispute.

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Food and Grocery Code of Conduct **Schedule 1**  
Dispute resolution **Part 5**

## Section 31

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### 31 Mediation or arbitration

- (1) A supplier may seek either mediation or arbitration of a complaint or dispute relating to a matter covered by this code, but only after any process begun under clause 29 or 30 in relation to the complaint or dispute:
  - (a) has been completed; or
  - (b) should have been completed.

Note: A supplier is not required to take action under clause 29 or 30 before entering into mediation or arbitration.

- (2) The retailer must:
  - (a) take part in the mediation or arbitration in good faith; but
  - (b) is not required by this code to take part in both mediation and arbitration in relation to the same complaint or dispute at the same time.
- (3) Despite paragraph (2)(a), the retailer is not required to take part in the mediation or arbitration if:
  - (a) the complaint is vexatious, trivial, misconceived or lacking in substance; or
  - (b) the supplier does not act in good faith.
- (4) In any dispute, the retailer has the onus of establishing the matter in subclause (3).

### 32 Conduct of mediation and arbitration

- (1) Mediation or arbitration for the purposes of this code must be conducted in accordance with the rules of the Institute of Arbitrators & Mediators Australia.
- (2) If the mediator or arbitrator is not agreed by the parties within 10 business days of a supplier referring a matter, the mediator or arbitrator must be appointed by the Institute in accordance with the rules of the Institute.
- (3) For the purposes of paragraph 31(2)(a), the retailer:

# EXPOSURE DRAFT

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## Section 32

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- (a) is taken to take part in the mediation or arbitration if the retailer is represented at the mediation or arbitration by a person who has authority to enter into an agreement to settle the dispute on behalf of the retailer; and
  - (b) is taken to be trying to resolve the dispute in good faith if the retailer approaches the resolution of the dispute in a reconciliatory manner, including by doing the following:
    - (i) attending and participating at meetings that are arranged at reasonable times;
    - (ii) at the beginning of the mediation or arbitration process, making it clear what the retailer is trying to achieve through the mediation or arbitration;
    - (iii) observing any obligation relating to confidentiality that applies during or after the mediation or arbitration process; and
    - (iv) not taking or refusing to take action during the dispute, including refusing to accept goods or to make payments, that has the purpose or effect of applying pressure to resolve the dispute.
- (4) All costs of any mediation or arbitration are to be determined under the rules of the Institute of Arbitrators and Mediators Australia.

# EXPOSURE DRAFT

Food and Grocery Code of Conduct **Schedule 1**  
Compliance and reporting **Part 6**

Section 33

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

### **33 Duty to train staff with respect to this code**

- (1) Within 6 months of being bound by this code, the retailer must provide its buying team with:
  - (a) a copy of this code; and
  - (b) training on the requirements of this code.
- (2) The retailer must provide any person who becomes part of the retailer's buying team after the retailer is bound by this code with:
  - (a) a copy of this code; and
  - (b) training on the requirements of this code.
- (3) The retailer must comply with subclause (2) within 20 business days after the person becomes part of the buying team.
- (4) The retailer must provide annual retraining to its buying team on the requirements of this code.

### **34 Reports by code compliance managers**

- (1) A code compliance manager must prepare a written report in respect of each 6-month period beginning 1 January and 1 July.
- (2) The report must:
  - (a) be prepared within 30 business days after the end of the period; and
  - (b) set out the following:
    - (i) the number of complaints received for investigation in the reporting period;
    - (ii) in general terms and without identifying a complainant—the nature of the complaints received;
    - (iii) the time taken to investigate each complaint;
    - (iv) the outcome of each investigation;

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

**Part 6** Compliance and reporting

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- (v) whether or not each complaint was resolved to the satisfaction of the complainant.

### **35 Keeping of records and providing information to the Commission**

Each document that a code compliance manager is required to keep under this code must be provided to, or made available for inspection by, the Commission:

- (a) at least every 6 months; and
- (b) on written request from the Commission.