



Independent Review of the Food and Grocery Code of Conduct 2023–24

ACCC submission

February 2024

Executive Summary

Industry specific regulation to protect suppliers who engage with supermarkets is critical. 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.

The *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the code) was introduced in 2015. Its policy objective as set out in the 2015 explanatory statement is “improving standards of conduct in the grocery sector in response to concerns raised in the public debate in recent years of potential market failures resulting from imbalances between retailers or wholesalers, and suppliers in the allocation of risks in commercial transactions.”¹ Bargaining power imbalances do not always result in harm. Hard bargaining and commercial self-interest by the stronger party are not illegal. But when commercial self-interest moves into harmful practices, over time, this erodes consumer choice and value, as suppliers innovate less, reduce investment, shrink or exit the market. The market does not work effectively and efficiently, and the overall welfare of Australians diminishes.

It is in this context that we present the Australian Competition and Consumer Commission’s (ACCC) submission to the review of the code. The efficient operation of food and grocery markets is critical to Australia, impacting all consumers and a wide range of suppliers and producers. We consider the code is an important regulatory tool, but only if it is improved so that it can deliver on its purpose.

We make 5 recommendations to strengthen the code.

1. The code should be remade as a mandatory prescribed code.
2. The code should be amended to establish minimum standards of conduct that cannot be contracted out of.
3. The definition of grocery supply agreement should be amended in the code to apply in situations where a retailer is dealing with a wholesaler as a supplier.
4. Civil pecuniary penalties should be available for breaches of all substantive provisions of the code.
5. That the review considers including requirements in the code relating to minimum prices, forecasted volumes, published terms of trade and quality assessors.

We also note our recommendations in relation to the dispute resolution provisions of the code as set out in our February 2023 submission, which included:

- The code should be amended to remove the Code Arbiter model and replace it with a genuinely independent dispute resolution process.

We see this review as an important opportunity to hear from the sector, in particular suppliers whom the code is designed to protect. The ACCC receives very few formal complaints about alleged breaches of the code. However, when we engage directly with suppliers and their representatives many tell us their concerns but also that they fear retaliation if they were to speak out. This may explain why we receive so few formal complaints. Therefore, the ACCC considers that the low level of complaints received does not necessarily indicate that the code is operating effectively and adequately protecting suppliers.

¹ [Explanatory statement](#) to F2015L00242 Food and Grocery Code 2015, accessed 21 February 2024

Well-designed industry codes have a specific purpose. They codify and complement the fundamental principles of the *Competition and Consumer Act 2010* (Cth) (the Act) into more practical and relevant requirements to directly address specific problems. The code was introduced in response to concerns about the conduct towards suppliers, particularly by the large supermarkets. However, the code does not regulate pricing or competition in the grocery sector. While the efficient operation of the grocery supply chain, including fair treatment of suppliers, is in the long-term interests of consumers, amendments to the code on its own are unlikely to significantly affect grocery prices for consumers.

While the code is not a direct lever on consumer prices, it does work with other regulatory tools in contributing to the object of the Act – to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. This submission is therefore the ACCC’s “point in time” perspective on the code, as there are other regulatory tools and processes that can impact this market such as:

- Changes to the unfair contract term (UCT) provisions that came into effect November 2023.
- The direction from Government that the ACCC conduct an inquiry into Australia’s supermarket sector, including pricing practices of supermarkets and the relationship between wholesale, including farmgate, and retail prices.
- The consideration of the introduction of unfair trading practice prohibitions.

In particular, the ACCC supermarkets inquiry presents a significant opportunity to understand the drivers of issues in the industry more deeply and identify solutions not limited to a particular code. However, the review of the code is of critical importance to enhancing the efficiency of markets for the supply of food and grocery products in the near term.

Our recommendations on changes to the code seek to make the code more effective in delivering on its important objective. We thank the review for the opportunity to put forward our recommendations.

Introduction

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, businesses, and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the Act, regulate national infrastructure, and undertake market studies.

As the regulator responsible for enforcing compliance with the code, the ACCC welcomes the opportunity to provide a submission to this review.

The code is a voluntary industry code prescribed under Part IVB of the Act. The code provides some regulation for commercial relations between grocery retailers and grocery wholesalers, and their suppliers.

This industry-specific regulation is in addition to broader economy-wide protections under the Act. These include provisions relating to false or misleading representations, UCTs, price fixing, resale price maintenance, and the assessment of mergers and acquisitions.

The code has 4 signatories: retailers ALDI, Coles and Woolworths and wholesaler Metcash.² Together, the signatories account for a very significant proportion of the Australian retail grocery market. The range of supermarket suppliers is diverse in terms of business size and food or grocery product offering.

In 2022-23, the Treasury conducted a review of the code's dispute resolution provisions. The ACCC made a [submission](#) to the review. The review report and Government response were subsequently published in January 2024.

On 3 October 2023, the Assistant Minister for Competition, Charities and Treasury, the Hon Dr Andrew Leigh MP, announced an independent review of the remaining provisions of the code (other than the dispute resolution provisions) and released the [review's terms of reference](#). The review is being conducted by the Hon Dr Craig Emerson.

This review is an important opportunity to hear from sector participants about how the code is operating and the extent to which it is achieving its objectives. The ACCC notes that the effectiveness of the code relies on the willingness of suppliers to raise and progress disputes, and report when they consider the retailer or wholesaler has breached the code. This includes making a report to the ACCC. The low number of formal complaints to the ACCC do not reflect the concerns we hear directly from suppliers, particularly primary producers, through our industry engagement. 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.

This submission will refer to the ACCC's most recent inquiry that closely considered supplier and supermarket relationships, the Perishable Agriculture Goods Inquiry (PAG Inquiry).³ This inquiry identified multiple responses to the issues faced by perishable goods suppliers, as the markets they supply and the goods they deliver are different and complex. This should be front of mind in the review to guard against the code being extended beyond its useful scope or being made so prescriptive that it creates unnecessary regulatory burden that does not match the harm it is trying to address.

² Metcash is the wholesale supplier to independent stores operating under brands such as IGA and Foodland.

³ ACCC, [Perishable Agricultural Goods Inquiry report](#), 10 December 2020

A factor in this risk is the code's breadth of coverage. While there are only 4 signatories, the industries, sectors and traders that engage with these signatories are almost as diverse as the product offerings of supermarkets.

We look forward to contributing to this review process to ensure the code provides effective regulation of Australia's grocery supply chain.

Competition, fair trading and consumer laws

Existing laws and codes relevant to the food and grocery sector

Competitive markets increase the prosperity and welfare of all Australians by delivering lower prices, better quality products and more choice. This is reflected in the objective of the Act – to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The Act achieves this by promoting competition in markets by prohibiting certain conduct that undermines the process of competition or is inconsistent with fair trading.

The Act protects competition in markets through prohibiting:

- cartel conduct
- agreements and exclusive arrangements that substantially lessen competition
- conduct by businesses with substantial market power that substantially lessen competition
- resale price maintenance
- mergers and acquisitions that substantially lessen competition.

The competition laws in the CCA do not, and are not intended to, prevent all of the harmful effects of bargaining power imbalances. These laws are aimed at preserving competition and are not intended to restore or improve competition in markets where, for various reasons, competition has been substantially reduced. As such, the Australian Consumer Law (ACL) and industry codes are of critical importance in addressing these harms.

The ACL prohibits certain practices that affect the proper functioning of markets such as misleading or deceptive conduct, false or misleading representations, unconscionable conduct, and the use of UCTs in standard form small business contracts.

Recent reforms to the UCT regime have strengthened protections. Businesses are now prohibited from applying or relying on (or purporting to apply or rely upon) UCTs in standard form contracts with small businesses or consumers entered into or renewed from 9 November 2023. The court can impose significant financial penalties against businesses that contravene these prohibitions. The coverage of the UCT laws has now expanded to protect businesses with up to 100 employees. Prior to this reform, a court could only declare specific terms of a contract unfair and therefore void.

These improvements are an important step forward in seeking to protect against the economic harms that can stem from bargaining power imbalances. However, as flagged in our PAG Inquiry, even with these amendments, the UCT framework will not cover non-contractual conduct stemming from bargaining power imbalances, which can also have harmful effects.

There are also other codes that apply to parts of the grocery supply chain – the Dairy Code, the Horticulture Code, and the Unit Pricing Code. Like the Food and Grocery Code these

codes have the force of law and are designed to achieve minimum standards of conduct where there is an identifiable problem. The Unit Pricing Code is the only mandatory code that directly relates to consumer pricing in supermarkets. It aims to provide consumers better transparency and comparability of product pricing in grocery retailers.

ACCC's enforcement approach

The ACCC is the regulator responsible for enforcement and ensuring compliance with the code. The ACCC uses a range of compliance and enforcement tools to encourage compliance with the Act. In deciding which compliance or enforcement tool (or combination of such tools) to use, our first priority is always to achieve the best possible outcome for the community and to manage risk proportionately. Our enforcement actions seek to maximise impact and leverage any outcomes across an industry sector to encourage compliance with the law. Further information about the ACCC's role, including our approach to enforcement and compliance, is at Attachment A.

Other developments relevant to the food and grocery sector

The ACCC is contributing to or leading other developments that have implications for suppliers to the supermarkets sector. These developments mean this submission is a "point in time" perspective from the ACCC. In particular, the ACCC Supermarkets Inquiry will enable the ACCC to analyse the industry in further detail. This review's interim report and submissions to the review will also assist in informing our views on the effectiveness of the code.

Merger reform

The ACCC is seeking amendments to Australia's merger regime to ensure that the ACCC has the tools necessary to be able to properly scrutinise and, if necessary, prevent mergers that are likely to substantially lessen competition.

Unfair trade practices

As set out in our submission to the Treasury's *Consultation Regulation Impact Statement* consultation, the ACCC supports the introduction of an unfair trading practices regime. The introduction of an unfair trading practices regime was also a recommendation of our 3-month PAG Inquiry (2020).

Supermarkets Inquiry 2024-25

On 1 February 2024 the Federal Government [directed](#) the ACCC to investigate pricing and competition in the supermarket sector. ACCC will provide an interim report by 31 August 2024 and a final report by 28 February 2025. The ACCC inquiry into supermarket prices will consider:

- (a) The current structure of the supermarket industry at the supply, wholesale and retail levels
- (b) The level and nature of competition in the industry
- (c) The competitiveness of small and independent retailers, including in regional and remote areas
- (d) The impact of technological change including the growth of online shopping
- (e) The pricing practices of supermarkets
- (f) Factors influencing prices along the supply chain, including the difference between farmgate and supermarket prices

- (g) Any impediments to efficient pricing along the supply chain, and
- (h) Other factors impacting competition, including loyalty programs.

The inquiry does not extend to reviewing the operation or scope of the code, except as necessary to consider the matters set out above.

Purpose of the code

Industry codes are a set of rules or standards of conduct for a particular industry, often regulating how parties in that industry relate to one another. Prescribed codes are introduced ‘where there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit.’⁴

The code was introduced in 2015 with the policy objective of “improving standards of conduct in the grocery sector in response to concerns raised in the public debate in recent years of potential market failures resulting from imbalances between retailers or wholesalers, and suppliers in the allocation of risks in commercial transactions.”⁵ The formal purpose of an industry code frames the content of the code within the boundaries of the policy objective. The code’s formal purpose is to:

- a) help regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain
- b) 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
- c) provide an effective, fair, and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers
- d) promote and support good faith in commercial dealings between retailers, wholesalers, and suppliers.

We consider the policy objective of the code is not being met by the current code. Changes to the purpose and other elements of the code are critical. In particular, the code has not delivered trust within the supply chain, ensured transparency and certainty or significantly improved dispute resolution.

Recommendations

1. The code should be remade as a mandatory prescribed code

The Food and Grocery Code is the first and only voluntary code to be prescribed under the CCA. The code originated from an industry-led code and was subsequently made a voluntary prescribed code under the CCA.

⁴ The Treasury, [Industry codes of conduct policy framework](#), November 2017, p8, accessed 20 February 2024.

⁵ Explanatory Statement to F2015L00242 Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 https://www.aph.gov.au/-/media/Committees/clac_ctte/Food_and_Grocery_2015/explanatory_statement.pdf?la=en&hash=C9D2D5182BA8BE3F6905A6AC841E58A8A2E6F51E accessed 28 February 2024)

It is the ACCC's longstanding view that the code cannot achieve its purposes until it is remade as a mandatory code.⁶ 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.

As we noted in our submission to the 2022-23 review of the code's dispute resolution provisions, 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.

If making the code mandatory, the method by which the relevant businesses are captured would need to be further considered. For example, the code's obligations currently apply to retailers and wholesalers. However, the ACCC considers that the code is largely intended to address issues related to major retailers and major wholesalers. As such, consideration should be given to including a turnover threshold or other clarification to ensure that smaller retailers and wholesalers are not captured.

For example:

- The mandatory Unit Pricing Code only applies to physical and online retailers when certain conditions are met regarding the items sold and, in relation to bricks and mortar retailers, the size of their store.
- The news media and digital platforms mandatory bargaining code enables the Minister to designate who would be subject to the code.⁷ To date, no designations have been made.

Recommendation 1

The code should be remade as a mandatory prescribed code.

2. Removing the ability to opt-out of code protections.

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. The code should not allow signatories to 'opt out' of these minimum standards.

There is a significant imbalance in power between some signatories and their suppliers. Two signatories – Coles and Woolworths – have a large combined market share. As a result, these two traders are an essential gateway for large and small businesses to reach Australian consumers at scale. Despite this significant imbalance in bargaining power, the code does not establish a set of minimum standards for grocery supply agreements, which will often be on "take it or leave it terms".

⁶ The ACCC's submissions to both the 2018 and 2023 code reviews as well as the 2020 [Perishable Agriculture Goods Inquiry \(PAG\) Report](#) recommended that the code should be remade as a mandatory prescribed code.

⁷ Competition and Consumer Act 2010, section 52E(3) In making the determination, the Minister must consider: (a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate; and (b) whether that group has made a significant contribution to the sustainability of the Australian news industry through 15 agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content). (4) In making the determination, the Minister may consider any reports or advice of the Commission.

For example, clause 13 of the code aims to prevent a signatory from requiring payments from suppliers for shrinkage⁸ through the grocery supply agreement or by other means. However, there are too many provisions where a signatory can effectively 'contract out of' certain protections through their supply agreements:

- Clause 9(2) allows a signatory to unilaterally vary their existing grocery supply agreements.
- Clause 12(3) allows signatory to set-off payments (make deductions from a supplier's invoice).
- Clause 14(2) allows a signatory to charge for wastage.
- Clause 15(2) allows the signatory to charge a supplier as a condition for stocking or listing grocery products.
- Clause 16(2) allows a retailer to charge a supplier for better positioning on shelf, or more shelf space.
- Clause 17(2) allows a signatory to require a supplier to make any payment towards the costs of any activity that is undertaken by the retailer or wholesaler in the ordinary course of carrying on a business.
- Clause 18(2) allows the signatory to require a supplier to fund part or all of the costs of a promotion.

The ACCC is concerned that the above clauses create uncertainty for the supplier as to the protections the code may provide and may have the effect of eroding the price the supplier receives for their goods. The ACCC considers that the ability for signatories to 'opt out' of certain provisions is a fundamental weakness of the code that, if retained, will continue to undermine the code's ability to achieve its first stated purpose; that is, to help regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain.

While the code does provide that these exceptions will need to be provided for in the grocery supply agreement and are subject to a reasonableness test, the ACCC considers that this is insufficient to protect suppliers. The operation of these clauses effectively places the onus on the supplier to raise concerns that the requirement is unreasonable, in circumstances where there is a known significant imbalance of power and where suppliers continue to indicate that fear of damaging a commercial relationship and fear of retaliation are impediments to raising issues with the signatories.⁹

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

Recommendation 2

The code should be amended to establish minimum standards of conduct that cannot be contracted out of.

3. The definition of grocery supply agreement should be amended to apply in situations where a retailer is dealing with a wholesaler as a supplier

⁸ Clause 3, Food and Grocery Code, shrinkage is a loss of grocery product that occurs after the retailer has taken possession of the item and arises from theft, another loss or accounting error.

⁹ 17% of respondents considered fear of retribution to be an impediment to bringing a complaint to their retailer/wholesaler. Australian Government, the Treasury, [Food and Grocery Independent Reviewer 2022–23 Annual Report](#), page 18.

The code requires grocery retailers and grocery signatories to enter into 'grocery supply agreements' with their suppliers. The definition of 'grocery supply agreement' explicitly excludes the relationship between a retailer and wholesale supplier.

For example, 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 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.

This also creates problematic interactions with the Horticulture Code, which is a mandatory code that regulates the conduct between horticulture wholesalers and growers. For example, a merchant under the Horticulture Code is, among other things, required to have a written agreement with growers that details how prices are to be set. However, the wholesaler exemption in the code means that the code's protections are not afforded to wholesalers that supply a retailer. This therefore creates enhanced risk throughout the supply chain for wholesalers and ultimately growers. This can also make compliance with the Horticulture Code more difficult in some areas for some wholesalers, due to the lack of certainty in agreements with retailers.

The ACCC considers this exclusion should be removed and 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. It will be increasingly important to remove this wholesaler exemption should the code be remade as mandatory. If the exemption remains it may create an incentive for signatories to restructure their businesses to increase their supply from wholesalers and avoid the obligations of a strengthened code.

Recommendation 3

The definition of grocery supply agreement should be amended in the code to apply in situations where a retailer is dealing with a wholesaler as a supplier.

4. Introduce meaningful compliance and enforcement tools for the ACCC

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

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

A number of prescribed codes include civil pecuniary penalties. This includes the Horticulture Code, Dairy Code and Franchising Code. In 2023 the ACCC successfully obtained a penalty of \$950,000 in the Federal Court against dairy processor Lactalis for

entering into milk supply agreements that did not comply with the Dairy Code.¹⁰ In 2023 the ACCC also issued infringement notices to horticulture traders Nutrano and Getfresh Merchants for trading under alleged non-compliant Horticulture Produce Agreements.¹¹

Given the size of signatories to the code the ACCC considers that significant civil pecuniary penalty provisions should be introduced for more serious contraventions of the code to drive higher levels of compliance. By way of example the Franchising Code has recently been amended to include civil pecuniary penalties for a number of clauses. For contraventions of these provisions, the maximum pecuniary penalty per contravention for corporations is the greater of:

- \$10,000,000
- if the Court can determine the value of the 'reasonably attributable' benefit obtained, 3 times that value, or
- if the Court cannot determine the value of the 'reasonably attributable' benefit, 10% of annual turnover in preceding 12 months.

For individuals, the maximum pecuniary penalty per contravention is \$500,000.

As it stands there are no civil pecuniary penalties for breaches of the code. The ACCC is limited in the actions it can take for alleged breaches of the code:

- issuing public warning notices to alert the Australian community to a suspected contravention of the code,¹²
- seeking injunctions to compel or restrain certain conduct by the signatory,¹³ and
- initiating court proceedings to compel the signatory to redress or prevent any loss or damage caused by the signatory's misconduct.¹⁴

These are useful powers for the ACCC to have. The ACCC has successfully used these powers in other areas of our work to inform the public of alleged non-compliance and remedy some of the harm experienced by consumers and small businesses. However, we do not consider that these powers alone are sufficient without civil pecuniary penalties and infringement notices to deter non-compliance with the code.

The ACCC conducts compliance checks on signatories, through the use of section 51ADD notices to compulsorily require that documents be provided. Signatories have been responsive to ACCC concerns about compliance that were uncovered through these checks. They have indicated that they will implement changes to practices and processes to achieve better compliance. However, it is not an efficient use of resources for the ACCC to be facilitating signatories' compliance in this way. The code has been in place since 2015, and in our view should be embedded, understood and applied by signatories. Civil penalty provisions would act as a meaningful incentive for signatories to ensure their compliance with the code's obligations.

The ACCC has consistently advocated for the introduction of civil pecuniary penalties for non-compliance with the code, including in the 2020 PAG Inquiry report and our submissions to the 2018 and 2022-23 code reviews.

¹⁰ Lactalis media release: <https://www.accc.gov.au/media-release/lactalis-penalised-for-dairy-code-breaches>

¹¹ Nutrano media release: <https://www.accc.gov.au/media-release/nutrano-pays-penalties-for-alleged-horticulture-code-breaches>

¹² Section 51ADA, CCA.

¹³ Section 80, CCA.

¹⁴ Section 51ADB, CCA – known as “non-party redress”. Suppliers can also seek damages for a contravention of the code, section 82, CCA

Recommendation 4

Civil pecuniary penalties should be available for breaches of all substantive provisions of the code.

5. Improving transparency and certainty in commercial dealings

The current code does not contain requirements about key elements of the commercial relationship between retailers and suppliers, including price and quantity. This undermines many of the objectives of the code, including building trust in relationships, and providing transparency and certainty in commercial dealings.

The ACCC considers that the Code should explicitly identify the core requirements that must be specified in writing and included in a grocery supply agreement. This will provide greater transparency and avoid the risk that sub-agreements fall outside the scope of the code.

Price disclosure

The code does not currently require that grocery supply agreements include information about the prices that will be paid for goods. In practice, this often means that prices will be determined via a separate process that sits outside a grocery supply agreement.

A concern regularly raised with the ACCC is that there is no clarity about how prices are determined by retailers when engaging with suppliers. For example, fruit and vegetable suppliers have suggested that prices are commonly set by retailers on a weekly basis and suppliers have limited capacity or time to assess these offers. This price disclosure also occurs at a time when the produce is ready for supply, meaning suppliers have limited other options. This means that retailers can often transfer price risk to suppliers, despite retailers likely being best placed to manage this price risk due to having more knowledge of the factors driving the prices paid by consumers.

In its prior inquiries and market studies, the ACCC has identified that market failures due to information asymmetries are often most significant in perishable produce markets, where producers must make quick decisions about who to supply and at what price.

When suppliers have access to accurate and reliable price information, they can make informed decisions for their business, including allocating their resources effectively and making investment decisions that will enhance the productivity of their business and their industry. Where there is a significant lack of transparency, this can contribute to, and exacerbate, bargaining power imbalances between the supplier and the other party. This can be damaging to both market participants and the efficiency of markets as a whole.

Some mandatory industry codes include requirements around price disclosure, such as that a minimum price be provided (Dairy Code) or that a price or process for determining the price are provided (Horticulture Code).

The ACCC acknowledges that prices can vary significantly for some products across a contract period. However, we consider that suppliers having a degree of price certainty can provide benefits to both suppliers and overall market efficiency. As such, the ACCC recommends that the review give serious consideration to including a requirement in the code that retailers must provide suppliers with a minimum price payable, subject to quality deductions, in a grocery supply agreement. The review process would provide a means of testing this proposal with industry, including how sufficient flexibility could be created to account for the wide range of supply relationships captured by the code.

The ACCC also considers that broader price transparency mechanisms can be a means of driving competition and efficiency in markets. In other jurisdictions such as the USA and EU, some extensive price reporting mechanisms exist to enhance market transparency. For example, in the United States, the *Livestock Mandatory Reporting Act 1999* was established to improve reporting of market information about cattle, livestock and meat products. However, any such mechanisms would likely need to be industry specific and considered in detail, and this would therefore likely sit outside the scope of this code review.

Volumes

Clause 8(e) of the code provides that a grocery supply agreement must set out 'any quantity and quality requirements relating to the groceries'. However, the code is not prescriptive in terms of requiring specific volumes or quantities to be documented and adhered to, and clause 9(2) also provides a pathway to the variation of agreements.

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

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

The ACCC recommends that the review considers including requirements in the code that:

- grocery supply agreements must include the volumes to be supplied under the agreement, and
- it is a breach of the code to not comply with the volumes set out in a grocery supply agreement. This could be accompanied by an appropriate level of flexibility to account for legitimate variations. For example, this could enable a flexibility of plus or minus 10% on stated volumes and an exception related to natural disasters.

Such protections would enable a higher degree of transparency and certainty in agreements. The review process would enable further assessment of how such an approach could be developed in a manner that meets the practical needs of retailers and suppliers.

Terms of trade

The current code does not require retailers to publish its minimum terms of trade. This is in contrast to the Dairy Code and Horticulture Code, which both require a form of minimum trading terms to be published or made publicly available.

Published terms of trade create greater transparency around the minimum terms being offered and enable prospective suppliers to compare these across buyers. This does not require the disclosure of commercially sensitive details as these would still be reserved for grocery supply agreements. However, it would allow for transparency concerning broader minimum terms of trade, such as payment periods and dispute resolution procedures.

The ACCC recommends the review consider adding a requirement to the code that retailers must publish their minimum terms of trade on a publicly accessible website.

Quality assessors

Another key concern raised by some stakeholders in relation to fresh produce supplied to retailers is about quality assessments.

A quality downgrade or rejection by a retailer can cause substantial financial loss for a supplier. The quality assessment process can also be complex, with produce quality changing over time, such as during transportation.

The ACCC has heard concerns that retailers use quality as a reason to reject produce to manage overall volumes where they have excess stock. However, there are also valid reasons for rejections or downgrades, such as where produce doesn't meet defined quality specifications.

Under the Horticulture Code, independent produce assessors can investigate and report on a range of matters, including whether produce has been rejected in line with the conditions of a horticulture produce agreement. The ACCC understands this process is not commonly used, but it does provide an independent pathway through which such disputes can be considered.

As such, the ACCC recommends that the review give consideration as to whether it would be beneficial to incorporate a quality assessor component into the broader dispute resolution framework in the code.

Recommendation 5

That the review considers including requirements in the code relating to minimum prices, forecasted volumes, published terms of trade and quality assessors.

Attachment A: Code compliance and enforcement

The ACCC's approach towards compliance with the code takes into account the absence of pecuniary penalties and infringement notices for non-compliance with the code, the low level of supplier reports to the ACCC, actions by traders to comply with the code in response to our concerns, and prioritisation of our resources.

The ACCC has previously taken action under the unconscionable conduct prohibitions against Coles and Woolworths in their dealing with suppliers. Coles admitted it had engaged in unconscionable conduct and paid a [penalty of \\$10 million](#). The ACCC's [action against Woolworths](#) was dismissed by the Federal court, which found Woolworths' had not engaged in unconscionable within the meaning of the ACL. We have also taken enforcement actions in the agriculture sector under the Dairy Code, Horticulture Code and ACL.

We do not consider the level of complaints to the ACCC about the code to be an accurate reflection of the challenges encountered by suppliers in their daily commercial dealings with signatories. The ACCC considers that this review provides an important opportunity to further contextualise the complaint numbers by hearing from suppliers, current and former, about the level of disputes and issues when dealing with the signatories.

- The ACCC has not taken any public enforcement action in relation to the code. We have completed 3 sets of compliance checks on signatories since the introduction of the code. We also provide education and engagement to the sector through detailed guidance on the [ACCC website](#).
- The ACCC receives very few complaints about the code signatories from suppliers. Since 2015, the ACCC has received 116 contacts about the Food and Grocery Code, which is on average 12-13 contacts annually.
- To understand issues in the sector we regularly engage with representatives of suppliers to supermarkets through our [Agricultural Consultative Committee](#) and the [Small Business and Franchising Consultative Committee](#) and other direct engagements.
- We have also conducted inquiries which include consideration of the code, for example the [Perishable Agriculture Goods Inquiry](#). The PAG inquiry examined trading practices throughout supply chains, including the relationships between farmers, processors, and retailers, and the extent to which any potential bargaining power imbalances in these relationships adversely impacted the efficient operation of these markets. The inquiry also examined the ability of current laws and regulations to address the harmful effects of bargaining power imbalances.

The ACCC's primary tool for compliance monitoring of industry codes is the section 51ADD power. This power allows the ACCC to seek documents or information from a trader covered by the code if the code requires the trader to keep, generate or publish documents or information.

- The ACCC has used its compulsory information gathering power under section 51ADD of the CCA, as well as voluntary information requests, to conduct 'compliance checks' on the signatories. Under section 51ADD of the CCA, the ACCC Chairperson can require a retailer or wholesaler corporation that is subject to the code to provide information or produce documents that the corporation is required to keep, generate or publish under the Code. The signatories have been responsive where the ACCC has identified issues with the signatories' compliance with the code.
- In order for us to use this power to check compliance a code must first state a requirement for a trader to keep, generate or publish (the record keeping

requirement). For example, under clause 42(2)(c), a copy or original of the notice of a decision to delist must be kept for 6 years. Record keeping requirements are an important element of compliance monitoring. If a clause is intended to reduce harm but does not require a trader to keep, generate or publish documents or information that demonstrates or evidences behaviour, we cannot check compliance using the s51ADD power.

- We acknowledge the importance of balancing record keeping requirements and effective compliance monitoring with the burden on signatories, as the code should not act as a significant barrier to entry for new entrants to the supermarket sector. As this review proceeds the ACCC will seek to understand how any additional provisions that seek to address conduct might be evidenced in documents.