



Land of the Ngunnawal people
23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
Tel 02 6243 1111
Fax 02 6243 1199
www.accc.gov.au

Contact officer: David Salisbury
Contact phone: 03 9290 1919

30 April 2024

Food and Grocery Code Review Secretariat
By email: GroceryCodeReview@treasury.gov.au

Dear Dr Emerson

Food and Grocery Code Review Interim Report

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 *Competition and Consumer Act 2010 (Act)*, regulate national infrastructure and undertake market studies.

As the regulator responsible for enforcing compliance with the *Competition and Consumer (Industry Codes -Food and Grocery) Regulation 2015 (Code)*, the ACCC welcomes the opportunity to provide a submission in response to the Review's interim report (**Report**).

The ACCC's supermarkets inquiry

On 1 February 2024 the Australian Government directed the ACCC to conduct an inquiry into Australia's supermarket sector. The inquiry is examining the pricing practices of supermarkets and the relationship between wholesale, including farmgate, and retail prices.

The supermarkets inquiry will run for one year. On 29 February 2024, we published an issues paper and consumer survey seeking views on the key issues we will consider in this inquiry. An interim report will be provided to the Australian Government no later than 31 August 2024. The final report is due to be provided no later than 28 February 2025.

The supermarkets inquiry is likely to provide additional information and evidence that could inform any Government decisions about the Code. While it is a matter for Government, a response on some aspects of this review might be informed by the supermarkets inquiry final report. This submission is therefore a point in time submission from the ACCC, as was our first submission.

Firm recommendations

The ACCC supports all of the "Firm Recommendations" (1-6, 8 and 10) of the Report. Making the Code mandatory, appropriately targeting the Code at the largest retailers and wholesalers and introducing meaningful penalties are necessary amendments for the Code to achieve its purposes. The Review might consider whether the proposed penalty of \$10 million is adequate or whether an amount equivalent to the maximum pecuniary penalties

available for contraventions of competition and consumer provisions of the Act (\$50 million) is preferred.

As noted below, the ACCC recommends in response to Recommendation 11 amending the Code to provide for Infringement Notices of 600 penalty units (currently \$187,800).

Regarding pecuniary penalties, the ACCC's position is that higher maximum penalties may be more capable of achieving specific and general deterrence. However, the examples of the Franchising Code and the Gas Code show that the government might prefer a range of penalties that vary from provision to provision in a Code. Should this be the case, the ACCC recommends that the Review consider the provision for maximum civil pecuniary penalties that are no lower than 3,200 penalty units (currently \$1,001,600) for breaches of the Code that may be considered less harmful. 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. See Table 1 below for a comparison on the amount of infringement notices and civil pecuniary penalties under various industry codes.

Table 1: Infringement notice and civil penalty amounts on various industry codes

| | | Gas Code | Dairy Code | Franchising Code | Recommendations for Food and Grocery code |
|---------------------------------------|--------------------|---|--|--|--|
| Infringement notice amount | Individual | 600 penalty units (\$187,800) | 10 penalty units (\$3,130) | 10 penalty units (\$3,130) | 120 penalty units (\$37,560) |
| | Corporation | 600 penalty units (\$187,800) | 50 penalty units (\$15,650) | 50 penalty units (\$15,650) | 600 penalty units (\$187,800) |
| Civil pecuniary penalty amount | Individual | For breaches of low-range provisions: 600 penalty units (\$187,800) For breaches of high-range provisions: \$2,500,000 | For a non-small business processor: 300 penalty units (\$93,900). For a small business processor or farmer: 100 penalty units (\$31,300). | For breaches of low-range provisions: 600 penalty units (\$187,800). For breaches of high-range provisions: the greater of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening | For breaches of low-range provisions: 3,200 penalty units (\$1,001,600). For breaches of high-range provisions: the greater of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening |
| | Corporation | For breaches of low-range provisions: 3,000 penalty | | | |

| | | | | | |
|--|--|---|--|----------|----------|
| | | units (\$939,000) For breaches of high-range provisions: The greater of \$50 million, 30 per cent of turnover or 3 times the benefit gained from the contravening conduct. | | conduct. | conduct. |
|--|--|---|--|----------|----------|

Improving protections against, and addressing incentives for, retribution and introducing mechanisms that support suppliers to make confidential complaints will also increase the efficacy of the Code. The ACCC recommends that the good faith obligation be amended to include a non-exhaustive list of factors to be considered, similar to Clause 11(4) of the Dairy Code of Conduct, including retribution. This approach will allow the ACCC to investigate, and the court to consider, the broader facts and circumstances surrounding alleged retribution than is likely to be possible under a stand-alone retribution prohibition.

The ACCC notes that 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.

The ACCC notes one of the firm recommendations was for a complaints mechanism to be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC. When considering this recommendation it would be more appropriate to reflect that mechanism be established to allow suppliers and any other market participants to report a matter of concern to the ACCC. The ACCC is not a complaint handling body. The use of wording of "reports" or "reporting" mechanism instead of "complaints" mechanism is a more accurate reflection of the ACCC's role.

Draft recommendations

Recommendation 7 – Dispute Resolution

Recommendation 7: The mandatory Code should include informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:

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

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

The ACCC supports in part recommendation 7 of the Report.

The ACCC supports the introduction of a genuinely independent dispute resolution process. As the Report recognises, retailers and wholesalers hold a persistent and significant bargaining power advantage in their dealings with suppliers. Therefore, any dispute resolution process adopted in a revised mandatory Code should ensure that those considering and determining disputes are, and are perceived to be, fully independent.

Retaining an informal dispute resolution mechanism substantially similar to the existing Code Arbitrator and Independent Reviewer process also retains a regime where there is, at least, a perception of lack of independence and a regime that could be subject to the kind of perverse incentives identified in Box 1 of the Report.

However, the ACCC notes the supplier feedback reported in the Report supporting retention of informal, confidential and low-cost processes for resolving disputes as part of a tiered dispute resolution process. Therefore, the ACCC supports the Review continuing to explore informal dispute resolution mechanisms that suppliers support.

Recommendation 9 – Contracting Out

Recommendation 9: Specific obligations under the Code should set minimum standards that cannot be contracted out of in grocery supply agreements or otherwise avoided.

The ACCC supports recommendation 9. To be effective, the Code must provide for clear and effective minimum protections for suppliers that cannot be opted out of.

Clauses 9(2), 12(3), 14(2), 15(2), 16(2), 17(2) and 18(2) should be amended to remove the current exemptions. No exemptions should be provided for these clauses, however limited.

The ACCC considers that exemptions, even when linked to reasonableness, should be removed. Linking an exemption to “reasonableness” effectively places the onus on a supplier to raise concerns that a requirement is unreasonable, in circumstances where there is a known significant imbalance in bargaining power and where suppliers continue to fear damaging commercial relationships and being subjected to retribution.

While improving protections against retribution may go some small way to addressing these concerns, the significant and persistent imbalance in bargaining power will remain and retaining exemptions linked to “reasonableness” will undermine the certainty and protection that the Code is intended to provide to suppliers.

Recommendation 11 – Infringement Notice Amounts

Recommendation 11: The Government should consider increasing infringement notice amounts for the Code.

The ACCC considers that the quantum of the infringement notices available under the Code should be set at 600 penalty units (currently \$187 800) for corporations and 120 penalty units (currently \$37 560) for individuals.

As the Review notes, infringement notices can be a powerful and timely compliance incentive provided they are set an appropriate monetary amount. In view of the size and turnover of the wholesalers and retailers that would be subject to the Code, adopting infringement notices of 600 penalty units (currently \$187 800), like what is currently provided for for listed companies for some contraventions of the ACL, is appropriate.

Consultation questions

The ACCC’s response to the consultation questions is set out in **Attachment A**.

Yours sincerely

Mick Keogh
Deputy Chair
Australian Competition and consumer Commission

Attachment A – ACCC response to select consultation questions

Consultation question

ACCC response

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

The ACCC notes that when a horticulture growers sells produce via an Agent agreement (as defined in the under the Horticulture Code of Conduct) to supermarkets, they currently receive the protections provided in the Horticulture Code of Conduct.

These protections do not apply if the horticulture produce is supplied under a Merchant agreement (as defined in the Horticulture Code of Conduct).

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

Applying the good faith obligation, which, if other recommendations in the Review are taken up, will be subject to significant penalties, to suppliers, is inappropriate.

The ACCC recommends that the good faith obligation be amended to include a non-exhaustive list of factors to be considered, similar to Clause 11(4) of the Dairy Code of Conduct, including retribution. This approach will allow the ACCC to investigate, and the court to consider, the broader facts and circumstances surrounding alleged retribution than is likely to be possible under a stand-alone retribution prohibition.

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 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.

3. Do the dispute resolution

The ACCC supports the introduction of a

arrangements outlined in this interim report allow for low-cost and quick resolution of complaints without fear of retribution?

genuinely independent dispute resolution process. As the Report recognises, retailers and wholesalers hold a persistent and significant bargaining power advantage in their dealings with suppliers. Therefore, any dispute resolution process adopted in a revised mandatory Code should ensure that those considering and determining disputes are, and are perceived to be, fully independent.

Retaining an informal dispute resolution mechanism substantially similar to the existing Code Arbitrator and Independent Reviewer process also retains a regime where there is, at least, a perception of lack of independence and a regime that could be subject to the kind of perverse incentives identified in Box 1 of the Report.

However, the ACCC notes the supplier feedback reported in the Report supporting retention of informal, confidential and low-cost processes for resolving disputes as part of a tiered dispute resolution process. Therefore, the ACCC supports the Review's continuing exploration of informal dispute resolution mechanisms.

The ACCC supports improving protections against retribution. However, for the ACCC to enforce any prohibitions against retribution, we will be reliant upon one or more suppliers coming forward with sufficient information and evidence to demonstrate a breach of the Code to a court. We expect that many suppliers that consider they have already experienced retribution may be *particularly* reticent in coming forward for fear of further retribution.

4. Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is the ombudsman under the Dairy Code of Conduct. As part of this role ASBFEO keeps a list of persons who can provide mediation or arbitration services if a dispute arises and appoint persons to provide these services when a dispute arises. ASBFEO can request information about disputes that are being, or have been, dealt with under the Dairy Code of Conduct. The Review could consider whether a similar approach should be adopted in the Code.

Perhaps the parties to a dispute could seek to agree to a mediator or arbitrator from the list and if they cannot reach agreement ASBEFO could be empowered to select one.

The Dairy Code of Conduct also requires milk supply agreements to contain a complaint handling procedure and mediation as an option, and may provide for arbitration. This requires the processor to have an internal procedure for dealing with and resolving complaints that arise under or in connection with the agreement. The milk supply agreement must provide for mediation as a means of resolving a dispute between the two parties. The processor is also required to appoint a complaint handling officer to manage complaints.

The Review could consider whether the Code could similarly require retailers and wholesalers to have a complaint handling procedure that needs to be set out in the Grocery Supply Agreement.

The ACCC recommends that the Review consider inserting an obligation in the Code for all informal dispute resolutions be signed off by a designated senior executive and require that senior executive to report to the Board on these outcomes.

5. What minimum standards of conduct, if any, should be specified in the Code that should not have exemptions? If exemptions are provided for, how should these be limited? Please provide reasons for your response.

To be effective, the Code must provide for clear and effective minimum protections for suppliers that cannot be opted out of.

Clauses 9(2), 12(3), 14(2), 15(2), 16(2), 17(2) and 18(2) should be amended to remove the current exemptions. No exemptions should be provided for these clauses, however limited.

The ACCC considers that exemptions, even when linked to reasonableness, should be removed. Linking an exemption to "reasonableness" effectively places the onus on a supplier to raise concerns that a requirement is unreasonable, in circumstances where there is a known significant imbalance in bargaining power and where suppliers continue to fear damaging commercial relationships and being subjected to retribution.

While improving protections against retribution

may go some small way to addressing these concerns, the significant and persistent imbalance in bargaining power will remain and retaining exemptions linked to “reasonableness” will undermine the certainty and protection that the Code is intended to provide to suppliers.

6. Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.

To be effective, the Code must provide for clear and effective minimum protections for suppliers that cannot be opted out of.

Clauses 9(2), 12(3), 14(2), 15(2), 16(2), 17(2) and 18(2) should be amended to remove the current exemptions. No exemptions should be provided for these clauses, however limited.

The ACCC considers that exemptions, even when linked to reasonableness, should be removed. Linking an exemption to “reasonableness” effectively places the onus on a supplier to raise concerns that a requirement is unreasonable, in circumstances where there is a known significant imbalance in bargaining power and where suppliers continue to fear damaging commercial relationships and being subjected to retribution.

While improving protections against retribution may go some small way to addressing these concerns, the significant and persistent imbalance in bargaining power will remain and retaining exemptions linked to “reasonableness” will undermine the certainty and protection that the Code is intended to provide to suppliers.

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

Suppliers would benefit from a Code obligation that compelled retailers and wholesalers to have all GSA terms being in writing and contained in a single document (as required by the Dairy Code).

The ACCC understands that current common practice is for retailers and wholesalers to have an overarching GSA that is high level and have the operative and meaningful clauses contained in sub agreements, verbal agreements, handbooks and manuals, to which the Code does not currently apply.

However, addressing this issue needs to be balanced against a need to allow for reasonable flexibility and simplicity to allow suppliers,

retailers and wholesalers respond to changing market conditions.

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

The Review could consider whether something similar to the horticulture produce assessor under the Horticulture Code of Conduct may be appropriate in the Code. These assessors assess and report on whether a rejection of produce was done in accordance with the requirements of the Horticulture Code of Conduct and the agreement.

A list of produce assessors must be published on the ASBFEO website. The Review could consider whether this, or a similar list may be appropriate for the Code.

The Code could require that GSAs outline how retailers/wholesalers will deal with produce that does not meet quality or quantity specifications set out in the GSA.

Similar obligations are in place in the Horticulture Code of Conduct which the Review may wish to consider.

9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?

In addition to the matters specified in response to question 8, the Review could consider whether the Code should be amended to specify when title passes to the retailer / wholesaler. This is specified in the Horticulture Code of Conduct. Adopting this requirement may provide some additional protection for suppliers.

10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

The ACCC does not have a view on this question at this stage, however the Supermarkets Inquiry is considering issues relating to transparency and how prices are set along the supply chain.

11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.

The Review may wish to consider the Dairy Code of Conduct which prohibits retrospective reduction in prices.

The Review may wish to consider the Horticulture Code of Conduct which requires that any quantity requirements to be specified the relevant Horticulture supply agreement.

12. What level of penalties should apply to breach of the Code? Please provide

Penalties for non-compliance should apply.

- Penalties for more harmful breaches of

reasons.

the Code being the greatest of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening conduct.

- Penalties for less harmful breaches should be set at 3200 penalty units (currently \$1 001 600).
- Infringement notices for all breaches should be 600 penalty units (currently \$187 800).

The ACCC considers that 3200 penalty units is materially below the proposed maximum penalty for serious breaches of the Code while still being high enough to incentivise compliance and materially higher than the quantum of 600 penalty units for Infringement Notices.

13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.

The following are provisions that should be subject to substantial penalties:

- Retailers/wholesalers entering into Grocery Supply Agreements that do not comply with the Code
- Duty to train staff with respect to the Code
- Retailers/wholesalers trading with a supplier without a written Grocery Supply Agreement
- Breaches of the good faith provisions by retailers / wholesalers.
- Failure by retailers / wholesalers to keep documents that are required to be kept under the record keeping obligations.
- Freedom of association
- Any future provisions related to retribution

14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

The ACCC considers that the quantum of the infringement notices available under the Code should be set at

1. 600 penalty units (currently \$187 800) for corporations
2. 120 penalty units (currently \$37 560) for individuals.

As the Review notes, infringement notices can

be a powerful and timely compliance incentive provided they are set an appropriate monetary amount. In view of the size and turnover of the wholesalers and retailers that would be subject to the Code, adopting infringement notices of 600 penalty units, like what is currently provided for for listed companies for some contraventions of the ACL, is appropriate.

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

In our experience suppliers are reluctant to complain to the ACCC and provide information and evidence to the ACCC. Record keeping obligations therefore have an important role to play in allowing the ACCC to conduct compliance checks as one way to learn of conduct that may breach the code or identify a culture of non-compliance.

The final form of the record keeping requirements will depend upon the final form of the code.

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 entered into and records that demonstrate training staff about the Code.

For other clauses that are intended to address significant harm it may be difficult to identify appropriate information or documents as the clause relates to behaviour, for example, acting in good faith.

The ACCC encourages the Review to continue to consult on this issue to understand what suite of documents may be fit for purpose for the final form of the code.