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18 October 2024

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Dear F&GC Treasury Secretariat

Food and Grocery Code of Conduct exposure draft

The Australian Competition and Consumer Commission (**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 [Government's exposure draft](#) of the revised Code (**Exposure Draft**).

On 24 June 2024 the Government released the [final report of the Independent Review of the Code \(Code Review\)](#) and the related [Government Response](#). On 23 September 2024, the Government released the Exposure Draft.

The ability to "negotiate" out of core code protections

The ACCC's key remaining concern is that the Exposure Draft continues to allow large grocery retailers to "negotiate" out of the core protections of the Code.

The Code exists because of the significant and persistent imbalance in bargaining power between supermarkets and the suppliers the Code is intended to protect. The ACCC remains of the view that for the Code to effectively protect suppliers, it must set out clear minimum standards of conduct. Allowing large grocery retailers to purportedly "negotiate" out of key minimum protections when suppliers experience a persistent and significant inferior bargaining position and fear both damaging their commercial relationship with, and retribution by, large grocery retailers, means that, in practice, suppliers will continue to be subject to harmful unilateral actions by large grocery retailers under the Exposure Draft.

The ACCC is further concerned that a reasonableness test is not sufficient to prevent this harmful unilateral action. Suppliers' persistent inferior bargaining power and fear of retribution means they will be unable or unwilling to object to exemptions to the Code on the

basis that a supplier considers them unreasonable. We note that reasonableness is currently undefined in the Exposure Draft. While the ACCC remains of the view that a reasonableness test, however expressed, will be insufficient protection, if one is to be retained, the ACCC recommends that clarifying criteria as to what is reasonable or not reasonable be incorporated into the Code.

The ACCC's views on the necessary amendments to the Code more generally are set out in our submissions to the 2024 Code Review's [consultation paper](#) and [interim report](#).

The ACCC has also identified some less significant issues and drafting queries set out in **Attachment A**.

Yours sincerely



Mick Keogh
Deputy Chair

Attachment A – suggested minor technical amendments

Exposure Draft Code clause	ACCC comment
13 Purpose of Code	<p>Suggested amendment</p> <p>Cl 13 (a) should be amended to “to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and</p> <p>Reasoning</p> <p>The existing text appears to have words missing and/or extraneous words.</p>
20 Unilateral variation of agreement	<p>Suggested amendment</p> <p>20 (4) a large grocery business that wishes to rely on subsection (2) must prove the matters in that subsection on the balance of probabilities (except in relation to whether the variation causes detriment to a supplier for the purposes of paragraph (2)(d)).</p> <p>Or</p> <p>Amend the existing text in brackets as follows, “for the avoidance of doubt the large grocery business does not bear the onus of demonstrating any costs or risks to a supplier for the purposes of subsections (2)(d) and (3)”.</p> <p>Reasoning</p> <p>The ACCC understands that the purposes of 20(2)(d), (3) and (4) is to place the onus of proof on the retailer to demonstrate any of the matters they seek to rely upon in 20(2) except for the costs and risks for the supplier (currently referred to as “detriment”) under 20(2)(d) and (3).</p> <p>In our view the current drafting of 20(4) is unclear and is likely to make cl 20 more difficult to interpret and enforce.</p> <p>The ACCC has the same feedback for other clauses in the Exposure Draft that use similar draft text including Cl 22, 24, 25, 26, 27 and 28.</p>
25 Payments as a condition of being a supplier	<p>In addition to the comments above, the reference to 25(2)(c)(iii) in 25(6) should instead be a reference to 25(3)(c)(iii).</p> <p>Reasoning</p> <p>25(3)(c)(iii) is the correct provision to cross-reference to.</p>
47 Code Mediator’s functions	<p>Suggested amendment</p> <p>47(3) The large grocery business may must authorise the</p>

	<p>Code Mediator to enter into an agreement on behalf of the large grocery business to resolve a complaint relating to the large grocery business' obligations under this Code (including a grocery supply agreement).</p> <p>The ACCC also recommends making 47(3) a penalty provision.</p> <p>Reasoning Requiring, rather than allowing, the Code Mediator to enter an agreement to resolve a complaint is more likely to lead to the rapid and effective dispute resolution.</p> <p>Making this provision a penalty provision is more likely to ensure that the retailers meaningfully empower the Code Mediator to resolve disputes.</p>
<p>52 Investigations by the Code Mediator – all other complaints</p>	<p>Suggested amendment/request for clarification</p> <p>(2) The Code Mediator's investigation of the complaint:</p> <p>(a) must include consideration of the large grocery business' obligation to deal lawfully and in good faith (see section 17); and</p> <p>(b) may without limiting paragraph 2(a), must include consideration of whether the large grocery business has acted fairly in dealing with the supplier.</p> <p>(3) For the purposes of paragraph (2)(b), the Code Mediator may take the following into account:</p> <p>(a) whether the large grocery business has acted in a way that denied the supplier the benefits of the relevant grocery supply agreement, or undermined those benefits for the supplier;</p> <p>(b) whether the large grocery business has acted in accordance with the legitimate and reasonable expectations of the supplier;</p> <p>(c) whether the large grocery business has had due regard to:</p> <p>(i) the nature of the relationship between the large grocery business and the supplier; and</p> <p>(ii) the individual characteristics of the supplier that were known, or ought to have been known, by the large grocery business.</p> <p>Reasoning The case law on good faith indicates that it encompasses a consideration of reasonableness and fairness in dealings.</p>

	Therefore, saying that the Code Mediator “must” consider good faith but “may” consider fairness appears contradictory.
54 Agreeing to a proposed remedy	Suggested amendment 54 (2) should include a timeframe by which the large grocery business must enter the written agreement.
54 Agreeing to a proposed remedy 55 <i>Acceptance period</i> for a proposed remedy	As currently drafted, it appears that if one or other party does not notify acceptance within the <i>acceptance period</i> but does notify acceptance after the expiration of the <i>acceptance period</i> then 54(2)-(4) will not apply to the remedy. The ACCC considers that the preferable outcome would be for 54(2)-(4) to apply regardless of whether acceptance occurs within or outside of the <i>acceptance period</i> . Further, it is likely preferable to specify a period after which an unaccepted remedy is taken to have lapsed and then set out what happens in relation to disputes after the lapsing of a remedy.
69 When a party is taken to be trying to resolve a dispute	Suggested amendment 69(2) To avoid doubt, a party may cease acting as required under subsection (1) is taken to be trying to resolve a dispute without taking actions in accordance with section 69(1) if the ADR practitioner appointed for the dispute finds that: Reasoning The ACCC considers that this amendment better achieves what we understand the intention of 69(2) is.