

18 October 2024

Competition Policy Unit
Treasury
Langton Cres
Parkes ACT 2600

Email: fgc@treasury.gov.au

Dear Competition Policy Unit

RE: The 2024 Food and Grocery Code of Conduct

The Australian Food and Grocery Council (AFGC) represents Australia's \$162.7 billion food and grocery manufacturing industry, it is the nation's largest manufacturing employer, providing direct jobs for more than 281,000 people.

The Food and Grocery Code of Conduct (Code) is vital to our members, governing the business conduct between them and their key supermarket retail trading partners. As one of the original architects of the 2015 Code, the AFGC has played a leading role in all the reviews to date. Our focus has been on strengthening the Code to meet its intended purpose.

The AFGC's submission on the exposure draft of the Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024 seeks to give effect to the eleven recommendations from Dr Emerson's final report. Our submission is set out by recommendation, providing our observations on the drafting and including, where appropriate, options for consideration. While the AFGC's is seeking to provide a constructive response to this stage of the process, we continue to hold two particular concerns about the review's outcome. We appreciate that the drafting process will not address either issue, but nevertheless consider it appropriate to note them for future reference.

1. Dispute Resolution Processes

It is vital that the Code's dispute resolution processes centre on the needs of suppliers. Suppliers require processes that are quick, low-cost, confidential, not harmful to commercial relationships and can provide binding outcomes with reparations. Under the exposure draft, independent mediation and arbitration (already available under the current Code) have been formalised. Our nearly decade-long experience with dispute resolution suggests these options will get little uptake. In contrast, the ability of the Independent Reviewer to address systemic industry issues, has been successful in curtailing egregious behaviours. Unfortunately, this function has been completely removed from the updated Code Supervisor role, which now has no purview to address systemic issues, and there is no apparent alternative pathway to address industry-wide issues.

2. Specific Provisions (Division 4 – Conduct generally)

Despite numerous requests for suggestions to improve them, no recommendations have been made to amend the specific provisions used by industry in their daily negotiations with supermarket retailers (e.g., range reviews, delisting or price increases). The industry requires these provisions to remain relevant to current trading arrangements and remain fit for purpose, thus making a tangible difference to supplier protections. With the prospect of the next full review no earlier than 2029, this results in a decade between updates to these provisions, potentially resulting in obligations that are out of date and no longer workable.

The AFGC considers these two areas should be afforded the same review period protections as allowable exceptions (Recommendation 7) and be re-considered two years after the Code changes come into effect, that is by 2027.

Yours sincerely,



Tanya Barden AO
CEO, AFGC



AUSTRALIAN
**FOOD &
GROCERY**
COUNCIL



AFGC SUBMISSION
**Competition and Consumer
(Industry Codes – Food and Grocery)
Regulations 2024**

18 October 2024

PREFACE

The Australian Food and Grocery Council (AFGC) is the leading national organisation representing Australia's food, beverage and grocery manufacturing sector.

With an annual turnover in the 2022-23 financial year of \$162 billion, Australia's food and grocery manufacturing sector makes a substantial contribution to the Australian economy and is vital to the nation's future prosperity. Each business in the sector has contributed towards an industry-wide \$4.2 billion capital investment in 2022-23.

Food, beverage and grocery manufacturing together forms Australia's largest manufacturing sector, representing over 32 per cent of total manufacturing turnover in Australia. The industry makes a large contribution to rural and regional Australia economies, with almost 40 per cent of its 281,000 employees being in rural and regional Australia.

It is essential to the economic and social development of Australia, and particularly rural and regional Australia, that the magnitude, significance and contribution of this industry is recognised and factored into the Government's economic, industrial and trade policies.

The industry has a clear view, outlined in *Sustaining Australia: Food and Grocery Manufacturing 2030*, of its role in the expansion of domestic manufacturing, jobs growth, higher exports and enhancing the sovereign capability of the entire sector.

This submission has been prepared by the AFGC and reflects the collective views of the membership.

OVERVIEW

The AFGC welcomes the opportunity to provide input on the Mandatory Food and Grocery Code exposure draft regulations. This submission is structured sequentially around the recommendations from the Food and Grocery Code of Conduct Review 2023-24 final report. It offers the AFGC's observations about those parts of the exposure draft designed to give effect to the final report's recommendations, identifying relevant provisions in bold where necessary.

Please note the AFGC has not provided comment to recommendations 8, 9 and 10. Recommendation 8 has been excluded because the AFGC does not represent fresh produce suppliers, and thereby has little expertise or standing in this area. Recommendations 9 and 10, relating to penalties and infringement notices, have been addressed in the AFGC's prior submission on the industry codes (penalties and other amendments) exposure draft legislation.

AFGC COMMENTS ON EXPOSURE DRAFT

RECOMMENDATION 1

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

Part 1 – Preliminary

Division 3 – Mandatory industry code

(10) Mandatory industry code

While noting that this provision sets out the Code as prescribed under Part IVB of the Competition and Consumer Act, and mandatory, there does not appear to be a clear articulation that the mandatory Code applies to large grocery businesses as defined in (6) Definitions and (10) Meaning of large retailer and large wholesaler. Per our comments regarding recommendation 2 below, this articulation should make clear that the Code's obligations apply to any associated entities of a large grocery business.¹

RECOMMENDATION 2

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

Part 1 – Preliminary

¹ As is the case in New Zealand; see Part 2 (8) [Grocery retailers that have grocery supply code obligations](#).

Division 2 – Definitions etc

(9) Meaning of large retailer and large wholesaler

Noting that the definitions provided account for the combined revenue of both the retailer or wholesaler itself, plus each related body corporate, the AFGC considers it necessary to ensure that related body corporates are bound by the Code's obligations.

RECOMMENDATION 3

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

- Including protection against retribution in the purpose of the Code;
- Ensuring that retribution captures under the obligation to act in good faith includes action taken against suppliers for exercising their rights under the Code;
- Requiring that any incentive schemes and payments that apply to supermarket's buying teams and category managers are consistent with the purpose of the Code; and
- Requiring supermarkets to have systems in place for their senior management to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.

Part 2 – Food and grocery industry code

Division 1 – Preliminary

(13) Purpose of Code

Addressing suppliers' fear of retribution is one of the central objectives of the review's final report, the AFGC supports the expansion of the Code's purpose statement. By articulating the encouragement of suppliers to exercise their rights under the Code, and protecting suppliers against retribution, we are hopeful that these fundamental purposes will be centred in any interpretation of the Code.² As a general principle, given the power imbalance between suppliers and large grocery businesses, the AFGC supports enabling suppliers to utilise the Code's protections without fear or fetter. Although little interpretive guidance has been provided regarding what would constitute 'exercising a right', the AFGC considers it vital that a broad interpretation is applied in order to provide sufficient cover for the ways in which suppliers typically engage with the Code in practice (largely following informal, non-escalatory pathways of raising disputes).

² Per page 46 of the final report.

Part 1 – Preliminary

Division 2 – Definitions etc

(8) Meaning of retribution

Further to the preceding paragraph, the AFGC supports the inclusion of a (non-exhaustive) definition of retribution within (8)(1). However, in recognition of the multiplicity of forms that retribution can take, we would recommend a small adjustment to this provision to emphasise the non-exhaustive nature of the list. This could be through the addition of an additional clause to the effect of: (i) any other action taken with the intent of causing commercial detriment to the supplier.

Regarding the contents of (8)(2), AFGC members have frequently raised issues regarding the ability of large grocery businesses to use ‘genuine commercial reasons’ as a means of circumscribing Code protections. However, we consider that the inclusion of (8)(2)(b) and (c) provides some coverage against retributive action that could be portrayed as a ‘genuine commercial reason’ by a large grocery business. We also support, per (8)(4), the onus of proof being on the large grocery business to demonstrate that an action which could be perceived as retributive is both for ‘genuine commercial reasons’ *and* not taken because a supplier either did, or had the potential to, exercise a right under the Code. In order to more fulsomely advance the intent of (8)(4), the AFGC would support a minor addition to oblige a large grocery business to provide information regarding a perceived act of retribution to a supplier, Code Mediator, ADR practitioner or the Code Supervisor upon request.

Part 2 – Food and grocery industry code

Division 4 – Conduct generally

Subdivision C – Other conduct

(29) Incentive schemes

The AFGC supports the inclusion of this new provision, however we regard a number of additions to be necessary in order to achieve its intent per the recommendations of the final report. The exposure draft does not contain any oversight mechanism through which another party could verify the alignment of the scheme with the Code’s obligations. This would presumably enable a large grocery business to keep a scheme commercial in confidence (barring a binding request for information from the ACCC). The AFGC recommends the addition of a further requirement that the large grocery business provide the contents of an incentive scheme related to a dispute if requested by a Code Mediator, ADR practitioner or the Code Supervisor. We further recommend the addition of an explicit statement that an incentive scheme can be accessed and used while investigating a supplier complaint under the Code.

Part 2 – Food and grocery industry code

Division 5 – Dispute resolution

Subdivision A – Investigations by a Code Mediator

(52) Investigations by a Code Mediator

To complement the recommendations in the preceding paragraph, the AFGC recommends the addition of another clause within (52)(2) to explicitly enable a Code Mediator to review the large grocery business' incentive scheme as part of an investigation.

(58) Reports by the Code Mediator

The AFGC also recommends a modest expansion to the contents of a Code Mediator's report to include an obligation to report on an incentive scheme and its alignment with (29), applying to any complaints investigated by the Code Mediator.

Part 2 – Food and grocery industry code**Division 4 – Conduct generally****Subdivision C – Other conduct****(31) Policies and procedures to protect against retribution**

In order to ensure a consistency of approach across the large grocery businesses to be brought under the mandatory Code, the AFGC recommends an addition to this provision to stipulate a time period for the review covered in (31)(a). We suggest a twofold requirement for reviews at six and 12 months following the supplier's complaint. This would align with the current requirements of Woolworths' Complaints Integrity Policy, and represents an appropriate timeframe within which to measure potential instances of retribution.

RECOMMENDATION 4

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

The AFGC notes that this recommendation will be implemented outside of the Code framework.

RECOMMENDATION 5

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

- Supermarkets must appoint a suitable qualified Code Mediator who is engaged by supermarkets (replacing their Code Arbiters), and who would be available to assist with resolving disputes, where requested by a supplier.
- Avenues for independent mediation and arbitration should also be available.
 - Parties can agree on an independent mediator or arbitrators. A list of suitably qualified mediators and arbitrators should be compiled by the Treasury or the Australian Small Business and Family Enterprise Ombudsman (ASBEFO) .
 - Supermarkets must attend independent mediation if requested by a supplier

- Where mediation has not settled a dispute, the independent arbitration can be used to settle disputes as agreed between the supermarket and supplier

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

Part 2 – Food and grocery industry code

Division 5 – Dispute resolution

Subdivision A – Investigations by a Code Mediator

(45) Each large grocery business must appoint a Code Mediator

Noting the final report’s recommendation for the appointment of a “suitably qualified” Code Mediator, the AFGC recommends that this qualification requirement be stipulated (akin to the qualification and experience requirements that apply to the Code Supervisor under (59)(3) Code Supervisor). In order to bolster the perceptions of Code Mediator independence (one of the keys to encouraging suppliers to engage with Code Mediators), the AFGC advises a modest expansion of (45)(2) to also prevent a large grocery business from engaging a person as Code Mediator who has previously acted for the large grocery business in any other role.³ This would also reinforce (47)(4) to guard against the potential for conflicts of interest.

(46) Notifying details of the Code Mediator’s appointment

(48) Complaints handling procedures

Given the increasing prevalence of large grocery businesses using online portals to engage with their suppliers, which can prove opaque and difficult to navigate, the AFGC recommends minor amendments to these provisions to ensure that Code Mediator details and complaints handling procedures are publicly available when published. This will guard against the potential for the procedure to be only available within the retailers online portal for their current suppliers.

Additionally, noting widespread supplier concerns about maintaining confidentiality, along with the in-text recommendation of the final report that Code Mediators should adhere to “strict confidentiality requirements”,⁴ the AFGC recommends an expansion of requirements for Code Mediator complaints handling procedures. This would be a requirement for the procedure to address confidentiality, including how supplier confidentiality is to be maintained, and the process that will be undertaken if confidentiality is

³ This is consistent with the in-text recommendation on page 53 of the final report that the Code Mediator should “be required to act independently of the supermarket”.

⁴ Page 53.

broken without supplier consent. In order to further bolster supplier confidence in confidentiality requirements, we also suggest including an additional requirement for a confidentiality agreement to be signed by the Code Mediator and supplier at the beginning of a formal complaint, noting that the supplier is the party that will determine whether confidentiality can be broken should the complaint proceed.

(49) Referring complaints to the Code Mediator

Further to the recommendation above, the confidentiality requirements under (49)(4) could be amended to oblige the Code Mediator to adhere to the confidentiality requirements within their complaints handling procedure.

(57) Records to be kept by the Code Mediator

Further to the above, the AFGC recommends that this provision be expanded to include an additional requirement for appropriate safeguards to maintain the confidentiality of the Code Mediator's records.

(58) Reports by the Code Mediator

Further to the above, the AFGC emphasises the importance of ensuring that (58)(2)(c) is sufficient to guard against the inadvertent identification of a complainant through the Code Mediator's obligation to report on the nature of complaints.

The AFGC's substantial experience with suppliers' engagement with the current Code Arbiters reveals that in practice suppliers are overwhelmingly more likely to engage with a Code Mediator informally, rather than lodging a formal complaint. Considering this strong preference, a more accurate picture of supplier-retailer relationships could be gained through an additional requirement for the Code Mediator to report on the number of suppliers who have contacted them for *informal* discussions of the supplier's Code-related concerns (without any obligation to provide further information beyond the raw number). This could be supplemented by an additional requirement that the Code Mediator's report include any systemic issues that have been identified through informal discussions with suppliers, and what (if any) action the Code Mediator has taken in response.

Division 3 - Grocery Supply Agreements

(19) Matters to be covered by agreement

While supportive of the intent, the AFGC is concerned that the new requirement in (19)(3) for all grocery supply agreements (GSAs) to include a commitment for the large grocery business to attend ADR mediation is impractical. This is because there is no single GSA document; it is an umbrella term used to cover effectively any commercial agreement between a large grocery business and a supplier, some of which may be executed daily.

As an alternative means to achieve the same intent, the AFGC recommends that large grocery businesses are obliged to include their commitment to attending mediation within the Trading Terms documentation

that is signed with each supplier at the commencement of their commercial relationship.⁵ This is the 'natural' home for such a standing agreement within the context of the industry's day-to-day operations.

Another alternative means to achieve the same intent may be a generalised requirement for a large grocery business to execute a binding agreement to attend mediation in accordance with Division 5 Subdivision C as a condition of being able to do business with a supplier. This could potentially be achieved through amending (19)(3) to read:

A large grocery business must not enter into a grocery supply agreement *with a supplier unless there is a binding agreement with that supplier* that the large grocery business must attend mediation, under Subdivision C of Division 5, of a dispute with the supplier if an ADR practitioner is appointed under that Subdivision for that mediation.

RECOMMENDATION 6

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

Part 2 – Food and grocery industry code

Division 5 – Dispute resolution

Subdivision B – Independent reviews by the Code Supervisor

(65) Annual survey

In accordance with aforementioned comments regarding the prioritisation of supplier confidentiality, along with concerns raised in consultation with AFGC members, we recommend that (65)(4) be expanded to include another requirement that the Code Supervisor must take all practical steps to ensure the confidentiality of responses, including the raw survey data.

RECOMMENDATION 7

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

- All exceptions should be subject to reasonableness requirement that consider the benefits, costs and risk to the supplier and the supermarket, and protects against exceptions that are not in the suppliers' interest, with the supermarket bearing the onus of proof that any exceptions is reasonable: and

⁵ If this option is taken, the AFGC will engage with large grocery businesses that will be brought under the mandatory Code to ensure that any amendments made to trading terms will be for the sole purpose of including this commitment, and not as an opportunity to renegotiate the trading terms.

- For all new grocery supplier agreements, supermarket should be required to provide suppliers a simple guide to any exceptions that are included in the agreement.

Part 1 – Preliminary

Division 3 – Mandatory industry code

(11) Review of Code

The AFGC notes that this section does not appear to give effect to the final report's recommendation⁶ to review the new approach to exceptions (recommendation 7) within two years. Given that the Code's obligations have, with few exceptions, not been amended in this review, and were therefore last fully reviewed in 2019, the AFGC recommends that this provision be amended to oblige a review of Division 4 – Conduct generally (including, but not limited to, the new approach to exceptions) within the two-year timeframe suggested within the final report.

Part 2 – Food and grocery industry code

Division 3 – Grocery supply agreements

(19) Matters to be covered by agreement

The AFGC supports the listing of allowable contrary provisions in (19)(4)(a)-(g), noting that their inclusion provides clarity. However, we note that there does not appear to be any requirement within this section of the exposure draft that gives effect to the final report's recommendation for the onus of proof regarding an exception's 'reasonableness' to sit with the large grocery business.

RECOMMENDATION 11

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

The AFGC supports the intent of this recommendation to ensure the ACCC, Code Mediators and Code Supervisor engage in education and outreach activities, while noting the dilution of the current obligations of the existing Independent Reviewer role in this sphere.

⁶ See page 64, recognising that the recommendation is only provided in-text, and not within the list of 11 recommendations provided on pages 11-12.

State of Industry 2022-23

**TOTAL
TURNOVER**
\$162.7bn
(+ 11.6%)



AFG TURNOVER
32.2%
(As % of
manufacturing)



EMPLOYMENT¹
281,269
(+4.1%)



**REGIONAL
EMPLOYMENT**
36.5%



EXPORTS
\$42.6bn
(+ 8.1%)



IMPORTS
\$48.6bn
(+ 4.7%)



**OPERATING
PROFIT
BEFORE TAX³**
\$7.2bn
(-7.2%)



**CAPITAL
INVESTMENT²**
\$4.2bn
(+ 24.5%)



The figures on this page exclude the fresh food sector and are based on 2022-23 ABS data.
1. This is total number of employees, head count basis and does not include seasonal employees.
2. Gross fixed capital formation for food, beverage and tobacco manufacturing subsector is taken as indicator of capital investment.
3. For food, beverage and tobacco product manufacturing subsector