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18 October 2024

**Exposure Draft of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024* – Metcash Food and Grocery Pty Ltd Submission**

Dear Sir/Madam,

Metcash Food & Grocery Pty Ltd (**MF&G**), as a current signatory to the voluntary Food and Grocery Code of Conduct (**Current Code**), is pleased to make this submission on the Exposure Draft of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024 (Draft Mandatory Code)*.

A mark-up showing MF&G's suggested amendments to the Draft Mandatory Code is enclosed with this submission.

MF&G confirms it consents to this submission, and the enclosed mark-up of the Draft Mandatory Code, being published.

**1. Definition of 'large wholesaler' captures Metcash's Liquor, Hardware, Tools and Food Service business divisions and retail supermarkets stores (wholly and majority owned), contrary to policy intent**

Consistent with MF&G's prior submissions, MF&G is concerned that the definition of 'large wholesaler' would impose costs and regulations on certain Metcash businesses which are not relevant to the objectives of the Code. Such an outcome is not only inconsistent with the Code's objectives, but would have the perverse result that additional costs would be imposed on Metcash businesses but not imposed on the larger vertically integrated and market dominant firms with which these Metcash businesses compete.

In its submission on the Interim Report of the Independent Review of the Food and Grocery Code of Conduct 2023-24, dated 30 April 2024 (**MF&G Submission**), MF&G submitted that:

- The application of a revenue test to determine those bound by a mandatory code may not necessarily be demonstrative of market power and that supermarket retail market share (including a wholesaler's proportion of retail sales) would be a better measure of market power in relations with suppliers.
- If the test is to be based on revenue, MF&G does not object to a \$5 billion threshold provided the revenue captured is limited to:

- goods/groceries covered by the Current Code; and
  - in the case of a retailer, revenue is from sales as a 'retailer' as currently defined in paragraph (a) of the definition of retailer in the Current Code; and
  - in the case of a wholesaler, revenue is from resales as a 'wholesaler' as currently defined in the Current Code.
- The issue of corporate groups needs to be clearly addressed so that business divisions within a larger corporate group, of which a wholesaler or retailer (as defined in the Current Code) forms only a part, are not inadvertently caught by a mandatory code in circumstances where the business carried on by that division is not wholly or predominantly:
- a supermarket business in Australia for the retail supply of groceries (retailer); or
  - a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries (wholesaler),

and/or they do not otherwise meet the revenue threshold as described above.

So, for example:

- Metcash's Hardware and Liquor business divisions should not be caught by the mandatory code if they each generate more than \$5 billion in revenue and they happen to sell, for example, some non-alcoholic beverages or gardening supplies to supermarkets but they are not wholly or predominantly in the business of retail or wholesale supply of groceries.
- If MF&G operates some retail supermarket corporate or joint venture stores which together generate retail revenues well below the \$5 billion threshold, those stores should not be caught by the Code because MF&G as a wholesaler generates more than \$5 billion in revenues.

The definition of large retailer and large wholesaler in section 9 of the Draft Mandatory Code wholly fails to take into account the issue of corporate groups and the conglomerate nature of a business such as Metcash Limited and its subsidiaries (**Metcash Group**). So for example:

- Each of the Metcash Group's Liquor (ALM), Hardware (IHG), Tools (Total Tools) and Food Service (Superior Food Services and Campbells) business divisions are caught as 'large wholesalers' *to the extent* (even if that is only a very small extent) they each carry on a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia (and therefore satisfy the definition of 'wholesaler') because the total of their respective revenue captured under section 9(2)(b) of the Draft Mandatory Code (even though minimal to negligible) when combined with MF&G's revenue captured under section 9(2)(b) (which combination is required by the operation of section 9(1)) exceeds \$5 billion, as MF&G's revenues alone exceed \$5 billion.

- Every retail supermarket corporate or joint venture store operated by the Metcash Group are caught as 'large retailers', as they satisfy the definition of 'retailer' and the total of their respective revenue captured under section 9(2)(b) of the Draft Mandatory Code (albeit relatively insignificant, being approximately *in aggregate* \$29 million in FY24 ) when combined with MF&G's revenue captured under section 9(2)(b) (again, which combination is required by the operation of section 9(1)) exceeds \$5 billion, as MF&G's revenues alone exceed \$5 billion.

We note that:

- ALM supplies non-alcoholic drinks to supermarkets but the revenue it earns from this is well below the \$5 billion threshold and only a very minor proportion of its overall revenues.
- IHG and/or Total Tools may in future sell, for example, pet food and pet care products or plants, flowers and/or gardening equipment to supermarkets, and noting that the definition of 'grocery product' continues to be drafted under the Draft Mandatory Code in an inclusive manner. Such revenues would constitute only a very minor proportion of its overall revenues and each of these business division's revenue falls well below the \$5 billion threshold (\$2.8bn and \$0.7bn respectively in FY24).
- Superior Food Services and Campbells supply some grocery products to supermarkets. Again, such revenues constitute only a very minor proportion of their respective overall revenues (as their customer bases are predominantly businesses other than supermarkets) and their total revenue falls well below the \$5 billion threshold (Superior: ~\$1.3bn in FY24 and Campbells: ~\$0.6bn in FY24).
- The draft Explanatory Statement states that the Code applies only to large grocery businesses to address the market power imbalance between those businesses and suppliers. MF&G, noting its relatively small position as an acquirer, denies that it has market power in negotiations with suppliers. Nevertheless, it does not object to the application of the Code to the part of its business which is predominantly purchasing grocery products for resupply to supermarket retailers. The Code should not apply to ALM, IHG, Total Tools, Superior Food Services, Campbells or retail supermarket corporate or joint venture stores operated by the Metcash Group. These businesses could not have market power as wholesalers of groceries for resale to supermarkets or as supermarket businesses. Any sales to supermarkets are incidental components of these businesses. It is also noted that applying the Code to ALM and IHG, but not to its competitors such as Endeavour and Bunnings (which are no longer related to large retailers) would impose a higher regulatory burden on ALM and IHG vis-à-vis those competitors. It should not be the case that a regulatory regime focused on providing a competitive outcome for suppliers would, by imposing uneven costs, decrease competition in other markets.

Throughout the independent review process, Treasury has confirmed that it is not the policy intent for the new mandatory Code to have the effect as outlined above. The issue could be easily addressed by:

- revising the definitions of retailer and wholesaler such that they only apply to entities that “solely or predominantly” carry on (and to the extent they carry on) a supermarket business in Australia (retailer) or a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia (wholesaler); and
- having separate definitions of large retailer and large wholesaler so that the revenues of small retailers and large wholesalers, or large retailers and small wholesalers, are not aggregated having the effect of capturing small retailers and wholesalers within the definition. If Treasury considered it important, a provision could be added for clarity that if a retailer is a large retailer, then the mandatory code will apply to its retailing and wholesaling activities (as is presently the case under the Current Code).

Our mark-up of the Draft Mandatory Code enclosed includes amendments reflecting the above suggested changes.

## **2. Provisions providing protection against retribution are uncertain, speculative and subjective, and therefore overly onerous and prejudicial to achieve their policy intent**

In the MF&G Submission, MF&G noted that it supports the principle that the new mandatory Code should place greater emphasis on addressing the fear of retribution but cannot comment further without seeing the detail proposed. MF&G further noted that if it is considered necessary to introduce further provisions to address a fear of retribution (noting the Current Code already contains some protections), these will need to be carefully drafted to not be overly broad.

‘Retribution’ has been defined in the Draft Mandatory Code in a broad inclusive manner, to effectively include *any* action including legitimate commercial action. The onus is then placed on the large grocery business to prove three things in order for the action not to constitute retribution:

- (a) The action is taken for genuine commercial reasons; and
- (b) The action is not taken because the supplier exercised, or indicated that it will or may exercise, a right under this Code against the large grocery business; and
- (c) The action is not taken because the supplier was, or may have been, able to exercise a right under this Code against the large grocery business.

Retribution should not be *any* action. There should be a positive relationship between the action and the cause, not a presumption that it is unless proven otherwise.

Paragraph (c) above in particular is too uncertain, speculative and subjective, and not in the nature of retribution. We simply cannot see how it would ever be possible for a large grocery business to prove paragraph (c). Paragraph (b) covers an indication that the supplier may exercise a right, which should be sufficient.

Our mark-up of the Draft Mandatory Code enclosed includes amendments that seek to preserve the enhanced protection against retribution for suppliers while not unnecessarily (and onerously/prejudicially) over-reaching.

### 3. Dispute resolution provisions

#### 3.1. Overarching comment

MF&G's position on the dispute resolution provisions of the Code has been relayed to Treasury numerous times both in the lead-up to MF&G becoming a signatory to the Current Code, during the separate review of those provisions in 2022/2023 and as part of the 2024 independent review of the Current Code.

We do not propose to restate our position in detail here, save to say that we have long held concerns regarding the incompatibility of the supplier's right to remain anonymous with the ability of the Code Arbiter (now Code Mediator) to effectively and satisfactorily determine an appropriate outcome for a dispute.

Hence, as an overarching comment, we simply note that MF&G supports its appointed Code Mediator playing a true mediation rather than determination role, and we are disappointed to see that the Draft Mandatory Code largely retains the existing dispute resolution provisions in so far as they relate to the Code Mediator and its functions, with the exception of course of being able to make binding determinations against the large grocery business. If the Draft Mandatory Code is not to be amended to make the Code Mediator role a true mediation role, we propose to address this through empowering and facilitating that role in our agreement with our Code Mediator and in turn the Code Mediator can reflect this role/function in their complaints handling procedure.

We set out below some more specific comments on particular provisions of each Subdivision within Division 5 of the Draft Mandatory Code.

#### 3.2. Subdivision A

##### *Subsection 46(2)*

This subsection has been reframed slightly from the former subsection 31(3) and now imposes a separate and independent obligation on large grocery businesses to ensure the Code Mediator is sufficiently resourced to perform the Code Mediator's functions.

Our Code Arbiter, Mr Martin Shakinovsky, does not engage any of his own staff in respect of his role as Code Arbiter, save that under the current terms of his engagement, he may delegate his responsibilities to another person, Ms Deborah Ziegler, and MF&G pays a retainer to both Mr Shakinovsky and Ms Ziegler. This enables Mr Shakinovsky to share his duties, especially during periods of high demand for his services, and have cover during periods when he is on holiday or otherwise unavailable. However, this is only one delegate and finding another such resource should demand require at short notice may be difficult.

MF&G would be willing to make available its own resources from its support functions (such as Legal, or Risk and Compliance) to support Mr Shakinovsky and Ms Ziegler if required. Given the Draft Mandatory Code retains the obligation not to "unduly influence" the Code Mediator, MF&G considers it would be helpful for the mandatory Code to expressly acknowledge resourcing may be provided in this manner and that such support will not contravene this obligation. Some suggested language is included in the mark-up of the Draft Mandatory Code enclosed with his submission. If the requirement not to identify suppliers making a complaint unless they consent is retained in the new mandatory Code, MF&G acknowledges this support may not be feasible without such consent. If therefore Treasury considers this is not a workable solution, paragraph 46(2)(b) should be deleted.

Paragraph 46(2)(a) is sufficient in our view, albeit it should be amended to make clear that the requirement to pay the Code Mediator's costs should be as agreed under the appointment agreement.

*Subsection 47(2)*

This subsection should contain a carve-out for documentation which the large grocery business claims is the subject of legal professional privilege.

*Subsection 50(b)(i)*

The Code Mediator should have the benefit of a pause in the 20-business day period if it is awaiting information, as is provided to the Code Supervisor under subsection 63(4).

*Subsection 51(2)*

While this subsection is substantially the same as subsection 35(4) of the Current Code, MF&G considers it should be deleted - if the large grocery business complied with all its obligations under the Code and otherwise so that the supplier's only ground in relation to a complaint is that it suffered detriment, that is precisely the reason a complaint may be lacking in substance.

*Subsection 53(3)*

This provision should facilitate consultation before proposing any remedy, not just a remedy that involves varying a grocery supply agreement.

*Subsection 53(5)*

As both the supplier and the large grocery business may give a notice under paragraph 53(4)(d), and the acceptance period and other time periods are calculated from the date the supplier is given notice under subsection 53(4), it is important that the large grocery business is given notice under subsection 53(5) at the same time as the supplier is given notice under subsection 53(4). Subsection 53(5) should be amended accordingly.

*Section 54*

MF&G does not see how it is possible to enter into a written agreement agreeing to perform a proposed remedy unless the identity of the supplier has been disclosed to MF&G. Hence, subsection (4) should be deleted and subsection (1) should be amended to provide an additional condition to the application of the subsection: that the supplier has consented to its identity being disclosed and the Code Mediator has disclosed its identity to the large grocery business.

3.3. Subdivision B

*Subsection 63(5)*

This subsection should be amended to make clear that the Code Supervisor's role is to review the Code Mediator's *process* only and not consider the merits of the dispute or itself determine a proposed remedy. However, it may recommend that the Code Mediator reconsider the original complaint.

*Subparagraph 65(2)(b)(ii)*

This subparagraph should be amended as follows (in recognition that this is the obligation of the Code Supervisor under paragraph 65(4)(b) and the large grocery business has no control over whether the Code Supervisor complies with this obligation):

(2) Each large grocery business must: (b) inform each supplier that (ii) the Code Supervisor must, under this Code, ensure that the results of the survey will not be reasonably capable of being used to identify them.

3.4. Subdivision C

Subdivision C seems to compel large grocery businesses to participate in both mediation and arbitration. This seems to be the combined effect of subsection 66(3) which allows a supplier to unilaterally appoint an ADR practitioner if one cannot be agreed and subsection 67(3) which states that “Each party to the dispute must attend the ADR process”.

Subsection 19(3) does not assist (as an aside, subsection 19(3) seems unnecessary – Mediation may be simply mandated in the Code – it is not necessary to have large grocery businesses also agree to mediation in their grocery supply agreements with suppliers to be compelled to participate in mediation).

As noted in the Final Report (page 54), “Owing to constitutional limitations, binding arbitration must be entered into voluntarily to resolve disputes; it cannot be imposed by a code of conduct.” Subdivision C will need to be amended accordingly and we have proposed drafting to remove references to arbitration.

As noted in the Final Report, Woolworths, Coles, ALDI and Metcash agreed in-principle to participate in independent arbitration when requested by a small supplier with annual turnover of less than \$10 million or fewer than 100 employees, and to be bound by a determination from an independent arbitrator involving compensation of up to \$5 million to be paid to the supplier, with Metcash’s in-principle agreement being subject to a supplier first mediating through its Code Mediator before proceeding to arbitration. MF&G will include provisions in its existing and future grocery supply agreements agreeing to proceed to arbitration if requested by a small supplier provided that the small supplier first participates in mediation using MF&G’s appointed Code Mediator. While Subdivision C could theoretically apply to arbitration that is so agreed, MF&G submits that:

- Many provisions within Subdivision C are not well suited to arbitration, where there will be a decision-maker and certainty of a resolution
- It is inappropriate to extend penalty arrangements to matters that can no longer be mandated.

*Subsection 66(1)*

The words in parentheses in subsection 66(1) should be deleted as they are broader than a dispute under the Code.

*Subsection 67(5)*

Subsection 67(5) should be deleted for the same reasons subsection 51(2) should be deleted as noted above.



#### **4. Compliance: Paragraph 73(2)(s)**

New paragraph 73(2)(s) is a catch-all requirement for record-keeping that is both unclear and burdensome, particularly given it is a penalty provision. It is also drafted as a responsibility on the large grocery business to maintain, but based on the intention of the supplier (whether actual or purported), which is subjective and unclear. It is in the interests of the large grocery business to maintain documents that show its compliance with the Code, but this appears to penalise the large grocery business if it is not in a position to produce documents which show its compliance with the Code.

#### **5. Funded promotions provisions: Section 33**

The move to a mandatory Code (and consequential need for new regulations) provides an opportunity for some much-needed clarification to section 33 on promotional funding in the context of the wholesale model.

In contrast to a vertically integrated retailer, a wholesaler does not have the model and systems in order to claim promotional funding based on in-store scan sales during the promotional period (given it does not operate the supermarket store). If promotional funding is only claimed on in-store scan sales during the promotional period, then clearly no breach of subsection 33(2) can occur. A wholesaler in contrast must adopt a “buy period” model and claim promotional funding on wholesale sales out to retailers. As explained in MF&G’s *Promotions Policy and Procedure*, “MF&G orders products in connection with a funded promotion based on reasonably anticipated demand for such products from our customers (and their shoppers). To allow for stocking and replenishment, a promotional buy period for our customers may run for a period before, during and after the in-store promotional period, as agreed by MF&G and the supplier.” While MF&G’s ordering for the buy period is based on reasonably anticipated demand, it will of course never exactly match the demand. Further, MF&G does not then control the conduct of the downstream retailer to whom it sells groceries purchased during the promotional buy period.

The Explanatory Statement to the 2020 amendments to the Current Code was helpful to a degree, in that it stated that section 33 (Current Code section 20) ‘only applies in relation to the [wholesaler’s] conduct in relation to buying groceries from a supplier and on-selling to a retailer; it does not apply to the conduct of the (downstream) retailer when subsequently selling these products to consumers (as wholesalers generally do not have control over the retailer’s pricing decisions)’. However, not only has this statement not been carried over into the Explanatory Statement for the Draft Mandatory Code, it would also be helpful to clarify that subsection 33(2) will be deemed to be satisfied in circumstances where a large grocery business that is a wholesaler only claims promotional funding on wholesale sales out to retailers. This clarification is not required for vertically integrated chains as they are able to only claim promotional funding on in-store scan sales during the promotional period. But wholesalers have to claim promotional funding based on wholesale sales during the promotional buy period, which does not necessarily precisely equate to the sales during the in-store promotional period of the retailers to whom wholesalers supply groceries for the reasons noted above.

We have included some suggested amendments to provide this much-needed clarification.



## 6. Other opportunities for drafting clarification and rectification of typographical errors

MF&G considers there are also other opportunities for drafting clarification and rectification of typographical/cross-referencing errors. We provide explanations for some of those here, but in other cases we have simply marked up the change in the attached copy of the Draft Mandatory Code where the reason for the change should be self-evident from the mark-up.

### 4.1. Subsection 19(4) and 74(2)

The purpose of subsection 74(2), as noted in the draft Explanatory Statement, is to effectively exempt existing grocery supply agreements from the operation of subsection 19(4) and the new regime for “allowable contrary provisions”. However, the exemption only applies to grocery supply agreements entered into before 1 April 2025. As “grocery supply agreements” can include acceptance of orders under previously agreed contracts, for the exemption to have the intended effect, it is necessary to also exempt grocery supply agreements entered into by the acceptance of an order on and after 1 April 2025 which incorporates by reference terms of a grocery supply agreement entered into before that day. Please see new paragraph 74(2)(i) that we have included in the enclosed mark-up of the Draft Mandatory Code for this purpose.

### 4.2. Subsection 19(5)

We have amended this subsection to make clear that the price, or the method or formula used to determine the price, of fresh produce may be set out in the agreement that is constituted by the acceptance of an order. Without this amendment, the price or the method or formula used to determine the price, of fresh produce would have to be set out in the underlying contract at the commencement of the supply relationship which is not practical given the dynamic nature of purchasing fresh produce.

We note for completeness that as drafted, and without MF&G’s proposed amendment, this subsection goes beyond the Horticulture Code of Conduct which requires that if a method or formula is used to determine price, that that method or formula must be set out in the horticulture produce agreement. However, the price does not otherwise have to be set out in the horticulture produce agreement and may be agreed in writing before or upon delivery of the produce.

### 4.3. Subsections 20(3), 22(4), 24(3), 25(5), 26(3), 27(4) and 28(3)

We have deleted paragraph (b) of each of these subsections as (1) under paragraph (a) regard must already be had to the “benefits” for the supplier and the large grocery business in determining reasonableness in the circumstances and so paragraph (a) should be sufficient in all circumstances and (2) it should not be necessary to show a purpose of *mutual* benefit for such clauses / set-off / payments / funding to be deemed reasonable. Rather a holistic approach should be taken having regard to relative benefits, costs and risks to the respective parties.

### 4.4. Subsection 22(5)

Subsection 22(5) requires a large grocery business to prove the matters in subsection 22(3) on the balance of probabilities except in relation to “whether the set-off causes detriment to a supplier for the purposes of paragraph 3(d)”. We have proposed a clarification of this wording on the exception.

This also applies in relation to subsections 20(4), 24(4), 25(6), 26(4) (for large retailers), 27(5) and 28(4).

4.5. Paragraph 24(2)(f)

While it is simply a carry-over from the drafting of the Current Code, it is not clear what “those costs” in paragraph 24(2)(f) is a reference to. Would “the costs of wastage” be better? The obligation should only be to mitigate the costs of wastage generally, not the specific wastage in respect of which each payment is claimed.

4.6. Subsection 45(3)

While this is a carry-over from the Current Code, Treasury may wish to take the opportunity to define the relevant “market” for these purposes. If it is not expressly defined, MF&G will continue to interpret the relevant market as the market for retail supermarket sales, in line with the original policy intent underpinning this exemption.

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Thank you for considering this submission. Treasury has indicated that a further draft of the Draft Mandatory Code will not be made available for review and comment. However, as you will see from the above, we consider the Draft Mandatory Code does require some significant revision to ensure it aligns with the policy intent and does not inadvertently overreach. MF&G would therefore welcome the opportunity to review a further updated draft of the Draft Mandatory Code.

Yours faithfully



**Julie Hutton** | Chief Legal, Risk and Compliance Officer & Company Secretary  
**Metcash Limited**



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# EXPOSURE DRAFT



EXPOSURE DRAFT

## Competition and Consumer (Industry Codes— Food and Grocery) Regulations 2024

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I, the Honourable Sam Mostyn AC, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2024

Sam Mostyn AC  
Governor-General

By Her Excellency's Command

Dr Andrew Leigh [**DRAFT ONLY—NOT FOR SIGNATURE**]  
Assistant Minister for Competition, Charities and Treasury  
Parliamentary Secretary to the Treasurer

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EXPOSURE DRAFT

# EXPOSURE DRAFT

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# EXPOSURE DRAFT

Preliminary **Part 1**  
Preliminary **Division 1**

Section 1

## Part 1—Preliminary

### Division 1—Preliminary

#### 1 Name

This instrument is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024*.

#### 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Parts 1 to 3 and anything in this instrument not elsewhere covered by this table	1 April 2025.	1 April 2025
2. Schedule 1, Part 1	At the same time as the provisions covered by table item 1.	
3. Schedule 1, Part 2	The later of: (a) immediately after the commencement of the provisions covered by table item 1; and (b) at the same time as Schedule [TBC] of the <i>Treasury Laws Amendment (Fairer for Families and Farmers) Act 2024</i> commences. However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

#### 3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.



# EXPOSURE DRAFT

Part 1 Preliminary

Division 1 Preliminary

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## 4 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## 5 Simplified outline of this instrument

This instrument prescribes a mandatory industry code relating to the food and grocery industry.

This Code regulates the conduct of large grocery businesses towards their suppliers, including by providing:

- (a) that large grocery businesses must deal with suppliers lawfully and in good faith; and
- (b) that certain things must be included in grocery supply agreements; and
- (c) how grocery supply agreements may be varied; and
- (d) when payments may be required from suppliers for certain benefits and activities; and
- (e) how a grocery business must communicate any requirements, standards or quality specifications for grocery products; and
- (f) protections for suppliers against retribution; and
- (g) certain additional protections for suppliers who supply fresh produce.

This Code also provides for the resolution of disputes. Grocery supply agreements must provide for mediation to resolve disputes between large grocery businesses and suppliers and may provide for arbitration.

A large grocery business must appoint a Code Mediator to deal with complaints against the business, and to handle disputes between the business and suppliers.

The Minister must appoint a Code Supervisor to review activities undertaken by Code Mediators and to provide an overview of issues relating to this Code.

Large grocery businesses may be liable to a civil penalty for conduct that contravenes this Code.

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## Division 2—Definitions etc.

### 6 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) Commission;
- (b) consumer;
- (c) corporation;
- (c) industry code.

In this instrument:

**acceptance period**, for a proposed remedy, has the meaning given by section 55.

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

**ADR practitioner** means a mediator ~~or arbitrator~~.

**ADR process** means mediation ~~or arbitration~~.

**allowable contrary provision**: a provision of a grocery supply agreement is an **allowable contrary provision** if:

- (a) the provision is contrary to a protective provision of the Code mentioned in any of paragraphs 19(4)(a) to (g); and
- (b) paragraphs 19(4)(h) to (j) are complied with in relation to the provision of the agreement.

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

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

**category manager** means an employee of a large grocery business who is responsible for a category of grocery products at the large grocery business.

**Code** means the industry code set out in Part 2.

**Code Mediator** means a Code Mediator appointed under subsection 45(1).

**Code Supervisor** means the Code Supervisor appointed under subsection 59(2).

**delists** has the meaning given by subsection 32(3).

**evidential burden**, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

**fresh produce** means the following:

- (a) fresh fruit;
- (b) fresh vegetables;
- (c) fresh mushrooms.

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**grocery product** includes (without limitation) the following:

- (a) food;
- (b) non-alcoholic drinks;
- (c) household products including electrical appliances, kitchenware and cleaning products;
- (d) personal care products including toiletries, cosmetics, first aid products and medicine (other than prescription medicine);
- (e) stationery products, magazines and newspapers;
- (f) tobacco and tobacco products;
- (g) pet food and pet care products;
- (h) plants, flowers and gardening equipment;

but does not include the following:

- (i) food sold for in-store consumption;
- (j) non-alcoholic drinks sold for in-store consumption;
- (k) alcoholic drinks.

**grocery supply agreement** means any agreement between a large grocery business and a supplier that relates to the supply of grocery products to or for the purposes of a supermarket business (whether or not the agreement is the principal agreement between them relating to the supply of grocery products) and includes any document:

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

**incentive scheme** means any arrangement by a large grocery business to reward an employee for meeting targets set by the large grocery business in relation to the supply or financial performance of:

- (a) a grocery product; or
- (b) a category or group of grocery products.

**large grocery business** means:

- (a) a large retailer; or
- (b) a large wholesaler.

**large retailer**: see section 9.

**large wholesaler**: see section 9.

**original complaint** has the meaning given by subsection 61(1).

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

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

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

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

***proposed remedy***, for dealing with a complaint under Subdivision A of Division 5 of Part 2, has the meaning given by subsection 36(2).

***retailer*** means a corporation: that solely or predominantly carries on a supermarket business in Australia, to the extent it carries on a supermarket business in Australia.

- ~~(a) to the extent that it carries on a supermarket business in Australia; and~~
- ~~(b) to the extent that it carries on a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia.~~

***retribution*** has a meaning affected by section 8.

***review request*** has the meaning given by subsection 61(2).

***senior buyer***, for a supplier, means the employee within a buying team of a large grocery business who manages the buyers who buy from the supplier.

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

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

***supermarket business*** means a business if:

- (a) the main purpose of the business is the retail sale of grocery products to consumers; and
- (b) a substantial proportion of those grocery products is food that is not for in-store consumption.

***supplier***: see section 7.

***wastage*** means grocery products that are unfit for sale.

***wholesaler*** means a corporation ~~to the extent that it~~ solely or predominantly carries on a business, and only to the extent it carries on that business, of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia.

### 7 Meaning of *supplier*

- (1) A supplier means a person carrying on (or actively seeking to carry on) a business of supplying grocery products for retail sale to consumers by another person (whether or not that other person is the person supplied).
- (2) A person who is a wholesaler may be a supplier. However, a large wholesaler may not be a supplier.

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### 8 Meaning of *retribution*

- (1) **Retribution**, by a large grocery business against a supplier, means an action detrimental to the supplier taken because the supplier exercised, or indicated that it will or may exercise, a right under this Code against the large grocery business and may include (without limitation) any of the following actions taken for such reason:
  - (a) delisting a grocery product of the supplier;
  - (b) requiring the supplier to make excessive contributions towards promotional or marketing costs for the supplier's grocery product;
  - (c) rejecting fresh produce from the supplier;
  - (d) changing the location of the supplier's grocery product in store or online to the detriment of the supplier;
  - (e) delaying restocking the supplier's grocery product in store or online;
  - (f) varying, terminating, or electing not to renew an agreement with the supplier for the supply of an own label/brand product;
  - (g) reducing the volume of stock ordered from the supplier;
  - (h) varying, terminating, or electing not to renew a grocery supply agreement with the supplier.
- (2) However, an action is not **retribution** if: the action is taken for genuine commercial reasons notwithstanding that the supplier exercised, or indicated that it will or may exercise, a right under this Code against the large grocery business.
  - ~~(a) the action is taken for genuine commercial reasons; and~~
  - ~~(b) the action is not taken because the supplier exercised, or indicated that it will or may exercise, a right under this Code against the large grocery business; and~~
  - ~~(c) the action is not taken because the supplier was, or may have been, able to exercise a right under this Code against the large grocery business.~~
- (3) For the avoidance of doubt, taking an action as punishment for a matter mentioned in paragraph (2)(b) or (c) the supplier exercising, or indicating that it will or may exercise, a right under this Code against the large grocery business is not a genuine commercial reason.
- (4) A large grocery business that wishes to rely on subsection (2) in relation to an action bears an evidential burden in relation to that matter.

### 9 Meaning of *large retailer* and *large wholesaler*

- (1) A retailer ~~or wholesaler~~ is a **large retailer** ~~or large wholesaler~~ ~~(as the case may be)~~ if the total covered revenue of the following entities:
  - (a) the retailer ~~or wholesaler~~;
  - (b) each related body corporate of the retailer ~~or wholesaler~~;as set out in the those entities' annual accounts, prepared in accordance with generally accepted accounting principles, exceeds \$5 billion for the previous financial year.

Note: For when a body corporate is deemed to be related to another body corporate, see section 4A of the Act.

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(2) A wholesaler is a *large wholesaler* if the total covered revenue of the following entities:

- (a) the wholesaler;
- (b) each related body corporate of the wholesaler;

as set out in the those entities' annual accounts, prepared in accordance with generally accepted accounting principles, exceeds \$5 billion for the previous financial year.

(2)(3) Revenue is covered revenue if the revenue relates to the carrying on of:

- (a) *in the case of a retailer*, a supermarket business in Australia; or
- (b) *in the case of a wholesaler*, a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia.

(3)(4) If a retailer is a large retailer, this Code also applies to the retailer to the extent that it carries on a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia.

## **Division 3—Mandatory industry code**

### **10 Mandatory industry code**

For the purposes of section 51AE of the Act, the industry code set out in Part 2 of this instrument:

- (a) is prescribed for the purposes of Part IVB of the Act; and
- (b) is declared to be a mandatory industry code.

### **11 Review of Code**

- (1) The Minister must cause a review to be undertaken in relation to the operation of the Code.
- (2) The review must:
  - (a) assess the impact of the Code in improving commercial relations between retailers, wholesalers and suppliers; and
  - (b) start before the end of the period of 5 years starting at the commencement of this section.
- (3) The Minister must cause a written report about the review to be prepared.
- (4) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister.



# EXPOSURE DRAFT

Part 2 Food and grocery industry code

Division 1 Preliminary

Section 12

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## Part 2—Food and grocery industry code

### Division 1—Preliminary

#### 12 Food and grocery Code of conduct

This Part sets out an industry code that relates to the industry of food and grocery products.

#### 13 Purpose of Code

The purposes of this Code are:

- (a) to regulate standards of business conduct in the grocery supply chain and to build ~~in order to~~ sustain trust and cooperation throughout that chain; and
- (b) to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and
- (c) to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between large grocery businesses and suppliers; and
- (d) to promote and support good faith in commercial dealings between large grocery businesses and suppliers; and
- (e) to encourage suppliers to exercise their rights under this Code, including by:
  - (i) making reasonable requests of large grocery businesses; and
  - (ii) referring legitimate complaints against large grocery businesses; and
  - (iii) seeking resolution of disputes with large grocery businesses; and
- (f) to protect suppliers from retribution from large grocery businesses.

#### 14 Interaction with other industry codes

This Code does not apply to the extent that it conflicts with the industry code set out in:

- (a) Chapter 2 of the *Competition and Consumer (Industry code—Franchising) Regulations 2024*; or
- (b) Schedule 1 to the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*.

Note: This code also does not apply to the extent it conflicts with the industry code set out in Division 2 of Part 2 of the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019*; see section 10 of that instrument.

#### 15 Civil penalty provisions of the Code

A provision of this Part that is of one of the following kinds and sets out at its foot a pecuniary penalty indicated by the words “civil penalty” is a civil penalty provision of the industry code set out in this Part for the purposes of Part IVB and section 76 of the Act:

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- (a) a subsection;
- (b) a section that is not divided into subsections.

## **16 Function of Australian Small Business and Family Enterprise Ombudsman**

The functions of the Australian Small Business and Family Enterprise Ombudsman include keeping lists of ADR practitioners who can provide services of mediation ~~or arbitration~~ for the purposes of this Code (including for a grocery supply agreement).

# EXPOSURE DRAFT

Part 2 Food and grocery industry code

Division 2 Good faith

Section 17

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## Division 2—Good faith

### 17 Obligation to deal with suppliers lawfully and in good faith

- (1) A large grocery business must at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law as in force from time to time.

Civil penalty: 600 penalty units.

- (2) The large grocery business must not enter into a grocery supply agreement that contains a provision that limits or excludes the obligation to act in good faith.

Civil penalty: 600 penalty units.

- (3) In determining whether the large grocery business has acted in good faith in dealing with a supplier, the following may be taken into account:

- (a) whether the large grocery business has acted honestly;
- (b) whether the large grocery business has cooperated to achieve the purposes of the relevant grocery supply agreement;
- (c) whether the large grocery business has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- (d) whether the large grocery business has not acted in a way that constitutes retribution against the supplier;
- (e) whether the large grocery business has conducted its trading relationship with the supplier without duress;
- (f) whether the trading relationship of the large grocery business with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
- (g) whether the large grocery business has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier;
- (h) whether, in dealing with the large grocery business, the supplier has acted in good faith.

- (4) Subsection (3) does not limit subsection (1).

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## Division 3—Grocery supply agreements

### 18 Grocery supply agreement must be in writing

A large grocery business must not enter into a grocery supply agreement unless it is in writing.

Note: Large grocery businesses must keep the original or a copy of each grocery supply agreement to which they are a party: see subsection 73(1).

Civil penalty: 600 penalty units.

### 19 Matters to be covered by agreement

- (1) A large grocery business must not enter into a grocery supply agreement that relates to the supply of grocery products unless the agreement includes the following:
  - (a) any requirements the large grocery business has in respect of the delivery of the grocery products;
  - (b) for grocery supply agreements that do not relate to the supply of fresh produce—any circumstances in which the large grocery business may reject the grocery products;
  - (c) the period within which the large grocery business must pay a supplier for the grocery products and the circumstances in which any payment, or part of a payment, may be withheld or delayed;
  - (d) if the agreement is intended to operate for a limited time only—the term of the agreement;
  - (e) in clear terms, any quantity and quality requirements relating to the grocery products;
  - (f) if the agreement provides for its termination—the circumstances in which it may be terminated.

Note: A large grocery business must accept fresh produce delivered in accordance with a grocery supply agreement unless certain conditions are met: see section 34.

Civil penalty: 600 penalty units.

- (2) Paragraph (1)(e) does not prevent the parties to the grocery supply agreement from later agreeing, in writing and in clear terms, to additional or different quantity and quality requirements relating to the grocery products.

#### *Dispute resolution*

- (3) A large grocery business must not enter into a grocery supply agreement unless the agreement provides 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.

Note: The agreement may also provide that the parties may attend arbitration, ~~under that Subdivision,~~ of a dispute.

Civil penalty: 600 penalty units.

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Food and grocery industry code **Part 2**

Grocery supply agreements **Division 3**

Section 21

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## *Reasonable exceptions to Code protections*

- (4) A large grocery business must not enter into a grocery supply agreement that includes a provision contrary to any of the following protective provisions of this Code:
- (a) subsection 20(1) (unilateral variations);
  - (b) subsection 22(2) (set-offs);
  - (c) subsection 24(1) (payments to cover wastage);
  - (d) subsection 25(1) (payments for stocking or listing);
  - (e) subsection 26(1) (payments for better positioning etc.);
  - (f) subsection 27(1) (payments for ordinary business activities);
  - (g) subsection 28(1) (payments for funding promotions);
- unless the agreement:
- (h) identifies the contrary provision of the agreement and the protective provision of this Code; and
  - (i) includes a statement to the effect that the contrary provision is an exception to, and removes the protection of, the protective provision; and
  - (j) explains why the contrary provision is reasonable.

Civil penalty: 600 penalty units.

## *Additional requirements for agreements that relate to fresh produce*

- (5) If a grocery supply agreement relates to the supply of fresh produce, a large grocery business must not enter into ~~the an~~ agreement under which the supplier is bound to supply the fresh produce unless ~~the at~~ agreement also specifies the price, or the method or formula to be used to determine the price, of the fresh produce.

Civil penalty: 600 penalty units.

- (6) Subsection (5) does not prevent a grocery supply agreement from specifying a mechanism to negotiate on a regular basis the price of fresh produce supplied under the agreement. Such a mechanism must be reasonable.
- (7) A large grocery business must exercise due care in forecasting the amount of fresh produce to be supplied under a grocery supply agreement.

Civil penalty: 600 penalty units.

- (8) For the avoidance of doubt, subsection (7) does not require a forecast to be included in an agreement that relates to the supply of fresh produce.

## **20 Unilateral variation of agreement**

- (1) A large grocery business must not vary a grocery supply agreement without the written consent of the supplier concerned.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not apply if:

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- (a) the agreement includes a provision that:
- (i) provides expressly for the large grocery business to make the variation; and
  - (ii) sets out clearly the changed circumstances in which the variation can be made; and
  - (iii) if the variation involves a quantitative adjustment to the terms of supply—sets out the basis or methodology for calculating the adjustment; and
- (b) that provision of the agreement is an allowable contrary provision; and
- (c) the variation is made in accordance with the agreement; and
- (d) the variation is reasonable in the circumstances; and
- (e) the supplier is given reasonable notice, in writing, of:
- (i) the variation; and
  - (ii) the terms of the variation; and
  - (iii) the large grocery business's reasons for making the variation.
- (3) For the purposes of (but without limiting) paragraph (2)(d), in determining whether the variation is reasonable in the circumstances, regard must be had to:
- the benefits, costs and risks (if any) for the supplier and for the large grocery business.
  - ~~(a) the benefits, costs and risks (if any) for the supplier and for the large grocery business; and~~
  - ~~(b) whether the variation is for a purpose that benefits both the supplier and the large grocery business.~~
- (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, if a person contends, for the purposes of paragraph (2)(d), that the variation causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the variation causes detriment to a supplier for the purposes of paragraph (2)(d).

## 21 Retrospective variation of agreement

A large grocery business must not vary a grocery supply agreement with retrospective effect.

Civil penalty: 600 penalty units.

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Food and grocery industry code **Part 2**  
Conduct generally **Division 4**

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## Division 4—Conduct generally

### Subdivision A—Paying suppliers

#### 22 Payments to suppliers

- (1) A large grocery business must pay a supplier for all grocery products delivered and accepted in accordance with a grocery supply agreement:
  - (a) within the time frame set out in the agreement; and
  - (b) in any case—within a reasonable time after receiving the supplier’s invoice for the products.

Civil penalty: 600 penalty units.

- (2) The large grocery business must not:
  - (a) set off any amount against a supplier’s invoice or remittance unless the supplier has consented in writing to the set-off of the amount; or
  - (b) require a supplier to consent to set off such an amount.

Civil penalty: 600 penalty units.

- (3) Subsection (2) does not apply if:
  - (a) the grocery supply agreement includes a provision that provides for the amount to be set off; and
  - (b) that provision of the agreement is an allowable contrary provision; and
  - (c) the set-off is made in accordance with the agreement; and
  - (d) the set-off is reasonable in the circumstances.
- (4) For the purposes of (but without limiting) paragraph (3)(d), in determining whether the set-off is reasonable in the circumstances, regard must be had to:  
the benefits, costs and risks (if any) for the supplier and for the large grocery business.
  - ~~(a) the benefits, costs and risks (if any) for the supplier and for the large grocery business; and~~
  - ~~(b) whether the set-off is for a purpose that benefits both the supplier and the large grocery business.~~

- (5) A large grocery business that wishes to rely on subsection (3) must prove the matters in that subsection on the balance of probabilities (except, if a person contends, for the purposes of paragraph (3)(d), that the set-off causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the set-off causes detriment to a supplier for the purposes of paragraph (3)(d).

### Subdivision B—Requiring payments from suppliers

#### 23 Payments for shrinkage

- (1) A large grocery business must not:
  - (a) enter into a grocery supply agreement that directly or indirectly requires a



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- supplier to make payments as compensation for shrinkage; or  
(b) otherwise directly or indirectly require such payments.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not prevent the large grocery business from raising, discussing or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.

## 24 Payments for wastage

- (1) A large grocery business must not directly or indirectly require a supplier to make any payment to cover any wastage of grocery products incurred at premises of:

- (a) the large grocery business; or
- (b) a contractor or agent of the large grocery business; or
- (c) any other entity that is a large grocery business.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not apply if:

- (a) the relevant grocery supply agreement includes a provision that sets out expressly and unambiguously:
  - (i) the circumstances, which could include negligence of the supplier, in which the supplier will be required to make payments to cover wastage of the supplier's grocery products incurred at premises of a person or entity referred to in subsection (1); and
  - (ii) the basis of the payments; and
- (b) that provision of the agreement is an allowable contrary provision; and
- (c) the wastage occurs in such circumstances; and
- (d) each such payment is made in accordance with the agreement; and
- (e) each such payment is reasonable in the circumstances; and
- (f) the large grocery business takes reasonable steps to mitigate those costs.

- (3) For the purposes of (but without limiting) paragraph (2)(e), in determining whether a payment is reasonable in the circumstances, regard must be had to: the benefits, costs and risks (if any) for the supplier and for the large grocery business.

- ~~(a) the benefits, costs and risks (if any) for the supplier and for the large grocery business; and~~
- ~~(b) whether the payment is for a purpose that benefits both the supplier and the large grocery business.~~

- (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, if a person contends, for the purposes of paragraph (2)(e), that the payment causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the payment causes detriment to a supplier for the purposes of paragraph (2)(e).

- (5) If:

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- (a) the relevant grocery supply agreement provides for the supplier to make payments to cover wastage of the supplier's grocery products; and
  - (b) the supplier seeks to negotiate a variation of the agreement relating to payments of that kind;

the large grocery business must not, in the course of the negotiations or as a precondition to entering into the negotiations, seek to negotiate other variations of the agreement unrelated to payments of that kind.

Civil penalty: 600 penalty units.

### 25 Payments as a condition of being a supplier

- (1) A large grocery business must not directly or indirectly require a supplier to make any payment as a condition of stocking or listing grocery products.

Civil penalty: 600 penalty units.

- (2) Subject to section 28 (funding promotions), subsection (1) does not apply in relation to a large grocery business if the payment is made in relation to a promotion.
- (3) Subsection (1) does not apply in relation to a large grocery business that is a retailer if:
  - (a) the relevant grocery supply agreement includes a provision that provides expressly for the payment to be made; and
  - (b) that provision of the agreement is an allowable contrary provision; and
  - (c) the payment:
    - (i) is made in accordance with the agreement; and
    - (ii) is made in respect of grocery products that have not been stocked, displayed or listed by the retailer during the preceding 365 days in 25% or more of its stores; and
    - (iii) is reasonable in the circumstances.
- (4) Subsection (1) does not apply in relation to a large grocery business that is a wholesaler if:
  - (a) the relevant grocery supply agreement includes a provision that provides expressly for the payment to be made; and
  - (b) that provision of the agreement is an allowable contrary provision; and
  - (c) the payment:
    - (i) is made in accordance with the agreement; and
    - (ii) is made in respect of grocery products that have not been stocked or listed by the large grocery business during the preceding 365 days in 25% or more of its distribution centres; and
    - (iii) is reasonable in the circumstances.
- (5) For the purposes of (but without limiting) subparagraph (3)(c)(iii) or (4)(c)(iii), in determining whether the payment is reasonable in the circumstances, regard must be had to: the benefits, costs and risks (if any) for the supplier and for the large grocery business.  
~~(a) the benefits, costs and risks (if any) for the supplier and for the large~~

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~~grocery business; and~~

~~(b) whether the payment is for a purpose that benefits both the supplier and the large grocery business.~~

- (6) A large grocery business that wishes to rely on subsection (2) or (4) must prove the matters in that subsection on the balance of probabilities (except if a person contends, for the purposes of subparagraph (2)(c)(iii) or (4)(c)(iii), that the payment causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the payment causes detriment to a supplier for the purposes of subparagraph (2)(c)(iii) or (4)(c)(iii).).

## 26 Payments for better positioning of grocery products—retailers

- (1) A large retailer must not directly or indirectly require a supplier to make any payment to secure either of the following for a grocery product:
- better positioning;
  - an increase in allocation of shelf space.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not apply if:
- a provision of the relevant grocery supply agreement expressly sets out the particular circumstances in which the payment may be required; and
  - that provision of the agreement is an allowable contrary provision; and
  - the payment is made in accordance with the agreement; and
  - the payment is reasonable in the circumstances.

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

- (3) For the purposes of (but without limiting) paragraph (2)(d), in determining whether the payment is reasonable in the circumstances, regard must be had to: the benefits, costs and risks (if any) for the supplier and for the large grocery business.
- ~~(a) the benefits, costs and risks (if any) for the supplier and for the large grocery business; and~~
- ~~(b) whether the payment is for a purpose that benefits both the supplier and the large grocery business.~~

- (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 if a person contends, for the purposes of paragraph (2)(d), that the payment causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the payment causes detriment to a supplier for the purposes of paragraph (2)(d).).

- (5) This section does not apply to a corporation to the extent that it is a wholesaler.

## 27 Payments for ordinary business activities

- (1) A large grocery business must not directly or indirectly require a supplier to make any payment towards the costs of any activity (an *ordinary business*

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*activity*) that is undertaken by the large grocery business in the ordinary course of carrying on a large grocery business.

Civil penalty: 600 penalty units.

- (2) Without limiting subsection (1), an ordinary business activity includes each of the following:
- (a) a buyer's visit to the supplier;
  - (b) artwork or packaging design;
  - (c) consumer or market research;
  - (d) the opening or refurbishing of a store;
  - (e) hospitality for the staff of the large grocery business.
- (3) Subsection (1) does not apply if:
- (a) a provision of the relevant grocery supply agreement expressly provides for the payment; and
  - (b) that provision of the agreement is an allowable contrary provision; and
  - (c) the payment is made in accordance with the agreement; and
  - (d) the payment is reasonable in the circumstances.
- (4) For the purposes of (but without limiting) paragraph (3)(d), in determining whether the payment is reasonable in the circumstances, regard must be had to: the likely and actual benefits, costs and risks (if any) for the supplier and for the large grocery business.
- ~~(a) the likely and actual benefits, costs and risks (if any) for the supplier and for the large grocery business; and~~
  - ~~(b) whether the payment is for a purpose that benefits both the supplier and the large grocery business.~~
- (5) A large grocery business that wishes to rely on subsection (3) must prove the matters in that subsection on the balance of probabilities (except, if a person contends, for the purposes of paragraph (3)(d), that the payment causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the payment causes detriment to a supplier for the purposes of paragraph (3)(d).

## 28 Funding promotions

- (1) A large grocery business must not directly or indirectly require a supplier to fund part or all of the costs of a promotion.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not apply if:
- (a) a provision of the relevant grocery supply agreement expressly provides for the funding; and
  - (b) that provision of the agreement is an allowable contrary provision; and
  - (c) the funding is required in accordance with the agreement; and
  - (d) the funding is reasonable in the circumstances.

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- (3) For the purposes of (but without limiting) paragraph (2)(d), in determining whether the funding is reasonable in the circumstances, regard must be had to: the likely and actual benefits, costs and risks (if any) for the supplier and for the large grocery business for the promotion.
- ~~(a) the likely and actual benefits, costs and risks (if any) for the supplier and for the large grocery business for the promotion;~~
- ~~(b) whether the funding is for a purpose that benefits both the supplier and the large grocery business.~~
- (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, if a person contends, for the purposes of paragraph (2)(d), that the funding causes detriment to a supplier, then that person must prove that matter on the balance of probabilities in relation to whether the funding causes detriment to a supplier for the purposes of paragraph (2)(d).

## Subdivision C—Other conduct

### 29 Incentive schemes

- (1) If a large grocery business has an incentive scheme which applies to a buying team or category manager of the large grocery business, the incentive scheme must be consistent with:
- (a) the purposes of this Code; and
- (b) any obligations of the large grocery business under this Code.

Note: For example, the scheme must be consistent with:

- (a) the purpose of protecting suppliers from retribution; and
- (b) the obligation to act in good faith in dealing with suppliers.

Civil penalty: 600 penalty units.

- (2) An incentive scheme is not consistent with a purpose of, or obligation under, this Code if the scheme:
- (a) requires; or
- (b) directly or indirectly incentivises;
- a buying team or category manager to act in a way which is contrary to the purpose or obligation.

### 30 Retribution

A large grocery business must not engage in retribution against a supplier.

Civil penalty: 600 penalty units.

### 31 Policies and procedures to protect against retribution

A large grocery business must have written policies and procedures to:

- (a) review the commercial decisions made by a buying team or category manager in relation to a supplier that: exercised, or indicated that it will or may exercise,
- ~~(i) exercised, or indicated that it will or may exercise; or~~

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~~(ii) was, or may have been, able to exercise;~~

a right under this Code against the large grocery business; and

(b) ensure that those decisions are not retribution against the supplier.

Civil penalty: 600 penalty units.

## 32 Delisting products

(1) A large grocery business must not delist a supplier's grocery product.

Civil penalty: 600 penalty units.

(2) Subsection (1) does not apply if the delisting is:

(a) in accordance with the terms of the relevant grocery supply agreement; and

(b) for genuine commercial reasons.

(3) A large grocery business *delists* a supplier's grocery product if:

(a) the product is removed from the range of grocery products of the large grocery business; or

(b) the large grocery business reduces the distribution of the product across the stores or distribution centres of the large grocery business (as the case may be), and that reduction has or is likely to have a material effect on the supplier.

(4) For the purposes of (but without limiting) paragraph (2)(b), genuine commercial reasons for delisting a product include the following:

(a) failure of the supplier to meet agreed quality or quantity requirements with respect to the product;

(b) failure of the supplier's product to meet the commercial sales or profitability targets of the large grocery business as notified to the supplier in, or in accordance with, the grocery supply agreement;

(c) persistent failure to meet the delivery requirements of the large grocery business as notified to the supplier from time to time in accordance with the grocery supply agreement.

(5) To avoid doubt, delisting as a punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason.

(6) Before delisting a supplier's grocery product, the large grocery business must provide reasonable written notice to the supplier of the decision to delist the product. The notice must:

(a) include the genuine commercial reasons for delisting the product; and

(b) inform the supplier of the supplier's right to have the decision to delist the product reviewed by the senior buyer for the supplier; and

(c) inform the supplier of the supplier's right to refer a complaint relating to the decision to delist the product to the Code Mediator for the large grocery business (see Subdivision A of Division 5); and

(d) include the contact details of the Code Mediator for the large grocery business.

Civil penalty: 600 penalty units.

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- (7) Subsection (6) does not apply if:
- (a) time is of the essence (including for product recalls, withdrawals or safety issues); or
  - (b) there are persistent issues with supply that have resulted in the large grocery business being out of stock or stocked at significantly reduced levels.

- (8) The senior buyer for a supplier must promptly comply, in writing, with any written request from the supplier for:

- (a) a statement of the genuine commercial reasons for a delisting; or
- (b) information (or additional information) relating to a delisting.

This subsection applies whether or not the large grocery business complied (or was required to comply) with subsection (6).

Civil penalty: 600 penalty units.

- (9) The senior buyer for a supplier must, after receiving a written request from the supplier, promptly review any decisions regarding delisting made by the large grocery business and provide the supplier with written notice of the outcome of that review including the basis for the decision of the large grocery business.

Civil penalty: 600 penalty units.

- (10) To avoid doubt, a decision by a large grocery business not to extend a fixed term grocery supply agreement, or enter into a new grocery supply agreement, following the expiry of an agreement is not a decision to delist a product.

- (11) A large grocery business that wishes to rely on subsection (2) or (7) must prove the matters in that subsection on the balance of probabilities.

### 33 Funded promotions

- (1) If a supplier agrees to make a payment to a large grocery business in support of the promotion of a product (the ***funded promotion***), the large grocery business must not hold the funded promotion unless the supplier has been given reasonable written notice.

Civil penalty: 600 penalty units.

- (2) If the large grocery business orders a grocery product from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance or otherwise), the large grocery business must:

- (a) ensure that the basis on which the quantity of the order is calculated is transparent; and
- (b) not over-order; and
- (c) if the large grocery business sells any over-ordered product other than at, or below, the promotional resale price—pay the supplier the difference between the supplier's promotional price and the supplier's full price for the product.

Civil penalty: 600 penalty units.

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(2A) To avoid doubt, in the case of a large grocery business that is a wholesaler, subsection 33(2):

(a) only applies in relation that wholesaler's conduct in relation to buying groceries from a supplier and on-selling to a retailer and not to the conduct of a retailer (or, to avoid doubt, any other person to whom the wholesaler on-sells groceries that is not a retailer); and

(b) will be deemed to be satisfied provided that the wholesaler only claims promotional funding on its wholesale sales of groceries to retailers and not its purchases of groceries from suppliers.

(3) If the large grocery business has placed an order for a grocery product with the supplier in connection with the funded promotion, the large grocery business must not do either of the following without the supplier's written consent:

- (a) cancel the order;
- (b) reduce the volume of the order by more than:
  - (i) if the large grocery business is a retailer—10%; or
  - (ii) if the large grocery business is a wholesaler—20%.

Civil penalty: 600 penalty units.

(4) Subsection (3) does not apply if:

- (a) the large grocery business gives the supplier reasonable written notice of the cancellation or reduction; or
- (b) the large grocery business compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the large grocery business failing to give reasonable notice of the cancellation or reduction.

## 34 Fresh produce standards and quality specifications

### *Standards or quality specifications*

(1) A large grocery business must provide any fresh produce standards or quality specifications to a supplier in clear, unambiguous and concise written terms. Such standards or quality specifications must be reasonable.

Civil penalty: 600 penalty units.

(2) Without limiting subsection (1), in determining the reasonableness of standards or specifications for a kind of produce, regard must be had to whether the same standards or quality specifications apply to all suppliers who supply that kind of produce to the large grocery business.

### *Fresh produce to be accepted*

(3) A large grocery business must accept fresh produce delivered in accordance with a grocery supply agreement.

Civil penalty: 600 penalty units.



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- (4) Subsection (3) does not apply in relation to a delivery of fresh produce if:
- (a) the produce fails to meet relevant fresh produce standards or quality specifications; and
  - (b) the large grocery business rejects the produce within 24 hours after the produce is delivered to the large grocery business; and
  - (c) the large grocery business does not reject the produce after the large grocery business has accepted the produce.

- (5) If a large grocery business rejects fresh produce because it does not meet relevant fresh produce standards or quality specifications, the large grocery business must provide written reasons for the rejection to the supplier within 48 hours.

Civil penalty: 600 penalty units.

### *Labelling, packaging and preparation requirements*

- (6) A large grocery business must communicate any labelling, packaging or preparation requirements for fresh produce to a supplier in clear, unambiguous and concise written terms.

Civil penalty: 600 penalty units.

- (7) A large grocery business must provide a supplier with reasonable written notice of any required changes to packaging, labelling or preparation standards for fresh produce (unless the change is required immediately by law) taking into consideration existing stock held by suppliers (where known) and any agreement as to stock coverage in the relevant grocery supply agreement.

Civil penalty: 600 penalty units.

- (8) A large grocery business must make any claim for damaged fresh produce or shortfalls, or any similar claims, in relation to fresh produce, within a reasonable time of, and in any event no later than 30 days after, delivery of the fresh produce to the large grocery business or a nominee of the large grocery business.

Civil penalty: 600 penalty units.

## **35 Changes to supply chain procedures**

- (1) A large grocery business must not directly or indirectly require a supplier to make any material change to supply chain procedures during the period of a grocery supply agreement with the supplier.

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not apply if:
- (a) the large grocery business gives the supplier reasonable written notice of the change; or
  - (b) the large grocery business compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the large grocery business failing to give reasonable notice of the change.

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(3) Paragraph (2)(b) does not prevent a supplier from waiving a right to compensation under that paragraph.

(4) This section has effect subject to section 20 (unilateral variation of agreement).

## 36 Business disruption

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

Civil penalty: 600 penalty units.

## 37 Intellectual property rights

(1) A large grocery business must respect the intellectual property rights held by suppliers in relation to grocery products, including intellectual property rights in branding, packaging and advertising.

Civil penalty: 600 penalty units.

(2) To avoid doubt, subsection (1) does not create, confer or extend any intellectual property rights in or of the supplier.

(3) In developing or producing own brand products, a large grocery business must not infringe the intellectual property rights held by a supplier in relation to grocery products, including rights relating to branding, packaging designs or advertising.

Civil penalty: 600 penalty units.

## 38 Confidential information

(1) This section applies if a supplier discloses confidential information to a large grocery business in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions or pricing.

(2) The large grocery business must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the large grocery business (as the case may be) who need to have that information in connection with that purpose.

Civil penalty: 600 penalty units.

(3) The large grocery business must establish and monitor systems to ensure compliance with subsection (2). The large grocery business must create a written summary of such systems.

Civil penalty: 600 penalty units.

(4) To avoid doubt, information is not confidential information for the purposes of this section if the information:

(a) is publicly available; or

(b) comes into the possession or knowledge of the large grocery business:

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- (i) independently of the supplier; and
- (ii) without any breach of subsection (2) on the part of the large grocery business.

## **39 Product ranging, shelf space allocation and range reviews**

- (1) A large grocery business must publish, or provide to all suppliers with whom it has a grocery supply agreement:
  - (a) its product ranging principles;
  - (b) if the large grocery business is a retailer—its shelf space allocation principles.

Civil penalty: 600 penalty units.

- (2) The large grocery business must act in accordance with the principles and keep them up to date.

Civil penalty: 600 penalty units.

- (3) Within a reasonable time before conducting a range review, the large grocery business must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of:
  - (a) the purpose of the range review; and
  - (b) the key criteria governing ranging decisions.

Civil penalty: 600 penalty units.

- (4) Following the range review, the large grocery business must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the final decisions of the large grocery business.

Civil penalty: 600 penalty units.

- (5) The large grocery business must apply:
  - (a) its product ranging principles; and
  - (b) in the case of a retailer—its shelf space allocation principles;without discrimination (including without discrimination in favour of its own brand products, as the case may be).

Civil penalty: 600 penalty units.

- (6) This section does not limit section 32.

## **40 Transfer of intellectual property rights**

- (1) A large grocery business must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent own brand product of the large grocery business (as the case may be).

Civil penalty: 600 penalty units.

- (2) Subsection (1) does not prevent the large grocery business from:
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- (a) holding an intellectual property right in an own brand product of the large grocery business; or
- (b) having an exclusive right to the retail sale of an own brand product of the large grocery business; or
- (c) making the holding of a right covered by paragraph (a) or (b) by the large grocery business a condition or term of supply by the supplier of an own brand product of the large grocery business, to the extent the product, recipe or formulation of the product:
  - (i) was developed or formulated by or for the large grocery business; or
  - (ii) is customised by or for the large grocery business.

### 41 Price increases

- (1) This section applies if:
  - (a) a large grocery business has a grocery supply agreement with a supplier for the supply of grocery products; and
  - (b) the supplier notifies the large grocery business, in writing, of an increase in the price (the *price increase*) of grocery products supplied under the agreement; and
  - (c) if the price increase is in respect of fresh produce that is supplied under the agreement and the agreement includes a mechanism to negotiate on a regular basis the price of that fresh produce—any negotiations about the price increase are not concluded within 5 business days after the supplier informs the large grocery business of the price increase.

Note: Nothing in this section affects the rights of a supplier to determine the price of grocery products that the supplier supplies.

- (2) Within 30 days of being informed by the supplier of the price increase, the large grocery business must, in writing, notify the supplier whether the large grocery business:
  - (a) accepts the price increase; or
  - (b) accepts an increase in the price of the grocery products supplied under the agreement but does not accept the amount of the price increase; or
  - (c) does not accept the price increase.

Civil penalty: 600 penalty units.

- (3) If the supplier is notified of a matter referred to in paragraph (2)(b) or (c), the supplier may request the large grocery business to enter into negotiations about an increase in the price for the grocery products.
- (4) A large grocery business that enters into such negotiations must engage in the negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay.

Civil penalty: 600 penalty units.

- (5) The large grocery business must not require the supplier to disclose commercially sensitive information in relation to the following:
  - (a) the price increase;

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(b) negotiations about an increase in the price for the grocery products.

Civil penalty: 600 penalty units.

## 42 Information about price increases

A large grocery business must give to its Code Mediator, in sufficient time for the information to be included in the Code Mediator's report for a financial year under section 58, the following information:

- (a) the total number of notifications given under subsection 41(2) by the large grocery business to any supplier during the financial year;
- (b) the number of those notifications that were not given within the 30-day period required by that subsection;
- (c) the total number of negotiations entered into during the financial year following requests made under subsection 41(3);
- (d) the number of those negotiations in which the large grocery business did not conclude its position on the negotiations within the period of 30 days starting on the day (the *notification day*) the large grocery business was notified of the relevant proposed price increase by the supplier;
- (e) for each of the negotiations to which paragraph (d) applies, the number of days the large grocery business took to conclude its position on the negotiations starting from the notification day for the relevant proposed price increase.

Civil penalty: 600 penalty units.

## 43 Freedom of association

(1) A large grocery business must not provide an inducement to prevent a supplier from:

- (a) forming an association of suppliers; or
- (b) associating with other suppliers for a lawful purpose.

Civil penalty: 600 penalty units.

(2) A large grocery business must not discriminate, or take any other action, against a supplier for:

- (a) forming an association of suppliers; or
- (b) associating with other suppliers for a lawful purpose.

Civil penalty: 600 penalty units.

## 44 Provision of contact details

(1) A large grocery business must make available to its suppliers, and keep updated:

- (a) contact details of the senior buyer for the supplier; and
  - (b) contact details of at least one other member of the buying team whose role includes buying grocery products from the supplier, or supervising such a person; and
  - (c) contact details of the Code Mediator of the large grocery business.
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Civil penalty: 600 penalty units.

- (2) The contact details must include position titles and contact telephone numbers.

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## Division 5—Dispute resolution

### Subdivision A—Investigations by a Code Mediator

#### 45 Each large grocery business must appoint a Code Mediator

- (1) Each large grocery business must appoint a person to be the Code Mediator in relation to this Code. The appointment must be by written agreement with the person.

Note: The agreement may contain conditions (see subsection 47(4)).

Civil penalty: 600 penalty units.

- (2) Subject to subsection (3), the large grocery business must:
  - (a) not engage the person in any other capacity; and
  - (b) ensure that no related body corporate of the large grocery business engages the person in any other capacity;while the person is the Code Mediator.

Civil penalty: 600 penalty units.

- (3) The person may be engaged in another capacity during a financial year if the large grocery business' market share:
  - (a) is less than 15% in that financial year; or
  - (b) was less than 15% in either of the previous 2 financial years.

#### 46 Notifying details of the Code Mediator's appointment

- (1) The large grocery business must notify the Commission and the Code Supervisor of:
  - (a) the Code Mediator's appointment; and
  - (b) the Code Mediator's contact details for use by suppliers in making any complaints against the large grocery business.

Civil penalty: 600 penalty units.

- (2) The large grocery business must:
  - (a) pay the Code Mediator's costs as agreed with the Code Mediator under the appointment agreement; and
  - (b) ensure the Code Mediator is sufficiently resourced to perform the Code Mediator's functions (which may include providing its own personnel, or personnel of a related body corporate, to support the Code Mediator to perform its functions, and the provision of such personnel will not be taken to contravene subsection 47(5)). **[Or, in the alternative, delete this paragraph (b)]**

Civil penalty: 600 penalty units.

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## 47 Code Mediator's functions

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### *Functions*

- (1) The Code Mediator's functions are as follows:
  - (a) the functions set out in section 48 relating to a procedure for handling complaints against the large grocery business;
  - (b) to assist suppliers of the large grocery business in relation to matters covered by this Code, including by providing information [upon reasonable request](#) about:
    - (i) this Code generally; and
    - (ii) the complaint and dispute resolution processes available under this Division;
  - (c) to investigate complaints against the large grocery business relating to matters covered by this Code (including [such matters in respect of a grocery supply agreement](#));
  - (d) to make recommendations from such investigations, including to propose remedies where appropriate;
  - (e) to facilitate consideration of, and agreement to, such recommendations;
  - (f) to mediate disputes between suppliers, and the large grocery business, relating to matters covered by this Code (including [such matters in respect of a grocery supply agreement](#));
  - (g) to keep records, and to report, about such complaints or disputes.

### *Assisting the Code Mediator to perform its functions*

- (2) The large grocery business must ensure that the Code Mediator has access to:
  - (a) all documentation held by the large grocery business in relation to any complaint or dispute with a supplier relating to the large grocery business' obligations under this Code, [other than documentation in respect of which the large grocery business claims legal professional privilege applies](#); and
  - (b) the large grocery business' buying team for the purposes of discussing issues relating to the large grocery business' obligations under this Code.

Civil penalty: 600 penalty units.

- (3) The large grocery business may authorise the 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 [such obligations relating to a grocery supply agreement](#)).

### *Code Mediator's performance of its functions*

- (4) [No obligations are imposed on the Code Mediator directly under this Code.](#) The large grocery business must:
  - (a) ensure that the agreement appointing the Code Mediator includes a condition requiring the Code Mediator to comply with the Code Mediator's obligations under this Division; and
  - (b) take reasonably appropriate action under that appointment agreement if the Code Mediator breaches such a condition; and



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(c) terminate that agreement if such a breach is serious or if such breaches are persistent.

Civil penalty: 600 penalty units.

(5) The large grocery business must not unduly influence, or attempt to unduly influence, the Code Mediator in the performance of the Code Mediator's functions.

Civil penalty: 600 penalty units.

### 48 Complaints handling procedures

(1) The large grocery business must ensure that the Code Mediator:

- (a) develops a written complaints handling procedure that is consistent with this Code; and
- (b) acts in accordance with the complaints handling procedure.

Civil penalty: 600 penalty units.

(2) The large grocery business must ensure that the Code Mediator:

- (a) provides a copy of the procedure to the large grocery business and the Code Supervisor; and
- (b) reviews the procedure annually and updates it as necessary; and
- (c) if the procedure is updated—provides a copy of the updated procedure to the large grocery business and the Code Supervisor.

Civil penalty: 600 penalty units.

(3) The large grocery business must publish a copy of the procedure on the large grocery business' website.

Civil penalty: 600 penalty units.

(4) The large grocery business must ensure that the copy of the procedure on its website is kept up to date.

Civil penalty: 600 penalty units.

### 49 Referring complaints to the Code Mediator

(1) If:

- (a) a supplier has a complaint against the large grocery business about a matter covered by this Code (including a grocery supply agreement); and
- (b) an ADR practitioner has not been appointed under Subdivision C to conduct an ADR process to resolve a dispute that is the same as the complaint;

the supplier may refer the complaint to the Code Mediator.

(2) The complaint must be in writing and include the following:

- (a) the supplier's identification details, including business or trading name;
- (b) either:
  - (i) contact details for the supplier; or

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- (ii) the name and contact details of a person authorised to deal with the complaint on behalf of the supplier;
- (c) details of the conduct giving rise to the complaint, including any documents or other information that would assist the investigation of the complaint;
- (d) the provisions of this Code that are relevant to the complaint.

### *Confidentiality requirements*

- (3) The Code Mediator must not disclose the supplier's identity to the large grocery business, except with the express consent of the supplier.
- (4) The Code Mediator must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving the complaint.

## 50 Investigations by the Code Mediator—timing

The large grocery business must ensure that the Code Mediator takes all reasonable steps to:

- (a) investigate the complaint; and
- (b) conclude the investigation within:
  - (i) the 20-business day period beginning on the day the Code Mediator is referred the complaint; or
  - (ii) such longer period as is agreed in writing between the supplier and the Code Mediator.

[The 20 business day period referred to in paragraph \(b\)\(i\) is paused while the Code Mediator is waiting to receive any information it has requested from a supplier or large grocery business, including documentation it has requested under paragraph 47\(2\)\(a\).](#)

Civil penalty: 600 penalty units.

## 51 Investigations by the Code Mediator—vexatious complaints etc.

- (1) If, after investigating the complaint, the Code Mediator decides that the complaint is vexatious, trivial, misconceived or lacking in substance, the Code Mediator must give the supplier written notice setting out:
  - (a) a statement to that effect; and
  - (b) the Code Mediator's reasons for making that decision; and
  - (c) that the supplier may take further action in relation to the matter under:
    - (i) Subdivision B (independent review by the Code Supervisor); or
    - (ii) Subdivision C (mediation ~~or arbitration~~).

~~(2) However, the Code Mediator must not decide that a complaint relating to:  
(a) section 20 (unilateral variation of agreement); or  
(b) section 21 (retrospective variation of agreement);  
is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the complaint is detriment to the supplier.~~

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~~(3)~~(2) The Code Mediator must give the large grocery business a copy of the notice. However, the Code Mediator must first redact from the copy any information that would disclose the supplier's identity unless the supplier has expressly consented to their identity being disclosed to the large grocery business.

### 52 Investigations by the Code Mediator—all other complaints

- (1) This section applies to a complaint that is not dealt with under section 51.
- (2) The Code Mediator's investigation of the complaint:
  - (a) must include consideration of the large grocery business' obligation to deal lawfully and in good faith (see section 17); and
  - (b) may include consideration of whether the large grocery business has acted fairly in dealing with the supplier.
- (3) For the purposes of paragraph (2)(b), the Code Mediator may take the following into account:
  - (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;
  - (b) whether the large grocery business has acted in accordance with the legitimate and reasonable expectations of the supplier;
  - (c) whether the large grocery business has had due regard to:
    - (i) the nature of the relationship between the large grocery business and the supplier; and
    - (ii) the individual characteristics of the supplier that were known, or ought to have been known, by the large grocery business.

### 53 Investigations by the Code Mediator—recommendations (including proposed remedies)

- (1) After:
  - (a) investigating a complaint to which section 52 applies; or
  - (b) reconsidering a complaint under subsection 56(2);the Code Mediator may decide to make one or more recommendations for dealing with the complaint if satisfied that it is appropriate to do so having regard to the purpose of this Code.

Note: Under section 56, the Code Supervisor may recommend that the Code Mediator reconsider a complaint.
- (2) Without limiting subsection (1), the Code Mediator may propose a remedy (a **proposed remedy**) involving the large grocery business taking an action such as:
  - (a) paying a specified amount of compensation to the supplier; or
  - (b) varying, subject to section 20 (unilateral variation of agreement), a grocery supply agreement with the supplier.

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- (3) Before recommending ~~a proposed remedy that a large grocery business should vary a grocery supply agreement~~, the Code Mediator may consult with the large grocery business, the supplier, or both.
- (4) Within 5 business days after concluding the investigation, the Code Mediator must give the supplier a written notice setting out:
- (a) whether the Code Mediator has decided to make any recommendations under subsection (1) and, if so, the content of the recommendations (including the details of any proposed remedy); and
  - (b) the Code Mediator's reasons for making that decision; and
  - (c) that the supplier may take further action in relation to the matter under:
    - (i) Subdivision B (independent review by the Code Supervisor); or
    - (ii) Subdivision C (mediation ~~or arbitration~~); and
  - (d) for each proposed remedy (if any)—that the supplier and the large grocery business may agree to the proposed remedy by:
    - (i) each providing a written notice to that effect to the Code Mediator before the end of the acceptance period for the remedy; and
    - (ii) entering into an agreement with each other to that effect.
- (5) The Code Mediator must give the large grocery business a copy of the notice at approximately the same time as it gives the supplier a notice under subsection 53(4). However, the Code Mediator must first redact from the copy any information that would disclose the supplier's identity unless the supplier has expressly consented to their identity being disclosed to the large grocery business.

## 54 Agreeing to a proposed remedy

(1) This section applies if:

(a) the supplier and the large grocery business each notifies the Code Mediator in accordance with subparagraph 53(4)(d)(i) that they agree to a proposed remedy for dealing with a complaint; and

~~(b)~~ the supplier has consented to its identity being disclosed to the large grocery business and the Code Mediator has disclosed the supplier's identity to the large grocery business.

~~(2)~~ (2) The large grocery business must enter into a written agreement with the supplier under which the large grocery business agrees to perform the proposed remedy.

Civil penalty: 600 penalty units.

~~(3)~~ (3) \_\_\_\_\_ The large grocery business must comply with the agreement. Civil penalty: 600 penalty units.

~~(3)~~ The Code Mediator may disclose the supplier's identity to the large grocery business.

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## 55 *Acceptance period for a proposed remedy*

- (1) The *acceptance period*, for a proposed remedy for dealing with a complaint, is:
  - (a) unless paragraph (b) applies—the 20-business day period beginning on the day the supplier is given the notice under subsection 53(4) setting out the details of the proposed remedy; or
  - (b) if the notice under subsection 53(4) setting out the details of the proposed remedy is the result of a reconsideration of the complaint under subsection 56(2)—the 10-business day period beginning on the day the supplier is given that notice.
- (2) However, if paragraph (1)(a) applies and within that period the supplier:
  - (a) requests under Subdivision B the Code Supervisor to independently review the Code Mediator’s process in dealing with the complaint; and
  - (b) notifies the Code Mediator that the supplier has done so;the *acceptance period* for the proposed remedy ends 10 business days after:
  - (c) if on a later day the supplier is notified of the Code Supervisor’s decision not to conduct the independent review (see subsection 62(3))—that later day; or
  - (d) if on a later day the supplier is notified of the completion of the independent review (see subsection 63(6)), and the review did not recommend that the Code Mediator reconsider the complaint—that later day; or
  - (e) if the independent review recommended that the Code Mediator reconsider the complaint—the day the supplier is notified under subsection 53(4) of the outcome of that reconsideration.

## 56 **Reconsideration by the Code Mediator if recommended to do so by the Code Supervisor**

- (1) This section applies if:
  - (a) the supplier requests under Subdivision B the Code Supervisor to independently review the Code Mediator’s process in dealing with the complaint; and
  - (b) the Code Supervisor:
    - (i) conducts the independent review; and
    - (ii) recommends under subsection 63(5) that the Code Mediator reconsider the complaint.
- (2) The Code Mediator must, within 10 business days of the recommendation:
  - (a) reconsider the complaint; and
  - (b) decide under subsection 53(1) whether to make one or more recommendations for dealing with the complaint (including any proposed remedies); and
  - (c) notify the supplier under subsection 53(4), and the large grocery business under subsection 53(5), accordingly.

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## 57 Records to be kept by the Code Mediator

The Code Mediator must keep each of the following for at least 6 years:

- (a) a record of each complaint referred to it under this Subdivision for investigation;
- (b) a record of each of those investigations;
- (c) a copy of each notice given under subsection 51(1) or 53(4) about each such complaint;
- (d) a summary of any actions taken by the large grocery business and the supplier in relation to each such complaint.

## 58 Reports by the Code Mediator

- (1) The Code Mediator must prepare a written report for each financial year.
- (2) The report must include the following:
  - (a) a description of the ways it has assisted suppliers of the large grocery business during the financial year in relation to matters covered by this Code (see paragraph 47(1)(ab));
  - (b) the number of complaints referred to it under this Subdivision during the financial year;
  - (c) in general terms and without identifying a complainant—the nature of each of those complaints;
  - (d) the time taken to investigate each of those complaints;
  - (e) the outcome of each of those investigations;
  - (f) whether or not each of those complaints was resolved to the satisfaction of the relevant supplier;
  - (g) the number of those complaints for which the Code Mediator recommended payment of compensation;
  - (h) any information given to the Code Mediator by the large grocery business under section 42 (information about price increases) during the financial year.
- (3) The Code Mediator must give a copy of the report to each of the following within 30 business days after the end of the financial year:
  - (a) the large grocery business;
  - (b) the Commission;
  - (c) the Code Supervisor.
- (4) Within 1 business day of being given a copy of the report, the large grocery business must publish a copy of the report on the large grocery business' website.

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## Subdivision B—Independent reviews by the Code Supervisor

### 59 Code Supervisor

- (1) There is to be a Code Supervisor.
- (2) The Code Supervisor is to be appointed by the Minister by written instrument.
- (3) A person must not be appointed as the Code Supervisor unless the Minister is satisfied that the person:
  - (a) has appropriate qualifications, knowledge or experience in procedural fairness; and
  - (b) has experience working in Australian industry.

### 60 Code Supervisor's functions

- (1) The functions of the Code Supervisor are as follows:
  - (a) to consider requests to review Code Mediators' processes (including complaints handling procedures) in dealing with complaints;
  - (b) to identify emerging and systemic issues in the grocery supply chain relating to the operation of this Code;
  - (c) to conduct annual surveys of suppliers and large grocery businesses relating to the operation of this Code;
  - (d) to report on the matters in the above paragraphs.
- (2) In performing functions under paragraph (1)(b) the Code Supervisor must act collaboratively with the Commission and with stakeholders in the grocery supply chain, including the following:
  - (a) suppliers;
  - (b) large grocery businesses;
  - (c) Code Mediators;
  - (d) relevant industry representative bodies.

### 61 Supplier may request an independent review of Code Mediator's process

- (1) A supplier may request the Code Supervisor to independently review a Code Mediator's process (including its complaints handling procedure) for dealing with a complaint (the *original complaint*):
  - (a) made by the supplier against a large grocery business; and
  - (b) for which the supplier has received a notice from the Code Mediator under subsection 51(1) or 53(4).
- (2) The request (the *review request*) must be in writing and include the following:
  - (a) the supplier's identification details, including business or trading name;
  - (b) either:
    - (i) contact details for the supplier; or
    - (ii) the name and contact details of a person authorised to deal with the review request on behalf of the supplier;
  - (c) details of the process giving rise to the review request, including any documents or other information that would assist the Code Supervisor to

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review the Code Mediator's process.

### *Confidentiality requirements*

- (3) The Code Supervisor must not disclose the supplier's identity to the large grocery business, except with the express consent of the supplier.
- (4) The Code Supervisor must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving the review request.

## **62 Code Supervisor's discretion to conduct an independent review**

- (1) The Code Supervisor must consider the review request and decide within 10 business days of receiving the review request:
  - (a) to conduct an independent review of the Code Mediator's process (including its complaints handling procedure) for dealing with the original complaint; or
  - (b) not to conduct such a review.

### *Deciding not to conduct an independent review*

- (2) Without limiting the Code Supervisor's discretion under subsection (1), circumstances in which the Code Supervisor might decide not to conduct such an independent review include the following:
  - (a) if the supplier agreed to a proposed remedy for dealing with the original complaint;
  - (b) if the Code Supervisor is satisfied that the review request is vexatious, trivial, misconceived or lacking in substance;
  - (c) if the Code Supervisor considers that the review request does not relate to the Code Mediator's process for dealing with the original complaint.
- (3) If the Code Supervisor decides not to conduct the independent review, the Code Supervisor must notify the supplier and the Code Mediator. The notice must:
  - (a) be in writing; and
  - (b) set out the Code Supervisor's reasons for deciding not to conduct the independent review.

## **63 The independent review**

- (1) If the Code Supervisor decides under subsection 62(1) to conduct the independent review, the Code Supervisor must:
  - (a) give the supplier and the Code Mediator a written notice of the decision; and
  - (b) give the large grocery business a written notice of the decision that has redacted any information that would disclose the supplier's identity, unless the supplier has expressly consented to their identity being disclosed to the large grocery business; and
  - (c) take reasonable steps to consider the review request, and complete the independent review, within the 20-business day period starting on the day that notice is given to the supplier.



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Note: This period may be paused while the Code Supervisor is waiting for information (see subsection (4)).

*Code Supervisor may request further information*

- (2) Without limiting paragraph (1)(c), the steps the Code Supervisor may take include requesting information relating to the original complaint from one or more of the following:
  - (a) the Code Mediator;
  - (b) the supplier;
  - (c) the large grocery business.
- (3) A large grocery business or Code Mediator who receives a reasonable request from the Code Supervisor to provide information relating to the original complaint must comply with the request within 10 business days of receiving it.

Civil penalty: 600 penalty units.

- (4) The 20 business day period referred to in paragraph (1)(c) is paused while the Code Supervisor is waiting to receive any information it has requested under subsection (2).

*Recommendations arising from the independent review*

- (5) After considering the review request, the Code Supervisor may make one or more recommendations to the Code Mediator. Unless the supplier has accepted a proposed remedy for dealing with the original complaint, this includes a recommendation that the Code Mediator reconsider the original complaint. [To avoid doubt, the function of the Code Supervisor is to review the Code Mediator's process in dealing with complaints only, and not to conduct a review of the Code Mediator's decision or any recommended remedy on the merits or to propose or recommend any other remedy.](#)
- (6) Within 5 business days of completing the independent review, the Code Supervisor must give the supplier and the Code Mediator a written notice:
  - (a) stating that the independent review is complete; and
  - (b) setting out any recommendations made under subsection (5); and
  - (c) setting out the Code Supervisor's reasons for making those recommendations.
- (7) The Code Supervisor must give the large grocery business a copy of the notice. However, the Code Supervisor must first redact from the copy any information that would disclose the supplier's identity unless the supplier has expressly consented to their identity being disclosed to the large grocery business.
- (8) If the Code Supervisor becomes aware, in connection with the review request, that a breach of this Code may have occurred, the Code Supervisor must give:
  - (a) particulars of the breach to the Commission; and
  - (b) a copy of the particulars to the large grocery business.

## 64 Reports by the Code Supervisor

- (1) The Code Supervisor must prepare a written report in respect of each financial
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- year that includes information on the following:
- (a) the number of review requests during the financial year;
  - (b) the number of independent reviews under section 63 during the financial year;
  - (c) the number of recommendations under subsection 63(5) for each of those independent reviews;
  - (d) any emerging and systemic issues identified in the grocery supply chain relating to the operation of this Code;
  - (e) the results of the survey conducted under section 65 for the financial year;
  - (f) the number of ADR processes under Subdivision C for which an ADR practitioner was appointed during the financial year;
  - (g) the number of ADR processes that were terminated under section 70 during the financial year;
  - (h) the Code Supervisor's other activities during the financial year.
- (2) The report must be prepared by the first 30 November after the end of the financial year.
- (3) The Code Supervisor must:
- (a) give a copy of the report to the Commission; and
  - (b) publish the report on the Code Supervisor's website.
- (4) The Code Supervisor must not publish information that the Code Supervisor is satisfied is confidential commercial information. The Code Supervisor may consult with the large grocery business or supplier concerned for the purpose of determining whether information is of that character.
- (5) The report must not identify, or be reasonably capable of being used to identify, a supplier.

## 65 Annual survey

- (1) Each financial year, the Code Supervisor must conduct a survey of suppliers and large grocery businesses for the purpose of:
- (a) identifying if any suppliers fear retribution from large grocery businesses; and
  - (b) identifying suppliers' experiences with agreeing to grocery supply agreements containing allowable contrary provisions of a kind mentioned in section 20, 22, 24, 25, 26, 27 or 28; and
  - (c) identifying emerging and systemic issues in the grocery supply chain relating to the operation of this Code; and
  - (d) any other matter identified by the Code Supervisor that relates to the operation of this Code.
- (2) Each large grocery business must:
- (a) distribute the survey to their suppliers; and
  - (b) inform each supplier that:
    - (i) their response to the survey will not be given to the large grocery business; and
    - (ii) [the Code Supervisor must, under this Code, ensure that the results of](#)

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the survey will not be reasonably capable of being used to identify them.

Civil penalty: 600 penalty units.

- (3) The Code Supervisor must publish the results of the survey on the Code Supervisor's website. This may be done as part of the report required by section 64.

### *Confidentiality requirements*

- (4) The Code Supervisor must:
- (a) not disclose to a large grocery business the identity of a supplier who responds to the survey; and
  - (b) ensure that the results of the survey:
    - (i) do not identify a supplier; and
    - (ii) are not reasonably capable of being used to identify a supplier.

## Subdivision C—ADR processes

### 66 Appointing an ADR practitioner to conduct an ADR process

- (1) This section applies if a party to a grocery supply agreement notifies the other party in writing that the first-mentioned party wishes to have a dispute relating to this Code (~~including the agreement~~) resolved by an ADR process under this Subdivision.

#### *Appointment of ADR practitioner*

- (2) The parties may, in writing, agree to appoint an ADR practitioner from a list kept by the Australian Small Business and Family Enterprise Ombudsman under section 16. The parties must ensure the Code Supervisor is notified of the appointment.
- (3) However, if:
- (a) the parties cannot so agree within 14 days after the day the notice was given under subsection (1); and
  - (b) subsection (4) does not apply;

the supplier may appoint an ADR practitioner from that list. The supplier must notify the large grocery business, and the Code Supervisor, of the appointment.

Note: The ADR process need not commence if subsection (4) applies.

- (4) This subsection applies if:
- (a) taking part in the ADR process would mean taking part in 2 ADR processes at the same time in relation to substantially the same dispute; or
  - (b) a process brought by the supplier:
    - (i) under Subdivision A (about the Code Mediator) or B (about the Code Supervisor); and
    - (ii) in relation to a complaint that is the same as the dispute; is still ongoing and a reasonable period for completing that process is still
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to end.

### 67 Conduct of an ADR process

- (1) Subject to subsection (2), an ADR practitioner appointed for a dispute may decide the time and place for the ADR process for the dispute.
- (2) The ADR process must be conducted in Australia and may be conducted by means of virtual attendance technology.

#### *Attendance at ADR process*

- (3) Each party to the dispute must attend the ADR process.

Note: For when a party is taken to attend an ADR process, see section 68.

Civil penalty: 600 penalty units.

- (4) The parties must try to resolve the dispute.

Note: For when a party is taken to be trying to resolve a dispute, see section 69.

Civil penalty: 600 penalty units.

#### *~~Whether the dispute is vexatious, trivial, misconceived or lacking in substance~~*

- ~~(5) The ADR practitioner must not decide that a dispute relating to:
  - ~~(a) section 20 (unilateral variation of agreement); or~~
  - ~~(b) section 21 (retrospective variation of agreement);~~is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the dispute is detriment to the supplier.~~

### 68 When a party is taken to attend an ADR process

A party to a dispute is taken to attend an ADR process for the dispute if the party is represented in the ADR process by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

### 69 When a party is taken to be trying to resolve a dispute

- (1) A party will be taken to be trying to resolve a dispute if the party approaches the resolution of the dispute in a reconciliatory manner, including doing any of the following:
  - (a) attending and participating in meetings at reasonable times;
  - (b) both:
    - (i) making the party's intention clear, at the beginning of the process, as to what the party is trying to achieve through the process; and
    - (ii) observing any obligations relating to confidentiality that apply during or after the process.
  - (c) not taking or refusing to take action during the period of the dispute, including refusing to accept goods or to make payments, that has the purpose or effect of applying pressure to resolve the dispute.

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- (2) To avoid doubt, a party may cease acting as required under subsection (1) if the ADR practitioner appointed for the dispute finds that:
- (a) the dispute is vexatious, trivial, misconceived or lacking in substance; or
  - (b) the other party to the dispute is not acting in good faith; or
  - (c) under subsection 54(2), the large grocery business has entered into a written agreement with the supplier under which the large grocery business agrees to perform one or more proposed remedies for dealing with a complaint that is the same as the dispute.

### 70 Termination of an ADR process by an ADR practitioner

- (1) This section applies to an ADR process for a dispute if:
- (a) at least 30 days have elapsed after the day the ADR process began; and
  - (b) the dispute has not been resolved.
- (2) The ADR practitioner for the ADR process may terminate the ADR process at any time unless satisfied that a resolution of the dispute is imminent.
- (3) However, if a party asks the ADR practitioner to terminate the ADR process for the dispute and gives written reasons for the request, the ADR practitioner must terminate the ADR process to the extent that it relates to that party's dispute.
- (4) If the ADR practitioner terminates the ADR process for a dispute under this section, the ADR practitioner must issue a certificate stating:
- (a) the names of the parties; and
  - (b) the nature of the dispute; and
  - (c) that the ADR process for the dispute has finished; and
  - (d) that the dispute has not been resolved [under this Subdivision C](#); and
  - (e) the reason for terminating the ADR process for the dispute.
- (5) The ADR practitioner must give a copy of the certificate to:
- (a) the Australian Small Business and Family Enterprise Ombudsman; and
  - (b) each of the parties to the dispute; and
  - (c) the Code Supervisor.

### 71 Costs of an ADR process

- (1) The parties to a dispute are equally liable for the costs of an ADR process under this Subdivision for the dispute (including the cost of the ADR practitioner, the cost of room hire and the cost of any additional input (including expert reports) agreed by the parties to be necessary to conduct the ADR process), unless they agree otherwise.

Note: If a single ADR process is conducted under this Subdivision for multiple disputes, this section applies separately to each of the disputes, and the costs of the ADR process for each dispute will be the part of the overall cost of the ADR process that is attributable to that dispute.

- (2) The parties must pay for their own costs of attending the ADR process.

# EXPOSURE DRAFT

Food and grocery industry code **Part 2**

Compliance **Division 6**

Section 72

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## Division 6—Compliance

### 72 Duty to train staff with respect to this Code

- (1) A large grocery business must, within 6 months of becoming a large grocery business, provide its buying team with:
  - (a) a copy of this Code; and
  - (b) training on the requirements of this Code.

Civil penalty: 600 penalty units.

- (2) The large grocery business must provide any person who becomes part of its buying team after becoming such a business with:
  - (a) a copy of this Code; and
  - (b) training on the requirements of this Code;within 20 days after the person becomes part of the buying team.

Civil penalty: 600 penalty units.

- (3) The large grocery business must provide annual retraining to its buying team on the requirements of this Code.

Civil penalty: 600 penalty units.

- (4) The large grocery business must keep a written record of training provided under this section.

### 73 Keeping records

- (1) A retailer or wholesaler must keep the original or a copy of each grocery supply agreement (including any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement) to which the retailer or wholesaler becomes a party while the retailer or wholesaler is a large grocery business:
  - (a) during the term of the agreement; and
  - (b) for 6 years after the agreement ends.

Civil penalty: 600 penalty units.

- (2) A retailer or wholesaler must keep the original or a copy of each of the following documents for at least 6 years from when the document is made or given (the **relevant time**), if the retailer or wholesaler was a large grocery business at the relevant time:
  - (a) any additional or different quantity and quality requirements agreed under subsection 19(2);
  - (b) notice of variation of a grocery supply agreement given under paragraph 20(2)(e);
  - (c) written consent from a supplier to the set-off of an amount against the supplier's invoice or remittance under paragraph 22(2)(a);
  - (d) notice of a decision to delist a product given under subsection 32(6);

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- (e) a request of a kind mentioned in subsection 32(6A8), and any statement or information given as a result of such a request;
- (f) notice of the outcome of the review of a decision to delist a product given under subsection 32(9);
- (g) reasons for rejection of fresh produce given under subsection 34(5);
- (h) notice of required changes to packaging, labelling or preparation standards given under subsection 34(7);
- (i) notice of a material change to supply chain procedures given under paragraph 35(2)(a);
- (j) a written summary of systems relating to confidential information created under subsection 38(3);
- (k) product ranging principles or shelf space allocation principles published or provided to a supplier under subsection 39(1);
- (l) notice of a range review given under subsection 39(3);
- (m) a proposed price increase notified by a supplier under subsection 41(1);
- (n) a notification given under subsection 41(2);
- (o) a request to enter into negotiations about a price increase made in writing by a supplier under subsection 41(3);
- (p) a notice that a complaint is vexatious, trivial, misconceived or lacking in substance given under subsection 51(1);
- (q) a copy of a Code Mediator's report given to the large grocery business under section 36D;
- (r) a written record of training provided under section 72;
- ~~(s) any other document provided to a large grocery business by a supplier that shows, or purports to show, that the large grocery business has complied with a provision of this Code.~~

Civil penalty: 600 penalty units.

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## Part 3—Application, saving and transitional provisions

### 74 Application—allowable contrary provisions

- (1) Subsection 19(4) applies in relation to grocery supply agreements entered into on or after 1 April 2025.
- (2) The following provisions of this instrument:
  - (a) subsection 20(2) (unilateral variations);
  - (b) subsection 22(3) (set-offs);
  - (c) subsection 24(2) (payments to cover wastage);
  - (d) subsection 25(3) or (4) (payments for stocking or listing);
  - (e) subsection 26(2) (payments for better positioning etc.);
  - (f) subsection 27(3) (payments for ordinary business activities);
  - (g) subsection 28(2) (payments for funding promotions);

apply on and after 1 April 2025 in relation to a grocery supply agreement entered into:

(h) before that day; or

(i) by the acceptance of an order on and after that day, which incorporates by reference terms of a grocery supply agreement entered into before that day.

as if each reference in those provisions to an allowable contrary provision of the agreement were a reference to a provision of the agreement.



# EXPOSURE DRAFT

**Schedule 1** Consequential amendments

**Part 1** Repeal of old Food and Grocery Code of Conduct

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## **Schedule 1—Consequential amendments**

### **Part 1—Repeal of old Food and Grocery Code of Conduct**

#### *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*

##### **1 The whole of the regulation**

Repeal the regulation.

# EXPOSURE DRAFT

Consequential amendments **Schedule 1**  
Consequential amendments relating to the Treasury Laws Amendment (Fairer for Families and  
Farmers) Act 2024 **Part 2**

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## **Part 2—Consequential amendments relating to the Treasury Laws Amendment (Fairer for Families and Farmers) Act 2024**

### *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024*

#### **2 After section 15**

Insert:

#### **15A Amount of civil penalty for certain contraventions by bodies corporate**

- (1) This section has effect for the purposes of the following civil penalty provisions of this Code:
  - (a) subsection 17(1);
  - (b) section 18;
  - (c) subsection 19(1);
  - (d) subsection 29(1);
  - (e) section 30;
  - (f) section 31;
  - (g) subsections 43(1) and (2);
  - (h) subsections 72(1), (2) and (3);
  - (i) subsections 73(1) and (2).
- (2) The amount of the pecuniary penalty for a contravention of a civil penalty provision referred to in subsection (1) by a body corporate is the greatest of the following:
  - (a) \$10,000,000;
  - (b) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, has obtained directly or indirectly and that is reasonably attributable to the contravention—3 times the value of that benefit;
  - (c) if the Court cannot determine the value of that benefit—10% of the adjusted turnover of the body corporate during the period of 12 months ending at the end of the month in which the contravention occurred.

#### **3 Subsection 17(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

#### **4 Subsection 17(2) (penalty)**

Repeal the penalty, substitute:

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Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **5 Section 18 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

#### **6 Subsection 19(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

#### **7 Subsection 19(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **8 Subsection 19(4) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **9 Subsection 19(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **10 Subsection 19(7) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

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- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **11 Subsection 20(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **12 Section 21 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **13 Subsection 22(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **14 Subsection 22(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **15 Subsection 23(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **16 Subsection 24(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

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- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **17 Subsection 24(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **18 Subsection 25(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **19 Subsection 26(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **20 Subsection 27(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **21 Subsection 28(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **22 Subsection 29(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

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- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **23 Section 30 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **24 Section 31 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **25 Subsection 32(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **26 Subsection 32(6) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **27 Subsection 32(8) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **28 Subsection 32(9) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or

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- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **29 Subsection 33(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **30 Subsection 33(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **31 Subsection 33(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **32 Subsection 34(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **33 Subsection 34(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **34 Subsection 34(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or

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- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **35 Subsection 34(6) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **36 Subsection 34(7) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **37 Subsection 34(8) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **38 Subsection 35(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **39 Section 36 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **40 Subsection 37(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or



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- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **41 Subsection 37(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **42 Subsection 38(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **43 Subsection 38(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **44 Subsection 39(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **45 Subsection 39(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **46 Subsection 39(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or

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- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **47 Subsection 39(4) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **48 Subsection 39(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **49 Subsection 40(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **50 Subsection 41(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **51 Subsection 41(4) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **52 Subsection 41(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or

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- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **53 Section 42 (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **54 Subsection 43(1) (penalty)**

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

#### **55 Subsection 43(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

#### **56 Subsection 44(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **57 Subsection 45(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### **58 Subsection 45(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

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## **59 Subsection 46(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **60 Subsection 46(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **61 Subsection 47(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **62 Subsection 47(4) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **63 Subsection 47(5) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **64 Subsection 48(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

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#### 65 Subsection 48(2) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### 66 Subsection 48(3) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### 67 Subsection 48(4) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### 68 Section 50 (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### 69 Subsection 54(2) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

#### 70 Subsection 54(3) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

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## **71 Subsection 63(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **72 Subsection 65(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **73 Subsection 67(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **74 Subsection 67(4) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—3,200 penalty units; or
- (b) for a contravention by a person who is not a body corporate—640 penalty units.

## **75 Subsection 72(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **76 Subsection 72(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

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## **77 Subsection 72(3) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **78 Subsection 73(1) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.

## **79 Subsection 73(2) (penalty)**

Repeal the penalty, substitute:

Civil penalty:

- (a) for a contravention by a body corporate—the amount under section 15A; or
- (b) for a contravention by a person who is not a body corporate—\$500,000.