



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

Select Legislative Instrument No. 16, 2015

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation.

Dated 26 February 2015

Peter Cosgrove
Governor-General

By His Excellency's Command

Bruce Billson
Minister for Small Business

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1 Name

This is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*.

2 Commencement

This instrument commences on the day after it is registered.

3 Authority

This instrument is made under section 51AE of the *Competition and Consumer Act 2010*.

4 Code of conduct

For section 51AE of the *Competition and Consumer Act 2010*, the code set out in Schedule 1:

- (a) is prescribed; and
- (b) is a voluntary industry code.

Note: Only grocery retailers and wholesalers can be bound by the code. For how a retailer or wholesaler agrees to be bound by the code, and ceases to be so bound, see clause 4 of the code.

5 Review of Code

- (1) The Minister administering section 51AE of the *Competition and Consumer Act 2010* must cause a review to be undertaken of the operation of the Food and Grocery Code of Conduct (the *code*).
- (2) The review must start before the end of the period of 3 years after the commencement of this section.
- (3) The review must assess the impact of the code in improving commercial relations between grocery retailers, wholesalers and suppliers.
- (4) The review must address the following:

Section 5

- (a) the extent to which retailers and wholesalers have become bound by the code;
- (b) levels of compliance with the code by retailers and wholesalers bound by the code;
- (c) whether the purposes of the code (see clause 2 of the code) are being met;
- (d) the extent to which the code assists in addressing any imbalances in the allocation of risks between retailers, wholesalers and suppliers;
- (e) whether there are any further measures that would improve the operation of the code with respect to the matters mentioned in paragraphs (c) and (d);
- (f) the interactions between the code and the Horticulture Code of Conduct;
- (g) how the code compares with overseas regulation of commercial relations between retailers, wholesalers and suppliers;
- (h) whether the code should be mandatory or voluntary;
- (i) whether the code should include civil penalty provisions;
- (j) whether retailers, wholesalers and suppliers should be bound by the code, and if so, to what extent;
- (k) whether the code should be repealed or amended and, if so, the timing of any such repeal or amendment;
- (l) the products that should be covered by the code.

Schedule 1—Food and Grocery Code of Conduct

Note: See section 4.

Part 1—Preliminary

1 Name

This is the *Food and Grocery Code of Conduct*.

2 Purpose of code

The purpose of this code is:

- (a) to help to regulate standards of business conduct in the grocery supply chain and to build and 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 retailers or wholesalers and suppliers; and
- (d) to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

3 Definitions

In this code:

Act means the *Competition and Consumer Act 2010*.

buying team means the employees of a retailer or wholesaler whose role includes at least one of the following:

- (a) direct involvement in buying grocery products;

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- (b) immediate management responsibility for an employee covered by paragraph (a).

code compliance manager means a person nominated under subclause 32(1).

delist means to remove a grocery product from a retailer's range of grocery products.

groceries includes the following:

- (a) food including fresh produce, meat and dairy items (other than dairy items sold for in-store consumption);
- (b) pet food;
- (c) non-alcoholic drinks (other than drinks sold for in-store consumption);
- (d) cleaning products;
- (e) toiletries, perfumes and cosmetics;
- (f) household goods, electrical appliances and kitchenware;
- (g) clothing;
- (h) "do-it-yourself" products;
- (i) pharmaceuticals;
- (j) books, newspapers, magazines and greeting cards;
- (k) CDs, DVDs, videos and audio tapes;
- (l) toys;
- (m) plants, flowers and gardening equipment;
- (n) tobacco and tobacco products.

grocery supply agreement means any agreement between a retailer or wholesaler and a supplier for the supply of groceries to or for the purposes of a supermarket business and includes any document:

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

own brand product means a grocery product:

- (a) produced, processed or manufactured by a retailer; or
- (b) produced, processed or manufactured for a retailer (including by a supplier); or

- (c) that carries a name or trade mark owned by, or licensed to, a retailer.

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 retailer and a supplier; and
- (c) that is intended to last only for a specified period.

retailer means a corporation:

- (a) to the extent that it carries on a supermarket business in Australia for the retail supply of groceries; and
- (b) to the extent that it carries on 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.

senior buyer, in relation to a supplier, means the employee within a retailer or wholesaler's buying team who manages the buyers who buy from the supplier.

shrinkage means a loss of grocery products that:

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

supermarket business means a business under which a person sells to consumers bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and other packaged food or most of those groceries.

supplier means a person carrying on (or actively seeking to carry on) a business of supplying groceries for retail sale by another person.

wastage means groceries that are unfit for sale.

wholesaler means a corporation to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of

Clause 4

resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

4 When this code applies

- (1) This code binds a corporation as a retailer if the corporation has agreed, by written notice given to the Commission, to be bound by this code as a retailer.
- (2) This code binds a corporation as a wholesaler if the corporation has agreed, by written notice given to the Commission, to be bound by this code as a wholesaler.

Note 1: Part 3 of this code does not apply to a corporation that is bound by this code as a wholesaler: see clause 11.

Note 2: Clauses 5 and 6 provide transitional arrangements in relation to grocery supply agreements entered into by retailers and wholesalers before being bound by this code.

- (3) The corporation ceases to be bound by this code if the corporation, by written notice given to the Commission, withdraws the agreement.
- (4) This code does not apply to the extent that it conflicts with:
 - (a) the Horticulture Code of Conduct; or
 - (b) the Franchising Code of Conduct.
- (5) To avoid doubt, withdrawing agreement to be bound by this code does not remove any obligation under this code that relates to conduct that occurred when the corporation was so bound.

5 Transitional application—retailers

- (1) This clause applies if a retailer is a party to a grocery supply agreement entered into before the retailer was bound by this code.
- (2) Within 6 months after being bound by this code, the retailer must offer in writing to vary the agreement so that it conforms with the requirements of this code in relation to making grocery supply agreements.

- (3) If the supplier concerned accepts the offer, the retailer must so vary the agreement within 6 months after the offer is accepted.
- (4) Parts 2, 3, 5 and 6 of this code do not apply in relation to the supply of groceries under the agreement until one of the following occurs:
 - (a) the agreement is varied under subclause (3);
 - (b) the period of 12 months that begins when the retailer is bound by the code ends.

6 Transitional application—wholesalers

- (1) This clause applies if a wholesaler is a party to a grocery supply agreement entered into before the wholesaler was bound by this code.
- (2) Within 18 months after being bound by this code, the wholesaler must offer in writing to vary the agreement so that it conforms with the requirements of this code in relation to making grocery supply agreements.
- (3) If the supplier concerned accepts the offer, the wholesaler must so vary the agreement within 6 months after the offer is accepted.
- (4) Parts 2, 5 and 6 of this code do not apply in relation to the supply of groceries under the agreement until one of the following occurs:
 - (a) the agreement is varied under subclause (3);
 - (b) the period of 24 months that begins when the wholesaler is bound by the code ends.

Part 2—Grocery supply agreements

7 Grocery supply agreement must be in writing and retained

The retailer or wholesaler must not enter into a grocery supply agreement unless it is in writing.

Note: The retailer or wholesaler must keep the original or a copy of each grocery supply agreement to which the retailer or wholesaler is a party while bound by this code (including any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement):

- (a) during the term of the agreement; and
- (b) for 6 years after the agreement ends.

See subclause 42(1).

8 Matters to be covered by agreement

The retailer or wholesaler must not enter into a grocery supply agreement unless the agreement specifies the following:

- (a) any requirements the retailer or wholesaler has in respect of the delivery of the groceries;
- (b) any circumstances in which the retailer or wholesaler may reject the groceries;
- (c) the period within which the retailer or wholesaler must pay the supplier for the groceries 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 groceries;
- (f) if the agreement provides for termination by one or more parties to it—the circumstances in which it may be terminated.

9 Unilateral variation of agreement

- (1) The retailer or wholesaler must not vary a grocery supply agreement without the consent of the supplier concerned.
- (2) Subclause (1) does not apply if:
 - (a) the agreement:
 - (i) provides expressly for the retailer or wholesaler 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) the variation is made in accordance with the agreement; and
 - (c) the variation is reasonable in the circumstances; and
 - (d) the supplier is given reasonable notice, in writing, of:
 - (i) the variation; and
 - (ii) the terms of the variation; and
 - (iii) the retailer or wholesaler's reasons for making the variation.
- (3) 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 retailer or wholesaler.
- (4) Subclause (3) does not limit paragraph (2)(c).
- (5) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (2).
- (6) In any dispute in relation to a contravention of subclause (1), a person alleging detriment to a supplier in relation to paragraph (2)(c) has the onus of establishing that detriment.

10 Retrospective variation of agreement

- (1) The retailer or wholesaler must not vary a grocery supply agreement with retrospective effect.
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Clause 10

- (2) Subclause (1) does not apply if:
 - (a) the agreement:
 - (i) provides expressly for the retailer or wholesaler to make the variation; and
 - (ii) sets out clearly the changed circumstances, which must be circumstances beyond the control of the retailer or wholesaler, 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) the variation is made in accordance with the agreement; and
 - (c) the variation is reasonable in the circumstances; and
 - (d) the supplier is given reasonable notice, in writing, of:
 - (i) the variation; and
 - (ii) the terms of the variation; and
 - (iii) the retailer or wholesaler's reasons for making the variation.
- (3) 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 retailer or wholesaler.
- (4) Subclause (3) does not limit paragraph (2)(c).
- (5) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (2).
- (6) In any dispute in relation to a contravention of subclause (1), a person alleging detriment to a supplier in relation to paragraph (2)(c) has the onus of establishing that detriment.

Part 3—Conduct generally

Division 1—Application of this Part

11 Application of this Part

This Part does not apply to a corporation that is bound by this code as a wholesaler.

Division 2—Paying suppliers

12 Payments to suppliers

- (1) The retailer 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.
- (2) The retailer 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.
- (3) Subclause (2) does not apply if:
 - (a) the grocery supply agreement provides for the amount to be set off; and
 - (b) the set-off is reasonable in the circumstances.
- (4) In any dispute, the retailer has the onus of establishing the matters in subclause (3).

Division 3—Requiring payments from suppliers

13 Payments for shrinkage

- (1) The retailer must not:
 - (a) enter into a grocery supply agreement under which a supplier is required to make payments as compensation for shrinkage; or
 - (b) otherwise require such payments.
- (2) Subclause (1) does not prevent the retailer from raising, discussing or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.

14 Payments for wastage

- (1) The retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred at premises of the retailer or its contractors or agents or another retailer.
- (2) Subclause (1) does not apply if:
 - (a) the relevant grocery supply agreement sets out expressly and unambiguously the circumstances, which could include negligence, in which the supplier will be required to make payments to cover wastage of the supplier's groceries incurred at premises of the retailer or its contractor or agents; and
 - (b) the wastage occurs in such circumstances; and
 - (c) the basis of the payment is set out in the grocery supply agreement; and
 - (d) the payment is reasonable having regard to the retailer's costs incurred by the wastage; and
 - (e) the retailer takes reasonable steps to mitigate those costs.
- (3) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

15 Payments as a condition of being a supplier

- (1) The retailer must not require a supplier to make any payment as a condition of stocking or listing grocery products.
- (2) Subclause (1) does not apply if:
 - (a) the payment is made in relation to a promotion; or
 - (b) the payment:
 - (i) is required under the relevant grocery supply agreement; and
 - (ii) is made in respect of groceries 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 having regard to the costs and risks to the retailer in stocking, displaying or listing the grocery products.
- (3) Paragraph (2)(a) has effect subject to clause 18 (funding promotions).
- (4) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

16 Payments for better positioning of groceries

- (1) The retailer must not require a supplier to make any payment to secure either of the following for a grocery product:
 - (a) better positioning;
 - (b) an increase in allocation of shelf space.
- (2) Subclause (1) does not apply if:
 - (a) the payment is required under the relevant grocery supply agreement; and
 - (b) the agreement sets out the particular circumstances in which the payment may be required; and
 - (c) the payment is reasonable having regard to either or both of the following:
 - (i) the additional benefits (if any) to the supplier;

- (ii) the costs and risks to the retailer of allocating additional or different shelf space.

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) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

17 Payments for retailer's activities

- (1) The retailer must not directly or indirectly require a supplier to make any payment towards the costs of any of the following (the *retailer's activities*):
 - (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 retailer's staff.
- (2) Subclause (1) does not apply if:
 - (a) the relevant grocery supply agreement provides for the payment; and
 - (b) the payment is reasonable in the circumstances.
- (3) In determining whether the payment is reasonable in the circumstances, regard must be had to the following:
 - (a) the likely benefits to the supplier from the retailer's activities;
 - (b) the likely benefits to the retailer from the retailer's activities;
 - (c) the costs borne, or contributions made, by the retailer for the retailer's activities.
- (4) Subclause (3) does not limit paragraph (2)(b).
- (5) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

18 Funding promotions

- (1) The retailer must not directly or indirectly require a supplier to fund part or all of the costs of a promotion.
- (2) Subclause (1) does not apply if:
 - (a) the relevant grocery supply agreement provides for the funding; and
 - (b) the funding is reasonable in the circumstances.
- (3) In determining whether the funding is reasonable in the circumstances, regard must be had to the following:
 - (a) the likely benefits to the supplier from the promotion;
 - (b) the likely benefits to the retailer from the promotion;
 - (c) the costs borne, or contributions made, by the retailer for the promotion.
- (4) Subclause (3) does not limit paragraph (2)(b).
- (5) In any dispute, the retailer has the onus of establishing the matters in subclause (2).

Division 4—Other conduct

19 Delisting products

- (1) The retailer may only delist a supplier's grocery product:
 - (a) in accordance with the terms of the relevant grocery supply agreement; and
 - (b) for genuine commercial reasons.
- (2) For the purpose of subclause (1), 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 retailer's commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement;
 - (c) persistent failure to meet the retailer's delivery requirements as notified to the supplier from time to time in accordance with the grocery supply agreement.
- (3) Subclause (2) does not limit subclause (1).
- (4) To avoid doubt, delisting as a punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason.
- (5) Prior to delisting a supplier's grocery product, the retailer must:
 - (a) provide reasonable written notice to the supplier of the retailer's decision to delist the product, including the reasons for delisting; and
 - (b) inform the supplier of the supplier's right to have the decision to delist the product reviewed by the retailer's senior buyer for the supplier.
- (6) Subclause (5) does not apply if:
 - (a) time is of the essence (including for product recalls, withdrawals or safety issues); or

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Part 3 Conduct generally

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- (b) there are persistent issues with supply that have resulted in the retailer being out of stock or stocked at significantly reduced levels.
- (7) The retailer's senior buyer for a supplier must, after receiving a written request from the supplier, promptly review any decisions regarding delisting made by the retailer and provide the supplier with written notice of the outcome of that review including the basis for the retailer's decision.
- (8) To avoid doubt, a decision by the retailer not to extend the agreement, or enter into a new grocery supply agreement, following the expiry of a fixed term grocery supply agreement is not a decision to delist a product.
- (9) In any dispute, the retailer has the onus of establishing the matters in subclauses (1) and (6).

20 Funded promotions

- (1) If a supplier agrees to make a payment in support of the promotion of a product, the retailer may hold the promotion only after giving the supplier reasonable written notice.
- (2) If the retailer orders a grocery product from a supplier at a promotional price (whether calculated by way of discount, rebate, credit, allowance or otherwise), the retailer 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 retailer 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.
- (3) If the retailer has placed an order for a grocery product with a supplier in connection with a promotion, the retailer must not do either of the following without the supplier's written consent:
 - (a) cancel the order;
 - (b) reduce the order by more than 10%.

- (4) Subclause (3) does not apply if:
 - (a) the retailer gives the supplier reasonable written notice of the cancellation or reduction; or
 - (b) the retailer compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

21 Fresh produce standards and quality specifications

- (1) The retailer must provide any fresh produce standards or quality specifications to a supplier in clear, unambiguous and concise written terms.
- (2) The retailer must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications.
- (3) The retailer may reject fresh produce only if all of the following conditions are satisfied:
 - (a) the produce fails to meet relevant fresh produce standards or quality specifications;
 - (b) the retailer rejects the produce within 24 hours after the produce is delivered to the retailer;
 - (c) the retailer does not reject the produce after the retailer has accepted the produce.
- (4) If the retailer rejects fresh produce because it does not meet relevant fresh produce standards or quality specifications, the retailer must provide written reasons for the rejection to the supplier within 48 hours.
- (5) The retailer must communicate any labelling, packaging or preparation requirements for a grocery product to a supplier in clear, unambiguous and concise written terms.
- (6) The retailer must provide a supplier with reasonable written notice of any required changes to packaging, labelling or preparation standards (unless the change is required immediately by law) taking into consideration existing stock held by suppliers (where

Schedule 1 Food and Grocery Code of Conduct

Part 3 Conduct generally

Division 4 Other conduct

Clause 22

known) and any agreement as to stock coverage in the relevant grocery supply agreement.

- (7) The retailer must make any claim for damaged grocery products or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the groceries to the retailer (or its nominee).

Note: See also clause 8 (matters to be covered by agreement).

22 Changes to supply chain procedures

- (1) The retailer must not directly or indirectly require a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement concerned.
- (2) Subclause (1) does not apply if:
- (a) the retailer gives the supplier reasonable written notice of the change; or
 - (b) the retailer compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the change.
- (3) Paragraph (2)(b) does not prevent a supplier from waiving a right to compensation under that paragraph.
- (4) This clause has effect subject to clause 9 (unilateral variation of agreement) and clause 10 (retrospective variation of agreement).

23 Business disruption

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

24 Intellectual property rights

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

- (2) To avoid doubt, subclause (1) does not create, confer or extend any intellectual property rights in or of the supplier.
- (3) In developing or producing own brand products, the retailer 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.
- (4) In any dispute relating to a breach of this clause, any relevant actions of the supplier in relation to the intellectual property rights of the retailer must be taken into account.
- (5) In taking action under Division 2 of Part 5 (complaints), the retailer may take into account any relevant actions of the supplier in relation to the intellectual property rights of the retailer.

25 Confidential information

- (1) This clause applies if a supplier discloses confidential information to the retailer in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions or pricing.
- (2) The retailer 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 retailer who need to have that information in connection with that purpose.
- (3) The retailer must establish and monitor systems to ensure compliance with subclause (2).
- (4) To avoid doubt, information is not confidential information for the purposes of this clause if the information:
 - (a) is publicly available; or
 - (b) comes into the possession or knowledge of the retailer:
 - (i) independently of the supplier; and
 - (ii) without any breach of subclause (2) on the part of the retailer.

26 Allocation of shelf space

- (1) The retailer's product ranging and shelf space allocation principles must be published or provided to all suppliers with whom the retailer has grocery supply agreements.
- (2) The retailer must act in accordance with the principles and keep them up to date.
- (3) Within a reasonable time before conducting a range review, the retailer 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.
- (4) Following the range review, the retailer must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the retailer's final decisions.
- (5) The retailer must apply its product ranging and shelf space allocation principles without discrimination (including without discrimination in favour of its own brand products).
- (6) This clause does not limit clause 19.

27 Transfer of intellectual property rights

- (1) The retailer 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.
- (2) Subclause (1) does not prevent the retailer from:
 - (a) holding an intellectual property right in an own brand product; or
 - (b) having an exclusive right to the retail sale of an own brand product; or
 - (c) making the holding of a right covered by paragraph (a) or (b) by the retailer a condition or term of supply by the supplier of

an own brand product, to the extent the product, recipe or formulation of the product:

- (i) was developed or formulated by or for the retailer; or
- (ii) is customised by or for the retailer.

Part 4—Good faith etc.

28 Obligation to deal lawfully and in good faith

- (1) The retailer or wholesaler 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.
- (2) The retailer or wholesaler must not enter into a grocery supply agreement that contains a provision that limits or excludes the obligation to act in good faith, and if it does, the provision has no effect.
- (3) In determining whether the retailer or wholesaler has acted in good faith in dealing with a supplier, the following may be taken into account:
 - (a) whether the retailer or wholesaler's trading relationship with the supplier has been conducted without duress;
 - (b) whether the retailer or wholesaler's trading relationship 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;
 - (c) whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.
- (4) Subclause (3) does not limit subclause (1).

29 Freedom of association

- (1) The retailer or wholesaler 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.
- (2) The retailer or wholesaler 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.

30 Provision of contact details

- (1) The retailer or wholesaler must make available to its suppliers, and keep updated:
 - (a) contact details of the retailer or wholesaler's buyers and senior buyers for the supplier; and
 - (b) contact details for the retailer or wholesaler's code compliance manager.
- (2) The contact details must include position titles and contact telephone numbers.

Part 5—Dispute resolution

Division 1—Preliminary

31 Information and documents

- (1) The retailer or wholesaler is not required to comply with this Part in relation to a complaint or dispute unless, at the time of making the complaint or notifying the dispute to the retailer or wholesaler, the supplier concerned provides, or offers to provide and is capable of providing, information and documents in accordance with subclause (2).
- (2) The information and documents must provide sufficient particulars of the following to enable the retailer or wholesaler to investigate, consider and respond to the complaint or dispute:
 - (a) the complaint or dispute;
 - (b) the conduct that is the subject of the complaint or dispute;
 - (c) the provisions of this code that are alleged to have been breached;
 - (d) the remedy or relief that the supplier is seeking.

Note: The supplier may supply any or all of the information or documents subject to appropriate confidentiality protections.

- (3) If the complaint relates to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement), the supplier provides sufficient particulars of the matters in paragraphs 2(a) and (b) if the supplier provides particulars of detriment that has been, or will be, caused to the supplier.

32 Code compliance manager

- (1) The retailer or wholesaler must nominate a person as the code compliance manager for the retailer or wholesaler.
- (2) The code compliance manager must:
 - (a) have access to:

- (i) the resources necessary to perform his or her functions;
and
 - (ii) all documentation relating to the retailer or wholesaler's obligations under this code; and
 - (iii) the retailer or wholesaler's buying team for the purposes of discussing issues relating to the retailer or wholesaler's obligations under this code; and
- (b) be independent of, and not be managed by, any member of the retailer or wholesaler's buying team; and
- (c) act in accordance with a written complaints handling procedure that:
- (i) has been developed by the retailer or wholesaler; and
 - (ii) has been provided to the Commission; and
 - (iii) is reviewed annually and updated as necessary.

Division 2—Complaints

33 Referral of complaints

- (1) A supplier may direct a complaint relating to a matter covered by this code to the code compliance manager.
- (2) The complaint must:
 - (a) be in writing; and
 - (b) include the following:
 - (i) the supplier's identification details, including business or trading name;
 - (ii) contact details for the supplier, or the person dealing with the complaint on behalf of the supplier, including the name, title and telephone number of that person;
 - (iii) details of the conduct giving rise to the complaint, including the provision of this code relevant to the complaint, together with any documents or other information that would assist the investigation of the complaint.

34 Immediate elevation of complaint

- (1) The complaint may include a request for immediate elevation of the complaint though senior levels of management.
- (2) If the supplier makes such a request, the retailer or wholesaler must elevate the complaint and attempt, within 20 business days, and in good faith, to resolve the complaint.

35 Investigation by code compliance manager

- (1) If the supplier does not request immediate elevation of the complaint, the code compliance manager must take all reasonable steps to:
 - (a) investigate the complaint; and
 - (b) conclude the investigation within 20 business days.

- (2) Subclause (1) does not apply if the code compliance manager:
 - (a) is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; and
 - (b) gives the supplier written notice to that effect.
- (3) However, if the complaint relates to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement), the code compliance manager must not be satisfied that the complaint 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.
- (4) A notice under paragraph (2)(b) must set out:
 - (a) the compliance manager's reasons for being satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; and
 - (b) that the supplier may take further action in relation to the matter under clause 37 (internal review) or 38 (mediation or arbitration).

36 Action following investigation

- (1) Following the investigation, the code compliance manager must determine what (if any) action should be taken in response to the complaint.
- (2) The code compliance manager must, within 5 business days after the conclusion of the investigation, give the supplier a summary of the action (if any) that has or will be taken in response to the complaint and the timetable for any such action.
- (3) The code compliance manager must keep the following for at least 6 years:
 - (a) a record of the complaint;
 - (b) a record of the investigations taken to investigate the complaint;
 - (c) a summary of any action taken in response to the complaint.

37 Internal review

- (1) This clause applies if:
 - (a) the supplier did not request immediate elevation of the complaint in accordance with clause 34; and
 - (b) the supplier:
 - (i) is satisfied that no action has been taken in relation to the complaint; or
 - (ii) is not satisfied with the outcome of the investigation into the complaint under that clause; or
 - (iii) has been given notice under paragraph 35(2)(b) to the effect that the code compliance manager is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; or
 - (iv) has not been given a summary of action taken in relation to the complaint in accordance with subclause 36(2).
- (2) The supplier may give the retailer or wholesaler a written request to elevate the dispute through senior levels of management.
- (3) The request must specify:
 - (a) the nature of the dispute; and
 - (b) the provision of this code relevant to the dispute; and
 - (c) the action that the supplier thinks will settle the dispute; and
 - (d) the outcome that the supplier is seeking.
- (4) The retailer or wholesaler must elevate the dispute and attempt, within 20 business days, and in good faith, to resolve the dispute.

Division 3—Mediation and arbitration

38 Supplier may seek mediation or arbitration

- (1) A supplier may seek either mediation or arbitration of a complaint or dispute relating to a matter covered by this code.
 - (2) However, if the supplier has begun a process under Division 2 (complaints) in relation to the complaint or dispute, the supplier must not seek mediation or arbitration of the complaint or dispute until the process:
 - (a) has been completed; or
 - (b) should have been completed.
 - (3) The retailer or wholesaler:
 - (a) must take part in the mediation or arbitration in good faith; but
 - (b) is not required by this code to take part in both mediation and arbitration in relation to the same complaint or dispute at the same time.
- Note: See subclause 39(3) for when the retailer or wholesaler will be:
- (a) taken to take part in the mediation or arbitration; and
 - (b) taken to be trying to resolve the dispute in good faith.
- (4) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (3).
 - (5) Despite paragraph (3)(a), the retailer or wholesaler is not required to take part in the mediation or arbitration if the mediator considers or the arbitrator determines that:
 - (a) the complaint or dispute is vexatious, trivial, misconceived or lacking in substance; or
 - (b) the supplier is not acting in good faith.
 - (6) However, if the complaint or dispute relates to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement), the mediator or arbitrator must not consider or determine that the complaint is vexatious, trivial, misconceived or

lacking in substance only because the supplier's only ground in relation to the complaint or dispute is detriment to the supplier.

39 Conduct of mediation and arbitration

- (1) Mediation or arbitration for the purposes of this code must be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia.
- (2) If the mediator or arbitrator is not agreed by the parties within 10 business days of a supplier referring a matter, the mediator or arbitrator must be appointed by the Institute of Arbitrators and Mediators Australia in accordance with the rules of the Institute.
- (3) For the purposes of paragraph 38(3)(a), the retailer or wholesaler:
 - (a) is taken to take part in the mediation or arbitration if the retailer or wholesaler is represented at the mediation or arbitration by a person who has authority to enter into an agreement to settle the dispute on behalf of the retailer or wholesaler; and
 - (b) is taken to be trying to resolve the dispute in good faith if the retailer or wholesaler approaches the resolution of the dispute in a reconciliatory manner, including by doing the following:
 - (i) attending and participating at meetings that are arranged at reasonable times;
 - (ii) at the beginning of the mediation or arbitration process, making it clear what the retailer or wholesaler is trying to achieve through the mediation or arbitration;
 - (iii) observing any obligation relating to confidentiality that applies during or after the mediation or arbitration process;
 - (iv) not taking or refusing to take action during the dispute, including refusing to accept goods or to make payments, that has the purpose or effect of applying pressure to resolve the dispute.
- (4) All costs of any mediation or arbitration are to be determined under the rules of the Institute of Arbitrators and Mediators Australia.

- (5) The Minister may, by legislative instrument, modify the operation of this clause by substituting another body in place of the Institute of Arbitrators and Mediators Australia.

Part 6—Compliance and reporting

40 Duty to train staff with respect to this code

- (1) Within 6 months of being bound by this code, the retailer or wholesaler must provide its buying team with:
 - (a) a copy of this code; and
 - (b) training on the requirements of this code.
- (2) The retailer or wholesaler must provide any person who becomes part of the retailer or wholesaler's buying team after the retailer or wholesaler is bound by this code with:
 - (a) a copy of this code; and
 - (b) training on the requirements of this code.
- (3) The retailer or wholesaler must comply with subclause (2) within 20 business days after the person becomes part of the buying team.
- (4) The retailer or wholesaler must provide annual retraining to its buying team on the requirements of this code.

41 Reports by code compliance managers

- (1) A code compliance manager must prepare a written report in respect of each 6-month period beginning on 1 January and 1 July.
- (2) The report must:
 - (a) be prepared within 30 business days after the end of the period; and
 - (b) set out the following:
 - (i) the number of complaints received for investigation in the reporting period;
 - (ii) in general terms and without identifying a complainant—the nature of the complaints received;
 - (iii) the time taken to investigate each complaint;
 - (iv) the outcome of each investigation;

- (v) whether or not each complaint was resolved to the satisfaction of the complainant.

42 Keeping records

- (1) The retailer or wholesaler must keep the original or a copy of each grocery supply agreement to which the retailer or wholesaler is a party while bound by this code (including any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement):
- (a) during the term of the agreement; and
 - (b) for 6 years after the agreement ends.
- (2) The retailer or wholesaler must keep the original or a copy of each of the following for at least 6 years from when the document is made or given, as the case requires:
- (a) an offer made under subclause 5(2) or 6(2) to vary a grocery supply agreement;
 - (b) notice of variation of a grocery supply agreement given under paragraph 9(2)(d) or 10(2)(d);
 - (c) notice of a decision to delist a product given under paragraph 19(5)(a);
 - (d) notice of the outcome of the review of a decision to delist a product given under subclause 19(7);
 - (e) reasons for rejection of fresh produce given under subclause 21(4);
 - (f) notice of required changes to packaging, labelling or preparation standards given under subclause 21(6);
 - (g) notice of material change to supply chain procedures given under paragraph 22(2)(a);
 - (h) notice of a range review given under subclause 26(3);
 - (i) notice that a complaint is vexatious, trivial, misconceived or lacking in substance given under paragraph 35(2)(b);
 - (j) a summary of action that has or will be taken in response to a complaint and the timetable for the action given under subclause 36(2);

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Part 6 Compliance and reporting

Clause 42

- (k) a code compliance manager's report prepared under subclause 41(1).