

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Minister for Housing and Assistant Treasurer**

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Codes – Food and Grocery) Amendment Regulations 2020*

Section 51AE of the *Competition and Consumer Act 2010* (the Act) provides that the regulations may prescribe an industry code under the Act. Regulations may declare an industry code to be either mandatory or voluntary. For a voluntary industry code, the regulations must specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be bound.

Section 172 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In 2015, the Government made the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* (the Code) which prescribed a voluntary grocery code under the Act.

The Code was introduced to improve standards of business conduct in the food and grocery sector. The Code governs conduct by grocery retailers and wholesalers in their dealings with suppliers. It has rules relating to grocery supply agreements, payments, termination of agreements, dispute resolution and a range of other matters.

Section 5 of the Code required the Government to commence a review of the Code within three years of its commencement. The factors that were to be considered by the review are prescribed in the Code.

On 2 March 2018, the Government appointed Professor Graeme Samuel AC to review the operation of the Code (the Review). The Review conducted three rounds of industry consultation and engagement and received feedback from over 50 individual stakeholders. The *Independent Review of the Food and Grocery Code of Conduct – Final Report* (the Report) was published in October 2018 and is available at [www.treasury.gov.au](http://www.treasury.gov.au).

Professor Samuel made 14 recommendations in the final Report. Key recommendations include:

- the Code remaining voluntary, noting that the Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories;
- amending the definition of good faith to provide greater clarity, and introducing a new requirement to consider fair dealings in dispute resolution;
- improving the internal dispute resolution requirements, by replacing Code Compliance Managers with Code Arbiters for each signatory. The Code Arbiters would be empowered by the Code to make binding determinations on the signatory, including awarding compensation;
- the Government appointing an Independent Reviewer to oversee the dispute resolution process to ensure it is conducted independently and without bias;

- ensuring that price rise negotiations are not conditional on suppliers providing commercially sensitive information to a signatory or third party; and
- requiring that a future review be conducted in three to five years' time to test the effectiveness of the Review's recommendations.

The Government responded to the Report on 27 March 2019, agreeing to retain the Code as a voluntary code but expressed a strong expectation that large retailers and wholesalers should become signatories. Failure for them to do so may result in the Government introducing a mandatory code in the future.

The purpose of the *Competition and Consumer (Industry Codes – Food and Grocery) Amendment Regulations 2020* (the Regulations) is to amend the Code to give effect to the Government's response to the Report.

The Regulations:

- apply the same obligations under the Code on wholesalers as already applies to retailers (with the exception of customer facing provisions);
- enhance the good faith obligations in the Code to make it clearer and more user friendly for industry;
- strengthen the dispute resolution procedures to give suppliers more confidence in raising their complaints and having them resolved;
- set limits on acceptable conduct during price rise processes between the parties to restore trust and cooperation between parties; and
- make minor changes to clarify existing provisions and improve protections for suppliers in their dealings with retailers and wholesalers.

Public consultation on an exposure draft of the Regulations was undertaken over an eight week period between 4 April and 3 June 2019. Further consultation on a revised draft of the Regulations was conducted with key stakeholders between 23 July and 7 August 2020.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Except for items 17 and 22 of Schedule 3, the Regulations commence on the day after this instrument is registered on the Federal Register of Legislation. Items 17 and 22 of Schedule 3 (conduct relating to price increase processes) commence three months after this instrument is registered.

The Office of Best Practice Regulation has acknowledged the Department of the Treasury's certification that the Review undertook a process and analysis equivalent to a Regulation Impact Statement (OBPR ref no 23950).

A statement of Compatibility with Human Rights is at [Attachment C](#).

**Details of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020***

**Section 1 — Name**

This section provides that the name of the Regulations is the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020* (the Regulations).

**Section 2 — Commencement**

This section provides that:

- items 17 and 22 of Schedule 3 commence three months after this instrument is registered on the Federal Register of Legislation; and
- the rest of the Regulations commence on the day after this instrument is registered.

**Section 3 — Authority**

This section provides that the Regulations are made under section 51AE of the Act.

**Section 4 — Schedules**

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out the applicable items in the particular Schedule.

**Schedule 1 – Extension of Part 3 of the Code to wholesalers**

Items 1, 5, 11 – clarification relating to the role of wholesaler as ‘supplier’ to retailers

As intermediaries in the grocery supply chain, wholesalers may perform dual roles – first, purchasing groceries from suppliers; and second, on-selling (‘supplying’) these groceries to retailers for sale to consumers.

These items clarify that the Code applies to wholesalers’ conduct in relation to purchasing groceries from suppliers, not their conduct in relation to ‘supplying’ groceries to retailers.

Items 2-4, 6-7, 12-17, 25-38, 47-54, 61-67 – extension of the majority of existing retailer conduct provisions to wholesalers

These items extend the majority of the existing provisions in Part 3 of the Code – which currently only relate to *retailers’* conduct with respect to suppliers – to wholesalers as well.

Part 3 sets minimum standards of behaviour in relation to a number of particular aspects of the relationship between a retailer and a supplier with a view to providing clarity for businesses and improving standards of conduct in the grocery sector. Where these provisions allow for limited exceptions to the general standard of behaviour, the retailer has the onus of proving that those exceptions apply.

The same principles are applicable to the relationship between a wholesaler and a supplier, except to the extent that they relate to customer facing provisions that are only relevant to retailers (eg conduct relating to shelf space in retail stores).

The majority of the existing clauses in Part 3 do not include customer facing provisions. Accordingly, these clauses (outlined below) are extended to the conduct of wholesalers in the same way that they apply to the conduct of retailers.

- Clause 12—Payments to suppliers
  - This clause requires retailers and wholesalers to pay suppliers for the products they deliver within the timeframe set by a grocery supply agreement, and in any event, within a reasonable timeframe after receiving an invoice.
  - Retailers and wholesalers are generally prohibited from setting off any amount against a supplier’s invoice unless the supplier has consented in writing. Retailers and wholesalers must not require a supplier to consent.
- Clause 13—Payments for shrinkage
  - This clause provides that retailers and wholesalers must not require suppliers to pay for shrinkage or to enter into a grocery supply agreement under which such payments are required.
  - Shrinkage refers to the loss of grocery products after a retailer or wholesaler has taken possession, due to factors such as shoplifting, employee theft or administrative error.
- Clause 14—Payments for wastage
  - Retailers and wholesalers are generally prohibited from requiring suppliers to pay for wastage which occurs at the premises of the retailer or wholesaler (or their contractor or agent, or another retailer or wholesaler). This is on the basis that the supplier would not normally have control over the groceries and any possible wastage once the retailer or wholesaler, or their contractor or agent, has taken delivery of the groceries.
  - Wastage refers to the state of groceries that are unfit for sale, for example, where fresh foods have spoiled, or packaged products are beyond their use-by date.
- Clause 17—Payments for retailer’s or wholesaler’s activities
  - This clause limits the circumstances in which retailers and wholesalers are able to require payments from suppliers for activities undertaken by the retailer or wholesaler in the ordinary course of carrying on their business. Retailers and wholesalers are generally prohibited from requiring payments toward the costs of:
    - : a buyer’s visit to the supplier;
    - : artwork or packaging design;

- : consumer or market research;
  - : the opening or refurbishing of a store; or
  - : hospitality for the retailer's or wholesaler's staff.
- Clause 18—Funding promotions
    - Retailers and wholesalers are prohibited from requiring a supplier, directly or indirectly, to fund all or part of the retailer's or wholesaler's costs of promotions.
    - This clause should be also read in conjunction with clause 20 which sets out obligations on the retailer and wholesaler regarding funded promotions.
  - Clause 19—Delisting products
    - Retailers and wholesalers can only delist a supplier's grocery product where permitted under the grocery supply agreement and where this occurs for genuine commercial reasons. Genuine commercial reasons for delisting grocery items include failure of the supplier to meet agreed quality or quantity requirements with respect to the product (however, isolated, short term fluctuations in supply may not constitute a genuine commercial reason for delisting). It also includes failure of the supplier's product to meet the retailer's or wholesaler's commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement. A persistent failure to meet agreed delivery requirements, as notified to the supplier from time to time in accordance with the agreement, would also constitute genuine commercial reasons.
    - This clause clarifies that delisting a product as punishment for making a complaint would not constitute a genuine commercial reason and is therefore not permitted.
    - If there are genuine commercial reasons for delisting, then the retailer or wholesaler must provide reasonable notice in writing setting out the reasons for delisting, and inform the supplier that it has a right to have the decision reviewed by the retailer's or wholesaler's 'senior buyer' (which is a defined term in the Code). However, this does not apply where time is of the essence (including product safety issues) or where there have been ongoing problems with supply where the retailer or wholesaler has been out of stock or had significantly reduced stock.
  - Clause 21—Fresh produce standards and quality specifications
    - A retailer or wholesaler must provide its fresh produce standards or quality specifications to suppliers in clear, written terms. Retailers and wholesalers must accept all fresh produce delivered in accordance with the specifications. If fresh produce fails to meet relevant specifications, a retailer or wholesaler may reject it within 24 hours, provided it gives written notice within 48 hours. Retailers and wholesalers cannot reject produce after accepting it.

- Clause 22—Changes to supply chain procedures
  - This clause broadly prohibits retailers and wholesalers from making any material changes to supply chain procedures during the term of a grocery supply agreement, unless they give a supplier reasonable written notice, or compensate it for any net resulting costs, losses or expenses incurred by the supplier as a result of the failure to give notice.
  - A supplier may waive its right to compensation.
- Clause 23—Business disruption
  - Retailers and wholesalers are not allowed to threaten to disrupt a supplier’s business or terminate a grocery supply agreement, without reasonable grounds.
- Clause 24—Intellectual property rights
  - This clause provides that a retailer or wholesaler must respect a supplier’s intellectual property rights in relation to their products, for example, with respect to branding, packaging, and advertising. It also provides that retailers and wholesalers must not infringe a supplier’s rights when developing their own brands.
- Clause 25—Confidential information
  - Retailers and wholesalers must protect suppliers’ confidential information, such as information relating to product development, proposed promotions or pricing, and ensure it is not used for a purpose beyond that agreed with the supplier. The information may only be disclosed to employees or agents of the retailer or wholesaler on a ‘need to know’ basis in connection with that purpose. This clause applies to information disclosed to the retailer or wholesaler by the supplier in connection with the supply of grocery products.
- Clause 27—Transfer of intellectual property rights
  - If a retailer or wholesaler is negotiating the supply of an own brand product from a supplier of an equivalent grocery product, the retailer or wholesaler must not require the supplier to transfer or exclusively license any intellectual property right held by it as a condition or term of supply.
  - Retailers and wholesalers are not prevented from holding intellectual property in an own brand product and they can hold an exclusive right to sell an own brand product. If an own brand product was developed, formulated or customised for the retailer or wholesaler, then the retailer or wholesaler may request the holding of intellectual property in an own brand product or the exclusive right to the retail or wholesale sale of the own brand product as a condition of supply. For example, if a retailer or wholesaler designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then the retailer or wholesaler may wish to hold intellectual property rights in that product.

### Items 18-22 – conduct relating to ‘new listings’ (clause 15)

Clause 15 deals with retailers’ conduct in relation to ‘Payments as a condition of being a supplier.’ Retailers are generally prohibited from requiring suppliers to make payments in order to have products stocked or listed by the retailer (subclause (1)), with two exceptions – this prohibition does not apply if the payment is made in relation to a promotion (paragraph (2)(a)) or products that have not been stocked, displayed or listed by the retailer in the preceding year in 25 per cent or more of its stores, known as ‘new listings’ (paragraph (2)(b)).

While this principle is applicable to both retailers and wholesalers, some aspects of this provision are customer facing and hence not relevant to wholesalers.

These items clarify that the existing exceptions in subclause (2) only apply to retailers, and introduce a new subclause (2A) to apply to wholesalers. Subclause (2A) mirrors subclause (2), but removes the customer facing aspects which are not relevant to wholesalers:

- removing references to ‘displaying’ products, while retaining references to ‘stocking’ and ‘listing’ products; and
- referring to wholesalers’ distribution centres rather than retailers’ stores.

### Items 23-24 – conduct relating to positioning of groceries and shelf space (clause 16)

Clause 16 deals with retailers’ conduct in relation to ‘Payments for better positioning of groceries.’ This is a customer facing provision that is not relevant to wholesalers.

These items clarify that the existing provision only applies to retailers.

### Items 39-46 – conduct relating to funded promotions (clause 20)

Clause 20 deals with retailers’ conduct in relation to ‘funded promotions.’ This provision is intended to protect suppliers from unconscionable behaviour: for example, retailers must not over-order products from a supplier at a reduced price as part of a promotion and then on-sell at full price (subclause (2)); and retailers must not lock in large orders from a supplier and then cancel or significantly reduce the volume of the order (subclause (3)).

This principle is applicable to both retailers and wholesalers. These items extend the existing requirements in this clause to wholesalers as well as retailers. However, as wholesalers generally have less ability to forecast promotional volumes than retailers, the threshold for a ‘significant reduction’ in the volume of an order is set at 20 per cent for wholesalers, while retailers retain the existing 10 per cent threshold.

Clause 20 does not apply in relation to other arrangements between the parties which are not connected to a *funded promotion*. For example, it does not prevent both parties agreeing that the wholesaler can purchase product from the supplier at a discounted price as an investment, with the clear intention that the wholesaler will sell the product at a later date at full price rather than as part of a promotion.

With respect to wholesalers, Clause 20 only applies in relation to their 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).

Items 55-60 – conduct relating to shelf space, product range and reviews (clause 26)

Clause 26 deals with retailers' conduct in relation to allocation of shelf space, product range and reviews. Some aspects of this provision are customer facing and hence not relevant to wholesalers.

These items extend the existing requirements in this clause relating to product ranging principles and range reviews to wholesalers as well as retailers. The existing requirements relating to shelf space allocation continue to only apply to retailers.

Application and transitional provisions (Schedule 1 – items 8-10, Schedule 4 – item 1, new clauses 46 and 47)

Clauses 5 and 6 outline the transitional provisions applicable to *new signatories* (retailers and wholesalers respectively) which agree to be bound by the Code after it has commenced, where the new signatories have existing grocery supply agreement(s) in place with supplier(s). These transitional provisions do not apply to Part 1 (preliminaries) and Part 1A (good faith), which apply to retailers and wholesalers immediately upon becoming bound by the Code. Separate transitional provisions apply to Part 5 (dispute resolution), as outlined in Schedule 2.

Clause 5 provides new retailer signatories with a 12 month transitional period in which to amend their existing grocery supply agreements, as necessary, to comply with the Code. Part 2 (grocery supply agreements), Part 3 (conduct generally) and Part 6 (compliance) of the Code will apply to these new retailer signatories either:

- 12 months after they become bound by the Code; or
- when the grocery supply agreements have been amended (if this occurs within the 12 month period).

Clause 6 currently provides similar transitional arrangements for new wholesaler signatories, but with a longer transitional period (24 months). Items 8-10 amend clause 6 to bring the transitional provisions applying to new wholesalers in line with those applying to new retailers by:

- extending the application of Part 3 to wholesalers; and
- providing a 12 month transitional period for the application of Parts 2, 3 and 6 to wholesalers who become bound by the Code after the commencement of this instrument (while retaining the existing 24 month transitional period for any wholesalers which become bound by the Code before that commencement).



## **Schedule 2 – Dispute resolution**

In response to the independent Review of the Food and Grocery Code, the Government agreed to amend the existing dispute resolution mechanism to ensure it is fit for purpose.

Consistent with the Government's response to the review, Schedule 2 (items 1-21) amend the dispute resolution system in Part 5 of the Code to:

- replace the code compliance manager with a Code Arbiter (new Division 1 of Part 5 of the Code);
- enable the Minister to appoint an Independent Reviewer to ensure due process is followed during the dispute resolution process (new Division 2 of Part 5 of the Code); and
- retain the existing ability for a supplier to seek external mediation or arbitration (existing Division 3 of Part 5 of the Code).

### **Division 1 – Code Arbiter**

Division 1 replaces the existing requirement for a retailer or wholesaler to have a code compliance manager with a requirement for the retailer or wholesaler to instead appoint a Code Arbiter. *[new clause 31]*

The Code Arbiter is responsible for investigating and proposing a resolution to a dispute or complaint raised by a supplier and must be sufficiently resourced by the retailer or wholesaler to fully perform this role.

Once a Code Arbiter has been appointed, the retailer or wholesaler must give the Australian Competition and Consumer Commission (ACCC) and Independent Reviewer the Code Arbiter's contact details.

While the Code Arbiter is appointed by, and its costs met by, the wholesaler or retailer, the Code Arbiter must be free to investigate a complaint and offer a proposed remedy on behalf of the wholesaler or retailer to the supplier without interference or improper influence from the retailer or wholesaler. The retailer or wholesaler must ensure that the Code Arbiter has access to any documentation that relates to a complaint and give the Code Arbiter access to the retailer or wholesaler's buying team to discuss issues about the retailer or wholesaler's obligations under the Code.

The Code Arbiter must also be authorised to enter into an agreement on the retailer or wholesalers' behalf to settle a dispute.

The Code Arbiter must not be engaged by the retailer or wholesaler in any way other than as a Code Arbiter. However, this does not apply to small retailers and wholesalers, defined as those with less than 15 per cent market share. In order to be eligible for this exemption, a retailer or wholesaler would be expected to self-assess their market share before the end of each financial year. The self-assessment can be determined based on third party industry market research and statistics.

To ensure a smooth transition when these small retailers and wholesalers grow their business beyond the 15 per cent threshold, the exemption continues to apply unless and until they exceed the threshold for two consecutive financial years. By the end of the financial year that the exemption ceases to apply, the retailer or wholesaler must ensure that the Code Arbiter is not engaged in any way other than as a Code Arbiter. *[new clause 32]*

For example, Retailer XYZ is a signatory to the Code:

- In 2020-21, Retailer XYZ has less than 15 per cent market share. The company appoints a Code Arbiter, who is also engaged to provide legal services to the company. This is permitted, as the exemption applies to Retailer XYZ for the 2020-21 financial year.
- By the end of 2021-22, Retailer XYZ's market share grows to over 15 per cent. The exemption still applies for the 2021-22 financial year and the company is not required to change its Code Arbiter arrangements.
- At the end of 2022-23, Retailer XYZ's market share remains over 15 per cent. The exemption would still apply for the 2022-23 financial year, to enable the company to transition to new Code Arbiter arrangements in the following year as the exemption would no longer apply in 2023-24. Retailer XYZ must ensure that its Code Arbiter is no longer employed in any other capacity by the end of 2023-24.

The Code Arbiter must have in place a written complaints handling procedure which is consistent with the Code, and must act in accordance with that procedure. A copy of the complaints handling procedure must be given to the Independent Reviewer and the retailer or wholesaler. The complaints handling procedure must also be published and made available on the retailer or wholesaler's website for suppliers to access in relation to resolving disputes. *[new clause 33]*

#### *Making a complaint to the Code Arbiter [new clause 34]*

To make a complaint, the supplier must, in writing, submit details of the complaint to the Code Arbiter along with contact details for the supplier. The supplier also needs to identify the provision(s) of the Code relevant to the complaint. However, this is not intended to limit the Code Arbiter's ability to investigate the complaint. For example, if the supplier incorrectly identifies the provisions relevant to the complaint, this does not preclude the Code Arbiter from investigating the complaint under the appropriate Code provisions.

When a complaint has been lodged with the Code Arbiter, the Code Arbiter has 20 business days to investigate the complaint and a subsequent five business days to propose a remedy to the supplier to resolve the complaint. The Code Arbiter may also conclude after the investigation that no action is required in response to the complaint. For all decisions that a Code Arbiter makes, including recommending that no further action is required, the Code Arbiter must include reasons supporting the decision.

The timeframe for the Code Arbiter to consider a complaint can be extended with the agreement of the supplier.

### *Confidentiality requirements [new clause 34]*

The Code Arbiter must not disclose to the retailer or wholesaler the identity of a supplier who has made a complaint, without the express consent of the supplier. The Code Arbiter also must not disclose any information, including but not limited to the nature or timing of the complaint, that may result in the retailer or wholesaler identifying the supplier making the complaint. The Code Arbiter must also observe any confidentiality requirements relating to information disclosed or obtained during the complaint process.

This provides protection for suppliers to come forward with a complaint to the Code Arbiter in the first instance, without fear of potential retribution. The Code Arbiter could commence an investigation based on the information provided by the supplier, and provide an indication to the supplier whether they consider it to be a valid complaint which could lead to a proposed remedy. However, the Code Arbiter would have limited ability to fully investigate a complaint where the supplier did not consent to disclosing their identity to the retailer or wholesaler. Furthermore, the Code Arbiter would not be able to action a proposed remedy for the supplier where they did not consent to disclosing their identity to the retailer or wholesaler.

### *Investigating a complaint [new clauses 35-36B]*

The Code Arbiter must take all reasonable steps to investigate a complaint, in accordance with its written complaints handling procedure. If, after investigating the complaint, the Code Arbiter is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance, the Code Arbiter must give the supplier written notice to that effect, setting out the reasons for that decision and outlining any further action that may be available to the supplier: through the Independent Reviewer, or external mediation or arbitration.

A copy of the notice must also be given to the retailer or wholesaler. Where the supplier has not consented to their identity being disclosed to the retailer or wholesaler, the Code Arbiter must ensure that any information that would disclose the identity of the supplier is removed from the notice.

For all other complaints, the Code Arbiter must take into consideration whether the retailer or wholesaler acted lawfully and in good faith. The Code Arbiter may also consider whether the retailer or wholesaler acted fairly.

The purpose of incorporating the concept of ‘acting fairly’ into the Code is to reflect that while a party may have conducted itself within the requirements of the law, the party may not have acted in a way that would meet community expectations. The Code sets out what may be taken into account by the Code Arbiter to decide if a party acted fairly. This concept focuses on the fairness of the process where the retailer or wholesaler has engaged with the supplier, rather than the fairness of a specific outcome. This includes whether the retailer or wholesaler:

- acted in a way that prevented the supplier from accessing the benefits of a contract or limited those benefits;
- acted in a way that would be expected by the supplier; or
- had regard for the relationship with the supplier and the specific characteristics of the supplier.

The Code Arbiter has the authority to offer a proposed remedy to the supplier on behalf of the retailer or wholesaler to address the complaint made by the supplier. The remedy could be the payment of compensation to the supplier to rectify the harm caused, changes to the Grocery Supply Agreement or another remedy. Given that changes to the Grocery Supply Agreement could have broader ramifications, the Code Arbiter may consult with the retailer or wholesaler and supplier before proposing such a remedy.

If the Code Arbiter determines that compensation is appropriate, the proposed remedy could include a binding determination that the retailer or wholesaler must pay compensation to the supplier up to a maximum of \$5 million per complaint. If the Code Arbiter considers that additional compensation is warranted, the proposed remedy could also include a non-binding recommendation that the retailer or wholesaler should consider paying an additional sum in compensation to the supplier.

The proposed remedy must be made to the supplier in writing, setting out the Code Arbiter's reasons for that decision and outlining any further action that may be available to the supplier: through the Independent Reviewer, or external mediation or arbitration.

A copy of the notice must also be given to the retailer or wholesaler. The Code Arbiter must ensure that any information that would disclose the identity of the supplier is removed from the notice, unless the supplier has accepted the proposed remedy or has otherwise consented to their identity being disclosed to the retailer or wholesaler.

The proposed remedy does not remain available indefinitely. The availability of the remedy depends on whether the supplier accepts the offer or refers the complaint to the Independent Reviewer and whether the Independent Reviewer decides to review the complaint.

- The offer will lapse if 20 business days after the Code Arbiter proposed the remedy it has not been accepted by the supplier or the supplier has not referred the complaint to the Independent Reviewer (see Diagram 1 in Attachment B).
- If the supplier refers the complaint to the Independent Reviewer within 20 business days of having been made the offer:
  - If the Independent Reviewer decides not to review the complaint, the offer lapses 10 business days after the Independent Reviewer has notified the supplier of that fact (see Diagram 2 in Attachment B);
  - If the Independent Reviewer reviews the complaint, the offer lapses:
    - : 10 business days after the Independent Reviewer has notified the supplier that the Code Arbiter's process was acceptable; or
    - : 10 business days after the Code Arbiter has reconsidered the complaint (in response to a recommendation by the Independent Reviewer) and given written notice to the supplier as to the outcome (see Diagram 3 in Attachment B).

To accept the proposed remedy offered by the Code Arbiter, the supplier must tell the Code Arbiter in writing that the offer is accepted and do so before the offer has lapsed. The Code Arbiter must enter into an agreement on behalf of the retailer or wholesaler. The retailer or wholesaler must action the agreement.

Failure to comply with the agreement would be contrary to section 51ACB of the Act and the remedies provided by Part VI of the Act would be available. For example, the supplier could seek an injunction under section 80 or commence an action for damages under section 82.

The Code Arbiter may also make recommendations to the retailer or wholesaler about amending its business practices to avoid similar problems occurring in the future with other suppliers. This is not intended to be binding or enforceable but will be reported in the Code Arbiter's annual report.

*Code Arbiter – annual report and record keeping obligations [new clauses 36C and 36D]*

The Code Arbiter is required to report annually on:

- the number of complaints received for investigation in the reporting period;
- in general terms and without identifying a complainant—the nature of the complaints received;
- the time taken to investigate each complaint;
- the outcome of each investigation;
- the number of proposed remedies which included a non-binding recommendation for additional compensation in excess of the \$5 million cap;
- whether or not each complaint was resolved to the satisfaction of the complainant; and
- information given to the Code Arbiter by the retailer or wholesaler about price increase processes (as required under clause 27B).

The report must cover the financial year period, and be provided to the Independent Reviewer, the ACCC and the retailer or wholesaler within 30 business days after the end of the financial year. Within a day of being given the report, the retailer or wholesaler must publish the report on its website.

The Code Arbiter also has record keeping obligations. The Code Arbiter must keep the following for a period of six years:

- the record of the complaint made;
- a record of the investigations undertaken to investigate the complaint;
- a copy of any notices given out that a complaint was vexatious, trivial, misconceived or lacking in substance;
- a copy of each notice given under subclause 36(5); and
- a summary of actions taken in response to the complaint.

A retailer or wholesaler's record keeping obligations are also amended as a result of the establishment of a Code Arbiter. A retailer or wholesaler must keep a copy of the Code Arbiter's report for six years as well as a summary of the action that has or will be taken in response to a complaint (Items 18 to 21).

### Division 2 – Independent Reviewer

Division 2 establishes an 'Independent Reviewer'. The Independent Reviewer has four key functions: *[new clause 37A]*

1. when a complaint is raised by a supplier with the Independent Reviewer, the Independent Reviewer may review the complaint to consider whether the process followed by the Code Arbiter afforded the supplier procedural fairness;
2. to work collaboratively with Code Arbiters and industry stakeholders to identify and address emerging and systemic issues and report on any findings in its annual report;
3. publish non-binding guidance material relating to compliance with the Code; and
4. conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of the Code.

The Independent Reviewer will be appointed by the Minister. In deciding who to appoint, the Minister will consider whether the person has skills and experience in applying principles of procedural fairness and has experience working within Australian industry so as to give the Independent Reviewer broad experience in commercial dealings and negotiations. *[new clause 37]*

The Independent Reviewer will be appointed shortly after the amendments to the Code take effect. However, complaints can only be referred to the Independent Reviewer once the retailer or wholesaler has a Code Arbiter in place.

#### *Referring a complaint to the Independent Reviewer [new clauses 37B and 37C]*

A supplier may raise a complaint with the Independent Reviewer about the Code Arbiter's process used to investigate and consider the supplier's complaint. A supplier cannot raise a complaint with the Independent Reviewer until the Code Arbiter has investigated the complaint and notified the supplier of the outcome (either a proposed remedy or that no action should be taken), or the time period in which the Code Arbiter's investigation should have been completed has lapsed. That is, the two processes are not run concurrently.

A referral to the Independent Reviewer must be in writing and include the supplier's contact details. The referral must also explain details of the original complaint and the aspects of the Code Arbiter's process the supplier wants the Independent Reviewer to consider. The supplier should also provide the Independent Reviewer with details about the alleged deficiencies or problems that the supplier experienced during the Code Arbiter's process.

The Independent Reviewer's role in considering complaints is not to consider whether the proposed remedy is reasonable or adequate given the nature of the complaint. Rather, the role of the Independent Reviewer is to consider whether the Code Arbiter followed due process and the Code Arbiter's complaints handling procedure.

Even where the supplier has accepted a proposed remedy, the supplier can still refer the complaint to the Independent Reviewer. However, in this instance the Independent Reviewer will only be considering the complaint from their broader perspective of monitoring systemic issues and will not make a recommendation to the Code Arbiter regarding the process of investigating the specific complaint.

The Independent Reviewer is not required to review every referral. Circumstances when the Independent Reviewer may decide not review a complaint include (but are not limited to):

- the supplier accepted the offer made by the Code Arbiter;
- the complaint is vexatious, trivial, misconceived or lacking in substance; or
- the complaint was not related to the process followed by the Code Arbiter.

The Independent Reviewer has 10 business days to confirm whether or not a review will be conducted.

- If the Independent Reviewer is not going to review the complaint, the Independent Reviewer must notify the supplier and Code Arbiter, in writing, that the complaint will not be reviewed and explain why.
- If the Independent Reviewer will review the complaint, the Independent Reviewer must notify the supplier, Code Arbiter, and retailer or wholesaler, in writing, that the complaint is being investigated.

#### *Confidentiality requirements [new clause 37B]*

The Independent Reviewer must not disclose to the retailer or wholesaler the identity of a supplier who has referred a complaint, without the express consent of the supplier. The Independent Reviewer must also not disclose any information, including but not limited to the nature or timing of the complaint, that may result in the retailer or wholesaler identifying the supplier making the complaint. However, the Independent Reviewer may have limited ability to fully review a complaint where the supplier did not consent to disclosing their identity to the retailer or wholesaler.

The Independent Reviewer must also observe any confidentiality requirements relating to information disclosed or obtained during the independent review process.

#### *Reviewing Complaints [new clause 37D]*

Where the Independent Reviewer is reviewing a complaint, the retailer or wholesaler and the Code Arbiter are required to provide any information requested by the Independent Reviewer. The information should be provided within 10 business days of the request.

The Independent Reviewer has 20 business days to complete a review. The timeframe is extended where the Independent Reviewer is waiting for information from the Code Arbiter, retailer or wholesaler, or supplier. The supplier and Code Arbiter must be notified of the Independent Reviewer's recommendation within five business days of the review being completed. The notice must be in writing, and set out the reasons for the Independent Reviewer's recommendation.

A copy of the notice must also be given to the retailer or wholesaler. Where the supplier has not consented to their identity being disclosed to the retailer or wholesaler, the Independent Reviewer must ensure that any information that would disclose the identity of the supplier is removed from the notice.

Where the Independent Reviewer makes a recommendation to the Code Arbiter about the process undertaken, the Code Arbiter has 10 business days to consider whether to:

- adopt the Independent Reviewer's recommendation and reconsider the proposed remedy; or
- not reconsider the complaint.

Having considered the Independent Reviewer's recommendation, the Code Arbiter must notify the supplier and Independent Reviewer of their decision by the conclusion of the 10 business days.

If the Code Arbiter does reconsider the case and decides to offer a new proposed remedy to the supplier, the supplier has 10 business days to accept or decline the new proposed remedy.

If the Code Arbiter does not reconsider the complaint, the supplier has 10 business days to accept or decline the original proposed remedy.

The Independent Reviewer may notify the ACCC of a potential breach of the Code. If so, to ensure procedural fairness the Independent Reviewer would also be required to notify the relevant retailer or wholesaler.

#### *Monitoring systemic issues – annual report and annual survey [new clauses 37E and 37F]*

The Independent Reviewer also has a role monitoring systemic and emerging issues in the food and grocery sector.

Item 9 inserts new clause 37E which places reporting obligations on the Independent Reviewer.

The Independent Reviewer is required to provide an annual report to the ACCC by 30 November each year on the Independent Reviewer's activities, including the role monitoring systemic issues and the information reported by Code Arbiters. The report should cover the previous financial year period.

The Independent Reviewer must also conduct an annual survey of suppliers, retailers and wholesalers, to identify emerging and systemic issues and assess systemic compliance with the Code.



Both the annual report and results of the annual survey must be published on the Independent Reviewer's website. The Independent Reviewer must ensure that any published material does not contain confidential commercial information, or information that could identify a supplier.

### Division 3 – External Mediation or Arbitration

Existing clauses 38 and 39 in the Code provide that a supplier may seek mediation or arbitration with an external mediator or arbitrator.

This option will remain under the amended dispute resolution process.

Currently, a supplier cannot take a complaint to the code compliance manager and an external mediator or arbitrator simultaneously. If the supplier has referred a complaint to the code compliance manager, the supplier cannot seek mediation or arbitration of the complaint until the code compliance manager's investigation is complete, or should have been completed (in accordance with the timeframes in the Code).

Similarly, under the amended Code, a supplier cannot take a complaint to an external mediator or arbitrator if the supplier has taken a complaint to the Code Arbiter or Independent Reviewer and that process has not been completed.

In cases where the supplier has referred the complaint to the Code Arbiter, the Code Arbiter must have offered a proposed remedy or notified the supplier that no action would be taken in response to the complaint – or should have done either of these things (in accordance with the timeframes in the Code) – before the supplier can initiate external mediation or arbitration.

In cases where the supplier has referred the complaint to the Independent Reviewer, the process is considered to be completed when the Independent Reviewer:

- notifies the supplier that they will not be reviewing the complaint; or
- notifies the supplier that the Code Arbiter's process is acceptable; or
- refers the complaint back to the Code Arbiter and the Code Arbiter notifies the supplier of the outcome of its reconsideration.

There is no requirement for a supplier to have raised a complaint with the Code Arbiter before seeking external mediation or arbitration.

Minor amendments are also made to clause 39 to reflect that the *Institute of Arbitrators and Mediators Australia* is now referred to as the *Resolution Institute*. There is also no need for the Minister to have the power to substitute an alternative body in place of the *Resolution Institute* and so the substitution power in subclause 39(5) is removed.

### Amended dispute resolution process – Application and transitional provisions (Schedule 2 - item 6, Schedule 4 – item 1)

All existing and new signatories will have two months to transition to the new Code Arbiter arrangements.

Once established, the Code Arbiter will handle all complaints irrespective of when the conduct in question took place, provided that it took place when the retailer or wholesaler was a signatory to the Code.

Complaints about new or existing signatories cannot be escalated to the Independent Reviewer until the signatory has a Code Arbiter in place.

Transitional arrangements would differ slightly for existing signatories with established code compliance manager systems; existing signatories without a code compliance manager (that is, recent signatories which are still in the initial transition phase under the current Code); and new signatories signing up to the Code after the commencement of the Regulations. However, even during transitional periods, all signatories must at all times have a dispute resolution system in place.

#### *Transitional arrangements for existing signatories with a code compliance manager*

Existing signatories to the Code will have two months from when the amendments commence to establish a Code Arbiter. If the signatory has already established a code compliance manager in accordance with the existing Code requirements, the current arrangements need to continue to be in place during the two month transitional period. The signatory could not concurrently have both a Code Arbiter and a code compliance manager – the existing code compliance manager arrangements need to cease when the Code Arbiter is established. Any complaints that the code compliance manager is considering when the Code Arbiter commences will be transferred to the Code Arbiter.

#### *Transitional arrangements for existing signatories with no code compliance manager*

The same principle applies to any recent signatories to the Code. That is, retailers and wholesalers who became signatories before the amendments commence – but who had not yet established a code compliance manager (as permitted under the current Code transitional arrangements) – will have two months from when the amendments commence to establish a Code Arbiter. However, the retailer or wholesaler must have an internal dispute resolution process in place through which a supplier can raise a complaint during this transitional period. If the signatory does not have an internal dispute resolution system in place, the two month transitional period does not apply – that is, the signatory is required to establish a Code Arbiter immediately upon commencement of the Regulations.

#### *Transitional arrangements for new signatories*

New signatories will also have two months after becoming a signatory to have a Code Arbiter in place. In this way, retailers and wholesalers who are not already signatories can decide to become signatories and adhere to other elements of the Code without first needing to have a Code Arbiter in place. However, the retailer or wholesaler must have an internal dispute resolution process in place through which a supplier can raise a complaint during this transitional period. If the signatory does not have an internal dispute resolution system in place, the two month transitional period does not apply – that is, the signatory is required to establish a Code Arbiter immediately upon signing up to the Code.

### **Schedule 3 – Other amendments**

#### **Items 1-2 – expectation that large retailers and wholesalers should sign up to the voluntary Code**

Section 4 prescribes the Code as a voluntary industry code. These items include a note to this regulation, to express the Government's view that large retailers and wholesalers – those with annual revenue of \$5 billion or more, or a market share of 5 per cent or more – should agree to be bound by the voluntary Code.

#### **Item 3 – reviews of the amended Code**

Section 5 outlines the requirements for reviews of the Code. Item 3 replaces the previous review requirements (which are now spent) with two further reviews of the amended Code:

- The first review will be undertaken two years after commencement of the amended Code and will focus on the new dispute resolution system.
- The second review will be undertaken three years after commencement of the amended Code and will cover the rest of the Code.

A report will be prepared about each review, and will be made publicly available.

#### **Items 4-5, 12-14, 21 – delisting products and significant reductions in distribution**

Clause 19 currently governs conduct relating to a retailer delisting a supplier's product, which is defined as 'remov[ing] a grocery product from a retailer's range of grocery products.' This clause has been extended to apply to wholesalers as well as retailers (see Schedule 1, items 32-38).

A decision by a retailer or wholesaler to significantly limit the distribution of a supplier's product is akin to delisting. Accordingly, item 12 extends the definition of delisting to include a reduction in the distribution of a product that has or is likely to have a material effect on the supplier.

Item 13 clarifies that prior to delisting a supplier's product, the retailer or wholesaler must provide reasonable written notice to the supplier of their decision to delist the product. The written notice must include the genuine commercial reasons for delisting the product; information about the supplier's right to have the decision reviewed and their right to direct a complaint to the relevant Code Arbitrator; and the Code Arbitrator's contact details.

Item 14 inserts a requirement that retailers and wholesalers comply promptly (in writing) with any written request from a supplier for information (or additional information) and/or details on the reasons for a delisting. This applies irrespective of whether or not the retailer or wholesaler has already complied (or was required to comply) with the notification requirements under subclause (5).

### Items 6-7 – definition of grocery supply agreement

These items clarify that the definition of grocery supply agreement includes any contracts or agreements between a retailer or wholesaler and a supplier that relate to the supply of groceries. This is to clarify that the definition is not restricted to the principal grocery supply agreement and documents made under that agreement. These other documents may include freight agreements, promotion agreements, supplier portal documents and purchase orders.

### Items 8, 18-19 – Good faith

These items replace the existing good faith provision (currently at clause 28 in Part 4 of the Code) with an enhanced good faith provision (new clause 6B in new Part 1A).

The Code currently includes a non-exhaustive list of factors which may be taken into account when determining whether a retailer or wholesaler has acted in good faith in dealing with a supplier. This provides guidance as to the sort of behaviour that reflects ‘good faith’ and assists retailers and wholesalers understand their obligations. In addition to the three factors currently outlined in the Code, the good faith provision has been expanded to include the following five factors:

- whether the retailer or wholesaler has acted honestly;
- whether the retailer or wholesaler has cooperated to achieve the purposes of the agreement with the supplier;
- whether the retailer or wholesaler has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes; and
- whether the retailer or wholesaler has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier.

### Items 9-10, 16, 20 – retrospective variations to grocery supply agreements

Clause 10 of the Code provides a ban on variations to grocery supply agreements that have retrospective effect. This clause currently includes ‘opt out’ provisions, prescribing certain circumstances in which the ban does not apply.

These items remove the ‘opt out’ provisions, so that grocery supply agreements cannot be amended with retrospective effect even with the agreement of both parties.

These amendments to clause 10 only apply to new grocery supply agreements that come into force on or after the commencement of these amendments, and/or existing agreements that are varied, renewed or extended after that commencement (see Schedule 4, item 1, new clause 48 of the Code). Any actions by the retailer or wholesaler to modify, adjust or continue an existing agreement (eg submitting a new purchase order under the terms of an existing grocery supply agreement) would constitute an existing agreement being varied, renewed or extended.

### Item 11 – payments for wastage

Clause 14 of the Code governs payments from a supplier to a retailer or wholesaler to cover any wastage of groceries incurred at the retailer's or wholesaler's premises.

This item provides suppliers with the right to renegotiate their wastage payments without being required to renegotiate other terms of their grocery supply agreement. This is intended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.

These amendments to clause 14 only apply to new grocery supply agreements that come into force on or after the commencement of these amendments, and/or existing agreements that are varied, renewed or extended after that commencement (see Schedule 4, item 1, new clause 49 of the Code). Any actions by the retailer or wholesaler to modify, adjust or continue an existing agreement (eg submitting a new purchase order under the terms of an existing grocery supply agreement) would constitute an existing agreement being varied, renewed or extended.

### Item 15 – fresh produce

Clause 21 of the Code governs conduct relating to fresh produce standards and quality specifications. This item clarifies that the 'fresh produce' covered by this clause only applies to fruit and vegetables. This includes fruit and vegetables that have been pre-packaged (but not tinned).

### Items 17, 22 – price increases

These items introduce two new provisions (clauses 27A and 27B) governing the conduct of retailers and wholesalers when dealing with suppliers in relation to a price increase.

Clause 27A provides that if a supplier informs a retailer or wholesaler, in writing, of a price increase, the retailer or wholesaler must provide a written response within 30 days, either:

- accepting the supplier's price increase; or
- accepting a price increase, but not accepting the amount notified by the supplier; or
- not accepting the supplier's price increase.

The purpose of clause 27A is to ensure that the retailer or wholesaler engages with the supplier, and provides a response, in a timely fashion. This provision is not intended to interfere with normal business practices, including commercial negotiations between the parties to an agreement. While the supplier retains the right to determine its own prices, if the retailer or wholesaler does not fully accept the supplier's price increase both parties may choose to negotiate a mutually acceptable outcome at any stage during this process.

At all times throughout this process, the retailer or wholesaler must engage in negotiations with the supplier in good faith, and take all reasonable steps to conclude the negotiations without delay. The majority of price increases notified by the supplier – including where the parties choose to negotiate a mutually acceptable outcome – are expected to be settled within 30 days. However, there may be instances where complex negotiations may take longer to resolve. Retailers and wholesalers may have their own policies for dealing with such negotiations in a timely fashion – for example, a commitment to finalise all negotiations within three months. Such a policy would not be inconsistent with clause 27A as long as:

- notification of a price increase under clause 27A by a supplier also triggers commencement of the retailer or wholesaler’s three month negotiation period (ie after the expiration of the 30 day period in clause 27A, the retailer or wholesaler would then have two months to finalise negotiations with the supplier in accordance with their policy); and
- the retailer or wholesaler does not routinely delay, or limit, actively engaging with suppliers on negotiations until near the end of the three month period.

Clause 27A also prevents the retailer or wholesaler from requiring the supplier to disclose commercially sensitive information at any stage during the process.

Clause 27B prescribes that retailers and wholesalers must report annually on these price increase processes. The following information must be provided to the retailer or wholesaler’s Code Arbitrator, for inclusion in their annual reports (which will be made publicly available from the retailer or wholesaler’s website):

- the total number of responses the retailer or wholesaler provided during the year in response to suppliers’ notified price increases, and how many of these (if any) did not meet the 30 day timeframe;
- where the retailer or wholesaler did not fully accept the price increase—the total number of times they engaged in further negotiations with the supplier, how many of these took longer than 30 days, and how long they took to conclude their final position on the negotiations.

These items commence three months after the regulations are registered, to enable retailers and wholesalers time to establish the necessary systems in order to comply with these new obligations.

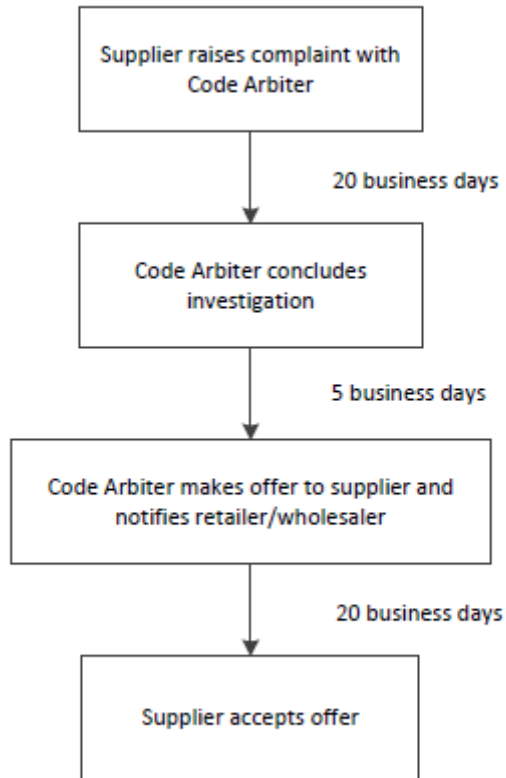
The price increase provisions in clause 27A and the corresponding reporting requirements in clause 27B do not apply to the supply of fresh fruit and vegetables, where the price is subject to seasonal fluctuations with regular price negotiations between suppliers and retailers or wholesalers, and where these routine price negotiations are concluded within five business days of the commencement of each round of negotiations.

#### **Schedule 4 – Application, saving and transitional provisions**

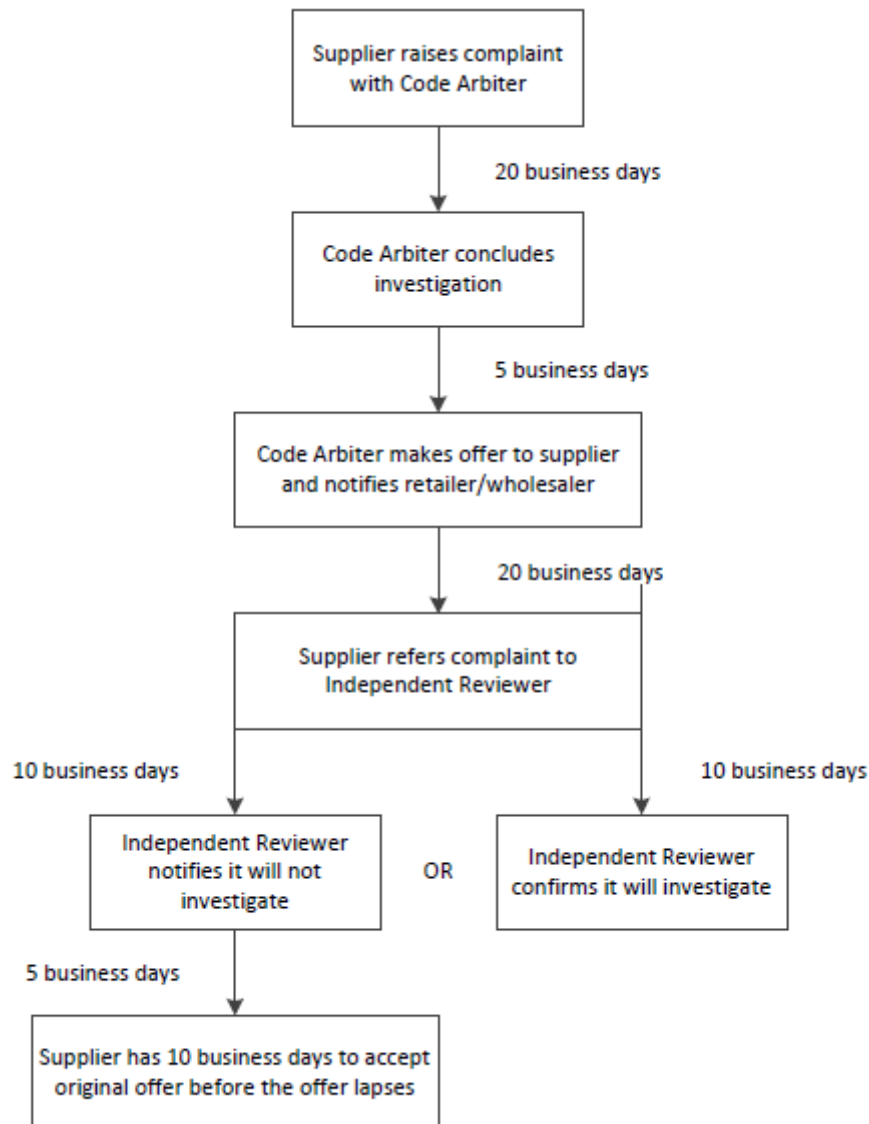
This schedule introduces a new Part 7 – Application, saving and transitional provisions. Details of the individual provisions are provided alongside the relevant amendments in Schedules 1-3, as outlined above.

**DISPUTE RESOLUTION PROCESS**

**Diagram 1 – Supplier accepts proposed remedy within 20 days of the offer being made by Code Arbiter**

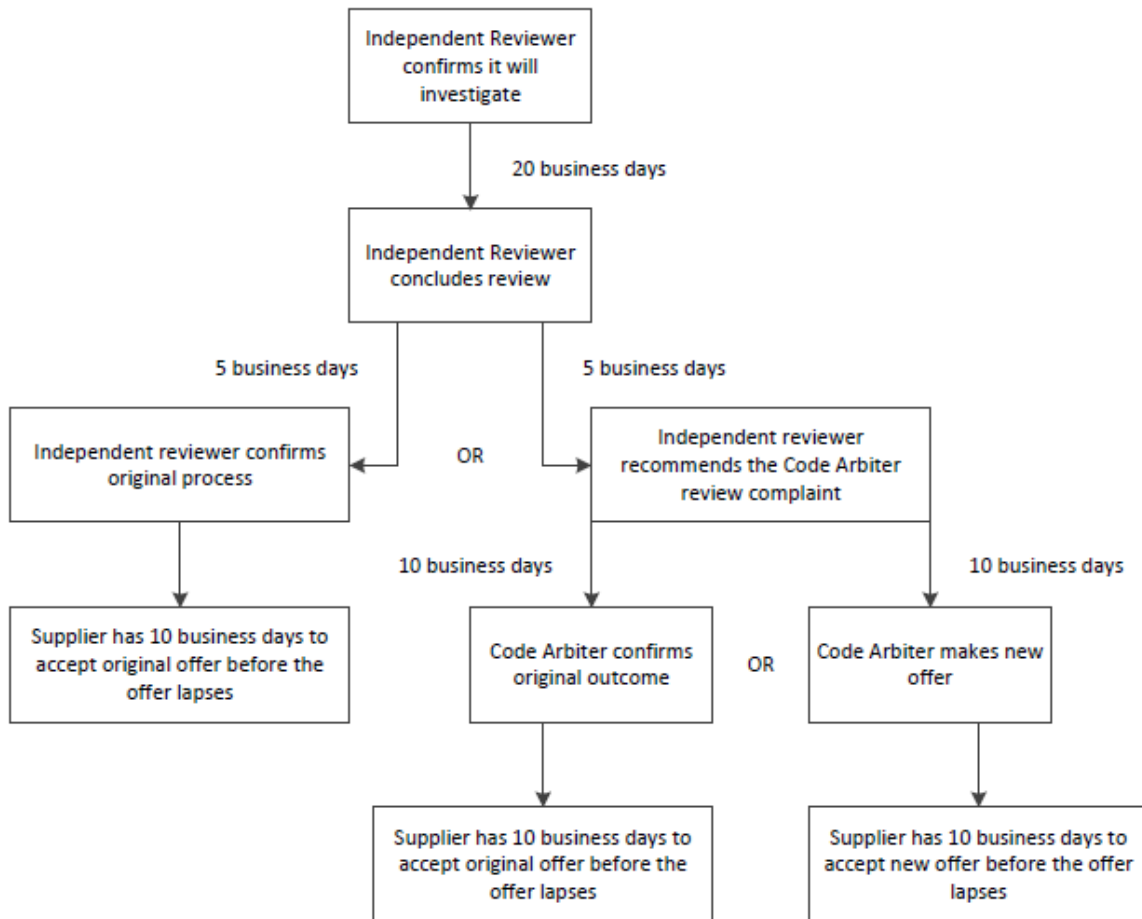


**Diagram 2 – Supplier refers complaint to Independent Reviewer – Independent Reviewer will not review**





**Diagram 3 – Supplier refers complaint to Independent Reviewer – Independent Reviewer reviews complaint**



**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights  
(Parliamentary Scrutiny) Act 2011*

***Competition and Consumer (Industry Codes – Food and Grocery)  
Amendment Regulations 2020***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The purpose of the *Competition and Consumer (Industry Codes – Food and Grocery) Amendment Regulations 2020* (Regulations) is to amend the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* (the Code) to give effect to the Government's response to the *Independent Review of the Food and Grocery Code of Conduct – Final Report*.

The Code was introduced in 2015 to improve standards of business conduct in the food and grocery sector. The Code governs conduct by grocery retailers and wholesalers in their dealings with suppliers. It has rules relating to grocery supply agreements, payments, termination of agreements, dispute resolution and a range of other matters.

The Code is a voluntary industry code. It imposes obligations on corporations – retailers and wholesalers – that agree to be bound by the Code. It does not impose penalty provisions, nor impose obligations on suppliers.

The Regulations amend the Code to:

- apply the same obligations under the Code on wholesalers as already applies to retailers (with the exception of customer facing provisions);
- enhance the good faith obligations in the Code to make it clearer and more user friendly for industry;
- strengthen the dispute resolution procedures to give suppliers more confidence in raising their complaints and having them resolved;
- set limits on acceptable conduct during price rise processes between the parties to restore trust and cooperation between parties; and
- make minor changes to clarify existing provisions and improve protections for suppliers in their dealings with retailers and wholesalers.

### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

This Legislative Instrument makes amendments to the voluntary Code, which governs the conduct of corporations and does not affect the rights of natural persons.

### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.