



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

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 01 October 2020

David Hurley
Governor-General

By His Excellency's Command

Michael Sukkar
Minister for Housing and Assistant Treasurer

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1 Name

This instrument is the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020*.

2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 4 and anything in this instrument not elsewhere covered by this table	The day after this instrument is registered.	3 October 2020
2. Schedules 1 and 2	The day after this instrument is registered.	3 October 2020
3. Schedule 3, items 1 to 16	The day after this instrument is registered.	3 October 2020
4. Schedule 3, item 17	The day after the end of the period of 3 months beginning on the day this instrument is registered.	2 January 2021
5. Schedule 3, items 18 to 21	The day after this instrument is registered.	3 October 2020
6. Schedule 3, item 22	The day after the end of the period of 3 months beginning on the day this instrument is registered.	2 January 2021
6. Schedule 4	The day after this instrument is registered.	3 October 2020

Note: This table relates only to the provisions of this instrument as originally made.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

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

3 Authority

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

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Extension of Part 3 of the Code to wholesalers

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

1 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

Omit “between a retailer or wholesaler and a supplier”, substitute “between a retailer and a supplier (other than a wholesaler), or between a wholesaler and a supplier,”.

2 Clause 3 of Schedule 1 (definition of *own brand product*)

After “retailer” (wherever occurring), insert “or wholesaler”.

3 Clause 3 of Schedule 1 (paragraph (b) of the definition of *promotion*)

Repeal the paragraph, substitute:

- (b) as agreed between:
 - (i) a retailer and a supplier; or
 - (ii) a wholesaler and a supplier; and

4 Clause 3 of Schedule 1 (paragraph (a) of the definition of *shrinkage*)

After “retailer”, insert “or wholesaler”.

5 Clause 3 of Schedule 1 (at the end of the definition of *supplier*)

Add “(whether or not that other person is the person supplied)”.

6 Subclause 4(2) of Schedule 1 (note 1)

Repeal the note.

7 Subclause 4(2) of Schedule 1 (note 2)

Omit “Note 2”, substitute “Note”.

8 Subclause 6(2) of Schedule 1

Omit “18 months”, substitute “6 months”.

9 Subclause 6(4) of Schedule 1

After “Parts 2,”, insert “3”.

10 Paragraph 6(4)(b) of Schedule 1

Omit “24 months”, substitute “12 months”.

11 Clause 11 of Schedule 1

Repeal the clause, substitute:

11 Application of this Part

This Part does not apply in relation to supplies to a retailer by a wholesaler.

12 Subclauses 12(1), (2) and (4) and 13(1) and (2) of Schedule 1

After “retailer”, insert “or wholesaler”.

13 Subclause 14(1) of Schedule 1

Repeal the subclause, substitute:

- (1) The retailer or wholesaler must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred at premises of:
 - (a) the retailer or wholesaler; or
 - (b) a contractor or agent of the retailer or wholesaler; or
 - (c) any other entity that is a retailer or wholesaler.

14 Paragraph 14(2)(a) of Schedule 1

Omit “the retailer or its contractor or agents”, substitute “a person or entity referred to in subclause (1)”.

15 Paragraph 14(2)(d) of Schedule 1

After “retailer’s”, insert “or wholesaler’s”.

16 Paragraph 14(2)(e) of Schedule 1

After “retailer”, insert “or wholesaler”.

17 Subclauses 14(3) and 15(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

18 Subclause 15(2) of Schedule 1

After “apply”, insert “in relation to the retailer”.

19 After subclause 15(2) of Schedule 1

Insert:

- (2A) Subclause (1) does not apply in relation to the wholesaler 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 or listed by the wholesaler during the preceding 365 days in 25% or more of its distribution centres; and
 - (iii) is reasonable having regard to the costs and risks to the wholesaler in stocking or listing the grocery products.

20 Subclause 15(3) of Schedule 1

Omit “Paragraph (2)(a) has effect”, substitute “Paragraphs (2)(a) and (2A)(a) have effect”.

21 Subclause 15(4) of Schedule 1

After “retailer”, insert “or wholesaler”.

22 At the end of subclause 15(4) of Schedule 1

Add “or (2A)”.

23 Clause 16 of Schedule 1 (at the end of the heading)

Add “—retailers”.

24 At the end of clause 16 of Schedule 1

Add:

- (4) This clause does not apply to a corporation to the extent that it is bound by this code as a wholesaler.

25 Clause 17 of Schedule 1 (heading)

After “retailer’s”, insert “or wholesaler’s business”.

26 Subclause 17(1) of Schedule 1

Repeal the subclause, substitute:

- (1) The retailer or wholesaler must not directly or indirectly require a supplier to make any payment towards the costs of any activity (the *retailer’s or wholesaler’s business activity*) that is undertaken by the retailer or wholesaler in the ordinary course of carrying on a business as a retailer or wholesaler.
- (1A) Without limiting subclause (1), the retailer’s or wholesaler’s business activity includes the following:
- (a) a buyer’s visit to the supplier;
 - (b) artwork or packaging design;
 - (c) consumer or market research;
 - (d) the opening or refurbishing of a store;
 - (e) hospitality for the retailer’s or wholesaler’s staff.

27 Paragraph 17(3)(a) of Schedule 1

Omit “activities”, substitute “or wholesaler’s business activity”.

28 Paragraph 17(3)(b) of Schedule 1

Omit “from the retailer’s activities”, substitute “or wholesaler from the retailer’s or wholesaler’s business activity”.

29 Paragraph 17(3)(c) of Schedule 1

Omit “for the retailer’s activities”, substitute “or wholesaler for the retailer’s or wholesaler’s business activity”.

30 Subclauses 17(5) and 18(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

31 Paragraphs 18(3)(b) and (c) of Schedule 1

After “retailer”, insert “or wholesaler”.

32 Subclauses 18(5) and 19(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

33 Paragraphs 19(2)(b) and (c) of Schedule 1

After “retailer’s”, insert “or wholesaler’s”.

34 Paragraph 19(6)(b) of Schedule 1

After “retailer”, insert “or wholesaler”.

35 Subclause 19(7) of Schedule 1

After “retailer’s” (first occurring), insert “or wholesaler’s”.

36 Subclause 19(7) of Schedule 1

After “retailer”, insert “or wholesaler”.

37 Subclause 19(7) of Schedule 1

After “retailer’s” (last occurring), insert “or wholesaler’s”.

38 Subclauses 19(8) and (9) of Schedule 1

After “retailer”, insert “or wholesaler”.

39 Subclause 20(1) of Schedule 1

Omit “product, the retailer”, substitute “product (the *funded promotion*), the retailer or wholesaler”.

40 Subclause 20(2) of Schedule 1

Omit “orders a grocery product from a supplier”, substitute “or wholesaler orders a grocery product from a supplier in connection with the funded promotion”.

41 Subclause 20(2) of Schedule 1

After “retailer” (second occurring), insert “or wholesaler”.

42 Paragraph 20(2)(c) of Schedule 1

After “retailer”, insert “or wholesaler”.

43 Subclause 20(3) of Schedule 1

After “retailer” (first occurring), insert “or wholesaler”.

44 Subclause 20(3) of Schedule 1

Omit “a promotion, the retailer”, substitute “the funded promotion, the retailer or wholesaler”.

45 Paragraph 20(3)(b) of Schedule 1

Repeal the paragraph, substitute:

- (b) reduce the volume of the order by more than:
 - (i) in the case of an order placed by the retailer—10%; or
 - (ii) in the case of an order placed by the wholesaler—20%.

46 Paragraphs 20(4)(a) and (b) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

47 Subclauses 21(1) to (7) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

48 Subclause 21(7) of Schedule 1

Omit “its nominee”, substitute “the retailer’s or wholesaler’s nominee”.

49 Subclauses 22(1) and (2) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

50 Clause 23 of Schedule 1

After “retailer”, insert “or wholesaler”.

51 Subclauses 24(1), (3) and (4) and 25(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

52 Subclause 25(2) of Schedule 1

After “retailer” (first occurring), insert “or wholesaler”.

53 Subclause 25(2) of Schedule 1

After “retailer” (second occurring), insert “or wholesaler (as the case may be)”.

54 Subclauses 25(3) and (4) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

55 Clause 26 of Schedule 1 (heading)

Repeal the heading, substitute:

26 Product ranging, shelf space allocation and range reviews

56 Subclause 26(1) of Schedule 1

Repeal the subclause, substitute:

- (1) The following must be published or provided to all suppliers with whom the retailer or wholesaler has grocery supply agreements:
 - (a) the retailer’s or wholesaler’s product ranging principles;
 - (b) in the case of a retailer—the retailer’s shelf space allocation principles.

57 Subclause 26(2) of Schedule 1

Omit “must act in accordance with the”, substitute “or wholesaler must act in accordance with the retailer’s or wholesaler’s”.

58 Subclauses 26(3) and (4) of Schedule 1

After “retailer”, insert “or wholesaler”.

59 Subclause 26(4) of Schedule 1

After “retailer’s”, insert “or wholesaler’s”.

60 Subclause 26(5) of Schedule 1

Repeal the subclause, substitute:

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

61 Subclause 27(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

62 At the end of subclause 27(1) of Schedule 1

Add “of the retailer or wholesaler (as the case may be)”.

63 Subclause 27(2) of Schedule 1

After “retailer” (first occurring), insert “or wholesaler”.

64 Paragraphs 27(2)(a) and (b)

After “product”, insert “of the retailer or wholesaler”.

65 Paragraph 27(2)(c)

After “retailer” (first occurring), insert “or wholesaler”.

66 Paragraph 27(2)(c)

After “own brand product”, insert “of the retailer or wholesaler”.

67 Subparagraphs 27(2)(c)(i) and (ii)

After “retailer”, insert “or wholesaler”.

Schedule 2—Dispute resolution

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

1 Clause 3 of Schedule 1

Insert:

Code Arbiter means a Code Arbiter appointed under subclause 31(1).

2 Clause 3 of Schedule 1 (definition of *code compliance manager*)

Repeal the definition.

3 Clause 3 of Schedule 1

Insert:

Independent Reviewer means the Independent Reviewer appointed under clause 37.

independent review request has the meaning given by subclause 37B(2).

original complaint has the meaning given by subclause 37B(1).

proposed remedy has the meaning given by subclause 36(5).

4 Subclause 5(4) of Schedule 1

Omit “, 5”.

5 Subclause 6(4) of Schedule 1

Omit “5”.

6 At the end of Part 1 of Schedule 1

Add:

6A Transitional application—Part 5 of this code

- (1) Part 5 of this code does not apply in relation to a retailer or wholesaler who becomes bound by this code until one of the following (an *application event*) occurs:
 - (a) the retailer or wholesaler appoints a Code Arbiter;
 - (b) the period of 2 months after the retailer or wholesaler becomes bound ends.
- (2) However, this clause does not apply unless, on and after becoming bound, the retailer or wholesaler has an internal dispute resolution process at all times until an application event occurs.

7 Subclause 24(5) of Schedule 1

Repeal the subclause.

8 Paragraph 30(1)(b) of Schedule 1

Omit “code compliance manager”, substitute “Code Arbiter”.

9 Divisions 1 and 2 of Part 5 of Schedule 1

Repeal the Divisions, substitute:

Division 1—Retailer’s or wholesaler’s Code Arbiter**31 Retailer or wholesaler must appoint a Code Arbiter**

- (1) The retailer or wholesaler must appoint a Code Arbiter for the retailer or wholesaler in relation to this code.
- (2) The retailer or wholesaler must notify the Commission and the Independent Reviewer of:
 - (a) the Code Arbiter’s appointment; and
 - (b) contact details for the Code Arbiter to be used by suppliers to raise a complaint with the Code Arbiter.
- (3) The retailer or wholesaler must pay costs of the Code Arbiter as necessary to ensure the Code Arbiter is sufficiently resourced to perform the Code Arbiter’s functions.
- (4) The retailer or wholesaler must not unduly influence, or attempt to unduly influence, the Code Arbiter in the performance of the Code Arbiter’s functions.
- (5) The retailer or wholesaler must ensure that the Code Arbiter has access to:
 - (a) all documentation held by the retailer or wholesaler in relation to any dispute with a supplier relating to the retailer’s or wholesaler’s obligations under this code; and
 - (b) the retailer’s or wholesaler’s buying team for the purposes of discussing issues relating to the retailer’s or wholesaler’s obligations under this code.
- (6) The retailer or wholesaler must give the Code Arbiter authority to enter into an agreement on behalf of the retailer or wholesaler to settle a dispute relating to the retailer’s or wholesaler’s obligations under this code.

32 Who can be appointed Code Arbiter

- (1) A Code Arbiter must not be engaged by the retailer or wholesaler in any capacity other than as Code Arbiter.
- (2) Despite subclause (1), a Code Arbiter appointed by a retailer or wholesaler may be engaged by the retailer or wholesaler in another capacity during a financial year if the retailer’s or wholesaler’s market share:
 - (a) is less than 15% in that financial year; or
 - (b) was less than 15% in either of the previous 2 financial years.

33 Function of the Code Arbiter

- (1) A function of the Code Arbiter is to deal with complaints that arise in relation to the conduct of retailers and wholesalers towards suppliers, to the extent that conduct is regulated by this code.

- (2) The Code Arbiter must develop a written complaints handling procedure that is consistent with this code.
- (3) The Code Arbiter must act in accordance with the procedure. The Code Arbiter must also:
 - (a) provide a copy of the procedure to the retailer or wholesaler and the Independent Reviewer; and
 - (b) review the procedure annually and update it as necessary; and
 - (c) if the procedure is updated—provided a copy of the updated procedure to the retailer or wholesaler and the Independent Reviewer.
- (4) The retailer or wholesaler must publish an up to date copy of the procedure on the retailer's or wholesaler's website.

34 Referral of complaints to Code Arbiter

- (1) A supplier may direct a complaint relating to a matter covered by this code to the Code Arbiter. The complaint must be in writing.
- (2) The complaint must also include the following:
 - (a) the supplier's identification details, including business or trading name;
 - (b) 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;
 - (c) details of the conduct giving rise to the complaint, including any documents or other information that would assist the investigation of the complaint;
 - (d) the provisions of this code that are relevant to the complaint.

Confidentiality requirements

- (3) The Code Arbiter must not disclose to the retailer or wholesaler the identity of a supplier who has made a complaint, except with the express consent of the supplier.
- (4) The Code Arbiter must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint.

35 Investigation by Code Arbiter

Investigation of complaint

- (1) The Code Arbiter must take all reasonable steps to:
 - (a) investigate the complaint; and
 - (b) conclude the investigation within 20 business days, or a longer period as extended under subclause (2).
- (2) With the written agreement of the supplier, the Code Arbiter may extend the period referred to in paragraph (1)(b) by a period of a specified number of days.

Complaints that are vexatious etc.

- (3) 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.
- (4) The Code Arbiter must not be satisfied that a complaint relating to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement) is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the complaint is detriment to the supplier.
- (5) A notice under subclause (3) must set out:
 - (a) the Code Arbiter'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 37B (independent review request) or 38 (mediation or arbitration).
- (6) The Code Arbiter must give the retailer or wholesaler a copy of the notice. Unless the supplier has expressly consented to their identity being disclosed to the retailer or wholesaler, the Code Arbiter must first redact from the copy of the notice any information that would disclose the identity of the supplier.

Other complaints

- (7) Subclauses (8) and (9) apply to complaints that are not dealt with under subclause (3).
- (8) The Code Arbiter's investigation of the complaint:
 - (a) must include consideration of the retailer's or wholesaler's obligation to deal lawfully and in good faith (see clause 6B); and
 - (b) may include consideration of whether the retailer or wholesaler has acted fairly in dealing with the supplier.
- (9) In considering for the purposes of paragraph (8)(b) whether the retailer or wholesaler has acted fairly in dealing with a supplier, the Code Arbiter may take the following into account:
 - (a) whether the retailer or wholesaler has not acted in a way that denied the supplier the benefits of the contract, or undermined those benefits for the supplier;
 - (b) whether the retailer or wholesaler has acted in accordance with the legitimate and reasonable expectations of the supplier;
 - (c) whether the retailer or wholesaler has had due regard to:
 - (i) the nature of the relationship between the retailer or wholesaler and the supplier; and
 - (ii) the individual characteristics of the supplier that were known, or ought to have been known, by the retailer or wholesaler.

36 Determination by Code Arbiter of proposed remedy

- (1) After investigating a complaint under clause 35, or after reconsidering a complaint under clause 36B, the Code Arbiter must determine what (if any) action should be taken by the retailer or wholesaler in response to the complaint.

- (2) Without limiting subclause (1), the Code Arbiter may determine that the retailer or wholesaler should:
 - (a) pay compensation to the supplier; or
 - (b) vary, subject to clause 9 (unilateral variation of agreement), a grocery supply agreement with the supplier.
- (3) However, the Code Arbiter may not determine that the retailer or wholesaler pay compensation to the supplier in excess of \$5 million in relation to the complaint.
- (4) If the Code Arbiter determines that the retailer or wholesaler should pay compensation of \$5 million to the supplier in relation to the complaint, the Code Arbiter may make a recommendation that the retailer or wholesaler also pay an additional amount of compensation.
- (5) If the Code Arbiter determines that the retailer or wholesaler should take action in response to the complaint, that action is the **proposed remedy** for the supplier in relation to the complaint. A recommendation under subclause (4) does not form part of the **proposed remedy**.
- (6) Before determining that a retailer or wholesaler should vary a grocery supply agreement, the Code Arbiter may consult with the retailer or wholesaler, or the supplier, or both.
- (7) Within 5 business days after the conclusion of the investigation, the Code Arbiter must give the supplier a notice in writing setting out:
 - (a) the determination made by the Code Arbiter under subclause (1); and
 - (b) the Code Arbiter's reasons for making that determination; and
 - (c) if the Code Arbiter determined a proposed remedy—the timetable for the proposed remedy; and
 - (d) that the supplier may take further action in relation to the matter under clause 37B (independent review request) or 38 (mediation or arbitration).

Note: If the Code Arbiter was satisfied that the complaint was vexatious, trivial, misconceived or lacking in substance, the Code Arbiter may combine a notice given under this subclause with the notice given under subclause 35(3).
- (8) The Code Arbiter must give the retailer or wholesaler a copy of the notice. The Code Arbiter must first redact from the copy of the notice any information that would disclose the identity of the supplier unless:
 - (a) the supplier has expressly consented to their identity being disclosed to the retailer or wholesaler; or
 - (b) the supplier has accepted a proposed remedy in relation to the complaint.

36A Acceptance by supplier of proposed remedy

- (1) The supplier may accept the proposed remedy by written notice given to the Code Arbiter at any time before the remedy lapses.
- (2) If:
 - (a) the supplier notifies the Code Arbiter that the supplier accepts a proposed remedy that has not lapsed; and
 - (b) the retailer or wholesaler has given the Code Arbiter authority to enter into an agreement on behalf of the retailer or wholesaler as required by subclause 31(6);

the Code Arbiter must enter into an agreement on behalf of the retailer or wholesaler with the supplier under which the retailer or wholesaler agrees to take the specified action that is the proposed remedy.

- (3) The retailer or wholesaler must comply with the agreement.

When a proposed remedy lapses

- (4) The proposed remedy lapses at the end of the period of 20 business days beginning on the day the supplier receives the notice under subclause 36(7). However, if within that period, the supplier:
- (a) requests the Independent Reviewer to review the Code Arbiter's process in dealing with the complaint under clause 37B; and
 - (b) notifies the Code Arbiter that the supplier has done so;
- the proposed remedy lapses as specified in subclause (5) or (6) of this clause (whichever is applicable).

Note: If the remedy is proposed as a result of a reconsideration of a complaint, the period is 10 business days instead of 20 business days: see subclause 36B(3).

- (5) If the Independent Reviewer decides not to conduct an independent review, the proposed remedy lapses 10 business days after the day the supplier receives notice of the decision under subclause 37C(3).
- (6) If the Independent Reviewer completes the independent review, the proposed remedy lapses 10 business days after:
- (a) the supplier receives notice of the outcome of the review under subclause 37D(7), unless paragraph (b) of this subclause applies; or
 - (b) for a case where the Independent Reviewer recommends that the Code Arbiter reconsider the complaint—the supplier receives notice under subclause 36B(2) of the outcome of the reconsideration.

36B Reconsideration by Code Arbiter

- (1) This clause applies if:
- (a) a supplier has made an independent review request in relation to the complaint; and
 - (b) the Independent Reviewer has:
 - (i) conducted an independent review; and
 - (ii) recommended under subclause 37D(6) that the Code Arbiter reconsider the complaint.
- (2) The Code Arbiter must, within 10 business days of the recommendation:
- (a) reconsider what (if any) action should be taken by the retailer or wholesaler in response to the complaint; and
 - (b) make a determination under clause 36 in relation to the complaint; and
 - (c) notify the retailer or wholesaler, the supplier, and the Independent Reviewer, in writing accordingly.
- (3) If the notice referred to in paragraph (2)(c) determines a proposed remedy, the reference in subclause 36A(4) to 20 business days is taken instead to be a reference to 10 business days.

36C Records to be kept by Code Arbiter

If a complaint is made, the Code Arbiter must keep the following for at least 6 years:

- (a) a record of the complaint;
- (b) a record of the investigations undertaken to investigate the complaint;
- (c) if the Code Arbiter gives notice under subclause 35(3) that a complaint is vexatious, trivial, misconceived or lacking in substance—a copy of the notice;
- (d) a copy of each notice given under subclause 36(7);
- (e) a summary of any action taken in response to the complaint.

36D Report by Code Arbiter

- (1) A Code Arbiter must prepare a written report in respect of each financial year.
- (2) The report must set out the following:
 - (a) the number of complaints received for investigation in the financial year;
 - (b) in general terms and without identifying a complainant—the nature of the complaints received;
 - (c) the time taken to investigate each complaint;
 - (d) the outcome of each investigation;
 - (e) whether or not each complaint was resolved to the satisfaction of the complainant;
 - (f) the number of complaints in relation to which the Code Arbiter made a recommendation under subclause 36(4) (about paying compensation in excess of \$5 million);
 - (g) any information given to the Code Arbiter by the retailer or wholesaler under clause 27B (information about price increases) in relation to the financial year.
- (3) The Code Arbiter must give a copy of the report to the following:
 - (a) the retailer or wholesaler;
 - (b) the Commission;
 - (c) the Independent Reviewer.
- (4) The Code Arbiter must prepare the report, and give copies of it as required by subclause (3), within 30 business days after the end of the financial year.
- (5) Within 1 business day of being given a copy of the report, the retailer or wholesaler must publish a copy of the report on the retailer's or wholesaler's website.

Division 2—The Code's Independent Reviewer

37 Minister to appoint an Independent Reviewer

- (1) The Minister is to appoint an Independent Reviewer by written instrument.
- (2) A person is not eligible for appointment as the Independent Reviewer unless the Minister is satisfied that the person:

-
- (a) has appropriate qualifications, knowledge or experience in procedural fairness; and
 - (b) has experience working in Australian industry.

37A Functions of the Independent Reviewer

- (1) The functions of the Independent Reviewer are:
 - (a) to consider requests to review Code Arbiters' processes in dealing with complaints; and
 - (b) to identify and address emerging and systemic issues in the grocery supply chain relating to the operation of this code; and
 - (c) to publish non-binding guidance material relating to compliance with this code; and
 - (d) to conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of this code.
- (2) In performing functions under paragraph (1)(b) the Independent Reviewer must act collaboratively with stakeholders in the grocery supply chain, including the following:
 - (a) Code Arbiters;
 - (b) retailers and wholesalers;
 - (c) suppliers;
 - (d) relevant industry representative bodies.

37B Supplier may request an independent review of Code Arbiter's process

- (1) If:
 - (a) a supplier has directed a complaint (the *original complaint*) relating to a matter to a Code Arbiter; and
 - (b) the supplier is dissatisfied with the steps taken by the Code Arbiter under clause 35;the supplier may request the Independent Reviewer to review the Code Arbiter's process in dealing with the complaint. The request must be in writing.
- (2) A request under subclause (1) (an *independent review request*) must also include the following:
 - (a) the supplier's identification details, including business or trading name;
 - (b) contact details for the supplier, or the person dealing with the independent review request on behalf of the supplier, including the name, title and telephone number of that person;
 - (c) details of the process giving rise to the independent review request, including any documents or other information that would assist the Independent Reviewer to review the Code Arbiter's process.

Confidentiality requirements

- (3) The Independent Reviewer must not disclose to the retailer or wholesaler the identity of a supplier who has made an independent review request, except with the express consent of the supplier.

- (4) The Independent Reviewer must observe any confidentiality requirements relating to information disclosed or obtained in the course of considering independent review requests and conducting independent reviews.

37C Independent Reviewer's discretion to conduct an independent review

- (1) The Independent Reviewer must consider the independent review request and decide within 10 business days of the request being received:
 - (a) to conduct an independent review of the Code Arbitrator's process in dealing with the complaint; or
 - (b) not to conduct an independent review of the Code Arbitrator's process in dealing with the complaint.

Deciding not to conduct an independent review

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

37D The independent review

- (1) If the Independent Reviewer decides to conduct the independent review, the Independent Reviewer must notify the supplier, the retailer or wholesaler, and the Code Arbitrator in writing.
- (2) If the Independent Reviewer decides to conduct the independent review, the Independent Reviewer must take all reasonable steps to:
 - (a) consider the independent review request; and
 - (b) complete the review within 20 business days of giving the supplier the notice referred to in subclause (1).
- (3) Without limiting subclause (2), the steps the Independent Reviewer may take include requesting information relating to the original complaint from one or more of the following:
 - (a) the Code Arbitrator;
 - (b) the supplier;
 - (c) the retailer or wholesaler.

-
- (4) A retailer, wholesaler or Code Arbiter who receives a reasonable request from the Independent Reviewer to provide information relating to the original complaint must comply with the request within 10 business days of receiving it.
 - (5) The 20 business day period referred to in paragraph (2)(b) (including the period as extended by a previous application of this subclause) is worked out not counting any days on which the Independent Reviewer is waiting to receive information the Independent Reviewer has requested as mentioned in subclause (3).
 - (6) Following the consideration, the Independent Reviewer may make one or more recommendations to the Code Arbiter. Unless the supplier has accepted a proposed remedy in relation to the original complaint, the Independent Reviewer may recommend that the Code Arbiter reconsider the original complaint.
 - (7) Within 5 business days of completing the review, the Independent Reviewer must give the supplier and the Code Arbiter a notice in writing:
 - (a) stating that the independent review is complete; and
 - (b) setting out the recommendations (if any) made to the Code Arbiter under subclause (6); and
 - (c) setting out the Independent Reviewer's reasons for making those recommendations.
 - (8) The Independent Reviewer must give the retailer or wholesaler a copy of the notice. Unless the supplier has expressly consented to their identity being disclosed to the retailer or wholesaler, the Independent Reviewer must first redact from the copy of the notice any information that would disclose the identity of the supplier.
 - (9) If the Independent Reviewer becomes aware, in connection with the independent review request, that a breach of this code may have occurred, the Independent Reviewer may give particulars of the breach to the Commission. The Independent Reviewer must give a copy of the particulars to the retailer or wholesaler concerned.

37E Annual report

- (1) The Independent Reviewer must prepare a written report in respect of each financial year.
- (2) The report must:
 - (a) be prepared by the first 30 November after the end of the financial year; and
 - (b) set out the Independent Reviewer's activities in the financial year.
- (3) The Independent Reviewer must:
 - (a) give a copy of the report to the Commission; and
 - (b) publish the report on the Independent Reviewer's website.
- (4) The Independent Reviewer must not publish information that the Independent Reviewer is satisfied is confidential commercial information. The Independent Reviewer may consult with the retailer, wholesaler or supplier concerned for the purpose of determining whether information is of that character.

- (5) The report must not identify, or be reasonably capable of being used to identify, a supplier.

37F Annual survey

- (1) The Independent Reviewer must conduct a survey of suppliers, retailers and wholesalers for the purpose of:
 - (a) identifying emerging and systemic issues in the grocery supply chain relating to the operation of this code; and
 - (b) assessing systemic compliance with this Code.
- (2) The Independent Reviewer must publish the results of the survey on the Independent Reviewer's website. This may be done as part of the report required by clause 37E.
- (3) The Independent Reviewer must conduct the survey, and publish the results, annually.
- (4) The results of the survey must not identify, or be reasonably capable of being used to identify, a supplier.

10 Subclause 38(2) of Schedule 1

Omit "Division 2 (complaints)", substitute "Division 1 (about the Code Arbiter) or Division 2 (about the Independent Reviewer)".

11 At the end of subclause 38(5) of Schedule 1

Add:

- ; or (c) the supplier has accepted a proposed remedy in relation to the complaint or dispute and the retailer or wholesaler has taken the specified action that is the proposed remedy.

12 Subclause 39(1) of Schedule 1

Omit "the rules of the Institute of Arbitrators and Mediators Australia", substitute "Resolution Institute Arbitration Rules 2016, as in force on the day Schedule 2 to the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020* commences".

13 Subclause 39(2) of Schedule 1

Omit "Institute of Arbitrators and Mediators Australia", substitute "Resolution Institute".

14 Subclause 39(4) of Schedule 1

Omit "rules of the Institute of Arbitrators and Mediators Australia", substitute "rules referred to in subclause (1)".

15 Subclause 39(5) of Schedule 1

Repeal the subclause, substitute:

- (5) This clause does not apply in relation to a complaint directed to a Code Arbiter.

16 Part 6 of Schedule 1 (heading)

Repeal the heading, substitute:

Part 6—Compliance

17 Clause 41 of Schedule 1

Repeal the clause.

18 Paragraph 42(2)(i) of Schedule 1

Omit “paragraph 35(2)(b)”, substitute “former paragraph 35(2)(b)”.

19 Paragraph 42(2)(j) of Schedule 1

Omit “subclause 36(2)”, substitute “former subclause 36(2)”.

20 Paragraph 42(2)(k) of Schedule 1

Omit “subclause 41(1)”, substitute “former subclause 41(1)”.

21 At the end of subclause 42(2) of Schedule 1

Add:

- ; (l) a summary of action that has been taken to comply with an agreement entered into under subclause 36A(2) (about acceptance of a proposed remedy);
- (m) a copy of a Code Arbiter’s report given to the retailer or wholesaler under paragraph 36D(3)(a).

Schedule 3—Other amendments

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

1 Section 4 (note)

Omit “Note”, substitute “Note 1”.

2 At the end of section 4

Add:

Note 2: The Commonwealth has expressed the view that retailers and wholesalers that have an annual revenue of \$5 billion or more, or a market share of 5% or more, should agree to be bound by the code.

3 Section 5

Repeal the section, substitute:

5 Reviews

- (1) The Minister administering section 51AE of the *Competition and Consumer Act 2010* must cause 2 reviews to be undertaken in relation to the operation of the Food and Grocery Code of Conduct (the *code*) set out in Schedule 1.
- (2) The first review must:
 - (a) review the operation of Part 5 of the code; and
 - (b) start before the end of the period of 2 years after the commencement of this section.
- (3) The second review must:
 - (a) review the operation of the code (other than Part 5); and
 - (b) start before the end of the period of 3 years after the commencement of this section.
- (4) Each review must assess the impact of the code in improving commercial relations between grocery retailers, wholesalers and suppliers.
- (5) The Minister must cause a written report about each review to be prepared.

4 Clause 3 of Schedule 1 (definition of *delist*)

Repeal the definition.

5 Clause 3 of Schedule 1

Insert:

delists has the meaning given by subclause 19(1A).

6 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

Omit “for the supply”, substitute “that relates to the supply”.

7 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

After “supermarket business”, insert “(whether or not the agreement is the principal agreement between them relating to the supply of groceries)”.

8 After Part 1 of Schedule 1

Insert:

Part 1A—Good faith**6B Obligation to deal with suppliers 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 has acted honestly;
 - (b) whether the retailer or wholesaler has cooperated to achieve the purposes of the relevant grocery supply agreement;
 - (c) whether the retailer or wholesaler has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
 - (d) whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes;
 - (e) whether the retailer’s or wholesaler’s trading relationship with the supplier has been conducted without duress;
 - (f) whether the retailer’s 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;
 - (g) 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;
 - (h) whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.
- (4) Subclause (3) does not limit subclause (1).

9 Subclause 10(1) of Schedule 1

Omit “(1)”.

10 Subclauses 10(2) to (6) of Schedule 1

Repeal the subclauses.

11 At the end of clause 14 of Schedule 1

Add:

- (4) If:
- (a) the relevant grocery supply agreement provides for the supplier to make payments to cover wastage of the supplier's groceries; and
 - (b) the supplier seeks to negotiate a variation of the agreement relating to payments of that kind;
- the retailer or wholesaler must not, in the course of the negotiations or as a precondition to entering into the negotiations, seek to negotiate other variations of the agreement unrelated to payments of that kind.

12 After subclause 19(1) of Schedule 1

Insert:

- (1A) The retailer or wholesaler *delists* a supplier's grocery product if:
- (a) the product is removed from the retailer's or wholesaler's range of grocery products; or
 - (b) the retailer or wholesaler reduces the distribution of the product across the retailer's stores or the wholesaler's distribution centres (as the case may be), and that reduction has or is likely to have a material effect on the supplier.

13 Subclause 19(5) of Schedule 1

Repeal the subclause, substitute:

- (5) Prior to delisting a supplier's grocery product, the retailer or wholesaler must provide reasonable written notice to the supplier of the retailer's or wholesaler's decision to delist the product. The notice must:
- (a) include the genuine commercial reasons for delisting the product; and
 - (b) inform the supplier of the supplier's right to have the decision to delist the product reviewed by the retailer's or wholesaler's senior buyer for the supplier; and
 - (c) inform the supplier of the supplier's right to direct a complaint relating to the decision to delist the product to the Code Arbiter for the retailer or wholesaler; and
 - (d) include the contact details of the Code Arbiter for the retailer or wholesaler.

14 After subclause 19(6) of Schedule 1

Insert:

- (6A) The retailer's or wholesaler's senior buyer for a supplier must promptly comply, in writing, with any written request from the supplier for:
- (a) a statement of the retailer's or wholesaler's genuine commercial reasons for the delisting; or
 - (b) information (or additional information) relating to the delisting.
- This subclause applies whether or not the retailer or wholesaler complied (or was required to comply) with subclause (5).

15 Before subclause 21(1) of Schedule 1

Insert:

- (1A) This clause applies only in relation to fresh fruit and vegetables.
-

16 Subclause 22(4) of Schedule 1

Omit “and clause 10 (retrospective variation of agreement)”.

17 At the end of Part 3 of Schedule 1

Add:

27A Price increases

- (1) This clause applies if:
 - (a) the retailer or wholesaler has a grocery supply agreement with a supplier for the supply of groceries; and
 - (b) the supplier informs the retailer or wholesaler, in writing, of an increase in the price (the *price increase*) of groceries supplied under the agreement; and
 - (c) if the price increase is in respect of fresh fruit and vegetables that are supplied under the agreement and the agreement includes a mechanism to negotiate on a regular basis the price of those fresh fruit and vegetables—any negotiations about the price increase are not concluded within 5 business days after the supplier informs the retailer or wholesaler of the price increase.
- (2) Within 30 days of being informed by the supplier of the price increase, the retailer or wholesaler must, in writing, notify the supplier whether the retailer or wholesaler:
 - (a) accepts the price increase; or
 - (b) accepts an increase in the price of the groceries supplied under the agreement but does not accept the amount of the price increase; or
 - (c) does not accept the price increase.
- (3) If the supplier is notified of a matter referred to in paragraph (2)(b) or (c), the supplier may request the retailer or wholesaler to enter into negotiations about an increase in the price for the groceries.
- (4) A retailer or wholesaler that enters into such negotiations must engage in the negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay.
- (5) The retailer or wholesaler must not require the supplier to disclose commercially sensitive information in relation to the following:
 - (a) the price increase;
 - (b) negotiations about an increase in the price for the groceries.

Note: Nothing in this clause affects the rights of a supplier to determine the price of groceries that the supplier supplies.

27B Information about price increases

The retailer or wholesaler must give to its Code Arbiter, in sufficient time for the information to be included in the Code Arbiter’s report in respect of a financial year under clause 36D, the following information in relation to the financial year:

- (a) the total number of notifications given under subclause 27A(2) by the retailer or wholesaler to any supplier during the financial year;

- (b) the number of those notifications that were not given within the 30-day period required by that subclause;
- (c) the total number of negotiations entered into during the financial year following requests made under subclause 27A(3);
- (d) the number of those negotiations in which the retailer or wholesaler did not conclude its position on the negotiations within the period of 30 days starting on the day (the *notification day*) the retailer or wholesaler was notified of the relevant proposed price increase by the supplier;
- (e) for each of the negotiations to which paragraph (d) applies, the number of days the retailer or wholesaler took to conclude its position on the negotiations starting from the notification day for the relevant proposed price increase.

18 Part 4 of Schedule 1 (heading)

Repeal the heading.

19 Clause 28 of Schedule 1

Repeal the clause.

20 Paragraph 42(2)(b) of Schedule 1

Omit “or 10(2)(d)”, substitute “or under former paragraph 10(2)(d)”.

21 After paragraph 42(2)(c) of Schedule 1

Insert:

- (ca) a request of a kind mentioned in subclause 19(6A), and any statement or information given as a result of such a request;

22 After paragraph 42(2)(h) of Schedule 1

Insert:

- (ha) a proposed price increase informed in writing by a supplier under subclause 27A(1);
- (hb) a notification given under subclause 27A(2);
- (hc) a request to enter into negotiations about a price increase made in writing by a supplier under subclause 27A(3);

Schedule 4—Application, saving and transitional provisions

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

1 At the end of Schedule 1

Add:

Part 7—Application, saving and transitional provisions

Division 1—Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020

43 Definitions

In this Division:

amending Regulations means the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020*.

new code means this code, as amended by the amending Regulations.

old code means this code, as in force immediately before the commencement of this clause.

relevant code provisions means the following provisions of the new code:

- (a) the provisions of Part 2 (other than clause 10);
- (b) the provisions of Part 3 (other than subclause 14(4)).

44 Application—clause 6 of new code

Clause 6 of the new code applies in relation to a wholesaler that becomes bound by the new code on or after the commencement of this clause.

45 Application—clause 6A of new code

Clause 6A of the new code applies in relation to a retailer or wholesaler who becomes bound by the new code on or after the commencement of this clause.

46 Application—wholesalers bound by old code

- (1) This clause applies in relation to a wholesaler if:
 - (a) immediately before the commencement of this clause, the wholesaler:
 - (i) was a party to a grocery supply agreement; and
 - (ii) was bound by the old code; and
 - (b) immediately after that commencement, the agreement does not conform with the requirements of the relevant code provisions in relation to making grocery supply agreements.

- (2) Within 18 months after the commencement of this clause, the wholesaler must offer in writing to vary the agreement so that it conforms with the requirements of the relevant code provisions 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) The relevant code provisions 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 this clause commences ends.
- (5) To avoid doubt, clause 6 of the old code does not apply in relation to the wholesaler.

47 Application—retailers bound by old code

- (1) This clause applies in relation to a retailer if:
 - (a) immediately before the commencement of this clause, the retailer:
 - (i) was a party to a grocery supply agreement; and
 - (ii) was bound by the old code; and
 - (b) immediately after that commencement, the agreement does not conform with the requirements of the relevant code provisions in relation to making grocery supply agreements.
- (2) Within 6 months after the commencement of this clause, the retailer must offer in writing to vary the agreement so that it conforms with the requirements of the relevant code provisions 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) The relevant code provisions 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 this clause commences ends.
- (5) To avoid doubt, clause 5 of the old code does not apply in relation to the retailer.

48 Application—retrospective variation of grocery supply agreements

Clause 10 of the new code applies in relation to:

- (a) grocery supply agreements that come into force on or after the commencement of this clause; and
- (b) grocery supply agreements that were in force immediately before that commencement and that are varied, renewed or extended after that commencement.

49 Application—payments for wastage

Subclause 14(4) of the new code applies in relation to:

- (a) grocery supply agreements that come into force on or after the commencement of this clause; and

-
- (b) grocery supply agreements that were in force immediately before that commencement and that are varied, renewed or extended after that commencement.

50 Appointment of Code Arbiter (no code compliance manager)

- (1) This clause applies in relation to a retailer or wholesaler who becomes bound by the old code before the commencement of this clause, if the retailer or wholesaler has not nominated a code compliance manager before that commencement.
- (2) Part 5 of the new code does not apply in relation to the retailer or wholesaler until one of the following (an *application event*) occurs:
 - (a) the retailer or wholesaler appoints a Code Arbiter;
 - (b) the period of 2 months after the commencement of this clause ends.
- (3) However, this clause does not apply unless, on and after becoming bound, the retailer or wholesaler has an internal dispute resolution process at all times until an application event occurs.

51 Transition from code compliance manager to Code Arbiter

- (1) This clause applies to a retailer or wholesaler who:
 - (a) is bound by the old code immediately before the commencement of this clause; and
 - (b) nominated a code compliance manager before that commencement.
- (2) Within 2 months after the commencement of this clause, the retailer or wholesaler must appoint a Code Arbiter.
- (3) Subject to subclause (4), Part 5 of the old code continues to apply in relation to the retailer or wholesaler until the Code Arbiter is appointed.
- (4) If:
 - (a) a supplier has directed a complaint to a retailer's or wholesaler's code compliance manager under Division 2 of Part 5 (complaints) of the old code; and
 - (b) the process of dealing with the complaint has not been completed at the time the relevant retailer or wholesaler appoints a Code Arbiter;
 then, on and after the commencement of this clause, Part 5 of the new code applies in relation to the complaint as if it had been made to the Code Arbiter under clause 34 of the new code on the day on which it was actually made to the code compliance manager.

Note: The process of dealing with a complaint may be completed by the code compliance manager being satisfied under subclause 35(2) of the old code that the code compliance manager was not required to investigate the complaint.

52 Code compliance managers' obligations

Transfer of complaints to Code Arbiter

- (1) If subclause 51(4) applies to a complaint, the code compliance manager must give the Code Arbiter:

- (a) any information in the code compliance manager's possession or control that the Code Arbiter reasonably requires for the purpose of dealing with the complaint; and
- (b) any other assistance the Code Arbiter reasonably requires for the purposes of fulfilling the Code Arbiter's responsibilities in relation to the complaint.

Records

- (2) The code compliance manager must give records and summaries retained under clause 36 of the old code to the retailer or wholesaler.

Reports

- (3) Despite the repeal of clause 41 of the old code by item 17 of Schedule 2 to the amending Regulations, that clause continues to apply, in relation to the first 6-month period ending after the commencement of that item, as if that repeal had not happened. However, the report need not cover a complaint to which subclause 51(4) applies.

53 Retailer's or wholesaler's obligations

A retailer or wholesaler must keep records and summaries received from the code compliance manager under subclause 52(2) for the remainder of the 6 year period referred to in subclause 36(3) of the old code.

54 Code Arbiter's report

The first report to be prepared by a Code Arbiter under clause 36D of the new code must be prepared in respect of the first financial year to end after the commencement of that clause.

55 Independent Reviewer's annual report

The first report to be prepared by the Independent Reviewer under clause 37E of the new code must be prepared in respect of the first financial year to end after the commencement of that clause.

56 Independent Reviewer's annual survey

The first survey to be conducted by the Independent Reviewer under clause 37F of the new code must be conducted within 12 months after the commencement of that clause.