

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Competition and Consumer Act 2010

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

The *Competition and Consumer Act 2010* (the Act) enhances the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Subsection 172(1) 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.

Part IVB of the Act provides for industry codes, which regulate conduct among participants in an industry. Specifically, section 51AE of the Act provides that the regulations may prescribe an industry code under the Act and declare the industry code to be a mandatory or voluntary industry code.

The purpose of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Regulations) is to introduce a mandatory industry code to address an imbalance in bargaining power between large grocery retailers or wholesalers and their suppliers, to support a competitive and sustainable food and grocery sector.

The Regulations replace the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the voluntary Food and Grocery Code) and implement the Government's response to various statutory reviews of the voluntary Food and Grocery Code.

The voluntary Food and Grocery Code was originally developed by industry and aims to improve standards of business conduct by retailers and wholesalers (supermarkets) towards suppliers in the food and grocery industry. The voluntary Food and Grocery Code sets minimum obligations and standards for behaviour of supermarkets towards their suppliers, including an obligation to act in good faith.

The voluntary Food and Grocery Code also provides avenues for dispute resolution: a supplier complaints process, mediation and arbitration. A supermarket must participate in these processes at the request of a supplier and would be bound by a determination made to resolve a complaint or arbitration.

However, due to the voluntary nature of this Code, it only applies to supermarkets that sign up to it, and there are no civil penalties to penalise non-compliance. There are four signatories to the voluntary Food and Grocery Code: ALDI, Coles, Metcash and Woolworths.

The voluntary Food and Grocery Code sunset on 1 April 2025.

Several statutory reviews have considered the operation of the voluntary Food and Grocery Code, most recently the Independent Review of the Food and Grocery Code (the Review) in 2024. Broadly, the Review considered that the voluntary Food and Grocery Code was not effective in achieving its objectives due to its voluntary application, the absence of civil penalties which are present in other industry codes, and insufficient protections and dispute resolution mechanisms for suppliers. The final report of the Review, released 24 June 2024, made 11 recommendations to improve the Code.

On 24 June 2024, the Government agreed to implement all recommendations of the Review.

The mandatory Food and Grocery Code introduced by the Regulations replaces the voluntary Food and Grocery Code and implements the recommendations of the Review. It applies to supermarkets with annual Australian revenue exceeding \$5 billion and has strong civil penalty and dispute resolution provisions to improve accountability and address suppliers' fear of retribution for exercising their rights under the Code.

Public consultation was undertaken on an exposure draft of the mandatory Food and Grocery Code between 23 September and 18 October 2024. This process built on the extensive consultation undertaken by the Review. Submissions were received from the public and industry stakeholders. Submissions broadly supported remaking the voluntary Food and Grocery Code as a mandatory code, but some were concerned about the potential for unintended consequences. In response to stakeholders' feedback, the Regulations were adjusted to refine drafting of penalty provisions to ensure core obligations, such as those relating to retribution and dispute resolution processes, work effectively in practice.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commenced on 1 April 2025.

The Regulations are subject to disallowance, and will sunset on 1 April 2035.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights is set out in Attachment B.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-07551) and agreed that the Review, supplemented by further analysis to quantify the net impact, has been certified as a process equivalent to an Impact Analysis. The certification and analysis is available here: <https://oia.pmc.gov.au/published-impact-analyses-and-reports/independent-review-food-and-grocery-code-conduct>.

The measure is estimated to have a low impact on compliance costs.

Details of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024*

Part 1 – Preliminary

Part 1 sets out machinery provisions, including the commencement provision, authorising legislation provision and definitions relevant to the regulations.

Division 1 – Preliminary

Section 1 – Name

This section provides that the name of the regulations is the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Regulations).

Section 2 – Commencement

The Regulations commenced on 1 April 2025.

Section 3 – Authority

The Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Simplified outline

The simplified outline provides a succinct overview of the Regulations to assist readers. However, readers should rely on substantive provisions as the outline is not intended to be comprehensive.

Division 2 – Definitions

General definitions

Section 5 defines terms used in the Regulations, including updated definitions from the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2015* (the voluntary Food and Grocery Code). Other relevant terms are defined in the Act.

In the Regulations:

- **Act** means the *Competition and Consumer Act 2010*.
- **ADR practitioner** means a mediator or arbitrator.
- **ADR process** means mediation or arbitration.
- **buying team** means the persons who are employed or otherwise engaged by a large grocery business, each of whose role includes direct involvement in buying grocery products or immediate management responsibility for a person whose role includes direct involvement in buying grocery products.

- **category manager** means a person who is employed or otherwise engaged by a large grocery business who is responsible for a category of grocery products at the large grocery business. For example, a category manager may be responsible for the supply and financial performance of dairy products. A large grocery business may ordinarily engage one or more category managers for each category of grocery products.

A category of grocery products is broader than a group of grocery products. For example, milk is a group within the category of dairy products.

- **Code** means the industry code set out in Part 2 of the Regulations. A reference to the ‘Code’ in this Explanatory Statement is a reference to Part 2 of the Regulations.
- **Code Mediator** means a Code Mediator appointed by a large grocery business in accordance with the Code.
- **Code Supervisor** means the Code Supervisor appointed under the Code.
- **evidential burden**, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
- **fresh produce** means fresh fruit, vegetables and mushrooms. This definition aligns with the meaning of fresh produce as a category of groceries defined in subsection 5(1) of New Zealand’s *Grocery Industry Competition Act 2023*.
- **grocery products** include the main categories of perishable and non-perishable goods sold by grocery retailers and wholesalers, but do not include food or non-alcoholic drinks that are sold for in-store consumption, and alcoholic drinks.

The definition includes food, such as fresh produce, meat, seafood, eggs, bakery products, dairy products, pantry goods and packaged food (including chilled and frozen food), and non-alcoholic drinks. It also includes household goods (including electrical appliances, kitchenware, and cleaning products), personal care products (including toiletries, cosmetics, first aid and non-prescription pharmaceutical products), and stationery products (such as greeting cards), magazines and newspapers. Other items typically sold by supermarkets are also covered, including tobacco, pet related products, plants, clothing and toys.

This list is not exhaustive and other products which would fall into the ordinary meaning of a grocery product would be captured by this definition.

The definition has been updated to reflect modern categories of grocery products in Australia and is modelled in part on the definition of ‘groceries’ in subsection 5(1) of New Zealand’s *Grocery Industry Competition Act 2023*.

- **grocery supply agreement** means any agreement between a large grocery business and a supplier that relates to the supply of grocery products to or for the purposes of a supermarket business (whether or not this agreement is the principal agreement between them relating to the supply of grocery products) and includes any document comprising the agreement or made, from time to time, under the agreement. Other

documents which may comprise the agreement include freight agreements, promotion agreements, supplier portal documents and purchase orders.

Under the voluntary Food and Grocery Code, this definition excluded agreements between a large grocery business and a supplier that is also a wholesaler. The definition has been updated to include agreements between a large grocery business and any supplier (whether or not that supplier is a wholesaler, but note the definition of ‘supplier’ excludes large wholesalers). This gives effect to the Review’s recommendation that the Code should apply to regulate the conduct of large grocery businesses towards all of their suppliers.

A grocery supply agreement may cover a one-off supply of grocery products, a limited term arrangement or an ongoing arrangement.

Division 3 of Part 2 sets requirements for grocery supply agreements, including matters to be covered by agreements.

- ***incentive scheme*** means any arrangement by a large grocery business to reward a person who is employed or otherwise engaged by the large grocery business for meeting targets set by the large grocery business in relation to the supply or financial performance of a grocery product, or a category or group of grocery products.
- ***large grocery business*** means a corporation that is a large retailer or a large wholesaler if the corporation is or has been required to notify the Australian Competition and Consumer Commission (the ACCC) about becoming or ceasing to be a large grocery business and the last notification to the ACCC was about becoming a large grocery business.

Large grocery businesses are required to comply with the relevant obligations under the Code and may be subject to civil penalties under the Code for non-compliance.

- ***old Code*** means the voluntary Food and Grocery code set out in Schedule 1 to the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*, as in force immediately before 1 April 2025.
- ***own brand product*** (also known as a private label product) means a grocery product produced, processed or manufactured by or for a large grocery business, or that carries a name or trade mark owned by, or licensed to, a large grocery business.
- ***promotion*** means any offer for sale at an introductory or reduced price, or involving non-standard sales activity, agreed between a large grocery business and a supplier that is intended to last only for a specified period. It may be accompanied by some other benefit to a consumer. For example, the definition of promotion includes temporarily offering a grocery product at a discounted price, a two-for-one sale of the product or advertising the product beyond just ordinary display or listing of the product.
- ***retailer*** means a corporation to the extent that it carries on a supermarket business in Australia.

- **senior buyer**, in relation to a supplier, means the person within a buying team of a large grocery business who manages other employees who buy from the supplier. This definition is about the employee's function, rather than their role title. A buying team may include one or more senior buyers.
- **senior manager** has the same meaning as in the *Corporations Act 2001*, to cover persons of influence in a corporation or other entity.
- **shrinkage** means a loss of grocery products that occurs after a large grocery business has taken possession of them, and arises from theft, other loss or accounting error.
- **supermarket business** means a business if the main purpose of the business is the retail sale of grocery products to consumers, and a substantial proportion of those grocery products is food which is not for in-store consumption.

This definition helps to distinguish large grocery businesses which have obligations under the Code from other retailers or wholesalers which may sell some grocery products but which are not subject to the Code (such as a chemist, newsagent or pet store).

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

The definitions of **acceptance period**, **allowable contrary provision**, **covered revenue**, **delists**, **large retailer**, **large wholesaler**, **original complaint**, **proposed remedy**, **retribution**, **review request** and **supplier** are explained at relevant points in the Explanatory Statement.

Meaning of supplier

Section 6 provides that a **supplier** is a person carrying on (or actively seeking to carry on) a business of supplying grocery products for retail sale to consumers by another person, whether or not that other person is the person being supplied.

This definition is updated to clarify that a person who is a wholesaler may be a supplier. As intermediaries in the grocery supply chain, wholesalers may perform dual roles; first, purchasing grocery products from suppliers, and second, on-selling (supplying) these grocery products to retailers. For example, a wholesaler is a supplier in circumstances where a wholesaler is party to a grocery supply agreement with a retailer for the supply of grocery products to the retailer. However, a wholesaler is only a supplier when they are acting in the capacity of a supplier.

A large wholesaler may not be a supplier, even if it otherwise meets the definition of supplier. This approach is taken because large wholesalers have sufficient market power in the food and grocery industry, so do not require the protections of the Code that smaller suppliers do.

If a supplier is a **large supplier** there are implications for application of the obligation to act in good faith (section 16). Information about that definition and its significance is below, under the heading *Exception where large supplier does not act in good faith*.

Meaning of retribution

Several new provisions in the Code relate to protecting suppliers from retribution. These provisions implement recommendation 3 of the Review.

Section 7 sets out when a large grocery business has engaged in *retribution* against a supplier, which is prohibited under the Code (see section 30).

A large grocery business engages in retribution if it takes action, or threatens to take action, against a supplier that causes, or would cause, detriment to the supplier, where the supplier:

- has exercised, or indicated that it will or may exercise, a right under the Code against the business; or
- is, or may be, able to exercise such a right.

The definition therefore applies to actions or threats made in response to a supplier exercising a right as well as to actions or threats made to prevent the supplier exercising a right.

Exercising a right under the Code would include, but is not limited to, a supplier making a complaint, initiating mediation or arbitration, or exercising a right to enforce an obligation of the large grocery business under a grocery supply agreement (in accordance with that agreement).

The provision sets out the following list of actions by a large grocery business against a supplier that may constitute retribution, as recommended by the Review (noting the conditions in subsection 7(1) would need to be met). It is not intended to be an exhaustive list.

- delisting a grocery product of the supplier;
- requiring the supplier to make excessive contributions towards promotional or marketing costs for the supplier's grocery product;
- rejecting fresh produce from the supplier;
- changing the location of the supplier's grocery product in store or online to the detriment of the supplier;
- delaying restocking the supplier's grocery product in store or online;
- varying, terminating, or electing not to renew an agreement with the supplier for the supply of an own brand product;
- reducing the volume of stock ordered from the supplier;
- cancelling an order for the supplier;
- varying, terminating, or electing not to renew a grocery supply agreement with the supplier.

However, there will be cases where such an action will not amount to retribution. This is the case if the action taken by the large grocery business:

- is not taken or threatened as punishment or retaliation for a supplier having exercised, or indicated that it will or may exercise, a right under the Code against the business, or was, or may have been, able to exercise such a right; and
- is taken or threatened for genuine commercial reasons.

The large grocery business bears the evidential burden of proving an action is not taken, or threatened to be taken, as punishment or retaliation and is for a genuine commercial reason, and therefore is not retribution. This refers to the burden of adducing or pointing to evidence that suggest a reasonable possibility that the action is not retribution.

Consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, placing this evidential burden on the large grocery business is appropriate as the matters relevant to proving that an action is not retribution are peculiarly within its knowledge, and are not readily available to other parties or the prosecution.

Meaning of large retailer and large wholesaler

Section 9 provides that a retailer or wholesaler is a **large retailer** or **large wholesaler** for a financial year if the total covered revenue of the retailer or wholesaler, and each related body corporate of the retailer or wholesaler, as set out in those entities' annual accounts, exceeds \$5 billion for the previous financial year. Annual accounts are those prepared in accordance with generally accepted accounting principles. Section 4A of the Act sets out when a body corporate is deemed to be related to another body corporate. This approach aligns with section 52M of the Act.

Revenue is considered covered revenue if it relates to the carrying on of a supermarket business in Australia, or a business of purchasing grocery products from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia. Consequently, only the revenue made in carrying on a business relevant to the corporation's capacity as a retailer or wholesaler is relevant in determining whether the corporation is a large retailer or large wholesaler. Revenue from other business or sale of products which are not grocery products, such as liquor, is not covered revenue.

A corporation that becomes a large retailer or large wholesaler for a financial year, and was not one the previous financial year, must notify the ACCC that it is a large grocery business (subsection 45(1)). The corporation remains a large grocery business until it notifies the ACCC that it has ceased to be a large grocery business for a financial year. More information about this requirement is set out under the heading *Requirement to notify the ACCC*.

This implements recommendation 2 of the Review, to ensure the Code applies to retailers and wholesalers above the \$5 billion revenue threshold.

Large retailers and large wholesalers are **large grocery businesses**, which have obligations and may be subject to civil penalties under the Code.

The Code applies only to large grocery businesses to address the market power imbalance between those businesses and suppliers (noting that suppliers exclude large wholesalers). Smaller retailers and wholesalers are not covered because they do not hold the same market power and would be disproportionately burdened by compliance costs if the Code applied to them.

Division 3 – Mandatory industry code and review

Section 9 prescribes the Code as an industry code for the purposes of Part IVB of the Act and declares the Code to be a mandatory industry code.

This implements recommendation 1 of the Review to remake the voluntary Food and Grocery Code as a mandatory industry code. The Review found that the effectiveness of the voluntary Food and Grocery Code was undermined by the possibility of signatories withdrawing their agreement to be bound at any time. In addition, the Review found that only a mandatory industry code could address the heavy imbalance in market power between large grocery businesses, such as supermarkets, and smaller suppliers in Australia's highly concentrated food and grocery industry.

Section 10 requires the Minister to cause a review of the Code to start within two years of the commencement of the Code. This review must assess the impact of the Code in improving commercial relations between retailers, wholesalers and suppliers.

The Minister must also cause a written report of the review to be prepared and tabled in Parliament.

Part 2 – Food and grocery industry code

Part 2 sets out the Code, and contains seven Divisions:

- Division 1 concerning preliminary matters such as the Code's application;
- Division 2 concerning the good faith obligations of large grocery businesses;
- Division 3 concerning the form, content and variation of grocery supply agreements;
- Division 4 concerning obligations and standards relating to the conduct of large grocery businesses towards suppliers;
- Division 5 concerning complaint and dispute resolution procedures under the Code;
- Division 6 concerning compliance with the Code by a large grocery business, including training and record-keeping obligations; and
- Division 7 concerning miscellaneous matters.

Division 1 – Preliminary

Food and Grocery Code of Conduct

Section 11 provides that Part 2 of the Regulations sets out an industry code that relates to the industry of food and grocery products.

Section 12 sets out the purposes of the Code, which are to:

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

The purposes of the Code have been updated to implement the Review's recommendation that it should address protecting suppliers from retribution, and to ensure an appropriate level of oversight of interactions between a large grocery business and its suppliers, but otherwise remain substantively unchanged from the voluntary Food and Grocery Code.

Interaction with other industry codes

Section 13 sets out how the Code interacts with other industry codes. The Code does not apply to the extent that it conflicts with the industry code set out in Chapter 2 of the *Competition and Consumer (Industry Code—Franchising) Regulations 2024* (the Franchising Code), Schedule 1 to the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (the Horticulture Code), and Division 2 of Part 2 of the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (the Dairy Code).

This means that those three Codes would apply in the limited circumstances where there is conflict with this Code, and otherwise all Codes continue to apply on their own terms. For example, if a person is a large grocery business and a trader as defined by the Horticulture Code, then the Horticulture Code applies to the extent they are a trader and undertaking activities regulated by the Horticulture Code, and this Code (the Food and Grocery Code) applies to the extent they are a large grocery business undertaking activities regulated by this Code.

Those three Codes regulate specific industries that may overlap with the food and grocery industry, so in the event of any conflict with the Code, it is appropriate for those industry codes to apply.

Civil penalty provisions of the Code

The Review found the voluntary Food and Grocery Code's effectiveness to be limited by the absence of financial penalties for contraventions of the Code. Introducing penalties is necessary to deter non-compliance by large grocery businesses, and provide more options for enforcement, including the availability of infringement notices.

Section 51AE of the Act sets out the maximum amounts of civil penalties and infringement notices which can be imposed for breaches of an industry code, including this Code.

Section 14 clarifies that where a provision of the Code (whether a section or subsection) includes a reference to 'civil penalty' in the foot of the provision, it is a civil penalty provision for the purposes of Part IVB and section 76 of the Act.

Civil penalties are specified within relevant provisions of the Code. Each penalty reflects the potential seriousness of a contravention of the relevant provision, with the ultimate aim to deter contravention.

Subject to enactment of primary legislation, this Code will have two tiers of civil penalties, according to the importance of the obligation and gravity of the consequences of contravention. This is a proportionate approach similar to the Franchising Code, as recommended by the Review.

The Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024 contain amending items which establish the two-tier regime, increase the maximum amounts of civil penalties, and provide separate penalties for bodies corporate and individuals using a ratio that is consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The majority of penalty provisions are obligations on a large grocery business. A small number of penalty provisions apply to other persons such as a Code Mediator or a supplier. These latter penalty provisions are necessary to support efficient dispute resolution and oversight of such processes conducted under the Food and Grocery Code. Other than those provisions, penalty provisions of the Code do not apply directly to individuals. In limited circumstances an individual could be subject to a civil penalty due to the operation of subsection 76(1) of the Act, which allows a Court to impose a penalty on a person if satisfied the person committed an ancillary contravention, such as being knowingly concerned in a contravention of a civil penalty provision. These longstanding provisions for ancillary contraventions in the Act serve a legitimate purpose of deterrence and ensure a comprehensive regulatory regime for competition and consumer matters.

Australian Small Business and Family Enterprise Ombudsman

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) plays a role in dispute resolution under various industry codes made under Part IVB of the Act.

Section 15 provides that the functions of the ASBFEO include keeping lists of ADR practitioners who can provide services of mediation or arbitration for the purposes of the Code, including for a grocery supply agreement.

Division 2 – Good faith

Section 16 sets out an overarching obligation that a large grocery business must always deal with suppliers lawfully and in good faith. This obligation is aimed at building trust and improving standards of conduct, and extends to all aspects of the relationship between large grocery businesses and suppliers.

Section 17 prohibits large grocery businesses from being a party to a grocery supply agreement that purports to limit or exclude this obligation.

The requirement for a large grocery business to deal with suppliers in good faith *within meaning of the unwritten law as in force from time to time* links the concept to common law jurisprudence as it evolves over time. This approach ensures the meaning of good faith remains up to date with expectations of contemporary business practices and conduct.

Without limiting the scope of the obligation or relevant considerations, in determining whether a large grocery business has acted in good faith, account may be taken of whether the supplier acted in good faith towards the large grocery business, and whether the large grocery business:

- acted honestly and cooperated to achieve the purposes of the relevant grocery supply agreement;
- did not act arbitrarily, capriciously, unreasonably, recklessly, with ulterior motives;
- engaged in retribution against the supplier;
- conducted the trading relationship with the supplier without duress and with recognition of the need for certainty regarding the risks and costs of trading (particularly in relation to production, delivery and payment);
- observed confidentiality requirements relating to information disclosed or obtained relating to complaint or dispute with the supplier.

This provision has been updated from the voluntary Food and Grocery Code to include retribution in the consideration of whether a large grocery business has acted in good faith, as recommended by the Review.

Exception where large suppliers do not act in good faith

Subsection 16(2) provides a limited exception to the overarching obligation to act in good faith with respect to large suppliers.

A large grocery business will not be subject to a civil penalty for failing to deal in good faith with a large supplier about a matter, if the large supplier has not dealt with the large grocery business in good faith in relation to that matter or a matter of that kind.

A supplier is a **large supplier** if the total revenue of the supplier, and any related body corporates, exceeds \$1 billion for the previous financial year. The revenue is determined by reference to the annual accounts of the supplier and its related body corporates, prepared in accordance with generally accepted accounting principles. Only revenue related to the carrying on of a business of supplying grocery products for retail sale to consumers in Australia by another person is relevant in this determination. This definition and approach align broadly with the definition of **large retailer** and **large wholesaler**.

The exception to the good faith obligation is intended to encourage large suppliers to act in good faith when dealing with large grocery businesses in order to benefit from the good faith protections under the Code. This exception is appropriate because large grocery businesses do not have the same bargaining power over large suppliers as they do over smaller suppliers.

Division 3 – Grocery supply agreements

Division 3 of the Code regulates general matters related to grocery supply agreements. Specifically, it includes requirements in relation to the form, content and variations of these agreements. The purpose of this Division is to improve certainty and transparency for businesses in the food and grocery industry.

The Division has been updated from the voluntary Food and Grocery Code to provide additional requirements in relation to agreements that relate to fresh produce and in relation to exceptions to certain protections of the Code. These updates are intended to implement parts of recommendations 7 and 8 of the Review.

Grocery supply agreement must be in writing

Section 18 provides that a large grocery business must not be a party to a grocery supply agreement unless it is in writing. This obligation should be read in conjunction with the recording keeping obligations set out later in the Code, which require large grocery businesses to keep the original (or a copy) of each grocery supply agreement to which they are a party. These obligations extend to any document comprising the agreement and any document made from time to time under the agreement that forms part of the agreement.

Written agreements reduce the inherent risk associated with oral agreements, which in turn reduces the possibility of disputes and assists with efficient dispute resolution.

Matters to be covered by the agreement

Section 19 prescribes certain matters that must be included in a grocery supply agreement. The section prohibits a large grocery business from being a party to a grocery supply agreement unless the agreement covers these matters. The Code does not prescribe how these matters are to be covered, to maintain flexibility for negotiation between the commercial parties to determine the details.

Section 81 provides how certain requirements apply to grocery supply agreements entered into before the day the Code commenced. Further detail is set out under the heading *Part 3 – Application, saving and transitional provisions*.

General requirements

A grocery supply agreement relating to the supply of grocery products must specify any requirements for the delivery of the grocery products, any circumstances in which the grocery products may be rejected (other than fresh produce, for which there are specific requirements in relation to when such products may be rejected), the period within which a supplier must be paid for the grocery products, the circumstances in which any payment (or part of payment) may be withheld or delayed, the term of the agreement (if intended to operate for a limited time only), and the circumstances in which the agreement may be terminated (if termination is provided for under the agreement).

Further, the agreement must specify, in clear terms, any quantity or quality requirements for the grocery products. Despite this, additional or different quantity or quality requirements relating to the grocery products may be agreed to, in clear written terms, by the parties to the agreement.

Requirements relating to reasonable exceptions to Code protections

The Code protects suppliers from certain conduct of a large grocery business. However, certain protections may be displaced by a provision of a grocery supply agreement, where reasonable and the relevant requirements of the Code for an exception to the protection are satisfied. In these cases, the agreement enlivens an exception to a protection of the Code and the protection does not apply. This approach is taken so the parties are not restrained by the Code from agreeing on the terms of an agreement where reasonable in the circumstances.

This section lists protective provisions which may be displaced by a provision of a grocery supply agreement and provides additional requirements for the agreement if parties agree to displace one of those listed protections of the Code.

A large grocery business is prohibited from being a party to a grocery supply agreement that includes a provision contrary to a protective provision of the Code, unless the agreement identifies the contrary provision of the agreement and the protective provision of the Code, and clearly states that the contrary provision is an exception to, and removes the protection of, the protective provision. The statement must be clear to ensure the supplier is aware of the removal. An explanation as to why the contrary provision is reasonable must also be included in the agreement.

A provision of a grocery supply agreement that is contrary to a protective provision of the Code listed in this section is an ***allowable contrary provision*** if it meets these requirements.

These requirements protect suppliers by ensuring they understand when and why a large grocery business wishes to displace a protection of the Code through the grocery supply agreement. It implements recommendation 7 of the Review to increase the transparency of exceptions to the Code provided for in agreements, including by explaining in the agreement why an exception is reasonable.

Additional requirements for fresh produce

The Review noted that, due to the perishability and volatility of fresh produce, suppliers of fresh produce are particularly vulnerable to the risk of uncertainty in relation to shifts in price and requested volume of that fresh produce by large grocery businesses.

Consequently, the Code has been updated with additional requirements for grocery supply agreements that relate to the supply for fresh produce, to provide those suppliers with more certainty.

A grocery supply agreement that relates to the supply of fresh produce must also specify the price of the fresh produce, or the method or formula to be used to determine that price. This does not prevent the agreement from specifying a mechanism to regularly negotiate the price of fresh produce supplied under the agreement, as long as the mechanism is

reasonable. This ensures that grocery supply agreements can remain flexible in response to shifts in supply and demand of fresh produce.

A grocery supply agreement is not required to specify the forecasted amount of fresh produce to be supplied under the agreement. However, a large grocery business must exercise due care in forecasting the amount of fresh produce that is to be supplied under the agreement.

Variations of the agreement

The Code prohibits unilateral or retrospective variations of a grocery supply agreement. However, the Code provides for an exception to this prohibition with respect to unilateral variations, whereby a large grocery business may unilaterally vary the agreement in limited circumstances.

A varied agreement would still need to meet the requirements of a grocery agreement set by sections 18 and 19, namely that it be in writing and cover certain matters. Otherwise, the extent and form of the variation is a matter for the parties.

Unilateral variations

Section 20 prohibits a large grocery business from varying a grocery supply agreement without the written consent of the relevant supplier, except in certain cases. This prohibition is intended to increase transparency and certainty for suppliers in relation to their rights and obligations under an agreement, while maintaining flexibility for the agreement to change over time.

Exception for unilateral variations

A large grocery business may unilaterally vary a grocery supply agreement if the agreement includes a provision that expressly provides for the variation, sets out clearly the changed circumstances in which the variation can be made and, if the variation involves a quantitative adjustment to the terms of supply, sets out the basis or methodology for calculating the adjustment. That provision must be an allowable contrary provision if the agreement is entered into on or after the Code's commencement day. Further, the variation must be in accordance with the agreement and reasonable in the circumstances. Without limiting what may be considered in determining what is reasonable, regard must be had to whether the variation is for a purpose that benefits both the supplier and large grocery business, and to any benefits, costs and risks for the parties to the agreement. These considerations provide a balanced approach where the interests of both parties are relevant. However, a variation that is detrimental to the supplier may not be considered reasonable unless it can be justified on balance of the circumstances.

Before making the variation, the large grocery business must give the supplier written reasonable notice of the variation, the terms of the variation and the reasons for making the variation.

As recommended by the Review, the large grocery business must prove, on the balance of probabilities, the matters set out in this section that permit the variation, since the default position is that a variation of this kind is prohibited. However, in relation to determining whether a variation was reasonable in the circumstances, a person that alleges the variation

causes detriment to a supplier has the onus of establishing that matter. This is because that person (rather than the large grocery business) would be uniquely positioned to know and have evidence of the detriment suffered.

Retrospective variations

Section 21 prevents a large grocery business from varying a grocery supply agreement with retrospective effect, even if the agreement allows for variation of the agreement.

Division 4 – Conduct generally

Division 4 of the Code sets standards of conduct for a large grocery business towards a supplier in relation to payments to and from suppliers, retribution, and other aspects of their commercial dealings or relationship. The conduct requirements seek to address the potential power imbalance between large grocery businesses and suppliers, and recognise suppliers' need for certainty in order to plan appropriately, invest, innovate and expand.

The Division includes new provisions to address incentive schemes, senior management oversight and retribution, as recommended by the Review. Otherwise, the general obligations in each provision remain largely unchanged from the equivalent provisions of the voluntary Food and Grocery Code.

The Code has been updated to ensure the Division applies to protect all suppliers, including suppliers who are also wholesalers (to the extent that they are acting as a supplier).

Exceptions to protections

The Code provides exceptions to certain protections in Division 4, which can be enlivened where reasonable in the circumstances and parties satisfy other requirements to rely on the exception.

For instance, certain protective provisions allow parties to agree to an exception in their grocery supply agreement. In this case, the parties must satisfy any requirements to enliven the exception as well as the requirements of Division 3 for their agreement.

The Code has been updated to require that certain matters be considered in determining whether relying on an exception is reasonable, to ensure that whether the purpose of the exception benefits the supplier and the likely and actual impacts of the removal on the supplier are taken into account, as recommended by the Review. This approach maintains protection for the supplier but provides flexibility for parties to agree on terms of a grocery supply agreement which suit their circumstances.

A large grocery business that wishes to rely on an exception must, in general, prove on the balance of probabilities the exception applies. Placing this burden on the large grocery business is appropriate as it is the business that seeks to displace a default protection of the Code, and these matters would be peculiarly within the knowledge of the large grocery business. However, the large grocery business is not required to prove whether removal of a protection causes or caused detriment to a supplier, as such matters are not peculiarly within its knowledge. Similarly, a large grocery business does not have the onus of proving an exception applies with respect to the protections relating to funded promotions, accepting fresh produce, and changes to supply chain procedures. This provides a balanced

approach which is consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Subdivision A – Paying suppliers

Section 22 requires a large grocery business to pay a supplier for all grocery products delivered and accepted in accordance with a grocery supply agreement, within the time frame set out in the agreement and within a reasonable time after receiving the supplier's invoice for the products. For example, if an invoice nominates a date for payment, it would generally be reasonable to pay the supplier by that date.

The large grocery business must not set off any amount against a supplier's invoice or remittance unless the supplier has provided written consent to the set-off of the amount. The large grocery business is also prohibited from requiring a supplier to consent to set off such an amount.

Set off refers to deducting an amount from what is payable to the supplier under an invoice or remittance. For example, if the large grocery business requires payment from the supplier for wastage, it must not deduct the amount of that payment against what the large grocery business owes the supplier under the supplier's invoice or remittance, unless the supplier has consented to the deduction.

However, the large grocery business may set off an amount against a supplier's invoice or remittance, if the grocery supply agreement includes a provision that provides for the amount to be set off and the set-off is reasonable in the circumstances. Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risk for the parties to the agreement and whether the set-off is for a purpose that benefits the supplier and the large grocery business. The provision of the agreement must be an allowable contrary provision if the agreement is entered into on or after the Code commences.

Subdivision B – Requiring payments from suppliers

This Subdivision protects suppliers from large grocery businesses using their market power to require certain payments from suppliers, except where such payments are reasonable in the circumstances. Protections apply in relation to payments for:

- shrinkage;
- wastage;
- stocking or listing grocery products;
- better positioning of groceries;
- funding the ordinary business activities of the large grocery business; and
- promotions.

Shrinkage and wastage

The Code prohibits a large grocery business from requiring payment from a supplier for shrinkage and wastage, where the groceries have been supplied to the large grocery business and therefore the associated risks and costs in relation to shrinkage and wastage should also be transferred to the large grocery business.

Shrinkage

Section 23 prohibits a large grocery business from being a party to a grocery supply agreement under which a supplier is required to make payments as compensation for shrinkage, or otherwise require such payments. Shrinkage is defined to mean a loss of grocery products that occurs after a large grocery business has taken possession of them and arises from theft, other loss or accounting error.

There is no exception to this restriction, which is subject to a civil penalty. However, this does not prevent the large grocery business from raising, discussing or agreeing with a supplier's proposals and procedures to mitigate the risk or occurrence of shrinkage.

Wastage

Section 24 prohibits a large grocery business from directly or indirectly requiring a supplier to make any payment to cover any grocery product that becomes unfit for sale at the premises of the large grocery business, a contractor or agent of the large grocery business, or any other entity that is a retailer or wholesaler.

This prohibition is a civil penalty provision. However, there is an exception to this prohibition if the grocery supply agreement includes a provision that clearly articulates the circumstances (which could include negligence) in which the supplier will be required to make payments to compensate the large grocery business for grocery products supplied by the supplier that becomes unfit for sale at the aforementioned premises, and the basis for the payments. That provision must be an allowable contrary provision (defined above, in Division 3) if the agreement is entered into on or after the Code commences. In that case, a large grocery business may require such a payment if the grocery products become unfit for sale in the circumstances set out in the agreement, the payment is made in accordance with the agreement and is reasonable in the circumstances, and the large grocery business takes reasonable steps to mitigate those costs. The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception.

Without limiting what may be considered in determining whether the payment is reasonable, regard must be had to:

- the benefits costs and risks for the supplier and the large grocery business, including the costs to the large grocery business incurred as a result of the grocery products becoming unfit for sale; and
- whether the payment is for a purpose that benefits both the supplier and the large grocery business. An example of this is where the supplier has grocery products with a short use-by date, which the supplier would ordinarily not be able to sell, and which a large grocery business is willing to buy if some of the risk is shared with respect to costs of the grocery products becoming unfit for sale.

However, if the supplier seeks to negotiate to vary the agreement in relation to payments of this kind, the large grocery business must not (in the course of negotiations or as a precondition to enter into the negotiations) seek to negotiate other variations unrelated to these payments. This provision carries a civil penalty, designed to prevent the large grocery business using variations of other terms as a bargaining tool in the negotiations.

Condition of stocking or listing products

Section 25 prohibits large grocery businesses from requiring payment from a supplier as a condition of stocking or listing grocery products, subject to certain exceptions which the large grocery business must establish apply on the balance of probabilities in order to rely on. This prohibition is a civil penalty provision.

This section does not apply to payments made in relation to a promotion. Requirements in relation to promotions are set out in section 28.

The other exception is if:

- the grocery supply agreement includes a provision that provides expressly for the payment to be made, and that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences); and
- the payment is made in respect of grocery products that have not been stocked or listed by the large grocery business during the preceding 365 days in 25 per cent or more of its stores (in the case of retailers) or distribution centres (in the case of wholesalers), and is reasonable in the circumstances.

Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risks for the supplier and the large grocery business, and whether allowing the payment benefits both parties.

The purpose of this exception is to balance the risk a large grocery business may bear in stocking, displaying or listing a product that has not been stocked, displayed or listed for a long period of time in its stores or distribution centres, against the financial burden imposed on a supplier.

Shelf space

Section 26 only applies to large retailers. It does not apply to a corporation to the extent that it is a wholesaler because it is not relevant to the type of supermarket business carried on by wholesalers.

The section prohibits a large retailer from requiring a supplier to make any payment to secure better positioning or an increase in allocation of shelf space for a grocery product. This prohibition is a civil penalty provision.

However, this prohibition does not apply if a provision of the grocery supply agreement expressly sets out the particular circumstances in which the payment may be required, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences), and the payment is made in accordance with the agreement and is reasonable in the circumstances. The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception to the prohibition.

Without limiting what may be considered in determining reasonableness, regard must be had to any benefits, costs and risks for the supplier and the large grocery business, and whether allowing the payment benefits both parties.

Ordinary business activities

Section 27 limits the circumstances in which a large grocery business may require payments from suppliers to fund any activity undertaken by the large grocery business in the ordinary course of carrying on a business as a large grocery business (an ordinary business activity).

Large grocery businesses are prohibited from directly or indirectly requiring a supplier to pay any of the costs of any ordinary business activity. Such activities include, but are not limited to, a member of a buying team's visit to the supplier, artwork or packaging design, consumer or market research, the opening or refurbishing of a store or hospitality for the large grocery business' staff.

However, this prohibition does not apply if a provision of the grocery supply agreement expressly provides for the payment, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences), and the payment is made in accordance with the agreement and is reasonable in the circumstances.

Any likely or actual benefits, costs and risks for the supplier and the large grocery business must be considered in determining whether the payment is reasonable, as well as whether the payment is for a purpose that benefits both parties. This does not limit what may be considered.

The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception. Otherwise, a civil penalty may apply for contravention of the prohibition.

Promotions

Section 28 sets out the circumstances in which a large grocery business may require payment from a supplier for a promotion. A large grocery business is prohibited from directly or indirectly requiring a supplier to fund any part of the promotion and may be subject to a civil penalty if it does not comply with this section.

This prohibition does not apply if a provision of the grocery supply agreement expressly provides for the funding, that provision is an allowable contrary provision (if the agreement is entered into on or after the Code commences) and the funding is reasonable in the circumstances.

Without limiting what may be considered in determining whether the funding is reasonable, regard must be had to any likely or actual benefits, costs and risks for the supplier and the large grocery business for the promotion and whether the funding is for a purpose that benefits both parties. Costs include contributions by the large grocery business.

The large grocery business must establish these matters on the balance of probabilities in order to rely on the exception to the prohibition.

Additional requirements apply if a supplier agrees or is required to make a payment to a large grocery business in support of a promotion (see section 33).

Subdivision C – Other conduct

Subdivision C covers conduct by a large grocery business unrelated to requiring payments from suppliers. It relates to:

- incentive schemes;
- retribution, including policies and procedures to protect against retribution;
- circumstances in which large grocery businesses can delist certain products;
- funded promotions;
- fresh produce standards and quality specifications, rejection of fresh produce by large grocery businesses and fresh produce labelling, packaging and preparation requirements;
- changing supply chain procedures;
- obligations with respect to the intellectual property rights of suppliers, including in relation to transferring those intellectual property rights;
- confidential information of suppliers;
- product ranging and shelf space principles;
- price increases, including providing information about price increases to suppliers and the Code Mediator;
- freedom of association of suppliers;
- senior management oversight; and
- providing contact details to suppliers.

Many of these provisions were included in the voluntary Food and Grocery Code in identical or similar forms. However, this Subdivision also introduces new provisions that are intended to implement the recommendation of the Review to address suppliers' fear of retribution. These provisions complement the updates to the purposes of the Code and large grocery business' overarching obligation to act in good faith, which now also address retribution.

Incentive schemes

An incentive scheme refers to any arrangement by a large grocery business to reward an employee (or group of employees) of that entity for meeting targets set by the business in relation to the supply or financial performance of a grocery product or a category of a grocery product.

Section 29 requires an incentive scheme of a large grocery business that applies to any member of a buying team or a category manager (see definitions, above) to be consistent with the purposes of the Code and any obligations the large grocery business under the Code. For example, an incentive scheme must be consistent with the purpose of the Code to protect suppliers from retribution, and the large grocery business' overarching obligation to act in good faith in dealing with suppliers.

An incentive scheme is not consistent with a purpose of, or obligation under, the Code if the scheme requires, or directly or indirectly incentivises, a buying team or category manager to act in a way which is contrary to the purpose or obligations.

This is a new civil penalty provision which implements a recommendation of the Review, which found that incentive schemes may lead to retributory conduct by employees of a large grocery business. For example, a buying team that receives a bonus for achieving a certain target for the volume of supply for a particular grocery product may be incentivised to pressure a supplier to reach that target by using or threatening an action that constitutes retribution.

The intention of this provision is to ensure incentive schemes are designed to operate consistently with the Code, so that a scheme does not lead to a breach of the Code or prevent a supplier exercising a right under the Code. There is no requirement for an incentive scheme to benefit suppliers in the course of commercial negotiations.

Retribution

The Review found that fear of retribution by a large grocery business was impeding suppliers, particularly small suppliers, from exercising their rights under the Code (including under grocery supply agreements). Various provisions have been introduced or updated throughout the Code to address this issue and provide greater protection to suppliers.

In particular, section 30 prohibits large grocery businesses from engaging in retribution against suppliers. The meaning of retribution, including a non-exhaustive list of actions which constitute retribution, is given in Division 2 of Part 1. This is a new provision, subject to civil penalties.

Section 31 requires a large grocery business to have written policies and procedures to review the commercial decisions made by a buying team or category manager in relation to a supplier that exercised (or indicated that it will or may exercise) or was able to exercise (or may have been able to exercise) a right under this Code against the large grocery business. The purpose of the review must be to determine whether any of the actions that were taken constitute retribution against the supplier. This is also a civil penalty provision.

Along with the new provision governing incentive schemes, these provisions aim to change any culture within those businesses that encourages, accepts or otherwise indirectly rewards retributory conduct towards suppliers.

Delisting products

Section 32 concerns delisting supplier's grocery products. A large grocery business delists a supplier's grocery product if it is removed from the range of grocery products of the large

grocery business, or the large grocery business reduces the distribution of the product across the stores or distribution centres of the large grocery business, and that reduction has or is likely to have a material effect on the supplier.

A large grocery business may only delist a supplier's grocery product in accordance with the terms of the grocery supply agreement and for genuine commercial reasons. Contravention of this section may attract a civil penalty.

Genuine commercial reasons

Genuine commercial reasons for delisting a product include, but are not limited to, failure of the supplier to meet agreed quality or quantity requirements with respect to the product, failure of the supplier's product to meet the commercial sales or profitability targets as notified to the supplier in (or in accordance with) the agreement, or persistent failure to meet delivery requirements as notified to the supplier from time to time in accordance with the agreement. However, isolated, short-term fluctuations in supply may not constitute a genuine commercial reason for delisting.

Delisting as punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason. Such action would constitute retribution by the large grocery business.

Notice to supplier

Reasonable written notice must be provided to the supplier of the large grocery business' decision to delist the supplier's grocery product, otherwise a civil penalty may apply.

The notice must provide the genuine commercial reasons for delisting the product, inform the supplier of their right to have the decision reviewed by the senior buyer for the supplier and to refer a complaint to the Code Mediator about the decision, and include the contact details of the Code Mediator.

The notice must be given before delisting the product, unless delisting the product is time sensitive (including for product recalls, withdrawals or safety issues) or there are persistent issues with supply that have resulted in the large grocery business being out of stock or stocked at significantly reduced levels.

Senior buyer role

In response to a written request from the supplier, the large grocery business must ensure the relevant senior buyer promptly:

- provides a statement of the genuine commercial reasons for the delisting, or information (including additional information) relating to the delisting; or
- reviews any decisions regarding the delisting and provide written notice of the outcome of that review to the supplier (including the basis of the large grocery business' decision).

Failure to do so may attract a civil penalty for the large grocery business.

A decision not to extend a grocery supply agreement following the expiry of a fixed term agreement is not a decision to delist a product but may be considered retribution in certain circumstances.

Funded promotions

As explained above, in certain circumstances a large grocery business may require a supplier to make a payment towards a promotion. This payment may fund all or part of the costs of a promotion if the relevant conditions are met.

Section 33 applies if a supplier agrees, or is required, to make a payment to a large grocery business in support of the promotion of a product, known as a funded promotion. In such a case, the large grocery business may hold the funded promotion only after giving the supplier reasonable written notice.

If the large grocery business orders a grocery product from a supplier in connection with funded promotion at a promotional price, it must ensure that the basis on which the quantity of the order is calculated is transparent. Further, the large grocery business must not over-order, and if it sells any over-ordered product above the promotional resale price, it must pay the supplier the difference between the supplier's promotional price and the supplier's full price of the product. These requirements apply whether the promotional price is calculated by way of discount, rebate, credit, allowance or otherwise.

Where an order has been placed with a supplier for a grocery product in connection with a funded promotion, the large grocery business must not, without the supplier's consent, cancel the order or reduce the volume of the order by more than 10 per cent (for an order placed by a retailer) or 20 per cent (for an order placed by a wholesaler). However, this prohibition does not apply if the large grocery business gives the supplier reasonable written notice of the cancellation or reduction, or compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the large grocery business failing to give reasonable notice of the cancellation or reduction.

These requirements are all subject to civil penalties, to deter non-compliance and protect suppliers.

Fresh produce

Section 34 applies only in relation to fresh produce, rather than grocery products in general. Broadly, it provides that a large grocery business must clearly specify to the supplier any standards or quality specifications in relation to fresh produce and set out the circumstances in which the large grocery business is permitted to not accept fresh produce delivered in accordance with the grocery supply agreement. These requirements, discussed in more detail below, are subject to civil penalties.

Standards and quality specifications

A large grocery business is required to specify to the supplier, in clear, unambiguous and concise written terms, any fresh produce standards or quality specifications. These standards or specifications must be reasonable. Without limiting what may be considered in determining reasonableness, regard must be had to whether the same standards or quality specifications apply to all suppliers that supply that kind of produce to the business.

When fresh produce can be rejected

A large grocery business must accept fresh produce delivered in accordance with a grocery supply agreement unless the produce fails to meet the relevant standards or quality specifications. In such a case, the large grocery business must reject the produce within 24 hours of it being delivered to the large grocery business. However, a large grocery business cannot reject produce that it has already accepted.

Written reasons for the rejection must be provided to the supplier within 48 hours.

Labelling, packaging and preparation requirements

Communication of any labelling, packaging or preparation requirements for fresh produce must be made to the supplier in clear, unambiguous and concise written terms. Reasonable written notice of any required changes to those requirements or standards (unless the change is required immediately by law) must be provided to the supplier, taking into consideration known existing stock held by suppliers and any agreement as to stock coverage in the relevant grocery supply agreement.

Any claim by the large grocery business for damaged fresh produce or shortfalls must be made within a reasonable time of (and, in any event, no later than 30 days after) delivery of the fresh produce to the large grocery business (or a nominee of the entity). The 30 days is a maximum timeframe designed to provide certainty but also give flexibility, for instance more timely action within that period may be appropriate in cases where the fresh produce is particularly perishable.

Supply chain procedures

Section 35 prohibits a large grocery business from directly or indirectly requiring a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement with the supplier. Non-compliance may attract a civil penalty.

This prohibition does not apply if reasonable written notice of the change is given to the supplier. The prohibition also does not apply if the supplier is compensated by the large grocery business for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the failing to give reasonable notice of the change, or if the supplier voluntarily waives the supplier's right to compensation for such costs, losses or expenses.

This section has effect subject to the large grocery business' obligations in relation to unilateral variations of grocery supply agreements set out earlier in the Code. In other words, the exception in this section may only apply if the obligations in relation to unilateral variations are satisfied.

Intellectual property rights

Section 36 provides that a large grocery business must not infringe the intellectual property rights held by suppliers in relation to grocery products, including rights for branding, packaging and advertising. For clarity, this provision does not create, confer or extend any intellectual property rights in or of the supplier.

Further, in developing or producing own brand products (see definitions above), the large grocery business must not infringe intellectual property rights held by a supplier in relation to grocery products.

These requirements are civil penalty provisions.

The actions of the supplier in relation to the intellectual property rights of the large grocery business may be taken into account in relation to any dispute relating to a breach of this section, according to the circumstances of the case.

Transferring intellectual property rights

Section 37 prohibits a large grocery business from directly or indirectly requiring a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term or supply of an equivalent own brand product of the large grocery business.

This civil penalty provision does not prevent the large grocery business from holding intellectual property in one of its own brand products, or holding an exclusive right to sell an own brand product. Further, it does not prevent the large grocery business from making the holding of such a right by the business a condition or term of supply by the supplier of the own brand product, to the extent the product, recipe or formulation of the product was developed or formulated, or is customised, by or for the large grocery business. For example, if a large grocery business designs and develops a new product and commissions a supplier to manufacture it as an own brand product, then the large grocery business may wish to hold intellectual property rights for that product.

Confidential information

Section 38 contains civil penalty provisions which apply if a supplier discloses confidential information to a large grocery business in connection with the supply of grocery products.

A large grocery business must not use such information other than for the purpose it was disclosed for and may only share the information with employees or agents of the business who need to have it in connection with that purpose. The large grocery business must also establish and monitor systems to ensure that its employees and agents comply with this requirement and create a written summary of such systems.

Confidential information could relate to product development, proposed promotions or pricing. Information that is publicly available, or that came into the lawful possession or knowledge of the large grocery business independently of the supplier does not constitute confidential information.

Product ranging, shelf space allocation and range reviews

Section 39 requires a large grocery business to publish or provide to all suppliers with whom it has a grocery supply agreement, its product ranging principles. If the large grocery business is a retailer, it must also publish or provide its shelf space allocation principles. Further, large grocery businesses must uphold these principles, keep them up to date, and apply them without discrimination (including without discrimination in favour of its own brand products).

If a large grocery business wishes to conduct a product range review, it must provide suppliers who might be adversely affected with written notice of the purpose of the review and the key criteria governing ranging decisions to be made by the review. This notice must be provided within a reasonable time before the review is conducted. Further, after the product range review is conducted and before making a final decision in relation the range review, a large grocery business must provide suppliers that might be adversely affected with a reasonable opportunity to discuss the decision with the large grocery business, including the basis on which the business will make the final decision.

The section does not limit the rights and obligations in relation to delisting grocery products of the supplier, set out earlier in the Code.

Civil penalties may apply for non-compliance with any of these obligations.

Price increases

The Code sets out large grocery businesses' obligations with respect to price increases by suppliers, which are civil penalty provisions. It is not intended to affect the rights of a supplier to determine the price of grocery products it supplies.

Obligations with respect to suppliers

Section 40 governs the conduct of a large grocery business when dealing with suppliers in relation to a proposed price increase, where there is a grocery supply agreement.

If a supplier informs a large grocery business in writing of a price increase, the large grocery business must provide a written response to the supplier within 30 days:

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

This requirement does not apply, however, if the price increase relates to fresh produce that is supplied under a grocery supply agreement which includes a mechanism to regularly negotiate the price of the produce, and any negotiations about the price increase are concluded within five business days after the supplier has proposed the price increase. However, it does apply if negotiations have not concluded in that time. If negotiations relating to fresh produce have not concluded within five business days, the five business days are included within the applicable 30-day period.

While a supplier retains the right to determine its own prices, if the large grocery business does not fully accept the supplier's price increase, the supplier may request the large grocery business to enter into negotiations about the price increase to negotiate a mutually acceptable outcome at any stage during this process. A large grocery business that enters into such negotiations must engage in those negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay. The purpose of this provision is to ensure the large grocery business engages with the supplier, and provides a response, in a timely fashion, not interfere in the commercial negotiations between the parties.

Importantly, a large grocery business must not require a supplier to disclose commercially sensitive information in relation to the price increase or negotiations about the price increase at any stage during the process.

Notifying the Code Mediator about price increases

Section 41 requires a large grocery business to give to its Code Mediator the following information in relation to the financial year:

- the total number of notifications given by the large grocery business to a supplier in response to being informed by the supplier of a price increase;
- the number of those notifications that were not given within the required 30-day period;
- the total number of negotiations entered into about an increase in the price of the groceries following a request by the supplier; and
- the number of those negotiations in which the large grocery business did not conclude its position on the negotiations within 30 days of being notified of the relevant proposed price increase, and in each of those cases, the number of days the large grocery business took to conclude its position.

This information must be given to the Code Mediator in sufficient time for the information to be included in the Code Mediator's annual report. This is a civil penalty provision.

Freedom of association

Section 42 prohibits large grocery businesses from providing an inducement to prevent a supplier from forming an association of suppliers or associating or joining with other suppliers for a lawful purpose. Further, large grocery businesses are prohibited from discriminating, or taking any other action, against a supplier for doing so.

This civil penalty provision aims to ensure suppliers are not constrained in their freedom to associate for fear of retribution from large grocery businesses.

Senior management oversight

Section 43 requires a large grocery business to appoint one or more senior managers (within the meaning of the *Corporations Act 2001*) to oversee the business' interactions with suppliers and take all reasonable steps to ensure that the senior manager is doing so at all times. A person appointed under this section may also perform other roles for the large grocery business, such as the role of senior buyer.

An interaction with a supplier includes an interaction by another person for, or on behalf of, the large grocery business, such as by a buyer, member of a buying team, senior buyer or category manager.

This requirement is introduced in the Code to complement other new provisions to address suppliers' fear of retribution, as recommended by the Review. It recognises that many of the large grocery business' obligations under the Code rely on interactions with suppliers.

The provision is intended to ensure large grocery businesses have appropriate systems in place for senior level oversight of the business' interactions with suppliers, with a view to prevent or remedy any retributory actions taken against a supplier, or other breaches of the Code. The obligation does not require the appointed senior manager to be present or actively participate in each interaction with a supplier.

For each appointment of a senior manager for interactions with one or more suppliers, the large grocery business must notify the ACCC and each of those suppliers in writing of the appointment and the contact details of the senior manager. This must occur before the 10th business day following the day of the appointment.

Large grocery businesses must also notify the ACCC and each of those suppliers if the appointment ceases, before 10 business days have passed since the day of the cessation.

These requirements are civil penalty provisions.

Provision of contact details

To support their commercial relationship and provide avenues to resolve issues, it is important for suppliers to have contact details of relevant persons within a large grocery business with which they have grocery supply agreements.

As such, section 44 provides that a large grocery business must make available to its suppliers up to date contact details (including position title and telephone number) of the senior buyer for the supplier, at least one other member of the buying team whose role includes buying products from the supplier (or supervising such a person), and its Code Mediator. The large grocery business must also publish the up to date contact details of its Code Mediator, including position title and telephone number, on its website. This is to ensure that suppliers can contact Code Mediators easily to raise issues or concerns with the large grocery business. Non-compliance with these requirements may be subject to a civil penalty.

Requirement to notify the ACCC

To ensure the ACCC is able to appropriately administer its functions under the Code, section 45 requires corporations to notify the ACCC if they have a change of circumstances that means they become or cease to be a large grocery business. Corporations must notify the ACCC if they were a large retailer or a large wholesaler for the previous financial year and no longer meet the revenue threshold to be a large retailer or a large wholesaler for the financial year.

Corporations are also required to notify the ACCC if they were not a large retailer or a large wholesaler for the previous financial year and meet the revenue threshold to be a large retailer or a large wholesaler for the financial year. A corporation required to make such a notification is a large grocery business whether or not it actually notifies the ACCC. It remains a large grocery business until it notifies the ACCC under this provision that it is no longer a large grocery business.

In both circumstances, the corporation must notify the ACCC regarding the change of circumstances within five days after the latest day that the corporation, or any related body

corporate of the corporation, is required to lodge a report for the previous financial year under section 319 of the *Corporations Act 2001*.

Section 80 sets out when certain corporations are treated as complying with the requirement to notify the ACCC when they become a large grocery business. Further detail is set out under the heading *Part 3 – Application, saving and transitional provisions*.

Division 5 – Dispute resolution

Division 5 sets out the complaint and dispute resolution framework of the Code.

Provisions in this Division have been strengthened to reflect the transition from a voluntary industry code to a mandatory code, address recommendations 5, 6 and 11 of the Review, and ensure greater alignment with other industry codes.

Key changes include replacing the Code Arbiter with the Code Mediator and replacing the Independent Reviewer with the Code Supervisor – including various amendments to each role.

There are multiple pathways to resolve an issue arising between a supplier and a large grocery business about matters under the Code. A supplier may seek general information from the Code Mediator to better understand the situation, or may actively try to resolve a complaint or dispute by:

- referring a complaint to the Code Mediator (which could subsequently be independently reviewed by the Code Supervisor if there are concerns about the Code Mediator’s process);
- mediation by the Code Mediator or an ADR practitioner, which must be attended by the large grocery business where initiated by the supplier; or
- arbitration by an ADR practitioner, which may be agreed to by the large grocery business.

These pathways ensure suppliers can choose the appropriate avenue for their particular circumstances. The Code does not allow for multiple processes regarding the same complaint or dispute to run concurrently, as this would be inefficient and costly. However, it is open to suppliers to pursue processes sequentially, for example, by referring a complaint to the Code Mediator in the first instance and then proceeding to mediation if the supplier is dissatisfied with the outcome.

Subdivision A – Investigations by a Code Mediators

Appointing a Code Mediator

Section 46 provides that each large grocery business must appoint a Code Mediator by written agreement and take all reasonable steps to ensure there is a person in this role at all times.

The person appointed as the Code Mediator must have appropriate qualifications, knowledge and experience to fulfil the Code Mediator’s functions. Given the Code Mediator’s functions are primarily about assisting suppliers with issues and complaints

against the large grocery business, the appropriate qualifications, knowledge and experience may relate to complaints handling and dispute resolution.

The large grocery business must also ensure its appointed Code Mediator is not engaged by the large grocery business or a related body corporate in any capacity other than as Code Mediator.

This rule does not apply to large grocery businesses with less than 15 per cent market share. To be eligible for this exemption, a large grocery business is 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 grocery businesses grow 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 large grocery business must ensure the Code Mediator is not engaged in any other capacity. In addition, a person who is the Code Mediator of a large grocery business is not prevented from being appointed as an ADR practitioner to mediate or arbitrate a dispute under Subdivision C of Division 5 of the Code. Where such an appointment occurs, the functions and obligations on the Code Mediator do not extend to the person when they are acting in their role as the appointed ADR practitioner of a dispute.

Section 47 requires the large grocery business to notify the ACCC and Code Supervisor of the Code Mediator's appointment, as well as their contact details, within 10 business days of the appointment. The large grocery business must also notify the ACCC and Code Supervisor if the Code Mediator's appointment ceases. This notification must occur within 10 business days of the cessation.

The large grocery business must cover the Code Mediator's costs and ensure the Code Mediator is sufficiently resourced to perform its functions.

Failure by the large grocery business to comply with these obligations may attract a civil penalty.

Code Mediator's functions

Section 48 provides the functions of a Code Mediator appointed by a large grocery business are to:

- develop and maintain a complaints handling procedure;
- assist suppliers of the large grocery business in relation to matters covered by the Code, including by providing general information about the Code and the complaint and dispute resolution processes available to the supplier under the Code;
- investigate complaints against the large grocery business relating to matters covered by the Code, make recommendations where appropriate and facilitate agreement by the grocery business to any such recommendations;
- assist suppliers of the large grocery business to informally resolve issues relating to matters covered by the Code (outside of the complaints and dispute resolution framework set out in the Code);

- mediate disputes between suppliers and the large grocery business if the dispute relates to matters covered by the Code and the mediation is not under Subdivision C of this Division; and
- keep records about and report on such complaints and disputes.

The Code Mediator's role replaces and updates the Code Arbitrator's role from the voluntary Food and Grocery Code, which focussed primarily on handling complaints. In particular, the role has expanded to hear views and provide assistance to suppliers even when there is no formal complaint made, and to mediate disputes (distinct from an independent mediation process, under Subdivision C). This ensures suppliers have access to more informal, confidential and low-cost avenues for resolving complaints and disputes.

To enable the Code Mediator to carry out its functions, the large grocery business must ensure that the Code Mediator has access to any documentation that relates to a complaint or dispute with a supplier and give the Code Mediator access to the relevant buying team to discuss any concerns about the grocery business' obligations under the Code. Failure to do so may attract a civil penalty.

Authorising the Code Mediator to enter into agreements on behalf of the grocery business

Similar to the voluntary Food and Grocery Code, a large grocery business may, but is not required to, authorise the Code Mediator to enter into an agreement on behalf of the business to resolve a complaint against the business about a matter covered by the Code. Such practices support efficient resolution of complaints.

This does not extend to authorising the Code Mediator to settle a dispute on behalf of the large grocery business under the Code. This limitation reinforces that in carrying out the mediation function, it is critical that the Code Mediator acts at arm's length from the large grocery business to ensure the needs of both the supplier and the grocery business are met. This supplements the general requirement in the Code that the large grocery business must not unduly influence the Code Mediator.

Performance of the Code Mediator's functions

A large grocery business must ensure that the written agreement appointing the Code Mediator includes a condition requiring the Code Mediator to comply with the Code Mediator's obligations under the Code.

If the Code Mediator breaches this condition by failing to comply with its obligations under the Code, the large grocery business must take reasonably appropriate action under the appointment agreement. If the breach is serious or the breaches are persistent, the large grocery business must terminate the appointment of the Code Mediator and appoint a new Code Mediator with appropriate qualifications, knowledge and experience.

While the Code Mediator is appointed by, and its costs met by, the large grocery business, the Code Mediator must be free to perform its functions without interference or improper influence from the grocery business.

These requirements are civil penalty provisions.

Developing a complaints handling procedure

Section 49 provides that a large grocery business must ensure the appointed Code Mediator develops a written complaints handling procedure and acts in accordance with the procedure. This procedure must be consistent with the Code.

The large grocery business must also ensure the Code Mediator reviews the procedure annually and updates it as necessary – for example, to take into account any changes to the Code or updated guidance by the ACCC.

Copies of the procedure and any updated procedures must be given to the Code Supervisor, and the large grocery business must publish a copy of the most up to date procedure on their website. This will ensure suppliers have access to the relevant procedure in the event of a complaint.

These requirements are civil penalty provisions.

Referring a complaint to the Code Mediator

Section 50 provides that if a supplier has a complaint against a large grocery business about a matter covered by the Code, they may refer the complaint to the Code Mediator appointed by the grocery business.

To refer a complaint to the Code Mediator, the complaint must be in writing and include the following information:

- the supplier's identification details, including their business or trading name;
- the supplier's contact details (or the contact details of the person dealing with the complaint on behalf of the supplier);
- details of the conduct giving rise to complaint; and
- the provisions of the Code that the supplier considers are relevant to the complaint.

The provision of this information ensures the Code Mediator can properly consider and begin investigating the complaint. However, if, for example, the supplier provides the incorrect provisions of the Code that are relevant to the complaint, this does not preclude the Code Mediator from accepting the referral and proceeding to investigate the complaint.

This process for referring complaints to the Code Mediator is not available if an ADR practitioner has been appointed under the Code to resolve the dispute. This avoids potentially costly and inefficient complaint and dispute resolution processes running concurrently.

Investigation of a complaint by a Code Mediator

Section 51 provides that a large grocery business must ensure the Code Mediator takes all reasonable steps to investigate a complaint that has been referred by a supplier, and conclude the investigation within 20 business days of the referral, or a longer period if agreed to by the supplier in writing. Failure to do so may attract a civil penalty.

Vexatious complaints

Section 52 sets out how a Code Mediator must deal with complaints that they decide are vexatious, trivial, misconceived or lacking in substance.

If, after investigating a complaint such a decision has been made, the Code Mediator must give the supplier written notice to that effect. The notice must also set out the reasons for that decision and outline any further action available to the supplier through an independent review by the Code Supervisor, mediation or arbitration.

If the complaint relates to either a unilateral variation or retrospective variation of a grocery supply agreement, and the supplier's only basis for the complaint is detriment to the supplier, this alone would be insufficient for the Code Mediator to determine that the complaint is vexatious, trivial, misconceived or lacking in substance. In these cases, the Code Mediator would likely need to take further steps to investigate the complaint, such as gathering additional information.

A copy of the notice must also be given to the large grocery business. Where the supplier has not expressly consented to their identity being disclosed to the large grocery business, the Code Mediator must ensure that any information that is reasonably capable of being used to identify the supplier is removed from the notice.

All other complaints

Section 53 sets out how a Code Mediator is to deal with all other complaints.

For investigations of these complaints, the Code Mediator must consider the large grocery business' obligation to deal lawfully and in good faith, and may consider whether the large grocery business acted fairly in dealing with the supplier.

The inclusion of the concept of 'acting fairly' reflects that while a large grocery business may have acted in accordance with the law, it may not have acted in a way that would meet community expectations. The Code sets out what the Code Mediator may consider in determining whether a large grocery business has acted fairly in dealing with a supplier. This concept focuses on the fairness of the way in which the large grocery business has engaged with the supplier, rather than the fairness of a specific outcome. This includes whether the large grocery business:

- 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 reasonably expected by the supplier; and
- had due regard for the relationship with the supplier and the specific characteristics of the supplier.

Recommendations by a Code Mediator following an investigation

Section 54 provides that after investigating a complaint, the Code Mediator may make a recommendation for dealing with the complaint if satisfied that it is appropriate to do so, having regard to:

- the purposes of the Code;

- the facts of the complaints;
- any findings of the Code Mediator’s investigation of the complaint (including in relation to the large grocery business’ obligation to deal lawfully and in good faith);
- any other relevant matters.

Depending on the circumstances, the Code Mediator’s recommendation could be:

- the payment of compensation by the large grocery business to the supplier to rectify any loss or damage, noting the Code does not limit the amount of that compensation;
- changes to the grocery supply agreement;
- another remedy; or
- that the large grocery business does not take action in response to the complaint.

Given changes to the grocery supply agreement could have broader ramifications, the Code Mediator may consult with the large grocery business and supplier before proposing such a remedy.

This provision only provides that the Code Mediator may make a recommendation. It does not give the Code Mediator the power to make binding determinations, including in relation to the payment of compensation by a large grocery business.

However, the Review indicated that the large grocery businesses that would be bound by the Code – being Woolworths, Coles, Aldi and Metcash, at that time – have agreed in-principle to be bound by a recommendation of their Code Mediator to pay up to \$5 million as remedy, where agreed by the supplier.

Within five business days after concluding the investigation, the Code Mediator must give the supplier a notice in writing setting out any recommendations, the reasons for the recommendation (or for not making a recommendation), and that the supplier may take further action through the Code Supervisor, mediation or arbitration.

If the Code Mediator’s recommendation includes a recommendation that the large grocery business take action in response to the complaint (a proposed remedy), the notice must also set out that the parties can agree to the proposed remedy by providing written notice to the Code Mediator and entering into an agreement to that effect.

A copy of this notice must also be provided to the large grocery business within five business days after concluding the investigation. Where the supplier has not expressly consented to their identity being disclosed to the grocery business, the Code Mediator must ensure that any information that is reasonably capable of being used to identify the supplier is removed from the notice.

Agreeing to a proposed remedy

The proposed remedy does not remain available for the parties to accept indefinitely. Section 56 defines the ***acceptance period*** for a proposed remedy, which is the period in which the proposed remedy remains available, after which it will lapse.

The duration of the acceptance period depends on whether the supplier accepts the offer or refers the complaint to the Code Supervisor, and if so, whether the Code Supervisor decides to review the complaint.

- The acceptance period ends if, 20 business days after the Code Mediator proposed the remedy, it has not been accepted by both the supplier and the large grocery business, or the supplier has not referred the complaint to the Code Supervisor.
- If the supplier refers the complaint to the Code Supervisor within the 20-business day period, and:
 - the Code Supervisor decides not to review the complaint – the acceptance period ends 10 business days after the Code Supervisor has notified the supplier of that decision;
 - the Code Supervisor reviews the complaint, the acceptance period ends:
 - 10 business days after the Code Supervisor has notified the supplier that the Code Supervisor does not recommend that the Code Mediator reconsider the complaint; or
 - 10 business days after the Code Mediator has reconsidered the complaint and given written notice to the supplier about the outcome.

Section 55 provides that if the supplier and large grocery business agree to the proposed remedy within the acceptance period, the large grocery business must enter into a written agreement with the supplier to perform the proposed remedy. Failure to enter into such a written agreement may attract a civil penalty.

As noted above, under the heading *Authorising the Code Mediator to enter into agreements on behalf of the grocery business*, the Code Mediator may be authorised to enter into such an agreement on behalf of the grocery business.

The large grocery business must subsequently comply with the terms of the agreement.

This requirement is subject to civil penalties, to deter non-compliance and protect suppliers. Failure to comply with the agreement would also 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.

Reconsideration of a complaint by a Code Mediator

Section 57 provides that if the Code Supervisor has conducted an independent review of the complaint and recommends that the Code Mediator reconsider the complaint, the Code Mediator must do so within 10 business days.

The Code Mediator must reconsider whether action should be taken by the large grocery business in response to the complaint and notify the large grocery business, supplier and the Code Supervisor in writing of any recommendation arising from the reconsideration.

Consistent with the original consideration of the complaint, the Code Mediator must ensure that any information that is reasonably capable of being used to identify the supplier is removed from the notice to the large grocery business, unless the supplier has expressly consented to the disclosure.

If the Code Mediator recommends that the large grocery business take action in response to the complaint (a proposed remedy), the parties have 10 business days to accept the offer before it lapses. This is set out in section 55, which defines the acceptance period for a proposed remedy.

Records to be kept by a Code Mediator

Section 58 provides that if a complaint is referred to the Code Mediator, the Code Mediator must keep the following records for at least six years:

- a record of the complaint made;
- a record of the investigations undertaken to investigate the complaint;
- a copy of any notices given because the Code Mediator was satisfied that the complaint was vexatious, trivial, misconceived or lacking in substance;
- a copy of each notice setting out the Code Mediator's response to the complaint, including any recommendations and proposed remedies; and
- a summary of any actions taken by the large grocery business and the supplier in response to the complaint.

Reporting requirements of a Code Mediator

Section 59 provides that for each financial year, a Code Mediator must prepare a written report about its activities in respect of its functions. The report must include:

- a description of the ways the Code Mediator has assisted suppliers, including by providing general information about the Code and complaints and dispute resolution avenues under the Code, and informally assisting suppliers to resolve issues relating to the large grocery business;
- the number of complaints referred for investigation;
- 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, including the number of complaints for which the Code Mediator recommended payment of compensation;
- whether or not each complaint was resolved to the satisfaction of the complainant; and

- information given to the Code Mediator by the large grocery business about price increases of grocery products supplied under a grocery supply agreement.

The report must be prepared and provided to the large grocery business, the ACCC and the Code Supervisor within 30 business days after the end of each financial year.

Within a business day of being given a copy of the report, the large grocery business must publish the report on its website.

Subdivision B – Independent reviews by the Code Supervisor

The Minister must appoint a Code Supervisor

Section 60 provides that the Minister must appoint a Code Supervisor by notifiable instrument.

In deciding who to appoint, the Minister must be satisfied that the person has appropriate qualifications, knowledge or experience in procedural fairness, and has experience working in Australian industry. This is intended to ensure the Code Supervisor has broad experience in commercial dealings and negotiations.

The Code Supervisor's role replaces and updates the Independent Reviewer's role from the voluntary Food and Grocery Code.

The Code Supervisor's functions

Section 61 provides that the Code Supervisor's functions are to:

- consider requests to review Code Mediators' processes in dealing with complaints;
- work collaboratively with Code Mediators, industry stakeholders and the ACCC to identify emerging and systemic issues in the grocery supply chain relating to the operation of the Code;
- conduct an annual survey of suppliers and large grocery businesses relating to the operation of the Code; and
- report on the above matters.

Compared to the Independent Reviewer's role in the voluntary Food and Grocery Code, there are two key differences.

The first difference is the Code Supervisor is only required to identify emerging and systemic issues in the grocery supply chain, rather than identify and address these issues. This reflects the Review's finding that it is unrealistic to expect the Code Supervisor to be able to address these issues, as they are likely to be complex and multifaceted.

The second difference is the Code Supervisor's role does not involve publishing non-binding guidance material relating to compliance with the Code, as this would otherwise overlap with the ACCC's role in publishing guidance.

Requesting an independent review of a Code Mediator's process

Section 62 provides that a supplier may request that the Code Supervisor independently review the process used by the Code Mediator to consider and investigate the supplier's complaint.

This request cannot be made until either:

- the Code Mediator has investigated the complaint and notified the supplier of the outcome (either a proposed remedy or that no action should be taken by the large grocery business); or
- the Code Mediator has not concluded investigating the complaint within 20 business days after the supplier has referred the complaint or such longer period as agreed in writing between the supplier and the Code Mediator.

This ensures the Code Supervisor's review and the Code Mediator's investigation does not run concurrently, unless the Code Mediator's investigation has not been concluded within a timely manner.

A request for an independent review must be in writing and include the supplier's details. The request must also explain details of the original complaint and the aspects of the Code Mediator's process that the supplier wants the Code Supervisor to review.

The Code Supervisor's role in reviewing these complaints is not to consider whether the proposed remedy is reasonable or adequate given the nature of the complaint. Rather, the Code Supervisor's role is to consider whether the Code Mediator followed due process and its complaints handling procedure.

It is open to a supplier to seek review by the Code Supervisor under this provision even where the supplier has accepted a proposed remedy. However, if the Code Supervisor decides to conduct an independent review in such a case, the Code Supervisor cannot recommend that the Code Mediator reconsider the complaint (see subsection 64(5)). Instead, the Code Supervisor may, for example, recommend the Code Mediator update its complaints handling procedure, or consider the complaint as part of its function to identify systemic issues.

Code Supervisor's discretion to conduct an independent review

Section 63 provides that the Code Supervisor must consider each request for an independent review by the supplier and decide within 10 business days of receiving the request whether to conduct the review.

The Code Supervisor may decide not to independently review the Code Mediator's process in dealing with a complaint where:

- the supplier accepted the proposed remedy recommended by the Code Mediator;
- the Code Supervisor considers that the review request by the supplier is vexatious, trivial, misconceived or lacking in substance; or
- the Code Supervisor considers that the review request by the supplier is not related to the Code Mediator's process in dealing with the complaint.

If the Code Supervisor decides not to conduct an independent review, the Code Supervisor must notify the supplier and the Code Mediator in writing and explain why.

Conducting an independent review

Under section 64, if the Code Supervisor decides to conduct an independent review, the Code Supervisor must notify the supplier, Code Mediator, and the large grocery business in writing.

The notice to the large grocery business must not contain any information that is reasonably capable of being used to identify the supplier, unless the supplier had expressly consented to it.

Within 20 business days of giving the notice to the supplier, the Code Supervisor must take all reasonable steps to complete the independent review. These steps may include requesting information relating to the original complaint from the Code Mediator, the supplier, or the large grocery business.

If a large grocery business or its Code Mediator receives such a request, they must provide the relevant information within 10 business days. Failure to do so may attract a civil penalty.

The 20-business day period to complete the independent review is paused where the Code Supervisor is waiting for the Code Mediator, supplier or the large grocery business to provide the relevant information.

Once the Code Supervisor has considered the review request, the Code Supervisor may make one or more recommendations to the Code Mediator. This may include a recommendation that the Code Mediator reconsider the original complaint, unless the supplier has already accepted a proposed remedy in relation to the original complaint.

If such a recommendation is made, the Code Mediator must reconsider the original complaint within 10 business days.

Within five days of completing the independent review, the Code Supervisor must give the supplier and the Code Mediator notice that the independent review is complete, and include any recommendations made to the Code Mediator and the reasons for those recommendations.

The Code Supervisor must also give a copy of the notice to the large grocery business, noting the confidentiality requirements relating to the identity of the supplier.

In addition, if during this process, the Code Supervisor becomes aware that a breach of the Code may have occurred, the Code Supervisor must provide details of the breach to the ACCC. In this event, a copy of those details must also be provided to the large grocery business concerned to ensure procedural fairness. If the breach relates to an obligation of the Code Mediator, the provision of this information will also allow the grocery business to take reasonably appropriate action under the agreement in which the Code Mediator was appointed, as required by the Code.

Reporting requirements of the Code Supervisor

Section 65 provides that the Code Supervisor must prepare a written report about its activities in respect of its functions over the financial year. This report must include:

- any emerging and systemic issues identified in the grocery supply chain relating to the operation of the Code;
- the number of review requests and independent reviews undertaken during the financial year;
- the number of recommendations made by the Code Supervisor for the Code Mediator to reconsider a complaint;
- the results of the survey of stakeholders (discussed in the next section);
- the number of mediation and arbitration processes under the Code that commenced during the financial year (discussed under the heading *Mediation and arbitration (ADR processes)*);
- the number of mediation and arbitration processes under the Code that were terminated during the financial year; and
- any other activities undertaken by the Code Supervisor during the financial year.

The report must be prepared within 4 months of the end of each financial year (by 30 November), and a copy must be given to the ACCC. The report must also be published on the Code Supervisor's website to support broader availability and transparency of its findings.

Annual survey of stakeholders

Section 66 requires the Code Supervisor to conduct a survey of suppliers and large grocery businesses for each financial year. This survey must be conducted for the purpose of:

- identifying if any suppliers feared retribution from a large grocery business during the financial year;
- identifying supplier's experiences with agreeing to any exception of a certain kind under the Code during the financial year;
- identifying emerging and systemic issues in the grocery supply chain relating to the operation of the Code during the financial year; and
- any other matter identified by the Code Supervisor that relates to the operation of the Code during the financial year.

To ensure suppliers can access the survey and are encouraged to respond, large grocery businesses are required to distribute the survey to their suppliers. The grocery business must also inform suppliers that their response will not be given to the large grocery business, and the results of the survey cannot be used to identify them. These requirements are civil penalty provisions.

As noted in the previous section, the Code Supervisor must publish the results of the survey as part of its annual report.

Subdivision C – Mediation and arbitration (ADR processes)

Starting an ADR process under the Code

Section 67 provides that a party to a grocery supply agreement may initiate an ADR process under the Code by notifying the other party in writing. Under the Code, mediation and arbitration are referred to as ***ADR processes***.

Whether the parties then need to attend the ADR process will depend on who initiated the ADR process and whether the ADR process is mediation or arbitration.

Mediation under the Code

If the supplier has initiated mediation under the Code and an ADR practitioner is appointed for the mediation, then both the supplier and the large grocery business must attend mediation of the dispute.

However, attendance is only required if there is no other ongoing complaint or other ADR process relating to the matter (including where the complaint is being considered by the Code Mediator or Code Supervisor) or where there is another ongoing process but a reasonable period for completing that process has passed.

If the mediation is initiated by the large grocery business, the supplier must notify the grocery business in writing within 10 business days of receiving the grocery business' notification whether it agrees to attend the mediation for the dispute.

If the supplier agrees to attend mediation initiated by the large grocery business, both parties must attend mediation of the dispute.

Failure to comply with these requirements to attend mediation and provide notification where relevant may attract a civil penalty.

Arbitration under the Code

If a party to a grocery supply agreement notifies the other party that it wishes to initiate arbitration under the Code, the responding party must notify the initiating party in writing within 10 business days of receiving the initiating party's notification whether it agrees to attend, and accept the outcome of, the arbitration in accordance with a written agreement between the parties that is consistent with Subdivision C of Division 5.

If agreed to, both parties must subsequently attend arbitration of the dispute once an ADR practitioner has been appointed.

Failure to comply with the requirement to attend arbitration and provide notification where relevant may attract a civil penalty.

The Review indicated that the large grocery businesses that would be bound by the Code – being Woolworths, Coles, Aldi and Metcash – have agreed in principle to participate in independent arbitration when requested by a small supplier and pay compensation of up to

\$5 million as determined by the independent arbitrator. The Review indicated that in this context, a small supplier is one with annual turnover of less than \$10 million or fewer than 100 employees.

Appointing an ADR practitioner under the Code

Section 68 sets out the process for appointing an ADR practitioner if mediation has been initiated by a party to a grocery supply agreement or if arbitration is agreed to by each party. Under the Code, mediators and arbitrators are referred to as *ADR practitioners*.

The parties may agree to appoint an ADR practitioner from a list kept by the ASBFEO of suitably qualified practitioners who can provide services of mediation or arbitration for the purposes of the Code.

To ensure the resolution of a dispute can proceed in a timely manner, if the parties are unable to agree on ADR practitioner, the supplier may unilaterally appoint an ADR practitioner from the ASBFEO's list. This unilateral appointment can only occur if:

- where the ADR process is mediation initiated by the supplier – 14 days have passed after the supplier has notified the large grocery business that it wishes to initiate mediation; or
- where the ADR process is arbitration initiated by either party or mediation initiated by the large grocery business – 14 days have passed after the responding party agrees to attend the ADR process.

The supplier must then notify the large grocery business and Code Supervisor of the appointment.

Taking part in an ADR process under the Code

Section 69 provides that an appointed ADR practitioner may decide the time and location in Australia for the ADR process for the dispute. The ADR process may be conducted by means of virtual attendance technology.

As noted under the heading *Starting an ADR process under the Code*, parties are required to attend an ADR process in certain circumstances. Section 70 provides that a party to a dispute is taken to attend an ADR process of the dispute if the party is represented in the ADR process by an authorised representative.

Parties to a dispute must also try to resolve the dispute. Failure to do so may attract a civil penalty.

Additionally, if the ADR process is arbitration, the arbitration must be conducted in accordance with the written agreement between the parties (see paragraph 67(5)(d)).

Section 71 provides that a party will be taken to be trying to resolve a dispute if they approach the resolution of the dispute in a reconciliatory manner, including by:

- attending and participating in meetings;
- making clear what they are trying to achieve through the process at the outset;

- observing any confidentiality obligations; and
- not taking action that has the purpose of applying pressure to resolve the dispute (such as the large grocery business refusing to accept goods or make payments to the supplier).

However, a party is not required to continue trying to resolve a dispute if the appointed ADR practitioner finds that:

- the dispute is vexatious, trivial, misconceived or lacking in substance;
- the other party to the dispute is not acting in good faith; or
- the supplier has already accepted a proposed remedy and the large grocery business has agreed to act on that proposed remedy.

If the dispute relates to a unilateral variation or retrospective variation of a grocery supply agreement, the ADR practitioner must not determine that the dispute is vexatious, trivial, misconceived or lacking in substance because the supplier's only basis for the dispute is detriment to the supplier.

The requirements relating to the parties to the dispute are civil penalty provisions. These civil penalty provisions apply to both large grocery businesses and suppliers. This approach is appropriate because each party to the dispute must attend and try to resolve the dispute to ensure the effectiveness of the ADR process.

Terminating an ADR process under the Code

Section 72 provides that if the dispute has not been resolved within 30 days after the ADR practitioner for the ADR process was appointed, the appointed ADR practitioner may terminate the ADR process at any time, unless they are satisfied that a resolution is imminent.

Additionally, if the ADR process is mediation and a party asks the ADR practitioner to terminate the process (and gives written reasons for the request), the ADR practitioner must terminate the mediation to the extent it relates to that party's dispute. This can only occur if at least 30 days has elapsed after the ADR practitioner's appointment and the dispute has not been resolved.

If an ADR practitioner terminates an ADR process, they must issue a certificate setting out the names of the parties, the nature of the dispute, that the ADR process has been terminated before the dispute has been resolved, and the reasons for terminating the ADR process. A copy of this certificate must be given to the parties to the dispute, the Code Supervisor and the ASBFEO.

Costs of an ADR process under the Code

Section 73 sets out who is liable for costs of an ADR process.

The parties must pay for their own costs of attending the ADR process. In addition, the parties are equally liable for the other costs of an ADR process under the Code, unless otherwise agreed. This includes the cost of the ADR practitioner, the cost of any room

hires, and the cost of any additional input agreed by the parties to be necessary to conduct the ADR process.

Subdivision D – Confidentiality requirements

Subdivision D sets out the confidentiality requirements that apply to Code Mediators, the Code Supervisor, and parties to ADR processes under the Code.

Section 74 prohibits a Code Mediator from disclosing any information that is reasonably capable of being used to identify a supplier in connection with any of the Code Mediator's functions, unless:

- the supplier has expressly consented to the disclosure; or
- if the disclosure relates to a complaint the supplier has against the large grocery business, the Code Mediator has recommended a proposed remedy for dealing with the complaint, and both the supplier and the large grocery business have notified the Code Mediator that they agree to the proposed remedy.

Accordingly, there will be circumstances where the large grocery business may not be aware of the supplier's identity until after it has agreed to a proposed remedy. This is intended to protect the supplier from any retribution from the large grocery business and prevent any bias from the grocery business when considering the proposed remedy.

Section 75 similarly prohibits the Code Supervisor from disclosing any information that is reasonably capable of being used to identify a supplier in connection with any of the Code Supervisor's functions, except with the express consent of the supplier.

The Code Supervisor must also ensure the annual report (including the survey) published on its website does not contain any information that identifies, or is reasonably capable of being used to identify, a supplier, or information that the Code Supervisor is satisfied is confidential commercial information of a supplier or large grocery business.

Further, Code Mediators and the Code Supervisor must each observe any confidentiality requirements relating to information disclosed or obtained in connection with the performance of their respective functions.

Section 76 provides that parties to an ADR process under the Code must observe any confidentiality requirements relating to information disclosed or obtained in connection with the ADR process. Failure to comply with this requirement may attract a civil penalty.

Division 6 – Compliance

Requirement to train staff

Section 77 provides that within six months of the commencement of the Code, or six months of becoming a large grocery business under the Code (whichever is later), the business must provide its buying team with a copy of the Code and training on its requirements.

Anyone who subsequently joins the buying team after the relevant six-month period also needs to be given a copy of the Code and training on its requirements. This needs to be done within 20 business days of the person joining that team.

The Code also requires large grocery businesses to provide ongoing training on the requirements of the Code on an annual basis and keep records about the training provided.

These requirements are civil penalty provisions.

General record keeping requirements

Section 78 sets out the record keeping requirements on large grocery businesses, which are all subject to civil penalties.

Large grocery businesses must keep records of each grocery supply agreement (including any documents comprising the agreement) to which the business is a party. These agreements need to be kept for at least six years after the agreement ends.

Large grocery businesses must also keep records of various offers, notices and reasons under the Code. For example, this includes an offer to vary a grocery supply agreement and a notice of a decision to delist a product. These records must be kept for at least six years from when the document is made or given.

In addition to the listed records, large grocery businesses must keep any other document provided to the business by a supplier that shows (or purports to show) that the business has complied with or not complied with a provision of the Code. These records must also be kept for at least six years from when the document is given.

These record keeping requirements ensure that key events that occur during the lifecycle of a grocery supply agreement and a complaint or dispute are retained. This will assist with compliance monitoring and provide evidence in complaint and dispute resolution processes.

Under section 51ADD of the Act, if a corporation is required to keep, generate or publish information or a document under an applicable industry code, then the ACCC may require that such information be provided to it for investigation and auditing purposes. The ACCC may therefore require that the large grocery business provide these records for these purposes.

Division 7 – Miscellaneous

Section 79 provides that a provision of the Code has no effect to the extent, if any, to which the provision's operation would result in the acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) otherwise than on just terms.

Part 3 – Application, saving and transitional provisions

Initial large grocery businesses

The Code requires corporations to notify the ACCC when they become a large grocery business under the Code. Section 80 modifies the notification requirement for corporations

which were either a retailer or wholesaler and had total covered revenue exceeding \$5 billion for the 2023-2024 financial year at the time the Code commenced.

Such a corporation is treated as having complied with this requirement if it notifies the ACCC in writing that it is a large grocery business within five business days after the day the Code commenced.

This approach ensures the ACCC has oversight over which grocery businesses are subject to the obligations of the Code.

Grocery supply agreements entered into before commencement

An obligation under the Code relating to a grocery supply agreement applies to all agreements from 1 April 2025 (the day of commencement of the Code). However, section 81 provides a transitional period to give parties to an existing grocery supply agreement (i.e., an agreement entered into before 1 April 2025) time to update their agreement to meet obligations in subsections 19(3), (4) and (6).

This approach reflects that while the matters to be included in a grocery supply agreement under subsection 19(1) continue from the voluntary Food and Grocery Code, the requirements in subsections 19(3), (4) and (6), about reasonable exceptions to Code protections and additional requirements for fresh produce, are new.

This means that:

- grocery supply agreements entered into on or after 1 April 2025 must comply with requirements in the Code relating to grocery supply agreements.
- grocery supply agreements entered into before 1 April 2025 must comply with most requirements in the Code relating to grocery supply agreements, but have 12 months in which to be remade or varied to comply with the obligations in subsections 19(3), (4) and (6).

The requirements of subsections 19(3), (4) and (6) will apply to existing grocery supply agreements from 1 April 2026 (being 12 months after the Code commenced). However, if before that day, the agreement is varied to deal with a matter mentioned in one of those provisions, that provision will start to apply in relation to the agreement on the day the agreement is varied. A variation to an existing GSA must be in writing, however, otherwise the form of this variation is a matter for the parties.

This approach is designed to improve standards and conduct over time, without unduly burdening industry by requiring all existing agreements to be renegotiated and rewritten at once.

Code Mediators

Sections 82 and 83 set out transitional arrangements for the replacement of Code Arbiters under the voluntary Food and Grocery Code with Code Mediators.

Records kept by Code Arbiters

Large grocery business must ensure the Code Arbiter gives to the Code Mediator various records and summaries retained by the Code Arbiter in relation to dispute resolution and any documents or information the Code Mediator reasonably requires in preparing their first report. This requirement only applies to large grocery businesses who were bound by the voluntary Food and Grocery Code as a retailer or wholesaler immediately before the day the Code commenced.

First report of Code Mediators

Persons who are Code Mediators on 30 June 2025 are required to prepare their first report for the 2024-2025 financial year. This covers a period which includes when the voluntary Food and Grocery Code was in force to ensure there is no gap in reporting.

The first report must include, to the extent known by the Code Mediator, the matters in clause 36D(2) of the voluntary Food and Grocery Code for the financial year, in addition to the matters the report is required to include under subsection 59(2).

The Code Supervisor

Sections 84 and 85 set out transitional arrangements for the replacement of the Independent Reviewer role in the voluntary Food and Grocery Code with the Code Supervisor.

The first report prepared by the Code Supervisor and the first survey to be conducted by the Code Supervisor must be done so for the 2024-2025 financial year. This approach is taken to ensure there is no gap in reporting and surveying between the sunset of the voluntary Food and Grocery Code and the commencement of the Code.

The first report must include, to the extent known by the Code Supervisor and in relation to the financial year, the number of review requests made to the Independent Reviewer, the number of independent reviews conducted by the Independent Reviewer and the results of the survey conducted by the Independent Reviewer. The report must also include the matters listed in subsection 65(1).

In relation to preparing the first report, the person who was Independent Reviewer before the Code commenced must give the Code Supervisor any information in their possession or control, or any other assistance, the Code Supervisor reasonably requires.

The first survey must address the matters listed in subclause 37F(1) of the voluntary Food and Grocery Code for the financial year, in addition to the matters listed in subsection 66(1).

Keeping records

Section 86 provides that the record-keeping requirements under repealed clause 42 of the voluntary Food and Grocery Code continue to apply with respect to any document a retailer or wholesaler was required to keep under that provision.

This approach ensures that documents related to, for example, grocery supply agreements entered into before the day the Code commenced are retained for an appropriate amount of time.

The Independent Reviewer under the voluntary Food and Grocery Code

Section 87 provides that an instrument appointing the Independent Reviewer under the voluntary Food and Grocery Code immediately in force before 1 April 2025, continues in force and has effect to appoint the Code Supervisor under the Code.

Complaints under the voluntary Food and Grocery Code

Section 88 ensures that pending complaints under the voluntary Food and Grocery Code continue to be considered following the repeal of that Code.

It provides Part 5 of the voluntary Food and Grocery Code (about dispute resolution) continues to apply on and after the day the Code commences in relation to complaints directed to a Code Arbiter under that Part that had not been finally dealt with before that day.

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) Regulations 2024

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 *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Regulations) introduces a mandatory industry code to address an imbalance in bargaining power between large grocery retailers or wholesalers and their suppliers, to support a competitive and sustainable food and grocery sector.

The Regulations replace the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the voluntary Food and Grocery Code) and implement the Government's response to the Independent Review of the voluntary Food and Grocery Code (the Review) in 2024.

Broadly, the Review considered the voluntary Food and Grocery Code was not effective in achieving its objectives due to its voluntary application, the absence of civil penalties which are present in other industry codes, and insufficient protections and dispute resolution mechanisms for suppliers. The final report of the Review, released 24 June 2024, made 11 recommendations to improve the Code. The Government agreed to implement all recommendations of the Review.

The mandatory Food and Grocery Code introduced by the Regulations applies to supermarkets with annual Australian revenue exceeding \$5 billion and has strong civil penalty and dispute resolution provisions to improve accountability and address suppliers' fear of retribution for exercising their rights under the Code.

Human rights implications

The Regulations may engage the following rights under the International Covenant on Civil Political Rights (the ICCPR):

- the right to proper processes for a fair trial under Articles 14 and 15;
- the right to protection from arbitrary or unlawful interference with privacy under Article 17; and
- the right to freedom of association under Article 22(1).

Consideration has been given to the guidance in the Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights* and

to the Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Civil penalty provisions and criminal processes

Articles 14 and 15 of the ICCPR provide the right to a fair trial, as well as the presumption of innocence. Article 14(2) of the ICCPR recognises that all people have the right to be presumed innocent until proven guilty according to the law. Articles 14 and 15 apply only in relation to the rights of natural persons, not legal persons, such as companies.

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR. Although there is a domestic law distinction between criminal and civil penalties, 'criminal' is separately defined in international human rights law. Therefore, when a provision imposes a civil penalty, it is necessary to determine whether or not the penalty amounts to a 'criminal' penalty for the purposes of Articles 14 and 15 of the ICCPR.

The Regulations implement civil penalties for contraventions of certain obligations under the Code to improve accountability and address suppliers' fear of retribution for exercising their rights under the Code.

Most of the new civil penalty provisions in the Regulations apply to the conduct of large grocery businesses in the food and grocery industry. These civil penalty provisions have limited engagement with Articles 14 and 15 of the ICCPR, as the Regulations do not apply the penalties to natural persons.

A small number of penalty provisions may apply to a person other than a large grocery business. An individual who is a Code Mediator may be subject to a civil penalty under subsection 64(3) of the Regulations, for failing to provide information about a complaint that is reasonably requested by the Code Supervisor. The civil penalty provisions relating to participation in dispute resolution processes in subsections 67(2) and (4) of the Regulations may also apply to suppliers, including any that are sole traders. These penalty provisions are necessary to support efficient dispute resolution and oversight of such processes conducted under the Code. Other than those provisions, penalty provisions of the Code do not apply directly to individuals. In limited circumstances an individual could be subject to a civil penalty due to the operation of subsection 76(1) of the Act, which allows a Court to impose a penalty on a person if satisfied the person committed an ancillary contravention, such as being knowingly concerned in a contravention of a civil penalty provision. The Regulations do not disturb these longstanding provisions for ancillary contraventions in the Act, which serve a legitimate purpose of deterrence and ensure a comprehensive regulatory regime for competition and consumer matters.

The civil penalty provisions contained in the Regulations are not 'criminal' for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary, and they aim to encourage compliance with the Code. Further, the provisions do not apply to the general public, but to large grocery businesses and suppliers in the food and grocery industry, who should reasonably be aware of their obligations under the Code. Therefore, imposing these civil penalties will enable an effective disciplinary response to non-compliance.

The civil penalties are an appropriate size in the corporate context of the Regulations and are consistent with civil penalties under other industry codes. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that larger penalties are more appropriate for bigger companies, as they provide an adequate disciplinary response.

Furthermore, the judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved. Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with the Regulations.

Based on the considerations above, the civil penalties in the Regulations are not ‘criminal’ for the purposes of the international human rights law and therefore do not limit criminal process rights under the ICCPR.

Right to privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person’s privacy, family, home or correspondence. It also provides that everyone has the right to protection from the law against such interference or attacks.

The Human Rights Committee has interpreted the term ‘unlawful’ to mean that interferences cannot take place except in cases envisaged by law, which itself must comply with the provisions, aims and objectives of the ICCPR. The Human Rights Committee has also indicated that an interference will not be considered to be ‘arbitrary’ if it is provided for by law, is in accordance with the provisions, aims and objectives of the ICCPR, and is reasonable in the particular circumstances.¹

Privacy is a broad concept that includes a right to information privacy. The Regulations engage the right to privacy by providing for disclosure of contact information, which may constitute personal information. Relevant provisions include:

- Paragraph 32(6)(d): large grocery business to include the Code Mediator’s contact details in written notice of a decision to delist a supplier’s product;
- Sections 43 and 44: large grocery business to provide contact details of relevant employees to ACCC and suppliers;
- Subsection 44(2): publication of the Code Mediator’s contact details online;
- Paragraph 47(1)(b): large grocery business to provide contact details of the Code Mediator to the ACCC and the Code Supervisor;
- Subsection 50(2): suppliers to include their contact details in complaints to the Code Mediator; and

¹ General comment No. 16: Article 17 (Right to privacy), Thirty second session (1988) at [3]-[4].

- Subsection 62(2): suppliers to include their contact details in requests to the Code Supervisor for review of the Code Mediator’s process.

Sections 43 and 44 require a large grocery business to make available to its suppliers the contact details of certain persons engaged by the large grocery business who are relevant contacts for that supplier. This includes the senior manager, the senior buyer and another member of the buying team whose role includes dealing with grocery products of that supplier, as well as the Code Mediator, whose role includes providing assistance to suppliers. The relevant contact details include position title and telephone number, which may be sufficient to identify an individual and thus constitute ‘personal information’ as defined by the *Privacy Act 1988*.

Subsection 44(2) also requires a large grocery business to publish the contact details of the Code Mediator on its website. This is to ensure suppliers are able to easily access these details if they require urgent assistance from a Code Mediator in relation to an issue or complaint concerning the large grocery business.

Other sections require the contact details of the Code Mediator to be provided as part of a written notice to suppliers or a notification of the Code Mediator’s appointment to the Commission and the Code Supervisor (refer to paragraphs 32(6)(d) and 47(1)(b)).

Requiring the provision and potential use of information that constitutes personal information is reasonable and necessary in the Regulations to ensure the effective operation of the Code. This information is essential to ensure a supplier knows who to contact in the event of an issue in its dealings with a large grocery business, whether it be a senior buyer of the grocery business or the Code Mediator, whose role is to handle complaints between the large grocery business and its suppliers. Without up to date contact details, suppliers – particularly small suppliers – are likely to face added difficulties in resolving their complaints against large grocery businesses in a timely manner, which may lead to significant detriment to the supplier’s business.

A supplier must also provide their identification details and contact details, or the contact details of an authorised representative of the supplier, to the Code Mediator as part of a complaint against a large grocery business or to the Code Supervisor as part of a request for an independent review of a Code Mediator’s process (refer to subsections 50(2) and 62(2)).

The identification and contact details of a supplier (or its representative) in these circumstances are necessary to ensure the Code Mediator and the Code Supervisor can appropriately discharge their obligation to investigate or review the complaint. In particular, this will ensure the Code Mediator and Code Supervisor (whichever applies) has a contact to obtain further information from and to provide updates to with respect to the progress of the complaint or review. The Regulations provide safeguards against the misuse of information collected or obtained in connection with the performance of any of the functions of the Code Mediator and the Code Supervisor.

Section 74 prohibits the Code Mediator from disclosing information that is reasonably capable of being used to identify a supplier to the large grocery business without the express consent of the supplier and requires the Code Mediator to observe any confidentiality requirements relating to the information collected or obtained. The Code Supervisor has similar privacy obligations under section 75, which apply to information

disclosed or obtained in connection with the performance of any of the Code Supervisor's functions.

Accordingly, provisions in the Regulations relating to the collection, use and disclosure of personal information are reasonable, necessary and proportionate to achieving a legitimate aim and are subject to appropriate safeguards.

Furthermore, Australia implements its international obligations in relation to privacy through the *Privacy Act 1988*. This Act applies to a range of entities, including large businesses and government agencies. Due to their size, the large grocery businesses which are subject to the Regulations would have obligations to protect personal information under the *Privacy Act 1988*. The ACCC is also subject to that Act, as a government agency, and would handle any personal information (such as notification of the contact details of a Code Mediator and any senior managers) obtained through its regulatory function in line with its obligations. The Regulations do not impact the application of obligations under the *Privacy Act 1988*.

As such, the Regulations do not impose an arbitrary or unreasonable limitation on the right to privacy.

Freedom of association

The Regulations engage the right to freedom of association with others under Article 22(1) of the ICCPR, by prohibiting large grocery businesses from providing inducement to prevent suppliers in the food and grocery industry from forming an association of suppliers, or otherwise associating with other supplier for a lawful purpose. Further, large grocery businesses are prohibited from discriminating or taking any other action against a supplier for doing so. These prohibitions are subject to civil penalties.

Therefore, the Regulations promote the right to freedom of association by removing possible deterrents for suppliers in the food and grocery industry to freely associate.

Conclusion

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.