Review of the Dispute Resolution Provisions in the Food and Grocery Code

ACCC submission to consultation paper

February 2023

Introduction

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, businesses, and the Australian community.

The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure, and undertake market studies.

The ACCC is the regulator responsible for enforcing compliance with the Food and Grocery Code, which is a voluntary industry code prescribed under the CCA. The code is intended to regulate the relationship between its signatories (ALDI, Coles, Woolworths, and Metcash) and their suppliers. This industry-specific regulation complements broader economy-wide protections, including prohibitions against various categories of anti-competitive conduct in the CCA and against various categories of unfair trading practices in the Australian Consumer Law (ACL).

The ACCC is grateful for the opportunity to provide a submission to the review. In our submission, we have considered the operation of the dispute resolution provisions since the changes made in 2020, as well as the general operation of the code, as we regard the issues to be intertwined. In our view:

- the dispute resolution provisions in the code do not achieve their purpose of providing suppliers with an independent and accessible avenue to resolve disputes when they arise, and
- the weaknesses in the dispute resolution provisions are inextricably linked to the fundamental weaknesses in the code as a voluntary code.

There is a persistent and significant bargaining power imbalance between grocery retailers/ wholesalers and their suppliers. A signatory's decision whether to stock a supplier's product and in what quantity can mean the difference between a supplier's business continuing to operate or closing its doors. The perishable nature of many of the products sold by signatories can further exacerbate this bargaining power imbalance, as the ACCC found in the final report of our 2020 Perishable Agricultural Goods Inquiry.[1]

Clause 2 of the code sets out the code's purposes as:

- to help regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain
- to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties
- to provide an effective, fair, and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers, and
- to promote and support good faith in commercial dealings between retailers, wholesalers, and suppliers.

These are important aims that deserve an effective regulatory response. The ACCC continues to hold the view that the code is not currently performing as effectively as it could

[1] ACCC, *Perishable Agricultural Goods Inquiry report*, December 2020. See, for example, p. 62.

and should. The concerns that we raised during the 2018 review remain, and we consider that the additional years of observation of signatories' behaviour and supplier concerns has borne out these concerns.

The Code's purpose is essentially to detail and establish minimum standards of expected conduct of signatories and provide an effective way to resolve disputes between suppliers and signatories.

This is not a role that the ACL does or can play. The ACCC's past experiences in litigating ACL-based matters against Coles and Woolworths for alleged unconscionable conduct in their dealings with suppliers has demonstrated that the evidentiary requirements and the timeliness of court-based enforcement processes are not an effective way of achieving behavioural change or resolving disputes in a timely way with adequate remedies for suppliers.

This submission notes that the ACL protections for smaller businesses are being increased through the amendments to the unfair contract terms provisions that commence in November this year. These provisions are likely to apply to more suppliers than previously, and importantly provide for penalties, enhancing deterrence. However, the interaction between the code and the UCT protections (which were only extended to small businesses in 2016, after the code came into effect) create some unintended consequences, which is outlined later in this submission.

We look forward to working with all stakeholders to ensure the fair and effective regulation of Australia's grocery supply chains.

Dispute resolution issues

The importance of a genuinely independent dispute resolution process

The changes made to the code's dispute resolution processes in 2020 have only gone some of the way towards addressing concerns around the independence and effectiveness of the dispute resolution processes available under the code.

The ACCC remains of the view that a dispute resolution process where the decision-maker is appointed by and represents one of the parties to the dispute cannot be considered genuinely independent. Fear of retribution and the possible loss of access to volume markets are key factors that would inhibit suppliers from raising issues with a body so closely associated with the retailer/wholesaler they supply to.

We maintain that the code and the businesses (particularly small businesses) that make up so much of Australia's grocery supply chains require a genuinely independent dispute resolution process. This process should ensure that those considering and determining disputes are, and are perceived to be, fully independent from the retailers and wholesalers who hold the bargaining power advantage in dealings with suppliers.

The final report of the 2018 review considered the relative merits of remaking the code as a mandatory code versus including a compulsory, binding dispute resolution process in the voluntary code. The report noted the constitutional issues likely to arise from having both, and considered that a compulsory, binding dispute resolution process would be more useful to the sector than a mandatory code.[2]

The ACCC takes a different view.

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[2] Professor Graeme Samuel AO, *Independent Review of the Food and Grocery Code of Conduct*, final report, September 2018, p. 22-23.

Firstly, we note the low uptake amongst suppliers of the compulsory, binding process introduced by the Government in 2020. Only five complaints have been lodged with the Code Arbiters over the lifetime of the current dispute resolution model and each complaint related to the same signatory.[3] We do not consider this to be an accurate reflection of the challenges encountered by suppliers in their daily commercial dealings with signatories.

For example, the Independent Reviewer's annual survey for 2021-22[4] indicated that fewer than half the respondent suppliers considered that Woolworths, Coles, and Metcash 'always' treated them fairly and respectfully.[5] Further, fewer than half considered that Woolworths, Coles, and Metcash 'always' took prompt, constructive action to resolve issues that were raised with them.[6] Of the respondent suppliers who identified an impediment to them raising an issue with the signatory's buying team, over one-third of suppliers to Woolworths and Coles identified 'fear of damaging a commercial relationship' as a key impediment.[7] For all four signatories, this was the single biggest identified impediment.[8]

As further indications of supplier concerns with supermarket behaviour, the ACCC's 2020 Perishable Agricultural Goods Inquiry was made aware of allegations of a range of concerning conduct by supermarkets. In particular, that inquiry identified alleged scenarios where:[9]

- supermarkets had decreased the volumes of perishable products that they ordered at very short notice, after a different volume had already been agreed. This can leave the supplier with a large amount of perishable product on hand that they thought was contracted but for which they suddenly have to try and find a last-minute buyer, or often just destroy the product and forego the income
- suppliers who seek a cost increase from a supermarket or refuse to decrease private label costs have had other products de-listed, in a potential act of commercial retribution
- supermarkets sometimes required suppliers who successfully negotiated a cost increase in one product to invest in an unrelated cost offset for another product, leaving the supplier in the same position as before.

These other sources of intelligence indicate that the five formal complaints under the Code Arbiter model are an underrepresentation of the dissatisfaction and disagreement felt by suppliers in their commercial dealings with signatories. We consider that the low levels of supplier engagement with the Code Arbiter model indicate suppliers clearly continue to hold concerns that such engagement may have negative commercial consequences for them. The benefits expected to flow from the compulsory binding dispute resolution process have therefore not been realised.

Secondly, we are of the view that the benefits of a mandatory code have been underestimated. We consider that a mandatory code, with the potential for the regulator to seek meaningful and proportionate penalties for alleged non-compliance, would more powerfully drive the kinds of behaviour the code seeks to achieve across the sector and incentivise retailers and wholesalers to comply.

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3 Treasury, *Review of the Dispute Resolution Provisions in the Food and Grocery Code*, consultation paper, 5 December 2022, p. 11.

4 Food and Grocery Code Independent Reviewer*, 2021-22 Annual Report*, December 2022.

5 ibid., p. 13.

6 ibid., p. 14.

7 ibid., p. 18.

8 ibid., p. 18.

9 ACCC, *Perishable Agricultural Goods Inquiry report*, December 2020, p. 49.

We consider that this would result in better outcomes for the sector compared to a compulsory, binding dispute resolution process that is not being used by the vast majority of suppliers who report, through other channels, significant challenges in their commercial dealings with retailers and wholesalers.

Recommendation 1

The code should be amended to remove the Code Arbiter model and replace it with a genuinely independent dispute resolution process.

The positive role played by the Independent Reviewer

In the absence of a fully independent dispute resolution process, the ACCC considers that the role of the Independent Reviewer is essential to ensure some checks and balances on how the Code Arbiters and signatories deal with complaints.

In addition to its important oversight role, the Independent Reviewer is also a key source of intelligence (via its annual survey and report) as to the difficulties that suppliers face in their dealings with retailers and wholesalers.

In relation to Question 13 in the review consultation paper, the ACCC does not consider that the Independent Reviewer requires 'stronger powers' to refer complaints to the ACCC.[10]

The Independent Reviewer already has the power under subclause 37D(9) of the code to refer potential contraventions of the code to the ACCC where it becomes aware of such a potential contravention through its own review process.

Through our strong working relationship with the Independent Reviewer, our own proactive compliance and enforcement work, and the option for parties to contact the ACCC through various channels (including anonymously), we consider that the avenues for making a complaint to the ACCC are sufficient.

Recommendation 2

The Independent Reviewer should not be given additional powers when referring complaints to the ACCC.

The 'informal' dispute resolution mechanism announced by signatories in mid-2022

The ACCC notes the 'informal' dispute resolution process implemented by the signatories in mid-2022, following discussions with the Independent Reviewer.[11] There is limited public information available on the details of this new process, although we understand it enables Code Arbiters to receive supplier complaints informally, i.e., without lodging a formal complaint under the code.

However, we note that the new process may raise:

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[10] Treasury, *Review of the Dispute Resolution Provisions in the Food and Grocery Code*, consultation paper, 5 December 2022, p. 12, question 13.

[11] Treasury, *Review of the Dispute Resolution Provisions in the Food and Grocery Code*, consultation paper, 5 December 2022, p. 9.

1. Code compliance concerns – given the requirement that Code Arbiters must not be engaged by signatories in any other capacity other than as Arbiters. If a signatory's Code Arbiter is also being employed by the signatory to deal with non-code processes, this may raise concerns under subclause 32(1) of the code.
2. Oversight concerns - the absence of formal documentation, including written records that the ACCC can seek under section 51ADD of the CCA, limits transparency and the ability of the Independent Reviewer and the ACCC to ensure that processes have occurred as they should.

The ACCC supports steps to improve the accessibility and effectiveness of dispute resolution processes in grocery supply chains. We do not make any recommendations regarding the informal process at this time as we believe it is essential to firstly hear suppliers' voices about the process, its take-up amongst suppliers, and what resolutions have been achieved. However, we do not consider that the informal process can address the fundamental weaknesses of the code itself and its dispute resolution process.

Broader code issues

The ACCC considers that the weaknesses in the code's current (and former) dispute resolution provisions are inextricably linked to what we perceive as the fundamental weaknesses in the code. In particular, the weaknesses as a voluntary code that does not provide meaningful protections to suppliers against a retailer's or wholesaler's misuse of its superior bargaining power and which does not provide the ACCC with meaningful compliance and enforcement tools.

These fundamental weaknesses undermine the incentives for, or act as barriers to prevent, suppliers fully utilising the dispute resolution provisions[12], in addition to limiting the ability of the code to effectively achieve its other purposes.

Remaking the code as a mandatory code

It is the ACCC's longstanding view that the code will not be able to effectively achieve its purposes unless it is remade as a mandatory code. We consider that the voluntary nature of the code undermines its effectiveness. In circumstances where there are identified harms in a sector that require a regulatory response, as the Government has decided with the grocery supply chain, sector participants should not be able to opt in or out of that framework according to their commercial interests.

Remaking the code as a mandatory code is an essential first step in strengthening the code, as the risk remains that any other efforts to improve the operation of the code will be undermined by the ability of signatories to withdraw from the code.

As we noted in submissions to the 2018 review, remaking the code as a mandatory code does not necessarily have to mean expanding its coverage to include all grocery retailers and wholesalers, should the Government consider that the regulatory burden of such an extension would outweigh its benefits. The scope of the code could be limited by turnover, the number of employees, or some method of limiting it to the current four signatories.

Recommendation 3

[12] The Hon Dr Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, *Review of the Dispute Resolution Provisions in the Food and Grocery Code*, terms of reference, 30 September 2022.

The code should be remade as a mandatory prescribed code.

Removing the ability to opt-out of code protections

The ACCC considers that the ability for signatories to contract out of certain protections[13] through their supply agreements (or to apply pressure to suppliers to contract out of certain protections) is another fundamental weakness that undermines the code's ability to achieve its purposes.

The ACCC has two main issues with these opt-out provisions.

First, the opt-out provisions fatally undermine the very protections that the code exists to provide, including through such significant latitude as allowing signatories to unilaterally vary their existing supply agreements.14 For example, the retailers have previously altered supply agreements without consultation and to the alleged detriment of their suppliers. Some of the arrangements that suppliers have been required to accept include:

- Paying retailers a "profit gap" when the supplier's products made less profit than forecasted.
- Paying retailers for the cost of the waste or mark-down of the supplier's products.
- Paying penalties to retailers for late or short deliveries, or risk having their lines removed from shelves.[15]

The code is intended "to help regulate standards of business conduct" in relationships that are generally characterised by a significant bargaining power imbalance. It would be naïve to believe that the same power imbalance would not affect the terms of the grocery supply agreement (GSA) between the parties, and the ability of the signatory to engage in behaviour that the code otherwise sought to regulate or limit.

An effective code should clearly set out minimum standards of conduct to regulate behaviour. In our view, the opt-out provisions make it easier for signatories to manoeuvre around the protections for suppliers in the code, which may make it difficult for a supplier to subsequently raise the issue with the signatory or lodge a complaint (as they have "agreed" to the term in the GSA).

It is no answer to this argument to say that those clauses of the code that allow opt-outs only allow them where the conduct is 'reasonable' in the circumstances.16 In a code with limited enforcement or compliance tools for the ACCC, and a sector with a well-entrenched fear of commercial retribution against suppliers who make complaints, what constitutes 'reasonable in the circumstances' is almost wholly up to the signatory to decide.

Secondly, the existence of the opt-out provisions may in fact decrease the overall protection given to suppliers, due to the interaction between prescribed industry codes and the unfair contract term laws in the ACL. Under subsection 26(1)(c) of the ACL, those terms that are 'required, or expressly permitted, by a law of the Commonwealth, a State, or a Territory' are excluded from the operation of section 23 of the ACL. By including the opt-out provisions in the code, they are effectively removed from the scope of the unfair contract term (UCT) laws, which were extended to small business contracts in November 2016.

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13 See, subclauses 9(2), 12(3), 14(2), 15(2), 16(2), 17(2), and 18(2) of the Code, where restrictions are placed on certain types of conduct unless the relevant grocery supply agreements contain clauses that allow the conduct.

14 Subclause 9(2) of the code.

15 ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405; ACCC v Woolworths Ltd [2016] FCA 1472.

16 See, subclauses 9(2)(c), 12(3)(b), 14(2)(d), 15(2)(b)(iii), 16(2)(c), 17(2)(b), and 18(2)(b) of the Code.

The ACCC raised this counterintuitive impact during the 2018 review, but consider it is important to raise again as the UCT laws have now developed even further, meaning that suppliers would be deprived of the even greater protections passed by Parliament in 2022 and due to commence in November 2023.[17] These greater protections:

- expand the range of small business contracts to which the UCT laws apply
- allow courts to impose substantial civil penalties on companies that include or rely on UCTs in their standard form contracts, and
- where a court has determined that a particular term used by a company is unfair, provides the court with clearer powers to stop the company from using the same or a substantially similar term to the declared UCT in future standard form contracts.

This places small business suppliers in a worse-off position compared to if those provisions did not exist. If the provisions were removed from the code, signatories and suppliers would continue to be able to include these terms in grocery supply agreements (as they are effectively permitted currently under the code), but their inclusion would be subject to the new unfair contract term laws, which will prohibit a business from including or relying on a UCT in a small business standard form contract.

The current structure of the code is in this sense a worse arrangement for suppliers than having no code. The code appears to offer suppliers protections that can be, and are (based on ACCC compliance checks), removed or limited by signatories, while simultaneously excluding them from the protections of the unfair contract terms laws. This arrangement is in direct opposition to one of the Government's key statements about the code in the explanatory statement from 2015, where the Government said that:

> The Code is not intended to, and does not operate to, exclude any person or the ACCC from enforcing any rights, or seeking any remedies, available in respect of the conduct of any retailer or wholesaler bound by the Code. For example, where a retailer or wholesaler engages in misleading conduct or acts unconscionably towards a supplier, the Australian Consumer Law would also provide a right of action.[18]

By bringing key categories of concerning conduct within the code, while simultaneously allowing signatories to opt out of the protections, suppliers will not be able to access these additional UCT protections.

Recommendation 4

The code should be amended to establish minimum standards of conduct that cannot be contracted out of.

Introducing meaningful compliance and enforcement tools for the ACCC

The final key element for turning the code into an effective piece of regulation that can achieve its purposes is to ensure that there are effective measures in places to promote retailer and wholesaler compliance with their obligations. Chief amongst these are civil pecuniary penalties and infringement notices.

Currently, when the ACCC considers that a signatory has not complied with the code, we are limited to the following courses of action: issuing public warning notices to alert the

[17] *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

[18] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth), explanatory statement, March 2015.

Australian community to a suspected contravention of the code,[19] seeking injunctions to compel or restrain certain conduct by the signatory,[20] and initiating court proceedings to compel the signatory to redress or prevent any loss or damage caused by the signatory's misconduct.[21] Suppliers can also seek damages for a contravention of the code.[22] These are useful powers to have, and the ACCC has successfully used these powers in other areas of our work to help deter non-compliance with our legislation and remedy some of the harm endured by consumers and small businesses.

However, we do not consider that these powers are sufficient without civil pecuniary penalties and infringement notices to deter non-compliance with the code. While useful, on their own they leave the compliance-checking burden to the ACCC, rather than creating strong incentives for the signatories to ensure their compliance. We note that penalties and infringement notices are already available under several prescribed codes, including the Dairy Code, Franchising Code and Horticulture Code. The availability of sufficient and proportionate penalties is important to enable the ACCC to promote compliance not only through the taking of enforcement action against the business but by signalling to others covered by the code that the cost of non-compliance will be significant. The ability of the ACCC to achieve and leverage outcomes can be more difficult with a voluntary code.

Further, the Independent Reviewer's annual survey for 2021–22 and the ACCC's 2020 Perishable Agricultural Goods Inquiry, both discussed above, show that suppliers consider they are being mistreated, and that strengthening the code is not simply a response to a theoretical weakness. These other sources of intelligence indicate that, although there have only been five formal complaints to Code Arbiters over the last two financial years (all against the same signatory), this is an underrepresentation of the challenges that suppliers face in their commercial dealings with signatories.

The crucial missing link in the effective enforcement of the code is deterrence over and above the cost for a signatory in simply repaying the loss or damage they have already caused. The ACCC recommends that this deterrence take the form of courts being able to levy civil pecuniary penalties for non-compliance with the code, and the ability for the ACCC to issue infringement notices for simpler or less egregious instances of non-compliance.[23]

Recommendation 5

The ACCC's powers to effectively enforce compliance with the code should be improved through the introduction of civil pecuniary penalties for non-compliance and extending the ACCC's infringement notice powers to include the code.

19 Section 51ADA, CCA.

20 Section 80, CCA.

21 Section 51ADB, CCA – known as 'non-party redress'.

22 Section 82, CCA.

23 In line with the ACCC's *Guidelines on the use of infringement notices*, July 2020.