



Our reference: D18/162940

28 November 2018

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Food and Grocery Code of Conduct Review
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

ACCC response to the Final Report of the Independent Review of the Food and Grocery Code of Conduct

The ACCC welcomes the opportunity to provide a response to the Government on the Final Report of the Independent Review of the Food and Grocery Code of Conduct.

The purpose of the Code is to prevent abuse by the signatories of their superior bargaining position in their dealings with their suppliers. When disputes do arise, the Code is intended to give suppliers viable avenues of dispute resolution.

As set out in in this letter and our previous submissions to the Review, the current Code does not fulfil these purposes. Unfortunately the key recommendations in the Final Report, if implemented as drafted, will make the Code less fit for purpose. The practical effect of implementing the key recommendations in the Final Report will be to create the false expectation that the amended Code is better able to address abuses of superior bargaining position and facilitate effective dispute resolution.

The ACCC recommends (for the reasons provided in this letter and annexure) that the Government:

1. **Reject** Recommendations 1, 5, 6 and 7
2. **Accept in principle** Recommendations 4, 8, 10, 11, 12, 13 and 14
3. **Accept** Recommendations 2, 3 and 9
4. **Remake** the Code as a single mandatory prescribed code that:
 - a. sets clear obligations on appropriately targeted retailers and wholesalers that cannot be opted out of;
 - b. provides meaningful and effective enforcement and compliance tools to the ACCC; and
 - c. provides for genuinely independent dispute resolution.

While the ACCC supports or gives conditional support to some of the recommendations in the Final Report, this does not mean that we support the implementation of these recommendations without the other changes proposed by the ACCC. The implementation of only these recommendations of the Final Report would not fix the fundamental problems and deficiencies of the current Code that the ACCC has raised in this letter and in our previous submissions.

There are three key problems with the current Code, none of which would be resolved by giving effect to the recommendations in the Final Report.

1. The Code does not provide meaningful protection to all suppliers

In order to provide meaningful protection to suppliers, the Code needs to:

- Apply to all relevant retailers and wholesalers in the sector. The Code should be remade as a single, targeted, prescribed mandatory code; not by making two codes, for different participants in the same sector. Without a mandatory Code there is the ever-present risk of signatories withdrawing, which could be triggered by a multitude of factors such as civil pecuniary penalties being introduced.
- Prohibit poor conduct on the part of signatories, and prevent signatories avoiding such prohibitions via contract arrangements with suppliers. The Code is intended to address the fact that signatories hold the bargaining power in negotiations with suppliers. However, retaining provisions in the Code that allow signatories to require suppliers to give up Code-protections, fatally undermines this purpose.

2. The Code does not provide the ACCC with enforcement tools to protect suppliers

In order to allow the ACCC to protect suppliers, the Code needs to:

- Make civil pecuniary penalties and infringement notices available for breaches of the Code. The Code is currently effectively unenforceable and therefore there is no effective deterrence against breaches. If signatories fail to comply with the Code, there is no meaningful redress provided for in the Code itself that the ACCC can use.

3. The Code does not provide for effective dispute resolution

In order to provide effective dispute resolution that suppliers are not deterred from using because of fear of bias or commercial retaliation by signatories, the Code needs to:

- Provide for genuinely independent dispute resolution. Just as signatories hold the power in contract negotiations, they hold the power in relation to internal dispute resolution. Suppliers are unwilling to use the internal dispute resolution mechanisms for fear of bias or retaliation. The proposed dispute resolution model lacks independence and will not address these concerns or create any greater confidence in the system for suppliers to raise their concerns.

As previously stated, the ACCC believes the Code should be mandatory with prohibitions against poor conduct that can be enforced through penalties for non-compliance, supported by an effective independent dispute resolution model for suppliers. If the Government considers that these principles are not appropriate for this sector, the ACCC submits that the Code should be retained in its current form as the recommendations in the Final Report will, if implemented, reduce the effectiveness of the Code.

Yours sincerely



Rod Sims
Chair

Annexure A – ACCC views on the Final Recommendations of the Food and Grocery Code of Conduct Review

Final Recommendations of the Food and Grocery Code of Conduct Review

ACCC views

1. The Grocery Code should remain as a prescribed voluntary code.

The Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.

The ACCC opposes Recommendation 1.

- **The Code should be remade as a prescribed mandatory code that applies to all major retailers and wholesalers in the sector, and comparable future industry participants. A single mandatory Code can be appropriately targeted (such as by means of a threshold test) to ensure that it only captures relevant industry participants.**
- **Under a voluntary Code, there is an ongoing risk of withdrawal by signatories and insufficient coverage of new entrants or existing major participants that refuse to sign up. This reduces the Code's effectiveness and utility, including because suppliers cannot rely on it consistently and in full confidence. Making the Code mandatory would remove these risks and provide greater certainty to both suppliers and to new entrants.**
- **Having two industry codes for different participants in the same sector is perplexing, inefficient and would create an unnecessary layer of complexity and regulatory burden. It would also create uncertainty and inconsistency for both suppliers and signatories. Whether the Code is voluntary or mandatory should depend upon what is the most appropriate regulatory option, not the disposition of any particular entity toward regulation.**
- **The Code was introduced to address concerns at the time that Australia's two major supermarkets were taking advantage of their superior bargaining position to the detriment of suppliers. The ACCC considers that the Final Report's focus on making the Code mandatory for Metcash is too narrow and that a single mandatory Code**

should consistently address problematic behaviour by market participants across the industry.

2. The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.

The ACCC supports Recommendation 2.

3. The current coverage of products under the Grocery Code should remain unchanged.

The ACCC supports Recommendation 3.

4. Enhance the current obligation to act in good faith (clause 28), including the addition of indicators of acting in good faith that are easy to understand and apply; and to introduce the concept of 'fair dealings' as guiding principles for the Code Arbiters.

The ACCC supports Recommendation 4 in principle in relation to the addition of indicators of acting in good faith, **but opposes the proposal relating to Code Arbiters.**

The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.

Fair dealings principles for Code Arbiters

- **The ACCC does not support the Code Arbiters model proposed in Recommendation 5, and therefore it follows that the ACCC does not support Recommendation 4 in relation to Code Arbiters.**

Good faith indicators

- The ACCC supports in principle the addition of indicators that would enhance the current obligation to act in good faith that are easy to understand and apply, including a prohibition of retribution against suppliers.
- The ACCC expects the outcomes of two court proceedings instituted in May 2017 to contribute to the development of judicial authority as well as industry understanding on how the existing good faith obligations apply across industry codes.

ACCC guidance

- The ACCC's education and information activities includes a section of our website that is dedicated to the Code. This is in addition to our code compliance program. The ACCC updates its guidance materials from time to time to reflect changes to relevant laws and decisions of the courts. However,

Australian courts are ultimately responsible for interpreting the CCA and related laws. ACCC guidance materials are not a substitute for legal advice.

5. The Code Compliance Manager should be replaced with an independent Code Arbiter, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.

6. New recommendation 6 in final report. The Government should appoint an Independent Reviewer to:
 - review the Code Arbiters' determinations for consistency with the requirements of the Grocery Code (at the request of a supplier); and
 - work collaboratively with Code Arbiters, signatories and the ACCC, meeting regularly to discuss issues under the Grocery Code.

7. The ACCC should also consider adopting a collaborative approach with signatories, Code Arbiters and the Independent Reviewer to encourage more active compliance with the Grocery Code.

The ACCC opposes Recommendation 5.

- **The employment relationship between the Code Arbiter and the retailer/wholesaler erodes the actual and perceived independence of the Arbiter. As a result, suppliers will be deterred from raising complaints out of concerns over confidentiality, bias and fear of reprisal.**
- **The ACCC also rejects the suggestion by the Review that it might utilise an annual report prepared by the Code Arbiters as a primary source for assessing compliance with the Code. Maintaining the ACCC's independence and discretion to exercise its audit powers under section 51ADD is essential to our role as regulator.**
- **The ACCC's preferred model would be the appointment of an independent adjudicator or arbiter, funded separately from signatories.**

The ACCC opposes Recommendation 6.

- **The institution of an Independent Reviewer will not resolve the primary issue of Arbiters lacking independence. This is especially so given that an Independent Reviewer would be focused on checking the processes followed by Code Arbiters and not the merits of Arbiters' decisions.**

The ACCC opposes Recommendation 7.

- **The recommendation is superfluous as the ACCC already engages with parties as appropriate in the course of its compliance and enforcement activities.**
- **If the intention of this recommendation is to require the ACCC to engage more with signatories (and any future Code Arbiters or Independent Reviewer) than it would with other parties, this**

would lessen the independence of the ACCC and further reduce suppliers' willingness to report alleged breaches of the Code.

Presently, any party is free to provide information to the ACCC including in relation to breaches of the CCA and/or Code. This will continue to be the case.

8. The Grocery Code should be amended to give suppliers the right to request further details on the reasons for delisting decisions, following the initial receipt of a signatory's reasons.

The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.

The ACCC supports Recommendation 8 in principle, however to effectively address the issue of information not being readily provided to suppliers:

- All delisting information should be provided in the same written delisting notice (including detailed reasons for the delisting and information about the supplier's right of review).
- Detailed reasons for delisting should be provided in the first instance, rather than at a later stage following a request.

9. It should be clarified that the term Grocery Supply Agreement, as defined in clause 3 of the Grocery Code, applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.

The ACCC supports Recommendation 9.

10. Clause 10 of the Grocery Code should be amended so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.

The ACCC supports Recommendation 10 in principle, however we maintain our view that the opt-out structure does not adequately account for the differences in bargaining power between signatories and suppliers and our support is conditional on:

- Removing signatories' ability to unilaterally vary terms of a grocery supply agreement, which can have serious and significant commercial consequences for suppliers that they cannot plan for and or avoid. This opt-out provision is especially significant because the protections of the unfair contract term provisions are unlikely to be available to suppliers where an opt-out clause has been relied on.
- Consideration being given to how other 'opt-out' provisions under the Code, if they are not to be removed, can at least

be improved.

11. Clause 14 should be amended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.

The ACCC supports Recommendation 11 in principle, however we consider that wastage payments should be banned outright and the 'opt-out' in clause 14 removed.

12. To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply only to fruit and vegetables.

The ACCC supports Recommendation 12 in principle, however further consideration should be given and consultation undertaken with suppliers and other relevant stakeholders as to whether the proposed exclusion of fresh produce other than fruit and vegetables raises any issues.

13. A new provision relating to price rise processes should be introduced to:

The ACCC supports Recommendation 13 in principle and only on the following conditions:

1. prevent signatories from requiring a supplier to disclose commercially sensitive information; and
2. require that signatories take no longer than 30 days to consider a price rise request from a supplier, unless circumstances exist that justify a reasonable extension that is negotiated with and agreed to by the supplier; and
3. require that signatories report on the times taken to make a price rise decision, to be published in the Code Arbiters' annual reports.

- Signatories must not exclude relevant input costs from a price rise discussion (utilities and labour costs are usually the most significant components of suppliers' costs).
- Signatories must be prevented from requiring the supplier to implement a price mitigation strategy following any agreement to increase a supplier's price of product.
- Signatories must be prevented from requiring a supplier to have its costs and price rise proposal audited at the supplier's costs – this is expensive and time consuming, and does not necessarily lead to a price rise.

14. There should be a review of the Grocery Code within three to five years of implementation of any changes as a result of this Review.

The ACCC supports Recommendation 14 in principle. However, the ACCC recommends that a review should occur within three years after the implementation of any changes as there should be an early opportunity to identify and adjust any changes that are not working as intended.

Other – civil pecuniary penalties and infringement notices

Related to Recommendation 1, the ACCC strongly considers that civil pecuniary penalties and infringement notices should be available under a remade mandatory Code because:

- A mechanism for the regulator to require signatories to comply with their Code obligations is necessary, in order for effective regulatory intervention to occur. This

should be provided for within the Code itself. Where there is no meaningful consequence for signatories in not complying with the Code, the Code is almost meaningless.

- Civil penalties and infringement notices have been a useful tool for the ACCC in regulating the Franchising Code and Horticulture Code. The ACCC has taken a number of successful enforcement actions under these codes where penalties were awarded and infringement notices paid. The benefits of penalties include:
 - they act as an effective deterrent against breaching the Code;
 - even if the financial impact of paying a penalty is relatively small compared to the financial status of a signatory, they can have a reputational effect; and
 - they can encourage suppliers to bring reports to the ACCC or invoke the dispute resolution procedures under the Code.
- Penalties can be made available concurrently with any action for remedies, bolstering the remedies available to participants, thereby further deterring Code breaches. Providing for penalties does not preclude from providing for compensation (and vice versa).