



**Australian Government**  
**The Treasury**



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

Consultation Paper

December 2022



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# Consultation Process

## How you can Contribute

The Treasury invites stakeholders and interested parties to make a written submission to the review of the dispute resolution provisions under the Food and Grocery Code of Conduct.

This consultation paper outlines questions that the review is interested in receiving feedback on. However, there is no requirement to answer all (or any of the questions) in your submission.

Non-confidential submissions will be published on the Treasury consultation website. If you do not wish your submission to be published, please inform us of this and ensure your submission is marked as 'confidential'.

### Closing date for submissions: 01 February 2023

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# Review of the Dispute Resolution Provisions under the Food and Grocery Code

## Introduction

The Food and Grocery Code of Conduct (the Code), introduced in 2015, is a voluntary code prescribed under Part IVB of the *Competition and Consumer Act 2010*.

The Code contains rules about how supermarkets (also known as retailers) and wholesalers of grocery products in Australia must deal with their grocery suppliers (which includes food manufacturers and farmers). Woolworths, Coles, Aldi, and Metcash are signatories to the Code and are bound by it.

The objectives of the Code are to promote transparency and certainty in commercial dealings between the parties and provide an effective process for resolving disputes without the need to resort to legal action. The Code also helps to protect suppliers against certain business behaviours that can impact the growth and sustainability of the grocery industry, which can in turn cause harm to Australian consumers.

## Review of dispute resolution provisions in the Code

In 2020, the Government made a suite of amendments to the Code based on the recommendations of Professor Graeme Samuel AC, following his 2018 review of the Code. These changes included an overhaul of the Code's dispute resolution provisions, which saw the introduction of new Code Arbiters for each Code Signatory and the Government-appointed Independent Reviewer, Mr Chris Leptos AO.

The Code Arbiters and Independent Reviewer roles were modelled off the United Kingdom's Groceries Code Adjudicator.<sup>1</sup> The current dispute resolution system provides each of the Code Arbiters with the autonomy and authority to investigate disputes and make binding decisions. The role of the Independent Reviewer is to oversee the process and ensure that suppliers are afforded due process. Confidentiality protections were also enhanced to encourage more suppliers to make use of the system to resolve their complaints in a way that could preserve ongoing commercial relationships.

The current dispute resolution model involves a form of binding arbitration. Signatories have agreed to be bound by the Code, including the decisions of the Code Arbiters. It was Professor Samuel's view that maintaining a voluntary code was the best way to achieve positive outcomes for suppliers.

Considerations about whether the Code should remain voluntary or be made mandatory is outside the scope of this review. Those issues will be considered in the next review, which will consider the remaining provisions of the Code and commence before 3 October 2023.

In accordance with the statutory requirements under the Code, the Government is undertaking a review of the dispute resolution provisions only, to ensure that they are operating as originally intended. It was considered appropriate to conduct a separate earlier review of these provisions given that the dispute resolution arrangements put in place were novel and had not been tested in other industry codes. This review provides an earlier opportunity to examine if the arrangements are fit-for-purpose or whether further changes should be considered by the Government in order to support the industry.

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1 [Groceries Supply Code of Practice](#).

The terms of reference require this review to consider:

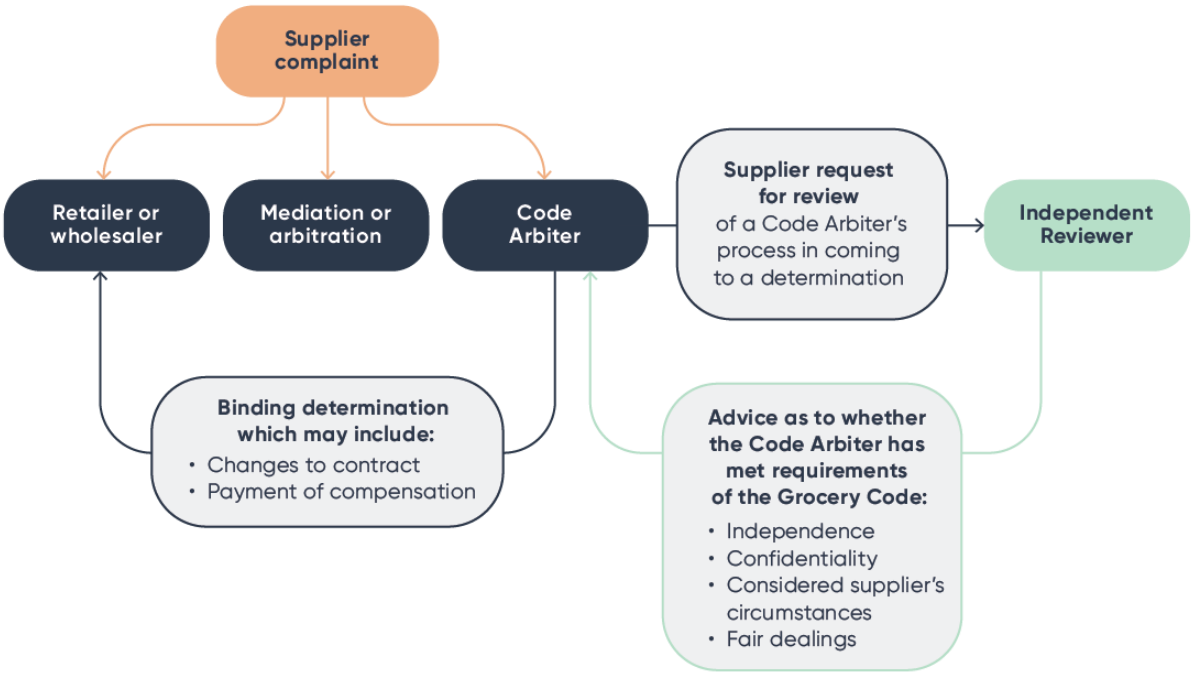
- the effectiveness of the provisions in Part 5 (Dispute Resolution) of the Code in meeting its purpose of providing an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers
- any barriers that may be preventing suppliers from fully utilising the dispute resolution arrangements in Part 5 of the Code
- if appropriate, options or alternative approaches for improving the dispute resolution provisions in Part 5 of the Code

## Current dispute resolution process

The Code contains dispute resolution procedures that are intended to give suppliers a clear pathway for escalating and resolving their disputes in a low cost and timely manner. Part 5 of the Code aims 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’.<sup>2</sup>

As demonstrated in Figure 1, there are several dispute resolution options available to suppliers, some of which are prescribed in the Code.

Figure 1 Grocery Code of Conduct dispute resolution framework



The first option is not prescribed in the Code, but suppliers can approach the retailer or wholesaler directly, such as through the buying team, a category manager, or another senior manager. The second option is compulsory mediation or arbitration, where a signatory is generally required to

2 [Explanatory Statement](#), Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, p 2.

participate under the Code at the request of the supplier. The third option, also prescribed in the Code, is to refer a complaint or dispute to the Code Arbiter appointed by the signatory for investigation and a determination. The Independent Reviewer also plays a role in dispute resolution, as a supplier that is dissatisfied with the process can request that the Independent Reviewer conduct a review of a Code Arbiter's process in dealing with a complaint. Each of these parties and their role in dispute resolution are discussed in greater detail in the following sections.

The Australian Competition and Consumer Commission (ACCC) is the agency responsible for enforcement of the Code. Suppliers can make a report to the ACCC directly about alleged breaches of the Code or the *Competition and Consumer Act 2010*. Under the Code, the Independent Reviewer may also report a potential breach of the Code to the ACCC.<sup>3</sup>

The signatories and the Code Arbiters have regular meetings with the Independent Reviewer where they discuss matters such as the Independent Reviewer's annual survey, the Code Arbiters' reports, and the ongoing effectiveness of the Code.

## Dealing with the retailers or wholesaler directly

Although not prescribed in the Code, one avenue for dispute resolution is for suppliers to discuss their concerns with the retailer or wholesaler directly. Each of the signatories have their own internal complaints handling and dispute resolution procedures, as discussed below. If dealing with the retailers or wholesalers directly fails, or the suppliers would prefer not to deal with the signatories directly, then the Code provides additional dispute resolution pathways for suppliers, as discussed in further detail in the following sections.

### ALDI

Aldi has an online supplier complaint or dispute form<sup>4</sup> which requires the supplier to complete some contact details and provide information (via drop-down boxes and textboxes) about the complaint or dispute. One of the drop-down options allows the supplier to choose whether they would like the complaint or dispute investigated by a buyer, senior buyer, or the Code Arbiter. Another drop-down option is for the supplier to select which provision of the Code is alleged to have been breached. Suppliers are asked to allow 14 days for Aldi to respond.<sup>5</sup>

### Coles

Coles has a complaint handling procedure.<sup>6</sup> In the first instance it is recommended that a supplier attempt to resolve any issues with the relevant category manager. If the issue is unable to be resolved, a supplier can then escalate the issue by making a formal complaint to a Supplier Dispute Resolution Manager or a Senior Manager, who will investigate the issue. The supplier portal also notes that Coles' Code Arbiter can be contacted if suppliers have any concerns that can be resolved under the Code.<sup>7</sup>

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3 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 37D (9).

4 Aldi, [Supplier complaint or dispute form](#), accessed 20 October 2022.

5 Aldi, [Supplier Complaints Handling & Dispute Resolution Guidelines](#), accessed 20 October 2022.

6 Coles, [Coles Complaints Handling Procedure – Goods for Resale](#), accessed 20 October 2022.

7 Coles, [Supplier Charter and Grocery Code](#), accessed 20 October 2022.



## Metcash

Metcash has a dispute resolution policy and procedure framework.<sup>8</sup> This framework outlines five options available to suppliers. Three options are different departments within Metcash that complaints can be directed to, depending on the issue. Suppliers may also raise any complaint, dispute, or other issue under Metcash's Speak Up Policy,<sup>9</sup> which provides avenues for suppliers and others to report any suspected or actual misconduct. The final option is to raise a complaint or dispute, that relates to a matter under the Code, with the Code Arbitrator.

## Woolworths

Woolworths offers four dispute resolution options to suppliers.<sup>10</sup> Firstly, suppliers can contact their primary Woolworths contact to make them aware of the issue. Suppliers can also direct their issue to a shared mailbox where a Woolworths representative will assess the issue and act accordingly. Woolworths also has an independent complaints line 'Supplier Speak Up', which allows suppliers to make anonymous complaints and the organisation will report issues to Woolworths' Senior Management as appropriate. The final option available to suppliers, if their complaint is covered by the Code, is to discuss it with Woolworths' Code Arbitrator.

## Key Elements of the Dispute Resolution Process under the Code

### Code Arbitrators

If a supplier does not achieve their desired outcome when dealing with the signatory directly, or chooses not to deal with the signatory directly, they may instead choose to direct a written complaint to that signatory's Code Arbitrator. Under the Code, all signatories are required to appoint a Code Arbitrator who is responsible for investigating and resolving supplier complaints in relation to conduct regulated by the Code. The Code Arbitrator is appointed by the signatory, but they work to manage and resolve supplier complaints independently and impartially.

The following must be included in a written complaint to the Code Arbitrator:

- contact details for the supplier and their business
- details of conduct giving rise to the complaint, including any documents or other information that would assist the investigation of the complaint
- the provisions of the Code that are relevant to the complaint

As part of their role, the Code Arbitrator must:

- develop a written complaints handling procedure that is consistent with the Code and act in accordance with this procedure
- deal with complaints that arise in relation to the conduct of the signatories towards suppliers, to the extent that conduct is regulated by the Code
- make a binding determination on the signatory's behaviour and determine what (if any) action should be taken in response to the complaint. The Code Arbitrator may determine that the retailer

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<sup>8</sup> Metcash, [Dispute Resolution](#), accessed 20 October 2022.

<sup>9</sup> Metcash, [Metcash Speak Up Policy](#), accessed 20 October 2022.

<sup>10</sup> Woolworths, [Woolworths Issue Resolution](#), accessed 20 October 2022.



or wholesaler pay compensation of up to \$5 million to the supplier per complaint. Code Arbiters may also determine that the retailer or wholesaler should vary a grocery supply agreement with the supplier<sup>11</sup>

There are also appropriate protections in place for suppliers using the formal Code Arbitrator processes. The Code Arbiters must:

- not disclose the identity without supplier consent
- complete their responsibilities within certain timeframes, for a quick resolution
- keep a record of supplier complaints and any record of investigations undertaken to investigate complaints, for at least 6 years

The Code Arbiters currently appointed for each of the signatories are:

- Coles – the Hon Jeff Kennett AC
- Woolworths – Helen McKenzie
- ALDI – Bronwyn Gallacher
- Metcash – Martin Shakinovsky

### Additional arrangements for Code Arbiters

In mid-2022, following discussions with the Independent Reviewer, the Code Signatories – Coles, Woolworths, Aldi, and Metcash – updated their complaints handling processes by issuing new directives to their Code Arbiters. These new directives allow the Code Arbiters to engage in informal discussions with suppliers outside of the arbitration process required by the Code and enables the Code Arbiters to report to the signatories' executive level any concerning conduct or practices being alleged as part of purchasing negotiations with suppliers.<sup>12</sup>

The purpose of the informal process is to provide greater flexibility to allow suppliers to access the Code Arbiters. These arrangements were also proposed to address the proportionally low number of complaints being brought to the Code Arbiters, compared with the number of informal complaints filtering through other avenues, including reports made to industry bodies and the Independent Reviewer.

While these informal processes are not part of the Code, the review is interested in receiving feedback on whether such arrangements complement the arbitration processes provided for under the Code, particularly whether such an approach benefits suppliers or enables early reporting to senior management of potentially systemic and unwanted practices from occurring at the purchasing level.

### Questions:

1. Do you think the current formal and informal Code Arbitrator functions support independent consideration of complaints and provide consistent outcomes across all Code Arbiters?
2. Are there appropriate protections in place for suppliers using the formal Code Arbitrator processes?

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<sup>11</sup> [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 36 (2).

<sup>12</sup> See letters from the CEO of each Code Signatory: [Aldi](#); [Coles](#); [Metcash](#); [Woolworths](#).

3. What do you consider to be the benefits of being able to raise a dispute with the Code Arbiter informally, as opposed to making a formal request?

## Independent Reviewer

The Grocery Code Independent Reviewer is appointed by the Minister and has several responsibilities including dispute resolution. If a supplier has directed a complaint to a Code Arbiter and is unsatisfied with the steps taken by the Code Arbiter in their investigation, then they are able to request that the Independent Reviewer reviews their case.

The Independent Reviewer must firstly consider the independent review request and decide, within 10 business days of the request being received, whether to conduct an independent review.<sup>13</sup>

If the Independent Reviewer decides to conduct an independent review, their role is not to re-prosecute the case or to make a new determination. Rather, the Independent Reviewer's function is to check the overall integrity of the process and to ensure that the Code Arbiter carried out their duties properly and in accordance with the requirements of the Code. If the Independent Reviewer becomes aware of a potential breach of the Code during the independent review, they are able to report this to the ACCC for its consideration.

The Independent Reviewer is empowered to request information from the supplier, Code Arbiter, and the retailer or wholesaler in order to conduct their independent review.<sup>14</sup> The Independent Reviewer may make recommendations to the Code Arbiter only and not to the retailer or wholesaler. For example, the Independent Reviewer may recommend that the Code Arbiter reconsider the original complaint.<sup>15</sup>

The Independent Reviewer is required to inform the Code Arbiter, supplier, and retailer or wholesaler of the recommendations and findings of the review, and the Code Arbiter has 10 business days to reconsider what (if any) action should be taken by the retailer or wholesaler in response to the complaint.

### Questions

4. What do you consider to be the advantages and disadvantages of the current dispute resolution framework?
5. Do you think the dispute resolution process under the Code provides an effective, fair, and equitable means for resolving supplier complaints?

## Outcomes of the dispute resolution process under the Code

### Disputes handled by the Code Arbiters

Under Section 36D of the Code, the Code Arbiters must prepare a written report for each financial year, with one of the requirements being that each Code Arbiter notes the number of complaints received for investigation in that financial year.

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13 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 37C (1).

14 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 37D (3).

15 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 37D (6).

**Table 1. Number of Complaints Received in the 2020-21 and 2021-22 Financial Years**

Code Signatory	Number of Complaints	
	2020–2021 Financial Year	2021–2022 Financial Year
Aldi <sup>16</sup>	0	0
Coles <sup>17</sup>	3	2
Metcash <sup>18</sup>	0	0
Woolworths <sup>19</sup>	0 <sup>20</sup>	0

In the 2020-21 financial year, Coles’ Code Arbiter received three complaints. The first involved a supplier taking issue with Coles’ request to comply with an ethical sourcing audit. It was found that Coles’ request was reasonable, and the supplier complied with the audit. The second and third complaints pertained to the delisting of products, in which Coles was found to have acted reasonably. All complaints were resolved<sup>21</sup>. In the 2021-22 financial year, Coles received two complaints regarding accounting practices and freight charges levied. Once the matters were explained to these small suppliers, the complaints were resolved.<sup>22</sup>

Aldi, Metcash, and Woolworths’ Code Arbiters all received no complaints in both financial years.

Of the small number of complaints received by the Code Arbiters over the two financial years, none of the suppliers have been awarded compensation.

Very few complaints from suppliers have been brought to the Code Arbiters over the two reporting periods. There are several possible explanations including:

- the Code is having a positive effect on the industry, which is leading to better behaviours and a lower number of disputes in general
- disputes being appropriately resolved by the signatories’ internal dispute handling procedures
- disputes not being relevant to the Code and therefore out of the Code Arbiters’ scope
- suppliers being unaware that they can raise complaints with the Code Arbiters, where conduct is regulated by the Code
- suppliers being concerned about elevating a complaint to the Code Arbiter (for various reasons including too much paperwork; fear of damaging the commercial relationship; and fear of retribution)

### Questions

6. Why do you think there are a low number of complaints being reported to the Code Arbiters?

16 [2020-21 Aldi’s Code Arbiter Report](#); [2021-22 Aldi’s Code Arbiter Report](#).

17 [2020-21 Coles’ Code Arbiter Report](#); [2021-22 Coles’ Code Arbiter Report](#).

18 [2020-21 Metcash’s Code Arbiter Report](#); [2021-22 Metcash’s Code Arbiter Report](#).

19 [2020-21 Woolworths’ Code Arbiter Report](#); [2021-22 Woolworths’ Code Arbiter Report](#).

20 There was one complaint reported in Woolworths’ Code Arbiter’s 2020-21 annual report; however, there was some doubt as to whether this should be counted given the conduct occurred prior to the Code Arbiter’s appointment and commencement.

21 [2020-21 Coles’ Code Arbiter Report](#).

22 [2021-22 Coles’ Code Arbiter Report](#).

7. Is more time needed to allow suppliers to become more familiar with the system and make greater use of it?
8. Do you think suppliers have a clear understanding of when, and how, they can escalate complaints and disputes to the Code Arbiters?
9. What other options are there to promote use of the Code dispute resolution system where there are genuine disputes that cannot be resolved by the internal processes provided by the signatories?
10. Is the Code Arbiters' maximum compensation order amount of up to \$5 million set at the appropriate level?
11. Should the Independent Reviewer play a greater role in evaluating Code Arbiters' dispute resolution processes under the code?

## Disputes handled by the Independent Reviewer

In late 2022, the Independent Reviewer received the first request from a supplier to conduct a review of a Code Arbiters' process in dealing with a complaint. The Independent Reviewer considered the supplier's request and decided to conduct an independent review of the Code Arbiters' process in dealing with the complaint. The Independent Reviewer made two recommendations to the Code Arbiters, one of the recommendations was to the Code Arbiters directly and the other was for the Code Arbiters to propose to the Code Signatory for further action (as the Independent Reviewer's recommendations are limited to the Code Arbiters process only). The Code Arbiters has received these recommendations and has made a final determination.

### Questions

12. Do you think the Independent Reviewer should also be able to make recommendations directly to the retailer or wholesaler (as well as the Code Arbiters) on procedural issues, following an independent review of a Code Arbiters' process in dealing with a complaint?
13. Do you think the Independent Reviewer should have stronger powers to refer complaints to the ACCC?
14. Is the public reporting on complaints, by the Code Arbiters and Independent Reviewer, useful to suppliers? Does it inform suppliers about the dispute resolution process?

## Third Party Mediation or Arbitration


Third party mediation or arbitration remains available to the parties. Under Division 3 of the Code, suppliers may seek either mediation or arbitration of a complaint or dispute relating to a matter covered by the Code. If the supplier has begun a process about a complaint or dispute with the Code Arbiters or Independent Reviewer, then the supplier must wait until this process has been completed before undertaking mediation or arbitration.<sup>23</sup> All mediation or arbitration for the purpose of the Code must be conducted in accordance with the Resolution Arbitration Rules 2016 and all costs are to be determined under those rules.<sup>24</sup> It is required that the relevant retailer or wholesaler participate in mediation or arbitration in good faith.<sup>25</sup>

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23 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 38 (2).

24 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 39 (1).

25 [Competition and Consumer \(Industry Codes—Food and Grocery\) Regulation 2015](#), Sch 1, cl 38 (3a).



Mediation and arbitration have been dispute resolution options available under the Code since 2015; it is unclear whether suppliers have utilised either option as there are no reporting requirements for mediation or arbitration under the Code.

### Questions

15. Have suppliers used third party mediation or arbitration to resolve disputes with the signatories? If so, was the process effective?
16. Do you recommend any changes to the mediation and arbitration provisions?

## Other provisions

### Independent Reviewer's annual survey and annual report

The Independent Reviewer must conduct an annual survey of suppliers, retailers, and wholesalers for the purpose of identifying emerging and systemic issues in the grocery supply chain relating to the operation of the Code and to assess systemic compliance with the Code. Survey results are to be published without the ability to identify individual suppliers that participated in the survey.

A report must be prepared annually by the Independent Reviewer, setting out the activities for the year. The report must be published on the Independent Reviewer's website, and a copy provided to the ACCC.

The first annual survey was conducted for the 2020-21 financial year, with key results included in the annual report published. The second survey was conducted from 5 September to 3 October 2022 and the results are yet to be released.

### Questions

17. Are the reporting requirements of the Independent Reviewer appropriate?
18. Is the annual survey providing a benefit to stakeholders? How could it be improved?

## Other issues

19. Is the current voluntary approach without penalties for non-compliance allowing for effective dispute resolution under the Code?
20. Are there any other issues or suggestions about the current dispute resolution process under the Code that you wish to bring to the attention of the review?