

Independent Review of the Food and Grocery Code of Conduct 2023-24

Consultation paper

February 2024



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Consultation process

Request for feedback

The purpose of this consultation paper is to seek information and views on whether and how the Food and Grocery Code of Conduct (the Code) could be made more effective.

All information, including name and address details, contained in formal submissions will be published on the Australian Treasury website, unless it is clearly indicated that all or part of the submission is provided in confidence.

View Treasury’s [Submission Guidelines](#) for further information.

Closing date for submissions: 29 February 2024

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Foreword from Dr Craig Emerson

I have been asked to review the Food and Grocery Code of Conduct (the Code) and recommend whether it should be amended, remade or repealed. The Code is a voluntary prescribed code of conduct under the *Competition and Consumer Act 2010*. The Code has four signatories: Woolworths, Coles, Aldi and Metcash, and suppliers to these signatories are automatically covered by the Code.

Amending the Code would retain it as a voluntary code. Remaking the Code would involve making it mandatory. In my view, repealing the Code and replacing it with nothing is untenable and therefore will not be considered in this review.

The Code will sunset automatically on 1 April 2025. Therefore, while this review is timely, it is also essential to the continued regulation of this industry.

The basic reason for the Code coming into existence in 2015 was an imbalance of market power between supermarkets and their suppliers, especially smaller suppliers. In Australia, the three major supermarkets, Woolworths, Coles and Aldi, together with wholesaler Metcash, which supplies IGA stores – hold 82 per cent of the Australian market.

Woolworths and Coles have a combined market share of 65 per cent, while Britain's top two supermarkets have a combined market share of 43 per cent, and the United States' four largest supermarkets have a combined market share of just 34 per cent.

Australia's small population, together with its distance from big global population centres, helps explain the high level of market concentration here, but it does confer greater market power on a small number of supermarket chains here than in most other countries.

The Samuel review of the Code in 2018 noted that very few suppliers had elevated a dispute under the Code. Since the introduction of the Code Arbiter model in 2021 there have been only 5 complaints to an arbiter. Supporters of the voluntary Code claim this small number indicates that the relationship between the supermarkets and suppliers is good. Critics of the voluntary Code argue that suppliers are too frightened to raise a dispute with a supermarket for fear of their product being removed from the supermarket's shelves.

Advocates of remaking the voluntary Code into a mandatory Code point to the weak enforcement powers in a voluntary code. Under the Code, Arbiters are appointed and funded by the supermarkets. The Arbiter's role is to deal with complaints from suppliers relating to a matter covered by the Code. If a supplier is dissatisfied with the steps taken by the Arbiter in relation to a complaint, the supplier may refer the matter to the Independent Reviewer. However, the Reviewer's decision cannot be enforced legally, although ultimately the Reviewer can refer the matter to the ACCC. The ACCC receives very few reports about alleged breaches of the Code. There is a widely held perception that compliance with the Code is voluntary.

A mandatory code with penalty provisions would likely incentivise greater compliance by supermarkets. Enforcement options that become available when penalty provisions are part of the Code could include infringement notices and court proceedings to impose financial penalties for non-compliance.

Supporters of a voluntary Code argue that ACCC enforcement can take years before the courts, by which time the supplier will have gone broke.

However, enforcement through lengthy legal proceedings is not the only option under a mandatory code. The ACCC points out that mediation is a good way to resolve disputes without going through complex and costly legal action. The ACCC adds that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) can provide parties with access to mediation services. ASBFEO maintains a specialist panel of trained mediators in each state and territory. All mediators are accredited under the National Mediator Accreditation Standards system.

Although the review's terms of reference do not include wider issues of competition policy for the supermarket industry, the outcome of this review of the Code will form part of a wider response to cost-of-living pressures. The consultation paper canvasses some of these policy instruments, including the Government's decision to ask the ACCC to undertake a price inquiry into the supermarket industry and the commissioning of CHOICE to publish periodically the prices of selected items sold by the various supermarkets.

It is through greater competition between supermarkets that the policy goals of higher prices for suppliers and lower prices for consumers can be achieved.

This review will produce an interim report, followed by a final report based on responses to the interim report.

Stakeholders and other interested parties are encouraged to respond to this consultation paper. To help frame responses, the consultation paper poses a specific set of questions, but respondents should feel free to include any other observations, data and views.

The Hon Dr Craig Emerson
Independent Reviewer
Review of the Food and Grocery Code of Conduct

Review of the Food and Grocery Code of Conduct

On 10 January 2024, the Prime Minister, the Treasurer, the Minister for Agriculture, Fisheries and Forestry, and the Assistant Minister for Competition, Charities and Treasury announced the appointment of the Hon Dr Craig Emerson to lead the 2023-24 Review of the Food and Grocery Code of Conduct (the Review).¹

To support Dr Emerson, a small secretariat has been established within the Treasury.

Background to the Review

The Review and its timing are prescribed under Section 5 of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (the Code).

Dr Emerson is required to prepare a written report to the Assistant Minister for Competition, Charities and Treasury by 30 June 2024. The report will include findings and recommendations drawing upon submissions and evidence received during the review process.

Dr Emerson will release an interim report for any further feedback from stakeholders.

Terms of Reference

The Review will:

- Assess the effectiveness of the Code provisions in achieving the purpose of the Code to improve the commercial relationship between retailers, wholesalers and suppliers in the grocery sector; and
- Consider the need for the Code, including whether it should be remade, amended or repealed.

In evaluating the purpose and features of the Code, the Review will have particular regard to:

- The impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers;
- Whether the Code's provisions should be extended to other retailers or wholesalers operating in the food and grocery sector;
- Whether the Code should be made mandatory; and
- Whether the Code should include civil penalty provisions.

1 The Hon Anthony Albanese MP, The Hon Jim Chalmers MP, The Hon Dr Andrew Leigh MP, Senator Murray Watt, [Appointment of Dr Craig Emerson as Independent Reviewer of the Food and Grocery Code of Conduct](#), Media Release, 10 January 2024.

Overview of the Code

Purpose of the Code

The purpose of the Code is to address harmful practices in the grocery sector stemming from an imbalance of bargaining power between supermarkets and their suppliers. As legislated, the Code has four objectives:

1. To help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain;
2. 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;
3. 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
4. To promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.²

Through protecting suppliers against business behaviours that affect the growth and sustainability of the grocery industry, the Code is intended to prevent harms passed on through the supply chain to Australian consumers. This review will test whether the Code is effectively contributing to the food and grocery industry as intended.

Consultation Questions

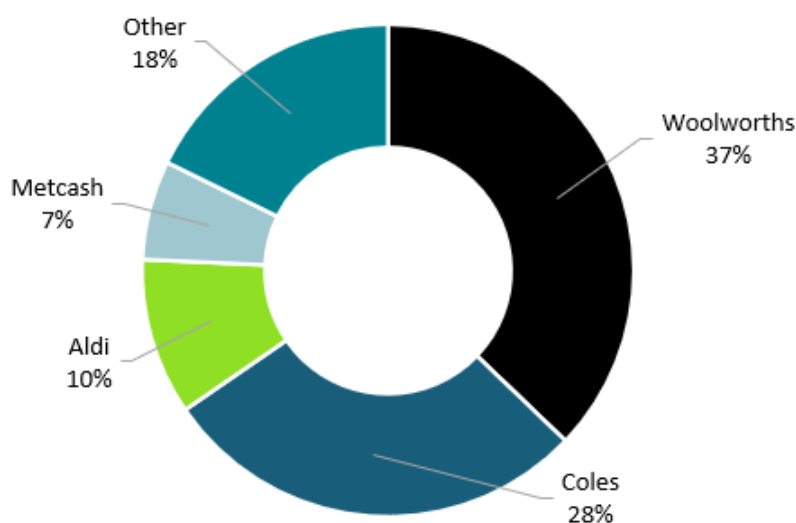
1. What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?
2. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

² Section 2, Schedule 1, Food and Grocery Code of Conduct.

Background to the Code

Australia's food and grocery sector is heavily concentrated, with the largest four retailers (supermarkets) and wholesalers (Metcash) holding a market share of more than 80 per cent (Figure 1). These four supermarkets and wholesalers – Woolworths, Coles, Aldi and Metcash – are signatories to the Code.

Figure 1. Food and grocery sector market share for the financial year 2022–23³



A highly concentrated market such as this can provide those few players with substantial market power over its counterparts in the supply chain.

In view of the dominant market share held by the four entities, suppliers to Woolworths, Coles, Aldi and Metcash rely on them as the primary means of distributing their products to consumers.

This market power disparity between suppliers and supermarkets can lead to large bargaining power imbalances. The extent of this bargaining power imbalance is likely to vary depending on the size of suppliers, the nature of their product and the market they are servicing. In Australia's food and grocery industry, the power imbalance is likely to be particularly acute for smaller suppliers, for suppliers of perishable products to supermarkets, and suppliers to supermarkets in remote locations that do not face direct competition.

There are, however, other instances where suppliers could be expected also to have a high degree of market power. Some suppliers to supermarkets are large multinational corporations. Similarly, some categories of products supplied to supermarkets come from sectors that also have a high level of market concentration. Yet even in these circumstances the threat of being delisted from a major

³ IBISWorld (August 2023), Industry Report ANZSIC G4111: Supermarkets and Grocery Stores in Australia, p. 11.

supermarket chain is real, given the lack of alternative avenues for selling products into the Australian market.

The Code was implemented in 2015 in an effort to guard against abuses of this imbalance in bargaining power through:

- Setting a minimum threshold for the basic provisions underscoring contracts to ensure that the terms and conditions set between signatories and their smallest suppliers are fair;
- Requiring an appropriate minimum standard of behaviour by which wholesalers and retailers conduct themselves so that even the smallest of suppliers can expect to be and are treated fairly; and
- Providing an avenue for dispute resolution which alleviates a supplier's fear of retribution for speaking out in instances where a signatory has acted not in accordance with the Code.

In 2018, the Code underwent a statutory review led by Professor Graeme Samuel AO, former Chair of the ACCC. The Government accepted 13 of Professor Samuel's 14 recommendations, most important of which were changes to the dispute-resolution process following a finding that the existing dispute-resolution provisions were ineffective and underutilised by suppliers.

Consultation Questions

3. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?
4. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

Stakeholder views on the Code

Many suppliers of food and groceries and their representative organisations have complained that, despite the Code's existence, they have not been receiving fair prices for the groceries they provide to the major supermarkets. Bill Bulmer, Chairman of Ausveg, said it had "very serious concerns" about the Code and added that:

*"Fundamentally, without a fair and sustainable price paid to growers at the farm gate, you are going to see vegetable growers going out of business in droves, which ultimately will just result in higher retail prices."*⁴

The National Farmers' Federation (NFF) President, David Jochinke, has said:

"The code is failing farmers and we've said for a long time it should be made mandatory. We need to get to the bottom of why there's a growing gap between what farmers get paid and

4 Sam Buckingham-Jones, AFR, 11 January 2024, [Grocery review won't lower checkout prices: former ACCC chiefs](#).

what produce is being sold for on supermarket shelves. It's not just supermarkets we need answers from, we need to know who else in the supply chain is clipping the ticket and sending food prices skywards.”⁵

CEO of the Australian Food and Grocery Council, Tanya Barden, expressed a more positive view of the Code and argued that:

“The relationship between suppliers and retailers has improved since the Code came into effect.”⁶

Operation of the Code

Scope and application

The Code provides that a supermarket can agree to be bound by it by giving written notice to the ACCC.

Australia's four major supermarket chains are signatories to the Code and have agreed to be bound by it. Grocery suppliers, which include food manufacturers and farmers, who supply grocery products to a Code signatory, do not need to sign up to the Code since they are automatically covered by it.

The Code covers suppliers in direct grocery supply relationships with a retailer or wholesaler. It does not regulate the entire supply chain, including the relationship between a processor, a wholesaler and a retailer.

The Code's provisions deal with a defined list of grocery products when regulating a grocery supply agreement. This list includes fresh produce, non-alcoholic drinks, household goods, clothing, and tobacco and tobacco products, but excludes alcoholic beverages.

The 2018 Samuel review of the Code recommended that the coverage of products be unchanged, with the ongoing exclusion of alcoholic drinks based, among other things, on the high level of export, particularly of wine. That said, market concentration in the liquor retail industry is high, with the four-largest retailers (Endeavour Group, Coles, Metcash and Aldi) holding a market share of almost 70 per cent, with Endeavour and Coles alone having 55 per cent market share.⁷

The ACCC's 2019 Winegrape Market Study noted that winemakers wholesale into highly concentrated domestic retail markets, and domestic wholesale prices for wine are constrained by the bargaining power of major supermarkets.⁸ In 2021, the ACCC conducted a follow-up review to the Winegrape Market Study which noted that the COVID-19 pandemic had caused wine retail sales to

⁵ National Farmers Federation, [NFF calls on Food and Grocery Code Review to give Code Teeth](#).

⁶ Australian Food and Grocery Council, [Food and Grocery Manufacturers Welcome Review of Essential Industry Code](#).

⁷ IBISWorld, *Industry Report G4123 Liquor Retailing in Australia*, IBISWorld, 2023, p. 10.

⁸ ACCC, *Wine grape market study Final Report*, ACCC, 2019, p. 121.

shift from hospitality and cellar doors to the retail sector, and that the retail sector was highly concentrated.⁹

Consultation Questions

5. Should the Code be extended to cover other aspects of the food and grocery supply chain?
6. Should some or all alcoholic beverages be included in the scope of the Code?
7. Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code's signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

Code provisions

The Code sets out minimum obligations and behavioural standards for retail and wholesale signatories that are bound by the Code in relation to their conduct with their suppliers.

Guiding these minimum standards is the primary obligation on signatories to deal with suppliers lawfully and in good faith. The Code provides guidance on behaviour that reflects good faith, such as acting honestly, and not unreasonably, recklessly or with ulterior motives.¹⁰

Beyond the overarching principle to act in good faith, the Code's provisions set specific standards for:

1. Grocery supply agreements;
2. General conduct; and
3. Compliance.

The standards for grocery supply agreements¹¹ set out the requirement for agreements to be in writing and retained, guidance on matters to be covered by the agreement, and rules regarding unilateral and retrospective variations to grocery supply agreements.¹²

Regarding general conduct, the Code sets out minimum standards guiding the practical aspects of the relationship between signatories and their suppliers. This includes rules in relation to:

- payment arrangements,
- delisting products,
- funding promotions,
- fresh produce standards and quality specifications,

9 ACCC, *Wine grapes market study Follow-up review*, ACCC, 2021, pp. 7, 10.

10 [Part 1A, Food and Grocery Code of Conduct](#).

11 A grocery supply agreement is the agreement between a supplier and a retailer or wholesaler for the supply of groceries to a supermarket business.

12 [Part 2, Food and Grocery Code of Conduct](#).

- changes to supply chain procedures,
- product ranging, shelf space allocation and range reviews,
- business disruption,
- intellectual property rights and their transfer,
- confidential information, and
- price increases.

The Code also sets out requirements for signatories to ensure that they have appropriate mechanisms in place to achieve compliance with the Code. Specifically, the Code requires signatories to train staff with respect to the Code and ensure appropriate record keeping practices are in place.¹³

The Code operates alongside several other Codes of Conduct, covering Horticulture, Sugar and Dairy, such that producers and some suppliers could be covered by more than one Code of Conduct.¹⁴

Consultation Questions

8. Do the provisions set out under the Code ensure it is fit for purpose?
9. Which provisions under the Code help or hinder suppliers? How can the provisions be improved?
10. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

¹³ [Part 6, Food and Grocery Code of Conduct.](#)

¹⁴ The Food and Grocery Code of Conduct does not apply where it conflicts with the mandatory Horticulture Code of Conduct or Franchising Code of Conduct.

International approaches

Other countries are working to address the impacts of increased cost of living on consumers, suppliers, wholesalers and retailers and whether their respective grocery codes are fit for purpose.

The United Kingdom's (UK's) model for addressing grocery disputes includes a Groceries Code Adjudicator, who acts as a sole regulator for the UK's equivalent grocery code of conduct. A 2018 independent review found that although the Adjudicator has the power to arbitrate disputes between large retailers and suppliers, this function was rarely employed, and was instead directed to the UK's equivalent of a Code Arbiter.¹⁵

Other jurisdictions have established or are in the process of implementing similar grocery codes, including Canada, the European Union and its Member States, and New Zealand. New Zealand's Grocery Supply Code of Conduct came into effect in September 2023 as part of wider reforms to improve competition in the grocery sector.¹⁶ Canada's industry-led model is planned for phased implementation from early this year.¹⁷

The Review will consider relevant international approaches and how they might be considered in the Australian context.

Consultation Question

11. What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?

15 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#), p. 40.

16 NZ Ministry of Business, Innovation & Employment, [New Grocery code of conduct mandatory for suppliers \(11 September 2023\)](#), accessed 23 January 2024.

17 [Canadian Grocery Code](#), accessed 23 January 2024.

Food and Grocery Code: voluntary or mandatory?

Key issues

The purpose of this Review is to assess whether the Code is effective in achieving its purpose to improve the commercial relationship between retailers, wholesalers and suppliers in the grocery sector.

Feedback from stakeholders, including previous ACCC chairs and supplier group representatives, has identified several key issues on which this review is seeking feedback. In assessing the Code's effectiveness, particular consideration will be given to three issues:

1. **Voluntary code** – should the Code be prescribed as mandatory or voluntary?
2. **Fear of retribution** – has the Code effectively reduced suppliers' fears of retribution from raising issues with the signatories?
3. **Penalties** – should the current enforcement powers of the ACCC be extended to include significant financial penalties?

Would a mandatory code create a fairer environment for suppliers?

The Code is a voluntary code prescribed in 2015 under Part IVB of the *Competition and Consumer Act 2010* (CCA). This means that while being a signatory to the Code is voluntary for supermarkets, once a supermarket opts in it is legally bound by the requirements of the Code. On the other hand, being a voluntary code, a signatory can withdraw at any time from being bound by the requirements in the Code.¹⁸ While the Code is prescribed under the CCA and the ACCC can take enforcement action for breaches of the Code, no enforcement action has been taken by the ACCC against a signatory for a breach of the Code.

Arguments for a voluntary code

The Code was reviewed in 2018 by Professor Graeme Samuel AO, Chairman of the ACCC from 2013 to 2014. Professor Samuel recommended that the Code remain voluntary but that the Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.¹⁹

18 Withdrawal from the code does not remove obligations relating to conduct that occurred while the entity was bound by the code, clause 4(5) of the Code.

19 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#).

Supporters of a voluntary code suggest it has the benefit of allowing for a requirement of binding arbitrated outcomes during dispute resolution, saving signatories and suppliers the time and cost of litigating matters through courts to reach an enforceable outcome. Generally, they argue, it is not possible to have a requirement for binding arbitration under a mandatory code, owing to constitutional limitations that apply in a mandatory setting, creating a more adversarial system.

The 2018 Review of the Code by Professor Samuel noted that:

“Forcing retailers and wholesalers to be subject to determinations about the existing legal rights and obligations, such as whether an entity has failed to conduct negotiations in good faith, is generally regarded as an exercise in judicial power. The compulsion of an entity to be bound by conclusive determinations on the law is a function exclusively reserved to the courts. If a mandatory Grocery Code were to give this function to an arbiter, it may be invalid as it risks infringing the separation of powers doctrine under the Constitution.”²⁰

Supporters of a voluntary Code also suggest that it allows the signatories and market participants to have greater input into the development and implementation of the Code’s provisions. Professor Samuel’s review concluded that the voluntary nature of the Code generated a higher level of buy-in and that collaboration improved compliance and adherence to the Code.²¹ Supporters suggest that while signatories could withdraw from the Code at any time, the reputational cost of doing so would be great.

Arguments for a mandatory code

Professor Rod Sims AO, Chair of the ACCC from 2011 to 2022, has described the Code as deeply deficient and since it is voluntary:

“... the supermarkets can walk away when they wish. It is unfathomable that such poor policy exists. It favours large businesses over small businesses and farmers.”²²

Professor Allan Fels AO, Chair of the ACCC from 1995 to 2003, described the Code as “just tokenistic”, adding that “it’s good that the Government and Craig Emerson doing the review are seriously considering making it compulsory.”²³

Supporters of a mandatory code suggest that the binding dispute resolution outcomes available through the Code Arbiter process of the voluntary Code are not, in practice, providing a benefit to suppliers. This is evidenced, they say, by the fact that so few complaints have been made to Code Arbiters out of fear of retribution, and that no compensation has been ordered for a supplier since the role was included in the Code in 2020.²⁴

20 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#), p. 23.

21 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#), p. 23.

22 Professor Rod Sims, [Opinion Piece](#), Sydney Morning Herald, 12 January 2024.

23 Lauren Evans, Sky News, [Former ACCC chairman Allan Fels declares supermarket review led by Craig Emerson a 'small step in the right direction'](#), January 11 2024.

24 Code Arbiters are able to provide up to \$5 million in compensation per dispute, clause 36 of the Code.

Moreover, they argue, it is common for mandatory codes to require internal dispute resolution mechanisms to be put in place, such as complaint-handling and mediation arrangements. Mandatory codes can also provide for arbitration on a voluntary basis (where parties consent to be bound by the decision).²⁵

The ACCC has previously recommended repealing the voluntary Code and replacing it with a mandatory Code:

“... 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.”²⁶

The ACCC has indicated it will not commit extensive resources to regulate compliance with the Code as it “... does not provide the ACCC with meaningful compliance and enforcement tools”.²⁷ The ACCC’s reluctance to initiate enforcement proceedings under the Code might be, in part, because its ability to “achieve and leverage outcomes can be more difficult with a voluntary code.”²⁸ While the Code is legally enforceable by the ACCC, there is a perception that, because the ACCC has not had a public enforcement outcome under the Code, compliance is, in effect, voluntary.

To whom should a mandatory code apply?

If the Code were made mandatory, the next question would be – for whom?

Since the objective of the Code is to address the bargaining power imbalance between major supermarkets and suppliers, it would seem appropriate to apply the Code only to supermarkets above a minimum threshold, or that have a material market share. In view of the compliance burden that would be imposed on smaller supermarkets, it may not be appropriate to require all market participants to be covered by the Code.

On the other hand, it could also be argued that the Code should apply to all supermarkets, irrespective of market share or profit, creating a level playing for all. This would also ensure that supermarkets that have substantial power in their local market would be included.

25 See, for example, Clause 43(4) of the *Competition and Consumer (Industry Codes-Dairy) Regulations 2019*.

26 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 3.

27 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 5.

28 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 8.

Consultation Questions

12. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?
13. What benefits could a mandatory code bring to suppliers?
14. If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?
15. Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

Market power and suppliers' fear of retributive action

The role of Code Arbiters

Under the Code, disputes between supermarkets and their suppliers can be dealt with by an Arbiter. Each of the four signatories to the Code appoints its own Arbiter. The main role of Arbiters is to resolve disputes between supermarkets and their suppliers.

Code Arbiters are responsible for investigating and resolving complaints relating to any matter regulated by the Code. If a Code Arbiter finds in favour of the supplier, they will offer a proposed remedy that can include compensation of up to \$5 million if the supplier has suffered a loss as a result of the signatory's actions. Suppliers dissatisfied with the handling of complaints by a Code Arbiter can refer matters to the Independent Reviewer, who is Mr Chris Leptos AO.

Although Arbiters might want to do a very good job in resolving disputes between supermarkets and their suppliers, the ACCC has pointed to inherent weaknesses in the system of Arbiters:

*"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."*²⁹

The ACCC added:

"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

29 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 2.

disputes are, and are perceived to be, fully independent from the retailers and wholesalers who hold the bargaining power advantage in dealings with suppliers.”³⁰

The ACCC has also commented on the general operation of the Code stating that:

“... the weaknesses in the dispute resolution provisions are inextricably linked to the fundamental weaknesses in the code as a voluntary code.”³¹

The Independent Reviewer is appointed by the Treasurer to oversee the dispute resolution process under the Code. Upon a supplier’s request for a review, the Independent Reviewer must decide whether to conduct a review. The Independent Reviewer can investigate the case, seek further information, recommend that the Code Arbiter reconsider the case and/or refer the matter to the ACCC if a possible breach of the Code has occurred. In addition to assessing referred cases, the Independent Reviewer is also responsible for conducting an annual survey of suppliers, retailers and wholesalers relating to the operation of the Code and producing an annual report on its operation.

Consultation Questions

16. Are Code Arbiters perceived to be independent from the supermarkets that they oversee?
17. If not, how could the reality and perception of independence of Code Arbiters be enhanced?

Overcoming the fear of retributive action

A major challenge for the Code is addressing the fear of retribution by supermarkets against a supplier who raises a complaint.

A very low number of formal complaints have been raised under the Code since its inception. The 2018 Review of the Code by Graeme Samuel noted that:

“The Review has not received evidence that any disputes have been taken to mediation or arbitration since the introduction of the Grocery Code”³²

Yet the Samuel Review also noted that:

“... some suppliers have achieved positive dispute resolution outcomes from utilising the Kennett Model (referral to independent arbiter as a representative of signatory) at Coles, with some stakeholders providing examples where they have used this process and sought satisfactory outcomes, such as changes to contracts or compensation.”³³

30 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 5.

31 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 5.

32 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#), p. 28.

33 Professor Graeme Samuel AC (2018), [Independent Review of the Food and Grocery Code of Conduct, Final Report](#), p. 37.

Since the reporting of formal complaints commenced in 2020 only five formal complaints have been made (Table 1).

Table 1. Number and nature of complaints³⁴

Code Signatory	Number of formal complaints		
	2020–21	2021–22	2022–23
Woolworths ³⁵	0 (a)	0	0
Coles ³⁶	3	2	0
Metcash ³⁷	0	0	0
Aldi ³⁸	0	0	0

(a) 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.

One possible explanation for the small number of complaints brought by grocery suppliers under the Code is that cooperation between supermarkets and their suppliers has been very strong, giving little reason for suppliers to complain.

However, it seems far more plausible that the small number of complaints reflects suppliers whose continued existence is reliant on a supermarket stocking their products having a fear of complaining about even the most egregious breaches of the Code.

The ACCC has referred to the Independent Reviewer's 2021-22 survey as providing evidence that the number of formal complaints under the Code Arbiter model is an under-representation of the level of supplier dissatisfaction with their commercial dealings with signatories, noting that:

*"... fewer than half the respondent suppliers considered that Woolworths, Coles, and Metcash 'always' treated them fairly and respectfully [and] fewer than half considered that Woolworths, Coles, and Metcash 'always' took prompt, constructive action to resolve issues that were raised with them."*³⁹

Of the respondent suppliers who identified an impediment to them raising an issue with the signatory's buying team, more than one-third of suppliers to Woolworths and Coles identified fear of damaging a commercial relationship as a key impediment to complaining.⁴⁰

34 These records are only available from the 2020-21FY onwards since the current dispute resolution provisions only came into effect in 2020, following Graeme Samuel's review in 2018 which recommended legislation to implement the process for Code Arbiters to receive and report on complaints.

35 Helen McKenzie (2023), [Woolworths Code Arbiter Report](#).

36 The Hon Jeff Kennett AC (2023), [Coles Code Arbiter Report](#).

37 Martin Shakinovsky (2023), [Metcash Code Arbiter Report](#).

38 Bronwyn Gallacher (2023), [Aldi Code Arbiter Report](#).

39 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 3.

40 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 3.

The ACCC also noted that it was made aware of indications of supplier concerns with supermarket behaviour during its ACCC's 2020 Perishable Agricultural Goods Inquiry, with allegations of a range of concerning conduct by supermarkets.⁴¹

The ACCC's submission concludes that:

*"The benefits expected to flow from the compulsory binding dispute resolution process have therefore not been realised."*⁴²

The current review of the Code has already been told informally that many small and even larger suppliers fear retribution by the major supermarkets if they make a complaint. Such retribution could take the form of delisting a supplier's products.

In the ACCC's 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."*⁴³

The ACCC pointed to:

*"... a persistent and significant bargaining power imbalance between grocery retailers/wholesalers and their suppliers".*⁴⁴

Consultation Questions

18. Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

41 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 3.

42 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 3.

43 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 1.

44 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 1.

Compliance penalties

A fit-for-purpose code is underpinned by an effective penalty regime that incentivises the right behaviours. The ACCC, as regulator of the Code, can take the following enforcement actions:

- Issue public warning notices about a suspected contravention of the Code;⁴⁵
- Seek injunctions to compel or restrict certain conduct by a signatory;⁴⁶ and
- Initiate court proceedings to compel a signatory to redress any loss or damage caused by the signatory's misconduct.⁴⁷

While these actions are available, the Code does not provide the ACCC with the power to impose financial penalties for non-compliance. In its submission to the 2023 review of dispute-settling procedures, the ACCC recommended that:

“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.”⁴⁸

In December 2022, the Independent Grocery Code Reviewer, Mr Chris Leptos AO, wrote to the ACCC following an investigation into a supplier’s complaint against Coles. Mr Leptos concluded that Coles had not complied with the Code and the Code Arbitrator’s process was flawed. Mr Leptos referred the complaint to the ACCC for further consideration and provided it with the particulars and further information on the matter. In Mr Leptos’s view, the ACCC had “not progressed the review in any material way”⁴⁹ and reiterated his previous calls to strengthen the Code by requiring the ACCC to conduct an investigation when requested by the Independent Reviewer, and by introducing financial penalties for material non-compliance with the Code.

Professor Sims has described the absence of financial penalties for breaches of the Code as a deep deficiency, adding:

“If you breach the code there are no penalties. Just think about that. The speed limit is 100 km/h. If you exceed it, it doesn’t matter? It just brings contempt for laws if there are no penalties. Secondly, the only way you can effectively complain is if it is dealt with by supermarkets. They’ll know who you are. Nobody would do it. The third problem is, it’s voluntary.”⁵⁰

45 [Competition and Consumer Act 2010, Section 51ADA.](#)

46 [Competition and Consumer Act 2010, Section 80.](#)

47 [Competition and Consumer Act 2010, Section 51ADB.](#)

48 ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code](#), p. 8.

49 Chris Leptos, [Food & Grocery Code Independent Reviewer – Annual Report 2022](#), p. 23.

50 Sam Buckingham-Jones, AFR, 11 January 2024, [Grocery review won’t lower checkout prices: former ACCC chiefs.](#)

What would be an appropriate financial penalty?

If breaches of the Code were subject to financial penalties, the next question would be what level of penalties would be appropriate.

Under the *Competition and Consumer Act 2010*, penalties under industry codes are generally limited to 600 penalty units (currently a maximum of \$187,800) per offence.⁵¹ Given the size of major supermarkets, it is likely that the threat of substantially higher financial penalties would be needed to act as an effective deterrent to breaches of the Code.

Consultation Questions

19. Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?
20. Should civil penalties be available for breaches of the Code?
21. If civil penalties are to be applied to the Code, what penalties are appropriate?

51 *Competition and Consumer Act 2010*, Section 51AE.

Complementary cost of living and grocery measures

On its own, reform of the Food and Grocery Code cannot solve all problems afflicting the industry that adversely affect grocery suppliers and consumers. A wider suite of competition reforms will be needed for this task.

It might be considered that improved prices and conditions for grocery suppliers to supermarkets would inevitably lead to higher prices for consumers. However, if greater competition were introduced into the grocery retailing industry, both suppliers and consumers would stand to obtain better prices.

Greater competition in the supermarket industry is the key to a better deal for both grocery suppliers and shoppers. The following describes a number of measures that the Government has initiated to complement this Review.

ACCC price inquiry

On 1 February 2024, the Treasurer directed the ACCC to undertake a 12-month price inquiry into the supermarket sector to ensure Australians are paying a fair price for their everyday groceries.

The inquiry will examine the competitiveness of retail prices for everyday groceries. Matters to be considered by the inquiry include, but are not limited to:

- The current structure of the supermarket industry at the supply, wholesale and retail levels;
- Competition in the industry and how it has changed since 2008, including the growth of online shopping;
- The competitiveness of small and independent retailers, including in regional and remote areas;
- The pricing practices of supermarkets;
- Factors influencing prices along the supply chain, including the difference between farmgate and supermarket prices;
- Any impediments to competitive pricing along the supply chain; and
- Other factors impacting competition, including loyalty programs and third-party discounts.

The ACCC will produce an interim report and a final report which will provide the Government with key findings and potential recommendations to address concerns regarding competition within the supermarket industry and allegations of price gouging of food, grocery and agricultural goods offered by supermarkets.

CHOICE price monitoring

The Government is providing \$1.1 million to consumer group CHOICE to provide price transparency and comparison reports on a quarterly basis for three years. This will start from the second quarter of 2024 and provide shoppers with increased transparency on the comparative costs of a basket of goods at different retailers, highlighting those charging the most and the least.

Senate Select Committee on Cost of Living

On 28 September 2022, the Senate established the Select Committee on the Cost of Living, to inquire into and report on:

- a. the cost of living pressures facing Australians;
- b. the Government's fiscal policy response to the cost of living;
- c. ways to ease cost of living pressures through the tax and transfer system;
- d. measures to ease the cost of living through the provision of government services; and
- e. any other related matters.

The Committee is due to report by 31 May 2024.

Senate Select Committee on Supermarket Prices

On 6 December 2023, the Senate resolved that a Select Committee on Supermarket Prices be established to inquire into and report on the price setting practices and market power of major supermarkets. The Committee was appointed to inquire into and report on the price setting practices and market power of major supermarkets, with particular reference to:

- the effect of market concentration and the exercise of corporate power on the price of food and groceries;
- the pattern of price setting between the two major supermarket chains;
- rising supermarket profits and the large increase in price of essential items;
- the prevalence of opportunistic pricing, price mark-ups and discounts that are not discounts;
- the contribution of home brand products to the concentration of corporate power;
- the use of technology and automation to extract cost-savings from consumers and employees;
- improvements to the regulatory framework to deliver lower prices for food and groceries;
- frameworks to protect suppliers when interacting with the major supermarkets;
- the role of multinational food companies in price inflation; and
- any other related matters.

The committee is to present a final report by 7 May 2024.

Anti-competitive planning and zoning laws

State and local government planning systems by their very nature create barriers to business entry, including through limiting the number, size and operating model and mix of businesses. This is

because planning systems seek to balance many competing objectives relating to sustainability, transportation and other matters. However, there is a question as to whether the objectives of some state and local planning systems give appropriate weighting to the interests of grocery consumers.

For example, planning systems and their decision makers may reject the approval of a new supermarket if it damages the interest of existing retailers, even when the benefit to consumers outweighs the detriment to incumbent retailers. It can do so overtly through rejecting a proposal based on consultation submissions.

Planning systems may also have more obscure ways of blocking new supermarkets; for example, placing caps on consolidating retail space, retailing hours and restrictions on the supply of alcohol. Since supermarkets generally need a large amount of consolidated retail space, such laws prevent new supermarkets from opening up in many areas, even where commercial zoning exists.

Aldi, a more recent supermarket entrant, managed to get around some of these planning restrictions as it generally has smaller store layouts and was willing to open in unconventional locations, including industrial zones and near airports. However, other potential entrants, such as Kaufland, have explicitly chosen not to proceed with entering the Australian market, despite expending a large amount of effort to navigate different planning systems to try secure viable retail sites.

Planning systems are predominantly the domain of state and local governments. The Australian Government is working with state and territory governments through National Cabinet on a National Planning Reform Blueprint,⁵² with planning, zoning, land release and other measures to improve housing supply and affordability. While the reforms are focused on housing outcomes, a general streamlining of approval pathways in planning systems might also have flow-on benefits for business approvals.

Competition Taskforce

In August 2023, the Government announced a Competition Review which is set to last two years and focus on the Government's priorities for modernising the Australian economy. A seven-person Expert Advisory Panel has been appointed to support the Review, which will respond to evidence that limited competition has contributed to a less dynamic and productive economy, and higher prices for consumers. The review will be looking especially at merger reforms and whether creeping or serial acquisitions in sectors such as supermarkets, liquor and hardware are adequately capture by current competition laws.

The Competition Taskforce is also working with state and territory governments to identify pro-competitive reforms to boost competition nationally. In December 2023, treasurers agreed to revitalise National Competition Policy.⁵³ This will include considering whether the original National Competition Policy agreements, including the Competition Principles, remain fit for the modern economy, as well as establishing a new long-term agenda of pro-competitive national reforms. Among these will be reforms to help alleviate cost of living pressures.

52 The Hon Anthony Albanese MP, [Meeting of National Cabinet - Working together to deliver better housing outcomes](#), 16 August 2023.

53 The Hon Dr Jim Chalmers MP, [Treasurers meet in Queensland](#), Media Release, 1 December 2023.

Appendix A: Previous competition reforms

ACCC grocery inquiry

In January 2008, the then Minister for Competition Policy and Consumer Affairs requested the ACCC to hold a public inquiry into the competitiveness of retail prices for standard groceries. The ACCC provided its report to the Minister on 31 July 2008.

Introduction of the Australian Consumer Law

On 24 June 2009, the Australian Government introduced into Parliament a bill to commence the creation for the first time of an Australian Consumer Law, a single, national consumer law. The legislation ensured that Australia's national regulators – the ACCC and ASIC – had a broader range of more effective enforcement measures to protect and help consumers.

The reform process culminated in the Australian *Competition and Consumer Act 2010*, the first national law covering both competition policy and consumer protection. The *Competition and Consumer Act 2010* covers most areas of the market: the relationships between suppliers, wholesalers, retailers, and consumers. Its purpose is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections.

The Australian Consumer Law prohibits businesses from engaging in conduct which is misleading or deceptive, or is likely to mislead or deceive. Misleading or deceptive conduct is assessed against whether an “ordinary” or “reasonable” member of the relevant class of people to whom the conduct was directed is likely to be misled.

The Australian Consumer Law also contains protections against unconscionable conduct, with a general ban on conduct which is particularly harsh or oppressive. To be considered unconscionable, the conduct must be against good conscience as judged against the norms of society.

With effect from November 2023, the Australian Consumer Law provides Courts with the ability to declare contract terms in standard form consumer and small business contracts unfair and to impose significant penalties. A term of a contract is unfair if it: causes a significant imbalance in the parties' rights and obligations; is not reasonably necessary to protect the legitimate interests of the supplier; and would cause significant detriment to a party.

In August 2023, the Government released a consultation regulation impact statement on protecting consumers from unfair trading practices. The closing date for submissions was 29 November 2023. The Government is currently considering the submissions received on this consultation paper.

Removal of restrictive provisions in supermarket leases

During its grocery inquiry in 2008, the ACCC identified a practice where supermarket operators would include tenancy terms which may have prevented shopping centre managers leasing space to any competing supermarkets. This had the potential to impose restrictions on the number of supermarket outlets in centres and consequently limit options for consumers.

In September 2009, the ACCC announced it had reached agreement with Coles and Woolworths to phase out restrictive provisions in more than 700 supermarket leases. At the time, ACCC Chairman, Graeme Samuel AO described the reform as a major breakthrough for grocery competition in Australia:

*“Reducing the barriers to entry for new and expanding players opens the possibility for Australian consumers to have greater choices in where to shop, and potentially pay lower prices as a result.”*⁵⁴

The agreement reached with Coles and Woolworths was in the form of a court-enforceable undertaking.

Laws to deal with creeping acquisitions by supermarkets

On 20 December 2011, the Australian Government introduced legislation to deal with creeping acquisitions, in a bid to limit the market power of the major supermarkets.⁵⁵ The amending legislation was designed to ensure the ACCC had the power to reject acquisitions that would substantially lessen competition in any local, regional or national market.⁵⁶

The move followed a private legal opinion for one of the major supermarkets questioning whether the ACCC had the power to consider effects on competition in local markets, suggesting it could examine impacts only in regional markets and the national market. The reforms clarified that the ACCC, in deciding whether an acquisition would substantially lessen competition, can examine the impact on any market – local, regional or national.

The amendments also confirmed the ACCC’s power to examine the acquisition of greenfield sites, which had previously come under question. They empowered the ACCC to review acquisitions of new sites by the major supermarket chains and to investigate whether such acquisitions could substantially lessen competition.

54 ACCC, [Supermarket agreement opens way for more competition](#), 18 September 2009.

55 [Competition and Consumer Legislation Amendment Act 2011 \(No. 184\)](#).

56 [Competition and Consumer Legislation Amendment Bill 2011 Explanatory Memorandum](#).