



Australian Government

# **Government response to the Independent Review of the Food and Grocery Code of Conduct**

June 2024



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# Introduction

The Australian Government thanks the Hon Dr Craig Emerson and the Treasury Secretariat team led by Anna Barker for their work in producing this comprehensive and insightful review of the Food and Grocery Code of Conduct (the Code).

The Government also thanks the many stakeholders who engaged constructively over the course of the review.

The Government will adopt all of Dr Emerson's 11 recommendations.

These changes will see the Code be made mandatory, with Coles, Woolworths, Aldi and Metcash subject to multi-million-dollar penalties for serious breaches of the Code.

The Government understands the importance of an effective dispute resolution process, with both formal and informal options to settle disputes. We will also be creating an anonymous supplier and whistle-blower complaints pathway through the Australian Competition and Consumer Commission (ACCC).

We will also introduce additional obligations to protect suppliers from retribution by supermarkets.

The changes will require new legislation, which the Government will prioritise.

We understand that more needs to be done to achieve a competitive and sustainable food and grocery sector that works for Australian farmers and families. We have directed the ACCC to conduct an inquiry into supermarket pricing, with a final report and recommendations due in February 2025. We have also funded CHOICE to conduct quarterly price monitoring reports to provide consumers with more information about where to access the best deals, with the first report out later this month.

The Albanese Government has also been working to ensure our competition laws and policies are fit for purpose. We are also progressing legislation to implement the biggest change to our merger reform system in almost 50 years. We have created a designated complaints function that allows small business and consumer advocates to report significant and systemic market issues to the ACCC for its consideration and a fast-tracked response. We've increased penalties for businesses that abuse their market power and banned unfair contract terms from standard form consumer and small business contracts and we are consulting on how to address unfair trading practices.

## Background

In 2015, the Code was created to address harmful practices in the grocery industry stemming from an imbalance of bargaining power between supermarkets and their suppliers.

The Code set minimum standards of behaviour for retail and wholesale signatories in relation to their conduct with grocery suppliers, including food manufacturers and farmers. Coles, Woolworths, Aldi and Metcash are signatories to the Code. All grocery suppliers who supply to signatories are automatically covered by the Code.

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 Code.

With the current Code due to sunset on 1 April 2025, the Review had two purposes. First, to assess the effectiveness of the Code provisions in improving the commercial relationship between retailers, wholesalers and suppliers in the grocery sector. Second, to consider the need for the Code, including whether it should be remade, amended or repealed, prior to the sunset date.

In evaluating the purpose and features of the Code, Dr Emerson was asked to 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.

Dr Emerson was required to submit a final report to the Assistant Minister for Competition, Charities and the Treasury by 30 June 2024.

The Government received Dr Emerson’s final report on 5 June 2024.



# Australian Government Response

Recommendation	Government statement
<p><b>Recommendation 1:</b> The Food and Grocery Code of Conduct should be mandatory.</p>	<p><b>Agree</b></p> <p>The Government will introduce a mandatory Code.</p> <p>A mandatory Code will ensure all supermarkets above the relevant threshold (see Recommendation 2) are subject to the Code.</p>
<p><b>Recommendation 2:</b></p> <p>All supermarkets, including online supermarkets, that meet an annual Australian revenue threshold of \$5 billion should be subject to the mandatory Code. Revenue should be in respect of carrying on a supermarket business as a ‘retailer’ or ‘wholesaler’ (as defined in the existing Code). All suppliers should be protected by the Code.</p>	<p><b>Agree</b></p> <p>The Government will make the Code mandatory for all supermarkets, with annual Australian revenue exceeding \$5 billion.</p> <p>The Government agrees that the threshold should apply to brick and mortar supermarkets, online supermarkets and hybrid-supermarkets alike. This would bring Woolworths, Coles, ALDI and Metcash all within the coverage of the Code.</p> <p><i>Updating lists of products</i></p> <p>In making the Code mandatory, the Government will modernise the definition of “groceries” given changes in the industry since 2015.</p> <p><i>Expansion to other retailers</i></p> <p>The Government considers that the policy intent of the Code is correct and should apply to businesses carrying on business as a supermarket.</p> <p>However, the Government is concerned about allegations of retailer conduct towards suppliers of nursery plants. The Government expects that all businesses, especially those</p>

with significant bargaining power, treat their suppliers fairly and in line with the law.

The Government encourages industry, retailers and suppliers, to consider options to ensure that suppliers have adequate avenues to raise concerns, and retailers have sufficient mechanisms in place to handle and address these concerns.

The Government will continue to monitor conduct in the nursery plants industry.

The Government notes that some stakeholders argued for wine to be added as a product under the Code. Further work is required on the competitive relationships and contracting practices in the wine and grape sector before making a decision on the appropriate regulatory response.

**Recommendation 3:** The Code should place greater emphasis on addressing the fear of retribution by:

- Including protection against retribution in the purpose of the Code;
- Ensuring that retribution captured under the obligation to act in good faith includes action taken against suppliers for exercising their rights under the Code;
- Requiring that any incentive schemes and payments that apply to a supermarket's buying teams and category managers are consistent with the purpose of the Code; and
- Requiring supermarkets to have systems in place for their senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.

**Agree.**

The Government will strengthen provisions of the Code to bolster protections against retribution by supermarkets.

It is the Government's expectation that supermarkets will put processes in place to ensure compliance with the Code, including reviewing incentive schemes.

The Government will request the Code Supervisor (previously Independent Reviewer under the voluntary Code) to monitor supplier concerns regarding fear of retribution through their annual survey of suppliers and annual report.

The Government will examine the effectiveness of these provisions as part of the next Code review.

**Recommendation 4:** An anonymous complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly with the ACCC.

**Agree**

The Government will introduce an anonymous complaints mechanism dedicated to the food and grocery sector to report conduct that may breach the *Competition and Consumer Act*

2010, including obligations under the new mandatory Code.

**Recommendation 5:** The Code should provide parties with avenues for mediation and arbitration to resolve disputes:

- Supermarkets must appoint a suitably qualified Code Mediator who is engaged by supermarkets (replacing their Code Arbiters), and who would be available to assist with resolving disputes, where requested by a supplier.
- Avenues for independent mediation and arbitration should also be available.
  - Parties can agree on an independent mediator or arbitrator. A list of suitably qualified mediators and arbitrators should be compiled by the Treasury or the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).
  - Supermarkets must attend independent mediation if requested by a supplier.
  - Where mediation has not settled a dispute, independent arbitration can be used to settle disputes as agreed between the supermarket and supplier.

In addition, Woolworths, Coles, ALDI and Metcash have agreed in principle to be bound by a decision of their Code Mediator to award compensation of up to \$5 million, where agreed by a supplier. They have also agreed to be bound by a decision of an independent arbitrator for compensation of up to \$5 million, where requested by a small supplier. Small suppliers would be those with annual revenue below \$10 million or fewer than 100 staff.

**Recommendation 6:** A Code Supervisor (previously the Independent Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys, be able to identify systemic issues with the Code and be available to suppliers to provide

**Agree.**

The Government notes the importance of effective dispute resolution mechanisms that allow suppliers to elect an independent mediator or an arbitrator.

The Government notes that many suppliers support retaining the informal, confidential and low-cost process for resolving dispute. The Government will retain this informal path in addition to providing for independent mediation and arbitration. The Government notes that Coles, Woolworths, Aldi and Metcash, have agreed in principle to comply with a remedy involving compensation of up to \$5 million when recommended by their Code Mediator and agreed by the supplier.

The Government's view is that the Australian Small Business and Family Enterprise Ombudsman is best placed to manage the list of suitably qualified mediators and arbitrators.

The Government notes that Coles, Woolworths, Aldi and Metcash, have agreed in principle to pay compensation up to \$5 million as decided by an independent arbitrator for disputes involving small suppliers.

The Government also notes that the substance of the accepted recommendations of the previous review (which was limited to only the dispute resolution provisions in Part 5 of the Code) will be adopted in implementing the proposed dispute resolution arrangements.

**Agree.**

The Government supports the renaming of the Code Reviewer to the Code Supervisor. The Government agrees that the Code Supervisor should produce an annual report on Code compliance and results of confidential supplier surveys. As noted in response to

information on options to resolve disputes and review the processes of Code Mediators.

Recommendation 3 and 7, the Government will ask the Code Supervisor to monitor supplier concerns regarding fear of retribution and experience with agreeing to exceptions to the Code through their annual survey of suppliers and annual report.

The Government notes that under the current voluntary Code, the Independent Reviewer conducts an annual confidential supplier survey and annual report which are published on the Treasury website.

**Recommendation 7:** To ensure exceptions are reasonable and transparent:

- All exceptions should be subject to a reasonableness requirement that considers the benefits, costs and risks to the supplier and the supermarket, and protects against exceptions that are not in a supplier's interest, with the supermarket bearing the onus of proof that any exception is reasonable; and
- For all new grocery supply agreements, supermarkets should be required to provide suppliers a simple guide to any exceptions that are included in the agreement.

**Agree.**

The Government will introduce a strengthened reasonableness test that must be satisfied in agreeing to contract out of obligations under the Code including incorporating benefits, costs and risks to the supermarket and supplier, into the Code.

The Government supports increased transparency and the provision of clear information on exceptions included in new grocery supply agreements.

The Government will also ask the Code Supervisor to monitor supplier experiences in contracting out through exemptions in their annual survey of suppliers and annual report.

**Recommendation 8:** To address issues relating to fresh produce, the Code should require that:

- Grocery supply agreements must include the basis for determining prices;
- All forecasts of required volumes are conducted with due care; and
- Fresh produce standards and specifications must be reasonable.

**Agree.**

The Government acknowledges the unique challenges faced by suppliers of fresh produce.

The Government will amend the Code to require that grocery supply agreements include the basis for determining prices, requiring supermarkets forecasting of volumes is conducted with due care and fresh produce standards and specifications must be reasonable.

The Government notes that the ACCC Supermarket Inquiry is looking into price transparency and supply-chain issues. The

ACCC will make recommendations in its final report to Government in February 2025.

The Government will consider the role of aggregators in the review of the Horticulture Code scheduled to commence in late 2024.

**Recommendation 9:** Maximum penalties for more harmful breaches of the Code should be the greatest of \$10 million, 3 times the benefit gained from the contravening conduct or, where the benefit cannot be determined, 10 per cent of turnover in the preceding 12 months. Maximum penalties for other breaches should be 3,200 penalty units (currently \$1,001,600).

**Agree.**

The Government will introduce penalties that act as a meaningful deterrent to poor behaviour.

The Government will introduce higher maximum penalties for more harmful breaches of the Code as recommended by the Review.

**Recommendation 10:** The penalty amount for infringement notices for contraventions of the Code should be 600 penalty units (currently \$187,800), an increase from 50 penalty units (currently \$15,650) that otherwise applies for industry codes.

**Agree.**

By introducing civil penalties to the Code, the ACCC will be able to issue infringement notices for Code breaches. The Government will increase the penalty amount for infringement notices issued for contraventions of the Code.

**Recommendation 11:** The ACCC, Code Mediators and the Code Supervisor should engage in education and outreach activities to ensure that suppliers are empowered to take advantage of their rights under the Code.

**Agree.**

The Government understands that education and advocacy are an important part of implementing a new regime.

## Next Review

The next statutory review of the Food and Grocery Code will commence within five years of the mandatory Code taking effect.

The Government agrees that the next review should consider how changes recommended for the Code are achieving their purpose. The Government agrees that the next review should include considering whether:

- The changes to the Code to bolster protection against retribution have sufficiently addressed suppliers' fear of retribution;
- The arrangements for dispute resolution are being used effectively by suppliers to resolve disputes;

- Allowing for exemptions to Code obligations to be included in grocery supply agreements where the reasonableness test is satisfied is working as intended;
- The changes to the Code adequately protect suppliers of fresh produce, noting that several stakeholders recommended a specific fresh produce section in the Code;
- Any additional reporting requirements are required to ensure compliance and enforcement; and
- Interactions between the Code and other industry codes of conduct are operating appropriately.

In addition, the next Review should consider any relevant recommendations from the ACCC's Supermarket Pricing Inquiry and other changes in the competitive dynamics in the food and grocery industry.