

Article Information

Service: Competition & Consumer

A new Food and Grocery Code - will supermarket heavyweights agree to be bound or will they go off their trolley?

Lawyer, Dina Shehata, discusses the commencement of a new regulatory framework for dealings between retailers or wholesalers and suppliers in the food and grocery sector.

Against the background of numerous actions by the ACCC against supermarkets last year, and after a comprehensive process of industry consultation, the Federal Government has introduced its Food and Grocery Code of Conduct (the Code). As of 3 March 2015, the Code became a *voluntary* industry code under the *Competition and Consumer Act 2010* (Cth) (Act) contained in the *Competition and Consumer (Industry Codes - Food and Grocery) Regulation 2015* (Cth).

The Code provides the opportunity for supermarkets to 'opt-in' and 'sign up' and provides a clear set of principles to govern the trading relationships between grocery retailers or wholesalers and their suppliers in an attempt to address concerns of market power abuse in the grocery supply chain. The Code complements rather than overrides the existing provisions of the Act and the Australian Consumer Law - particularly unconscionable conduct, misleading and deceptive conduct and misuse of market power - which continue to apply.

The ACCC has indicated that enforcing the Code is one of its priorities for 2015 so we can expect it to be scrutinising those who have signed up to it.

Suppliers, check this out...

The Code imposes a number of key restrictions on grocery supply terms and practices to protect businesses that supply groceries and wholesalers. For instance, the Code:

- Establishes a good faith benchmark requiring retailers and wholesalers to act lawfully and in good faith.
- Prohibits retailers from threatening suppliers with business disruption or termination without reasonable grounds.
- Establishes minimum standards of conduct by a retailer when dealing with suppliers, such as payment, de-listing, standards and specifications for fresh produce, and the allocation of shelf space.
- Requires retailers and wholesalers to provide annual training to employees whose role includes direct involvement in buying grocery products, and to their managers in relation to the requirements of the Code.
- Sets out minimum obligations for retailers and wholesalers relating to the making of grocery supply agreements.
- Sets out dispute resolution mechanisms.

To sign-up or not to sign-up...

If you are an Australian food or grocery supplier, you are not required to sign up to the Code. You will be automatically covered by the Code when dealing with a retailer or wholesaler which has agreed to be bound by the Code. If you are a retailer or wholesaler, once you 'opt-in', your compliance (and non-compliance) is regulated by the ACCC which has the power to take enforcement action for breaches of the Code.

So why sign up, you may ask? Good reasons include customer perception, preservation of reputation and avoiding paying penalties. In the industry, many suppliers are yet to be convinced that the culture has changed within the major supermarket chains. Against this background, the supermarket heavyweights are looking to align their businesses to the core principles of the Code and effectively discourage unwelcome conduct in grocery supply arrangements.

Supplier Agreements - buyer beware

As a grocery retailer and wholesaler operating under the Code you must deal with suppliers in good faith. Your agreements with suppliers must not contain provisions that limit or exclude the obligation to act in good faith, as these will be deemed

ineffective. However, while the good faith obligations require a retailer or wholesaler to have regard to the rights and interests of a supplier, you will not be required to act in their best interest, as against your own legitimate business interests.

On the other hand, as a food supplier your supply agreements must be drafted in a manner which promotes certainty and fairness while minimising risk in your key commercial areas. Legal advice should be sought, particularly in the event where a supplier is subject to a retailers' supply agreement.

Where to?

For those opting-in, transition arrangements are provided under the Code whereby existing agreements can remain in place for certain periods of time. These transition periods range from 6-24 months after the retailer and/or wholesaler agrees to be bound by the Code. However, the good faith obligations apply immediately and remain in force as soon as the retailer or wholesaler agrees to be bound by the Code.

A full evaluation of the Code's performance and effectiveness will be conducted in three years. Whilst the Code is expected to level the playing field for food and grocery suppliers in their negotiations with supermarkets, its effectiveness is largely dependent on the participation of the industry's major players.

For more information on this topic contact a member of our [Competition & Consumer team](#).