

CODE ARBITER

BACKGROUND

Over a number of years, suppliers have demonstrated a reluctance to raise concerns or complaints with or against a retailer or wholesaler. This reluctance is due to a number of factors including fear of retribution, concerns about damaging commercial relationships and a lack of confidence that any effective outcome would be achieved.

In response to this, the FGCC introduced a new dispute resolution framework, incorporating Code Arbiters, appointed by the retailers and wholesalers, and a Government appointed Independent Reviewer. The Code Arbiters will replace the Code Compliance Manager role under the former FGCC.

INTENT

To provide an independent dispute handling framework, with the Code Arbiter having the authority to investigate complaints and propose binding resolutions on the retailer or wholesaler.

RELEVANT FGCC PROVISIONS

Part 5, Division 1 – Retailer’s or Wholesaler’s Code Arbiter

The retailer or wholesaler must appoint a Code Arbiter that:

- Has no other role in the organisation (unless the retailer or wholesaler’s market share is less than 15% in that financial year or was less than 15% in either of the 2 previous financial years);
- Has the authority to enter into binding agreements on behalf of the retailer or wholesaler to settle a dispute relating to the FGCC; and
- Has access to all relevant documents related to any dispute with a supplier relating to the retailer or wholesaler’s obligations under the FGCC and to its buying teams; and
- The retailer or wholesaler must not unduly influence or attempt to unduly influence the Code Arbiter’s functions.

The Code Arbiter will develop a written complaints handling procedure that is consistent with the FGCC and will be publicly available on the retailer’s or wholesaler’s website. Suppliers wanting to submit a complaint to a Code Arbiter relating to matters covered by the FGCC must do so in writing.

The Code Arbiter must observe and maintain confidentiality requirements and not disclose the identity of the supplier making the complaint without their express prior consent.

Upon receiving a complaint the Code Arbiter must:

- Take all reasonable steps to undertake and conclude an investigation within 20 business days (or a longer time

period agreed with the supplier);

- Consider whether the retailer or wholesaler has dealt lawfully and acted in good faith with the supplier. The Code Arbiter can also choose to consider whether they have acted fairly in their dealings with the supplier; and
- Determine whether a remedy is appropriate, including compensation of up to \$5 million or a variation of the Grocery Supply Agreement (GSA).

Within 5 business days after the conclusion of the investigation, the Code Arbiter must write to the supplier outlining the determination made, the reasons for it and a proposed remedy (if any). The supplier has 20 business days to accept the proposed remedy, after which the proposed remedy lapses, unless the supplier has advised they are referring the complaint to the Independent Reviewer for review of the Code Arbiter’s process.

Upon concluding a complaint, the Code Arbiter must also provide the retailer or wholesaler with a copy of the notice of determination. The notice must not contain any information that would identify the supplier (unless the supplier has expressly consented to their identity being disclosed, or has accepted a proposed remedy).

A complaint concludes when a Code Arbiter:

- Determines the complaint is vexatious, trivial, misconceived or lacking substance;
- Can no longer pursue the investigation without revealing the supplier’s identity;
- Concludes their investigation and determines that no breach of the FGCC has occurred;

Remember to keep your FGCC training up to date.
Contact AFGC and NextGen.

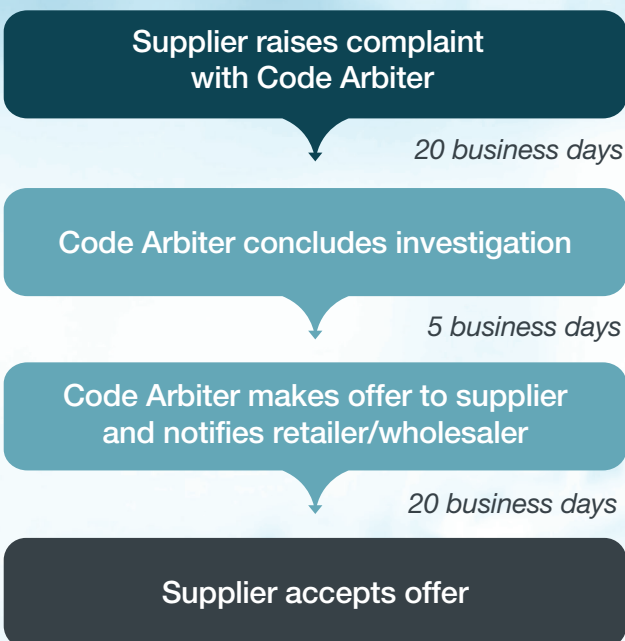
All companies should seek independent legal advice when considering matters under the Food and Grocery Code of Conduct

RELEVANT FGCC PROVISIONS CONT.

- Concludes their investigation and determines that a breach of the FGCC has occurred and receives acceptance of a proposed remedy from a supplier, or the proposed remedy lapses; and
- Concludes the reconsideration of a complaint referred to it by the Independent Reviewer.

The Code Arbiter must prepare a report for each financial year detailing various prescribed matters, including but not limited to: the number of complaints received, the nature of those complaints, the time taken to investigate and the outcome of each complaint. Nothing in the report should identify the suppliers involved. The report will also contain details of price increases that the retailer or wholesaler has dealt with each financial year.

CODE ARBITER COMPLAINT REVIEW PROCESS



CONSIDERATIONS

- The contact details for each Code Arbiter can be found on the AFGC website.
- It is difficult to effect change in industry behaviour if there are no complaints to demonstrate a problem exists. If a supplier experiences retailer or wholesaler behaviour that is contrary to the FGCC, a complaint to the relevant Code Arbiter will help to have these issues addressed, even where a full investigation could not be completed.

KEY TIP

If in order for a Code Arbiter to investigate a breach of the FGCC, they require information that the supplier is not comfortable providing (for example, the identity of the buyer or details of a supplier's correspondence with a particular buyer) and undertakings as to confidentiality cannot address a supplier's concerns, the supplier should still consider making the complaint, as the mere fact a complaint was made and the general nature of it will need to be included in the Code Arbiter's annual report, a copy of which is provided to the Independent Reviewer and other parties. This information could assist the Independent Reviewer to identify any emerging or systemic issues in the grocery supply chain where they see a similar pattern of complaints or allow them to produce guidance material relating to compliance with the Code.

WHAT SHOULD HAPPEN

- The Code Arbiter should publish a complaints handling procedure that aligns with the requirements of the FGCC and follow this procedure in dealing with any complaints.
- The Code Arbiter should give confidence to the supplier that their identity will not be disclosed to the retailer or wholesaler without their express consent – at times this may limit the extent to which a Code Arbiter can pursue an investigation.
- When concluding an investigation the Code Arbiter must include reasons supporting their decision, including where they decide that no further action is required.
- The retailer or wholesaler must provide for any accepted remedy. Failure to do so would be a breach of the Competition and Consumer Act 2010 and a supplier could seek an injunction or commence an action for damages.
- The Code Arbiter should work with the Independent Reviewer to ensure there is a consistent application of the FGCC across all retailers and wholesalers.