Australian Manufacturing Workers' Union

Submission on the 'Improving Commercial Relationships in the Food and Grocery Sector' Consultation Paper

September 2014

AMWU

INTRODUCTION

The Australian Manufacturing Workers' Union (AMWU) represents workers across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing industries in particular metal, vehicle and food manufacturing, but also in the industries of mining, building and construction, printing and graphic arts, repair and maintenance, laboratory and technical services. We have large numbers of members employed in the processed food sector, particularly in the factories of SPC Ardmona, Simplot, McCain, Nestle, Campbell's, Heinz and Mondelez (Cadbury/Kraft).

We welcome the opportunity to make submissions regarding the Food and Grocery Code of Conduct ('the Code') and to raise a number of issues regarding the proposed changes to the regulation of commercial relationships in the food and grocery sector – an issue which is of central concern to our members. This area of regulation has important implications for the future of the food processing industry in Australia and hence the work and livelihoods of our members, their families and communities.

BACKGROUND TO THIS SUBMISSION

The food processing industry in Australia is in crisis. Like much of the manufacturing sector in this country it is suffering from a confluence of factors that are putting pressure on our local processors to remain competitive. The food industry faces particular issues given the low cost of imports, the historically high Australian dollar and the disparity in international food safety standards. Downsizing and closures are increasingly occurring in the industry and the loss of employment is having a devastating effect, particularly on regional communities.

Food processing in Australia employs more than 180,000 people directly – more than any other manufacturing industry. Employment in this sector, unlike other areas of manufacturing, is concentrated in regional areas, especially major horticultural centres such as the Goulburn Valley and the Murrumbidgee Basin, where alternative work is much harder to find. Cities like Shepparton in Victoria have built a large part of their infrastructure and services – including construction, retail and business services - on the assumption of the ongoing presence of the food processing facilities and the pay packets they contributes to the community. It is not an exaggeration to say that food processing is integral to many regional communities and pressures on the industry have a significant flow-on effects to the entire community.

As has been detailed extensively in our submissions to previous government inquiries on this subject,[1] the AMWU has consistently urged the government to address the concerns raised by suppliers across the grocery supply sector about the conduct of the major grocery retailers (MGRs) – specifically, Coles and Woolworths. The market power of the "duopoly" means they are able to set prices and dictate contractual terms to suppliers. The so-called "price wars" between the two MGRs have seen many suppliers exit the market due to margin pressures exerted by the retailers, who in many cases have moved to cheaper offshore suppliers for their private label brands.

The concerns outlined in Part A of this inquiry's consultation paper broadly reflect our understanding of the nature of the problems faced by large and small suppliers, many of whom employ our members. During enterprise bargaining negotiations and in consultations with us around redundancies or factory closures, employers in this industry regularly cite the pressure on their bottom line caused by the lack of equality of bargaining power in their relationships with the MGRs. Small businesses, which make up the majority of food processors, are especially vulnerable to this disparity.

Suppliers tell us they are often left with no choice but to accept unfavourable contract terms through fear of losing their contract with the MGRs, which in many cases is their sole or primary route to market. This fear is evidenced by the difficulty the ACCC had in its current investigation into retailer behavior in getting complainants to come forward prior to granting them anonymity.

Allegations which have been raised with us include many of those examples cited in the consultation paper and range from auctioning of shelf-space (known as "cliffing"), to the deduction of arbitrary costs for promotions or stock handling services, to the rescinding of contracts mid-term, to expensive and unexpected changes to product specifications, and the requirement to forego intellectual property rights.

[1] See, e.g. AMWU's submissions to the National Food Plan.

The view from the industry has been clear for many years: "The reality is with two key customers there has become an inhospitable environment for grocery manufacturers… We've seen our margins squeezed as the pressure comes on." [2]

These problems with the duopoly are well-recognised, having been repeatedly established across various inquiries and investigations over many years. The time for action on this matter is long overdue. We are pleased that activities such as this inquiry and the ACCC investigation are finally bringing these issues to light. The dominance in the market place by these two MGRs has been for many years one of the major problems facing the food industry and we are pleased that action is finally being taken to address it.

We emphasise that this should not be seen as a cure for all the problems facing the industry. There are many other regulatory issues, such as country of origin labelling, biosecurity measures and lopsided trade arrangements which need to be addressed. While important, an industry code of conduct should not be seen as a standalone measure but should form part of a suite of policy improvements to assist the sector.

POLICY OPTIONS: STATUS QUO, OPT-IN OR MANDATORY CODE

The existing Produce and Grocery Industry Code of Conduct is not widely recognised or understood in the industry, its terms are unenforceable and its voluntary nature allows participants to opt in and out at will. As the consultation paper states, the PGIC's administrative committee has not even met since 2011. For such a code to have any potential impact it would need to be mandatory and form part of the consumer and competition law framework, with breaches subject to prosecution.

As a general proposition we strongly support the introduction of a mandatory code as we believe that the "opt-in" component of the Code is highly problematic. While we consider it an important first step to have the Code prescribed under the Act, the voluntary nature of the Code weakens it considerably. As the consultation paper makes clear, several important retailers have already declined to sign up to the Code. These include Metcash, Costco and, perhaps most significantly, ALDI. ALDI now has 350 stores nationwide and between seven and fourteen per cent of the market, a proportion which is expected to almost double in the

[2] Arthur Winkleblack, CFO and Executive Vice President, H.J. Heinz Co., quoted in *The Sydney Morning Herald*, 30 August 2011.

next five years.[3] With another European-based multinational, Lidl, expected to enter the market as early as next year[4] it makes little sense to impose a regulatory burden on only some of the market players. We believe that as the market share of these foreign competitors grows it will reduce the incentive for Coles and Woolworths to participate in the Code when it imposes a regulatory burden that their competitors do not have to carry. Moreover, businesses who supply to the non-proponent firms will not have the same protections across all their supply relationships, thus undermining the primary purpose of the Code. The necessity to regulate the entire market is recognised in the UK where their Groceries Supply Code of Practice covers all eight major supermarket chains operating in the country.

We do not believe that the costs incurred through the introduction of a mandatory code are considerable in relative or absolute terms when taking into account the size and profitability of the companies concerned. In fact, the compliance activities cited in Attachment E are those which ought to be undertaken as standard practice in a major corporation who has an eye to corporate responsibility and risk management, and thus ought not to constitute any real additional burden. Moreover, they will theoretically be offset by the avoidance of legal costs from actions such as that underway in the Federal Court by the ACCC. The costs to the government would potentially also be reduced for similar reasons, namely the reduction in legal costs through the introduction of an alternative dispute resolution model.

FEEDBACK ON THE TERMS OF THE CODE AS CURRENTLY DRAFTED

Whether mandatory or opt-in, we believe that the requirements of the Code as drafted go some way towards addressing the issues in the supply relationship. The level of detail and specificity of the prohibited conduct – conditional payments, promotional payments, intellectual property rights - shows a recognition of the problems faced by suppliers and in doing so provides the opportunity for real and targeted remedies to redress the power imbalance in their relationship with retailers.

However, we have a number of strong concerns with the Code as drafted which, if implemented, would render it potentially ineffective.

[3] The Age, August 15.

[4] Food Magazine, 1 Aug.

First, we do not believe the provision for exemptions to the requirements of the Code are strongly worded enough to meet the purposes of the Code. As the consultation paper foreshadows, the ongoing imbalance of power within the retailer-supplier relationship leaves open the possibility that suppliers will simply be forced into agreeing to broad exemptions at the negotiation stage, rendering them ultimately no better off. We strongly encourage the inclusion of a no disadvantage test as described in the consultation paper as an essential safety net for the ongoing protection of suppliers' interests. We believe this would strike the appropriate balance between the parties' freedom to contract and the purpose of the code to ensure minimum standards of conduct are observed.

Second, we have a major concern with the current dispute resolution mechanism. As drafted, the decision-making power in relation to commencing dispute resolution processes lies in the hands of the relevant Code Compliance Manager – an employee of the retailer. We find this immensely problematic as it effectively amounts to self-regulation. We believe there is a fundamental lack of procedural fairness in an approach which leaves the decision as to the legitimacy of a complaint up to the very party against whom the complaint has been made. We believe this approach would discourage already-reluctant suppliers from raising concerns as they would have little confidence that their issue would not be dismissed as "vexatious" by a retailer eager to avoid the costs associated with the dispute resolution process. This would leave suppliers in the position of having to seek legal recourse which is both costly and completely undermines the aim of the alternative dispute resolution model.

We know of no reason to believe that there will be an influx of frivolous or vexatious complaints from suppliers once the Code is introduced, as there is cost and time involved for suppliers in doing so. It is our view that without substantial evidence from the MGRs that this will be the case, the dispute resolution process should be accessible by either party and participation in the process – including attendance at any mediation or arbitration - should be required by both, with penalties to be applied for non-compliance.

Finally, we believe that strong consideration should be given to the inclusion of pecuniary penalties amongst the various remedies available, particularly for blatant and extremely detrimental contraventions of the Code. Moreover, these penalties should be significant, taking into consideration the size and profitability of the MGRs. Often the cost of compensation or damages which may be extremely significant to the bottom line of a small business person is little more than "small change" to a multinational like Coles or

Woolworths. Penalties ought to be significant and proportional in order to discourage the offending behaviour.

We would reiterate that a mandatory code would be preferable and strongly support its adoption. In any case, we are encouraged that this process is occurring and commend the parties who have engaged in it. We believe a real opportunity exists to improve relationships that will have a strong benefit for a struggling food processing sector. However, without the amendments we have discussed above the opportunity to make these improvements that opportunity will be wasted.

Thomas Hale
National Secretary – Food and Confectionery Division
Australian Manufacturing Workers' Union