

OUT18/5498

Food and Grocery Code of Conduct Review
Commonwealth Treasury
By email: FGCreview@treasury.gov.au

Dear Sir or Madam

REVIEW OF THE FOOD AND GROCERY CODE OF CONDUCT

I refer to Treasury's review of the Food and Grocery Code of Conduct (the Code).

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small businesses in government, and makes it easier to do business through policy harmonisation and regulatory reform.

The OSBC provides the comments and recommendations below for your consideration in preparing the report on the Code to be released by the Assistant Minister to the Treasurer. Following our introductory comments regarding the business and regulatory context in which the review is taking place, this submission is structured in line with Terms of Reference for the review.

The OSBC consents to this submission being made public.

Summary of recommendations

Recommendation 1: The Code should be amended to provide that it is mandatory for all retailers and wholesalers with an annual turnover above a prescribed amount, such that all major retailers and wholesalers are bound by the Code.

Recommendation 2: In the alternative to Recommendation 1, the ACCC should undertake engagement with Metcash with a view to having it agree to be bound by the Code.

Recommendation 3: The Code should be amended to provide that the ACCC may investigate a suspected breach of the Code and impose penalties if it determines that a breach has occurred. The ACCC should have regard to the United Kingdom precedent in determining the appropriate maximum penalty.

Recommendation 4: The ACCC should develop and offer free or low-cost training concerning the provisions of the Code, and how suppliers may make use of it, on an ongoing basis.

Recommendation 5: Clause 12 of the Code should be amended to provide that, in determining whether setting off payments, or requiring a supplier to consent to do the same, is reasonable, regard must be had to the benefits, costs, and risks to the supplier.

Recommendation 6: The ACCC should be empowered to publish guidance on the application of the Code, and the steps retailers must take to comply, on the basis of supplier complaints. The authority should be required to execute these functions while preserving the anonymity of a supplier complainant to the full extent practicable.

Recommendation 7: The ACCC should be empowered to advise the parties to an informal dispute regarding interpretation and application of the Code, on the basis of a supplier complaint.

Recommendation 8: The ACCC should be required to collect and publish anonymised statistics and case studies concerning formal disputes that occur under the Code.

Recommendation 9: The Code should be amended to provide that, where the parties to a dispute cannot agree on appointment of a mediator, a supplier based in NSW, or a retailer or wholesaler, may refer the matter to mediation by the Office of the NSW Small Business Commissioner's Dispute Resolution Unit.

Recommendation 10: The Code should be amended to provide that retailers and wholesalers may not refuse to participate in dispute resolution on the basis of their assessment that the subject of the complaint is vexatious, trivial, misconceived or lacking in substance, or that the relevant supplier is acting in bad faith.

Recommendation 11: The Code should be amended to provide that any action by a retailer or wholesaler that confers a detriment on a supplier for trying to access rights under the Code is not undertaken in good faith.

Recommendation 12: The ACCC should consult with industry and legal experts, and suppliers and their representatives, regarding additional grounds upon which the Code could be amended to clarify the meaning of good faith.

Recommendation 13: The Code should be amended to provide that a retailer or wholesaler must process payments to small businesses within a prescribed period. The ACCC should have regard to the commitments made by Woolworths and Coles in this area in determining the prescribed period.

Recommendation 14: The Code should be amended to provide that the responsible Minister must review the Code every three years.

1. Context

OSBC recognises the Code as an important and indeed necessary regulatory intervention to protect the interests of small suppliers from abuse of market power.

It is hardly a matter of contention that the supermarket industry is characterised by the dominance very large retailers and wholesalers. The 'big two' of Wesfarmers-Coles and Woolworths currently account for 67.5% of the market, with Aldi and Metcash holding an additional 16.6% collectively.¹ Despite increased competition over the last five years, precipitated by the growth of Aldi, it remains one of the most concentrated major industries in Australia.²

However, for the companies that supply the retailer giants, the picture is considerably more complex. Like the supermarket industry, suppliers represent a major component of the national economy. The food and grocery sector is by far the largest component of the wider manufacturing sector - with turnover of \$127.4 billion in the 2015-16 financial year - and employs over 320,000 workers.³ However, far from a small handful, there are over 30,000 businesses currently operating in the sector.⁴ Small businesses are heavily represented within this highly diverse landscape. The average number of employees per food and grocery business is 10.4.⁵ Many sections of the industry are occupied substantially by companies with less than 2% market share.⁶ Indeed, Coles and Woolworths each contract with several thousand suppliers.⁷

Accordingly, it is widely recognised that a significant imbalance in bargaining power exists between suppliers and the major supermarket chains.⁸ This is particularly true of the balance of power between the major chains and their many small suppliers – overwhelmingly if not in all cases.⁹

Unchecked, this asymmetry affords the major chains with the discretion to impose unfair and unconscionable terms on suppliers when negotiating grocery supply agreements, and to act outside the terms of the contract agreed. Amongst the most prominent manifestations of this unbalanced power relationship have been delays in payments to suppliers, retrospective reductions in prices paid, and unfair de-listing practices.¹⁰

The Code cannot provide a complete solution to exploitation of the power imbalance between supermarkets and suppliers. No code can be so prescriptive as to account for every aspect of a nuanced business relationship, or so powerful and well-understood as to engender undeviating compliance. Nonetheless, the Code is comprehensive in form,¹¹ and

¹ IBISWorld (2018), *'Supermarkets and grocery stores in Australia'*, p. 23

² IBISWorld (2018), *'Supermarkets and grocery stores in Australia'*, p. 19

³ Australian Food & Grocery Council & EY (2017), *'State of the Industry'*, pp. 8, 16-17

⁴ Australian Food & Grocery Council & EY (2017), *'State of the Industry'*, p. 8

⁵ Australian Food & Grocery Council & EY (2017), *'State of the Industry'*, p. 8

⁶ For example, food and vegetable processing: IBISWorld (2017), *'Food and vegetable processing in Australia'*, pp. 25-28

⁷ Australian Financial Review (7 March 2017), *'Woolworths connects with suppliers to win back customers'*;

Australian Food & Grocery Council (2015), *'Coles refunds suppliers and signs up to code of conduct'*

⁸ Beaton-Wells, C. & Paul-Taylor, J. (2017), *'Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct'*, University of Melbourne Law School, p. 204; Office of the Australian Small Business Commissioner (2014), *'Improving commercial relationships in the food and grocery sector'*, p. 2; Australian Food & Grocery Council (2014), *'Competitiveness and Sustainable Growth'*, p. 15

⁹ Beaton-Wells, C. & Paul-Taylor, J. (2018), *'A code of conduct for supermarket-supplier relations: Has it worked?'*, Australian Business Law Review, vol 46, no 1, pp. 22, 29

¹⁰ Burch, D, Lawrence, G. & Hattersley, L. (2013), *'Watchdogs and ombudsmen: monitoring the abuse of supermarket power'*, Agriculture and Human Values, vol 30, no 2, p. 263

¹¹ Beaton-Wells, C. & Paul-Taylor, J. (2018), *'A code of conduct for supermarket-supplier relations: Has it worked?'*, Australian Business Law Review, vol 46, no 1, p. 7

exhaustive in its coverage of the most contentious aspects of the retailer-supplier relationship, such as those detailed above. It must be considered the principal regulatory instrument governing that relationship in Australia.

The Code therefore plays a critical role in addressing a legitimate market failure that is adversely affecting a major Australian industry – and particularly the small businesses within that industry.

2. The extent to which retailers and wholesalers have become bound by the code

It is well-documented that three of the four dominant companies in the supermarket industry have signed up to the Code. Collectively, signatories Coles, Woolworths, and Aldi comprise 76.2% of the industry - with the remaining signatory, About Life, a marginal presence.¹²

That three quarters of major companies in the industry, and over three quarters of the total market, have opted into the Code since its introduction is commendable progress. Nonetheless, the absence of Metcash,¹³ with 7.4% market share, represents a prominent shortcoming in the extent to which the industry has become bound.

Also of note is the prospect that new entrants to the market may establish a major presence in the short to mid-term. Large international retailers Schwarz Gruppe and Amazon have signalled an interest in expanding into Australia.¹⁴ As a voluntary code, these very well-resourced, potentially disruptive¹⁵ entrants would not be compelled to adhere. A more diverse supermarket industry could mitigate, to some extent, the imbalance in bargaining power between supermarket chains and small suppliers. But any such benefit could well be offset if a larger proportion of major supermarket chains were not bound by the Code.

The prospect of major new retailers also affords additional significance to the issue of whether a voluntary code affords an unfair advantage in supplier negotiations to those who elect not to sign.¹⁶

The failure of the Code to bind all major supermarket chains is one of two principal reasons that the Code should be mandatory for major retailers and wholesalers (see also Sections 3, 4). The equivalent code in the United Kingdom, the Groceries Supply Code of Practice, has addressed this issue in a simple and considered manner. That is, the code is mandatory for suppliers with annual turnover exceeding £1 billion per annum.¹⁷ An equivalent approach in Australia, adopting a lower minimum figure that accounts for the smaller Australian market, would ensure that all major retailers and wholesalers are bound by the Code. In turn, it would also provide that small operations, to whom the imbalance in bargaining power does not necessarily apply, are not captured.

Recommendation 1: The Code should be amended to provide that it is mandatory for all retailers and wholesalers with an annual turnover above a prescribed amount, such that all major retailers and wholesalers are bound by the Code.

¹² IBISWorld (2018), 'Supermarkets and grocery stores in Australia', pp. 23-27; About Life n.d., '[Find your local store](#)'

¹³ ACCC (2016), '[Grocery update: AFGC Leaders Forum](#)'

¹⁴ Australian Food & Grocery Council & EY (2017), '[State of the Industry](#)', p. 11

¹⁵ Deloitte (2017), '[Global powers of retailing 2017](#)', p. 14

¹⁶ Beaton-Wells, C. & Paul-Taylor, J. (2018), 'A code of conduct for supermarket-supplier relations: Has it worked?', Australian Business Law Review, vol 46, no 1, p. 30

¹⁷ United Kingdom Competition Commission, '[The Groceries \(Supply Chain Practices\) Market Investigation Order](#)', cl 4

Recommendation 2: In the alternative to Recommendation 1, the ACCC should undertake engagement with Metcash with a view to having it agree to be bound by the Code.

3. Whether the code should include civil penalty provisions; Levels of compliance with the code by retailers and wholesalers bound by the code

The OSBC's consultations suggest the Code has been effective in engendering compliance amongst signatories in many aspects of the contractual relationship – for example, unilateral and retrospective variations of grocery supply agreements, and payments for shrinkage. This is broadly reflected in some of the academic literature available on the subject, suggesting that the Code has given some suppliers the confidence to “push back” against abuses of its provisions in negotiations.¹⁸ However, our consultations also suggest that egregious conduct by signatory retailers in relation to range reviews and the de-listing of products, in particular, has persisted.

Academic research into the Code suggests that the inclusion of civil penalty provisions would increase compliance.¹⁹ Most notably, the UK Grocery Supply Code of Conduct empowers the relevant regulator to investigate a suspected breach of the code,²⁰ and issue penalties of up to 1% of the retailer's turnover for the business year preceding the date of the infringement if it finds a breach has occurred.²¹ Such potentially large penalties are likely to have been effective as a means of increasing compliance with the code amongst British retailers since its introduction.²² In the case of Tesco, the largest retailer in the United Kingdom,²³ the maximum penalty that may be imposed under the code is approximately £376 million. This is equivalent to almost three quarters of the organisation's operating profit in the UK for the most recent business year.²⁴

However, such provisions are largely if not entirely inconsistent with a voluntary code. It is reasonable to assume that exposing retailers and wholesalers to the risk of penalties large enough to engender compliance would incentivise current signatories to opt out of the Code, and function as a major disincentive for other retailers to opt in. The utility of civil penalty provisions therefore speaks further to the need for the Code to be mandatory for large retailers and wholesalers (see also Sections 2, 4).

The issue of compliance with the Code could be further addressed by strengthening its dispute resolution provisions (see Section 5b, below).

Recommendation 3: The Code should be amended to provide that the ACCC may investigate a suspected breach of the Code and impose penalties if it determines that a breach has occurred. The ACCC should have regard to the United Kingdom precedent in determining the appropriate maximum penalty.

¹⁸ Beaton-Wells, C. & Paul-Taylor, J. (2017), *Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct*, University of Melbourne Law School, p. 156

¹⁹ Beaton-Wells, C. & Paul-Taylor, J. (2017), *Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct*, University of Melbourne Law School, p. xi

²⁰ Groceries Code Adjudicator Act 2013 (UK), ss4-10

²¹ Groceries Code Adjudicator (2013), *Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions*, p. 18

²² Beaton-Wells, C. & Paul-Taylor, J. (2018), 'A code of conduct for supermarket-supplier relations: Has it worked?', *Australian Business Law Review*, vol 46, no 1, p. 18

²³ USDA Foreign Agricultural Service (2016), *United Kingdom -- Retail Foods*, p. 6;

²⁴ Tesco (2017), *Annual report and Financial Statements*, p. 15

Result is approximate as the figures quoted combine revenue and profit for the United Kingdom and the Republic of Ireland.

4. How the code compares with overseas regulation of commercial relations between retailers, wholesalers and suppliers

The history of supermarket-supplier relations and regulation in both New Zealand and the United Kingdom should be considered as supplementary evidence supporting a mandatory code for major retailers and wholesalers (see also Sections 2, 3). In addition to their shared structures of government, history, culture, and language, all three jurisdictions are home to highly concentrated supermarket industries dominated by a small number of very large retailers.²⁵

The United Kingdom implemented a voluntary code of practice to regulate retailer-supplier relations in 2002. However, 85% of suppliers considered the code ineffective in resolving the issue of retailers' unfair and unconscionable abuse of their superior bargaining power.²⁶ A 2008 review of the code by the UK Competition Commission reached the same conclusion - recommending the code be replaced with a mandatory code for large retailers. The British Government subsequently implemented the Grocery Supply Code of Practice. It is mandatory for large retailers.²⁷

No code equivalent to the Food and Grocery Code of Conduct is currently in force in New Zealand. However, the implementation of a mandatory code of conduct has been the subject of political debate over the last several years.²⁸ Most recently, the major party in the current New Zealand Government committed to developing and implementing a mandatory code in the current term of government²⁹ (whilst not excluding the possibility of instead adopting a voluntary code³⁰).

5. Whether the purposes of the code are being met

a) 'To help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain'

Given the evidence that signatories have been largely compliant with many of its key provisions, the Code cannot be regarded as having failed to regulate standards of conduct, or build trust, in the grocery supply chain.

Nonetheless, the efficacy of a code in modifying business conduct will be less than optimal if those who it is intended to protect are not aware of its existence. Both the literature and OSBC's consultations suggest that not all suppliers are aware of the Code, and that awareness is poorest amongst small suppliers.³¹ OSBC acknowledges the efforts of the Australian Food & Grocery Council in offering training on the Code to over 2,000 supplier

²⁵ USDA Foreign Agricultural Service (2016), '[United Kingdom – Retail Foods](#)', p. 6; IBISWorld (2018), '[Supermarkets, Grocery Stores and Convenience Stores – New Zealand Market Research Report \(summary\)](#)'

²⁶ Burch, D, Lawrence, G. & Hattersley, L. (2013), 'Watchdogs and ombudsmen: monitoring the abuse of supermarket power', *Agriculture and Human Values*, vol 30, no 2, p. 263

²⁷ Burch, D, Lawrence, G. & Hattersley, L. (2013), 'Watchdogs and ombudsmen: monitoring the abuse of supermarket power', *Agriculture and Human Values*, vol 30, no 2, pp. 263-264

²⁸ See, for example, *Commerce (Supermarket Adjudicator and Code of Conduct) Amendment Bill 2015 (NZ)*

²⁹ New Zealand Labour Party (2017), '[Manifesto 2017 – Commerce](#)'

³⁰ Interest.co.nz (2017), '[Self-proclaimed 'pushy' Commerce & Consumer Affairs Minister Kris Faafoi commits to revamping archaic insurance law, but prioritises introduction of payday lender interest rate caps & a supermarket code of conduct](#)'

³¹ Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, pp. 150-151

representatives.³² However, as these training sessions cost \$640-\$800 per attendee,³³ they may be prohibitively expensive for some small suppliers. Moreover, despite its status as the industry peak, the Food & Grocery Council's membership comprises 207 businesses³⁴ in an industry of thousands. It may therefore be prevented from engaging many non-members regarding Code training. The ACCC should be resourced to provide such training, as it is better positioned to offer ongoing training for small suppliers that is informed, unbiased, and accessible.

Recommendation 4: The ACCC should develop and offer free or low-cost training concerning the provisions of the Code, and how suppliers may make use of it, on an ongoing basis.

In addition, the OSBC notes that Clause 12 of the Code - prohibiting a retailer from setting off payments, or requiring a supplier to consent to the same - affords a retailer the capacity to contract out provided it is "reasonable under the circumstances".³⁵ Clause 12 may allow a retailer to unscrupulously take advantage of its superior bargaining position to subvert the restriction on setting off, given the minimal protection offered by the requirement of reasonableness alone. This is potentially detrimental to building trust and engendering consistently high standards of business conduct.

The generality of Clause 12 contrasts with similar contracting out provisions in the Code, which prescribe key considerations that must be accounted for in any determination of what is reasonable³⁶ - most notably, the 'benefits, costs and risks' for the supplier. Amendments to Clause 12 providing for the same would allow the Code to more effectively regulate standards and build trust in this area.

Recommendation 5: Clause 12 of the Code should be amended to provide that, in determining whether setting off payments, or requiring a supplier to consent to do the same, is reasonable, regard must be had to the benefits, costs, and risks to the supplier.

b) 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

The utility of the Code in delivering effective dispute resolution is an issue of vital importance for small suppliers. Alternative dispute resolution is typically much more cost and time-efficient than litigation,³⁷ and thus generally desirable to resource-constrained small businesses. Litigation between the major supermarket chains and suppliers specifically is likely to be slow, complex, and expensive,³⁸ and therefore inappropriate for small suppliers.³⁹

³² Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, p. 150

³³ Australian Food & Grocery Council (2017), '[Food and Grocery Code of Conduct Training](#)'

³⁴ Australian Food & Grocery Council (2017), '[2016 Annual Report](#)', p. 34

³⁵ Clause 12(3)

³⁶ Clauses 9(3), 10(3), 16(2)(c), and 18(3)

³⁷ Stinanowich (2004), '[ADR and the "Vanishing Trial": The growth and impact of "Alternative Dispute Resolution"](#)', Journal of Empirical Legal Studies, Vol 1, no. 3, pp. 5-7; v

³⁸ Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, p. XVIII

³⁹ Beaton-Wells, C. & Paul-Taylor, J. (2018), '[A code of conduct for supermarket-supplier relations: Has it worked?](#)', Australian Business Law Review, vol 46, no 1, p. 31

Small businesses may also face particular difficulties in resolving a dispute by informal means, as well as emotional stress and opportunity cost once a dispute is formalised.⁴⁰

The Code could provide more effective dispute resolution in numerous respects.

Both the literature and OSBC's own consultations suggest that suppliers rarely make use of either the retailer-wholesaler review provisions in the Code, or those that provide for external mediation and arbitration.⁴¹ While the efficacy of the Code in regulating numerous aspects of the retailer/wholesaler-supplier relationship should be acknowledged, it would be exceedingly optimistic to suggest that the Code has been so effective as to all but eliminate disputes. Much more credible is the view, put to OSBC in its consultations and reflected in the research, that many suppliers are highly reluctant to access its dispute resolution provisions. This is attributable to fear of retailer retribution, and long-term damage to a key business relationship, in the event that a supplier initiates a formal dispute.⁴² OSBC also understands that the absence of public information regarding interpretation and application of the Code, and the outcome of formal disputes that do occur, functions as an additional disincentive to suppliers to formalise a grievance. Moreover, the cost of dispute resolution, though unquestionably lower than litigation, remains high for some suppliers.

The dispute resolution provisions within the Code are predicated on an assumption that the supplier is willing to formally declare a grievance to the retailer or supplier, and communicate with the other party with a view to resolution. It is therefore unlikely that the issues of supplier fear and uncertainty around bringing an issue to formal dispute resolution may be resolved by adjustment of these provisions.

Rather, the Code should be amended to provide for additional methods of dispute resolution that afford suppliers increased anonymity and access to authoritative but informal dispute resolution. In this regard, the approach taken by the United Kingdom is once again instructive. The UK has established the 'Grocery Code Adjudicator' – that is, a semi-independent⁴³ expert authority that oversees retail-supplier relations under the equivalent Groceries Code. In addition to its basic function in receiving complaints regarding adherence to the code,⁴⁴ the Adjudicator is empowered to:

- Publish guidance concerning the application of the Groceries Code;⁴⁵
- Publish guidance concerning steps that retailers must take in order to comply with the code;⁴⁶ and
- Directly advise retailers and suppliers on any matter relating to the code⁴⁷ - i.e. including its interpretation and application.

In addition, the Adjudicator is prevented from revealing the identity of a complainant if disclosure might cause someone to believe a person has complained about non-compliance with the code.⁴⁸

⁴⁰ Office of the Australian Small Business Commissioner (2014), '[Improving commercial relationships in the food and grocery sector](#)', p. 4

⁴¹ Beaton-Wells, C. & Paul-Taylor, J. (2018), 'A code of conduct for supermarket-supplier relations: Has it worked?', *Australian Business Law Review*, vol 46, no 1, p. 26;

⁴² Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, p. 131

⁴³ *Groceries Code Adjudicator Act 2013* (UK), ss15-16, Schedule 1

⁴⁴ Groceries Code Adjudicator n.d., '[Groceries Code Adjudicator complaints policy](#)'

⁴⁵ *Groceries Code Adjudicator Act 2013* (UK), s12(3)(a)

⁴⁶ *Groceries Code Adjudicator Act 2013* (UK), s12(3)(b)

⁴⁷ *Groceries Code Adjudicator Act 2013* (UK), s11

⁴⁸ *Groceries Code Adjudicator Act 2013* (UK), s18(2)

These provisions afford suppliers a potential solution to the fear of accessing formal dispute resolution. The Adjudicator may publish expert guidance on the application of the code, or advise the parties to a dispute as to how the code should be applied, on the basis of a supplier complaint. It may do so without formalising the dispute or, in the case of publishing guidance, necessarily revealing the identity of the supplier as a complainant at all. The power to publish guidance also affords certainty as to the application of the code to other suppliers with substantially the same grievance.

Recommendation 6: The ACCC should be empowered to publish guidance on the application of the Code, and the steps retailers must take to comply, on the basis of supplier complaints. The authority should be required to execute these functions while preserving the anonymity of a supplier complainant to the full extent practicable.

Recommendation 7: The ACCC should be empowered to advise the parties to an informal dispute regarding interpretation and application of the Code, on the basis of a supplier complaint.

The potential for the Code to better serve suppliers with substantially similar disputes would be further enhanced if all parties that administer formal dispute resolution – that is, retailers and wholesalers, and mediation and arbitration services - were required to provide the ACCC with anonymous data and case studies concerning the few disputes that are exposed to these processes. As neither the Commonwealth nor the signatories to the Code currently publish such information, suppliers are largely unable to be guided in managing a dispute by the experiences of their contemporaries. Signatories may also take advantage of this information vacuum, by falsely dismissing a supplier's complaints on the basis that they are the only business that has raised the issue. Publication of information concerning formal disputes would therefore serve as a valuable resource for suppliers.

Recommendation 8: The ACCC should be required to collect and publish anonymised statistics and case studies concerning formal disputes that occur under the Code.

Modifying the Code's provisions regarding the appointment of a mediator may also assist suppliers in accessing affordable dispute resolution - at least as regards suppliers based in NSW. The OSBC's Dispute Resolution Unit (DRU) offers mediation services for commercial disputes at a fraction of the cost of commercial equivalents, at \$760 for a formal, five-hour mediation. DRU is also highly versatile, having assisted with over 80 types of commercial dispute, relating to a wide variety of NSW and Commonwealth laws, in the current financial year alone. It is capable of absorbing any conceivable increase in caseload arising from referrals under the Code. DRU has undertaken 292 formal mediations over the last 12 months, and assisted with an average of 954 total disputes per year since 2015.

Allowing suppliers, retailers, and wholesalers right of access to OSBC's mediation services could therefore increase the effectiveness of the Code's mediation provisions for all parties.

Recommendation 9: The Code should be amended to provide that, where the parties to a dispute cannot agree on appointment of a mediator, a supplier based in NSW, or a retailer or wholesaler, may refer the matter to mediation by the Office of the NSW Small Business Commissioner's Dispute Resolution Unit.

Though prominent, the above-listed concerns are not the only impediments to suppliers utilising the Code's dispute resolution provisions. A further impairment⁴⁹ is that the Code allows a retailer or wholesaler to decline to participate in dispute resolution on the basis that it regards a grievance to be "vexatious, trivial, misconceived or lacking in substance", or has assessed that a supplier is acting in bad faith.⁵⁰ It is patently inequitable that the Code affords such broad discretion to retailers and wholesalers to opt out of dispute resolution on the basis of their own subjective assessment. In any case, if a grievance was so lacking in substance, it would be open to the authority overseeing the dispute to reach this conclusion on the basis of full and proper consideration of the facts.

Recommendation 10: The Code should be amended to provide that retailers and wholesalers may not refuse to participate in dispute resolution on the basis of their assessment that the subject of the complaint is vexatious, trivial, misconceived or lacking in substance, or that the relevant supplier is acting in bad faith.

c) *To promote and support good faith in commercial dealings between retailers, wholesalers and suppliers*

Most relevant to the issue of whether the Code is promoting good faith in dealings between retailers, wholesalers, and suppliers is Clause 28 - requiring signatories to act in good faith. OSBC's consultations suggest that many suppliers have found these provisions useful in their dealings with retailers. The wide construction and application of the good faith provision affords suppliers broad assistance.

However, the generality of the good faith provisions is also a double edged sword. In particular, good faith is a "nebulous" legal concept.⁵¹ What may or may not constitute 'good faith' in commercial dealings is in a great many instances not settled; indeed, the meaning of good faith is the frequent subject of litigation.⁵² As such, there is no consistent understanding of the meaning of good faith amongst retailers, wholesalers, and suppliers.⁵³ This uncertainty may serve to perpetuate confusion amongst suppliers as to the application of the good faith clause, and even shield a retailer or wholesaler acting in bad faith.

Amendments to Clause 28 that provide additional clarity on what good faith, in the context of the Code, includes but is not limited to, would address this concern without restricting the potential application of the provision. At the least, the Code should provide that any action by a retailer or wholesaler that confers a detriment on a supplier for trying to access rights under the Code is not undertaken in good faith.

Recommendation 11: The Code should be amended to provide that any action by a retailer or wholesaler that confers a detriment on a supplier for trying to access rights under the Code is not undertaken in good faith.

⁴⁹ Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, p. 132

⁵⁰ cl 35(2)-(3), 38(5)

⁵¹ Terry, A. & Di Lernia, C. (2009), '[Franchising and the quest for the Holy Grail: Good faith or good intentions?](#)', Melbourne University Law Review, vol 33, p. 575

⁵² Terry, A. & Di Lernia, C. (2009), '[Franchising and the quest for the Holy Grail: Good faith or good intentions?](#)', Melbourne University Law Review, vol 33, pp. 575-577

⁵³ Beaton-Wells, C. & Paul-Taylor, J. (2018), '[A code of conduct for supermarket-supplier relations: Has it worked?](#)', Australian Business Law Review, vol 46, no 1, pp. 22-23

Recommendation 12: The ACCC should consult with industry and legal experts, and suppliers and their representatives, regarding additional grounds upon which the Code could be amended to clarify the meaning of good faith.

6. Additional comments

a) Payment times

Late and extended payment times are a serious and growing issue for Australian small businesses. These practices restrict cash flow, prevent businesses from growing, and are the leading cause of business insolvency.⁵⁴ The OSBC notes with approval that, in response to the Australian Small Business and Family Enterprise Ombudsman's recent Inquiry into Payment Times and Practices, both Coles and Woolworths committed to processing payments to businesses with net annual sales of under \$1 million per annum within 14 days.⁵⁵ However, these commitments are of course non-binding, and do not compel the other major retailers and wholesalers to follow suit. The Code could be amended to resolve this shortcoming in industry practice.

Recommendation 13: The Code should be amended to provide that a retailer or wholesaler must process payments to small businesses within a prescribed period. The ACCC should have regard to the commitments made by Woolworths and Coles in this area in determining the prescribed period.

b) Subsequent reviews of the Code

As provided in Sections 1 and 2, the supermarket industry has undergone considerable change in recent years, and remains at risk of potential disruption. If realised, such changes would disrupt not only the shape of the market, but its business models. The prospective emergence of Amazon best exemplifies the potential changes facing the Australian supermarket industry - and the threat to the ongoing effectiveness of the Code. With no customer-facing presence in traditional storefronts (or very little⁵⁶), the Amazon business model diverges sharply from that of the current signatories to the Code. Given the Code was written before the emergence of major digital-only retailers, or even of digital retailing en masse,⁵⁷ it is unclear how relevant it may be to such business models.

At present, the Code only provides for the review to which this submission applies, occurring three years after implementation of the Code. In order to ensure the Code remains both appropriate and relevant to a rapidly changing industry, it should instead provide for ongoing, periodic review.

Recommendation 14: The Code should be amended to provide that the responsible Minister must review the Code every three years.

⁵⁴ Australian Small Business and Family Enterprise Ombudsman (2017), '[Payment Times and Practices Inquiry – Final Report](#)', pp. 4-5

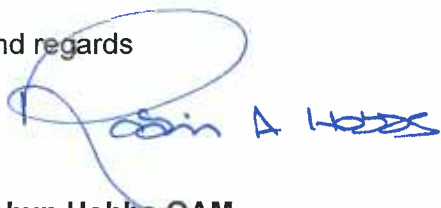
⁵⁵ Smart Company (13 April 2017), '[Woolworths to follow Coles with 14-day payment terms as supermarkets chase good relationships with suppliers](#)'

⁵⁶ ABC News (23 January 2018), '[Amazon Go concept store opens to public, ditching registers for smartphone app and cameras](#)'

⁵⁷ News.com.au (7 April 2016), '[Coles and Woolworths lagging in online sales](#)'

To discuss this submission, please contact Thomas Mortimer, Advisor, Advocacy and Strategic Projects, on (02) 8222 4196 or thomas.mortimer@smallbusiness.nsw.gov.au.

Kind regards

A handwritten signature in blue ink that reads "Robyn A. Hobbs". The signature is written in a cursive style with a large, looping initial 'R'.

Robyn Hobbs OAM
NSW Small Business Commissioner

7 May 2018