



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

February 2024

Dr Craig Emerson

The Treasury

Langton Crescent

PARKES ACT 2600

Via email: GroceryCodeReview@treasury.gov.au

Dear Dr Emerson,

Independent Review of the Food and Grocery Code of Conduct 2023–24.

Small and family businesses play a critical role in the supply and distribution of goods and services to the supermarkets. The Australian supermarket and grocery stores market is highly concentrated, with the top four companies generating 70% of industry revenue; namely Coles, Woolworths, Aldi and Metcash.¹ The two predominant companies (Woolworths Group and Coles Group) have a combined share of 57% of the market.²

This market concentration not only makes it difficult for small supermarkets, who have limited market share and purchasing power to compete with larger players, but also small and family businesses who supply to large supermarkets. These businesses generally face significant power imbalances when negotiating pricing and contract terms.

In considering reforms to the Food and Grocery Code of Conduct (the code), it is important to bear in mind that its purpose is to improve standards of business behaviour, including the conduct of retailers and wholesalers towards suppliers. It is not a mechanism for reducing vertical integration or determining appropriate prices along the supply chain. Industry codes of conduct cannot be a substitute for reforms to increase the competitiveness of the supermarket and grocery sector.

The ASBFEO makes the following recommendations to the committee to encourage more reasonable and transparent dealings in the Australian supermarket and grocery stores market:

Recommendation 1: The Food and Grocery Code of Conduct status (prescribed voluntary binding vs mandatory) is less important than incorporating key attributes, including:

- a. Maintaining a prior commitment to arbitration and process responsiveness**
- b. Support for and reporting on non-dispute-resolution informal problem-solving**
- c. safeguards are put in place to address concerns about retribution and preserve the code's compensatory agility**

There are potential costs and benefits from moving from a prescribed voluntary binding code (in which signatories agree to specific standards of conduct) to a mandatory code of conduct are not immediately apparent. A revised code (either prescribed voluntary binding or mandatory code)

¹ Ibisworld supermarket and Grocery stores in Australia Market size, Industry Analysis, Trends and Forecasts (2024-2029)

² Australia Market Overview 2024, Australia Market Overview, Hunt Export Advice. 2024.



could expand coverage of the sector beyond the major supermarkets and allow for additional substantive matters to be introduced. Such additional matters that are canvassed as part of the code Consultation Paper include:

- extension to broader aspects of the food and grocery supply chain, including other participants in the supply chain such as wholesalers/aggregators that sit between the retailers and producers of food and grocery products.

inclusion of alcoholic beverages within the scope of the code

better integration of the code with other sectoral codes of conduct, particularly in the agricultural sector

- directly addressing the fear of retribution by supermarkets
- more effective supervision and enforcement
- inclusion of closely related entities

While a mandatory code may facilitate the introduction of targeted civil penalty provisions, the commensurate procedural fairness requirements and diminished scope of timely restorative action may offset many of the perceived benefits. A mandatory code could well impede the low-cost, accessible and timely arbitration mechanism owing to Constitutional limitations.

That said, a shift to a mandatory code could be beneficial, provided that it would be accompanied by:

- securing a pre-commitment by major supermarkets to arbitration
- establishing more robust dispute-resolution processes and an independent arbiter, to give suppliers the confidence to raise matters without the fear of losing future business
- preserving the ability of the Code Arbiter to provide an affordable, fast and fair remedy to small business complainants

The code makes provision for the Code Arbiter to determine that a retailer or wholesaler act in response to a complaint, enabling small businesses the opportunity to access an affordable, fast and fair remedy. Part 5 of the code section 36 empowers code arbiters to determine that the retailer or wholesaler pay compensation to the supplier up to \$5 million or vary a grocery supply agreement.

In evaluating the merits of a mandatory code, the government should consider retaining Part 5 section 36 of the code and the benefits afforded to small businesses. Retailers and wholesalers may be more amenable to moving to a mandatory code if mechanisms for procedural fairness are included. The compensation provision is currently at the discretion of the code arbiters and is a remedial provision that can be exercised without external involvement enabling commercial relationships to continue without being compromised.

The ASBFEO supports processes that favour efficient, affordable and commercially sound outcomes that enable business relationships to continue. Compensatory agility preservation of the economic interests of small businesses which are at detriment when disputes arise.



Recommendation 2: Improve the Food and Grocery Code of Conduct: Alternative Dispute Resolution Provisions.

Supplier confidence in the code is vital to ensure the code remains relevant, functional, and fit for purpose. We therefore make the following key recommendations and comments for the committee's consideration:

a) The code reviewer should be afforded additional powers to ensure capacity to perform their duties efficiently, effectively and robustly.

Empowering the reviewer to complete thorough quality control evaluations to identify compliant experience, process deficiencies and recommend corrective actions, will help to build stakeholder confidence, reduce systemic risks, and promote continual improvement. To support effective operation of the code and alternative dispute resolution (ADR) processes, the reviewer should have adequate powers to gain access to stakeholder's files, as well as to any documentation and explanations for any conduct that would assist the conduct of systemic reviews. For example, to effectively review the effect of key performance indicators that can have critical impacts on supplier relationship outcomes would require access to a broad range of documentation and explanation of their practical operationalisation.

b) The Australian Government should consider expanding sectoral scope to capture all closely held entities to the signatories and the fresh produce sectors, via the amendment of the code's dispute resolution timeframes to ensure fresh produce suppliers have access to timely, cost efficient and equitable ADR options.

While acting in good faith should ensure a dispute is responded to in a timely manner, this is not always the case. The code should ensure timeframes for resolving disputes (including price negotiations) related to perishable goods more accurately acknowledge supplier's product spoilage risk and seek to mitigate this power imbalance and vulnerability against small business supplier. Restructuring within the signatories has produced closely held entities that engage in food and grocery supply relationships but sit outside the Code's reach.

c) Penalties and supplier remediation for breaching the code should be proportionate, effective, and targeted deterrents to retailers and wholesalers seeking to utilise the often-significant power imbalance to the detriment of small business.

Enforcement and penalties under the code should adequately accommodate both systemic breaches and uniquely individual matters. This could include referral to enforcement agencies who can apply monetary penalties, as well as the publication of code breaches, and self-reporting through environment, social and governance reporting requirements. Greater penalties for breaching the code would increase small business supplier confidence in their market, reward their efforts and investment, and reduce oppressive cartel behaviour.

d) Revise the code to give particular reference to the circumstances of smaller suppliers and bespoke processes that reflect supplier size, sophistication and access to specialist advice.

Food and grocery suppliers can be anything from a multi-national billion-dollar enterprise to a small family firm producing a popular specialist item. It is more likely the larger



business will be able to call on seasoned professionals in its own team or access the specialist skills, advice and commercial acumen to engage effectively in the more robust negotiation and to activate options (including exercising code provisions) to advance its interests.

A smaller firm will have less capacity to defend its interests and should be able to access support in identifying problem-solving options including activating code provisions. Just as the informal support of code arbiters has been recognised to be highly valued and a less confrontational path to dispute resolution, enhancing this ‘problem solving’ approach with additional tools would be helpful.

These could include permitting industry associations or agents to represent their interests, the provision of a supplier advocate, process ‘conciierge’ or source of counsel, to explore alternatives and explain available decision-support information. The central imperative is the solving of problems while maintaining mutually beneficial commercial relationships. For a small supplier, initiating a formal dispute is viewed as a ‘nuclear option’ and helps to explain why so few activate this course of action.

The code should also protect smaller suppliers from agreeing to opt-out/set aside ‘by agreement’ safeguards and protections expressly provided for by the code.

Recommendation 3: Establish an Independent Arbiter or extend the functions of the Independent Reviewer for the Food and Grocery Code of Conduct.

As the code currently stands, code arbiters are appointed by retailers, and suppliers who have grievances must seek access to arbitration through these means. Fears of retribution by small suppliers are indicated by the small number of disputes raised with the code arbiters. Only five complaints have been lodged with the Code Arbiters over the time the current dispute resolution model has been in place and each complaint is related to the same signatory.³

The low level of supplier engagement with the current code could arise from the code arbiters, who go to considerable length to protect and project their independence, still being perceived as a signatory appointment. Extending the role of the Independent Reviewer to provide an indisputably and visibly arm’s-length review option of the code arbiters’ decisions and thorough quality control evaluations to identify process deficiencies and recommend corrective actions, will help to build stakeholder confidence. Alternatively, an independent arbiter could be appointed by government, to ensure that major retailers treat their direct suppliers lawfully and consistently with the code.

The United Kingdom has an operating better practice model of an independent arbiter captured by the Groceries Code Adjudicator (GCA). The GCA regulates relationships between suppliers and retailers by encouraging, monitoring and enforcing compliance with the Groceries Supply Code of Practice. The adjudicator is appointed by the UK government and is an office within the Department for Business and Trade.

Arbitration by the GCA handles disputes between designated retailers and their direct suppliers. These awards are binding and may include compensation. If matters of a similar nature are repeatedly reported to the GCA by suppliers, the Adjudicator can publish formal guidance. Where

³ Treasury, *Review of the Dispute Resolution Provisions in the Food and Grocery Code*, consultation paper, 5 December 2022, p. 11.



there are reasonable grounds to suspect a breach of the code, the GCA has powers to investigate. If a code breach finding is made, the GCA can make recommendations and require retailers to publish details of any breach. In the most serious cases, the GCA can impose fines.

Recommendation 4: Introduce a Small Business and Codes List in the Federal Circuit Court and Family Court of Australia

The effectiveness of the range of requirements under industry codes of practice is limited owing to the ability (or willingness) of small businesses to raise issues and enforce requirements under the codes.

Mandatory alternative dispute resolution under the codes is important and generally effective in dealing with a broad range of disputes. However, it does not necessarily resolve all aspects of disputes; and, where disputes do not resolve, the next step is commonly either to engage in formal legal action or abandon the dispute altogether.

Dispute resolution and code enforcement could be enhanced via the creation of a Small Business and Codes List (the List) in the Federal Circuit Court and Family Court of Australia, which fall outside of the ADR options available under the code. This would provide small businesses with a timely means to directly pursue their commercial interests and receive a determinative outcome. The size of disputes appearing on the List could be capped, the parties could be required to bear their own costs and court processes including ADR could be delivered via online hearings, significantly reducing the time and cost burden on a small business.

A Small Business and Codes List in the Federal Circuit Court of Australia would complement the government's proposal to grant the Fair Work Commission new powers to deal with disputes about unfair contract terms involving independent contractors earning less than a high-income threshold. This jurisdiction would also cover matters that fall outside the Fair Work Commission's jurisdiction and provide a holistic timely and cost-effective resolution mechanism.

Recommendation 5: The ACCC as part of its *Supermarkets inquiry 2024-25* to investigate the effects of the Australian grocery market concentration on small and family businesses.

- a) Addressing vertical integration** – As the major supermarket retailers acquire or establish companies that produce and distribute food and groceries, they become vertically integrated in their supply chains. Lack of competition arising from such integration significantly shifts bargaining power away from suppliers to the supermarkets.

Often the major retailers are the main or sole customers of small business suppliers, who are faced with the need to promote and maintain strong business relationships and have limited power to negotiate terms of trade.

The ASBFEO urges the ACCC's Supermarkets inquiry to consider reforms to reduce barriers to entry, attract new entrants and drive more robust competition between incumbents.

- b) Unfair trading practices** – The government should explore policy options to encourage a more competitive grocery market including developing an unfair trading practices framework.

Small businesses are often placed under financial pressure as the major retailers can dictate terms that go against the economic interests of the suppliers. The major retailers



often monitor the suppliers input costs which results in demands being made for ‘cost downs’ that may not be reflective of actual input costs incurred by suppliers and it maybe failing to account for further key costs that have occurred.

Shrinkage is further prohibited under the Food and Grocery Code of Conduct . However, the bargaining power of the large retailers could mean that they require suppliers to make payments to the retailer as compensation for shrinkage. For example, compensation demands can be made once theft or loss has occurred after a retailer has taken possession of groceries. ASFEBO understands that these issues will be addressed in the 2024 Food and Grocery Code of Conduct Review by Dr Craig Emmerson and by the ACCC Supermarket Inquiry 2024 – 25.

The ASBFEO recommends an extension of the good faith dealing principles of the code to be applied to the whole of the relationship. The current code has a key unilateral element in which suppliers are not encouraged to engage in good faith with supermarkets therefore it can be interpreted that it does not apply to suppliers. Modifying the code to acknowledge that a positive relationship must be fostered from both sides of the commercial relationship will provide the supermarkets with further incentives for compliance.

- c) Unfair contract terms** – Suppliers and the major chains set up supplier agreements under the Grocery Supply Agreement (GSA), prescribed in the code. There are concerns that some suppliers with weak bargaining power are not able to negotiate reasonable GSA terms or are vulnerable to unreasonable terms. Owing to the concentration of the grocery market, retailers often require suppliers to change their packaging, logistics and software as a condition of maintaining a supply relationship. The ASBFEO is also aware of small suppliers facing threats of delisting at the eleventh hour if unfair terms are not agreed to, r being held accountable for costs or disruptions beyond their control.

Unfair contract terms provisions also disproportionately effect fresh food suppliers as the perishability of the products leads to limited time to find and negotiate supply agreements with other possible retailers. It forces their hand in accepting conditions put forth by large supermarkets. Although there are legislated unfair contract term provisions that have general operation, targeted and practical rules of conduct that apply to the specific sector and are not limited to particular types of contracts are beneficial in ensuring that contracts do not unintentionally include unfair contract terms.

Recommendation 6: Establish a more comprehensive and transparent reporting regime

ASBFEO consultations on the code revealed that despite an apparent lack of disputation, suppliers have used informal processes enable by code arbiters to escalate and resolve issues with retailers. This alternate ‘problem solving’ pathway should be recognised, promoted, and encouraged.

The ASBFEO recommends that the independent reviewer publish the following data to indicate vital signs:

- how many informal ‘requests for assistance’ matters have been addressed
- whether advice, support to engage with the signatory, dispute resolution facilitation, escalation to a formal dispute or some other action arose from the ‘request for assistance’



- the number and nature of disputes and resulting action
- the issues, behaviours and prior actions that led to the dispute
- reoccurring areas of concern
- the buying group to which the dispute relates
- outcomes or subsequent actions
- post-dispute resolution process experience of the supplier (by way of after-the-event interview)
- subsequent commercial dealings review (as a potential marker of retribution).

Publishing this data will give all parties visibility of what the problems are, what actions are required, and indicate the extent to which they reveal a systemic problem. Reporting will provide more information about how supermarkets make decisions. For example, double deducting only comes to light when small suppliers sell businesses.

A more transparent dispute-resolution process, with greater consistency of information and reporting functionality between the arbiters and the Independent Reviewer, will improve small business engagement with the code. It will provide insights into behaviours or contract terms that result in potential disputes as it may act as a guidance mechanism and a focal point for further Independent Review inquiry.

There is a widespread perception issue about the confidence suppliers can have in the closely held code processes and resources operationalised by the signatories. Small businesses suppliers express a wariness about the independence of arbiters, who are supermarket funded.

The overriding perception is that they are captive despite the active steps arbiters take to underline their independence and the absence of any evidence that this independence has been compromised. To improve the independence of the arbiter greater transparency of the support and facilitation in informal dispute resolution processes should be made available. The arbiter could provide:

- published guides and case studies on how the arbiter has assisted suppliers, representative industry bodies and agents
- arbiter interventions and counselling processes between suppliers and category managers; reporting on post-dispute relationship with the supplier
- and asking the independent reviewer to follow-up with small suppliers.

Even if the number of disputes remains low, greater reporting on successful informal processes may demonstrate that the code is working as intended.

Recommendation 7: Calibrate the Food and Grocery Code of Conduct to recognise small suppliers.

Retailers manage numerous suppliers across a variety of product categories, including small businesses who are predominantly involved in the supply of perishable food. For example, Woolworths partners with 18,000 suppliers, including 5,000 (27%) who meet the Payment Times



Reporting Scheme definition of a small supplier.⁴ However, the code does not provide a distinction between large and small organisations omitting the unique constraints of small suppliers.

Compared to their multinational counterparts, small businesses generally do not have the time, resources and legal expertise to effectively negotiate contracts with retailers. Their preparedness to potentially withstand economic losses coming out of high stakes negotiations is lower than those of multinationals. Allowing small businesses suppliers to be represented by an association may be a viable means of strengthening their position.

Further, a better calibration of the code for small businesses will provide protection for small businesses against infringements on the intellectual property rights of small business owners through the shelving of home brand products that simply emulate their innovations.

Case study: How home-brand products impede on the economic interests of small business.

The small business in question is an online subscription razor delivery service. The owner had engaged with the Woolworths product selection and range review process on stocking their range of razors at Woolworths stores. However, Woolworths own-brand range of personal care products, available exclusively through stores was also of a similar name. The business owner had received complaints from customers that as they Google-searched his razor product with keywords the immediate search result was not his razors but those of the Woolworths home brand.

Home brand products present cheaper often foreign-sourced alternative products to customers. The extent to which small business can withstand the financial pressures arising from possible trademark infringements is limited. Establishing communication with the supermarket on possible infringement, sourcing information from third party entities and regulators, engaging in mediation and accessing the courts to pursue their case are all barriers for time poor small businesses to protect their products before their business is harmed. Further, economic concerns also arise as evident through the case study when small businesses are purely based on an online platform with no physical presence on store shelves. Therefore, the inclusion of a calibrated code with special provisions for small businesses may build small business suppliers' confidence by reducing weakness in the code.

Thank you for the opportunity to contribute the inquiry. If you would like to discuss this matter further, please contact advocacy@asbfeo.gov.au.

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman

⁴ Woolworths, *Submission to the Statutory Review of the Payment Times Reporting Act 2020*. The Woolworths Group. Payment Times Reporting Act Review Secretariat. The Treasury. March 2023