



Law Council
OF AUSTRALIA

Business Law Section

14 March 2024

Ms Anna Barker
Acting Assistant Secretary
Grocery Code Review Secretariat
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: GroceryCodeReview@treasury.gov.au

Dear Ms Barker

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

1. The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) is pleased to make this submission in response to the February 2024 *Independent Review of the Food and Grocery Code of Conduct 2023–24 Consultation Paper*.
2. The SME Committee has, as its primary focus, the consideration of legal issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.
3. In the interests of full disclosure, one of the members of the SME Committee is Ms Bronwyn Gallacher, who is currently the ALDI Code Arbitrator. Ms Gallacher has not contributed to the preparation of this submission in any way.

Previous Submissions

4. The SME Committee has previously lodged several submissions with the Treasury in relation to the *Food and Grocery Code of Conduct* (the **Grocery Code**).
5. In September 2014, the SME Committee lodged a submission in response to the *Improving Commercial Relationships in the Food and Grocery Sector* report and the draft Grocery Code.¹ In that submission, the SME Committee expressed the view that the Grocery Code should be a mandatory code.

¹ Business Law Section, Law Council of Australia, *Submission in relation to 'Improving Commercial Relationships in the Food and Grocery Sector' and the draft Food and Grocery Code of Conduct* (12 September 2014) <<https://lawcouncil.au/publicassets/2ba0844f-e1d6-e611-80d2-005056be66b1/140912-Submission-2884-Food-and-Grocery-Code-of-Conduct.pdf>>.

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6. In August 2018, the SME Committee lodged a submission in response to the June 2018 'Draft Report into the Independent Review of the Food and Grocery Code of Conduct'.² In its submission, the SME Committee reiterated its position that the Grocery Code should be a mandatory code. The SME Committee continues to hold this view.
7. In February 2023, the SME Committee lodged a further submission in response to the December 2022 Consultation Paper, 'Review of the Dispute Resolution Provisions in the Food and Grocery Code'.³ For the Treasury's convenience, a key extract from the SME Committee's submission is set out below.⁴

The main concern which the SME Committee has about the current dispute resolution framework is the low level of complaints. This level of complaint seems inconsistent with the level of concern among suppliers about the conduct of certain grocery retailers as demonstrated by the two Australian Competition and Consumer Commission (ACCC) cases taken in 2014⁵ and 2016.⁶

This level of complaint also seems to be inconsistent with the level of concern raised by suppliers in the context of each of the previous reviews concerning the Grocery Code.

The SME Committee also notes the statement in the Consultation Paper on page 9:

These (informal) arrangements were also proposed to address the proportionally low number of complaints being brought to the Code Arbiters, compared with the number of informal complaints filtering through other avenues, including reports made to industry bodies and the Independent Reviewer.

Whilst the SME Committee agrees that the introduction of the Grocery Code was likely to have reduced the level of inappropriate conduct occurring in the grocery sector towards suppliers, it believes that there remains a high degree of concern amongst suppliers about the conduct of Grocery Code signatories. It believes that suppliers are unwilling to invoke the dispute resolution processes of the Grocery Code due to a concern that it is not independent and effective, as well as the potential concerns about the risk of retribution.

² Business Law Section, Law Council of Australia, *Draft Report into the Independent Review of the Food and Grocery Code of Conduct* (Submission, 1 August 2018) <<https://lawcouncil.au/resources/submissions/draft-report-into-the-independent-review-of-the-food-and-grocery-code-of-conduct>>.

³ Business Law Section, Law Council of Australia, *Review of the Dispute Resolution Provisions in the Food and Grocery Code* (Submission, 1 February 2023) <<https://lawcouncil.au/resources/submissions/review-of-food-and-grocery-code-of-conduct>>.

⁴ Ibid 3-5.

⁵ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 45.

⁶ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 147.

The SME Committee also notes the following table from the Independent Reviewer's Annual Report for 2020–21 which records the number of suppliers contacted as part of the Independent Reviewer's survey:⁷

Table 1. Responses as a proportion of Code signatories' contacts

Signatory	Responses per retailer/wholesaler	Supplier contacts sent survey	Responses as a proportion of supplier contacts (%)	Number of suppliers per retailer/wholesaler
Woolworths	313	2115	15%	1152
Coles	306	5327	6%	2114
Metcash	256	3869	7%	1375
Aldi	207	828	25%	828

The Independent Reviewer also noted that of the suppliers which responded:

- 81 per cent of the responses indicated that suppliers were always or mostly treated fairly and respectfully by their retailer/wholesaler;
- 16 per cent identified that their retailer or wholesaler acts unreasonably at times; and
- 2 per cent identified that their retailer frequently acts unreasonably or with duress.

This translates to the following based on 1082 responses:

- 1335 suppliers who were always or mostly treated fairly and respectfully by their retailer/wholesaler;
- 173 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 21 suppliers who believed that their retailer frequently acts unreasonably or with duress.

If one were to extrapolate these percentages to the entire number of suppliers (ie 12,139) the results would be as follows:

- 9832 suppliers who were always or mostly treated fairly and respectfully by their retailer/wholesaler
- 1942 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 242 suppliers who believed that their retailer frequently acts unreasonably or with duress.

⁷ Food and Grocery Code Independent Reviewer, *Annual Report 2020-21* (2021) <<https://grocery.codereviewer.gov.au/reports/annual-reports/2020-21-annual-report>>.

The results from the Independent Reviewer 2021–22 survey were largely similar to the previous year:⁸

Table 2. Responses as a proportion of Code Signatories' contacts

Signatory	Survey responses per retailer/wholesaler	Number of supplier contacts that were sent the survey	Survey responses as a proportion of supplier contacts sent the survey (%)	Number of suppliers per retailer/wholesaler
Woolworths	267	1,654 ¹²	16%	3,200 ¹³
Coles	274	1,811	15%	1,925
Metcash	241	3998	6%	2140
Aldi	217	1,440	15%	1,675

The Independent Reviewer also noted that of the suppliers which responded:

- 50 per cent indicated that they were always treated fairly and respectfully by their retailer/wholesaler;
- 38 per cent identified that their retailer/wholesaler mostly treated them fairly and respectfully;
- 9 per cent identified that their retailer/wholesaler acted unreasonably at times; and
- 2 per cent identified that their retailer/wholesaler frequently acts unreasonably or with duress.

Based on a total of 999 responses, this translates to the following:

- 1998 suppliers who were always treated fairly and respectfully by their retailer/wholesaler;
- 378 suppliers who were mostly treated fairly and respectfully by their retailer/wholesaler;
- 89 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 20 suppliers who believed that their retailer frequently acts unreasonably or with duress.

As is apparent from the above statistics, the level of complaint to the Code Arbiters is inconsistent with the concerns expressed by a not insignificant number of suppliers as demonstrated by the Independent Reviewer's survey results.

⁸ Food and Grocery Code Independent Reviewer, *Annual Report 2021-22* (2022) <<https://grocery.codereviewer.gov.au/reports/annual-reports/2021-22-annual-report> >.

Responses to the consultation questions

Question 1: What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?

8. In the SME Committee's view, the current purposes of the Grocery Code are appropriate, namely:⁹
- (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; and*
 - (b) *to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and*
 - (c) *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; and*
 - (d) *to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.*

Question 2: Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

9. As is apparent from its previous submissions, the SME Committee does not consider that a voluntary Grocery Code—which does not allow for penalties where there has been a breach—can effectively address the bargaining power imbalances between supermarkets and their suppliers. The SME Committee considers it anomalous that penalties apply under other industry codes, such as the Franchising Code of Conduct, the Horticulture Code and the Dairy Code, but not under the Grocery Code.

Question 3: Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?

10. In the SME Committee's view, there is an imbalance in market power between supermarkets and virtually all suppliers. This is due to the extremely high market shares of the two largest grocery retailers. As a result of these market shares, very few suppliers would be in a position to dictate pricing or trading terms to either of the two major retailers.
11. Furthermore, almost all suppliers, except for some small niche suppliers, require access to the shelf space provided by the two major grocery retailers in order to achieve profitability.

⁹ Food and Grocery Code of Conduct, sch 1, s 2.

Question 4: Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

12. The Grocery Code should be extended to cover all supplier interactions, given the level of vertical integration. For example, various major grocery retailers provide wholesaling services, and are backward vertically integrated into both processing and manufacturing.¹⁰

Question 5: Should the Code be extended to cover other aspects of the food and grocery supply chain?

13. An area of concern amongst suppliers is the security of their intellectual property when dealing with the major grocery retailers. Suppliers are often concerned at the major grocery retailers developing their own copycat home brand or generic brand product of a popular branded product. Suppliers are also concerned about major retailers demanding that they manufacture a home brand or generic brand in a particular category for the grocery retailer that is of the same standard as the suppliers' branded products. The major grocery retailers often sell this high quality home brand or generic brand product at a significantly reduced price.
14. While such conduct clearly benefits consumers, it causes detriment to suppliers. It is also arguable that such conduct would be seen in economic terms as creating an inefficient allocation of resources, due to the exercise of monopsony power.

Question 6: Should some or all alcoholic beverages be included in the scope of the Code?

15. Alcoholic beverages should be included in the coverage of the Grocery Code. Not only is the market for the retail supply of alcoholic beverages highly concentrated, but both major supermarkets have been proven in ACCC proceedings to have engaged in anti-competitive conduct, in contravention of the law, in this sector by entering into deeds directed to preventing new entry.¹¹ The SME Committee also notes the increasing level of vertical integration in this sector.

¹⁰ Recently, Coles has backward vertically integrated into dairy processing with the acquisition of two milk processing plants from Saputo.

¹¹ Australian Competition and Consumer Commission v Liquorland (Australia) Pty Limited [2006] FCA 1799 (Woolworths penalty), Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd [2006] FCA 826 (Woolworths liability), Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd (ACN 007 512 419) [2005] FCA 683 (Coles/Liquorland liability and penalty).

Question 7: Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code’s signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

16. The SME Committee is of the view that it would be appropriate to extend the Grocery Code to other grocery retailers, such as Costco, as well as the large wholesalers. There is significant inequality of bargaining power between the major wholesalers and smaller product suppliers and small independent grocery retailers .

Question 8: Do the provisions set out under the Code ensure it is fit for purpose?

17. In the SME Committee’s view, the Grocery Code is not fit for purpose for three reasons:
- it is voluntary and not mandatory;
 - there are no penalties for breach; and
 - the system of Code Arbiters being appointed by the grocery retailer signatories is inappropriate and undermines the perceived legitimacy of the Grocery Code.

Question 9: Which provisions under the Code help or hinder suppliers? How can the provisions be improved?

18. As discussed elsewhere in this submission, the SME Committee is of the view that the Grocery Code should be mandatory and subject to penalties for breaches. The role of the Code Arbiters should also be removed.

Question 10: Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

19. There is an anomaly between the Grocery Code and other industry sectoral codes—such as the Horticulture and Dairy Codes—which are both mandatory and subject to penalties.

Question 11: What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?

20. The SME Committee considers that the United Kingdom Groceries Supply Code of Practice (the **UK Code**) provides the most valuable insights about how to regulate the conduct of supermarkets, given it has been in operation since 2013 and permits the Groceries Code Adjudicator to arbitrate disputes.
21. While the SME Committee acknowledges that there are Constitutional issues with implementing a similar arbitral system in Australia, further consideration should be given to introducing an ombudsman scheme based on the Australian Financial Complaints Authority (**AFCA**) model.

Question 12: What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers' concerns of retribution?

22. The SME Committee considers that mediation and other potential mechanisms could be administered that would most effectively facilitate positive outcomes. However, each of these dispute resolution mechanisms must be administered by an independent government body, such as the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**), rather than Code Arbiters appointed and funded by the grocery signatories.

Question 13: What benefits could a mandatory Code bring to suppliers?

23. A mandatory Code would improve the conduct of the major grocery retailers, and there would also be a clearer role for the ACCC in terms of enforcement. Whilst the ACCC has been very active over the last 12 to 18 months in the enforcement of the mandatory Horticulture and Dairy Codes, this has not been the case under the voluntary Grocery Code.

Question 14: If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?

24. There should be a threshold based on turnover, with a further Ministerial discretion to designate particular businesses, which may be below those thresholds, to be bound by the Grocery Code. This latter situation could arise where a business has a degree of market power in a particular market segment, despite falling below the turnover threshold.

Question 15: Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

25. While the SME Committee acknowledges the Constitutional issues associated with introducing binding arbitration at the Federal level, it considers that there may be ways of introducing a scheme based on the AFCA model.

Question 16: Are Code Arbiters perceived to be independent from the supermarkets that they oversee?

26. The SME Committee considers that Code Arbiters are not perceived to be independent from the supermarkets that appoint and pay them.
27. The SME Committee is not suggesting that the Code Arbiters do not undertake their role independently and with integrity. Regardless, there appears to be a strong perception amongst suppliers that the Code Arbiters are not independent.

Question 17: If not, how could the reality and perception of independence of Code Arbiters be enhanced?

28. The reality and perception of independence of Code Arbiters could be enhanced if they were selected and appointed by a third party, for example by the ACCC or the ASBFEO. The SME Committee understands that in other jurisdictions—for example, the United States—company compliance monitors are routinely selected and appointed by the Department of Justice or an equivalent agency.

Question 18: Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

29. As stated in its February 2023 submission to the Treasury in response to the review of the dispute resolution provisions in the Food and Grocery Code,¹² the SME Committee does not believe that there are appropriate protections in place for suppliers using the formal Code Arbiter processes.
30. There are no sanctions that would apply to Grocery Code signatories in the event that adverse action or retribution is taken against a supplier for having pursued the formal Code Arbiter process. This contrasts with section 162A of the *Competition and Consumer Act 2010* (Cth) which creates a criminal offence for the following conduct:

Intimidation etc.

A person who:

- (a) *threatens, intimidates or coerces another person; or*
- (b) *causes or procures damage, loss or disadvantage to another person;*

for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission, the Tribunal or the AER, or for or on account of the other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Question 19: Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?

31. The primary evidence that suspected breaches of the Grocery Code are not being enforced due to a lack of civil penalty provisions comes from the following statement by the ACCC, as provided on page 14 of the Consultation Paper:

The ACCC has indicated it will not commit extensive resources to regulate compliance with the Code as it “... does not provide the ACCC with meaningful compliance and enforcement tools”.

¹² Business Law Section, Law Council of Australia, *Review of the Dispute Resolution Provisions in the Food and Grocery Code* (Submission, 1 February 2023) <<https://lawcouncil.au/resources/submissions/review-of-food-and-grocery-code-of-conduct>> 2-3.

32. It makes sense to the SME Committee that the ACCC would not be rigorously enforcing the Grocery Code in circumstances where it does not believe it could achieve meaningful specific and general deterrence through the imposition of penalties, where breaches have occurred. Indeed, enforcement action in such circumstances may be seen as an inefficient use of the ACCC's finite resources.

Questions 20 and 21: Should civil penalties be available for breaches of the Code? If civil penalties are to be applied to the Code, what penalties are appropriate?

33. As a general principle, the Business Law Section considers that obligations that carry significant civil penalties for breaches should be contained in primary legislation. This position is consistent with the Australian Law Reform Commission's (ALRC) 2003 Report on federal civil and administrative penalties in Australia,¹³ and its 2023 Report on reforming corporations and financial services legislation.¹⁴
34. Nonetheless, the Business Law Section recognises that this is not always the case in practice. For example, the Franchising Code of Conduct imposes significant civil penalties for breaches of several key provisions,¹⁵ where the maximum penalty for companies is the greater of:
- \$10,000,000;
 - three times the value of the benefit the company has attained due to a breach of the provision; or
 - if the court cannot determine the value of that benefit, 10 per cent of the annual turnover of the relevant body corporate during the preceding 12 months.
35. The SME Committee is of the view that, consistent with the Franchising Code of Conduct, civil penalties should also be available for breaches of the Grocery Code, as this will assist to achieve both specific and general deterrence in the food and grocery sector through more effective compliance and enforcement mechanisms. However, the provisions of the Grocery Code that should have penalties attached—and the appropriate size of those penalties—will require further consultation to ensure that their imposition is justified.

¹³ ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report 95, March 2003) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf>> Recommendation 6-1.

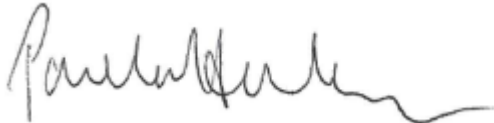
¹⁴ ALRC, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Report 141, November 2023) <<https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf>> Recommendation 47 and Appendix D [D.21].

¹⁵ See Franchising Code of Conduct, cl 17, 33, 46A, 46B.

Further discussion

36. The SME Committee would welcome the opportunity to discuss any aspect of this submission.
37. Please contact Mr Bruce Collins, the Chair of the SME Committee, on 0409 440 415 or at bruce@taxcontroversypartners.com.au if you require further information or clarification.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Pamela Hanrahan', with a long, sweeping horizontal flourish extending to the right.

Dr Pamela Hanrahan
Chair, Business Law Section