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Competition Policy Unit
Treasury
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Via email: IndustryCodeConsultation@treasury.gov.au

Subject: Submission to exposure draft of the mandatory Food and Grocery Code of Conduct

Thank you for the opportunity to provide a response to the exposure draft of the Mandatory Food and Grocery Code of Conduct (hereafter, the Code). NSW Farmers understands that the draft Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024 is intended to make amendments Code is intended to:

- Ensure that large grocery businesses deal with suppliers lawfully and in good faith
- Provide for specific protections for fresh produce suppliers
- Protect suppliers against retribution
- Provide for the resolution of disputes

To address the harmful impacts of market power imbalances for producers in the food and grocery supply chain, NSW Farmers has called for a FGCC that:

- Recognises and addresses the specific vulnerabilities faced by suppliers who supply perishable goods including agricultural produce.
- Is mandatory for all retailers and wholesalers.
- Has the ability to apply significant civil pecuniary penalties when it is breached including necessary enforcement tools for the ACCC to protect suppliers against signatories that fail to comply with its requirements.
- Is amended to ensure a genuinely independent dispute process to resolve supplier complaints.
- Has appropriate enforcement tools available to the ACCC to enable issues identified independently to be acted upon.
- Public reporting of the code provides important accountability and intelligence on supplier relations with code signatories.

In principle, NSWFA welcomes Government's response to implement a Food and Grocery Code of Conduct that is mandatory through this regulation. However, there are several provisions in the draft Code that raise significant concerns for its efficacy in achieving its objectives. These are outlined in the sections below.

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Protections against retribution

Specific prohibitions against retribution in the Code are welcome, as are substantial penalties for breaching the Code. However, the Code should also provide that where there is proven retribution – for example, delisting a supplier’s products or unilaterally cancelling a Grocery Supply Agreement (GSA) – that the large retailer is obliged to restore the supply agreement under the length of its term under the supervision of the independent Code Supervisor.

Ability to opt out of mandatory provisions of the code

A mandatory code of conduct is only as strong as the provisions they bind their parties to. NSWFA notes with concern that all of the provisions outlined in Division 4 (Conduct generally) do not apply if, on the balance of probabilities and with no regard to impact to suppliers:

- The GSA sets out where the exception may occur and are required
- Is an allowable contrary provision
- Is made in accordance with the agreement
- Is reasonable in the circumstances

NSWFA considers that the burden of proof is so low, especially without any requirement to take into consideration the likely detriment to the supplier, or seek any information to inform the likely detriment, that large retailers will be able to opt out of nearly all of the general provisions of the Code, rendering it mandatory in name only. The risk is increased if GSAs with broad exemptions become the norm, and widely applied as the default text in any new agreements between retailers and suppliers. The provisions of the Code must therefore be redrafted to raise the burden of proof for exemptions, and require evidence that the exemptions do not leave suppliers worse off.

Conflicting requirements to forecast quantities to be supplied

Section 19 (1)(e) states that a GSA must, in clear terms, include any quantity and quality requirements relating to the grocery products. Further, 19(7) includes an obligation to forecast the amount of produce supplied with due care, however 19(8) does not require that forecast to be included in the GSA. NSWFA notes that these sections of the Code are in direct conflict with each other and are incompatible – any quantity requirements included in a GSA can only be interpreted as a forecast of volumes required. It is impossible for a GSA to simultaneously include reasonable quantity requirements, but not forecast when they should be delivered. Additionally, no forecasting can be considered to be undertaken with due care if the outputs, underlying assumptions, and uncertainties associated with those forecasts are not shared.

Independence of Code Mediators and Supervisor

Section 45(1) states that each grocery business bound by the Code must appoint and resource a Code Mediator of its choice. NSWFA considers this to be an insurmountable actual and perceived conflict of interest which will deter any supplier from raising complaints. A Code Mediator whose performance and remuneration are managed and adjudicated by the very retailers whose behaviour they are meant to monitor cannot be considered independent. Alternatively, it would be considered more appropriate for large retailers to pay an amount to the office of the Code Supervisor, which can be used to resource Code Mediators under their direct employment and assigned to each retailer to carry out their functions.

In addition, NSWFA notes with concern that the Code Supervisor under section 60(2) must act collaboratively with large grocery businesses. It is not considered appropriate that an arms-length watchdog should be obliged to maintain a close working relationship, openly share

information or process details which may prejudice investigations, or share the contents of reports before their publication with large retailers in order to maintain the perception or character of a 'collaborative' approach to monitoring and enforcement. Such a requirement must be removed from the remit of the Code Supervisor's obligations.

Anonymity and adequacy of the complaints resolution process

Sections 49 and 50 deal with the complaints resolution process, and stipulate that the Code Mediator shall not disclose the supplier's identity to the retailer, while taking all reasonable steps to investigate the complaint. NSWFA expresses reservations as to whether it is feasible to simultaneously investigate a complaint while maintaining the supplier's anonymity. NSWFA recommends that Code Mediators be able to initiate investigations into any part of the retailer's supply chain at any time, without the need to act on specific complaints, and to make recommendations for proposed remedies (as per Section 53) with respect to any GSAs or trading practices it finds are in breach of the code based on their findings. The decision to investigate may be informed for example, by previous complaints made, or current general intelligence of non-adherence to the code in any supply chain.

Inadequate protections for a failure to act in good faith with respect to indirect suppliers

Section 17(3) outlines some considerations that may be taken into account when deciding whether or not a supermarket has acted in good faith in its dealings with a supplier. However, the provisions do not take into account the fact that dealings with direct suppliers (such as aggregators, who may also be farmers themselves) have direct ramifications for downstream suppliers like farmers whose produce is being fed into the supply chain. For example, a supermarket engaging in unfair pricing against a farmer-aggregator will have a direct flow-on to the other farmers feeding into that supply chain. NSWFA recommends that an additional consideration within section 17(3) of the Code be included to the effect of 'whether the trading relationship of the large grocery business with the supplier has been conducted in recognition of the specific vulnerabilities of indirect suppliers, and the flow-on impacts of pricing, volume and all other aspects of supply agreements'.

Inability to prosecute and seek higher-tier penalties

As outlined in our accompanying submission to the **Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments)**, NSWFA is concerned that it will be impossible to effectively prosecute the most severe breaches of the code and apply for higher-tier penalties, unless a pattern of lower-tier infringements over a period of time can be collectively considered a significant breach of the Code.

Should The Treasury Competition Policy Unit require further information from NSW Farmers for this inquiry, please contact NSW Farmers Head of Policy and Advocacy, Kathy Rankin via email at