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16 October 2024

Exposure Draft of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024*

Dear Sir/Madam,

I am pleased to make this submission on the Exposure Draft of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024 (Draft Code)*.

I am the Code Arbiter for Metcash Food & Grocery Pty Ltd (**MF&G**), appointed under the voluntary Food and Grocery Code of Conduct (**Current Code**). Accordingly, I have limited my submissions to the provisions of Subdivision A of Division 5 of Part 2 of the Draft Code - "Investigations by a Code Mediator".

Submission 1 – anonymity requirements (subsections 49(3), 53(5), 54(4))

I would submit that these provisions are impractical, and detrimental to an effective, fair and equitable resolution process. This issue is more pronounced under the Draft Code than the Current Code because the Code Mediator does not have the power to make binding rulings and requires the consent of the large grocery business for any proposed remedy to be implemented.

The anonymity requirements are detrimental to a fair and equitable resolution process in that they preclude the operation of the basic principles of procedural fairness. A Code Mediator cannot ensure an investigation is balanced and fair if one party does not even know of the fact of, or the details of, a complaint before an investigation is conducted and a recommendation is made.

The requirement of anonymity is also likely to inhibit, and perhaps even preclude, a Code Mediator's ability, in practice, to properly investigate the facts, obtain both sides of the story and make effective recommendations. Moreover, I would expect that it is highly unlikely that any large grocery business would agree to a recommendation or proposed remedy if it does not consider it has been afforded procedural fairness throughout the process, which in most cases would necessitate disclosure of the supplier's identity at an early stage.

The anonymity provisions are impractical in that if the Code Mediator proposes a remedy following investigation of a complaint (which will presumably be the intended purpose of a supplier making a complaint), it is highly unlikely that the large grocery business will agree to implement the remedy unless it knows the identity of the complainant. It is also not possible for a large grocery business to enter any form of remedial agreement with a supplier whose identity has not been disclosed.

I understand the principal rationale for anonymity is to avoid the prospect of retribution for making a complaint. In this connection, I note that the Draft Code includes a specific prohibition

of, and penalties for, retributive behaviour: section 30. I would suggest this express means of protecting suppliers avoids the need for any anonymity provisions.

Moreover, where a proposed remedy has been agreed by the supplier and the large grocery business, section 54(4) permits the identity of the supplier to be disclosed to the large grocery business. The effect of this is that if there to be any is any form of redress, the purpose of the anonymity provisions will, in the event, be eroded.

As MF&G Code Arbiter, I have had the experience of:

- being precluded from making inquiries I considered appropriate for fear of disclosing a complainant's identity. I have received informal complaints in circumstances where the complainant had made it clear they wished to remain anonymous and I found myself unable to obtain MF&G's version of events because any such inquiries by me would have almost certainly, in practice, resulted in the identity of the complainant becoming apparent to MF&G.
- receiving an informal complaint in circumstances where the supplier initially made it clear it wished to remain anonymous and following discussions with me agreed for me to disclose its identity in circumstances where safeguards were put in place to avoid any retribution. It transpired that not all the facts presented were correct. Had I not received permission to disclose the supplier's identity, I could not have ascertained this.
- A supplier making a complaint on the strength of an agreement without disclosing subsequent amendments to that agreement which materially impacted the position. Again, had I not received permission to disclose the supplier's identity, I could not have ascertained this.

For all these reasons, it is submitted that the anonymity obligations in sections 49 and 53 should be removed and section 54(4) should be deleted.

I would also submit that if the anonymity provisions are to be retained, section 54(4) should be amended to make it clear as to when the identity of the supplier may be disclosed by the Code Mediator. The Code Mediator should be permitted to disclose the identity of the supplier *before* any proposed remedy is considered by the large grocery business, and certainly before any agreement to implement the remedy is entered into by the large grocery business.

Submission 2 - timing for investigations (subsection 50(b)(1))

It is submitted that:

- Clause 50(b)(i) should be amended to make it clear that it is referring to a complaint "compliant with section 49(2)".
- The Code Mediator should have the benefit of a pause in the 20-day business period prescribed by subsection 50(b)(1) while it is awaiting information from a supplier or the large grocery business. This would be consistent with subsection 63(4) which allows such a pause for the Code Supervisor.

Submission 3 – Prohibition in subsection 51(2) (vexatious complaints etc)

Subsection 51(2) provides that the Code Mediator must not decide that a complaint relating to unilateral or retrospective variation of an agreement is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the complaint is detriment to the supplier. This is substantially the same as subsection 35(4) of the Current Code.

I would submit this restriction is inappropriate. If the sole ground of a complaint is detriment to the supplier (and the supplier does not identify conduct by the large grocery business which is non-compliant with the Code), then this would be a proper basis for the Code Mediator to decide that the complaint is misconceived or lacking in substance.

Accordingly, it is submitted that subsection 51(2) should be removed.

Submission 4 – Subsection 53(3) (consultation)

Subsection 53(3) provides that before recommending that a large grocery business should vary a grocery supply agreement, the Code Mediator “may consult with the large grocery business, the supplier, or both”. This is substantially the same as subsection 36(6) of the Current Code.

This provision carries the implication that the Code Mediator may only consult with the supplier and with the large grocery business before recommending a variation of a grocery supply agreement. I would submit that a Code Mediator would need to consult with both parties before making any recommendation (not merely where a variation to the grocery supply agreement is recommended), and that therefore subsection 53(2) should either be removed or amended to make this clear.

Thank you for the opportunity to make this submission.

Yours faithfully,



Martin Shakinovsky
Code Arbiter for Metcash Food & Grocery Pty Ltd