

1 March 2024

Dr Craig Emerson
Grocery Code Review
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: GroceryCodeReview@treasury.gov.au

Dear Dr Emerson,

We welcome the opportunity to provide input to the Independent Review (the Review) of the Food and Grocery Code of Conduct 2023–24 (the Code).

Maurice Blackburn Lawyers is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland states and territories. We specialise in personal injuries, abuse law, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

As a firm committed to extending access to justice to everyone, Maurice Blackburn shares community concerns about allegations of unjust pricing and other practices by our major supermarkets. Australians deserve a fair go at the checkout as much as they do before the legal system, and we applaud the Albanese Labor Government for asking the eminent economist Dr Craig Emerson to review the Code, as well as separately directing the ACCC to conduct an inquiry into the sector.

By signing the Code the supermarket chains have committed themselves to the highest standards of business conduct. In practice there is evidence they are falling short. A recent inquiry¹ into price gouging and unfair pricing practices by Professor Allan Fels AO received 325 supermarkets and grocery related submissions – more than twice the next largest category of complaints received.

The Fels inquiry recommended the Code should be fully mandatory rather than voluntary as it is now, a change we support. At the same time even a mandatory Code can only hold supermarket chains and other retailers to account for poor behaviour if instances of poor behaviour are brought to light in the first place.

The current Code acknowledges this will only happen if individuals with knowledge of breaches can be confident they will not suffer retaliation if they report them. In the case of suppliers, the Code includes protections from retribution actions by supermarkets. However,

¹ Professor Allan Fels AO (2004), [Inquiry into price gouging and unfair pricing practices](#), February 2024.

in the case of another class of individuals with inside knowledge of signatories' conduct – those who work for them – the Code does not give any specific encouragement or protection.

In our view, this oversight is leaving untapped a potentially powerful enforcement mechanism. We acknowledge existing private sector federal laws offer some protection to supermarket and other private sector employees who report misconduct or a breach of the law by their employer. For example, as public companies the major supermarkets are required to have a whistleblower policy that includes information about the legal protections available to whistleblowers, and how the company will investigate disclosures and protect whistleblowers from retaliation.

We note at least two limitations in relation to the existing protections for whistleblowers. First, research suggests the operation of these laws is providing little practical encouragement to private sector employees to come forward with their concerns. In 2023 the Human Rights Law Centre found “there has not been a single successful case... brought by a whistleblower under the federal public or private sector laws, or the federal union sector laws, since their respective enactment.”²

The second limitation relates to specific hindrances on the conduct of lawyers under existing arrangements. In *AG Australia Holdings v Burton and Anor (2002)*, a whistleblower was sued for talking to class action lawyers for shareholders in breach of a confidentiality agreement. *Burton* has had a chilling effect on whistleblowers in the context of civil litigation, with lawyers acting for victims of misconduct effectively precluded from speaking with whistleblowers. It is contrary to the interests of justice for wrongdoers to be protected from the consequences of unlawful behaviour in this way.

Maurice Blackburn applauds the Albanese Labor Government for the work it has begun to strengthen whistleblower protections for public sector employees through amendments to the Public Interest Disclosure Act 2013 passed in 2023. We believe the Review provides an opportunity to widen the scope of that work to further strengthening protections for private sector employees as well, using the supermarket sector as a catalyst.

We encourage the Review to:

- recognise explicitly the enforcement role of employees who report suspected breaches by signatories
- consider the need for the Code to include provisions specifically dealing with protections for employee whistleblowers
- consider the need for broader legislative amendments to prevent alleged wrongdoers from suing whistleblowers or lawyers acting for victims of misconduct in circumstances where the whistleblower has provided incriminating confidential information to lawyers in litigation against the alleged wrongdoer
- examine the feasibility of a whistleblower reward scheme for employees who make reports that lead to successful enforcement action.

In relation to a whistleblower reward scheme, we note such schemes have been effective in other jurisdictions, especially in the US, at encouraging legitimate disclosures. The positive financial incentive encourages whistleblowers to come forward. This contrasts with the compensation-only models that operate in Australia, where the best whistleblowers can hope for is that they are compensated for any retributive actions they suffer.

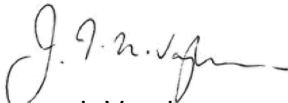
² Human Rights Law Centre (2023), [Cost of Courage: Fixing Australia's Whistleblower Protections](#), August 2023.

Whistleblower reward schemes would also help address the lack of legal support that is currently available to whistleblowers. Most whistleblowers cannot afford upfront legal fees, and lawyers will only run cases a no win, no fee basis where reprisal action has already happened (with consequent loss). Reward schemes would transform the economic viability of whistleblower cases and dramatically increase the level of legal support available to whistleblowers.

A strong and mandatory Code with effective enforcement mechanisms is critical to fair supermarket pricing in Australia. We believe this can best be achieved by including appropriate protections and incentives for whistleblower employees to report breaches and help to ensure compliance, supported by broader legislative amendments to strengthen whistleblower protections across the private sector.

Please do not hesitate to contact me via my Executive Assistant Bianca Parry on 03 8102 2151 or at BParry@mauriceblackburn.com.au if we can further assist with the Review team's important work.

Yours faithfully,



Jacob Varghese

CEO

Maurice Blackburn Lawyers