



**Small Business  
Development Corporation**

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Grocery Code Review Secretariat  
Market Conduct and Digital Division  
The Treasury  
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Dear Secretariat

## **REVIEW OF THE FOOD AND GROCERY CODE OF CONDUCT 2023-24**

The Small Business Development Corporation (**SBDC**) welcomes this opportunity to provide feedback<sup>1</sup> to the Treasury's consultation paper for the Review of the Food and Grocery Code of Conduct 2023-24 (**the Review**).

The SBDC is an independent statutory authority of the Government of Western Australia (**WA**), established to support and facilitate the growth and development of small businesses in the State.

In early 2012, the SBDC's structure and governing legislation<sup>2</sup> was enriched with the introduction of the role of WA Small Business Commissioner (as Chief Executive Officer) and establishment of Dispute Resolution Services (**DRS**). The DRS can assist small businesses based in WA with disputes relating to contracts, retail tenancy leases, non-payment or non-performance, and unfair terms *inter alia*.

The DRS can assist disputing parties to clarify the issue in question and attempt resolution, including identifying when further legal assistance may be necessary. The DRS can also offer access to a subsidised, low-cost mediation service (at a cost of \$125 per party per mediation session), which can provide a valuable opportunity for parties to resolve specific concerns and fulfil their contractual obligations.

In 2020, the Commissioner was granted greater ability to inquire into conduct that is having an adverse impact upon small business in WA. To this end, the Commissioner

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<sup>1</sup> This submission outlines the views of the SBDC and does not necessarily represent the views of the Western Australian Government.

<sup>2</sup> See the *Small Business Development Corporation Act 1984 (WA)*.

has established an Investigations and Inquiry Unit (**IIU**) whose role, amongst others, is to investigate and inquire into poor and unfair business practices that affect the commercial activities of small businesses.

Among its key strategic objectives, the SBDC also plays a critical role in ensuring the interests of small businesses in WA are represented to all tiers of government and in advocating for a fair operating environment. In line with this, the SBDC works closely with, and feeds relevant issues and emerging trends to, relevant authorities including the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission (**ACCC**), and the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**).

### **Feedback on the consultation paper**

The Food and Grocery Code of Conduct (**the Code**) was introduced in 2015 to address harmful practices in the grocery sector stemming from an imbalance of bargaining power between supermarkets and their suppliers, especially smaller suppliers. The highly concentrated grocery market in Australia is dominated by three major supermarkets and a wholesaler, who hold over 80 per cent combined market share.

The Review is looking to:

- assess the effectiveness of the Code provisions in improving the commercial relationship between retailers, wholesalers, and suppliers in the food and grocery sector; and
- consider whether the Code should be remade, amended or repealed, with the consultation paper noting that repeal is not a consideration.

The SBDC concurs with the view expressed in the consultation paper that a mandatory code with penalty provisions is likely to incentivise greater compliance by the supermarkets.

#### *Impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers*

A number of articles, studies and surveys demonstrate that the Code has not improved relations between grocery retailers, wholesalers and suppliers. There exists a major imbalance of power at the detriment of the latter who, in most cases, are small and medium-sized enterprises (SMEs).

Subsequent issues to this power imbalance are many and include payment terms, lack of transparency, late cancellations and more.

It is important to note that in today's environment where SMEs are facing the challenges of increased costs of doing business, cost of living, labour shortages, and climate change and adaptation, those added issues imposed by a handful of large grocery retailers and wholesalers, could also have a drastic macro-economic impact.

An alarming number of small suppliers are experiencing issues inherent to the market power of supermarkets. In fact, 'market power of processors/supermarkets' ranked first among 15 issues raised in the 2023 National Farmer Priorities Survey; with 37.5 per cent of farmers responding they were 'very concerned' by the issue and 45.5 per cent 'concerned'.

According to peak industry body AUSVEG, specific examples of issues imposed on small suppliers by large retailers and wholesalers include unscheduled specials, unauthorised deductions, questionable rejections, lack of written supply agreements, and late cancellations of orders. AUSVEG states that while such behaviour is not permitted under the Code, grower feedback shows it is part of doing business with supermarkets.<sup>3</sup>

One particular issue affecting relationships between large retailers/wholesalers and smaller suppliers that has recently attracted media attention is pricing.

The SBDC is also aware of claims by farmers and other small business suppliers of a large discrepancy between the amount they receive for their produce at the farmgate, and the prices consumers are paying at the supermarket checkout. Consequently, there have been vociferous concerns raised in recent times regarding alleged price gouging and the pricing and margin-setting practices of the major supermarket brands.

Some supermarkets are imposing a rebate to smaller suppliers should the latter need to be paid in a timely manner. These 'rebate charges' can represent up to four per cent of a supplier's invoice.<sup>4</sup>

The SBDC is therefore hopeful that the Review will ultimately enhance competition in the supermarket sector and lead to higher prices for suppliers and lower prices for consumers.

### *Extending the application of the Code*

The consultation paper raises the question of extending the Code to other parts of the food and grocery supply chain and increasing the number of signatories from the current four. The SBDC sees value in this suggestion to ensure the Code covers other components of the supply chain (such as manufacturers of alcoholic beverages) rather than only suppliers who are involved in direct supply relationships with one of the four listed retailers or wholesalers.

### *Voluntary or mandatory Code and penalty provisions*

The consultation paper seeks stakeholder views on whether the Code should be amended and remain voluntary or be remade and made mandatory. The SBDC notes the arguments made in the consultation paper for and against either option, with the views of the ACCC (along with some of its previous Chairs in Professor Rod Sims and

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<sup>3</sup> <https://ausveg.com.au/articles/ausveg-proposes-solutions-to-grower-retailer-power-imbalance/>

<sup>4</sup> <https://www.theguardian.com/business/2024/feb/13/supermarket-giants-hit-farmers-who-want-early-payment-with-hefty-fees>

Professor Allan Fels) about the weaknesses inherent in voluntary codes especially enlightening.

In particular, the weak enforcement powers under the current voluntary Code, coupled with the ACCC publicly indicating it is not regulating meaningful compliance, are *prima facie* encouraging signatories to not act in good faith. The SBDC concurs with the view expressed in the consultation paper that a mandatory code with penalty provisions is likely to incentivise greater compliance by the supermarkets.

Currently, being voluntary only and without meaningful financial penalties, the Code is not effective in addressing its objectives. This is highlighted with the aforementioned examples of issues affecting smaller suppliers as well as the results of the Independent Reviewer's annual survey for 2021-22<sup>5</sup> cited in this Review's consultation paper; specifically, the fact that "more than one-third of suppliers to Woolworth and Coles identified fear of damaging a commercial relationship as a key impediment to complaining."

While opponents claim that enforcement by the ACCC would result in lengthy legal proceedings, there are other options that can also be established under a mandatory code. For example, the SBDC notes that trading terms and expected conduct for other comparable primary producers are contained within the Horticulture Code of Conduct and Dairy Code, both of which are mandatory.

#### *Lack of penalties*

Although able to take enforcement action through the courts to compel a Code signatory to redress any loss or damage, the ACCC does not currently have the power to impose pecuniary penalties for non-compliance. The SBDC notes that the ACCC has not taken any enforcement action against a signatory for a breach of the Code to date, with the lack of available penalties considered a severe impediment to achieving the desired outcome of addressing harmful practices in the grocery sector.

As raised in its 2023 submission to the Dispute Resolution Provisions review, the SBDC shares the ASBFEO's view that penalties and supplier remediation for breaching the Code should be proportionate, effective and targeted deterrents to retailers and wholesalers seeking to use their superior bargaining power to the detriment of small businesses.

Consequently, the SBDC supports the ACCC's call for the introduction of significant financial penalties to be introduced under the Code. Such pecuniary penalties should be at a level that is sufficient to act as a deterrent for breaching the Code; given the size and scale of the current signatories, the amount should align with the penalty provisions contained in the *Competition and Consumer Act 2010* and Australian Consumer Law (i.e. up to \$50 million for Corporations and \$2.5 million for individuals)<sup>6</sup>.

Thank you for the opportunity to provide feedback in response to the consultation paper. If you would like to discuss this submission in more detail, please contact

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<sup>5</sup> Food and Grocery Code Independent Reviewer, 2021-22 Annual Report, December 2022.

<sup>6</sup> The SBDC notes that the maximum pecuniary penalty available under the Horticulture Code of Conduct and Dairy Code is \$93,900.

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Yours sincerely

A handwritten signature in blue ink, appearing to read 'David Eaton', followed by a comma.

David Eaton PSM  
**Small Business Commissioner**

8 March 2024