



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

16 May 2024

Grocery Code Review Secretariat
Market Conduct and Digital Division Treasury
Langton Crescent
Parkes ACT 2600

via email: GroceryCodeReview@treasury.gov.au

Dear Sir/Madam,

Submission to the 2023-24 Review of the Food and Grocery Code of Conduct interim report

The Australian Small Business and Family Enterprise Ombudsman welcomes the interim report of the 2023-24 review of the Food and Grocery Code of Conduct (the Code). The ASBFEO acknowledges that the review has consulted broadly with industry and government stakeholders, and formed recommendations that aim to address the harms of market failure in the supermarket sector.

Code reform is urgently needed in this sector to enhance market efficiency and promote trust and cooperation in supply chain relationships. The entrenched market power of Woolworths and Coles (the major supermarkets) has enabled them to transfer a disproportionate amount of risk onto their suppliers through distortionary practices that exploit their informational and bargaining power advantages. This has undermined the ability of suppliers to withstand other risks and has significantly reduced their commercial viability, especially in industries such as fresh produce.¹ Despite this, only 5 disputes have been raised through the Code's dispute resolution framework, suggesting that barriers to raising disputes may outweigh suppliers' incentives for bringing them.

It is therefore critical to address existing impediments to dispute resolution under the Code and, in doing so, encourage suppliers to bring disputes. This requires that the Code provide for independent, robust and efficient dispute-resolution processes that are structured to produce impartial outcomes. It would also require that there be formal functions to review the longer-term implications of disputes brought under the Code, report on evidence of supermarkets engaging in retribution against suppliers for raising a dispute and, as appropriate, work with regulators and industry participants to resolve these issues. These steps would encourage greater participation in the Code's dispute resolution processes, improve prospects for timely and effective resolution and remediation, and alleviate resourcing pressures for regulator-led enforcement.

The Code must also provide for meaningful standards to address distortionary practices that cause significant harms, often affecting smaller suppliers. Small business participation is crucial to the functioning of the supermarket sector. Small businesses contribute 78% of the value of production by the agriculture, forestry and fishing sector and employ 79% of its workers, who in

¹ For example, AUSVEG, the prescribed peak industry body for the Australian vegetable and potato industries finds that 37% of surveyed growers are considering leaving the industry in the next 12 months, up from 34% in mid-2023. AUSVEG, *AUSVEG proposes solutions to grower-retailer power imbalance* [media release], AUSVEG, 21 February 2024, accessed 4 May 2024.



turn are supermarket consumers.² It is therefore critical that, when examining issues and possible solutions, the review considers how small business interests will be affected.

The ASBFEO appreciates this opportunity to provide targeted feedback on the interim report and is available for further consultation to assist the review.

Recommendation 1: The Code’s dispute-resolution framework should be independent and should not incorporate supermarket-appointed Code Mediators.

The ASBFEO supports the draft recommendation for the Code to adopt the dispute resolution provisions of other industry codes, which provide for independent mediation and arbitration. However, in line with this approach, the Code should not provide for supermarket-appointed Code Mediators to mediate disputes. While the ASBFEO endorses the intent of the Code to provide ‘informal, confidential and low-cost processes for resolving disputes’, it is critical this does not come at the cost of the independence of the Code’s dispute-resolution framework. Accordingly, while suppliers should be allowed to raise a complaint with a supermarket internally, the mediation and arbitration processes under the Code should be structurally independent.

As this review and previous reviews of the Code have highlighted, dispute resolution processes under the Code are rarely utilised. The ASBFEO understands from stakeholder engagement that this is likely due to impediments to suppliers using the Code’s dispute-resolution framework, including potentially the fear of losing market access and perceived structural bias in the dispute resolution framework. This is supported by the findings of the Independent Reviewer that more than 30% of surveyed Woolworths and Coles suppliers reported ‘fear of damaging a commercial relationship’ as an impediment to raising an issue with a Code Arbiter, and that 18% were not confident their confidentiality would be maintained.³

The ASBFEO considers that these impediments arise mainly because of two key issues: (1) the market power of the supermarkets which results in significant bargaining power imbalances between supermarkets and their suppliers, and (2) the lack of structural independence in the Code’s current dispute resolution framework. While Code reform would not by itself increase the competitiveness of the supermarket sector, it could establish the structural independence of the Code’s dispute resolution framework. This would help to ensure that disputes are resolved impartially and, in comparison to a framework allowing for supermarket-appointed Code Mediators, it would also limit additional opportunities for parties to leverage their bargaining power to influence dispute resolution processes and outcomes. These are critical requirements for setting up an effective dispute resolution framework that attracts industry confidence and participation, especially given the widespread bargaining power imbalances in this sector.

The ASBFEO’s concerns about the suggested availability of supermarket-appointed Code Mediators are not alleviated by ostensibly allowing suppliers discretion over their use because this choice would in practice be illusory for many suppliers. Many suppliers rely on their relationships with major supermarkets and would be unlikely to resist pressure by a major supermarket to

² Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Contribution to Australian Gross Domestic Product*, ASBFEO, Australian Government, June 2023, p. 4; ASBFEO, *Contribution to Australian Employment*, ASBFEO, Australian Government, June 2023, p. 4.

³ Independent Reviewer, *2022-23 Annual Report*, Food and Grocery Code Independent Reviewer website, Australian Government, 2023, accessed 4 May 2024.



engage a supermarket-appointed Code Mediator, even if the supplier had concerns about the appointee's impartiality.⁴ The major supermarkets could therefore engage in strategic behaviour to offer mediation through their appointees as a 'free' or convenient option to encourage their supplier's acceptance of less favourable mediation outcomes or to delay dispute resolution processes.

Accordingly, while the ASBFEO supports the recommendation to include independent mediation and arbitration in the Code's dispute resolution framework, it cautions against the suggestion to include mediation by supermarket appointees as an additional option. In forming this view, the ASBFEO supports the review's observation that incentives for bad business behaviour are likely to result in poor market outcomes. It would be concerning if the Code allowed for an option that major supermarkets choose to fund because they expect it would ultimately cost them less.

Instead, there are many possible alternatives to incorporating supermarket-appointed Code Mediators while retaining the intended cost and convenience benefits of this idea. One example is the funding model for the Australian Financial Complaints Authority (AFCA). AFCA is jointly funded by its members, including banks and other financial service providers, against whom complaints are made to AFCA. Applying this model to the supermarket sector, supermarkets captured by the Code would be required to jointly fund the Code's dispute resolution framework but would have no input into the appointment of mediators or arbitrators.

This is only one such example of an alternative that both retains the structural independence of the Code's dispute resolution framework and reduces dispute resolution costs for suppliers. Regardless of the precise form of the funding model, the ASBFEO's view is that costs should not be a significant impediment to bringing a dispute under the Code's dispute resolution processes and that timely resolution is important. Accordingly, the ASBFEO recommends that the Code makes use of established frameworks to coordinate and advise on the independent mediation and arbitration processes, as detailed below.

Recommendation 2: Consider situating the dispute-resolution advisory and coordination functions of the Code Supervisor in the ASBFEO, noting that additional resources may be required.

The ASBFEO supports the draft recommendation to introduce and formalise functions under the Code to advise suppliers on their dispute-resolution options, raise issues with supermarkets, Code Mediators and the ACCC, and appoint independent mediators and arbitrators to resolve disputes if requested by a supplier. These functions would help to increase awareness of the Code's dispute-resolution processes, support industry and regulator-led compliance activities, and reduce the time and cost needed for suppliers to pursue dispute resolution under the Code.

The ASBFEO undertakes similar functions to these in multiple industries, including formally under the Dairy Code of Conduct, the Franchising Code of Conduct, the Horticulture Code of Conduct and the Oil Code of Conduct, which deal with similar issues to the Code and operate in sectors with similar bargaining power imbalances to those in the supermarket sector. The ASBFEO also provides guidance and advises small businesses on their options for resolving disputes, including disputes relating to alleged breaches of the Code, under its assistance function and is legislatively

⁴ As the Independent Reviewer finds, more than 41% of surveyed Woolworths and Coles suppliers reported 'fear of damaging a commercial relationship' as an impediment for raising an issue with the supermarket.



required to report on the number and nature of disputes that it has helped to resolve. In performing these roles, the ASBFEO has established the infrastructure, internal processes, stakeholder relationships, training and staffing needed to ensure it does them effectively.

Accordingly, the ASBFEO has the necessary framework to efficiently deliver the proposed advisory and coordination functions of the Code Supervisor. The institutional knowledge, experience and processes that the ASBFEO has developed could minimise the financial and time costs and extent of regulatory change needed to implement these reforms. Additionally, the ASBFEO's relationships and recognisability with industry and government bodies could help to promote industry adoption of the proposed new dispute resolution framework under the Code.

While it is a matter for the review's discretion, the ASBFEO encourages the review to consider these factors in its analysis of how these functions should be allocated. The ASBFEO is available to provide further detail on possible implementation approaches and their likely costs to assist the review.

Recommendation 3: Consider situating review functions in the ASBFEO to identify where retribution has been meted out on a supplier for raising a dispute under the Code, noting that additional resources may be required.

The ASBFEO acknowledges that the review has recommended that the Code Supervisor be given the Independent Reviewer's responsibility to publish annual reports on disputes and confidential supplier surveys. Separate to this recommendation, the ASBFEO considers it would be beneficial for the review consider the value of a distinct function to review the longer-term implications of outcomes of disputes raised under the Code, particularly whether suppliers have faced retribution for raising a dispute. The ASBFEO, given its legislated mandatory information gathering powers under its existing inquiry function, would be well-placed to undertake this work subject to additional resourcing, noting however it would be limited to examining issues relating to small businesses.

Should the ASBFEO identify evidence of retribution for raising a dispute, it could publicly report on this information, consult with industry participants to help improve standards of business behaviour and, where appropriate, refer specific concerns (or make a designated complaint, should it be given this authority) for regulator consideration as an enforcement matter. This would help to deter and protect suppliers from retribution for raising a dispute and, in doing so, enhance the Code's effectiveness and encourage greater participation in the Code's dispute resolution processes. It would also shine transparency on whether suppliers' fears about possible retribution are justified and focus industry and government efforts towards addressing key types of poor business conduct. These are important steps to building confidence in the Code, its dispute resolution framework and to improving business behaviour in this sector.

Recommendation 4: The review should continue to engage with the ACCC's Supermarkets Inquiry and other ongoing reviews to ensure that improvements to standards of conduct are meaningful and are part of a cohesive policy response.

The ASBFEO supports the draft recommendation to set minimum standards that cannot be overridden in grocery supply agreements or otherwise avoided. This is important, not only to address the most prevalent harms in the sector, but also to protect suppliers from the most egregious harms, often affecting smaller suppliers.



The special vulnerability of smaller suppliers and those that operate in certain industries, such as fresh produce, means that these suppliers are often presented with take-it-or-leave-it decisions and are forced to bear a disproportionate proportion of risks and costs. This is demonstrated by entrenched norms in the industry including, as the review finds, the lack of certainty about price and volume in the supply arrangements between major supermarkets and fresh produce suppliers. In addition, the ASBFEO has also been advised of excessive payment times and the practice of suppliers paying excessively high rebates to reduce payment times. These practices not only reduce price certainty and therefore exacerbate the information asymmetry and bargaining power imbalance between fresh produce suppliers and major supermarkets, but also reduce the quality of market signals to incumbent and potential suppliers. In other words, these practices are distortionary and likely reduce the welfare of Australian consumers more broadly.

The ASBFEO encourages the review to continue consulting with stakeholders to help ensure that it forms meaningful standards of conduct to address poor market outcomes in the supermarket sector. These standards should be part of a cohesive policy approach between the ongoing inquiries and reviews into the sector to ensure that reforms are delivered across the supply chain and that major supermarkets cannot simply offload their compliance burden onto their suppliers.

Recommendation 4: Infringement notice penalty amounts for the Code should be increased.

The ASBFEO endorses the draft recommendation for the Government to consider increasing the infringement notice penalty amounts for the Code. Unless the expected costs of non-compliance with the Code are sufficient, the ASBFEO considers that even with improvements to other aspects of the Code, supermarkets may lack sufficient incentives to comply with the Code.

As the regulator of the Code and other similar industry codes, the ACCC's view may be instructive. In its submission to the Franchising Code of Conducts review, the ACCC states that the penalty amounts of infringement notices for a breach of an industry code is insufficient to 'motivate compliance and should be brought into line with those available for alleged false or misleading representations and alleged unconscionable conduct'.⁵

Further comments: Dispute resolution and code enforcement through the court system

Alternative dispute resolution, including under the Code, can provide a cost efficient and timely avenue of dispute resolution. However, where disputes cannot be resolved through alternative dispute resolution, small businesses can face significant financial and time costs to seek redress through litigation, as well as the risk of adverse cost orders. Accordingly, harmed businesses tend to rely upon regulator-led remedies, yet often find that their circumstances do not trigger the policy parameters for enforcement action.

The ASBFEO therefore recommends the introduction of a Small Business and Codes List in the Federal Circuit Court and Family Court of Australia. This would provide small businesses with a timely means to directly pursue their commercial interests and receive a determinative outcome. The knowledge that an accessible means of formal dispute resolution exists can also incentivise parties to resolve disputes early, thereby enhancing the effectiveness of the Code.

⁵ Australian Competition and Consumer Commission (ACCC), *Franchising Code of Conduct Review*, ACCC, Australian Government, September 2023, p. 13



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The size of disputes appearing on the list could be capped, the parties could be required to bear their own costs and court processes including alternative dispute resolution could be delivered via online hearings, significantly reducing the time and cost burden on a small business.

We can provide significant additional information on this proposal should the review be interested in hearing further on how it may help to bolster the effectiveness of the Code.

If you require any further information, please do not hesitate to contact the ASBFEO via email at advocacy@asbfeo.gov.au.

Yours sincerely,

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman