Independent Review of the Food and Grocery Code of Conduct 2023-24

Interim Report April 2024

Metcash Food & Grocery Pty Ltd Submission

Metcash Food & Grocery Pty Ltd (**MF&G**) provided a submission in February 2024 on the *Independent Review of the Food and Grocery Code 2023-24 Consultation Paper* (**Consultation Paper Submission**). MF&G is pleased to provide this submission in response to the *Independent Review of the Food and Grocery Code 2023-24 Interim Report* (**Interim Report**). MF&G confirms it consents to this submission being published.

COMMENTS ON EACH RECOMMENDATION IN THE INTERIM REPORT

Recommendation 1: The Food and Grocery Code of Conduct should be made mandatory

As set out in MF&G's Consultation Paper Submission, MF&G considers that the Food and Grocery Code of Conduct (**Code**) is effective as a voluntary Code in achieving its stated purpose and objectives. As a principles-based voluntary industry code, it allows for and promotes collaboration between industry participants, government (including the Independent Reviewer) and the regulator to foster improvements in culture, relationships and behaviours to the benefit of both signatories and suppliers.

MF&G is committed to remaining a signatory to the Code, and, as such, MF&G has no objection in principle to the Code becoming mandatory in respect of itself or the other current signatories. However, MF&G questions the finding of the Interim Report that the voluntary Code has been ineffective in achieving its stated purpose and objectives and that a mandatory Code would better achieve that purpose and objectives. The Interim Report has not pointed to any specific instances of widespread or intentional non-compliance with the Code to necessitate a change from a voluntary to a mandatory Code.

Recommendation 2: All supermarkets that meet an annual revenue threshold of $5 billion (indexed for inflation) should be subject to the mandatory Code. Revenue should be in respect of carrying on business as a 'retailer' or 'wholesaler' (as defined in the voluntary Code). All suppliers should be automatically covered.

As set out in MF&G's Consultation Paper Submission, MF&G considers that supermarket retail market share (including a wholesaler's proportion of retail sales) would be a better measure of market power in relations with suppliers. A fundamental objective of the Code is to address imbalances of market power between supermarkets and their suppliers. A revenue test may not necessarily be demonstrative of market power. However, if the test is to be based on revenue, MF&G does not object to a $5 billion threshold provided the revenue captured is limited to:

- goods/groceries covered by the Code; and
- in the case of a retailer, revenue is from sales as a 'retailer' as currently defined in paragraph (a) of the definition of retailer in the Code; and
- in the case of a wholesaler, revenue is from resales as a 'wholesaler' as currently defined in the Code.

The issue of corporate groups needs to be clearly addressed so that business divisions within a larger corporate group, of which a wholesaler or retailer (as defined in the Code) forms only a part, are not inadvertently caught by a mandatory Code in circumstances where the business carried on by that division is not wholly or predominantly:

- a supermarket business in Australia for the retail supply of groceries (retailer); or
- a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries (wholesaler),

and/or they do not otherwise meet the revenue threshold as described above.

So, for example:

- Metcash's Hardware and Liquor business divisions should not be caught by the Code if they each generate more than $5 billion in revenue and they happen to sell, for example, some non-alcoholic beverages or gardening supplies to supermarkets but they are not wholly or predominantly in the business of retail or wholesale supply of groceries.
- If MF&G operates some retail supermarket corporate or joint venture stores which together generate retail revenues well below the $5 billion threshold, those stores should not be caught by the Code because MF&G as a wholesaler generates more than $5 billion in revenues.

The Interim Report refers to Woolworths' proposal of a $1 billion threshold for a mandatory Code. A fundamental objective of the Code is to address imbalances of market power between supermarkets and their suppliers. Metcash considers that $1 billion in revenue does not represent significant market power at the supermarket retail level. Consequently, MF&G considers this is well below what the threshold should be for a mandatory Code. As outlined in MF&G's Consultation Paper Submission, setting the threshold too low and extending to retailers with a smaller market share would have a detrimental impact on the independent retailer sector and affect the overall competitiveness of the sector.

Recommendation 3: The Code should place greater emphasis on addressing the fear of retribution. This can be achieved by including protection against retribution in the purpose of the Code and by prohibiting any conduct that constitutes retribution against a supplier.

MF&G supports this principle but cannot comment further without seeing the detail proposed, beyond what is currently covered by the Code.

There are protections in the current Code, and protocols have been adopted among signatories to try to address such concerns.

In particular the Code requires retailers and wholesalers to at all times deal with suppliers in good faith. The Code requires the following to be taken into consideration in determining whether a retailer or wholesaler has acted in good faith in dealing with a supplier: 'whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes.' If a retailer or wholesaler failed to act in good faith, including acting in a way that constitutes retribution for complaints or disputes, the supplier would have a right of action against the retailer or wholesaler for loss or damage suffered as a result.

Over and above the Code provisions, MF&G has also implemented internal protocols to provide meaningful protection to address fear of retribution: the Executive General Manager Merchandise

oversees all significant decisions relating to any supplier who makes a complaint to the Code Arbiter for a period of 12 months from the complaint to ensure decisions are made for valid commercial reasons and not for retribution against the supplier for making the complaint. This process also applies to informal complaints received through Metcash's Code Arbiter.

If it is considered necessary to introduce further provisions to address a fear of retribution, these will need to be carefully drafted to not be overly broad. For example, there would need to be a clear absence of genuine commercial reasons for the action or decision by the retailer or wholesaler and the action or decision should be within a reasonable (defined) period of a supplier making a complaint.

Recommendation 4: As part of their obligation to act in good faith, supermarkets covered by the mandatory Code should ensure that any incentive schemes and payments that apply to their buying teams and category managers are consistent with the purpose of the Code.

MF&G would require further detail and clarity on what is proposed before making further comment.

MF&G notes that the Metcash group has implemented a Code of Conduct, to which all employees are subject, requiring them to comply with high standards of conduct, demonstrate appropriate behaviours and generally act lawfully, ethically and in a socially responsible manner.

Furthermore, in accordance with the Code, all members of MF&G's buying team are trained initially and retrained annually on the requirements of the Code, including the core good faith obligation.

Recommendation 5: To guard against any possible retribution, supermarkets covered by the mandatory Code should have systems in place for senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.

MF&G supports this recommendation which is consistent with Metcash practice. As noted under the Interim Report's Recommendation 3 above, MF&G has implemented internal protocols to guard against retribution: the Executive General Manager Merchandise oversees all significant decisions relating to any supplier who makes a complaint (whether formally or informally) to the Code Arbiter for a period of 12 months from the complaint to ensure decisions are made for valid commercial reasons and not for retribution against the supplier for making the complaint.

Recommendation 6: A complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC.

Under the current Code, suppliers and other market participants could take this action now. However, MF&G would be supportive if there is seen to be a benefit in adding further structure for raising issues with the ACCC.

Recommendation 7: The mandatory Code should include informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:

- **Adopting the dispute-resolution provisions of other industry codes, which provide for independent mediation and arbitration;**

- **Allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by the supplier, and recommend remedies that include compensation for breaches and changes to grocery supply contracts; and**
- **Allowing suppliers to go to the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of Code Mediator's processes; or to arrange independent, professional mediation or arbitration.**

Supermarkets are encouraged to commit to pay compensation of up to $5 million to resolve disputes, as recommended by the Code Mediator and agreed by the supplier, or as an outcome of independent arbitration.

MF&G would require further detail and clarity on what is proposed before making detailed comment or forming any definitive views, but we make the following preliminary observations:

- MF&G prefers that retailers'/wholesalers' appointed Code Mediators (i.e. the current Code Arbiters) be the default mediator for mediations or, at the very least, there be an obligation to first mediate through their appointed Code Mediators. The Code signatories have invested time and resources into their Code Arbiters to get to know the industry and their business. Because this would be at no cost to the supplier, this would be consistent with the low-cost objective. MF&G also does not consider that new qualifications on the Code Arbiter/Code Mediator (e.g. experienced and qualified alternative dispute-resolution practitioners) are necessary. The current Code Arbiters are sufficiently qualified for this role.
- MF&G does not consider that pre-committing to paying compensation up to $5 million or amending contracts if recommended by the Code Mediator, and the Code Supervisor having review powers over the Code Mediator's processes, is consistent with a mediation process. If mediation does not result in a mutually agreed resolution, the supplier will have further dispute resolution options through litigation or agreed arbitration.
- MF&G would be very willing to consider in good faith a request by a supplier to submit to a binding arbitration process on a case by case basis (indeed, it is bound to do so under the Code's good faith obligation in any event). A case by case approach is preferred as there are pros and cons of both arbitration and court proceedings (for both parties to the dispute) and the best mode of dispute resolution will depend on the circumstances. An arbitral award is generally final and binding, and there is no appeal and only limited grounds on which to set aside an award; arbitration proceedings are conducted in private and in certain cases confidentially, which would exclude a public record of the dispute and the outcome. There is no precedential value attached to an award. In contrast court proceedings are generally conducted in public and the evidence and decision is public and can be referred to and relied on in other cases. Court cases are also subject to appeal. Court proceedings and arbitrations can each be costly although there is scope in arbitration to tailor the process to the scope and nature of the arbitration and there are no appeal costs. Arbitration has been available as an option for dispute resolution since the Code was introduced. The 2018 review of the Code conducted by Professor Graeme Samuel AC stated it was not aware that any disputes have undergone arbitration (or mediation) since the introduction of the Code.
- MF&G considers that the ACCC should be the sole regulator of a mandatory Code and the role of the ACCC and the Code Supervisor under the Code should not be conflated. Arguably allowing suppliers to make complaints to both the ACCC and Code Supervisor conflates these roles. We also do not think it necessary for the Code Supervisor to become involved in the dispute

resolution process (e.g. the applicable mediation and arbitration rules will specify a process for determining the mediator or arbitrator where the parties cannot agree).

Recommendation 8: A Code Supervisor (previously the Code Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys.

MF&G generally supports this recommendation.

The Interim Report also recommends that the Code Supervisor provide guidance material on accessing dispute resolution processes and options for complaints and explicit examples of what conduct might be considered breaches of the Code including actions that would be considered to be retributive conduct. MF&G disagrees that this should be the function of the Code Supervisor. The ACCC as the regulator of a mandatory Code should be responsible for any such guidance material. Again and as noted above, the roles of the ACCC and the Code Supervisor should not be conflated. MF&G supports the Code Supervisor's intended role under a mandatory Code being to conduct supplier surveys, produce annual reports and play a role in facilitating constructive relationships in the industry.

Recommendation 9: Specific obligations under the Code should set minimum standards that cannot be contracted out of in grocery supply agreements or otherwise avoided.

MF&G does not consider that any change to these provisions of the Code is needed.

The existing Code framework sensibly balances freedom to contract with an appropriate level of protection for suppliers. The Code is both principles-based with a sensible degree of some prescriptive elements and allows parties to work constructively together to improve relationships between suppliers and wholesalers/retailers. An overly prescriptive approach may undermine prospects of industry participants working together constructively to resolve issues and/or promote legalistic technical responses to issues that arise which, in the view of MF&G, may undermine effectiveness.

Reasonableness considerations that are currently required under the Code and supply contracts vary from case to case depending on the circumstances and should not be overly prescriptive. It would be impossible to cover on a prescriptive basis all areas that may reasonably be negotiated as part of the supply relationship, particularly having regard to the wide variety of suppliers – in size, capacity, product type and geography – with whom retailers/wholesalers contract.

Extending these prohibitions so that there is no ability to contract out of them seems to miss the essential point that in each case the exception to the prohibition requires the supplier to agree to the exception in the grocery supply agreement. The real issue is perhaps therefore situations where suppliers unwillingly agree due to fear of retribution for failure to do so. This is better addressed through the Code provisions protecting against retribution (and strengthening those provisions if considered necessary) rather than unnecessarily restricting the parties' freedom to contract.

MF&G sets out below further comments on specific areas which permit contracting out of a prohibition referenced in the Interim Report:

- **Unilateral variations** – To address changes in circumstances over time, MF&G has included a right to vary its grocery supply agreement with suppliers in most contracts. This right is limited to certain defined circumstances, and, in accordance with the Code, requires that the change is

reasonable, reasonable notice is given and reasons for the change are provided. What is reasonable will depend on the circumstances. MF&G has utilised these provisions to, for example, make changes to fresh produce specifications to meet food safety and quality requirements or expectations, make changes to policies and procedures recommended by the ACCC through its compliance check process, and to make changes to further improve fairness for suppliers having regard to unfair contract terms legislation. Many of these changes have been favourable to suppliers or otherwise benefit consumers.

- **Delisting of products** – MF&G considers that the current Code provisions provide a reasonable level of protection and procedural fairness for suppliers and that delisting for 'genuine commercial reasons' is not an overly broad exception, and hence changes are not warranted. If there is a concern that delisting is not for genuine commercial reasons, for example retribution for a complaint, the Code has existing protections against this: the delisting would contravene both the prohibition against delisting and the good faith requirements of the Code. The nature of supermarket retailing and wholesaling is such that a level of product selection or curation is required; it is impossible to carry every item and impractical to expect that once an item is listed it cannot be replaced, with due process and notice, by a product deemed to better meet the needs of consumers. In the case of MF&G, a range that does not meet the needs of consumers will result in loss of market share from independent retailers to the dominant retailers.
- **Wastage** – Wastage payments represent a sharing of risk for a known industry issue where stock may be damaged before or after it reaches the retailer's or wholesaler's premises and it may not always be possible to evidence how or when the damage occurred. Again, MF&G considers that the current Code provisions provide a reasonable level of protection for suppliers and changes are not warranted.
- **Pass through of costs** – The Interim Report notes the Review is considering whether the prohibition against requiring suppliers to fund promotions should be strengthened so that suppliers are not required to fund specified promotions, such as those that are part of a price-matching exercise. The logic for this is not entirely clear. As just one example, MF&G notes that it has had strong supplier support to provide funding for its Price Match program to support independent retailers being price competitive with Coles and Woolworths on key lines, as suppliers support having a strong and competitive independent sector generally. As a general comment, MF&G's promotional program is the result of a collaborative joint business planning process that recognises suppliers' and MF&G's objectives and reflects a joint commitment to working towards shared goals. Following that process, suppliers load promotional activity into MetProms (MF&G's promotions management platform) for MF&G's consideration and acceptance.

Recommendation 10: Penalties for non-compliance should apply, with penalties for more harmful breaches of the Code being the greatest of $10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening conduct. Penalties for more minor breaches would be 600 penalty units ($187,800 at present)

If the Code becomes mandatory, MF&G does not object to a penalty regime subject to the following comments:

- Ten percent of revenue of a minimum $5 billion business seems disproportionate, and would risk insolvency which would not be in the interests of the industry (as an aside, given this would

mean a minimum penalty of $500 million, including a reference to '$10 million' in the 'higher of' equation seems meaningless). MF&G nevertheless concurs that the penalty should be of a sufficient quantum to 'move the share price' in order to act as a deterrent for 'more harmful breaches'.

- Further clarity and consultation are needed in relation to 'more harmful breaches'. The higher penalties should be limited to cases of serious and systemic breaches contrary to the intent of the Code, and not one-off breaches of the Code.
- MF&G as a wholesaler has smaller margins as a proportion of revenue than the vertically integrated retailers, and consideration should be given to this as part of the assessment on appropriateness of the penalty.
- MF&G does not object to a maximum 600 penalty units ($187,800) for other proven breaches.
- MF&G does not object to infringement notices generally applicable for corporations under other industry codes, of 50 penalty units ($15,650), being issued under the Code. This lower penalty amount is not unreasonable given infringement notices are not contested and they are recorded on the ACCC's public register, which can have a reputational impact and provides insights for industry participants. The Interim Report refers to infringement notice penalties of 600 penalty units for specific provisions of the Australian Consumer Law and that the Review will further consider arguments for increasing the infringement notice penalty amounts for breaches of the Code above 50 penalty units. MF&G considers that 600 penalty units in the context of an infringement notice under the Code would be excessive given the lack of procedural fairness. Hence, the level of penalty units for infringement notices under the Code should be materially below this.

COMMENTS ON CERTAIN CONSULTATION QUESTIONS IN THE INTERIM REPORT

MF&G responds below to consultation questions 1 and 2 in the Interim Report.

1. Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?

MF&G understands that:

- this question is primarily directed at fresh produce and other perishables such as meat, dairy, wine grapes, green life, etc (**Fresh Goods**); and
- Consultation Questions 8, 9, 10 and 11 also relate to these types of goods.

The Code's drafting works well for dry grocery goods, including in relation to matters such as price changes, promotions, ranging and delisting, intellectual property, etc. However, there are unique issues, community concerns and supplier contracting arrangements applicable to Fresh Goods. MF&G's Consultation Paper Submission provided further comments on how contracting differs in relation to milk, meat and fresh produce. While the Code includes certain provisions dealing with fresh produce, the Code does not necessarily work as a 'one size fits all' model for all supermarket grocery products. MF&G considers that a separate code of conduct specifically designed to address 'farmgate' and other issues specific to Fresh Goods would be better suited to address these issues, to the extent they are not already covered by another existing industry code.

2. Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.

MF&G considers that good faith obligations, as a cornerstone principle of the Code and a foundation to the supplier – retailer/wholesaler relationship, should be mutual, extending to all suppliers. Mandatory codes such as the Dairy Code of Conduct, the Franchising Code of Conduct and the Horticulture Code of Conduct, which are primarily for the protection of certain industry participants, still have mutual obligations to act in good faith.

Date: 30 April 2024