



**Small Business
Development Corporation**

Our ref: D24/3073

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

GroceryCodeReview@treasury.gov.au

Dear Secretariat

FEEDBACK TO THE INTERIM REPORT ON THE FOOD AND GROCERY CODE OF CONDUCT REVIEW 2023-24

Following its submission to the consultation paper on the Independent Review of the Food and Grocery Code of Conduct (the **Review**), the Small Business Development Corporation (**SBDC**)¹ has read the Review's Interim Report with great interest and welcomes the opportunity to provide further feedback.

General feedback

Overall, it is pleasing to see that the Review's Interim Report recommends:

- that the Food and Grocery Code of Conduct (the **Code**) be made mandatory to supermarkets with annual revenues over \$5 billion
- mechanisms to address suppliers' fear of retribution if raising supermarkets' unconscionable behaviours
- effective penalties to apply when the Code is breached.

While the SBDC supports the Review's eight firm recommendations, we have reservations with the second subpoint of draft *Recommendation 7* (including alternative dispute resolution options under the mandatory Code) and would like to provide further feedback in response to some of the matters and questions raised in the Interim Report.

To whom the mandatory Code should apply

The SBDC notes that the Code was introduced in 2015 to address harmful practices in the grocery sector stemming from the imbalance of bargaining power between supermarkets and their suppliers, especially smaller suppliers. As outlined in the Interim Report, the Code has failed in addressing those practices; this is particularly alarming in today's business climate

¹ The SBDC is an independent statutory authority of the Government of Western Australia (WA) and the views outlined in this submission are those of the SBDC and do not necessarily represent those of the WA Government.

where suppliers have had to deal with the additional challenges of rising costs of doing business, cost of living, labour shortages, and climate change and adaptation.

Maintaining the status quo would pose a serious threat to the viability of smaller suppliers and subsequently continue to see consumers experience higher prices.

The SBDC reiterates that making the Code mandatory to large supermarket retailers and wholesalers (as per the Review's *Recommendations 1* and *2*) is a needed reform to better protect suppliers from harmful practices and ensure a healthy, competitive market.

There is ample evidence that demonstrates that these harmful practices and behaviours, described as 'common' by a range of growers and smaller wholesalers in Western Australia, impact more players in the supply chain than direct suppliers only. Therefore, in response to *consultation question 1*, the SBDC believes that suppliers selling to a supermarket via another entity (for example, farmers delivering produce to an aggregator) should be afforded the same protections available to suppliers under the Code. The SBDC is also of the opinion that these protections should equally be afforded to small and medium-sized wholesalers acting as suppliers.

The SBDC understands that written contracts are not universally used in the supermarkets' supply chain. We recommend that all negotiations between supermarkets and their supply chain are formalised by written supplier agreements. These agreements would set out the terms and conditions of sale and therefore provide extra protection for all parties involving in supplying to the supermarkets.

Dispute resolution under a mandatory Code

One of the main objectives of the Code is to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving supplier disputes with retailers or wholesalers. The current framework, through which disputes under the Code can be referred to a Code Arbiter for a binding dispute resolution outcome, appears to be failing suppliers and the SBDC strongly concurs with the findings in the Interim Report that the dispute resolution process needs to be amended to improve small business access to justice.

The Interim Report notes the importance of providing a range of both informal and more formal channels for dispute resolution under the Code and recommends an approach that replicates options for independent mediation and arbitration used in other industry codes as well as incorporating the informal provisions of the current voluntary Code. The SBDC is supportive of this approach.

In that regard, we support draft *Recommendation 7*; the new mandatory Code should include informal, confidential and low-cost processes for resolving disputes and should provide parties with options for independent mediation and arbitration.

The SBDC is a strong supporter of independent, easily accessible, low-cost and timely alternative dispute resolution options for parties in dispute. Mediation is typically an effective, low-cost option that can typically achieve successful outcomes in a more conducive atmosphere than arbitration. However, having the option to move to arbitration (by agreement) when mediation fails is important.

The SBDC supports the adoption of the dispute resolution provisions of other industry codes, namely the Dairy Code of Conduct and the Franchising Code of Conduct, which provide for independent mediation and arbitration by agreement, as recommended in the first subpoint of *Recommendation 7*; along with the inclusion of many of the provisions of *Part 5 – Dispute Resolution* in the current voluntary Code.

However, we have some concerns in relation to the second subpoint, which allows for supermarket-appointed Code Mediators to mediate disputes (where agreed by the supplier).

The SBDC is aware of small business suppliers' apprehensions that the current complaints mechanism does not support anonymity, as well as concerns about the Code Arbiters' (perceived or real) lack of independence from the supermarkets. We strongly support the contention that the chronically low number of complaints made under the Code is due to suppliers being reticent to raise their concerns, fearful of potential repercussions on their supply agreement or business.

In our previous submission to the 2018 review of the Code, prior to the Code Arbiter (then known as the Code Adjudicator) model being introduced, we stated:

The SBDC believes that the success of the Code Adjudicator role will rest on the perception of its independence from the retailer or wholesaler [...]. While the intent to be independent is there [...] some small business suppliers may still have reservations about raising their concerns in this environment based on previous fears of retribution and lack of trust in the process.

The SBDC continues to hold this view and therefore has concerns about the use of **supermarket-appointed** Code Mediators replacing the current supermarket-appointed and -funded Code Arbiters.

In noting the third subpoint in *Recommendation 7* – to allow suppliers to approach the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of the Code Mediator's processes; or to arrange independent, professional mediation or arbitration – the SBDC contends that it would be preferable to establish **genuinely independent** Code Mediators from the outset.

This would remove any perceived or real threats to impartiality and hopefully encourage more disputes to be raised and, more importantly, addressed before they impact on the commercial viability of small business suppliers.

Alternative or additional mechanisms to improve dispute resolution

Consultation question 4 asks whether there are alternative or additional mechanisms that could improve dispute resolution under a mandatory Code. The SBDC is of the view that there are.

We believe more avenues should be made available to raise and address complaints under the Code and provide small business suppliers with better access to justice.

As mentioned above, one of the biggest barriers to justice for aggrieved small businesses under the current system is the perceived or real lack of impartiality of the supermarket-appointed Code Arbiters. Although alternative dispute resolution paths (including third-party mediation and arbitration) are available under the Code, they are presently simply not being accessed.

Last year's review of the Dispute Resolution Provisions under the Code stated that it was not aware of any instances since the Code's introduction in 2015 where suppliers have utilised these provisions to trigger mediation or arbitration by an independent third party. As recommended in our 2018 submission, the SBDC is strongly supportive of better promotion of these (along with the provision of other options) so that small businesses have more awareness of the alternatives that are available.

In line with this, the SBDC supports the key finding in the Dispute Resolution Provisions review that:

The review finds that the third-party dispute resolution provisions in the Code complement the Code Arbitrator and Independent Reviewer functions by providing a greater degree of flexibility in how suppliers may choose to seek to resolve disputes with retailers or wholesalers. There is scope to improve suppliers' access to third-party mediation and arbitration through a range of non-legislative measures, such as by providing [the Australian Small Business and Family Enterprise Ombudsman] ASBFEO a more active role in assisting suppliers to navigate the process or through the issuing of further guidance on third-party alternative dispute resolution processes.

Alternative dispute resolution providers

As mentioned earlier, the SBDC is a strong supporter of impartial, easily accessible, low-cost and timely alternative dispute resolution options for parties in dispute, such as that provided to Western Australian (**WA**) small businesses through our Dispute Resolution Services (**DRS**) or at the national level by the ASBFEO.

In arguing that mediation is an effective way of resolving disputes without the need for complex and costly legal proceedings, the Australian Competition and Consumer Commission (**ACCC**) raised the proposition that the ASBFEO could provide parties with access to mediation services.

Mediation can preserve the commercial relationship between the parties, which is a key consideration for small business suppliers, and also allows for the scope to include issues that exist beyond the Code. It can bring the dispute to a close without the need for enforcement action or the risk of negative media attention, with confidentiality clauses able to be incorporated into agreements or Deeds of Settlement.

The SBDC notes that in its Final Report in September 2023, the Dispute Resolution Provisions review concluded that:

.. measures could be taken to make it easier for parties to utilise this [i.e. mediation] alternative dispute resolution option. For example, consideration could be given to providing the ASBFEO with a more active role in assisting the parties to approach and navigate this process. The ASBFEO could draw on its experience in undertaking its alternative dispute resolution role in other codes to make this option easier and more streamlined for the parties.

The SBDC would be supportive of the ASBFEO becoming more involved as a dispute resolution provider under the Code – if the ASBFEO was keen to take on this role.

Dispute resolution assistance by SBDC

The SBDC has a wealth of experience and a strong track record of achieving successful outcomes in resolving small business disputes at the local level through our intensive case management and mediation services, whilst managing to preserve commercial relationships.

In addition, the SBDC has gained significant knowledge of agribusiness in WA stemming from our successful role in operating a voluntary Farm Debt Mediation Scheme (**FDMS**) since 2015, in conjunction with the WA Department of Primary Industries and Regional Development. The FDMS is available to assist farm and pastoral businesses and financial institutions resolve disputes about commercial farm business finances (e.g. term loans, overdrafts, bank bills, and commercial bills including equipment finance debt).

Providing an opportunity to address issues and disputes through mediation, the FDMS has achieved a mutually acceptable agreement between parties in over 95 per cent of cases, with relationship building and trust with the banks supporting its success.

A key component in the success of the SBDC's DRS model is the involvement of dedicated case managers who undertake intensive preparation with the parties, which helps to keep costs low and often results in disputes being settled prior to mediation.

For disputes originating in WA, the SBDC could be better utilised as the first port of call for small business suppliers prior to commencing formal dispute resolution under the Code. In the first instance, the SBDC would be able to assist the supplier to understand their options in regard to the dispute and whether informal dispute resolution such as that provided by SBDC case managers might assist.

Our local knowledge would have a positive impact on the resolution of this type of dispute as it is likely many suppliers would be small agribusiness operators and family businesses. In our opinion, providing such services to assist WA suppliers in dispute with wholesalers or supermarkets would provide a further valuable low-cost option to the Code's dispute resolution framework.

As well as providing assistance with dispute resolution, the SBDC could also act as a point of contact for complaints or allegations from small business suppliers to the supermarkets through the Investigations and Inquiry Unit (IIU)², with these able to be made anonymously.

In cases where further investigation is warranted, the Small Business Commissioner has powers under the *Small Business Development Corporation Act 1984* to investigate complaints or allegations through the IIU. For serious issues requiring further investigation, the Small Business Commissioner has the authority to compel parties to provide information or documents – with financial penalties for non-compliance – and to protect a complainant's identity and their confidentiality (unless required by law). Findings from such investigations may be provided to Ministers, State Government and specified Commonwealth Government authorities.

Fears of retribution

As outlined in the Interim Report, and as corroborated by a range of WA growers and smaller wholesalers the SBDC has spoken with, those impacted by supermarkets' unfair trading practices often do not raise them – neither with supermarkets directly nor through available dispute resolution mechanisms – mainly because they fear commercial retribution.

To encourage suppliers to raise such practices, it is critical to not only ensure a range of accessible dispute resolution mechanisms but also address their fear of reprisal.

The SBDC is therefore highly supportive of *Recommendations 3, 5 and 6* which propose to:

- prohibit any conduct that constitutes retribution against a supplier and include protection against retribution in the purpose of the Code
- ensure that supermarkets covered by the mandatory Code have systems in place to monitor commercial decisions in respect to suppliers who have pursued a complaint through mediation or arbitration

² The role of the IIU is to, amongst others, investigate and inquire into poor and unfair business practices that affect the commercial activities of small businesses in WA.

- establish a complaints mechanism to enable suppliers and other market participants to raise issues directly and confidentially with the ACCC.

Having witnessed the effectiveness of our anonymous reporting tool *Safe2Say*³, the SBDC supports the Review's consideration of mechanisms for raising issues anonymously as a further way of countering the fear of reprisal. Our experience is that anonymity can be protected when reports are used to raise or address a systemic issue. However, there are instances where to progress the resolution of an individual dispute, a business's or person's details must be provided (with their consent).

Strengthening obligations under the Code

The SBDC supports the views of the ACCC, National Farmers' Federation and Fruit Producers SA shared in the Interim Report regarding provisions of the Code (*prohibiting certain conducts*) that are subject to exceptions. In the current Code, such exceptions are often possible if set out in the grocery supply agreement and if deemed reasonable in the circumstances. There is, however, sufficient evidence demonstrating that smaller suppliers often lack the bargaining power to influence the content of grocery supply contracts.

Echoing these stakeholders, the SBDC believes allowing these exceptions counters the Code's objective of ensuring balanced bargaining powers between parties and addressing harmful conduct in the grocery sector. We therefore support removing or narrowing such exceptions and favour instead, as per *Recommendation 9* and as contained in both the Dairy and Horticulture Codes of Conduct, comprehensive requirements under the Code setting minimum standards that cannot be contracted out of in grocery supply agreements.

Issues specific to fresh produce

The SBDC is aware that some of the unfair business practices imposed by supermarkets, such as uncertainty of volume and late cancellations of orders, are even more detrimental to growers due to the perishability of their produce.

The largely one-sided relationship between supermarkets and suppliers, with its 'take it or leave it' approach, can leave producers between a rock and a hard place – accept a below-cost price for their goods or dump the produce and waste perfectly edible food. The latter contributes to Australia's major problem with food waste, where it is estimated that around 7.6 million tonnes of food across the food supply chain is thrown away each year, at a cost to the economy of \$36.6 billion annually.⁴

Unless addressed, these issues inherent to buyer power will continue to threaten the viability of growers, contribute to significant food waste, and ultimately drive retail prices higher as food suppliers leave the industry, supply reduces, and markets concentrate. It is crucial to ensure suppliers of fresh produce can benefit from fair trading arrangements.

As stated in our 2023 submission to Treasury's Consultation Regulatory Impact Statement '*Protecting consumers from unfair trading practices*', the SBDC strongly supports regulatory intervention to address unfair trading practices. In the context of the relationship between

³ *Safe2Say* is a platform powered by CrimeStoppers WA that allows the anonymous reporting of behaviours having an adverse impact on small businesses in WA, anonymous communication with the SBDC as a matter progresses, and the ability to monitor the status of the report without having to reveal one's identity.

⁴ See <https://www.dcceew.gov.au/environment/protection/waste/food-waste>

supermarkets and suppliers, the SBDC would encourage the development of an unfair trading practices framework specifically relating to food and grocery.

The framework could for example cover protections for suppliers of fresh produce regarding wastage due to supermarkets' lack of transparency with volume forecasting and/or over-ordering. The practice of over-ordering appears especially egregious not only to the financial detriment of suppliers but the moral dilemma it poses, particularly in times where an increasing number of households are struggling with the rising cost of living.

With data analytics tools available these days, it is surprising supermarkets are not forecasting orders better (or not being more transparent) to provide greater certainty to suppliers. The SBDC believes supermarkets should be able to better forecast and communicate necessary quantities and in the event of over-supply due to supermarkets over-ordering, they should fully bear the costs of wastage.

The SBDC also proposes that consideration be given to whether there is an opportunity to require supermarkets to donate produce that would otherwise go to waste to relevant charities at their own operational means and costs – such an initiative should not become an additional burden on suppliers.

Further, we are of the opinion that the regulator (the ACCC) should require supermarkets to disclose pricing information upfront to their suppliers, including the terms of trade and the basis for pricing decisions. Price transparency requirements may help prevent unfair pricing practices and ensure that suppliers have access to the information they need to negotiate fair deals with supermarkets.

Enforcement and penalties

Penalties

The SBDC concurs with the views expressed in the Interim Report that the absence of pecuniary penalties undermines the effectiveness of the Code in incentivising compliance by the supermarkets and instilling confidence in suppliers. It also impacts on the ACCC's ability to undertake meaningful enforcement action.

We agree with the Interim Report's findings that a mandatory code with penalty provisions is likely to result in greater compliance with the Code by the supermarkets and therefore strongly support the introduction of pecuniary penalties as stated in *Recommendation 10*.

The SBDC notes that the ACCC has to date not taken any enforcement action against a signatory for a breach of the Code, with the lack of available penalties considered a severe impediment to achieving the desired outcome of addressing harmful practices in the grocery sector. It is believed that the introduction of pecuniary penalties would assist the ACCC to better enforce the Code.

The inclusion of effective penalties for breaches of the Code would also assist in addressing the reticence of suppliers to make complaints about the behaviour of parties to the Code.

To this end, the SBDC shares the ASBFEO's view that penalties and supplier remediation for breaches of the Code should be proportionate, effective and targeted deterrents to supermarkets seeking to use their superior bargaining power to the detriment of small businesses. Consequently, we support the introduction of significant pecuniary penalties set at a level that is sufficient to act as a deterrent for breaches, considering the size and scale of the businesses that would be covered under the Code.

Further, the SBDC concurs with views in the Interim Report that penalties should be applied to all substantive provisions under the mandatory Code, aligning it with the Horticulture and Dairy Codes of Conduct.

It is noted that the introduction of penalties would also allow the ACCC to issue infringement notices for minor contraventions. In this regard, the SBDC supports *Recommendation 11* to increase infringement notice amounts for the Code, noting that the Interim Report suggests raising the amount above the maximum 50 penalty units (currently only \$15,650) that usually applies to an industry code.

Again, considering the size of the businesses that would be covered by the Code, the infringement amounts need to be at a level that is sufficiently high to deter contraventions, which we contend needs to be significantly higher than 50 penalty units.

Compensation

The SBDC is supportive of the proposal to allow the Code Mediator to recommend remedies that include compensation for breaches and changes to grocery supply contracts. Although the current voluntary Code enables the Code Arbiter to order the supermarkets to pay compensation to suppliers of up to \$5 million in relation to a dispute, no compensation has ever been awarded.

In this regard, we would support *Recommendation 7* that the supermarkets be encouraged to agree to pay compensation up to \$5 million to resolve disputes when recommended by the Code Mediator or through independent arbitration, with this arrangement set out in grocery supply agreements.

Concluding statement

Thank you for the opportunity to provide feedback to the Interim Report. The SBDC is hopeful that the Review of the Code will help address major power imbalances affecting the grocery sector and lead to better outcomes for small business suppliers.

If you would like to discuss this submission in more detail, please contact Sophie Leadbeater, Senior Policy and Advocacy Officer on (08) 6552 3210 or email sophie.leadbeater@smallbusiness.wa.gov.au; or Karine Soares, A/ Assistant Director Policy and Advocacy on (08) 6522 3310 or email karine.suares@smallbusiness.wa.gov.au.

Yours sincerely



David Eaton PSM

Small Business Commissioner

30 April 2024