

## Review of the Food and Grocery Code of Conduct

### Woolworths Supermarkets Submission

10 May 2024

#### Introduction and Summary

Woolworths is pleased to provide this submission in response to the Independent Review of the Food and Grocery Code of Conduct (**Code**) Interim Report dated 8 April 2024 ([Interim Report](#)).

In our submission dated 6 March 2024 (**First Submission**), we expressed our commitment to fostering fair, transparent and mutually beneficial relationships with our suppliers and our support for a mandatory Code on the basis that it should:

- apply to all substantial retailers and wholesalers of grocery products with a gross annual turnover of \$1 billion or more;
- require all parties to work in good faith - retailers/wholesalers and suppliers alike;
- encourage suppliers to feel comfortable to raise complaints (including informally with the Code Arbiter); and
- enable the swift and cost effective settlement of supplier concerns and disputes.

Having considered the Interim report we continue to support a mandatory code which achieves those objectives.

In this submission, we provide comments to the 11 recommendations and 6 consultation questions from the Interim Report. Of priority importance are the submissions we make on the following (in numerical order):

- Recommendation 2 (Revenue threshold for applicability);
- Recommendation 7 (Code Mediation & Independent Arbitration);
- Recommendation 9 (Contracting out of Code Obligations); and
- Consultation Questions 8, 9, 10 and 11 (Fresh Produce).

A key issue highlighted in the Interim Report (Recommendation 7) is whether existing signatories will “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.”<sup>1</sup> (**Compensation Commitment**). We support this proposal in principle and are prepared to sign up to a mechanism of this type via a voluntary section of the Code to be signed by all major grocery retailers and wholesalers. In the case of independent arbitration, for pre-agreed compensation up to \$5 million, we support this in principle for small suppliers. This is on the basis that the selection process for appropriately qualified independent arbitrators is fair and unbiased.

Woolworths remains committed to providing continuous, open-minded engagement with this review process, as revision proposals take shape.

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<sup>1</sup> Draft recommendation 7, and references on page 7 and 48 of the Interim Report

## Comments on the recommendations in the Interim Report

### ***Recommendation 1: The Food and Grocery Code of Conduct should be made a Mandatory Code.***

As set out in the introduction above and in our First Submission, we support a mandatory Code. This is on the basis that the Code, as revised, incorporates the following key elements for the effectiveness and efficiency of the regulation:

- the fast, flexible, informal and low cost elements of the voluntary Code are preserved - these are particularly beneficial for smaller suppliers. Code Arbiters, with accumulated business knowledge and experience in informal complaints handling in signatory businesses, should be retained alongside alternative dispute resolution avenues. Strict requirements of independence and confidentiality should be preserved.
- the good faith obligation central to the Code applies to all - retailers/wholesalers and suppliers alike.
- civil penalty provisions are proportionate and in line with other mandatory codes under the *Competition & Consumer Act 2010 (CCA)*.
- there is a level playing field: all other major Australian retailers of “groceries”<sup>2</sup>, as defined under Part 1, Clause 3 of the Code, should be subject to the Code.
- care is taken not to apply a “one-size fits all” approach in a mandatory Code setting: large multinational suppliers do not need the same protections as much smaller, Australian suppliers and indeed, fostering commercially robust negotiations between retailers/wholesalers and larger suppliers supports better retail pricing outcomes for Australian consumers.

To enhance supplier awareness and the benefits from a mandatory Code in the event of a dispute, we support proactive Code training and education, particularly for small suppliers. We support Code Arbiters (or Code Mediators) running proactive training sessions and 1:1 informal outreach sessions for suppliers to familiarise themselves with the Code and the avenues for making a complaint and resolving a dispute. These sessions could be coordinated by the Code Supervisor and would be in addition to the awareness campaigns on Code dispute resolution processes currently run by retailers today.

### ***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 the respect of carrying on the business as a ‘retailer’ or wholesaler’ (as defined in the voluntary Code). All suppliers should be automatically covered.***

Competition in grocery retail is dynamic and now extends well beyond traditional supermarkets. Many suppliers who supply Woolworths, Coles, Aldi and Metcash, also supply major grocery category specialists such as Bunnings (pet, household and cleaning products), Chemist Warehouse (health and personal care products) and The Reject Shop (discount food and grocery products), who are increasingly extending their grocery range and competing directly with traditional supermarkets. For further details on competition in the Australian grocery supply chain, please see Annexure A. A contemporary and effective industry Code needs to reflect the field of close rivalry in the grocery supply chain as it operates in practice today.

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<sup>2</sup> “Groceries” as defined under Part 1, Clause 3 of the Code.

### Level playing field

We continue to support a level playing field by ensuring the Code regulates the lawful and good faith treatment of suppliers by all high volume “grocery” retailers and wholesalers with a gross annual turnover of \$1 billion or more.

This will better govern the large grocery retailers and wholesalers with whom suppliers negotiate on a regular basis including Bunnings, Chemist Warehouse, Amazon and Costco, and is consistent with supplier views put forward in the Senate Inquiry.

This position is also consistent with the long-established purpose of the Code which is to “*help regulate standards of business conduct*” and “*ensure transparency and certainty in commercial transactions*” to enable greater trust and cooperation within the grocery supply chain.

To achieve this outcome we recommend:

- Setting the revenue threshold for “grocery” retailer applicability to gross annual turnover of \$1 billion or more. This is consistent with international precedents, for example in New Zealand (NZ) the threshold is \$750 million annual “groceries” turnover and in the United Kingdom (UK), the revenue threshold is turnover exceeding £1 billion with respect to the retail supply of “groceries”; and
- Updating the definition of “retailer<sup>3</sup>” under the Code to remove the reference to a “supermarket business<sup>4</sup>”. This would be more consistent with the definition of “retailer” under the UK code<sup>5</sup> which appropriately captures businesses beyond traditional “supermarket businesses” (as defined under Part 1 of the Australian Code), for example, Amazon, B&M and Home Bargains.

Should, contrary to our submission, this Review conclude that the mandatory Code should not be extended to include other large retailers of “groceries”, as detailed above, we request that the Final Report in the Review:

- expressly acknowledge the dynamism of the grocery sector and the growth and expansion of large non-supermarket retailers of “groceries” as defined under the Code (reflecting Annexure A); and
- recommend Code coverage of all “grocery” retailers be specifically reviewed within 2 years of the current Review, with a particular focus on whether grocery category specialists and multinational and other large retailers of “groceries” should be brought into the Code.

### Proactive reporting obligation

We also submit that a proactive reporting obligation should be included in the Code, requiring impacted retailers to notify the Treasury and the ACCC once the mandatory Code application threshold is reached.

Such an obligation would serve to reduce and/or eliminate any time lag between when a grocery retailer reaches the revenue threshold for applicability and when this information would be made public via annual reporting processes. This is particularly important having regard to the proximity to the current Code application thresholds (which we submit need to be reset) of Costco and Amazon:

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<sup>3</sup> “Retailer” as defined under Part 1, Clause 3 of the Code

<sup>4</sup> Ibid

<sup>5</sup> Clause 1 of the *Groceries Supply Code of Practice*, (UK)

- Costco currently has an annual revenue of \$4.4 billion<sup>6</sup> and with a growth rate of 19.8%<sup>7</sup> and is estimated to reach \$5 billion in annual Australian revenue by 2025 (if not at threshold already). Costco has global retail sales of ~\$361.85bn (F23).<sup>8</sup>
- Amazon currently has an annual revenue of \$3.1 billion<sup>9</sup> in Australia and with a growth rate of 18%<sup>10</sup> and is estimated to reach \$5 billion annual revenue by 2026. Amazon has global retail sales of ~\$736.76bn (2023).<sup>11</sup>

***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.***

We support the Review's focus on continuing to take action to address the reported fear of retribution, including:

- by protecting against retribution in the purpose of the Code;
- adding a standalone prohibition against retaliatory conduct (including identifying a non-exhaustive list of factors to take into account to determine whether a supermarket has acted in a way that constitutes retribution);
- a higher penalty for the standalone prohibition against retribution conduct.

We welcome the finding in the Interim Report that a supermarket should be able to undertake actions in the normal course of business for genuine commercial reasons without it being considered to be undertaking retaliatory conduct.<sup>12</sup>

***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.***

We support Recommendation 4. All members of the Woolworths commercial team are required to maintain current knowledge of the Grocery Code, attend training and operate at all times in accordance with the Code, the Woolworths Code of Conduct and Woolworths [Trade Partner Charter](#). Feedback from Woolworths regular "Voice of Supplier" and "Voice of Team" surveys is also relevant to the assessment of buyer performance.

It is important however that the Code does not seek to prescribe specific buyer KPIs within the Code. At Woolworths, category managers are encouraged to perform against a balanced scorecard of individual performance, customer, supplier and financial parameters, and to contribute to the overall performance of the Woolworths Group, as well as demonstrating our core values including 'always

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<sup>6</sup> The Australian Article, 1 January 2024, *Costco Sales in Australia hit \$4.4bn*: <https://www.theaustralian.com.au/business/retail/costco-a-new-retail-force-as-australian-sales-race-towards-5bn/news-story/8b4b6f83f501104643d6a335db52628a>

<sup>7</sup> Ibid

<sup>8</sup> Costco Wholesale, '2023 Annual Report Fiscal Year Ended September 3 2023', page 35: [https://s201.q4cdn.com/287523651/files/doc\\_financials/2023/ar/cost-annual-report-final-pdf-from-dfin.pdf](https://s201.q4cdn.com/287523651/files/doc_financials/2023/ar/cost-annual-report-final-pdf-from-dfin.pdf).

<sup>9</sup> Tess Bennett, 'Amazon books losses on \$6b Aussie sales as retail and cloud boom', 6 March 2024, Australian Financial Review: <https://www.afr.com/technology/amazon-books-losses-on-6bn-aussie-sales-as-retail-and-cloudbooms-20240306-p5fa9w>

<sup>10</sup> Ibid

<sup>11</sup> Amazon, 'Amazon.com announces fourth quarter results', 1 February 2024: <https://ir.aboutamazon.com/newsrelease/news-release-details/2024/Amazon.com-Announces-Fourth-Quarter-Results/>. Note that this figure represents total net sales (USD \$574.8bn) with AWS segment sales removed (USD \$90.8bn). Conversion rate from OFX as at 5 April, 2024; 1 USD = 1.522233 AUD

<sup>12</sup> As referenced in the Interim Report, page 40

doing the right thing' and ways of working. It is core to effective competition that businesses retain the freedom to set their commercial strategy and internal operational settings to deliver on that strategy, within a regulatory level playing field.

***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.***

We support recommendation 5 which is consistent with Woolworths Trade Partner Integrity Policy, published June 2023 (see Annexure B). Under this policy, Woolworths Supermarkets' Managing Director monitors the subsequent treatment (at 6 and 12 months) of any trade partner raising a grocery code complaint regarding Woolworths. This covers both (a) grocery code complaints raised directly with Woolworths and (b) both formal and informal grocery code complaints raised with Woolworths' Code Arbiter, where the trade partner has provided consent for the Code Arbiter to share their name and details of the complaint with Woolworths.

We submit that the scope of recommendation 5 should be extended to apply to both formal and informal grocery code complaints raised with the retailer or Code Mediator (in addition to those pursued through mediation or arbitration), to mirror the Woolworths Trade Partner Integrity Policy.

***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.***

The Interim Report recommends the establishment of a whistleblower hotline to the Australian Competition and Consumer Commission (ACCC). While we support measures that enhance and encourage suppliers to raise complaints, it is not clear how the proposed ACCC hotline would operate alongside the other avenues of complaint and dispute resolution mechanisms proposed in the Interim Report. The introduction of the Grocery Code Complaints ACCC hotline - yet a further channel for raising concerns - runs a risk of confusing suppliers, especially smaller suppliers. If introduced, it should not overlap, undermine or complicate the dispute resolution framework proposed in the Code. It is vital that suppliers of all levels of sophistication have a clear understanding of the complaints channels open to them.

The Code should make clear to suppliers that the remit of the ACCC under the Code, is to investigate serious and systemic breaches. The informal and formal complaints mechanism to Code Arbiters that have been increasingly successful and appealing for suppliers should remain available and be promoted as the avenue for investigation and resolution of non systemic complaints.

***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. 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.***

In principle we support recommendation 7, however we note the following relevant submissions:

### **Options for independent mediation and arbitration**

Current Code Arbiter model and informal complaints mechanism should be retained. We support preserving the current Code Arbiter model and the informal complaints mechanism. The Interim Report recommends a “best-of-both worlds” approach to dispute resolution that mirrors the option for independent mediation and arbitration in other industry Codes; and incorporates the informal and confidential complaint handling and dispute resolution process in the voluntary Code. We agree that such an approach is likely to be of greatest benefit to suppliers.

### **Clarity on how dispute resolution mechanisms work together**

The proposed dispute resolution provisions have introduced a range of processes that are not streamlined or harmonised. This may confuse suppliers, especially small suppliers, who may struggle to navigate which pathway to use to resolve disputes. For example, a supplier wishing to resolve a Code dispute quickly and in a low cost manner may not immediately grasp the cost, procedural, time and confidentiality/ anonymity implications of the various channels available. In addition, the multiple options for raising a complaint to either the ACCC whistleblower hotline, the Code Supervisor, the Code Mediator, a retailer or wholesaler whistleblower service or by escalation to a senior manager within the retailer or wholesaler, is likely to lead to complexity and uncertainty as to the best pathway to resolve the issue. This may especially be the case if a supplier were to raise the same concern through several channels simultaneously.

Woolworths therefore submits that further clarification is required in the Final Report, for example:

- Clear guidelines on the proposed dispute resolution process including flowcharts, FAQs and examples in relation to a) methods of raising complaints b) role of ACCC c) role of Code Mediator d) role of Independent Mediator e) Role of Independent Arbitrator f) role of Code Supervisor and g) Remedies; and
- Details for the full scope of the function and powers of the new Code Mediator, Code Supervisor and the roles and relationship between the Code dispute resolution process in Part 5, and the ACCC whistleblower hotline and investigation process. It is not clear at present if the ACCC can commence investigations in parallel with a Grocery Code complaint being mediated or arbitrated or otherwise being handled by the Code Mediator or Code Supervisor. The ACCC should continue to make clear on its [Grocery Code website pages](#) that it does not resolve individual disputes.

### **Code Mediator role**

We agree with the Review that the fast, flexible, informal and low cost elements of the voluntary Code should be retained and welcome confirmation that the Code Arbiter (renamed Code Mediator) will continue to have the power to investigate confidential and informal complaints from suppliers.<sup>13</sup>

However, clarification is needed as to the Code Mediator’s dual functionality as a mediator and arbitrator as set out in the Interim Report, as well as an investigator and informal complaints handler.

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<sup>13</sup> Interim Report, page 47

### Careful Panel Selection: Independent Mediators and Arbitrators

Independent Mediators and Arbitrators (as appointed by the Code Supervisor) will need to possess a sound understanding of the grocery sector's unique challenges and operations to most efficiently and effectively mediate or arbitrate disputes. At a minimum Independent Mediators and Arbitrators should:

- Have appropriate qualifications, knowledge or experience in procedural fairness and dispute resolution, with experience working in Australia.
- A good understanding of the Code obligations.
- A good understanding of, and experience with, grocery retail operations (e.g. knowledge of buying processes, supply chain management and contracting processes).
- satisfy all the requirements set out in the *Resolution Institute Arbitration Rules 2016* (as required by clause 39 of the current Code) and/or be accredited under the National Mediator Accreditation Standards system.
- Not be engaged by the relevant retailer/wholesaler or supplier in any other capacity.
- Be free from conflict or bias (other than as expressly disclosed to and accepted by the parties).

### Compensation Awards

We support the inclusion of the Compensation Commitment for small suppliers in a voluntary section of the Mandatory Code to which we would sign up in principle, subject to:

- **Appropriately selected and qualified mediators and arbitrators.** As detailed above, we would like to understand and have input into the Panel selection process to provide the necessary confidence to sign up to pre-agreement to very significant determinants of compensation; and
- **Understanding of the substantive content in the revised Code.** Understanding these changes will be important to provide confidence in advance of the voluntary commitment to pay large sums of compensation, as determined by an unknown appointed arbitrator. It is difficult to voluntarily submit to pre-agreed compensation award amounts without understanding the compliance obligations from which, if breached, those awards would flow.
- **Distinction between large multinationals and small suppliers.** Pre-agreed compensation awards by the Independent Arbitrator of up to \$5 million should only be available to small<sup>14</sup> suppliers.

We further submit that the automatic application of the Compensation Commitment to large global suppliers, who stock "must have" brands and/or who otherwise enjoy similar or greater bargaining power to retailers and wholesalers, be reviewed within 2 years of the re-making of the Code in mandatory form.

### Power to determine changes in the commercial arrangements between the parties

We oppose the Interim Report's proposal that independent arbitrators possess the authority to modify Grocery Supply Agreements (**GSA's**). Given the complexity and strategic and commercial implications,

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<sup>14</sup> Small suppliers would be those that have annual revenue of less than \$10 million or fewer than 100 staff

and broad application across our supplier base, of such agreements, the power to amend contractual arrangements between parties should only be exercised under conditions of mutual consent. The Code Mediator and Arbitrator may, however, be empowered to recommend amendments to a GSA.

### **Form of voluntary agreement by Retailers to accept compensation determinations**

We consider that any commitment by retailers and wholesalers to be bound by the proposed Code Mediator recommendations and Independent Arbitrator decisions should most appropriately be reflected in a voluntary Part [5] [Dispute resolution] of the Code itself, following a similar mechanism to that which is currently in clause 4 of the Code.

Signatory acceptance of the dispute resolution provisions in a voluntary section of the mandatory code will avoid the constitutional obstacles to entrusting non-judicial officers with the ability to award compensation or to determine whether legislation has been breached or impose penalties.

It will also avoid the significant administrative burden for both retailers/wholesalers and thousands of grocery suppliers that would exist if retailers and wholesalers were required to amend all grocery supply agreements to reflect the code mediator and arbitral process.

### **Confidentiality of Arbitration details**

It will be important to suppliers and retailers alike to have confirmation that the confidential details and outcomes of arbitral processes will remain confidential and not be disclosed in public reports absent the consent of both parties.

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

We note this is primarily a name change from Independent Reviewer to Code Supervisor.

### **Code Supervisor Annual Report**

The change in the annual reporting requirements of the Code Supervisor is a requirement to report the number of informal complaints (these are not currently captured in the Code Arbitrator, or Independent Reviewer annual reports).<sup>15</sup> We support this change so long as the current requirements under the Code not to publish information that is confidential commercial information and/or could identify a supplier are retained.<sup>16</sup>

### **Code Supervisor Guidance**

The Interim Report recommends the Code Supervisor provide advice and guidance to suppliers about obligations under the Code, dispute resolution and examples of Code breaches.<sup>17</sup> Consideration should be given to whether the ACCC as the enforcement agency, may be better placed to provide this type of guidance to suppliers and the wider industry, consistent with the approach taken in relation to

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<sup>15</sup> Clause 36D and 37E of the Code

<sup>16</sup> Clause 37E(4) and (5) of the Code

<sup>17</sup> The Interim Report, page 47



other industry Codes.<sup>18</sup> We seek further clarity on this guidance, will it be informal and/or published guidance and how will it be written into the Code?

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

In our experience, the current Code provisions give both parties the flexibility to negotiate and agree on key commercial and operational terms in their GSA and where not captured in a GSA, the Code provides a default position, or backstop for both parties which protects suppliers from potentially unacceptable practices. Material changes to this flexibility will have a substantial operational and commercial impact on us and our suppliers, especially in areas such as unilateral variations, delisting, wastage and pass-through costs.<sup>19</sup> No case has been made for change in this regard, when the practical operation of these clauses and their impact in their commercial context is well understood. In addition, there is a real risk of unintended consequences of hard restrictions being introduced in relation to what are otherwise fair and reasonable mutual agreements. Rather, we submit that retailers should continue to be required to provide to suppliers a clear explanation of any set off or deduction from their remittances made under any of the existing provisions in the grocery supply agreement. If a supplier is unhappy about that outcome, it may, of course, raise its concerns through any of the various channels referred to above.

**If, contrary to our submission and experience, the Review considers contracting out provisions are to be modified, efficient changes could be made to the Code** that require retailers to provide a “clear and full written explanation to the supplier” as to why this is reasonable in the circumstances.<sup>20</sup> We believe the opt out provisions of the Code could be strengthened for the benefit of suppliers, by the inclusion of this reasonableness test which requires the retailer/wholesaler to explain its position clearly. We note this reflects the position adopted in the recently introduced NZ Grocery Code. Such an approach would provide further express protection for suppliers against misuse of opt out provisions and guard against any unintended restrictions on suppliers’ rights and levers to negotiate their positions in flexible good faith commercial dealings today.

We would be happy to provide more detail and discuss the operation of individual provisions with the Review.

***Recommendations 10 & 11: Penalties for non-compliance should apply, with penalties for more harmful breaches of the Code being the greatest of \$10 million, 10 percent 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. The Government should consider increasing infringement notice amounts for the Code***

We support a regime which allows the issue of infringement notices for less serious breaches and provides for court ordered penalties that are proportionate for systemic serious instances of non-compliance by a retailer or wholesaler.

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<sup>18</sup> See for example ACCC guidance material for the Horticulture Code of Conduct (**Horticulture Code**): <https://www.accc.gov.au/media-release/accc-updates-guidance-material-for-horticulture-code>; and the Dairy Code of Conduct (**Dairy Code**): <https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct> and existing guidance in relation to the voluntary Food and Grocery Code of Conduct <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

<sup>19</sup> Interim Report, page 52

<sup>20</sup> *Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 (NZ)*, clause 16(7)

## Responses to Consultation Questions 1, 2, 8, 9, 10 and 11 from the Interim Report

### Intermediaries

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

The current Code properly addresses and protects the relationships between retailers/wholesalers and their suppliers, including suppliers who are aggregators or processors (these entities fall within the definition of “supplier” under the Code).

The Horticulture Code and the Dairy Code clearly and directly regulate the agreements between farmers, traders and processors respectively. Woolworths’ expectation and requirement is that its suppliers comply with all laws and regulations that apply to them - this is clear in Woolworths’ standard trading terms.

Having regard to the multiple submissions made on behalf of growers in this Review relating to their treatment by Traders (merchants and agents), an independent review of the effectiveness of the Horticulture Code may be required. This could include whether growers would benefit from a Horticulture Mediator or Ombudsman with the power to deal with unsatisfactory negotiations swiftly and in real time. It should also consider the merits of a proactive education campaign for growers, and whether penalties for breach of the Horticulture Code should be increased (the current maximum penalty under both codes is \$93,900).

### Good Faith Provisions

**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.**

Woolworths supports the extension of the current good faith obligation under the Code to suppliers, particularly large multinational suppliers. A mutual obligation requiring both suppliers and retailers/wholesalers to act in good faith, will better facilitate mutually beneficial outcomes for both parties. Extending the good faith obligation to suppliers will also achieve the following benefits:

- **Alignment with other Industry Codes:** As noted in the Interim Report, a mutual good faith obligation, would bring the Code into line with all other industry codes under the CCA.
- **Prohibit unreasonable conduct of larger suppliers:** As we have previously noted, many of our large multinational suppliers already have strong countervailing power in negotiations with Woolworths. Where they negotiate unreasonably with us, we are obliged to agree to their terms, to avoid cessation of supply, often of “must have brands” that our customers love. Extending the good faith obligation to suppliers would likely limit unreasonable behaviour.

### *Issues specific to fresh produce*

**8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.**

**9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?**

**10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.**

**11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.**

Consultation questions 8-11 in the Interim Report relate to Code protections for suppliers of fresh produce. At present, there appears to be a low level of awareness and understanding among some fruit and vegetable suppliers of the Food and Grocery Code protections which are already available to them. This may be impacting preparedness and confidence to effectively rely on the Code and the available dispute resolution mechanisms. Woolworths supports both the clarification of Code protections for fruit and vegetable suppliers and the provision of related practical support and education as set out below.

### *Clarifying and strengthening Code protections for fruit and vegetable suppliers*

We support the following **5 proposals** to address issues raised by fruit and vegetable suppliers in the Review:

- 1. Clarify that the Good Faith protection applies to fruit and vegetable suppliers** - the Code should make clear that clause 6B operates to ensure lawful and good faith activity by retailers/wholesalers and suppliers in relation to their dealings with fruit and vegetable suppliers, including to protect against the following activities which have been complained of by fruit and vegetable suppliers in the Review:
  - a. unreasonable long range forecasting practices;
  - b. misrepresentations about market price; and
  - c. unreasonable, capricious or dishonest application of standards and specifications.
- 2. In relation to product specifications for fruit and vegetable suppliers**, we support augmenting the existing protections in clause 21 of the Code relating to fresh produce standards and specifications. Simple amendments could be made to incorporate a reasonableness requirement, mirroring the New Zealand Grocery Supply Code.
- 3. A dedicated education program for fruit and vegetable suppliers** should be run to build understanding and awareness of the Food and Grocery Code protections and available avenues for raising complaints and resolving issues with confidence, and without fear of retribution. Industry training might be sponsored and promoted by the Code Supervisor. Woolworths commits to ensuring that its own fruit and vegetable suppliers are given more information on these issues.
- 4. Establishment of an end to end price transparency industry project by a trusted, independent body.** Price transparency may be improved end to end through the fruit and vegetable supply chain by the publication of the average prices paid by retailers and wholesalers by commodity

and region. An appropriately placed research and development organisation responsible for investing in agriculture could conduct the project, with whole of industry participation. The development of fruit and vegetable price transparency solutions is a complex matter that must be undertaken across the industry. Woolworths will play its role in contributing to any such efforts.

- 5. Reasonable grounds for long range forecasting and requirement to provide 3 days written notice of change in demand (or accept and pay for product).** In line with their existing obligations to act in good faith, retailers and wholesalers should have reasonable grounds for making long range forecasting requirements. In addition, retailers/wholesalers might also be required to give at least 3 days' notice in writing ahead of making any change to an existing order for fruit/vegetable products to be packed in retailer branded packaging. This requirement could be introduced to ensure proper notice of any reasonable change to supply requirements before produce is packed and to better apportion the risk and costs of uncertain consumer demand conditions.

We would be happy to engage further with the Review to discuss this or any of the issues and proposals put forward in this Submission.

**WOOLWORTHS GROUP**

## Annexure A: Competition in the Australian grocery supply chain

Since 2008, there has been significant entry and expansion of global retailers and competition from a broad set of competitors in the retail sale of grocery products, which are not limited to traditional supermarkets. We face robust competition (both in-store and online) from a broad set of competitors in the retail sale of grocery products, which are not limited to traditional supermarkets. Figure 1 below shows the many different types of grocery retailers in Australia competing fiercely for share of the customer's grocery basket.



Figure 1: Competitors of Woolworths

Competition in grocery retail extends well beyond supermarkets. Many suppliers who supply Woolworths, Coles, Aldi and Metcash, also supply category specialists like Bunnings, Chemist Warehouse and The Reject Shop, who are increasingly extending their grocery range and competing with traditional supermarkets, for example:

- Chemist Warehouse offers ~21,000 SKUs in-store, with a wider range online<sup>21</sup>, with non-pharmacy products such as health, wellness and personal care products accounting for ~70% of store revenue.
- Bunnings has ~4,000 SKUs across cleaning products and pet needs alone<sup>22</sup>, 10 competing heavily on a price point basis through its 'lowest prices' policy.
- The Reject Shop has around 6,000 products<sup>23</sup> in the long-life packaged food and 11 non-food essential categories including cleaning products, toiletries, personal hygiene, lunchbox snacks and pet products, and offers pick up or delivery for over 1,350 products via DoorDash<sup>24</sup>.

<sup>21</sup> Sigma Healthcare, Transformational Merger with Chemist Warehouse Group and Sigma Equity Raising – Investor Presentation, 11 December 2023, page 46:

<https://investorcentre.sigmahealthcare.com.au/static-files/d2c377b3-f487-4488-b34d-43c02330e6b7>.

<sup>22</sup> Carrie LaFrenz, 'Bunnings launches biggest product expansion in decades with pet care', 28 February 2023, Australian Financial Review: <https://www.afr.com/companies/retail/bunnings-launches-biggest-expansion-in-decades-20230224-p5cneq>

Sarah Swain, 'Bunnings expands bulk cleaning products to compete with supermarkets', 21 November 2023, 9News: <https://www.9news.com.au/national/bunnings-cleaning-products-expansion/2ce87496-337a-43ea-a2e0-f0fe95c0a829>.

<sup>23</sup> See search results depicting size of The Reject Shop's product range here:

<https://www.rejectshop.com.au/search?products%5Bquery%5D=%2A>.

<sup>24</sup> The Reject Shop, 'Online Same Day Delivery FAQ':

<https://www.rejectshop.com.au/customerservice/online-same-day-delivery-faq>.

- Online grocery retailing has changed competition dynamics meaningfully since 2008, with competitors such as Amazon having ~80% of the Australian population within a 12 hour drive of its Western Sydney DC. The Amazon Prime subscription reportedly has more than 4 million members (and growing) in Australia<sup>25</sup>, driving consumers to turn first to Amazon.
- Woolworths Supermarkets offers a diverse range of products - more than 28,000 product SKUs (including around 6,000 own brand products) across 82 product categories and 364 subcategories. To provide relativity compared to the grocery retailers listed above, Woolworths Supermarkets has around: 1300 Health and Wellness SKUs; 4800 Personal Care SKUs; 900 Pet needs SKUs; and 1000 Household cleaning SKUs. This helps demonstrate the increasing role of other retailers in providing customers with options to purchase these groceries and the leverage these other retailers may have on suppliers.

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<sup>25</sup> Sam Buckingham-Jones, 'Aussies added 189,000 streaming services despite cost-of-living crunch', 2 May 2023, Australian Financial Review:  
<https://www.afr.com/companies/media-and-marketing/aussies-added-189-000-streaming-services-despite-cost-of-living-crunch-20230501-p5d4j2>.



## **Woolworths Supermarkets Trade Partner Complaints Integrity Policy**

**June 2023**

### **Purpose**

Woolworths Supermarkets (**Woolworths**) is committed to ensuring our Trade Partners can raise complaints and resolve issues with us. We encourage our Trade Partners to raise any concerns they have with us, either directly to Woolworths Commercial leaders, the Managing Director of Woolworths Supermarkets or with our Code Arbiter.

We will ensure that our Trade Partners will not be subject to commercial detriment or adverse consequences as a result of raising any complaint with Woolworths.

To demonstrate Woolworths' commitment, the Managing Director of Woolworths Supermarkets will monitor the status of Woolworths' commercial relationships with any Trade Partner after it has raised a complaint relating to the Food and Grocery Code of Conduct (**Code**) which is:

- raised with Woolworths directly in writing; and/or
- raised with Woolworths' Code Arbiter formally or informally, if the relevant Trade Partner has provided consent for Woolworths' Code Arbiter to share their name and the details of the complaint.

This Policy has been developed to support Woolworths' obligation under paragraph 6B of the Code to deal with Trade Partners lawfully and in good faith.

Woolworths will not tolerate any reprisal against a Trade Partner for making a complaint under the Grocery Code. We have made this clear to our Buying Team across all levels of experience and seniority. A failure to comply with paragraph 6B of the Code by engaging in retribution or reprisal may result in a formal investigation and, if substantiated, disciplinary action for the relevant Buying Team member. If a reprisal is found by the Managing Director to have occurred, a formal apology will be made and corrective and/or remedial action will be taken.

### **Integrity Reviews**

At **6 and 12 months** after any Code complaint is a) raised directly with Woolworths or, b) if approval has been given by the Trade Partner, shared by Woolworths' Independent Code Arbiter, the Managing Director of Supermarkets will take the following proactive action:

1. **Review the commercial actions of the Buying Team:** to check that all material decisions that involve a change to the Trade Partners' business with us have been made in good faith, as defined by the Code, and were based on genuine and reasonable commercial reasons.
2. **If needed, directly contact the Trade Partner:** to understand the status of their current commercial

relationship with Woolworths, and listen and learn from any feedback received.

3. **Make the findings from this integrity review process available to Woolworths' Code Arbiter:** to provide visibility as to whether the trade partner suffered detriment as a result of having raised the complaint.

Woolworths is committed to engaging proactively and in good faith with all our Trade Partners, and encourages them to approach the Woolworths' Independent Code Arbiter, if they are unhappy with outcomes achieved through directly raising a complaint with the Woolworths' Commercial Team.

This Policy is intended to be consistent with and support the Code. To the extent of any inconsistency with the Code, the Code will prevail.