



18 October 2024

Competition Policy Unit

Treasury

Langton Cres

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via email: fgc@treasury.gov.au

Dear Sir/Madam

Mandatory Food and Grocery Code exposure draft regulations

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) appreciates the opportunity to comment on the Mandatory Food and Grocery Code exposure draft regulations, and to reiterate comments provided to the Grocery Code Review Secretariat in April 2024.

The ASBFEO acknowledges the inclusion of ASBFEO functions, including keeping lists of alternative dispute resolution practitioners who can provide services of mediation or arbitration for the purposes of this Code. We further note that several new provisions in the Code are aimed at protecting suppliers from retribution, and that amendments have been made to strengthen dispute-resolution arrangements. However, the ASBFEO maintains that it is critical to address existing impediments to dispute resolution under the Code and, in doing so, encourage suppliers to bring disputes.

It is the ASBFEO's view that the Code should provide for independent, robust and efficient dispute resolution processes that are structured to produce impartial outcomes. This would encourage greater participation in the Code's dispute resolution processes and improve prospects for timely and effective resolution and remediation.

ASBFEO position 1: Consider situating review functions in the ASBFEO to identify where retribution has been meted out on a supplier for raising a dispute under the Code, noting that additional resources may be required.

The ASBFEO maintains that it would be beneficial for a distinct function to review the longer-term implications of outcomes of disputes raised under the Code, particularly whether suppliers have faced retribution for raising a dispute. The ASBFEO, given its legislated mandatory information gathering powers under its existing inquiry function, would be well-placed to undertake this work subject to additional resourcing, noting however it would be limited to examining issues relating to small businesses.

This review process should include follow-up with Code complainants after the ADR process to inquire about their experiences and incorporate these observations into reporting on the Code's effectiveness. Key considerations of the review should include:

- Ensuring the price paid to suppliers allows for a sustainable business.
- Facilitating innovation and productivity improvements among suppliers. (NB if suppliers aren't innovating, it may be owing to unsustainable profits or a lack of trust that large grocery businesses will share fairly in the gains from such improvements).



- Targeting a stable product mix that allows customers to develop loyalty to supplier brands, while also encouraging the introduction of new and innovative products.

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

ASBFEO position 2: The Code should include an internal 'problem solving/assistance' process.

The ASBFEO suggests the Code includes a structured internal process for problem-solving and assistance, where a supermarket representative with expertise in navigating the business can help smaller suppliers resolve issues and understand decisions. This role would assist suppliers in clarifying reasons behind certain events, provide reminders about commitments made by buyers, and offer follow-ups. Additionally, supermarkets have been known to share commercial information that aids smaller suppliers in making decisions related to product listings, delistings, and pricing, which helps fill knowledge gaps.

The supermarket-appointed mediators believe their strongest contributions come from this supportive role, distinguishing themselves from external Alternative Dispute Resolution (ADR) providers, like ASBFEO, who operate independently and often come in with some prior context. This internal mediator could also guide smaller suppliers through the external Code-ADR process, advising them on essential factors, potential solutions, and strategies for effective engagement with ADR. It's important to maintain this informal problem-solving function, rather than shifting to a rigid, formalised system that treats minor issues as formal disputes.

ASBFEO position 3: Smaller suppliers should have the option to be represented by their industry association or trusted advisor.

The ASBFEO suggests that there should be an option for smaller suppliers to be represented by their industry associations or trusted advisers. This representation would help balance the dynamics between parties in what can be a highly demanding and complex commercial environment. Being a leading supplier in a particular category does not necessarily equate to having equal expertise in areas such as commodity costs, business input trends, market conditions, marketing strategies, and negotiation tactics, and having representation from their industry associations or trusted advisers to help smaller suppliers in negotiations.

ASBFEO position 4: The Code's dispute resolution framework should be independent and should not incorporate supermarket-appointed Code Mediators.

The ASBFEO notes that the intent of the Code is to provide 'informal, confidential and low-cost processes for resolving disputes.' However, it is critical this does not come at the cost of the independence of the Code's dispute resolution framework. Accordingly, while suppliers should be



allowed to raise a complaint with a supermarket internally, the ASBFEO maintains the position that the mediation and arbitration processes under the Code should be structurally independent.

Reviews of the Code have highlighted that dispute resolution processes under the Code are rarely used. The ASBFEO understands from stakeholder engagement that this is likely due to impediments to suppliers using the Code's dispute resolution framework, including potentially the fear of losing market access and perceived structural bias in the dispute resolution framework. This is supported by the findings of the Independent Reviewer that more than 30% of surveyed Woolworths and Coles suppliers reported 'fear of damaging a commercial relationship' as an impediment to raising an issue with a Code Arbiter, and that 18% were not confident their confidentiality would be maintained.¹

The ASBFEO considers that these impediments arise mainly because of two key issues:

- (1) the market power of the supermarkets which results in significant bargaining power imbalances between supermarkets and their suppliers
- (2) the lack of structural independence in the Code's current dispute resolution framework.

While Code reform would not by itself increase the competitiveness of the supermarket sector, it could establish the structural independence of the Code's dispute resolution framework. This would help to ensure that disputes are resolved impartially and, in comparison to a framework allowing for supermarket-appointed Code Mediators, it would also limit additional opportunities for parties to leverage their bargaining power to influence dispute resolution processes and outcomes. These are critical requirements for setting up an effective dispute resolution framework that attracts industry confidence and participation, especially given the widespread bargaining power imbalances in this sector.

The ASBFEO's concerns about the suggested availability of supermarket-appointed Code Mediators are not alleviated by ostensibly allowing suppliers discretion over their use because this choice would in practice be illusory for many suppliers. Many suppliers rely on their relationships with major supermarkets and would be unlikely to resist pressure by a major supermarket to engage a supermarket-appointed Code Mediator, even if the supplier had concerns about the appointee's impartiality.² The major supermarkets could therefore engage in strategic behaviour to offer mediation through their appointees as a 'free' or convenient option to encourage their supplier's acceptance of less favourable mediation outcomes or to delay dispute resolution processes.

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

¹ Independent Reviewer, *2022-23 Annual Report*, Food and Grocery Code Independent Reviewer website, Australian Government, 2023, accessed 4 May 2024.

² As the Independent Reviewer finds, more than 41% of surveyed Woolworths and Coles suppliers reported 'fear of damaging a commercial relationship' as an impediment for raising an issue with the supermarket.



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

This is only one such example of an alternative that both retains the structural independence of the Code's dispute resolution framework and reduces dispute resolution costs for suppliers. Regardless of the precise form of the funding model, the ASBFEO's view is that costs should not be a significant impediment to bringing a dispute under the Code's dispute resolution processes and that timely resolution is important.

Recommendation 1: The large grocery business must provide the supplier with the Code and details of the appointed Code Mediator and the dispute resolution processes upon entering a grocery supply agreement.

Noting our reiteration of relevant positions above, the ASBFEO recommends that suppliers be provided with the Code at the time of entering into a grocery supply agreement, along with details of the dispute resolution processes and the Code Mediator.

The large grocery business should be required to provide to the supplier explicit details of:

- the appointed Code Mediator
- timeframes for dispute resolution
- what methods of dispute resolution are available
- what remedies are available through the dispute resolution process
- the escalation process if the Code Mediator's process fails to resolve the dispute
- costs involved in the dispute resolutions process.

ASBFEO position 5: Dispute resolution and code enforcement through the court system.

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

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



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

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

Yours sincerely



The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman