

1 February 2023

Director
Competitive Conduct Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: GroceryCodeReview@treasury.gov.au

Dear Sir/Madam,

Review of the Dispute Resolution Provisions in the Food and Grocery Code

Introduction

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) makes this submission in response to the '*Dispute Resolution Provisions in the Food and Grocery Code - Consultation Paper*', dated December 2022 (Consultation Paper).

The SME Committee has as its primary focus the consideration of legal issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

One of the members of the SME Committee is Ms Bronwyn Gallacher who is currently the ALDI Code Arbiter. Ms Gallacher has not commented or otherwise contributed to this submission.

Previous Submissions

The SME Committee has previously lodged submissions with Treasury in relation to the *Food and Grocery Code of Conduct* (the **Grocery Code**).

In September 2014, the SME Committee lodged a submission¹ in response to the '*Improving Commercial Relationships in the Food and Grocery Sector*' report and the draft Grocery Code. The SME Committee was of the view at that time that the Grocery Code should be a mandatory code.

¹ Law Council of Australia Business Law Section, *Improving Commercial Relationships in the Food and Grocery Sector and the draft Food and Grocery Code of Conduct (the Grocery Code)*, Submission to The Treasury, 12 September 2014.

In August 2018, the SME Committee lodged a submission² in response to the 'Draft Report into the Independent Review of the Food and Grocery Code of Conduct' dated June 2018. In its submission, the SME Committee reiterated its view that the Grocery Code should be a mandatory code.

The SME Committee remains of the view that the Grocery Code should be a mandatory code.

Having said that, it notes the comment on page 5 of the Consultation Paper:

Considerations about whether the Code should remain voluntary or be made mandatory is outside the scope of this review. Those issues will be considered in the next review, which will consider the remaining provisions of the Code and commence before 3 October 2023.

Accordingly, the SME Committee will not comment substantively on this issue in this submission.

Questions

The SME Committee provides the following responses to each of the questions set out in the Consultation Paper.

1. Do you think the current formal and informal Code Arbiter functions support independent consideration of complaints and provide consistent outcomes across all Code Arbiters?

The SME Committee supports the informal Code Arbiter functions which it believes will support the independent consideration of complaints. However, the informal function is unlikely to provide consistent outcomes across all Code Arbiters given each Code Arbiter will approach the task differently.

2. Are there appropriate protections in place for suppliers using the formal Code Arbiter processes?

The SME Committee does not believe that there are appropriate protections in place for suppliers using the formal Code Arbiter processes. There are no sanctions which would apply to Grocery Code signatories in the event that adverse action or retribution is taken against a supplier for having pursued the formal Code Arbiter process. This contrasts with section 44ZK of the *Competition and Consumer Act 2010* (Cth) which creates a criminal offence for the following conduct:

Intimidation etc.

A person must not:

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person;

because that other person:

² Law Council of Australia Business Law Section, *Draft Report into the Independent Review of the Food and Grocery Code of Conduct dated June 2018*, Submission to The Treasury, 1 August 2018.

(c) proposes to produce, or has produced, documents to the Commission; or
(d) proposes to appear or has appeared as a witness before the Commission,

Penalty: Imprisonment for 12 months.

3. What do you consider to be the benefits of being able to raise a dispute with the Code Arbiter informally, as opposed to making a formal request?

The main benefit of being able to raise a dispute with the Code Arbiter informally is that it gives suppliers another option to raise a complaint. Often complainants wish to find out more information on an informal basis about such issues as how a complaint will be dealt with, confidentiality, and possible sanctions before deciding to lodge a formal complaint.

4. What do you consider to be the advantages and disadvantages of the current dispute resolution framework?

The main concern which the SME Committee has about the current dispute resolution framework is the low level of complaints. This level of complaint seems inconsistent with the level of concern among suppliers about the conduct of certain grocery retailers as demonstrated by the two Australian Competition and Consumer Commission (**ACCC**) cases taken in 2014³ and 2016.⁴

This level of complaint also seems to be inconsistent with the level of concern raised by suppliers in the context of each of the previous reviews concerning the Grocery Code.

The SME Committee also notes the statement in the Consultation Paper on page 9:

These (informal) arrangements were also proposed to address the proportionally low number of complaints being brought to the Code Arbiters, compared with the number of informal complaints filtering through other avenues, including reports made to industry bodies and the Independent Reviewer.

Whilst the SME Committee agrees that the introduction of the Grocery Code was likely to have reduced the level of inappropriate conduct occurring in the grocery sector towards suppliers, it believes that there remains a high degree of concern amongst suppliers about the conduct of Grocery Code signatories. It believes that suppliers are unwilling to invoke the dispute resolution processes of the Grocery Code due to a concern that it is not independent and effective, as well as the potential concerns about the risk of retribution.

³ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 45

⁴ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 147.

The SME Committee also notes the following table from the Independent Reviewer's Annual Report for 2020–21 which records the number of suppliers contacted as part of the Independent Reviewer's survey:⁵

Table 1. Responses as a proportion of Code signatories' contacts

Signatory	Responses per retailer/wholesaler	Supplier contacts sent survey	Responses as a proportion of supplier contacts (%)	Number of suppliers per retailer/wholesaler
Woolworths	313	2115	15%	1152
Coles	306	5327	6%	2114
Metcash	256	3869	7%	1375
Aldi	207	828	25%	828

The Independent Reviewer also noted that, of the suppliers that responded:

- 81 per cent of the responses indicated that suppliers were always or mostly treated fairly and respectfully by their retailer/wholesaler;
- 16 per cent identified that their retailer or wholesaler acts unreasonably at times; and
- 2 per cent identified that their retailer frequently acts unreasonably or with duress.

This translates to the following, based on 1082 responses:

- 1335 suppliers who were always or mostly treated fairly and respectfully by their retailer/wholesaler;
- 173 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 21 suppliers who believed that their retailer frequently acts unreasonably or with duress.

If one were to extrapolates these percentages to the entire number of suppliers (ie 12,139) the results would be as follows:

- 9832 suppliers who were always or mostly treated fairly and respectfully by their retailer/wholesaler;
- 1942 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 242 suppliers who believed that their retailer frequently acts unreasonably or with duress.

⁵ <https://grocerycodereviewer.gov.au/resources/annual-reports/2020-21-annual-report>

The results from the Independent Reviewer 2021–22 survey were largely similar to the previous year:⁶

Table 2. Responses as a proportion of Code Signatories' contacts

Signatory	Survey responses per retailer/wholesaler	Number of supplier contacts that were sent the survey	Survey responses as a proportion of supplier contacts sent the survey (%)	Number of suppliers per retailer/wholesaler
Woolworths	267	1,654 ¹²	16%	3,200 ¹³
Coles	274	1,811	15%	1,925
Metcash	241	3998	6%	2140
Aldi	217	1,440	15%	1,675

The Independent Reviewer also noted that, of the suppliers that responded:

- 50 per cent indicated that they were always treated fairly and respectfully by their retailer/wholesaler;
- 38 per cent identified that their retailer/wholesaler mostly treated them fairly and respectfully;
- 9 per cent identified that their retailer/wholesaler acted unreasonably at times; and
- 2 per cent identified that their retailer/wholesaler frequently acts unreasonably or with duress.

Based on a total of 999 responses, this translates to the following:

- 1998 suppliers who were always treated fairly and respectfully by their retailer/wholesaler
- 378 suppliers who were mostly treated fairly and respectfully by their retailer/wholesaler
- 89 suppliers who believed that their retailer or wholesaler acts unreasonably at times; and
- 20 suppliers who believed that their retailer frequently acts unreasonably or with duress

As is apparent from the above statistics, the level of complaint to the Code Arbiters is inconsistent with the concerns expressed by a not insignificant number of suppliers as demonstrated by the Independent Reviewer's survey results.

5. Do you think the dispute resolution process under the Code provides an effective, fair, and equitable means for resolving supplier complaints?

In the SME Committee's view, the dispute resolution process under the Grocery Code does not provide an effective, fair, or equitable means of resolving supply complaints. This is because the actual process by which complaints will be managed is not transparent. Other dispute resolution processes spell out their

⁶ Australian Government, Food and Grocery Code Independent Reviewer, *Annual Report 2021-22*, available at <<https://grocerycodereviewer.gov.au/resources/annual-reports/2021-22-annual-report>>.

processes in considerable detail, for example the Mortgage and Finance Association of Australia Disciplinary Rules which had been authorised by the ACCC.⁷

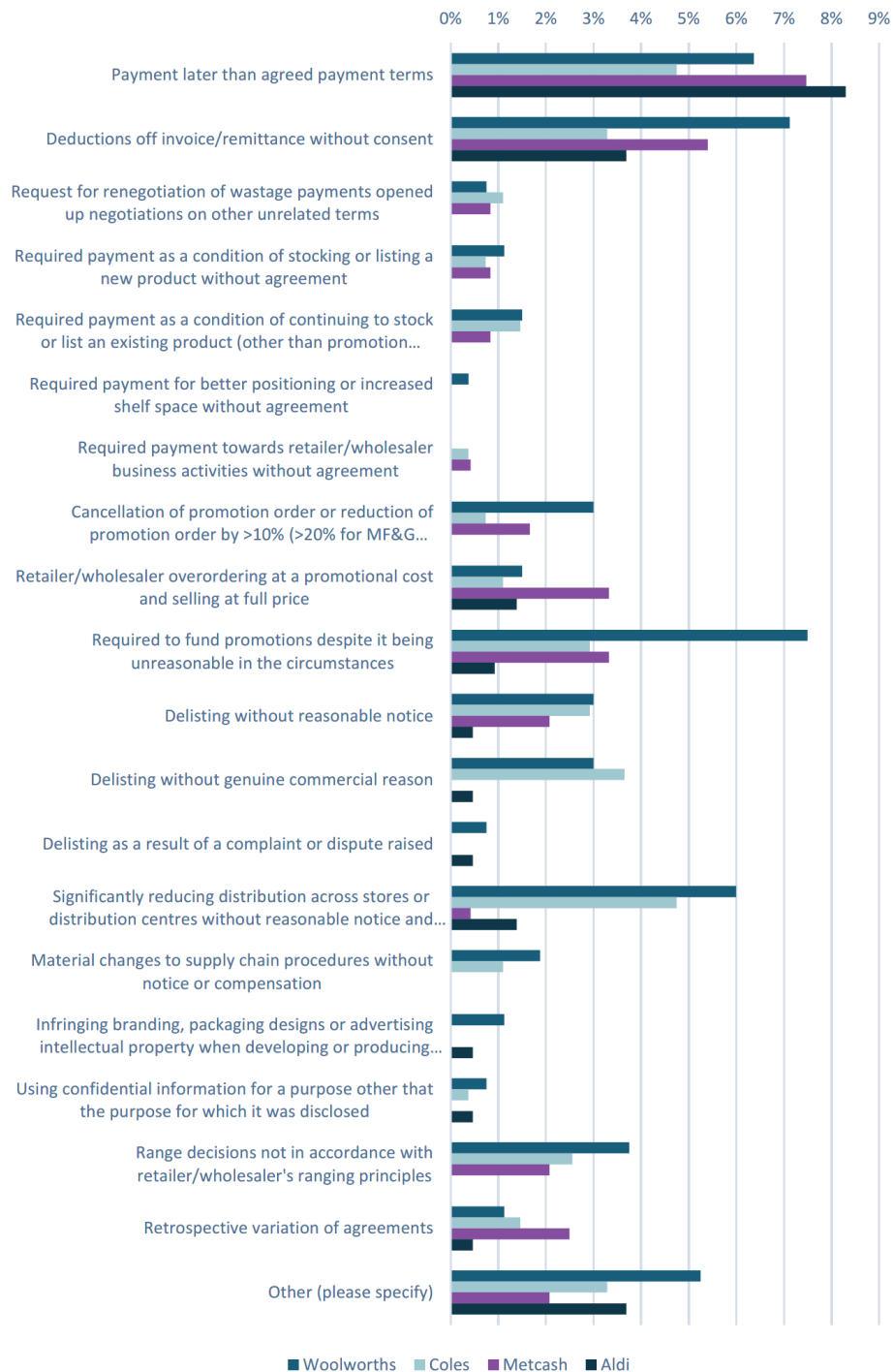
The SME Committee believes that each of the relevant Code Arbiters who has been appointed to that role is appropriate in terms of his or her independence and expertise. However, it also believes there may be a perception that the Code Arbiters are not independent of the relevant Grocery Code signatory because that they are selected, appointed and remunerated by the relevant Grocery Code signatory. The SME Committee notes that in other jurisdictions, such as the United States, compliance monitors in the antitrust/competition law and consumer law areas are only appointed with the agreement of the relevant regulator for example the United States Department of Justice or the Federal Trade Commission.⁸ A similar approach could be considered in Australia in relation to the appointment of Code Arbiters.

⁷ See ACCC, 'Mortgage and Finance Association of Australia', 19 November 2021, <<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/mortgage-and-finance-association-of-australia-0>>.

⁸ See American Bar Association, 'Criminal Justice Standards Monitors', available at <https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/>.

Further it appears to the SME Committee that much of the conduct that was originally of concern and which resulted in the introduction of the Grocery Code is still occurring, as demonstrated by the following table from the Independent Reviewer's 2021–22 Annual Report:⁹

Figure 6. Issues experienced by suppliers with their retailer/wholesaler



⁹ Australian Government, Food and Grocery Code Independent Reviewer, *Annual Report 2021-22*, available at <<https://grocerycodereviewer.gov.au/resources/annual-reports/2021-22-annual-report>>, 16.

6. Why do you think there are a low number of complaints being reported to the Code Arbiters?

As stated above, the SME Committee believes that the low number of complaints is due partially to improved conduct in the grocery sector, but more to an unwillingness among suppliers to use the dispute resolution processes, due to a belief that it is not independent and effective and that a complaint could result in some form of retribution.

7. Is more time needed to allow suppliers to become more familiar with the system and make greater use of it?

The SME Committee believes there has been adequate time for suppliers to become aware of the dispute resolution system under the Grocery Code. It does not believe that further time will result in suppliers making greater use of the system. Whilst it notes that the current review is not considering whether the Grocery Code should be made mandatory, it is of the view that the only way that the system is going to be used more extensively by suppliers is if it is made a mandatory code with penalties for non-compliance.

8. Do you think suppliers have a clear understanding of when, and how, they can escalate complaints and disputes to the Code Arbiters?

The SME Committee believes that suppliers' understanding of the system, including when and how suppliers can escalate complaints and disputes, is understood differentially among suppliers. The largest suppliers have a sound understanding of how the Grocery Code operates, as do some smaller suppliers who are members of particular industry associations. However, on balance, it believes that most smaller suppliers do not have a good understanding of the way the Grocery Code operates.

9. What other options are there to promote use of the Code dispute resolution system where there are genuine disputes that cannot be resolved by the internal processes provided by the signatories?

The SME Committee believes that more information needs to be provided to suppliers about the Grocery Code and the way it operates. Furthermore, it may be worthwhile to conduct more extensive surveys of suppliers to determine not only their level of understanding of the operation of the Grocery Code but also why they may be reluctant to invoke its provisions in relation to a particular dispute.

10. Is the Code Arbiters' maximum compensation order amount of up to \$5 million set at the appropriate level?

The Code Arbiters' maximum compensation order of \$5 million should be increased, given that it was established a number of years ago and has not kept pace with inflation. An alternative would be to increase the compensation limit to \$10 million or to provide the Independent Reviewer with discretionary jurisdiction to award compensation at higher levels in appropriate cases.

11. Should the Independent Reviewer play a greater role in evaluating Code Arbiters' dispute resolution processes under the code?

The SME Committee believes that the Independent Reviewer currently has an appropriate role in evaluating the Code Arbiters' dispute resolution processes and that no changes are required.

12. Do you think the Independent Reviewer should also be able to make recommendations directly to the retailer or wholesaler (as well as the Code Arbiters) on procedural issues, following an independent review of a Code Arbiters' process in dealing with a complaint?

The SME Committee agrees that it is appropriate and sensible for the Independent Reviewer to be able to make recommendations directly to the retailer or wholesaler and Code Arbiters on procedural issues. However, it should also be mandatory for the Independent Reviewer's recommendations to be implemented by Grocery Code signatories and Code Arbiters.

13. Do you think the Independent Reviewer should have stronger powers to refer complaints to the ACCC?

The SME Committee does not believe that the Independent Reviewer has any obstacles to referring a complaint to the ACCC, except for confidentiality restrictions imposed by the supplier. Therefore, in its view, stronger powers are not required. However it may be appropriate for there to be regular liaison meetings between the Independent Reviewer and the ACCC so as to facilitate such referrals.

14. Is the public reporting on complaints, by the Code Arbiters and Independent Reviewer, useful to suppliers? Does it inform suppliers about the dispute resolution process?

In our view, most suppliers would not be aware of the public reporting of complaints undertaken by the Code Arbiters and Independent Reviewer as such information is not routinely and effectively brought to the attention of suppliers. Unfortunately announcements by these organisations do not have the same public and media profile as announcements made by government regulators, particularly the ACCC.

15. Have suppliers used third party mediation or arbitration to resolve disputes with the signatories? If so, was the process effective?

The SME Committee is unaware of whether third party mediation or arbitration has been used to resolve disputes with Grocery Code signatories. Accordingly it is unable to comment on whether the process was effective. However, it notes that private arbitration is often quite formal and very costly.

16. Do you recommend any changes to the mediation and arbitration provisions?

The SME Committee believes that it may be appropriate to provide the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) with jurisdiction to conduct mediation and arbitration in relation to disputes arising under the Grocery Code. The ASBFEO has a strong track record in conducting effective and inexpensive dispute resolution processes for small businesses.¹⁰

17. Are the reporting requirements of the Independent Reviewer appropriate?

Whilst the reporting requirements of the Independent Reviewer are appropriate, the concern is that there is very little on which the Independent Reviewer is required to report, due to the underuse of the Grocery Code dispute resolution processes.

18. Is the annual survey providing a benefit to stakeholders? How could it be improved?

The annual survey does provide some benefits to stakeholders but again it is not well known among suppliers. The key challenge remains to make this information better known to stakeholders. The survey could also be supplemented by individual interviews particularly with those suppliers who have advised that their retailer or wholesaler acts unreasonably at times or frequently acts unreasonably or with duress.

19. Is the current voluntary approach without penalties for non-compliance allowing for effective dispute resolution under the Code?

As stated above the SME Committee has long advocated for a mandatory Grocery Code with the inclusion of penalties for non-compliance. Unfortunately, it believes there is a strong perception that the Grocery Code lacks “teeth” due to its voluntary nature and the absence of penalties for non-compliance.

20. Are there any other issues or suggestions about the current dispute resolution process under the Code that you wish to bring to the attention of the review?

The SME Committee believes that the Independent Reviewer’s annual surveys are a valuable source of intelligence about the industry and the operation of the Grocery Code. However, there is a need for the Independent Reviewer to obtain greater understanding of relevant issues by conducting more in-depth interviews with suppliers.

¹⁰ Representatives of ASBFEO regularly attend SME Committee meetings as observers.

Further discussion

The SME Committee would be happy to discuss any aspect of this submission.

Please contact Bruce Collins, the Chair of the SME Committee, on 0409 440 415 or bruce@taxcontroversypartners.com.au if you require further information or clarification.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section