



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

1 February 2023

Mr Vinh Le

Director, Competitive Conduct Unit

Market Conduct Division, The Treasury

Langton Crescent

PARKES ACT 2600

via email: GroceryCodeReview@treasury.gov.au

Dear Mr Le,

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

We welcome the opportunity to comment on the Food and Grocery Code of Conduct's (the code) alternative dispute resolution (ADR) provisions. The code has sought to formalise industry best practice protocols, provided independent oversight of disputes, and a comprehensive suite of ADR options, to mitigate the significant power imbalances between small business suppliers and larger food and grocery buyers. However, fear of retribution or damaging commercial relationships is an ongoing barrier to small businesses formally raising disputes with the code's arbiters'.

This review provides the opportunity to enhance ADR provisions to increase small business supplier confidence in the code, and ensure the code remains relevant, functional, and fit for purpose. We therefore make the following key recommendations and comments:

- 1. The code reviewer should be afforded additional powers to ensure capacity to perform their duties efficiently, effectively and robustly.** Empowering the reviewer to complete thorough quality control evaluations to identify deficiencies and recommend corrective actions, will help to build stakeholder confidence, reduce systemic risks, and promote continual improvement. To support effective operation of the code and ADR processes, the reviewer should have adequate powers to access to stakeholder's files.
- 2. The Australian Government should consider expanding sectoral scope to capture all fresh produce sectors, via the amendment of the code's dispute resolution timeframes to ensure fresh produce suppliers have access to timely, cost efficient and equitable ADR options.** While acting in good faith should ensure a dispute is responded to in a timely manner, this is not always the case. The code should ensure timeframes for resolving disputes (including price negotiations) related to perishable goods more accurately acknowledge supplier's product spoilage risk and seek to mitigate this power imbalance against small businesses.
- 3. Penalties and supplier remediation for breaching the code should be proportionate, effective, and targeted deterrents to retailers and wholesalers seeking to utilise the often-significant power imbalance to the detriment of small business.** Enforcement and penalties under the code should adequately accommodate both systemic breaches and uniquely individual matters. This could include referral to enforcement agencies who can apply monetary penalties, as well as the publication of code breaches, and self-reporting through environment, social and governance reporting requirements. Greater penalties for breaching the code would increase small business supplier confidence in their market, reward their efforts and investment, and reduce oppressive cartel behaviour. To ensure the full efficacy of



increased penalties the Australian Government should consider the implementation of a 'super-complaints' mechanism that allows ASBFEO and other credible agencies to refer cases to the ACCC for guaranteed investigation and where necessary enforcement action.

Further, the power imbalance could be reduced via the creation of a Small Business and Codes List (the list) in the Federal Circuit Court of Australia, which fall outside of the ADR options available under the code. As previously highlighted by this office, the introduction of the list would provide a low-cost alternative for small businesses to utilise should they seek a timely, cost-effective judgement, or where the other dispute resolution options have failed.

- 4. Inclusion of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) Assistance support services would complement the reviewer functions and support small business suppliers.** Inclusion of ASBFEO services will enhance the functions of the code, via the confidential provision of impartial information, dispute triaging, timely facilitation of mediation and arbitration administrative functions, dispute de-escalation including stakeholder relationship management and ADR case data collection. ASBFEO currently provides comparable services for the Franchising, Dairy and Horticulture codes.

We provide the following comments to further strengthen the code's effectiveness:

- 1. Review and determine the merits of retaining Section 31 (6) as code signatories have already consented to the code's obligations.** This change may build small business suppliers' confidence by reducing weaknesses in the code.
- 2. The reviewer and Australian Competition and Consumer Commission (ACCC) websites should be synchronised to provide comprehensive support, guidance, and ADR reporting capabilities.** It is difficult for stakeholders to quantify formal code disputes due to limited data collection. Greater consistency of information and reporting functionality between the reviewer and ACCC websites may improve small business engagement and ADR data collection.
- 3. Uniformity of key documentation and concise timely reporting of relevant information will assist stakeholders to review, analyse, and interpret information efficiently.** It is important that code breaches are identified and accurately reported to the reviewer. For example, where price increase requests have not been processed compliantly, it is important that the reviewer can clearly identify the entity, industry segment, business size, price increase request, details of the negotiation and resolution, so that the next steps can be considered including the reviewer making recommendations to retailers, arbiters, and agencies.
- 4. The reviewer's annual questionnaire process should be managed by an independent third party to build trust in the anonymity of the data collection process.** The anonymity of respondents is critical to achieving higher participation rates and forthright responses. Further, the questionnaire structure should be consistent to limit data comparability distortions.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr David Meakin on 02 5114 6106 or at david.meakin@asbfeo.gov.au.

Yours sincerely

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman