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To whom it may concern

Thank you for the opportunity to provide feedback on the *Food and Grocery Code of Conduct Review 2023-24*.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides advice, advocacy and affordable dispute resolution services to small businesses across NSW. As an advocate for small business, I support improvements to strengthen the *Food and Grocery Code of Conduct* (the Code) to extend the coverage, protections and the enforcement framework.

Mandating the Code

The Commission supports improvements to strengthen the Code including further consideration of the introduction of a mandatory code. A mandatory code would go further to address market power imbalances between small to medium sized food producers and supermarkets or wholesalers. While the annual reports of the Code's Independent Reviewer indicate that the objectives of the Code are broadly satisfied, I am concerned the self-enforcing nature of the code means smaller suppliers may be reluctant to come forward with complaints.

A prescribed mandatory code would extend to all retailers and wholesalers automatically. While there is provision for wholesalers to become signatories, some of whom may also have significant bargaining power over suppliers, the obligations of the Code does not extend to the broader grocery market. While signatories of the code: Coles Group Limited, Woolworths Group, Metcash Food and ALDI Australia¹ represent the vast majority of the grocery retail market, it does not provide universal coverage and there may be other supplier relationships warranting coverage. For example, the Code's obligation for retailers and wholesalers to act in good faith towards suppliers would, at face value, appear to be a reasonable obligation for all participants in the grocery sector.

However, in extending the coverage of the Code, policy consideration should be given to whether a minimum turnover threshold should be applied to exempt smaller or independent retailers to mitigate the risk of reversing power imbalances in favour of large or multinational grocery suppliers. In contemplating broader coverage of the obligations of the Code, consideration could also be given to whether tiered requirements exist in circumstances where power imbalances are less likely to limit the ability for suppliers to negotiate contractual obligations in accordance with their reasonable interests.

¹ Food and Grocery Code Independent Reviewer, Code Signatory CEO Letters at <https://grocerycodereviewer.gov.au/resources>

Resolving disputes

The Commission is aware of perceptions that the appointment and remuneration of Code Arbiters by retailers undermines their independence when exercising authority under the Code (including to issue binding compensation orders of up to \$5 million for losses sustained by a supplier as a result of a breach by a retailer).

An example of these concerns is the Independent Reviewer's investigation in 2021-22 of a complaint made in relation to the Coles Group's compliance with the code and the subsequent finding of non-compliance by the Independent Reviewer.² The circumstances surrounding this complaint led to the Independent Reviewer concluding "*that Coles and its Code Arbiter are not acting in accordance with the spirit of a voluntary code*". This review provides an opportunity to consider whether current arrangements deliver confidence to all parties that their disputes will be given due consideration should they wish to make a formal complaint.

Strengthened enforcement

The absence of formal disputes raised under the Code does not of itself indicate the effectiveness of the Code or the dispute resolution processes. Annual supplier surveys conducted by the Independent Reviewer indicate that the fear of retribution³ remains a significant barrier to raising a formal complaint. I would suggest that other reasons for complaints not being formally advanced may include the limited remedies and an enforcement framework perceived by some as ineffective.

Alternative Dispute Resolution (ADR) is a practical option for small businesses due to the lower costs and ability to deal with a matter quickly. However, ADR processes are not always effective where there is a significant power imbalance between the parties, without a viable legal option to pursue if ADR is unsuccessful. A complainant who lacks legal or commercial leverage is unlikely to gain a favourable outcome.

The lack of remedies together with the costs and complexity associated with commencing legal proceedings can dissuade small businesses from seeking resolutions by taking legal action. The respondents of these types of claims are significantly better resourced which can intimidate small businesses and lead them to conclude that the costs to dispute an issue will outweigh the benefit, rendering the claim unviable.

The Commission encourages further consideration of strengthening the enforcement framework to:

- Provide the ACCC with powers to make orders for civil penalties.

- Provide remedies for suppliers including compensation for losses incurred for breaches of the Code's obligations by retailers and wholesalers.

- Provide access to litigation pathways for small to medium sized claimants that are cost effective and quick (for example, tribunal determinations)

- Provide access to independent and impartial dispute processes appointed by Small Business Commissions (or equivalent) rather than allow one party to select a private mediator/arbitrator.

Thank you for the opportunity to make a submission. The Commission supports improvements to the Code of Conduct framework to ensure small businesses are adequately protected.

Yours sincerely

Chris Lamont

Commissioner

NSW Small Business Commission

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