

Review of the Food and Grocery Code of Conduct

Woolworths Supermarkets Submission

6 March 2024

Introduction and Summary

As a foundation signatory of the Food and Grocery Code of Conduct (**Code**) in 2015, Woolworths Supermarkets (**Woolworths**) is pleased to contribute its views and observations to this 2023-24 review.

In this submission, we provide our responses to the specific questions in the Consultation Paper¹, as well as some key observations, based on our eight year experience of working with the Code in practice.

The Code has improved supplier/retailer relations. It has provided parties with greater certainty in relation to good faith business operations and acted as an effective minimum standard for commercial buying teams. Together with the range of feedback we receive from suppliers, the Independent Reviewer, our Code Arbiter, the Code has helped to improve our ways of working. Healthy supplier/retailer relationships are vital to the success of our business and for a sustainable and innovative retail sector.

We aspire to be the retail partner of choice for our supplier trade partners. In addition to being a founding signatory to the Code, our [Trade Partner Charter](#) launched in December 2020, outlines our aspiration to build sustainable collaborative relationships that enable our Customer First strategy. Woolworths was ranked #1 retailer in the most recent independent annual Advantage Supplier Survey². Suppliers have consistently rated our understanding of the Code among our highest performing survey results. We are committed to listening to feedback from our supplier partners, and continuing to improve our ways of working.

We recognise there is always more to do and that improvements could be made to the Code to engender stronger perceptions of trust among all stakeholders. The Code could be strengthened where it will:

- encourage all parties to work in good faith;
- encourage suppliers to feel comfortable to raise complaints (including informally with our Code Arbiter);
- enable the swift and cost effective settlement of supplier concerns and disputes; and
- importantly - apply to *all* substantial retailers and wholesalers of grocery³ products with a gross annual turnover of \$1 billion or more.

The context for this review of the Code is one of intensifying competition among a growing number of grocery retailers. In 2008, the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries⁴ concluded that “grocery retailing [in Australia] is workably competitive”. Australia now has three of the largest and most efficient food and everyday needs retailers in the world competing to

¹ Independent Review of the Food and Grocery Code of Conduct 2023-24, Consultation Paper February 2024

² The Advantage Group, Annual Grocery Industry Voice of Supplier Program, May 2023. The survey covers business relationship, organisational behaviour, personnel/ organisation, category & business development, execution and supply chain management

³ See “Groceries” as defined under Part 1, Clause 3 of the Code

⁴ Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, July 2008, page xiv

serve Australian consumers - Aldi (global retail sales of A\$180 billion⁵), Costco (global retail sales of A\$360 billion⁶) and Amazon (global retail sales of A\$660 billion⁷). All three have material positions in Australia and plans to expand further. In addition to global competitors, we continue to face robust competition, both in-store and online, from long-standing rivals Coles, Metcash and the independent sector. On top of this, large national retailers such as Kmart, Bunnings, Chemist Warehouse, The Reject Shop and others compete vigorously in key long-life food and everyday needs products. To promote effective competition among all large grocery product retailers in Australia, there should be equivalent standards in their dealings with grocery suppliers.

We consider that **small to medium suppliers should be the primary beneficiaries of any revised or additional protections in the Code**. Small to medium sized suppliers can find large retailers and wholesalers complex to deal with. By contrast, large multinational Consumer Goods Companies (CPG's) companies are, in some cases, many times the size of Australian retailers and wholesalers and bring much greater bargaining power to negotiations, having a great number of channels to market on a global scale. Large Australian and foreign owned multinational suppliers of this sort supply to Woolworths over **70%** of our packaged goods products (by sales) and more than **60%** across all products (by sales).

In summary we make the following three overarching points in our submission:

1. **The Code should apply to all grocery product retailers and wholesalers** of substantial size, including global retail giants such as Costco and Amazon now operating in Australia, and other large retailers selling "groceries" in Australia (as defined under Part 1, Clause 3 of the Code), such as Chemist Warehouse.
2. **We support a mandatory Code on the basis that:**
 - the fast, flexible, informal and low cost elements of the voluntary Code are preserved - these are particularly beneficial for smaller suppliers. Specifically, the Code Arbiters and their informal complaints mechanism should be retained.
 - the good faith obligation 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*.
 - there is a level playing field: all other major Australian retailers of "groceries"⁸, 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).
3. We remain committed to providing **continuous, open-minded engagement** with this review process, as revision proposals take shape.

⁵ Datacentre from IGD, Aldi Global Sales 2022

⁶ Costco 2023 Annual Report; Conversion rate from OFX as at 22 Jan, 2024; 1 USD = 1.515549 AUD

⁷ Amazon Q3 Earnings Release, 2023, page xiv, TTM 2022 global retail sales excl. AWS, Conversion rate from OFX as at 22 Jan, 2024; 1 USD = 1.515549 AUD

⁸ See "Groceries" as defined under Part 1, Clause 3 of the Code

Finally, building on the notes above, we wish to highlight the **significant positive impact the recent introduction of the informal complaints process** has made on the practical operation of the Code.

Raising informal complaints to Code Arbiters has been an important improvement for effective issue resolution, including in relation to matters that are not strictly within the ambit of the Code. Helen McKenzie has, since her appointment as the Code Arbiter for Woolworths in 2020, gained important industry knowledge and an understanding of our retail operations which has allowed her to influence fast and effective changes within our business in response to informal complaints for the benefit of suppliers. Supplier feedback is that Helen is approachable, well qualified, and keen to help achieve practical positive outcomes. The informal complaints mechanism was recommended by the Independent Reviewer following his extensive engagement with suppliers.

Responses to Questions in the Consultation Paper

Purpose of the Code

1. What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?

The purpose and four objectives set out in section 2 of the Code continue to be appropriate.

We have not identified different or additional objectives that should be included in the Code. However, should additional objectives be considered, we recommend they align with the following high level principles:

- to encourage parties to work together in good faith;
- to encourage suppliers to feel comfortable to raise complaints (whether informally or otherwise);
- to enable the swift and effective settlement of disputes;
- to focus primarily on small and medium sized suppliers;
- to bind all 'grocery' retailers and wholesalers of substantial size; and
- not impede reasonable, good faith commercial negotiations, in order to support better outcomes for Australian consumers.

2. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

We are committed to fostering fair, transparent and mutually beneficial relationships with our suppliers. We believe the Code creates an effective framework that supports this objective and establishes a platform for fair dealing across hugely diverse food and grocery supply chains.

We acknowledge that the sophistication, resourcing and the relative bargaining power across different suppliers in their dealings with grocery retailers will vary significantly. The Code assists with good faith and fair dealing, irrespective of the size and sophistication of a supplier. It appropriately invokes the need for grocery retailers to act in good faith at all times, and to consider the particular circumstances of suppliers when making retail decisions that impact them.

Market context

3. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?

There are very different levels of relative bargaining power across our many suppliers. These suppliers range from large well known multinational consumer goods companies - in some cases many times the size of Woolworths - supplying large volumes of products across the entire store fleet (and more broadly on a global scale), through to small Australian family-owned operations supplying products to a subset of our stores.

Large suppliers

Large multinational suppliers typically have global scale, 'must have' brands, strong marketing investment and brand recognition, sophisticated systems and processes and significant financial resources. Large Australian and foreign owned multinational suppliers supply over **70% of our packaged goods**, by sales and **more than 60% of sales** across all products. In more than 20 packaged grocery categories there are two or three multinational companies that have significant scale, brand differentiation and greater than 50% share of category sales. For example, the top two suppliers of pet products to our stores together have more than 50% share of category sales in the 'Pet Needs' Category and the top three suppliers of snacks together have more than 62% share of sales in our snacks category. The drinks, confectionary and baby needs categories are also examples of where large multinational companies have a significant share of sales.

Wholesale price increases by our **largest 100 suppliers (ranked by sales) accounted for approximately 80% of all cost price increases** we received in the 2022/2023 reporting period. Large suppliers are often robust cost price negotiators and may, in some cases, withhold the supply of products as part of the negotiation. We negotiate directly with them with the intent of trying to ensure that their price increases are reasonable and based on genuine changes in their cost. However, it is important to note that suppliers are not obliged to provide cost information to justify their increased wholesale prices to retailers, under the Code. This limits our ability to test and verify the basis for a cost increase request. In many cases, we are obliged to accept these cost price increases or face an inability to supply our customers with well known brands.

Smaller suppliers

By contrast, we recognise that smaller suppliers with very small teams can find large retailers and wholesalers complex to deal with due to a lack of resources, knowledge and experience in the retail industry. We continue to invest in ways to simplify and streamline how we engage with these suppliers. In June 2023, we established a dedicated team to actively support small suppliers to do business with us and to guide them in their first months' partnering with us.

We have invested significantly in a range of small supplier initiatives to help small suppliers grow their business with us including:

- a dedicated team to work with small suppliers, including support for onboarding and the first few months of doing business with us;

- development of a Small Supplier Commercial Report, providing our smaller suppliers with data on the commercial performance of their products (drawing on feedback from the Independent Reviewer);
- shorter payment terms (14 days or less), including actively working to resolve cash flow issues due to growth with us; and
- investing over \$5.2 million in Seedlab, an independent national small business incubator and accelerator program.

These initiatives have been met with very positive feedback and actively helped to strengthen small supplier knowledge and growth in the retail industry. This has been recognised in a significant uplift in our 2024 small supplier internal Voice of Supplier survey results which have shown improved perceptions of working with us.

For small suppliers, there may be an opportunity to strengthen provisions in the Code or to further educate and empower these suppliers to make use of the significant protections within it. The recent changes to facilitate informal supplier engagement with our Code Arbiter are an example of good refinements to the Code - for both suppliers and retailers. Further engagement with the Code Arbiters and retailers and wholesalers on this point may assist the Secretariat.

Risk of “one size fits all” approach

It is our view that a “one size fits all” approach in the Code may have the unintended consequence of disadvantageous outcomes for consumers. Commercially robust - but always good faith - negotiations with large suppliers are important to support better pricing outcomes for Australian consumers. Many such suppliers already enjoy superior bargaining power to us. Further insulating such suppliers from inquiry and testing in negotiations with us risks muting competitive dynamics that are essential to well functioning retail markets which work well for consumers.

4. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

We refer to our responses to questions 2 and 3 and our summary position above.

Input from Code Arbiter, Helen McKenzie, may be of value on this topic, based on her successful engagement with smaller suppliers since her appointment.

Coverage of the Code

5. Should the Code be extended to cover other aspects of the food and grocery supply chain?

As stated above, we recognise the benefits of broadening the base of signatories to the Code, so that it applies to all substantial retailers and wholesalers of “groceries”⁹ with a gross annual turnover of \$1 billion or more. This will ensure a level playing field and consistent fair trading standards for all

⁹ See “Groceries” as defined under Part 1, Clause 3 of the Code

suppliers of “groceries” to all major retailers. There may also be opportunities to strengthen the Code in favour of small suppliers, as set out in the response to questions 3 and 4 above.

6. Should some or all alcoholic beverages be included in the scope of the Code?

We are not aware of any circumstances that would support this.

7. Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code’s signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

As stated above, our view is that all substantial retailers and wholesalers of “groceries”¹⁰, with a gross annual turnover of \$1 billion or more should become signatories to the Code. We see the application of consistent fair trading standards across the retail industry as a positive outcome for suppliers.

Code provisions

8. Do the provisions set out under the Code ensure it is fit for purpose?

In our experience the provisions of the Code are generally fit for purpose and have resulted in improved supplier/retailer relationships in accordance with the stated objectives detailed in section 2 of the Code.

We recognise however, that there may be more to do to engender trust and confidence in the Code. We have suggested possible improvements in our responses to questions 1, 5, 7, 9, 11, 13, 14, 15, 18 and 21 in relation to promoting good faith conduct by all suppliers and retailers, encouraging suppliers to feel comfortable to raise complaints; enabling the swift and cost effective settlement of supplier concerns and disputes; focusing Code protections on smaller suppliers; and through binding all retailers and wholesalers of grocery products of substantial size.

To further improve supplier confidence and perceptions of independence in the dispute resolution processes, we support the removal of clause 32(2) from the Code which currently permits some signatories to appoint a Code Arbitrator who is engaged in another capacity. We support an amendment that consistently requires that *all* signatories’ Code Arbitrators must not be engaged to act for the retailer or wholesaler in any other capacity.

9. Which provisions under the Code help or hinder suppliers? How can the provisions be improved?

The provisions under the Code contribute to fair, transparent and efficient relationships with our suppliers. Key provisions such as the good faith obligations ensure that the parties engage in open, and cooperative dealings, fostering a positive and sustainable working relationship. The dispute

¹⁰ See “Groceries” as defined under Part 1, Clause 3 of the Code

resolution mechanisms in the Code provide a clear, structured process for addressing any concerns or disagreements, ensuring they are resolved promptly and fairly. The current Code provisions not only support a healthy dialogue between retailers/wholesalers and suppliers but also contribute to the stability and predictability of the supply chain.

The current Code provisions give suppliers the flexibility to negotiate and agree on key commercial and operational terms in their Grocery Supply Agreements (**GSA**) and where not captured in a GSA, the Code provides a default position, or backstop for both parties.

This Code structure also provides clear obligations for retailers, as well as practical steps to ensure compliance where changes do arise as part of day to day retail trading. For example, Clause 22 of the Code, "Changes to supply chain procedures", provides a clear obligation on retailers not to "directly or indirectly require a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement concerned". However, in practice, changes to supply chain procedures do occur and the provision recognises this. The Code provides a clear set of rules to ensure compliance, including the requirements to give suppliers reasonable written notice of any change; or compensation in lieu of reasonable notice. We see important benefits in the current drafting of the Code which is fit for purpose and appropriately takes account of the fast paced and dynamic nature of the retail industry.

The current Code provisions collectively contribute to a more predictable and equitable business environment for suppliers. They not only protect suppliers from potentially unacceptable practices, but they also encourage a cooperative, mutually beneficial relationship between trading partners.

Possible opportunities for improvement having regard to Australian market dynamics

Further to our response to Questions 2-4, we consider there are three possible opportunities to strengthen the Code provisions as follows:

- **Level playing field:** The application of the Code should be to all substantial retailers and wholesalers of "groceries"¹¹ with a gross annual turnover of \$1 billion or more. This would promote more and fairer competition among all large retailers and wholesalers of "groceries" operating in Australia, including those such as Costco, Amazon, Bunnings and Chemist Warehouse.

This proposal would recognise and respond to the fact that the Australian retail **grocery market(s) is/are now undeniably broader** than what has traditionally been defined as supermarkets. This is illustrated in Figure 3 below from a March 2024 industry update published by Jarden retail analytics¹². The update notes that:

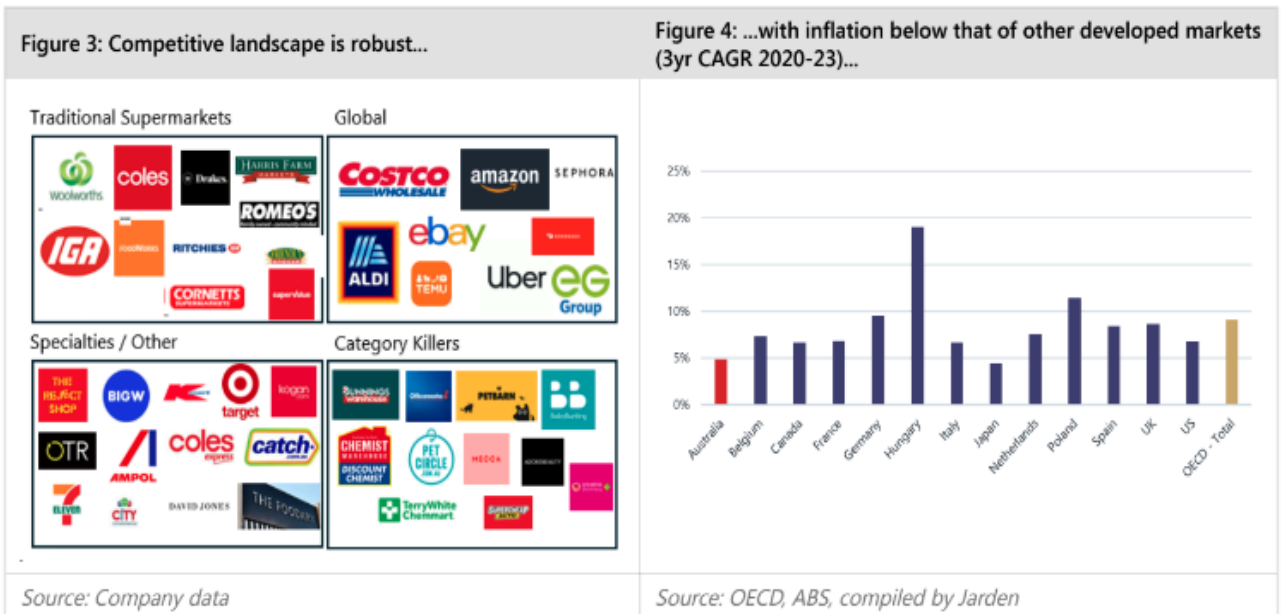
- in 2024, competition is intensifying for Australian retailers, including supermarkets;
- the major supermarket companies (MSCs) now compete against the likes of Amazon, Chemist Warehouse, The Reject Shop, Bunnings and OTR to name a few;
- the landscape¹³ has changed: traditional MSCs (Coles, Woolworths) have lost share over the past five years to the likes of Amazon, Chemist Warehouse and specialists, which have outpaced MSCs;

¹¹ See "Groceries" as defined under Part 1, Clause 3 of the Code

¹² "Food for thought: Do perceptions = reality?", Industry Update, 1 March 2024, Jarden

¹³ Landscape defined as Total Addressable Market for Retailers (TAM) by Jarden in "Food for thought: Do perceptions = reality?", Industry Update, 1 March 2024, Jarden

- while inflation has been high in Australia, it is lower than in most developed markets (Figure 4 below), and driven by external factors (freight, geopolitical, weather) rather than company behaviour/factors; and
- importantly, “since 2001, Aldi, Amazon, Costco, EG, Temu, Sephora, DoorDash and Uber, to name a few, have all entered the Australian market, combined generating >\$30 billion of turnover, a similar size to, if not greater than, Coles’ supermarket turnover.”



- **Code protections should be focused on small suppliers:** Protections in the Code should recognise the significant difference in size, scale and resources between large Australian and Foreign owned multinationals (who make up over 70% of our packaged goods and 60% sales of goods sold by us overall) as against small suppliers.
- **The Code could be made mandatory, but should retain flexibility for informal complaints and resolutions:** We support a mandatory Code that continues to allow both informal and formal dispute resolution processes for the benefit of suppliers. We also support retaining the current Code Arbiter model, with one arbiter per retailer/wholesaler, with common checks and balances at the government-appointed Independent Reviewer level.

We do not support Code Arbiters being shared or pooled across the industry. A critical element of the success of the Woolworths Code Arbiter has been her engagement with both us and suppliers, taking up extensive confidential and commercially and competitively sensitive information in doing so. Such information should not be shared between multiple retailers: to do so would stifle the informality, transparency and pragmatism that is permitted by the current arrangements (in which trust is now increasing).

We are open-minded as to strengthened functions of the Independent Reviewer where these may address supplier perceptions of the independence and accessibility of the alternative dispute resolution channels available to them.

10. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

The Code operates alongside other sectoral codes such as the Horticultural Code of Conduct (**Horticultural Code**) and the Dairy Code of Conduct (**Dairy Code**), creating a regulatory framework that permits emphasis on fairness of process within the specific context of the differing sectors that they relate to. We have no suggestions as to how they may better inter-relate (if at all).

International approaches

11. What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?

Regulatory frameworks in one jurisdiction may not always be suitable for another, for example due to different agricultural industries and import/export profiles. However, drawing lessons from international approaches, particularly those in the United Kingdom (**UK**) and New Zealand (**NZ**), can offer insight for the Australian Code context, for example in relation to appropriate thresholds for the application of a mandatory Code:

- In NZ, the Commerce Commission (**NZCC**) can recommend to the Minister (who in turn makes a recommendation to the Governor General) to designate a retailer under the NZ Grocery Supply Code. In order to be designated the NZCC must be satisfied, the retailer or wholesaler must meet the following criteria¹⁴:
 - supplies all (or a majority) of the categories of “groceries” (as defined in the NZ Code) to consumers; and
 - has a groceries turnover for the last accounting period above \$750 million; or
 - designation would promote a level playing field or competition; or
 - the NZCC has conducted an investigation and is satisfied that the designation will assist in the purpose of the Grocery Supply Code being met.
- In the UK a retailer can be designated by the Competition and Markets Authority (**CMA**), to be bound by the Groceries Supply Code of Practice (**GSCOP**), where their annual UK groceries turnover is more than 1 billion pounds. The definition of “groceries” is taken from GSCOP and enables the CMA to designate retailers who supply a range of grocery products, creating a level playing field for suppliers. In addition, the definition of “retailer” is broader in the UK and captures businesses beyond those which are traditional “supermarket businesses” (as defined under Part 1 of the Australian Code): for example, Amazon, B&M (variety goods retailer across grocery and general merchandise categories) and Home Bargains (discount retailer selling health and beauty products, food, homewares, gardening equipment, furniture and toys) are covered by the GSCOP.

Applying the learnings from the UK and NZ, and having regard to the particular market dynamics in Australia, we recommend that all substantial retailers and wholesalers of “groceries”¹⁵ in Australia are designated under the Code where they have a gross annual turnover of \$1 billion or more.

¹⁴ Groceries Industry Competition Act 2023 (NZ), Clause 11

¹⁵ See “Groceries” as defined under Part 1, Clause 3 of the Code

In addition to the above, we believe there are relevant insights from the types of retailers who have been designated under the UK Code, for example, there are parallels between the designation of the likes of Amazon UK, B&M and Home Bargains in the UK and Bunnings, Amazon and Costco in Australia.

We recommend that if the Code is to be made mandatory, a clear financial threshold be developed as has been in the case in the UK and NZ in order to promote a level playing field for suppliers and to capture all large retailers and wholesalers of grocery¹⁶ products operating in Australia, such as Costco, Amazon, Bunnings and Chemist Warehouse.

Voluntary/ Mandatory & Dispute resolution model

12. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?

To be effective in the fast paced consumer goods industry, any dispute resolution mechanism needs to be fast, flexible, cost effective and efficient for suppliers. The incentive to proactively resolve issues in a timely manner within commercial timetables should be preserved and strengthened.

Suppliers tell us they don't want to lose the speed, flexibility and cost effectiveness of the current dispute resolution model and particularly, the scope for informal engagement with our Code Arbiter. As such, we consider it premature for wholesale change to the dispute resolution system prior to being able to judge the effectiveness of these relatively new mechanisms. The recent review of the dispute resolution framework found there was broad ongoing support within the grocery industry for retaining the current dispute resolution framework and that it should be given more time to work¹⁷.

Important changes were recently made to the Code, including the introduction of the informal complaints mechanism in July 2022. Suppliers are becoming increasingly familiar with, and trusting of, Code Arbiters as a result. Our Code Arbiter's contact with suppliers has increased and she is raising issues of potential concern more frequently with us, which are promptly investigated and addressed. The Code Arbiter noted in her FY 2023 report that she had spoken with around 40 individual suppliers. In FY2024, to date, the Code Arbiter has met with an average of two-three suppliers each month who have sought informal advice.

We have good systems to receive Code feedback, address issues and close the loop with our Code Arbiter and suppliers. We strongly believe the new informal dispute resolution provision should be retained and that it would be premature to make wholesale changes to the current dispute resolution model. Further details of our preferred dispute resolution model are provided in Question 15.

13. What benefits could a mandatory code bring to suppliers?

We support making the Code mandatory on the basis set out on page 2 of this submission, given the need to strengthen public perception concerning the Code, however we are currently already legally

¹⁶ See "Groceries" as defined under Part 1, Clause 3 of the Code

¹⁷ [Final Report: Review of Part 5 of the Food and Grocery Code of Conduct](#), September 2023, page 10

bound by the Code and have strong incentives to comply. Our compliance and training programs are the subject of audits by the ACCC and no material compliance issues have arisen to date.

As is the case for other current signatories to the Code, we are also the subject of independent reviewer annual surveys and public reports, including retailer performance rankings. Each of the Code Arbiters publishes their report and provides a copy to the ACCC and the Independent Reviewer.

We are doubtful that making the Code mandatory will increase suppliers' propensity to make complaints.

If the Code were made mandatory, one benefit to suppliers may be that it would compel other large retailers and wholesalers (who are not voluntary signatories to the Code) to become subject to the Code. See the discussion above on this issue.

It is our view that the obligation to deal in good faith should have reciprocal application, particularly in relation to large suppliers, should the Code become mandatory. At the very least, whether the supplier acted in good faith should be relevant to the assessment of whether the Code has been breached and whether a penalty should be imposed.

14. If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?

As stated above, all substantial retailers and wholesalers of "groceries"¹⁸ with a gross annual turnover of \$1 billion or more, including the likes of Amazon, Costco, Bunnings and Chemist Warehouse should be subject to the Code, so as to promote a level playing field across grocery retailing in Australia.

As set out in Question 11, international grocery codes (such as those in the UK and NZ) may provide helpful indicia as to an appropriate turnover threshold.

15. Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

The future dispute resolution model will need careful design to prevent constitutional challenges to any formal dispute resolution/arbitration processes and outcomes, should the Code be made mandatory.

Currently, organisations voluntarily agree to be a signatory to the Code, and in doing so accept that the Code requires them to be bound by private determinations, including awards of compensation of up to \$5 million by a Code Arbiter.¹⁹

Making the Code mandatory would remove the consent requirement to be regulated by the Code, exposing the Code to concerns in relation to the separation of powers under the Australian Constitution.

¹⁸ See "Groceries" as defined under Part 1, Clause 3 of the Code

¹⁹ A Code Arbiter may recommend a compensation award above \$5 million, but may only make a binding compensation order up to \$5million

We strongly support the retention of the informal and formal Code Arbitrator dispute resolution processes. This may be possible under a mandatory Code, if suppliers were to elect to be subject to dispute resolution/arbitration processes and outcomes.

The expansion of the Code Arbitrators' roles to receive and respond to informal supplier complaints or issues (in addition to formal complaints) has proved a positive development - it has promoted greater interaction between suppliers and Code Arbitrators, and in our experience, faster, practical responses to confidential feedback and improved ease and effectiveness of raising issues with our Code Arbitrator. This is an element that should be retained in the Code.

16. Are Code Arbitrators perceived to be independent from the supermarkets that they oversee?

From our perspective, the investigation and arbitration role of our Code Arbitrator, Helen McKenzie is entirely independent, and empowered to be so.

We are bound not to exercise undue influence on: (1) the performance of the Code Arbitrator's functions; and (2) her authority to enter into an agreement on behalf of Woolworths to settle disputes relating to a retailer's obligations under the Code, and to impose remedies including very large compensation payments.

The requirements in paragraph 31 of the Code provide a strong underpinning for the independent consideration of complaints, as does the ability of the Independent Reviewer to review the process followed by the Code Arbitrator in investigating and resolving complaints. Furthermore, Helen McKenzie is an accomplished dispute resolution lawyer with professional training and ethical obligations. She is also the President of Anti-discrimination NSW.

As Code Arbitrator, Helen McKenzie:

- sent all suppliers a letter describing her background, independence and the expansion of her role to receive and respond to informal complaints (see **Annexure A**);
- attends supplier updates to introduce herself and talk directly to suppliers about how to raise complaints and issues formally or informally with her;
- attends industry events and supplier convened conferences to promote awareness in suppliers of both fresh and packaged goods of the Code Arbitrator's role, powers and ability to hear complaints and disputes;
- provides her contact details and photograph in supplier communications (newsletters and updates) to promote awareness of her role; and
- provides details to be included in the Supplier Onboarding Guide and Partner Hub portal about herself and her role, to which every Woolworths supplier has access.

Helen has direct access to our buying team, Group CEO and Supermarkets Managing Director to raise issues as and when she considers necessary or appropriate. We provide information to Helen on request and have altered and clarified commercial policies and template correspondence and internal processes at her request, to the benefit of suppliers.

Over the last four years, Helen has developed a deep understanding of how our Supermarkets business operates, our systems and processes with suppliers and key contacts to support a timely resolution of issues.

We see significant value for suppliers and for the efficacy of commercial dispute resolution in having a well qualified Code Arbitrator for each retailer and wholesaler who is independent, empowered to seek information both formally and informally, and who has a deep understanding of the organisation in relation to which they are appointed to investigate and or make binding determinations.

17. If not, how could the reality and perception of independence of Code Arbiters be enhanced?

See above - and we are open to engaging with the views of suppliers, Dr Emerson and the Secretariat on this point.

18. Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

Any “retribution” by a retailer would breach the Code, including the good faith obligation in clause 9.

One way the Code could be amended to address the reported fear of retribution, is the inclusion of a review process similar to that set out in our Trade Partner Integrity Policy (launched June 2023).

Under this policy, our Supermarkets Managing Director has personally committed to monitor/review the status of our commercial relationships with any supplier (referred to as a “Trade Partner”) after it has raised a complaint relating to the Code, at 6 and 12 months post the complaint being raised directly with us or, if approval has been given by the supplier, shared by our Code Arbitrator.

This has been communicated at our Annual Supplier Conference and in other supplier-wide forums, as well as on Partner Hub, our supplier facing information portal. We believe the Trade Partner Integrity Policy underlines our zero tolerance approach to the possibility of retribution towards our suppliers. This approach might usefully be adopted more broadly across the retail industry.

Civil penalties

19. Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?

We are not aware of any such circumstances.

20. Should civil penalties be available for breaches of the Code?

The Code (as prescribed under the *Competition and Consumer Act 2010*) is legally binding on signatories today. Code Arbitrators possess very significant powers to make binding determinations on retailers, including to alter grocery supply agreements and to award compensation of up to \$5 million (and, with retailer consent, even more). In addition, the ACCC has significant enforcement powers in relation to the Code and conducts regular checks regarding our compliance. As such, introducing pecuniary penalties will not change our close attention to Code compliance.

In 2018, the Samuel Report recommended against the imposition of penalties in favour of a more collaborative 'Code Arbiter' model, which we have adopted and actively encouraged suppliers to use.

Notwithstanding the above, we understand that there may not be a full understanding of the binding nature of the Code and the serious consequences for retailers if they do not comply. In these circumstances, we are not opposed to the introduction of penalties, provided they are proportionate, subject to rules of procedural fairness, and reserved for issues of serious or systemic non-compliance so as not to hinder the swift resolution of lower order commercial disagreements.

21. If civil penalties are to be applied to the Code, what penalties are appropriate?

If civil penalties are applied to the Code, these should be proportionate and only apply to serious/systemic instances of non-compliance by a retailer or wholesaler.

We look forward to further engagement with the government and industry stakeholders on this matter.

WOOLWORTHS GROUP

ANNEXURE A

Letter from Woolworths Code Arbiter to Suppliers



LETTER TO SUPPLIERS FROM WOOLWORTHS FOOD AND GROCERY CODE ARBITER

As many of you will know, in December 2020 I was appointed as the independent Code Arbiter for Woolworths to resolve complaints suppliers may have with Woolworths about any matters covered by the Food and Grocery Code of Conduct (**Code**).

I bring to this new role over 30 years' experience in complaint management and dispute resolution having practised as a workplace relations lawyer for most of my career.

My Complaints Handling Procedure for dealing with formal complaints made under the Code is available on the Woolworths website and Partner Hub.

Since my role began, I have received very few complaints from suppliers. Feedback from suppliers and others suggests that the requirement in the Code for complaints to be made in writing may be deterring suppliers from seeking my assistance, and that there is a perception that I am not genuinely independent of Woolworths. This may be leading to a lack of trust or confidence in the effectiveness of the Code Arbiter role. I would like to address each of these issues:

Independence of the Code Arbiter

Although, the Code required Woolworths to appoint and resource the Code Arbiter, I operate independently of Woolworths – I am not employed by Woolworths, I do not report to Woolworths and I am not accountable to anyone in Woolworths in relation to the exercise of my powers under the Code.

I am required by the Code to keep confidential any information provided to me by a supplier and I will always do so, unless the supplier consents to its disclosure for the purpose of resolving a dispute.

It is an express requirement of the Code that Woolworths not unduly influence or attempt to unduly influence the Code Arbiter in the performance of the Code Arbiter's functions.

I have had Woolworths' full support from the outset, and at no time since my appointment has it interfered, or attempted to interfere or influence the exercise of my responsibilities as Code Arbiter.

As a further safeguard of the independence of the Code Arbiter, the Code also provides for the appointment by the Minister of an Independent Reviewer whose role includes to review any request by a supplier to review the processes adopted by a Code Arbiter in dealing with the supplier's complaint.

Informal assistance with complaints or concerns

Recently my role has been expanded beyond the formal requirements of the Code and I am now able to receive and respond to informal complaints or requests for assistance from suppliers in relation to Code matters.

I am available to talk with or meet with any supplier who wishes to informally and confidentially raise concerns, including to report Code-related bad behaviour or inappropriate conduct by Woolworths.

I will keep confidential any information provided by a supplier but can use the information (appropriately de-identified and aggregated) to conduct inquiries, request information from Woolworths and to provide Woolworths with feedback on problematic conduct or practices by Woolworths. This expanded role will, I believe, enable me to proactively raise and resolve issues with Woolworths in a general way without identifying a particular supplier.

If I consider it appropriate, I will require Woolworths to change any practices or conduct which, in my view, are not consistent with the spirit or letter of the Code even where no formal complaint has been made.

This opportunity to raise matters informally with the Code Arbiter is in addition to, and not instead of the avenues already available to suppliers to raise issues directly with Woolworths' buying teams or Woolworths' senior management or through the Woolworths Supplier Speak Up channel.

Over the next few months I propose to arrange listening sessions with suppliers to gain a better understanding of the key issues that are currently of concern to you. Details of the times and dates of these will be posted on the Partner Hub.

I am also available to talk or meet with any supplier who wishes to raise an issue informally with me on a confidential basis and I would welcome the opportunity to meet you.

My contact details are:

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Phone: 0499885090



Helen McKenzie

Woolworths Code Arbiter

5 September 2022