



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

18 October 2024

Senator Andrew Bragg

Chair, Senate Standing Committee on Economics – References Committee

PO BOX 6100, Parliament House

Canberra ACT 2600

via email: economics.sen@aph.gov.au

Dear Senator Bragg

Big Box Price Setting

Thank you for the opportunity to provide comments to the Senate Standing Committee on Economics – References Committee (the Committee) on Big Box Price Setting. We acknowledge ongoing and more recent scrutiny into the supermarket sector by Government, parliament and regulators including the review of the Food and Grocery Code of Conduct (FGCoC) and numerous intersections with the Committee's inquiry.

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has made a number of submissions into these inquiries, noting the significant power imbalances at the heart of small business concerns when supplying to large retail organisations. These power imbalances have a significant impact on negotiating supply agreements, supplier viability and scale, investment intentions, branding and logistics.

While the primary focus of other reviews has been supermarket conduct and the food and grocery supply sector, submissions to these reviews have raised concerns that similar power imbalances exist between other retail streams and supply chains impacting on small business suppliers in adjacent sectors unprotected by codes of conduct.

Our assistance cases often arise from the power imbalance between small and medium/big businesses where disputes are caused by the more powerful party dictating pricing of goods and services or imposing commercial terms and condition.

The power imbalance is at times exercised via the lure of volume that is attractive to smaller suppliers seeking to scale and the larger customer seeks to leverage this additional volume (that is often enabled by a significant supplier investment that creates a commercial dependency) to seek wholesale prices and accompanying terms that are uneconomic for the smaller supplier.

This can place smaller suppliers in the bind of either walking away from what they have built or accepting supply arrangements that will 'cannibalise' their business over time. Concerning practices can include an insistence on sole supply arrangements, verbal or vague agreements, supplier cost and margin disclosure obligations, risk transfer onto suppliers, 'brand-hushing' or vanilla labelling, requirements to use specific service providers, participation in costly 'specials' and promotional campaigns, price freezes, rebates and extended payment times.

Beyond the economy-wide legislative prohibitions that address the most egregious and economically consequential practices, Industry Codes of Conduct have been used to curtail some of the more concerning conduct that can arise from power imbalances including unilateral



actions, information asymmetries, risk transfer tactics and less than transparent terms and conditions.

In the absence of a legislated Unfair Business Practices prohibition like those ASBFEO has been advocating for (that includes specific unlawful conduct as well as a general prohibition), Codes have been viewed as the preferred mechanism for addressing industry-specific conduct and transaction concerns where power imbalances are evident and more direct harm to individual businesses arises.

Unfair trading practices are types of commercial conduct that are not prohibited by law; yet they can nevertheless distort competition and significantly harm consumers and small businesses. The Government has announced its intention to legislate an economy-wide 'unfair trading practices' prohibition. ASBFEO is keen to ensure that this measure has a distinct business-to-business focus with a combination of general and specific prohibitions on unfair trading practices beyond consumer protection objectives emphasised at the time of the announcement.

It is the ASBFEO's view that an unfair trading (or business) practice typically occurs when there is a power imbalance, and when a person or group(s) of person who:

- acts, or fails to act, to the detriment of another party
- acts in a manner that is not reasonably necessary to protect its legitimate commercial interests
- does not follow the intent of the agreement as struck and related expected or agreed practices
- undertakes a practice that could be an unfair contract term if became a term of a written contract, including applying/enforcing duties and/or obligations not reflected in but accompanying a contract
- conducts itself in a manner (including through a third party) that disadvantages the other business.

The EU, the UK and Singapore have a combined general and specific prohibition. Such a prohibition could address economy-wide fair commercial dealings minimum expectations and support Codes designed to deal with specific and unique concerning industry conduct.

Recommendation 1: That the Australian Government and parliament expedite the enactment of an unfair business/trading prohibition, including a particular focus on business-to-business harm, in accordance with option 4 (a combination of general and specific prohibitions) of the Consultation RIS.

Given the high degree of concentration in many key markets in the Australian economy, we urge the Committee to take a holistic view of competition and power imbalance across the retail sector to compliment the Treasury's current inquiry into Revitalising the National Competition Policy and the importance of nurturing competition, new entrant opportunities and not impeding innovation.

Small businesses are a crucial part of this story. In the agriculture, forestry and fishing sector, small businesses account for 78% of the value of production and employ 79% of the sector



workers. Small businesses are themselves consumers and employ consumers in this sector.¹ Indeed, almost 98% of businesses in Australia are small businesses – some 2.5 million which generate nearly \$600 billion of economic activity accounting for 33% of our nation's GDP. Small businesses provide jobs for 5.36 million people – 42% of the private workforce. However, back in 2006, small businesses contributed 40% of GDP and employed 53% of those with a private sector job.²

While our data reveals very few specific examples of 'big box' retailing-related requests for assistance or formal disputes, our consultations surfaced some significant concerns in sectors where small and family business make significant contribution. In the case of 'greenlife' supply arrangements, the lack of a significant body of disputes is likely to be the result of the absence of formal supply agreements, making it difficult to assert a breach of terms or conduct expectations with them not being documented. Suppliers also speak of a fear of retribution.

In our consultations, Greenlife Industry Australia (GIA) advises that small businesses supplying nursery products such as seedlings, herbs, food plants and annuals (also known as greenlife), are subject to very similar conduct and power-imbalance concerns as have been identified by suppliers in the supermarket sector reported in previous reviews.

While these greenlife products are as perishable as fresh fruit and vegetables, suppliers to substantial retailers (including 'big box' retailers) are not covered by either the FGCoC or the Horticulture Code of Conduct (HCoC). Supplier representatives have voiced specific concerns that Bunnings Group Limited (Bunnings) allegedly does not use written supply agreements or contracts, creates expectations about likely orders that suppliers invest to meet, that then do not materialise, enforces a 'volume discounting' scheme that is more punitive as volume scales, and applies unreasonable payment terms.

This excessive supply expectation tactic can contrive 'over supply' conditions where suppliers can be pressured to reduce prices to move stock volumes, placing small business suppliers at an immediate commercial disadvantage that amplifies power imbalances. A similar process is described by grape producers seeking Code protections in their dealings with wine makers. This approach can result in a shift of commercial risk onto suppliers, investment in production for which there might not be a buyer and can place suppliers in a commercial precarious position.

It has been reported to ASBFEO by supplier representatives that Bunnings uses a number of methods to impose production conditions to the disadvantage of supplier and to shift costs to suppliers. These include diminishing a supplier 'brand' strength and presence via various 'brand hushing' tactics including the removal of producer identification on pots and labelling requirements, reducing the suppliers' scope to attract customer interest via other retail channels.

According to Greenlife, obligations to use nominated transport service providers are imposed, at greater expense and with a requirement that the supplier pay for secondary movement transport costs if stock, in the possession of Bunnings, needs to be moved to a location other than that prescribed for delivery.

¹ Australian Small Business and Family Enterprise Ombudsman(ASBFEO), *Independent Review of the Food and Grocery Code of Conduct 2023-24*, ASBFEO, 7 March 2024

² Australian Small Business and Family Enterprise Ombudsman(ASBFEO), *Energising Enterprise – 14 Steps to boost Australia's small and family businesses*, ASBFEO, August 2024



We have been advised of concerns about Bunnings' rebate structure that disadvantages suppliers when they sell at greater volumes. This is highlighted in GIA's submission to the Supermarket Pricing Inquiry dated 16 February 2024, which noted issues such as information asymmetry about price, a lack of meaningful commitments on volumes, requirements to repackage plants in unbranded containers, third line forcing and fear of retribution when challenging Bunnings decisions.³

The Emerson Review of the FGCoC (the Emerson Review) noted that the sale of plants, flowers and gardening equipment were captured by the Code, however it was determined that while there was a degree of overlap between supermarkets and other retailers, the FGCoC should be limited to places where Australians undertake their weekly shopping.⁴ The Emerson Review's decision to exclude particular markets from the FGCoC was not intended to imply that these markets are functioning well. It was suggested further examination of the case for regulation was needed, and if an industry code is an appropriate response, consideration would need to be given as to the form of any such code, including the extension of an existing code, or a new one.⁵

In the absence of data pointing to systemic problems but existence of examples of not insignificant concerns and grievances about trading terms, larger customer conduct and specific business harm to smaller suppliers, further actions to regularise and document business-to-business dealing in the supply chains of concentrated retail segments (including 'big box' retailing) and ongoing monitoring against these reasonable commercial standards is the recommended regulatory posture at this time.

Recommendation 2: Bunnings and GIA should collaborate to develop and agree upon a general supply agreement template/s to be used in all supply arrangements between greenlife suppliers and Bunnings.

Specific concerns have been raised dealings between 'greenlife' suppliers and Bunnings. ASBFEO supports the Emerson Review's suggestion that Bunnings and the GIA create general supply agreements to be used in all supply arrangements with small business suppliers. Bunnings should make available a supply agreement template on their website, so that potential suppliers have a clear understanding of what they are entering into.

The Emerson Review determined that the FGCoC should be limited to Supermarkets with an annual turnover exceeding \$5 billion and considered that GIA and Bunnings would benefit from developing a document that sets out expectations relating to the supply of nursery plants.⁶ As described earlier, we have heard from suppliers that the lack of written supply agreements has a negative impact on the clarity and certainty of supply arrangements with Bunnings.

In developing a general supply agreement, Bunnings and the GIA may wish to draw from aspects of pre-existing Industry Codes such as the HCoC and the Dairy Code of Conduct (DCoC). We note

³ Greenlife Industry Australia (GIA), *Price setting practices and market power of major supermarkets*, GIA, 16 February 2024, pp 2-3

⁴ The Hon Dr Craig Emerson, *Independent Review of the Food and Grocery Code of Conduct, Final Report*, Independent Reviewer, June 2024, p 33

⁵ The Hon Dr Craig Emerson, *Independent Review of the Food and Grocery Code of Conduct, Final Report*, Independent Reviewer, June 2024, p 34

⁶ The Hon Dr Craig Emerson, *Independent Review of the Food and Grocery Code of Conduct, Final Report*, Independent Reviewer, June 2024, p34



that the ACCC's submission to the Emerson Review has drawn attention to protections provided by these Industry Codes including:

- Complaints handling processes, good faith obligations, and prohibitions against retrospective price changes written into the DCoC.
- Quantity specification requirements in supply agreements and horticulture produce assessors who can investigate and report on whether a rejection of produce was done in accordance with the requirements of the HCoC.⁷

Access to dispute resolution undertaken by a neutral third party is essential to boosting supplier confidence in negotiating fair supply agreements and raising disputes. The ASBFEO has been empowered to provide access to the Alternative Dispute Resolution (ADR) under the Australian Small Business and Family Enterprise Ombudsman Act 2015 and Industry Codes. We urge the parties to seek to endorse and promote a general supply agreement that includes a commitment to transparent dispute resolution processes.

ASBFEO is ready to assist the parties if negotiations to develop a general supply agreement between Bunning and GIA are not able to be progressed in a timely way.

Recommendation 3: The Australian Competition and Consumer Commission (ACCC) should monitor the nature and effects of bargaining power imbalances affecting small businesses in concentrated retail markets (including 'greenlife' and 'big box' retail segment supply chains), examine the level of and resolutions to informal and formal disputation and consider the need for further intervention .

The ACCC should use its inquiry powers to examine and report on the nature and significance of bargaining power imbalances affecting small businesses in the big box retail supply chain. In doing so, the ACCC should examine the decision-making inputs and processes of the major buyers in concentrated retail segment (including 'big box' retailers), to uncover the practices, conduct, rationales for decision-making and incentives that underlie the commercial dealings they have with their smaller suppliers.

The ACCC should also explore whether there should be stronger safeguards in place to protect the interests of small suppliers to enhance competition, fair dealings and support the opportunity for new entrants and supplier accessing new customers and markets. A useful avenue of inquiry for the ACCC to examine these issues, may be by seeking access to supply agreements and details of arrangements between suppliers (many of which are small businesses) and major concentrated markets retailers, and the promotion of dispute resolution services available via ASBFEO.

This could provide an evidence base for revealing unfair practices, exploitation of commercial dependencies and harmful conduct enabled by power imbalances that may provide the basis for further regulatory intervention.

⁷ Australian Competition and Consumer Commission (ACCC), *Submission in response to Food and Grocery Code of Conduct Review 2023-24 – Interim report*, ACCC, pp 6-9



Recommendation 4: Give small businesses an affordable, effective and timely alternative to defend their own economic interest where fair trading protections and reasonable commercial conduct safeguards are infringed upon, by creating a Federal Small Business and Codes List in the Federal Circuit and Family Court of Australia

Existing fair trading protections and reasonable commercial conduct safeguards are often not able to be relied upon as there are considerable difficulties and obstacles to a small business seeking to enforce them. Every business should be assured of the opportunity to compete on merit not just economic muscle. Regulators have their own investigation and enforcement frameworks that guide the deployment of scarce publicly funded resources, but too often this will mean a single harmful action may well go unpunished and unremedied.

Small businesses should be able to defend their economic interests in an accessible and affordable way when the 'rules of the road' are infringed upon and their business is harmed.

At state level small claims tribunals provide a simple, quick and cost-effective way of seeking justice.

But if it is a federal matter, seeking your day in court means going to the Federal Court which requires a small business to have at least \$200,000 ready to spend on their own case. And it can take two years to get an outcome and will include the risk of an order to pay the other party's legal costs.

It is no surprise most cases involving a small business never make it to court as this is neither an affordable or timely solution for a small business which may go out of business waiting.

For too many aggrieved small businesses, the protections and safeguards aimed at ensuring fair commercial conduct are illusory and regulators are 'no shows'.

The introduction of a Federal Small Business and Codes List into the business agenda of the Federal Circuit and Family Court of Australia would provide small business with a pathway to justice that is right-sized, affordable, and timely.

This would empower a small business owner to defend their own economic interest. It would be low-cost and without cost-orders, except where a judge determines the matter is vexatious or frivolous. We suggest capping disputes at \$1 million for awards and penalties, and proceedings could be delivered via online hearings, significantly reducing the time and cost burden on a small business. It would require compulsory alternative dispute resolution before you even get to the court gate.

A Federal Small Business and Codes List would deal with matters that are day-to-day commerce. It is a simple and achievable change to give small businesses a chance to restore whatever harm's being caused and get back to business. It will also enable the testing of the utility and effectiveness of existing protections before considering the need for further policy and regulatory intervention that may also be undermined by an absence of enforcement.



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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bruce Billson'.

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman