



Australian Government

**Australian
Small Business
Commissioner**

12 March 2015

Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

Re: Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

Thank you for the invitation for my Office to make a submission to the Senate Economics Legislation Committee's Inquiry into the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015.

Advocating on behalf of the small business community is a core function of my Office. My Office is supportive of initiatives that aim to create a fair operating environment and reduce the burden on small businesses, specifically through the improvement of commercial business relationships between supplier and retailer. We are also supportive of access for small business and family enterprises to affordable, effective and timely dispute resolution processes.

My Office has been working closely with the Treasury over an extended period to consider ways to improve commercial relationships in this sector and we are strongly supportive of this industry-led code. Businesses and associations have an intimate knowledge of their sector and are often best placed to address issues that arise. To this end, we believe that the Code will help retailers, wholesalers and suppliers to improve contracting practices and business relationships.

As per our submission in relation to the *Improving commercial relationships in the food and grocery sector* consultation paper (attached)¹, my Office identified and detailed various areas that could be further clarified in relation to the voluntary Code. We stand behind our views reflected in that submission and draw your attention to two matters that we believe are particularly worthy of ongoing consideration, namely ensuring ready access to low cost dispute resolution, and the coverage of the Code.

Access to low cost dispute resolution

We commend the Code's approach of providing a mechanism for alternative dispute resolution. A primary feature of alternative dispute resolution is the provision of a mechanism that is clear, speedy and inexpensive.

In our experience, many disputes are able to be resolved in the pre-mediation phase. It is critical that this initial phase is able to be commenced as easily and inexpensively as possible to encourage the early resolution of disputes. In this context, we note that subclause 39(1) of the Code requires that mediation or arbitration must be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia (IAMA). Subclause 39(2) provides, that in the absence of the disputing parties agreeing, IAMA will appoint the mediator or arbitrator.

¹ Note that clause references in our submission reflect those in the draft Code.

Unfortunately, in many instances, parties may find it difficult to agree a mediator or arbitrator and this subclause will consequently be triggered. IAMA's rules include the requirement that where IAMA nominates a mediator, a fee of \$330 is payable, or such other sum as prescribed by IAMA from time to time (see rule A2 of Schedule A to IAMA's Mediation Rules).

A \$330 "flag-fall" fee is likely to be considered an unreasonable impost on small business. This threshold impost should be considered alongside the costs involved in the actual mediation or arbitration, such as the commercial fees of the mediator or arbitrator and potentially the costs of legal representation. In that light, the threshold fee of \$330 charged merely to appoint a mediator or arbitrator appears contrary to a commitment to provide low cost alternative dispute resolution.

By contrast, the State-based Small Business Commissioners provide low cost (subsidised) alternative dispute resolution services. Accordingly, where disputant parties are able to access the State Small Business Commissioners there may be a tendency to do so, and dilute the significance of the dispute resolution mechanism provided by the Code. In due course, perhaps the proposed Australian Small Business and Family Enterprise Ombudsman (ASBFEO) could assume responsibility for the resolution of disputes under the Code.

Code coverage

We note that the definition of 'Groceries' under the Code does not extend to alcoholic beverages, despite alcoholic beverages often being available in these retail businesses. Our particular interest in this aspect is prompted by our discussions with key stakeholders in the wine industry relating to the adverse impact on small business of retrospective pricing. It appears that retrospective pricing in the wine industry is commonplace in retailer/supplier relationships.

An example of retrospective pricing is the situation where one retailer negotiates a better buying price from a supplier than a competitor retailer negotiates. The competitor who has not been able to negotiate the better price, then charges the difference back to the supplier. The supplier is commonly forced to wear the loss in profits, without the ability to negotiate.

By including alcoholic beverages in the Code, concerns about issues such as retrospective pricing could be sought to be addressed under the provisions of the Code.

Conclusion

In summary, we are strongly supportive of the Code and believe that it will provide for positive outcomes for both small and larger businesses. Consideration of the issues raised in this letter (and more broadly in the attached submission) could further benefit the commercial relationships of food and grocery retailers and suppliers. These matters could also be included in the review of the Code after three years of operation.

Yours sincerely

Mark Brennan
Australian Small Business Commissioner
www.asbc.gov.au