



Dr Kathleen Dermody  
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Senate Economics Legislation Committee  
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CANBERRA ACT 2600

**By email:** [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Dr Dermody,

**Submission to the Inquiry into the Competition and Consumer (Industry Codes –  
Food and Grocery) Regulation 2015 (Code)**

Thank you for giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to comment on the Code.

The role of the OSBC is to support small businesses in NSW by:

- providing mediation and dispute resolution services;
- delivering quality small business support through a range of programs and resources; and
- speaking up for small business within government.

The OSBC is focused on improving the operating environment for small businesses within NSW. The OSBC therefore supports measures aimed at improving the quality of commercial relations between large retailers or wholesalers and small suppliers.

In summary, the OSBC considers the introduction of the Code as a step in the right direction in improving the commercial relations between large retailers or wholesalers and small suppliers. The OSBC therefore welcomes the Code's regulation of retailer and wholesaler conduct that has been the subject of concern in the food and grocery industry. The minimum requirements around the making of grocery supply agreements, and the general prohibition of certain types of conduct in Code will assist with setting common industry expectations and standards for large retailer and wholesaler conduct.

However, in the OSBC's view, two factors may limit the Code's potential to promote significantly improved relations between large retailers or wholesalers and small suppliers. First is the voluntary, 'opt-in' nature of the Code, which will mean that unless all of the major retailers opt-in, there is a risk of inconsistent industry standards. Second is the availability of significant exceptions to conduct otherwise prohibited by the Code, which, in light of the existing imbalance in bargaining power between small suppliers and large retailers, may result in little practical improvement for small suppliers.

The OSBC has reviewed the Code and the Explanatory Statement and makes the following general comments relevant to small business suppliers. Many of these comments reiterate aspects of the OSBC's submission to the Treasury's 2014 consultation paper entitled 'Improving Commercial Relationships in the Food and Grocery Sector'.

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➤ **Grocery supply agreements**

The OSBC supports the requirement that retailers and wholesalers enter into written “Grocery Supply Agreements” (GSAs) and for those GSAs to contain provisions on six fundamental matters. This will go some way to ensuring that the terms which govern the commercial relationships between small suppliers and large retailers are clearly understood by both parties, which is not always the case at present.

➤ **Conduct generally**

The OSBC welcomes the Code’s regulation of retailer conduct that has been the subject of concern in the food and grocery industry. The general prohibition of certain types of conduct will assist with setting common industry expectations and standards for large retailer conduct.

Subject to our comments below, the OSBC supports the conditions and procedural safeguards – for the benefit of suppliers – attached to the exceptions available to retailers from the general conduct requirements. These features will provide some protection for small suppliers that agree to exceptions in their GSAs with major retailers. At the very least, having the exceptions documented in GSAs will give small suppliers an opportunity to understand what they are being asked to agree to.

However, the combined effect of these exceptions may undermine the ability of the Code to improve retailer-supplier relations. The superior bargaining power of the large retailers, which often leads to contracts being offered on a “take it or leave it” basis, may mean that in practice there could be little room for true negotiation about the exceptions to take place, and that the exceptions become the norm.

➤ **Good faith**

The OSBC supports the inclusion in the Code of a duty on retailers and wholesalers to act in good faith. This is appropriate because it is the conduct of large retailers and wholesalers that is sought to be improved through the introduction of the Code. The OSBC also notes that the Code provides that when a court is assessing whether a retailer or wholesaler has acted in good faith, it may consider whether or not a supplier has acted in good faith.

➤ **Dispute resolution**

The OSBC welcomes the fact that an independent third party, namely a mediator or arbitrator, has the power under the Code to decide if a complaint made by a supplier under the Code is trivial or vexatious. This is an important improvement to the draft dispute resolution provisions, which, in the OSBC’s view, inappropriately gave this power to the retailer.

➤ **Opt-in Code**

The OSBC prefers that the Code be a mandatory code of conduct, rather than a voluntary ‘opt-in’ code. This is because by covering all retailers and wholesalers, the Code would provide greater certainty and consistency in the relationships between suppliers and retailers or wholesalers in the industry.

In the OSBC's submission to Treasury on the draft Code, it was submitted that if the Code were to be retained as an opt-in code there was a risk that the major retailers may choose not to opt-in, or to withdraw their participation at a later date, causing uncertainty and inconsistency in supplier-retailer relationships.

As at the date of this submission, the OSBC understands that three of the four major retailers have not opted-in to the Code, and so it appears that this risk may have already materialised.

Should you wish to further discuss any of the issues raised in this submission please contact

Yours sincerely

**Robyn Hobbs OAM**  
**Small Business Commissioner**

16 March 2015