

12 September 2014

Grocery Code Consultation Paper
Small Business, Competition and Consumer Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

We write to you in relation to the consultation paper on the proposed Food and Grocery Code, hereafter referred to as the proposed code.

Executive Summary

Business SA provides qualified support to the concept of the proposed code as an opt-in voluntary code. It is critical that the code has 'industry buy in' which will only be achieved if retailers are willing to be bound by the code. However, the code must also include alcohol, particularly given the number of small businesses in the wine and beer manufacturing sectors which face similar contractual issues to other suppliers to major supermarket chains.

Although we generally support the intent of the code, we are concerned that it may be circumvented by individual grocery supply agreements between supermarkets and suppliers. While there are valid considerations for the code to allow for commercial flexibility which can benefit both sides, there needs to be adequate consideration for the reality that small businesses are not typically in a position to bargain with major supermarkets with respect to grocery supply agreements.

The transition arrangements for the code also need to recognise that the supermarkets' buyers may have existing incentive arrangements, such as KPIs, which may not align with the intent of code. If the code is to actually improve commercial relationships in the food and grocery sector, this must involve ensuring incentives are appropriately set at an operational level.

Background

Business SA recently made a submission to the Federal Government's consultation paper in relation to the proposed extension of unfair contract term (UCT) protections to small business. Although we supported the sentiment of the proposed changes, we declared concerns about the unintended consequences of any legislative change on business to business contracts at large, including for contracts between small businesses.

Furthermore we made the point that, considering the move to extend UCT protections to small business had in a large part been driven by issues in the grocery supply chain, the Federal Government should primarily consider remedying the shortfalls here before extending UCT protections economy wide.

In that context, we provide further comment on the proposed code:

1. Feedback from Business SA's members indicates that alcohol should be included in the proposed code, particularly given the nature of the wine and beverage manufacturing sector which has relatively low barriers to entry and a significant number of small businesses operators. Recent growth in the craft beer market is testament to the ability of small businesses to succeed in this sector and there needs to be appropriate provisions in the proposed code to accommodate these growing small businesses.

Business SA provides the following feedback specifically in relation to alcohol supply for major supermarket chains:

- Suppliers have been asked to pay ranging fees for alcohol supplied to Coles over and above standard terms;
 - Scan data costs which are being passed onto registered suppliers are prohibitive for small business operators trying to enter the market;
 - Trading term increases lack standardisation and should require at least six months notice;
 - All out of code issues should be borne by the retailer which has strict delivery centre and store requirements to prevent the supplier from having to pay for retailer negligence. At present, supermarkets are constantly pressuring suppliers for any code issue stock.
2. There is ambiguity around the definition of 'retailer' in the exposure draft regulation which makes it unclear as to the circumstances in which a wholesaler would not be considered a retailer.

Our understanding is that a wholesaler would be considered a retailer unless there was another intermediary between the wholesaler and the supermarket.

'Wholesaler' may also need to be defined in the regulation to provide clarity, particularly to small businesses which may find it difficult to comprehend the legalistic definition of 'retailer' and whether or not the proposed code applies to their wholesaler.

3. The issues described in point 2 are quite relevant considering the issues for businesses such as franchisees of major suppliers into supermarkets which may not be covered by the proposed code.

For example, while a major supplier may agree to certain terms with a supermarket, the cost of additional services is often passed back onto the franchisee to be provided at their own cost.

One business which provided feedback to Business SA had not received an increase in commissions or other provisions they could claim on delivering a product for eight years and over the same period, overheads for this business had tripled. In this instance, additional costs being passed back to them by the major supplier were reducing already tightly compressed margins. Furthermore, aggressive discounting campaigns by the supermarkets are hurting these types of businesses which operate on commission for delivery contract arrangements.

4. Defining which entities fall under the proposed code is important, but it also vital to ensure the code can be structured such that grocery supply agreements reached between major suppliers and the supermarkets do not unfairly impose costs on smaller businesses down the supply chain.

Smaller suppliers to larger wholesalers will not have bargaining power in grocery supply agreements which is not necessarily inefficient, but the Federal Government needs to be mindful of any negative externalities arising from the structure of the proposed code.

5. We support the proposed code restricting retailers from requiring suppliers passing on costs relating to:
 - A buyer's visit to the supplier;
 - Artwork or packaging design;
 - Consumer or market research;
 - Opening or refurbishing of a store;
 - Hospitality for the retailer's staff.

Again, while some major wholesalers may accept such costs, these are usually passed down the chain to smaller businesses.

6. In relation to s 15 of the proposed code, De-listing products, we support the focus on ensuring supermarkets only de-list products for genuine commercial reasons. In one example provided to Business SA, our member was expected to pay a bill within two weeks or was threatened with de-listing. Obviously this type of behaviour does not constitute commercial dealing in good faith and we would expect the code will provide guidance to limit such instances.
7. The Federal Government should also take into consideration that the process for suppliers to apply for price increases from major supermarkets can be quite cumbersome, taking several months and requiring a significant amount of documentation, regardless of whether or not it breaches confidentiality agreements.
8. In relation to s 8 of the proposed code, Matters to be covered by agreement, the grocery supply agreement should also include details of any volume rebate.

9. The Federal Government should also consider that suppliers are typically liable for freight demurrage (after a specified grace period which may be as little as one hour) if the supermarket does not load or unload their contracted carrier within an allocated time slot.
10. The proposed code needs to be adequately structured to incentivise change in supermarket/supplier relationships but we are reluctant to support penalties being introduced which force supermarkets to comply. Furthermore, such penalties could end up being imposed on wholesalers which may filter back down the chain to smaller businesses.

It is appropriate for the proposed code to allow for compensation, but if the intent of the code is to improve commercial relationships between supermarkets and suppliers, introducing penalties is not conducive to that goal. Supermarkets and suppliers need to maintain ongoing working relationships which will not be enhanced through penalties being imposed on either party following a dispute in relation to the code.

11. While the proposed code is well intended, its structure still allows for any provision to be circumvented through individual grocery supply agreements. The reality is that many small business suppliers to major supermarkets will not have either the time or resources to negotiate grocery supply agreements with supermarkets and will most likely just accept the standard agreement.

Standard form agreements are an efficient way in which supermarkets can deal with suppliers but how does the code prevent the standard form agreement from entirely circumventing the intent of the code? Perhaps any variances on standard grocery supply agreements need to be made explicit to suppliers and should be more on an exception basis rather than the norm.

Business SA acknowledges the code needs to allow for commercial flexibility but if it is genuinely trying to reduce instances of supermarkets using power to unreasonably impact suppliers, it needs to ensure it puts an appropriate onus back on supermarkets to act in good faith.

12. The proposed code should be designed such that all industry participants see it as best practice and are genuinely willing to enter into negotiations which use the code as a reference point. In this context, the code and its implementation need to be structured to reflect the commercial realities of dealings between supermarket buyers and their suppliers.

Given the individuals agreeing to the code are typically at an executive level, there needs to be recognition of how the actual buyers which will act under the code are incentivised to give effect to the intent of the code. Although it is appropriate to provide operator training for the code, if the underlying incentives for buyers such as KPIs are not set in accordance with the code, the code will not achieve its aim of improving commercial relationships in the food and grocery sector.

13. We are mindful of the proposed code introducing unnecessary compliance and the Federal Government may wish to re-visit the need for code compliance reporting to the ACCC.

Who we are

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

Should you require any further information or have any questions, please contact Rick Cairney, Director of Policy, Business SA on (08) 8300 0060 or rickc@business-sa.com.

Yours sincerely

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