

RESPONSE TO FOOD AND GROCERY CODE CONSULTATION PAPER

The Retailer and Supplier Roundtable (**RSR**), comprising Coles, Woolworths and the Australian Food and Grocery Council (**AFGC**), welcomes the opportunity to respond to Treasury's Consultation Paper on the proposed Food and Grocery Code (**Proposed Code**). Since the beginning of 2013, the development of the Code has been an industry-led initiative by the RSR, culminating in RSR agreement on the terms of a draft Code on 18 November 2013 (**November Draft Code**).

The matters and issues addressed in the November Draft Code were informed by the collective experiences of the supplier members of the AFGC, including its small and medium enterprise CEO Forum; and Coles and Woolworths, each as customers of many thousands of suppliers. The RSR believes this November Draft Code identified and dealt comprehensively with issues central to relationships within the sector.

The RSR has since worked with government through 2014 to revise the November Draft Code to fulfil legislative requirements. Fundamentally, the RSR believes the Government should maintain both the spirit and the practical outcomes of the November Draft Code and avoid changes that would alter the character of this agreed industry outcome. To that end, the RSR singles out the following matters arising from the Consultation Paper on the Proposed Code.

[1] **Voluntary retailer adoption of the Code**

The RSR's common and clear intention was that the Proposed Code would be prescribed as a voluntary, or "opt in", code under the *Competition and Consumer Act 2010 (CCA)*. As a voluntary code, the Proposed Code will only bind retailers that choose to sign it (to date, the retailers that have indicated an intention to opt-in are Coles and Woolworths).

The RSR continues to support voluntary adoption. It is consistent with good regulatory practice, being both the minimum level of regulatory intervention needed to address issues of concern, and is consistent with numerous statements by Government recognising the importance and legitimacy of industry-led self-regulatory initiatives. A voluntary Code, once it is prescribed under the CCA, is of course legally enforceable.

[2] **Targeted mandatory Code not supported**

The RSR commitment to a voluntary prescribed Code means that it does not support the "targeted mandatory" Code canvassed in the Consultation Paper. To the extent that the Government might wish to see retailers other than the current RSR participants bound by the Code, the RSR proposes that the Government seek to

persuade such retailers to engage in the voluntary “opt-in” Code, rather than establish by regulation a two-tier classification for retailers in the Australian market. Any proposal to narrow the scope of the Code to named retailers would be inconsistent not only with fundamental regulatory principles but also with the way in which existing prescribed mandatory codes apply – that is, on a “whole of industry” basis.

[3] Good faith

The RSR notes that the November Draft Code provided for mutual good faith obligations. The Code specified that suppliers would have an obligation to act in good faith in relying upon the Code’s dispute resolution provisions, and that retailers and suppliers would each respect the other’s intellectual property rights.

The Proposed Code departs from that position, for reasons that have been fully discussed between Government and the RSR. The RSR re-affirms its commitment to the spirit and outcomes of the November draft Code and with this in mind, intends to work constructively with the Government, including further discussion on the topic of good faith, to finalise the Proposed Code.

[4] Commercial flexibility

The Treasury Consultation Paper raises the issue of retailers seeking or having a capacity to “contract out” of obligations under the Code.

As set out in their joint submission to Treasury in relation to the November Draft, the RSR participants share the view that for the Proposed Code to be workable from an industry perspective, it must retain an appropriate level of commercial flexibility. As above, the November Draft Code comprehensively sets out the issues that are key to retailer-supplier relationships in the grocery industry.

The Proposed Code sets out unambiguously each of the circumstances in which retailers and suppliers may seek to exercise commercial flexibility, and the specific criteria and processes which must be satisfied. It is worth noting that many of the provisions relating to commercial flexibility in the Proposed Code provide higher levels of protection for suppliers than the UK’s Groceries Supply Code of Practice. Any failure to allow for such limited flexibility would, in the RSR’s collective view, create a real possibility of perverse or unintended outcomes.

In conclusion, the RSR wishes to reinforce strongly the importance of the Proposed Code being informed by the collective experience of two leading retailers and the Australian Food and Grocery Council, as the peak body for Australia’s major grocery suppliers. It is an industry-led initiative to build stronger relationships across the grocery sector, negotiated and agreed between parties for whom the dynamics of these relationships are an everyday reality.

