



**Submissions on the
FOOD AND GROCERY CODE
OF CONDUCT REVIEW**

Submissions of Derek M. Minus

I am a dispute resolver with 27 years experience as a barrister:

- an Accredited Mediator under the NMAS system who has conducted over 4,000 mediations since 1992,
- Chartered Arbitrator, court appointed arbitrator and former Tribunal Member in New South Wales,
- Lecturer in Law at the University of Sydney conducting a one semester course on *Commercial Dispute Resolution* in relation to the Food and Grocery Code.

I am responsible for arranging the dispute resolution processes under the Commonwealth Government's:

- Franchising Code of Conduct
- Horticulture Code of Conduct
- Oil Code

which are similar to the Food and Grocery Code in being prescribed codes under the Competition and Consumer Act 2010.

Since 1 December 2016, I have been appointed a dispute resolution adviser to the Commonwealth Government, for the franchising, horticulture and petroleum industries. I was appointed as the:

- Franchising Mediation Adviser by The Hon Michael McCormack MP, then Minister for Small Business,
- Horticulture Mediation Adviser by The Hon Barnaby Joyce MP, then Minister for Agriculture and Water Resources,
- Oilcode Dispute Resolution Adviser by The Hon Josh Frydenberg MP, Minister for the Environment and Energy.

I am responsible for the administrative functions in managing these Codes and dispute resolution arrangements, including selecting and appointing mediators Australia-wide to assist with the resolution of disputes for the:

- Office of the Franchising Mediation Adviser, see www.franchisingcode.com.au
- Office of the Horticulture Mediation Adviser, see www.horticulturecode.com.au
- Office of the OilCode Dispute Resolution Adviser, see www.oilcode.com.au

I consent to my submissions being made publicly available.

NOTE:

The views expressed in this submission are my own and may not be representative of the Commonwealth Government of Australia or the Departments of Jobs and Small Business, Agriculture and Water Resources, and Environment and Energy.

1. What is working well in the Code?

In terms of the range of dispute resolution functions provided under the Food and Grocery Code ("the Code") it can be regarded as the "best of breed" and fit for purpose. The Code allows a supplier to choose the type of dispute resolution option that best meets their needs.

The Code provides for negotiation with a company buyer, mediation and arbitration. In this way the Code mirrors the range of processes typically provided for in private commercial dispute resolution contracts. It therefore allows for the full range of processes for resolution; private discussions / facilitated negotiation / binding determination.

In this way the Code differs from the:

- Franchising Code (only negotiation via lodgement of a Notice of Dispute and mediation through a Request for appointment of a mediator);
- Horticulture Code (negotiation via lodgement of a Notice of Dispute, mediation through a Request for appointment of a mediator and expert non-binding appraisal through appointment of a horticulture advisor);
- Oil Code (mediation through a Request for appointment of a mediator or expert non-binding determination)

In my personal experience arranging and managing hundreds of disputes annually under the Franchising, Horticulture and Oil Codes the lack of a determination process like arbitration leads to lasting unhappiness in the use of the code processes for which I am responsible, even though our settlement rate in mediation is 80%.

2. What is not working so well?

1. The Code is should be **mandatory**. The Code cannot work to achieve better standards of conduct in an industry, if not all industry participants are bound by it.
2. The Code should be advertised and promoted. As the Adviser for the Franchising Code, I continually deal with franchisees who have never heard of the Code and it has been in existence for over 15 years and receives up to one thousand enquiries each year. In comparison the Code is unknown to lawyers and unused.
3. There is no information about how many disputes have been arranged under the dispute resolution processes offered by the Institute of Arbitrators and Mediators and handled by them. I doubt that there have been any at all and the publication of this information is vital to understanding how the Code is operating.

3. Are the dispute resolution arrangements under the Code working?

1. The Code lacks a clear “protocol” of operation. It is a legislative instrument which lacks the normal procedural rules of “how” it should be applied.
2. The Code offends against some basic dispute resolution processes in requiring mediators to “make a determination” whether a complaint or dispute is vexatious, trivial, misconceived or lacking in substance.
3. Requiring the supplier to only seek mediation or arbitration but not both at the same time (clause 38) is naïve and misunderstands the present practice of **med-arb**, currently employed internationally and provided for in the domestic State Commercial Arbitration Acts. Here mediation is followed by an integrated process of arbitration and the parties may move back and forth between these processes as issues are raised, discussed, resolved and determined. This type of flexible process leads to faster and cheaper resolution.
4. The conduct of mediation and arbitration (clause 39) should not be tied to the Rules of a **private** dispute Resolution organisation, the Institute of Arbitrators and Mediators. In any event shortly after the publication of the Code the Institute ceased to exist. This inhibited not only the advancement of the rule making functions under the Code but also its promotion.
5. The Code should be advertised and promoted. As the Adviser for the Franchising Code, I continually deal with franchisees who have never heard of the Franchising Code and it has been in existence for over 15 years and receives up to one thousand enquires each year. By comparison the Code is unpromoted and unknown to lawyers and therefore unused.
6. For the past three years, I have conducted a legal training course at the University of Sydney Law School focussed on the Food and Grocery Code. The students, both Australian final year undergraduates as well as postgraduate international students, are presented with a problem which has been co-written with the legal counsel from the Australian Food and Grocery Council. Students were then required to apply the Code procedures to the problem and develop practical solutions by following the mandated processes of the Code. Students were given access to both the ACCC managers and the dispute resolution services provided by the Relationships Institute (the organisation that subsumed IAMA). They found that both organisations lacked information and understanding about the very Code they were administering.
7. In my experience, there is a great need for small businesses to have the ability to utilise “collective complaint” mechanisms to obtain assistance with an issue that is negatively impacting the business interests or viability of a group of small businesses. The Code in focussing only on the resolution mechanism of the individual organisation fails to provide provisions for small businesses, in situations where a number of small businesses are similarly impacted, to lodge joint complaints.