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OUT18/10306

Food and Grocery Code of Conduct Review
Commonwealth Treasury
By email: FGCreview@treasury.gov.au

Dear Sir or Madam

DRAFT REPORT TO THE INDEPENDENT REVIEW OF THE FOOD AND GROCERY CODE OF CONDUCT

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business in government, and makes it easier to do business through policy harmonisation and reform.

The OSBC is pleased to make further comment on the reforms to the Food and Grocery Code of Conduct ('the Code') proposed in the draft report to the review ('the draft report'), in addition to the submission provided during the initial consultation period of the review. We consent to this submission being made public.

We agree with Treasury's conclusion that, despite evidence that the Code has had a significantly positive impact on retailer-supplier relations, it has not delivered on its intended outcomes in some respects. We hope that the following commentary further assists Treasury in finalising recommendations that will better equip the Code to support equitable, transparent, and cooperative relationships between signatories and their suppliers.

We also concur with Treasury's comments regarding the implications of the trend towards increased competition in the supermarket industry. That is, from a small supplier's perspective, this represents a mixed blessing. A more diverse landscape should mitigate the well-established power imbalance between large supermarkets and most small suppliers. But it is also producing increased pressure from those same supermarkets to reduce prices - even as higher production costs have already lowered suppliers' margins over recent years.[1] Small suppliers will therefore remain particularly vulnerable regardless of the course of foreseeable industry change - and the Code will remain a vital intervention to safeguard suppliers against signatory misconduct.

[1] See also Australian Food & Grocery Council (2018), '*2018-2019 Pre-budget submission*', pp. 2-3

Summary of OSBC positions on draft recommendations

Draft recommendation 1: The Code should be amended to provide that it is mandatory for all retailers and wholesalers with an annual turnover above a prescribed amount, such that all major retailers and wholesalers are bound by the Code. In the alternative, Draft recommendation 1 and the related materials in the final report should provide:

- That a parallel mandatory code should be introduced to apply to major market participants that refuse to become signatories to the voluntary Code, irrespective of whether or not Metcash signs up to the voluntary Code;
- That the parallel mandatory code applies to all retailers and wholesalers with an annual turnover above a prescribed amount that have not signed up to the voluntary Code; and
- That the substantive provisions of the parallel mandatory code must mirror those of the voluntary Code.

Draft recommendation 2: Should be maintained without amendment in the final report.

Draft recommendation 4: Should be maintained in the final report. However:

- The reference to 'capricious' behaviour should be replaced with an equivalent plain English term
- The final report should further recommend that the ACCC also develop materials designed to improve awareness of the Code among suppliers.
- Treasury should consider the merit of replacing additional references to 'good faith' in the Code with references to 'fair dealing'.

Draft recommendation 5: Should be amended in the final report to provide that:

- Adjudicators and any support staff must be remunerated by the Commonwealth;
- Adjudicators must be appointed by the ACCC, in consultation with the relevant signatory;
- Adjudicators should engage with suppliers in a plain rather than legalistic manner to the full extent practicable.

Draft recommendation 6: Should be maintained without amendment in the final report.

Draft recommendation 8: Should be maintained in the final report. However, the final report should also recommend:

- That the Code be amended to prohibit the practice of providing 'blanket' notifications of possible delisting during a range review.
- That the Code be amended to provide a supplier with the right to require additional or more detailed reasons for a delisting decision, following initial receipt of a signatory's reasons; and that a signatory must inform a supplier of this right prior to a delisting taking effect.

Draft recommendation 9: Should be maintained without amendment in the final report.

Draft recommendation 11: Should be maintained without amendment in the final report.

Draft recommendation 12: Should be maintained in the final report. However, the final report should also recommend that Clause 3 be amended to define 'fresh produce' as including fresh fruit, vegetables, meat, seafood and dairy.

Draft recommendation 13: Should be maintained in the final report. However, the final report:

- Should also provide that 'commercially sensitive information' includes, but is not limited to, in-depth ingredient breakdowns and details of a supplier's raw input providers; and
- Should also recommend that the Code be amended to prohibit a signatory from charging a fee for assessment of a proposed price increase beyond that reflecting its costs for undertaking the assessment.

Draft recommendation 14: Should be amended to recommend a review of the Code every three years.

***Draft recommendation 1:* The government should introduce a separate targeted mandatory code**

In our initial submission to the review, the OSBC expressed concern regarding the status of Metcash – the largest operator to have declined to sign up to the Code, with 7.4% of the Australian groceries market. The status of Metcash poses a clear risk to small suppliers and to the efficacy of the Code, in that the wholesaler may abuse its significant market share without regard to potential consequence under the Code. It also gives rise to a concurrent issue of fairness between operators in the groceries industry. Metcash's primary competitors – the largest retailers - are all signatories to the Code, and thus bound by its provisions in their own engagements with suppliers.

The OSBC is pleased that Treasury appears to share both concerns, and welcomes its support for having all major retailers and wholesalers bound by the Code. However, the draft report raises a number of uncertainties as to the means by which Treasury proposes to achieve this end.

The body of the draft report states that the "*optimal solution*" is that Metcash becomes a voluntary signatory to the Code - with a parallel mandatory Code introduced only in the event that it refuses to cooperate.[2] However, this is inconsistent with the form of Draft recommendation 1 itself, which supports the introduction of a mandatory code to apply to all major market participants that refuse to sign without reference to Metcash.

This inconsistency is not without consequence. While Metcash is the presently the only major operator that has elected not to be bound by the Code, the draft report itself notes the "*imminent*" arrival of major international retailers Amazon, Lidl, and Kaufland.[3] All are very well-resourced, potentially disruptive market entrants.[4] For example, one recent analysis determined that Kaufland – set to launch domestically in 2019 – could compete favourably in the Australian market with Aldi.[5] If Treasury's preferred position is not to support a parallel mandatory code in the event Metcash signs, this fails to account for the obvious risk that the problem will re-occur following the emergence of a major retailer or wholesaler in the near or medium-term.

In addition, if Treasury's preferred position is in fact to support a parallel mandatory code regardless of the actions of Metcash, the draft report still leaves a foundational question unresolved. That is, it is silent on the means by which it would be determined that a retailer

[2] Draft report, pp. 19-20
[3] Draft report, p. 10
[4] Deloitte (2017), '*Global powers of retailing 2017*', p. 14
[5] The Australian (2018), '*Don't underestimate Kaufland, analysts warn*'; The Shout (2018), '*Report predicts Kaufland's Australian growth*'

or wholesaler that had refused to sign the voluntary Code was or was not bound by the mandatory code. The draft report simply states that the mandatory code would apply to all market participants that "*should*" be bound, but have refused to sign up to the voluntary code.[6] In its initial submission, the OSBC supported reform to the Code to provide that it is mandatory for all retailers and wholesalers whose annual turnover exceeded a prescribed amount, with reference to the £1 billion threshold utilised in the equivalent UK code for the larger British market.[7] We note the ACCC's support for the same approach in its submission to the review.[8] A measure of turnover would also represent the most appropriate means of establishing a threshold for capture by a parallel mandatory code.

The relationship between the current Code and a prospective mandatory code also appears somewhat uncertain. The draft report states that the mandatory code would simply mirror the substantive terms of the voluntary Code upon its introduction. This would appear to leave open the prospect that they would eventually evolve to be distinct from one another. Nonetheless, even in the event of an enduring and strict intent to maintain the two codes as a mirror, a dual code system would likely require greater time and resources to review and maintain than a unified code.

The OSBC's position remains that amending the Code, such that it is mandatory for all retailers and wholesalers with turnover above a prescribed amount, represents the optimal solution. Plainly, a targeted mandatory system would achieve the same objectives as Draft recommendation 1: ensuring blanket coverage amongst major market participants without imposing disproportionate or unnecessary costs on small operators. It would also avoid both the current and prospective issues the OSBC has identified with the proposed dual code solution.

In addition, we do not accept that a targeted mandatory system should necessarily result in a loss of buy-in or feeling of 'ownership' from industry.[9] In our submission, these attributes would be retained provided all public authorities tasked with applying, reviewing, or otherwise engaging with with the Code maintained the consultative, responsive methods that have characterised the regulatory approach to date. Nor is it clear why or how the system would stifle retailer and wholesaler innovation, as the draft report states.[10] However, if Treasury has resolved not to further consider a targeted mandatory code, the final report should be amended for clarity, and to address the issues identified with the proposed reform to the extent possible under a dual code system.

OSBC position: The Code should be amended to provide that it is mandatory for all retailers and wholesalers with an annual turnover above a prescribed amount, such that all major retailers and wholesalers are bound by the Code.

In the alternative, Draft recommendation 1 and the related materials in the final report should provide:

- That a parallel mandatory code should be introduced to apply to major market participants that refuse to become signatories to the voluntary Code, irrespective of whether or not Metcash signs up to the voluntary Code;
- That the parallel mandatory code applies to all retailers and wholesalers with an annual turnover above a prescribed amount that have not signed up to the voluntary Code; and
- That the substantive provisions of the parallel mandatory code must mirror those of the voluntary Code.

Code of Conduct review', p. 5

[8] Australian Competition and Consumer Commission (2018), '*Food and Grocery Code of Conduct Review – ACCC Submission*', p. 12

[9] Draft report, p. 19

[10] Draft report, p. 20

***Draft recommendation 2:* The grocery code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers, except for customer facing provisions that are only relevant to retailers.**

The OSBC unreservedly concurs with the view expressed in the draft report that there is no rationale for restricting Part 3 of the Code, dealing with general conduct, to retailers only (except to the extent that it relates to matters that are not relevant to the wholesaler model).[11] The Code should therefore be amended to provide that Part 3 applies to wholesalers to the full extent that its provisions relate to wholesaler operations.

OSBC position: Draft recommendation 2 should be maintained without amendment in the final report.

***Draft recommendation 4 (i):* Introduce a new primary provision of fair dealings to replace the current obligation to act in good faith. The new provision should contain indicators of fair dealings that are easy to understand and apply to the particular circumstances of the parties.**

In our original submission, the OSBC expressed concern regarding the utility of the overarching requirement, prescribed in Clause 28 of the Code, that signatories deal with suppliers in good faith. The doctrine of good faith is nebulous, and so interpreted by retailers, wholesalers, and suppliers and in a highly inconsistent manner. We suggested these issues could be addressed by amending the Code to provide additional definitional guidance that could be referred to in consideration of whether a signatory has acted in good faith.[12] We welcome the sections of the draft report reflecting this position.

Moreover, we are supportive of Treasury's finding that the role and utility of the duty to act in good faith would be enhanced if it were replaced with the proposed 'fair dealing' provision. While it is appropriate that the Code moves away from direct reference to 'good faith' and its associated vagaries, it is equally proper that the definitional guidance in proposed clause 1) b) reflects the recurring themes in jurisprudential construction of good faith, identified in the submission of Professor Caron Beaton-Wells and Jo Paul.[13] The proposed amendment thus prescribes that conduct should be undertaken in good faith, inasmuch as that represents a settled legal concept, without the uncertainty associated with use of the term itself.

In addition, proposed clause 1) b) viii) appears to account for the view expressed in our original submission that any action to confer a detriment on a supplier for trying to access rights under the Code should be prescribed as 'not undertaken in good faith'.

The high-level 'principles-based' approach to drafting the proposed definitional guidance largely speaks to the need for it to be easily understood by industry – a matter of particular importance to many small operators that may lack easy recourse to professional advice. One possible exception is the reference to 'capricious' behaviour not constituting fair dealing, in proposed clause 1) b) vii). While the OSBC acknowledges the term is taken directly from the considered work of Professor Beaton-Wells and Ms Paul,[14] it is neither commonly used nor simply defined - and so may well fail the "*common sense test*"

[11] Draft report, p. 20
[12] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review*', p. 11
[13] Beaton-Wells, C. & Paul, J. (2018), '*Food and Grocery Code of Conduct review – submission to Treasury*', p. 4
[14] Beaton-Wells, C. & Paul, J. (2018), '*Food and Grocery Code of Conduct review – submission to Treasury*', p. 4

prescribed in the draft report for the fair dealing clause.[15] Treasury should therefore replace it with a simpler term of similar meaning, such as 'unpredictably' or 'erratically'.

Finally, the Code in its present form prescribes a series of requirements that a signatory or supplier must, or should, act in "*in good faith*" in particular circumstances.[16] Similarly, one of the prescribed purposes of the Code is "*to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers*."[17] There may be merit in amending these Clauses to instead refer to 'fair dealing'. This would cement the status of 'fair dealing', as opposed to 'good faith', as the *"lens through which all of the other provisions in the Grocery Code are to be interpreted*",[18] as well as prevent any confusion as to the relevance and application of either term.

OSBC position: Draft recommendation 4 should be maintained in the final report. However, the reference to 'capricious' behaviour should be replaced with an equivalent plain English term.

Treasury is further advised to consider the merit of replacing additional references to 'good faith' in the Code with references to 'fair dealing'.

Draft recommendation 4 (ii): The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.

In our initial submission, the OSBC noted the lack of public information concerning interpretation and application of the Code.[19] Enhanced guidance materials of this type would confer a direct benefit on resource-constrained small suppliers: allowing them to engage more effectively with signatories. Accordingly, OSBC welcomes this recommendation.

However, our initial submission also detailed the considerable evidence suggesting that many suppliers – particularly small suppliers - are not aware of the Code at all.[20] The submissions of both the ACCC[21] and the Mediation & Arbitration Centre[22] also identify a shortfall in simple awareness among stakeholders. Plainly, a supplier that does not know the Code exists will not be empowered by materials that better explain how it should be interpreted and applied. Treasury should therefore recommend that the ACCC develop additional materials designed to directly address the issue of awareness of the Code amongst suppliers.

OSBC position: Draft recommendation 4 should be maintained in the final report. Treasury should further recommend that the ACCC also develop materials designed to improve awareness of the Code among suppliers.

[15] Draft report, p. 25
[16] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth), Cl 34(2), 37(4), 38(3)(a), 38(5)(b), 39(3)(b)
[17] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth), Cl 2(d)
[18] Draft report, p. 26
[19] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review'*, p. 8
[20] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review'*, p. 6
[21] Australian Competition and Consumer Commission (2018), '*Food and Grocery Code of Conduct Review – ACCC Submission*', p. 7
[22] Mediation & Arbitration Centre (2018), '*Submissions on the Food and Grocery Code of Conduct review*', p. 3

Draft recommendation 5: ***The Code Compliance Manager should be replaced with an independent Code Adjudicator, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.***

Dispute resolution functions of proposed adjudicator

The OSBC's first submission to the review provided that supplier recourse to signatory review or dispute resolution under the Code is very rare. The reluctance to access these provisions is attributable in large part to a fear of signatory retribution and damage to the business relationship if a dispute is formalised. We therefore recommended the Code provide additional dispute resolution mechanisms designed to address these concerns.[23]

Accordingly, we welcome the findings in the draft report reflecting the reluctance of suppliers to engage. Likewise, the adjudicator model detailed in the draft report appears to go much of the way to addressing this dysfunction. Particularly appropriate are the recommendations that adjudicators should operate independently of the signatory's executive and buying teams, and maintain a complainant's confidentiality in the first instance.

Furthermore, making adjudicators easily accessible to suppliers, and affording them the power to access information and make binding decisions, should assist in allowing them to efficiently and effectively resolve disputes.

However, the proposed adjudicator model fails to address a vital consideration in ensuring supplier buy-in to the adjudicator model: that of independent remuneration. The omission of the issue of payment in the draft report leaves open the possibility that Treasury proposes the adjudicators draw their pay from the signatories themselves. This is particularly so given Mr Jeff Kennett, whose role as Coles' arbiter appears to have played a decisive role in shaping the proposed model, exercises these functions as an employee of the retailer.[24]

It is difficult to envisage a clearer conflict of interest to which the proposed adjudication system could be exposed than reliance on the signatories which they propose to regulate for payment. It is likely that any such model would be fatally compromised in its capacity to deliver widespread confidence in its independence– and thus to address the serious issues around supplier buy-in to dispute resolution identified in the draft report.

Indeed, the draft report itself notes the widespread supplier perception that Code compliance managers are partial in their actions, and lack the necessary degree of independence from the retailers.[25] In our submission, this is an inevitable product of the position of the Code compliance managers as employees of the retailers. As compliance managers are tasked with resolving disputes between their paymasters and an outside party, theirs is an inherently conflicted position - and will inevitably provoke apprehended bias at the least. The draft report also provides that some suppliers share the same concerns regarding Mr Kennett's position.[26] In light of these acknowledgements, the failure of the draft report to address the issue of independent remuneration for the proposed adjudicators is especially perplexing.

[23] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review*', pp. 8-9
[24] ABC news (2014), '*Coles sets Jeff Kennett up as independent arbiter in dealings with suppliers*'
[25] Draft report, p. 30
[26] Draft report, pp. 33, 35

It is therefore vital that the final report address this issue by providing that the adjudicator model proposed would rely on independent remuneration for adjudicators and any support staff, provided by the Commonwealth. This would ensure an appropriate degree of separation between the adjudicators and signatories, and thus allow them to achieve their intended purpose.

The report is equally silent on the question of how adjudicators should be appointed. If signatories were tasked with this responsibility, it would allow for the appointment of an adjudicator with a pre-existing relationship with the signatory – most obviously, a former employee or director. This, too, would give rise to a conflict of interest - compromising the perceived independence of an appointee and inhibiting the function of the office. The final report should therefore provide that adjudicators are to be appointed by the ACCC as regulator. The ACCC should perform this function in consultation with the relevant signatory, so as to ensure industry 'buy in' and the suitability of the appointee to the role.

More generally, there is no reason that providing for integrity in the nomination and remuneration processes should prevent retailers from modifying aspects of the adjudicator model as applies to their business, such that it is best suited to their processes.[27]

The OSBC notes further that one aspect of the Coles-Kennett model that stakeholders did approve of was the "*common sense*", rather than legalistic, approach taken to suppliers.[28] This is appropriate in delivering a service that is accessible to a stakeholder group possessing little or no legal expertise. It is also broadly reflective of the long-term trend toward increased use of non-legalistic dispute resolution across the civil law.[29] However, this principle does not appear to have been carried over to draft recommendation 5. In order to ensure adjudication services are as accessible to suppliers as possible, the final report should be amended accordingly.

OSBC position: Draft recommendation 5 should be amended in the final report to provide that:

- Adjudicators and any support staff must be remunerated by the Commonwealth;
- Adjudicators must be appointed by the ACCC, in consultation with the relevant signatory;
- Adjudicators should engage with suppliers in a plain rather than legalistic manner to the full extent practicable.

Reporting and surveying functions of proposed adjudicator

In our prior submission to the review, the OSBC stressed the potential value of publishing case studies and statistics relating to signatory-supplier disputes. Such materials could serve as a valuable means of guiding the wider supplier community through a potential dispute, but are currently not made available to suppliers.[30] This OSBC is therefore supportive of the recommendation that adjudicators be tasked with publishing an annual summary of the cases they receive.

This function should be enhanced by the related proposal that the adjudicators conduct a survey of suppliers' experiences with signatories, including as regards dispute resolution.

[27] As recommended in the draft report, p. 35
[28] Draft report, p. 33
[29] Stinanowich (2004), '*ADR and the "Vanishing Trial": The growth and impact of "Alternative Dispute Resolution"*', Journal of Empirical Legal Studies, Vol 1, no. 3, pp. 5-7
[30] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review*', p. 9

Increased transparency around any such information can only assist the supplier community in enhancing their understanding of the Code, and thus making more effective use of its provisions. This information should also serve a valuable function for the ACCC (see also our comments regarding draft recommendation 6).

OSBC position: The adjudicators' reporting and surveying responsibilities in draft recommendation 5 should be maintained without amendment in the final report.

***Draft recommendation 6:* The role of the ACCC should be expanded to:**

- ***Have oversight responsibility of the Code Adjudicators, including a regular meeting to discuss issues under the Grocery Code; and***
- ***Review the Code Adjudicator's annual reports and seek confidential submissions from suppliers as part of ACCC's core compliance activities for the Grocery Code.***

It is appropriate that the ACCC, as the authority with ultimate responsibility for ensuring the efficacy of the Code, should exercise oversight and review functions over an office created by, and operating within, the Code itself.

It is also foreseeable that regular engagements between the Adjudicators and ACCC could significantly enhance the ACCC's understanding of the industry landscape, in light of the dearth of contact the agency receives from industry stakeholders directly.[31]

In addition, given the ACCC's high public standing and visibility, providing the regulator with oversight should serve to enhance the perceived credibility of the Adjudicators - provided the issues around their independence (see our comments regarding recommendation 5) are satisfactorily addressed.

OSBC position: Draft recommendation 6 should be maintained without amendment in the final report.

***Draft recommendation 8:* The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.**

The OSBC supports the finding in the draft review that a decision by a signatory to significantly reduce the purchase of a supplier's product can have financial ramifications for the supplier akin to delisting itself.[32] We therefore endorse as eminently logical the recommendation to extend the protection and notification requirements for delisting to decisions to significantly limit distribution of a product.

However, in our prior submission to the review, we expressed concern that egregious behaviour by supermarkets in relation to range review and product delisting had persisted.[33] The review process to date has uncovered specific examples of this behaviour. Most notably, the draft report itself states:

[31] Australian Competition and Consumer Commission (2018), '*Food and Grocery Code of Conduct Review – ACCC Submission*', pp. 6-7
[32] Draft report, pp. 44-45
[33] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review'*, p. 5

- There is evidence that retailers provide 'blanket' notifications of delisting – regarding a suppliers' entire range - during the range review process. This technically satisfies the requirements of the Code concerning notification of any delisting decision, but fails to provide suppliers with meaningful notification of a delisting;[34] and
- There is evidence that retailers provide signatories with no more than rudimentary reasons for a delisting, making it difficult to determine the actual cause of the decision.[35]

It is concerning that draft recommendation 8 is the only recommendation in the draft report pertaining to the range review and delisting process. Plainly, the recommendation does not attempt to address the abovementioned issues.

The final report should therefore include additional recommendations that address the practices of 'blanket' notifications and providing rudimentary reasons. Given they represent a deliberate attempt to undermine the intent of the Code,[36] blanket delisting warnings should simply be prohibited. Such an amendment would not prohibit any genuine decision by a signatory to delist a supplier's entire range; the signatory could simply provide the relevant notification after the conclusion of a legitimate range review.

As regards the practice of providing rudimentary reasons, the Code could be amended to afford suppliers the right to request additional or more detailed reasons for delisting from a signatory. A signatory could be required to inform suppliers of this right prior to a delisting taking effect - in the same manner as Clause 19(5)(b) of the Code imparts an obligation on signatories to inform suppliers of the right to have a desilting decision reviewed.

OSBC position: Draft recommendation 8 should be maintained in the final report. However, the final report should also recommend:

- That the Code be amended to prohibit the practice of providing 'blanket' notifications of possible delisting during a range review.
- That the Code be amended to provide a supplier with the right to require additional or more detailed reasons for a delisting decision, following initial receipt of a signatory's reasons; and that a signatory must inform a supplier of this right prior to a delisting taking effect.

Draft recommendation 9: It should be clarified that the term 'Grocery Supply Agreement' applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.

In OSBC's submission, the clear intent of the Code's is to provide that a Grocery Supply Agreement consists of the whole of the agreement between a signatory and a supplier (at least to the full extent practicable, given the partially relational nature of the contract[37]). The Code's dictionary already appears to provide as much – stating as it does that a supply agreement "*includes any document comprising the agreement or made, from time to time, under the agreement*".[38]

[34] Draft report, p. 44
[35] Draft report, p. 44
[36] Draft report, p. 44
[37] Draft report, p. 22; Spencer, E. (2009), *'Consequences of the Interaction of Standard Form and Relational Contracting in Franchising'*, Franchise Law Journal, vol 29, pp. 33-34
[38] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth), Cl 3

We also support the draft report's finding that any narrow interpretation of the requirement that the agreement be in writing does not provide suppliers with adequate certainty regarding the application of the Code – or indeed the basic substance of the contract.

Given the uncertainty around what constitutes a 'Grocery Supply Agreement' identified in the draft report, the OSBC supports the recommendation that the Code be amended to unambiguously provide that the term applies to all agreements between a signatory and supplier relating to the supply of groceries.

OSBC position: Draft recommendation 9 should be maintained without amendment in the final report.

Draft recommendation 11: Clause 14 should be amended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.

In principle, it is plainly fair that a supplier that has reduced the costs incurred by a retailer or wholesaler arising from its processes, including those associated with wastage, should be able to renegotiate the terms of a Grocery Supply Agreement to reflect that saving. Moreover, the Code in its current form provides that any wastage charge must reasonably reflect the actual cost incurred by a retailer or wholesaler.[39] This appears to compel renegotiation when a supplier reduces waste costs – leaving little doubt that renegotiation is permissible.

It is therefore unclear why some retailers have taken an alternate view. Nonetheless, given the apparent confusion identified in the draft report,[40] OSBC supports the proposal to amend the Code, to explicitly protect a supplier's right to negotiate a reduction in wastage charges without impact on any other terms of the agreement.

OSBC position: Draft recommendation 11 should be maintained without amendment in the final report.

Draft recommendation 12: To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply to all fresh produce, including fruit, vegetables, meat, seafood and dairy etc.

Given the reported stakeholder confusion as to the meaning of 'fresh produce',[41] it is appropriate that Clause 21 be amended for clarity in the manner suggested. Such an amendment would only serve to provide that 'fresh produce', as regards Clause 21, should be interpreted in a manner consistent with its ordinary meaning.

However, it is OSBC's view that the confusion Treasury has identified may be attributable to vagary in the definition of 'groceries' prescribed in Clause 3. The Clause provides that 'groceries' includes *"food including fresh produce, meat and dairy items…".*[42] This could be read as implying that 'fresh produce' does not include meat or dairy products. Such a reading would seem to be consistent with the confusion described in the draft report.

[39] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) Cl 14(2)(d)
[40] Draft report, p. 47
[41] Draft report, p. 47
[42] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth), Cl 3

Treasury should therefore consider an additional clarification - amending Clause 3 to include a definition of 'fresh produce' that provides that the term includes fresh fruit, vegetables, meat, seafood and dairy. Such a provision would address any and all uncertainty arising around what may or may not constitute 'fresh produce' under the Code.

OSBC position: Draft recommendation 12 should be maintained in the final report. However, the final report should also recommend that Clause 3 be amended to define 'fresh produce' as including fresh fruit, vegetables, meat, seafood and dairy.

Draft recommendation 13: A new provision relating to price rise processes should be introduced to:

- ***Prevent a retailer from requiring a supplier to disclose commercially sensitive information where the retailer has a competing own-brand product; and***
- ***Require that retailers take no longer than 30 days to consider a price rise request made by a supplier, unless circumstances exist that justify a reasonable extension that is agreed to by the supplier.***

The OSBC shares the concerns raised in the final report that suppliers are being asked to disclose a wealth of commercially sensitive information in relation to a proposed price increase – especially where a retailer has a competing own-brand product. The potential for abuse of confidential information disclosed by a supplier is clear. The risk of such misconduct would also appear common, as both the 'Coles Brand' and 'Woolworths food' own-brand ranges comprise over 2,000 products.[43] We note also the largely approving public response the proposal has received from stakeholders, including the Australian Food & Grocery Council.[44] We therefore support the recommendation to prohibit disclosure of commercially sensitive information where a retailer has a competing product.

Nonetheless, in its current form, the recommendation does not address the question of what constitutes 'commercially sensitive information'. While the Code should not seek to restrict what might constitute commercially sensitive information in any one negotiation, it is our submission that in-depth ingredient breakdowns and the details of raw input providers are inherently sensitive. These go to the heart of a product's makeup, and thus its position in the market. The Code should thus provide that 'commercially sensitive information' includes, but is not limited to, this information.

The recommendation that a signatory be required to complete a price increase assessment within 30 days is also suitable. The risk that such a process will require months or even a full year imparts considerable uncertainty onto the affected supplier. A significant delay would be likely to represent a particular issue for small suppliers, given their reduced margins and more limited customer bases.

However, requiring the completion of an assessment within a reasonable timeframe will not necessarily compel signatories to reduce the fees charged to suppliers for undertaking this process. Moreover, in our submission, there is no reasonable explanation as to why a signatory should require a fee beyond that required to cover its costs to undertake the assessment. This process is essentially one of negotiation - undertaken to provide an evidentiary basis for terms under which the parties seek to profit. It should not function so as

[43] Woolworths n.d., '*The Woolworths Food range*'; Coles n.d., '*Product search*'
[44] Australian Food & Grocery Council (2018), '*Draft report for the review of the Food and Grocery Code of Conduct*'; Herald Sun (2018), '*Government grocery code review hears suppliers threatened over setting of supermarket prices*'; Sydney Morning Herald (2018), '*'Abuse of power': supermarkets' supplier audits under fire*'

to profit the signatory directly - and do so at the expense of a supplier. The Code should therefore be amended to restrict a signatory from charging a fee beyond that reflecting its actual costs for undertaking the assessment process.

OSBC position: Draft recommendation 13 should be maintained in the final report. However, the amendment sought should also provide that 'commercially sensitive information' includes, but is not limited to, in-depth ingredient breakdowns and details of a supplier's raw input providers.

The final report should also recommend that the Code be amended to prohibit a signatory from charging a fee for assessment of a proposed price increase beyond that reflecting its costs for undertaking the assessment.

Draft recommendation 14: There should be a review of the Grocery Code within three to five years of implementation of any changes as a result of this review.

In our initial submission, the OSBC supported an amendment to the Code to provide for ongoing review of its provisions every three years. Ongoing review would ensure the Code remains both appropriate and relevant in light of a grocery industry set to undergo rapid change for the foreseeable future.[45] Therefore, while OSBC is supportive of draft recommendation 14, a rolling review process remains more appropriate than the singular process envisaged in the draft report.

OSBC position: Draft recommendation 14 should be amended to recommend a review of the Code every three years.

To discuss this submission, please contact Thomas Mortimer, Senior Advisor, Advocacy and Strategic Projects, on (02) 8222 4196 or thomas.mortimer@smallbusiness.nsw.gov.au.

Kind regards

Robyn Hobbs OAM
NSW Small Business Commissioner
2 August 2018

[45] Office of the NSW Small Business Commissioner (2018), '*Submission to the Food and Grocery Code of Conduct review*', p. 11