



Small Business Development Corporation

**Improving Commercial Relationships in
the Food and Grocery Sector**

September 2014



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About the Small Business Development Corporation

The Small Business Development Corporation ('SBDC') welcomes the opportunity to provide comments to the Federal Treasury's "Improving Commercial Relationships in the Food and Grocery Sector" consultation ('the Consultation') and on the proposed "Food and Grocery Code of Conduct" ('the Grocery Code').

The SBDC is an independent statutory authority of the Western Australian Government and was established to facilitate the development and growth of small businesses in this State.¹ For over 30 years now, the SBDC has been providing assistance to small business owners and our vision is for "A strong and enterprising small business sector in Western Australia".

One of the SBDC's key strategic objectives is to advocate for a fair, conducive and productive environment for small businesses in Western Australia. The agency strives to achieve this by taking a leading role in influencing the policy and regulatory environment for small business.

The SBDC also supports the small business sector through the provision of information and education materials, workshops and tailored business and commercial tenancy advice, amongst other things. These educative and advisory services assist small businesses to better understand their rights and responsibilities, in order to minimise their exposure to risks and disputes.

In 2011, the *Small Business Development Corporation Act 1983 (WA)* was amended to introduce the role of the Small Business Commissioner ('SBC') as the Chief Executive Officer of the SBDC and to establish an alternative dispute resolution ('ADR') service to assist small businesses to resolve their business-to-business and business-to-government disputes.

Problems in the Food and Grocery Industry

Part A of the Consultation Paper outlines the policy problem that the Consultation is seeking to address. It also highlights issues with the food and grocery industry that have been identified by previous Government inquiries.²

In the last financial year, the SBDC received very few enquiries from small businesses operating in the food manufacturing and wholesale industries. As such, the SBDC is unable to provide empirical or anecdotal evidence from our clients that would further substantiate the nature and scale of problems already identified in the food and grocery industry in Western Australia.

¹ Please note that this submission contains the views of the SBDC and not necessarily that of the Western Australian Government

² "Improving commercial relationships in the food and grocery sector" Consultation Paper, August 2014

Despite this, the SBDC supports the findings of Part A of the Consultation Paper and believes that the issues highlighted are in fact a problem worthy of Government intervention.

Whilst not having specific data on businesses subject to these types of supply agreements, the SBDC is familiar with the impact of some of the problems highlighted by the Consultation Paper on small businesses in general. The problems outlined in Part A of the Consultation Paper are not unique to businesses subject to supply agreements with Australia's large food and grocery retailers. Unfair trading conditions, extended payment terms and inequitable allocation of risk are issues affecting many small businesses that are party to contracts with larger businesses. In the SBDC's experience, these issues have the potential to impact the cash-flow and risk exposure of small businesses, which in turn can cripple individual operators and have flow-on impacts on other entities.

An Opt-in Prescribed Code

The SBDC supports in principle the introduction of the voluntary prescribed Grocery Code and the concept of grocery supply agreements ('GSA') to govern the relationship between retailers and suppliers of food stuffs and grocery items in Australia.

If executed well, the introduction of the Grocery Code has the potential to benefit those supplying goods directly to retailers, either as manufacturers or wholesalers. By establishing fundamental terms and minimum standards of conduct to address known problem areas, the Grocery Code may assist in rectifying the power imbalance that currently exists in many supplier-retailer relationships within the food and grocery industry.

Specifically, the SBDC is supportive of the inclusion of protections against the de-listing of products due to a supplier making a complaint or raising a dispute³ and against threats of termination of the GSA without reasonable grounds.⁴ Furthermore, mandating the attendance at dispute resolution processes within the agreement provides parties with the opportunity to resolve issues before they have the potential to destroy important business relationships.

Whilst the SBDC generally supports the Grocery Code, there remain however a few concerns about its implementation and execution that may limit its effectiveness. These concerns relate to the exceptions to fundamental terms, how the concept of good faith will be included in the Grocery Code, and the processes around accessing dispute resolution mechanisms.

³ Clause 15(2) of the Proposed Code

⁴ Clause 20 of the Proposed Code

The Exceptions

The inclusion of provisions to regulate conduct and set out fundamental matters (such as the delivery of groceries) in GSAs is essential to the Grocery Code's effectiveness. However, the SBDC notes that in order to maintain flexibility in commercial arrangements, the Consultation Paper considers the inclusion of exceptions to each provision, which in effect allows potentially unfair terms and standards of conduct to be incorporated into a GSA.

The SBDC believes that some of these exceptions will significantly weaken the Grocery Code's efficacy and negatively impact on small business suppliers. In particular, the SBDC is concerned with exceptions that allow the retailer to:

- unilaterally vary the agreement (including retrospectively) – Clause 10(2) and 11(2);
- charge the supplier for wastage – Clause 12(2)(b);
- hold back money when paying the supplier's invoice – Clause 16(3);
- charge a fee to cover their costs (e.g. a buyer's visit, refurbishment of the store) – Clause 16(5); and
- charge the supplier for the cost of a promotion – Clause 17(2).

It has already been established that small business suppliers typically have weaker bargaining power than retailers and are quite often dependent on such supply arrangements for their ongoing viability. Allowing parties to contract out of these fundamental provisions creates an opportunity for a retailer to exert influence over the supplier to include exceptions that they should be protected from.

Given the inherent power imbalance, suppliers may be susceptible to bullying tactics and pressure to sign a GSA that may contain unfair terms or standards of conduct that would otherwise be prohibited under the Grocery Code. It is for these reasons that the SBDC does not support the introduction of a Grocery Code that allows such exceptions.

Recognizing the potential loopholes that these exceptions can introduce, the Consultation Paper contemplates the introduction of a "no disadvantage test" as an alternative means of achieving commercial flexibility. This type of test would allow the retailer to rely on an exception so long as it does not result in the supplier being "materially disadvantaged".

The SBDC does not believe that the "no disadvantage test" is a viable solution. This proposal has the potential to create confusion and increase disputes as parties test the meaning of "materially disadvantaged".

Good Faith

The SBDC notes that consideration is being given to the inclusion in the Grocery Code of an obligation to act in good faith and that five options have been proposed. Whilst seeing benefit in requiring parties to act in good faith, the SBDC believes that unless careful consideration is given to how this provision will be incorporated into the Grocery Code it could cause confusion for parties.

An obligation to act in good faith is not an easy concept to define nor is it clearly understood by many who seek to rely on it in their commercial relationships. In the SBDC's opinion, it has the potential to create a false sense of security among small business owners as they may believe it to be the panacea to any issue or dispute that may arise under a contractual arrangement with another party.

The SBDC's experience is that small business owners are typically unclear on what constitutes good faith (as well as what doesn't) and may ultimately be disappointed that it does not provide an effective remedy to enforce their rights or resolve their disputes.

Whilst the SBDC does not have specific views on how best to incorporate good faith into the Grocery Code, it is important that the potential implications and unintended consequences of each option be carefully considered.

Dispute Resolution

The SBDC strongly supports the inclusion of access to dispute resolution mechanisms under the Grocery Code, and notes that it is proposed that parties would have access to either internal or external processes.

As mentioned earlier, the SBDC offers an ADR service to assist small businesses in Western Australia to resolve their business-to-business and business-to-government disputes. This service is easy to access, timely and cheaper than that offered by the private sector. The SBDC has designed the ADR service to ensure minimal barriers to access for small business operators seeking to resolve their commercial disputes.

The principle that ADR should be easily accessible and delivered in a timely manner is essential to protecting the ongoing business relationship of parties in dispute. In the SBDC's opinion, not all of the arrangements proposed under the Grocery Code are in keeping with this philosophy.

In particular, the SBDC has some reservations that the threshold set by the Grocery Code will create a barrier for suppliers seeking to resolve their disputes using either the internal or external process. Under the Grocery Code, the supplier would need to convince the retailer that its dispute is not "vexatious, trivial, misconceived or lacking in substance" (i.e. that it meets the threshold) before it can be escalated to either process.

Whilst it is understandable that retailers would wish to limit attending dispute resolution for claims that do not satisfy this threshold, the SBDC does not believe that retailers should be the decision maker on whether a supplier's concern is appropriate for this course of action.

To ensure better equity and fairness, the SBDC believes that an independent third party arbitrator should review a supplier's claim and make a judgment on whether it has merit and could be appropriately resolved through the dispute resolution processes available under the Grocery Code. If the independent arbitrator judges that a supplier's claim is meritorious, then the retailer should be bound by this decision and dispute resolution should be arranged without delay.

Enforcement

The SBDC supports the proposal to make the Grocery Code enforceable against those that choose to opt-in to it (i.e. Option 2 in the Consultation Paper). In the SBDC's opinion, parties that are bound by the Grocery Code would be more likely to comply with it if there are enforceable consequences for failing to do so, as set out in section 51ADC of the *Competition and Consumer Act 2010 (Cth)*.

Further to this, the SBDC supports the enforcement of the Grocery Code by the Australian Competition and Consumer Commission ('ACCC'), as it currently does with other industry codes of conduct. To ensure that the ACCC is effective in enforcing the Grocery Code, the SBDC recommends that the regulator's funding be reviewed in conjunction with this Consultation. There is little point in giving the ACCC this responsibility if it does not have adequate resources to carry it out effectively.

Conclusion

The SBDC welcomes the opportunity to provide comments on the Consultation and proposal to introduce the Grocery Code. For further information on this submission, please contact Ms Darcy Bosch (Senior Policy & Project Officer) on (08) 6552 3308 or email darcy.bosch@smallbusiness.wa.gov.au.