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Secretariat Team
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RE: GROCERY CODE REVIEW - CALL FOR SUBMISSIONS ON DRAFT REPORT

Please find attached the submissions from Dispute Resolution Associates on the Review of the Grocery Code undertaken by Professor Graeme Samuel.

I refer to the submissions prepared by the Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (SME Committee) which I have participated in preparing. Where we do not make particular comments on specific recommendations we generally adopt the manner of that review and the recommendations contained in that report.

However, because of our own unique experience with the management of dispute resolution processes concerning the "other" three Codes of Conduct, we make the particular recommendations below which we hope will inform the final report.

We consent to these submissions being made publicly available.

Kind regards,

A handwritten signature in blue ink, appearing to read "Derek Minus".

Derek Minus



REVIEW OF THE DRAFT REPORT OF PROFESSOR SAMUEL

1. Dispute Resolution Associates

Dispute Resolution Associates (DRA) is a dispute resolution company that has been providing services to government and private organisations since it was established in 1999. These services cover the full range of mediation and conciliation services, investigative services, training and coaching, dispute management planning, dispute resolver identification and dispute resolution information provision.

DRA has been selected by the Commonwealth Government to provide the administrative services for three of Australia's "Codes of Conduct" promulgated under s 51AE of the *Competition and Consumer Act 2010*. The Franchising Code, Horticulture Code and Oil Code of Conduct have variously been in operation as mandatory Codes for upwards of 20 years.

On 1 December 2016, the principal of DRA, Derek M. Minus, was appointed as the:

- **Franchising Mediation Adviser** for the Franchising Code by The Hon Michael McCormack MP, then Minister for Small Business, pursuant to cl 44 of the *Competition and Consumer (Industry Codes—Franchising) Regulations 2014*.
- **Horticulture Mediation Adviser** by The Hon Barnaby Joyce MP, then Minister for Agriculture and Water Resources pursuant to cl 39(1) of the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*.
- **Dispute Resolution Adviser** for the Oil Code by The Hon Josh Frydenberg MP, Minister for the Environment and Energy pursuant to cl 41 of the *Competition and Consumer (Industry Codes—Oil) Regulations 2017*.

A Barrister-at-Law for over 27 years, Derek Minus is an Accredited Mediator under the NMAS system who has conducted over 4,000 mediations since 1992; a Chartered Arbitrator, court appointed arbitrator and former tribunal member in New South Wales and a part-time 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 that teaches practical skills of negotiation, mediation and arbitration.

As the Adviser appointed by the various Ministers under the Codes, he is responsible for undertaking the Adviser's functions under the Codes and managing the administrative functions of the:

- Office of the Franchising Mediation Adviser, see www.franchisingcode.com.au
- Office of the Horticulture Mediation Adviser, see www.hoirticulture.com.au
- Office of the Oil Code Dispute Resolution Adviser, see www.oilcode.com.au

These Offices provide telephone answering, information dissemination, advice about the operation of the Codes and how to access dispute resolution services under them, the separate websites providing an information service about dispute resolution, lists of appointed mediators, and an on-line enquiry and registration of disputes service.

The Adviser is principally engaged in operating the dispute resolution functions of these Codes of Conduct by maintaining a list of competent mediators and appointing a mediator when requested by a party to a dispute to do so or (under the Oil Code) personally making a non-binding determination.



The Adviser is required to prepare detailed statistical reports on a quarterly and annual basis for the Commonwealth Government, concerning:

- (a) the performance of the dispute resolution service
- (b) the nature of the matters referred for mediation
- (c) who made the request for mediation
- (d) what type of issues were most frequently raised
- (e) where the enquiries arise, by state
- (f) the nature of enquiries by Industry Type (categorized using the ANZSIC coding system)
- (g) the number of enquiries and disputes mediated
- (h) the mediation success rate and quality of outcome
- (i) the average cost of the mediation
- (j) the party's satisfaction with the mediator's performance
- (k) the party's satisfaction with the administrative service

The Adviser has provided submissions to the current Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the operation and effectiveness of the Franchising Code of Conduct, and the Oil Code of Conduct, in particular the effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct.

The Codes provide a separation between the regulatory actions of the ACCC and the resolution operation of the Adviser. Information by the Adviser was that the current system was working well with over 400 requests for mediation received for 159 different companies in the 16 month period from 1 December 2016, with a dispute settlement rate achieved of over 80%.

The Adviser has recommended to the Inquiry a strategy that used binding arbitration and existing arbitrators to provide an alternative, lower cost methodology for obtaining resolution of disputes that do not completely resolve at mediation. This would avoid the need for small businesses to engage in litigation in Court where the expense can be prohibitive and where the decision maker may have no expertise in the commercial nature of the transaction.

Derek Minus, under the auspices of Mediation and Arbitration Centre, provided submissions to the Food and Grocery Review process in 2018 and in 2014 provided submissions on the Grocery Code Exposure Draft Part 5 – Dispute Resolution.

Those submissions provided in 2014, noted in Summary that:

There is no doubt that the proposed mediation and arbitration system contained in the dispute resolution process, if adopted, will assist small businesses to achieve the result they need. A quick decision by an experienced industry "expert", using a flexible dispute resolution process can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court or being frustrated by not achieving an outcome (or being offered a "take it or leave it" proposal) in mediation. But the application of these processes needs to be better thought through as if badly managed they will lead to this Code as being as ineffective as the other Codes in introducing real change.



2. Review of the Recommendations

Like the SME Committee report (which painstakingly extracted from the Draft Report a list of problematic behaviours identified by the Reviewer) we agree that the Reviewer has correctly identified many of the current problems with the application and enforcement of the voluntary Grocery Code.

However, we believe that the major recommendations proposed by the Reviewer ignore the existing dispute resolution processes that have been in place and working with the other Codes in Australia for a considerable period of time.

Draft Recommendation 1

The Government should introduce a separate targeted mandatory code to apply to major participants that refuse to become signatories to the voluntary Grocery Code.

We do not agree with this recommendation.

As previously proposed, the Code should be made mandatory for all industry participants.

Experience with the Franchising Code is that you get participant engagement only when you make the Code mandatory. Also the history of the now abandoned (but earlier) Produce and Grocery Industry Code (which provided a free, but unused mediation service) was that a non-mandatory Code did not ultimately attract strong industry support.

Leaving the Code non-mandatory and adopting the Reviewer's recommendation of a "separate targeted mandatory code to apply to major participants that refuse to become signatories to the voluntary Grocery Code" to force a single industry participant, Metcash, to join would result in a bifurcated system that would be unnecessarily complex and the antithesis of what good regulation policy tries to promote.

Draft Recommendation 2

The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.

We agree with this recommendation, subject to the proviso that the Code should be made mandatory for all industry participants.

Draft Recommendation 3

That the current coverage of products under the Grocery Code remains unchanged.

We do not agree with this recommendation.

As proposed by the SME Committee, the operation of the Code should be extended to the supply of alcohol.



Draft Recommendation 4

Introduce a new primary provision of fair dealings to replace the current obligation to act in good faith (clause 28). The new provision should contain indicators of fair dealings that are easy to understand and apply to the particular circumstances of the parties.

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.

We do not agree with this recommendation.

It has been argued in Australia for years that “good faith” bargaining should be a legislated feature of Australian contract law. In 2012 the Federal A-G published a paper seeking to explore the issue: *“Improving Australia’s Law and Justice Framework - Contract Law Discussion Paper”*

Even though not yet a regular feature of commercial transactions, “good faith” bargaining has been introduced as a key element of the Franchising and Horticulture Codes. There has also been support in recommendations to the present Senate Inquiry that “good faith” bargaining should also be introduced into the Oil Code.

On its website (<https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct/acting-in-good-faith>) the Australian Competition and Consumer Commission (ACCC) identifies the obligation of good faith in the following statement:

Although the Code does not define exactly what good faith means, it does state that the obligation of good faith is to reflect historical judge-made law (known as the ‘common law’).

Under common law, good faith requires parties to an agreement to exercise their powers reasonably and not arbitrarily or for some irrelevant purpose. Certain conduct may lack good faith if one party acts dishonestly, or fails to have regard to the legitimate interests of the other party.

Australian courts have found business dealings to be not in good faith when they involve one party acting for some ulterior motive, or in a way that undermines or denies the other party the benefits of a contract.

Given that there is a consistent use of the concept of “good faith”, the Reviewer’s suggestion to remove “good faith” bargaining from the Food and Grocery Code and replace it with a “fair dealings” provision would we believe introduce complexity rather than clarity. It is also difficult to understand precisely what “fair dealings” means and how it is different from the concept of “good faith” bargaining. It appears the Reviewer has adopted it simply because it is used as part of the UK Food and Grocery process.

We agree with the SME Committee’s recommendation that the ACCC should be tasked with providing enhanced guidance materials about the Grocery Code and the interpretation and application of its provisions and in particular the “good faith” requirements.

There has not been sufficient investment by government in funding educational activity in relation to the Grocery Code (and the Franchising and Horticulture Codes) over the last three years, with the consequence that many suppliers remain unaware of the Code and its central provisions.



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.

We do not agree with this recommendation.

As the Reviewer identifies, Division 3 of the Grocery Code provides a framework for suppliers to seek mediation or arbitration of a complaint or dispute. It establishes a framework for the industry to improve suppliers' access to justice, within a timely and cost effective manner. A signatory is required to participate in mediation or arbitration should a supplier decide to use the Grocery Code's framework.

However, the Reviewer notes that it has not received evidence that any disputes have been taken to mediation or arbitration since the introduction of the Grocery Code. He opines that: "This may be due to a fear of retribution associated with escalating complaints against retailers, as well as a preference for resolving complaints through commercial negotiations."

It is an extraordinary situation that the carefully designed dispute resolution processes, embedded in the Code, have not been utilised at all during the 3 years that the Code has been in place. The Reviewer fails to examine why these processes of mediation and arbitration have not been used.

Since the late 1980s, Alternative Dispute Resolution (ADR) has gained ground in Australia as a mechanism for the resolution of disputes. This was helped by the fact that the former Chief Justice of the Supreme Court of New South Wales, the late Sir Laurence Street, became a mediator on his retirement from the court and an active proponent of ADR.

ADR processes of mediation and arbitration are today used in every tribunal and court in Australia:

- The Family Court has a family dispute resolution process with Family Dispute Resolution Practitioners (FDRP) accredited by the Federal Attorney-General's Department, as well as arbitration of Family law property only, disputes.
- The Federal Administrative Appeals Tribunal (AAT) has incorporated processes of conferencing, conciliation, mediation, case appraisal and neutral evaluation.
- The NSW Local Court system which can deal with commercial disputes up to \$100,000 can appoint mediators or arbitrators to resolve disputes under the *Civil Procedure Act 2005*.
- The NSW Workers Compensation Commission has an integrated conciliation/ arbitration system where the same person provides both processes.
- The NSW Civil and Administrative Tribunal (NCAT) has a wide and flexible power to resolve disputes other than by adjudication, and the may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes.
- The QCAT (Queensland Civil and Administrative Tribunal) even has an arbitration-mediation (arb-med) process, termed a hybrid hearing, whereby the member first arbitrates the dispute (and privately records the decision) before attempting to resolve the dispute by mediation.
- Each of the Codes of Conduct established under section 154AE of the *Competition and Consumer Act 2010*, provides for compulsory mediation.



When it was introduced in 2015, the Food and Grocery Code provided a “best of breed” dispute resolution process and a model example of a modern dispute resolution process.

The Code makes available to a supplier, a choice of both collaborative and determinative processes that they can choose from:

- (a) negotiation with a buyer,
- (b) mediation (facilitated negotiation), and
- (c) binding arbitration

Most commercial contracts, particularly those entered into by sophisticated organisations, such as the Commonwealth Government or any major trading corporation, include the same range of dispute resolution processes; negotiation, mediation and arbitration.

Instead of referencing the existing dispute resolution processes that are currently employed in Australia with the existing Franchising Code, Horticulture Code and Oil Code and using them to upgrade the service processes, the Reviewer has opted to promote as an alternative solution an English process which has scant relevance to the Australian legislative and administrative law scenario.

An examination of the Australian experience would indicate that there are problems with the implementation of the dispute resolution processes in the Code, not the processes themselves.

Promotion As has already been indicated there has been a lack of funding to properly advertise and inform the suppliers about the availability of the Code processes.

Pricing Suppliers have no indication what the cost of utilizing these private services will be, unlike the other Codes where the Government has mandated a maximum fee for the provision of the dispute resolution service. The World Intellectual Property Organization (WIPO) domain name arbitration service which has been operating for nearly 20 years, provides a good example of a determinative, fixed price model with clear, well understood procedural rules.

Procedure There are no clear procedures about how disputes are resolved under the Code, who the mediators or arbitrators are, how they are chosen or appointed, what accreditation and experience they require and whether they will be independent. By comparison, under the other three Codes for which DRA is responsible, parties recognise that the role of the Adviser is independent and can be relied on to assist both parties with an effective, efficient and inexpensive dispute resolution process.

3. An Alternative

DRA proposes that the better way forward would be to upgrade the Food and Grocery Code procedures for the allocation of mediation and arbitration in line with the other three Codes currently operating in Australia.

It, or another organisation could then be appointed to promote and provide information about the Code dispute services and manage the allocation of matters to mediation and arbitration and resolution of the disputes.

An independent Adviser appointed by the relevant Minister would provide the service of last resort in managing and appointing the dispute resolvers.



The Reviewer has suggested that:

Suppliers with complaints and disputes with retailers are also able to pursue third party avenues that are outside the framework of the Grocery Code. These include the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and state-based small business commissioners. These entities can provide assistance to suppliers that may be in disputes and can also provide access to mediation and arbitration.

There are current and practical limitations around this suggestion. National organisations prefer to use a nationally based service, rather than a state-based small business commissioner, which can promote consistency of decision making and access to the widest market of skilled practitioners.

Regarding a proposed role for the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), there would have to be a fundamental change to the charter of that organization to allow it to play the current role required.

The legislation enabling the ASBFEO, the *Australian Small Business and Family Enterprise Ombudsman Act 2015*, only allows it to refer matters to Alternative Dispute Resolution (s 71). But the definition of ADR does NOT include arbitration. So the ASBFEO currently has no power to even refer disputes to arbitration let alone conduct them. Further, s 73 prevents the ASBFEO from conducting ANY form of ADR process. It provides that, “an alternative dispute resolution process recommended by the Ombudsman must not be conducted by the Ombudsman; or a delegate of the Ombudsman; or a person assisting the Ombudsman”.

The ASBFEO was only recently reviewed (see the report commissioned by Treasury: *Review of the Australian Small Business and Family Enterprise Ombudsman*, June 2017). That report specifically considered whether the role of the ASBFEO should be expanded to undertake the functions currently provide by the Mediation Adviser. The Report concluded (para 2.4.1):

There is no evidence of a gap in the ASBFEO’s assistance function at present. One stakeholder suggested the ASBFEO’s assistance function should expand to include dispute resolution services under the Franchising Code of Conduct, the Horticulture Code of Conduct and the Oil Code of Conduct, which are mandatory industry codes of conduct prescribed under the Competition and Consumer Act 2010. A mediation adviser provides dispute resolution services under the codes, informing parties of the dispute resolution procedures available to them and, where the parties request mediation, nominating a specific mediator. However, expanding the assistance function of the ASBFEO is considered infeasible due to differences in:

- ***the roles of the ASBFEO and the mediation adviser in mediation*** – The Act provides for the ASBFEO to recommend a group of dispute resolution providers and the parties to the dispute must choose the provider. In contrast, the mediation adviser must nominate a specific provider which the parties to a dispute must use.
- ***the types of parties to which the ASBFEO and the mediation adviser provide dispute resolution services*** – The Act limits the ASBFEO to assisting small businesses, whereas the mediation adviser can assist all businesses, small or large, as well as consumers. This highlights that combining the disputes resolution services of the ASBFEO and the mediation adviser would require both legislative change and a fundamental change in the ASBFEO’s role. If the ASBFEO’s assistance function was strengthened in future to include in-house mediation or adjudication for example, many stakeholders would no longer consider the current arrangements to separate it from the advocacy function to be adequate. Given this risk, the ASBFEO’s assistance function should only expand in response to a clearly identified gap.