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**Small Business
Commissioner**
SOUTH AUSTRALIA

Professor Graeme Samuel AC
Reviewer
Review of the Food and Grocery Code of Conduct
Langton Crescent
PARKES ACT 2600

T 08 8303 2026
Toll Free 1800 072 722
F 08 8303 0943
E sasbc@sa.gov.au

GPO Box 1264,
Adelaide SA 5001
ABN 34 643 517 562
www.sasbc.sa.gov.au

BY EMAIL: FGCreview@TREASURY.GOV.AU

Dear Professor Samuel

**Review of the Food and Grocery Code of Conduct
Small Business Commissioner's submission on the Draft Report**

I refer to the Secretariat Team's email dated 2 July 2018 inviting me to provide a submission on the draft report and recommendations.

I will address those parts of the draft report and recommendations which relate to the findings and recommendations made by the South Australian Economic and Finance Committee in its report "*From the Paddock to the Plate – a Fair Return for Producers*" dated 28 November 2017, which I support as the Small Business Commissioner of South Australia.

Draft Recommendation 1 of the Review of the Food and Grocery Code of Conduct

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

I note at page 19 of the draft report that:

"[T]he Review sees little benefit in converting the voluntary Grocery Code into a mandatory code, as it already applies to most of the industry by virtue of the major retailers being signatories.

However, there remains the issue of recalcitrant key players in the industry, such as Metcash, that have refused to sign up voluntarily to the Grocery Code."

The Review suggests that the obligations set out in the targeted mandatory code should mirror those contained in the voluntary Grocery Code to ensure equal protection for suppliers when dealing with retailers and wholesalers.

The Economic and Finance Committee (the Committee) makes the following recommendation at page 119 of its report *From the Paddock to the Plate*:



Government
of South Australia

“Recommendation 9

The Committee suggests that the statutory review of the Grocery Code of Conduct, to be conducted at the request of the responsible Commonwealth Minister in 2018, should consider recommending that the Code be mandatory in nature.”

I am pleased to see that the draft report has considered whether the Grocery Code should be made mandatory. In my view, by introducing a separate mandatory code to apply to those participants who refuse to sign up to the voluntary Grocery Code, all participants in the industry are captured, thereby providing protection to suppliers across the board. I therefore support draft recommendation 1.

Draft Recommendation 5 of the Review of the Food and Grocery Code of Conduct

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.

The draft report considers suggestions from some stakeholders to establish an independent adjudicator or ombudsman, which is based on the United Kingdom Government’s Grocery Code Adjudicator (UK GCA).

In the Presiding Member’s Introduction at page 7 of *From the Paddock to the Plate*, Mr Lee Odenwalder MP says:

“The Committee acknowledges that it was suggested at this [Supermarket Power] Symposium that next year’s review into Australia’s Food and Grocery Code of Conduct could examine whether the addition of UK’s enforcement model could improve our code.”

The recommendation to replace the Code Compliance Manager with an independent Code Adjudicator arises from the need to maintain confidentiality and independence, which gives suppliers the confidence to use the process. In light of this, I support draft recommendation 5.

Civil Penalties for Contraventions of the Code

Recommendation 10 made by the Committee at page 119 of *From the Paddock to the Plate* states:

“Recommendation 10

The Committee suggests that the statutory review of the Grocery Code of Conduct, to be conducted at the request of the responsible Commonwealth Minister in 2018, should consider recommending the inclusion of civil penalty provisions for contravention of the Code’s provisions.”

I note that civil penalties have not been addressed in the draft recommendations, however, they are considered and discussed at page 41 and 42 of the draft report. The view taken by the Review is that civil penalties are unnecessary given that:

“substantial pecuniary and infringement notices are already available to the ACCC to address serious and egregious misconduct by retailers and wholesalers against suppliers. Retailers and wholesalers are prohibited from engaging in unconscionable conduct under the Australian Consumer Law, which attracts penalties of up to \$1.1 million (for corporations).”

In my view civil penalties under the Code are warranted. I agree with the ACCCs argument that the implementation of civil pecuniary penalties would act as a deterrent against contraventions of the Code. I respectfully suggest that the Review reconsider its position on civil penalties.

State-based Mandatory Code

Finally, I draw to your attention Recommendation 11 made by the Committee at page 120 of its report *From the Paddock to the Plate*:

“Recommendation 11

In the absence of Commonwealth reform to the Grocery Code of Conduct, the South Australian Government should institute a state-based mandatory Code or add to the current Fair Trading (Farming Industry Dispute Resolution Code) Regulations 2013 (SA) within the Small Business Commissioner’s jurisdiction, to fill the gap caused by the inconsistencies between the Horticulture Code of Conduct and the Grocery Code of Conduct.”

While it is preferable that the federal Grocery Code of Conduct undergo appropriate reform to fill the gap between the two federal codes, it should be noted that there is a strong view that a state-based mandatory code should be introduced in South Australia if the requisite reform is not implemented. I would stress that such a development would be subject to the consideration of the State Government.

If you would like to discuss my submission in further detail, please do not hesitate to contact me on [REDACTED] or [REDACTED]

Thank you for the opportunity to comment on the draft report and recommendations.

Yours sincerely



John Chapman
Small Business Commissioner

7th August 2018

