



**Small Business
Development Corporation**

Our ref: D18/4211

Food and Grocery Code of Conduct Review
The Treasury
Langton Crescent
PARKES ACT 2600

via email: FGCreview@treasury.gov.au

To whom it may concern

Submission to the Review of the Food and Grocery Code of Conduct

Thank you for the opportunity to submit comments on the *Independent Review of the Food and Grocery Code of Conduct Draft Report June 2018* (Grocery Code Review).

The Small Business Development Corporation (SBDC) is an independent statutory authority of the Western Australian (WA) Government established to foster the growth and development of small businesses in this State. We offer a wide range of services designed to meet the needs of small businesses, including advocacy to government on legislative and policy settings to ensure a fair and productive operating environment.

The SBDC¹ welcomes the release of the Grocery Code Review and the Federal Government's commitment to review the *Food and Grocery Code of Conduct* (Grocery Code) to ensure that the Grocery Code continues working effectively for the food and grocery industry.

Background

In September 2014, the SBDC provided in principle support for the introduction of the Grocery Code on an opt-in basis, arguing that if executed well, it had the potential to address some of the imbalance in bargaining power in the supplier-retailer relationship that existed in the food and grocery industry. At the time, the SBDC shared a number of concerns regarding the implementation of the Grocery Code, primarily in relation to proposed exceptions to fundamental terms, the introduction of good faith and the processes around accessing dispute resolution mechanisms.

It is reassuring to note then that industry feedback has broadly indicated that the commercial relations between grocery retailers, wholesalers and suppliers have improved significantly

¹ The views presented here are those of the SBDC and not necessarily those of the Western Australian Government.

since the Grocery Code's adoption by signatories. This has led to far fewer issues being raised about retailer practices and less disputes with suppliers.

While this is positive affirmation about the efficacy of the Grocery Code to maintain an effective baseline for commercial conduct, the SBDC notes that more can be done to encourage fair dealings with small business suppliers.

To this end, the SBDC supports, in principle, most of the recommendations outlined in the Grocery Code Review and agrees that a light-touch approach to regulatory change is appropriate in these circumstances. We do however wish to make comment on a number of recommendations relating to how the concept of fair dealings will be included in the Grocery Code, the creation of the new independent adjudicator role and the requirement for significant wholesalers and retailers to be bound by the voluntary code.

Fair Dealings

The SBDC notes that the Grocery Code Review recommends the creation of a new fair dealings provision. This provision will be a value-based approach that aims to set overarching values to form the foundations of retailer and wholesaler/supplier relationships.

Stakeholders indicated that there was uncertainty regarding the interpretation and application of the original good faith provision as well as a lack of guidance material explaining how good faith would be applied practically to real world situations. The SBDC had previously argued that a good faith standard would not be an easy concept to define and could not be relied upon as an effective remedy to enforce supplier rights to resolve disputes with retailers in all their commercial dealings.

While strongly supportive of the requirement for wholesalers and retailers to act fairly when dealing with suppliers, the SBDC is concerned that unless careful consideration is given to how the new 'fair dealings' provision will be interpreted and applied in practice, stakeholders may face similar issues that they had with understanding and applying good faith.

An obligation to act fairly, having regard to a list of value-based principles that builds on the case law underpinning good faith, is still not without doubt, so it will be interesting to see how it is understood and applied by those seeking to rely on it in their commercial relationships.

In this regard, the SBDC supports the Grocery Code Review's recommendation that the ACCC be tasked with enhancing its guidance materials to include detailed and practical examples on how the Grocery Code and specifically fair dealings can be applied. Providing a broad range of examples and scenarios of the sort of behavior and actions that may constitute a breach of fair dealings will aid in stakeholder understanding of the concept and how to adopt the practice of fair dealings within their transactions.

Dispute Resolution – Independent Code Adjudicators

The SBDC supports the proposed changes to the internal dispute resolution process and introduction of the Independent Code Adjudicator (Code Adjudicator).

As the Grocery Code Review outlined, stakeholders expressed concerns about the Code Compliance Manager (CCM) model under the current code. Stakeholders indicated that there is a lack of trust in a retailer's ability to resolve complaints based on the perceived bias of CCM's towards that party. A fear of retribution and a lack of trust in the process has understandably seen the CCM process not utilised to its full potential.

The SBDC is a strong supporter of independent, easily accessible and timely alternative dispute resolution options for parties in dispute (like the service we provide to Western Australian small businesses) and can understand why the CCM was not successful in delivering its intended outcomes.

The SBDC believes that the success of the Code Adjudicator role will rest on the perception of its independence from the retailer or wholesaler. The SBDC notes that the Code Adjudicator will still be employed by the signatory retailer or wholesaler with the ACCC having a new oversight responsibility. While the intent to be independent is there, as well as the new inclusion of a confidentiality requirement, some small business suppliers may still have reservations about raising their concerns in this environment based on previous fears of retribution and lack of trust in the process.

Should the new Code Adjudicator function replace CCM's, the SBDC recommends the development of educational material for suppliers. Outlining the new function of the Code Adjudicator, the ACCC oversight and other key changes around confidentiality and transparency should be explained to alleviate concerns suppliers may have in using the service and providing clarity on the pathways available to escalate and resolve disputes.

In addition, this educational material for suppliers could also include details of other alternative dispute resolution services available through the Australian Small Business and Family Enterprise Ombudsman and state-based Small Business Commissioners.

The SBDC is hopeful that the additional confidentiality requirements as well as the oversight capacity of the ACCC brings about a change in perception amongst suppliers thus building confidence in the ability to resolve their disputes through a Code Adjudicator.

Calling for significant wholesalers and retailers to be bound by the Grocery Code

The SBDC notes that the Grocery Code Review recommends that wholesaler Metcash become a signatory and failing this further recommends the introduction of a targeted mandatory code to apply to major participants refusing to sign the voluntary code.

Use by the Grocery Code Review of the term 'recalcitrant' in describing key players who haven't become a signatory is particularly concerning given the voluntary nature of the Grocery Code. It is important that retailers and wholesalers are afforded the principle of freedom to contract and not be forced into something that is still an "opt-in", especially if it would add cost and further diminish their ability to compete in the Australian grocery market. The specific targeting of market participants as part of a voluntary scheme is, in the SBDC's opinion, not appropriate.

Ultimately, suppliers will always have the ability to not enter into supply contracts with non-signatories if they choose, or enforce their rights under the Australian Consumer Law and *Competition and Consumer Act 2010* (i.e. in relation to protections against unfair contract terms, misuse of market power, unconscionable conduct, etc.).

Further the idea of creating a mandatory code to run alongside a voluntary code for those who refuse to become signatories takes away from the original intent of introducing the code. The SBDC notes that the Grocery Code was originally designed to foster robust and sustainable change in business culture through voluntary industry buy-in and ownership.

While the SBDC is supportive of the Grocery Code generally, we recommend that either a voluntary code or a mandatory code should apply, as having both is not an effective method of regulating an industry or a particular commercial relationship.

The SBDC will watch with interest the response from Metcash and the Master Grocers Association to this particular recommendation.

Concluding statement

The SBDC welcomes the review of the Grocery Code and the identified recommendations to further improve the operation and effectiveness of the code and awaits the release of the final recommendations to the Federal Government.

If you would like to discuss this submission in more detail, please contact Nikki Forrest, Policy and Advocacy on (08) 6552 3373 or email nikki.forrest@smallbusiness.wa.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Eaton', with a stylized flourish at the end.

David Eaton
SMALL BUSINESS COMMISSIONER

1 August 2018