

This Member Brief is **CONFIDENTIAL** to AFGC members only. Please do not distribute outside your organisation.

## INDEPENDENT REVIEW OF THE FOOD AND GROCERY CODE OF CONDUCT DRAFT REPORT RELEASED

Professor Graeme Samuel AC today released a draft report for the **review of the Food and Grocery Code of Conduct**. The draft report can be **accessed here** for your consideration.

### THE DRAFT REPORT

On 2 March 2018 the Government announced the independent Review of the Food and Grocery Code of Conduct (Grocery Code). The purpose of the Review is to assess the impact of the Grocery Code in improving the commercial relations between grocery retailers, wholesalers and suppliers.

The draft report has found three main areas for improvement including:

1. **Major wholesaler Metcash should become a signatory**
2. **New fair dealings provision** – The Review recommends reframing the Good Faith provision to focus on fair dealings between the parties. This new provision will allow the assessment of fairness to be considered within the context of the supplier's individual circumstances.
3. **An independent adjudicator** – the dispute resolution mechanisms in the Grocery Code have been underutilised by suppliers, largely due to fear of retribution for making complaints. An independent adjudicator in each signatory with the power to resolve individual complaints, make binding decisions and award compensation will dramatically improve outcomes for suppliers.

The draft report makes 14 Recommendations which were largely flagged by Professor Samuel in his speech to Food and Grocery Australia in May 2018. Thirteen recommendations specifically apply to AFGC membership which include:

1. Introducing a separate targeted mandatory code to apply to major participants that refuse become signatories to the voluntary Code.
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.
3. That the current coverage of products under the Grocery Code remains unchanged ie does not apply to alcohol.
4. Introducing 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.

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.
6. The role of the ACCC should be expanded to:
  - have oversight responsibility of the Code Adjudicators, including 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.
7. The ACCC should change its approach to conducting annual compliance checks on signatories and should only rely on its section 51ADD information gathering powers after certain conditions are met, including that matter has been raised with the Code Adjudicator and deemed not to have been resolved satisfactorily.
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.
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.
10. Clause 10 of the Grocery Code should be amended to so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.
11. Clause 14 of the Code 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.
12. A new provision relating to price rise processes should be introduced to:
  - a. prevent a retailer from requiring a supplier to disclose commercially sensitive information where the retailer has a competing own-brand product; and
  - b. 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.
13. 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.

## NEXT STEPS

AFGC will continue to engage closely with this process and will consult closely with Members. Responses to this draft report will close on Wednesday 1 August 2018. For more information contact [Samantha Blake](#) or [James Mathews](#).

**TANYA BARDEN**  
**CHIEF EXECUTIVE OFFICER**