

8. In practice to date

As at the date of writing, the FGCC has been in place for just over two years. An official review looms in 2018. It is appropriate and timely then to stand back and reflect on how the Code has worked in practice to date. In essence the aim of the FGCC is to change behaviour, principally by its retailer signatories but also to some extent the behaviour of suppliers. That reflection gives rise to a number of questions:

- to what extent is there awareness and understanding by suppliers, and those dealing most directly with them on behalf of the retailers, of the existence and provisions of the Code?
- to what extent and in what ways are the provisions of the Code being drawn upon, either directly or indirectly, in the context of supply negotiations and in dispute resolution?
- to what extent is exclusion of price from the Code an issue?
- are there counteracting factors that are detracting from the use of the Code provisions for either of these purposes?
- are there reinforcing factors that are facilitating or supporting the use of the Code provisions for either of these purposes?

Each of these questions is addressed in turn below and where relevant, comparisons with and insights from the UK experience are drawn upon. Such comparisons are elaborated on in the context of the specific purposes of the FGCC and having regard to the upcoming review of the Code in 2018, in the final Part of the report.

I. Awareness and understanding

It almost goes without saying that for the FGCC to have any impact in practice a crucial precursor is that the representatives of both suppliers and the retailer signatories involved in supply negotiations and disputes are aware of and understand its provisions.

For the retailers, the Code's obligations would have entailed a significant upfront investment of time and resources in internal adjustments, including in relation to the preparation and dissemination amongst their suppliers of the paperwork involved in GSAs, the appointment of a CCM, and perhaps most significantly, in the training of their buying team. According to some, the MSCs got on board with taking the necessary steps and making these adjustments post-haste. Coles is said to have been quicker off the mark in this regard than Woolworths but the latter is observed as increasingly getting with the program:

...you speak to the senior leadership team within Coles or Woolworths, and I've spoken to both recently, I genuinely believe that they think they are doing the right thing, Coles particularly, and we've been very publicly saying we think Coles have taken this whole code thing way more seriously than what they have, in fact, taken it way more seriously than

Woolworths and they've put resources internally in place to be able to manage it, they've trained their staff reasonably well, unlike Woolworths that haven't, so I think they genuinely are endeavouring to take it seriously..⁷⁷¹

...

Well, I think Coles acted quicker and in a more structured way. I think that's happening now with Woolworths...⁷⁷²

...

Coles have taken that incredibly seriously. And I think Coles was very pleased that the ACCC implicitly recognise that they've taken this very, very seriously. I don't think other supermarkets haven't, I just think that Coles have been a public leader for a bit longer...⁷⁷³

With regard to resourcing implications for the MSCs, we have been told by representatives of both Coles and Woolworths:

... the cost of implementing the code has been significant. It would certainly exceed the significant multiple that the government estimated, but we have spent half a million dollars on IT systems ...⁷⁷⁴

So I think the impact statement said that it was going to cost us \$60,000, something like that. I can tell you that it's probably more the million – two ...⁷⁷⁵

... we did the original estimates in good faith, but they were just estimates. And I think they were wildly wrong. We looked at the likely cost of dealing with complaints when they arose, and so on, but if none have arisen, there have been no costs. On the other hand, I would suggest that we dramatically understated the likely cost of training and repeated training, and producing associated materials.⁷⁷⁶

As one MSC interviewee noted, a new computerised system had to be put in place to monitor and record transactions in line with Code requirements. However despite this, 'you have to record it in writing as well as a requirement of the code, so it is difficult. I mean, a grocery supply agreement is not just a single document.'⁷⁷⁷

In short, when it comes to the increased work load of category managers, we were told that they:

... needed to spend a lot more time capturing and recording. I think it brings an awareness of what they're doing and what they're saying in their emails and their conversations, which isn't

⁷⁷¹ Transcript of interview, director of a consultancy that advises suppliers, p. 33.

⁷⁷² Transcript of interview, Gary Dawson 2, p. 8.

⁷⁷³ Transcript of interview, former senior representative of the UK OFT, p. 24.

⁷⁷⁴ Transcript of interview, MSC representative, Coles, p. 17.

⁷⁷⁵ Transcript of interview, MSC representative, p. 23.

⁷⁷⁶ Transcript of interview, MSC representative, p. 20.

⁷⁷⁷ Transcript of interview, MSC representative, p. 17.

*necessarily a bad thing, but it has required enormous expenditure on IT infrastructure, on training.*⁷⁷⁸

By contrast, other retailers reported less disruption or additional expense as a result of signing up to the FGCC:

*... we're just doing training about the code and then investigating alleged breaches of the code but I wouldn't say [work in relation to compliance has] significantly increased.*⁷⁷⁹

In relation to training initiatives specifically, it is apparent that this has been taken very seriously by the MSCs. One MSC representative involved in the Code-related training program in his organisation outlined the measures put in place for this purpose as follows:

*We initially trained some 800 people, which included all of the buying personnel irrespective of what level they were at, plus any supplier-facing person in other parts of the business, such as replenishment, such as marketing, and so on. And that was ... face-to-face training with handouts and takeaways and guides on how to interpret and apply the Code. We then produced an electronic training module, which is an annual refresher, which each buying person has to complete – call it a licence to operate – and it's ... collectively managed and ticked off. We've then done subsequent training, we've done two or three offsite half-day training where we've taken the entire buying team away and we talked about the Code. We've also done [training] business segment by business segment (so [by] meat and produce and deli and so on). [E]ach of those individual training sessions were half a day [sessions with] live examples of the Code, live examples of real life situations, where an interpretation of the Code has been required. And you can workshop that, and then have people express their views and build their understanding through looking at some real life stuff. And we've produced [a] manual [on the Code], and we're just busy reproducing the next edition of the manual. And obviously I talk and meet buying teams on a regular one-on-one basis, [and] on a more ad hoc basis, to talk [to] issues on the Code as well.*⁷⁸⁰

He went on to explain that his organisation also seeks feedback from their suppliers regarding the awareness amongst buyers of the FGCC. He reported that this feedback indicated a high level of buyer recognition of the Code: 'they are very well versed'.⁷⁸¹

A different representative stated:

... whenever someone seeks advice from us ... the[se] are really good opportunities to train people because it's the application in a particular situation and in context, which makes everything very real for the buying team. So it's part of our everyday work, compliance work, as well as we obviously have a very structured program. You're not allowed to actually

⁷⁷⁸ Transcript of interview, MSC representative, p. 17.

⁷⁷⁹ Transcript of interview, interviewee that consults to / advises grocery businesses, p. 2.

⁷⁸⁰ Transcript of interview, MSC representative, p. 18.

⁷⁸¹ Transcript of interview, MSC representative, p. 15.

*operate in a buying role unless you've done the training, hence it's called "licence to operate". And we get the data all the time on particular teams, and whether they've done the training, and so there is actual follow-up.*⁷⁸²

These internal messages about the importance of the FGCC are said further to be reinforced by the most senior levels of management:

*I think one of the great things last year, something that really works, is when [names of senior managers] talk to the entire community about these issues, and why it's so important to our business, and why you have to have read the Code back to back as well. But they all do do it. And I think you need that senior management buy-in to really then push it right throughout the organisation, when you are as big as us. I'm sure it would be perhaps a simpler task if you were a bit smaller. But we have to attack it from very many angles.*⁷⁸³

For suppliers, again the AFGC has played an important leadership role, in working to bring the Code to the attention of its members and in educating and training them in its provisions. As explained by a director of NextGen, the AFGC's chosen training provider:

*...we started a dialogue with the AFGC about two years ago around the code, there's – they'd identified through observing the UK code that the code in its' own right isn't going to change behaviour unless both manufacturers and retailers truly understand it and manufacturers enforce it to all intents and purposes all – it's not their position to enforce it but endeavour to live and breathe by it forcing the retailer to acknowledge and change behaviour. And one of the learnings was that supplier training was critical so they went to market to look at who could help them, we were chosen as a partner to develop and then deliver the training for Australian suppliers, all of them, and we've subsequently also then worked extensively with those suppliers on adjusting, reviewing, amending their position with retailers in the context of the code.*⁷⁸⁴

Dawson recounts, with some (arguably deserved) pride that all of the 200 members of AFGC are aware of the Code and that across the association's membership, they have had over 2,000 people undertake code training.⁷⁸⁵ He also considers that awareness across the broader supplier community would be high 'because the retailers, Coles in particular but now Woolworths ... are working it into more of their communications'.⁷⁸⁶

At the same time, Dawson readily concedes that awareness is much greater amongst larger suppliers than smaller suppliers and this would be consistent with the fact that the majority of the AFGC's

⁷⁸² Transcript of interview, MSC representative, pp. 18-19.

⁷⁸³ Transcript of interview, MSC representative, p. 19.

⁷⁸⁴ Transcript of interview, director of a consultancy that advises suppliers, p. 7.

⁷⁸⁵ Transcript of interview, Gary Dawson 2, p. 1.

⁷⁸⁶ Transcript of interview, Gary Dawson 2, p. 1.

membership are in the former category as well as being companies with their own army of internal and external compliance and legal teams.

At the time of our interview with NextGen they reported that, 'we've trained in excess of 150 suppliers and best part of 1600 individuals and we are working extensively and in detail on their terms with about 35.'⁷⁸⁷ By 2017 this number had increased to 258 with NextGen reporting that, 'underlying Code understanding has improved significantly over the past 12 months'.⁷⁸⁸ This is reflected in the findings of a 2017 survey conducted by the AFGC, with 89% of respondents reporting that they had a solid understanding of the FGCC, up 15% on 2016.⁷⁸⁹ Furthermore, 91.9% stated that their business had now completed the AFGC / NextGen industry training.⁷⁹⁰ Moreover, those participating in the training ranged from, 'a small father and son show ... all the way though to ... three training sessions for Coca-Cola.'⁷⁹¹ Smaller suppliers were catered for through full day group training sessions, whereas larger organisations often opted for in-house company-specific training.

Dawson acknowledges that being aware of the Code is one thing, but understanding its provisions sufficiently and having the wherewithal to apply it in actual negotiations is another: 'so there would be awareness that it exists but actually knowing enough about it to work it into their negotiations, probably less so'.⁷⁹² This might be contrasted with an account we received from a MSC representative who reported to us that:

*...some very small suppliers who run their own business by themselves, and they may or may not have a legal background, but they can be quite pedantic in terms of some of the particular wording of the Code, such as not wanting us to buy us a free lunch in clause 6.3 or whatever it is. And you go through those things, and you work through everything and it all goes away. The very large suppliers, of course, have significant legal resources and it takes some time to put a GSA together with them.*⁷⁹³

NextGen is very cognisant of the underlying power imbalance between suppliers and MSCs in the context of Code-related negotiations. The primary goal of the training therefore is to ensure that suppliers understand the obligations created by the Code and the ways that they can benefit from it, and to teach them to recognise behaviour that should not be considered acceptable. As a NextGen director told us:

...in the training we use some horrible analogies ... we talk about Stockholm Syndrome in training so we say you've lived in Stockholm all your life, perfectly normal behaviour, and we

⁷⁸⁷ Transcript of interview, director of a consultancy that advises suppliers, p. 8.

⁷⁸⁸ NextGen, 'FGCC – What Should You Be Doing?' presentation to AFGC conference, 2017, slide 4.

⁷⁸⁹ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 6.

⁷⁹⁰ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 8. Albeit, this is not surprising given that the survey was conducted by the AFGC of its members.

⁷⁹¹ Transcript of interview, director of a consultancy that advises suppliers, p. 8.

⁷⁹² Transcript of interview, Gary Dawson 2, p. 3.

⁷⁹³ Transcript of interview, MSC representative, p. 15.

*use your mum test, if you told your mum this would your mum say it's normal? Well, no, because she doesn't understand, that's because she lives in London not Stockholm.*⁷⁹⁴

The AFGC recognised parallels between the UK and Australian grocery code experiences, learning from the UK that for such a code to be effective its implementation had to be accompanied by cultural and behavioural change; changes best achieved through education and training.

The UK has a similar, although not identical, champion for suppliers to the AFGC in the British Brands Group. As its director John Noble says, British Brands Group is 'is a trade organisation, it represents brand manufacturers and its mission is all about creating the best climate possible in the UK for brands to be created, sustained and to thrive, bringing their many benefits to individuals, society and the economy.'⁷⁹⁵ Funded by membership fees, the primary objective of the Group up until recently has been to champion brands – to commission studies, examine the interrelationship between brands and responsible business, contribute to the media, educate policy makers and the like.⁷⁹⁶ However according to Noble this focus has shifted in the past three years and British Brands Group is now 'doing an awful lot of training on GSCOP'. Unlike the AFGC, which outsources this to NextGen, the British Brands Group, 'was the first in the market on GSCOP training'. This in turn has created an alternative revenue stream for the Group.⁷⁹⁷ It has also meant a diversification in British Brands Group's membership as increasingly SME suppliers are seeing the benefits for them in a trade association that can help with interpretation and use of the GSCOP, that can 'act as a sounding board [as to whether] there's a breach... provide advice lines and provide a route to the adjudicator if members want to alert her to something but don't want to alert her themselves..'.⁷⁹⁸ As another advisor to UK suppliers points out:

*...historically, British Brands Group's members were big multinationals. Actually, what it's done is it's taken this role of champion of the code to some extent, but in doing so, it's also said, look, actually we want to work with suppliers other than our big members. So they've kind of put together more attractive membership packages that are cheaper, that are intended to get smaller people in. They're willing to do stuff without charge for smaller people, run them through their training courses, so that they have tried to reach out in that way, as they see it as a significant issue.*⁷⁹⁹

Noble is clearly passionate about the code training enterprise: 'we want all the suppliers to understand GSCOP and be confident in using it.'⁸⁰⁰ According to the British Brands Group website, a full day course includes training on the GSCOP and the reasons it was introduced, what it covers, the implications of the GSCOP for day-to-day trading relationships, the role of the GCA, and advice on

⁷⁹⁴ Transcript of interview, director of a consultancy that advises suppliers, p. 11.

⁷⁹⁵ Transcript of interview, John Noble British Brands Group, p. 2.

⁷⁹⁶ Transcript of interview, John Noble, British Brands Group, pp. 3-4.

⁷⁹⁷ Transcript of interview, John Noble, British Brands Group, p. 5.

⁷⁹⁸ Transcript of interview, John Noble, British Brands Group, p. 7.

⁷⁹⁹ Transcript of interview, experienced legal advisor to suppliers in the UK, pp. 22-23.

⁸⁰⁰ Transcript of interview, John Noble, British Brands Group, p. 6.

how suppliers can safeguard against unfair trading practices. More generally, the Group promises to help suppliers 'tip the balance back in their favour'.⁸⁰¹

Training and education on the GSCOP is also provided through the office of the GCA. In addition, GCA supplier mornings are held regularly, providing an opportunity for Tacon to update suppliers on the work being undertaken by her office and any recent relevant developments, and to answer questions.⁸⁰² An annual GCA conference provides further opportunity for updates, education sessions and the chance for suppliers to attend workshops on code-related or other relevant issues. The GCA also regularly publishes best practice statements, case studies and newsletters and, like the AFGC, conducts and publishes results of annual surveys of code awareness and compliance.⁸⁰³ Unlike the AFGC or NextGen, the GCA also works with the retailers' CCOs. This arguably allows Tacon to close the loop in a way that the AFGC is not able. As Tacon puts it:

*So people anecdotally telling me that there's issues – through feedback from training programs, the survey, listening to suppliers at events means that I can say these are my major issues and talk to Code Compliance Officers and then ask them to report back to me quarterly on what they're doing about these issues.*⁸⁰⁴

This informal process allows Tacon to identify and address key issues early on, as well as act as an intermediary between retailers and suppliers in ensuring there is common understanding of how Code-related issues should be addressed. She also makes use of the media – the trade press in particular – to disseminate as widely as possible information about the GSCOP and how it is working. But she does so in a way that is intended to be constructive and educative, rather than accusatory and critical – for example, Tacon regularly publishes and in turn the media covers case studies of issues that have arisen and which have been resolved in the industry through her intervention. In doing so she will identify the relevant retailer but only with its prior agreement, having given the retailer the opportunity first to review the text.⁸⁰⁵ Her approach in this regard appears to won over many in the industry:

*...whenever you see her talking you know she's always very keen to be fair and to the point, she's not emotional or subjective or partisan; I think she's got a very good media position and media voice, and she tends to only engage when she really needs to, so she's not using it willy-nilly here and there...*⁸⁰⁶

...if you read The Grocer [a reference to a UK retail grocery trade magazine], there's something in there most weeks about her and her activities. She has that kind of publicity and that profile. And again, having an adjudicator who's willing to sort of do that engagement on a regular basis means

⁸⁰¹ British Brands Group, Full Training: A one-day course designed for direct suppliers to supermarkets at <http://www.britishbrandsgroup.org.uk/grocery/training/full>

⁸⁰² News story: GCA supplier mornings, 3 March 2017 <https://www.gov.uk/government/news/gca-supplier-mornings>

⁸⁰³ See GCA website <https://www.gov.uk/government/organisations/groceries-code-adjudicator>

⁸⁰⁴ Transcript of interview, Christine Tacon, p. 27.

⁸⁰⁵ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 29.

⁸⁰⁶ Transcript of interview, John Noble, British Brands Group, p. 42.

*you get that profile on an ongoing basis that you can't get if the OFT had it or if the CMA had it. They just won't do that, they can't do that.*⁸⁰⁷

The education, training and profile-raising initiatives of the GCA were resoundingly endorsed in the recently completed review reported on in July 2017, even if it was noted that there was still work to be done amongst suppliers, in respect of which there appeared to be an expectation that trade associations would do more to contribute to GSCOP training of their members.⁸⁰⁸

II. Using the Code

Early assessments by some are that the FGCC's provisions relating to the negotiation of terms and conditions of supply have had an impact. For a start, it immediately changed the rules of the game, particularly as to unilateral and retrospective variations which are now off limits (at least in certain circumstances), and key interviewees reflected in general terms on how this was changing the behaviour of buying personnel:

*...the effectiveness of the voluntary code is the extent to which it influences behavioural change or drives the behavioural change ... Now, obviously we won't know that for some years probably but there's some evidence of it changing already. Very encouraging signs ... within the retailers already...*⁸⁰⁹

*So the two things that we co-defined in principles and in the provisions of the code, was to prevent unilateral action and retrospective action. So that fundamentally changed the behaviour of the retailers.*⁸¹⁰

At the same time it is apparent that behavioural change by buyers is not just being driven by the requirements of the FGCC, but by MSC senior management who regard the principles of the Code as consistent with an overarching strategy to improve supplier relations. As one senior MSC representative told us:

... the code principles that are there, and the prescriptive bits that go with it that are in there, are a base operating premise that is something short of where we want to be as a business anyway in the normal course of everyday trading. So they state fundamental principles that were no different from our internal code of conduct that every buyer signs and every staff member signs, and had signed, up until that date, to have it be fair and reasonable and dealing with suppliers in the proper manner. So the Code wasn't doing or setting anything that wasn't already at least a minimum standard that we expected of ourselves.

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⁸⁰⁷ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 21.

⁸⁰⁸ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [69]-[72].

⁸⁰⁹ Transcript of interview, Gary Dawson, p. 44.

⁸¹⁰ Transcript of interview, Robert Hadler, p. 27.

I'm not sure it has done anything to change Aldi's mode or method of growing the market either, because they equally look to have open, clean and very efficient relationships with their suppliers. So I'm not sure that the Code cost them anything in terms of joining, nor would it change their behaviour necessarily if they left.

... To some extent, if we opted out of the Code tomorrow, it wouldn't probably change the practices that we've now embedded in our business, the principle of everything being agreed in advance, everything being agreed in writing, right, and no unilateral changes to anything, of course. We should be operating that way anyway, so we wouldn't necessarily change.⁸¹¹

Even if, as suggested by this account, the FGCC is superfluous given pre-existing or current strategies by retailers in relation to suppliers, it does appear to be playing a useful reinforcement role. Further, it is evident that MSC management are taking steps, not just to ensure their staff are aware and understand its provisions, but to enforce it internally:

... we are – and the business is all over the Code. So you do get in a bit of trouble if you are not doing the right thing or perceived to not be doing the right thing.⁸¹²

According to Dawson at least, the behaviour shift at the coal face is not just on account of rules in the Code but, significantly, due also to the threat of escalation to the CCM. This manager is independent of the buying team and, under the Code provisions, the designated first port of call for suppliers who have grievances that have not been possible to resolve by direct recourse to buying personnel:

... what we've found is that the, dare I say, the, not the, well, the threat, the suggestion that if this particular issue is not resolved we might have to take it to the code compliance manager is generating quite a visceral reaction amongst the relevant supermarket staff.⁸¹³

This appears to be supported by the approach taken in supplier training by NextGen's in which the importance of including the language of the Code in their communications with the MSCs, words such as 'good faith', 'reasonable', 'timely', etc.⁸¹⁴ is emphasised. Interestingly, accounts from MSC representatives suggest that not only are suppliers increasingly willing and able to draw on Code provisions in their dealings with buyers, and do so in an appropriate way, but that there are some seeking to use it in ways that were never intended. This is hardly surprising, they reflect:

... I do think that suppliers do feel quite empowered with the Code. They are quite quick to raise it ... and often probably not quite in the right circumstance. But ... we'll look at it and go, mmm, but let's see what the issue is and make sure we can resolve it.⁸¹⁵

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⁸¹¹ Transcript of interview, MSC representative, p. 5.

⁸¹² Transcript of interview, MSC representative, p. 14.

⁸¹³ Transcript of interview, Gary Dawson, p. 54.

⁸¹⁴ NextGen, 'FGCC – What Should You Be Doing?' presentation to AFGC conference, 2017, slide 11.

⁸¹⁵ Transcript of interview, MSC representative, p. 14.

... if you think of the number of sellers in the market and there's many thousands of those... some may understand [the Code], but others might not, but think it's a point of leverage and use it for purposes that it wasn't intended for. So, I think, it's better understood and lived up to by everybody that's in the trade today than it ever has been and that will continue to ... improve as time goes by. But not everybody thinks about it the same way. Like any piece of law or regulation, some people think it's there to serve a different purpose than ... what I might think it's there to serve.⁸¹⁶

In addition, it is apparent that suppliers are benefitting from the transparency and certainty that is the result of having a GSA provided for by the FGCC. Suppliers can now proceed on the basis that:

... if you've agreed to a set of trading terms and you've agreed to it and you've signed it, that that's it. There's nothing else over and above. So you will deliver this and we will deliver this for you. At this cost. So you've got a signed set of trading terms, I suppose.⁸¹⁷

Dawson, in particular, is buoyed, in a measured way, by signs that suppliers have grown in confidence in their negotiations. He puts this down to suppliers now knowing that there are standards that apply across the sector, standards that can be insisted upon, not as a matter of special treatment for the individual supplier but as a matter of universal application dictated by the Code. In terms of the 'massive information asymmetry' as between retailers and suppliers in the industry, the increased transparency and predictability resulting from the Code is 'shifting the dial a bit in the right direction.'⁸¹⁸ In the first year after the Code having taken effect, he recounted as follows:

... we've had a lot of anecdotal feedback of small and – small through to large, really, companies utilising it in those negotiating discussions and because if you think about it, previously – particularly as a small supplier, I've got no visibility of what happens in this room if all my competitors are in here, all I know is what I'm selling and what they're telling me in terms of what they're buying. Now of course you've got quite a bit of insight into what happens across the industry because it's detailed there and you've also got stronger grounds to push back and say, well, no, I don't think that's reasonable. Now, will all suppliers feel confident in using it? Well, of course not and will it work in every case? No...⁸¹⁹

A year on (in our second interview with him), Dawson's account was much the same – the Code is giving suppliers the capacity and basis on which to push back in negotiations with buyers. Although it is taking time (as might be expected), increasingly suppliers are working out how the terms of the FGCC relate to the specifics of the terms negotiated with their buyers – they are really starting to see its 'practical relevance'.⁸²⁰

⁸¹⁶ Transcript of interview, MSC representative, p. 15.

⁸¹⁷ Transcript of interview, CEO of MGA, p. 23.

⁸¹⁸ Transcript of interview, Gary Dawson, p. 48.

⁸¹⁹ Transcript of interview, Gary Dawson, p. 44.

⁸²⁰ Transcript of interview, Gary Dawson 2, p. 4.

This is further supported by NextGen's finding that the number of trading terms reviewed in light of the FGCC increased to 83 in 2017, up from 37 the year before. Outcomes from these reviews included the re-negotiation of waste charges; the re-negotiation of freight charges, improvement in payment terms, agreement to change listing decisions; and increased notice being given on deletions and decisions on deletions being reversed.⁸²¹

However there is still room for improvement. NextGen reported that while some buyers were doing better with their range review criteria this was 'still hit and miss'; quarter, half and year end 'asks' were still happening; and there were still reports of, 'ambiguity around retrospective claim time frames'.⁸²²

Despite the increased level of awareness about the FGCC reported in the recent AFGC survey, only 61% of supplier respondents knew who the CCM was at Woolworths, with this number dropping to 54% for Coles and 24% for Aldi. However, this was up from 41.2 and 45.1% respectively with regard to the CCMs for Woolworths and Coles in 2016.⁸²³ Perhaps more importantly, the AFGC survey report found that suppliers are still hesitant to raise issues with CCMs, and that where they have done so, the outcomes (according to the survey respondents) have not always been satisfactory.⁸²⁴

Survey responses regarding retailer code compliance also were not consistent. Woolworths appears to have improved their compliance since 2016, however less than 60% of those surveyed felt that Woolworths consistently or mostly conformed to the Code. And while Coles fared better at around 65% compliance in 2017, this was drop from 80% the year before. Perceptions of Aldi's compliance have fluctuated; however by 2017 they were seen to be on par with Coles.⁸²⁵ By contrast, while buyers' knowledge about the Code was shown to have improved when compared to the 2016 survey results, on average only just over 10% of respondents reported that any retailer had a 'very good' understanding of the FGCC.⁸²⁶

Dawson emphasises that it is the Code's provisions relating to supply agreements and retailer conduct that are most being taken out for a run, the provisions as to dispute resolution less so:

*...I don't think there's a lot of activity at the dispute resolution level. I'm not aware of any, to be quite honest. There may be some but I'm not aware of it. There haven't been a lot of complaints referred to the ACCC or inquiries. So the feedback we get is that it's being used mostly commonly and most effectively at the negotiating level, which is pretty much what we expected.*⁸²⁷

There have been similar accounts of the effect of the GSCOP in the UK. The head of British Brands Group observes, for example, that since the Code's introduction retailer buyers are:

⁸²¹ NextGen, 'FGCC – What Should You Be Doing?' presentation to AFGC conference, 2017, slide 5.

⁸²² NextGen, 'FGCC – What Should You Be Doing?' presentation to AFGC conference, 2017, slide 6.

⁸²³ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 9.

⁸²⁴ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 10.

⁸²⁵ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 11.

⁸²⁶ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 12.

⁸²⁷ Transcript of interview, Gary Dawson, pp. 2, 3.

*...more wary, more responsive. In the negotiation if ever there is a hint of GSCOP coming up then I think alarm bells ring in the buyer's ears. This really puts them on notice that they've got to be very careful about this.*⁸²⁸

However, he also observes that the change has been particularly notable since the appointment of the GCA:

*And definitely you see the changes that have been happening since Christine's powers came in. It's been really quite dramatic. I would point to the fact that there had been no arbitrations before she was appointed, the previous code was found not to work and nothing happened really between 2010 and 2013. Then as soon as she arrives we saw things change. It would be interesting to look at how code compliance officers changed because my sense is that they suddenly became more senior, more influential within the companies. The code compliance officer was now on the line. I think you can see just through the code compliance officer approach and how code compliance office departments have been staffed how seriously the Code was and is being taken.*⁸²⁹

In Australia, Dawson is also confident about the role of the CCMs. As mentioned above, from his observations, suppliers are becoming 'more willing or more open' to using that channel, again largely as a mechanism for obtaining added leverage in negotiations. That, he quite rightly observes, is a notable development 'because traditionally they have been very wary about – because of the relationship prior – very wary about any other channel, let alone going to the ACCC'.⁸³⁰ In a similar vein, another interviewee points out:

*... the point at which you start using code language is the point at which it is likely to maybe get taken a little more seriously purely because, if they don't, the likelihood of it getting reported internally increases and the buyer doesn't want to get reported internally.*⁸³¹

These positive signals should not be taken to suggest, however, that there are not ongoing issues and concerns, including ones that are meant to be headed off by the Code. Dawson cites delisting (and the associated question of category average margin), 'paying for positioning' (in the context of so-called range reviews), and early settlement discounts as examples of issues about which there is a degree of consternation at present, and is aware that the ACCC is looking into at least some of these. According to NextGen, there are also 'quarter, half and year end "asks" still happening and 'ambiguity around retrospective claim time frames'.⁸³² In his customarily understated and careful way, he describes the situation on such matters as 'an ongoing discussion ... [involving] a bit of back and forth

⁸²⁸ Transcript of interview, John Noble, British Brands Group, p. 37.

⁸²⁹ Transcript of interview, John Noble, British Brands Group, p. 37.

⁸³⁰ Transcript of interview, Gary Dawson 2, p. 4.

⁸³¹ Transcript of interview, director of a consultancy that advises suppliers, p. 29.

⁸³² Neil Rechlin, 'FGCC - What Should You Do?' presentation to AFGC conference, 2017, slide 6. But he also acknowledges progress on renegotiation of waste charges and freight charges, improvement in payment terms compliance, a significant reduction in claims, agreement to change listing decisions and increased notice on deletions and decisions reversal.

around interpretations of what the code provisions mean and should mean⁸³³ (an account that highlights lawyers as beneficiaries of the Code as much as anyone...).

On the issue of delisting, for example, this practice is permitted under the Code but only for 'genuine commercial reasons'.⁸³⁴ This raises the issue of what might constitute such reasons. According to the FGCC provisions, these include a failure by the supplier to meet agreed quality or quantity requirements; a failure of the product to meet the retailer's commercial sales or profitability targets, as notified to the supplier in the GSA; or a persistent failure on the part of the supplier to meet the retailer's delivery requirements as set out in the GSA.⁸³⁵ Of particular concern is whether these provisions legitimately include failing to meet 'category average margin' and if so, how that margin is calculated. It is stipulated in the Code that 'delisting as a punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason.'⁸³⁶ Such matters are currently the subject of an active dialogue between at least some suppliers and their buyers, he reports, and it is evident that they are matters that the ACCC is looking into also.⁸³⁷ Dawson postulates that once this issue has been ironed out it would have been the Code that in effect resulted in rewriting the rules on delisting.

Delisting and range reviews were also the subject of the ACCC's 2017 audit of compliance with the FGCC, and the 2017 AFGC survey of its members previously referred to also highlights issues with these practices as being of ongoing substantial concern, together with issues relating to requirements to fund retailer margin shortfalls, requirements for lump sum payments over and above what had been agreed, and excessive retailer charges.⁸³⁸ Consistently with the survey findings, the ACCC audit revealed a range of issues relating to the failure to give suppliers reasonable notice of delisting, not providing genuine commercial reasons, and not advising suppliers of the right to have the delisting decision reviewed.⁸³⁹ A MSC representative explained to us what this involved from their perspective, an explanation suggesting that as perceived by this organisation, current delisting issues are more in the nature of issues with form rather than substance:

[The ACCC] asked for the records of the last 20 range reviews that we've done, and they looked at how well we had conducted those and communicated those, and done the various steps on time and effectively. And we found issues and faults where we had written ...matters that weren't necessarily precisely containing the right words that they should have. We had one part of the process that was reliant on a system notification that went to, when we stop buying a product from the supplier, and that became also the notice of delisting to the supplier, so that didn't leave sufficient time. Notwithstanding the fact we'd had that

⁸³³ Transcript of interview, Gary Dawson 2, p. 6.

⁸³⁴ FGCC, cl 19(1)(b).

⁸³⁵ FGCC, cl 19(2).

⁸³⁶ FGCC, cl 19(4).

⁸³⁷ Michael Schaper, Deputy Chair (ACCC), 'Current Food & Grocery Issues: An ACCC Perspective', presentation to AFGC conference, 2017, slide 9.

⁸³⁸ AFGC 2017 Annual Food and Grocery Code of Conduct Survey, pp.17-18.

⁸³⁹ Michael Schaper, Deputy Chair (ACCC), 'Current Food & Grocery Issues: An ACCC Perspective', presentation to AFGC conference, 2017, slide 10.

conversation and discussion with the supplier beforehand, we hadn't necessarily had it in writing, and we hadn't – we've done so with a notice of the right to review by a senior manager. So some of those were running late. So there were some technical points like that. None that said that we hadn't done the thing in a fit and proper manner, just that we hadn't necessarily executed it 100% right in a number of instances out of the 20.⁸⁴⁰

Uncertainty and debates concerning the meaning and correct application of the wording of the Code's provisions are perhaps not unexpected in this early phase, and it can also be anticipated that these are issues that will be ironed out over time. Certainly this is borne out by the UK experience. Surveys conducted by the GCA show consistent falls in the proportion of suppliers experiencing issues with the language of the Code. In 2016, the proportion had decreased from 79% in 2014 and 70% in 2015 to 62%, albeit notably still a high percentage even after seven years of the GSCOP.⁸⁴¹ The top three issues with respect to the Code provisions concerned delay in payments (30%), variations of supply agreements (26%) and compensation for forecasting errors (25%).⁸⁴²

Again, arguably with some merit, Dawson makes the point that it is the Code that has provided the platform for the airing and testing of matters that previously have been 'difficult to raise or impossible to raise' and, if raised by a supplier, have been 'just dismissed'. Indeed, the very process of entering into GSAs, as required by the Code, gave suppliers the opportunity to raise or revisit 'a whole raft of things'⁸⁴³ that previously had simply been prescribed unilaterally by buyers or left open, to be changed as and when buyers saw fit. In the UK it is evident that there has also been an ongoing process of interpreting and clarifying the practical implications of the code in that jurisdiction. A compliance manager with whom we spoke at one of the major retailers saw this as 'inevitable with any piece of legislation'.⁸⁴⁴

A more critical assessment from another commentator, also close to current developments, is that there are some 'issues live right now that are absolutely 100% provable as breaches of the code – 100%'.⁸⁴⁵ For him it is not a matter of interpretation, it's black and white: some retailers on some issues are flagrantly in breach. The issue of early settlement discounts and late payments is, for him, a 'case study' of this:

... so suppliers give the retailers a percentage off invoice discount for early settlement, so I give you 2% discount off invoice for you to pay me in 14 days, so when would you expect they get paid? Fourteen days? Oh, you fool. In Stockholm we'll pay you in about 40, but we'll take the 2% as well, okay. So you think it would be fairly straightforward, I give you 2%, you pay me in 14, if you don't pay me in 14 I don't give you the 2%, but if you don't give me 2% I'm going to delist you for a start so your call. So, and this is not just one or two suppliers, this

⁸⁴⁰ Transcript of interview, MSC representative, pp. 22-23.

⁸⁴¹ News story, GCA achieving significant progress for suppliers, 27 June 2016, <https://www.gov.uk/government/news/gca-achieving-significant-progress-for-suppliers>

⁸⁴² GCA, *GCA Annual Survey Results 2016*, YouGov, p. 20.

⁸⁴³ Transcript of interview, Gary Dawson 2, p. 6.

⁸⁴⁴ Transcript of interview, compliance manager at a major UK retailer, p. 25.

⁸⁴⁵ Transcript of interview, director of a consultancy that advises suppliers, p. 46.

*is 99% of suppliers that have got either agreed payment days and or early settlement discounts in place that aren't paid on time.*⁸⁴⁶

Not unexpectedly, when we raised the topic of late payments with our MSC interviewees, we received a somewhat different perspective, explaining that this was an issue that mostly arose with small suppliers who are still using paper invoices:

*Obviously, suppliers have been raising issues. We haven't had a lot, but with newsagents in particular, people ... who hadn't gone digital and who would deliver an invoice, say, with their block of papers to a petrol station, have had trouble getting their payments on time. So they might be on seven-day terms, for example. That's quite hard, actually, practically, when those invoices can get lost. And they don't often have Internet access. ... And so we've had some concerns around paper-based suppliers in particular.*⁸⁴⁷

Referring to the recent report by the SBF E Ombudsman on the late payments problem for suppliers generally,⁸⁴⁸ the same MSC representative went on to say:

*...that was a good opportunity for us to review how are we are going in this important area. We do understand that from a cash flow perspective for smaller suppliers we need to get this right. And there's still work to be done. We identified this in terms of our processing. ... Also, in reality I think, payment terms have stayed the same for a long, long time. And it was a good opportunity with people shining the torch on it as it were for us to go, hang on a second, yes, we still do have these people in the paper-based world; what can we do to help them, when ideally we would like them all to be digital, because then we can process everything more quickly.*⁸⁴⁹

III. Exclusion of price

Whether or not the issues described in such accounts are a matter of interpretation to be worked out over time, thereby clarifying for all the scope and effect of the Code, it is clear that there remain aspects of the supply relationship that the FGCC does not and cannot touch and that this is seen as highly problematic. Price and price increases over time are the most obvious of these. In a report of findings from the recent AFGC survey of suppliers regarding the FGCC, previously referred to, it was noted that, '[w]hilst price is not included in the FGCC it was raised by multiple respondents as a significant issue for members'.⁸⁵⁰ The price at which a retailer will buy from a supplier does not feature anywhere in the Code, and deliberately so. On the one hand, this is hardly surprising. Were the situation otherwise, it would have been tantamount to price fixing - by regulation, no less – and could have the effect of increasing prices for consumers. For these reasons, Dawson makes it clear, the ACCC was opposed to any suggested inclusion of price in the Code from early on:

⁸⁴⁶ Transcript of interview, director of a consultancy that advises suppliers, pp. 46-47.

⁸⁴⁷ Transcript of interview, MSC representative, p. 24.

⁸⁴⁸ SBF E Ombudsman, *Payment times and practices inquiry: Final report*, April 2017.

⁸⁴⁹ Transcript of interview, MSC representative, pp. 25-25.

⁸⁵⁰ AFGC 2017 Annual Food and Grocery Code of Conduct Survey, p. 21.

... the fact that you don't have anything in here about price is quite deliberate.

It came up, certainly there is some of our members who felt it should extend to that, but I think it was pretty clear in the discussions we had with the ACCC that, well, an industry code really can't go to something that is a matter rightly for commercial negotiation between two parties and, so for us in here that was quite a clear distinction in our minds so we weren't confused about that, but it's obviously an area where there's a lot of tension as you would expect in a dynamic market.⁸⁵¹

As another interviewee explains:

... the code doesn't specifically touch on price because the code is the – is now fully administered by the ACCC, the ACCC have a very simple remit which is to do right by consumers in Australia. If this were – if there were a mechanic within this to facilitate suppliers or retailers or both to put their prices up that would arguably be contra to what the ACCC is trying to do, they're trying to increase competition and protect the consumer's rights, so having something in here that enables prices to go up or indeed price – legal ability to put prices up just wouldn't sit logically and comfortably with the ACCC's remit, totally understand and get that. So hence there's nothing in here at all about price increases.⁸⁵²

The situation pertaining to price is the same in the UK. It is not covered by the GSCOP. As the GCA explained in our interview with her: 'our Code doesn't have anything to do with price... since when has this country ever interfered with pricing!'⁸⁵³ She cited this as one reason against extending the Code to primary producers as indirect suppliers to retailers, pointing out that 'my role has nothing to do with price ... if you extend it [the Code and her role], down to the primary producer [as some commentators have been calling for], it still has nothing to do with price. And, actually, the primary producer's main concern is the price.'⁸⁵⁴

On the other hand, it needs to be acknowledged that, for suppliers, price is a significant omission from the FGCC, whether for good reason or not, and it strikes at the heart of the question whether, in the current climate, there are sufficient incentives for ongoing supplier investment and innovation. As one of the experienced supplier consultants we interviewed told us:

... if you go to speak to a number of suppliers and you say, right, give me your top 10 – the list of top 10 things that cause you sleepless nights and angst. There'll be things around supply chain changes, changes to promotional plans, range reviews, the top of that list will be the ability to generate price increases over time so that it's often the single biggest issue that suppliers wrestle with, they've not been able to get a price increase through...the retailers are pushing very hard now for zero price increases, so I've seen in writing from retailers unnamed

⁸⁵¹ Transcript of interview, Gary Dawson, 2016, p. 41.

⁸⁵² Transcript of interview, director of a consultancy that advises suppliers, pp. 16-17.

⁸⁵³ Transcript of interview, Christine Tacon, pp. 5-6

⁸⁵⁴ Transcript of interview, Christine Tacon, pp. 5-6. See also Transcript of interview, compliance manager at a major UK retailer, p. 18: 'It does not cover price, and the biggest concern, for example, in the dairy world is what is the price of milk?'

that they will accept your new products if you commit to, a, no price increase under any circumstances for the next two years and any subsequent price increase that goes through that they agree to allow you to put through, all of the cash generated out of that price increase must be reinvested back into that retailer. ..The code doesn't address price increases ... so as a result you're sitting there as a supplier going, right, I've been smashed over the head anyway to give the lowest possible price on this new product, this innovation, I now can't put any price increases through for two years and any subsequent price increases they deign to approve, all of the money I make doesn't pay for my increased cogs, it goes back to the retailer as promotional funds or whatever it might be. So to all intents and purposes I can never generate a material offset against cogs increases or indeed a profit increase so why would I innovate, why would I bother innovating in – in fact the only way this is going to make sense is for me to offshore manufacturing. So I think this is the crack in the dam that potentially will force ever more suppliers to go, you know what, it's just not worth my while investing in innovation, creativity, I'll just offshore it to Indonesia, to India, bring it in on a ship, sell it under contract and be done, there's only 20 odd million people in Australia, who cares? Which is bad for us.⁸⁵⁵

And from another experienced advisor to suppliers, emphasising again the significance of the challenges facing suppliers in securing price increases:

There is a point, a very important point, it is not in the Code at all. And that's about the price increase. So many companies are struggling like hell because they've not been able to put any price increase in the market for two, three, four, five years. So they are suffocating. So sometimes it's not only the big Woollies or Coles pushing you or bullying you. The fact that they just said no to price increase, what do you do? How do you fight it? So there could be a point on the Code. But again, what could that be? Because at the end of the day, the commercial principle is very simple. If you buy and sell here, we need to agree on two things. We need to agree on the what, for that service or whatever, and the how much. You cannot have somebody coming from the sky and saying, I decide the price and you have to accept the price.⁸⁵⁶

Dawson does not shy away from the reality that 'the biggest issue' facing not just suppliers, but retailers as well, is 'the relentless pressure just to stay competitive – retail price, deflation and rising costs.'⁸⁵⁷ On this front, he freely admits that the Code has no bearing and will not ease the pressure. But he is sanguine: 'there are things the code can do and there are things the code can't do and I think we have been clear on that from the start.'⁸⁵⁸ He concedes that 'plenty' of the AFGC's members wanted price dealt with in the Code but, realistically, that was never on the table. Leverage on price is in effect down to the individual supplier and the extent to which it is able to stay ahead on

⁸⁵⁵ Transcript of interview, director of a consultancy that advises suppliers, pp. 12-14.

⁸⁵⁶ Transcript of interview, experienced advisor to suppliers, p. 42.

⁸⁵⁷ Transcript of interview, Gary Dawson 2, p. 10.

⁸⁵⁸ Transcript of interview, Gary Dawson 2, p. 10.

understanding of consumer preferences and trends, and sufficiently differentiate its product in the eyes of consumers and in turn retailers – the Code ‘can’t do all the heavy lifting’! Take for example this supplier’s pragmatic approach to the pricing of his premium brand product by the MSCs:

So we’ve always been in and out of supermarkets because we’re premium. What happens is our product sells very well, even at a premium because it’s not expensive anyway. What’s the difference for a lot of the consumers between paying, say, for example, \$5 ... and paying \$9 ..., even though the percentage difference is large, to a lot of consumers it doesn’t matter if they like what they see. But because we’re at the high price point, being de-ranked from one of the supermarkets, and the other one will pick us up and then we’re there for a while, then we get de ranked from them. So because we won’t exactly sell to their price points we move in and out. So within that context we do well in the commercial markets but they can always find a cheaper product to put in, instead of our product, in a supermarket shelf to a slightly different market.⁸⁵⁹

...

... consumers go chasing brands so you’ll see that when either supermarkets or mass merchants go completely no-brand, they do well for a while because they get extra margin or extra profit on their private label, but then the foot traffic falls away. So then they’ve got to bring brands back in to bring people back into the stores, and the supermarkets oscillate from that all the time.⁸⁶⁰

As a former Managing Director of a major consumer goods manufacturer (now a consultant to suppliers) sees it, the key is for suppliers to realise that they have power in their relationship with the MSCs, and to learn how to use that power effectively when negotiating with buyers:

So the key concept, the fundamental thing is, the balance of power is not related to the relative size. I’m not saying it doesn’t count, of course it counts. But it’s not that important. What’s important is the concept of relevance and uniqueness.⁸⁶¹

He also has been quoted as saying:

Suppliers need to understand what they are facing. Don’t wait for the code to save you, but adapt your business to the balance of power model now.⁸⁶²

An appreciation of this imperative was reflected in the comments of a representative from a large supplier to one of the MSCs. When asked about imbalances in bargaining power and the role of regulation in redressing it, he said:

⁸⁵⁹ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 6.

⁸⁶⁰ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 9.

⁸⁶¹ Transcript of interview, former managing director of a major consumer goods manufacturer, p. 17.

⁸⁶² Sue Mitchell, ‘Grocery code won’t save suppliers, says former Kellogg boss’, *SMH*, 13 March 2015.

If you are in a position of strength, clearly you have the balance of power. If you utilise the essence you have, whether it be brand, investment, all the tools of the trade we have. Conversely, if you don't that's where it becomes very difficult. Now the regulatory intervention to help small suppliers, I think in a lot of cases is there to support either poor structural businesses, poor business behaviour, or just lack of knowledge of the way things work, and the way you can reshape your business to give you back the balance of power in a negotiation. We've learned that over time. We've learned through many adversarial negotiations that haven't gone well, that we have to reshape our approach and reshape our either investment strategy or ways of working with [our MSC] and all our other business partners. And so that's something that regulatory influences don't really have an impact on. It's how you learn as a business and how you evolve your business.⁸⁶³

Similar advice is dished out by another advisor to suppliers, this time in the UK:

I don't believe that this code can be a panacea to everything. It won't be and I think [there needs to be] some expectation management for everybody in the industry, which is to say, look - you still live in a competitive world. You're still going to have trade hard. You're still going to have negotiate hard and nobody is going to give you a free pass on any of this stuff. You still have to do all of that.⁸⁶⁴

Reflecting on the lobbying for indirect suppliers to be included in GSCOP (just as it was with the FGCC), a UK commentator is also accommodating of the exclusion: 'it's just simpler ... [and] if there's an effect on indirect suppliers, you ought to see the pull through from direct suppliers. But you can't fix the whole world!'⁸⁶⁵

Moreover, price is an issue that, for suppliers, will be affected not just by the size and power of the MSCs as buyers (matters which the FGCC cannot alter), but will also be affected by the degree to which suppliers have access to and are competitive in export markets which in turn will depend to some extent on the dollar. In addition, the nature of the product and its stage in a product cycle will be material. As a MSC representative explained to us, suppliers that have products in high growth categories marked by innovation will be in a materially different position to those that are in 'the commodity category that's very low growth, very low innovation'. 'The nature of the relationship [between the supplier and its buyer] will depend ultimately [on] whether the category's growing or whether the supplier has got great brands or bringing some innovation [to the retailer]'.⁸⁶⁶

That said, Dawson notes an expectation of a return to food inflation in the UK in coming years, if not this one, and it could be significant, 3-4%. This will be driven, he says, by the fact that the retailers are 'needing some topline growth'.⁸⁶⁷ He points out that as there is not much more margin, if any, to squeeze out of suppliers, that (at least according to his anecdotal feedback), 'price rises are being

⁸⁶³ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 33.

⁸⁶⁴ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 44.

⁸⁶⁵ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 43.

⁸⁶⁶ Transcript of interview, MSC representative, p. 28.

⁸⁶⁷ Transcript of interview, Gary Dawson 2, p. 14.

approved commonly' (a possible reference to some tacit coordination as between the MSCs) and he wonders aloud whether Australia will follow a similar inflationary trajectory...

...most of our retailers are populated with senior executives from the UK. They do watch the trends in the UK and that's what I mean about the unknown around that competitive piece at the moment with Woolworths getting momentum back having invested a lot in price, sacrificed margin, which way does it go? Do they simply both of them try and claw back - do the traditional thing, claw back margins from their suppliers or do they look to, I guess, repair that margin in other ways?⁸⁶⁸

Over time, Dawson also accepts that the Code will only continue to remain relevant if it is adapted and refined to reflect and deal with actual behaviours in the marketplace and changes in these over time. Those behaviours in turn, and the degree to which they matter to suppliers, will be affected inevitably over the long run by structural shifts. In respect of the latter, this is not just a matter of continuing encroachment by Aldi on MSC market share or even the entry of other discounter retailers or a second wholesaler, as has been foreshadowed in the press.⁸⁶⁹

Looking even further ahead, there will be the disruptive effects of e-commerce which has been slower to date to affect grocery than other retail markets in Australia. In the UK, there will be the impact of currency change post-Brexit.⁸⁷⁰ And perhaps more in the medium to long term there will be Amazon – the talk of many across the country in the retail sector at large. 'That's certainly one to watch... and probably the biggest influence on the market to come', Dawson observes. It will cut out the retailer, facilitating direct relationships between suppliers and consumers, and it will also generate for Amazon if not also the suppliers who use its platform, a significant new source of consumer data that to date suppliers have had to in effect pay retailers for. These are dynamics that, for Dawson, 'changes the equation.'⁸⁷¹ The same observations are made of developments in the UK:

We actually had a major UK retailer come in here and speak two or three weeks ago. And what came across very vividly listening to him, they are dealing with an industry that needs significant reshaping to deal with the new world and the new consumer preferences. So they have a base of large stores, designed for a world where people did a once a week big shop in a big supermarket. We're now in a world where a pretty high proportion of UK customers order groceries online and then top up in convenience stores. And it just means a very radical reconfiguration - and if you think, if you then track that back to the supply chain, well that means much smaller ranges, much more complicated distribution chain. It's a different thing. You'll see a whole different set of problems play out.⁸⁷²

⁸⁶⁸ Transcript of interview, Gary Dawson 2, p. 14.

⁸⁶⁹ See Madeleine Heffernan 'Aldi's arch rival Schwarz Group confirms Oz interest', *The Age*, 21 November 2016; Madeleine Heffernan, 'Australia set for a new grocery wholesaler', *SMH*, 6 June 2016.

⁸⁷⁰ Transcript of interview, compliance manager at major UK retailer, p. 26.

⁸⁷¹ Transcript of interview, Gary Dawson 2, p. 13.

⁸⁷² Transcript of interview, experienced legal advisor to suppliers in the UK, p. 45.

IV. Counteractions

Despite these mostly positive reflections on the early impact of the FGCC on both retailer and supplier attitudes and behaviour, there are also grounds on which optimism is to be tempered.

(a) Code confusion

First, there are some who point to a degree of confusion amongst smaller suppliers, those whom the Code was particularly intended to benefit, and who do not have the back up of in-house and/or external lawyers to sort through the maze of 'rules' that now apply to matters that for a long time have been dealt with through informal conversation and a handshake.

For a layperson, the Code itself is hardly a readily digestible resource – some 36 pages and 42 clauses of dense legislative-style text. Sensitive to the 'difficult challenge' that this represents for suppliers (for those new to the business in particular), we were told by a MSC representative that:

We take a great amount of care in ensuring that both the conversations we have with suppliers when they are setting themselves up, and the written covering letter that we send out to them, say “go and get all of the advice that you need, take whatever time you require to be comfortable with this and go through it”. And we recognise the fact that there’s some 15 pages there of a written agreement. And a lot of them do take sufficient care, and a lot of them, even the small suppliers, use their solicitor to have a look and come back with particular questions. ...

... [C]umulatively it can take me five or six hours to negotiate a GSA agreement ... But it works on backwards and forwards; one day, two weeks later you’re doing the next bit, and so on and so on. So lots of iterations. ... [Y]ou’re going through it point by point, you’re going through it clause by clause. So each party, at least at the end, has a very strong understanding of what they read into each of the Code clauses. And it’s no different with small suppliers, if they choose to have a discussion... [I]f they choose to ask and query individual clauses, we’re very happy to go through them. It takes time, but it works.⁸⁷³

...I think the ACCC’s website on the Code is a really good resource, and ACCC does need to continue to make sure everything is in plain English, setting out things by issue, and making it easier. And I think the AFGC provide a lot of good support and do a lot of good work in educating small suppliers. And it still does. So they do have go-to points where if they are confused about, “I don’t feel like I’m being treated fairly, what’s the right path?” I think they know where they can go. And ... through Fair Trading, we’ll get questions as well. And we take them very, very seriously and respond very quickly, as does our code compliance

⁸⁷³ Transcript of interview, MSC representative, pp. 16-17.

*manager. So I do feel that although it can be bewildering, we have really good intent to help them.*⁸⁷⁴

Then there is the overlay of the MSCs' own internal codes or charters which, while themselves simpler and more user-friendly (the Coles Supplier Portal is a one page online document that includes links to the company's product ranging and shelf-allocation principles and its complaints handling procedure),⁸⁷⁵ might still create uncertainty as to which rules apply to which circumstances and when and to whom to complain. Further, out in the ether somewhere, for some suppliers, there may be consciousness also of other laws intended to protect them, laws that they might understand have something to do with abuse of market power and unfair trading, not to mention, general laws of contract also. A possible case of too much 'help' to be helpful? The following observations from interviewees with extensive experience in dealing with or advising suppliers appear to suggest as much:

*... there's far too much of this quick-fix solutions and viewing some medium such as codes as solutions for every problem under the sun, whereas in actual fact, in my view, they're actually creating greater uncertainty for parties.*⁸⁷⁶

*I think it's not accessible, there's nothing in there about how you go about it or how you do it, it would scream effort and cost and it also doesn't say that there's a person who knows what they're doing from a retail perspective in there. ... I also think there are just too many already settled ways of being able to get your grievances up or – there are always going to be times that people don't agree and you need some third party, but there are just too many other easy alternatives, why would you do that?*⁸⁷⁷

When a senior representative of AMWU was asked whether any suppliers were unhappy about the transition from a 'handshake' approach to more formalised agreements under the Code he replied:

*As soon as you put it down on paper and you start getting lawyers involved and third parties trying to make a decision as to what you meant when you said you'd do that, that's when it becomes a lot more complicated.*⁸⁷⁸

As mentioned above, our interview with a major fresh produce supplier to a MSC revealed degree of antipathy amongst small suppliers regarding formal rules and processes as a way of doing business. It appeared that he had little awareness of – or interest in – the provisions of either the FGCC or the MSC's own code of conduct, or the dispute resolution processes available to his company: 'I don't

⁸⁷⁴ Transcript of interview, MSC representative, pp. 16-17.

⁸⁷⁵ Coles Supplier Portal, Coles Supplier Charter <https://www.supplierportal.coles.com.au/csp/wps/portal/web/ColesSupplierCharter>.

⁸⁷⁶ Transcript of interview, interviewee that consults to / advises grocery businesses, p. 5.

⁸⁷⁷ Transcript of interview, MSC representative, p. 20.

⁸⁷⁸ Transcript of interview, senior representative of AMWU, p. 43.

spend my time worrying about that kind of thing. ... I would hate to think that I would have to have access to something like that.⁸⁷⁹

(b) Cultural change and competitive pressure

Secondly, at a more fundamental level, and potentially compounding the confusion factor, is the unavoidable reality that adherence to the provisions and processes of the Code involves a step-change in standards and expectations for all involved. On paper the Code anticipates if not demands a significant change in the nature of the commercial relationship, at least for some suppliers. Suppliers are intended by the Code to have more bargaining power and to use it. For some if not most suppliers, evidently, this is an idea that will take some getting used to and what's more, there appears to be a high degree of scepticism as to whether the Code will change anything at all. An interviewee who has conducted training with a large number of suppliers points out in this regard that:

...the biggest challenge is suppliers read through the code, going, yeah, that's great, wouldn't it be super if? But there is an immense amount of cynicism in the marketplace, they've been beaten over the head for so many years so hard, relentlessly without apology that the retailers turning around saying, no, no, you misunderstood us, we never meant it that way and we are truly going to change the way that we do business and we are going to be the good corporate citizens that we are supposed to be. Unsurprisingly there's decades of scars and bruises where the suppliers are going, oh, I'll believe that when I see it, crack on, so there's that dynamic, which is a challenging one to overcome.⁸⁸⁰

He hastens to add that, cynicism aside, suppliers still harbour considerable fear about dire consequences if they are to attempt an exercise in the leverage that the Code is supposed to give them:

There's also the – you can't underestimate the level of fear within suppliers, if you are a \$50 million supplier, so a small supplier, you're probably privately owned, you probably employ maybe 40, 50 people and you maybe have a small factory, you maybe have a couple of production lines and if you're fortunate enough to supply Woolworths and Coles you know that if you were to put your head above the parapet and say you nasty people, you're doing something wrong and you were to get delisted, two things would happen; first, you'd lay off half your workforce; the second thing that would happen is the other retailer would go you know what, I've just seen that you've been thrown out of that other retailer, you know what I'm going to do, you are this close to the edge of the grave, you give me a whole load of money or I'm going to give you the last little nudge and you'll be in the grave. And the retailers do that without batting an eyelid, they will abuse the position where they suddenly realise that they're not just half of that supplier's business, they may be 90% of that supplier's business and will leverage their position. So as a supplier you can't afford to rock this boat, you can't afford to

⁸⁷⁹ Transcript of interview, CEO of a major fresh produce supplier to a MSC, p. 35.

⁸⁸⁰ Transcript of interview, director of a consultancy that advises suppliers, p. 10.

*have all of your eggs in one basket, you can't – so you've got to – if they say jump, you politely ask how high. So the whole concept of putting your head above the parapet saying I think you're being horrible to me and I'd like you to desist is a brave position to put yourself, which is why the ACCC doesn't get anywhere near the number of phone calls, emails and letters as they would like to get or even deserve to get purely due to the fear of the consequences.*⁸⁸¹

All in all, however, notwithstanding these dynamics, the interviewee's reflection on the initial phase of the Code's implementation from a supplier perspective is positive, albeit also realistic about the time it will take for substantive change in both psychology and practice to seep through:

*...we've got off to a good start, suppliers are getting it, there's still a lot of fear, trepidation, concern, cynicism, retailers starting to nudge in the right direction a little bit, sometimes, but we're on a journey, it took five years in the UK, we're a year in.*⁸⁸²

In terms of step change, if suppliers are intended to have more bargaining power, buyers are intended to have less. Working against this is the ingrained practice, culture even, of driving as hard a bargain as possible. Hard bargaining is part and parcel of competition. The competitive climate in which the MSCs are operating is tough and all the signs are that it is only going to get tougher. The 2017 IBIS World report 'Supermarkets and Grocery Stores in Australia' predicts that in addition to the continued growth of Aldi and Costco, other large foreign grocery retailers including AmazonFresh, and the two German Schwarz Group's supermarket brands, Lidl and Kaufland, will further intensify price competition in the market over the next five years, placing increased pressure on Coles and Woolworths.⁸⁸³ Capturing this sense, in March 2017 Woolworths CEO Brad Banducci was quoted as saying that growing competition had destroyed the supermarket 'duopoly' that Woolworths had enjoyed with its rival Coles.⁸⁸⁴

Other experienced observers of the Australian grocery scene point to parallels between developments here and in the UK:

*The UK market is less concentrated than the Australian market, with more players generally. As with Australia, the UK has also witnessed the entry of limited assorted discounters (Aldi, Lidl, Netto). Even with a limited range, these discounters have grown rapidly and had a huge (positive for consumers) impact on the incumbent supermarket behaviour.*⁸⁸⁵

Offering a contrasting perspective, in late March 2017 David Errington, an analyst with broker Bank of America Merrill Lynch, was reported as saying that Coles and Woolworths could expect their sales to grow by up to 5% in the coming five years, as a result of a softening Australian economy. According to Errington, history shows that MSCs benefit from tougher economic conditions, with people opting to

⁸⁸¹ Transcript of interview, director of a consultancy that advises suppliers, p. 10.

⁸⁸² Transcript of interview, director of a consultancy that advises suppliers, p. 67.

⁸⁸³ 'Spotlight on Australia's supermarkets and grocery industry', *RetailWorld*, 24 March 2017.

⁸⁸⁴ Madeleine Heffernan, 'Woolworths warns prices will rise on surging electricity costs', *The Age*, 28 March 2017.

⁸⁸⁵ Transcript of interview, former senior representative of the UK OFT, p. 14.

eat at home more. He further stated that the active cutting of prices by the MSCs had already curtailed encroachment by competitors like Aldi and Costco. Errington described the threat posed by Amazon as 'over-played', noting that in all the discussions Merrill Lynch had had with suppliers, not one had said they had been approached by the online retailing giant:

We don't see Amazon being a major threat to supermarkets, particularly over the coming five-year period...

Australians' preference to buy food online is at relatively low levels and the time required for a new participant to establish the necessary distribution and supplier capabilities in Australia is lengthy.⁸⁸⁶

Merrill Lynch is of the view that the growth of the discounters (i.e. Aldi and Costco) has slowed as a result of adjustments made by Coles and Woolworths, and that from here on their growth will be on par with overall industry rates.⁸⁸⁷ The real threat, according to these reports, was to independent grocers including butchers and green-grocers:

Over the next five-year period the major supermarkets will continue stepping up their competitive offer in order to continue gaining market share at the expense of the independents and specialists that we see slowly exiting the Australian market.⁸⁸⁸

Price however, remains an important weapon in the MSC battle to retain their dominance, and as Aldi approaches 10% of national market share it is showing no signs of easing off on the pressure. In May 2017 the German discounter launched, 'Good Different', the company's biggest Australian brand campaign in 16 years. The primary aim is said to be, 'promoting the discount retailer's differences and challenging the conventions of supermarket retailing in this market.'⁸⁸⁹ Aldi Australian CEO Tom Daunt is reported as saying;

After 16 years of establishing ourselves as a trusted place for the weekly shop, it's now time for us to build on this success and tell Australians what makes us different, and why we will continue to be different.⁸⁹⁰

And it appears this difference will remain tightly tied to price:

While other supermarkets might offer temporary markdowns and promotional pricing, ALDI's unique promise of permanently low prices saves shoppers both time and money.⁸⁹¹

Meanwhile Coles has been reported as having told suppliers that customers would not accept price increases, with suppliers in turn reporting that it was close to impossible to get price increases from

⁸⁸⁶ Catie Low, Supermarkets to prosper from softening economy', *The Age*, 30 March 2017.

⁸⁸⁷ See also a UBS report finding referred to in C Kohler, 'Shoppers cool on Aldi, Woolies rebounds', *The Age*, 5 April 2017 to the effect that Aldi is 'losing momentum.'

⁸⁸⁸ Catie Low, Supermarkets to prosper from softening economy', *The Age*, 30 March 2017.

⁸⁸⁹ 'Aldi reveals new business strategy', *RetailWorld*, 19 May 2017.

⁸⁹⁰ 'Aldi reveals new business strategy', *RetailWorld*, 19 May 2017.

⁸⁹¹ 'Aldi reveals new business strategy', *RetailWorld*, 19 May 2017.

the MSCs, even as energy and input prices increase.⁸⁹² Therefore, while there may be scope for competition on quality, range and service, it is evident that for the MSCs, price remains a, if not the, most significant lever for maintaining performance on profit margins. As noted in the 2017 IBIS report, this goes against overseas trends, where product differentiation rather than price reductions has appeared to have become the preferred competition strategy.⁸⁹³

Price has certainly been instrumental in Woolworths' recent turnaround. In January 2017 it was reported that, for the first time since 2009, analysts were predicting that Woolworths would 'beat Coles' on the like-for-like sales growth measure. This was attributed to both a return of focus, and a return on investment, by Woolworths, having divested itself of the highly unsuccessful Masters Home Improvement Stores.⁸⁹⁴ This reported 'victory' is said to have come at a cost of more than \$1 billion that had been invested in lower food prices over the year, leading to a 13.9 % reduction in supermarket earnings.⁸⁹⁵ In April 2017, Woolworths CEO pointed out that the company has invested \$1 billion in 12 months to lower prices as part of its turnaround strategy, but is reported to have 'said it wasn't yet where it needed to be. "We felt we needed to get trust on price. And we're a year into our journey of doing that, but still have a long way to go."⁸⁹⁶

Coles is not taking this challenge lying down, with CEO John Durkan reportedly declaring in the face of Woolworths' billion dollar investment that Coles would be 'competitive forever' and 'never give up'.⁸⁹⁷ When analysts asked Durkan to explain what they suggested was arguably an irrational response with little chance of ensuring ongoing profitability he reportedly responded:

I go back to the fact that I think it's been an unusual year in terms of price adjustment but we've also had the rollout of a major competitor in two different geographies [a reference to Aldi's recent expansion to other states]. I can't say that won't happen twice but it would be unusual. What I do see is that there's plenty of room to grow in this marketplace for all players.⁸⁹⁸

Advantage over rivals on retail price will arguably continue to have to be derived largely from negotiations on wholesale price, all the more so while other costs (particularly energy costs) continue to rise. As one journalist recently observed, 'what is becoming increasingly clear is the war in the aisles is taking its toll on the bottom line for Australia's two largest supermarkets chains.'⁸⁹⁹

This competitive pressure means that there may be tension between the letter and spirit of the Code, on the one hand, and the messaging and target-setting by senior management, not to mention the personal consequences for buying personnel of failing to reach target, on the other. Seasoned industry watchers point out that this is no different to the tension that has always existed between

⁸⁹² Catie Low, 'Supermarkets to prosper from softening economy', *The Age*, 30 March 2017.

⁸⁹³ 'Spotlight on Australia's supermarkets and grocery industry', *RetailWorld*, 24 March 2017.

⁸⁹⁴ Madeleine Heffernan, 'Coles might need to splash cash after Woolworths 'wins' Christmas', *SMH*, 20 January 2017.

⁸⁹⁵ 'Woolies cuts its way to sales victory', *AAP*, 22 February 2017.

⁸⁹⁶ C Kohler, 'Shoppers cool on Aldi, Woolies rebounds', *The Age*, 5 April 2017.

⁸⁹⁷ Catie Low and Patrick Hatch, 'Wesfarmers vows Coles will be competitive forever', *The Age*, 16 February 2017.

⁸⁹⁸ Catie Low and Patrick Hatch, 'Wesfarmers vows Coles will be competitive forever', *The Age*, 16 February 2017.

⁸⁹⁹ Catie Low, 'Coles, Woolworths, Aldi in battle for diminishing shopper dollars', *The Age*, 28 January 2017.

doing what may be 'right', from a moral or ethical standpoint, and the harshness of commercial reality in an organisation and environment where profit rules, and often with brutal repercussions for individuals:

... [it] is an absolute fact, I can prove it factually: a gap between the intent of what the management team are trying to achieve in context of code and the behaviours at a buyer level. Now, the senior guys swear blind they're not aware of that behaviour at a grass roots level, I think there is an element of conscious deniability about that because the targets and KPI's put in place by the senior team on the buying team are in many instances unattainable without poor behaviour. Then let's say hypothetically within dry grocery or grocery general you've got your impulse teams that look after chips, chocolate and the like and that group, tick, achieve their targets. Then within that, biscuits, yep, achieve their targets, chocolate down. You're the chocolate buyer, what now? So everyone else above you has achieved their targets, you're the one guy or girl in that team that hasn't, it isn't about whether you get your bonus, it's whether you're in the building in four weeks' time and it's as simple and as brutal as that. It starts at the top, so if you're delivering a 5.7 EBIT last year and you've got to deliver a 5.85 this year you've got to cascade that down. Again, I'm not a retailer, I'm not employed by retailers, have never been employed by a retailer, but sitting external to them and being close to the industry we don't believe, in our opinion, that the targets that they currently are striving for, or indeed this new financial year, we don't believe that they can easily be achieved through good everyday practice or behaviour. And the reason for that is that a percentage of historical profit has been, and a material percentage of historical profit, pre-code profit, has been generated through behaviour that your mum would say isn't right or reasonable. So that isn't going to go away, that's profit that was last year's profit, I've got to lap that this year so how do I lap dirty money? It's impossible, well, it's not impossible. Where's all this future growth going to come from? So when there isn't top line growth and there's price deflation, the only place it's going to come from is the suppliers.⁹⁰⁰

For Dawson, just about mid-way into the second year of Code operation, the industry is at a critical juncture in terms of competitive dynamics and this will truly test the robustness of the FGCC.

Speaking in March 2017, he said:

⁹⁰⁰ Transcript of interview, director of a consultancy that advises suppliers, pp. 33-38. Cf the cooperative model of some supermarket chains in the UK which are structured as a partnership. Each employee has part-ownership of the company, a share of its annual profits, and a say in how it is run. All staff regardless of their position in the company receive the same percentage payout which is directly tied to the company's profits. Employees are partners and hold the management and board to account while providing broad strategic direction for the business. There are no external shareholders. We interviewed the Manager (Compliance) for one of these cooperatives. As one of the 60 partners, she spoke with passion about what having a personal stake in the business means in terms of both the benefits and responsibilities:

What it means is that we share in the rights and the responsibilities so we have rights as employees and partners, but we also have responsibilities to ensure that the company continues to grow, develop, evolve and handed onto the next generation... It doesn't suit everybody, but it is a company that people want to join to. The benefits are huge, but there are also responsibilities. And you do have to be committed because if you don't do your job right, somebody is going to be saying to you, "Hey, you're not doing your job right. You are wasting my company's money and that's my bonus." It used to be epitomised by stickers by the light switches, saying, "Switch off. You're burning my bonus," which was that it was everyone's responsibility to save the last bit, and that was how it was epitomized. It is a challenging environment, but it's great. (Transcript of interview, Compliance manager at a major UK retailer, p. 2)

But if you shift to looking at what about commercial outcomes I do think there's a question that - we won't - I suppose we won't really know the answer to that until later on this year because we've reached this point in the market where Woolworths have sacrificed an enormous - well, almost half their margin to invest in price, to regain sales momentum, which they've done. Everyone expects Coles to respond to that, which they're doing, and traditionally to claw back margin the retailers have gone to suppliers, either asked for it voluntarily or pressured them in order to claw back margins. So I think we're at a critical point and obviously we're watching that really carefully through the rest of this year and there's quite a bit of analyst commentary on this and so forth. But the expectation - let me put it this way; the expectation amongst suppliers is that both retailers will put pressure on them in terms of margin transfer. I mean, my sense from talking to our members and suppliers generally is that for various reasons there would be quite a bit of resistance to any further margin transfer, partly because there's not a whole lot of margin left to give and, of course, things like energy costs are chewing up some of that margin already, deflation in the retail environment, and partly because their position - they feel their position has been strengthened by the provisions in the code. So I do think the code is playing a part in that. But I accept that it's far from certain how that's going to play out through this year. I think this year is a critical one in terms of the competitive environment.⁹⁰¹

There are other perspectives, however. From the perspective of major multinational suppliers, the Australian market is a very different one today to the market 15 years ago. Whereas previously it was a 'high growth' environment, today it is 'low growth'⁹⁰². Previously, 'it was a very comfortable existence between supplier and retailer. Prices went up 2-5% every year and frankly, costs were passed on right through the line.'⁹⁰³ Now there is more competition between retailers and, by global standards, prices are too high. This 'creates tension... and that tension goes back up the line.'⁹⁰⁴ Suppliers, accustomed 'to a certain style of behaviour, a certain level of growth and certain level of profitability, become compromised [and] there is a period of readjustment ... of the price and structure of the profit transfer and that's driven some tension and some pain'.⁹⁰⁵ As a result, the nature of 'the conversations' between suppliers and buyers are different. Retailers, he explained, are under 'a lot of pressure... to deliver attractive results [and] shareholder returns. That's going to drive some tough conversations'.⁹⁰⁶ But, he was quick to add, 'I don't think the tough conversations are unreasonable'.⁹⁰⁷ For a multinational, they are the same conversations that they have had with retailers in other markets overseas, and in that sense the developments in Australia are familiar and just a reflection of developments in the market.

⁹⁰¹ Transcript of interview, Gary Dawson 2, p. 9.

⁹⁰² Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 34.

⁹⁰³ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 36.

⁹⁰⁴ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 36.

⁹⁰⁵ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 36.

⁹⁰⁶ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 34.

⁹⁰⁷ Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 34.

From the perspective of the MSCs, they are evidently in a process of constantly reviewing and adjusting their strategies in response to the competitive pressures and there are signs in both organisations that this includes a new or renewed focus on building relationships with suppliers. According to the account we received from one MSC, this is not just about strategic change, it is about cultural change. Whereas previously, 'everyone was just watching numbers, watching numbers, watching numbers',⁹⁰⁸ there is now a top down effort to make the end customer the primary focus of the business and a key aspect or lever in this is engagement with suppliers. This was emphasised repeatedly in our interviews with MSC representatives:

*[O]ur real differentiator that we're trying to build is our culture, so we're trying to take our suppliers with us. We're trying to work with suppliers ... to make sure that they understand what are customers are telling us so that they can help us on that journey. We need to partner with them to develop the right products at the right price points for customers to buy, and to grow.*⁹⁰⁹

*[W]e definitely wanted to, with all the different media going on, actually change the relationships with our suppliers. I think there'd been a period just generally where there hadn't been as much of a focus on partnership and we wanted to renew that. [W]e're all in this together, we need each other, all of the negotiations we have reflect that. [W]e can't just do things alone ...*⁹¹⁰

Another MSC representative went further, explaining that 'no retailer survives without their suppliers ... [Y]ou can't treat your suppliers badly and then expect to get good outcomes for your customers. The two just don't, it doesn't work'.⁹¹¹ But he also pointed out that the challenge for a large retailer lies in achieving consistency of approach in the treatment of suppliers: 'we're quite a large group of people trying to interact with another large group of people, and that, in fact, is 500 odd folks in buying, interacting with many thousands across, 4,000 plus suppliers'. Meeting this challenge, he explained, is not just a matter of training and retraining buyers in the content of the FGCC; it's about instilling a real appreciation of 'the intent of the Code' but also teaching 'communication skills, focussing on emotional intelligence' and emphasising that, at the end of the day, the goal is for the MSC to be and be seen to be 'good to do business with'.⁹¹² Further, positive feedback from suppliers is being built into 'key performance indicators' for buying teams and that 'has a direct impact on [the buyer's] bonus. [S]o ... if you are ... getting regular negative feedback from suppliers, you've got a real risk.'⁹¹³

If rebuilding of relationships with suppliers is indeed to be a genuine focus for the MSCs, then it may be expected or hoped that trust, cooperation and good faith in supplier dealings will be driven

⁹⁰⁸ Transcript of interview, MSC representative, p. 22.

⁹⁰⁹ Transcript of interview, MSC representative, pp. 5, 8.

⁹¹⁰ Transcript of interview, MSC representative, p. 37.

⁹¹¹ Transcript of interview, MSC representative, p. 4.

⁹¹² Transcript of interview, MSC representative, pp. 6-7.

⁹¹³ Transcript of interview, MSC representative, p. 9.

internally by the corporate leadership of these businesses, and will not require or may simply be reinforced by the demands of an external instrument such as the FGCC.

(c) Continued political pressure?

Finally, if the change in culture on which the Code's true effectiveness is premised is to penetrate the industry, on both sides, it is arguably material to consider whether the political pressure that was so instrumental in the FGCC's instigation will continue (should it need to). It goes without saying perhaps that politics is reactive, and it is difficult if not impossible to predict the possible factors that might reignite the embers in Canberra. A further outbreak of 'bad' behaviour by one of the MSCs, potentially caused by increasing intensification of competition, might well have such effect, particularly if it were to incite investigation and proceedings by the ACCC, with attendant publicity. One would like to imagine that, given the experience of the past few years, MSC leadership will be on its guard to prevent such occurrences and certainly on accounts from the MSCs themselves, vigilance is being exercised in this respect. That said, based on any track record review of corporate misconduct generally, such imaginings are readily contradicted. If Dawson's predictions of food inflation are borne out, that too may well have a stirring effect, and the possibility of an ACCC inquiry into retail grocery prices mark II at some stage in the future cannot be discounted entirely.

However, as recent history also tells us, there may be factors beyond MSC control, including further farmer outcry responding to strains likely to be ongoing in the agricultural sector, and that may cast the political spotlight back again on the size and power of our two largest grocery chains. This prospect is borne out to some extent in the UK where in a review being undertaken in relation to the GCA, there has been a call for evidence as to whether her remit should be extended to primary producers.⁹¹⁴ It is true that in Australia key actors in the Code's genesis are no longer on stage: Dawson, Billson, and at some point in 2018, Sims too may have exited (his term expiring next year, albeit he may well be re-appointed). However, with the exception possibly of Billson (whose replication as a champion for small business is hard to conjure), there is no reason at this stage to think that their replacements as well as other influential figures, Barnaby Joyce and independent Senator Nick Xenophon amongst them, will not continue to play a role in supermarket politics.

V. Reinforcements

Compensating to a degree for some of the factors cited above as counteracting the positive impact of the FGCC to date, there are several factors that appear to have assisted in reinforcing its impact, at least in its first two years of operation. The role of the ACCC in this regard appears to have been particularly influential.

In relation to its role with respect to industry codes, it was determined from the outset that the ACCC would create guidelines offering 'some practical guidance for bodies in the market looking to develop

⁹¹⁴ See further Part 7 of this report.

industry codes'.⁹¹⁵ The intention was not only to set out the legal implications of codes, but to offer 'a practical experience guide to what works, where – a code that's credible as opposed to a code that lacks rigor or credibility'.⁹¹⁶ Further, Graeme Samuel AC quite early in his role had contemplated the possibility of the ACCC formally endorsing voluntary codes that were consistent with these guidelines. However, as one ACCC interviewee reported, 'we came to a landing that there was more risk associated with [this] than was acceptable.'⁹¹⁷

The ACCC nevertheless continued to provide guidance, particularly to 'small business industry associations that wished to develop voluntary codes'.⁹¹⁸ The aim was to 'provide some kind of framework of fairness for small business dealing with larger businesses particularly, then voluntary industry codes can be part of the framework'.⁹¹⁹ A similar approach has been taken by the OFT in the UK, assisting trade associations in drafting codes to achieve sufficient specificity and customisation to the issues of their sector, while at the same time ensuring that the code does not raise barriers to entry or engender anti-competitive coordination.⁹²⁰

The ACCC has the capacity to audit various aspects of industry codes, and we have been told the ACCC will be doing so in relation to the FGCC, 'as part of our active audit program schedule'.⁹²¹ Our understanding is that audits are scheduled to occur annually and look at compliance with the 'behavioural requirements of the code'.⁹²² The supermarkets are forewarned of upcoming audits and under their audit powers the ACCC is entitled to request access to certain documents and information that businesses are required under the Code to keep. This in turn tells the ACCC, 'about the behaviour of the entity that's regulated, about the supermarket',⁹²³ without having to rely on complaints or reports from third parties:

*So really it allows us – without having to rely on named complainants or any individual example that identifies someone who might otherwise be given a supply holiday, to test behaviour on this or that aspect of the code via a particular supermarket and complaint data that comes to us, information that comes to us telling us that there might be a problem on this or that aspect allows us to target those audits ...*⁹²⁴

As previously noted, the Code allows for code-related complaints to be made directly to the Commission and potential breaches may be investigated using the full arsenal of ACCC compulsory information gathering powers. In line with this the ACCC website provides suppliers with an overview of the obligations and key protections that suppliers are afforded under the FGCC. The ACCC also makes clear that if a supplier has:

⁹¹⁵ Transcript of interview, senior representative of the ACCC, p. 2.

⁹¹⁶ Transcript of interview, senior representative of the ACCC, p. 2.

⁹¹⁷ Transcript of interview, senior representative of the ACCC, p. 2.

⁹¹⁸ Transcript of interview, senior representative of the ACCC, p. 2.

⁹¹⁹ Transcript of interview, senior representative of the ACCC, p. 4.

⁹²⁰ Transcript of interview, John Noble, British Brands Group, p. 29.

⁹²¹ Transcript of interview, senior representative of the ACCC, p. 28.

⁹²² Transcript of interview, senior representative of the ACCC, p. 28.

⁹²³ Transcript of interview, senior representative of the ACCC, p. 28.

⁹²⁴ Transcript of interview, senior representative of the ACCC, p. 28.

*... concerns that a retailer or wholesaler has done something that's prohibited under the Code or you just have a general enquiry about the Code, then you can always contact the ACCC. We can investigate and if it's necessary, take enforcement action.*⁹²⁵

Enforcement action includes a range of orders, declaratory, injunctive and compensatory in nature, even if at this stage pecuniary penalties are not yet on the table (a matter likely to feature in the upcoming review, as previously noted).

Our research revealed high support generally for having ACCC oversight and enforcement action as a backstop that would shore up the Code, giving it teeth if not bite. As pointed out in Part 5 of this report, at the time of the Treasury consultation and the Senate inquiry, there were some who argued for a separate dedicated Ombudsman-style monitor and watchdog – the UK model. As former PGCC Ombudsman Robert Gaussen has repeatedly argued, ‘you need an ombudsman, you need someone to oversight it’.⁹²⁶ Early on, at least under Carnell’s leadership, the AFGC had also supported going down a similar road to that taken in the UK. However when it became clear that this would not be an option, under Dawson, a more pragmatic approach was adopted:

*...the AFGC certainly put proposals that was under my predecessor, for a mandatory code similar to what’s been done in the UK with its own statutory watchdog, code ombudsman... I come into this role, the then government made it clear they weren’t willing to amend the Act to do that and so, I suppose, from my point of view and my board’s point of view it was a matter of, well, what can we usefully do that will make it – that will improve the environment for our members ...*⁹²⁷

However others voiced strong opposition to following the UK’s lead. As one former senior MSC employee said:

*... our fear was that we were going to get something like the UK model, where it was very prescriptive. And it was funded by retailers. And there was an ombudsman that would just keep issues alive. Whether it was perceived or real. I remember talking to Rod Sims about that, he said, “What’s the problem with the UK model?” I said, “Well, we don’t want to have to pay for an ombudsman, who’s just going to kick us every day...” I don’t mind the regulator doing his job, but at the end of the day, we don’t want a code that’s designed by regulators. We want a code that’s designed by industry that will avoid unintended consequences and actually work – allow retailers and suppliers to work together.*⁹²⁸

...

⁹²⁵ ACCC website, Food and Grocery Code of Conduct, <https://www.accc.gov.au/about-us/tools-resources/social-media/transcripts/food-and-grocery-code-of-conduct>.

⁹²⁶ Transcript of interview, Robert Gaussen, p. 38.

⁹²⁷ Transcript of interview, Gary Dawson, 2016, p. 29.

⁹²⁸ Transcript of interview, Robert Hadler, p. 19.

We wanted fast track low cost dispute resolution process. We didn't want a government designed ombudsman process that would cost a lot of money and take a lot of time and probably not result in any satisfactory outcome. ⁹²⁹

From the time of the Code's inception, the ACCC has been at pains to ensure the industry knows it is on watch. Its 2015 Compliance and Enforcement Policy highlighted code monitoring and possible enforcement as a priority. And in September 2015, only a matter of months after the Code took effect, the agency fired a warning shot across the bows of the Code signatories, Sims using the press to report that the agency:

... has concerns as to the manner in which some retailers, in particular Woolworths and Aldi, are presenting new Grocery Supply Agreements (GSAs), which might give the impression that the supplier is not able to negotiate the terms of the GSA. ⁹³⁰

Woolworths appears to have been less than impressed with the ACCC's resort to the media to ventilate such concerns, complaining that the ACCC had only raised additional – and minor – concerns about the wording of Woolworths' and Aldi's supplier contracts, 'just hours before contacting the media'. ⁹³¹ Indeed, it was evident from our interviews that, within the MSCs, there is a view by some of being singled out, victimised even, by the ACCC on account of simply being 'big':

... if we take one small step they're all over us, and ... that's explained by the fact that [as] Rod Sims said the other day, "we are focussed on big business because that's where we think we can generate the most noise in terms of the messages, but also ideally because you will reach more consumers". But if it's going to work well across the market and everyone is going to compete and have to raise to the same standard, I do think there needs to be a bit more parity in enforcement approaches. By all means keep your eye on the big businesses, but don't let the rest of the market just do other things, because it's very frustrating for our people as well. Why are we doing the right thing and others aren't? Can we complain about them? Will anyone listen to us if we complain? ⁹³²

Moreover, MSC accounts of ACCC intervention of the kind in this instance suggest that, from the MSC perspective, the agency can take something of a nit-picking approach and one that, at times, is disproportionate to the issue at hand:

Unfortunately, the ACCC, because of the nature of the organisation and the nature of the Code, they have to be fairly legalistic in their interpretation and their ability to look at the Code, and performance against the Code. And the audit that they do, or the next audit that they do, probably again will be quite detailed, but directly towards the wording of the Code, as opposed to how well it's interpreted, or how well it's applied. And it becomes a real challenge

⁹²⁹ Transcript of interview, Robert Hadler, p. 48.

⁹³⁰ 'ACCC investigates claims Woolworths, Aldi 'off to a bad start' under supermarket code of conduct', *ABC Rural News*, 24 September 2015.

⁹³¹ Catie Low, 'Aldi and Woolworths accused by the ACCC of misusing grocery code', *The Age*, 24 September 2015.

⁹³² Transcript of interview, MSC representative, p. 34.

*to meet the absolute provisions of certain parts of the Code that are very prescriptive, although the spirit of the thing may well have been properly in place, and the outcome may well have been perfectly happy between the two parties, it may look on paper that the notification has been a week too late, or something else that's relatively minor in the scheme of things, but technically might be a breach of the Code.*⁹³³

Other commentators too, when asked about the ACCC handling of the matter concerning new GSAs by Woolworths and Aldi, are critical, describing it as evidencing the ACCC's propensity to make 'short term shrill use of the media', an approach thought to be damaging in the long run in securing buy-in by retailers to the Code.⁹³⁴ In a more tempered response Aldi was quoted as saying it would respond to the specific issues raised by the ACCC and that:

*Aldi's commitment to sign and implement the Food and Grocery Conduct Code before any other major supermarket is testament to our business values and dedication to quality supplier relationships. The spirit of the code reflects Aldi's current practice with suppliers, forging long-term sustainable relationships.*⁹³⁵

Then, in late 2016, the ACCC reported concerns about the way that Aldi, Coles and Woolworths were treating suppliers when delisting products, with Sims telling an AFGC forum that, 'some delist notices did not include any real reasons for delisting and where reasons were provided, they were typically very general in nature'. Sims went on to make clear that the ACCC had already raised such concerns with all three supermarkets, and said that retailers would need to improve the way they notified suppliers about delisting if they wanted to avoid breaching the FGCC.⁹³⁶

Aside from code-specific activity, there is no doubt that the ACCC's demonstrated capacity and willingness to take the MSCs to court for unconscionability has been influential in reinforcing the value of the Code, in the eyes of the retailers at least. Reports are that the investigations and proceedings in both the Coles and the Woolworths' suits had a potent impact on the personnel of those organisations, both at senior management and operational levels.

*Oh, they [the ACCC unconscionability actions] had a significant impact. From the Wesfarmers board right down, I mean, that is a terrible thing for the ACCC to be calling out against the company.*⁹³⁷

*It had a big impact ... it caused a lot of people who were in the business at that time, to become quite introspective. And you know, we were running flat out, probably at the time, the world's biggest turnaround. And not that it is right, but you know ... the pressure's there...*⁹³⁸

⁹³³ Transcript of interview, MSC representative, p. 13.

⁹³⁴ Transcript of interview, former senior representative of the UK OFT, p. 10.

⁹³⁵ Catie Low, 'Aldi and Woolworths accused by the ACCC of misusing grocery code', *The Age*, 24 September 2015.

⁹³⁶ 'Major supermarkets draw ACCC ire', *News.com.au*, 8 November 2016.

⁹³⁷ Transcript of interview, MSC representative, p. 22.

⁹³⁸ Transcript of interview, MSC representative, p. 54.

As previously highlighted, that despite succeeding in its defence to the ACCC's unconscionability action, Woolworths' leadership was nevertheless at pains to emphasise its commitment to higher standards in the future is also telling in this regard.

The capacity and effectiveness of the ACCC in fulfilling its mandate as Code and unconscionability watchdog depends of course on the willingness of suppliers to turn in their buyers, and the historical record suggests that this will continue to be problematic. Indeed, when we asked an interviewee who had trained and advised a large number of suppliers in the FGCC provisions about whether any of them had reported concerns about Code compliance to the ACCC his response was not encouraging: 'none, not one!'.⁹³⁹ This is in contrast to an account given by an ACCC representative at a subsequent AFGC conference, reporting as at May 2017 that there had been '17 complaints and 24 inquiries' relating to the FGCC.⁹⁴⁰ These numbers could have been higher were it not, according to the supplier trainer whom we interviewed, for:

*...the level of fear within suppliers ... which is why the ACCC doesn't get anywhere near the number of phone calls, emails and letters as they would like to get or even deserve to get purely due to the fear of the consequences.*⁹⁴¹

Such concerns are reflected in supplier responses to the 2017 AFGC survey referred to previously. With regard to impediments to raising an issue with the ACCC, 62.2% were not confident that their confidentiality would be maintained, and 69.5% feared retribution.⁹⁴² Having spoken to ACCC staff himself about the matter, our interviewee was of the view that the ACCC did not even have the basis for a reasonable belief of a potential breach that would enable it to exercise its compulsory information-gathering powers to investigate:

I sat down with the ACCC and said "All you need – just go in and pluck 10 contracts off the shelf and go and look at the payment and you'll find nine, guarantee, nine of those out of 10 will be in breach." "We can't do that." "Why can't you do that?" "Well, because we don't know where to look." "Grab any 10." "Well, which 10, we need – we can't go in on suspicion."⁹⁴³

This account, suggesting that the ACCC may lack the will and/or the resources to act in response to supplier complaints regarding Code compliance is not dissimilar to the response we received from the COSBOA CEO when we asked him about ACCC receptiveness and capacity to respond to small business complaints generally:

⁹³⁹ Transcript of interview, director of a consultancy that advises suppliers, p. 46.

⁹⁴⁰ Michael Schaper, Deputy Chair, ACCC, 'Current Food & Grocery Issues: An ACCC Perspective', presentation to AFGC conference, 2017, slide 9.

⁹⁴¹ Transcript of interview, director of a consultancy that advises suppliers, p. 10-11.

⁹⁴² AFGC 2017 Annual Food and Grocery Code of Conduct Survey, p. 19.

⁹⁴³ Transcript of interview, director of a consultancy that advises suppliers, p. 46-7.

*You ring them up, you get nothing. And it's not like everything is their call, and they would need a lot of resources, so if you ring them up, very rarely you get listened to, very rarely.*⁹⁴⁴

This view is also evident in the AFGC survey. 54% of suppliers surveyed, when asked about reasons for not raising an issue with the ACCC, said they didn't think the ACCC could do anything, 21.6% thought the behaviour would be viewed as a normal way of doing business, and 10.8% believed the issue would not be taken seriously, with a further 10.8% stating that they didn't think the concern was important enough for the ACCC to get involved.⁹⁴⁵

The approach taken by the code enforcer is seen as critical by commentators to the effects of a code such as the FGCC.⁹⁴⁶ It is evident that the approach taken by the GCA in this respect, with its emphasis on education, collaboration, and informal mediation, is seen in a highly positive light. Tacon's non-confrontational consensus-building approach, in particular, is seen by some in the UK as having made suppliers more willing to speak out:

*... the climate of fear thing has changed somewhat. When we working on the 2008 enquiry, there was genuinely fear on the part of suppliers to have any kind of contact with the process. So suppliers actually had to go to the CMA, to the CC at the time and say, look, use your statutory mandatory powers to send us information requests, because we will then feel more able to respond. If you don't use your mandatory powers, actually we won't answer. Whereas now, if the GCA holds a conference, you'll look at the attendee list. There's half a dozen, a dozen supplier representatives there who seem to be quite happy to be openly seen to be interested in the topic.*⁹⁴⁷

In the review of the GCA completed in July 2017, the majority of respondents, from both large retailers and suppliers, expressed the view that the GCA 'has been highly effective in exercising its existing powers through a combination of ensuring better Code related information for suppliers, promoting collaboration with large retailers, and using investigatory and regulatory powers.'⁹⁴⁸ There had been some criticism that the GCA had not undertaken more investigations, exercising her formal powers, over the three period under review. However, this criticism was far outweighed by the view from across the sector that the GCA's 'lighter touch' approach, with hallmarks of awareness raising, education, and relationship-building was what made the GCA, in the words of the report on the review, 'an exemplar for modern regulation.'⁹⁴⁹ Tacon's personal style, marked by professionalism and fair-mindedness, was also highlighted as instrumental in the highly positive response received to the review. As the report noted: 'the current Adjudicator has created a level of trust with the large

⁹⁴⁴ Transcript of interview, CEO of COSBOA, p. 20.

⁹⁴⁵ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 19.

⁹⁴⁶ Transcript of interview, former senior representative of the UK OFT; Transcript of interview, experienced legal advisor to suppliers in the UK, p. 44.

⁹⁴⁷ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 40.

⁹⁴⁸ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [66].

⁹⁴⁹ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [82].

retailers, without which, some responses highlighted, it was more likely that issues would have remained hidden.⁹⁵⁰

Tacon's approach in handling and the outcomes of an investigation into Tesco for GSCOP breaches (referred to further below) also has attracted favourable comment from a range of commentators, focussing on how Tacon was balanced in her findings, recognising that the transgressions uncovered in the investigation were a minority of instances in a large complex organisation in which it is simply impossible to get everything right all of the time. Some of these same commentators who are also familiar with the ACCC, question whether it's more aggressive and litigious approach will be as effective and suggest that it may even have counterproductive effects:

I think one of the problems in Australia is that the ACCC is a very shrill organisation that – it basically shouts first and finds the facts later. ...in the UK, you do not get that sort of behaviour by regulators... so I worry that if the ACCC is not going to be balanced about how it enforces it [referring to the FGCC]... I certainly think that that's the sort of thing that in the long-term could really mean that the supermarkets ...just become weaker at bargaining on behalf of consumers with suppliers.⁹⁵¹

[From the perspective of those running supermarkets] even making the best efforts to treat suppliers well, it is difficult to get everything right all the time in a fast-paced, highly competitive environment. With intense competition, supermarkets need to purchase as efficiently as possible and the pursuit of that can result in mistakes being made. Conversely a retailer that caved into everything a supplier says would not be very competitive, and the customer would not get as good a deal. The important thing is that the ACCC, a bit like the grocery code adjudicator, when an issue comes up, can be proportionate about it. So they probably want to ask themselves ... three questions. First, what percentage of the overall set of agreements is affected; second what is the impact on consumers; and third what is the impact on suppliers. It also needs to understand the company policy, and what efforts the company has made to get compliance with that policy.

... so I think it's really important that ... the ACCC [is] looking at this as a long-term change program and being supportive of the direction of travel, as opposed to an opportunity to impose sanctions even with minor errors.⁹⁵²

⁹⁵⁰ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [80].

⁹⁵¹ Transcript of interview, former senior representative of the UK OFT, pp. 5-6.

⁹⁵² Transcript of interview, former senior representative of the UK OFT, pp. 17-18.