

9. Up for review and looking ahead

As previously mentioned, it was decided that the FGCC should be reviewed earlier than the five years generally allowed before such reviews. A three year time period, providing for a review in 2018, was settled upon. An early review was said by Treasury to be ‘appropriate’.⁹⁵³ Reasons were not given for that assessment. But it was almost certainly a matter discussed and agreed with key stakeholders, at least the AFGC and MSCs, and in the circumstances, given the degree of angst surrounding the issues that culminated in the Code, the sense that a timely ‘look back’ was appropriate is hardly surprising. That the FGCC was voluntary, and the first of its kind in this respect, may have also contributed to the view that there should not be a five year wait. If the Code was not living up to expectations then consideration would need to be given to follow up action – mandating the Code in particular – and after all, as the preceding account makes clear, such action was promised / threatened should the voluntary option be seen to have failed to have ‘fixed the problem’.

These good reasons for a review in 2018 aside, it should be acknowledged also that in the scheme of things, three years is not a long time to bed down a wholly new, and in some respects, novel set of industry arrangements. This is particularly so given that as a result of the transitional provisions, for some suppliers, the Code would not have affected their supply terms and conditions for some months (in some cases, over a year) until after the FGCC took effect. It should be borne in mind further that in effect the transactional requirements of the Code necessitated not just a change in the way of operating but arguably a wholesale shift in culture, on both the MSC and the supplier sides of the equation. Cultural change is by its nature a slow process.

Given these considerations, it is fair to say that while the 2018 review should produce some useful insights, deeper reflections on the implications of the Code for supermarket-supplier relations and regulation of the sector more generally may take longer to emerge. This is consistent with comments of one experienced observer of developments in both the UK and Australia:

*... it may be difficult to observe [the true effectiveness of a code] in a three year timeframe, simply because there's so much effort by all of the supermarkets going into – getting in compliance with the code...and you only really know when it's working when things go wrong.*⁹⁵⁴

It should also be acknowledged that there will be difficulties with reviews of this nature at any stage in isolating the impact of regulation vis-à-vis the impact of other factors operating in and affecting the industry. As one UK supermarket representative told us in response to a question about the effect that the regulatory developments have had on supermarket-supplier relations in that country:

...it's very difficult to isolate the impact of the GSCOP and the GCA, separate to everything else that has been going on in the environment at the same time, so you can't identify what

⁹⁵³ Explanatory Statement, *FGC Regulation 2015*, p. 37.

⁹⁵⁴ Transcript of interview, former senior representative of the UK OFT, p. 23.

*was the impact of the financial crisis or what was the impact of that movement, as opposed to that, and the whole lot has to be seen in tandem. Yes, it has an influence. Would it have happened without it? You can't say. It's very difficult to isolate it from that point of view.*⁹⁵⁵

At the time of making the Regulation, the Government identified a range of matters that should be considered for the purposes of the review:

- *the extent to which retailers and wholesalers have become bound by the code;*
- *levels of compliance with the code by retailers and wholesalers bound by the code;*
- *whether the purposes of the code (see clause 2 of the code) are being met;*
- *the extent to which the code assists in addressing any imbalances in the allocation of risks between retailers, wholesalers and suppliers;*
- *whether there are any further measures that would improve the operation of the code with respect to the matters mentioned in the two previous paragraphs;*
- *the interactions between the code and the Horticulture Code of Conduct;*
- *how the code compares with overseas regulation of commercial relations between retailers, wholesalers and suppliers;*
- *whether the code should be mandatory or voluntary;*
- *whether the code should include civil penalty provisions;*
- *whether retailers, wholesalers and suppliers should be bound by the code, and if so, to what extent;*
- *whether the code should be repealed or amended and, if so, the timing of any such repeal or amendment;*
- *the products that should be covered by the code.*⁹⁵⁶

No doubt there will be submissions from across the grocery industry as well as from others providing Treasury, which will conduct the review, with input on all of the matters identified above and Treasury can be expected also to consult with the ACCC. For the purpose of this report, however, we have chosen to focus on what would appear to be the overarching matter for consideration in the context of the review, namely 'whether the purposes of the code are being met'. Addressing that question subsumes in turn several of the other questions identified in the review list.

⁹⁵⁵ Transcript of interview, compliance manager at a major UK retailer, p. 27.

⁹⁵⁶ Explanatory Statement, *FGC Regulation 2015*, p. 37.

Clause 2 of the FGCC identifies the purpose of the Code as being:

(a) to help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and

(b) to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and

(c) to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and

(d) to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

The extent to and ways in which each of the elements of this purpose are being met are considered below. This consideration draws and elaborates on the findings and analysis in Part 6 of the report but again supplements it to the extent relevant and seen as helpful in this exercise, with an account of and comparisons with the code experience in the UK.

In the UK the GSCOP has been in place for seven years and the GCA for just over three years. At the outset it is perhaps notable to observe that in Australia the discourse surrounding the need to regulate supermarket-supplier relations has been as much if not more about fair trading than competition (albeit often with a link between the two). In the UK, by contrast, the primary if not exclusive focus originally and continues to be on competition and efficiency in the supply chain (as ultimately in aid of consumer welfare) justifying the introduction of the GSCOP and the establishment of the GCA.⁹⁵⁷ This was clear in the CC's 2008 report which called for the GSCOP and the GCA, was confirmed repeatedly in our UK interviews, and is reiterated in the recently completed review of the GCA, referred to below. These regulatory interventions were rationalised solely on competition grounds, to address market failure caused by supply chain practices that were viewed as transferring excessive risks to suppliers, in turn dampening incentives for innovation and investment and consequently resulting in consumer detriment, through a potential lack of choice and quality.⁹⁵⁸ As one interviewee, an experienced legal practitioner, recounted:

[The UK Code is] explicitly stated as a solution to a competition problem. It's explicitly not about fairness or anything else; it's about a market failure...it was about consumer welfare, it wasn't about fairness to competitors, it wasn't about fairness to all small suppliers or anything

⁹⁵⁷ See, e.g., Competition Commission News Release 33/06, *Groceries Issue Statement*, 15 June 2006, in Seely, p. 22.

⁹⁵⁸ CC 2008 report, [9.66]-[9.67]. See also Transcript of interview, John Noble, British Brands Group, p. 35; Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [28].

*else. ... It was explicitly stated as: this will harm consumer welfare in the medium term because choice and innovation will suffer. And that's what we're trying to fix.*⁹⁵⁹

This is not to discount the influence of 'a mood around fairness' and a 'mood around the impact on farmers'⁹⁶⁰ even if, as in Australia, the policy response did not ultimately address at least the latter. Correspondingly, there are views amongst UK commentators to the effect that codes and ombudsmen of the kind adopted in the UK and Australia reflect the reactivity of politics, and a 'political choice' about the need to protect small business and have in fact 'nothing to do with competition'⁹⁶¹ and, further, that the empirical evidence supporting risks to dynamic inefficiency in upstream grocery supply chains is weak.⁹⁶²

It is also relevant to note that in the UK there is no counterpart to the business-to-business fair trading provisions in the CCA. Perhaps reflecting this and the fact that the GSCOP is an instrument that was created by the CC, the emphasis on competition as distinct from fair trading or other equity-related considerations is readily apparent in the statement of purposes relevant to the GSCOP. The text of the Code is contained in a Schedule to an Order made by the then CC pursuant to its powers under the *Enterprise Act 2002*, the Groceries (Supply Chain Practices) Market Investigation Order 2009. The background to the Order states that the Order is made:

*... for the purpose of remedying, mitigating or preventing the adverse effects on competition concerned and for the purpose of remedying, mitigating or preventing detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effects on competition.*⁹⁶³

Following three years of the GCA's operation (the same time frame applicable to the FGCC review), the UK government conducted a review of the performance of the GCA to date, in which submissions were sought from stakeholders on the Adjudicator's performance, how much her powers have been exercised, how effective she has been in enforcing the GSCOP, whether to make orders relating to information gathering in investigations, whether to amend or replace the order that confers power on the GCA to impose financial penalties, whether some or all of the GCA's functions should be transferred to another public body and whether to close down the GCA.⁹⁶⁴ The results published in 2017 constitute an unambiguous commendation of the GCA and her work over the review period, finding that the GCA has been effective in the role of administering and enforcing GSCOP and concluding that there was 'evidence of a positive shift in the relationship between large retailers and

⁹⁵⁹ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 15.

⁹⁶⁰ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 3

⁹⁶¹ Transcript of interview, former senior representative of the UK OFT, p. 3.

⁹⁶² Transcript of interview, former senior representative of the UK OFT; Transcript of interview, compliance manager at a major UK retailer, p. 9.

⁹⁶³ CC, GSCOP (The Groceries (Supply Chain Practices) Market Investigation Order 2009, UK, p. 2.

⁹⁶⁴ Department for Business, Energy & Industrial Strategy and Groceries Code Adjudicator, *Groceries Code Adjudicator: statutory review*, 18 October 2016, <https://www.gov.uk/government/consultations/groceries-code-adjudicator-statutory-review>.

direct suppliers and an end to some of the unfair trading practices that were prevalent before the Adjudicator was appointed.⁹⁶⁵

As mentioned previously, the government has called also for evidence on the question whether to extend the remit of the GCA to indirect suppliers, which predominantly means primary producers and farmers.⁹⁶⁶ This reflects the continuing preoccupation with the plight of the primary production sector, and the political heat that it generates, notwithstanding that in neither the UK nor Australia have the Codes to date been extended to indirect suppliers and nor is it clear that these instruments would be appropriate or effective in addressing the myriad of challenges facing farmers. As a UK commentator pointed out in our interview with him:

...when you go along to the conferences and meetings, people are talking about the prices that primary producers get. And there are two issues [with] that. Because the code does not talk about price, the adjudicator has no powers to determine the prices that people get paid. And the second thing is, it doesn't protect primary producers if they go through a secondary supplier. Because it's a direct relationship with the supermarket and the secondary supplier. So there are apparent gaps, [but] the pressures and the push to have someone deal with this, are sort of misdirected, because this architecture is not dealing with the policy issue.⁹⁶⁷

At the time of writing this report, the Department of Business, Energy & Industrial Strategy and Groceries were analysing feedback received and the results of the review on the GCA's remit extension were yet to be released.

I. Trust and cooperation

Decoded, whether and the extent to which this element of the FGCC's purpose is being fulfilled is in essence a question of whether and the extent to which the Code is changing behaviours in the buyer-supplier relationship and arguably in ways that reflect not just the letter but the spirit of the Code (bearing in mind that the Code itself does not prescribe 'trust and cooperation'; rather such relational qualities are implicit in many of its provisions). As mentioned previously, given that behavioural change of this nature and on this scale means changing deeply ingrained expectations and ways of operating and interacting, it may well be just too soon to draw any firm conclusions as to the fulfilment to date of this purpose. However, based on our research and the analysis and findings set out above, it is possible to make at least the following observations.

As pointed out in Part 6, any behavioural change is predicated upon both buyers and suppliers being both aware of and understanding the provisions of the FGCC and their implications in the context of

⁹⁶⁵ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [7].

⁹⁶⁶ Department for Business, Energy & Industrial Strategy and Groceries Code Adjudicator, *Groceries Code Adjudicator: extending its remit*, 18 October 2016, <https://www.gov.uk/government/consultations/groceries-code-adjudicator-extending-its-remit>.

⁹⁶⁷ Transcript of interview, director, leading UK economics consultancy, pp. 17-18. See also Transcript of interview, compliance manager at a major UK retailer, p. 18 supporting the view that GSCOP should not be extended.

supply negotiations, agreements and, as relevant, disputes. On the buying side it is evident that the retailer signatories, the MSCs at least, have gone to considerable lengths to ensure that awareness of and training in the FGCC penetrates all relevant corners of their sizeable organisations. Reports from the UK are to similar effect as regards the seriousness with which the retailers have taken on their obligations under GSCOP, noting at the same time that that Code is mandatory and that there was a notable pick up in compliance response once the GCA was appointed in 2013. Tacon recalls that upon passage of the Code in 2010, retailers took steps to introduce written supply agreements and train their buyers. She is less certain that CCOs were appointed and she has doubts as to the extent to which these roles had any prominence in the actual operation of supply arrangements. Upon her appointment, however, ‘all of a sudden a lot of the CCOs changed when they realised how much I was going to be asking them to do’ and those retailers who had not taken action in this respect, acted with speed to get these appointments in place.⁹⁶⁸ A similar observation was made by the UK consultant:

*... on the back of the code and the adjudicator, the large supermarkets are investing much more heavily in staff training programs ... that's prompted by the adjudicator and the code being more rigidly enforced, rather than being something that they're doing unilaterally.*⁹⁶⁹

A compliance manager at one of the major grocery retailers in the UK told us that their employer ‘has been supportive of the code ... it's been very supportive of the GCA and will continue to do so.’⁹⁷⁰ She explained that while the retailer already had a code of practice that aligned with the spirit of GSCOP, the formal instrument has required considerable tightening up and monitoring of processes, as well as much more systematic training of staff, and auditing of complaints and responses to them. She saw this as a positive development.⁹⁷¹

*It [referring to GSCOP] has brought some clarity around the way we operate and how other supermarkets are operating. It has given us some things to have a look at, and out of all these things, it doesn't harm to have a look at your own processes again, and say, "Okay, have we got it absolutely right? Can we do any better?"*⁹⁷²

Notably, in the recently completed review of the GCA, it was noted that while there had been opposition initially to the establishment of the GCA by large retailers, concerns about the administrative burdens and the potential inhibition of commercial practices, such concerns had not been realised. Indeed, in responses to the consultation for the review, the large retailers indicated that they saw ‘the GCA as having a beneficial impact on the groceries market, by increasing scrutiny over retailers’ compliance with the Code, increasing understanding of the Code by all parties and increasing awareness amongst large retailers of supplier concerns’. As noted in the report, one large

⁹⁶⁸ Transcript of interview, Christine Tacon, p. 13.

⁹⁶⁹ Transcript of interview, director, leading UK economics consultancy, p. 22.

⁹⁷⁰ Transcript of interview, compliance manager at a major UK retailer, p. 12.

⁹⁷¹ Transcript of interview, compliance manager at a major UK retailer, p. 14.

⁹⁷² Transcript of interview, compliance manager at a major UK retailer, p. 19.

retailer has pointed out that ‘ “by focusing on improving efficiencies and removing uncertainty from the supply chain, the Adjudicator has reinforced the impetus for change in the industry”’.⁹⁷³

On the supply side, the picture is much more mixed, in both Australia and the UK. At home, courtesy to a significant extent of the efforts of the AFGC, a large number of suppliers have been told about, if not received training in, the Code. That said, the AFGC membership represents only a small fraction of the overall supplier community – some 200 businesses are members of the association, out of a sector that encompasses some 3,000-4,000 businesses (ie only approx. 5%).⁹⁷⁴ Moreover, as Dawson acknowledges, larger suppliers are likely to be disproportionately represented amongst those who have benefitted from training – whether AFGC-provided or self-initiated harnessing internal and/or external legal resources.

The head of the AFGC equivalent in the UK, the British Brands Group, was less optimistic about the level of awareness among its members, ‘we want all the suppliers to understand GSCOP and be able to use it and we’re rather shocked, shall we say, that they’ve been rather slow off the mark.’⁹⁷⁵ That said, an annual survey conducted by the GCA indicated that as of 2016, 45% of large suppliers had received training on the Code, as compared with 29% of small and 28% of medium size suppliers. For 42% of respondents, this training was being conducted by an external agency or consultancy, 35% by the GCA’s office and 26% by a trade association.⁹⁷⁶ Of those who had not received training, 56% reported that they either did not know training was available or did not know how to access or who provides it.⁹⁷⁷

Lack of awareness in both jurisdictions may in part just be a product of time. We certainly got this sense from our interviewees in the UK where the GSCOP has been in place now for seven years, a compliance manager at one of the major retailers reflecting that ‘...awareness from the supply base is good...the trends over the last couple of years are all going in the right direction, in terms of awareness, in terms of number of issues being raised.’⁹⁷⁸

In her 2015-16 Annual Report the GCA reported that, at least with regard to the GCA annual survey, awareness among suppliers had doubled, increasing from 574 in 2014 to 1,145 in 2016. Respondents in 2016 included 978 direct suppliers (representing 85% of the total), 163 indirect suppliers and 41 trade associations.⁹⁷⁹ Overall awareness of the GCA among direct suppliers increased from 71% to 78% between 2015 and 2016, however the level of awareness varied across the sector. Earlier annual reports highlighted the lack of supplier awareness of the GCA as a key issue that was to be targeted.⁹⁸⁰

⁹⁷³ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017,

⁹⁷⁴ Transcript of interview, Gary Dawson 2, p. 1.

⁹⁷⁵ Transcript of interview, John Noble, British Brands Group p. 6.

⁹⁷⁶ As these percentages exceed 100% in total it may be assumed that a small proportion of respondents may have sourced training from more than one training provider.

⁹⁷⁷ GCA, *GCA Annual Survey Results 2016*, YouGov, pp.13-14.

⁹⁷⁸ Transcript of interview, compliance manager at a major UK retailer, p. 21.

⁹⁷⁹ *GCA Annual Report 2015-16*, p. 17.

⁹⁸⁰ *GCA Annual Report 2013-14*, p. 10; *GCA Annual Report 2014-15*, p. 50.

While these figures suggest awareness is increasing it is worth noting the potential for self-selecting bias to creep into the findings:

*... so what about all the people who didn't fill out a questionnaire? Because [if] I know nothing about GSCOP, I won't bother filling in the questionnaire. So my feeling is that actually the levels of awareness are lower than her YouGov survey would indicate.*⁹⁸¹

Moreover, in the July 2017 report on the GCA review, it was noted that there was significant work to be done in improving awareness of the GSCOP and increasing the number of suppliers trained on the Code.⁹⁸² Evidently, this is seen as an ongoing project.

In addition, the apparent high awareness amongst large suppliers relative to small suppliers is not as troubling as it might first seem. This is because, as one UK observer put it, larger suppliers 'can be the canary in the mine'. She went on to explain:

*A lot of the practices that happen in the supermarkets are not - we're not really talking about things that happen bilaterally in any single individual relationship. If a grocer has a policy of behaving in a particular way, if they do something in particular, they'll do it across the board and chances are that it will be beating up the small suppliers even harder than it's beating up the large suppliers, who can't actually stand up for themselves to a degree. So if there is something that a big supplier is willing to speak about as an issue that is badly affecting them, you can pretty much bet that it's affecting the smaller supplier who won't speak up even more. So it's a way of actually exposing some of these issues that will not get exposed, because small suppliers more struggle to speak up... it's been bigger suppliers who are willing to keep the pressure up.*⁹⁸³

It is also clear that the GCA herself has been highly instrumental in the UK in generating awareness and understanding of the implications of the GSCOP, not just amongst suppliers but as if not more importantly, amongst retailers – using the CCOs, with whom she has cultivated a close working relationship, as a key channel into these organisations. For example, Tacon holds quarterly meetings with these managers at which she reports back on issues that she has been hearing in the industry and seeks their input and views. Minutes of these meetings are published on the GCA website.⁹⁸⁴ It is expected that managers will report back to her on issues she has raised at the next meeting and her reflection on this approach is that 'the Code Compliance Officers have all been listening to what I've been saying and taking it backstage to resolve.'⁹⁸⁵

⁹⁸¹ Transcript of interview, John Noble, British Brands Group, p. 39.

⁹⁸² Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [8].

⁹⁸³ Transcript of interview, experienced legal advisor to suppliers in the UK, 22.

⁹⁸⁴ See e.g. <https://www.gov.uk/government/publications/meeting-record-december-2016-quarterly-meetings>.

⁹⁸⁵ Transcript of interview, Christine Tacon, p. 14.

Tacon also holds regular 'Supplier mornings',⁹⁸⁶ and publishes quarterly newsletters,⁹⁸⁷ best practice statements⁹⁸⁸ and case studies,⁹⁸⁹ all of which are intended not only to raise the profile of GSCOP and her work but to guide industry participants in developing ways of working that are in compliance with the Code – measures reported on as having positive effects in the recent review.⁹⁹⁰ It is notable that the GCA does all this despite being a part-time appointee only (she works three days per week) and having an office run on a skeletal staff made up of government secondees and contractors. Tacon's office is wholly funded by a levy on the retailers which for 2016/17 was £2 million.⁹⁹¹ For the Tesco investigation, an external law firm was contracted to assist the GCA and as some have pointed out, 'hiring an external law firm to run a regulatory investigation is suboptimal because they don't know how to do it.'⁹⁹² The question of funding and staff for the GCA was canvassed in the recent review and it was concluded that given the GCA had proven to be so effective, the current resourcing arrangements should be seen as sufficient.⁹⁹³

As mentioned above, the GCA also conducts annual surveys, similar to but more extensive than the AFGC annual survey of its members previously referred. This acts as a mechanism by which to collect information on current Code-related concerns and uses the results of these, which are presented at an annual conference, to help her set her top priorities and generate discussion in the industry about how specific practices and code compliance generally can be improved. There is significant participation in these surveys – in 2016, the survey was completed on behalf of 921 direct suppliers, 105 indirect suppliers and 44 trade associations.⁹⁹⁴ In addition to collecting data on levels of awareness of GSCOP, the surveys canvasses views on:

- readiness by suppliers to raise issues with the GCA;
- reasons for not raising an issue;
- awareness of the availability of training and extent to which suppliers are being trained on the Code;
- extent to which suppliers have written supply agreements with designated retailers;
- extent to which suppliers know who and where to find a retailer's CCO; and
- experiences with specific issues such as aspects of retailer practice that are having the most negative impact.

One of the innovative aspects of these surveys is the publication of a 'league table' reflecting respondent supplier views on change in retailer practice over the last year and overall assessment of

⁹⁸⁶ News story, 'GCA Supplier Mornings' 3 March 2017, <https://www.gov.uk/government/news/gca-supplier-mornings>

⁹⁸⁷ GCA, Newsletters, <https://www.gov.uk/government/collections/gca-newsletters>.

⁹⁸⁸ GCA, Best Practice Statements, 24 January 2017, <https://www.gov.uk/government/collections/gca-best-practice-statements>.

⁹⁸⁹ GCA, Code clarification case studies, 14 June 2016, <https://www.gov.uk/government/collections/code-clarification-case-studies>.

⁹⁹⁰ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [10], [64]-[72].

⁹⁹¹ Department for Business, Energy & Industrial Strategy and Groceries Code Adjudicator, *Groceries Code Adjudicator: statutory review*, 18 October 2016, Part 1.

⁹⁹² Transcript of interview, experienced legal advisor to suppliers in the UK, p.39.

⁹⁹³ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [73]-[74].

⁹⁹⁴ GCA, *GCA Annual Survey Results 2016*, YouGov.

Code compliance. In the 2016 survey results, for example, Aldi was ranked highest, 98% rating the retailer as either complying consistently well or mostly with the Code, whereas Morrisons ranked lowest, with 80% across these criteria.⁹⁹⁵ Tacon reflects that it is this particular aspect of the survey that has had ‘the biggest impact’ – retailers are now competing with each other to rank well on the GCA survey and in the eyes of their suppliers in relation to GSCOP compliance.⁹⁹⁶

In addition to the GCA survey findings and the ‘league table’ rankings, all grocery retailers operating under the GSCOP must publish the summaries of their GSCOP compliance that they are required under the Order to submit to the CMA. The British Brands Group in turn reviews these published summaries and publishes them on their website. In their most recent review the Group found that while retailers were ‘broadly’ meeting the statutory requirements the reports provided, ‘little in the way of insight or elucidation.’⁹⁹⁷ The review also stresses that this self-reporting by the retailers provides, ‘just one perspective and in a formal compliance context’ and that the GCA survey is complementary in its provision of an additional viewpoint.⁹⁹⁸

The impact that Tacon has had on awareness in the industry and in prompting retailers to take steps to ensure compliance with the UK Code is reflected on positively by industry observers:

*... one of the things that Christine Tacon has done well is to raise awareness of the issues, to get people around the table and discuss things and to the extent that supermarkets are putting in place, structures internally and training and compliance programs to raise awareness inside the supermarkets of the code and how they should apply this. That is likely to reduce the need to launch investigations.*⁹⁹⁹

These sentiments were echoed in the 2016-17 review of the GCA, emphasising that Tacon’s approach of raising awareness and engaging with parties across the sector had almost certainly reduced the need for formal action by way of investigations and arbitrations to be taken to a greater extent and had allowed the focus to be on engendering voluntary compliance.¹⁰⁰⁰

As also noted in Part 6, being aware of or even trained in a new set of rules, no matter how practical or applied the training or accomplished the trainers, does not necessarily translate into appreciation of how to ‘use’ the rules to proper or best effect in the setting of an actual negotiation or dispute. Such appreciation is also inevitably going to take time and various kinds of regular reinforcement (examples of which are available from the UK experience) to infiltrate in a practical sense. This is particularly so given the not unexpected levels of scepticism, cynicism even, amongst suppliers, referred to above.

⁹⁹⁵ GCA, *GCA Annual Survey Results 2016*, YouGov.

⁹⁹⁶ Transcript of interview, Christine Tacon, p. 13.

⁹⁹⁷ See, eg, the Aldi summary for 2015-16 in British Brands Group, ‘Retailers’ GSCOP reports for 2015-16: a review of retailers’ published reports on compliance’,

<http://www.britishbrandsgroup.org.uk/upload/file/GSCOP%20retailer%20compliance%20report%202015-16.pdf>

⁹⁹⁸ British Brands Group, ‘Retailers’ GSCOP reports for 2015-16: a review of retailers’ published reports on compliance’,

<http://www.britishbrandsgroup.org.uk/upload/file/GSCOP%20retailer%20compliance%20report%202015-16.pdf>

⁹⁹⁹ Transcript of interview, former senior representative of the UK OFT, p. 32.

¹⁰⁰⁰ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [45]-47].

In the short time that has passed since the FGCC taking effect, however, there appear to be signs that, amongst some suppliers at least, the Code's provisions are being used. This is in the sense at least of providing them with a basis on which to raise and test matters relevant to their trading terms and conditions in a way that was not previously seen as possible, for whatever reason. As the UK adjudicator notes, simply having a Code – or perhaps an adjudicator – has had a positive impact:

*But people were saying to me, just having me there is making a difference and things are better, they see changes... they are noticing it. And I think that most of them like to feel I'm making a difference, but the market is very hard. The competition is tough.*¹⁰⁰¹

It is arguable that Tacon underestimates the positive impact she has had and, in particular, how favourably her collaborative approach in working with CCOs and in turn as an intermediary between these representatives of retailers and suppliers is seen, a feature of her effectiveness to date remarked on in the recently completed review of the GCA.¹⁰⁰² Indeed, according to one of our interviewees, the GCA is seen to have been so effective that there are now proposals to replicate the model in other sectors.¹⁰⁰³ She points out that for a role of this nature to be effective, you need someone:

*... who knows enough about the industry, knows enough about where the skeletons are buried, can take a softly softly approach... that dialogue [between the GCA and industry members] does make a difference and I think that having someone who can engage that meaningfully is more useful than having an ex-Judge who sat there waiting to see if there was any dispute that can come in for you to tackle.*¹⁰⁰⁴

At least for one observer close to suppliers – the head of the British Brands Group – the GCA's approach has given the CCO role real meaning and enabled it to be used effectively as a conduit for mediating on issues as they arise in supply arrangements (including on issues that are not strictly covered by the GSCOP):

We always knew the code compliance [officer role] would be there but we never really envisaged how it might work, and I thought it was a flash of inspiration and skill that Christine was able to get the relationship going with code compliance officers. I think it's brought a huge, huge benefit and the reason for it is that suppliers don't want an antagonistic relationship either individually or necessarily through the regulator. They'd much rather see things worked out in this area in a collaborative, positive way if at all possible, and that's exactly what Christine is doing with the code of compliance officers. But she's been very firm about what her areas of focus are and where she's looking to them to come up with improvements. I think it's very telling that she got a voluntary agreement, for example, on

¹⁰⁰¹ Transcript of interview, Christine Tacon, p. 24.

¹⁰⁰² Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [10]-[106].

¹⁰⁰³ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 12, referring to the proposal for a 'pub adjudicator'.

¹⁰⁰⁴ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 19.

*forensic auditing for 8 of the 10 designated retailers. In strict terms, you could argue that it was not entirely a GSCOP matter, but it was her relationship with the [code compliance officers] and her listening to suppliers saying these forensic audits were giving huge problems, that she was able to broker an agreement. That, for me, is testament to her role and skill. If she didn't have that collaborative arrangement she would be limited to taking on one or two issues a year in the form of big investigations which are very costly and no doubt challengeable. As it is, she has instead five priority areas of focus, more than double what might be achievable otherwise. It is so much better to be able to deal with concerns with the cooperation of code compliance officers, and so that's why I think it is an inspiration, to be honest.*¹⁰⁰⁵

Another interviewee describes the approach taken by GCA in using the CCOs to air supplier concerns and stave off the escalation of disputes as follows:

*...having a channel to resolve some of these things without escalating them is really quite effective, and she can do it in a way that individual suppliers can't, so she can go say "look, I'm hearing stuff about what you're doing on third party packaging, can you explain to me what it is you're doing? I'm not using my formal powers, but I'd quite like to understand what you're up to." Oh, okay, let's see, okay best practice would be to do this, can you go away and look at it. I'm not using any of my formal powers, I'm not going to put a case study in place, but actually can you think about best practice and here are principles of best practice to do that." That's the kind of outcome you can achieve with her in that role that you couldn't achieve in any way, really.*¹⁰⁰⁶

It appears that this approach is paying off for suppliers in the UK, if not also for retailers given that, as pointed out in the 2017 review, the 'current, collaborative process is highly regarded and a means that has, to date, avoided any further, full investigations'.¹⁰⁰⁷ One supplier advisor told us that as a result of the GCA's activities:

...there's certainly much more confidence on the supplier's side. Commercially, there's all sorts of pressures. But in terms of confidence to engage the code. Anecdotally, plenty of people will tell me we've raised the code in negotiations and actually, it's been effective in getting it all - so I've heard back from more than one. There is now a little cottage industry of people who train suppliers on the use of the code, which didn't exist until the last two or three years. So people are seeing some value in that. There has certainly been much more interest on supply. So I think in 2010, you were still looking at quite a sceptical audience. I

¹⁰⁰⁵ Transcript of interview, John Noble, British Brands Group, p. 40.

¹⁰⁰⁶ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 20.

¹⁰⁰⁷ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [92].

*think 2013 sort of changed the perception of it on the supplier's side and I think the launch of the Tesco investigation, it changed it again.*¹⁰⁰⁸

On the buyer side, the same interviewee also saw change:

I think people's views and people's behaviours of what is acceptable has shifted.

..

*I mean yeah, the fact that these buyers are trained the whole time on this stuff, it doesn't go without having an impact, it does.*¹⁰⁰⁹

It may be too early to say whether the positive changes in UK retailer-supplier relations that are attributed to the role being played by the GCA are likely to be replicated in Australia. Arguably not, given that the ACCC is unlikely to play a similar role. Its role is clearly as enforcer rather than as mediator in relation to the FGCC. This raises the question whether in fact a dedicated ombudsman-style scheme should be introduced here. As recounted above, many pressed for it in the FGCC consultation by Treasury and it was recommended by the report of the subsequent Senate inquiry. No doubt, it is an issue that will be revisited in the forthcoming review.

The extent to which early experiences with the FGCC instil confidence in suppliers to continue in the vein of using the Code, and in turn strengthen trust and confidence in their relationship with their customers and in the Code itself, is likely to depend very much on how MSC personnel respond to suppliers raising Code-related issues. To the extent that such personnel show a receptiveness to listen to and act on concerns raised in relation to the application of the Code provisions, such confidence is likely to grow. This in turn requires that buyers themselves see the FGCC as a positive development.

To the extent that retailer responses are dismissive of or result in what appears to the supplier in question to be an exercise in semantic interpretation (so as to require legal input even perhaps), the inverse will apply. This too, and with it the slow pace of cultural change, is evident in the UK, suggesting not unexpectedly that responses will vary across the industry and even within individual retail organisations:

*If you speak to some of the hardened old-school buyers, some of the people who have worked for supermarkets for a long time, they would tell you that she's [the GCA] ruined the grocery sector, closed off a revenue stream....*¹⁰¹⁰

The necessarily snail's pace development of more trust and cooperation in these relationships will not only depend on the experience in and outcomes of actually using the FGCC, however. Other communications, actions and initiatives of the MSCs that bear on supplier relationships in general are

¹⁰⁰⁸ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 30.

¹⁰⁰⁹ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 45.

¹⁰¹⁰ Transcript of interview, John Noble, British Brands Group, p. 36.

likely to set a tone or create an environment that is either conducive to or damaging of these relationships and the extent to which the Code is able to play a meaningful role in strengthening them. By way of illustration, as previously highlighted in this report, there has been the episode of the Woolworths Chairman promising 'higher standards' while at the same time standing behind the company's decision to defend allegations of unconscionability on the ground that a scheme such as 'Mind the Gap' was a normal and by implication acceptable mode of doing business. Such an episode is likely at best to send a mixed signal, at worst to engender further cynicism and potentially have the effect of undermining the efficacy of the Code.

In the UK it is material to note in this regard that the GCA not only works with and through the CCOs who she describes as her 'mouthpiece' but she has also asked for and been given for each designated retailer, a CEO or 'board level contact' and for listed companies, has annual meetings with the chairman of the board's audit committee (a person she points out is 'acutely aware of what the regulator can do and of risk').¹⁰¹¹ It is to be expected that this helps to ensure that the messages about the importance of Code compliance are as much top down as bottom up. As Tacon explains, these contacts are important to ensure that retailers have a culture conducive to compliance and that is critical because 'you can say everyone is trained in [the Code], but [then be] putting pressure on your buyers, such that the only way they can achieve what you've asked them to achieve is by breaking the code.'¹⁰¹² This view is supported by experienced consultants in the UK who observe that 'at board level, the issue of supplier relations and goods violations is something that boards care about... is the prime driver of what they do..'.¹⁰¹³ They also remark that the introduction of substantial fining powers for the GCA would have concentrated the minds of retailer boards even further.¹⁰¹⁴

Like the ACCC, the GCA also has powers to launch formal investigations relating to alleged breaches of GSCOP and significantly but, unlike the ACCC, since April 2015 has had the power to impose a maximum financial penalty of 1% of the relevant retailer's UK turnover.¹⁰¹⁵ As noted previously, the UK Secretary of State for Business, Innovation and Skills, Vince Cable, had said in 2012 that he reserved the right to introduce pecuniary penalties if naming and shaming measures alone provided insufficient to bring about industry change.¹⁰¹⁶ In response to the outcome of the Tesco investigation Cable was reported as saying:

This is an historic day for the groceries code adjudicator and shows we have created a regulator that has real teeth.

¹⁰¹¹ Transcript of interview, Christine Tacon, p. 17.

¹⁰¹² Transcript of interview, Christine Tacon, p. 32.

¹⁰¹³ Transcript of interview, former senior representative of the UK OFT, p.27.

¹⁰¹⁴ That said, such matters are clearly relative. As another interviewee pointed out, when Tesco was facing a criminal investigation, including potential jail terms for individuals, in a recent Serious Fraud Office matter this would have had to have been 'much higher up the food chains in terms of Tesco's concerns than the code' (Transcript of interview, experienced legal advisor to suppliers in the UK, p. 29).

¹⁰¹⁵ The GCA's power to issue a financial penalty was brought into effect by the Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 which came into force on 6 April 2015.

¹⁰¹⁶ Rebecca Smithers, "'Unfair' supermarkets could face hefty fines under new watchdog", *The Guardian*, 5 December 2012.

Last week I secured the final agreement in government to proceed with legislation to enable the regulator to impose hefty fines for those supermarkets found guilty of mistreating suppliers.¹⁰¹⁷

Such powers and potential sanctions too no doubt play a role in sharpening the attention of retailer senior management on the consequences of falling short in performance on code compliance.

To date the GCA has held only one investigation – into delayed payments and payment for positioning by Tesco. She found a breach of GSCOP in respect of the former, but not in respect of the latter. After a two year investigation that involved extensive information gathering, in her lengthy report released in January 2016, Tacon found that the breach with respect to delayed payments had arisen in only a minority of instances and was ascribable to a range of factors, including data input errors and duplicate invoicing but also and more significantly for senior Tesco management, due to the retailer's focus on meeting financial targets:

It was clear from the evidence that a major focus of the Tesco commercial team during the investigation period was on hitting budgeted margin targets. A percentage margin target was a key element of many of the Joint Business Plans (“JBP”) which Tesco negotiated with suppliers on a periodic basis. Payments to maintain the margin target were requested from suppliers by Tesco regardless of whether the planned growth had been achieved and regardless of whether Tesco had delivered on its own JBP commitments. I found that the direction being given to Tesco’s buying team as to the status and enforceability of JBP targets was contradictory and unclear. I received internal Tesco emails which encouraged Tesco staff to seek agreement from suppliers to the deferral of payments due to them in order temporarily to help Tesco margin. I also saw internal Tesco emails suggesting that payments should not be made to suppliers before a certain date in order to avoid underperformance against a forecasted margin. I found that Tesco knowingly delayed paying money to suppliers in order to improve its own financial position.¹⁰¹⁸

Tacon further found that ‘cultural’ factors were at play:

One of the key cultural factors which contributed to delay in payments was the apparent reluctance of some Tesco buyers to pro-actively engage in the resolution of payment disputes. There were times when Tesco did not appear to even attempt to resolve supplier concerns before unilaterally deducting money from suppliers. I found the delay that resulted from a failure by Tesco to fully engage in resolving difficulties to be unfair and unreasonable. Buyers frequently sought to use money owed to a supplier as leverage in negotiations for future agreements or promotions. I found that Tesco acted unreasonably when seeking to

¹⁰¹⁷ Matthew Weaver, ‘Tesco under investigation by new regulator over dealings with suppliers’, *The Guardian*, 5 February 2015.

¹⁰¹⁸ GCA, Investigation into Tesco plc, 26 January 2016, p. 6.

*bring the resolution of debts into other commercial negotiations and delaying payment of monies owed until other negotiated terms were agreed.*¹⁰¹⁹

The GCA did not have the power to financially sanction the company retrospectively but she made a series of recommendations directed at preventing the recurrence of the practices in question, required Tesco to provide a detailed implementation plan within four weeks of the report's publication and to then report quarterly on compliance with the recommendations.¹⁰²⁰

Demonstrating arguable parallels with Coles's response to the ACCC's unconscionable conduct action, the GCA's investigation and findings elicited a positive and constructive response. Tesco chief executive Dave Lewis reportedly said Tesco had changed substantially:

*Over the last year we have worked hard to make Tesco a very different company from the one described in the GCA report. The absolute focus on operating margin had damaging consequences for the business and our relationship with suppliers. This has now been fundamentally changed.*¹⁰²¹

Evidently this was more than just words. At the Food and Drink Federation Convention in London in late June 2016 Tesco Chief Product Officer Jason Tarry again emphasised the importance of rebuilding trust and transparency with suppliers so as to ensure that the company could provide the best service to their customers:

*Crucially, we want to do this by working with our partners in a simple and straightforward way which is good for our customers, good for our suppliers, and good for Tesco. So, over the last year, we've put in place a number of measures to help improve the way we work with our suppliers.*¹⁰²²

Steps taken reportedly included the introduction of a 'Fair for Farmers Guarantee' in support for British dairy farmers; and the announcement of the first long-term contracts for potato farmers and packers, worth £12 million (\$20.6 million) over three years. A supplier survey subsequently conducted by the GCA that included approximately 500 Tesco suppliers found 65% of respondents had seen an improvement in the way Tesco operates, making Tesco the most improved retailer in that survey.¹⁰²³ This is consistent with the positive report from British Brands Group's John Noble about the impact of the GCA's investigation into Britain's biggest grocery retailer on the situation for suppliers generally:

... the Tesco investigation made a huge impact for suppliers. Before it, money would be unilaterally deducted from trading accounts for all sorts of reasons, and trying to get that money back when it had been wrongly deducted could be a real struggle and not always

¹⁰¹⁹ GCA, Investigation into Tesco plc, 26 January 2016, p. 7.

¹⁰²⁰ The five recommendations of the GCA were: (1) Money owed to suppliers for goods supplied must be paid in accordance with the terms for payment agreed between Tesco and the supplier; (2) Tesco must not make unilateral deductions; (3) data input errors identified by suppliers must be resolved promptly; (4) Tesco must provide transparency and clarity in its dealings with suppliers; and (5) Tesco finance teams and buyers must be trained in the findings from this investigation.

¹⁰²¹ Emma Simpson, Tesco knowingly delayed payments to suppliers', *BBC News*, 26 January 2016.

¹⁰²² 'International news: Tesco improves supplier relations', *RetailWorld*, 8 July 2016.

¹⁰²³ 'International news: Tesco improves supplier relations', *RetailWorld*, 8 July 2016.

*successful – you might need to negotiate a solution; you may get a better deal later on but not actually get your money back. Now such deductions are much more difficult and that, for me, has a huge impact on suppliers' certainty of doing business. That was a big win, I think, for Christine too and absolutely on message on what the code's all about. It was a prevalent practice.*¹⁰²⁴

Another interviewee sees the Tesco case as having had a positive impact in raising the profile of the GSCOP and the GCA generally:

*For whatever reason, it attracted a lot of attention and interest and I'm finding people coming to me, which I haven't had for years, where people come to me and say, well, we understand more about the code, can you come in and train us, can you come talk to us. It's been a slog trying to persuade people that they ought to be interested in it and actually, it's the other way around now. And you know, smaller national suppliers who are not the people who are usually on top of this stuff are now following it closely anyway.*¹⁰²⁵

Noble is also highly complementary of the way in which Tacon handled the investigation and reflects that the outcomes that she secured would not have been secured by the CMA:

*...generally speaking [suppliers] ...feel that the Tesco investigation and the way that she dealt with the findings in her report where she was direct and forthright was spot on. And I can't see how else you would have got that report in the public domain without an independent adjudicator. I cannot see the CMA producing a report like that. And it hit the nail on the head. It has, I think, changed the ten designated retailers' way of trading significantly for the better.*¹⁰²⁶

Others too, despite having initially harboured scepticism about the need for and potentially anti-competitive effects of the GCA, are favourable in their view of the balanced way in which Tacon approached her findings in the investigation:

*I was impressed with the report on Tesco. ... What's good about it is that the GCA documents all of the problems clearly. It then says that Tesco has agreed to address all these issues. It also acknowledges that Tesco is a big supermarket and that these are a minority of instances and that in the majority of relationships there is no problem. So it is balanced and reasonable report, trying to solve a problem sensibly and without sensational headlines.*¹⁰²⁷

Back in Australia, news that the ACCC is investigating possible code breaches is also likely to be material, either in reinforcing or in weakening FGCC-related trust and confidence amongst suppliers, depending again to some extent on MSC reactions to these investigations and their outcomes.

¹⁰²⁴ Transcript of interview, John Noble, British Brands Group, p. 38.

¹⁰²⁵ Transcript of interview, experienced legal advisor to suppliers in the UK, pp. 31-32.

¹⁰²⁶ Transcript of interview, John Noble, British Brands Group, p. 41. See further the positive reflections on the handling of the investigation and its outcomes in Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [52]-[57].

¹⁰²⁷ Transcript of interview, former senior representative of the UK OFT, p.5.

Equally the approach taken by the ACCC in its handling of these investigations is likely to affect retailer attitudes to the Code.

II. Transparency and certainty

There can be no quibble that the advent of written supply agreements with a set of terms and conditions that must cover the ground stipulated by the FGCC and that cannot be altered within the life of the agreement, except with the consent of the supplier, constitutes a step change in supermarket-supplier relations, and arguably for the better. The certainty provided by such agreements must enable suppliers to plan for their business in a way that would not have been or seen to have been as possible under former less formal and less stable or secure arrangements. The way in which such certainty is now manifested and its benefits for small suppliers particularly were extrapolated by a MSC representative in the following terms:

...the small suppliers, what they get now is the certainty of trading with us. So they have published, that they can look at, the 18 months ahead. They can look at when that range next is going to be looked at, and when their products may or may not be at some risk of de-listing. And they can look at the performance, and they get details from us on how well the product is going relative to the rest of the category. They have published, in front of them, our principles for laying our products on the shelf and how much space we'll give and where we'll give space for particular items, and how much space they will get relative to their volume of sales. They get notification of when a review is about to come up, and basically three months' notice to say, your product is at risk, a noted risk of deletion; come and tell us what you want to do with your range. And then get a notice with sufficient time to have a decision, if it goes against them, reviewed by a senior manager. So suddenly you have a whole lot of concrete, set rules that a small supplier can apply to their business without having to beg or plead or appear to be doing anything other than exactly what's permitted to them. So it's quite a strong platform for small suppliers. Whereas, as you say, large suppliers could do that for themselves anyway, and use that ability to come and argue with us. But suppliers, small suppliers, now have that encoded as a right for them to come and do that, too. So it's actually very good from a small supplier point of view.¹⁰²⁸

As far as we are aware, there is no publicly available data on the extent to which there has been compliance by the FGCC signatories with the requirement to have written supply agreements. Results from the 2017 AFGC survey of its members indicated that substantial proportions of supplier respondents saw no improvement in the extent to which there were written supply agreements with their retailer from the previous year (34% for Coles, 43% for Woolworths and 40% for Aldi). Then again, data from the UK suggests that an expectation of 100% compliance in this respect would be overly optimistic. In that jurisdiction, despite the GSCOP having been in place for seven years, as of 2016 the GCA survey indicated that the highest level of compliance with the written supply agreement

¹⁰²⁸ Transcript of interview, MSC representative, p. 9.

obligation was by Aldi and that was only in respect of 69% of the suppliers who responded to the survey. That said, amongst all retailers, the survey showed improved levels of compliance from the previous year,¹⁰²⁹ and the compliance manager at Waitrose whom we interviewed reflected that overall the impact of written supply agreements has been significant for suppliers, in terms of providing much greater certainty of the terms and conditions under which they are trading.¹⁰³⁰

The banning of unilateral and retrospective variations to such agreements under the FGCC is also a particularly material and positive development for suppliers in terms of enhanced certainty. The significance of this change in the Australian context is mirrored by the experience in the UK where the GCA, when asked what the GSCOP is essentially trying to achieve, responded: 'it's about transparency at the outset'. She went on to explain that the Code is trying 'to make sure that retailers treat their supplier fairly' and 'fairness is about not doing things to people retrospectively' and 'if you are going to make any unilateral changes that you give people reasonable notice'.¹⁰³¹

An experienced advisor to suppliers put the benefits to suppliers of this kind of fairness in the following terms, pointing out at the same time that it is an approach embedded in the business model of retailers like Aldi independently of the Code:

*So if you've got clarity upfront, the chance of getting hit with all sorts of random stuff later, it does help the small suppliers as well, because they've clarity. They know what they're signing up to. And it might be a hard bargain, but they can take a cold hard look at that and kind of go, is it worth my while to do? And if the answer is it's not, then it's not and then the supermarkets have to think harder about what bargain they offer. I mean, it's a way it's the model that German discounters trade on. So people will say to me, actually, trading an Aldi or a Lidl is really straightforward. They have a limited range, they struck a deal with you at the outset, it's no frills, it's pretty simple, but they stick to it. And you kind of know upfront, do I want to do it, or do I not want to do it? I can plan for that, I can deal with that.*¹⁰³²

Similar observations were made by a MSC representative:

*... [the Code] strikes a balance between pointing out very clearly what the base rules are for trading and operating, and therefore if someone with their eyes open chooses to come to a mutual agreement with us, to interpret the Code in a given way in relation to one particular aspect of going to market, I think that's fine. I think it's what the Code intends. It doesn't intend to have something imposed on anyone. So ... [M]any of the provisions are enabling provisions; the parties may agree to do this, or they may agree to do that. It doesn't force anything on either party, but it does make them look at things with their eyes open when they go to make an agreement.*¹⁰³³

¹⁰²⁹ GCA, *GCA Annual Survey Results 2016*, YouGov, p. 17.

¹⁰³⁰ Transcript of interview, compliance manager at a major UK retailer, p. 10.

¹⁰³¹ Transcript of interview, Christine Tacon, pp. 1-2.

¹⁰³² Transcript of interview, experienced legal advisor to suppliers in the UK, p. 38.

¹⁰³³ Transcript of interview, MSC representative, pp. 7-8.

As reflected in these comments and as previously highlighted in this report, the relevant provisions as to variations and other aspects of retailer conduct (for example, as to various types of supplier payments or contributions to retailer costs), allow for agreements to deviate from the starting position - that variations and payments are not permissible. These provisions are accommodating of such conduct as long as the deviating provision in the agreement is explicit and unambiguous, and reasonable in the circumstances, and reasonable notice of the intended variation has been given. It is thus necessary to consider to what extent such accommodations are undermining the benefits that the FGCC is intended to deliver insofar as redressing the retailer-supplier imbalance in bargaining power.

A similar approach is taken in the drafting of the GSCOP which was highly influential in the Australian drafting process and, as explained in Part 6 of this report, allowing for such deviations was seen by the drafters in both jurisdictions as crucial to preserving commercial flexibility. Indeed, in the UK, one of the reasons for including the Code in a schedule to the Order made by the CC was that, in that form, it could be amended more readily.¹⁰³⁴ This was seen as important to create the flexibility needed to deal quickly and effectively with any unintended consequences.¹⁰³⁵ However, it should also be pointed out that in that jurisdiction, a substantial role is played by the GCA in facilitating agreement between retailers and suppliers as to what is 'reasonable'. This is to be contrasted with the experience under the former SCOP that preceded the GSCOP and was voluntary in nature and lacked any independent oversight or enforcement mechanism. In a 2004 report on that earlier Code, the OFT noted that the concept of 'reasonableness' was 'seen by suppliers to allow the supermarkets to interpret the Code to the detriment of suppliers, leading to uncertainty about some of the Code's key provisions and increasing reluctance to complain.'¹⁰³⁶

In Australia, there is no informal arbiter as to reasonableness equivalent to the GCA and 'flexibility' in this context might as well as be read as code for 'bargaining'. Reaching any agreement by its very nature involves bargaining and therein lies the rub, at least as far as small but also possibly large suppliers are concerned. Notably, we heard from our MSC interviewees that in fact some small suppliers have greater bargaining power than their larger counterparts given that such suppliers:

...have many avenues to sell their products ... from the corner store through to the bespoke specialty [store], online delivery.¹⁰³⁷

Moreover, some small suppliers with niche or distinctive brands are said to have particular power:

¹⁰³⁴ In fact in the UK there is the arguably odd situation where some of the provisions, including those relating to the duty to have written supply agreements, appoint and train staff and the dispute resolution scheme are contained in the Order itself. Whereas the GSCOP appears as Schedule I of the Order and contains the relevant definitions, along with the provisions dealing with specific terms of agreements and retailer conduct such as the variation of supply agreements and promotions.

¹⁰³⁵ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 10.

¹⁰³⁶ OFT press notice 28/04, 'OFT publishes supermarkets code review', 20 February 2004.

¹⁰³⁷ Transcript of interview, MSC representative, p. 21.

... if you are the sole supplier of arrowroot powder and someone wants to bake a cake, it's very difficult [for a retailer] to delete that product, even though it may not be a major selling item in your store.¹⁰³⁸

MSC representatives also express the view that some large suppliers have greater bargaining power than their retail buyers, but point out that generalisations in this regard are hazardous as the competitive dynamics vary so much from one product category and even one brand to another:

...we would say we have unequal bargaining power and we're on the lower end of the stick. We're playing against big global giants like Unilever and they might have a must stock product, that kind of thing. But then you might hop to another product that is in the same aisle and the dynamics will be completely different. So you can talk broadly about oligopolies in our economy, but I find it hard to engage with when I don't know what particular market I'm looking at – because I think it changes so much depending on that.¹⁰³⁹

The merits of any such arguments aside, the asymmetry in bargaining power between retailers and suppliers in the grocery sector in Australia as currently structured, is an undeniable reality and given that the FGCC of itself cannot alter the imbalance, it would seem that retailers remain in much the same position as previously, that is a position of being able to 'bargain' in favour of Code deviations in supply agreements and on so-called 'reasonable' terms that are weighted in favour of retailer interests. Such terms may not in fact be reasonable from a supplier's perspective which then raises questions as to what role the overarching requirement of good faith might have to play and also what a supplier can or may be prepared to do about the perceived unreasonableness (questions discussed below). It is perhaps notable in this respect that in the period between 2010 when GSCOP took effect and 2013 when the GCA was appointed in the UK, in the absence of a dedicated enforcement structure, the Code is said to have been used to imposed unreasonable terms on suppliers (just as the SCOP had ten years prior). As one experienced supplier advisor told us, during that period:

...what the retailers did was use the code and the need to have terms in writing in some ways as an excuse to sort of force unfavourable terms and conditions on the supply base. They said: "oh you've got to sign these because the code requires you to", which is not the case. And they would draft in some cases quite aggressively, to try to maximise... their position.¹⁰⁴⁰

The terms that suppliers were being asked to sign up to were not in breach of the UK Code, because as the interviewee explained:

...the code provides carve outs, right. The code says, "you will be liable to pay for full costs unless you agree otherwise, or, you will be liable" - so there's always scope in the code to agree otherwise. And so you're not having true agreement, you're having suppliers being

¹⁰³⁸ Transcript of interview, MSC representative, p. 9.

¹⁰³⁹ Transcript of interview, MSC representative, p. 27.

¹⁰⁴⁰ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 27.

*asked to sign T's and C's they don't necessarily feel they have a choice but to sign. So there was a little bit of opportunism actually, around 2010.*¹⁰⁴¹

If the UK experience is any guide it may be the case that, while the FGCC may have generated enhanced transparency and certainty and in this sense be working in a way consistent with this element of its purpose, that is not to say that it has changed or will change circumstances for suppliers in any substantive sense. Terms that are 'negotiated' may still be unfair (provided they are negotiated in good faith, are not unconscionable and do not constitute a misuse of market power, of course) but it may simply be the case that the unfairness is now more transparent and more certain.

If indeed this is the situation then there may be grounds for considering a reduction in the flexibility in the Code provisions and making them more prescriptive, with fewer carve-outs and qualifications. However, as the account provided of the Treasury consultation on the FGCC in Part 5 of his report makes clear, any such attempt is likely to be met with substantial opposition from at least the MSCs. It may well be supported by some supplier and other groups, consistent with the positions taken in the earlier consultation. Whether it is opposed or supported by the AFGC remains to be seen. However, given the pivotal role played by that organisation in this process to date, its position on the matter (which in turn can be expected to be informed by its members, and may also be affected by the turn over at the top of the association) is likely to be crucial. AFGC leadership may well have to negotiate itself between its various categories of members on this front if, as might be expected, larger members favour the retention of flexibility (commensurate with their greater degree of bargaining power with the MSCs) whilst members of the AFGC's SME Forum are less enthusiastic.

The AFGC's position aside, if a considerable tightening up of the provisions means losing the support of the MSCs, serious consideration may need to be given to mandating the Code. And, as would be evident from prior sections of this report that has not been an approach previously entertained by government. The politics entailed in such a course of action, both within government and in government's relations with 'big business', is likely to be complex. With Billson no longer in the mix (described by Dawson as having 'been one of the strongest advocates of the Code'¹⁰⁴²), it is far from clear whether, aside from the Nationals and Joyce in particular, there would be any individual champion within current government ranks for such a course. That said, there remain members of the cross-bench concerned about the size and power of the MSCs and with the composition of Parliament at present, their influence is not to be discounted. As Dawson pointedly remarked in his final week at the AFGC, in looking ahead to the 2018 review:

*... beyond the coalition when you look at the views in the cross-bench of the Senate there are some very, very strong views there about the market power of the major retailers... [i]n the Labor party there are very strong views as well... the Labor Party and Nick Xenophon are already starting the process of getting feedback and gauging where to next.'*¹⁰⁴³

¹⁰⁴¹ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 27.

¹⁰⁴² AFGC Media Release, 'Food and Grocery Code of Conduct now in effect', June 2015.

¹⁰⁴³ Transcript of interview, Gary Dawson2, p. 21.

If the UK experience is any indicator, the possibility of the Code becoming mandatory cannot be discounted. As one interviewee observed of the UK experience:

*... originally the code was voluntary. It was self-regulation. And the supermarkets were expected to voluntary comply with it. There was a mechanism which said in the event that this isn't working, then we might need someone to enforce it. And that's why we've ended up with an adjudicator.*¹⁰⁴⁴

As Christine Tacon said: 'I know they started off with a voluntary code of practice. ...And it, didn't work. So the next thing to do was to take it, refine it and say that this has become law now'.¹⁰⁴⁵

III. Effective, fair and equitable dispute resolution

It is difficult to assess the effectiveness of the FGCC's dispute resolution processes at this juncture given that, on the accounts that were available for this research, it appears that, aside from a smattering of 'referrals' to the CCMs of the MSCs, those processes have not been extensively invoked to date. While one MSC representative was unable to furnish us with exact numbers, at the time of our interview she reported that the number of disputes that the company had dealt with under the Code was 'negligible'.¹⁰⁴⁶ Another MSC representative recounted that 'we've only had one code complaint in two and a half years' and, interestingly, it appears that the complaint was not dealt with pursuant to the FGCC dispute resolution processes but rather it was 'easily managed through the small business Ombudsman [referring to the SBFE Ombudsman]'.¹⁰⁴⁷

There are several possible interpretations of this so far minimal use of the FGCC dispute resolution mechanisms. One is that few disputes have arisen and this in turn may reflect favourably on the role being played by the FGCC provisions at the stage of negotiating GSAs, in influencing the way in which both buyers and suppliers approach these negotiations. As far as its influence on buyer approaches is concerned, this interpretation is supported by accounts from some MSC representatives:

*...one of the effective parts of the Code has been to get to us a place where disputes are solved before they arise, not afterwards, where we have buying teams and others coming to me, especially, and to their team leaders, and saying, "I'm thinking of doing this, but I'm having this conversation with a supplier today, what do you think?" And that's one of the heightened awareness things that have come from all the training we've done on the code and it's a great help ... Think of it as a law though, the purpose of the law is not to fill up the gaols, the purpose of the law is to keep people out of gaol, isn't it? That's what this is doing, I think.*¹⁰⁴⁸

¹⁰⁴⁴ Transcript of interview, director, leading UK economics consultancy, p. 17.

¹⁰⁴⁵ Transcript of interview, Christine Tacon, p. 10.

¹⁰⁴⁶ Transcript of interview, MSC representative, p. 13.

¹⁰⁴⁷ Transcript of interview, MSC representative, p. 10.

¹⁰⁴⁸ Transcript of interview, MSC representative, p. 17.

Another possibility is that, as previously mentioned, many suppliers remain unaware of the availability of these processes. Yet another is that they are aware but are choosing not to employ the dispute resolution framework and resources established under the Code for the purposes of resolving grievances with their buyers.

Of the possible interpretations, past history could be taken to suggest that the third is a highly likely scenario. But a conscious choice not to use the Code dispute resolution provisions may be explicable on various grounds also. One possible ground (albeit admittedly one likely to attract a contest of views) is that, for large suppliers at least, such provisions and processes are simply not necessary as a way to resolve issues that arise at either the negotiating table or in the enforcement of contracts. They have sufficient bargaining power to look after themselves. This view is certainly held by some in the UK:

*... who is protected by the code in the UK? ... these are companies like Coca-Cola and these are not small companies. These are global multinationals who don't appear need the protection of the state in their negotiations with the supermarkets...*¹⁰⁴⁹

...

*...clearly, the very large suppliers, it's [referring to GSCOP and the GCA] not as relevant to them. The balance of power is on their side.*¹⁰⁵⁰

A further possible explanation for the low take up of the FGCC dispute resolution provisions, more likely to apply to smaller suppliers, is that the Code's particulars and paperwork requirements are just too onerous and represent a substantial disincentive to making a complaint or notifying a dispute pursuant to the FGCC. The formalism of the Code processes in this regard was certainly pointed to by some of our interviewees as a difficulty for small suppliers particularly.

Notably, under the UK Code, there are no provisions equivalent to those in the FGCC requiring the provisions of particulars by suppliers as a condition of notifying a dispute. Rather, without prescription as to form, the GSCOP simply provides that:

A Dispute will arise under the Code when a Supplier informs the Code Compliance Officer that the Supplier believes that the Designated Retailer has not fulfilled its obligations under the Code, and that the Supplier wishes to initiate the dispute resolution procedure set out in this Article 11.

Whenever a Supplier contacts the Code Compliance Officer regarding an alleged breach of the Code by the Designated Retailer, the Code Compliance Officer will inform the Supplier of its right to initiate a Dispute under Article 11(2) above, and confirm whether the Supplier

¹⁰⁴⁹ Transcript of interview, director, leading UK economics consultancy, p. 20.

¹⁰⁵⁰ Transcript of interview, compliance manager at a major UK retailer, p. 10.

*wishes to initiate a Dispute. In the absence of the Code Compliance Officer requesting confirmation, a Dispute will be deemed to arise.*¹⁰⁵¹

Another possible reason why the FGCC dispute resolution process is apparently not being used to any significant extent may relate to the fact that, at various stages in the process, the relevant dispute resolution representative, be it the CCM or a more senior individual (on internal review) may decide not to engage with the matter being 'satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance'.¹⁰⁵² As highlighted in Part 5 of this report, in the context of the Senate inquiry, several submissions registered concerns that such provisions placed or would be seen by suppliers to vest all power in the hands of the retailer with respect to dispute resolution.

There are no equivalent provisions in the GSCOP. In the UK the only consequence of the GCA reaching the view that a supplier complaint was 'vexatious or wholly without merit' is that, instead of the arbitration costs being borne by the retailer, 'costs will be assigned at the arbitrator's discretion.'¹⁰⁵³ A view about vexatiousness or lack of substance is not a reason that can be invoked by the CCO not to investigate. As one compliance manager for a UK supermarket chain told us:

*...you have to report concerns, whether or not they are found to be justified or not. So, if a supplier has a general concern, it's still reported, or if it's actually, you say no, it's out of scope or it's not reasonable, then we still have to report it.*¹⁰⁵⁴

At the time that the FGCC's dispute resolution design was subject to consultation, concerns were also expressed about the use of external mediators/arbitrators who may lack industry knowledge. Such concerns may also be inhibiting the use of the FGCC's processes for resolving disputes, and again, they are concerns that have been headed off in the UK. In that jurisdiction the GCA plays a similar role to the role that was played by the PGCC Ombudsman in Australia. Under the GSCOP, if disputes cannot be resolved at the level of the retailer's CCO, then there is no requirement for escalation to a more senior rank in the retail organisation. The supplier may submit an arbitration request and arbitrations are conducted by the GCA.¹⁰⁵⁵ The GCA in turn is clearly a person with in-depth knowledge of and front line experience in the industry. As she told us herself:

*I have been [in] FMCG, I've been in farming and I've worked as a retailer and as a production engineer, I am passionate about supply chains. And I just want this to get better. I have no vindictiveness against any of the retailers. I actually think we have a fantastic food supply network in the UK, but it's not perfect, and I'd like to get involved to make things better.*¹⁰⁵⁶

¹⁰⁵¹ GSCOP, art 11(2)-(3). The GCA's [Guidance on raising issues, and disputes and the escalation process](#) (1 April 2014) also suggests that a supplier need to do little more than contact the CCM with a concern that the Code has been breached in order to initiate a dispute resolution process.

¹⁰⁵² FGCC, cl 35(2), cl 38(5).

¹⁰⁵³ GSCOP, art 11(7).

¹⁰⁵⁴ Transcript of interview, compliance manager at a major UK retailer, p. 22.

¹⁰⁵⁵ GSCOP, art 11(4)-(5).

¹⁰⁵⁶ Transcript of interview, Christine Tacon, p. 12.

To listen to Tacon talk, her understanding of and passion for the industry is hard to miss and as she acknowledged: 'I think it has to be a passion if you want to do it and a passion to make a difference... I really want to make the supply chain perfect.'¹⁰⁵⁷ In the 2017 review of the GCA, respondents also took the opportunity to comment favourably, not only on her deep knowledge of the sector, but also her personal style in carrying out her role, one marked by 'professionalism, care and consideration', engendering the trust and confidence of both retailers and suppliers who deal with her.¹⁰⁵⁸

In addition to the possible concern about the prospect of a mediation/ arbitration being conducted by an 'outsider', there is not inconceivably a concern by suppliers relating to the cost (aside from the time involved) of any such process. In the UK all costs of GCA arbitrations are borne by the retailer in question,¹⁰⁵⁹ so cost concerns are clearly not an inhibiting factor, whereas here, the question of costs falls to be determined by the rules of the Institute of Arbitrators and Mediators Australia (a provision of the FGCC not likely to be helpful or comforting to a supplier contemplating the possible use of this as a mechanism for resolving a dispute).¹⁰⁶⁰

Unlike in Australia, there is also no separate recourse in the UK to the competition authority – the Competition and Markets Authority (CMA) – in relation to disputes or allegations of breach of the Code. When asked as to why not more use is being made of the arbitration procedures under the GCA (there have been only four to date), the supplier advocate, Noble, pointed out that in effect 'it's a last resort... [if] you've been delisted, your relationship is dead, you've got nothing to lose..'.¹⁰⁶¹ Similar observations were made by a legal advisor to suppliers in the UK:

*I don't think anybody on the supply side seriously believes that actual adjudications on bilateral disputes is ever going to be a significant feature of life. It's just not. It doesn't make commercial sense for it to be. So as I understand it, there are two arbitrations on Christine's book at the moment. Both related to delisting. So you could see a situation where somebody's got nothing to lose, you might as well have that - use that toolkit. But it's not something that anybody sensible is going to want to do, where they have an ongoing commercial trading relationship. You're going to either resolve it beforehand through some other channel or you're not going to escalate at that point. Because you know that commercially, it could be hit back. So what matters are two things; one is the informal discussion that's ongoing and the other thing that matters in terms of ultimate sanction is the power to do investigation on endemic issues.*¹⁰⁶²

Not unrelated to concerns about the administrative burden imposed on suppliers in raising a dispute under the FGCC, there may be a perception amongst Australian suppliers that there are other, less formal less burdensome and possibly more effective more expeditious routes to the same end.

¹⁰⁵⁷ Transcript of interview, Christine Tacon, p. 12.

¹⁰⁵⁸ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [79]-80].

¹⁰⁵⁹ GSCOP, art 11(7).

¹⁰⁶⁰ FGCC, cl 39(4).

¹⁰⁶¹ Transcript of interview, John Noble, British Brands Group, p. 39.

¹⁰⁶² Transcript of interview, experienced legal advisor to suppliers in the UK, p. 19.

Processes available under MSC internal supplier charters or policies may be seen as more user-friendly, for example. This would appear to be the case for at least one MSC, where – at the time of our interview at least – more complaints were reportedly being dealt with under the company’s own pre-existing code than the FGCC.¹⁰⁶³ This may reflect also the MSC’s own preference for use of its internal Charter as the primary mechanism for dealing with supplier grievances given, as one commentator close to the MSC told us, ‘it is a quicker and easier resolution mechanism for them.’¹⁰⁶⁴ A different MSC representative told us that:

*We have four different mechanisms for our suppliers to resolve issues. And we ask them to put the Code last in that list of things, because if they have to resort to that, it means everything else has failed.*¹⁰⁶⁵

The four mechanisms were described in conversation as:

- ‘come talk to the person you deal with’ [i.e. the supplier’s direct contact on the buying team];
- ‘come and talk to a more senior manager’;
- ‘we have an internal person nominated ... on our website as the person to go to with a supplier complaint, and .. an organised form of response that says, within 24 hours you can go to the general manager, within 72 hours you can go to the CEO, and so on and so on, to escalate a complaint and get it fixed’; and
- ‘we then have an externally managed hotline that can be anonymous if the supplier wants it to be anonymous’.¹⁰⁶⁶

The same representative reported that ‘none of these [mechanisms] are used to any great degree beyond the initial approach [i.e. to the supplier’s direct contact on the buying team]’.¹⁰⁶⁷

Last but by no means least, as recited earlier in this report, on other accounts, suppliers – small ones in particular – continue to harbour considerable reticence to push the bar with their MSC customers for fear of commercially adverse repercussions. They also remain reluctant to approach the ACCC or air their dirty laundry in some other public fashion. Even if the grounds for such ambivalence should be seen as lesser than pre-FGCC if not for any other reason than the MSCs themselves can be expected to be much more wary about meting out or being seen to mete out ‘punishments’, the ‘scars and bruises’¹⁰⁶⁸ (to which one of our interviewees colourfully referred) are likely to take some time to heal.

Judging by the UK experience, it is arguable that a code of conduct, even a mandatory code of conduct, may not fully mitigate such deeply engrained concerns and attitudes:

¹⁰⁶³ Transcript of interview, MSC representative, p. 13.

¹⁰⁶⁴ Transcript of interview, former senior representative of the UK OFT, p. 21.

¹⁰⁶⁵ Transcript of interview, MSC representative, p. 10.

¹⁰⁶⁶ Transcript of interview, MSC representative, p. 11.

¹⁰⁶⁷ Transcript of interview, MSC representative, p. 11.

¹⁰⁶⁸ Transcript of interview, director of a consultancy that advises suppliers, p. 10.

*It's definitely a fear of retribution that comes out. And I know a lot of suppliers think that this is life, this is business, we've got to sort out our own problems. We don't want to go running to teacher.*¹⁰⁶⁹ (Christine Tacon, GCA)

*...if you can't deal with the supermarkets then if you're a supplier with any kind of scale then you're nowhere in the UK.*¹⁰⁷⁰ (Policy officer for a UK fair trade organisation)

*...You don't wench on your customer. It's a collaborative, cooperative relationship and as a supplier you are always trying to strengthen that. But yes, there's a realisation and a keen awareness amongst suppliers that actually if you do upset your retail customer there are many, many ways in which they can punish you and over a long time.*¹⁰⁷¹ (John Noble, Director, British Brands Group)

There does appear to be some positive movement on this front. As a lawyer with considerable experience in this space noted, in the past 'there was genuinely fear on the part of suppliers to have any kind of contact with the process.' When asked what had changed, she responded, 'it's a normalisation of this issue. So it's no longer nuclear to say, you're beating us up.'¹⁰⁷² However, in the 2017 review of the GCA, one of the issues seen as representing an ongoing challenge was a continuing 'climate of fear' and ameliorating supplier anxieties about reporting was earmarked as a priority for the GCA to work on in the lead up to the next review, in 2019.¹⁰⁷³

In acknowledgement of such concerns the GSCOP makes provision for anonymity (albeit not in the context of arbitrations), and the GCA in turn takes steps to minimise the possibility of any single complainant being identified when she is making inquiries or seeking evidence. This is important given the experience under the former SCOP in the UK in respect of which it was reported that suppliers failed to make complaints to the OFT given that that Code prevented such complaints from being made anonymously.¹⁰⁷⁴ In responding to this experience, in its account of why the GCA should be established, the CC addressed the vexed issue of anonymity in the following way:

A number of suppliers emphasised the need for the Ombudsman to maintain the anonymity of individuals who made complaints regarding retailer behaviour. It was submitted that suppliers would be unlikely to come forward with information on GSCOP practices unless they could be assured of anonymity. In contrast, a number of retailers were concerned with the anonymity provisions, stating that anonymity will limit the ability of retailers to respond to the proposed investigation and defend its supply chain procedures. Our view is that complainant anonymity should be considered against the role of the Ombudsman in investigating complaints. As set out in the Groceries Report, there is an important distinction between the investigative

¹⁰⁶⁹ Transcript of interview, Christine Tacon, p. 24.

¹⁰⁷⁰ Transcript of interview, policy officer for a UK fair trade organisation, p. 20.

¹⁰⁷¹ Transcript of interview, John Noble, British Brands Group, p. 26.

¹⁰⁷² Transcript of interview, experienced legal advisor to suppliers in the UK, p. 32.

¹⁰⁷³ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [11]-[16], [60]-[61].

¹⁰⁷⁴ HC Deb 7 December 2005 c 968, referred to in Seely, p. 12.

function of the Ombudsman and the dispute resolution function in the GSCOP. A dispute involves a single complaint by a supplier against a retailer, whereas an investigation would follow a period of information-gathering, through which the Ombudsman may identify, for example, a pattern of behaviour or area of concern from a particular retailer or set of retailers. We have reflected this in the undertakings. Given that an investigation will likely cover a broad area of concern, rather than focussing on individual complaints, we do not think that the anonymity of complainants should be a problem for retailers in responding to investigations. We therefore recommend that the anonymity of persons who provide information to the Ombudsman be maintained.¹⁰⁷⁵

To some, anonymity is imperative if investigations are to be successful; ‘...the reason that the GCA is so important in our eyes is that it allows anonymous complaints.’¹⁰⁷⁶ To others this approach places unnecessary constraints on the Adjudicator, and limits the overall impact of the role:

... having that strict requirement on confidentiality, not only makes it harder for the adjudicator to do his or her job, but also means that the sector doesn’t really benefit from that learned experience over time.¹⁰⁷⁷

Anonymity of complainants also appears to pose challenges for the compliance personnel in the retailers. To illustrate the difficulties, one compliance manager recounted an episode where there was a complaint about payment terms owing to currency negotiations:

...we are aware of one supplier that had a concern, they raised it with the GCA, but the GCA couldn’t tell us who the supplier was, so they gave us the broad parameters of what the complaint was around; and we sat there and thought ... “okay, we don’t quite know what this is, we don’t have enough information here to really go and say this is the problem, let’s deal with it”; because it was all anonymous. And it was so hard because we couldn’t even pin it down to which area it was at. And it was so generic. So, then we said to the team “okay, let’s have a look at this topic and see if we can improve”.

... another example was one of the comments we received was that currency exchange rates were affecting negotiations – okay, that affects a lot of suppliers. So we did a general reminder on how to approach negotiations where currency exchange rates come into play.

So, you’ve got to balance enough information to say, okay, what’s the problem, and be able to do something about it, against protecting the supplier.¹⁰⁷⁸

¹⁰⁷⁵ CC, *Undertakings to establish a Groceries Supply Code of Practice Ombudsman Scheme - Response to consultation*, August 2009 [15-16].

¹⁰⁷⁶ Transcript of interview, policy officer for a UK fair trade organisation, p. 19.

¹⁰⁷⁷ Transcript of interview, director, leading UK economics consultancy, p. 28.

¹⁰⁷⁸ Transcript of interview, compliance manager at a major UK retailer, p. 23.

This observation is consistent with the ACCC's position, voiced in the Senate inquiry, to the effect that it is extremely difficult to investigate without knowing who the parties involved in the dispute are.¹⁰⁷⁹

The surveys conducted by the GCA, referred to above, provide further insights into supplier readiness to raise issues – at least with the Adjudicator. The results in 2015 and 2016 indicated that in both years 47% of direct suppliers would be prepared to raise issues with the GCA, as would 62% of indirect suppliers (up from 41% in 2015) and 77% of trade associations (up from 64% in 2015), suggesting amongst other things the degree of comfort and security that suppliers have in relation the UK process.¹⁰⁸⁰ Of those who indicated that they would not raise an issue, the top three reasons were fear of damage to their relationship with the retailer as the reason (56%), fear of retribution (for example by way of delisting) (47%) and fear that their reputation in the wider retail sector would be affected (30%). Only 9% cited the reason as not knowing if the issue is covered by the Code or as seeing the issue as a normal part of doing business.

Notably, Tacon's message to retailers is that having more rather than less issues raised by suppliers is in fact a positive development. She explains that if issues are not being raised to the retailers:

*... it means you've got no idea where your buyers are pushing the boundaries.. If you had 28 people go to the code compliance officer in the last year you're going to have a very good idea... It's a bit like health and safety, where you record your near misses and you hopefully get lots of near misses and that helps [to ensure] you never have a fatality...*¹⁰⁸¹

A similar view was expressed by a senior adviser to one of the MSCs in Australia:

*My view is that MSCs should encourage people to come forward to them first, and only go to the ACCC if that does not resolve the issue. A lot of instances are likely to be errors that the MSC will be keen to correct.*¹⁰⁸²

But it is also clear that the surveys provide a highly useful tool for the GCA in gathering information on an anonymous basis, in a way that provides suppliers with security in speaking out:

*...the YouGov survey is a bit of a master stroke because, in an environment where suppliers aren't going to speak out publicly, it gives her a measure of how she's doing, it gives her an indication of the things exercising suppliers and it puts in the public domain a list of retailers and their relative performances. And so, I think, the YouGov survey is a valuable initiative.*¹⁰⁸³

¹⁰⁷⁹ Scott Gregson, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 22, cited in SELC, *FGC Regulation*, 2015, p. 14.

¹⁰⁸⁰ GCA, *GCA Annual Survey Results 2016*, YouGov, p. 9.

¹⁰⁸¹ Transcript of interview, Christine Tacon, p. 31.

¹⁰⁸² Transcript of interview, former senior representative of the UK OFT, p. 22.

¹⁰⁸³ Transcript of interview, John Noble, British Brands Group, p. 42.

IV. Good faith

Assessing the extent to which this final element of the FGCC's purpose has been realised to date is the possibly the most challenging. In large part, this is because, as mentioned above, there are highly divergent conceptions of good faith across the sector. As our interviewee responses to questioning on their understanding of the concept bore out, some see good faith as largely entailing considerations of procedural justice – in particular, being willing to listen, clear about expectations and open to negotiation. Others see it as more substantive in character, as requiring that the party exercising good faith take account of the interests of the other party in any negotiation or decision affecting those interests.

The relevant clause in the Code itself provides yet further indicia as meaning, including reference to the meaning of good faith 'under the unwritten law as in force from time to time' and then to three further considerations, namely the exertion of duress, recognition of the need for certainty in the risks and costs of trading particularly in relation to production, delivery and payment, and whether the supplier has acted in good faith. In the GSCOP, the explanation that is provided in relation to the 'Principle of Fair Dealing' (referred to above) refers to 'good faith' which it not itself defined but it is clear that it would entail dealing 'without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.'¹⁰⁸⁴

Reference to the 'unwritten' (common) law in the FGCC is a particularly good example of why several of our interviewees bemoaned the legalistic nature of the Code and the consequence that it is likely, on its own (without sufficiently skilled assistance in interpretation and application), to be largely impenetrable for most suppliers. Even Treasury did not attempt a fulsome explanation of the common law definition in its consultation paper, acknowledging that there 'is no definitive meaning ... there has been considerable jurisprudence and legal commentary surrounding [the concept]'.¹⁰⁸⁵ But Treasury did offer some pointers, referring to 'honesty, cooperation, reasonableness and fairness' as 'guiding principles ... to assist in determining the obligation on a case-by-case basis.'¹⁰⁸⁶ Most if not all of the good faith attributes referred to by Treasury are likely themselves be matters in the application of which different results are reached by different interpreters. That said, amongst suppliers at least, there is likely to be a strong intuitive sense as to when certain conduct crosses the line in one of these respects and is sufficiently unreasonable or unfair, say, as to constitute bad faith.

Assessing the extent to which the FGCC has 'worked' in engendering good faith in retailer-supplier relations raises similar considerations to assessing the extent to which it has helped to build and sustain trust and cooperation in such relations – particularly given such qualities are likely to be a function or product of the exercise of good faith. The challenges associated with changing a long-standing culture that has spawned the types of behaviour of concern in the sector again will be

¹⁰⁸⁴ GSCOP, cl 2.

¹⁰⁸⁵ Treasury, FGCC consultation paper, 2014, p. 18.

¹⁰⁸⁶ Treasury, FGCC consultation paper, 2014, p. 18.

material. These challenges will be aggravated insofar as retailer senior management sends messages, comes up with profit-driven initiatives and sets performance targets with associated remuneration and other career-related consequences for front line buying personnel that weaken incentives to act in good faith. It might be presumed or hoped that MSC management are alive to this and act accordingly. That said, as has been pointed out already, competition amongst retailers is intensifying and costs are rising, generating pressures that just as in the post 2008 period may work against even the strongest commitment to instilling a 'good faith' culture in the MSCs.