

7. At the negotiating table

In this Part of the report we look at how the substance and form of the FGCC was negotiated. We start with identifying who was at, who walked away from, and who apparently was not invited to join the RSR that produced a first draft of what was to become the FGCC. In the end, just three organisations were represented: Coles, Woolworths and the AFGC. Explanations for this vary and we consider the reasons if and why others, particularly the NFF and Metcash, as well as the retailers - Aldi, Costco and the IGAs - particularly did not participate to the same extent if at all. We trace the process of negotiation, highlighting the matters on which agreement was readily reached, and why, and the compromises that this entailed.

Moving from industry to political machinations, we document the role played by Billson, mostly behind the scenes, supporting at times, coaxing at others but also strong-arming where he saw necessary, on issues that he regarded as critical and, in particular, in an attempt to bring around important stakeholders in support of the process. We also explore the impact of other political dynamics afoot - in particular, the ultimately unproductive dialogue between the Labor Party and the NFF as to its role in the negotiation, before turning then to the role of Treasury.

We provide an overview of the process by which Treasury reviews and consults on draft codes, such as the one presented to it by the RSR. It is important in this context and so we provide a brief background on the manner in which such codes are developed from a regulatory perspective, their place in the overall regulatory framework and the benefits that they are seen to deliver. We note that elected Australian governments of both persuasions have long advocated codes of conduct as a method of self- or co-regulation; that industry is often seen as the best driver of tailored and effective codes; and that the prescription of mandatory codes under the CCA is viewed generally as an avenue of last resort.⁴⁵⁴ Not insignificantly, in the almost 20 years since provision for codes was legislated, the FGCC is the first prescribed voluntary code to be promulgated, all others being mandatory, and as will become apparent in this section of the report, the question of the FGCC's status in this regard was fiercely debated. It is a matter also likely to be reargued in the 2018 review.

In the context of Treasury's regulatory review of the proposed code, we record the stated purposes of the FGCC and map out its main provisions. We then document the debate overseen by Treasury and continued in the Senate inquiry that was held once the FGCC was laid before Parliament. As is clear from this exercise, this debate coalesced on more than just the issue of the Code's coverage (to be determined by whether it was voluntary or mandatory), encompassing a range of issues concerning whether the proposed provisions were too lax and whether the dispute resolution processes were appropriate and likely to be workable. On each of the issues at stake, the position put by the RSR more or less held sway.

⁴⁵⁴ *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, May 2011, Australian Government Treasury, p. 6.

I. The (not so) round Roundtable

The so-called RSR that was established to negotiate and produce a first draft what was to become the FGCC was in fact more triangular than round. Places at the negotiating table were limited. In the end, there were only three seats taken: by the AFGC, Coles and Woolworths. For the AFGC, this became Gary Dawson's chief preoccupation from virtually day one in the job. Clearly his predecessor had already started the conversation from the AFGC's side, taking the strong position that Australia's should emulate the UK example – nothing less than a mandatory code, administered and enforced by a dedicated independent grocery ombudsman would suffice. Dawson's mission and challenge was to translate that position into a proposition that would bring the MSCs on board.

For Coles, the lead negotiator was General Manager of Corporate Affairs, Robert Hadler, a self-described specialist in advocacy, crisis management and reputational strategies, with a long track record and experience in large corporates, including grocery suppliers such as Goodman Fielder, as well as AWB and National Australia Bank.⁴⁵⁵ For Woolworths, Hadler's opposite number, Andrew Hall, occupied the other retailer seat at the table, at least initially, and then was replaced by Tjeerd Hegen (Woolworths Manager of Supermarkets and Petrol, and like several of the MSC executives, formerly of the UK grocery giant Tesco).⁴⁵⁶ As might be expected given their roles at each of the MSCs, both Hadler and Hall had politics in their education, and Hall had practised in it – as a media adviser to Warren Truss MP (having been a journalist prior to that) and then as Federal Director of the National Party, before taking up the position as Director of Corporate and Public Affairs at Woolworths. Hadler, Hall and Hegen have all since left the MSCs, but Hadler and Hall are still plying their corporate affairs craft, Hadler at a global consulting firm (FTI Consulting) that helps businesses manage change and risk and Hall as Executive General Manager, Corporate Affairs at the Commonwealth Bank, while Hegen now heads up Dutch discount retailer, HEMA. Hadler participated in an interview for this research. Regrettably both Hall and Hegen declined the invitation.

Over the course of just more than a year, from about September 2012, there was a frenzied process of discussion, debate and drafting, involving multiple meetings between the three men as well as follow up and side meetings with others from their own organisations and constituencies. While Hadler and Hall consulted internally, and it is also clear that external legal advice was sought, it is telling perhaps that the MSC representatives leading the negotiations on behalf of their organisations were in public and government relations roles, with no front-line involvement in the actual business of buying and selling groceries.

The AFGC consulted with its members and particularly those involved in its SME forum. But it also consulted with the ACCC and, according to Dawson, with Aldi and Metcash too. At some stage in 2012 it had become known, at least within the industry, that the ACCC was investigating with a possible view to an unconscionability action against one or both of the MSCs. An ACCC

⁴⁵⁵ Robert Hadler, LinkedIn profile, <https://www.linkedin.com/in/robert-hadler-49154215/?ppe=1>

⁴⁵⁶ In addition, in 2017, a former Tesco executive (Jeff Adams) was appointed to lead Metcash. See 'Former Tesco exec Jeff Adams to be next Metcash CEO' *Sydney Morning Herald*, 11 July 2017.

representative recalls that around that time there was an approach made to the agency by ‘industry associations’ in the sector. However, he also recalls that unlike in most instances where the ACCC is asked for and provides quite detailed guidance on design and drafting of a code, in this instance the association in question was prepared to and took much of the running itself:

So we were approached initially by two industry associations together who had some interest in a food and grocery code of conduct, and at the time there was a genuine question mark about whether it would be something they would consider, whether they felt needed to be prescribed... So we had our investigation on foot and we had the industry association saying so is there some other way beyond the investigation that we can help, and so we said well there’s codes of conduct and this is how they work and so forth, so there was interest coming from them on that. I think it would be fair to say at some point in the investigation, one or more of the retailers also expressed a strong interest in a code approach and arguably to find a way forward that was able to show... that they might be able to use to say: here’s our commitment to treating our suppliers well, we submit ourselves to a code of conduct and we’re willing to sign up for that. So that’s really the genesis, and giving that we had long standing guidance as to what we think works as an industry code of conduct, less aspirational, more concrete commitments and so forth, for example, some sort of administration mechanism, it’s more the engineering of a code that we think is more likely to work, transparency, that we are able to say, well look in these circumstances... sit down with them, understand the kind of issues that were of concern to the industry associations on behalf of their members and give some guidance on how some of that might be ultimately captured in a code of conduct, but to be fair, to be quite frank, [in this instance] the industry associations took some very high level suggestions or guidance on how codes might work in this situation and secured their own legal advice and so forth, and worked up a code.⁴⁵⁷

This account is consistent with the recollection of a MSC representative who recalls that initially there was:

...an open agreement on how we would conduct ourselves, but it wasn’t a legally structured agreement. A lot of it [was] based on UK wording. But when we approached the market and the ACCC in particular and said, we would like this to be an industry code, they gave us very strong and good advice on how to set up what was known as a voluntary code. And we went down that path, and with their assistance got to the stage of it becoming an instrument that went through a whole range of treasury drafting, and eventually ended up as a regulation.⁴⁵⁸

As is the way of any negotiation, the parties started some way apart. On Hadler’s account, he ‘did the first draft... a principles draft, based on the [Produce and Grocery Code]’.⁴⁵⁹ The AFGC countered with its own draft and a quite different version: ‘basically a straight lift out of the UK legislation’⁴⁶⁰ (a

⁴⁵⁷ Transcript of interview, senior representative of the ACCC, p. 20.

⁴⁵⁸ Transcript of interview, MSC representative, pp. 1-2.

⁴⁵⁹ Transcript of interview, Robert Hadler, p. 21.

⁴⁶⁰ Transcript of interview, Robert Hadler, pp. 20-21.

draft that had possibly been on Carnell's desk in some form for some time and that may also have reflected the consultations that the AFGC had had with the grocery adjudicator in the UK, Christine Tacon). According to the same ACCC official, this initial divergence in approach is common in code negotiations, and the agency's advice was very much in favour of 'more concrete' provisions so that those subject to and benefiting from the code would 'understand what was intended in a given situation.'⁴⁶¹ Apart from that advice though, the only substantive input that the ACCC had at that stage was to identify 'the degree to which we thought the issues covered in the code aligned with the issues that we had as live issues in the matters we were investigating.'⁴⁶²

Predictably perhaps, Coles's response to the AFGC's opening gambit was: 'no'.⁴⁶³ But it took hardly any time at all it seems, to close the gap and the parties quickly came into alignment on at least two significant points, namely that:

- (1) the proposed code had to be sufficiently detailed in relation to the behaviour with which it was concerned but at the same time sufficiently flexible to allow for legitimate commercial negotiation; and
- (2) it had to be a statutory instrument but should be voluntary rather than mandatory in its application.

On these things, according to Dawson, from early on, 'everyone knew where each other was coming from.'⁴⁶⁴

(a) Detailed but still flexible

It was readily agreed that 'in order to be credible' the code 'couldn't simply be an aspirational statement or set of principles'.⁴⁶⁵ It had to get to the specifics of the matters about which suppliers were aggrieved – matters such as unilateral and retrospective variations, payments for shrinkage and wastage and even intellectual property protection where a supplier is supplying for MSC private labels as well as their own brands (a matter not covered in the UK counterpart). As Dawson explains, his personal view was: 'let's not talk about generalities', we need the code to deal and deal meaningfully with 'the top 10 things that the industry wants to change in terms of the behavioural relationship'.⁴⁶⁶

At the same time, it is clear that the parties were also in heated agreement that the code could not be overly prescriptive. It had to allow for commercial flexibility. A MSC representative explained this balance, which he saw as having been achieved in the drafting of the code, as follows:

...the best part of it was that it was prescriptive enough for people to have comfort on both sides of the fence in certain aspects of mutual dealings that we do. Areas of particular

⁴⁶¹ Transcript of interview, senior representative of the ACCC, p. 22.

⁴⁶² Transcript of interview, senior representative of the ACCC, p. 22.

⁴⁶³ Transcript of interview, Robert Hadler, pp. 20-21.

⁴⁶⁴ Transcript of interview, Gary Dawson, p. 32.

⁴⁶⁵ Transcript of interview, Gary Dawson, p. 41.

⁴⁶⁶ Transcript of interview, Gary Dawson, p. 41.

*sensitivity were covered with some degree of prescription, but it wasn't written in a way that was so absolutely prescriptive that we couldn't operate the business.*⁴⁶⁷

For Dawson, flexibility in the code provisions was not only in the interests of the retailers. He could see the merit in it for suppliers ('our members') and that meant for consumers as well. So strong was his view on this that he was prepared to wear the inevitable criticism from AFGC constituents for not going in hard enough:

...one of the key features of the code which has been subject to criticism is the fact that the code allows the retailers a significant degree of commercial flexibility, so the code – it's not business as usual for them, but it certainly doesn't impede their own corporate need to respond flexibly to the shifting tides of consumer demand and consumer pull. So I think one of the benefits for them was to end up with a quasi, well, what is a regulatory instrument but which nonetheless does not dictate a rigid structure in which they must operate but one which has that flexibility for them to operate as they need to operate to be successful and in some ways we copped a bit of criticism for allowing those provisions, but in many ways it's of as much interest to our members to have commercial flexibility as it is for the supermarkets. We were, look, frankly we were conscious of the interests of suppliers, many of whom might want the opportunity to go in and negotiate a particular deal and ultimately that's in the consumer's interest as well and the consumers – you don't want the things that are on the shelf now to be there set in stone forever, that's the whole point of a dynamic market - - - you have movement and by definition that means there's going to be winners and losers every day in this market. Now, you want some rules of engagement, some bumper rails - as Bruce Billson used to put it - but you don't want it to be too prescriptive because you choke off that competitive drive...⁴⁶⁸

As for whether the code drafting strikes the 'right' balance between detailed prescription of behaviours on the one hand, and flexibility so as not to stifle negotiating capacity on the other, commentators are divided. Certainly there can be no quibble that the Code delves into minutiae, touching on both the form and substance of almost every aspect of contractual dealings between grocery retailers and their suppliers. Its formal style of language is consistent with its status as a legislative instrument but is also redolent of many federal statutory texts – torturous in the drafters' evident attempt to be both comprehensive while building in qualifications and creating carve-outs. In many instances, obligations as to retailer conduct are framed in terms of 'reasonableness' and where certain conduct is prohibited, the prohibition is subject to provision otherwise in the grocery supply agreement (GSA).

According to an experienced adviser to suppliers, a person who has conducted extensive training on the Code, the provisions are not prescriptive enough and the reason for that deficiency is that because it has been written by 'lawyers':

⁴⁶⁷ Transcript of interview, MSC representative, p. 2.

⁴⁶⁸ Transcript of interview, Gary Dawson, pp. 49-50.

...I would make some elements of this more explicit, so specifically around things like range reviews so publishing criteria on range reviews, I'd make it less ambiguous what that means... The ability to create a little bit more structure around how some of these things are applied I think is very straightforward, that isn't – law makers would really struggle with that, the reason we've run this program rather than lawyers is because we look at this through – I'm not a lawyer, never could be or would be, I'm nowhere near bright enough – but the ability to apply the commercial intent to this is the crucial piece, but it's been written in large part by lawmakers ... So the way that we train parts of this is through joining the dots because each dot in isolation doesn't do the job, so a good example of that is the retailer must publish their range review criteria for range and space, doesn't say what criteria need to be or anything along those lines...⁴⁶⁹

Concerns about the legalistic character of the Code were also raised by another interviewee with extensive training and consulting experience in the sector:

My focus is always on the issue of dispute resolution but the way in which this is framed in terms of the rights of suppliers, well ... it's almost a roadblock to a supplier's success because the language and the manner of drafting creates almost impenetrable barriers.⁴⁷⁰

A MSC representative in turn complains of the opacity of the FGCC, comparing it to, 'having to hand a copy of legislation to people'.⁴⁷¹ The interviewee went on to say that even after providing training to ensure that employees understand their obligations under the Code there remains some confusion. While being in no way opposed to having clear guidelines for the industry, she added: 'handing out legislation is really unfair and actually quite unhelpful, but I had to do it.'⁴⁷²

An insider with knowledge of the negotiations has suggested that this lack of precision may have been intentional on the part the MSCs:

... typically the retailers would try and negotiate language that was aspirational and less likely to be something that you could actually have enforced in a concrete way ...⁴⁷³

By contrast, according to a grocery business advisor, the provisions fall short because they are too prescriptive and so either duplicate or conflict with general obligations under the CCA, and the reason for this is because the drafting was not done by 'legally trained practitioners':

... whilst the ACCC is party to the conversations, industry representatives who represent certain players are dominating the drafting. The drafting isn't being done by legal-trained practitioners so the drafting is pretty average in my view and, really, what is it going to result

⁴⁶⁹ Transcript of interview, director of a consultancy that advises suppliers, p. 52.

⁴⁷⁰ Transcript of interview, Robert Gaussen, p. 42.

⁴⁷¹ Transcript of interview, MSC representative, p. 22.

⁴⁷² Transcript of interview, MSC representative, p. 22.

⁴⁷³ Transcript of interview, senior representative of the ACCC, p. 22.

*in? ... I think there's far too many mandatory, voluntary, industry-based, voluntary codes, mandatory codes and I think it's actually detracting from the statute itself.*⁴⁷⁴

Graeme Samuel AC too has suggested, somewhat disparagingly, that the Code is so lacking in flexibility as to read more like a rule book for the industry:

*...40 pages of specific prescription as to how they must conduct their business.*⁴⁷⁵

Reflecting the not uncommon divergence of views on many aspects of regulation of this sector, others however believe a prescribed code such as the FGCC strikes just the right balance:

*[It] provides an avenue for the government to consider a policy response that is not statute, it's not too prescriptive but it provides – with these prescribed codes... you get transparency about the contract you're getting into, you get an ability to resolve disputes while you're within the term of your contract and the termination process for the contract is one that is reasonably fair.*⁴⁷⁶

(b) Prescribed but voluntary

The AFGC-MSA negotiators also agreed that the Code had to have some 'regulatory force'.⁴⁷⁷ What this meant in effect was that it had to be a statutory instrument, prescribed under the provisions of the CCA, and not yet another industry (non-statutory) code. BUT, between the two models provided for by the legislation – a mandatory and a voluntary model – it was also readily (in the end) agreed that this code had to be in the latter category. To the layperson, this would appear to suggest that the code would be optional. However, the only option is in fact whether or not to sign on. Once signed on, compliance with the code is in effect mandatory in the sense that its provisions are legally enforceable - a breach of the Code is a breach of the CCA. While the terminology and difference between the two models may have generated some confusion amongst outside observers and commentators, there was no doubt about its effect amongst those at the negotiating table. For the MSCs, signing up to a so-called voluntary (but prescribed and enforceable) code would represent a serious legal commitment and in turn lend serious credibility to the initiative.

It is possible that the decision to support a statutory code and one that was detailed in its prescription of behaviour was influenced too by the experience with the PGCC – a purely voluntary instrument introduced by the industry in 2000 to deal with many of the same issues that had brought the parties to the table on this occasion. That code had had a wide ranging industry membership and had addressed issues concerning product standards and specifications, contracts, product labelling, packaging and preparation and notification of acquisitions. It provided for an ombudsman who provided dispute resolution and facilitated mediation services. Yet, despite covering much of the same ground as the RSR-proposal, the PGCC was criticised for being too high level in its prescriptions, for

⁴⁷⁴ Transcript of interview, interviewee that consults to / advises grocery businesses, pp. 4-5.

⁴⁷⁵ Transcript of interview, Graeme Samuel AC, p. 29.

⁴⁷⁶ Transcript of interview, senior representative of the ACCC, p. 9.

⁴⁷⁷ Transcript of interview, Legal Director at the AFGC, pp. 36-7.

the lack of reporting responsibilities and its failure to offer protection from commercial retaliation.⁴⁷⁸ In an independent review in 2004, it was recommended that government step in and mandate the code.⁴⁷⁹ But there was no appetite for that recommendation, government being sensitive to imposing additional regulation and associated compliance costs. From 2009, parties began to resign their memberships and by 2011 the PGCC had fallen into desuetude, regarded by many as ‘very aspirational ... [lacking] any real bite, any real expectation in terms of behaviour other than the spirit of goodwill.’⁴⁸⁰

In the context of the RSR, it appears to have been the Coles negotiator who in fact first proposed the idea of a voluntary prescribed code. Hadler told us that he was able to secure agreement to the idea high up in the Coles hierarchy not least because the provisions being negotiated were not seen to go beyond the retailer’s obligations under existing laws anyway.⁴⁸¹ Another interviewee pointed out that agreement to involvement in the Code was very much influenced by the pressure being brought to bear by the ACCC unconscionability investigation was then in full swing (‘it was done at a particular point in time when they had an unconscionable conduct investigation going on....’).⁴⁸²

At same time, there was clear recognition that, in practical and political terms, the code would be voluntary in name only. As Hadler points out:

*...despite being voluntary, the statutory version was seen as having regulatory teeth because once you’ve signed it, you’re in. And you won’t opt-out. The reputation damage is too big...it wasn’t actually – it wasn’t voluntary, I mean, to be honest.*⁴⁸³ (emphasis added)

Hadler’s view on this resonates with the ACCC. There is certainly ‘reputational risk’ as a deterrent to a party opting out of a code and added to this, a senior ACCC representative pointed out, would be the risk that the government would take the action to step in and mandate the code, thereby producing the very situation that had sought to be avoided in the first instance:

*So you can think about walking away but it’s at your cost and it’s at the risk of having a mandate [imposed].*⁴⁸⁴

This risk is evidently a real one in the minds of MSC representatives. One told us that, were his organisation to opt out, ‘it would be an automatic move to a mandatory code’.⁴⁸⁵

In some respects, agreement to a voluntary rather than a mandatory code represented an early back down by the AFGC, given its previous position. But it had also been made clear by government that it

⁴⁷⁸ Treasury, *Improving Commercial Relationships in the Food and Grocery Sector* consultation paper, August 2014 (Treasury, FGCC consultation paper, 2014), pp. 39-40.

⁴⁷⁹ Neill Buck and Associates, *Report of the review of the retail grocery industry code of conduct*, Dept. of Industry, Tourism and Resources, 2003.

⁴⁸⁰ Transcript of interview, senior representative of the ACCC, p. 8.

⁴⁸¹ Transcript of interview, Hadler, p. 22.

⁴⁸² Transcript of interview, former senior representative of the UK OFT, p. 7.

⁴⁸³ Transcript of interview, Hadler, pp. 23, 26.

⁴⁸⁴ Transcript of interview, senior representative of the ACCC, p. 23.

⁴⁸⁵ Transcript of interview, MSC representative, p. 7.

was looking to the industry to 'solve' the problem and would only step in an industry solution was not forthcoming:

... they [referring to various government representatives] made it very clear at that meeting [referring to a meeting between government and industry representatives] that they were not willing to amend the law to take – in order to take particular action over this perceived problem of retailers market power, that there'd just been a range of amendments to the Competition and Consumer Act, they were simply not interested in taking further amendments forward and that they wanted the players - the stakeholders, the market players – to see what they could do to address perceived problems before - - - That was the, I think, the catalyst for the first discussions around a code that – so, there'd been proposals put forward for a mandatory supermarket code which would have been an amendment to the Act and that's where the ministers were saying, no, we're not willing to do that.⁴⁸⁶

The steer from government aside, for Dawson, unlike his predecessor, a voluntary code was a no-brainer. Firstly, it was clear in his mind that Carnell's call for the replication of the UK model in Australia would not be supported by government. Secondly, the MSCs had to be involved in the project and there was no doubt that they were not going to come to the party for a mandatory code. The voluntary model under the CCA enabled the AFGC to lead the charge for an instrument with 'real teeth',⁴⁸⁷ but at the same time bring and keep the MSCs on board. As another AFGC representative has explained:

... it started off with all options but very quickly narrowed to that [a prescribed voluntary code] and there were a number of - - - Yeah, look, I can tell you that Coles put forward the option of a prescribed voluntary code. [The benefits of having it prescribed] were that it had some, well, that it was a legislated instrument and had some regulatory force .. they were sensitive to the perception issue around it being seen as just a bit of paper versus something that had real teeth and from our point of view the AFGC having previously had a position around a mandated legislated approach we couldn't accept anything less than something that had some regulatory rigour behind it, regulatory force, so the fact that the Act provided for that was quite fortunate because it gave us a, if you like, a bit of a bridge to an instrument that has real effect. In the game of chess that is one party trying to read thoughts of the other person about what they're thinking about you and so forth, from our perspective there were obvious attractions to the supermarkets, for it being a voluntary prescribed code, number one, it gave them the appearance of being the good guys, they get to sign on and get the marketing and publicity PR kudos or something like that.⁴⁸⁸

The cynicism in this perspective as to why the MSCs backed a voluntary code may not be entirely fair. According to Dawson, the MSCs 'genuinely felt they needed to find a way forward because of the

⁴⁸⁶ Transcript of interview, Gary Dawson, pp. 27-8.

⁴⁸⁷ Transcript of interview, Legal Director at the AFGC, pp. 36-7.

⁴⁸⁸ Transcript of interview, Legal Director at the AFGC, pp. 36-7.

pressure that was being brought to bear ... [and they] genuinely they felt that this was only worth doing if it stood up to scrutiny.⁴⁸⁹ What's more, Dawson held the view, to which the MSC representatives evidently also subscribed, that going down the voluntary code route meant that the drafting of the code's provisions could be controlled by the 'industry' (which in this context meant the AFGC and the MSCs). The alternative, a mandatory code, meant that that control would be divested to government. Drafting control was seen as critical as it would enable the code to be tailored to 'the realities of the market'⁴⁹⁰ and ensure that it addressed the particular issues at hand. Hence, the voluntary model was viewed as essential ultimately to maximise the chances of the Code being effective, as well as legitimate:

...it was another reason in my mind for us to pursue a prescribed voluntary code rather than expecting governments to legislate and write amendments to the Act to deal specifically with this particular market and, I think, again, I think that's one of the strengths. ... I think if you ask a – if you just ask the Treasury or the ACCC to draft a mandatory code I'm not sure it would have been at all as relevant to the market, the realities of the market as this is and that's in part a function of the fact that it is a voluntary – it's voluntary sign up and therefore required negotiation with the other players...⁴⁹¹

Dawson is also of the view that for the MSCs, there were significant commercially strategic benefits in a code that was meaningful in its degree of detail and in its statutory status. Signing up would establish credibility not only in the eyes of government, but in the eyes of suppliers as well and, in the long term, this could be important in maintaining security of supply:

... there are benefits for them in it as well. I think in terms of their credibility around the way they deal with their suppliers, in terms of, so it won't always be the case that Australian food and grocery manufacturers will have to go to Coles and Woolworths to sell their wares. Markets change, markets are already changing, our export markets are opening up dramatically. So from their point of view when they think about certainty of supply in the future around key categories, key lines, key products, the ability to have a framework in place as provided by the code is going to work in their favour and I think that's going to be more of an issue in the future than has been the case in the last few years..⁴⁹²

II. Holding out: the NFF

The NFF pulled up a chair at the negotiating table initially but at some stage, relatively early in proceedings it seems, decided to leave the room. Having the NFF at the table made sense. It meant that the issues from the perspective of both packaged and fresh food suppliers could be covered. Indeed, early on, it even appeared to be contemplated that an all-encompassing code, one that

⁴⁸⁹ Transcript of interview, Gary Dawson, pp. 36-7.

⁴⁹⁰ Transcript of interview, Gary Dawson, p. 43.

⁴⁹¹ Transcript of interview, Gary Dawson, pp. 42-3.

⁴⁹² Transcript of interview, Gary Dawson, p. 49.

subsumed all pre-existing codes (the PGCC and the HCC), was on the drawing board and that the new code might cover indirect as well as direct suppliers.⁴⁹³ But it fairly quickly became evident that that idea was utopian.

In part, the restriction of the draft code to direct suppliers may have been a function of the fact that the process moved so quickly and there was such a strong sense of urgency to get it completed that there was not time to grapple with the much wider set of issues as well as negotiate with the broader range of stakeholders that would have been necessary to produce an all-encompassing instrument.

In part, it may have been because the NFF pulled out of the process thereby removing a strong voice for fresh suppliers from the negotiating table. Both Hadler and Dawson give an account of the reasons for this that involved reference to 'political factors'.⁴⁹⁴ Ultimately though it was clear that the NFF was holding out for a mandatory code:

*So there was a bit ... around how much relevance it [had], and also [whether] it was going to be mandatory. So we were of the view that it should be mandatory.*⁴⁹⁵

It appears that what the NFF was striving for was a fully inclusive, mandatory code of conduct to regulate the entire sector. While acknowledging that this could be 'tricky' given the diversity of stakeholders,⁴⁹⁶ the NFF's view was that 'if it's [the Code] going to be across the supply chain then it should be mandated, it should be that all players are in.'⁴⁹⁷

It would have become obvious at some early stage that this was not the way in which the majority at the table were headed. As the CEO of the NFF explained:

*So from the farm sector – we actually had the discussion to say, farmer's supply chain to processors, not necessarily all directed to retailers. So can we be involved in this code of conduct, given it's a retailer supply chain? And the actual code itself has a lot to do with shelf space and contracts, which really are not directly relevant to farmers.*⁴⁹⁸

Perhaps given the political heat and traction surrounding the dairy industry around the time, the NFF considered that it had more bargaining power in direct negotiations with government. If that was their call, history shows it was the wrong one. In his typically colourful account, Billson points out – 'the NFF played that card and then were left out in the cold ...'⁴⁹⁹

The NFF stuck to its guns nevertheless, making it clear in its submission to the Senate Economics Legislation Committee review of the proposed code in March 2015 that it continued to support a 'mandatory, binding code that encompasses all retailers' and would be 'monitoring how the initiative

⁴⁹³ Transcript of interview, Robert Hadler, p. 21.

⁴⁹⁴ Transcript of interview, Gary Dawson, p. 34; Transcript of interview, Robert Hadler, p. 23.

⁴⁹⁵ Transcript of interview, CEO of NFF, p. 13.

⁴⁹⁶ Transcript of interview, CEO of NFF, p. 17.

⁴⁹⁷ Transcript of interview, CEO of NFF, p. 13.

⁴⁹⁸ Transcript of interview, CEO of NFF, p. 13.

⁴⁹⁹ Transcript of interview, Bruce Billson, pp. 30-1.

will work in practice'.⁵⁰⁰ However the NFF also acknowledged that while 'not perfect' the FGCC 'does address several key imbalances with regard to major retailer power over suppliers.'⁵⁰¹

III. Outside the tent: Aldi and Costco

Neither Aldi nor Costco were seated at the negotiating table. On one view, the absence of Aldi might be regarded as particularly troublesome given its growing competitive significance in the sector. Costco has a much lower retail share but is nevertheless a major wholesale presence in groceries. Aside from their market relevance, an objective observer might have taken the view that as large foreign companies they may well have been able to make a valuable contribution, drawing on their regulatory experience from other jurisdictions. But the fact is they were not involved, and reasons for this vary again depending on who is offering them.

According to Hadler, Aldi 'refused to participate'.⁵⁰² This appears to suggest that Aldi was invited and declined to pull up a chair. According to Dawson, Aldi was approached (possibly by the AFGC on its own) for feedback on drafts and gave it. Nevertheless, there appears to have been a feeling that Aldi's input was not a priority and could even be a hindrance. Securing agreement, and doing so quickly (as the circumstances were evidently seen to demand), were imperative and the only way to reach this outcome was to confine substantive input to the MSCs. According to Dawson:

*...from a practical point of view we felt that to be effective it had to have Coles and Woolworths signatories and to broaden it beyond that in terms of the negotiation would potentially jeopardise the ability to get an outcome, so that was simply a pragmatic view on what might be achievable.*⁵⁰³

A direct account from Aldi as to whether it was or was not invited to participate in the code negotiation and drafting process is not available. However, Aldi did make a submission to the consultation held by Treasury on the AFGC-MSC draft that had been handed to government. As is pellucidly clear from that submission, Aldi did not see much in the initiative that should be material or could even be relevant to it. Indeed, at the time of their submission, Aldi was in two minds as to whether it would sign on – 'ALDI is still considering whether it would be prepared to opt in to the Code'⁵⁰⁴ – expressing concern that to do so would only:

...add complexity to our current effective and transparent procedures and processes with suppliers. This would increase administrative and compliance costs on ALDI and its suppliers

⁵⁰⁰ NFF submission to the Senate Economics Legislation Committee Inquiry, *Competition and Consumer Act 2010 (Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015*, March 2015, p. 3.

⁵⁰¹ NFF submission to the Senate Economics Legislation Committee Inquiry, *Competition and Consumer Act 2010 (Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015*, March 2015, p. 3.

⁵⁰² Transcript of interview, Robert Hadler, p. 23.

⁵⁰³ Transcript of interview, Gary Dawson, p. 34.

⁵⁰⁴ Aldi submission to Treasury, FGCC consultation paper, 2014, 19 September 2014, p. 1.

*which is in contrast to ALDI's business model to simplify and standardise its operations to keep operating costs low in order to ensure everyday low prices for consumers.*⁵⁰⁵

Aldi also made clear that it did not view the code as having direct application to its behaviour or business model:

In short, we understand that the Code seeks to respond to concerns in relation to specific behaviours of the two major supermarket chains ('MSCs') who have significant market power...

*In considering the Code, ALDI notes that it does not have the same market power as the MSCs, and it does not engage in the types of behaviours that have been raised in relation to the MSCs as outlined in the Consultation Paper. ALDI already has clear and fair agreements and good relationships with suppliers, and efficient and simple processes to resolve any issues that emerge from time to time with suppliers.*⁵⁰⁶

Furthermore, Aldi's submission suggests that it had not been involved in the development of the Code. This is so despite the former AFGC head recalling that he had consulted offline with the discounter during the course of negotiations with MSCs. Aldi's submission, however, reads:

*We also observe that the Code is based on the AFGC Code, the drafting of which did not involve ALDI. Accordingly, many of the provisions in the Code suit the business model of the MSCs but are inapplicable or inconsistent with ALDI's business model as a limited line, low cost retailer.*⁵⁰⁷

There also appears to have been a sense that any critique that Aldi constructively offered would not have held much sway given the dominance of the MSCs in the process and also given that there seemed to be rush in getting to an outcome:

*[Aldi] did make comments about it [Treasury's draft] but the comments were so limited because it was rushed through. And also, if you actually look at it from the perspective of definitions it talks about senior buyers. Well, that is not our definition because we have group line directors so the code doesn't even cater for the lines with Aldi. And we wanted liquor in it and it should've been but the others [said], "No, no, no, we don't have time for this, no, no, no, it's not relevant, and push it through."*⁵⁰⁸

Yet despite its strong views on the irrelevance and the attendant disadvantages for it of the Code, Aldi signed up. Why? Again, the answer lies in the politics. Aldi, not unlike the MSCs, appreciated that if 'the industry' did not provide government with a solution to the problems in the sector (and a way to relieve the political pressure), the government would take its own action so as at least to be seen to

⁵⁰⁵ Aldi submission to Treasury, FGCC consultation paper 2014, 19 September 2014, p. 1.

⁵⁰⁶ Aldi submission to Treasury, FGCC consultation paper 2014, 19 September 2014, p. 1.

⁵⁰⁷ Aldi submission to Treasury, FGCC consultation paper 2014, 19 September 2014, p. 1.

⁵⁰⁸ Transcript of interview, interviewee that consults to / advises grocery businesses, p. 23.

be addressing the crescendo of grievances, now fully in the public eye and capturing community sympathy. Aldi faced an invidious choice: sign up to what it saw as the Coles-Woolworths code and cop the added compliance cost or refuse to sign up and cop the bad press and potentially a mandatory code. As one interviewee ruefully remarked, for Aldi it was a case of 'damned if you do and damned if you don't'.⁵⁰⁹ Given the company's strong cultural preference for staying out of politics and the media spotlight, it is little surprise that it chose the 'damned if you do' option. And from Billson at least, for that, it deserves due credit:

... they [referring to Aldi] didn't have to [sign up to the Code] but they were excellent, I found dealing with Aldi extremely positive, in fact they were first cab off the rank...⁵¹⁰

From a supplier perspective, Aldi really had nothing to lose from signing up to the FGCC. As one experienced supplier consultant told us with more than a touch of wryness:

..they strive for a good deal, nothing wrong with that, but once you're in they look after you, they're fair, they're honourable ..But when you're expecting to deliver a 3 EBIT and you're delivering – or 3.5 and a half and you're delivering a 5 EBIT as Aldi is, it's roses in the garden... they don't have to be horrible, they can make great margins just by being normal.⁵¹¹

According to a senior representative of the US discounting chain, Costco wasn't asked to participate or consulted by the code negotiators. Exclusion does not appear to have been a matter of any concern to Costco, however. This exercise was, in their view, 'very much a Woolworths/Coles thing'⁵¹² - a reference not only to the fact that the process was being driven by the MSCs but also, echoing Aldi's position, that it was being undertaken as a result of bad behaviour by Coles and Woolworths and that type of behaviour was simply not a part of the Costco culture. As the same representative explained:

... if we had have been consulted we may have had some input, but I think what we've illustrated to you here today too is that we don't really need that code ... The code basically says you have to obey the law. We will obey the law, and the first thing they will do is break the code... It's not our business, it's their business regulation, not ours.⁵¹³

Like Aldi, Costco made a submission to the Treasury consultation and like Aldi, it pointed out the ways in which proposed code would conflict with its business model. Costco acknowledged the Government's desire to better regulate supermarket-supplier relations, but stated that, 'it does not

⁵⁰⁹ Transcript of interview, interviewee who consults to grocery businesses, pp. 34-5.

⁵¹⁰ Transcript of interview, Bruce Billson, p. 43. In fact the first retailer to sign on to the Code was About Life, a NSW-based wholefoods grocer that has 7 stores in Sydney and 1 in Port Melbourne. About Life signed up on 19 May 2015, Aldi signed on 15 June and both Coles and Woolworths signed up soon after on 1 July 2015 (see ACCC Food and Grocery Code of Conduct website).

⁵¹¹ Transcript of interview, director of a consultancy that advises suppliers, p. 43.

⁵¹² CC 2008 Report, p. 55.

⁵¹³ CC 2008 Report, p. 56.

agree with the proposed regulation in that it attempts to treat very different businesses in the same manner.’⁵¹⁴

Costco made clear that it did not consider itself to be part of the problem when it came to suppliers, ‘primarily because Costco considers that a sustainable relationship with its suppliers is commercially astute’, and attributed the lack of relevance of the Code to its operations to ‘the process by which the draft Code was composed – that is, in close consultation with the two MSCs.’⁵¹⁵

However, unlike Aldi, Costco stood its ground when it came to the crunch of signing up, stating in its submission that ‘in the Code’s current state, Costco would not volunteer to be bound by it’.⁵¹⁶ Possibly reflecting a greater risk tolerance (in turn possibly reflecting its US origins), the company was not prepared to put its name to an instrument that, in its view, had no relevance to its *modus operandi*.

IV. A bet both ways: Metcash, MGA and the IGAs

Independent retailers, their representative association (the MGA) and their principal wholesale supplier (Metcash) were also not involved in the roundtable discussions that preceded the Treasury consultation, although again Dawson’s recollection was that he consulted with Metcash representatives separately.

According to Hadler, ‘they were asked to participate and declined.’⁵¹⁷ However the owner of a group of IGA stores believes it was the lack of any such request that in part explains why Metcash have not signed up:

*I know why Metcash didn’t want to sign because Coles and Woolworths set the code up but Metcash actually didn’t have any input into what the design of the code was, so I know that was the biggest issue that they had.*⁵¹⁸

He went on to say that he thought Metcash’s position was:

*“Don’t come and ask us to sign it after you’ve put it all together because obviously the Code is going to be stacked in the favour of Coles and Woolies for all the mistakes they’ve made ... where Metcash has maybe made three or four mistakes you’ve got these guys have actually made a couple hundred”.*⁵¹⁹

Whether or not Metcash was invited to provide input to the RSR aside, reasons offered second-hand as to why they apparently remained aloof again vary depending on the source. Hadler says Metcash saw the code initiative as irrelevant to them because they are a wholesaler not a retailer. But he is also somewhat cynical about this position: ‘they play a funny game... the reality is that they source

⁵¹⁴ Costco submission to Treasury, FGCC consultation paper 2014, 11 September 2014, p. 2.

⁵¹⁵ Costco submission to Treasury, FGCC consultation paper 2014, 11 September 2014, p. 2.

⁵¹⁶ Costco submission to Treasury, FGCC consultation paper 2014, 11 September 2014, p. 3.

⁵¹⁷ Transcript of interview, Robert Hadler, p. 24.

⁵¹⁸ Transcript of interview, managing director of an independent supermarket group, p. 46

⁵¹⁹ Transcript of interview, managing director of an independent supermarket group, p. 46.

from suppliers anyway and then they just distribute through the IGA network. And the IGA guys, who are the franchisees, say they don't buy the product. So they try and play both sides.'⁵²⁰

This view is reinforced by an industry expert who works closely with suppliers and believes that while some of Metcash's activities may not be covered by the Code in its current form, perhaps they should be. In his opinion, the Code should be broad enough that 'if you do business with a retailer in Australia you're protected by the code because the core poor behaviours exist across grocery supermarkets, liquor, DIY, you name it.'⁵²¹ The same interviewee expressed disappointment that Metcash and Costco had not signed up, and expressed the view that there was, 'no reason why IGA groups shouldn't be party to this at all'.⁵²²

Interestingly the owner of one such group, while also attributing Metcash and his own group of IGA stores' decision not to opt in to a lack of business relevance, did entertain the possibility of Metcash and his group signing up to a revised Code:

*Metcash is a different model to Woolies and Coles so it can't be "just sign here" because it's the same Code. But if the Codes are modified to be relevant then I'm not against – in my opinion, if it was good enough – and I'm saying, if that's good enough for [my stores] to work to a code, I think it's perhaps good enough for Metcash to work to a code, whereas I think it would be a more stringent code for the likes of perhaps Coles and Woolies.*⁵²³

The MGA head is more generous. Metcash did not sign onto the code, in his view, 'because that independent wholesaler model is something very complex' but 'they've committed to acting on a lot of the initiatives within it' in any event.⁵²⁴ As for independents outside of the Metcash-IGA network, he was even more accommodating as to why these smaller retailers did not sign up and were justified in not doing so: 'it really became kind of an unknown... it could put some real added red tape and cost burden pressure on them.'⁵²⁵

Billson's reflections on Metcash's position echo the comments of both Hadler and the MGA's CEO but also paint a picture of an organisation trying to have a bet both ways. The former Minister recollects Metcash's position as being to the effect: ' "oh, we're all really nice and charming and we don't need this [ie to subscribe to the code]" – a position Billson, and many others reject, on account of reports that Metcash was as tough if not even tougher for suppliers to deal with. However, Billson also remembers Metcash's reasons for refusing to sign on as relating to the complexity of their model (the head of MGA's point) and the argument that the regulatory burden, not just on Metcash but and arguably even more so on their retail arm, would put them at a disadvantage to the MSCs. At the same time, Billson distinctly recalls the Metcash MD telling him that the company nevertheless would 'comply with it [the code] in every respect.' The contradiction in this was not lost on Billson:

⁵²⁰ Transcript of interview, Robert Hadler, p. 24.

⁵²¹ Transcript of interview, director of a consultancy that advises suppliers, p. 57.

⁵²² Transcript of interview, director of a consultancy that advises suppliers, p. 60.

⁵²³ Transcript of interview, CEO of an independent supermarket, p. 23.

⁵²⁴ Transcript of interview, CEO of Master Grocers' Association (MGA), p. 21.

⁵²⁵ Transcript of interview, CEO of MGA, p. 23.

*..I said, "So hang on, you just told me it was the cost you were worried about and that's why you weren't going to sign, now you're telling me you're going to mimic full compliance therefore incur those costs that were so traumatising and still not sign." I said, "That's like saying you're playing footy but you're sitting in the third row back. What logic is that?"...*⁵²⁶

There may be broader repercussions that flow from Metcash's reticence to sign on. As Dawson recently observed, if Metcash still hasn't signed on by the time the Code is reviewed in 2018 then the option to make the Code mandatory may once more be on the table.⁵²⁷

Indeed, it was made clear in response to a recent AFGC survey of suppliers that, 'there is a very strong view that [the] Code should have 'whole of industry' application'. The majority of suppliers surveyed were in favour of Costco, the independents and in particular Metcash, along with on-line grocery retailers, to become signatories.⁵²⁸

V. Behind the scenes: Billson

While AFGC and MSC representatives and advisors were busy meeting, consulting and drafting, there was evidently a lot of negotiation taking place behind the scenes and this appeared to escalate when the rubber hit the road and it came time during the Treasury consultation to determine which parties would sign on and which would withstand the pressure to do so. Billson was a key protagonist in these backroom dealings.

With all of the stakeholders, Billson's message was clear: come up with something that works and is politically sale-able, and then I will run with it; but come up short, and I will flick the switch that ignites the cumbersome and heavy-handed regulatory machine. There is no doubt that most of the primary parties involved took the (not so) veiled threat seriously, as reflected in the degree of commitment to and urgency in the process being undertaken by the AFGC and MSC trio. Not content to leave matters to Harper et al in the root and branch competition law review, Billson continued to press the MSCs to come up with a fix for the problems in the supply chain.

However, as Billson readily concedes, there may have been challenges in carrying out the threat to pull the trigger on a mandatory code. Partly that was because it would have flown in the face of the government's red tape cutting agenda and he may have encountered resistance in the party room ('to be absolutely frank with you, and it's probably not a great justification but I'll share it with you as well, we had deregulation targets, now, I've got to tell you.. in this space you could regulate everything up the wazoo and never stop').⁵²⁹ Partly it was because Billson's personal philosophy and preference favoured a lighter touch:

⁵²⁶ Transcript of interview, Bruce Billson, 47.

⁵²⁷ Transcript of interview, Gary Dawson 2, p. 16.

⁵²⁸ AFGC, *Annual Food and Grocery Code of Conduct Survey Report*, 2017, p. 20.

⁵²⁹ Transcript of interview, Bruce Billson, p. 24.

I'm a gradualist on regulatory interventions, you don't bring a sledge hammer if that's not what's needed. Why? Well, that's intuitively who I am. And secondly there's the bloody red tape accounting process, so I was trying to deliver the best bang for the least amount of regulatory burden bucks knowing that if it didn't work we would then have an evidence base to move to the next level. Now, if you want to check my form on that look what I did with the Franchising Code, we said let's get this – I – my mantra is minimum effective regulation, that's what gets me in a bit – minimum effective regulation. You overreach it's a drag on the economy and we can't afford that, so to live that discipline I had to walk the talk and, so this was about saying to them, "No, no, don't play me on this," they tried it a couple of times, I said, "Don't try me on, I will regulate, I will impose something on you if you can't give something that's adequate so just get that little idea out of your head that is there, call it a threat, whatever you want, but there is going to be something happening and if it's not adequate I will make sure it happens and it might not look like what you want it to look like so you best get yourselves back together." ⁵³⁰

Tensions between the appointment of an adjudicator to enforce GSCOP and a deregulatory agenda were felt also in the UK. As one of our interviewees told us, "introducing [the GCA] at the time it came in, was uncomfortable in some ways for a conservative government that believes in deregulation."⁵³¹ That discomfort is reflected in the fact that the GCA apparatus is reviewable every three years and in the recently completed review, one of the explicit considerations was whether or not it should be replaced by another body, if not removed altogether.⁵³²

On the disadvantages of regulation, not unexpectedly, Billson and the big business representatives were one. As Hadler explains of the voluntary code approach:

...this was designed to manage the – close perception gaps and to avoid increased regulation that would result in dead weight cost to industry and unintended consequences for suppliers, without any consumer benefit... I think if it was a heavily prescribed, mandatory code with an industry funded regulator, I think it could result in consumer detriment...It was going to be regulated. It was a question of how it was going to be regulated..⁵³³

In getting what needed to be done, Billson evidently saw an ally or a partner in the AFGC and Dawson in particular:

..I said to a few of the players and particularly with Gary, "Take it as far as you can get it," and I think I said when they handed it to me I think I gave it a six out of 10 or something if I remember correctly ... we'd been closely monitoring it and I was giving a few cues to the players about what I thought would be adequate. They were short on a few of those things. Gary did exceptionally good work there but he took it as far as he could and he – and I'll be

⁵³⁰ Transcript of interview, Bruce Billson, p. 26.

⁵³¹ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 7.

⁵³² See further Part 7 below.

⁵³³ Transcript of interview, Robert Hadler, pp. 30-1.

honest with you, he rang me and he said, "I can't take it any further, I just can't take it any further, we're going to have to pass the parcel." I said, "Okay, well, I'll run with it now." So we exhausted that collegiate collaborative thing and then I got my piece of work which was a little more targeted cajoling with the knowledge that if we couldn't get an adequate outcome I would push and I would count the red tape costs and if I got it wrong, well, too bad, you're going to have to wear it then because you wouldn't work with us on it. So that was how that worked and by acting the way we did the red tape cost counter was a dramatically different piece of work, dramatically, so.⁵³⁴

With the MSCs, Billson may have been a bit more forceful and it is also evident that with these parties, he was dealing over the heads of the corporate affairs negotiators. Referring to the Coles' CEO, Billson recounts:

You see, John Durkan and I got on pretty well but we had some Bruce and John chats because we'd get to a point where we thought we were there and then it would go back into their machine and it would spit out and I said, "Mate, that's not what we agreed, that's bullshit, that's not what we agreed, you go and have another go." "Oh, but, but," I said, "That is not," sorry, that was a little bit dramatic but that's basically how it went and that was – Woolworths were – they didn't want to be left out but Coles were the ones that were probably most active...⁵³⁵

According to one source, and despite Billson's favourable depiction of Aldi's attitude, he played it no less tough with the discounter. The recollection of this interviewee was that Aldi decided to make a submission to Treasury '...when Billson said, "I'm going to make this mandatory so you'd better sign up"⁵³⁶.

As for the NFF, as previously mentioned, politics was very much in play. It was an election year. According to Billson, the NFF had assurances from Labor: 'if you bail ... if you abandon this process and say how unsatisfactory it is ... we will impose a mandatory code' (which was, after all, what the NFF wanted). So the NFF duly jumped ship. But the process had gathered such steam by that stage that the farmer group's withdrawal seems to have constituted little more than a hiccup. And by the time it became apparent that a code would be enacted and it would be voluntary, it would have become obvious to the NFF that its strategy had tanked (and Rudd's failure at the 2013 election meant that Labor's promises could not have been made good in any event). According to Billson, the NFF then came to him saying in effect: "oh, that didn't turn out the way we hoped ...", and from his response it is clear that at that stage Billson was no longer listening:

⁵³⁴ Transcript of interview, Bruce Billson, pp. 26-7.

⁵³⁵ Transcript of interview, Bruce Billson, p. 28.

⁵³⁶ Transcript of interview, interviewee that consults to / advises grocery businesses, p. 23.

I said, "Looks like you've cracked a sooky la la and you've got nothing for it, you realise when you throw the toys out of the cot you can't reach them after that so just chuck them to the other end of the cot next time".⁵³⁷

Other primary produce stakeholders were watching from the sidelines and Billson may have been prepared to include them in the process but, amongst some at least, there was a view shared with and perhaps influenced by the NFF that 'they could do better'.⁵³⁸ They too read the politics wrong. Billson again:

...there was an awful lot going on there and just to frame it a bit further if I could, the other Codes, the yeah, and the grape growers and the wine makers ... they were pretty convinced that they could do better and so they stayed out as well ... they thought they could do their own thing and then I said, "Oh, okay, good luck with that." And it was ironic because then the horticultural industry, having known of the problems of the Hort Code ... they came very late in the piece and said, "We can't get anything near what you've got, can we have in?" I said, "You just left it too late guys, its five to 12, I've been asking you to get on board." And they said, "Oh, we so want this now, we're never..." so I found that really quite reassuring that the hort industry and the winemakers who were pretty convinced they were on better ground than we were, they saw what I tried to do with this Code, it had far more utility in than people anticipated..⁵³⁹

Billson's strategy of monitor, guide, cajole and where necessary threaten may have worked with most of the major players, but it failed with Metcash. The larger than life small business politician pulled out all the stops to get Metcash over the line. His threats were not confined to heavy regulatory intervention (by way of a mandatory code) should the industry initiative fall short; they extended to bad publicity for Metcash. Billson had been told by suppliers that some of the most 'egregious' treatment was meted out not by the MSCs but by the wholesaler-retailer. When faced with denials from a senior Metcash representative, Billson's response was: "Don't take my word for it, do you want me to get the suppliers talking publicly? I can organise that..."⁵⁴⁰ When threats didn't work, he tried reasoning on commercial grounds: "What are you saying, that you don't want to play fair, you want to be able to behave in an unfair way and that's good for your share price? ..."⁵⁴¹ Finally, concessions:

I gave them longer to transition because they did have a different contractual platform and I thought that was legitimate; and the second thing was I cut them an awful lot of slack with their customer facing businesses, they have a multibillion dollar retail business and I said, "I'm not going to give you a hard time about that, you've got to at least get your wholesale business."⁵⁴²

⁵³⁷ Transcript of interview, Bruce Billson, pp. 30-1.

⁵³⁸ Transcript of interview, Bruce Billson, p. 31.

⁵³⁹ Transcript of interview, Bruce Billson, p. 31.

⁵⁴⁰ Transcript of interview, Bruce Billson, pp. 43-47

⁵⁴¹ Transcript of interview, Bruce Billson, pp. 43-47

⁵⁴² Transcript of interview, Bruce Billson, pp. 43-47

When both bad cop and good cop failed, Billson was left angry, bewildered even:

*And they still said no and I said, "I just can't believe it," so I did my nana with them and said, "That's just bizarre and if I'm asked I'll say so, so don't expect any polite no comments about your decision, it's a shocker and I'll say it's a shocker and I can't understand the logic to it."*⁵⁴³

VI. Making it official: Treasury

Competition and consumer policy and law-related matters lie within the Treasury portfolio and so it fell to the engine room of government policy-making and administration to take the draft code presented to it by the RSR in November 2013 to the next stage. Treasury has a standard process for dealing with and consulting on these types of regulatory proposals. The process accords with the Treasury's guidelines on code prescription and the requirements of the federal Office of Best Practice Regulation (OBPR) directed at ensuring that 'public policy achieves a desired objective in a cost-effective manner'.⁵⁴⁴

The initial step was to redraft the Roundtable version to ensure it had the requisite degree of formality required for legislative instruments and was consistent not just with the Treasury's but also the ACCC's guidelines for industry codes.⁵⁴⁵ It does not appear that, at that stage, any substantive changes were made to the AFGC-MSD draft. The Treasury version then became the basis for consultation. A consultation paper that constituted the government's Early Assessment Regulatory Impact Statement (RIS) was produced, together with a Fact Sheet and Explanatory Statement, and these documents were published with a call for submissions in August 2014.⁵⁴⁶ 33 submissions (13 of which were confidential) were received over the five week period that the consultation stayed open and were also published on the Treasury website.⁵⁴⁷ Some face to face hearings were held. The submissions were reviewed. Treasury 'took on board all the feedback', liaised with the responsible Minister, Billson, and also negotiated further with the MSCs.⁵⁴⁸ A Final RIS was approved by OBPR and published in November 2014.

As the responsible Minister, Billson then sought the approval of the federal Executive Council to have the relevant Regulation made. Approval was forthcoming and the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* subsequently received the final rubber stamp, that of the Governor-General. The FGCC is contained in Schedule 1 to the Regulation and came into operation on 3 March 2015. It was gazetted on 9 March 2015 and then tabled before both Houses of Parliament. At this stage the Parliament had the option of allowing the prescription of the Code in its

⁵⁴³ Transcript of interview, Bruce Billson, pp. 43-47.

⁵⁴⁴ Australian Government, Department of Prime Minister and Cabinet, Best Practice Regulation, <https://www.dpmc.gov.au/regulation/best-practice-regulation>

⁵⁴⁵ Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, 2011; ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, 2011.

⁵⁴⁶ Treasury, FGCC consultation paper, 2014.

⁵⁴⁷ See <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Improving-Relationships-Food-Grocery-Sector/Submissions>.

⁵⁴⁸ Transcript of interview, Treasury, p. 10.

proposed form, disallowing the prescription of the Code or asking the Minister to make amendments to address any deficiencies identified.

On 21 April 2015 a Senate Economic Legislation Committee, having called for submissions and received 13, met to inquire into the proposed Regulation. Several witnesses were heard, including representatives from Treasury, Queensland Dairyfarmers' Organisation Ltd, Mareeba District Fruit and Vegetable Growers Association Inc and the ACCC. In its report, the Committee acknowledged concerns about the Code in its current form:

In particular, the committee notes concerns expressed by a number of witnesses regarding the voluntary nature of the Code, the provisions for exceptions to conduct otherwise prohibited under the Code, the potential costs and difficulties raised by the dispute resolution processes provided for by the Code, and the extent of penalties that might be applied in response to breaches of the Code. The committee further notes concerns regarding the coverage of the Code, and in particular concerns that it does not cover alcoholic beverages or issues relating to pricing.⁵⁴⁹

Notwithstanding these concerns, the Committee found that there was general support for a code of conduct for the industry and concluded that:

... the Code represents significant progress in improving the standards of business conduct in the food and grocery sector. [It will] achieve its stated purposes, as set out in clause 2 ... [and] the fact that the Code has emerged from an industry-led process [is to be welcomed] ... industry participants are often best placed to develop codes that properly reflect the circumstances of their industry.⁵⁵⁰

While prescribed codes are typically reviewed every five years in consultation with industry, consumers and business, in this instance an earlier review was determined appropriate. Further consultation had been undertaken prior to the Committee's inquiry and a provision inserted requiring a review be undertaken three years from commencement of the Code.⁵⁵¹ The Committee noted this, stating:

This review must consider certain matters, including whether the purposes of the Code are being met, levels of compliance with the Code, whether it should be mandatory or voluntary, and whether it should include civil penalty provisions. The committee notes that the review will be able to draw on assessments of the Code's operations and effectiveness. As such, the

⁵⁴⁹ Senate Economic Legislation Committee Report, Competition and Consumer Act 2010—Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, 14 May 2015 [SELC, *FGC Regulation*, 2015], 2.61 at p. 22. With reference to the concerns that the proposed code would not cover alcohol in its definition of groceries it may be noted that in the UK, alcoholic beverages are covered by the CC, GSCOP (The Groceries (Supply Chain Practices) Market Investigation Order 2009, UK, Part 1 s 1.

⁵⁵⁰ Explanatory Statement, *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (Explanatory Statement, FGC Regulation, 2015).

⁵⁵¹ SELC, *FGC Regulation*, 2015, p. 22.

*committee believes that the concerns raised during this inquiry would be best considered as part of the required review.*⁵⁵²

The Committee closed with the recommendation that the Regulation stand as promulgated.⁵⁵³ The FGCC did not come into immediate effect, however. Naturally there were transitional provisions. Any new GSAs entered into after a retailer or wholesaler had agreed to be bound by the Code did have to comply with the requirements of the Code. But for agreements made prior to the retailer or wholesaler agreeing to be bound by the Code, there would be six months for retailers and 18 months for wholesalers (fulfilling Billson's promise to Metcash of a longer transition), to offer to vary existing agreements so as to comply with the Code. If an agreement was not varied, the entire Code would apply to a retailer 12 months, and to a wholesaler 24 months, after they agreed to be bound. The good faith (and freedom of association) obligations however applied immediately upon either party agreeing to be bound.⁵⁵⁴

Before examining further the substance of Treasury's consultation on the proposed code and its outcomes, it is useful to provide some brief background. As this background makes clear, the codification exercise entailed in the FGCC's introduction was by no means some novel or unprecedented experiment from a regulatory perspective, even if this was/is the first voluntary code to be prescribed under the CCA.

(a) Codification as a way of doing business, both for industry and government

Prescribed codes of conduct were introduced into the CCA framework at the same time as the unconscionability provisions in the Act were extended to small business in 1998.⁵⁵⁵ However, non-statutory industry codes had been around for a long time previously, seen by the business sector and often driven by active industry associations as a constructive way of self-regulating in the interests of improving standards, promoting consistency, enhancing reputation and bolstering community confidence, providing for efficient and effective dispute resolution, and warding off more draconian regulatory responses from government.⁵⁵⁶ As explained by Treasury:

*... from industry's perspective it's the opportunity to tailor the law to their particular circumstances. And also with the way that codes operate from the purely voluntary ones to the grocery codes, it is potentially less onerous regulation than a full mandatory code, so there's a bit of a benefit there as well. It's just about getting the balance right.*⁵⁵⁷

⁵⁵² SELC, *FGC Regulation*, 2015, p. 23.

⁵⁵³ SELC, *FGC Regulation*, 2015, p. 23.

⁵⁵⁴ Explanatory Statement, *FGC Regulation*, 2015.

⁵⁵⁵ See s 51AE, *Trade Practices (Industry Codes - Franchising) Regulations 1998* (Cth).

⁵⁵⁶ Transcript of interview, Treasury, p.4.

⁵⁵⁷ *Policy guidelines on prescribing industry codes under part IVB of the Competition and Consumer Act 2010*, May 2011, Commonwealth of Australia, see in particular pages iv, 1, 2 and 6.

Such code practices had also been part of ACCC business for some time. In the late 1980s the then Trade Practices Commission had conducted a review of self-regulation that was supportive of such schemes as a cost-effective, efficient and unobtrusive alternative to government regulation and providing a set of principles to guide industry in developing their own codes of practice.⁵⁵⁸ The initial guide developed by the ACCC in relation to industry codes evolved into a more detailed manual on the appropriate uses, design and implementation of codes of conduct, first published in 1989 and in revised version again in 1996.⁵⁵⁹ The ACCC developed a practice of assisting industry, often through their own association, in decision-making about and drafting of such codes, but also encouraged industry bodies to apply for authorisation of such instruments under the CCA where there was potential for anti-competitive effects. According to one interviewee from the ACCC, provision of such assistance is 'standard'; '[it's] an avenue that's available, and it is an avenue that was pursued [with regard to the development of the FGCC].' He went on to say, with regard to any industry seeking the assistance of the ACCC:

We give them guidance ... on just how or what they should think about in terms of mechanisms to deliver the rigour that they would seek to make the code effective. And it's not uncommon, ... where we'll have some preliminary discussions, we'll explain how the mechanism works in our view and then they will go and consult and work through a process and basically take it offline, develop an industry code of conduct consistent with our best practice guide, and not necessarily come back to us to seek any kind of advice.⁵⁶⁰

1996 was an important year for codes in two other respects. It was the year in which a major report into the burdens on small business of government regulation was released and a call made for a change in the culture of government so as to reduce compliance requirements and associated paperwork.⁵⁶¹ In the same year a parliamentary inquiry into fair trading was commenced, a substantial theme in which was the imbalance in power between small and large businesses (in the context of franchising and leasing particularly).⁵⁶² Small business associations saw the solutions lying both in a strengthening of black letter laws addressing oppressive conduct as well as strengthening codes of conduct - a dual pronged approach. The outcome was the introduction of the *Trade Practices Amendment (Fair Trading) Bill*, a year later, extending protections from unconscionability (previously applicable only to consumers) to small businesses,⁵⁶³ and establishing a legislative framework for the recognition, governance and enforceability of codes of conduct so as to send the strongest possible message to the Australian business community that:

... commercial relations between big and small businesses must be treated on a fair and reasonable basis ... [and to] induce behavioural change in commercial practices so that small

⁵⁵⁸ Trade Practices Commission, *Self-Regulation in Australian Industry and the Professions: Report by the Trade Practices Commission*, 1988.

⁵⁵⁹ For the most recent guidelines, see ACCC, *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, July 2011.

⁵⁶⁰ Transcript of interview, senior representative of the ACCC, p. 6.

⁵⁶¹ Small Business Deregulation Task Force, *Time for Business*, November 1996.

⁵⁶² House of Representatives Standing Committee on Industry, Science and Technology, *Finding the Balance: Towards fair trading in Australia*, May 1997.

⁵⁶³ See s 51AC, *Trade Practices Amendment (Fair Trading) Bill 1997* (Cth).

*businesses do get a fair go and, where they are treated unfairly, they have available to them a means of redress.*⁵⁶⁴

The introduction of provisions allowing for the creation of statutory industry codes evidently did not signify a desire by the government to see a slew of such codes come into force. Instead, the Coalition government continued to advocate for industry self-regulation which was viewed as providing a more flexible alternative to direct government regulation.⁵⁶⁵ Correspondingly the ACCC continued its work in supporting the development and where necessary authorising non-statutory industry codes, although over time such work has become less of a priority and particularly at present given the focus on the new provisions relating to unfair contract terms.⁵⁶⁶ The process involved in having a code prescribed, by contrast, was much more formal and in 2010, became the subject of policy guidelines issued by Treasury.⁵⁶⁷ The guidelines make it clear that mandating a code of conduct under the CCA is seen by government as a last resort⁵⁶⁸ given that, in most instances, the net benefit of effective self-regulation will exceed government intervention. Such intervention will only be used where there is 'a demonstrable problem' that the industry itself or the market cannot overcome.⁵⁶⁹

According to the Treasury guidelines:

The primary goal of an industry code, from the perspective of the Australian Government, is that it enhances the wellbeing of the Australian people. This might be achieved by reducing complexity that industry participants or consumers are required to deal with, by reducing risks, by ensuring that industry participants are afforded some measure of fairness in their dealing with other industry participants, or by increasing the aggregate output from a particular industry.

...

*Industry codes are not, as a general proposition, designed to address circumstances in which smaller participants in an industry experience competitive pressures that relate to limited access to economies of scale in purchasing, bargaining or access to markets. If this is the case, there should be compelling evidence to indicate that the problems experienced are so significant that they have effects beyond individual firms or groups of firms within an industry, such that there is a public interest in the prescription of an industry code.*⁵⁷⁰

The formal process for prescribing an industry code is generally started by representations made to government by industry participants in favour of intervention, as indeed was the case with the FGCC. Consideration is then given to the introduction of a prescribed code by way of response and

⁵⁶⁴ Australia, House of Representatives, *Hansard*, 30 September 1997: 8546.

⁵⁶⁵ Treasury, *Industry Self-Regulation in Consumer Markets, Report prepared by the Taskforce on Industry Self-Regulation*, August 2000.

⁵⁶⁶ See <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>.

⁵⁶⁷ Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the CCA 2010*, May 2011.

⁵⁶⁸ Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the CCA 2010*, May 2011, p. 6.

⁵⁶⁹ Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the CCA 2010*, May 2011, p. 2.

⁵⁷⁰ Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the CCA 2010*, May, 2011, p. 6.

consultation to that effect undertaken with key stakeholders, including with States and Territories and the ACCC, by the responsible government department. Where the consultation supports this response, a draft RIS is prepared and is to identify the relevant problem or problems giving rise to the need for a code, its objectives, the options for achieving such objectives (including an assessment of each option in terms of costs and benefits for consumers, businesses, government and the community generally – both financial and non-financial), a preliminary conclusion as to which is the preferred option based on that assessment, and a draft implementation strategy. The draft RIS is then released for public comment. Upon completion of the consultation process, a final RIS is issued and presented to the OBPR for approval. The decision as to whether to proceed with a prescribed code then falls to the responsible Minister, having taken the final RIS and the consultation feedback into account. If in favour, the code is submitted to the federal Executive Council for approval. Upon approval, the Governor-General is asked to make regulations to this effect, to which the code itself is a Schedule. The Regulations are laid before both Houses of Parliament, which may request amendments or may disallow the code, albeit that rarely occurs.

Pursuant to this process, there have been five industry codes prescribed as mandatory codes under the CCA to date.⁵⁷¹ The FGCC emerged out of the same process, albeit as the first voluntary code under the legislative framework introduced almost 20 years prior.

(b) Purposes and provisions

In the broadest terms, the policy objective justifying the FGCC was identified by government as being ‘to improve standards of business conduct in the food and grocery sector, so as to address ‘potential market failures resulting from imbalances between retailers or wholesalers, and suppliers in the allocation of risks in commercial transactions.’⁵⁷² It was said to be an initiative ‘in response to concerns raised in the public debate in recent years about the conduct of retailers (in particular, supermarkets) towards their suppliers’ and it was acknowledged that the code’s development had been industry-driven.⁵⁷³ Government made it clear that the industry’s initiative and response was to be ‘welcomed’ and was ‘considered to represent an important step forward for the industry.’⁵⁷⁴

More specifically, the purposes of the FGCC were said to be:

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

⁵⁷¹ The Franchising Code of Conduct; Horticulture Code of Conduct; Wheat Port Code of Conduct; Oil Code of Conduct; and the Unit Pricing Code.

⁵⁷² Explanatory Statement, FGC Regulation, 2015, p. 4.

⁵⁷³ Explanatory Statement, FGC Regulation, 2015, introduction.

⁵⁷⁴ Explanatory Statement, FGC Regulation, 2015, p. 1.

- *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*
- *to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.*⁵⁷⁵

The provisions in the Code directed at fulfilling the stated purposes are summarised and justified in the Explanatory Statement accompanying the code regulations as follows.

Part 1 deals with preliminaries, including a statement of purposes, definitions of terms, explanation of applications and transitional arrangements. In its definitional provisions, the Part makes clear the scope of the code as applying to retailers, being corporations carrying on supermarket business (in turn defined by reference to the business of selling certain grocery products to consumers), wholesalers, being corporations in the business of buying groceries from suppliers for the purpose of selling them to suppliers, and suppliers, being persons in the business of supplying groceries to other persons for retail sale. As is explained in the RIS, the definition of wholesale was added at a relatively late stage in the consultation ‘in light of many stakeholders calling for greater coverage of the sector’ and possibly still at a stage when Billson and/or the AFGC might have thought that Metcash could still be talked into signing up, or perhaps to leave open the option of it being covered if/when the code was mandated. In its application provisions, Part 1 makes clear that the Code binds a corporation as a retailer or as a wholesaler, if the corporation has agreed by written notice to the ACCC to be so bound, but also that a corporation would be able to withdraw its agreement by the same means – it is in this sense only that the Code is voluntary.

Part 2 sets out minimum obligations for retailers and wholesalers bound by the Code relating to the making of GSAs. The agreements must be in writing and address certain matters, such as requirements for the delivery of groceries and when they may be rejected. The Code does not stipulate minimum terms — it leaves it up to the parties to consider and agree on these matters. The requirement to keep records encompasses documents comprising or forming part of the agreement.

Importantly, this Part also governs unilateral variations and retrospective variations to GSAs. Such variations are not permitted except where the agreement allows them and clearly sets out the circumstances in which they may be made. The Code requires written notice to be given to the supplier of the variation and the basis for it. An additional requirement is that a unilateral or retrospective variation of an agreement must be reasonable in the circumstances. The onus of proof in establishing the matters required for the exception to apply lies with the retailer or wholesaler. As explained further below, suppliers are able to initiate the Part 5 dispute resolution process on the basis of detriment resulting from a unilateral or retrospective variation.

⁵⁷⁵ Explanatory Statement, FGC Regulation, 2015. These purposes are directly reproduced in the FGCC (Clause 2 – Purpose, *Competition and Consumer (Industry Codes — Food and Grocery) Regulation 2014*, p. 4.

In short, the provisions in Part 2 are said to improve transparency and clarity in commercial transactions within the supply chain by, in effect, encouraging the parties to include upfront provisions in their GSAs about a number of aspects of their relationship.

Part 3 deals with a retailer's conduct towards suppliers and does not apply to wholesalers. It sets minimum standards of conduct in relation to a number of aspects of the relationship between a retailer and a supplier, including payment terms. This is with a view to providing further clarity for businesses and improving standards of conduct in the grocery sector.⁵⁷⁶

Generally speaking, a retailer must pay a supplier in accordance with the terms of the GSA. Certain payments (for example, for wastage or better positioning of groceries) are generally prohibited unless an exception is provided for in the agreement and the payment would be reasonable having regard to certain circumstances. The retailer would have the onus of proving the requirements for the exceptions. Payments for shrinkage would be prohibited under a GSA and a retailer would be prevented from otherwise demanding such payments.

This Part also regulates other aspects of the relationship between a retailer and a supplier, such as delisting products, funding promotions, fresh produce standards and quality specifications, changes to supply chain procedures, business disruption, confidential information, intellectual property rights and allocation of shelf space. By regulating a broad range of circumstances relating to the retailer-supplier relationship, the Code is seen as promoting improved practices in commercial transactions, and improving transparency, whilst allowing sufficient flexibility to the parties.⁵⁷⁷

Part 4 includes a number of more general obligations applicable to corporations bound by the Code. As noted above, these obligations bind retailers and wholesalers in their dealings with suppliers from the time they agree to be bound by the Code. The most important obligation is the overarching duty to act lawfully and in good faith at all times in dealing with suppliers. The meaning of 'good faith' is said to be the same as that at common law and intended to build trust and improve standards of conduct. It does not apply to suppliers as they are not compelled to opt in to the Code, which only provides for retailers and wholesalers to elect to be bound. As the Law Council of Australia's Small to Medium Enterprises (SME) Committee noted in its submission regarding the development of the FGCC:

*The SME understands that the Code is a response to anecdotal evidence of widespread negative commercial behaviours by major grocery retailers towards their suppliers. The SME Committee also understands that there are allegations that such negative commercial behaviours have been made possible by the substantial degree of market power which the major grocery retailers possess. In these circumstances, it seems that the purpose of the Code is to provide protections for suppliers, and not to provide unnecessary protections for the major retailers.*⁵⁷⁸

⁵⁷⁶ Part 3 – Conduct generally, *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*.

⁵⁷⁷ Clause 2 – Purpose, Explanatory Statement, FGC Regulation, 2015, p. 4.

⁵⁷⁸ Law Council of Australia, submission, Treasury, FGCC consultation paper, 2014, 12 September 2014 at [14].

However, the Code provides that when a court is assessing whether a retailer or wholesaler has acted in good faith, it may consider whether or not a supplier has acted in good faith.

Other obligations in this Part protect suppliers' freedom of association and include requirements for the provision of relevant buyers' contact details to suppliers.

Part 5 sets out internal and external dispute resolution processes for suppliers to lodge complaints and seek to have their disputes with retailers and wholesalers resolved. The provisions aim to establish fair and equitable mechanisms for dispute resolution which should promote transparency and accountability.⁵⁷⁹

Under the Code, it is open to suppliers to choose the type of dispute resolution option that best meets their needs. A supplier may make a complaint to a Code Compliance Manager (CCM), a person appointed by the retailer or wholesaler under the Code, and may escalate its concerns to senior management if not satisfied with the outcome. Importantly, the Code sets out a requirement that the CCM is independent of the retailer or wholesaler's buying team. A supplier also has the ability to request that the complaint be elevated directly to senior management for consideration.

A supplier is also able to take a complaint directly to mediation or arbitration (or to the ACCC). The only requirement is that if the complaint has already been raised with the CCM or elevated to senior management, the supplier may not seek mediation or arbitration until such procedures have, or should have, been completed. Importantly, the Code requires a retailer or wholesaler to take part in mediation or arbitration in good faith. According to Treasury:

It's structured in a way to give the participants maximum choice [as to] what dispute resolution path they'd like to follow. So normally you'd go to internal dispute resolution before you went to external dispute resolution, but I think the grocery code is structured that they can do that, or they can elevate to the senior management through the code compliance manager or they can go straight to mediation and arbitration. So it's maximum flexibility for the participants to make sure that they resolve their dispute as expeditiously as they wish.⁵⁸⁰

There are some limited exceptions to recourse to this external procedure where the mediator or arbitrator forms the view that the complaint is vexatious, trivial, misconceived or lacking in substance, or the supplier is not acting in good faith.

With respect to disputes relating to unilateral and retrospective variations of a GSA, a supplier's obligation to provide certain details required in order to initiate a dispute will be met by the provision of particulars of detriment to it, even though supplier detriment alone may not be sufficient to constitute a breach of the provisions relating to variations. Further, a complaint of this nature cannot be dismissed

⁵⁷⁹ Explanatory Statement, FGC Regulation, 2015, p. 12.

⁵⁸⁰ Transcript of interview, Treasury, p. 15.

as vexatious, trivial, misconceived or lacking substance solely because the only ground raised by a supplier is detriment to it.

The rules of the Institute of Arbitrators and Mediators Australia will apply to mediation and arbitration processes commenced under the Code.

Finally, Part 6 sets out the requirements for retailers and wholesalers to ensure they have appropriate mechanisms in place in order to comply with the Code. It includes obligations for retailers and wholesalers to train their buying team on the requirements of the Code. It requires the retailer or wholesaler's CCM to prepare written reports on complaints twice a year and also sets out obligations about record keeping.

(c) Getting to 'yes'

In order to understand fully how Treasury and government arrived at the conclusion that the provisions as summarised above were the best way of addressing the stated policy objectives and how they would do so, it is necessary to go back in some detail to Treasury's consultation on the RSR draft of the Code. What emerges from a review of that process and its outcomes is that there was significant concern regarding several key aspects of the approach proposed by the AFGC and MSC alliance from various industry quarters. Yet, on each of these issues of concern, ultimately the views of the alliance prevailed, with the support of Treasury and the Government.

a) What's the problem?

Adhering to the template for regulatory review of such proposals, Treasury's first task in the regulatory review process was to identify 'the policy problem to be solved'.⁵⁸¹ The logical starting point, albeit more by way of context-setting than anything else, was to note that Australian retail grocery markets are relatively concentrated by international standards and that this gave the large incumbents buyer power.⁵⁸² While supermarket size could result in benefits for suppliers, and vigorous competition between supermarkets in benefits for consumers, there was also the prospect of costs in terms of dampened incentives for dynamic efficiencies on the part of suppliers.⁵⁸³ This, in essence, was identified as the structural issue, explaining rather than justifying the need for a code. It went without saying perhaps that it was not an issue that a code could address. Rather, a code of conduct, as the name suggests, is an instrument concerned with market behaviour as distinct from market structure.

In this connection, the jumping off point was to acknowledge that concerns about supermarket conduct in their negotiations with suppliers had been the subject of public concern and debate for some time, raised as long ago as in submissions to the ACCC Grocery Inquiry.⁵⁸⁴ This debate, Treasury recounted, had focussed on differences in bargaining power between suppliers and

⁵⁸¹ Treasury, FGCC Final Assessment RIS, p. 3.

⁵⁸² Treasury, FGCC Final Assessment RIS, 2014, p. 3.

⁵⁸³ Treasury, FGCC Final Assessment RIS, 2014, p. 4.

⁵⁸⁴ Treasury, FGCC Final Assessment RIS, 2014, p. 4-5.

supermarkets (and in some cases between suppliers and wholesalers – a veiled reference to Metcash), and resultant difficulties suppliers may face in negotiating fair (notably, the reference here was to ‘fair’ rather than competitive) terms.⁵⁸⁵ There are views, it was noted, that grocery suppliers looking to do business in Australia have relatively limited options besides supermarkets to get their product to market, particularly on a national basis.⁵⁸⁶

Treasury went on to record that there have been ‘anecdotal claims’ that:

*... some suppliers may have little choice but to accept disadvantageous terms for fear of losing contracts, and may similarly be unwilling to complain to the supermarkets, or other bodies to resolve issues or enforce their legal rights during the life of the agreement for fear of retribution.*⁵⁸⁷

Having listed the types of behaviour that had been the subject of such ‘claims’, and noted that some of these had resulted in ACCC litigation (a reference to the unconscionability actions against the MSCs), Treasury neatly summarised the ‘problems’ as having the following three themes:

1. *Poor transparency and clarity in grocery supply agreements – particularly in cases where the agreement is not in writing and does not sufficiently cover basic matters, such as quantity and quality requirements in respect of grocery produce.*
2. *Poor business conduct and behaviour – not engaging in commercial dealing with suppliers in good faith.*
3. *Lack of dispute resolution mechanisms and access to justice – suppliers may be unable to have their complaints heard or addressed.*⁵⁸⁸

The Department concluded that ‘to the extent that these behaviours are present in the grocery sector they may have adverse effects on the efficiency of commercial dealings between retailers and suppliers, which may ultimately result in long term detriment to consumers.’⁵⁸⁹ More specifically:

To the extent that these behaviours are present, they may result in inappropriate levels of risk being shifted on to the suppliers. If these types of retailer behaviours occur unexpectedly or recurringly, they could result in serious detriment to suppliers, particularly smaller ones. This includes: forcing suppliers to bear unnecessary costs; inhibiting the ability of suppliers to plan appropriately for their businesses; increasing variability of cash flow; and imposing additional financing costs. In turn, this would detract from the incentive for suppliers to invest, innovate,

⁵⁸⁵ Treasury, FGCC Final Assessment RIS, 2014, p. 6.

⁵⁸⁶ Treasury, FGCC Final Assessment RIS, 2014, p. 4.

⁵⁸⁷ ACCC 2008 Grocery Inquiry, p. 326, cited in Treasury, FGCC Final Assessment RIS, 2014, p. 4.

⁵⁸⁸ Treasury, FGCC Final Assessment RIS, 2014, pp. 6-7.

⁵⁸⁹ Treasury, FGCC Final Assessment RIS, 2014, p. 7.

expand capacity or develop new product lines. Ultimately, some suppliers may be forced out of business as a consequence.

There may also be long term detrimental effects for Australian consumers. Erosion of the supplier base, including deterring suppliers from investing, innovating and expanding, may result in higher long-run prices, limited product range and variety, poorer quality products, less intense competition between suppliers, and potentially fewer new products coming to the market. This outcome would not be in the long term interest of Australian consumers and may reduce the efficiency of the grocery sector.⁵⁹⁰

Notably, Treasury acknowledged that additional in the public debate had been concerns raised by primary producers that they are offered unsustainably low prices.⁵⁹¹ This framing could be seen as understated given that, as Part 3 of this report makes evident, such concerns had in fact been the preoccupation of many participating in the debate in the years leading up to and continuing throughout the code negotiations. However, such framing was evidently deliberate as Treasury was quick to dispense with any prospect of such matters being the subject of response by way of the FGCC. Rather, these were issues being addressed in the separate policy context of agricultural competitiveness that was then the subject of the Government's Agricultural Competitiveness White Paper. The proposed code, Treasury pointed out, 'does not seek to deal with the issue of the base prices that suppliers receive for their goods'.⁵⁹² For reasons that are explained below (see Part 6), for some suppliers, it might have been tempting to stop reading there.

b) Why should government get involved?

Having identified the problem/s, the second task for Treasury was to explain and justify why government action was needed to address them. A prescribed industry code of conduct may be required to address specific problems and will only be effective if it sets out clear requirements and obligations⁵⁹³ (as distinct from aims and ideals), Treasury explained. However, and consistently with the policy discourse preceding the introduction of Part IVB into the CCA, it hastened to add:

The Government is keenly aware that any intervention needs to be beneficial overall, and not impose undue regulatory burden. Retailers should continue to have sufficient flexibility to negotiate good deals with suppliers that ultimately benefit consumers. An outcome that is too prescriptive or restrictive may have the unintended effect of resulting in higher retail prices for consumers. Conversely, allowing too much flexibility may mean that the issues of concern outlined above are not addressed.

⁵⁹⁰ Treasury, FGCC Final Assessment RIS, 2014, p. 6.

⁵⁹¹ Treasury, FGCC Final Assessment RIS, 2014, p. 6.

⁵⁹² Treasury, FGCC Final Assessment RIS, 2014, p. 6.

⁵⁹³ Treasury, FGCC Final Assessment RIS, 2014, p. 7.

*The intention of any Government action is not to prevent hard bargaining and vigorous competition, but rather to ensure that market distortions do not compound and have a longer-term detrimental impact on consumers or the grocery sector more broadly.*⁵⁹⁴

As the origins of the RSR account in Part 4 of this report reveal, it was in part government compulsion and in part public pressure (the two not being unrelated) that had led ‘the industry’ to develop a response and deliver it to government to formalise as official regulation. Government evidently appreciated the initiative. As Treasury noted in concluding this aspect of the RIS:

*The Government also wishes to encourage industry-led responses to resolving issues in different sectors where this is feasible. Allowing industry to lead the response to problems in a market can have several benefits, as outlined in the guidelines for developing industry codes of conduct. In particular, prescribing an ‘opt-in’ industry code reinforces that the Code has industry buy-in and is not overly prescriptive or burdensome. An effective code would codify good practice, provide greater transparency between affected parties, and provide more dependable commercial relationships moving forward.*⁵⁹⁵

c) So what are the options?

In the ensuing two sections of the RIS Treasury mapped the costs and benefits of the three options that it had identified as ‘alternative courses of action’ for tackling the problem at hand:

Option 1: *Status quo* — *Involves maintaining the ‘status quo’ and relying upon existing laws, regulations and codes. This option would not preclude a code of conduct being implemented by the industry outside of the CCA.*

Option 2: *Opt-in, prescribed code* — *Involves prescribing a Grocery Code, whereby a retailer or wholesaler chooses whether or not to be bound by the Code. Retailers and wholesalers that agree to be bound by the Code would then be legally required to comply with it.*

Option 3: *Mandatory prescribed code* — *Involves prescribing a mandatory Grocery Code, whereby a retailer or wholesaler (as defined in the Code itself) would be legally bound by the Code.*⁵⁹⁶

i. Option 1: do nothing

In the highly charged environment leading up to the FGCC’s promulgation, it is hard to imagine for whom exactly this first, in effect, ‘do nothing’, option might have been acceptable. But in the setting of a liberal government with a vigorous deregulatory-minimal intervention agenda, it was a ‘course of action’ (or inaction, rather) that at least had to be on the table.

⁵⁹⁴ Treasury, FGCC Final Assessment RIS, 2014, p. 7.

⁵⁹⁵ Treasury, FGCC Final Assessment RIS, 2014, pp. 7-8.

⁵⁹⁶ Treasury, FGCC Final Assessment RIS, 2014, p. 9.

Treasury noted that there were other codes and laws that touched on the issues that were the subject of concern. But, as far as the other codes (the PGCC and the HCC) were concerned, the feedback was 'mixed':

... the Horticulture Code lacks sufficient transparency around contracts and the prices received for goods; and it has failed to deal effectively with disclosure about the method of sales engagement. ... There are also many exemptions to this Code. Importantly, it is obvious that there has been insufficient resourcing provided to the ACCC to police and enforce the Horticulture Code. This has contributed to the lack of successfully prosecuted outcomes. As a result, people are unwilling to bring complaints forward, as they fear that they may lose their contract or be 'punished' in some other way.⁵⁹⁷

Of the PGCC, Treasury observed (arguably somewhat understatedly given that the PGCC had been disabled for at least 3 years) that it:

... is not widely recognised or understood in the industry, its terms are unenforceable and its voluntary nature allows participants to opt in and out at will.⁵⁹⁸

While still live, it is certainly true to say that the HCC has had a chequered history. This code was introduced by the Howard government in 2007 following grower concerns over a number of years about the need to improve commercial transparency in fresh fruit and vegetable wholesale markets. At the time, growers and wholesalers could not agree on a voluntary code, so the government agreed to prescribe a mandatory code of conduct under the CCA. A grower we interviewed expressed doubts that such a Code could be truly effective, given the process through which it was developed:

So what happened was a team of growers were put together for developing the current code. And they were effectively the people that sat on that management group were CEOs of peak industry bodies in horticulture predominantly. And not to speak ill of them but they don't understand the problem. They didn't understand the problem. They don't have the skin in the game, they don't have an invested interest where I – the growers understand it and have skin in the game.⁵⁹⁹

The HCC applies to all growers and traders of horticulture produce, but not to parties that purchase horticulture produce for retail, export or processing. In basic terms, it is intended to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and to provide a fair and equitable procedure for dispute resolution.

In the ACCC Grocery Inquiry, a number of recommendations were made with a view to improving the operation and effectiveness of the HCC. Like many other aspects of that inquiry's findings and proposals, the HCC-related recommendations were met with strong and contrasting views within the

⁵⁹⁷ Tasmanian Farmers and Graziers Association submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 6.

⁵⁹⁸ AMWU submission, Treasury, FGCC consultation paper, 2014, September 2014.

⁵⁹⁹ Transcript of interview, former primary produce supplier to the MSCs, p. 20.

industry. The then Minister for Agriculture subsequently appointed the HCC Committee to consider the implications of implementing the ACCC's recommendations. The committee undertook extensive consultation with industry in the preparation of its report, which the Rudd Government released in November 2009. In its report, the committee noted that business practices of the horticulture industry vary widely and that the implementation of the recommendations was expected to standardise practices throughout the industry. The committee predicted that this could be met with initial resistance, but it believed the industry would benefit from improved efficiencies and transparency in the long run.

In June 2015, Billson and Joyce launched a further independent review of the beleaguered HCC. This review provided a damning assessment of the effectiveness of the Code since its introduction in 2007, an assessment echoed in our interviews: 'I think it's fairly safe to say there's a fair bit of cynicism about the Horticulture Code and its effectiveness'.⁶⁰⁰ Most transactions were found to be based on contracts and trading terms that had come into force before the Code was enacted and therefore fell outside the scope of the HCC. As an ACCC member observed when asked his thoughts on the Code's effectiveness, this is not entirely surprising:

*The framework of the code and its application were revealed about a year before the code took effect, which enabled those that it was intended to regulate to seek some good advice on how to avoid the application of the code and by doing so there was a flurry of activity by wholesalers, fresh fruit and vegetable wholesalers at the time, to sign up their suppliers to long-term contracts and thereby avoid the application of the codes, because they're a grandfather provision.*⁶⁰¹

The review found fear of retaliation meant that few growers were prepared to pursue disputes under the HCC, and that the separation of market traders into agents or merchants had only served to create a hybrid system that continued to pass market risk to growers.⁶⁰² One interviewee was sympathetic to the challenges faced in the sector in this regard, noting that poor communication and, in some cases, a low level of education makes this a very complex issue. However he went on to say that the existing dispute resolution process meant 'something will fail' unless the right support is provided, and that 'the code hasn't got that type of support built into it'.⁶⁰³

The review also noted that there had been significant changes in the sector since 2007, with larger specialised traders entering the market and an increased concentration of trading in the Sydney and Melbourne produce markets.⁶⁰⁴ The current Code sunset on 30 March 2017.

The Government published its response to the recommendations of the independent review in early 2017. While the Government did not deem it necessary to remove the distinction between agent and

⁶⁰⁰ Transcript of interview, senior representative of a dairy industry association, p.36.

⁶⁰¹ Transcript of interview, senior representative of the ACCC, p. 50.

⁶⁰² Mark Napper and Alan Wein, *Issues Paper: Review of the Horticulture Code of Conduct*, pp. 24-6, 36-40.

⁶⁰³ Transcript of interview, Robert Gaussen, p. 46.

⁶⁰⁴ Mark Napper and Alan Wein, *Issues Paper: Review of the Horticulture Code of Conduct*, p. 23.

merchant,⁶⁰⁵ it did accept the recommendation that the current exemption for contracts entered into prior to 15 December 2006 be removed. Instead a transitional period similar to that of the FGCC was proposed. Where existing arrangements are not brought into line with the Code within 12 months, all transactions between growers and traders will be captured by the HCC.⁶⁰⁶

The Government also recognised that the informal nature of transactions in the industry meant that, at times, these transactions were occurring without the protection of a formal signed agreement. The Government therefore proposed to amend the Code, 'to allow for a greater range of options for acceptance of horticulture produce agreements'.⁶⁰⁷ In an attempt to ensure all growers' transactions with retailers are covered by a code, the reviewers recommended that where a retailer was not a signatory to the FGCC their transactions with growers automatically be regulated by the HCC.⁶⁰⁸ The Government did not determine this appropriate, in part because of the different ways the two codes had come into being - a position that presumably the MSCs would support. As one interviewee reported when asked about his involvement during the development of the HCC, 'Coles and Woolies said, whoa, that's got nothing to do with us, which in fairness to them it didn't, and so they got severed out and went down their own path.'⁶⁰⁹ However the Government has said that the interaction between the two codes could be considered further when the FGCC came up for review in 2018 (and the terms of reference for that review reflect as much).⁶¹⁰

With regard to dispute resolution the Government reported that the review had found 'that the Code's dispute resolution mechanism is irrelevant, inappropriate and largely not adopted by parties in the horticulture sector.'⁶¹¹ However it did not support the review's call for the Horticulture Mediation Adviser (HMA) to be phased out, instead stating that the HMA role would be reviewed.⁶¹² Likewise the Government did not support calls for horticultural produce assessors to be registered with the ACCC or the SBF E Ombudsman, who in turn the review proposed would act as 'non-determinative conciliators' between parties in dispute. The Government made clear that this was not the role of these agencies, and that there may also be legislative constraints on such an approach.⁶¹³

The Government also stated in its response that civil penalty provisions will be introduced for breaches of provisions of the HCC, 'to enhance the enforcement tools available to the ACCC by allowing it to take rapid action when breaches of the Code do occur.'⁶¹⁴ Other proposed amendments include the annexing of a standard produce agreement to the HCC⁶¹⁵ and the introduction of an obligation to act in good faith for all parties, consistent with the approach taken in the FGCC.⁶¹⁶

⁶⁰⁵ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 2.

⁶⁰⁶ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 9.

⁶⁰⁷ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 7.

⁶⁰⁸ Mark Napper and Alan Wein, *Independent Review of the Horticulture Code of Conduct: Final Report*, November 2015.

⁶⁰⁹ Transcript of interview, Robert Gaussen p. 45.

⁶¹⁰ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 10. See further Part 7 of this report.

⁶¹¹ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 14.

⁶¹² Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 13.

⁶¹³ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 14.

⁶¹⁴ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 15.

⁶¹⁵ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 3.

⁶¹⁶ Australian Government response to the Independent Review of the Horticulture Code of Conduct, p. 4.

A new Code was subsequently drafted and came into effect on 1 April 2017.⁶¹⁷ Key changes to the Code, in accordance with the findings of the Review include: after the expiry of a 12-month transition period for parties with existing written agreements, all agreements must comply with the current Code. This includes agreements entered into before 15 December 2006, which had not been covered by the earlier code. There are also new, stiffer penalties for non-compliance and increased auditing powers for the ACCC.⁶¹⁸

Reflecting perhaps the issues with these existing codes, some submissions in Treasury's consultation on the FGCC called for that code and the HCC to be combined into a single whole of supply chain instrument.⁶¹⁹ Others suggested that the PGCC be revamped:

*... the NFF believes that suppliers may be better served by reviewing, amending and significantly revamping the Produce and Grocery Industry Code to cover retailer supply agreement – terms of trade.*⁶²⁰

The ADF sought a broader-ranging code, reasoning that their industry 'must be viewed as an integrated supply chain', and as a consequence it was desirable that there be a code to 'cover the whole of the supply chain in order to facilitate more complete application of [its] provisions.'⁶²¹

Apart than noting that there were some for and some against such propositions, the RIS did not dwell on these proposals. As far as a broader instrument was concerned, and as Billson had explained to the NFF with his customary eloquence after the farmer group pulled out of the RSR, that boat had effectively sailed. It is also unlikely to re-emerge as a serious contention in the 2018 review of the FGCC given that there is now a new HCC.

However, in an interesting parallel to the Australian debate, it is perhaps notable that in the UK there have been calls for the GCA's remit to be extended to encompass indirect suppliers to the designated grocery retailers. This is an apparent reflection of the positive impact of the GCA to date in overseeing the application of the GSCOP to direct supply relationships. As Tacon herself ruefully observed in her interview with us, there has been growing 'frustration' associated with the restricted nature of her remit. Many had believed that she 'would be the fairy godmother to the food chain' and as she has 'only been working in one part of the food chain they're all saying, "could she please come and wave her wand over here."⁶²² In a statutory review of the GCA launched in 2016 (to be reported on at some stage in 2017), the responsible Minister explained:

The GCA monitors and enforces the Code. The remit of the GCA – or the extent to which its powers apply in the groceries supply chain – is limited to the carrying out of this purpose. This

⁶¹⁷ Australian Government Department of Agriculture and Water Resources website, Horticulture Code of Conduct, <http://www.agriculture.gov.au/ag-farm-food/hort-policy/code-of-conduct>

⁶¹⁸ Explanatory Statement, *Competition and Consumer Act 2010 Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*.

⁶¹⁹ Treasury, FGCC Final Assessment RIS, 2014, p. 11.

⁶²⁰ NFF submission, Treasury, FGCC consultation paper, 2014, p. 8.

⁶²¹ ADF submission, Treasury, FGCC consultation paper, 2014, p. 10.

⁶²² Transcript of interview, Christine Tacon, p. 5.

means that the GCA's remit applies to the grocery retailers subject to the Code and their direct suppliers only. It does not apply elsewhere in the groceries supply chain: for example, it does not apply to businesses which supply these retailers through a third party (referred to as "indirect suppliers").

A number of these indirect suppliers and their representatives have argued that the limitation in the GCA's remit is unfair. They argue that they are at least as vulnerable as direct suppliers to the practices referred to above, if not more so, but have no regulatory protection. These points received particular attention when a global over-supply of milk exposed problems in the dairy industry – and which brought greater attention to current issues across the whole farming and primary production sector.⁶²³

In response to these concerns the statutory review has included a 'call for evidence' seeking the views of a range of stakeholders on how the grocery supply chain is functioning and whether there is a need for further government intervention by way of extension of the GCA remit or by other means.⁶²⁴

As far as the economy-wide provisions of the CCA, as well as common law and intellectual property (IP) laws were concerned, and with the exception of Aldi's stance on existing IP protections (referred to below), the view was that they were insufficient or ineffective in targeting the specific issues at which the FGCC would be directed.⁶²⁵ In the case of the unconscionability provisions there was also a preference for further assessing their effectiveness after the resolution of the ACCC's then current litigation against Coles.⁶²⁶ Reflecting the centrality of private brands to its business model, Aldi contended that IP laws were sufficient and expressed concern that the proposed Code might further burden Aldi in this regard:

There are already requirements at law, both under statute and at common law, to recognise the intellectual property rights of a party. If a supplier considers that a retailer has breached its intellectual property, then it could take legal action to protect that intellectual property.

ALDI is concerned that the obligation to "respect" the intellectual property rights of suppliers in clause 21(1) of the Code is vague and may require ALDI to go above and beyond the requirements of the law in recognising the intellectual property rights of suppliers, particularly when combined with the effect of the proposed dispute resolution procedures which would easily allow suppliers to make such allegations.⁶²⁷

⁶²³ Department of Business, Energy and Industrial Strategy, *Groceries Code Adjudicator Review: Part 2, Call for evidence on the case for extending the Groceries Code Adjudicator's remit in the UK groceries supply chain*, October 2016.

⁶²⁴ Department of Business, Energy and Industrial Strategy, *Grocery Code Adjudicator Review Part 1: Statutory review of the Grocery Code Adjudicator*, October 2016, p. 13.

⁶²⁵ Treasury, FGCC Final Assessment RIS, 2014, p. 10.

⁶²⁶ Law Council of Australia SME Committee submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 8.

⁶²⁷ Aldi submission, Treasury, FGCC consultation paper, 2014, September 2014, pp. 5-6.

Notably, the question as to whether IP protection in respect of private labels was an issue considered, in the UK, by the CC in its 2008 report.⁶²⁸ The CC did not accept that there was sufficient evidence to suggest this was an issue that warranted inclusion in the proposed new Code, and in any event, was satisfied that it was a matter that would be dealt with by laws on passing off.⁶²⁹

It was also acknowledged by Treasury that some retailers had already taken their own action in response to the concerns with which the FGCC was to deal. The Coles Supplier Charter, presided over by Jeff Kennett (referred to in Part 4 above), was cited as an example.⁶³⁰ But self-evidently perhaps, such measures were not regarded as likely to be adequate and given the degree of angst about 'industry practice', some 'regulatory intervention' was seen as required.⁶³¹ Indeed as one MSC representative conceded in his interview with us, the company had an internal code of conduct but 'the genesis of the need for a [statutory] code [was] a public concern about whether or not suppliers were being treated fairly and appropriately' and it was in response to this that 'the role of government kicks in'; for this purpose industry codes [would prove to be ineffective in placating the public's expectations].⁶³²

ii. Option 2: do what the Roundtable proposes

The second, RSR-proposed and government-recommended, option was a voluntary prescribed code. As is apparent from pros and cons discussion in relation to this option in the RIS, the benefits were seen as far outweighing the costs and in certain respects this section of the document reads as essentially the case for the Roundtable's proposal. The following benefits were identified and then each elucidated upon:

- creating a spirit of compliance with the code;
- creating transparency and certainty in commercial transactions;
- creating trust and cooperation during commercial dealings;
- higher likelihood of compliance because of the audit and enforcement powers of the ACCC.⁶³³

Notably, with the exception of the first cited, the other benefits would flow equally from a mandatory code, assuming the provisions would be largely the same (albeit possibly less flexible) and the only key difference would be that application was comprehensive and compulsory. If this analysis is correct, then it would appear that the most significant benefit of this option over the mandatory option was that there would be 'buy in' from the signatories.

⁶²⁸ See Section 9.71-9.81, Competition issues in the groceries supply chain in 'Competition Commission, 'The supply of groceries in the UK market investigation', 30 April 2008, p. 171.

⁶²⁹ Transcript of interview, experienced legal advisor to suppliers in the UK, pp. 43-44; CC, 'The supply of groceries in the UK market investigation', 30 April 2008, p. 171.

⁶³⁰ Coles supplier portal <https://www.supplierportal.coles.com.au/csp/wps/portal/web/ColesSupplierCharter>

⁶³¹ Treasury, FGCC Final Assessment RIS, 2014, p. 11.

⁶³² Transcript of interview, MSC representative, p. 13.

⁶³³ Treasury, FGCC Final Assessment RIS, 2014, pp. 21-23.

Another, more blunt, way of putting this is that the MSCs (if not the AFGC also) would support the voluntary ‘course of action’; they would oppose, and vehemently, the mandatory one. This position was not expressed in quite this way in the submission put by the RSR to the consultation. The softer but still direct and unambiguous position was there stated in essentially the following terms: because we are committed to a voluntary code, we do not support a mandatory code and if the government wants to see others bound by a code, then it is for government to persuade them to sign up voluntarily. As highlighted already, Billson certainly exercised his ardent powers of persuasion in this regard, but was only partly successful (with Aldi, not so Costco and Metcash). Coles and Woolworths may have gone further on the point in their own submissions but regrettably, such submissions were marked and kept confidential. It is hard to imagine what might have justified confidentiality in this context – political / public relations sensitivity possibly, as distinct from commercial necessity? The AFGC SME Forum made a public submission but it was brief – a page and a half – and mostly by way of affirmation of the approach it had negotiated through the RSR, although it did add that ‘*eventually* [it] would be keen for [the code] to be extended to the broader industry by additional retailers choosing to do business within the framework of the Code as signatories’⁶³⁴ (emphasis added).

Treasury also remarked on ‘other benefits’ associated with the voluntary option, at least for the signatories, pointing out that for these retailers there would be a substantial public relations boost in submitting themselves to the regulation:

*The Grocery Code may also have commercial benefits for retailers and wholesalers that opt-in with respect to their corporate goodwill, and public relations, with positive coverage in media enhancing their public image. Retailers and wholesalers may be able to leverage their participation in the Code to better promote themselves as good corporate citizens and derive a competitive advantage over others that are not signatories to the Grocery Code.*⁶³⁵

In summarising the submissions that supported the voluntary option, Treasury gave prominence to the RSR submission. Other stakeholder submissions, said to include submissions from ‘supplier groups’, were noted as having recognised the voluntary code as a ‘worthwhile step’, despite otherwise supporting a mandatory code. This quote may have been drawn from a confidential submission. The only public submission that contains these words was from the NFF and, read in context, it is evident that the national farmers group strongly retained the view that a voluntary code was inadequate:

*The NFF does not believe the proposed Code is a sufficient solution to the problems identified in Part A, although it recognises the added formality and transparency in negotiating trading terms and documenting these in Supply Agreements as a worthwhile step forward and should go some way towards assisting in compliance.*⁶³⁶

⁶³⁴ Treasury, FGCC Final Assessment RIS, 2014, p. 1.

⁶³⁵ Treasury, FGCC Final Assessment RIS, 2014, p. 23.

⁶³⁶ NFF submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 7.

Yet others were recorded as having pointed out that whatever its status, the drafting of the code had not been in consultation with them, its concern was not with their behaviour, and was so irrelevant to their business models that it really should not apply to them – essentially the Aldi/CostCo position.⁶³⁷ But there were others who too were critical of what they saw as their exclusion from the process. According to the Australian Chamber of Fruit and Vegetables Industries:

*There was a lack of consultation regarding the introduction of the Code and The Australian Chamber of Fruit and Vegetable Industries Limited, as the peak industry body representing the Market wholesalers had no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and no final say as to whether the code was workable or acceptable to those who were to be regulated by it.*⁶³⁸

In response to the latter, Treasury observed that as the proposed code was an opt-in instrument, 'it is currently best suited to those that have currently indicated an intention to be bound by the code.'⁶³⁹ In other words, this is a code by and for the MSCs. Accepting this position, the views of others were perhaps less relevant.

In relation to costs associated with option 2, the RIS identified a range of largely financial compliance-related 'burdens' associated with extra paperwork, training, monitoring and dispute resolution. There was an effort to quantify estimates of these in an attachment to the document. According to Treasury the 'best practice requirements' for creating an RIS include estimating compliance costs and it acknowledges that the making of such estimates involves making considerable assumptions:

*So a lot of assumptions [had to be made] about how much time would it take, how many staff members to do something required under the code and that incorporated information that we had about the major retailers and so adjusting that for what it might be for a smaller retailer.*⁶⁴⁰

Such assumptions were:

*... informed by consultations that we'd had with the major retailers. ... about how much time it might take to do certain things under the code and then some assumptions to allow for different types of business models and then we just put that out for public consultation to see if other people wanted to challenge those assumptions and say, no it won't take four hours, it will take six hours or and then revise the estimates for the final decision.*⁶⁴¹

⁶³⁷ Note the similar stance taken by Aldi and Lidl in the UK. As recounted by Noble of the British Brands Group, '...some retailers are saying "why am I being hit with this cost of regulation – the Icelands of this world – when actually it's Tesco and ASDA that are causing the problem". I think it's the same with Aldi and Lidl; our relationships with our suppliers is very straightforward, yes, we negotiate, we get the best deal we have, but then the deal is the deal and we don't go back on it, so why are we getting all of this grief just because the big guys have been misbehaving? So that, I think, has been quite prevalent in the dialogue for the last three, four years.'" Transcript of interview, John Noble, British Brands Group, p. 36.

⁶³⁸ Australian Chamber of Fruit and Vegetable Industries submission, Treasury, FGCC consultation paper 2014, September 2014, p. 2.

⁶³⁹ Treasury, FGCC Final Assessment RIS, 2014, p. 24.

⁶⁴⁰ Transcript of interview, Treasury, p. 11.

⁶⁴¹ Transcript of interview, Treasury, p. 12.

It would seem, however, that despite reflecting industry input, these estimates may have fallen short. According to one major retailer, 'the cost of implementing the code has been significant. It would certainly exceed the significant multiple that the government estimated'.⁶⁴²

Interestingly the cost considerations appear limited to those borne by business, it is a 'business regulatory compliance cost estimate'.⁶⁴³ According to Treasury, the potential burden on the regulator and its budget are not directly factored in. Rather, Treasury:

*... would in the process of developing [the code] talk to the ACCC about [whether] a certain process was going to be unduly burdensome to regulate or not – but this doesn't feed into the formal cost calculations because those calculations are based on the impact on the business, not the regulator.*⁶⁴⁴

More substantively, the most obvious downside of a voluntary code was highlighted, namely that initial signatories could decide to opt-out at any stage. If this was to occur though, the mandatory option could be adopted or, as Treasury put it, that was something government 'could consider'.⁶⁴⁵ Yet, as recorded already in this report, from a commercial-political perspective, opting out, according to MSC and other interviewees, was a highly improbable scenario.

In setting out the benefits of the voluntary option, the RIS also dealt with a range of aspects of the proposed code that had loomed large in the consultation, namely:

- the extent to which there was flexibility in the way in which conduct obligations were expressed and imposed;
- the need for an overarching good faith obligation and whether it should apply to suppliers also, and not just retailers and wholesalers;
- the structure and some of the terms of the proposed dispute resolution processes; and
- whether there should be pecuniary penalties for code breaches.

On each of these matters, submissions made both in the Treasury consultation and subsequent Senate inquiry, as well as the views expressed in our interviews and the resolution reached on issue, are outlined below.

⁶⁴² Transcript of interview, MSC representative, p. 17.

⁶⁴³ Transcript of interview, Treasury, p. 13.

⁶⁴⁴ Transcript of interview, Treasury, p. 13.

⁶⁴⁵ Treasury, FGCC Final Assessment RIS, 2014, p. 25.

i. FLEXIBILITY

According to the RIS, the aim was to create a code that was prescriptive enough to limit ‘undesirable retailer behaviour’, yet flexible enough ‘to support mutually beneficial supply agreements’,⁶⁴⁶ thereby ensuring the best deals for consumers:⁶⁴⁷

*The intention of any Government action is not to prevent hard bargaining and vigorous competition, but rather, to ensure that market distortions do not compound and have a longer-term detrimental impact on consumers or the grocery sector more broadly.*⁶⁴⁸

With regard to commercial flexibility, the ‘for’ argument primarily relied on by Treasury echoed the RSR position that the exemptions in the proposed code struck the right balance between ‘flexibility and safeguards’. Indeed, according to the Roundtable:

*Any failure to allow for such limited flexibility would, in the RSR’s collective view, create a real possibility of perverse or unintended outcomes.*⁶⁴⁹ (Such outcomes were not identified or elucidated upon).

This was a position that Treasury saw as supported by the NFF and Business SA, albeit on the condition that retailers were obliged to act in good faith. The NFF in fact had argued that:

*Exemptions do reduce the effectiveness of a Code of conduct because in an ideal world they would not be there, however such allowances reflect commercial reality and should be used sparingly. But, they amount to a variation from the (original) terms of trade and this generally has relatively greater commercial consequences for suppliers than retailers.*⁶⁵⁰

For its part, Business SA had emphasised the need to limit the potential for harm:

*Business SA acknowledges the code needs to allow for commercial flexibility but if it is genuinely trying to reduce instances of supermarkets using power to unreasonably impact suppliers, it needs to ensure it puts an appropriate onus back on supermarkets to act in good faith.*⁶⁵¹

Treasury certainly acknowledged that there was opposition to the RSR view: ‘several submitters, including Growcom, New Zealand Food & Grocery Council, Australian Manufacturing Workers Union, and Australian Dairy Farmers, raised concerns that the scope for retailers to avoid the key restrictions in the code was too broad.’⁶⁵² In the words of some of these opponents:

⁶⁴⁶ Treasury, FGCC consultation paper, 2014, p. 1.

⁶⁴⁷ Treasury, FGCC consultation paper, 2014, p. 7.

⁶⁴⁸ Treasury, FGCC consultation paper, 2014, p. 7.

⁶⁴⁹ RSR submission, Treasury, FGCC consultation paper, 2014.

⁶⁵⁰ NFF submission, Treasury, FGCC consultation paper, 2014, p. 13.

⁶⁵¹ Business SA submission, Treasury, FGCC consultation paper 2014, 12 September 2014, p. 4.

⁶⁵² ES FGC Regulation 2015, p. 15.

*It is of interest that many of the protections in the draft Code can be overridden if the 'relevant grocery supply agreement provides' otherwise. These and similar clauses would seem to undermine the intent of the protections.*⁶⁵³ (New Zealand Food & Grocery Council)

*... the ongoing imbalance of power within the retailer-supplier relationship leaves open the possibility that suppliers will simply be forced into agreeing to broad exemptions at the negotiation stage, rendering them ultimately no better off.*⁶⁵⁴ (Australian Manufacturing Workers Union (AMWU))

As far as Treasury was concerned, however, changes had already been made to the proposed FGCC in an attempt to address these concerns, particularly with regard to clauses permitting unilateral and retrospective variations. The intention behind such changes was to strengthen protections for suppliers while permitting adequate commercial flexibility for retailers and wholesalers and Treasury was satisfied that the right balance had been struck in that regard.

In the minds of some suppliers at least, these amendments evidently were not sufficient. Concerns regarding the acceptable level of flexibility were examined by the Senate Inquiry into the proposed Code. Treasury told the Committee that a voluntary code was preferable to a mandatory one because 'in some respects' it 'provided greater flexibility':

*In particular, this code provides that retailers must offer to vary agreements to suppliers to bring them into line with the code and allow suppliers to seek binding arbitration for disputes by an independent third party. Were the code to be mandatory rather than voluntary, such provisions may be considered to be an acquisition of property, which the Constitution would then require to be done on 'just terms'.*⁶⁵⁵

However the Senate Committee noted that the Law Council of Australia SME Committee rejected the suggestion that exceptions concerning retrospective and unilateral variations in GSAs were necessary to protect commercial flexibility. Rather, the SME Committee argued in its submission that there should be no exceptions.⁶⁵⁶

This was a view supported by the Office of the NSW Small Business Commissioner⁶⁵⁷ and the Mareeba District Fruit and Vegetable Growers Association Inc.⁶⁵⁸ Further, the ADF suggested that the many exceptions contained in the proposed voluntary Code, 'imply a greater emphasis on commercial flexibility than ensuring fair trading'.⁶⁵⁹

⁶⁵³ New Zealand Food and Grocery Council submission, Treasury, FGCC consultation paper, 2014, 12 September 2014, p. 2.

⁶⁵⁴ AMWU submission, Treasury, FGCC consultation paper, 2014, September 2014.

⁶⁵⁵ Ben Dolman, Acting General Manager, Treasury, Proof Committee Hansard, 21 April 2015, p. 25.

⁶⁵⁶ Law Council of Australia, submission 3, Treasury, FGCC consultation paper, 2014, p. 5.

⁶⁵⁷ Office of the NSW Small Business Commissioner submission 8, Treasury, FGCC consultation paper, 2014, p. 2.

⁶⁵⁸ Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association Inc., Proof Committee Hansard, 21 April 2015, p. 1.

⁶⁵⁹ ADF, Submission 4, attachment 1, Treasury, FGCC consultation paper, 2014, p. 12.

In the end, neither Treasury nor the Senate accepted what could be seen as having been the majority view (amongst submitters at least) that in its proposed form, the FGCC would trade flexibility for fairness. It is a view that will be tested again in the forthcoming review of the Code, in 2018.

ii. GOOD FAITH

As mentioned above, the provision of a 'good faith' clause was viewed by some as a check on the flexibility built into commercial negotiations under the Code. According to Treasury:

*On balance, the submissions received via the consultation process were supportive of the inclusion in the Grocery Code of an obligation to act in good faith. Given the focus of the Code on improving dealings in the sector, the benefits deriving from such inclusion were assessed as outweighing any negligible costs, noting that it is an overarching obligation that already exists at common law.*⁶⁶⁰

Clearly, and not surprisingly, there was strong support for an obligation on retailers to act in good faith. However, there were also qualifications, suggesting that for some, while a good faith provision may have been seen as necessary, it was not necessarily sufficient.

The Tasmanian Farmers and Graziers Association (TFGA), for example, supported the inclusion of a good faith provision,⁶⁶¹ but went on to say that:

*Allowing pecuniary penalties to be enforced by a court, as opposed to just punitive penalties, would have a more influential effect on ensuring retailers adhere to the Code, the agreements and the duty of good faith.*⁶⁶²

The Small Business Development Corporation of WA (SBDC) highlighted the difficulty in defining the concept of good faith and drew attention to some of the implications of a lack of understanding as to its meaning:

An obligation to act in good faith is not an easy concept to define nor is it clearly understood by any who seek to rely on it in their commercial relationships. In the SBDC's opinion, it has the potential to create a false sense of security among small business owners as they may believe it to be the panacea to any issue or dispute that may arise under a contractual arrangement with another party.

*The SBDC's experience is that small business owners are typically unclear on what constitutes good faith (as well as what doesn't) and may ultimately be disappointed that it does not provide an effective remedy to enforce their rights or resolve their disputes.*⁶⁶³

⁶⁶⁰ Treasury, FGCC Final Assessment RIS, 2014, p. 18.

⁶⁶¹ TFGA submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 5.

⁶⁶² TFGA submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 6.

⁶⁶³ SBDC submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 5.

The subjective and amorphous nature of the good faith concept was reflected in our interviews. Dawson explained that the provision was included in the RSR draft of the code, having had the benefit of feedback from the UK as to its importance as ‘a bit of a catch-all’ (that is to cover gaps that emerge in the more detailed provisions).⁶⁶⁴

Interestingly though there is a difference, and potentially an important one, between the way in which the good faith provision is incorporated in the UK Code and its incorporation in the FGCC. In the latter it is a free-standing obligation, additional to the other obligations in the Code. This could be taken to suggest that it operates as a catch-all, imposing obligations (albeit unspecified beyond the general parameters of ‘good faith’), additional to those specified in the rest of the Code. By comparison, in the UK, a ‘Principle of Fair Dealing’ is included upfront, and in that way is seen to infuse and inform, rather than add to, the other provisions of the GSCOP.⁶⁶⁵ As the GCA explained in our interview with her, ‘the Code... has an overarching principle of fair dealing, but what that actually means is interpreted by each individual section of the code underneath it. So I can’t say that “this is unfair”, if there’s actually nothing underneath to link it.’⁶⁶⁶

The difference in these approaches not a matter of mere semantics. It may be material in relation to the degree of certainty that is associated with, and hence the degree of practical usefulness, of the concept of good faith in each Code. This is reflected in comments by John Noble of British Brands Group who recalls that when GSCOP was introduced there was concern about the potential breadth of the Principle of Fair Dealing and in general a collective sigh of relief when, upon her appointment, the GCA made it clear that this was not a stand-alone provision and was simply there to inform other parts of the Code.⁶⁶⁷

Evidently, when it comes to ‘good faith’ there is a wide range of interpretations as to its meaning. We asked interviewees what they understood it to mean, and in response we heard:

*The key purpose of the Code is to build trust in the trading relationships. The specific provisions address many of the retailer behaviours that were undermining trust. But beyond these the good faith provision is a catch all that sets a standard for the overall trading relationships, based on honesty and genuine negotiations. If behaviours emerge that are not covered by the specific Code provisions but could arguably be in breach of good faith then the regulator has a basis for investigation and action.*⁶⁶⁸

*Unconscionable is something so bad it goes against good conscience, whereas we’re not just talking about not doing that, we’re talking about something much more clean and pure than that, and that’s where I see good faith.*⁶⁶⁹

⁶⁶⁴ Transcript of interview, Gary Dawson, pp. 41-2.

⁶⁶⁵ According to an experienced legal advisor to suppliers in the UK, the principle was drawn from the European Directive on unfair contract terms (p. 16).

⁶⁶⁶ Transcript of interview, Christine Tacon, p. 3.

⁶⁶⁷ Transcript of interview, John Noble, British Brands Group, p. 21.

⁶⁶⁸ Transcript of interview, Gary Dawson, pp. 46-7.

⁶⁶⁹ Transcript of interview, MSC representative, p. 4.

It's a terrific value, isn't it? To do something in good faith. And when someone says - actually carries out what they say they're going to do or commit to. So I would offer that in good faith is that, is adhering to the commitments..⁶⁷⁰

..it's about treating the other party, giving them an opportunity to respond to the position and actually in a manner that gives them an opportunity to have a voice in the transaction and not a take it or leave it type position, and [it's about being] fair..⁶⁷¹

...it's clarity of the expectations ... that doesn't mean that you're [not] going to have tough conversations ... [but] clarity of expectations, it allows me to make the choice. Either you choose to play, and this is the cost and the reward of playing, or we make the choice to not play, and that's the cost, the downside of not playing. I think that's really all you can ask. Because I think each person walks in each other's shoes. You recognise the pressure that your retailers are under in terms of, they are providing the results that they need to provide, and also on the flip side, it's not personal, it's not emotional, it's just around how do we deliver better outcomes. There's transparency of the metrics.⁶⁷²

Very practically it means staying at the table, very practically it means maintaining an open dialogue and being willing to participate whilst not lording threats or enacting threats over one or other.⁶⁷³

I think the other thing about the notion of good faith to me is around fairness; whatever we discuss, is the outcome fair?⁶⁷⁴

It goes to this notion of doing the right thing, and I think it's difficult to say what good faith is; it's much easier to say what bad faith is, and if you were telling people the things that are not acceptable as well as it helps address that point of what is acceptable.⁶⁷⁵

...good faith is a very broad vehicle church ... and the way I describe it to large or small suppliers is that a retailer must take your interests into consideration as well as theirs roughly. It, kind of, has to be mostly fairish and if I'm smiling and you're crying then maybe it's not been done in good faith, if your mum were to say, darling, that's not right, it might be a bridge of good faith. So there should be equal risk, equal reward, not equal in the broadest sense, but I need to be aware of your circumstances and my circumstances and make a decision based on both, particularly if I'm the big guy and you're the small guy, I need to be conscious of that and act in good faith.⁶⁷⁶

⁶⁷⁰ Transcript of interview, CEO of MGA, pp. 25-6.

⁶⁷¹ Transcript of interview, interviewee who consults to grocery businesses, p. 37.

⁶⁷² Transcript of interview, senior representative of a larger supplier of packaged goods to the MSCs, p. 40.

⁶⁷³ Transcript of interview, MSC representative, p. 19.

⁶⁷⁴ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 39.

⁶⁷⁵ Transcript of interview, MSC representative, p. 21.

⁶⁷⁶ Transcript of interview, director of a consultancy that advises suppliers, pp. 24-5.

*...if I'm smiling and you're crying then maybe it's not been done in good faith.*⁶⁷⁷

In the GSCOP, the 'Principle of Fair Dealing' is framed as follows:

*A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, 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.*⁶⁷⁸

Treasury also recognised that while some stakeholders, such as the NSW Small Business Commissioner, felt that the good faith obligation should apply only to retailers,⁶⁷⁹ several others advocated a reciprocal provision that would extend to suppliers as well. As one of our interviewees saw it, from the perspective of suppliers, a reciprocal obligation had the advantage of enabling them to set the standard for what it meant or should mean:

*...look, if you want to teach your children not to pick their noses then don't pick your nose yourself - - - it's not nice, so don't do things to them that you wouldn't want them do unto you, so why would you not act in good faith as a supplier?*⁶⁸⁰

Costco made the argument in favour of a reciprocal good faith obligation on the grounds that large suppliers possessed significant bargaining power, and that this should be recognised by such a code.⁶⁸¹ The MSCs might have made a similar point in their confidential submissions, but as one MSC representative told us, ultimately his organisation accepted the argument that the good faith obligation should not be mutual 'because the Code was about retailer behaviour, not about the whole-of-industry behaviour'.⁶⁸² However, he also pointed out there is a provision in their GSAs that requires the supplier to act in good faith and, when questioned about this by some suppliers, his response is that 'they will still have a lower threshold of good faith behaviour than we have because in our case the onus of proof is on us, to prove that we behaved well. ... [T]hat onus isn't placed on the supplier with regard to the GSA'.⁶⁸³

Others too, including those from the farming and produce sectors, argued for extending the good faith obligation to suppliers, albeit on fairness grounds:

The TFGA supports the inclusion of the duty of faith provision, as it should have the capacity to improve commercial relationships. To make sure this does occur, it would be prudent to ensure

⁶⁷⁷ Transcript of interview, director of a consultancy that advises suppliers, p. 24.

⁶⁷⁸ GSCOP, cl 2.

⁶⁷⁹ Small Business NSW Commissioner submission, Treasury, FGCC consultation paper, 2014, September 2014, p. 4.

⁶⁸⁰ Transcript of interview, director of a consultancy that advises suppliers, 32.

⁶⁸¹ Costco submission, Treasury, FGCC consultation paper, 2014, p. 5.

⁶⁸² Transcript of interview, MSC representative, p. 8.

⁶⁸³ Transcript of interview, MSC representative, p. 8.

*compliance from both parties from the beginning, so no party is seen to be at disadvantage.*⁶⁸⁴
(TFGA)

*In the spirit of building relationships, the NFF believes the need for good faith dealing applies equally to suppliers – irrespective of where the market power is considered to reside.*⁶⁸⁵ (NFF)

Ultimately, Treasury considered it problematic to impose obligations on parties that were not themselves opted into the code. Nevertheless, Treasury noted that:

*... to address the concerns of stakeholders raised during consultation, the Grocery Code provides that when a court is assessing whether a retailer has contravened the obligation, it may consider whether or not a supplier has acted in good faith.*⁶⁸⁶

iii. DISPUTE RESOLUTION

A key purpose behind the development of the FGCC was:

*...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.*⁶⁸⁷

The dispute resolution processes provided for in the Code only come into play at the instigation of suppliers. There is no equivalent process for wholesalers or retailers.⁶⁸⁸ Despite this, some question how many suppliers would actually rely on these mechanisms, and when. As one supplier told us:

*You don't go to a marriage counsellor every time you don't agree with something do you? It's the same philosophy in business. ... Now people are scared about relationships in business because you can get power through a relationship or you can get an advantage. Bull shit. You earn your relationship, right.*⁶⁸⁹

Another expressed doubts about whether suppliers – particularly smaller suppliers – would notify a dispute under the Code; in part because of the complexity of the process, and in part because of ongoing concerns about unintended negative consequences:

*I'm just cynical that suppliers would go to those lengths. Because things happen very rapidly, when you're doing business. ... I don't know if they would go through the dispute resolution for fear of that retribution.*⁶⁹⁰

⁶⁸⁴ TFGA submission, Treasury, FGCC consultation paper, 2014, p. 5.

⁶⁸⁵ NFF submission, Treasury, FGCC consultation paper, 2014, p. 7.

⁶⁸⁶ Treasury, FGCC Final Assessment RIS, 2014, p. 18.

⁶⁸⁷ Treasury, FGCC Final Assessment RIS, 2014, p. 2.

⁶⁸⁸ Treasury, FGCC Final Assessment RIS, 2014, p. 18.

⁶⁸⁹ Transcript of interview, CEO of a major fresh produce supplier to a MSC, p. 35.

⁶⁹⁰ Transcript of interview, CEO of MGA, p. 31.

Treasury reported 'broad support' for a clear and effective dispute resolution mechanism, however it also acknowledged that amendments had been made to the initial draft in response to concerns raised about this aspect of the proposed code during the consultation process.⁶⁹¹

The debate surrounding these amendments further illustrate the disparate concerns amongst stakeholder groups.

One such amendment was the requirement that, 'if a complaint is found to be trivial, vexatious, or lacking in substance, notice in writing should be provided to the supplier.'⁶⁹² Such notice must advise of the reasons for the conclusion reached, and there is provision for the supplier to seek internal review and/or mediation/arbitration if they are not satisfied with the outcome.

This amendment was presumably sought by retailers, anticipating perhaps and seeking to limit the number of frivolous claims lodged. However the NSW Small Business Commissioner argued that 'it unfairly places the decision-making power in relation to commencing dispute resolution processes firmly with the retailer.' The Commissioner went on to note that such a clause may discourage suppliers from using the dispute resolution processes provided under the Code - a cause for concern, 'given that there is evidence that many small suppliers are hesitant to raise complaints at all'.⁶⁹³

In line with this, stakeholders reportedly perceived, 'the proposed mechanisms to be 'too weak' and not 'fair or equitable' due to placing too much discretion in the hands of major retailers'.⁶⁹⁴ The SBDC stated that while it 'strongly supports the inclusion of access to dispute resolution mechanisms under the Grocery Code', it had, 'some reservations that the threshold set by the Grocery Code will create a barrier for suppliers seeking to resolve their disputes using either the internal or external process.' The SBDC went on to state in its submission that:

... the SBDC does not believe that retailers should be the decision maker on whether a supplier's concern is appropriate for this course of action.

*To ensure better equity and fairness, the SBDC believes that an independent third party arbitrator should review a supplier's claim and make a judgment on whether it has merit and could be appropriately resolved through the dispute resolution processes available under the Grocery Code.*⁶⁹⁵

In accord with this, the NFF argued that:

... the Code provides for dispute remedies (excluding money penalties) but many suppliers question the independence of the dispute resolution process and even more may not have

⁶⁹¹ Treasury, FGCC Final Assessment RIS, 2014, p. 19.

⁶⁹² Treasury, FGCC Final Assessment RIS, 2014, p. 19.

⁶⁹³ Small Business NSW Commissioner, submission Treasury, FGCC consultation paper, 2014, p. 4.

⁶⁹⁴ Treasury, FGCC Final Assessment RIS, 2014, p. 19.

⁶⁹⁵ SBDC submission, Treasury, FGCC consultation paper, 2014, September 2014, pp. 5-6

*sufficient confidence to test it for fear of subsequent retribution. This situation points to the need for an independent supermarket commissioner or ombudsman.*⁶⁹⁶

There has also been criticism targeting the complexity of the process. As one dispute resolution expert noted:

*My focus is always on the issue of dispute resolution but the way in which this is framed in terms of the rights of suppliers, well ... it's almost a roadblock to a supplier's success because the language and the manner of drafting creates almost impenetrable barriers.*⁶⁹⁷

Even Billson (otherwise a fervent supporter of every aspect of the Code) concedes that there are potential weaknesses in the dispute resolution framework. However, he clearly saw a real need for suppliers to have alternatives to litigation:

*... we all know if a small business gets in a commercial blue and ends up in court they're gone, they're just going to lose or they'll be starved out. So I was trying to put in place machinery to – where a dispute arose, get it sorted quickly.*⁶⁹⁸

When asked about whether suppliers, small ones particularly, would use the system in the FGCC for resolving grievances, he acknowledged that 'there was a contest about how good [that system] was.'⁶⁹⁹ He disclosed that his 'original design' was in fact to use the SBFE Ombudsman for FGCC-related dispute resolution 'but sequencing played against me'.⁷⁰⁰ The legislation establishing that office had not yet been passed and thus yet again, it seems, the need to drive through a 'solution' to the MSC-supplier problem overrode any consideration that might have delayed the process, even if it might have made (in the eyes of some) for a better outcome.⁷⁰¹

Concerns about the use of external mediator/arbitrators as opposed to an industry specific ombudsman were raised by the former PGCC Ombudsman in his testimony to the Senate Inquiry into the FGCC: 'the industry needs, and the public interest requires, a genuine independent oversight mechanism in relation to the commercial transactions in the produce and grocery industry.'⁷⁰²

It seems however that independence alone is not viewed by some as sufficient, if this independence comes without industry knowledge. This became evident in our interview with a major MSC fresh produce supplier to one of the MSCs. When asked whether he knew that the MSC had an external mediator that he could contact regarding possible breaches of the Code the supplier responded, 'Yeah I am but I'm not – I don't think that a farmer growing xxx is going to go to xxx, is my point'.⁷⁰³

⁶⁹⁶ NFF submission to Treasury, FGCC consultation paper, 2014, p. 6.

⁶⁹⁷ Transcript of interview, Robert Gaussen, p. 42.

⁶⁹⁸ Transcript of interview, Bruce Billson, p. 17.

⁶⁹⁹ Transcript of interview, Bruce Billson, p. 38.

⁷⁰⁰ Transcript of interview, Bruce Billson, p. 38.

⁷⁰¹ Kate Carnell AO commenced as the inaugural SBFE Ombudsman on 11 March 2016, a year after the FGCC took effect.

The functions and powers of the Ombudsman are set out in *Australian Small Business and Family Enterprise Ombudsman Act 2015* <https://www.legislation.gov.au/Details/C2015A00123>

⁷⁰² Robert Gaussen testimony, Senate Economics Legislation Committee Inquiry, *Competition and Consumer Act 2010—Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*, Tuesday, 21 April 2015, p. 10.

⁷⁰³ Transcript of interview, CEO of a major fresh produce supplier to a MSC, p. 34.

In his interview for this research, Robert Gaussen elaborated on why he thinks his role as PGCC Ombudsman was, to his mind, a success. His reasoning goes beyond independence and places greater emphasis on relationship building:

I would just try and get through to people that I was genuine, I'd look them in the eye, I'd shake their hand ... Doesn't matter if it doesn't go anywhere, I'm here to be talked to and I can help you understand how the processes go, I can't give you advice as to the merit of your dispute, I made that always very clear ... but in terms of the process, the process of what the codes about, what you can do under the code, how to put together a case under the code I can help you with all those things.⁷⁰⁴

In conjunction with the importance of building trust with suppliers Gaussen emphasised the need to establish similarly strong relationships with the MSCs, to everyone's benefit; and the potential power of employing informal channels as well as formal channels to achieve mutually beneficial outcomes:

The deal was very simple. If – whatever complaints in relation to their conduct I would ring the nominated person who was very, very senior for both of them at the time, ring one of them – of the particular company – and I'd lay out what the dispute was and they'd have at least 48 hours to come back to me and they always did and in almost every occasion it was well and truly fixed by the time they got back. But I would – the agreement was I did not report that as a dispute, I reported it as an enquiry but it wasn't recorded as a mediation and when we came to publish the disputes it wasn't a dispute because it never went to mediation or that's what they wanted out of it. And they also liked the fact they could learn about things they didn't know about, they liked the early warning system that I could provide and also they didn't have to deal with highly spirited and very upset people, I was their filter.⁷⁰⁵

In the case of one of the suppliers whom we interviewed, he said that if he did suspect a breach of the Code he was more likely to contact his category manager, 'and if that doesn't work I'll find – I'll bloody drive in there and find an answer'.⁷⁰⁶ When pressed as to whether or not he knew that the MSC had a code compliance manager the supplier laughed and responded, 'I don't spend my time worrying about that kind of thing. I'm not – I'm discounting it but, I would hate to think that I would have to have access to something like that.'⁷⁰⁷ Ultimately, for this supplier, it all came down to mutual trust with his buyer, arguably something that can be supported by, but not prescribed, under any formal code.

The debate as to whether or not the Code should be overseen by an ombudsman was played out in the submissions to Senate Economic Legislative Committee. While some such as Gaussen, the ADF and the Office of the Australian Small Business Commissioner (OASBC)⁷⁰⁸ argued in favour of an ombudsman, others, including the ACCC, were more sceptical. Certainly, as became evident in our interviews, this was one element of the regulatory intervention to which the MSCs were vehemently

⁷⁰⁴ Transcript of interview, Robert Gaussen, p. 27.

⁷⁰⁵ Transcript of interview, Robert Gaussen, p. 18.

⁷⁰⁶ Transcript of interview, CEO of a major fresh produce supplier to a MSC, p. 34.

⁷⁰⁷ Transcript of interview, CEO of a major fresh produce supplier to a MSC, p. 35.

⁷⁰⁸ The OASBC has now been superseded by the Australian Small Business and Family Enterprise Ombudsman.

opposed. When it was pointed out to one MSC representative that the collaboration between Coles and Woolworths on the RSR could be seen in some ways as unprecedented – a collaboration between two fiercely competitive and culturally different rivals – and asked about what brought them together in this endeavour, we were told:

I would say probably the prospect of an Ombudsman, a heavy-handed instrument being imposed on the marketplace, as opposed to something that would achieve the right outcome but be more manageable in the marketplace.⁷⁰⁹

For the OASBC, having the SBFE Ombudsman assume responsibility for the resolution of disputes under the Code would be a low cost ADR alternative.⁷¹⁰ Gausson also made the argument that an industry-specific ombudsman was a cost effective alternative to arbitration or litigation. Gausson particularly stressed the need for a dedicated industry-specific ombudsman who could build up a body of knowledge that could be drawn on over time. The ACCC told the Committee, however, that it was better suited to advising suppliers on the best avenue by which to resolve their disputes, including when litigation was the preferred or necessary course.⁷¹¹

Gausson reasoned that during his time in the PGCC Ombudsman role he was often able to work with MSCs and wholesalers to resolve a dispute without having to identify the complainant, and that the preservation of this anonymous compliant avenue would be a valuable asset for the Code.⁷¹² However again the ACCC, countered, questioning just how realistic this suggestion was and telling the committee that it was, 'rare that you are able to get into the issues without understanding who the parties are'.⁷¹³

Separate to the Senate inquiry some at the ACCC have suggested there is value in having a single point of contact for dealing with disputes that arise under the Code:

So ADR general works well. There are different tools and, of course, you have to ask yourself, really, if Commonwealth Government has gone to the level of setting up a small business commissioner, unfortunately called a small business ombudsman, but a federal one, then why do we have multiple dispute resolution [mechanisms] – clearly, to my mind, the logical thing is to collapse all of those into the one body and ... give them to the ombudsman.⁷¹⁴

However the interviewee was cautious about just what an ombudsman's role might be, or be perceived to be:

⁷⁰⁹ Transcript of interview, MSC representative, 3.

⁷¹⁰ Office of the Australian Small Business Commissioner, Submission 2, SELC review of the FGC Regulation, 2015, pp. 1-2.

⁷¹¹ Nigel Ridgway, Executive General Manager, Consumer, Small Business and Product Safety, ACCC, Proof Committee Hansard, 21 April 2015, p. 18.

⁷¹² Robert Gausson, private capacity, Proof Committee Hansard, 21 April 2015, p. 11.

⁷¹³ Scott Gregson, Executive General Manager, ACCC Consumer Enforcement, Proof Committee Hansard, 21 April 2015, p. 22.

⁷¹⁴ Transcript of interview, senior representative of the ACCC, p. 38.

I was in - yesterday for example – Shepparton, and someone said, “You know, there needs to be an ombudsman to make a decision about what these prices are.” I tried to explain, well, you know, constitutionally you can’t have an ombudsman who just sits down and decides who’s right and who’s wrong. We’ve got this thing called the constitution. It might not suit you today, but I tell you what, if the cops charge you for something you really want to know that there’s a court system and a legal representation, so just be careful what you ask for.⁷¹⁵

Despite the overall objections of the ACCC and others, however the Senate Committee ultimately believed that:

In light of the benefits an ombudsman would bring to the operation of the Grocery Code and the grocery sector more generally, we believe there is a strong case for the appointment of an independent ombudsman to oversight the Grocery Code, with funding provided by the government. The ombudsman should have formal capacity to refer businesses for further assistance to relevant industry, Commonwealth, State or Local government bodies, including the ACCC.⁷¹⁶

In line with this the committee supported the OASBC proposal that FGCC-related disputes should fall within the ambit of the SBFE Ombudsman’s office;⁷¹⁷ saying that this, ‘would be a sensible policy that would strengthen the operation of the Code’,⁷¹⁸ which would ‘result in efficiency and organisational benefits’ rather than creating a new Ombudsman position to provide oversight for the FGCC.⁷¹⁹ At the time of writing such proposed reforms do not appear to have developed further but may be revisited in the 2018 review.

Despite the concerns raised by and recommendations made on the part of small business in particular, the MSCs view prevailed with regard to the evidentiary requirements imposed on suppliers in any dispute resolution process. The following position was taken in the RIS, laying the burden very much at the feet of suppliers:

Importantly, following consultation, it was clarified that a supplier provides sufficient particulars of its complaint or dispute about a unilateral or retrospective variation of the agreement if it provides particulars of the detriment that has been or will be caused to the supplier. The supplier also needs to point to the provision of the Grocery Code alleged to be breached and the remedy sought.⁷²⁰

It is notable that in the UK a very similar debate had been played out, in relation to the question whether the GSCOP should be administered and enforced by an independent ombudsman or by the competition authority, then the OFT. This was a question that occupied the minds of many submitters to the CC’s 2006-2008 inquiry and, as in Australia, views were divided. But in the end, unlike here, the

⁷¹⁵ Transcript of interview, senior representative of the ACCC, p. 34.

⁷¹⁶ SELC, *FGC Regulation*, 2015, p. 27.

⁷¹⁷ SELC, *FGC Regulation*, 2015, p. 28.

⁷¹⁸ SELC, *FGC Regulation*, 2015, p. 28.

⁷¹⁹ SELC, *FGC Regulation*, 2015, p. 28.

⁷²⁰ Treasury, *FGCC Final Assessment RIS*, 2014, p. 19.

CC's view (which government supported, over the fierce opposition of the retailers) was that there should be an independent ombudsman.

Amongst the submitters to the CC inquiry, many parties (including the Association of Convenience Stores, suppliers, supplier organisations, non-governmental organisations and primary producer organizations, and consumers) questioned whether the OFT was the best authority to supervise and enforce retailer compliance with the proposed code, and in addition, whether the monitoring authority should have a proactive role in reviewing retailer practices more generally. These submissions supported the establishment of an ombudsman.⁷²¹

By contrast, submissions from retailers supported the continued involvement of the OFT in this role. Morrisons said that the costs of an ombudsman would be excessive, relative to the consumer detriment arising from supply chain practices. Certain retailers (Waitrose, Morrisons) suggested that the burden of the costs of the ombudsman, should one be established, ought to be weighted towards retailers which are the subject of complaints and disputes. Some retailers (Asda, Waitrose) took the view that there was a danger of 'regulatory creep' (ie the ombudsman extending its remit to non-competition issues).⁷²²

Interestingly and in contrast to the position of the ACCC in the Australian debate, the OFT itself recognised that a dedicated body with industry expertise, which would build working relationships with supplier associations and retailers and monitor compliance and promote best practice, would have advantages. It suggested that this entity could also raise the profile of the GSCOP. Indeed, so strong was the OFT view that the Code's enforcement should not be part of its bailiwick, a former senior representative of the agency recounted in his interview with us: 'I jokingly said when the UK Government was introducing it that if the OFT was running it, we should see it as an opportunity to create employment on a Scottish island.'⁷²³ Light heartedness aside, he explained:

I really didn't want it to contaminate our brand. I was against it being something that was part of the competition and consumer protection regime. I believed it would be better to have a separate regulator that could get more involved in understanding the industry. I also thought that any law or such code addressing the treatment of suppliers should have as its overriding objective, the improvement of value for the consumer at the end of the food chain, as opposed to being about allocation of profit within the food chain. Having orderly supply arrangements and efficient contracting and avoiding legal disputes is in the consumer's long term interest. So I certainly would have a preference for that, because I think it is less confusion in the public mind as to who is doing what and why.⁷²⁴

In our interview, reflecting back herself on why GSCOP administration is best carved out of the responsibilities of the competition authority, the GCA noted that individual disputes between retailers

⁷²¹ CC 2008 report, p. 242.

⁷²² CC 2008 report, p. 242.

⁷²³ Transcript of interview, former senior representative of the UK OFT, p. 19.

⁷²⁴ Transcript of interview, former senior representative of the UK OFT, pp. 19-20.

and suppliers just would not register as a priority for the authority and this was particularly so given that, as in Australia, by and large competition is seen to be working, at least at a horizontal level, in the grocery sector in that country.⁷²⁵ This view was echoed by Noble from British Brands Group:

*...the OFT had its prioritisation principles and our experience was that they were reluctant to get into the nitty-gritty of enforcing day-to-day. They had many other markets they were looking at, mergers to deal with, consumer protection duties – they had a huge task and trying to get something on their prioritisation principles was always very difficult, particularly if it was seen by them as being a spat between a retailer and supplier with difficult-to-assess implications for the shopper and the consumer. We would say that just one practice, when multiplied over the whole range of different categories and across different retailers, the impact on the consumer gets quite significant. But trying to demonstrate consumer harm to get over the prioritisation principles was always very, very difficult. And so I think the Competition Commission recognised that limitation and said, “Well the only way that we’re going to get this monitored and enforced is by having a dedicated enforcer whose job won’t be distracted by other things and isn’t subject to the same prioritisation principles...”*⁷²⁶

Noble supports his argument in favour of the GCA over the competition authority as enforcer of a code by pointing out that, somewhat oddly, in the UK it is the CMA that has jurisdiction over the requirement to have written supply agreements while the GCA has jurisdiction over the remainder of the Code. Tacon has notified the CMA about allegations that some of the retailers are failing in the written supply agreements obligation, but:

*... the CMA [has] done little in the areas it is responsible for and is unlikely to. It’s got bigger fish to fry. So that is quite an interesting dichotomy where one area, enforced by the CMA, is not being enforced and another area where you’ve got Christine being very engaged, very active and collaborative in her regulatory activity.*⁷²⁷

Noble’s view on why the competition authority was not given responsibility for administering most of GSCOP is supported by other UK commentators. An experienced legal advisor to suppliers told us:

*When the OFT had responsibility for the prior version of the code [a reference to SCOP] .. I think it was perceived to have no interest in doing anything about it whatsoever. So there was a view that the OFT has had the job already once and has failed to do anything with it. So it needed to be somebody else to have any credibility. So you’re right, the natural place for it would have been the OFT. And that’s to do with a number of things. It’s easy to be hard on the OFT. But you have an agency with numerous functions. There is a contest on its resources. Taking it outside of there, you could create somebody who has dedicated resources and you’ve got to remember the GCA is funded by the retailers, it’s not funded by government.*⁷²⁸

⁷²⁵ Transcript of interview, Christine Tacon, p. 11.

⁷²⁶ Transcript of interview, John Noble, British Brands Group, p. 33.

⁷²⁷ Transcript of interview, John Noble, British Brands Group, p. 34.

⁷²⁸ Transcript of interview, experienced legal advisor to suppliers in the UK, pp. 17-18.

She also made the point that there is a merit in having funding for GSCOP enforcement that is ‘ring-fenced’ and not in a “central pot’ that constitutes the budget for the competition authority: ‘the problem is if you put it in the OFT central pot and you say “okay, we’ll give you extra budget to do it,” unless you’d ring fenced that budget in some way, there’ll be something sexier or more exciting..’⁷²⁹ Priorities for these authorities range from year to year, sectors go in and out of vogue ... and, she observes, this was the case with the OFT and SCOP enforcement. There just came a point ‘where they just went, do you know what? We’re not interested in this anymore.’ There are always other calls on their attention: ‘yes, grocery’s important ... but I can’t see them getting back to cases like that, unless they’re in an online environment, which is what they now regard as a priority...’⁷³⁰

Tacon also made the point that, in her view, what was needed in the role was not the enforcement approach or mentality of an agency otherwise generally tasked with determining liability and imposing sanctions, but rather a more collaborative approach of bringing and working together with parties to find a compromise solution to issues of concern – an approach similar to that taken by the former PGCC Ombudsman. Tacon distinguishes in this regard between her *modus operandi* when performing educative and monitoring functions and when acting in an investigative capacity but even in relation to the latter she takes a collaborative approach, as evinced by the guidance on investigations that she has published.⁷³¹ As she pointed out to us, when she was being considered for the position, she put the question to the government: ‘were they looking for someone who would roll up their sleeves and get involved or [did they want] a retired judge?’⁷³² Clearly she was in the former category and, having met Tacon, evidently the government ultimately decided that it wanted the more hands-on approach that she promised.⁷³³ Apparently, however, the advert for the position read as if the government was ‘looking for an ex-Judge who’s going to adjudicate disputes’.⁷³⁴ That initial intention perhaps explains also the name given to the role.

Having reviewed the various submissions, the CC found favour predominantly in the OFT view, namely ‘that a dedicated body with industry expertise, which would build working relationships with supplier trade associations and retailers and monitor compliance and promote best practice, would have advantages.’⁷³⁵ The CC went on to explain that ‘given the importance of involving stakeholders in the process of establishing an Ombudsman scheme’⁷³⁶ it would seek undertakings from all retailers that it had decided should be covered by the GSCOP to support and fund the ombudsman scheme. However, if retailers failed to agree to these undertakings, it recommended that the government should take the necessary steps to create an ombudsman.

⁷²⁹ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 41.

⁷³⁰ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 42.

⁷³¹ See Grocery Codes Adjudicator, *GCA policy: Continuing the collaborative approach during an investigation*, at <https://www.gov.uk/government/publications/gca-collaborative-approach-during-an-investigation>.

⁷³² Transcript of interview, Christine Tacon, p. 12.

⁷³³ See Transcript of interview, compliance manager at a major UK retailer, P. 17: the government wanted ‘somebody that understood the industry and was able to give an independent view with some authority. The supermarket world and the supplier world is quite a complex one and the farming world is quite complex; I think what Christine was able to bring was experience from those environments that people would say, yep, this is not just a pure civil servant in here doing the absolute black and white, this is much more about somebody that has a reasonable understanding.’

⁷³⁴ Transcript of interview, experienced legal advisor to suppliers in the UK, p. 18.

⁷³⁵ CC 2008 report, [11.333-6].

⁷³⁶ CC 2008 report, [11.343].

Perhaps not surprisingly, securing retailer agreement on such a scheme proved impossible. In some parallel with the MSC alliance that stood behind the FGCC and opposed a mandatory code in Australia, the UK retailers spoke with one voice in opposition to the establishment of the GCA. As Noble of British Brands Group recounts, when the CC asked the supermarkets to set up the ombudsman scheme themselves, ‘they said no.’⁷³⁷ And why would they have said otherwise, he asks somewhat rhetorically. ‘It [was] going to cost them money, they saw it as extra regulation. Delay isn’t a bad policy... so by not agreeing they prompted a five, six year delay ... in public policy terms you can say that’s a result!’⁷³⁸

Hence the government set up the GCA itself – explaining in part the time between the GSCOP coming into effect in 2010, and the establishment of the GCA in 2013.⁷³⁹ Indeed, in the period following the CC’s 2008 report, economic conditions had toughened and, fearing that this would prompt retailers to place suppliers under even greater pressure, the CC took the view that the case for ombudsman oversight was even stronger a year out from the publication of its report.⁷⁴⁰ The UK government evidently agreed but it also stuck to its guns that the ombudsman scheme would be funded by imposing a levy on the retailers, an aspect of the UK model that the MSCs here quite clearly wanted to avoid being replicated. For the British government, this was seen as ‘smart’ regulation – making ‘sure that the people who are creating the problem are tasked with sorting it out and paying if necessary rather than the taxpayer doing it.’⁷⁴¹

What is notable about this sequence of events is the parallels between UK and Australian developments. In the UK there was a voluntary code (SCOP from 2010) and evidently it failed, in large part due to non-compliance by the supermarkets and notwithstanding that there was oversight by the competition authority, the retailers having given undertakings to be bound.⁷⁴² The next step was for government to intervene and create a dedicated enforcement and compliance architecture. In Australia it could be said that we are at stage 1, in UK terms, with a voluntary code to be enforced by the ACCC. The MSCs opposed the establishment of a specialist ombudsman scheme, just as did the supermarkets in the UK. The question in due course will be whether we reach UK stage 2 ...

IV. PENALTIES

At the time that the RIS was published, the CCA did not provide for pecuniary penalties or infringement notices for contraventions of an industry code, or for the creation of regulations that prescribe penalties for the contravention of an industry code. The RIS noted, however, that the Government was proposing to introduce pecuniary penalties for breaches of the Franchising Code

⁷³⁷ Transcript of interview, John Noble, British Brands Group, p. 15.

⁷³⁸ Transcript of interview, John Noble, British Brands Group, p. 35.

⁷³⁹ The other explanation for the delay was that the GCA’s establishment required the passage of primary legislation and it kept slipping on the parliamentary timetable given other more pressing legislative priorities at the time (Transcript of interview, experienced legal advisor to suppliers in the UK, p. 26).

⁷⁴⁰ CC News Release 08/09, *CC publishes code of practice order*, 26 February 2009.

⁷⁴¹ Transcript of interview, John Noble, British Brands Group, p. 36.

⁷⁴² Transcript of interview, experienced legal advisor to suppliers in the UK, p. 24: ‘people regarded that code as dead letter ... so you know, if you attempted to point to compliance with it, people felt that you would be laughed at and that there were practices continuing...’.

and to allow the ACCC to issue infringement notices for breaches of a civil penalty provision of that Code, and that for these changes to take place it would be necessary to amend the CCA.⁷⁴³ These amendments have now come into effect. As of 1 January 2015, the regulation making a prescribed code under the CCA can now include provision for civil penalties up to a maximum of 300 penalty units (\$54,000 as of 2017). The FGCC does not currently contain any such provision therefore, as things stand, financial penalties cannot be imposed for breaches of the Code.⁷⁴⁴

One of the questions raised, but not extensively explored, in the RIS was whether provision should be made for pecuniary penalties for breaches of the FGCC. The issue was looked at in more depth by the Senate Committee. The Committee noted that while submitters were 'generally supportive of the Grocery Code', one of the key concerns was the adequacy of the penalties that could be applied where there was a breach.⁷⁴⁵ The NSW Farmers Association suggested 'an appropriately graduated approach to enforcement', viewing this as a way to encourage:

*...desired behaviours from market participants', i.e. the ACCC could employ infringement notices for minor transgressions, or pursue pecuniary penalties through the courts where determined appropriate.*⁷⁴⁶

However a representative for Treasury suggested that to introduce penalties might prove a disincentive for companies to sign on to the Code:

*... this is the first time anybody has come forward with a voluntary prescribed code. And whether - so when a supermarket signs up to the code, they are voluntarily submitting themselves to a whole range of court enforceable remedies. And the question there is whether also applying the penalties in that situation would be - I guess (a) likely to encourage more industries to use that approach (b) would it actually encourage support of the code itself.*⁷⁴⁷

When asked about the subject in our interviews, a former and a current MSC representative both opposed the introduction of penalties, in part because they saw the Code as having a different, more positive, purpose than black letter law:

*I've always said no, because the law is the – the backdrop is where the law is. And the law has several and – and penalties. So penalties should apply in civil law. I don't think they should apply in a code, which is trying to be proactive.*⁷⁴⁸

⁷⁴³ Treasury, FGCC Final Assessment RIS, 2014, p. 22.

⁷⁴⁴ See CCA, ss 51AE (2).

⁷⁴⁵ SELC, *FGC Regulation*, 2015, p. 7.

⁷⁴⁶ NSW Farmers submission 7, pp. 9-13, cited in SELC, *FGC Regulation*, 2015, p. 14.

⁷⁴⁷ Transcript of interview, Treasury, p. 36.

⁷⁴⁸ Transcript of interview, Robert Hadler, p. 51.

*...you spend every day in here as traders building trust with customers and your traders. It's about losing that trust and about your reputation, it's got very little to do with fines in my view.*⁷⁴⁹

Yet another MSC representative saw penalties for Code breaches as unnecessary because:

*There's injunctions, there's compensation if somebody suffered loss or damage, there's also the action that the ACCC could take for unconscionable conduct [or] misleading and deceptive conduct. ... [I]n my view, if you're breaching the Code in a material and serious way, there probably is an avenue for you to be financially penalised.*⁷⁵⁰

He also foresaw a possible added compliance burden in the event that penalties were available:

*There's people raising the Code when it's actually not really that relevant. And I just wonder whether we'd have to spend more time on it if there were financial penalties involved, and I'm not really sure.*⁷⁵¹

And he argued that, while penalties and associated reputational damage:

*...concentrate the mind, more of the board and senior management and so on, operationally in the commercial team what frightens them probably more than anything else is the prospect of additional red tape, additional administrative difficulty in doing day-to-day business, additional reporting requirements let's say or something like that or additional audits that may happen – that type of thing. Something that gets in the way of the day-to-day job is probably much more in the minds of buyers because literally in this type of business there isn't enough hours in the day, it's full on so anything that slows down the process of going to market is something that frightens buyers.*⁷⁵²

A further perspective on why penalties may not be appropriate for code enforcement or if imposed, the importance of penalties being proportionate, was offered by a commentator from the UK. His argument was that high financial sanctions should be available where it is necessary to engender general deterrence and that that is particularly so where the rate of detection of the impugned conduct is low (as in the case of cartel conduct, for example). It is material in this context not to confuse deterrence and compensation in the design of a penalty regime – the focus must always be on whether the overall system delivers 'value for the consumer', not on whether individual suppliers are harmed.⁷⁵³

However, several submitters did advocate for penalties. Gaussen, the former PGCC Ombudsman, told the Senate Committee that:

⁷⁴⁹ Transcript of interview, MSC representative, p. 24.

⁷⁵⁰ Transcript of interview, MSC representative, p. 13.

⁷⁵¹ Transcript of interview, MSC representative, p. 14.

⁷⁵² Transcript of interview, MSC representative, p. 44.

⁷⁵³ Transcript of interview, former senior representative of the UK OFT, p. 20.

*... any code of conduct that has no adequate enforcement regime will not be a successful code of conduct. The words that appear in this code are good words. The content and intention of what is being described in this code are great, and they are needed and are long overdue. But there is no obligation on anyone to do anything, even if they sign up to it, because of the system under which there is no enforcement.*⁷⁵⁴

Gaussen also suggested that an industry-specific ombudsman should have the power to refer disputes to the ACCC, and vice versa. In its submission, however, the ACCC suggested such matters 'might be better suited to dispute resolution rather than litigation'.⁷⁵⁵ Instead the ACCC emphasised the role of the audit power provided for under the FGCC, allowing the agency to identify and respond to breaches, even in the absence of a complaint:

*In a sector where there have been ongoing observations that suppliers are reticent to bring problems to the ACCC's attention for fear of retribution by stopping of a supply agreement or a holiday, however it is characterised, the audit power enables the ACCC to reach in and check the books of those who subject themselves to the discipline of the code. This allows the ACCC to get the information we believe would identify problem behaviour without individuals needing to identify themselves.*⁷⁵⁶

In our interviews with the ACCC there was support for the introduction of penalties for FGCC breaches. One representative said:

*...for me, that's like why are we bothering with some of these, because what are we going to do, get a court order that says don't do this? That might look good for a lawyer, but I'll tell you what, for your average fruit and vegetable grower it means, huh, they broke the law so you took them to court to do what, so the judge said don't break the law? How does that work? What's that about? So, you know, without penalties they're a bit pointless.*⁷⁵⁷

When asked why the ACCC had not pushed previously for penalties for FGCC breaches, the same representative expressed frustration, replying: 'We have. We have – we have - we have – we have.'⁷⁵⁸

Former Chairman Graeme Samuel AC took a similar stance:

Let's look at the code as being no more or less than a regulation or a law. If you're going to have a law that requires you to do certain things and it requires you not to do other things and you're going to disobey the law, then there's got to be a consequence. And the consequence

⁷⁵⁴ Robert Gaussen, Proof Committee Hansard, 21 April 2015, p. 10

⁷⁵⁵ SELC, *FGC Regulation*, 2015, p. 15.

⁷⁵⁶ Nigel Ridgway, Executive General Manager, Consumer, Small Business and Product Safety, ACCC, Proof Committee Hansard, 21 April 2015, in Senate Economics Legislation Committee Inquiry, *Competition and Consumer Act 2010 (Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015*, March 2015, p. 16.

⁷⁵⁷ Transcript of interview, senior representative of the ACCC, p. 32.

⁷⁵⁸ Transcript of interview, senior representative of the ACCC, p. 36.

*has got to be more than a naming, that you've breached. More than a court conviction – court adjudication. ... A declaration that you've breached. There has to be a penalty.*⁷⁵⁹

The lack of penalties for FGCC breaches is in stark contrast to the position in the UK where the GCA has power to impose fines up to a maximum of 1% of the relevant retailer's UK turnover over a 12 month period.⁷⁶⁰ The UK Secretary of State for Business, Innovation and Skills had noted in 2012 that while the proposed legislative framework at that time only granted the GCA the power to 'name and shame', he had reserved the right to introduce fines if these measures proved insufficient.⁷⁶¹ On 29 January 2015 the UK government took this next step to shore up the potency of the GSCOP, the Secretary saying:

This important final step will give the Groceries Code Adjudicator the power it needs to address the most serious disputes between the large supermarkets and their direct suppliers.

*I created the Groceries Code Adjudicator to ensure a fair deal for those who supply goods to supermarkets such as farmers and small businesses. I am pleased today to be giving the Adjudicator the final element in a set of powers that will give this new body all the tools it needs to succeed in this challenging and important role.*⁷⁶²

In its report on the 2016-17 review of the GCA, the UK government noted that it had received submissions from some large retailers expressing concern about the potential size of the penalty available for breach of the GSCOP, and arguing that reputational damage alone would be a sufficient deterrent. Others were reported as indicating that the penalty was 'an important signal of how seriously the Code is being enforced' and overall, the report found 'broad support' for the sanction as a 'very powerful tool to use against non-compliant retailers'. Reflecting this, it was concluded that the current maximum financial penalty should be retained.⁷⁶³

iii. Option 3: do what the farmers want

The discussion in the RIS about the third option is brief relative to the other two options, and the second (voluntary) option in particular. The primary movers for the mandatory option were, as noted by Treasury, the various representative farmers' associations at national and State levels, including the ADF:

⁷⁵⁹ Transcript of interview, Graeme Samuel AC, p. 63.

⁷⁶⁰ Article 2, *Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015/722*.

⁷⁶¹ Rebecca Smithers, "'Unfair' supermarkets could face hefty fines under new watchdog", *The Guardian*, 5 December 2012.

⁷⁶² Press Release, 'Fines for supermarkets move a step closer' Department for Business, Innovation & Skills, Groceries Code Adjudicator and The Rt Hon Dr Vince Cable, 29 January 2015, <https://www.gov.uk/government/news/fines-for-supermarkets-move-a-step-closer>

⁷⁶³ Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016*, July 2017, [90]-94].

*They raised concerns that the major supermarket chains may opt-out at a later date; other major retailers may choose not to opt-in; and that the Code does not cover the whole grocery supply chain.*⁷⁶⁴

The precise words of the ADF in their submission were as follows:

*While the Code is admittedly a step in the right direction, ADF believes that it lacks scope and is not sufficiently comprehensive. In this submission, ADF will bring attention to significant gaps in the Code including but not limited to the need for an Ombudsman, penalties, establishing a Code that is mandatory, and an Effects Test.*⁷⁶⁵

Other stakeholders, while favouring a mandated approach, were prepared to concede a voluntary code was better than nothing. This was the tenor of the AMWU's submission, for example:

*As a general proposition we strongly support the introduction of a mandatory code as we believe that the "opt-in" component of the Code is highly problematic. While we consider it an important first step to have the Code prescribed under the Act, the voluntary nature of the Code weakens it considerably.*⁷⁶⁶

In response, Treasury emphasised:

*The Retailer and Supplier Roundtable (RSR) strongly opposed a mandatory code, highlighting that such a move would be inconsistent with the Government's red tape reduction agenda.*⁷⁶⁷

The discussion of pros and cons that then followed identified two pros and two cons, in effect cancelling each other out. Benefits of the third option were greater certainty that all supply relationships would be covered and compliance was mandatory and there was also the 'key' advantage that bound parties would be subject to obligations 'which they would not accept voluntarily.'⁷⁶⁸ Costs were that it may not be appropriate to impose mandatory obligations on parties that 'were not directly considered during the initial formulation of the code' (i.e. all retailers other than the MSCs and possibly also Metcash). This could lead to 'unintended consequences' (which were unspecified). Plus there would be higher compliance costs all round – for industry and government.⁷⁶⁹

Tellingly, at this point, Treasury re-emphasised the seemingly irrebuttable proposition that a mandatory code 'would not have the benefit of implicit support by those that are bound, and ... (therefore) may be less supportive of it and less willing to be bound.'⁷⁷⁰ As a proposition grounded in the psychology of human behaviour, if not common sense, it is difficult to quibble with this reasoning.

⁷⁶⁴ Treasury, FGCC Final Assessment RIS, 2014, p. 26.

⁷⁶⁵ ADF submission covering letter, Treasury, FGCC consultation paper, 2014.

⁷⁶⁶ AMWU submission, Treasury, FGCC consultation paper, 2014, p. 4.

⁷⁶⁷ RSR response to Treasury, FGCC consultation paper, at [2].

⁷⁶⁸ Treasury, FGCC Final Assessment RIS, 2014, p. 27.

⁷⁶⁹ Treasury, FGCC Final Assessment RIS, 2014, p. 27.

⁷⁷⁰ Treasury, FGCC Final Assessment RIS, 2014, p. 27.

But equally it belies the smarts of the MSCs in deploying a collaborative strategy to find a political solution to the problem caused by their own bad behaviour.