

Executive summary

This report documents the analysis and findings of research relating to the Food and Grocery Code of Conduct (FGCC), introduced by way of regulation in 2015 with the general aim of improving relations between retailers and wholesalers and their suppliers in the Australian grocery sector. The report is accurate and reflects developments as at 1 September 2017.

Funded by an Australian Research Council grant, the research was conducted over a period of two years and involved review of an extensive documentary record and more than 70 in-depth interviews with a wide range of stakeholders across industry, government and civic society.

Two of the key questions guiding the research were as follows:

- What were the problems to which the FGCC was responding and why and how was the FGCC responsive to or seen as likely to address them?
- To what extent has the FGCC been effective to date or is it likely to be effective in the future in addressing such problems?

A summary of the research analysis and findings in relation to each of these questions is set out below.

Problems

1. The problems to which the FGCC was responsive fall into four broad categories:
 - an economic problem of market structure and conduct;
 - a socio-cultural problem of business culture and behaviour;
 - a political problem of farmer struggles and public sympathies;
 - a systems problem of legal rules and litigious avenues.
2. These problems are not mutually exclusive and in some respects are inter-related. In some cases the problem was clearly and publicly articulated and the FGCC was presented as directly responsive to it. In others, the articulation was not as clear, was often not publicly articulated and nor was it necessarily seen as a problem that the FGCC may be able to address fully if at all, even it was influential as an impetus for the action taken to introduce the Code.
3. Views on whether the issues as set out here were or are problems as such, the degree to which they were or are likely to continue to be problematic and the appropriateness or likely effectiveness of the FGCC to address them vary considerably between stakeholders. This research has sought to capture this diversity of perspectives as well as bring an independent and objective frame of reference to the issues at hand.

4. The analysis in this report does not purport to uncover or canvas the forces or factors that gave rise to the problems in question. A causal analysis of this kind would necessitate a much broader inquiry that would involve a historical as well as more of a sociological perspective, neither of which are within the scope of this report, but are reflected in other aspects of the [Supermarket Power project](#) of which this research relating to the FGCC is part.
5. The report includes comparisons with the experience in the United Kingdom (UK) based on review of the documentary record as well as interviews with stakeholders in that jurisdiction. While similar issues and debates relating to supermarkets exist around the world, the UK is particularly relevant in the Australian context as it has had a mandatory code of conduct in place since 2010 (the Groceries Supply Code of Practice (GSCOP)), which replaced a voluntary code introduced in 2002, and a dedicated statutory officer (the Grocery Code Adjudicator (GCA)) to enforce it since 2013. The design and experience in implementation of the UK regime was influential in Australian developments.

An economic problem of market structure and conduct

6. At its root, the economic problem to which the FGCC was seen to respond arises in the structure of retail grocery markets in Australia, specifically the high level of concentration and the combined market share across a substantial number of product categories of the major supermarket chains (MSCs), Coles and Woolworths.
7. In the lead up to an inquiry into grocery prices by the Australian Competition and Consumer Commission (ACCC) in 2008 (ACCC Grocery Inquiry), this was viewed as a problem principally for horizontal competition and associated detriment for consumers, predominantly by way of high prices. However, in the ACCC's judgement, notwithstanding the concentration, competition was still 'workable'. That view was echoed in the findings of an independent review (Harper Review) in 2015 consistent with the fact that, in the intervening years between the two inquiries, competition intensified and indeed has continued in that vein following the Review and is likely to continue to do so in the future.
8. In the years immediately following the ACCC Grocery Inquiry, the increase in competition was driven principally by two factors: (1) the turnaround in Coles' performance as a result of its acquisition by the conglomerate business, Wesfarmers; and (2) the expansion of the discounter Aldi, with its lean business model and aggressive positioning on prices.
9. Intensified retail competition meant that the MSCs strove harder to achieve efficiencies in their supply chains and this included squeezing suppliers on margins as well as reducing supplier numbers and promoting private labels. These developments, combined with factors in the macro-economic environment both domestically (including regulatory burdens and the carbon tax) and internationally (specifically, the spike in the Australian dollar), placed substantial pressure on suppliers.

10. This shifted the focus and perceptions of the economic problem to vertical dimensions of the grocery sector. The prevailing view was that the buyer power of the MSCs created an imbalance of bargaining power between these retailers and their suppliers at least in many if not all grocery supply chains. The imbalance in turn enabled the MSCs to extract terms and conditions from suppliers which were said to involve a transfer of excessive risk onto these parties. Particularly where such terms and conditions were imposed unexpectedly and even more so when accompanied with threats of adverse commercial consequences for failure to agree, the result was seen as suppliers bearing substantial costs, facing increased variability of cash flow and being inhibited in their capacity to plan ahead for their businesses.
11. In the longer term, this was regarded as likely to diminish incentives for supplier investment, expansion and innovation. In competition terms, these effects on suppliers were of concern because of potential long term detriment for consumers. Erosion in or increased concentration of the supplier base and reduced investment, expansion and innovation by suppliers could result in lower competition between suppliers and higher prices, more limited choice and poorer quality in product range.
12. It was recognised that the FGCC could not and would not alter the structure of retail grocery markets. Structurally, the competitiveness of these markets and high combined share of the MSCs would ultimately be a matter determined by contestability, specifically the degree to which recent entrants could continue to expand and new players viably enter and compete. The condition of entry was thus the focus of the Harper Review in the context of its discussion regarding the grocery sector and underpinned its recommendations regarding changes to the process for planning approvals and the regulation of trading hours. However, even without such changes, there are strong signs of continued expansion by Aldi and entry of at least one further foreign discounter as well as a possible second wholesaler have been foreshadowed. Moreover, the MSCs and others point to the increasing emergence of niche online retailers, the real prospect of AmazonFresh entering the Australian market, and the growing use of technology by grocery consumers generally amongst the factors likely to continue to drive competition in the sector.
13. Despite not altering market structure, the FGCC was seen as necessary and justified on the basis of its perceived capacity to address the conduct of concern that arose from the asymmetry in bargaining power between major retailers and suppliers and in particular, between these retailers and smaller suppliers. Specifically, it was conceived as a mechanism that would ensure that its retailer signatories conduct their trading relationships in such a way as to allow greater transparency and certainty for suppliers in contractual arrangements.
14. Provisions in the FGCC directed at these ends relate to the requirement that grocery supply agreements (GSAs) be in writing and that they not be unilaterally or retrospectively varied by retailers except in limited circumstances and with reasonable notice, and to a range of obligations or prohibitions pertaining to payments, delisting, promotions, standards and specifications, supply chain procedures, shelf space, intellectual property and confidential information. The reasoning

was that such measures would engender greater trust and cooperation in grocery supply chains and provide suppliers with the confidence to invest, expand and innovate, which ultimately would engender efficiencies that would benefit consumers in the long run.

Assessment of effectiveness

15. Whether or not the FGCC has delivered improved trust and cooperation in grocery supply chains and greater transparency and certainty for suppliers is a question that is difficult to answer definitively only two and a half years (at the time of writing) since its coming into effect. This is particularly as, for some suppliers, the transitional provisions of the Code would have meant that they would have remained under their former contractual arrangements for 12-18 months following the Code's promulgation. While the passage of more time will assist, making such an assessment at any stage will be complicated by the fact that there is likely to be a wide range of factors that affect supermarket-supplier relations, not least changes in a highly fluid competitive environment (referred to further below).
16. Even more challenging would be any attempt to determine empirically whether, in the long run, the FGCC alone has affected the level of dynamic efficiency in the market; that is the extent to which consumers are benefitting from an increased readiness of suppliers to invest, expand and innovate. This is all the more so given that efficiency of this kind is premised to a substantial degree on suppliers achieving the margins over time that will facilitate the necessary investment for innovation. The FGCC does not regulate prices or price increases and hence will not directly affect these significant determinants of dynamic efficiency over time.
17. Those caveats aside, the FGCC can only be effective in fulfilling its more limited objectives of increasing transparency, certainty, trust and cooperation in grocery supply chains insofar as the relevant retailers comply with it and key representatives in both retailer and supplier organisations are aware of and understand its provisions. Further and importantly, such representatives need to feel able and be willing to use that understanding in supply negotiations.
18. It is evident that the MSCs have gone to considerable lengths to put GSAs in place, bring the FGCC to the attention of and train their buying and other affected personnel in its provisions and processes, appoint prescribed personnel for dispute resolution purposes and make the necessary investments in systems to monitor and record transactions in accordance with Code requirements.
19. Amongst suppliers, however, and despite the considerable efforts of the Australian Food and Grocery Council (AFGC), the ACCC and the MSCs themselves, it appears that awareness is not only low overall but uneven in that it is large rather small suppliers that are more likely to have undergone training. This is consistent with the early experience with the code regime in the UK; however, there is evidence that awareness and use of the GSCOP increased substantially following the establishment of the GCA (the role of which is referred to further below). There are

also criticisms made of the FGCC's legislative-style text, seen as user-unfriendly to small business people in particular, and suggestions are made of confusion amongst members of this sector as a result of the plethora of rules and procedures that now govern or affect transactions with their buyers.

20. That said, there are some signs that informed (and even some uninformed) supplier representatives are showing a willingness to use the FGCC, at least in the sense of being prepared to raise and test issues that previously may have been more difficult to air. Moreover, there are reported instances of suppliers being prepared at least to threaten escalation to the Code Compliance Manager (CCM), the person that the FGCC requires be appointed in-house by retailer signatories to deal at first instance with Code-related grievances independently of buying personnel, as a means of obtaining greater leverage in negotiations.
21. It is reported further that these interactions are generating robust but on the whole constructive discussion about the 'correct' interpretation of the FGCC provisions (for example, as to what constitutes 'genuine commercial reasons' for delisting). In this way it is providing a platform and framework for an exchange of views on matters which suppliers might formerly have been reticent to raise or in respect of which they may have been more readily accepting of outcomes against their interest on the basis that they had no choice but to so accept. It is also evident that supplier confidence in these respects is being shored up by the sense that the ACCC is 'on watch', monitoring compliance with the Code through its audits, and remaining open to receiving complaints and taking enforcement action where deemed necessary.
22. At the same time it needs to be acknowledged that these positive early trends may not just be slow to take hold more broadly across the sector but also may prove only short-term in effect. This is because conduct in accordance with both the intent and the specific provisions of the FGCC necessitates a degree of cultural change, transformation even, on the part of the MSCs and to some extent on the part of suppliers also.
23. Amongst suppliers it is reported that there is a deeply ingrained cynicism about whether the MSCs will in fact 'change their ways' and an ongoing reluctance to 'push back' too strongly for fear of jeopardising important (in some cases critical) business relationships. There is good reason to conclude that the leverage of suppliers in bargaining with their MSC buyers is a matter that ultimately can and will only be improved by increased competition (that is by way of structural change in the market), if or when they have a sufficient range of options by way of retail channels, both domestically and through exports, so as to lessen dependence on Coles and Woolworths. The viability of export growth will continue to be affected by factors extraneous to the domestic market, not least by international commodity prices and currency fluctuations.
24. Within the MSCs, competitive pressures are playing a role in an increased recognition by the corporate leadership that a supplier-friendly culture is in the long-term strategic interests of their supermarket business. Observation of this trend could lend support to the view that in the long

run, issues of the kind that gave rise to the FGCC will be resolved as a function of the normal ebb and flow of competition and strategic responses in a sector in which such dynamics are constantly changing. But at the same time there are some who consider that those pressures are only going to become more acute. They argue that with the continued emphasis on low prices particularly, there is every prospect that the MSCs, or at least individual buying personnel, will revert to former practices of the kind that prompted the regulation, in the ongoing battle for share and an effort to deliver on ambitious profit targets.

25. If there is such a risk, then the FGCC will continue to be necessary and important in reducing its potential materialisation. Equally, however, consideration may need to be given to strengthening or refining the Code at some stage so as to reduce the degree to which it currently allows considerable leeway for contracting out of its provisions. If the MSCs oppose such changes, the FGCC would need to be made mandatory. In addition, in order to counteract the effects on behaviour of intense competitive pressures, consideration should be given to introducing pecuniary sanctions for breaches of the Code and possibly to appointing a dedicated ombudsman or other statutory officer to more actively monitor and facilitate compliance with its provisions.
26. On the assumption that the FGCC will retain some relevance in affecting or responding to competitive dynamics in the sector, it is incumbent on policymakers to consider whether it is having or may have any unintended or unanticipated adverse consequences. At least two possibilities are worth consideration in this regard.
 - a. The first is that the FGCC is not mandatory and so only applies to those retailers that have signed up voluntarily to its obligations. This unevenness in application could be seen to give those retailers (and wholesalers, the conduct of which the Code is also intended to regulate) that have not signed up an advantage over rivals. Parties outside of the Code are not encumbered by the same obligations and compliance burdens as apply to those that have opted in and thus may be able to derive cost savings in ways that are no longer available to the same extent to their competitors. This is a live issue in the UK where there is a much larger number and range of retailers and the GSCOP only applies to those with turnover exceeding what is regarded by some as an arbitrary threshold (£1 billion per year). In Australia currently, given the concentration in the market, it is less of an issue, even if some are troubled by the fact that the wholesaler/retailer, Metcash, has chosen not to be bound by the FGCC. However, at some stage it may be a matter that demands attention, particularly if another global discounting chain was to enter the market and, unlike Aldi but like CostCo, decline to sign up to the Code.
 - b. The second consideration is the prospect of the FGCC unduly inhibiting retailer signatories from continuing to strive for efficiencies in their supply chains. There is no question that the drive for such efficiencies in recent years, led by Coles following the Wesfarmers' acquisition, yielded significant benefits for consumers, largely by way of lower prices. Leaders in these organisations would argue that there has been and will be no dampening of their commitment

to efficiency (and low prices) but rather that they are developing new more strategically smart ways of being efficient. This includes an increasing trend of long-term supply contracts that give key suppliers the certainty and confidence necessary to make investments and innovate in the interests of the supplier, their retail 'partner' and consumers.

However, whatever the high level strategy of the MSCs, it is not possible to exclude entirely the prospect that, lower down in the corporate hierarchy, the behaviour of buyer personnel will be affected by the FGCC's prescriptions in ways that may result ultimately in a poorer deal for consumers. There may be an understandable tentativeness by buyers to bargain as hard as previously for fear of crossing the blurry line from legitimate and permissible commercial negotiation into the treacherous terrain of potential FGCC breaches and even unconscionability. Certainly, on some accounts, there is evidence already of buyer wariness in this respect, both as a result of the introduction of the Code, as well as if not even more so in response to the ACCC's investigations and proceedings against the MSCs for unconscionable conduct. Some argue that this can only be seen as a positive development given the nature of the conduct that gave rise to those interventions. Others identify risks for efficiencies, competition and consumer welfare should such wariness take the form of, in effect, over-compliance. However, it is also emphasised that, to reduce such risks, it is critical that the ACCC take and be seen to take a measured and restrained approach in responding to complaints and determining whether formal enforcement action is warranted.

27. Finally, it is important to record that the FGCC was not seen as a complete solution to the problem of asymmetric bargaining power and the conduct to which it gives rise or that is, as a response to the exclusion of other possible responses and remedies. The FGCC was to supplement and possibly bolster other relevant avenues under the *Competition and Consumer Act 2010* (CCA), specifically the provisions relating to misuse of market power, unconscionability and unfair contract terms.
28. At the time of the drafting of the Code, the potency of these avenues was being borne out by increased enforcement activity by the ACCC in relation to unconscionability (in investigations and suits brought against each of the MSCs, referred to above) and by proposed reform to the prohibition against misuse of market power (a proposal influenced in no small part by concerns surrounding MSC market power and conduct). In addition, at least as far as the MSCs were concerned, the FGCC was seen as complementing and reinforcing a range of internal initiatives, including their own corporate charters or codes of conduct, being taken to heal and strengthen their supplier relationships.

A socio-cultural problem of business culture and behaviour

29. Albeit less explicitly, it is evident that the FGCC was responsive to what was perceived as not just an economic problem but a separate although possibly related socio-cultural problem in the way in which the MSCs were behaving towards their suppliers. While this element of the concerns that

gave rise to the FGCC is harder to crystallise in clear objective terms, it was most often expressed in the proposition that the MSCs were behaving unfairly.

30. The unfairness was seen as made possible or at least aggravated by the imbalance in bargaining power between these retailers and their suppliers. But it was also ascribed in part to the then culture of the MSCs, both at the corporate level and at the level of individual buyer personnel within these organisations at the time of and in the years immediately following the ACCC Grocery Inquiry. Some attributed the cultural dimension of the problem to the influence of an influx of executives from the UK, importing a tougher management style and practices from a jurisdiction where there had been similar controversy surrounding supermarket-supplier relations leading to the introduction of the GSCOP and establishment of the GCA. Distinctions in this regard were often drawn between the MSCs, on the one hand, and Aldi and Costco, on the other. The distinction was not directly ascribed to the German and US origins of these other companies; however, there was a discernible theme to the effect that they had a very different 'way' to that of the MSCs, one that promoted trust by those who dealt with them. Accounts were that, in these organisations, business continued to be done based on the proverbial handshake and when a buyer gave his/her word, it was honoured.
31. Others explained the MSCs' more hard-nosed way of doing business as referable to the fact that the competitive environment and market realities were becoming harsher. However, as previously noted and not without some irony, one consequence of heightened competition appears to be that, more recently, the MSCs themselves are increasingly emphasising cooperation if not partnership with suppliers and taking steps to inculcate this way of thinking into their business culture so as to strategically shore up security of supply. Whether that emphasis is ongoing or at some point is corroded again by competitive pressures is of course hazardous to predict. Strategies relating to supply relationships, and associated aspects of business culture, will also continue to be shaped also by changes in corporate leadership and the experience, styles and preferences of the executives who determine the future direction of these organisations.
32. There was a strong tendency to view the problem of unfair trading as linked to the problem of competition and consumer welfare. This tendency was most pronounced amongst those who advocate for so-called 'fair competition', such advocates being those closely associated with supporting the cause of small business in the economy – which, in the context of this sector, included those representing not just small suppliers, but small 'independent' retailers also. While accepting the general premise that competition rules should protect the competitive process rather than individual competitors (or at least inefficient ones), proponents of the 'fair competition' thesis argue that competition works best when all efficient businesses have an opportunity to thrive and prosper, regardless of size; in other words, where the market presents a 'level playing field' and it is possible to succeed based on 'merit not muscle.' Consumers are said to be better off in this environment given that diversity, both in price and product choice, is preserved and facilitated.

33. At the same time, there are those who refute the suggestion that problems of fairness and competition are interconnected. Competition by its nature is not supposed to be fair, it is argued, and if unfairness results, that is a matter to be managed through distributive policies (through the tax system, for example) and not through competition policy. If competition is working there will be casualties and in a relatively small, isolated and hence unavoidably concentrated economy such as Australia, those casualties inevitably will largely be small businesses. That may be regarded as 'unfair' but, so it is argued, it is nevertheless competition at work. The destructive dimension of the competitive process is defensible, according to these proponents, on the grounds that the ultimate objective is to engender efficiencies that will promote consumer welfare and in turn, economic growth for the benefit of all. If smaller businesses are disadvantaged or eliminated in the process then so be it: there is a higher or at least wider good at stake.
34. The problem of business culture and associated behaviour that is unfair, particularly vis-à-vis small suppliers, was seen as having undesirable consequences of a socio-cultural nature, quite apart from and in addition to any adverse effects on competition and consumer welfare. In particular, the harm to and possible elimination of small businesses was seen as damaging to the social fabric, amenity and cohesion of the local communities of which they are part. Unfairness by big business of the MSC ilk was seen as accentuating public mistrust in large institutions - not only in the corporate world but also in government and the legal system insofar as those institutions are seen as incapable of or unwilling to hold big business to account for what may be regarded as socially unacceptable behaviour. More generally, unfair trading that threatened the livelihoods of small business people was regarded as contrary to entrenched cultural norms of egalitarianism (a 'fair go') in Australian society.

Assessment of effectiveness

35. The FGCC was seen as responsive to the socio-cultural problem because it was specifically aimed at preventing the MSCs from acting unfairly or at least reducing the likelihood that they would do so. This was reflected not just in the specific provisions of the Code directed at unfair behaviours but, importantly, in its imposition of a general obligation of good faith in dealings with suppliers. Not insignificantly, this was not imposed as a reciprocal obligation.
36. The FGCC was not seen as directly addressing problems of public mistrust in or cynicism about business and government elites, albeit there may have been a hope amongst some that it could be pointed to as a concerted effort by the industry and the government to allay public consternation about the behaviour by the MSCs. It also was seen as consistent with the societal value of a 'fair go' by tempering some of the harshness of competition and its effects. That is, the FGCC was seen as conducive with so-called 'fair competition' as a social and not just an economic value.
37. It is unclear to what extent the FGCC has or is likely ever to solve the problem of unfair trading behaviour. As previously mentioned, in the short term there is evidence of genuine commitment

by MSC leadership to the letter and spirit of the code project, in putting the necessary organisational and documentary changes in place, and more broadly taking steps to improve supplier relations through a range of initiatives as part of a broader reformulation or adjustment of strategy. However, in large part, such changes can also if not more be attributed to political and consumer pressures, as well as to the ACCC's scrutiny and enforcement action under the unconscionability provisions, referred to above.

38. Moreover, in the long term, doubters point to the overriding profit maximisation objective, responsibilities to and expectations from shareholders in the context of intensifying competition, and hence associated performance targets and incentives as likely to undermine the effectiveness of the FGCC, at least in terms of stamping out behaviour that could be seen as socially (as well as economically) unacceptable. These sceptics view so-called corporate social responsibility, under which umbrella the fair treatment of suppliers might shelter, as inherently fragile and always prone to the vicissitudes of the market in which private companies, particularly listed ones, are compelled if not obligated to act in their commercial self-interest.
39. In any event, public mistrust in large institutions and cynicism about business motives as well as the perception of an unhealthy close relationship between government and big business are much broader and deep seated issues that, at least in the grocery sector, the FGCC is incapable, on its own, of addressing. They are issues that almost certainly will continue to flare up as a consequence of 'bad' behaviour across the economy, including reports of excessive C-suite salaries, swindles and scams, and from time to time large scale malfeasance and GFC-style collapses. The current controversy and debate surrounding the big banks is a case in point.

A political problem of farmer struggles and public sympathies

40. The low level of farmgate prices threatening farmer livelihoods, undermining rural and regional economic and social welfare, and putting at risk the future viability of the Australian agriculture sector and possibly our long term food security were and continue to be marked features of the debate concerning the high level of concentration in the retail grocery sector. These concerns were acknowledged but their attribution to the market power of the MSCs was largely dismissed in the ACCC Grocery Inquiry in 2008 and again in the Harper Review in 2015.
41. It was emphasised in both of these inquiries and is recognised more broadly that the struggles facing Australian farmers are a product of a host of factors, amongst which grocery retail concentration is only one and arguably a marginal one relative to others. Such factors include:
- the effects of industry deregulation pursuant to National Competition Policy introduced in the 1990s, ending governmental price support and ushering in a period of significant rationalisation, consolidation and adjustment in primary production sectors;

- concentration at intermediate and particularly processing levels of supply chains (in the dairy, chicken and beef sectors especially);
 - the dysfunctionality of wholesale markets in which agents or merchants are seen as particularly culpable in their dealings with growers and the failure of the Horticulture Code of Conduct to eradicate behaviour which might, at best, be said to be non-transparent and, at worst, criminal;
 - seasonal fluctuations (drought and flood) and the impact of climate change in this regard;
 - under-investment by government in necessary infrastructure for rural and regional communities;
 - high costs (for labour and energy particularly);
 - regulatory burdens (for example as to labelling and technical specifications); and
 - international commodity prices (affecting prices for commodities such as sugar and wheat).
42. Strong concerns in connection with the dairy industry prompted a spate of Parliamentary inquiries between 2009 and 2011 in which the full range of forces at work were canvassed but in which the role of the MSCs still loomed large, amplified by the calls from some Parliamentarians for drastic action to 'break up the duopoly'. This focus of attention was accentuated by the Coles-led initiative to introduce \$1/L milk and the ensuing so-called 'milk wars', a matter which was seen to justify an inquiry all of its own. However government responses failed to exclusively or even directly ascribe the economic and social challenges besetting the dairy sector to the conduct of the MSCs. Rather, the challenges were to be dealt with through other lenses, including an Agricultural Competitiveness package and a National Food Plan, neither of which had the MSCs squarely in their sights.
43. Nevertheless media coverage and popular public discourse relating to these developments perpetuated a focus on the MSCs as 'villains' in the dairy drama and this ensured, if nothing else, a substantial degree of political pressure. Such pressure reflects a general risk confronting governments in mediating the competing demands of, on the one hand, effective management of the economy (including through the promotion of competition, as a policy measure important to productivity and growth) and, on the other hand, effective responses to social needs and values – in particular the need for a stable social order based on shared norms, social values and cultural identity, one inevitably threatened by economic change and uncertainty.
44. In the present context, this risk was reflected in the dilemma facing politicians by virtue of the fact that, while their constituents benefitted from low milk prices, there was also apparent public sympathy for farmers. Even if this sympathy did not necessarily translate into widespread changes in consumer purchasing behaviour, its strength as a public sentiment was undeniable. While

complex to define and explain, some argue that it is a sentiment underpinned by a nostalgia for and allegiance to the primary industries and pastoral communities - the 'sheep's back' - on which the country's economic success was built, and that it is fuelled by cultural syndromes of support for the 'underdog' and denigration of the 'tall poppy'. Marketing initiatives by the MSCs and other retailers, directed at a show of dairy farmer support, reflected supermarket sensitivity to this sentiment as well as sensitivity to the risks that political reactivity would result in unwanted and unproductive regulation in response.

45. It is thus in no way coincidental that in 2012 the industry heavyweights – the MSCs and the AFGC together initially with the National Farmers Federation – decided to act. The Retail-Supplier Roundtable (RSR) was formed to nut out a code that, three years later, would become the FGCC. The FGCC does not apply to indirect supply relationships and so does not benefit farmers directly. Nor does it touch on prices paid to direct suppliers so as to affect prices that may be paid to farmers indirectly. It is evident nevertheless that, to some degree, the FGCC arose out of a course of events in which the MSCs, and the government, considered it necessary to respond to significant public pressure to take action in response to farmer concerns. It is in this sense that the FGCC may be characterised as at least in part responsive to a political problem. That sense is reinforced by MSC insistence that the FGCC only formalised an approach to supply chain relations that reflected commitments and practices they had already started to establish or in fact had always had in place.

Assessment of effectiveness

46. The FGCC is seen to have been effective in addressing the political problem, at least in the short to medium term. The consensus amongst both supporters and detractors is that the promulgation of the Code gave both government and 'the industry' (at least the MSCs and the AFGC) the ability to publicly point to it as a targeted and proportionate regulatory response to the concerns of suppliers, consumers and the broader public about the power and conduct of the major grocery retailers.
47. This is not to say that there was not then and indeed continues to be significant dissent regarding the strength of the FGCC and whether it 'goes far enough' in addressing relevant issues. There was no shortage of critics, from a range of organisations representing small business and farmers particularly, who called for the Code to be mandatory, to be less flexible / more prescriptive, and to have a dedicated Ombudsman or other enforcement architecture supplementing the role of the ACCC, as well as for there to be meaningful penalties for Code breaches. However, by and large, and in accordance with a general deregulatory agenda and ethos, the liberal arm of the government was persuaded (and evidently of the view that its most politically important constituencies would be persuaded) that the FGCC was a sufficient response to the concerns at hand. At the same time it promised a review in three years time, reassuring detractors that their views were not being dismissed, rather just deferred.

48. Whether or not the Code continues to be viewed in this way will depend to a substantial degree on assessments made of its operation and impact in its first three years, at the time of the review in 2018. Those assessments in turn will be influenced substantially by the stance taken by key independent stakeholders, the AFGC and the ACCC particularly, in relation to the review. The submissions of the MSCs which are likely to point, amongst other things, to the actions they have taken both in compliance with the FGCC and, indeed, in excess of its requirements to assuage supplier concerns will be given weight also. The criticisms made of the code proposal, at the time of Treasury's consultation and the Senate inquiry in 2013-14, can be expected to be repeated. However, at this stage there are no strong signs that the politics surrounding the sector will favour major change. This is particularly as the government has taken already significant steps separately to address broader small business and farming-related issues.

A systems problem of legal rules and litigious avenues

49. There are laws available to deal with most if not all of the conduct issues at which the FGCC is directed, and a well-resourced and capable independent agency in the ACCC to enforce them, including through legal proceedings with the potential for (soon-to-be) significant financial sanctions imposed, in addition to the reputational fall-out associated with allegations, investigations and litigation of this nature. Nevertheless, these systems were seen as inappropriate or inaccessible avenues for dispute resolution by suppliers in their dealings with the MSCs. This was particularly believed to be the case for small suppliers although there was a view held by some that legal routes were unlikely also to be pursued by large suppliers also. While some argued this was because large suppliers have sufficient leverage to be able to sort out grievances in the context of commercial negotiations, others were of the view that large suppliers too, perhaps even more so than small ones, are reluctant to 'rock the boat', given their degree of dependence on the MSCs as a channel to market.
50. As a systems problem related broadly to 'access to justice', this was an issue seen as having at least the following dimensions:
- the laws intended to protect suppliers from anti-competitive and/or unconscionable conduct are not well understood by suppliers other than the largest businesses with the benefit of in-house and external legal advice;
 - legal proceedings are too slow (especially where the dispute involves perishables), too complex and too expensive;
 - the ACCC has limited resources and has to focus on issues that have economy-wide effect and even where it can and does take action, the penalties applicable to breaches are inadequate to punish and deter; while reputational damage is significant, it is arguably only short term in effect; and

- suppliers are reluctant to complain to the ACCC out of fear of commercial retribution, an issue again predominantly associated with but not limited to small suppliers.

51. The FGCC was seen to address this problem by providing a multi-tiered system of dispute resolution. It would start with avenues internal to the retailer, enabling suppliers to raise issues with or make a complaint to the CCM and to escalate internally to more senior management, if necessary. A supplier would also be entitled to engage an external process of mediation or arbitration, once internal mechanisms were exhausted. At any time, recourse to the ACCC would be preserved. The ACCC would play an important role in monitoring and auditing compliance with the FGCC and could decide to take action to enforce the Code in accordance with its normal enforcement powers and procedures. In addition or alternatively the Commission could take action where the conduct in question was regarded as in potential breach of the general competition and fair trading rules in the CCA.

Assessment of effectiveness

52. To date there has been scant use of FGCC's dispute resolution provisions and processes. This appears to be due to several factors that are also material in assessing the degree to which the FGCC is ever likely to be effective in tackling the systems problem outlined above:

- suppliers are either unaware of or reluctant to use the internal dispute resolution process provided for by the Code because it imposes onerous, unrealistic and impractical burdens to make their case, vests power in the retailer to dismiss the complaint on grounds of being vexatious, trivial, misconceived or lacking in substance, and, culturally, is also just not seen as the 'way to do business';
- suppliers are either unaware of or reluctant to use the external process of mediation/arbitration for the same reasons and also because of the perception that it would be of limited if any value to involve a third party mediator/arbitrator who lacks industry knowledge; there are also concerns about the potential cost of this process;
- suppliers remain reticent to approach the ACCC for the reasons stated previously, particularly because ultimately neither this nor the other avenues referred to above provide or provide sufficiently for anonymity in relation to complaints.

53. There are mixed views on and accounts as to whether the weaknesses in the dispute resolution framework established by the FGCC are matters about which to be substantially concerned at this stage. On the one hand, there are those who take the positive view that, at least on early indications, the FGCC has 'changed the rules of the game' sufficiently (particularly, through its requirements of written agreements and restrictions on variations and extra-contractual payments) so as to have minimised the extent to which suppliers have grievances that need to be addressed through a formal dispute resolution process. On the other hand, there are those who regard the code enforcement architecture to have been misconceived from the outset and

point, by comparison, to the very different approach taken in the UK and the positive experience of its impact in that jurisdiction to date.

54. In the UK, the GCA is playing a significant and, according to widespread opinion it seems, highly effective role both in heading off and, when they arise, managing disputes between retailers and suppliers. Much more in the style of an ombudsman than an enforcement agency, albeit with coercive investigative and substantial fining powers, the GCA's approach has the following key ingredients:

- a significant commitment to education and training of both supplier and retailer personnel in the purposes and provisions of the GSCOP, through workshops, conferences, web communications, published newsletters, case studies and surveys and the media generally (particularly the trade press);
- relationship building and collaboration with the retailers' Code Compliance Officers (the equivalent to CCMs), including close regular consultation with these individuals to identify issues early on, assist with interpretation of the relevant GSCOP provisions, develop effective responses to them and feed back concerns raised with the GCA by suppliers;
- systematic and detailed data collection on GSCOP awareness and compliance generally and on specific issues that have arisen in the course of consultations, published at an annual conference and through the media, both as a way of furthering understanding and education but also to incentivise positive competition by retailers wanting to be seen as committed to the Code;
- board level contacts by the GCA within the retailers to ensure that there is ongoing vigilance at the most senior level of these organisations in managing the regulatory and strategic risks associated with any slackening in code adherence, and in continuing to engender a business culture conducive to compliance; and
- the GCA's deep personal experience in and knowledge of the industry and supply chains generally, and her non-legalistic, practical and balanced style and approach to fulfilling her role.

55. The creation of a similar role in Australia was strongly resisted by the MSCs in the negotiations that culminated in the FGCC, and ultimately was not pressed for by the AFGC despite its initial support for such a model. It was also a model advocated for by a range of other stakeholders. The GCA is funded by a levy paid by the retailers designated as subject to the GSCOP in the UK. MSC resistance was not necessarily based on concern about replication of the UK funding arrangements, as there is no obvious precedent for an industry-funded statutory scheme in Australia. However, there was significant concern about the degree of oversight and potential

‘interference’ that an ombudsman-style scheme was likely to involve, and its associated compliance cost.

56. The debate regarding the practical effectiveness of the FGCC dispute resolution framework is likely to be revisited in the 2018 review. The contrasting experience in the UK should be considered in this context. It can be anticipated, however, that the MSCs at least will maintain their opposition to the establishment of a similar scheme for the Australian sector and again, on such matters, the views of the AFGC and the ACCC will be highly influential. Certainly, the introduction of any such scheme would be likely to require that the FGCC be made mandatory, as the MSCs are unlikely to subscribe voluntarily to a code with a UK-style enforcement architecture. This may be reason enough for the government to resist any pressure for change on this score. However, the government is also able to point to the establishment of the Small Business and Family Enterprise Ombudsman’s office that followed the promulgation of the Code as at least providing some of same functions, even if some way short of the dedicated services of the GCA.

In short...

57. Economic concerns regarding the conduct of the MSCs and its long term effects on dynamic efficiency and consumer welfare are a product of the structure of the market and specifically the degree of concentration at the retail level owing to the high combined share of Coles and Woolworths across a substantial number of product categories. The FGCC was not intended to and will not address this structural issue.
58. While awareness, understanding and willingness to invoke the FGCC is sub-optimal and varies considerably across the supply sector at present, there are indications that the FGCC has improved transparency and certainty for some suppliers in their contractual arrangements with MSC buyers and may have engendered a greater degree of trust and cooperation in supply chains generally. Even if the MSCs regard the FGCC as only formalising approaches that they had either already adopted or were beginning to adopt anyway, it is evident that the FGCC is playing a useful reinforcement role in this regard.
59. That said, in the medium to long term, the prospect of the MSCs engaging in or reverting to conduct of the kind that prompted the introduction of the FGCC will be determined largely by the level of competition which in turn will remain predominantly a function of market structure. Intensified competition may incentivise retailers to adjust strategically in ways that are beneficial to suppliers; there are signs of this occurring already and with the likely continued expansion of recent entrants as well as new entry, there are grounds for confidence that such adjustments will be retained if not strengthened.
60. However, competitive pressures equally might cause some buyers to revert to former practices or develop new ones inconsistent with the spirit if not the letter of the FGCC. Should this risk

materialise, the FGCC will continue to be an important safeguard in minimising the perpetuation or spread of such practices but only insofar as the Code is regularly reviewed, adapted and refined to reflect developments in the market place and is subject to ongoing close monitoring of compliance by the ACCC, and a willingness and capacity by this agency to take enforcement action as necessary. Review and refinement of the FGCC for this purpose could entail:

- a. making some of its provisions less flexible (more prescriptive);
- b. adding new provisions to address emerging practices; and
- c. providing a more potent consequence for breaches by way of meaningful financial penalties.

61. Social concerns about unfair behaviour on the part of the MSCs are likely to have been ameliorated by the FGCC to the extent that it has resulted in or reinforced changes in the way in which these retailers go about dealing with suppliers. However, just as in relation to economic concerns, the ongoing effectiveness of the FGCC in this regard will be substantially determined by the MSC responses to dynamics in the competitive environment. These responses in turn will be shaped largely by the prevailing culture within these organisations at any given time and these cultures in turn will be influenced by the profile of the corporate leadership. It is corporate culture that will determine ultimately whether targets set for performance and associated remuneration structures, at the corporate level and for individual buyers, and the strategies adopted to achieve them create an environment that prompts and possibly even facilitates a reversion to socially unacceptable conduct.
62. Broader social concerns relating to a general public mistrust of large and powerful institutions will not be addressed by the FGCC, although for some the Code may provide an assurance that government is prepared to step in and regulate where necessary to ensure that big businesses act in accordance with social norms and values. There may also be support for the FGCC on the grounds that it is consistent with a notion of 'fair competition' and, more generally, with the strongly held cultural attachment to egalitarianism in Australian society.
63. Political pressures to take action in relation to the challenges facing farmers and respond to public sympathies in that regard are likely to have been alleviated to some degree by the FGCC. Self-evidently, the FGCC does not apply to MSC relationships with farmers as indirect suppliers and, as it does not affect prices negotiated with direct suppliers, it also cannot be said to be likely to have a positive flow-on effect on farm-gate prices. Despite this, from the perspective of the MSCs at least, the FGCC ameliorated the prospect of the government adopting a more heavy-handed and costly stance given that, in the public arena, the government was able to point to the Code as a welcome industry-led solution to concerns about the power and conduct of the major retailers. It is less clear that consumers, with their deeply engrained suspicion of big business, will be so easily won over.

64. The inappropriateness and inaccessibility of relevant laws and legal proceedings to resolve supermarket-supplier disputes, particularly but not limited to those involving smaller suppliers, is a systems problem that the FGCC, in its current form, is unlikely to address. Even if suppliers are aware of the availability of the internal and external process for dispute resolution provided for by the FGCC, there are reasons to conclude that there is unlikely to be substantial uptake of these processes. Suppliers are and are likely to remain sceptical of the value of such processes and fearful of the consequences of invoking them.
65. Low take up of the FGCC dispute resolution framework may not be of major concern to the extent that the Code's provisions are able to change the behaviour of buyers in a way that minimises disputes arising and certainly there are signs of such change afoot. It may also be said that suppliers now have a considerable range of avenues for raising grievances and making complaints, beyond those available under the Code. They include processes put in place by the MSCs under internal charters and policies, the services provided by the Small Business and Family Enterprise Ombudsman's office and ultimately by way of complaint to the ACCC. At some stage in the future, however, there should be assessment as to whether the combination of these avenues is being effective in addressing supplier access to justice. At that point, depending on the outcome of the assessment, consideration may be given to possible adoption of a UK-style ombudsman scheme given the positive experience with the GCA model in that jurisdiction to date.