



Case Study Supermarket-Supplier Relations

INTERVIEW GUIDE - GENERAL

Note: These questions indicate general topics that may be covered in the interview. If necessary the interviewers may use prompts for discussion in relation to these topics. The questions and prompts will be tailored to the extent necessary to reflect the particular background and involvement of the interviewee in the matters under discussion. There may be topics not identified in this guide that the interviewee may wish to raise. Equally there may be topics identified in this guide that are not canvassed in the interview for various reasons. Several of the questions in this guide refer to clauses of the Food and Grocery Code of Conduct and the Treasury Discussion Paper used for the consultation relating to the code. Copies of the code and Discussion Paper are provided with this guide for ease of reference.

Context

- In 2008 the ACCC concluded in its grocery inquiry that there was nothing 'fundamentally wrong' with the supply chain. Yet just five years later in 2013 major industry stakeholders negotiated a proposed code of conduct to manage and improve retailer-supplier relationships, and in 2015, the prescribed Food and Grocery Code (FGC) was introduced.

What does this apparent shift say about:

- the evidence and/or analysis and findings of the ACCC in 2008?
- developments in the industry, ACCC activity and public discourse surrounding supermarkets since the 2008 inquiry?
- What led to the adoption of the FGC / what were the impetuses for it in terms of what was happening in the grocery industry and in the public discourse surrounding supermarkets?
- Insofar as you are aware of it, describe the process of negotiations in which the major supermarket chains (MSCs), the Australian Food and Grocery Council (AFGC) and any other stakeholders came to draft a proposed industry code and the process of consultation with Treasury in relation to the statutory version.
 - Who led and who was involved in the negotiations?
 - Who was not involved and why? Who actively opposed the process and why?
 - What effect, if any, did the fact that the FGC emerged out of an initiative led by the MSCs and the AFGC have on the framing of its objectives, scope and ultimately its likely effectiveness?
 - What prompted the industry code instigators to approach government with a proposal to have the code prescribed? Or was the approach made by government?

- What issues, concerns loomed large in the negotiations – were seen as particularly important or difficult, and why?
 - From the industry perspective? Individual stakeholders? Collectively?
 - From the government perspective?
- To what extent did the final text of the FGC address issues/concerns raised by submitters in the consultation process?
- To what extent should the way in which industry stakeholders worked together on this code 'project' be seen as novel? What precedents are there for this type of collaboration in the industry? To the extent that it should be seen as novel or unprecedented, what was it about the circumstances or climate of the time that prompted or was seen as requiring / justifying the collaboration on these particular issues / in this instance?
- How influential were overseas developments, in the UK particularly (code and adjudicator) in the instigation and negotiations over the text of the FGC?

Objectives

- What were the concerns, issues or problems that the FGC was seen as necessary to address?
- Are there benefits for suppliers in dealing with the MSCs? Were any such benefits adequately reflected in the debate re the code? If not, why not?
- What are the purposes of the code? Views on purposes set out in cl 2?

Regulatory approach/choice of instrument

- Why was a code (as opposed to other types of regulatory measures) seen as the optimal way to address the issues?
- Whose interests are a code seen as most serving and why?
- Whose interests are a code seen as NOT serving and why?
- How was/is a code seen to interact with relevant laws?
 - Does it cover the ground that would otherwise be covered by:
 - the unconscionability and/or unfair contract prohibitions?
 - the misuse of market power prohibition and/or other prohibitions on anti-competitive conduct?
 - general contract laws?
 - general intellectual property laws?
 - Are its provisions inconsistent with or in conflict with any of these prohibitions?
- Is it justifiable to regulate the grocery sector (by overriding freedom of contract principles) in a way that exceeds regulation of any other sector of the Australian economy? What differentiates this sector from other highly concentrated sectors?
- Are regulatory measures other than or in addition to the FGC required to effectively regulate the grocery sector (deal with the concerns/problems referred to above)?

Application

- What are the relative merits/demerits of:

- a voluntary (opt-in) statutory code? (see opt in and opt out provisions in cl 4)?
- a mandatory statutory code?
- an industry (non-statutory) code?
- individual corporate / in-house codes

Coverage

- What are the merits/demerits of the FGC covering (see definition of 'retailer' in cl 3):
 - MSCs only? Coles and Woolworths? Aldi?
 - All supermarkets – big and small (ie independents?)
 - All grocery retailers?
 - Wholesalers? (see definition of 'retailer' in cl 3, which covers wholesalers)
 - Just Metcash or all?
- Should the FGC also bind suppliers?* If so, should it bind:
 - All?
 - Big vs small?
 - Domestic and international?
- Should the FGC also cover indirect suppliers (ie supplying to an intermediary – a wholesaler, processor, etc – excluded by definition of 'supplier' in cl 3) – which largely means primary producers?
- Should the FGC cover groceries only? Alcohol? Other goods or services sold by supermarkets eg petrol, hardware, insurance? See definition of 'groceries' and 'supermarket business' in cl 3.

Grocery supply agreements (GSAs) (Part 2)

- What were seen the benefits of requiring GSAs in writing? What are the problems, if any, with this? And from whose perspective?
- How are GSAs being created / negotiated in practice?
 - Are the intended benefits being realised?
 - Are problems (unforeseen or foreseeable) being manifested?
 - What form do GSAs take? Standard form vs tailored?
 - What happens if a supplier refuses to or simply fails to sign?
- Views on the FCG requirements relating to what has to be covered by a GSA? Any requirements it should not cover? Any gaps? See cl 8.
- Views on the provisions relating to GSA variations (see cls 9 and 10)?

Retailer conduct (Part 3)¹

- Views generally on:
 - Scope of conduct covered? Any major gaps?

¹ Does not apply to wholesalers

- Qualifications on / exemptions / carve outs from prohibitions? Is the right balance struck between need for commercial flexibility and supplier protection?
 - Vagueness of language used for qualifications / exemptions? Impact on certainty?
 - What does 'reasonable' mean in this context? How will/should 'reasonableness' be determined?
 - Do the qualifications / exemptions / carve outs simply mean that the imbalance in bargaining power will shift more to the negotiations phase associated with the GSA?
- Any specific views on:
 - Payments to suppliers (cl 12)
 - Payments for shrinkage (cl 13)
 - Payments for wastage (cl 14)
 - Payments as condition for stocking or listing (cl 15)
 - Payments for better positioning or an increase in allocation of shelf space (cl 16)
 - Payments for retailer's activities (cl 17)
 - Payments for promotions (cl 18)
 - De-listing (cl 19)
 - Funded promotions (cl 20)
 - Fresh produce standards and quality specifications (cl 21)
 - Changes to supply chain procedures (cl 22)
 - Business disruption (cl 23)
 - Intellectual property rights (cl 24)
 - Confidential information (cl 25)
 - Allocation of shelf space (cl 26)
 - Views on an alternative approach as proposed in Treasury Discussion Paper – no disadvantage test?
 - A no disadvantage test would allow the retailer to rely on an exemption provided for in the GSA and engage in certain conduct so long as it does not result in the supplier being materially disadvantaged.
 - This may require any costs imposed on the supplier due to the retailer's exercise of an exemption to be factored in during initial negotiations on the supply agreement or possibly compensation being offered at the time the exempted conduct is engaged in.
 - This approach attempts to maintain commercial flexibility to the extent it is mutually beneficial, while offering safeguards against conduct that may be considered inconsistent with the minimum industry standards.
 - Other alternative approaches?

Good faith (Part 4)

- What is the rationale for including a general obligation of good faith in the FGC? See cl 28.
- How does the obligation add to the other provisions of the code?
 - Should good faith have been an interpretative provision instead of a standalone duty under the FGC?
- How does the obligation add to the general law on contracts that implies an obligation of good faith in contractual dealings?

- What does 'good faith' mean in practical terms?
- Is the obligation any more than an obligation not to act unconscionably? Does it go beyond the CCA prohibition on unconscionable conduct in B2B transactions?
- Is there a tension between this obligation and the usual cut and thrust of business?
 - Specifically is there a tension between an obligation of fairness and an obligation to compete?
- Are there benefits for competition, the functioning of markets generally, and consumers from the requirement or practice of good faith between retailers and suppliers?
- Should the obligation apply also to suppliers – a mutual obligation?
- Is good faith in business dealings a function of corporate culture? Is it possible to train employees to act in good faith? If so, how?
- Insofar as you can comment, what impact if any has the introduction of a good faith obligation in the Franchising Code of Conduct had on the effectiveness of that code and relations between franchisors and franchisees? Was the introduction of this change to the Franchising code instrumental in its inclusion in the FGC?
- Views on freedom of association clause (cl 29)? What were the reasons for including this?
- Requirement to make contact details for buyers, senior buyers and code compliance managers available to suppliers (cl 30). What were the reasons for including this? Is it something that needs to be regulated?

Dispute resolution (Part 5)

- Requirement that suppliers provide information and documents relating to the complaint or dispute (cl 31). Why was this seen as important to include?
- Code compliance manager obligation (cl 32)
 - Profile of appointees?
 - Level in hierarchy?
 - Why important that CCMs be independent of buying team?
 - What training is there for CCMs? Who is providing the training?
- Complaints – internal process
 - How many and what kinds of complaints to CCMs? Any change since introduction of code? To whom were complaints previously made?
 - What does an investigation by the CCM involve?
 - What kind of complaint would qualify as 'vexatious, trivial, misconceived or lacking in substance'?
 - To whom are complaints 'elevated' if supplier not satisfied? How many complaints have been elevated?
 - How does senior management then resolve the complaint?
- Mediation and arbitration – external process

- Available as immediate alternative to internal process or as next step after internal process completed. To what extent has this process been invoked? To what extent is it likely to be invoked?
 - What are the benefits of this avenue and for who?
 - What are its limitations and for who?
 - Appropriateness of IAMA as mediation body?
 - Cf dedicated ombudsman as under PGIC?
- Why are there no equivalent processes for retailer / wholesaler complaints provided for? Should there be?

Enforcement

- Complaints to ACCC and enforcement action under the *Competition and Consumer Act* (CCA) are also available independently of code dispute resolution processes. Why is this seen as important?
- Readiness of suppliers to make complaints and provide sufficient information? Any change in this since 2008 inquiry?
- Adequacy of ACCC appetite for and resources to monitor / audit the industry and investigate?
- Adequacy of ACCC powers to investigate?
- Adequacy of CCA remedies? Compensation, declarations, injunctions, corrective advertising, setting aside or variation of contracts, refunds.
- Should there be civil penalties for code breaches? What should the penalties be? What purpose/s would penalties serve?
- Should there be infringement notices for code breaches?
- Should there be a dedicated ACCC commissioner or separate ombudsman (as in the UK) charged with code enforcement? What would be the benefits / drawbacks of this approach?
- Should the ACCC 'name and shame' in relation to investigations and/or outcomes of investigation? Why would such practices be useful / harmful?

Compliance and reporting (Part 6)

- Duty to train buying team (cl 40)
 - Profile of buying team members?
 - Level in corporate hierarchy? Direct reports?
 - Turnover in buying staff?
 - What does training involve?
 - How do payment, incentive and performance assessment schemes affect the type of behaviour relevant to the code?
 - What role does corporate culture play? What does this mean?
- Reporting obligations (cl 41)
 - Public access to CCM reports?
 - Who does the CCM report go to?
 - Has any senior management action ensued in response to CCM reports?

Other grocery-related codes

- How does the FGC differ in its intent, scope and provisions from:

- the Produce and Grocery Industry Code?
- the Horticulture Code?
- Does the FGC conflict with the Horticulture Code in any way?
- How should these other codes be judged in terms of their effectiveness and impact?
- Is there an industry code, private or prescribed, in the grocery or other sector that should be regarded as a success? Explain.
- Does the dual operation of the FGC and Horticulture code create imbalances and/or inequities in the overall regulatory system? Explain.
- The grocery sector has now had experience with three different approaches to codes:
 - a voluntary industry code (PGIC),
 - a mandatory prescribed code (Horticulture) and now
 - a voluntary prescribed code (FGC).
 How are these shifts in regulatory approach best explained? Which is the optimal approach and why?

Effectiveness

- Developments in the grocery sector are fluid and fast moving. Are the same impetuses, justifications for the FGC that were present at the time that it was first conceived still present? If not, what has changed and what does this mean for the relevance and likely impact / effectiveness of the code?
- To what extent are mechanisms developed at the same time or since the FGC being used instead of the FGC but to the same ends? E.g. Coles Supplier Charter; Aldi Code of Ethics? Is this duplication a problem?
- Should the FGC have an end date for operation? When should it be reviewed (current plan is for review in 3 years cf usual review time frame for codes is 5 years – why shorter in this context)?
- What factors / requirements determine a code's effectiveness? Relatedly, what are the criteria by which the FGC should be judged in terms of effectiveness?
- How would you assess the effectiveness of the FGC thus far in achieving its purposes, as set out in cl 2?
- What would be the appropriate time frame in which to assess its effectiveness by these criteria?
- Is the FGC having any unintended or unforeseen consequences – positive or negative?
- What degree of regulatory burden (cost) have the FGC obligations imposed? On retailers? On suppliers? Others?

- Cost estimates of the regulatory burden were set out in the Treasury Discussion Paper Regulatory Impact Statement. How were these figures estimated? Are they robust, realistic? Are there gaps?
- How has the FGC affected ACCC workload / impact on ACCC resources? How actively is the ACCC monitoring the industry / compliance with the code?
- How does the FGC and regulation of the grocery sector generally in Australia compare with the approach taken in the UK? In other jurisdictions?