

6. Significant actors

In this Part we identify and examine how key actors, both individuals and organisations in the private and public sectors, influenced developments between 2010 and 2015, leading up to the introduction of the FGCC. Without purporting to be exhaustive, and for reasons that should be evident from the analysis, we single out for this purpose:

- the ACCC and in particular, its two Chairmen over the relevant period, Graeme Samuel AC and Rod Sims;
- the former Minister for Small Business, Bruce Billson MP; and
- the AFGC and its two CEOs within the relevant time frame, Kate Carnell and Gary Dawson.

During the course of 2010-2011 and in the particular context of attention focussed on the dairy industry, the ACCC came under substantial pressure regarding its oversight and interventions in the grocery sector, both as to correctness of decisions it had made (in particular with respect to merger approvals) and as to the processes it had adopted with respect to investigations (in particular, in relation to the milk price cuts). We document the ensuing enforcement activity of the watchdog agency over the years that followed, from 2012 onwards particularly, reflecting a galvanisation in action. In part it is hard to avoid the conclusion that the Commission was responding, at least in part, to the criticism levelled at it in the spate of parliamentary inquiries over this period. However, our research indicates that the apparent change in approach was also attributable to a degree to the appointment of Rod Sims as Chairman and his quite different personal style to that of his predecessor, Graeme Samuel AC. A particular feature of Sims's leadership over this period was the litigation brought against Coles and then Woolworths for unconscionability in their treatment of suppliers. The significance of these actions and their outcomes, a win in the former and a loss in the latter, is examined in Part 6 of this report in the context of considering the relative effectiveness of the FGCC in changing behaviour.

In addition to the ACCC, the role and influence of the Small Business Minister at the time, Bruce Billson MP, is hard to understate. His personal passion for all things 'small business' and his particular commitment to a wide ranging review of competition laws (with a strong undercurrent of levelling the playing field for small to medium sized enterprises (SMEs)) and to the FGCC drove a considerable proportion of the developments affecting the grocery sector during the 2012-2015 period. While Billson was to retire in late 2015, having been ousted from Cabinet courtesy of a Turnbull reshuffle which returned competition policy to the Treasury portfolio (a relief for some), it was not before many of his causes came to fruition. In particular, the lead up to his exit saw the introduction of unfair contract laws for small business, the government's final endorsement of an effects test for s 46, and last by no means least in the present context – the enactment of the FGCC.

A more nuanced but arguably no less important role was played by the AFGC over this period. The strong voice of its CEO, Kate Carnell, in the 2010-2011 inquiries, calling for a replication of the UK grocery reforms in Australia, is documented below. Fittingly perhaps, upon leaving the supplier body,

Carnell went on to become the country's first federal Small Business and Family Enterprise (SBFE) Ombudsman. Her successor, Gary Dawson, had a somewhat different, arguably more muted, style and this was evidently an important factor in bringing the AFGC and the MSCs together in what some might regard as an unexpected and possibly unparalleled episode of collaboration to negotiate a code that would become the FGCC. Dawson showed himself to be adept at working across the industry and government, finding common ground and where necessary making the compromises that he regarded as justifiable in taking action that would substantively improve retailer-supplier relations. This he saw as genuinely in the interests not just of AFGC members but suppliers generally, the retailers too and ultimately consumers. Like Billson, Dawson leaves a particular legacy in this regard. However, his decision to resign from the organisation at the end of March 2017 also leaves a question mark over the role that the AFGC will play in the future, most immediately the stance it will take in preparing for and participating in the FGCC's 2018 review (see further Part 7).

I. The watchdog, watching and being watched: the ACCC

As should be evident from the account in Part 3 above, farmers, suppliers and politicians were not the only ones under pressure as the calendar ticked over to 2010. The competition / consumer watchdog too may have been feeling the heat. In both milk inquiries, the ACCC had been in the firing line. In the 2010 parliamentary inquiry, submitters were scathing of the Commission's approval of National Foods' acquisition of Dairy Farmers having regard, in particular, to its impact on competitive dynamics in the Tasmanian dairy market:

Who in their right mind would approve National Foods taking over Dairy Farmers? ...That would have to be the biggest blunder that has ever happened to the Australian dairy industry (Grant Rogers, Tasmanian farmer).²²⁴

...it seems extraordinary to us as ordinary dairy farmers that the ACCC allowed the takeover of Dairy Farmers by National Foods, which in a sense is almost creating a monopoly (Phil Beattie, Tasmanian Suppliers Collective Bargaining Group).²²⁵

...quite frankly I think the ACCC, through Mr Graeme Samuel, was really asleep at the wheel in allowing National Foods to buy Dairy Farmers in the first place, as it was a direct competitor to them in the marketplace... (John Oldaker, Chairman, Cadbury Suppliers).²²⁶

In addition to being portrayed as at least in part responsible for the increased level of concentration amongst processors (criticism that may have been ringing in the ACCC's ears when it expressed concerns in the same year about a proposed acquisition by Murray Goulburn of Warrnambool

²²⁴ Grant Rogers, Tasmanian farmer, *Committee Hansard*, 5 November 2009, p. 11, cited in SERC, *Milking it for all its worth* 2010, p. 63.

²²⁵ Phil Beattie, Tasmanian Suppliers Collective Bargaining Group, *Committee Hansard*, 5 November 2009, p. 24, cited in SERC, *Milking it for all its worth*, 2010, p. 63.

²²⁶ John Oldaker, Chairman, Cadbury Suppliers, *Committee Hansard*, 6 November 2009, p.7, cited in SERC, *Milking it for all its worth*, 2010, p. 63.

Cheese, leading to the withdrawal of the bid),²²⁷ there were questions raised about the agency's capacity to impartially investigate market power abuses by the behemoth businesses created post merger approvals. On this issue, the Senate Committee concluded in its 2010 report that:

There is inadequate assessment of whether markets have become excessively concentrated because the agency assessing this (the ACCC) is the same agency that approved the mergers leading to the high degree of concentration. The Committee is also concerned that the 'public interest' which the ACCC seeks to protect appears to be restricted to consumers and it does not pay sufficient attention to ensuring that farmers get a fair deal...²²⁸

It recommended that the PC look into the matter and consider whether separate agencies were required.²²⁹

In 2011, the spotlight was on the ACCC again, this time in relation to its response to Coles' milk price cuts and its investigation into whether the conduct constituted so-called predatory pricing, in breach of the misuse of market power provisions of the CCA. The inquiry that year heard submissions questioning whether the ACCC had been sufficiently proactive or prompt in its response, a strong element in which was that, if indeed the Commission had been investigating, it had not announced as much – hence stakeholders were left in the dark as to whether their concerns were being taken seriously:

We wonder if the ACCC is providing leadership in the area of supermarkets. They might be doing a lot of things behind the scenes... I suppose I got the impression—and this is a broad impression I got—that the ACCC does not always signal what they are doing in terms of investigation. I do not know if that applies to supermarkets. I think it was argued that perhaps there needed to be more prominent smoke signals, as it were, to the ACCC. Basically, they have been very quiet on this whole issue. I think many people would have looked to them to have real guidance in terms of what was and was not predatory pricing and what was and was not in the consumer interest (Christopher Zinn, Director, Campaigns and Communications, CHOICE).²³⁰

From what we have seen, the ACCC likes to watch. They take a long time to investigate. They could not even answer the question on whether they could give an answer about their investigation before the end of the year. If we have to wait beyond the year then there is

²²⁷ In 2013 Murray Goulburn attempted the acquisition again however lost out to a successful competing bid by Canadian dairy giant, Saputo Inc. The ACCC again registered concerns about the cooperative's proposal and was criticised for failing to recognise or give sufficient weight to the benefits that the acquisition would have had for the Australian dairy industry, in export market growth in particular. See, 'Murray Goulburn waits as Hockey approves Saputo bid', *Dairy News Australia*, 12 November 2013; ACCC's Issues Paper – ACT No. 4 of 2013 *Re Proposed acquisition of Warrnambool Cheese and Butter Factory Company Holdings by Murray Goulburn Co-Op Co Ltd.*

²²⁸ SERC, *Milking it for all its worth*, 2010, p. 65.

²²⁹ SERC, *Milking it for all its worth*, 2010, recommendation 9, p. 66

²³⁰ Christopher Zinn, Director, Campaigns and Communications, CHOICE, *Committee Hansard*, 29 March 2011, cited in SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, p. 81.

*something seriously wrong with someone's investigative processes (Associate Professor Frank Zumbo).*²³¹

*I suppose I got the impression—and this is a broad impression I got—that the ACCC does not always signal what they are doing in terms of investigation. I do not know if that applies to supermarkets. I think it was argued that perhaps there needed to be more prominent smoke signals, as it were, to the ACCC. Basically, they have been very quiet on this whole issue. I think many people would have looked to them to have real guidance in terms of what was and was not predatory pricing and what was and was not in the consumer interest (Christopher Zinn, Director, Campaigns and Communications, CHOICE).*²³²

As became obvious in the course of the inquiry, the ACCC had indeed been investigating, and actively so. Its 'behind the scenes' approach in this regard was consistent with its longstanding policy not to comment on investigations out of sensitivity to procedural fairness. However, owing to the substantial public interest in the milk pricing issue, in this instance the ACCC had in fact issued a media release, albeit only upon conclusion of its investigation, declaring there to be no evidence of unlawful conduct. Coles had not acted with an anti-competitive purpose, which was an element required for liability under s 46 of the Act.²³³

It was evident that the Committee had wrestled with whether the ACCC's handling of the matter warranted criticism. Ultimately, taking a middle ground position, it acknowledged the independence of the agency, the need to protect the integrity of its investigative processes and the importance of not unfairly damaging reputations of those subject to such processes, but at the same time called for additional transparency in the Commission's enforcement activities. In relation to the latter the Committee noted that 'at times, there can be significant concern within certain sectors and the wider community regarding the effectiveness of the ACCC in enforcing the CCA'²³⁴ - hence more information about what the agency is actually doing 'could help ensure that the public is confident that matters are being taken seriously, and increase the accountability of the ACCC'.²³⁵

(a) Yet more public inquiries, yet more pressure on the ACCC

Given the public and political focus, it is not perhaps not surprising that from 2011 onwards the grocery sector became more of a focus for the ACCC, at least as manifest in enforcement action. Following the conclusion of the ACCC Grocery Inquiry, the agency had only a few loose ends to tie up. In late 2009 it dealt with the issue identified in the inquiry regarding the use of restrictive covenants in lease agreements for supermarket space that were hampering independent supermarket

²³¹ Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 50, cited in SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, p. 81.

²³² Christopher Zinn, Director, Campaigns and Communications, CHOICE, *Committee Hansard*, 29 March 2011, p. 92 cited in SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, p. 81.

²³³ ACCC Media Release, 'ACCC: Coles discounting of house brand milk is not predatory pricing', 22 July 2011.

²³⁴ SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, recommendation 5, p. xvii.

²³⁵ SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, p. xvii.

operators from setting up shop in large retail centres.²³⁶ Consistent with what had come to be known as Chairman Samuel's trademark backroom dealing style, the approach taken with respect to this issue was to negotiate first with Coles and Woolworths and then with other retailers to obtain enforceable undertakings by which there was agreement not to include such provisions in any new supermarket leases and not enforce any existing provisions.²³⁷ In 2009 and 2010 the Commission examined the competitive implications in petrol markets of cross-promotions between fuel and grocery sales but decided no action was warranted (a stance that would change under Samuel's successor).²³⁸ It also undertook a range of activities aimed at securing greater compliance with both the Unit Pricing Code and the HCC,²³⁹ again areas identified in its 2008 report where there could be further work done in the sector.²⁴⁰

In late 2010 the ACCC announced its decision to oppose the acquisition by Metcash of the Franklin supermarket business from the cash-strapped South African Pick n Pay business.²⁴¹ This decision was consistent with the finding in its 2008 report that Metcash's wholesale pricing policies were a significant factor inhibiting independent retailers from competing aggressively on price with the MSCs.²⁴² Based on a much criticised approach to defining the relevant market, the ACCC's opposition was on the grounds that the acquisition would reduce the number of players competing to provide wholesaling services to medium to larger sized supermarkets from two to one, effectively giving Metcash a wholesaling monopoly in New South Wales. Metcash's aim was to re-sell Franklins' 77 company-owned stores to independent operators, making its profit from the deal by becoming the wholesale supplier to the expanded network of supermarkets. A handy side effect of the deal was that Franklins agreed to end a long-running legal action against Metcash relating to a claim that Metcash owed it millions of dollars in rebates when it was Franklins' wholesale supplier of groceries.²⁴³ Given the ACCC's stance, instead of its IGA stores increasing their share of NSW supermarket sales from 11 to 18%, it was reported that 'the likelihood was that the Franklins chain

²³⁶ ACCC 2008 Grocery Inquiry, [9.4.2] at pp. 184-189; ACCC Media Release, 'ACCC focuses on lasting change in the supermarket sector', 11 August 2009.

²³⁷ ACCC Annual Report 2009-10, p. 41; ACCC Media Release, 'Supermarket agreement opens way for more competition', 18 September 2009.

²³⁸ Ashley Hall, 'ACCC tells independent grocery to match supermarket petrol discounts', *ABC PM*, 15 July 2009.

²³⁹ ACCC, *Annual Report 2008-09*, p. 8; ACCC, *Annual Report 2010-11*, p. 66.

²⁴⁰ Unit pricing is the practice of displaying the price by unit of measure along with the total sale price of each item. In its Grocery Inquiry report, the ACCC found that while the introduction of unit pricing would impose costs on retailers, these would reduce over time (p. 451), and that there was broad support for unit pricing from consumers (p. 450). Both Coles and Woolworths supported the introduction of a mandatory unit pricing scheme (p. 452) and the ACCC recommended, 'a mandatory, nationally-consistent unit pricing regime be introduced for standard grocery items both on in-store price labels and in print advertising' and that this regime apply to 'significant supermarkets' (20.8. p. 456). An assessment of the effectiveness of the HCC was one of the terms of reference of the Grocery Inquiry (p. 388). The ACCC undertook a detailed review of the Code, finding ultimately it was not operating as effectively as anticipated and recommending a range of amendments, including that: the CCA, 'be amended to introduce civil pecuniary penalties and infringement notices for a breach of a mandatory code made under Part IVB such as the Horticulture Code and that the ACCC be given powers to facilitate the conduct of random record audits as an enforcement mechanism under the code.' (18.5.5. p. 400); and 'that the Horticulture Code be extended to regulate first point of sale transactions of horticulture produce between a grower and a retailer, exporter or processor.' (18.5.6. p. 406). The ACCC also recommended several amendments be made to the way that contracts and transactions were conducted under the Code (18.5.8. p. 410) and found that further education was needed in relation to dispute resolution procedures available under the Code. It was recommended that these be subsidised by the Government (8.5.13. p.420).

²⁴¹ ACCC Media Release, 'ACCC to oppose Metcash proposed acquisition of Franklins supermarket', 17 November 2010.

²⁴² ACCC 2008 Grocery Inquiry, p. 145.

²⁴³ Elizabeth Knight, 'Metcash defies competition ruling on supermarkets', *InvestSMART*, 24 November 2010.

would be broken up, and buyers of the stores were likely to include the industry gorillas, Woolworths and Coles'.²⁴⁴

Again, the Commission resisted litigation as a way to resolve the issue – an application to the court to prevent the acquisition would have seen its economic analysis judicially tested. No such application was made and Metcash called the agency's bluff, indicating in response to the ACCC's decision that it would complete the transaction in five business days unless the Commission applied for an injunction to restrain it. The ACCC folded, filing an action in the Federal Court, which it eventually lost on appeal.²⁴⁵ In the meantime, Metcash CEO, Andrew Reitzer, had been ratcheting up the political heat on the Commission – reportedly having lobbied for a Senate Economics References Committee inquiry into the ACCC's opposition. This was portrayed by some as having a distinctly acrimonious personal flavour – the move as tantamount to a declaration of war on the competition chief, Graeme Samuel AC, as it would force the agency boss to face questioning from the Committee. As one interviewee put it:

*I believe that Graeme Samuel had a personal issue with Metcash. Not Metcash, but with the former CEO, Andrew Reitzer. My understanding is that they very much had a conflict. A public conflict and I don't think that Graeme Samuel ever forgot about it.*²⁴⁶

It is not only highly unusual that the Committee would be convened to scrutinise an individual regulatory decision, but the sequence of events and timetable for the inquiry was so astonishingly fast as to suggest that this was far from run of the mill parliamentary business. The ACCC announced its decision on 17 November 2010,²⁴⁷ the Senate referral took place on 23 November²⁴⁸ and Nationals Senator Ron Boswell, who had led the Senate motion for the reference,²⁴⁹ was reported as saying that the Committee would report back by 17 December, 'after it has asked Mr Samuel to explain why the commission made a decision that seemed to give independent supermarket operators less market clout than before.'²⁵⁰ The Committee handed down an interim report on 6 December and 2 days later the ACCC filed its Federal Court application, one result of which was that the Committee's proceeding became largely redundant.

Not only was this the third parliamentary inquiry with a grocery sector focus in the space of just three years, it was the third in which an individual regulatory decision of the ACCC was the subject of Senate committee scrutiny - the National Foods-Dairy Farmers acquisition having been examined in the first milk inquiry which was convened in September 2009 and reported in May 2010 and the investigation into Coles milk price cuts having been a focus in the second milk inquiry which was convened in January 2011 and reported in November 2011.

²⁴⁴ Elizabeth Knight, 'Metcash defies competition ruling on supermarkets', *InvestSMART*, 24 November 2010.

²⁴⁵ ACCC Media Release, 'ACCC responds to Metcash decision', 5 December 2011.

²⁴⁶ Transcript of interview, CEO of MGA, p. 30. See also Association of Sales and Marketing Companies Australia Update, vol. 8/35 2 December 2010.

²⁴⁷ ACCC media release, 'ACCC to oppose Metcash proposed acquisition of Franklins supermarkets', 17 November 2010.

²⁴⁸ ACCC 2010-11 Annual Report, p. 128.

²⁴⁹ Journals of the Senate, No. 13 – 23 November 2010, Parliament of the Commonwealth of Australia, p. 398.

²⁵⁰ Elizabeth Knight, 'Metcash defies competition ruling on supermarkets', *InvestSMART*, 24 November 2010.

Around the same time the ACCC contributed comments to yet a further two other parliamentary inquiries that had a substantial grocery sector and MSC-related focus: the House of Representatives Standing Committee on Economics inquiry into the Constitutional Corporations (Farmgate to Plate) Bill 2011 and Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011,²⁵¹ and the Senate Select Committee inquiry into Australia's Food Processing Sector.²⁵² In the House of Representatives Committee's report, although the Committee recommended neither bill be passed, it did note that the ACCC's 2008 rejection of a widening gap between farmgate and retail prices was under question.²⁵³

In the Senate Select Committee report, an entire chapter was devoted to competition issues afflicting the food processing sector. As is evident from the chapter, echoing the questions raised in the first milk inquiry and looking for explanations of the level of concentration in the sector, the inquiry involved questioning of the ACCC's effectiveness in performing its merger review function.²⁵⁴ Concerns about the growing penetration of private label products were also revisited, highlighting again the implications of the MSCs competing with their suppliers, and also the prospect of a reduction in consumer choice over the long run.²⁵⁵

Furthermore, contrary to the ACCC's 2008 finding regarding an absence of serious issues in supply chain relationships, the Committee expressed concern about the imbalance of bargaining power between retailers and suppliers. Contrary to Samuel AC's account of why suppliers were reluctant to speak out in the ACCC Grocery Inquiry (see Part 1 of this report), the Committee heard enough from grower associations and other representative groups to accept that such reluctance was on account of fear of commercial retribution. It made a strong appeal to suppliers to approach the ACCC with evidence of 'specific instances of abuses of market power' by the MSCs in contract negotiations and, like the Committees before it, called for review of the misuse of market power provisions of the CCA.²⁵⁶ It further proposed that consideration be given to including the functions of a food supply chain ombudsman within the ongoing role of the ACCC,²⁵⁷ resisting calls for a mandatory code to regulate supplier-retailer relations with a separate ombudsman, at least until there had been a proper investigation as to why the existing office (referring to the PGCC Ombudsman) was not effective.²⁵⁸

Just as in the milk inquiries, both parliamentary reports had implicit if not explicit strains of concern that while competition in the retail grocery sector might be benefitting consumers, the benefit may only be short term. Thus, while the Senate Select Committee acknowledged 'the need for the CCA to

²⁵¹ House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry, *Advisory Report on the Constitutional Corporations (Farm Gate to Plate) Bill 2011 and Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011*, March 2012 (HOR, *Farm Gate to Plate and Horticultural Code Bills*, 2011).

²⁵² Senate Select Committee on Australia's Food Processing Sector, *Inquiry into Australia's food processing sector*, August 2012 (SSC, *Australia's Food Processing Sector*, 2012).

²⁵³ HOR, *Farm Gate to Plate and Horticultural Code Bills*, 2011, [2.10]-[2.11].

²⁵⁴ SSC, *Australia's Food Processing Sector*, 2012, [3.22]. Treasury too was questioned about this, from a policy perspective, the Committee concluding that it found the assertions of Treasury officials on the matter 'less than reassuring' [3.30]. It called for the effectiveness of s 50 of the CCA in addressing creeping acquisitions to be reviewed yet again (despite that section having been amended in December 2011) [3.31].

²⁵⁵ SSC, *Australia's Food Processing Sector*, 2012, [3.14-3.69].

²⁵⁶ SSC, *Australia's Food Processing Sector*, 2012, [3.68], [3.91], [3.108], [3.118].

²⁵⁷ SSC, *Australia's Food Processing Sector*, 2012, [3.109].

²⁵⁸ SSC, *Australia's Food Processing Sector*, 2012, [3.115].

protect and promote the interests of consumers and ensure food remains affordable', it also expressed concern 'that soon the "pendulum" might swing so far in favour of the short-term interests of consumers that research and development, innovation and diversity will be lost in the market place and consumers begin to lack choice and may face increased prices.'²⁵⁹ Further both reports suggested that up to that point insufficient consideration had been given to the adverse impacts of such competition on other groups in society – farmers and food manufacturers specifically – such that there was seen to be a not insignificant threat to the future viability of these sectors, with wide ranging social and economic repercussions.

Further, in its Issues Paper in relation to the NFP, released in June 2011, the government identified competition in the food sector as being 'essential to ensuring efficient use of resources and encouraging rapid uptake of new technologies in food production and services'²⁶⁰ and highlighted the current level of competition in the grocery sector as a matter causing concern to some stakeholders.²⁶¹ In particular, it was noted that 'recent strong price competition between major supermarkets, which is placing downward pressure on grocery prices, is raising some stakeholder concerns about the impact on prices received by food processors'.²⁶² However the Issues Paper stated that the Australian Government believed, 'competition is by far the most effective means of exerting downward pressure on grocery prices'.²⁶³ Relying on the ACCC Grocery Inquiry finding, it was determined that the best way to address price competition issues was, 'to lower barriers to entry and expansion'.²⁶⁴ The paper fell back on the ACCC inquiry finding that there was no evidence that MSCs were acting in an anti-competitive manner when dealing with fresh produce suppliers.²⁶⁵

In line with this, the NFP White Paper, while acknowledging the concerns of 'many stakeholders' that the dominance of the two MSCs was negatively impacting competition in the sector, concluded that the sector was continuing to evolve and that the expansion of Aldi and Costco, along with the increased popularity of alternative shopping options such as farmers' markets, meant that the sector was competitive. The NFP cited the work that was currently underway to create an industry-driven voluntary code of conduct (a reference to the RSR described in Part 5 below), and the increased activity of the ACCC in monitoring supplier relationships in the sector as evidence that the concerns raised by stakeholders were being addressed. Further, the NFP cautioned against allowing regulation to, 'stifle competition or impose unnecessary red tape and costs' that may lead to higher food prices.²⁶⁶

²⁵⁹ SSC, *Australia's Food Processing Sector*, 2012, [3.68].

²⁶⁰ DAFF 2011, *Issues paper to inform development of a national food plan*, Department of Agriculture, Fisheries and Forestry, Canberra, (NFP issues paper, 2011), p. 31.

²⁶¹ NFP issues paper, 2011, p. 31.

²⁶² NFP issues paper, 2011, p. 31.

²⁶³ NFP issues paper, 2011, p. 31.

²⁶⁴ NFP issues paper, 2011, p. 31.

²⁶⁵ NFP issues paper, 2011, p. 32.

²⁶⁶ NFP issues paper, 2011, p. 50.

(b) A new leader at the helm

Given the level of political attention on the sector, and the fact that it was not only the powerful industry players but the (some might say) equally powerful enforcement agency in the firing line, it is hardly surprising that in 2011 the grocery sector was elevated officially to a corporate priority for the ACCC. It was also the year when there was a change-over at the helm, Rod Sims taking over from Graeme Samuel AC as Chairman. Both had completed their undergraduate studies at the University of Melbourne. However while Samuel's education had had a legal focus (he completed a Bachelor of Laws before undertaking a Master of Laws from Monash University), Sims is an economist through-and-through, with a first class honours degree in Commerce from the University of Melbourne and a Master of Economics from the Australian National University. Both men had had experience in the private sector - Samuel, in particular, as a past president of the Australian Chamber of Commerce and Industry, having worked in law and investment banking, and in 2000 having been appointed an honorary fellow of the Australian Institute of Company Directors.²⁶⁷ Sims in turn had more of a public policy background. His previous roles included Chair of the Independent Pricing and Regulatory Tribunal of NSW and Deputy Secretary in the Commonwealth Department of Prime Minister and Cabinet responsible for economic, infrastructure and social policy.²⁶⁸

It is notable perhaps that when Samuel was nominated for the role of ACCC Chairman by the then Liberal Federal Treasurer Peter Costello, the Labor States, in a rare split with the federal government, rejected his nomination. In part this was seen to be because they feared he would be soft on big business.²⁶⁹ Sims, Bob Hawke's former Chief Economic Adviser, was nominated by the Labor Gillard Government.²⁷⁰ While some believe Samuel was too close to big business – Council of Small Business Australia (COSBOA) CEO Peter Strong has been reported as referring to Samuel as 'an apologist for big business',²⁷¹ Sims' chairmanship too has been coloured at times by a tendency to draw ire from the big end of town. Reflecting on his at times fraught relations with the MSCs, one interviewee said, 'Rod Sims in particular had a view that Coles had become cavalier about its responsibilities, particularly driven by [a] view of the then MD Ian McLeod, and they didn't have a very great relationship...'²⁷²

The stylistic if not ideological differences between the two were evident in the recent and very public opinion war waged between Sims (supported in his views by former ACCC Chair Allan Fels AO and the architect of the 2015 Competition Policy Review, Ian Harper) on the one hand, and Wesfarmers CEO Richard Goyder (supported in his views by Samuel AC), on the other in early 2016. At times the

²⁶⁷ Professor Graeme Samuel AC, CEDA Council on Economic Policy, <http://www.ceda.com.au/about/governance/ceda-council-on-economic-policy/samuelgraeme>.

²⁶⁸ ACCC Chairs & Commissioners, Chairman Rod Sims, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/accc-chair-commissioners>.

²⁶⁹ Stephen Long, 'States reject Graeme Samuel as ACCC head', *AM transcript*, Wednesday 13 November 2002.

²⁷⁰ Media release, 'Government nominates Rod Sims and ACCC Chairman', 3 May 2011.

²⁷¹ Peter Strong, 'Why an effects test could help fix our failed competition policy', *Smart Company*, 3 September 2014. In our interview with him, Strong repeated the observation: 'He [referring to Samuel] was a big business apologist ... I've had a lot of blues with him, he doesn't talk to me anymore ... he would just blame the small business ... [and] I'd say, "you're blaming the victim here."' See Transcript of interview, CEO of COSBOA, p. 25.

²⁷² Transcript of interview, MSC representative, p. 26.

two sides appeared trapped in 'a bitter deadlock' over the proposed strengthening of misuse of market power laws. While Goyder warned that the so-called 'effects test' for s 46 of the CCA would 'chill competition'²⁷³ Sims is reported to have countered with a veiled threat that, 'companies that want to compete on their merits have nothing to fear. Only those who wish to exclude their competitors and damage the competitive process will need to re-examine their conduct.'²⁷⁴ If the way in which Samuel handled the issue of restrictive covenants after the ACCC Grocery Inquiry is any guide, it might be surmised that he would have dealt with the difference of opinion quite differently – picking up the phone to Goyder perhaps, rather than going head to head in the mainstream media.

In its 2011-12 Annual Report the Commission recorded having undertaken a 'strategic enforcement review' with a particular focus on concentrated markets, as exemplified by 'supermarkets and fuel'²⁷⁵ and looking ahead, it indicated that its enforcement and compliance priorities would continue to include 'acting on competition and consumer issues in highly concentrated sectors, in particular supermarkets and fuel.'²⁷⁶ Notably also, close attention was to be paid to alleged unconscionable conduct, in both business-to-business and business-to-consumer markets; and to instances of alleged misuse of market power by firms that have a substantial degree of power in any market.²⁷⁷ If not already obvious, the relevance of this to the MSCs specifically became evident in late 2012-early 2013.

In its review of the year in its 2012-13 Annual Report, the ACCC identified maintenance and enhancement of competition in 'concentrated markets' as having been one of five key objectives. To that end the report recorded that the Commission had commenced investigations into potential unconscionable conduct by the MSCs relating to their dealings with suppliers and into shopper dockets, as well as into potential misuse of market power in connection with their supply of house brand products.²⁷⁸ That year it also announced a particular focus on incremental (creeping) small retail acquisitions by the MSCs.²⁷⁹ It was also in 2012 that discussions at a government-industry forum initiated the process of development of what became the FGCC and the ACCC reported on its engagement with this process during the course of that year.²⁸⁰

To some extent, for those inclined to regard the ACCC as influenced by populist or political pressures, this surge in focus and activity post-2010 could be interpreted as the Commission responding to the degree of public noise and heat surrounding the MSCs over this period. As one interviewee commented (albeit more by way of observation of objective reality than by way of criticism):

They're [referring to the ACCC leadership] have to be very politically savvy, because they depend on government money. And they go before Senate estimates every year, twice a year, to explain their performance to the Senate. ... They're appointed by federal and state

²⁷³ Patrick Durkin, 'Goyder joins Samuel in war over ACCC powers', *AFR*, 12 January 2016.

²⁷⁴ Patrick Durkin, 'ACCC chairman Rod Sims: 'Nothing to fear' from effects test', *AFR*, 17 March 2016.

²⁷⁵ ACCC, *Annual Report 2011-12*, p. 5.

²⁷⁶ ACCC, *Annual Report 2011-12*, p. 8.

²⁷⁷ ACCC, *Annual Report 2011-12*, p. 8.

²⁷⁸ ACCC, *Annual Report 2011-12*, p. 8.

²⁷⁹ ACCC, *Annual Report 2012-13*, p. 45.

²⁸⁰ ACCC, *Annual Report 2012-13*, p. 185.

*governments as well. So they're very politically savvy. And they do play – and they're very attentive and play to political perceptions about big business...it was the political and media focus on the issue that drove the regulators.*²⁸¹

A not dissimilar view is taken by a former member of a MSC board of directors who expressed sympathy for the ACCC with regard to its limited resources when he said, 'I think they are forced to take on the cases that might have more political connotations and I can understand that.'²⁸² A further perspective, offered by a current MSC representative and reflecting specifically on the ACCC's unconscionability cases against the MSCs, was that 'when you get a new law you've got to show that you're going to use it especially if you've lobbied for it hard so the ACCC will, like, they will be under some, not pressure, but people will want to see when the new law comes in that there's activity in the area.'²⁸³

For others, the ratcheting up of enforcement activity against the MSCs was more or perhaps also a function of the particular views or style of the then new Chairman. For one critic, there was evident frustration with the approach of the former Chairman:

...we've known it's [referring to the type of conduct that was the subject of the ACCC's unconscionability cases] been going on for 25 years, so why has it taken this incredible determination from one particular ACCC chairman? Surely the previous chairman saw that, but no, the previous chairman did not see that. Or maybe saw it, but wasn't at all perturbed. The fact is, it's been happening for a long, long time and suppliers have been held to ransom....

I think the ACCC, under the auspices of Graeme Samuel, was very aware of our concerns, but was never willing to do anything. And I don't think that Graeme Samuel left much of a legacy in that area at all. And the current chairman, I think realised that there is an issue and that there is a threat to the Australian public of large organisations actually behaving - misbehaving. Their conduct being exclusionary and that kind of thing...

*What's happened is that you've had - you've got a regulator that has an appetite now to investigate, as it should do, misdemeanours. Investigate accusations of breaches in the law. And that's what a regulator should do.*²⁸⁴

Others saw the shift in ACCC approach as reflecting both the change in political environment (as the government moved from a majority (under Kevin Rudd, from 2007 to 2010) to a minority (under Julia Gillard and then Kevin Rudd, from 2010 to September 2013), as well as a change in the personal style of the ACCC leader:

²⁸¹ Transcript of interview, Robert Hadler, pp.13-14.

²⁸² Transcript of interview, former member of a MSC board of directors, p. 30.

²⁸³ Transcript of interview, MSC representative, p. 33.

²⁸⁴ Transcript of interview, CEO of MGA, pp. 3, 8, 16.

...when Graham Samuel was head of the ACCC and he did the 2008 review, he's very bright, very analytical and he was dealing with a government that didn't see it, didn't want to do anything about it, really. Because they saw supermarkets providing value to consumers. They were big employers, it was a Labor government, it was the SDA; it was close to the ALP. So they referred it to Graham. There was a report done. Said that there was nothing fundamentally wrong in the competitive environment. Clearly, there were things wrong in the macro-economic environment. But not in the competitive environment. And was confident that he had the tools to manage it. Now Graham's modus operandi was to say - was if an issue arose, he would ring the CEOs of the major supermarkets and say, "Look, there's an issue. Whether it's perception or not, we don't need to have a fight over it. If we do this deal, it goes off the radar screen." And the deal would be done. So supermarket leases in big retail centres was a major issue. Graham brokered a deal for that. So that was a phase and a cycle and a personality issue. Change of the phase and the cycle, where government changed. The economic environment changed, became a lot tougher for suppliers. The small business supplier started complaining. And Rod Sims came in. And I felt sorry for Rod, because he was probably the first chairman of the ACCC, who had to work to a minority government. And a Senate dominated by independents. Therefore, he had to be very cognisant of the issues they were raising. You know, I know Rod. I used to work with him in Prime Minister in Cabinet in the 80s. Very smart, former Labor policy advisor. But he – unlike Graham, he would not ring and head off a problem. He would say, "We're going to take action over a problem." And he would go through and he would aggressively pursue the law. So I think different styles, different people at different phases, had a big impact on regulation.²⁸⁵

(c) The enforcer takes aim

Almost immediately upon his appointment, Sims signalled that his approach would be a more litigious one. In 2011, in his first speech to the Law Council of Australia's Competition and Consumer Committee annual workshop after becoming Chairman, Sims made it clear that, under his watch, the Commission would be taking more litigation risks, in particular when it came to matters of predatory pricing and possible breaches of s 46 for taking advantage of substantial market power.²⁸⁶ In Sims' view the ACCC's close to 100% success rate in first instance litigation was, 'frankly too high', as it suggested the Commission had become too 'risk averse'.²⁸⁷ By taking a more aggressive approach to litigation Sims believed it was important both that action would be seen to be taken (presumably by the general public, as well as by those operating under these laws), and that the existing laws would thereby be tested in the courts.²⁸⁸ Sims also let it be known that the ACCC would, 'be increasingly

²⁸⁵ Transcript of interview, Robert Hadler, p. 10.

²⁸⁶ Rod Sims, *Future Directions*, speech to the Law Council Workshop, 2011, p. 4.

²⁸⁷ Rod Sims, *Future Directions*, speech to the Law Council Workshop, 2011, p. 5.

²⁸⁸ Rod Sims, *Future Directions*, speech to the Law Council Workshop, 2011, p. 5.

assessing whether quick action in applying for interlocutory orders is necessary to stop conduct that is detrimental to consumers or the market.’²⁸⁹

Sims kept his word. As a compliance consultant observed of the ACCC under Sims, ‘its enforcement / litigation-focused, it’s not compliance focused.’²⁹⁰ This view is supported by another industry commentator who observed, ‘my impression of the ACCC is it’s an organisation that measures its performance by how many cases it brings, not by what its impact is on consumers.’²⁹¹ Regardless of whether such observations have merit (a matter on which minds would differ), there is no doubt that, from 2012 onwards, ACCC scrutiny and enforcement activity against the MSCs picked up considerably.

In 2012 and 2013 the ACCC instituted a number of cases concerning credence claims in the food industry, which the ACCC viewed as having the potential to significantly impact consumers and the competitive process. Examples included an action against Coles for false, misleading and deceptive conduct in the supply of bread that was partially baked and frozen off site, transported to Coles stores and ‘finished’ in-store, and then promoted as ‘Baked Today, Sold Today’ and/or ‘Freshly Baked In-Store’ at Coles’ in-house bakeries.²⁹² A similar investigation triggered by a complaint that Coles was displaying imported navel oranges and kiwi fruit underneath signs that read ‘Helping Australia Grow’ and featuring the ‘Australian Grown’ symbol saw Coles receive six infringement notices totalling \$61,200 for alleged misleading representations about the country of origin of fresh produce made in five of its stores.²⁹³

In February 2013, the ACCC made clear that in addition to ongoing areas of priority across the economy, one of its particular focuses for the year ahead would be yet again, ‘competition and consumer issues arising in highly concentrated sectors, especially the supermarket and fuel sectors.’²⁹⁴ In a statement tabled at a hearing of the Senate Economics Committee to update the Committee on the ACCC’s investigation into supermarket-supplier issues that same month,²⁹⁵ Sims outlined allegations raised with the ACCC, including that some supermarket conduct did not conform with, ‘acceptable business practice and may be unconscionable or a misuse of market power, including in their supply of house brand products.’²⁹⁶ The ACCC had been actively seeking information from suppliers from early 2012 about their dealings with the MSCs. As one supplier said, ‘the ACCC came to us and said, “we understand that you transact with Coles and that you’ve been involved in the ARC Scheme [a reference to a scheme that was to become the subject of the ACCC’s subsequent unconscionability suit against the retailer] and we want to see all the correspondence

²⁸⁹ Rod Sims, *Future Directions*, speech to the Law Council Workshop, 2011, p. 4.

²⁹⁰ Transcript of interview, interviewee that consults to / advises grocery businesses, p. 37.

²⁹¹ Transcript of interview, former senior representative of the UK OFT, p. 10.

²⁹² ACCC *Annual Report* 2012-13, p. 72.

²⁹³ ACCC *Annual Report* 2012-13, p. 74.

²⁹⁴ ACCC *Annual Report* 2012-13, p. 34.

²⁹⁵ See the Chairman’s statement dated 13 February 2013, tabled at an Additional Budget Estimates hearing of the Senate Economics Committee at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_cte/estimates/add_1213/index.htm

²⁹⁶ ACCC *Annual Report* 2012-13, p. 38.

associated with it.”²⁹⁷ According to a spokesperson from one of the MSCs, ‘[around this period] the ACCC were relentless in their pursuit to find things that were wrong.’²⁹⁸

In December 2013 the ACCC instituted proceedings in the Federal Court against Colgate-Palmolive Pty Ltd, PZ Cussons Australia Pty Ltd, a former sales director of Colgate, and Woolworths regarding alleged cartel conduct and anti-competitive arrangements in supplying laundry detergents. It was alleged that Woolworths were knowingly concerned in the arrangements. The ACCC won the case to the tune of \$18m in penalties against the detergent manufacturer, landing \$9m against its MSC accessory.

In its 2014 Compliance and Enforcement Policy, for the fourth consecutive year, the ACCC identified competition and consumer issues arising in highly concentrated sectors, in particular the supermarket and fuel sectors, as priorities.²⁹⁹ In line with this, the agency began separate actions in the Federal Court against Coles and Woolworths for allegedly breaching court enforceable undertakings made to the ACCC regarding fuel shopper dockets. In 2012 the ACCC had begun investigating fuel savings offers made by the MSCs to determine whether they substantially lessened competition for the retail sale of fuel. As previously mentioned, in December 2013 the ACCC accepted voluntary court undertakings from Coles and Woolworths that they would stop offering fuel discounts that were wholly or partially funded outside their fuel retailing business. Both MSCs agreed that from 1 January 2014 they would limit discounts offered in concert with supermarket purchases to four cents per litre.³⁰⁰ However Woolworths continued to offer its 4+4 discount until 9 April and in February 2014 Coles began offering bundled fuel savings of 14 (10+4) cents per litre. In April 2014 the Federal Court found that Woolworth’s 4 + 4 cent offer to 9 March 2014 had breached their voluntary undertaking, as the discount depended on a supermarket purchase. However the Court dismissed the ACCC’s proceedings against Coles, determining that only 4 cents of the total bundled discount of 14 cents per litre was contingent on a qualifying supermarket purchase.³⁰¹

In May 2014 its two year investigation came to a head with proceedings launched in the Federal Court against Coles, alleging it had engaged in unconscionable conduct regarding its Active Retail Collaboration (ARC) program. The ACCC alleged that in 2011 Coles had developed a strategy to improve its earnings by gaining better trading terms from suppliers, including through the introduction of ongoing rebates to be paid by suppliers for the ARC program. It alleged that Coles had engaged in unconscionable conduct towards 200 of its smaller suppliers, in breach of the ACL by, among other things: misleading suppliers about the savings from and value of the changes Coles had made; using undue influence and unfair tactics against suppliers to make them pay the rebate; taking advantage of their superior bargaining position by seeking payments without a legitimate basis for seeking them;

²⁹⁷ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 27.

²⁹⁸ Transcript of interview, MSC representative, p. 24.

²⁹⁹ ACCC *Annual Report* 2013-14, p. 30.

³⁰⁰ ACCC *Annual Report* 2013-14, p. 34.

³⁰¹ ACCC Media Release, ‘Court finds Woolworths breached fuel shopper docket undertaking but later offers by Coles and Woolworths did not’, 14 April 2014.

and requiring suppliers to agree to the ongoing ARC rebate without giving them sufficient time to assess the value, if any, of the purported benefits of the ARC program to their business.³⁰²

In October 2014 the ACCC instituted further proceedings against Coles arising out of the same investigation, alleging that in 2011 Coles, outside of its trading terms with the suppliers concerned, pursued agreements from suppliers to pay Coles for 'profit gaps' on a supplier's goods, and imposed fines or penalties on suppliers for short or late deliveries.³⁰³ In the face of continued adverse publicity it did not take long for Coles to settle. As senior counsel for the ACCC is quoted to have said when urging Federal Court (now High Court) Judge, Michelle Gordon, to accept the high penalties proposed by the Commission:

*This is not only a test case but a headline test case. It is one of the largest companies involved in trade and commerce in the country dealing with some of the smallest suppliers.*³⁰⁴

In December 2014 Coles was ordered to pay pecuniary penalties of \$10 million and the ACCC's costs. The retailer subsequently engaged the former Victorian Premier, Jeff Kennett AC, as an independent arbiter to administer a compensation scheme, a scheme that led to a refund of over \$12 million to suppliers.³⁰⁵ In addition to taking the court-ordered penalties and compensation on the chin, Coles moved quickly in an attempt to mitigate reputational damage, with CEO John Durkan offering a full and unconditional public apology:

*I believe that in these dealings with suppliers, Coles crossed the line and regrettably treated these suppliers in a manner inconsistent with acceptable business practice. These suppliers were not treated with the transparency and respect they should be able to expect, Coles sincerely regrets and apologises for its conduct in these dealings.*³⁰⁶

It is beyond doubt that the action against Coles focussed the corporate mind of the organisation. As one Coles' representative put it, the unconscionability action 'had a significant impact. From the Wesfarmers board right down, I mean, that is a terrible thing for the ACCC to be calling out against the company.'³⁰⁷ It also brought about behavioural change, at least in the short term.³⁰⁸ As one interviewee told us, 'in all fairness Coles have gone out of their way considerably since the findings of the case to have better relationship with suppliers.'³⁰⁹ He went on to stress that, from a supplier point of view, 'the money wasn't the driver ... at the time I think it served its purpose in terms of building a better relationship with Coles.'³¹⁰

³⁰² ACCC Annual Report 2014-15, p. 68.

³⁰³ ACCC Annual Report 2014-15, p. 68.

³⁰⁴ Sue Mitchell and Madeleine Heffernan, 'Coles to settle unconscionable conduct cases with ACCC', *AFR*, 15 December, 2014.

³⁰⁵ ACCC Annual Report 2014-15, p. 68.

³⁰⁶ Sue Mitchell and Madeleine Heffernan, 'Coles to refund suppliers as it settles cases with ACCC', *SMH*, 15 December 2014.

³⁰⁷ Transcript of interview, MSC representative, p. 22.

³⁰⁸ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 20.

³⁰⁹ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 33.

³¹⁰ Transcript of interview, CEO of major packaged goods supplier to the MSCs, p. 38.

Coles certainly does appear to have made some substantive changes in its approach to supplier relations in recent years. In response to the unconscionable conduct investigation, in an effort to curb the temptation on the part of some buyers to drive a hard bargain regardless of cost, the company changed its buyer remuneration strategy.³¹¹ Then in April 2015, Coles established the Coles Nurture Fund, allocating \$50 million over five years for 'no strings attached'³¹² grants and interest-free loans aimed at developing new products, technologies, systems and processes.³¹³ Any farmer in a food business with less than 50 employees that generates less than \$25 million in annual business revenue can apply for a grant under the scheme, and does not have to be currently supplying Coles. CEO John Durkan is reported to have denied suggestions that this was a 'public relations stunt':

*We know small entrepreneurs, be they farmers or food processors, are a great launch pad for innovation and clever ideas. With modest financial support, we can help get those ideas out to consumers.*³¹⁴

In September that same year Coles held its inaugural Supplier Awards Gala Dinner, publicly and lavishly celebrating its suppliers.³¹⁵ In its 2015 Annual Report the company stated that:

*We have fundamentally changed the way we source food for our customers by fostering longer-term and deeper relationships with our suppliers.*³¹⁶

A year later Woolworths would face similar allegations to those by which Coles had been burnt. In December 2015 the ACCC instituted proceedings in the Federal Court alleging Woolworths had engaged in unconscionable conduct through the development and implementation of the 'Mind the Gap' scheme (a name strangely redolent of the London subway and hence possibly the inspiration of UK imports amongst Woolworths' staff), which was designed to obtain payments from a group of 'Tier B' suppliers in order to urgently reduce a significant half year gross profit shortfall. The ACCC further alleged that, 'these requests were made in circumstances where Woolworths was in a substantially stronger bargaining position than the suppliers, did not have a pre-existing contractual entitlement to seek the payments, and either knew it did not have or was indifferent to whether it had a legitimate basis for requesting a Mind the Gap payment from every targeted Tier B supplier.'³¹⁷

However in this one, the ACCC chalked up a loss. The Court held that the Mind the Gap requests were not unconscionable within the meaning of the ACL.³¹⁸ The retailer's scheme was held to be within the law because, in effect, it involved conduct that was not qualitatively different to conduct that occurs in the normal course of Woolworths' and indeed any supermarket's dealings with its suppliers. Yates J accepted Woolworths' primary contention that:

³¹¹ Transcript of interview, MSC representative, p. 23.

³¹² Sue Neales, 'Coles unveils \$50m fund to help farms expand', *The Australian*, 24 April 2015.

³¹³ Coles Supplier Portal, Coles Nurture Fund, <https://www.supplierportal.coles.com.au/csp/wps/portal/web/ColesNurtureFund>

³¹⁴ Sue Neales, 'Coles unveils \$50m fund to help farms expand', *The Australian*, 24 April 2015.

³¹⁵ 'Coles honours top suppliers', *Retail World*, 18 September 2015.

³¹⁶ Coles, *Annual Report 2015*, p. 6.

³¹⁷ ACCC media release, 'ACCC takes action against Woolworths for alleged unconscionable conduct towards supermarket suppliers', 10 December 2015.

³¹⁸ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472 at 1.

...from the perspective of any individual supplier who was contacted as part of the Mind the Gap scheme', the experience would have been no different to any ordinary negotiation that the supplier might have had with Woolworths.³¹⁹

Not surprisingly, the outcome provoked some strong reactions. From a defiant ACCC Chairman, despite the finding of legality: a description of the conduct as an 'unfortunate' way to do business and 'not the sort of business behaviour I am used to, having spent 20 years in the private sector'.³²⁰ And, in the media release announcing the judgment, a promise 'to continue to take enforcement action where appropriate, particularly in relation to supply chain issues'.³²¹ Notwithstanding the loss, the ACCC's reaction suggests it is possible that a supplier representative was correct in his suspicion, voiced prior to the decision being handed down, that, as with Coles, 'the ACCC are trying to bang the drum as loudly as they can to force Woolworths into behaviour change'.³²²

From the then head of the AFGC there was a strongly worded observation that 'it would be pretty appalling if it [the judgment] were seen as a green light to do the same thing again' and an associated warning that it too would be continuing to keep 'a close eye' on supplier relationships.³²³ In a follow up interview for this research, on eve of his departure from the supplier association, Dawson reflected further on the decision, observing:

We think it sent a terrible signal and that's our view. We're particularly concerned at the element in the judgement that questioned whether Woolworths has any market power. ... I think there's widespread concern at the judgement and the signal that it potentially sent. So the concern was if the lesson that is drawn from this by both Coles and Woolworths is, hey, its open slather again, then obviously it's hugely concerning. So that was the initial reaction...³²⁴

Despite its victory in court, and having successfully defended the action on the grounds that the Mind the Gap scheme was an acceptable norm in dealings with suppliers (at least for Woolworths if not the industry), at the Woolworths Annual General Meeting in November 2016 the Chairman Gordon Cairns stood behind the decision to test challenge the ACCC's allegations. But he also announced that Woolworths would 'hold ourselves going forward to higher standards'.³²⁵ The irony of this was not lost on Dawson:

Now, of course, interestingly, Woolworths then and still today were at pains to say, "But we hold ourselves to a high standard." Well ... from a supplier's point of view you're left ... with the question of what is "the Woolworth's way"? "Is it the one they stand up in court under

³¹⁹ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472 at 199.

³²⁰ Eli Greenblat and John Durie, 'Woolworths beats ACCC supplier mistreatment case', *ABR*, 8 December 2016.

³²¹ ACCC media release, 'ACCC won't appeal Woolworths unconscionable conduct decision', 10 December 2015.

³²² Transcript of interview, director of a consultancy that advises suppliers, p. 64.

³²³ Madeleine Heffernan, 'Suppliers on edge after Woolworths wins cash-demand case', *SMH*, 12 December 2016.

³²⁴ Transcript of interview, Gary Dawson 2, pp. 18-19.

³²⁵ Sue Mitchell, 'ACCC Woolworths' unconscionable conduct case dismissed', *AFR*, 8 December 2016.

*oath and say or is it the one they say in supplier [discussions]? Well, you can work that out. That's still the concern I think ...*³²⁶

There are also possible broader, potentially legislative implications of the case. According to one media outlet, 'victory may prove pyrrhic if the case leads to renewed calls for tougher competition laws.'³²⁷ The CEO of COSBOA expressed strong views too on any suggestion that the ACCC proceedings against the MSCs in these cases should be taken as evidence that 'the system works'. Reflecting specifically on the Coles' admission, he observed:

*... that's like saying that if a truck hits a bus, 20 kids are killed, as long as that truck driver goes to jail the system works.. We're all happy?*³²⁸

Senator Xenophon, a long time advocate of drastic measures to break up the grocery retail 'duopoly', suggested that the outcome in the case against Woolworths strengthens the case for the amendment of the misuse of market power prohibition to create an anti-competitive effects test.³²⁹ As noted below, that amendment has now been approved by the government, albeit the approval preceded the Federal Court judgment, and on 28 March 2017 the amending Bill passed the House of Representatives. As of 29 March the Bill had been introduced into the Senate and a second reading moved.³³⁰

The judgment may also pave the way for consideration of whether the unconscionability provisions require further elucidation refinement, or even extension. The test for unconscionability is based on the norms of society, not the norms of the business in question or even the industry at large. It would make a mockery of the law if an accepted defence to a charge of unconscionability was, in effect: 'but this is how things have always been done.' Moreover, norms are fluid and change over time. Even if conduct has been seen as socially acceptable in the past, that is not to say it will always remain so. An Interim report by Consumer Affairs Australia and New Zealand (CAANZ) in its review of the ACL (CAANZ-ACL Review) released in October 2016, just prior to the Woolworths judgement, did not support the calls by some commentators for lowering the standard and introducing a general prohibition on unfair trading into the law. It instead favoured allowing the case law on unconscionability to develop.³³¹ Perhaps the outcome in the Woolworths case will prompt a rethink of this assessment.

Moreover, the former AFGC CEO has reflected that Woolworths' decision to defend the case, the basis for its defence and the courts' acceptance of that defence, only serve to open the door for considering whether the FGCC needs to be toughened up, in the context of the 2018 review. After all,

³²⁶ Transcript of interview, Gary Dawson 2, pp. 18-19.

³²⁷ Sue Mitchell, 'ACCC Woolworths' unconscionable conduct case dismissed', *AFR*, 8 December 2016.

³²⁸ Transcript of interview, CEO of COSBOA, 14.

³²⁹ Caron Beaton-Wells, 'Supermarket unconscionability – the difference two years can make', <http://law.unimelb.edu.au/news/cen/supermarket-unconscionability-the-difference-two-years-can-make>.

³³⁰ *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* (Cth).

³³¹ Consumer Affairs Australia New Zealand, *Australian Consumer Law Review Interim Report*, October 2016 (CAANZ-ACL review interim report 2016), [2.3] at pp. 105-106

the conduct that was the subject of the case – in essence, retrospective claims under threat of retribution – is the very type of conduct that the Code is intended to eradicate.

The decision may also have ramifications for the strengthening of deterrence and Rod Sims' support for this is evident in the ACCC's submission to the CAANZ-ACL review that:

*...the current maximum penalties available under the ACL are too low and need to be increased if they are to act as an effective deterrent. Court ordered penalties are an important part of our enforcement toolkit and, like all enforcement tools, need to be set at an appropriate level if they are to form part of a proportionate response to consumer harm.*³³²

Sims and other ACCC representatives subsequently took to the media, reinforcing the call for higher penalties in the media with a particular emphasis on stronger deterrence for 'the big end of town'.³³³ It was a call that received wide support including from Choice³³⁴ and the ALP,³³⁵ amongst others, while opposed not unexpectedly by big business groups, including the National Retail Association.³³⁶ In a separate review of Consumer Law Enforcement and Administration conducted by the PC at about the same time as the CAANZ-ACL Review, and concluded in April 2017, the PC agreed with the CAANZ-ACL Review's view on this, supporting an increase in the maximum financial penalties for breaches of the ACL.³³⁷ It made particular note of the submissions in support of higher penalties that would see the maxima recalibrated to match the maximum penalties for breaches of the competition rules under the CCA.³³⁸ In the recently handed down Budget, the government announced that it would support this change.³³⁹

Having decided not to appeal the decision in the Woolworths' unconscionability case, it is unclear to what extent the ACCC is likely to continue to seek out or take opportunities to test further this particular aspect of the law.³⁴⁰ Moreover, as both its 2016 and 2017 Compliance and Enforcement policies suggest,³⁴¹ as far as supplier relationships in the grocery sector are concerned, its focus now is very much on monitoring compliance with the FGCC and this is likely to be accentuated by the approach of the 2018 review (see further Part 7 below).

³³² ACCC submission to Productivity Commission Inquiry into Consumer Law Enforcement and Administration, p. 9.

³³³ Patrick Durkin, 'Rod Sims says ACCC 'too cautious' on penalties in the past', *AFR*, 5 February 2017.

³³⁴ Choice Submission to CAANZ-ACL Issues Paper, pp. 40-42.

³³⁵ Andrew Leigh, 'Australian Labor Party submission to the Productivity Commission Inquiry into the enforcement and administration of Australian Consumer Law', p. 1.

³³⁶ National Retail Association submission to Productivity Commission's Inquiry into Consumer Law Enforcement and Administration, p. 5.

³³⁷ PC, *Consumer Law Enforcement and Administration*, March 2017 (PC, *Consumer Law*, Final Report 2017), Finding 4.5 at p. 19.

³³⁸ This would mean that companies incur the greater of: a maximum penalty of \$10 million, three times the value of the benefit the company received from the breach or 10 per cent of annual turnover in the preceding 12 months if the benefit cannot be determined.

³³⁹ Budget Measures: Budget Paper No. 2. 2017-18, Part 1: Revenue measures, 9 May 2017, The Commonwealth of Australia, p. 35.

³⁴⁰ Cf comments made by the ACCC Deputy Chair (Small Business) at the AFGC Conference in 2017 to the effect that the decision not to appeal was based entirely on advice regarding the approach that the judge in the case had taken to the evidence, implying there was no dampening of the ACCC's appetite for litigation in this area. See Michael Schaper, 'Current Food & Grocery Issues: An ACCC Perspective', Presentation at AFGC Conference, 24 May 2017.

³⁴¹ ACCC *Compliance and Enforcement Policy* 2016, p. 3; ACCC, *Compliance and Enforcement Policy* 2017, p. 4.

(d) Harper gives grocery a free pass but goes not so easy on the ACCC

The Harper Review included a focus on the grocery sector and the MSCs particularly. This was hardly surprising given the calls for review of competition laws in relation to various aspects of the workings of the sector in the parliamentary inquiries in 2010 and 2011, as well the heightened controversy surrounding the MSCs generally during that period. However, in many respects, the findings of the review on this subject echoed those of the ACCC in 2008. The review panel acknowledged the receipt of a number of submissions tabling concerns about the MSCs, including a statement from the MGA that:

*... the market dominance of two major retailers is seriously affecting the ability of smaller independent retailers to compete effectively in Australia.*³⁴²

However the panel also noted that other stakeholders, including Coles and Woolworths, had submitted that ‘that the grocery industry is highly competitive and has become more so in recent years’.³⁴³ The findings of the review supported this position (as does the analysis in Part 2 of this report). It was confirmed that competition had intensified as a consequence of Wesfarmers’ acquisition of Coles and the growing presence of Aldi and Costco in the market in the years leading up to the review, and reported that, as a consequence, ‘few concerns have been raised about prices charged to consumers by supermarkets’.³⁴⁴

While issues of horizontal competition were not considered significant, the panel did acknowledge strains in the supply chain. In response to concerns raised by suppliers about unconscionable conduct and misuse of market power by the MSCs (possibly evidencing less reluctance by suppliers to speak up than at the time of the ACCC Grocery Inquiry), the panel repeated the mantra that, ‘the CCA prohibits conduct that harms the competitive process, not individual competitors.’³⁴⁵

With regard to unconscionable conduct, the review panel largely took a watch-and-see approach. The panel did call for continued ‘active and ongoing review’ of the relevant provisions; however, it also cited the settlement by Coles of the action that the ACCC had brought against it, and its admission of unconscionable conduct, as evidence that the current provisions were, ‘working as intended to meet their policy goals’.³⁴⁶ One can only speculate as to whether the same conclusion might have been reached had the panel been considering the matter after the Woolworths’ decision was handed down. Further, the panel determined that the recently announced FGCC should also assist suppliers to contract ‘fairly and efficiently’ with the MSCs’.³⁴⁷

³⁴² MGA submission, p. 6, cited in Harper Review 2015, p. 433

³⁴³ Harper Review 2015, p. 433.

³⁴⁴ Harper Review 2015, p. 433.

³⁴⁵ Harper Review 2015, p. 88.

³⁴⁶ Harper Review 2015, p. 88.

³⁴⁷ Billson, B (Minister for Small Business) 2015, Grocery Code to improve relationships between retailers, wholesalers and suppliers, media release 2 March, Canberra, cited in Harper Review 2015, p. 88.

When it came to misuse of market power however the panel made the controversial call for a strengthening of s 46 of the CCA, recommending the provision be reframed so as to:

*..prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.*³⁴⁸

As discussed below, this amendment so as to create an ‘effects test’ for the misuse of market power was one of the most contentious recommendations of the Harper Review, and resulted in a passionate and highly public debate between its supporters, including the then Small Business Minister Bruce Billson, ACCC Chairman Rod Sims and former Chairman Allan Fels AO; and its very vocal detractors, which included the BCA,³⁴⁹ Wesfarmers boss Richard Goyder,³⁵⁰ former ACCC commissioner Stephen King and former ACCC Chairman Graeme Samuel AC.³⁵¹

The review’s terms of reference included the institutional framework for competition policy-making and legal enforcement and hence, yet again, the ACCC found itself the subject of scrutiny. While the panel was largely supportive of the agency, the changes that were recommended aligned closely with concerns raised in earlier inquiries (referred to in Part 3 above). With regard to transparency, the government supported the recommendation that the ACCC should ‘establish, publish and report against a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law.’³⁵² Further, the government said it would continue ‘to liaise with the ACCC with a view to enhancing public disclosure of operational procedures and decision-making processes where it is appropriate and feasible to do so.’³⁵³ It appears this has had some substantive impact, and a positive one in the view of at least one commentator:

*I would say that two years later, the relationship [between the ACCC and MSCs] is now much better. I think the ACCC – the ACCC got criticised by Harper on the way it uses the media, and I think it’s become a little better on that. I think the ACCC has got to understand the grocery sector better.*³⁵⁴

When it came to the governance of the agency, the Government supported the panel’s recommendation that the ACCC report regularly to a ‘broad based committee of the Parliament, such as the House of Representatives Standing Committee on Economics.’³⁵⁵ The government also accepted the recommendation that a specialist small business commissioner be retained, as well as

³⁴⁸ Harper Review 2015, recommendation 30, p. 348.

³⁴⁹ Eloise Keating, ‘Allan Fels slams big business lobbying over effects test and government’s “disastrous incapacity” to deliver reform’, *Smart Company*, 4 September 2015.

³⁵⁰ Eli Greenblat and Annabel Hepworth, ‘Goyder blasts PM’s effects test’, *ABR*, 17 March 2016.

³⁵¹ Graeme Samuel and Stephen King, ‘Competition law: Effects test would have shackled competition’, *AFR*, 9 September 2015.

³⁵² Government response to the Harper Review 2015, recommendation 52: Media Code of Conduct, pp. 39-40.

³⁵³ Government response to the Harper Review 2015, recommendation 53: Small business access to remedies, p. 40.

³⁵⁴ Transcript of interview, former senior representative of the UK OFT, p. 10.

³⁵⁵ Government response to the Harper Review 2015, recommendation 51: ACCC Governance, p. 39.

committing to the creation of a specialist agriculture commissioner, as announced in the Agricultural Competitiveness White Paper.³⁵⁶

In February 2016 Mick Keogh was appointed to this role. Keogh is a leading agricultural analyst, with a strong background in this area, having grown up on a farm and obtained degrees in Wool and Pastoral Sciences from the University of New South Wales before working as an agricultural management consultant across the private and public sectors. He has also served as the General Manager Policy for the NSW Farmers' Association and the Executive Director of the Australian Farm Institute, as well as Chairman of the National Rural Advisory Council, and a Member of the CSIRO Sustainable Agriculture Flagship Advisory Committee.³⁵⁷ Keogh's appointment was well received by the rural sector. The National Farmers' Federation (NFF), while complaining that the position was well overdue, welcomed his appointment;³⁵⁸ and NSW Farmers Association President Derek Schoen was quoted as saying:

He brings a depth of understanding about the complexity and sensitivity of our agricultural supply chains and he will be a valuable source of practical knowledge for the competition regulator,

*For the first time ever, farmers will have a voice at the decision making table when the commission makes important decisions about both competition and consumer protection issues.*³⁵⁹

Further support for the small business sector was evident in the government's 'in principle' acceptance of the recommendation that the ACCC improve its communication with small business, and complainants more generally, noting that the Government had requested that the ACCC 'improve transparency and clarity for small businesses on why it is unable to pursue certain complaints'.³⁶⁰

Yet again the need for the ACCC to take further steps to facilitate greater awareness on the part of small business about collective bargaining, the exemption process and how this might be used to improve their bargaining position featured in the recommendations.³⁶¹

II. A small business man: the Small Business Minister

During this time the smaller players in the sector – farmers, manufacturers, distributors and independent retailers – had an energetic and vocal champion in government. In 1996 Bruce Billson, a working class boy from Frankston who had himself worked in several small businesses before running his own, was elected to represent the outer Melbourne constituency of Dunkley. After holding a

³⁵⁶ Government response to the Harper Review 2015, recommendation 51: ACCC Governance, p. 39.

³⁵⁷ Australian Farm Institute, Key Staff, Mick Keogh, Executive Director, <http://www.farminstitute.org.au/about-us/institute-structure/key-staff.html>

³⁵⁸ Anna Vidot, 'Mick Keogh appointed as competition watchdog's first ever agricultural commissioner', *ABC Rural*, 24 February 2016.

³⁵⁹ 'New ACCC agriculture commissioner appointed', *The Rural*, 24 February 2016.

³⁶⁰ Government response to the Harper Review 2015, recommendation 53: Small business access to remedies, p. 40.

³⁶¹ Government response to the Harper Review 2015, recommendation 54: Collective bargaining, p. 41.

variety of portfolios for the Liberal party Billson became the Shadow Minister for Small Business in 2009, and in 2013 was sworn in as the Minister for Small Business in the Abbott-led Coalition government.³⁶² As Billson himself reportedly said, he spent this time ‘...fearlessly advocating the case for the small business, family enterprise, start-up and self-employed community.’³⁶³ To quote journalist Matthew Knott, ‘Bruce Billson talks about small business the way other people talk about God or football or their favourite band.’³⁶⁴

Billson was Australia’s 15th Minister for Small Business. But he was one of the first to hold the portfolio within the cabinet. In 2012, the then Labor Prime Minister Julia Gillard, possibly in response to the increasing political pressure from the sector, determined it necessary to elevate the small business portfolio from the outer ministry. However, the turbulent years of the Gillard government meant there was a succession of Ministers in the role.³⁶⁵

While all previous Small Business Ministers held shared portfolios Billson was the first, as Shadow Minister, to combine the Small Business, Competition Policy and Consumer Affairs portfolios. For some, the combination of small business and competition policy in the one portfolio was incongruous and potentially problematic:

*The change cements some of the fears over a small business focus for competition policy that have arisen in recent months ... [it] suggests a move away from the protection of the competitive process to the protection of the competitors.*³⁶⁶

(a) Competition reform for small business – roots, branches and all

A ‘root and branch’ review of Australia’s competition laws, as the Harper Review was known initially, had been a key campaign promise of the Coalition party in the lead up to 2013 Federal election, an election where the small business vote had been viewed as ‘critical’.³⁶⁷ In an open letter to small business published in the Sydney Morning Herald in April 2013, Billson bemoaned the declining number of people working in the small business sector, attributing this in no small part to the ‘22,000 new regulations’ that Labor had introduced, and the recent churn of small business ministers.³⁶⁸ Billson stated in the letter that he, Prime Minister Abbott and Treasurer Hockey had been listening to small business and announced that the Coalition have, ‘developed a plan that will double the rate of small business formations and create one million new jobs within five years.’ The plan included a commitment to instigate ‘a root and branch review of competition laws and policy and deliver more competitive markets.’³⁶⁹

³⁶² The Hon. Bruce Billson, <http://www.brucebillson.com.au/about-bruce-billson/>.

³⁶³ Tim Mazarol, ‘Farewell Bruce Billson your passion for small business will be sorely missed’, *The Conversation*, 29 November 2015.

³⁶⁴ Matthew Knott, ‘Meet Bruce Billson, the evangelical minister for small business’, *SMH*, 26 May 2015.

³⁶⁵ Mark Arbib (December 2011 to March 2012), Brendan O’Connor (March 2012 to February 2013), Chris Bowen (February to March 2013), and Gary Gray (March to September 2013).

³⁶⁶ Julie Clarke, ‘No competition minister in new cabinet’, 16 September 2013, *Competition Law, Australian competition law and policy discussion*, <https://competitionlaw.wordpress.com/2013/09/16/no-competition-minister/>

³⁶⁷ The Hon Bruce Billson MP, ‘Revealed: Coalitions small business policy’, *SMH*, 9 April 2013.

³⁶⁸ The Hon Bruce Billson MP, ‘Revealed: Coalitions small business policy’, *SMH*, 9 April 2013.

³⁶⁹ The Hon Bruce Billson MP, ‘Revealed: Coalitions small business policy’. *The SMH*, 9 April 2013.

This commitment echoed the recommendations of the Senate inquiry into the impacts of supermarket price decisions on the dairy industry in 2011, that had called on the Government to initiate an independent review of the competition provisions of the CCA, stating:

It is clear that Coles and Woolworths have a very strong position in Australia's grocery market. While the recent signs of Coles and Woolworths more fervently seeking to attract consumers to their respective stores are encouraging for competition, the effects need to be closely monitored. Other possible developments, such as implications for the major supermarkets' dealings with their suppliers due to the growth in private label products generally, need to be monitored for any signs of anticompetitive conduct. The committee expects the Government and the ACCC to keep a watching brief on these issues and the grocery sector in general.³⁷⁰

This was a recommendation that had been mirrored less than a year later, in the report of the Senate Committee on Australia's food processing sector:

The committee recommends that the government initiate an independent review of the competition provisions of the Competition and Consumer Act 2010. The committee recommends that the review should include consideration of: the misuse of market power; creeping acquisitions; predatory pricing; and unconscionable conduct.³⁷¹

The Coalition made good on its pledge. The terms of reference for a Competition Policy Review were released in December 2013, just three months after it had won the Federal election. While some, particularly within Coles and Woolworths, may have viewed the review as a pointed attack, the terms of reference were seen as 'extraordinarily wide'.³⁷² However, as the Prime Minister said, this was to be the first review of competition laws and policies in over 20 years and it would, 'examine not only the current laws but the broader competition framework, to increase productivity and efficiency in the markets, drive benefits to ease cost of living pressures and raise living standards for all Australians'.³⁷³

Both the focus of the review and composition of the review panel reflected Billson's sympathy for small business. The review panel included individuals with previous experience and profile in relation to small business, as well as regional issues, and was instructed to focus on identifying, 'regulations and other impediments' that restricted competition and reduced productivity without serving any broader public interest; and to examine the competition provisions and special protections for small business in the CCA 'to ensure that efficient businesses, both big and small,' could 'compete effectively and have the necessary incentives to invest and innovate for the future'. The panel was also expected to ensure that the competition provisions in the CCA were driving 'efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy' both locally and

³⁷⁰ SERC, *Impacts of supermarket pricing on the dairy industry*, 2011, recommendation 5 p. xvi.

³⁷¹ SSC, *Australia's Food Processing Sector*, 2012, recommendation 4, p. vi.

³⁷² John Durie, 'Billson packs licence to kill of any impediments to small business', *AFR*, 9 January 2014.

³⁷³ Media release, Tony Abbott, PM, 'Review of Competition Policy' Wednesday 4 December 2013.

globally; to consider the existing ‘structure and powers of the competition institutions’ to ensure they were still appropriate, ‘given changes to the economy and the desire to reduce the regulatory impost on business’; and ‘to review government involvement in markets’ with a view to reducing this involvement where it was no longer in the public interest.³⁷⁴

It was clear nevertheless that the grocery sector was of particular interest. The panel was to consider ‘whether the misuse of market power provisions effectively prohibit anti-competitive conduct’³⁷⁵ and, more pointedly in the present context, to:

*...examine whether key markets – including, but not limited to, groceries, utilities and automotive fuel – are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains.*³⁷⁶

(b) Small business budget measures

Billson’s influence and passion for his portfolio, and its increasing political significance, were further evident in the 2014 federal budget. Indeed, the few policy initiatives that the federal opposition did not seek to obstruct included: cuts to the corporate tax rate for small businesses, and significant investment in an Industry Skills Fund to provide training support for SMEs together with an Entrepreneurs Infrastructure Program to help boost innovation and commercialisation in the sector. Funding was made available to improve access by SMEs to government contracts and for the ACCC to investigate a possible extension of the unfair contract provisions to small businesses. The budget also provided for the creation of a SBFE Ombudsman’s office so as to provide a single entry point for SMEs seeking access to government assistance and dispute resolution.³⁷⁷

The 2015 budget in turn was declared a ‘small business budget’.³⁷⁸ All small businesses were to get an immediate tax deduction for any individual assets purchased for less than \$20,000 (the previous threshold having been \$1,000); the company tax rate for incorporated businesses with an annual turnover of less than \$2 million was to reduce to 28.5%; and fringe benefits tax exemptions were expanded to include work-related portable electronic devices, a move aimed at reducing red tape for small business while helping ‘small business employees stay connected in the digital economy’.³⁷⁹

Later that same year, on 24 November 2015, Billson announced that he would leave politics after the next election, a decision that came in the wake of Malcolm Turnbull replacing Tony Abbott as Prime Minister after a leadership spill in September 2015. In the subsequent cabinet reshuffle Turnbull demoted Billson in favour of Kelly O’Dwyer, who became both Minister for Small Business and

³⁷⁴ Harper Review 2015 terms of reference, overview.

³⁷⁵ Harper Review 2015 terms of reference, 3.3.2.

³⁷⁶ Harper Review 2015 terms of reference, 4.2.

³⁷⁷ Expense Measures: Budget Paper No. 2. 2014-15, Part 2: Expense measures, Treasury, 13 May 2014, The Commonwealth of Australia, p. 217.

³⁷⁸ Tim Mazzarol, ‘Farewell Bruce Billson your passion for small business will be sorely missed’, *The Conversation*, 29 November 2015.

³⁷⁹ Budget 2015, Jobs and Small Business: the right time to invest, Australian Government <http://www.budget.gov.au/2015-16/content/highlights/jobsandsmallbusiness.html>

Assistant Treasurer.³⁸⁰ In announcing his decision to retire from parliament Billson reportedly said, 'it has become clear to us that while I love what I do, it is not possible for me to fully do what I love'.³⁸¹

(c) Effecting an effects test

A key area of unfinished business for Billson was the introduction of an effects test for s 46 of the CCA, as recommended by the Harper Review released in March 2015. Billson firmly believed that while nothing could guarantee success when it came to small business operators, 'success or otherwise will be determined on merit, not on muscle'.³⁸² This meant getting the incentives right, minimising regulatory burdens, and giving businesses, regardless of size, the chance to prosper (which, in turn, meant ensuring big business did not misuse its market power).³⁸³

Billson had been one of the few government ministers willing to defend (publicly at least) the introduction of such a reform.³⁸⁴ In an opinion piece penned in August 2015 he argued that the proposed change, 'strikes the right balance and has the potential to better foster innovation and efficiency, improve productivity and ultimately deliver economic, employment and consumer benefits'.³⁸⁵ Large corporates represented by the BCA vehemently opposed the mooted amendment.³⁸⁶ BCA President Catherine Livingstone warned in a public statement released in August 2015 that:

*Changing the 'misuse of market power' provision by introducing an effects test and removing the 'take advantage' clause will create major regulatory uncertainty for business. It will expose our business to the risk of investigation and prosecution due to effects on competition that we cannot foresee. It will deter legitimate innovative pricing, product development or business expansion that would be good for consumers.*³⁸⁷

Livingston also foreshadowed that small business would not be immune:

*Small business needs to understand they will not be quarantined from the impact of this change which will apply equally to all business, for example, in regional towns or markets where a small business' product or service is dominant. In these circumstances, small businesses could be the instigator of actions against other small businesses, who would bear the unintended consequences of additional cost and uncertainty.*³⁸⁸

³⁸⁰ Tim Mazzarol, 'Farewell Bruce Billson your passion for small business will be sorely missed', *The Conversation*, 29 November 2015.

³⁸¹ Tim Mazzarol, 'Farewell Bruce Billson your passion for small business will be sorely missed', *The Conversation*, 29 November 2015.

³⁸² Transcript of interview, Bruce Billson, p. 8.

³⁸³ Transcript of interview, Bruce Billson, p. 9.

³⁸⁴ Tim Mazzarol, 'Farewell Bruce Billson your passion for small business will be sorely missed', *The Conversation*, 29 November 2015.

³⁸⁵ Bruce Billson, 'Harper review misuse of market power clause would energise enterprise', *AFR* 31 August 2015.

³⁸⁶ Bruce Billson, 'Harper review misuse of market power clause would energise enterprise', *AFR* 31 August 2015.

³⁸⁷ BCA Statement on the Introduction of an Effects Test, 3 August 2015 at <http://www.bca.com.au/media/statement-on-the-introduction-of-an-effects-test/view-all-related-publications>.

³⁸⁸ BCA Statement on the Introduction of an Effects Test, 3 August 2015, at <http://www.bca.com.au/media/statement-on-the-introduction-of-an-effects-test/view-all-related-publications>

The BCA has considerable political influence in Australia, but also is said to have a track record of opposing the strengthening of competition regulation. It opposed the introduction of the TPA (now the CCA) in 1974, the strengthening of the merger law in 1993, the broadening of laws that capture unconscionable conduct, and initially at least, the criminalisation of cartel laws.³⁸⁹ As Allan Fels AO has observed, the core approach of the BCA is to oppose stronger competition law to the extent that it affects large businesses. And while not all BCA members were concerned with changes to s 46 it is perhaps not surprising that the MSCs were highly opposed to, and had the support of the BCA in their opposition to the proposed amendment:³⁹⁰

*The people who don't want the effects test are half a dozen retailers from the top end of town, the big end of town have the money for a major advertising campaign.*³⁹¹

In the opposite corner, one of the strongest advocates for the SME sector and the introduction of an effects test was the COSBOA. While nowhere near as well-resourced as advocates for big business,³⁹² CEO Peter Strong appears to have been effective in having the views of his members heard,³⁹³ particularly by the media and by governments that increasingly have become very sensitive to the political implications of not being seen to listen to small business.³⁹⁴ Strong, a small bookshop owner, appears to have captured the attention (if not the imagination) of many in the political sphere, with his emphasis on 'people' as opposed to economics in debates relating to small business, his avid use of the media, including social media ('COSBOA has been noisy'),³⁹⁵ and his willingness to work with but also to challenge the arguments put by senior representatives across industry and government. The bluntness of his approach was borne out by an anecdote he shared with us regarding a conversation he had had with a senior retailer representative:

*I said, "You know [name], do you keep a record of the number of suicides in the supply chain?" which really threw him. "What do you mean?" he said. I said, "well, there's been suicides in the malls ... there's certainly suicides in the Coles or Woollies supply chain; we know that." They didn't know what to say to that.*³⁹⁶

Strong is an unconditional fan of Billson. As he told us, 'I just supported Bruce to the hilt. I gave him ten out of ten, you never give that to a pollie ... he was relentless.'³⁹⁷ He is highly complementary too of Kate Carnell. Referring to Carnell and the establishment of the SBF E Ombudsman's office, he told

³⁸⁹ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 5.

³⁹⁰ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, pp. 6.

³⁹¹ Catie Low, 'Big business 'called on' to pull down effects test', *SMH*, 17 September 2015.

³⁹² Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 7.

³⁹³ Patrick Durkin, 'The Wesfarmer's Affect: BCA accused of driving supermarket's agenda', *AFR*, 23 September, 2015.

³⁹⁴ Michelle Grattan, 'Big win for small business in government embrace of competition 'effects test'', *The Conversation*, 16 March 2016.

³⁹⁵ Transcript of interview, CEO of COSBOA, p. 26.

³⁹⁶ Transcript of interview, CEO of COSBOA, p. 26.

³⁹⁷ Transcript of interview, CEO of COSBOA, pp. 24-5.

us: 'she's fantastic. You know what, I'll say, we got that position in and I thought of resigning; we thought she was doing a great job but I can still say stuff she can't say...'.³⁹⁸

Section 46 reform had Carnell's support also. Still the head of the Australian Chamber and Commerce in 2015, Carnell is reported to have expressed surprise at the ferocity of the BCA's stance, stating that it was a 'moderate' reform and pointing out, in contradiction of claims by others, that, 'it doesn't stop a company with significant market power from pushing down prices with a particular supplier. It would only be if the effect of that activity impacted on the competitiveness of the whole market.'³⁹⁹

Six months later, as the newly appointed SBFE Ombudsman, Carnell commended the Minister for Small Business in a media release for supporting the 'effects test':

*Focussing on the effect of conduct, rather than just the purpose of conduct, will provide better protection for all small businesses and family enterprises. The Minister's decision to support the effects test sends a positive message to the small business sector that the Government supports them and understands the need for an appropriate balance in business relationships.*⁴⁰⁰

This was a view echoed by the MGA, with its CEO having been reported to have said that the effects test was important because it would give the ACCC the clout to 'crack down' on anti-competitive practices.⁴⁰¹

As mentioned above, there was dissent amongst the current and former chairs of the ACCC when it came to the need for the reform. As former chairman Allan Fels AO acknowledged:

*Whilst generally supporting a strengthening of the competition law, its [the ACCC's] approach to abuse of dominance has varied from one Chair of the Commission to the next. It has never been neutral, nor, some would say, disinterested.*⁴⁰²

Fels, as Chairman, had in fact advocated for the addition of an effects test since as far back as the 1990s without success. Then, when Samuel took the helm, there had been opposition to any substantial reform of the abuse of dominance laws. Rod Sims, however, as a former government official and a strong advocate for change, seemed the right person to support a further push for such reform.⁴⁰³ As mentioned above, the result was a very public and at times pointedly personal exchange between parties with opposing views.

At a political level the Labor Party traditionally has been a strong supporter of the strengthening of competition laws. However, it opposed the proposed reform. While an examination of the reasons for

³⁹⁸ Transcript of interview, CEO of COSBOA, p. 20.

³⁹⁹ Catie Low, 'Big business 'called on' to pull down effects test', *SMH*, 17 September 2015.

⁴⁰⁰ The Australian Small Business and Family Enterprise Ombudsman applauds Minister's support for 'effects test', 16 March 2016.

⁴⁰¹ Catie Low, 'Big business 'called on' to pull down effects test', *SMH*, 17 September 2015.

⁴⁰² Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 7.

⁴⁰³ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 8.

this policy stance is beyond the scope of the current discussion, it has been said by some that it was due in part to the close ties between the Labor Party and the Shop Distributive and Allied Trades Association (SDATA), the union that covers retail employees and is in turn closely associated with the MSCs.⁴⁰⁴

The Coalition Government itself had to manage tensions within its own ranks, tensions that are a product of it being made up of a Liberal Party that is pro-business and traditionally cautious when it comes to strengthening competition law and/or regulation; and the National Party, which at that time had a considerable number of members in the Cabinet and was both pro-small business and pro-farmer. As is made clear above, a key player in all of this was Bruce Billson.⁴⁰⁵

Upon leaving his Ministerial role Billson is reported to have warned Prime Minister Turnbull that giving in to the big business lobby would, 'essentially see the government capitulate to powerful vested interests, and encourage business behaviour that would have the "effect of substantially lessening competition"'.⁴⁰⁶

On 24 November 2015, a day after Billson announced his retirement, the Government released its response to the Harper Review. Despite stating its intention to implement 'the majority of the Review's recommendations',⁴⁰⁷ when it came to an effects test, it was not yet able to commit:

*The Government acknowledges concerns raised in submissions to the Harper Review about the operation of the misuse of market power provision (section 46 of the CCA) and the Harper Review's recommendation for reform. In light of the importance of this issue for business and consumers, the Government will consult further on options to reform the provision and release a discussion paper on this topic.*⁴⁰⁸

Ultimately, however, Billson's view prevailed. A further consultation completed, including consideration of 'part-Harper' options,⁴⁰⁹ the Government came through the test of its mettle, supporting the 'full Harper' in amendment of s 46. A key reason for the success of the s 46 reform has been said to have been the strong support of the National Party. Turnbull had needed the support of the Nationals to wrest the Prime Ministership from Abbott. According to Fels, the Nationals are said to have made support of the effects test a condition of that support. Fels argues Turnbull may have agreed to this on the condition that there could be discussion at some later stage about the exact

⁴⁰⁴ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 8. The influence of the union in this debate was also emphasised by Peter Strong in our interview with him. When asked about Labor's platform and its opposition to the effects test and the reason for it, he responded: '... they've walked away from small business ... [In relation to the effects test], they've gone back to their root, which is the worker ... because the SDA are in bed with Coles and Woollies...' (Transcript of interview, CEO of COSBOA, p. 12).

⁴⁰⁵ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 8.

⁴⁰⁶ Tim Mazarrol, 'Farewell Bruce Billson your passion for small business will be sorely missed', *The Conversation*, 29 November 2015.

⁴⁰⁷ Government response to Harper Review 2015, p. 1.

⁴⁰⁸ Government response to Harper Review 2015, p. 2.

⁴⁰⁹ Fleur Anderson, 'Scott Morrison to consider 'part-Harper' option for the effects test', *AFR*, 24 November, 2015.

wording of any changes to the relevant provisions.⁴¹⁰ In the end however, the form recommended by the Harper Review remained intact.

On 16 March 2016 the Turnbull Government announced it would 'legislate to fix competition policy in Australia', by implementing the recommended amendment to s 46.⁴¹¹ On 5 September 2016 the Government released Exposure Draft legislation incorporating the 'effects test' and on 1 December 2016 the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* was introduced into the House of Representatives. A Senate Economics Committee inquiry recommended that the Bill be passed, but it also recommended changes to some of the drafting of the provisions and that the Government review the reform five years from commencement.⁴¹²

In March 2017 the PC was critical of the changes to section 46 in its final report into the Regulation of Agriculture, reportedly saying that that they would neither benefit consumers nor protect small farm businesses from the MSCs. Advocating a position that aligns with that of the Labor party, the PC said:

*The perception in the agricultural sector that introducing an effects test to section 46 of the Competition and Consumer Act 2010 is likely to shield farm businesses from intense competition in retail grocery markets is ill-founded. ... In any event, doing so would not be in the interest of consumers. ...In agricultural markets, consumer interests are served by competitive forces that lower the cost of food and improve its quality.*⁴¹³

As at the date of writing, while the Bill was introduced and read in the Senate at the end of March 2017, the Government is yet to respond either to the PC's report or to the Committee's report.

III. A monitor and mediator: the AFGC

Beyond Billson and Joyce, suppliers to the MSCs had another champion – this one outside government, in the AFGC. First under Kate Carnell, the CEO from 2008 and until 2012, and then under her successor, Gary Dawson, the peak association representing suppliers played a pivotal role not just as advocate for a substantial proportion of the businesses supplying the MSCs, but as a trusted intermediary in negotiations between stakeholders within the industry and between industry and government. How did a lobbyist organisation come to play such a pivotal role and play it so effectively?

Founded in 1995, the AFGC is an influential voice for the Australian fast moving consumer goods (FMCG) industry, a sector populated by a significant numbers of SMEs not readily capable of advocating collectively on their own behalf. As the AFGC sees it:

⁴¹⁰ Allan Fels AO, 'The Australian controversy over abuse of market power law, a study in political economy', Competition Policy at the Intersection of Equity and Efficiency Honouring the Scholarship of Eleanor M. Fox, Brussels, 8 June 2016, p. 21.

⁴¹¹ Joint Media Statement: Fixing Competition Policy to Drive Economic Growth and Job, Prime Minister, Treasurer, Assistant Treasurer, 16 March 2016.

⁴¹² *Australian Competition Law, Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (Cth).

⁴¹³ Phillip Coorey, 'Effects test won't help farmers or consumers: Productivity Commission', *AFR*, 28 March 2017.

*...there is a real reluctance from a lot of companies to speak to a regulator or anyone else about difficulties they face whereas they'll speak to us quite openly. So for the ACCC, if you think if they're – or for government to engage in detail on this – in the regulation of this space, they need to understand it. How do they understand it if the players won't talk to them? Well, I think it's a critical role, really, that we play in that.*⁴¹⁴

The AFGC is both a vocal and an effective advocate for its members on a broad range of issues and concerns. As well as engaging with issues spanning the supply chain, including on competition and fair trading issues, the AFGC plays an important role in providing specialist technical expertise. This includes liaising with the Food Standards Agency and non-food related regulators such as the Therapeutic Goods Association, and providing relevant advice to members on food labelling, health/nutritional and environmental regulation.⁴¹⁵

The AFGC has a strong public profile and lobbies government, industry and stakeholder groups, makes submissions and actively engages with the media to achieve its ends. It also works strategically. As Dawson says, 'outrage in newspaper columns will get you so far, it will get you an awareness, doesn't actually get you a result'.⁴¹⁶

The overall aim of the AFGC is to promote the role that the \$125.9 billion food and grocery processing sector plays in sustaining Australia's economic, community and environmental health, and to champion initiatives in its sector that increase productivity and profitable growth.⁴¹⁷ A key sector in the Australian economy, it is made up of over 27,745 businesses, directly employing more than 307,170 people.⁴¹⁸

As at June 2016 the AFGC had 135 full members, 59 associate members and 13 affiliate members. These 207 member organisations include Australian operations of the world's biggest FMCG companies (of the Nestle, Mondelez, Procter & Gamble ilk) through to small, family owned Australian businesses and many mid-tier companies.⁴¹⁹

The food, and in particular the horticulture, sector is awash with trade and industry associations. AusVeg cites 43 peak vegetable industry bodies⁴²⁰ the Australian Agricultural Directory lists 4 associations for sugar cane growers alone, 20 associations for crop growers, and 27 grower and professional associations for the horticultural sector, topped only by the 38 for breeders and producers of livestock.⁴²¹

Horticulture is a particularly disparate sector. Still predominately small-scale family farms (although, as noted in Part 2, this is starting to change), these primary producers often work in isolation and

⁴¹⁴ Transcript of interview, Gary Dawson, pp.14-5

⁴¹⁵ AFGC website, our business <http://www.afgc.org.au/about-afgc/our-business/>

⁴¹⁶ Transcript of interview, Gary Dawson, p. 31.

⁴¹⁷ AFGC website, our business <http://www.afgc.org.au/about-afgc/our-business/>

⁴¹⁸ AFGC website, our business <http://www.afgc.org.au/about-afgc/our-business/>

⁴¹⁹ AFGC, *Annual Report* 2016, p. 3. For a full list of members see pp. 38-39. <http://www.afgc.org.au/wp-content/uploads/AFGC-Annual-Report-2016.pdf>

⁴²⁰ Ausveg website <https://ausveg.com.au/>

⁴²¹ AgLinks, The Australian Agriculture Directory website <http://www.aglinks.com.au/>

must continually adjust operations in line with competition from imported and processed produce, changing market demands and pricing, and seasonal conditions. Further, the range of produce being farmed, from potatoes to macadamia nuts, berries to bananas, and rare and exotic fruits such as abiu and durian means that the needs and concerns across the sector vary greatly.⁴²² And as one industry representative observed:

*As always with any industry, people always think their patch is the most important and that's why you get the separation. I mean, I believe that you'd probably get better value by bringing different groups together and working on the common issues ... which would make it work better but our horticultural people probably think a little bit differently.*⁴²³

A possible consequence of this disparity is the lack of a cohesive voice and, at a more practical level, a lack of sufficient resources on the part of smaller produce-specific associations to have their specific concerns heard. By contrast, as noted by Gary Dawson, the AFGC does, 'recognise within our membership that it's not homogeneous and we do have strategies ourselves based on a fairly thorough piece of member research to target out offerings to various levels.'⁴²⁴

Kate Carnell took over from Dick Wells as CEO of the AFGC in 2008. Like Billson, she had started out in small business before entering public life. Carnell bought her first pharmacy at the age of 25, purchasing three more before being elected as a member of the Liberal Party to the Australian Capital Territory (ACT) Legislative Assembly in 1992.⁴²⁵ By 1993 she was the ACT opposition leader and in 1995 Chief Minister. In October 2000 Carnell resigned, apparently pre-empting a no-confidence motion in relation to cost over-runs in a sports stadium redevelopment project.⁴²⁶ Carnell went on to be the CEO of the National Association of Forest Industries until 2004, before serving as the CEO of the Australian General Practice Network for the following four years.

In 2008 the AFGC board of directors appointed Carnell as CEO. Taking to the role with gusto, she was a vocal advocate for her members, in particular those operating SMEs. During the 'milk wars' in 2011 Carnell spoke out forcefully on behalf of dairy farmers, and is reported to have observed that, '[t]his [the heavy discounting of generic milk] has caused real problems for Australian farmers and producers in terms of their profitability', noting that some companies were considering moving off-shore or modifying local operations as a result. Carnell also raised concerns about the spread of private-label goods on supermarket shelves, warning that the introduction of cheap private-label milk had set a dangerous precedent.⁴²⁷

This concern was also a theme in Carnell's evidence to the Senate Select Committee Inquiry into Australia's Food Processing Sector that same year, in which she elaborated on the difficulties faced

⁴²² Horticulture fact sheet, http://www.agriculture.gov.au/ag-farm-food/hort-policy/horticulture_fact_sheet

⁴²³ Transcript of interview, CEO of a state farmers' organisation, p. 19.

⁴²⁴ Transcript of interview, Gary Dawson, p. 7.

⁴²⁵ Ross Peake, 'ACT's controversial former chief minister Kate Carnell has returned to the main game selling a forceful message', *The Canberra Times*, 15 March 2014.

⁴²⁶ Ross Peake, 'ACT's controversial former chief minister Kate Carnell has returned to the main game selling a forceful message', *The Canberra Times*, 15 March 2014.

⁴²⁷ Henrietta Cook, 'Milk wars leave sour taste in farmers', *SMH*, 21 January 2012.

by branded products when competing with private label products, sheeting home the blame to the high level of retail concentration:

So what you see is a scenario where Coles and Woolworths own 80 per cent of the supermarket shelf space in this country. You can look at it almost like real estate. ... You need to be able to get onto that shelf to grow your product and to have the economies of scale that you need to be able to compete with those cheap imports. The dilemma is that, of that 80 per cent, more of that 'real estate' is being taken up by private label products, which means that the real estate that is left for Australian branded products is decreasing quite significantly. That means that access to customer is becoming significantly harder. Also, the other issue is that, unless you deal with Coles and Woolworths—that 80 per cent of the shelf space—your capacity to get your product in front of enough consumers to achieve the economies of scale you need to achieve to compete in this market goes down significantly.⁴²⁸

During the same inquiry, in response to Treasury's view that concentration does not 'necessarily indicate that incumbent firms have market power',⁴²⁹ Carnell drew attention to the fact that even if the market is competitive, the MSCs' power could still be used unconscionably:

...there is market failure in this space at the moment. One of the things about market failure is that, where you have such an imbalance in power, the people with no power are not game to say anything. ... At the moment, with the ACCC legislation, unconscionable conduct is almost impossible to prove unless you can prove they actually set out to send you broke. Coles and Woolies are [not] setting out to send our members broke, [so] it is almost impossible for our members to win.⁴³⁰

As previously noted, Carnell was supportive of the changes to s 46 recommended by the Harper Review and in advocating for these and other reforms, she did not mince words about what she saw as the likely consequences of a failure to act:

In five years' time, we will be talking about when we used to have a food manufacturing industry in Australia and how unfortunate it was that it closed. ... We have got a good example of what happens if you take your eye off the ball.⁴³¹

However, while Carnell has been recognised as raising the profile of her members' concerns on both sides of the political aisle, some believe she also 'polarised her membership', with the multinationals in particular not sharing the desire of some of the smaller members to take the fight to the MSCs.⁴³²

⁴²⁸ Kate Carnell, *Committee Hansard*, 13 December 2011, p. 20, cited in SSC, *Australia's Food Processing Sector*, 2012, p. 43.

⁴²⁹ Treasury submission to SSC, *Australia's Food Processing Sector*, 2012, p. 5

⁴³⁰ Kate Carnell, *Committee Hansard*, 13 December 2012, p. 28, cited in SSC, *Australia's Food Processing Sector*, 2012, p. 56.

⁴³¹ Kate Carnell, *Committee Hansard*, 13 December 2012, p. 28, cited in SSC, *Australia's Food Processing Sector*, 2012, p. 56.

⁴³² Transcript of interview, Robert Hadler, p. 13.

Carnell's focus was reflected in the establishment of the AFGC's SME Forum in early 2012, the impetus for which was a change in membership as more SMEs sought representation. As Carnell said in a press release:

*AFGC has an increasing number of SMEs joining our industry organisation ... Manufacturers are feeling pressure right across the supply chain, so it is important for AFGC to offer a wider range of services. ... Industry is currently weathering a 'perfect storm' from an extraordinary number of pressures including rising costs of wages, water and energy, a carbon tax, global commodity prices: sugar, dairy, cocoa, oilseeds and wheat and the near record Australian dollar making imported products significantly cheaper. ... Intense supermarket discounting in and private label growth is also forcing down retail prices and seriously impacting manufacturers' margins.*⁴³³

The AFGC's structure allows member companies within particular industry sectors to establish sector-specific forums, providing them with the opportunity to address specific issues affecting their sector, promote sector interests, and network amongst each other. These fora are seen as a way for members to advance interests and have greater leverage in influencing policy.⁴³⁴ The SME Forum was established to serve the needs of smaller food and grocery manufacturers and to explore emerging issues impacting this group.

In May 2014 Carnell left the AFGC to become the CEO of the Australian Chamber of Commerce and Industry (ACCI). The ACCI slogan is, 'small business – too big to ignore' and the organisation represents over 30,000 business operators and industry associations.⁴³⁵ Noting that she has run small businesses herself, Carnell made it clear that she is prepared to argue forcefully on behalf of this broad constituency and that she had the political experience to do so.⁴³⁶

Carnell did not stay at ACCI long however. In early 2016 she was selected by Small Business Minister Kelly O'Dwyer to be Australia's first SBFE Ombudsman. Carnell is reported to have said that she sees the position as having two key roles: to act as an advocate for SMEs, serving as a conduit between them and government and providing a single point of entry; and to focus on alternative dispute resolution (ADR) mechanisms to prevent small operators getting caught up in lengthy and expensive legal proceedings. Carnell is said to have described the role as similar to what she had been doing previously, acting as 'an advocate for small to medium business, but inside the tent.'⁴³⁷

As pointed out below, Billson's initial intention was that the SBFE Ombudsman have jurisdiction for dispute resolution under the FGCC but the office was not set up in time for this to come to fruition. Whether or not the Ombudsman could play such a role may be a question revisited at some stage in

⁴³³ 'AFGC establishes SME Forum', *What's new in food technology and manufacturing*, 24 February 2012.

⁴³⁴ <http://www.foodprocessing.com.au/content/training-education/news/afgc-establishes-sme-forum-1111858545>

⁴³⁵ <http://www.afgc.org.au/our-expertise/afgc-supported-forums/>

⁴³⁶ Australian Chamber of Commerce and Industry website; home page and 'About the Australian Chamber', <https://www.acci.asn.au/program/small-business-too-big-ignore>

⁴³⁷ Ross Peake, 'ACT's controversial former chief minister Kate Carnell has returned to the main game selling a forceful message', *The Canberra Times*, 15 March 2014.

⁴³⁸ James Massola, 'Kate Carnell quits business lobby to become first small business ombudsman', *SMH*, 1 February 2016.

the future. In the meantime, however, the Labor Party would like to see the capacity of the office extended, proposing that an additional \$1 million in funding be made available over two years so that the Ombudsman can help small businesses assess the likelihood of success before engaging a lawyer to commence legal action for anti-competitive behaviour.⁴³⁸

The Harper Review appeared to echo these views in considering ways to increase access to justice for small business. The panel did suggest that the ACCC could play a more active role in connecting small businesses to ADR schemes and noted the role of the extension of unfair contract terms for small businesses in this regard;⁴³⁹ however it also recognised that this would not always be the best use of ACCC resources. The Panel noted the newly created SBFEE Ombudsman position, along with the role to be played by existing ombudsman offices, small business commissioners and small business offices,⁴⁴⁰ before endorsing several recommendations made in the PC's Access to Justice Arrangements report, including:

*...that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code.*⁴⁴¹

The new CEO of the AFGC had a very different background from that of Billson or Carnell. Gary Dawson was a journalist, having worked in print, radio and television before completing a Bachelor of Economics and moving into strategy and communications roles, including that of a senior advisor to former Prime Minister John Howard and as an advisor to his AFGC predecessor when Carnell was still the ACT Chief Minister.⁴⁴² Dawson sported a somewhat different style to Carnell. As one industry observer noted, he 'is an effective advocate for the AFGC but in a quieter way [than Carnell]'.⁴⁴³

The most significant initiative – and as he says himself 'far and away the hottest issue'⁴⁴⁴ – during Dawson's time with the AFGC was the development of the FGCC. On his first day in the job Dawson found himself not in his office but at Woolworths, meeting with senior executives to discuss the issues that had arisen out of the development of the NFP. In Dawson's words:

... the relevant ministers ..., Joe Ludwig, the Agriculture Minister, and David Bradbury who was the Assistant Treasurer with responsibility of competition law, convened a stakeholder forum in Sydney that involved us and the retailers and farmers and various produce groups and they made it very clear at that meeting 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 Consumer Act, they were simply not interested in taking further amendments forward and that they wanted the players – the

⁴³⁸ Broede Carmody, 'Labor plans to make it easier for small business to sue big companies', *Smart Company*, 15 March 2016.

⁴³⁹ Harper Review 2015, recommendation 53 – small business access to remedies, p. 85.

⁴⁴⁰ Harper Review 2015, p. 84.

⁴⁴¹ Harper Review 2015, recommendation 53, p. 85.

⁴⁴² AFGC website, <http://www.afgc.org.au/about-afgc/key-contacts/mr-gary-dawson-chief-executive/>.

⁴⁴³ Transcript of interview, Robert Hadler, p. 19.

⁴⁴⁴ Transcript of interview, Gary Dawson, p. 29.

*stakeholders, the market players – to see what they could do to address perceived problems.*⁴⁴⁵

*..the AFGC certainly put proposals, that was under my predecessor, for a mandatory code similar to what's been done in the UK with its own statutory watchdog, code ombudsman or code of UK ... so that had been put forward as a proposal. I come into this role, the then government made it clear they weren't willing to amend the Act to do that and so, I suppose, from my point of view and my board's point of view it was a matter of, well, what can we usefully do that will make it – that will improve the environment for our members and that's where we decided to sit down with Coles and Woolworths and the NFF and that was the initial discussion that – around what might be possible.*⁴⁴⁶

Dawson soon realised that 'anecdotes will get you so far but eventually you need evidence and data' and so engaged accounting giant, KPMG to undertake a detailed investigation into what was actually happening in the market.⁴⁴⁷ In releasing the resultant Competitiveness and Sustainable Growth Report covering 2010-13, Dawson said that the report:

*... demonstrates how tough the market conditions have become for food and grocery suppliers, squeezed between the unstoppable force of dominant retailers and the immovable object of high labour, utility and regulatory costs.*⁴⁴⁸

Dawson believed strongly in the potential of an industry code to level the playing field between retailers and suppliers.⁴⁴⁹ Under his leadership some have argued it was in fact the AFGC that 'led the charge' for the first draft of what would become the FGCC.⁴⁵⁰ Dawson was later to characterise the FGCC as, 'an industry led solution to put some rules of engagement in place and remove some of the bad behaviour we've seen in the past,' going on to say, 'it will improve the trading environment, give suppliers a fair go.'⁴⁵¹

In early 2017 Dawson announced his decision to step down as CEO of the AFGC. With the first review of the FGCC slated for early 2018, an element in his decision to leave may well have been that at this critical juncture in the code experiment, it is important that the AFGC and its members be represented by a CEO unencumbered by the style and approach taken in the previous negotiations.⁴⁵² He would leave in March,⁴⁵³ and regardless of the outcome of the review or any assessment that may be made of the FGCC in the longer term, it would be fair to say that the Code is an important and, as far as the AFGC is concerned, a positive legacy of his leadership.

⁴⁴⁵ Transcript of interview, Gary Dawson, p. 27-28.

⁴⁴⁶ Transcript of interview, Gary Dawson, p. 29.

⁴⁴⁷ Transcript of interview, Gary Dawson, pp. 31-32.

⁴⁴⁸ 'Financial squeeze getting tougher for food and grocery suppliers', AFGC media release, June 2014.

⁴⁴⁹ 'Financial squeeze getting tougher for food and grocery suppliers', AFGC media release, June 2014.

⁴⁵⁰ Director of a consultancy that advises suppliers, p. 17.

⁴⁵¹ Sarina Locke, 'Farmers and food suppliers welcome more power under recommended changes to competition policy', *ABC Rural*, 1 April 2015.

⁴⁵² Transcript of interview, Gary Dawson 2, p. 22.

⁴⁵³ 'AFGC CEO resigns', *Retail World*, 3 February 2017.