

2. About this report

I. Research aim, questions and time frame

The broad aim of this report is to set out the key findings from two years of research into the FGCC, its background and operation to date, and the analysis on which those findings are based.

The approach to the research has been framed with a view to addressing the following questions:

1. What were the problems to which the FGCC was responding and why and how was the FGCC seen as responsive to or likely to address them?
2. To what extent has the FGCC been effective to date or is it likely to be effective in the future in addressing such problems?
3. What are the insights and lessons from the FGCC experience for regulation of the grocery sector in relation to competition and fair trading, if not regulation of the grocery sector and potentially business more generally?

This report is largely concerned with addressing the first two of these questions.

Its analysis ostensibly commences on 22 January 2008, when the then Assistant Treasurer directed the ACCC to conduct an inquiry into the price of groceries (the ACCC Grocery Inquiry).¹ However, in exploring important context relevant to impetuses for the FGCC's introduction, the report also canvasses earlier developments, including the impact of deregulation on the grocery sector brought about in part by the National Competition Policy (NCP), introduced in the 1990s under the Hawke-Keating Labor Governments as part of a package of microeconomic reforms.

Further, insofar as relevant, the report draws on public inquiries and industry reports that predate the ACCC Grocery Inquiry. The analysis also takes into consideration precursors to the FGCC, including the now defunct voluntary Retail Grocery Industry Code of Conduct in 2003 (renamed the Produce and Grocery Industry Code (the PGCC) in 2005), and the mandatory Horticulture Code of Conduct (HCC), prescribed under the *Competition and Consumer Act 2010* (Cth) (CCA) in late 2006.

The analysis relating to the FGCC's operation is current as at June 2017.

II. Research method

The research underpinning the report has involved review and analysis of the extensive documentary record bearing on the subject of supermarket-supplier relations in Australia, predominantly from 2008 onwards, including official policy, regulatory and legal documents such as draft and final reports from public inquiries and related submissions; industry/market and consumer research reports and court

¹ ACCC (2008) *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (ACCC 2008 Grocery Inquiry).

judgments. The report also draws on media releases, speeches, press articles and other sources of commentary relevant to its subject-matter.

The report is informed further by 71 stakeholder interviews conducted over approximately eighteen months between early 2016 and mid-2017. These interviews assisted substantially in supplementing, interpreting and testing the documentary record. They enabled the researchers to explore how a wide range of actors perceive the regulatory goals and processes and hear their views directly on issues relating to competition and fair trading in the grocery sector, including their perspectives on the relative effectiveness of existing and proposed regulatory instruments.

Interviewees were selected according to their knowledge and experience in or of the grocery sector and/or regulation in this space, with the aim of obtaining a diverse range of perspectives from a broad cross-section of the industry, government and civic society. Interviewees included representatives from:

- the MSCs and other grocery retailers;
- individual suppliers and advisers/consultants to suppliers;
- industry associations for retailers and suppliers;
- farmers' federations and fruit and vegetable growers associations;
- business lobby groups;
- consumer groups;
- social researchers;
- journalists;
- the ACCC;
- the federal Treasury;
- parliamentarians; and
- federal, State and local government agencies.

The interviews were structured in accordance with a series of open-ended questions, of which interviewees generally had notice in advance. Based on a general template, each questionnaire was tailored to the individual interviewee. Preference was given to face to face interviews; however where not practical interviews were conducted by phone. The interviews ranged in length from one to two hours and where possible were conducted by two and sometimes more members of the research team.

In compliance with University ethics safeguards, interviewees were guaranteed anonymity and confidentiality, undertakings as to which were set out in a Plain Language Statement provided to interviewees. Interviewees were required to sign a consent form, consenting to the interview and its recording, as well as any individual, mutually agreed naming and quotation arrangements, before the interview commenced.

The professional service used to transcribe the interview recordings was under contractual obligations of confidence and steps have been to ensure secure custody of the interview data. The audio recordings, transcripts and coded data are kept in locked facilities on University premises and can only be accessed on computer by the project team. The interview material will be kept for at least 5 years, after which it will be disposed of using a University approved confidential disposal service.

A largely anonymised list of interviewees is **Appendix A** to this report and the template questionnaire used in the interviews is **Appendix B**. Given the number and range of stakeholders, the interviews do not purport to be representative of all possible views on the issues that are the subject of this report.

The researchers are indebted to the interviewees for the generosity of their time and candour of their views, including on subjects that in some contexts are commercially sensitive or controversial for various reasons. The views of respondents and direct quotes from interviews populate this report, providing at times unique insight into the opinions, issues and concerns that permeate the grocery sector. Attribution for these views is in accordance with the special naming arrangements agreed between the researchers and each interviewee. This varies across interviews. Some have given full consent to be named, others are identified according to the institution they represent, while others still are afforded full anonymity by way of a generic identifier.

III. UK comparisons

The research also involved analysis of the experience in the United Kingdom (UK). While similar issues and debates relating to supermarkets exist around the world, the UK is particularly relevant in the Australian context.

A Supermarket Code of Practice (SCOP) was introduced in the UK in March 2002 following an inquiry by the Competition Commission (CC),² upon referral from the then competition authority, the Office of Fair Trading (OFT). The SCOP was voluntary insofar as it applied only to those retailers that gave undertakings to the OFT, and was overseen by that Office. Its purpose, as with the FGCC, was to redress the power imbalance between big supermarkets and their suppliers by placing relations between these parties on a more transparent and certain footing.

In 2003 OFT undertook a review of the Code and in 2004 reported that it had anecdotal evidence of breaches but no evidence that relations between retailers and suppliers had changed significantly since the Code's inception.³ The OFT promised to undertake further follow up work and in 2005 completed a 'compliance audit' which in essence concluded that by and large supermarkets were compliant even if the Code was not being used to settle disputes (predominantly, it appeared, because a fear by suppliers of retribution in response to complaints).⁴ Despite ongoing pressure to take further action, in late 2005 the OFT concluded that there were no grounds to make a referral back to the CC for a further market study⁵. However, in response to legal action by various industry

² CC, *Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom*, October 2000.

³ The Supermarket Code of Practice, Review OFT697, February 2004.

⁴ OFT, *Supermarkets: The Code of Practice and Other Competition Issues*, March 2005.

⁵ 'OFT rejects supermarket suppliers inquiry', *Financial Times*, 4 August 2005.

associations to compel the reference, the OFT announced it would review its decision and by mid-2006 it had made the referral, announcing that the CC would undertake a full investigation into the sector.

In a substantial report published in 2008 (CC Report) the CC recommended, amongst other things, that there be a new strengthened and extended Code and an independent ombudsman to oversee and enforce it.⁶ The Groceries Supply Code of Practice (GSCOP) came into effect on 4 February 2010 by way of an administrative order made by the CC, replacing the SCOP. Unlike the FGCC, the GSCOP is mandatory in its application. However, it only covers the eight major supermarket chains operating in the UK and all other retailers with groceries turnover in excess of £1 billion per year. Like the FGCC, it relates only to direct supply relationships. It includes provisions about fair dealing (including an obligation on retailers to deal with suppliers in good faith), prohibitions on retrospective changes to terms of supply, procedures for customer complaints and de-listing, the burden of proof on retailers for 'requests', and compliance and enforcement, including dispute resolution and binding arbitration procedures and the requirement that retailers have in-house compliance officers. The GSCOP also imposes obligations on retailers to appoint a Code Compliance Officer (CCO), maintain written records of all agreements with suppliers, and supply information to the Competition and Markets Authority (CMA, formerly the OFT) as required.

In June 2013, the office of the Groceries Code Adjudicator (GCA) was established by the *Groceries Code Adjudicator Act 2013* (UK), to enforce compliance with the GSCOP. The GCA's statutory functions are to: investigate confidential complaints from any source about how supermarkets treat their suppliers; make recommendations to retailers if a complaint is upheld; require retailers to publish details of a breach of the code; in the most serious cases, impose a fine on the retailer; and arbitrate disputes between retailers and suppliers. Christine Tacon CBE became the first Adjudicator and was appointed for a four year term. The Adjudicator is wholly funded by a levy on the retailers which for 2016/17 was £2 million. The performance of the GCA, and the scope of her remit, were the subject of a statutory review in 2016. The results released in 2017 resoundingly endorsed Tacon's performance and the effectiveness of the GCA as a regulatory approach to improving supply chain relations.⁷ As at the date of writing, there is an ongoing review of whether the GCA's remit should be extended to cover primary producers.

The design and experience in implementation of the UK regime was influential in Australian developments. The research undertaken to facilitate comparisons with and insights for the Australian experience involved review of relevant official reports and submissions and interviews with UK policymakers, regulators, industry association representatives, retailers and leading commentators. The approach taken to these interviews was the same as described above in relation to the Australian interviews and the UK interviewees are included in Appendix A.

⁶ CC, *The supply of groceries in the UK market investigation*, 30 April 2008 (CC 2008 Report).

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

IV. Structure of this report

Following this introduction, the report is structured as follows:

Part 3, 'Warning signs', canvasses key regulatory and industry developments, as well as broader shifts in the macro-economic environment, from 2008 onwards and analyses how such developments served as signposts to the likelihood that action would be taken to regulate supermarket-supplier relations.

Part 4, 'Immediate catalysts', identifies and explores how critical events in the dairy sector created the political conditions and momentum for regulatory action. It analyses how and why these events had salience amongst the general community and in turn how this, combined with political pressures, placed sufficient pressure on the MSCs and in turn on government to act.

Part 5, 'Significant actors', identifies and examines how key actors, both individuals and organisations, in the private and public sectors influenced developments. Without purporting to be exhaustive, and for reasons that should be evident from the analysis, the report singles 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, and the AFGC and its two Chief Executive Officers (CEOs) within the relevant time frame, Kate Carnell and Gary Dawson.

Part 6, 'At the negotiating table', explains the process of and critical voices in, as well as those absent from or at the margins of, the negotiations that led to the enactment of the FGCC. It highlights the issues that occupied most attention and explains how they were resolved.

Part 7, 'In practice to date', charts the experience with the FGCC in practice since its introduction up until the time of writing and starts to identify aspects of the Code that are seen as working as well as areas in which the Code is proving less effective and the reasons for this.

Part 8, 'Up for review and looking ahead', reflects on the analysis and findings in the report with a view to providing insights that may be valuable in the context of the review of the FGCC to be held in 2018.