

The Senate

Economics
Legislation Committee

Competition and Consumer Act 2010—
Competition and Consumer (Industry
Codes—Food and Grocery) Regulation 2015

May 2015

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ISBN 978-1-76010-211-1

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Printed by the Senate Printing Unit, Parliament House, Canberra.

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Chapter 1

Introduction and overview of the regulation

1.1 On 5 March 2015, the Economics Legislation Committee resolved, under Standing Order 25(2)(a), to inquire into and report by 31 March 2015 on the *Competition and Consumer Act 2010—Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the Regulation). On 26 March 2015, the committee resolved to extend the reporting date to 14 May 2015.

1.2 Section 172 of the *Competition and Consumer Act 2010* (the Act) allows for the making of regulations under the Act, provided they are not inconsistent with the Act. Section 51AE of the Act provides that regulations may prescribe an industry code, which can be either mandatory or voluntary. For a voluntary industry code, the regulations must specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be bound.

1.3 The Regulation provides for the *Food and Grocery Code* (the Code), a voluntary industry code for the food and grocery sector.

Conduct of the inquiry

1.4 The committee advertised the inquiry on its website and wrote directly to a range of individuals and organisations inviting written submissions. Submissions closed on 13 March 2015. The committee received 13 submissions, which are listed at Appendix 1.

1.5 The committee held a public hearing in Canberra on 21 April 2015. The names of witnesses who appeared at the hearing are listed at Appendix 2.

1.6 The committee thanks all who contributed to the inquiry.

Overview of the Grocery Code

1.7 According to the Explanatory Statement, the Code is intended to:

...improve standards of business conduct in the food and grocery sector. It is in response to concerns raised in the public debate in recent years about the conduct of retailers (in particular, supermarkets) towards their suppliers, and has arisen out of an industry response to these issues. In this sense, the Code aims to regulate commercial relations between retailers and wholesalers, on the one hand, and suppliers, on the other hand, to the extent that they are not regulated by other codes.¹

1 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*, p. 2.

1.8 The purpose of the Code, as set out in clause 2, is to:

- help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain;
- ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties;
- provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and
- promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.²

1.9 The Code includes provisions setting out certain standards of conduct of the relationship between retailers and wholesalers and suppliers, and seeks to address the potential imbalance in these relationships with respect to the allocation of risk. As the Explanatory Statement outlines, the Code:

...recognises suppliers' need for certainty to plan appropriately for their business, invest, innovate, and expand capacity or develop new product lines. Some of the requirements have limited exceptions, and place the onus on the retailer or wholesaler of proving that an exception applies in the circumstances.³

1.10 Protections for suppliers under the Code include that grocery and supply agreements must be in writing and include certain information. This information includes requirements for the delivery of groceries and when they may be rejected, payment terms, the term of the agreement if it is intended to operate for a limited time, quantity and quality requirements, and when the agreement can be terminated. This is intended to reduce the uncertainty and risk of disputes deriving from oral contracts. However, the Code does not stipulate minimum terms of these agreements—instead, parties are left to negotiate these matters.

1.11 Under the Code, retailers and wholesalers are not allowed to unilaterally or retrospectively vary a grocery supply agreement, unless an exception applies. In most cases, these exceptions need to be provided for in the written agreement, and are subject to a reasonableness test. The retailer or wholesaler must notify the supplier in writing of the variation and the basis for it. Suppliers are able to initiate a dispute resolution process on the basis of detriment resulting from a unilateral or retrospective variation. The retailer or wholesaler bears the onus of proving the exception applies in circumstances where the supplier claims that prohibited conduct has been engaged in.

2 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 10.

3 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 2.

1.12 Part 3 of the Code includes several provisions governing a retailer's conduct toward suppliers.⁴ In general terms, unless an exception applies a retailer must pay a supplier in accordance with the terms of the grocery supply agreement. Retailers are prohibited from requiring certain payments from suppliers, such as payments for shrinkage (that is, a loss of groceries that occurs after the retailer has taken possession), wastage that occurs once groceries have been delivered or better positioning of groceries.⁵ As the Explanatory Statement notes, Part 3 of the Grocery Code also regulates:

...other aspects of the relationship between a retailer and a supplier, such as delisting products, funding promotions, fresh produce standards and quality specifications, changes to supply chain procedures, business disruption, confidential information, intellectual property rights and allocation of shelf space.⁶

1.13 With regard to the abovementioned exceptions to otherwise prohibited conduct, Treasury explained that the Code seeks to find 'a balance between prohibiting conduct and providing a level of commercial flexibility'.⁷

1.14 As indicated above, the Code includes dispute resolution processes, both internal and external, for a supplier to raise its concerns about a retailer or wholesaler. It is open to a supplier to choose the type of dispute resolution that best meets their needs. A supplier may make a complaint to a code compliance manager—who is appointed by the retailer or wholesaler under the Code, but is to be independent of the retailer or wholesaler's buying team—and may escalate its concerns to senior management if it is not satisfied with the outcome. A supplier can also request direct elevation of their complaint to senior management. A supplier is also able to take its complaint directly to mediation or arbitration or to the Australian Competition and Consumer Commission (ACCC). However, if a complaint has already been raised with the code compliance manager or elevated to senior management, the supplier may not seek mediation or arbitration until such procedures have been completed.

1.15 The dispute resolution process requires that a retailer or wholesaler participate in mediation or arbitration in good faith. Some limited exceptions to this requirement apply where the mediator or arbitrator 'forms the view that the complaint is vexatious,

4 Part 3 of the Grocery Code does not apply to wholesalers.

5 For more detail, see Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 16–18.

6 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 8, pp. 18–21.

7 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

trivial, misconceived or lacking in substance, or the supplier is not acting in good faith'.⁸

1.16 The Code provides that in the instance a supplier seeks to pursue mediation or arbitration processes, the rules of the Institute of Arbitrators and Mediators Australia (IAMA) will apply to those processes. Subclause 39(2) provides that if the parties do not agree on the appointment of a mediator or arbitrator within 10 business days from the referral of a matter by a supplier, the mediator or arbitrator must be appointed by IAMA according to its rules. The Code further provides that the costs of mediation or arbitration will be determined under the same rules.⁹

1.17 As a voluntary instrument, the Code is binding on corporations that elect to 'opt-in', through notice given to the ACCC. A corporation may at any time withdraw their agreement by written notice, and thereafter is not bound by the Code. Withdrawal of such agreement does not remove any obligation under the Code that relates to conduct that occurred when the corporation was still a party to the Code.

1.18 Transitional arrangements apply for participating retailers and wholesalers that are party to a pre-existing supply agreement.¹⁰

1.19 The Code can be enforced by private action or, since a breach of the Code is a breach of the Act, by the ACCC. If court action is taken by the ACCC or an aggrieved party and the court finds the Code has been breached, the court can order a range of remedies, including injunctions and damages.¹¹

1.20 Section 5 of the Regulation provides that the Minister administering section 51AE of the Act must cause a review of the operation of the Code to be undertaken within three years of its commencement. The review must assess the impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers. This assessment must consider certain matters, including whether the purposes of the Code are being met, levels of compliance with the Code, whether it should be mandatory or voluntary, and whether it should include civil penalty provisions.

8 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 8–9.

9 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 26.

10 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, pp. 3, 12–13.

11 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 4.

Background to the Grocery Code

1.21 The industry has driven development of the Code. On 18 November 2013, Coles, Woolworths and the Australian Food and Grocery Council (AFGC; the representative body for processed food, drink and grocery manufacturers and suppliers in Australia), collectively known as the Retailer and Supplier Roundtable (RSR), provided a draft code to the government. The proposal brought forward by the RSR was for a voluntary 'opt-in' code prescribed under the Act. Parties to the Grocery Code would be legally bound by it, and as it would sit under the Act, the ACCC and private parties could take enforcement action in response to breaches.

1.22 The Treasury explained to the committee that industry codes such as the Grocery Code are:

...co-regulatory measures that are designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. This recognises that industry participants are often best placed to tailor codes to reflect the circumstances of their industry. In this case, they have come together to ask the government to prescribe a voluntary code as the most effective way to address the problems that have been identified in recent years in that sector—namely, about the conduct of retailers towards suppliers.¹²

1.23 The industry-led draft code was subsequently revised in consultation with the government to comply with the Act. In August 2014, the Treasury released a discussion paper and a draft code for public consultation, with the consultation process reflected in the Regulation Impact Statement (RIS) released in November 2014.¹³

1.24 As the RIS notes, the government has indicated that it is satisfied the Code 'will contribute towards achieving fair and efficient commercial dealing in the grocery sector, while not imposing an excessive regulatory burden'.¹⁴

12 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

13 Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 3.

14 Australian Government, Final Assessment Regulation Impact Statement, *Improving commercial relationships in the food and grocery sector* (November 2014), Attachment C to Explanatory Statement, *Competition and Consumer Act 2010 – Competition and Consumer (Industry Codes–Food and Grocery) Regulation 2015*, p. 1.

Chapter 2

Views on the Grocery Code

2.1 While submitters were generally supportive of the Grocery Code, at least as a 'first step' to improving supplier relations with wholesalers and retailers and otherwise protecting the interests of suppliers, a number of concerns were raised regarding the scope and application of the Code. These included:

- the voluntary, opt-in nature of the Code, with some witnesses arguing it should be mandatory, particularly for large retailers;
- the extent of exceptions allowed regarding conduct otherwise prohibited under the Code and the risks this created for suppliers—specifically, some witnesses argued that the Code included excessive exceptions to the prohibitions on unilateral and retrospective variations to grocery supply agreements;
- the adequacy and equity of the Code's dispute resolution processes, and whether there was a need to appoint an ombudsman to oversee the Code;
- the adequacy of penalties that can be applied in relation to breaches of the Code; and
- whether the Code should be extended to cover alcoholic beverages.

General support for the Grocery Code

2.2 Asked how the Grocery Code advanced the interests of suppliers, Treasury responded:

The code provides buyers with a number of rights. It imposes new regulations on standards of business conduct. It limits the actions of retailers and wholesalers in their dealings with suppliers in a variety of ways. It ensures transparency and certainty in terms of providing written supply agreements. Also in terms of transparency it requires retailers and wholesalers to keep certain documents that the ACCC can then audit. It provides an equitable and fair dispute resolution mechanism, including the right for suppliers to seek immediate elevation of their concerns within senior management of retailers and wholesalers, or to immediately seek mediation or binding arbitration. And it introduces a new global obligation for retailers and wholesalers to act in good faith in their dealings with suppliers.¹

1 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 26.

2.3 The RSR wrote in support of the Code. It argued that the Grocery Code 'should not be subject to further amendments that would alter either its spirit or practical outcomes'. It further suggested that amendments would:

...necessarily involve further delays and more consideration of issues that have already been exhaustively considered, discussed and negotiated. In any event, the RSR notes that a thoroughgoing review of the Code's operations and effectiveness has already been scheduled and that this review would be the appropriate forum to canvass any further changes in the light of industry's practical experience of the Code in operation.²

2.4 The New Zealand Food & Grocery Council welcomed the Grocery Code as a 'further and important step towards addressing certain aspects of supermarket conduct and the supplier-wholesaler/retailer relationship'.³

2.5 The Office of the Australian Small Business Commissioner (OASBC) indicated it was 'strongly supportive' of the Grocery Code, as a means of helping retailers, wholesalers and suppliers improve contracting practices and business relationships. At the same time, the OASBC suggested (as discussed below) two areas that might be further clarified in relation to the Grocery Code: 'namely, ensuring ready access to low cost dispute resolution, and the coverage of the Code'.⁴

Should the Grocery Code be mandatory?

2.6 The National Farmers Federation (NFF) supported the Grocery Code, which it suggested was 'not perfect' but nonetheless addressed 'several key imbalances with regard to major retailer power over suppliers'. However, the NFF underlined its preference for 'a mandatory, binding code that encompasses all retailers'. The NFF noted that the Code includes a requirement for a review of its operation and effectiveness within three years. Should this review reveal a lack of support from the retail sector, the NFF argued, it 'will be demanding that a mandatory Code be put in place'.⁵

2.7 The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (the 'SME Committee') argued that the Grocery Code should be mandatory for retailers with a turnover figure of grocery sales above \$500 million.⁶ The SME Committee argued that a voluntary code:

...would not achieve the objective of improving retailer-supplier relationships given its discretionary application to large retailers, as well as

2 Retail & Supplier Roundtable, *Submission 5*, p. 1.

3 New Zealand Food & Grocery Council, *Submission 1*, p. 1.

4 Office of the Australian Small Business Commissioner, *Submission 2*, p. 1.

5 National Farmers' Federation, *Submission 11*, p. 3.

6 This figure, it notes, would ensure Woolworths, Coles, Metcash, ALDI and Costco were covered by the Grocery Code. Law Council of Australia, *Submission 3*, pp. 2–3.

the exceptions which would undermine the protections a Code is looking to otherwise afford to suppliers. Similarly the SME Committee considers that a voluntary Code may fall short in achieving the objective of improving standards of business in the food and grocery sector due to its discretionary application to large retailers, and the exceptions it allows for.⁷

2.8 The SME Committee also highlighted the failure of the Produce and Grocery Industry Code of Conduct (PGICC), which was 'also a non-prescribed voluntary, industry run code' established in 2000 (originally as the Retail Grocery Industry Code of Conduct). The PGICC is administered and monitored by the Produce and Grocery Industry Code Administration Committee (PGICAC), whose membership had at one point included the NFF, AFGC, Australian Chamber of Fruit and Vegetable Industries Limited, National Association of Retail Grocers of Australia, Australian Retailers Association, Australian Dairy Farmers (ADF), Coles Group and Woolworths Limited. However, ADF, National Farmers Federation, AFGC and Australian Dairy Farmers resigned from the PGICAC in 2009, and it is unclear whether the remaining members support the PGICC or if the PGICC is in fact still functioning.⁸ The SME Committee suggested that the Grocery Code:

...is likely to go the same way as the PGICC if it is implemented as a voluntary opt in Code. A mandatory Code with legislative backing is required for the grocery industry.⁹

2.9 The Mareeba District Fruit and Vegetable Growers Association Inc. (MDFVGA) also referred to past experience in questioning the value of a voluntary code. It argued:

...while this is an important first step, we maintain that a mandatory code is the most efficient way to improve the balance of power that occurs between supplier and purchaser. This is due to past experiences with and longstanding failures of voluntary produce and grocery codes.¹⁰

2.10 ADF welcomed the Grocery Code, but noted that it 'long advocated for a Mandatory Code of Conduct with an Ombudsman, to ensure compliance through significant financial penalties if necessary'.¹¹ In a submission to the government's Competition Policy Review, which ADF attached to its submission, ADF further argued that gaps existed in the Code, 'including but not limited to the need for an Ombudsman, penalties and making the Code mandatory'. It argued that the Code should 'apply to retailers and it must be mandatory to ensure complete coverage across

7 Law Council of Australia, *Submission 3*, p. 1.

8 Law Council of Australia, *Submission 3*, p. 3.

9 Law Council of Australia, *Submission 3*, p. 3.

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

11 Australian Dairy Farmers, *Submission 4*, p. 1.

the industry and it must remove the ability of retailers to opt out of the Code'.¹² The case for an ombudsman to monitor the code is addressed further below.

2.11 Similarly, the Queensland Dairyfarmers' Organisation (QDFO) also told the committee it was 'pleased' the government had pursued a grocery code of conduct, while suggesting that 'being voluntary, it is not strong enough'.¹³

2.12 Similarly, NSW Farmers submitted that the Code was a start toward 'developing the rules required to ensure that the market power exercised by the major supermarket chains does not impede the ability of the market to return value to the farm gate'. However, it also argued that a mandatory grocery code with a broader scope 'would be better suited to manage the market power exercised by supermarkets'.¹⁴

2.13 The NSW Small Business Commissioner (OSBC) wrote that the Code was a 'step in the right direction', but that its effectiveness would be limited by its voluntary, opt-in nature, and (as discussed further below) the availability of exceptions in the code to conduct that is otherwise prohibited. A mandatory code, it argued, would 'provide greater certainty and consistency in the relationships between suppliers and retailers or wholesalers in the industry'.¹⁵

2.14 Mr Robert Gausson, who was the Produce and Grocery Industry Ombudsman from 2001 to 2006, also submitted that the Code should be mandatory. He suggested that the 'Minister administering section 51AE of the *Competition and Consumer Act 2010* should be empowered to proclaim a named retailer as subject to the Code in which case the provisions of the Code shall bind the retailer'.¹⁶

2.15 The Treasury told the committee that in some respects a voluntary code provided greater flexibility than a mandatory code. It explained:

In particular, this code provides that retailers must offer to vary agreements to suppliers to bring them into line with the code and allow suppliers to seek binding arbitration for disputes by an independent third party. Were the code to be mandatory rather than voluntary, such provisions may be considered to be an acquisition of property, which the Constitution would then require to be done on 'just terms'.¹⁷

12 Australian Dairy Farmers, *Submission 4*, p.11.

13 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 1.

14 NSW Farmers, *Submission 7*, pp. 6–8.

15 Office of the NSW Small Business Commissioner, *Submission 8*, pp. 1–2.

16 Expert Today Pty Ltd, *Submission 10*, p. 5.

17 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

2.16 The Treasury further noted that the Code provides for a review after three years, 'to consider its effectiveness in practice, including whether the code should be voluntary or mandatory'.¹⁸

Exceptions to prohibition on retrospective and unilateral variations

2.17 The SME Committee rejected the idea that exceptions in relation to the prohibition on retrospective and unilateral variations to grocery supply agreements were needed in order to preserve commercial flexibility. It argued there should be no exceptions, and the retailer 'should be expected to rely on the usual force majeure clauses in their contracts for circumstances outside of their control'. The SME Committee continued that, as currently drafted, the Code:

...creates a range of rights for suppliers which can be easily modified, altered or removed by the retailer.

In the SME Committee's view, the current range of qualifications and exemptions included in the opt-in Code undermine the ability of the Code to improve retailer-supplier relationships and provide the protections the Code would otherwise afford suppliers. As a result, the Code does not properly address the problematic issues that arise during the relationship between retailers and suppliers.¹⁹

2.18 ADF suggested that one of the key failings of the Code was the many exceptions, 'which imply a greater emphasis on commercial flexibility than ensuring fair trading'.²⁰

2.19 NSW Farmers noted that farmers make significant capital investments on the basis of contractual arrangements with customers, and any form of unilateral or retrospective variation 'is likely to have a direct and detrimental impact on farm gate prices'. However, it also welcomed the inclusion in the Code of provisions which:

...tighten the circumstances under which such variation can be undertaken; specifically the new requirement that the variation is reasonable in the circumstances and that detriment to the supplier is to be taken into account when considering the reasonableness of the variation.²¹

2.20 While welcoming the Code as a 'step in the right direction', the OSBC suggested that the availability of exceptions in the code to otherwise prohibited conduct:

...may undermine the ability of the Code to improve retailer-supplier relations. The superior bargaining power of the large retailers, which often

18 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

19 Law Council of Australia, *Submission 3*, p. 5.

20 Australian Dairy Farmers, *Submission 4*, attachment 1, p. 12.

21 NSW Farmers, *Submission 7*, p. 8.

leads to contracts being offered on a "take it or leave it" basis, may mean that in practice there could be little room for true negotiation about the exceptions to take place, and that the exceptions become the norm.²²

2.21 Similarly, the MDFVGA informed the committee that the:

...general consensus about this code among growers who supply the major retailers is that, while the provisions may largely seem on the surface to be sound, there are a number of cavities and opportunities to alter the negotiations, returning the balance of power back to the supermarkets.²³

Dispute resolution processes

2.22 Mr Gaussen argued that the Code failed to achieve its stated purpose of providing 'an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers'.²⁴ Specifically, he argued that the Code placed the onus for making and establishing a complaint on suppliers. He notes:

Each retailer is required to nominate a code compliance manager who has access to resources, documentation and relevant staff in investigating a complaint. The supplier has no right to require resources and documentation, applicable to the dispute, from the retailer.²⁵

2.23 Mr Gaussen further argued that the Code is:

...unreasonably harsh on suppliers in that it compels a supplier to provide sufficient particulars to enable the retailer to investigate, consider and respond to a complaint. In other words the supplier must make and establish a case. Often the supplier will not have the necessary documents. In any case, there is no-one other than the retailer to decide whether sufficient information and documents are available. This is a recipe for further disputation. The supplier should have the capacity to compel the retailer to produce all relevant documents relating to a transaction so as the preparation of the complaint is facilitated. Additionally, the capacity of the dispute resolver to compel production of documents should be clearly stated.²⁶

2.24 Mr Gaussen highlighted the potential costs to suppliers of seeking dispute resolution under the Code. Mr Gaussen notes that during his period as ombudsman, dispute resolution services were fully funded by the Commonwealth:

22 Office of the NSW Small Business Commissioner, *Submission 8*, p. 2.

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

24 Expert Today Pty Ltd, *Submission 10*, p. 2.

25 Expert Today Pty Ltd, *Submission 10*, p. 2.

26 Expert Today Pty Ltd, *Submission 10*, p. 5.

Now it is to be funded by the parties at the discretion of the dispute resolver. The risk of very high costs, particularly in relation to arbitrations, being awarded against suppliers will be a major deterrent to making an application. There is nothing about travel costs or venue. Geographically the most common disputes I handled were between suppliers from the Northern Territory or North Queensland and retailers located in Sydney or Melbourne.²⁷

2.25 With regard to ensuring access to low cost dispute resolution, the OASBC noted concern that the Code requires that the IAMA appoint an arbitrator or mediator in the instance disputing parties are unable to agree upon one. This would carry a fee of \$330, which is 'likely to be considered an unreasonable impost on small business'. The OASBC suggests that to provide low cost alternative dispute resolution services, the Australian Small Business and Family Enterprise Ombudsman might assume responsibility for the resolution of disputes under the Code.²⁸

2.26 The MDFVGA suggested that while there was an option to go to mediation under the Code, suppliers would in practice be reluctant to initiate such proceedings given the potential costs involved and a lack of resources to make and establish a complaint.²⁹

2.27 The QDFO also argued that suppliers would be reluctant to initiate a complaint under the code out of fear of retribution by powerful retailers:

[I]f you have a situation where your business has a majority of its turnover going through a major corporate retailer, obviously you would be pretty nervous about making a complaint. So what we wanted to make sure was that there was provision within the code or the act that a party could go and try to sort an issue out without fear of retribution.³⁰

2.28 The fear of retribution, the QDFO argued, made the appointment of an ombudsman (as discussed further below) preferable to mediation and arbitration processes provided for under the Code.³¹

2.29 Mr Gaussen also explained to the committee that there was a 'great reluctance and fear' on the part of suppliers to bring forward complaints against retailers, given the 'unique nature of the commercial relationships they have'.³² He further explained

27 Expert Today Pty Ltd, *Submission 10*, p. 2.

28 Office of the Australian Small Business Commissioner, *Submission 2*, pp. 1–2.

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

30 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 9.

31 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 9.

32 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 11.

that in his time as ombudsman, he would often work with major retailers and wholesalers to resolve a dispute without identifying the complainant. Mr Gausson noted that in a mediation or arbitration process it would not be possible to maintain this confidentiality, with suppliers having to identify themselves in order to pursue a complaint.³³

2.30 The ACCC questioned the extent to which real anonymity could be protected in an ombudsman process. It told the committee that it was 'rare that you are able to get into the issues without understanding who the parties are'.³⁴ Moreover, in response to concerns about possible retribution against a supplier, the ACCC assured the committee that:

... if there is any suggestion that a party might be punished or impacted for having approached or assisted the ACCC, that is a serious offence under the Competition and Consumer Act, and we have instigated and pursued investigations where that has been alleged.³⁵

2.31 As noted in the previous chapter, the costs of mediators and arbitrators appointed to resolve disputes under the Code are determined according to the IAMA's rules. The Treasury confirmed that these rules basically state that the costs should be borne by the unsuccessful party to the dispute, although the Arbitral Tribunal may apportion costs between the parties if it determines it reasonable and appropriate to do so. The Treasury further confirmed that this might mean a supplier who had taken a complaint to mediation or arbitration and lost could be liable for all the costs.³⁶

Penalties and enforcement

2.32 NSW Farmers suggested the Code should include provision for regulatory tools that enable 'an appropriately graduated approach to enforcement' to encourage the 'desired behaviours from market participants'. In this regard, it expressed concern regarding the absence of civil penalty provisions for non-compliance with the Code. Such provisions, it noted, would enable the ACCC to utilise infringement notices for minor contraventions that might not otherwise be pursued through the courts, or to pursue pecuniary penalties through the courts.³⁷

2.33 The NFF also indicated that it would support a review that:

33 Mr Robert Gausson, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 11.

34 Mr Scott Gregson, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 22.

35 Mr Scott Gregson, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 19.

36 Ms Jenny Allen, Acting Principal Advisor, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 27.

37 NSW Farmers, *Submission 7*, pp. 9–13.

...looks at the need for additional measures such as including civil penalties and other improvements to ensure that the Code is meeting its objective of improving standards of business conduct in the food and grocery sector.³⁸

2.34 Mr Gaussen told the committee that:

...any code of conduct that has no adequate enforcement regime will not be a successful code of conduct. The words that appear in this code are good words. The content and intention of what is being described in this code are great, and they are needed and are long overdue. But there is no obligation on anyone to do anything, even if they sign up to it, because of the system under which there is no enforcement.³⁹

2.35 As noted in the previous chapter, since a breach of the Code constitutes a breach of Competition and Consumer Act, the Code can be enforced by the ACCC. However, according to Mr Gaussen (who, as noted below, argued for the appointment of an ombudsman to help enforce the Code), whereas the ACCC might pursue large and lengthy enforcement cases, it was not well resourced to resolve smaller disputes between suppliers and their customers in a low-cost or efficient way:

The average cost for the ACCC to investigate, inquire into and manage disputes is massive, so there is no way in the world that they can provide, through their systems and the laws under which they have to operate, an effective enforcement regime. They are not resourced to do that. An ombudsman service, with referral capacity to the ACCC, provides that filter and at a much reduced price—and quickly. The key to disputes is speed.⁴⁰

2.36 Mr Gaussen noted that he was a 'great supporter of the ACCC', but that he viewed its role as 'the High Court of the resolution system'. Extending the analogy, he argued that an ombudsman would provide the 'local courts and district courts' of the system. He further suggested that an ombudsman should have the ability to refer a matter to the ACCC, and vice versa, when it was appropriate to do so.⁴¹

2.37 However, the ACCC told the committee that under the Code it would be able to suggest to complainants that a matter might be better suited to dispute resolution rather than litigation:

In the event that a party were to come to the ACCC, as with other industry codes in place now typically we would consider the issue that has been put by the individual raising their concerns and if we felt it was a matter that was better suited to dispute resolution other than the Federal Court, we would provide that view to the complainant. We have suggested some times, depending on the nature of the issue on the table, that dispute resolution is a better way than a court based outcome. There are times, of

38 National Farmers' Federation, *Submission 11*, pp. 3–4.

39 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 10.

40 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 12.

41 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 17.

course, when a court based outcome is well and truly warranted and we would distinguish those.⁴²

2.38 The ACCC also suggested that the audit power provided for under the Code represented a significant addition to its power and ability to identify and respond to breaches of the Code. It further noted that it would be able to use these powers either in response to a complaint or proactively—that is, absent a complaint:⁴³

In a sector where there have been ongoing observations that suppliers are reticent to bring problems to the ACCC's attention for fear of retribution by stopping of a supply agreement or a holiday, however it is characterised, the audit power enables the ACCC to reach in and check the books of those who subject themselves to the discipline of the code. This allows the ACCC to get the information we believe would identify problem behaviour without individuals needing to identify themselves.⁴⁴

2.39 Expanding on this point, the ACCC informed the committee:

Typically, to date, in a number of industry codes, the audit code has had a reach that says the supplier has an obligation to provide documentation or to issue something and the authority allows us to see whether or not a disclosure document, for example, or an agreement has been provided to, say, a franchisee by a franchisor. This code goes beyond the mere provision of documents to reach documents that are maintained by retailers for a period of six years, typically, which go into a whole range of details, such as the operation of the retailer in their dealings with suppliers, that we can reach and acquire through the audit process and to test. That information provided by the documents and the records that are required to be kept by the retailers will allow us, we believe, to identify problematic behaviour that otherwise would not come to us through a complaint. That is a substantial enabler.⁴⁵

2.40 More broadly, the ACCC suggested the Code would make enforcement more straightforward and time-effective. Mr Scott Gregson, the ACCC's Executive General Manager of Consumer Enforcement, told the committee:

I was involved in the investigations that we have undertaken with respect to suppliers and retailers recently. They are long. They are difficult because of

42 Mr Nige Ridgway, Executive General Manager, Consumer, Small Business and Product Safety, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 18.

43 Mr Scott Gregson, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 20.

44 Mr Nige Ridgway, Executive General Manager, Consumer, Small Business and Product Safety, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 18.

45 Mr Nige Ridgway, Executive General Manager, Consumer, Small Business and Product Safety, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 20.

the broad nature of the provisions. These will be much sharper and give us real powers to deal with those issues.⁴⁶

The appointment of an Ombudsman

2.41 As noted above, ADF argued for appointing an ombudsman to help ensure compliance with the Code. It argued:

Considering the market power of the major retailers and the reluctance of suppliers to take action or give evidence against them, an important aspect of the Code will be the ability of industry organisations, federations or associations to make complaints on behalf of their members. Appointment of an Ombudsman will be instrumental in facilitating correct compliance with the Code and improving the balance in the commercial relationship between retailers and suppliers.⁴⁷

2.42 ADF further submitted that the appointment of an ombudsman would help ensure a strong focus on the Code, and encourage the speedy resolution of disputes rather than escalation.⁴⁸

2.43 ADF highlighted the United Kingdom's Groceries Supply Code of Practice (GSCP) and the appointment of a GSCP Ombudsman as a possible model for consideration in Australia. The GSCP came into force in February 2010, and applies to all retailers with a turnover of more than £1 billion in groceries in the UK.⁴⁹

2.44 Mr Gaussen, who as noted above was the Produce and Grocery Industry Ombudsman from 2001 to 2006, also recommended the appointment of an ombudsman service to redress the lack of supplier power relative to retailers. A Commonwealth-funded ombudsman, he argued, would have the expertise, industry knowledge, resources and independence necessary to be able to resolve disputes in a way that is equitable, low-cost and time effective. An ombudsman could also 'spend time promoting the Code, educating the parties and encouraging them to improve their conduct and business practices'.⁵⁰

2.45 Mr Gaussen explained how an ombudsman might assist in protecting suppliers under the Code:

As a prerequisite to go forward under this code, you have to be able to identify yourself and make a case. This makes it even more difficult to advance. With an ombudsman, complaints can be raised with an ombudsman, there can be discussions with the ombudsman and then the

46 Mr Scott Gregson, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 21 April 2015, p. 20.

47 Australian Dairy Farmers, *Submission 4*, attachment 1, p. 11.

48 Australian Dairy Farmers, *Submission 4*, attachment 1, p. 11.

49 Australian Dairy Farmers, *Submission 4*, attachment 1, p. 6.

50 Expert Today Pty Ltd, *Submission 10*, pp. 3–4.

ombudsman can go to the senior executive nominated by the retailer and/or wholesaler, raise those issues, discuss those issues and find solutions to those issues on a wide-ranging, generic-type basis. It is not hard. It is not rocket science. It can be done, and it does not have to be done in a way that is aggressive or makes enemies. It can be done in a collaborative manner. That is what an ombudsman service offers.⁵¹

2.46 According to Mr Gaussen, an ombudsman could develop the industry knowledge and trust and respect of industry participants to be able to resolve disputes under the Code in a cost-effective and timely manner. This, he argued, would not be possible in a system where dozens of mediators across Australia might be called on to mediate different disputes:

You can have the same disputes repeating, coming before different people who have no expertise, knowledge or background or anything to draw on. The same wool can be pulled over different sets of eyes repeatedly. It took me two years to get on top of what this was about. There is no way in heavens that a system of dispute resolution which goes to the appointment of one of their members anywhere in Australia without any training or qualification or knowledge of this industry can be successful or effective. It is a guaranteed recipe for failure.⁵²

2.47 Mr Gaussen also noted that arbitration was now 'overwhelmingly more expensive' than litigation. In part, he suggested, this reflected improved efficiency on the part of courts. However, Mr Gaussen also told the committee that arbitrators often lacked the knowledge and background to arbitrate disputes in a cost-efficient manner, and some would even seek to unnecessarily 'spin out' the process to maximise their fees.⁵³

2.48 Mr Gaussen emphasised that for the Code to be successful, it needed proper enforcement mechanisms. This, in turn, not only required the appointment of an ombudsman, but an ombudsman who was *well-resourced* to do the job:

You need an ombudsman. When you go back to the year 2000, when the government was introducing this whole concept of a code, government talked about and budgeted an amount of close to \$30 million to provide for an ombudsman service. In July 2001, when the initial project failed, my company Mediate Today was appointed to provide the ombudsman services. We had a budget of less than \$300,000, including our travel. On the basis of that we were being asked to service all of Australia and all of the disputes that arose out of the hundreds of thousands of transactions that were occurring on a monthly basis. It simply was not practical and it was not possible.⁵⁴

51 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, pp. 11–12.

52 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 12–13.

53 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 14.

54 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 10.

2.49 Asked how much an ombudsman service would cost the government, Mr Gaussen suggested a figure of \$1 million per year to provide a basic service. He noted, however, that if 'you were going to resource it properly state offices, it would be a lot more'.⁵⁵

2.50 The MDFVGA also highlighted the success of the UK model, and told the committee it considered 'the appointment of an ombudsman with powers of enforcement absolutely critical to the success of the code'.⁵⁶ As noted earlier, the MDFVGA argued that small suppliers often lacked the resources or capacity to make and establish a case to go to mediation. However, the MDFVGA suggested that an ombudsman would have the ability to assist suppliers in this respect, and in turn resolve disputes in a more effective and efficient manner than would be possible through mediation:

I would hope the ombudsman would have powers to investigate some of the allegations that are put forward. Those matters could be investigated by the ombudsman and then their office could make a determination on whether to proceed and take further action against either party, depending on who was in breach of the code. Mediation is more a way of resolving issues rather than trying to get a satisfactory outcome in the best interests on the basis of some sort of legal outcome.⁵⁷

Should the Grocery Code cover alcoholic beverages?

2.51 The OASBC expressed concern that the Grocery Code did not extend to alcoholic beverages, despite evidence from the wine industry regarding the adverse impact on small businesses of retrospective pricing. The OASBC explained:

An example of retrospective pricing is the situation where one retailer negotiates a better buying price from a supplier than a competitor retailer negotiates. The competitor who has not been able to negotiate the better price, then charges the difference back to the supplier. The supplier is commonly forced to wear the loss in profits, without the ability to negotiate.⁵⁸

2.52 The SME Committee also suggested that there was no reason the Grocery Code should not extend to the supply of alcohol:

In 2005, the ACCC commenced legal proceedings against liquor retailers for entering into anticompetitive agreements in the liquor industry. This case resulted in the imposition of pecuniary penalties of more than \$10 million. In the view of the SME Committee there is a risk that

55 Mr Robert Gaussen, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 16.

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

57 Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association Inc., *Proof Committee Hansard*, 21 April 2015, p. 2.

58 Office of the Australian Small Business Commissioner, *Submission 2*, p. 2.

unacceptable commercial conduct could be engaged in by the major grocery retailers in the liquor industry, which could not only affect price competition at the retail level but also SMEs at the wholesale level.⁵⁹

Pricing and other issues

2.53 The SME Committee also suggested there were certain additional issues that the Code should cover, including pricing issues associated with home brands. It expressed concern that retailers might sell home brand products at a loss 'in order to either extract more favourable terms from the suppliers of branded products or to drive branded suppliers out of the market'.⁶⁰

2.54 The QDFO also expressed concern that the Code failed to address:

...the really big issues that we have been chasing about outlawing predatory conduct or discriminatory pricing, which has really been at the core of the \$1 milk issue in the domestic market over the last four years.⁶¹

2.55 Expanding on this point, the QDFO explained that it was 'not against discounting', but rather 'discriminatory pricing to a point where it becomes predatory and affects competition with those brands'. It proposed a clause in mandatory code of conduct that 'actually outlawed that predatory conduct'.⁶² The QDFO also argued that to prevent predatory pricing the Code needed to cover the whole supply chain, which it did not do at present:

We have got a lot of issues between farmer and processor that are forced into that second part of the supply chain due to what happens between retailer and processor. Our first proposal was that the mandatory code needed to cover the whole supply chain and go from there. So as it stands at the moment it is not going to do the job that we need for our farmers, and that is why we have been raising the issue with government; if they are not going to amend and strengthen this code, then parts of the Competition and Consumer Act need to be strengthened to outlaw predatory conduct and discriminatory pricing and that is absolutely fundamental if we are to get a result for our farmers and other small business operators.⁶³

2.56 The Australian Chamber of Fruit & Vegetable Industries Ltd ('the Australian Chamber') argued that the introduction of a voluntary code with provision for exceptions to otherwise prohibited actions (that is, to unilateral or retrospective

59 Law Council of Australia, *Submission 3*, p. 4.

60 Law Council of Australia, *Submission 3*, p. 2.

61 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 5.

62 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 6.

63 Mr Robert Adrian Peake, Executive Officer, Queensland Dairyfarmers' Organisation Ltd, *Proof Committee Hansard*, 21 April 2015, p. 7.

variations to grocery supply agreements) was in stark contrast to the imposition on wholesalers supplying Central Markets of the mandatory *Horticulture Code of Conduct*:

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a voluntary Code with flexibility which is enshrined in the Code and with exclusions from certain actions 'which would otherwise be prohibited'. This will occur while the other half of the industry, and in particular Market wholesalers and the independent retailers who rely on Central Markets, labouring under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.⁶⁴

2.57 The Australian Chamber concluded that the benefits which growers have in dealing with Central Markets (which it outlines in its submission) will be:

...eroded over time as the uneven playing field continues with the supermarket (retailer) sector applying an opt-in voluntary code and the fresh fruit and vegetable wholesaling sector being regulated by an unworkable, mandatory code with unequitable compliance costs. The growers supplying the Central Markets are disadvantaged and the consumers of those supplied through the Central Markets are also disadvantaged. Ultimately all parts of this supply chain are disadvantaged compared to the supermarket sector supply chain.⁶⁵

Consultation process in the development of the Code

2.58 Mr Gausson expressed concern that the Code was not based on a 'true process of wide consultation', and told the committee that many industry players and organisations were not consulted or withdrew during the negotiation process. Ultimately, he suggested, the Code represented an agreement 'between retailers, wholesalers and the grocery council'. To address this situation, he argued for:

...a genuine consultative process between primary producers, retailers, wholesalers, merchants and agents that engages the representative groups and the individual interests and reports back to this Senate committee on outcomes, within a period of 12 months.⁶⁶

2.59 The consultation process on the Code was outlined in the previous chapter. As the Treasury told the committee, that process saw 33 submissions from interested stakeholders, and involved a further process of targeted consultation.⁶⁷ Asked what

64 The Australian Chamber of Fruit and Vegetable Industries Ltd, *Submission 6*, p. 3.

65 The Australian Chamber of Fruit and Vegetable Industries Ltd, *Submission 6*, p. 5.

66 Mr Robert Gausson, private capacity, *Proof Committee Hansard*, 21 April 2015, p. 10.

67 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 25.

changes had been made to the Code as a result of these consultations, the Treasury advised:

Very briefly: the original code imposed obligations on suppliers as well as retailers and wholesalers. The current code only imposes obligations on retailers and wholesalers. There is the [reasonableness] test [that applies when considering certain exemptions in the Code to otherwise prohibited conduct]...which is an important strengthening of the code. The good faith requirement in the code was broadened to bring it into line with the common law concept of good faith. The dispute resolution mechanism was strengthened by allowing suppliers to immediately elevate complaints within senior management of retailers and wholesalers, and so forth. There were improved record keeping requirements introduced into the code. The code now provides that retailers and wholesalers cannot interfere with freedom of association between suppliers. There was a tailored regime introduced into the code to suit wholesalers, noting that some of the provisions—such as allocation of shelf space, for example—are not relevant to wholesalers. There is a statutory obligation within the code for it to be reviewed after three years of operation, including a detailed statement of what must be considered as part of that review.⁶⁸

Committee view

2.60 The committee believes the Code represents significant progress in improving the standards of business conduct in the food and grocery sector. The committee is also satisfied that the Code will achieve its stated purposes, as set out in clause 2 of the Code. The committee welcomes the fact that the Code has emerged from an industry-led process, and recognises that industry participants are often best placed to develop codes that properly reflect the circumstances of their industry.

2.61 At the same time, the committee acknowledges that some witnesses believe that while the Code is an important step forward, its scope and application is not as great as they would prefer. In particular, the committee notes concerns expressed by a number of witnesses regarding the voluntary nature of the Code, the provisions for exceptions to conduct otherwise prohibited under the Code, the potential costs and difficulties raised by the dispute resolution processes provided for by the Code, and the extent of penalties that might be applied in response to breaches of the Code. The committee further notes concerns regarding the coverage of the Code, and in particular concerns that it does not cover alcoholic beverages or issues relating to pricing.

2.62 The committee notes that the Regulation includes a requirement for a review of the operation of the Code to be undertaken within three years of its commencement. This review must consider certain matters, including whether the purposes of the Code are being met, levels of compliance with the Code, whether it should be mandatory or

68 Mr Ben Dolman, Acting General Manager, The Treasury, *Proof Committee Hansard*, 21 April 2015, p. 26.

voluntary, and whether it should include civil penalty provisions. The committee notes that the review will be able to draw on assessments of the Code's operations and effectiveness. As such, the committee believes that the concerns raised during this inquiry would be best considered as part of the required review.

Recommendation

2.63 The committee recommends that the Regulation stand as promulgated.

Senator Sean Edwards

Chair

Additional comments by Nationals' Senators

1.1 The committee notes concerns among stakeholders about dispute resolution processes under the code, including their workability, timeliness and costs (paragraphs 2.22 to 2.29). We wish to add our voice to these concerns. Given the disparity between suppliers on the one hand, and the major supermarkets on the other—in terms of market power, financial resources as well as experience and expertise in dealing with disputes—the ability of the Code to operate effectively hinges on the presence of effective, accessible and timely dispute resolution mechanisms.

1.2 Suppliers face a number of hurdles in making and establishing a case for a complaint under the Code. Lack of access to relevant documents from retailers is one key issue. This is exacerbated by the presence of substantial information asymmetries, which mean that in many cases suppliers will face uncertainty about whether documents necessary to make and sustain their case even exist.

Costs of mediation and arbitration

1.3 The potential costs to suppliers seeking dispute resolution under the Code is another significant barrier. In particular, concerns about costs of mediation and arbitration were raised during discussions at the inquiry hearing.

1.4 Former Produce and Grocery Industry Ombudsman, Mr Robert Gausson, noted:

Arbitration is overwhelmingly more expensive in today's years than litigation because the courts are now much quicker and more efficient in the time they take to resolve matters. Arbitrators might get one or two matters a year. They have very little practical experience in the area, so they are learning from nought. And, quite frankly—and some of my close friends are arbitrators—they spin it out, unnecessarily so, because they are being paid a high rate. It is a bad system. ... Most of them are on daily rates. But some of them will get \$2½ thousand to \$8½ thousand a day.¹

1.5 Following these discussions, Treasury provided evidence which shed some light on costs, stating:

Professional fees vary depending upon the complexity of the case and the amount in dispute. They also vary between service providers. Treasury understands, based on consultation with a private mediation provider, that typical mediation costs are in the order of \$275 per hour for each party and that typical disputes are resolved following around 7 hours of mediation. That is, typical mediation costs may be in the order of \$1925 for each party.²

1 *Proof Committee Hansard*, 21 April 2015, p.15.

2 The Treasury, *Answer to Question on Notice*, May 2015.

1.6 In making the judgement as to whether to seek mediation, a business seeking to bring an issue forward would have to weigh up a range of factors including the likelihood of successful mediation, the length of time, and the range of possible costs they may face. In our view fees of around \$2000 per day for each participant are likely to represent a significant deterrent to small suppliers seeking arbitration.

1.7 Given the great disparity in size between parties, the potential for the party with the deeper pockets to extend negotiation periods and increase costs would undoubtedly be a consideration to be factored in by any small supplier seeking to have a matter resolved under the Code.

1.8 In the case of arbitration, Treasury stated that:

[T]he Institute of Arbitrators and Mediators Australia (IAMA) Arbitration Rules also sets firm caps on arbitrator's fees that depend upon the amount in dispute. For example, for a dispute involving an amount up to \$250,000, arbitrators' fees are capped at \$25,000.³

1.9 The cap on arbitrators' fees of \$25,000 applies for disputes ranging from \$1-\$250,000. For disputes of larger values the cap increases. As the committee notes, the arrangements for dispute resolution mean that costs are borne by unsuccessful parties, which means that a supplier who takes a complaint to mediation or arbitration and loses may be liable for all the costs (2.31).

1.10 Former Produce and Grocery Industry Ombudsman Robert Gausson noted:

Most industry dispute resolution is based on the assumption that parties are 'equal' and able to properly resource dispute resolution through both their preliminary research and presentation of arguments. In the produce and grocery industry, this is seldom the case. The supplier has no or highly limited access to paperwork, little 'evidence' to support their assertions and no experience in presenting an argument in dispute resolution.⁴

1.11 For many suppliers struggling to stay afloat, the prospects of fees such as those discussed above, in addition to the lost productivity (particularly for small farms or sole operators) due to time away from their business would often represent a material barrier to accessibility of dispute resolution under the Code. The time costs for suppliers are a particular issue in the grocery industry given the often substantial geographic distance between the suppliers and retailers, which can make timely resolution of disputes difficult.

Grocery ombudsman

1.12 We believe that the appointment of an ombudsman to oversight the Code would provide an effective and proven mechanism for low-cost, timely resolution of disputes under the Code.

1.13 The evidence provided through the hearing process highlighted that this approach has been clearly shown to be an effective model in improving retailer-

3 The Treasury, *Answer to Question on Notice*, May 2015.

4 Expert Today Pty Ltd, *Submission 10*, p. 3.

supplier relationships, in particular due to its capacity to 'nip in the bud' many of the problems that would otherwise arise.

1.14 As former Produce and Grocery Industry Ombudsman Robert Gaussen stated:

An ombudsman can spend time with both sides of the dispute, reframing the issues between them and generally resolving the differences in private discussions. Many disputes arise and continue in the industry through a failure of adequate communication which is compounded by geographic distance. Dispute resolution without any prior assistance to the parties loses the capacity to encourage parties to resolve their disputes. Disputes are more likely to drag on generating bad feeling and ill will. There is a certain respect for the holder of the title 'ombudsman' which is often sufficient for parties to accept encouragement to modify their position and reach agreement thereby avoiding unnecessary time, cost and stress.⁵

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

Small Business and Family Enterprise Ombudsman

1.16 The government provided \$8.0 million over four years to the Department of the Treasury to transform the existing Office of the Australian Small Business Commissioner into a Small Business and Family Enterprise Ombudsman with additional functions and powers.⁶

1.17 The Office of the Australian Small Business Commissioner suggested that to provide low cost alternative dispute resolution services, the Australian Small Business and Family Enterprise Ombudsman might assume responsibility for the resolution of disputes under the Code.

1.18 We believe this would be sensible policy that would strengthen the operation of the Code.

1.19 Further, as part of the arbitration and mediation mechanisms under the Code, the Code provides for either party agreeing to a named dispute resolver or an appointment by the Institute of Arbitrators and Mediators Australia (IAMA). However, during the course of the inquiry the committee heard that IAMA has, in recent years suffered significant financial problems and has now merged with Leading Edge Alternative Dispute Resolution (LEADR) under a new name.

1.20 The Government acknowledged that the code would need to be updated to reflect this and Treasury noted:

5 Expert Today Pty Ltd, *Submission 10*, p. 3.

6 Source: Budget Paper No.2, Part 2: Expense Measures, Treasury (available at: http://budget.gov.au/2014-15/content/bp2/html/bp2_expense-22.htm)

When that new merged entity comes into existence, we would expect that references to IAMA within the code will be appropriate to update.⁷

1.21 Given this, it is recommended that the Small Business and Family Enterprise Ombudsman be appointed to replace IAMA under the Code.

1.22 We recognise that this will place an additional cost on the office of the Small Business and Family Enterprise Ombudsman. However, as with ombudsman services in other sectors, including telecommunications and financial services, the costs of providing this service could be funded by a small levy paid by signatories to the code.

1.23 Allowing the Australian Small Business and Family Enterprise Ombudsman to assume responsibility for the resolution of disputes under the Code would also result in efficiency and organisational benefits in drawing on this position rather than creating a new position to provide ombudsman oversight to the Grocery Code.

Recommendation

1.24 It is recommended that the Small Business and Family Enterprise Ombudsman be appointed to replace the Institute of Arbitrators and Mediators Australia under the Grocery Code, and the Code be amended to reflect this.

1.25 It is also recommended that, consistent with funding arrangements in other industries, the costs of providing ombudsman services for dispute resolution to the grocery sector be funded by a small levy paid by signatories to the Code.

Senator Matthew Canavan
Nationals Senator for Queensland

Senator Bridget McKenzie
Nationals Senator for Victoria

Senator Barry O'Sullivan
Nationals Senator for Queensland

Senator John Williams
Nationals Senator for New South Wales

⁷ *Proof Committee Hansard*, 21 April 2015, p.15.

Appendix 1

Submissions received

Submission

Number Submitter

1. New Zealand Food & Grocery Council
2. Office of the Australian Small Business Commissioner
3. Law Council of Australia
4. Australian Dairy Farmers
5. Retail & Supplier Roundtable
6. The Australian Chamber of Fruit and Vegetable Industries Ltd
7. NSW Farmers
8. Office of the NSW Small Business Commissioner
9. Metcash Limited
10. Expert Today Pty Ltd
11. National Farmers' Federation
12. Confidential
13. Confidential

Answers to questions on notice

1. Answers to questions on notice from a public hearing held in Canberra on 21 April 2015, received from the Treasury on 6 May 2015.
2. Answers to questions on notice from a public hearing held in Canberra on 21 April 2015, received from the Treasury on 7 May 2015.

Appendix 2

Public hearings and witnesses

CANBERRA, 21 APRIL 2015

ALLEN, Ms Jenny, Acting Principal Advisor, The Treasury

DOLMAN, Mr Ben, Acting General Manager, The Treasury

GAUSSEN, Mr Robert, Private capacity

GREGSON, Mr Scott, Executive General Manager, Consumer Enforcement, Australian Competition and Consumer Commission

LE, Mr Vinh, Analyst, The Treasury

MORO, Mr Joe, President, Mareeba District Fruit and Vegetable Growers Association Inc

PEAKE, Mr Robert Adrian, Executive Officer, Queensland Dairyfarmers' Organisation Ltd

RIDGWAY, Mr Nigel, Executive General Manager, Consumer, Small Business and Product Safety, Australian Competition and Consumer Commission

SALISBURY, Mr David, Acting General Manager, Consumer and Small Business Strategies, Australian Competition and Consumer Commission