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 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

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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

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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 Gaussen, 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]

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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 commercially 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 take 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

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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:

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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

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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 Gaussen 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:

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33 Mr Robert Gaussen, 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

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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

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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

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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 the 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]

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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

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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 Gaussen 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 Gaussen, 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