

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 Gaussen, 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.

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