THE UNIVERSITY OF MELBOURNE

FOOD AND GROCERY CODE OF CONDUCT REVIEW

SUBMISSION IN RESPONSE TO DRAFT REPORT

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31 July 2018

1. This Submission

We welcome the opportunity to make a submission in response to the Draft Report (June 2018) (the DR) of the Independent Review of the Food and Grocery Code of Conduct (FGCC). This Submission complements and extends our submission dated 8 May 2018 regarding provisions that employ the term 'good faith' in the FGCC and, in particular, the obligation on retailers and wholesalers to deal with suppliers in good faith pursuant to cl 28.

This Submission responds to the following recommendations in the Draft Report:

- draft recommendation 1 proposing the introduction of a separate targeted mandatory code to apply to major market participants that refuse to become signatories to the voluntary FGCC (see Part 2 below);
- draft recommendation 4 proposing the introduction of a new primary provision of fair dealings that would contain indicators of fair dealings and make clear that contravention of the provision is to involve consideration of the individual characteristics and circumstances of the supplier in question (see Part 3 below);
- draft recommendation 5 proposing that the internal Code Compliance Manager (CCM) of a signatory to the FGCC be replaced with an Independent Code Adjudicator (ICA) (see Part 4 below);
- draft recommendation 6 proposing an expansion of the role of the ACCC when it comes to oversight of the proposed ICAs (see also Part 4 below).

We also address the question of civil penalties for breaches in the FGCC (see Part 5 below).

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This submission is based on a four year Australian Research Council funded project examining the regulation of Australia's major supermarket chains (MSCs). The background to, objectives, provisions, and likely effectiveness of the FGCC is a centrepiece of this research which has involved more than 70 in-depth interviews with industry, government and other stakeholders, in Australia and the United Kingdom (UK). Further details about the project, publications generated to-date and, in particular, an extensive report on the FGCC, are available online.[1]

2. Voluntary vs Mandatory Code

Draft recommendation 1 proposes that the Government introduce a separate targeted mandatory code to apply to major participants that refuse to become signatories to the voluntary FGCC. This recommendation is predicated on the stated position in the DR that the FGCC should remain a voluntary code. In our view, the FGCC should become a mandatory code. Moreover, the proposed targeted mandatory code raises concerns at both a practical and a policy level.

When considering the background and developments that led to the current voluntary code it is important to recognise the regulatory environment into which the FGCC was born, the place of codes in the Australian regulatory framework, and the benefits that they are seen to deliver.

Australian governments have long advocated codes of conduct as a method of self- or co-regulation, with industry often seen as best placed to tailor and drive effective codes. The prescription of mandatory codes under the *CCM* is generally viewed as an avenue of last resort,[2] but it is nevertheless the case that the FGCC is currently the only voluntary code under Part IVB of the *Competition and Consumer Act* 2010 (*CCA*).[3]

As recognised in the DR, the FGCC was an industry-led initiative developed by Coles, Woolworths and the Australian Food and Grocery Council (AFGC) in response to public concerns about the conduct of retailers and wholesalers towards their suppliers and the implications for competition and dynamic efficiencies, in particular, in the grocery sector. There was also at this time a clear message from government that if industry could not produce an acceptable solution to this problem, it would intervene.[4] Nevertheless, consistent with government policy with regard to regulation, such

[1] https://law.unimelb.edu.au/centres/clen/research/supermarket-project.
[2] Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, May 2011, p. 6.
[3] The other five codes are mandatory codes, and the code for the dairy industry, as proposed by the ACCC (see Dairy Inquiry Final Report, April 2018) would also be a mandatory code.
[4] Treasury, *Improving commercial relationships in the food and grocery sector, consultation paper* (FGCC consultation paper), August 2014, p. 25.

intervention was always to be light touch.

Given these developments it is understandable that, despite some initial pressure to make the code mandatory[5] and specific concerns voiced by suppliers in submissions to the Senate Economic Legislation Committee inquiry,[6] Treasury in large part supported the voluntary code as it was advocated by the MSCs and AFGC.

2.1 Converting to a mandatory code

As the DR recognises, the grocery industry is highly competitive and likely to become even more so, in particular as a consequence of the expansion of recent entrants and the impact of additional new entrants. Relevant developments include the growth of Aldi and Costco and the anticipated arrival of international discount food and grocery retailers such as AmazonFresh, Lidl and Kaufland, as well as the emergence of various home delivery grocery services and other niche providers.

The short and long-term impact of new entrants into the grocery sector cannot always be predicted. When Aldi arrived in Australia they were viewed by the MSCs as complementary to their business.[7] Today, with a market share of 9.2% they are very much seen as the competition. It is important to consider the ramifications of continuing with a voluntary code of conduct in such a fast-evolving sector. In particular, there is uncertainty as to whether future new entrants will choose to voluntarily sign on to a code that they may not perceive as directly relevant or beneficial to the way they wish to do business. Aldi's response to the FGCC is instructive on this point.

Aldi may have been the first signatory to the FGCC, but as is evident from its submission to the FGCC consultation, it did so with serious reservations. Aldi did not consider the Code necessary or relevant to its business model and was also concerned that it would:

> *…add complexity to our current effective and transparent procedures and processes with suppliers. This would increase administrative and compliance costs on ALDI and its suppliers which is in contrast to ALDI's business model to simplify and standardise its operations to keep operating costs low in order to ensure everyday low prices for consumers.*[8]

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[5] Caron Beaton-Wells and Jo Paul-Taylor, 'Codifying supermarket-supplier relations, a report on Australia's FGCC', September 2017, at 7.
[6] Treasury, *FGCC Final Assessment RIS*, 2014, 26; ADF submission covering letter, Treasury, FGCC consultation paper, 2014; AMWU submission, Treasury, FGCC consultation paper, 2014, p. 4.
[7] Elizabeth Knight, 'The Aldi Effect: Why Your Grocery Bill Is Shrinking', *The Sydney Morning Herald* (online), 20 June 2016; Simon Evans, 'Aldi Boss Says No Fine-Tuning Needed for SA, WA', *The Sydney Morning Herald* (online), 2 February 2016.
[8] Aldi submission to Treasury, FGCC consultation paper 2014, 19 September 2014, p. 1. The DR itself explains how different the buying process adopted by Aldi is to the buying process adopted by Coles and Woolworths (pp. 12-13).

Concern that the FGCC is not suited to their business model was a key reason given also by Costco,[9] and by Metcash,[10] for not signing on. In light of this experience, it cannot be assumed that new players entering the market will automatically sign on to a voluntary code that may be perceived as not relevant to their business and/or introducing an additional, non-compulsory regulatory and compliance cost.

The DR notes that the current signatories remain highly supportive of the FGCC. The DR infers from this that there would be little benefit in converting from a voluntary to a mandatory code. We respectfully contend that in a climate where new entrants have the option of not signing up to the FGCC, a voluntary code may in effect put the current signatories at a competitive disadvantage. In an increasingly competitive market it risks creating a less than level playing field. Relatedly it may increase costs for suppliers in that there will be one set for rules for some of the retailer customers with which they deal, and another set of rules for others.

2.2 Mandatory vs targeted mandatory code

The DR proposes a hybrid approach involving the maintenance of the voluntary FGCC and the introduction of an additional targeted mandatory code of conduct. Such an approach would be unprecedented in the history of Part IVB of the *CCA*. We believe that it would introduce an unnecessary additional level of regulatory complexity. Further, we fail to see the regulatory or administrative advantages this model may have over making the existing code mandatory.

It is made clear in the DR that the primary intent in proposing a targeted mandatory code is to compel Metcash to sign on to the voluntary FGCC. We agree Metcash should become a signatory. However, in the event that Metcash does not respond in the way intended by this veiled threat, the result by way of a regulation that is essentially introduced to deal with a single entity would be rather extraordinary as a matter of policy or regulatory practice.

The DR further suggests that the targeted instrument would apply not just to Metcash (if it does not sign up to the voluntary code) but to 'any other major market participant that should, but refuses to, become signatories to the existing voluntary code'. This is a problematic approach in various respects. It does not elucidate how or on what grounds government would form the view that a participant 'should' become a signatory. Nor does it identify a transparent and objective process by which such a view may be formed.

[9] Costco submission to Treasury, FGCC consultation paper, 2014, 11 September 2014, pp. 2-3.
[10] Caron Beaton-Wells and Jo Paul-Taylor, 2017, at 7. IV.

With regard to the participation of smaller retailers, we commend the DR on its recognition that the benefits that such retailers may derive from being a signatory to the FGCC may be outweighed by regulatory costs. However, we believe that our proposed alternative, as set out below, addresses this issue.

2.3 Proposal for a mandatory FGCC

We propose a more practical, fairer and less administratively burdensome approach that would:

- address the issues the targeted code is intended to address;
- avoid imposing an unwarranted regulatory burden on smaller retailers; and
- guarantee a level regulatory playing field for all substantial grocery retailers.

In our submission the FGCC should be made mandatory for all businesses with a turnover of or over a specified gross turnover derived primarily from the retail or wholesale supply of groceries in Australia. Such an approach would capture retailers and wholesalers that would be considered most relevant from the perspective of the competitive process while releasing smaller operators from an unnecessary administrative burden.

This approach accords with the approach taken to the application of the mandatory Grocery Supply Code of Practice (GSCOP) in the UK. The GSCOP is legally binding on all Designated Retailers. A Designated Retailer is defined as any retailer with a turnover of more than £1 billion with respect to the retail supply of groceries in the UK.[11] This list can be amended as the commercial circumstances of grocery retailers alter.

For the purposes of a mandatory FGCC a minimum turnover with respect to the retail or wholesale supply of groceries in Australia would clearly identify all businesses that are captured by the regulation, without the need to identify and target specific players. In our view, converting the FGCC to a mandatory code in this way would not undermine industry buy-in and ownership'[12] and more specifically, should not dampen the proven commitment of the MSCs to adherence to the Code.

Nor are there grounds, of which we are aware, to conclude that such a development would inhibit retailers in or prevent them from developing 'innovative solutions'[13] to issues that arise in the industry. This is particularly as the substantive provisions of the mandatory code would mirror those

[11] *The Groceries (Supply Chain Practices) Market Investigation Order 2009* (UK) Part 2 article 4(1). This includes persons carrying out all or a substantial part of that business on behalf of that retailer, article (1)(b).
[12] Independent Review of the FGCC Draft Report June 2018, p. 19.
[13] Ibid, p. 20.

in the FGCC (as amended pursuant to the Review).

2.4 Consistency across codes

In the almost 20 years since provision for codes was legislated, the FGCC is currently the only prescribed voluntary code. It is notable that two other prescribed codes that were voluntary at their inception, the Franchising and Horticultural codes, are now mandatory. We are unaware of any negative outcomes as a consequence of this amendment. Further, the precursor to the current FGCC, the short-lived Produce and Grocery Industry Code (PGICC) was a voluntary industry initiative in which key industry stakeholders soon lost confidence, citing among their concerns a lack of specificity with regard to provisions and insufficient enforcement mechanisms.[14]

From a government policy perspective, we see no justifiable reason why the Australian grocery sector should be viewed or treated in a manner inconsistent with those sectors currently regulated by a mandatory prescribed code of conduct. We further note that the Australian Competition and Consumer Commission (ACCC) has proposed a code for the dairy industry and that the code be mandatory.[15]

3. Fair Dealings

Draft recommendation 4 proposes the introduction of a new primary provision of fair dealings to replace the current obligation to act in good faith (cl 28). In accordance with our earlier submission (May 2018),[16] we support amendment of the existing good faith provision. However, we have some reservations concerning the suggested improvements that may be made to the proposed new provision.

We agree with the Review's conclusion that any provision targeting good faith / fair dealings should be given prominence at the start of the FGCC and that it should be free-standing as a substantive obligation that is additional to other obligations under the Code (as distinct from acting as a mere interpretive provision). In our view, this is because:

- the purposes clause of the FGCC already plays an interpretive role and specifically refers to a purpose of the Code as being to 'support good faith in commercial dealings between retailers, wholesalers and suppliers' (cl 2(d));

[14] Treasury, FGCC consultation paper, August 2014, p. 39-40.
[15] ACCC, Dairy Inquiry Final Report, April 2018.
[16] Available at https://static.treasury.gov.au/uploads/sites/1/2018/06/beatonpaul.pdf.

- it is inevitable that there will be gaps or loopholes in the other provisions, either currently or in the future and a free-standing obligation of good faith / fair dealing may assist in filling those gaps; and
- it means that the obligation is enforceable by the ACCC and prevents suppliers from having to rely on general contract law or other provisions under the *CCA* in connection with an allegation that a retailer has not engaged in good faith / fair dealing.

We agree further with the DR that the provision of an exhaustive definition for good faith or fair dealings is not necessary and would not be effective (for full reasoning, see paras 18-21, May 2018 submission).

With regard to the model Fair Dealings Provision set out in the DR, we are concerned about the adoption of the term 'fair dealings' to replace 'good faith'. Evidently, this new (in an Australian context) term is drawn from the UK.[17] However, in Australia, 'good faith' is the term used in other codes[18] as well as in the common law. While there is uncertainty as to its scope and application in those contexts, such uncertainty will be replicated if not exacerbated by replacing it with a wholly new and novel term.

We further note that it may be incongruous to introduce 'fair dealings' as the term used in the proposed provision when the term 'good faith' is retained in other provisions of the FGCC (see clauses 34(2), 37(4), 38(3)(a), 38(5)(b), 39(3)(b)).

Aside from the adoption of the term 'fair dealings' in the standard of conduct prescribed by the proposed new provision, we agree with the wording of the proposed sub cl(1)(a). The wording of this sub-clause is important in that it should give the fair dealing obligation the widest scope possible. Achieving this end may be aided by ancillary provisions that would make clear that:

- without limiting sub cl (1)(a), the obligation on a retailer or wholesaler to deal fairly with a supplier:

  (i) applies to every aspect and stage of dealing between a retailer or wholesaler and a supplier in relation to a grocery supply agreement, including negotiating the terms of, entering into, varying, renewing, resolving disputes relating to and terminating the agreement; and

[17] GSCOP, Part 2 article 2.

[18] See, eg, Competition and Consumer (Industry Codes—Horticulture) Regulations 2017, Division 3 cl 8 and 9; Competition and Consumer (Industry Codes— Franchising) Regulation 2014, Division 3 cl 6.

(ii) is not limited to matters arising under or in connection with this code.

- for avoidance of doubt, the retailer or wholesaler must not enter into an agreement that contains a provision or purports to limit or exclude the fair dealing obligation, and if it does, the provision is to have no effect.

Further in this regard, we suggest that cl (1)(b) of the proposed provision be amended to incorporate wording that reinforces the non-exhaustive nature of the 'guideline indicators', as follows:

> *Without limiting subclause (a) when determining whether a Retailer or Wholesaler has acted fairly, regard should be given, but not limited, to whether the Retailer of Wholesaler has …*

We also suggest that, if 'fair dealings' is to be retained in sub cl(1)(a) as a replacement for 'good faith', the list of indicators in sub cl(1)(b) should include 'acting in good faith'. This may allow for the common law on the term to be drawn on to some extent in interpretation of the primary fair dealings obligation.

We agree with sub cl(1)(c) and the importance of ensuring that assessments of whether a retailer or wholesaler has acted in accordance with the proposed provision are informed by close regard to the individual characteristics and circumstances of the supplier and should include whether the supplier itself has acted fairly.

We agree with sub cl 1(e), providing that the matters outlined in sub cl 1(b) may be considered in determining whether there have been breaches of any other provision in the Code.

We also support the proposed creation of additional guidance materials by the ACCC to assist industry participants with understanding the obligations under the FGCC. The ACCC currently provides such guidance on its website with regard to 'good faith'. In accordance with our earlier submission, we agree with the DR proposal that the ACCC develop guidance material that explores a range of scenarios and provides examples of what may constitute a breach of the 'good faith' provision.

For more detailed reasoning in support of our submissions above (as they relate to the current 'good faith' provision), see our earlier submission (May 2018).[19]

4. Dispute Resolution

[19] Available at https://static.treasury.gov.au/uploads/sites/1/2018/06/beatonpaul.pdf.

Draft recommendation 5 is made in response to inadequacies identified in the DR in relation to the current FGCC dispute resolution framework. We largely support the account given in relation to this issue in the DR. However, for the reasons set out below, we oppose the recommended replacement of the Code Compliance Manager (CCM) with an internal Independent Code Adjudicator (ICA) positioned within each signatory's business.

4.1 Independence

Fear of retribution in response to complaints by retailers or wholesalers is a fundamental and longstanding concern among suppliers that has not been ameliorated by the FGCC to any significant extent. It is a key reason why complaints are not made to the CCM and why the current dispute resolution framework is not being employed effectively by suppliers. The DR recognises as much and states that:

> *Evidence from consultations has demonstrated a need for strengthened governance arrangements to help ensure the Grocery Code dispute resolution framework maintains confidentiality and independence in order to give suppliers the confidence to use the process.*[20]

In accordance with this statement, any amendments to the FGCC dispute resolution framework and process must focus on reducing this fear, predominantly by increasing faith in the independence, confidentiality and effectiveness of the dispute resolution process.

In our view the proposed conversion of CCMs to internal but supposedly 'Independent' Code Adjudicators (ICAs) would not achieve these ends. The proposed new role would not be a statutory appointment and arguably would be 'independent' in name only.

4.2 The role of the CCM

The DR recognises the unique and potentially important role of the CCM in managing and resolving disputes between suppliers and retailers or wholesalers. However, as the DR also acknowledges, at present 'very few suppliers consider elevating a dispute higher than the buying team and rarely engage a CCM or senior management'.[21]

The reasons cited in the DR for this relate not just to fear of retribution but also to a general lack of trust in the process, the absence of any requirement that the CCM protect confidentiality, a perception that the CCM is biased toward the retailer, and the view that the CCM is not sufficiently

[20] Independent Review of the FGCC Draft Report June 2018, p. 25.
[21] Ibid, p. 29.

senior with authority to deal adequately with complaints and/or mitigate the risk of retribution.[22]

These findings are in no way surprising and reflect the flawed conception of the dispute resolution model in the FGCC as one that is primarily industry-based, avoids the establishment of an external truly independent ombudsman-style officer to deal with disputes, and restricts the role of the ACCC to that of an enforcer (primarily through court proceedings) and hence, in effect, an avenue of last resort.

4.3 Mediation and arbitration

The DR reports that the Review did not receive any evidence that any disputes have been taken to mediation or arbitration since the introduction of the FGCC. The DR suggests this too may be due to a fear of retribution, as well as a preference for resolving complaints through commercial negotiations.[23]

We would add that a lack of awareness about the process on the part of suppliers, particularly small suppliers, and where there has been awareness the perceived complexity, risks and potential costs of the process also serve as major impediments to its employment and note in that regard that:

- the process is likely to appear to suppliers to be a legalistic and formal one, including the burdens of paperwork, and possibly requiring the engagement of a lawyer;
- the power in the mediator or arbitrator to determine that the complaint is vexatious or lacking in substance, or that the supplier is not acting in good faith, and thereby allow the retailer or wholesaler not to take part, is likely to be a disincentive to supplier participation;
- many suppliers are unlikely to have any understanding of what such a process would practically involve and reference in the FGCC to the procedure being conducted pursuant to the rules of the Institute of Arbitrators and Mediators Australia is unlikely to assist in that regard;
- many suppliers are likely to perceive that a non-specialist external mediator or arbitrator would not have sufficient understanding of how the industry works, let alone the supplier's business;

[22] Ibid, p. 30.
[23] Ibid, p. 30.

- the possibility that suppliers may bear costs of any mediation or arbitration (the FGCC provides that costs are to be determined under the rules of the Institute of Arbitrators and Mediators Australia) is also likely to inhibit take up of the process.

4.4 Other internal dispute resolution mechanisms

As the DR recognises, the MSCs have their own additional internal complaints handling and dispute resolution avenues for suppliers, as too does Aldi.

The DR cites the Coles Supplier Charter and the role played by Coles' independent Arbiter, the Hon Jeff Kennett AC, as an example of an internal dispute resolution process that has been found effective by some stakeholders (the Kennett model).

However, it also notes that others remain concerned 'that internal processes give too much discretion to the retailers and that complainants risk reprisal from buyers'.[24] Further, as reported in the DR, 'the Review also heard from stakeholders who were sceptical about the independence of Mr Kennett, with some saying that they would not use the option because he was employed by Coles or felt that this option was restricted to small suppliers only'.[25]

It is thus evident that support for such mechanisms is mixed. Moreover, there are grounds for the view that the so-called 'Kennett model' has been successful to a large extent due to the personality of the individual in question and his relationship with Coles senior management. It cannot be expected that these attributes are readily replicable across other organisations and settings.

4.5 The proposal ICA model

We strongly support the DR's finding that changes must be made to the current framework to ensure that suppliers have 'the confidence to elevate disputes; confidentially test complaints; receive a binding outcome from dispute resolution; and be assured that the outcome will be in line with the principles of the Grocery Code'.[26] However, we do not believe that conflating the role of an internal CCM with that of an internal 'independent' adjudicator will effectively bring about these changes.

We support the increased agency of CCMs. However, we do not believe that an ICA, located within and employed by the retailer, will provide the level of perceived, if not actual, autonomy and independence that is required to ensure the trust and support of many suppliers.

[24] Ibid, p. 33.
[25] Ibid, p. 33.
[26] Ibid, p. 34.

The role of the ICA under the proposed model seems an invidious one. Legally independent (in some respects) of the signatory and operating outside the organisational hierarchy, it is difficult to envisage how this role would work in practical terms or how it would necessarily assuage many of the concerns associated with the current model.

The ICA are to be employed for a fixed term. Presumably immunity from termination will be defined and constrained by legislation. Reference is made to prohibition of termination 'on the grounds of making decisions that are unfavourable towards the signatory'.[27] However, it is not difficult to conjecture how this prohibition could be circumvented, by termination asserted on other potentially spurious grounds.

It is not clear from the DR the grounds on which the appointment of the ICA would be renewed / terminated at the end of this process or whether their remuneration would be determined by their employer or whether this too will be governed by specific provisions within the FGCC. Self-evidently, remunerations conditions (and associated performance appraisal) are part and parcel of independence.

In any event, to have detailed regulatory prescription of employment terms and conditions of a specific employee within specific organisations would be novel.

It is also not entirely clear what career path may follow from such a role and hence what calibre of candidates might be attracted to the position.

The proposal advocates 'flexibility' in the design of the models for ICAs. From the point of view of suppliers who will need to understand the processes of each ICA and may need to engage with more than one ICA over a given period of time we argue that consistency, rather than flexibility, is important in reducing impediments to access.

Further, given the powers that the proposal would grant to ICAs (particularly the power to bind the supplier in payment of compensation), this flexibility raises the spectre of similar issues resulting in markedly different outcomes for suppliers dealing with different ICAs within different organisations. This in turn may impair confidence in 'the system' and generate additional administrative costs for industry.

4.6 The UK model

The DR also recognises the effectiveness of the UK model in which there is a Grocery Code

[27] Ibid, p. 35.

Adjudicator (GCA) as an independent statutory officer (currently, Christine Tacon) who enforces compliance with the GSCOP and works in a range of ways to ensure that large supermarkets treat their direct suppliers lawfully and fairly.

The DR acknowledges the important role that Code Compliance Officers (CCOs – similar to CCMs) play in working with the GCA to facilitate dispute resolution. It then reasons that it would be 'more appropriate' to adapt elements of the GCA model into Australia's current framework and that this will remove the need to 'create an additional Government bureaucracy at a cost to the industry'.[28]

We respectfully disagree with this conclusion insofar as it relates to the ICA proposal given that, in terms of actual and perceived independence, impartiality and objectivity, an internal codes adjudicator is simply not comparable with an external codes adjudicator (or equivalent position).

However, as explained below, we do agree that the UK experience provides insights for additional measures that could be taken to enhance the effectiveness of the FGCC generally.

4.6.1 Dispute resolution under the GSCOP

In the UK, as in Australia, all signatories to the Code must employ a code compliance person. As with CCMs there is provision in the GSCOP that a CCO must 'be independent of, and not managed by' any member of the organisation's buying team.[29] Unlike the FGCC, however, the GSCOP explicitly states that the CCO will be available as a point of contact for suppliers, as well as any authority making inquiries concerning the Code;[30] and will be available to discuss with the supplier the reasons why any decisions have been made by the retailer in relation to the Code.[31]

In our view, the CCM role in the FGCC should be retained but be remodeled to ensure that these officers are not charged solely with dispute resolution and reporting functions but also explicitly with an integral communications and early intervention role, so as to support fair and efficient dealing between parties and thereby the avoidance and minimisation of disputes.

The dispute resolution process under the GSCOP is simpler in that it has less layers and, importantly, places less evidentiary onus on suppliers. A dispute arises automatically when a supplier informs the CCO that they are seeking to initiate the dispute resolution procedure.[32] Also important is the commitment of the GCA to takes steps to minimise the possibility of any single complainant being

[28] Ibid, p. 34.
[29] GSCOP, article 9 (2) (c).
[30] GSCOP, article 9 (2) (b).
[31] GSCOP, article 9 (2) (d).
[32] GSCOP, article 11 (2).

identified when she is making inquiries or seeking evidence.[33] Further, under the GSCOP (unlike the FGCC), a CCO cannot dismiss a supplier's complaint on the grounds that it is vexatious or without merit.

If a dispute has not been resolved to the supplier's satisfaction within 21 days from when it arises the supplier can submit, in writing, an arbitration request.[34] Arbitration is conducted by the GCA.[35] The GSCOP provides that all costs of the GCA be borne by the retailer, unless the GCA determines at this stage the supplier's claim to be vexatious or entirely without merit. Where this is the case, costs are allocated at the GCA's discretion, as are all other costs.[36] The GCA's decision is final and binding on both parties, except where there is an appeal on grounds as set out in the *Arbitration Act 1996* (UK).[37]

4.6.2 The extended role of the GCA

The GCA plays a much more extensive role than as an arbitrator of GSCOP disputes. The extended role of this office is a distinctive feature of the UK model and arguably one of the principal reasons why it has been so effective. The performance of the GCA was the subject of a government review in 2016. The results released in 2017 resoundingly endorsed the GCA's performance and the effectiveness of the GCA as a regulatory approach to improving supply chain relations.[38]

The DR states that there has been some confusion as to the role of the UK GCA, pointing out that while the GCA has the power to enforce the code in the UK, it is the ACCC that has that power in Australia. This distinction is correct of course but is only tangentially relevant to understanding why the dispute resolution model in the UK has apparently been more effective than the model under the FGCC.

The GCA has rarely had to exercise her formal powers of arbitration, investigation or fining.[39] Indeed, Tacon believes these powers should only be employed when all other options have been

[33] HC Deb 7 December 2005 c 968, referred to in Antony Seely, 'Supermarkets: competition inquiries into the groceries market' SN03653, *House of Commons Library*, 2 August 2012, p. 12.
[34] GSCOP, article 11 (4).
[35] GSCOP, article 11 (5).
[36] GSCOP, article 11 (7).
[37] GSCOP, sections 67 to 69 inclusive of the *Arbitration Act 1996* (UK).
[38] Department for Business, Energy & Industrial Strategy (UK), *Statutory Review of the Groceries Code Adjudicator 2013-2016,* July 2017.
[39] In 2017 no new disputes were referred to the GCA for arbitration. Two that were underway from the previous year were resolved in 2017. The GCA had no call to exercise enforcement measures in 2017 and no formal investigations were commenced. However, the GCA did launch its second formal investigation in 2018 (see below) (Groceries Code Adjudicator *Annual Report and Accounts 1 April 2016 - 31 March 2017*, p. 13).

exhausted.[40] This is largely because of the substantial role that her office plays in educating and practically supporting suppliers and retailers (particularly through their CCOs), as well as in holding retailers to account in informal ways when it comes to their obligations under the GSCOP.

The GCA employs a range of measures to generate awareness and understanding of the implications of the GSCOP, not just amongst suppliers but as if not more importantly, amongst retailers – using the CCOs, with whom she has cultivated a close working relationship, as a key channel into these organisations. Tacon holds quarterly meetings with these officers at which she reports back on issues that she has been hearing in the industry and seeks their input and views. In this way she can act as an intermediary and promote common understanding of how Code-related issues should be addressed. In addition, Tacon holds regular 'supplier mornings', and publishes quarterly newsletters, best practice statements and case studies, all of which are intended not only to raise the profile of GSCOP and her work but to guide industry participants in developing ways of working that are in compliance with the Code.[41] She also makes use of the media – the trade press in particular – to disseminate as widely as possible information about the GSCOP and how it is working.

The GCA's office also conducts annual surveys to collect information on current Code-related concerns and uses the results to set priorities and generate industry discussion about how specific practices and code compliance generally can be improved.[42] There is significant participation in these surveys, an innovative aspect of which is the inclusion of a 'league table' reflecting respondent supplier views on change in retailer practice over the last year and overall assessment of Code compliance. We understand that this has had a significant impact – with retailers now competing with each other to rank well. The AFGC conducts an annual survey of its members to understand FGCC-related issues between retailers and suppliers. Like the GCA the AFGC has suppliers rate the MSCs on Code compliance, however unlike the GCA the results of the AFGC survey are not made

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[40] On 26 January 2016 the GCA published the results of her first formal investigation under the GSCOP. Tesco was found to have breached para 5 of the Code through widespread delay in payments which affected 'a broad range of Tesco suppliers on a significant scale.' At the time of the investigation the GCA had not been granted its current financial penalty powers. However, the GCA made several recommendations designed to prevent future breaches (see *Groceries Code Adjudicator Investigation into Tesco plc*, 26 January 2016). In March 2018 the GCA launched its second formal investigation. The investigation is based on reasonable suspicion that the Co-operative Group Limited may have breached the GSCOP in relation to de-listing and the introduction of benchmarking and depot quality control charges over a period from early 2016 to at least summer 2017 (see *GCA launches investigation into Co-Operative Group Limited*, 8 March 2018).

[41] Notably Tacon is able to carry out these functions despite being a part-time appointee only (she works three days per week) and having an office run on a skeletal staff made up of government secondees and contractors.

[42] The surveys canvas supplier views on: readiness by suppliers to raise issues with the GCA; reasons for not raising an issue; awareness of the availability of training and extent to which suppliers are being trained on the Code; extent to which suppliers have written supply agreements with designated retailers; extent to which suppliers know who and where to find a retailer's CCO; and experiences with specific issues such as aspects of retailer practice that are having the most negative impact.

public and hence arguably do not have the same impact as the GCA surveys.

4.7 An Australian version of the UK model

There is currently no body or even combination of bodies in Australia that perform a corresponding industry-wide advocacy, intermediary liaison, advisory and dispute resolution role to that of the GCA.

We agree with the assessment in the DR that the ACCC has a crucial role as the agency ultimately responsible for enforcing the FGCC by way of proceedings that may be brought for its breach.

We further agree with the DR that the ACCC is well-placed to provide the sector with educational material about the Code and could do more in this regard. We note that at present this support is primarily directed at suppliers and relative to the GCA's approach with respect to advocacy and education, is fairly hands-off.

Given the UK experience, we therefore support the general suggestion in the DR that the ACCC play 'a more active role' in the industry.[43] Increased activity, in our view, should be by way of directing further resources to educating the industry about the FGCC and, where necessary, investigating and taking action to enforce the Code.

Aside from those activities, the ACCC is not best placed to play a role comparable to that of the GCA (including by way of meetings with CCMs/ICAs) and nor is it an appropriate body to deal with disputes.

While the Commission does carry out activities directed at enhancing compliance by businesses with their legal obligations and conducts educative and outreach activities in support of this, on a sector-specific basis its work in this regard is not as extensive as that of the GCA in relation to the UK grocery industry. Given the extent of the ACCC's portfolio and limited resources, nor could it be.

The ACCC's remit is to focus on matters that have an economy-wide impact and warrant prioritisation (and corresponding allocation of its limited resources) according to publicised criteria that include harm to the competitive process and detriment to consumers.[44] The ACCC generally does not become involved in dealing with small business or individual consumer disputes.

[43] Independent Review of the FGCC Draft Report June 2018, p. 37.

[44] *2017 ACCC Compliance and Enforcement Policy*, February 2017, p. 2; ACCC submission to the Food and Grocery Code of Conduct Review, 11 May 2017, p. 9.

In our view, these functions are better performed by a different external body or service.[45] We have considered two possible options in this regard: (1) extending the remit of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO); and (2) our preferred option, creating a new industry or code specific education, advisory and dispute resolution service. A third option may be to draw on the services provided by State-based small business ombudsmen and related offices.

4.7.1 Option one

Consideration may be given to allocating advisory and dispute resolution functions to the ASBFEO. This would harness the expertise and reputation of this agency in advocating for and dealing with the grievances of small business by way of assisting with dispute resolution. The ASBFEO would need to be resourced to create a FGCC-specific role for this purpose and an individual with industry expertise would need to be sought for that role.

We recognize that this option brings with it certain challenges:

Firstly, the titular purpose of the ASBFEO is to advocate for small business. MSCs may be concerned that, as such, SME supplier interests may be given preference over their own. Further, for the same reason, the ASFBEO is arguably not an avenue appropriate to larger suppliers.

Secondly, such an extension of the current remit of the ASBFEO would require changes to the charter of that organisation. Under current legislation the ASBFEO can only refer matters for alternative dispute resolution (ADR).[46] The ASBFEO does not have the power to conduct any form of ADR itself.[47] Further, the definition of ADR does not include arbitration. Therefore, for the ASBFEO to have the power to refer disputes to arbitration amendments would be required.

Treasury recently undertook a review of the ASBFEO. In this review Treasury considered whether the role of the ASBFEO should be expanded to undertake the functions currently provided by the appointed Mediation Adviser under the Franchising, Horticulture and Oil codes.[48] However, the report concluded that expanding the assistance function of the ASBFEO in this way would be infeasible due to differences in:

- the roles of the ASBFEO and the mediation adviser in mediation – *The Act* provides for the

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[45] Under the Horticulture and Franchising codes, a mediation adviser is appointed by the relevant minister and the advisor in turn is responsible for appointing mediators to a dispute arising under that code (see, Horticulture Code of Conduct, cl 39; Franchising Code of Conduct, cl 44, 45).

[46] *Australian Small Business and Family Enterprise Ombudsman Act 2015*, s 71.

[47] *Australian Small Business and Family Enterprise Ombudsman Act 2015*, s 73.

[48] Review of the ASBFEO – final report at 2.4.1.

ASBFEO to recommend a group of dispute resolution providers and the parties to the dispute must choose the provider. In contrast, the Mediation Adviser must nominate a specific provider which the parties to a dispute must use.

- the types of parties to which the ASBFEO and the Mediation Adviser provide dispute resolution services – *The Act* limits the ASBFEO to assisting small businesses, whereas the mediation adviser can assist all businesses, small or large, as well as consumers.[49]

Further, the Report concluded that, 'there is no evidence of a gap in the ASBFEO's assistance function at present.'[50]

There may be no gap in the ASBFEO's assistance function, however there is a clear gap in the dispute resolution processes currently provided under the FGCC. If this gap is found to be mirrored within the current mandatory codes of conduct and / or is a concern for the drafters of the proposed mandatory dairy code, reconsideration of an extension of the ASBFEO's remit to fill that gap across various codes may be appropriate.

Thirdly, we acknowledge the importance of independence and impartiality, and perceived independence and impartiality, in any dispute assistance agency. The Report states that there were initial concerns among some ASBFEO stakeholders in this regard. The Report concludes that these concerns have been allayed by limiting the capacity of the ASBFEO to one of advocacy. As noted above, the ASBFEO must refer all requests relating to disputes to the relevant government agencies or to ADR providers. The ASBFEO does not provide any ADR services.[51]

Given the conclusions of the recent ASBFEO review, while we see some value and efficiencies in extending the remit of the ASBFEO, a less exigent solution may lie in the creation of a new industry or code specific education, advisory and ADR service.

4.7.2 Option two

This new service could be a FGCC-specific body. However, there is a strong case for consolidating and extending the services currently provided under Franchising, Horticulture and Oil codes, as well as any such services associated with a possible dairy code of conduct, to include a service that encapsulates all or some of these codes. This would maximise the value of the substantial

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[49] Ibid.
[50] Ibid.
[51] Ibid.

experience already available in Australia in managing code-related disputes.

While each industry has sector specific concerns, there are synergies across the horticulture, food and grocery and dairy sectors in particular that would benefit significantly from the body of knowledge and experience such a consolidated or omnibus service could generate.

Such a service would need to be resourced to employ an individual or team with significant relevant experience and standing in the relevant industry or industries. The remit of such a body should include advocacy, education, industry liaison and the provision of and / or ability to nominate industry-specific providers across a range of dispute resolution options.

In the context of the food and grocery sector, the role should include:

- regular (say, quarterly) meetings with CCMs to discuss and ward off issues under the FGCC;
- surveys of suppliers on FGCC compliance, the results of which should be published, and liaison with CCMs about key findings and actions that may be taken in response to them;
- advice to suppliers on a confidential basis in relation to specific issues that suppliers bring to the service about ways in which the issue might be managed and resolved, including whether or not the issue could involve a breach of the FGCC;
- provision of mediation and arbitration services, drawing on a pool of experienced ADR professionals and in accordance with a clear set of procedures and cost rules that are publicly available; and
- liaison between the codes disputes management service provider and the ACCC in support of each other's respective roles and activities in the industry.

Reflecting our submissions above, we do not agree with Draft recommendation 6 concerning expansion of the role of the ACCC to have oversight responsibility for the proposed ICAs.

However, in the interests of enhanced education of the industry, as well as transparency and accountability, we do support the proposal that the ACCC be required to review and publish CCM annual reports.

5. Compliance and enforcement

Contrary to the views of some stakeholders, including the ACCC, the DR concludes that there is not a sufficient case for introducing civil pecuniary penalties for breaches of the FGCC. We respectfully disagree with this conclusion.

We agree that from the perspective of suppliers, compensation is more of a pressing concern than penalties. However, this is not of itself a reason for not introducing penalties for breach the FGCC. Penalties serve quite a different function to compensation and it should not be a case of choosing between them.

The DR notes that the current limit on pecuniary penalties for prescribed industry codes is relatively small in relation to the signatories' financial status – 300 penalty units (currently $63,000). The DR argues that to have a deterrence effect this would have to be significantly increased and that to do so may run counter to the light-touch regulatory framework underpinning industry codes.[52]

However, as was evident from the ACCC actions brought against both Coles and Woolworths under the *CCA*, even substantial pecuniary penalties often do not materially affect the bottom line of businesses the size of the MSCs. However, the reputational damage and management distraction that investigations and proceedings involve are very real concerns, and arguably are more effective in terms of deterrence than any financial sanction.[53]

The introduction of penalties would also send a clear message from government to both signatories and suppliers about the seriousness with which the government treats these issues.

Both the Horticulture and the Franchising codes provide for civil penalties and infringement notices. Neither code included such penalties in their original form. However, following the recommendations of the Wein review of the Franchising Code in 2013 the government introduced penalties for breaches of certain provisions of that code.[54] In turn, the government accepted the recommendation of the Horticulture Code review that 'a code lacking proper enforcement powers is unlikely to deter unacceptable conduct and inappropriate behaviour' and penalties were introduced.[55]

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[52] Independent Review of the FGCC Draft Report June 2018, p. 41.
[53] See Beaton-Wells and Paul-Taylor, 2017, at 6. I (c). Also, Sue Mitchell and Madeleine Heffernan, 'Coles to refund suppliers as it settles cases with ACCC', *The Sydney Morning Herald*, 15 December 2014.
[54] Explanatory Statement Select Legislative Instrument No. 168, 2014 Issued by the authority of the Minister for Small Business *Competition and Consumer Act 2010 Competition and Consumer (Industry Codes—Franchising) Regulation 2014*, p.3.
[55] Department of Agriculture and Water Resources, *Australian Government response to the Independent Review of the Horticulture Code of Conduct 2017*, February, Canberra, Recommendation 11.

As a matter of policy, in our view, there should be consistency between at least these two codes and the FGCC in terms of penalties. However, we acknowledge that a stronger case for this argument would be available if the FGCC was a mandatory code.

We would be pleased to answer any questions or discuss any aspect of this submission if it would assist the Review.