SUBMISSION TO SENATE STANDING COMMITTEE ON ECONOMICS RE COMPETITION AND CONSUMER (INDUSTRY CODES - FOOD AND GROCERY) REGULATION 2015

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My name is Robert (Bob) Gaussen. From 16th July 2001 to 31st August 2006, my company Mediate Today Pty Ltd (renamed Expert Today Pty Ltd) provided the services of the Produce and Grocery Industry Ombudsman under contract to the Commonwealth Government.

I apologise for this late submission but am working overseas and only very recently became aware of the Reference. This submission has been prepared without access to my full resources.

I have read the Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015. Section 2 (c) states that a purpose of the code is:

> "to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers."

The Code does not satisfy this purpose.

Part 5 is titled "Dispute Resolution".

Division 1 – "Preliminary" places an onus on the supplier to provide sufficient particulars to enable the retailer or wholesaler (retailer) to investigate, consider and respond to a complaint. In other words the supplier must make and establish a case. 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.

Division 2 – "Complaints" deals with the first stage dispute resolution procedure being the retailer's internal dispute resolution procedures.

Division 3 – "Mediation and arbitration" deals with the second stage dispute resolution procedure being the external dispute resolution procedures. A supplier (but not a retailer) may refer a dispute which has been processed or should have been processed under Division 2 to a mediator or arbitrator who will proceed under the rules of the Institute of Arbitrators and Mediators Australia (IAMA). In recent years this organisation has suffered significant financial problems and has now merged with LEADR under a new name. There is no provision for the collection of statistical data or training in the practices of the industry for dispute resolvers. There is no provision for the promotion of the external dispute resolution procedure. Unlike the previous code, there is no barrier to the involvement of lawyers.

During my period as ombudsman, the service was fully funded by the Commonwealth. 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.

An intimate knowledge of the produce and grocery industry is essential to assist parties to resolve their disputes. Mediation or arbitration (dispute resolution) in the industry has three characteristics which readily distinguish it from other industries.

- The retailer is characterised by enormous negotiating power (generally a price maker) and the supplier is characterised by minimal negotiating power (generally a price taker).
- The retailer is well resourced financially; the supplier is struggling and unable to sustain an award of costs.
- Geographic distance between the parties is often a major contributor to the dispute and barrier to speedy dispute resolution.

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. There is to be no ombudsman, dispute resolution advisor or similar to explain the Code processes and assist all parties (in reality the supplier) gather and present necessary information and negotiate a commercially realistic settlement. The supplier is to receive no external assistance under the Code.

Drawing on my practical experience as Produce and Grocery Industry Ombudsman, I recommend that an Ombudsman service be reinstated albeit with additional powers and responsibilities.

A single ombudsman service offers many advantages to suppliers when dealing with complaints against well-resourced and powerful retailers with substantial market share.

1. 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.

2. The Code provides for either party agreeing to a named dispute resolver or an appointment by IAMA. This may lead to the appointment of many different dispute resolvers who have no experience of industry matters. Alternatively retailers may develop relationships with certain dispute resolvers in whom they have trust and strongly prevail on suppliers to accept their proposed individual. Clearly this leads to a perception of bias in the mind of suppliers and will undermine the necessary perception of independence and neutrality in the operation of the Code.

3. An ombudsman develops an understanding the practices of both suppliers and retailers whereby they can initially conspire to conceal the cause of disputes.

4. An ombudsman service provides a single point for the collection of confidential information relating to the details of disputes. Industry areas with a large number of problems (e.g. mangoes) can be quickly identified and action taken. Dishonest industry participants can also be identified. Without a centralised ombudsman scheme there can be no centralised collection of statistics. Both the dispute resolver’s code of ethics and the standard Agreement to Mediate prohibit a dispute resolver releasing the details of individual disputes and commenting on the dispute and honesty or otherwise of parties. Dishonest industry participants will avoid identification by ensuring that dispute resolutions are conducted by a different dispute resolver.

5. An ombudsman service should, as previously, be funded by the Commonwealth. Under the Code, parties will be required to share the cost of the dispute resolver or the dispute resolver may make an award for costs against either party. In addition, suppliers will need to pay the travel and lost time costs due to the geographic distance. In most cases it can be expected that a retailer will refuse to travel for dispute resolution leaving the responsibility to the supplier. The cost of airfares and lost days of productivity need to be included. While ombudsman, I conducted many video conference between remote parties with the cost being met by the Commonwealth. By way of example, the hire of video conferences facilities in 2005 was in excess of $2,000 per day.

6. If there are many dispute resolvers, their individual expertise and performance will be variable. Over a period of time respect for the system will be lost as suppliers share experiences of dispute resolvers with little expertise. Unfortunately most industry participants will form their opinion based on the worst case stories.

7. An ombudsman service can spend time promoting the Code, educating the parties and encouraging them to improve their conduct and business practices.

These comments are relevant because every dispute that can be expected to arise under the Code will be between parties which are unevenly matched. We call this negotiating at an uneven table. One of the most difficult challenges for a dispute resolver is to empower parties to address the basic inequity in their available resources and expertise.

In my view the 1999 Federal Parliamentary Joint Select Committee inquiry into the Retailing Sector in its report, "Fair Market or Market Failure?" (Baird Report[1]) got it right. It recommended:

> "…the appropriate dispute resolution mechanism should take the form of an independent Ombudsman, to be funded by government, who could attempt to resolve all sorts of complaints brought to it by business in the retailing sector. Where the complaints received by the Ombudsman raise issues that fall within the jurisdiction of another established body, or which it cannot resolve on its own, or where an issue of a breach of systemic law is raised, the Ombudsman could refer businesses for further assistance in appropriate cases, to the relevant industry, Commonwealth, State or Local government body (including the ACCC in respect of competition and consumer protection issues).
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> The Retail Industry Ombudsman would have the power to receive complaints, the expertise to give advice and would be required to make all efforts to deal with them quickly and through dispute resolution or referral. Compliance systems in industry would also ensure complaints are handled quickly and responsibly.
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> The Committee believes that support should be made available to the Retail Industry Ombudsman through an advisory panel made up of representatives of various relevant Commonwealth and State agencies that can then provide a network of assistance.
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> The Committee wishes to emphasise that the Retail Industry Ombudsman should be an independent officer, however the Committee sees a link with the ACCC as being crucial, particularly in light of the fact that many of the complaints emanating from the retail sector relate to competitors as well as suppliers, which may raise competition law concerns."

The Baird Report also proposed that the Ombudsman:

- Have formal capacity to refer businesses for further assistance in appropriate cases, to relevant industry, Commonwealth, State or Local government bodies (including the ACCC in respect of competition and consumer protection issues); and

- Receive support through an advisory panel made up of representatives of various relevant Commonwealth and State agencies that can then provide a network of assistance.

If the Code is to genuinely address grievances of suppliers in their relationship with retailers, the following issues should be addressed.

1. **Promotion**
   There needs to be a clear responsibility on retailers to promote the Code and educate suppliers on its provisions. Retailers should be obliged to make a copy of the Code available to suppliers at least annually.

[1] Fair Market or Market Failure? A review of Australia's retailing sector. August 1999

2. **Concerns about victimisation**
   Some suppliers will be discouraged from proceeding under the Code for fear of victimisation. Other than the general provisions in Part 4 – "Good faith etc.", there is no clear statement that suppliers will not be victimised by retailers for proceeding to make a complaint under the Code. A clear statement should be made.

3. **Discovery of documents**
   Section 31 (2) 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.

4. **Role of ACCC**
   The ACCC does not have the resources to investigate all matters referred to it. An ombudsman service acts as a natural filter on referrals within jurisdiction of the Code. In any case, the Code is silent on how matters may be referred to the ACCC. There should be a clear right for the dispute resolver to refer a matter to the ACCC and resultant obligation on the ACCC to advise the dispute resolver and parties on any action it proposes to take within a period of 90 days.

5. **Legal indemnity**
   All parties participating in dispute resolution, including the dispute resolver, should be protected by legal indemnity against threats of or actual defamation proceedings, or similar.

6. **Participation of lawyers**
   Without the agreement of the parties and the dispute resolver, lawyers should not be available as third party participants in dispute resolution. Lawyers employed in a full-time capacity by any party should be exempt from this provision.

7. **Voluntary Code**
   The Code should be mandatory. 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.

As I expect to remain overseas throughout March, it is not practical to appear before the Committee. However I am available for either video or telephone conference at the convenience of the Committee.