



Retail Grocery Industry Ombudsman

Third Annual Report

13th September 2003 – 30th September 2004

Office of the Retail Grocery Industry Ombudsman.
Provided under contract to the Commonwealth Government by MEDIATE TODAY Pty Limited
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It's something you don't think about much... until it happens. Conflict! A disagreement between any parties is unpleasant, but what happens when the conflict occurs between business associates and the rift appears irreconcilable? It would be a shame to sever a previously profitable and amicable commercial relationship over one dispute, whether it is over money, or a communication breakdown. What does one do in such a situation?

Fortunately, in the Retail Grocery Sector, there is an effective solution to resolving disputes cheaply and quickly.

It is the Retail Grocery Industry Ombudsman.

Ombudsman's Foreword

The Retail Grocery Industry Ombudsman is a fully funded Commonwealth Government initiative. The Industry Ombudsman works to the Retail Grocery Industry Code of Conduct which was devised by retail grocery industry participants with support from Government.

The Code was proposed in 1999 by a joint report of both Houses of the Federal Parliament and, in large measure, constitutes the retail grocery industry's response to concerns identified by that report. It provides a set of voluntary standards covering produce standards and specifications, contracts, labelling, packaging and preparation, and notification of acquisitions. Importantly the Code also contains comprehensive dispute resolution procedures based around a two-stage process. The first stage places an onus on participants to resolve disputes under any internal procedures which may exist and, where problems can't be resolved in this way, for referral to second stage dispute resolution provided by the Industry Ombudsman.

The Industry Ombudsman is available to all parties in dispute as a mediator (honest broker) to provide a safe, secure and, if agreed, confidential forum for discussions. Notwithstanding the relative commercial or financial strength of any one party, the dispute resolution provisions of the Code are intended to bring parties unable to directly resolve a problem into mediation, chaired by the Industry Ombudsman, and attended by company principals without the presence of lawyers. Indeed the Code provides that neither party may be legally represented before the Industry Ombudsman. When industry participants are in dispute, the Industry Ombudsman ensures that all parties have both the power to negotiate freely and authority to change their organisations view, if convinced that it is warranted.

Mediation is not intended to be a forum for "complex legal arguments". It is a forum for considering the impact of a dispute on the respective businesses of the parties with a view to finding a sensible and fair commercial outcome without the need to determine complex legal arguments or follow strict legal form. Indeed when parties seek to present complex argument, a role of the Industry Ombudsman is to encourage parties to move beyond such positional bargaining and assist them workshop, understand and implement agreements that are commercially sensible and, as far as practical, allow accommodation of both views. Mediation is a precursor to litigation and legal argument and when successful renders the time, cost, emotion and publicity of litigation unnecessary.

In the vast majority of mediated cases, the respondent (the party which is the subject of the complaint) will assert that it "understands the applicant's (usually a grower or producer) disappointment but considers they have acted both in a fair manner and within their legal rights". However most parties still participate in mediation and in 93% of cases reach a signed settlement agreement.

This third Annual Report covers a period during which the federal government commissioned an independent review into the performance of the Code. The Office of the Industry Ombudsman was involved in making a comprehensive submission to the review and in responding to requests for information. The review process has impacted on the normal operation of the Code.

As in previous years, the level of enquiries and applications received can be related to the number of field visits by the Industry Ombudsman. However there continues to be a major need to educate industry participants in the Ombudsman's dispute resolution service.

Bob Gaussen and David Holst
Retail Grocery Industry Ombudsman

November 2004

About the Retail Grocery Industry Code of Conduct and Ombudsman Service

The Retail Grocery Industry Code of Conduct, which establishes the office of the Industry Ombudsman, was developed by the Retail Grocery Industry Code of Conduct Committee. This committee was appointed by the Federal Government in February 2000 upon its acceptance of a number of the recommendations by the Federal Parliamentary Joint Select Committee on the Retailing Sector in its report, *Fair Market or Market Failure?* (Baird Report).

This committee consisted of major participants in the industry including senior executives from the National Farmers Federation, Coles-Myer, Woolworths and the National Association of Retail Grocers of Australia. On 13th September 2000, the Committee was able to introduce the Code as a voluntary Code for all industry participants.

The objects of the Code are to:

- Promote fair and equitable trading practices amongst industry participants;
- Encourage fair play and open communication between industry participants as a means of avoiding disputes; and
- Provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute.

Industry participants are involved in vertical commercial relationships in the production, preparation and sale of food, beverages and non-food grocery items, including (but not limited to) primary producers, manufacturers and/or processors, wholesalers, importers and/or distributors, brokers and/or agents and grocery retailers.

This is a vast industry which is defined by reference to both produce and product. The Code defines these terms in Section 4 "Definitions".

"Produce means yield, especially of fields or gardens, waterways, dams or oceans, including yield from plants and/or animals under cultivation and/or harvested from the wild, for sale as raw horticultural and agricultural goods. Produce includes yield of freshwater and marine life and yield which is food or non-food."

This includes fruit, vegetables, cattle meat, sheep meat, chicken and turkey meat, grains, fish, cane, dairy, cotton, eggs, rice and flowers. More controversially some industry participants believe these terms include wine grapes and seeds grown at nurseries.

"Product means that which may be generated or made by a process of industrial transformation, including any produce that has been subject to any process or treatment resulting in an alteration of its form, nature or condition, that is sold in the industry."

This includes all processed foods sold in supermarkets including products such as breakfast cereals, biscuits, breads, jams, confectionary, tinned foods and fruits of all varieties, frozen foods, bottled drinks, soups etc. More controversially some industry participants assert these terms include alcohol, wool, pharmaceuticals, detergents and other non-food grocery products sold by grocery retailers.

The Industry Ombudsman is required to provide an independent mediation service to the retail grocery industry in accordance with the Code. The service must be readily accessible to industry participants and be supported by a toll free telephone enquiry line which is available 24 hours a day, 7 days a week, including all public holidays. In addition it includes an internet site which allows for electronic lodgement of dispute notifications and provision for industry participants to seek specific information via email.

The dispute resolution procedures of the Code support a two staged process. Stage one (internal procedures) encourages applicants to raise disputes with the respondent and stage two (Industry Ombudsman) encourages unresolved disputes to be raised with the Industry Ombudsman.

A stage one dispute may be accepted by the Industry Ombudsman where:

- The respondent has failed to respond to the matter in dispute within a reasonable period or within that period stipulated in the internal procedures;
- The applicant and respondent are unable to resolve the matter under the internal procedures;
- The applicant or respondent is dissatisfied with the outcome of the internal procedures; or
- The applicant is dissatisfied with the respondent's internal processes or procedures in considering the matter or in reaching its decision.

However this process rarely occurs as few respondents have implemented internal dispute resolution procedures that are consistent with the Code. Where there are no internal procedures, Section 10.2 of the Code permits direct referral to the Industry Ombudsman. Given the thrust of the Code is to encourage parties to resolve matters directly, the Committee responsible for managing the Code recently enhanced Section 10 "Dispute Resolution Procedure" under the heading of "Principle" to read as follows:

"All industry participants support a dispute resolution procedure in which:

- industry participants will publish internal dispute resolution principles consistent with the two-stage dispute resolution procedure described in this Code;
- all industry participants, industry associations and signatories to this Code will promote the existence of internal dispute resolution procedures in a genuine effort to resolve disputes;
- all internal dispute resolution procedures will provide both a statement to the effect that the industry participant supports the Retail Grocery Industry Code of Conduct and contact details for the Industry Ombudsman."

Notwithstanding there may be no internal procedures, we are reluctant to directly accept disputes without firstly encouraging negotiations between the parties. Therefore, the following procedures generally apply.

Initial contacts with the Office of Ombudsman are taken as "dispute enquiries". Details of the enquiry are recorded in a database. The enquirer is questioned as to whether the dispute has been discussed with the respondent. In most cases there has been either an inadequate attempt to negotiate or the issue has been largely ignored by the respondent. Permission is received from the enquirer to speak to the managing director, chairman or owner of the respondent company about the dispute with the purpose of strongly encouraging both parties to have direct negotiations over the next two weeks. The parties are requested to notify the Office as to the success or otherwise of their discussions. In about 50% of matters this intervention is sufficient reason for the respondent to focus on the complaint and, working with the applicant, devise a sensible commercial solution.

If negotiations fail or have not commenced within a reasonable period, a formal complaint is taken in the form of an application for mediation. Both parties receive correspondence advising receipt of the application and that the Industry Ombudsman will be in personal contact shortly. If we are satisfied that the parties are unlikely to make further progress in direct discussions, that the matter is within jurisdiction and is not frivolous, vexatious, repetitive or lacking in substantive merit, a mediation conference is convened at an agreed time and date with the parties.

The fact that the Code Administrative Committee (CAC) has had to modify Code processes is a practical reflection of the low take-up rate of internal procedures that comply with the Code. We are not convinced that the Code amendment is receiving any measurable compliance and this low take-up rate remain as an ongoing issue

Highlights for 2003 - 2004

Milestones during the year include:

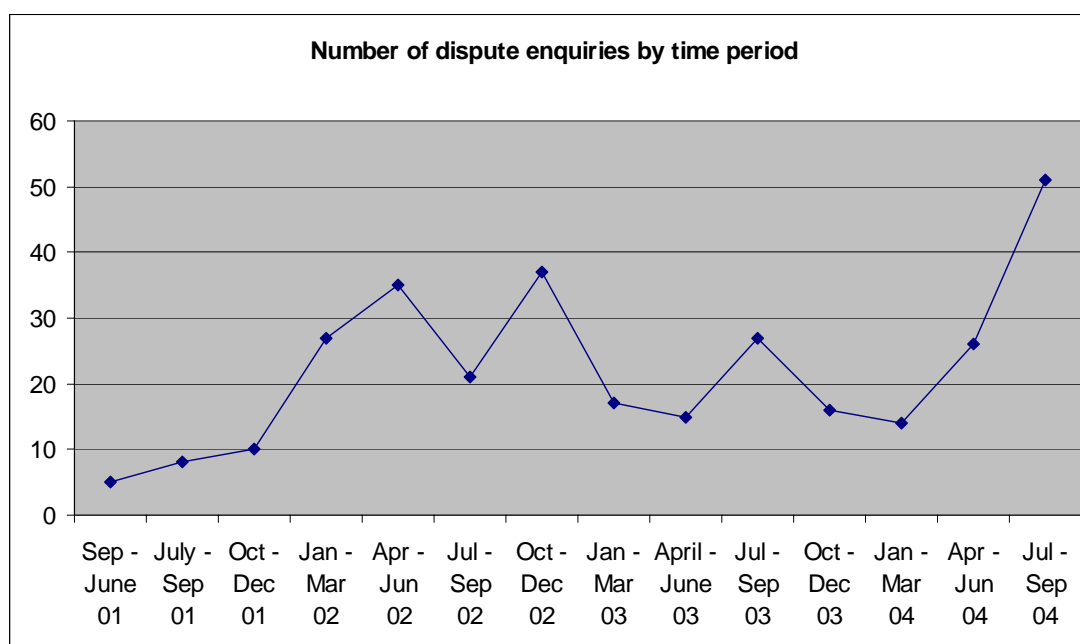
- 107 dispute enquiries which is an increase from 96 in the previous period. Importantly the number of requests for mediation declined from 44 in the previous period to 33. This statistic demonstrates an important objective of the Code, being to encourage parties to resolve their disagreement prior to the matter being mediated by the Ombudsman. In an increasing number of enquiries, informal discussion between the Ombudsman and both the applicant and respondent was sufficient for parties to be able to discuss their problem and resolve it directly without the need for mediation.
- Preparation of a substantial submission to the Buck Enquiry into the performance of the Code, highlighting the progress made and areas for improvement.
- Speaking at 15 industry conferences and 24 meetings across Australia in order to promote the Code, encourage better business practices and describe the two stage dispute resolution process. These figures are a reduction from previous years principally due to the industry focus on discussions with Mr Neil Buck in assisting him with his review into the performance of the Code.
- Responding to interview requests from print, radio and television, including 'County Wide', 'Country Roundup', 'Rural Hour' and current affairs reports on local television.
- Appearance on the ACCC Competing Fairly Forum and attending monthly meetings with the ACCC Small Business Commissioner and staff.
- Compiling aggregated statistics on the operation of the dispute resolution provisions of the Code.
- Distribution of a series of articles "Tips from the Ombudsman" to industry journals and publications. The articles provide practical advice for readers on dealing with disputes and how to engage the services of the Ombudsman.
- Further development and maintenance of an interactive website at www.rgio.com.au which is regularly updated with key information and serves as a respected information resource for government, industry and the community. The site currently receives an average of 77 requests for information per day.

The Year in Review – Statistical Report

How many dispute enquiries?

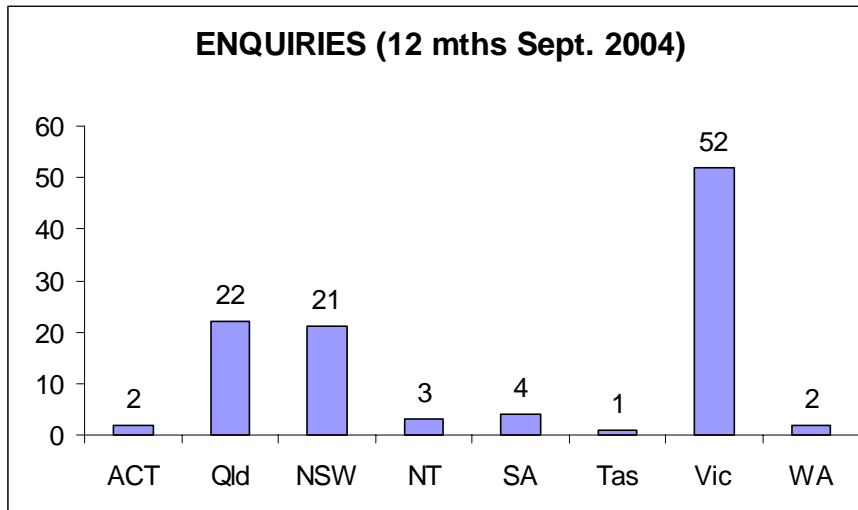
There was an increase in the number of dispute enquiries from 96 to 107 from the previous year. The emphasis remained in the eastern states; however enquiries were received from every State and the Northern Territory.

Analysis of the enquiries by quarter reveals a significant decline during the period of the Code review up to March 2004, with the June and September quarters showing a significant increase. In fact during the September 2004 quarter 51 enquiries were made which is the highest ever recorded versus 35 in June 2002. Sixteen of these Victorian enquiries related to the export of table grapes.



NUMBER OF ENQUIRIES BY STATE / TERRITORY (12 mths September 2004)

ACT	2
Qld	22
NSW	21
NT	3
SA	4
Tas	1
Vic	52
WA	2
Total	107



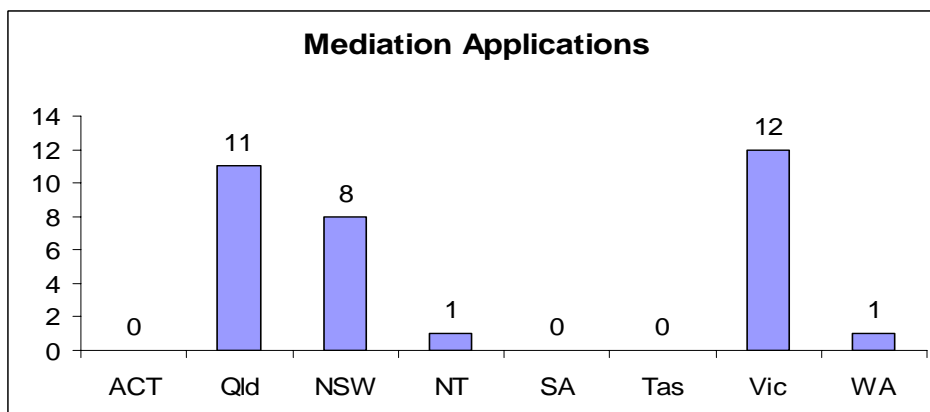
Note: The increase in Victorian enquiries relates to sixteen enquiries in relation to disputes over export of table grapes.

How Many Applications for assistance?

There were 33 applications for mediation which was a decrease of 11 on the previous year. There was also a decrease in the percentage of enquiries progressing to formal requests for assistance from 46% in the previous year to 30.8%. This statistic is important as it supports an objective of the Code being to encourage parties to resolve disputes directly without the need for formal mediation. In most cases, resolution followed informal discussion between the Ombudsman and all parties.

Number of Mediation Applications received by State / Territory

ACT	0
Qld	11
NSW	8
NT	1
SA	0
Tas	0
Vic	12
WA	1
Total	33



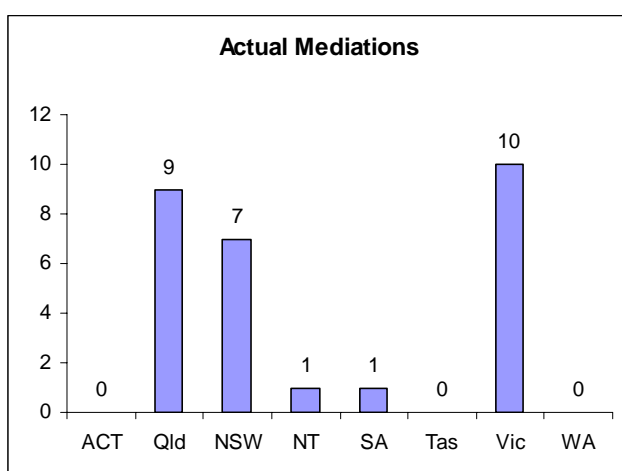
How many mediations?

All applications and enquiries were reviewed and the most appropriate dispute resolution process consistent with the Code adopted.

- 28 matters were mediated, including 2 matters joined;
- 24 matters concluded with signed agreements following formal mediation; and
- 8 applications were rejected as beyond jurisdiction, including 2 referrals to other agencies.

Number of Mediations undertaken by State / Territory

ACT	0
Qld	9
NSW	7
NT	1
SA	1
Tas	0
Vic	10
WA	0
Total	28

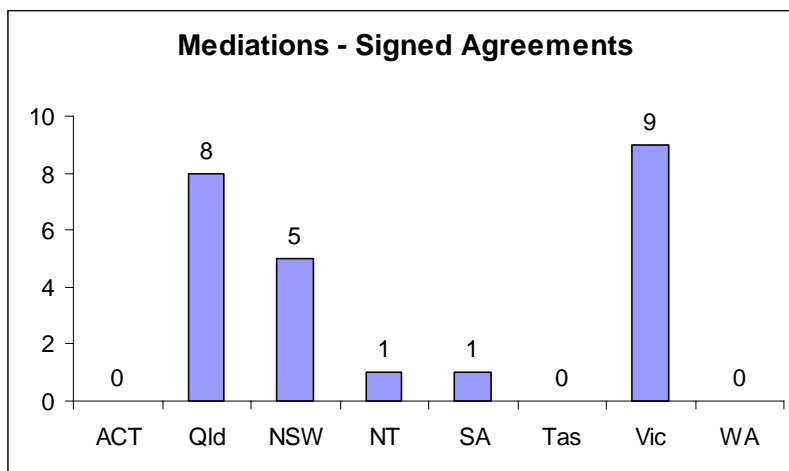


What is the success rate for mediations undertaken?

There were 28 matters that proceeded to mediation during the year with a further 8 awaiting a suitable date for all parties to proceed. Ninety-three percent (93%) of the mediations resulted in a signed settlement agreement.

Number of formal mediations resulting in signed agreements between the parties.

ACT	0
Qld	8
NSW	5
NT	1
SA	1
Tas	0
Vic	9
WA	0
Total	24

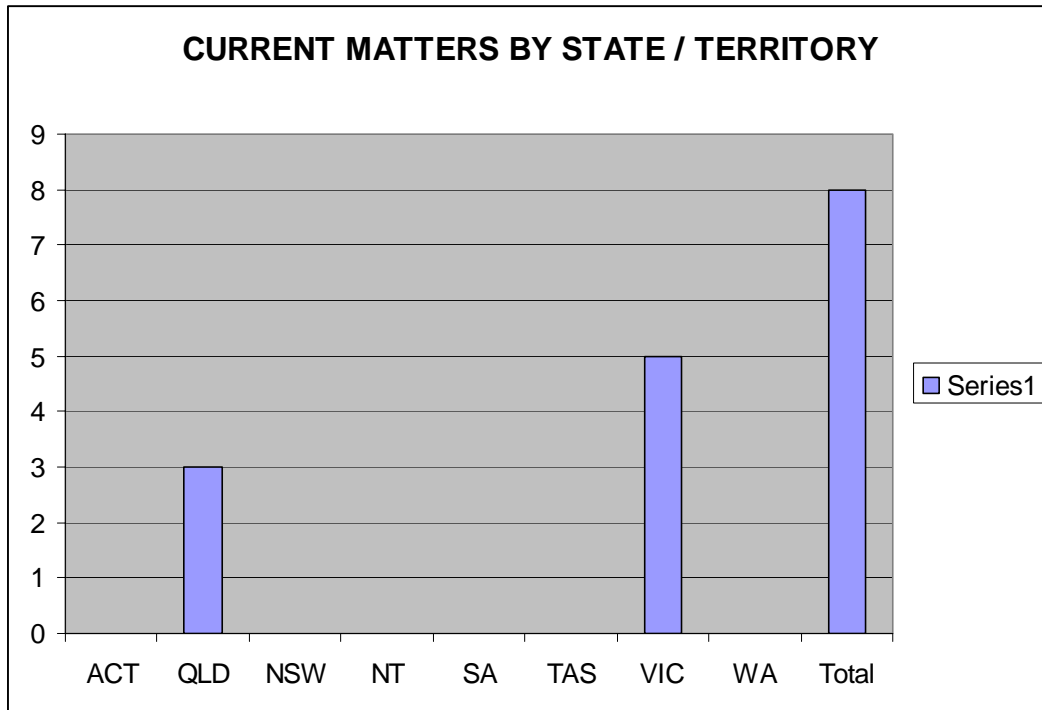


How many current matters?

There are 8 matters currently in process awaiting agreement by the parties to a time and place for mediation.

Current matters by State / Territory

ACT	0
QLD	3
NSW	0
NT	0
SA	0
TAS	0
VIC	5
WA	0
Total	8



Three year comparison

Examination over the past three years of the number of enquiries, applications and mediations per annum vary within a relatively small band, however, this does not tell the whole story.

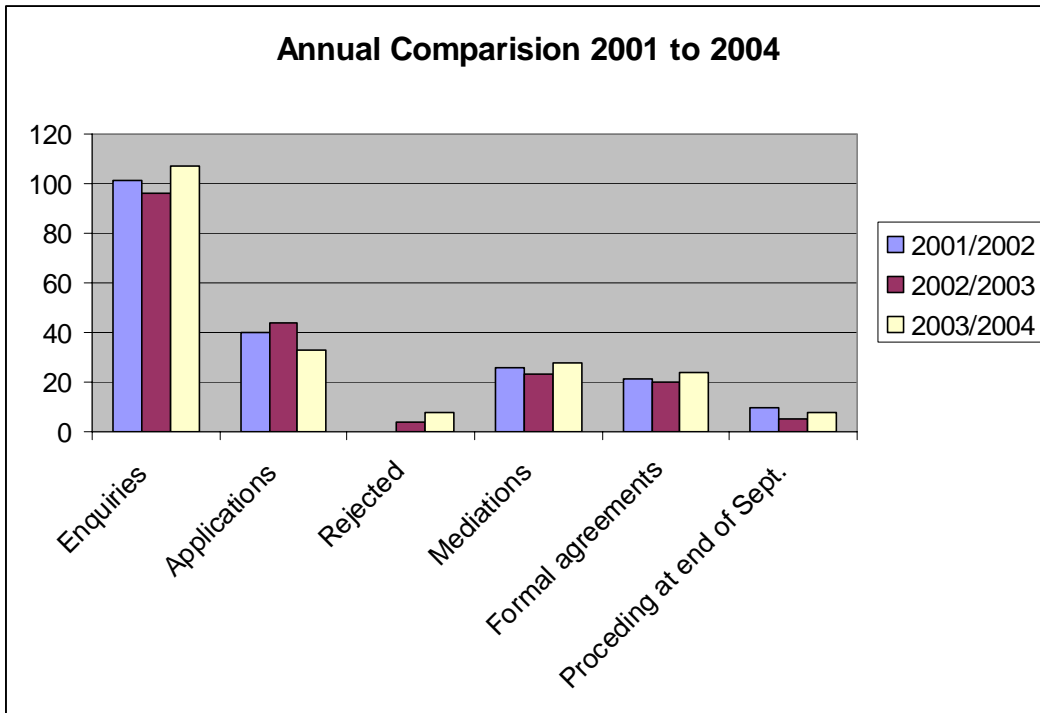
The bulk of enquiries and applications are received following attendance by the Ombudsman at conferences, grower meetings and ACCC seminars.

Over the three years we have encountered low levels of knowledge about how the Code may benefit industry participants. This fact was recognised in the Buck Report which stated:

“There was a significant lack of awareness of the Code and its procedures”.

One of the causes identified in the report was the failure of industry participants to recognise that the name “Retail Grocery Industry Code of Conduct” encompasses all participants in the food supply chain, including growers, packers, transporters, producers, processors, refiners, wholesalers, retailers, etc. Our experience supports this finding and that a change to the name of the Code would assist in market penetration. Although most of our invitations to speak and contacts have been with the grower and producer end of the market, anecdotal evidence suggests that similar lack of understanding applies throughout all levels of the industry supply chain.

An example of the increase in the number of enquiries following personal contact by the Ombudsman can be seen in this years’ analysis of the statistics. In the six month period, October 2003 to March 2004, 30 enquiries were received with a jump to 77 enquires from April to September. This reflected the reduced activity of the Ombudsman during the review and immediate post review period, with a more back to normal operation in the second half of the year.



Issues of Concern and/or Systemic Problems

The major cause of industry disputes can be traced to a lack of open and transparent trading arrangements between the industry participants. Related issues are:

- Lack of certainty in contract – in many cases there is no written contract and only the most vague oral contract;
- Whether the quality of the product is fit for the intended purpose; and
- A perception that a complaint will lead to market intimidation.

Each issue was recognised and accepted by the Buck Review and, since July 2004, the major industry parties have been engaged in detailed negotiations dealing with these and other important issues.

By reporting on the nature of the disputes, the ombudsman's service provides the information necessary for the industry participants to review the performance of the Code and make necessary changes.

Transparency in Supply Markets

In our last two annual reports, we have reported that the majority of disputes are in areas where there is a lack of open and transparent trading arrangements between industry participants.

In our second annual report, we concluded:

“The industry accepts that retailer's trade as merchants. However there is wide debate and discord over whether key characteristics of many central market trades should be classified as either merchant or agent transactions. The answer to this question determines whether wholesalers and growers have an obligation to collect and remit GST and the rights of parties to full transparency in the market trail.”

Our Office receives minimal numbers of complaints about the conduct of the major retailers, including Coles-Myer, Woolworths, Aldi and the independent sector. Retailers overwhelmingly purchase product at an agreed price which means that, other than disagreements over the quality of produce, this price is returned to growers. In our experience quality disputes with retailers are resolved quickly without the need to resort to the Ombudsman.

In contrast, when product is not purchase at agreed prices disputes may occur when there is absence of clarity over issues such as:

- The date of the first point of sale and subsequent sales;
- The type, quantity and count or size of the produce traded;
- The price received for each grade/size;
- The number of parties associated with transactions(s) and their respective commissions and other deductions, including any respective GST, transport, packing, sorting, storage, handling, industry levy and royalty costs; and

- The identity of the purchaser, most particularly whether there is a market trader to market trader transaction.

In courts of law and court based mediations, any party can be required to produce documents which another party believes is relevant to resolving a dispute. This process, known as "Discovery", is fundamental to Australian law as it seeks to ensure parties can't conceal relevant documents from each other. It is also important in ensuring that when negotiating conflict, no party is at an overwhelming advantage by controlling all the documents demonstrating the truth or otherwise of respective claims.

If an agreement is reached in mediation, it does not necessarily follow that the agreement is a "fair" outcome to both parties. It may be that the agreement simply reflects the best that can be achieved in the absence of documents which describe the trail of the actual events.

As the Industry Ombudsman, we regularly confront situations where there is a power imbalance between disputants. In making this comment we are not referring to the often discussed market domination of the major retailers, but rather the refusal of a respondent to make available documents to assist in the resolution of the dispute.

Christopher Moore in his book "The Mediation Process: Practical Strategies for Resolving Conflict" at page 68 discusses the problem and the ethical difficulty created for the mediator.

"In order to derive mutually satisfactory and acceptable decisions from negotiations, all parties must have some means of influence, either positive or negative, on other disputants at the table. This is a prerequisite for a settlement that recognizes mutual needs. Unless a weaker party has some power or influence, recognition of its needs and interests will occur only if the stronger party is altruistically oriented. If the power or influence potentials of the parties are well developed, fairly equal in strength, and recognized by all disputants, the mediator's job will be to assist the disputants in using their influence effectively to produce mutually satisfactory results. If, however, the influence of each side is not equal and one party has the ability to impose on the other an unsatisfactory solution, an agreement that will not hold over time, or a resolution that will result in renewed conflict later, the mediator will have to decide whether and how to assist the weaker party and moderate the influence of the stronger one.

To assist or empower the weaker party or to influence the activities of the stronger (contingent strategies that do not occur in all mediations) requires very specific interventions that shift the mediator's role and function dangerously close to advocacy. This problem has been debated among mediators (Bernard, Folger, Zumeta, 1984). One argument states that a mediator has an obligation to create just settlements and must therefore help empower the underdog to reach equitable and fair agreements (Laue and Cormick, 1978; Suskind, 1981; Haynes, 1981).

Another school argues that mediators should do little, if anything, to influence the power relations of disputing parties because it taints the intervenors impartiality (Bellman, 1982; Stulberg, 1981)."

Given the lack of clarity leading to many disputes in the industry, we consider that the first step towards obtaining fair mediated outcomes is requiring the production of Discovery documents. These are the documents that would normally be available in court proceedings and describe issues identified above.

In mediation, we seek to ensure that no participant is at a disadvantage that can not be properly addressed. Fundamental to removing such disadvantage is ensuring all parties have accurate information about the events and circumstances leading to the dispute.

At the commencement of mediation, claimants are expected to explain and justify their claim by reference to their view of the facts. However without access to the necessary documents describing the market trail, this is very difficult.

We propose that in industry discussions, parties consider providing the Ombudsman with the power to require the production of documents relevant to a dispute. In the event of disagreement about relevance of claimed documents or claims that documents are market sensitive and must remain confidential, the Ombudsman may inspect the documents and determine the question.

While not proposing that market trader to market trader transactions are all without merit or justification, we are alarmed at the number of disputes where the trader with whom the grower dealt sold the produce to another trader at a price substantially less than market price. In some cases we are aware that the final trader in the chain made a margin in excess of 40% on the final sale.

We propose that in industry discussions, parties consider how to deal with trader to trader transactions. It may be that in the absence of price agreed in writing between the grower and original trader, trader to trader transactions be notified to the grower in advance and only proceed with the grower's written agreement.

Attending Mediation in Good Faith

It is essential that the Code have credibility in the eyes of industry participants. Three years ago, when we commenced in office, there was a lack of confidence in the Code and it was in danger of collapsing. Since that time confidence in the Ombudsman scheme has grown but many industry participants remain highly sceptical about the effectiveness of the Code.

Industry commitment to a Code presumes that the parties will participate in the dispute resolution process. When parties refuse to participate, they effectively render the Code inoperable and, in the eyes of the applicant, demonstrate the Code to be ineffective and a waste of their time and resources.

The Ombudsman must respect a respondent's decision not to participate and has no power to follow up or even publicly report non-compliance. Of equal concern is the respondent who attends mediation with no intention of contributing to the discussion or seriously reviewing their position.

We propose that in industry discussions, parties consider introducing the principle of "good faith" in mediation. Failure to attend a mediation conference or participate in mediation in "good faith" should be reportable by the Ombudsman to the Minister and publicly. The term "good faith" in mediation has statutory meaning in NSW and has been successful in addressing issues of power imbalance between banks and borrowers in respect to rural mortgages.

“Good Faith” in mediation was considered in *Aiton v Transfield*¹ to mean:

“An obligation to negotiate or mediate in good faith:

- (1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable);
- (2) to undertake in subjecting oneself to that process, to have an open mind in the sense of:
 - a. A willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate.
 - b. A willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

- a. to act for or on behalf or in the interests of the other party;
- b. to act otherwise than by having regard to self interest.”

In the event the Ombudsman believes that “Good Faith” mediation has not occurred, we propose that the offender be named in our Annual Report and that the report be tabled in the Parliament under privilege.

In most cases the threat to “name and shame” should be sufficient to encourage compliance with the spirit of the Code, however in particularly serious matters, we propose that the Ombudsman be empowered to refer a matter to the ACCC and/or federal police for investigation and report.

Legal Indemnity of Ombudsman

In each annual report, we have requested that consideration be given to extending legal indemnity to the Ombudsman when engaged in legitimate activities under the Code.

We remain deeply concerned that legal proceedings may be brought against the Ombudsman in the proper performance of our duties, including:

- A party feels dissatisfied with a deal struck at mediation and attributes a loss to the negligence of the Ombudsman;
- A party feels they could have done substantially better through litigation and seeks to reopen the dispute in a court of law;
- A party feels aggrieved by the procedures adopted by the Ombudsman;

¹ Einstein J; Unreported – Supreme Court of NSW 1/10/1999

- A party objects to being named publicly by the Ombudsman as not participating in “good faith mediation” and/or is subject to proceedings arising from allegations of victimisation or similar.

Many statutes extend full protection and immunity against civil liability to mediators operating in court-attached systems or through government agencies. An example is the Courts (Mediation and Arbitration) Act 1991 (Cwth) which introduced provisions into the Family Law Act 1975 and the Federal Court Act 1976 extending to all mediators and arbitrators, when operating under the relevant sections of the Acts, the same protection and immunity enjoyed by judges when performing judicial duties. Similarly the community justice legislation in New South Wales, Queensland and Victoria extends an absolute immunity to mediators in the respective services. Most modern legislation providing for mediation also contains an absolute or qualified immunity.”

Issues of Price/Quality

Many disputes are characterised by assertions that produce is not fit for the intended purpose. As a consequence the grower and/or producer receives a return substantially less than that proposed. Discovery of documents will assist in resolution of these disputes but may not assist with all issues.

The first issue to be addressed in mediation is whether there was a problem in quality and, if so, who is responsible. There are many possibilities, including:

- The grower acted irresponsibly in forwarding produce below specifications.
- Unbeknown to the grower the produce suffered a defect such as disease.
- Damage occurred to the produce during packing or unpacking or in the transport chain.
- The trader or carrier left the produce to spoil under hot sun or other adverse conditions.
- The trader received an oversupply of goods and, as a consequence of an inability to sell, claimed poor quality to avoid making payment to the grower.

Requiring traders to obtain a quality report on all goods about which they have quality concerns will benefit all parties and resolve many of the issues, including assist in determining the party responsible for the inferior quality goods. However, whatever the quality of the goods, a role of the Ombudsman in mediation is to assist the parties agree on a reasonable price for the goods.

Currently there is no clear method of establishing a “reasonable” price.

With deregulation of the market and the repeal of the various Farm Produce Acts, there are no published or authoritative guidelines to establish a “minimum” price, much less the more difficult “reasonable” price which is independently verifiable.

In relation to fresh fruit and vegetables, a recent report by the Department of Agriculture, Fisheries and Forestry entitled “Price Determination in the Australian Food Industry” states at page 126 that:

“Wholesale data is widely reported and accessible but subject to strong risks of error and manipulation.”

Without independently verifiable collection of data, it may be attractive to understate the value of produce sold for a number of commercial reasons including lowering the price expectation of growers.

Some traders will not explain how they arrived at a “reasonable” price but expect the grower to make the case. In the absence of proper documentation and independently verifiable price data, this places the grower in a very difficult position. The suspicion is that without regulation or oversight, some traders may pay what they consider the grower will accept rather than an estimated 90% of the value of the produce. The “Price Determination in the Australian Food Industry” report states at page 59 that wholesalers adopt different positions on the amount of returns payable to growers based on their view of the grower.

“Those (growers) who have inferior quality, few or no market relationships or do not have their own source of market intelligence are exposed to manipulation by the trade”.

An example in the report is based on observed practice at the Sydney fresh fruit market and the prevailing market price for top quality on the day of \$16 per 12 kg carton of fruit.

- A reliable high quality supplier with brand, consistent volumes, loyal with good personal relationships will receive \$16, less 10% – 15%.
- A usually reliable quality supplier with seasonal volumes and is loyal may receive \$12.
- Average quality to poor quality suppliers may receive outcomes of \$4 to \$8.

The findings of the report mirror our practical observations from mediation.

Perceptions that a Complaint will lead to Market Intimidation.

Many growers and other suppliers believe that filing a complaint with the Ombudsman will lead them open to market intimidation. In over three years in office, we have heard the allegation many times but never received an application based on a victimisation claim. However we accept from many discussions that the fear, real or perceived, has prevented many industry participants coming forward with complaints.

The NSW Farmer’s Federation has recently written:

“The Code offers no protection from commercial retaliation, a real fear in a commercial environment in which volume buyers have considerable power and opportunity to curtail market access or to affect commercial outcomes. In a survey of members 57% of respondents feared commercial retaliation if they raised a dispute with a market trader and 61% had the same fear in regard to supermarkets. This fear presents a powerful disincentive for growers to use the dispute resolution process”².

² NSWFF submission to the Buck Review.

We consider that views expressed by the NSWFF represent an honestly held but possibly misplaced fear amongst members of the growing community.

The Australian Horticulture Limited submission makes a similar point:

“...it is likely that the potential for fear of retaliation/victimisation is most likely to be a factor in circumstances where there is a great imbalance in market power between parties and where possible adverse consequences on long-term viability are considerably greater for one party relative to the other”³.

In industry discussions, the parties may consider whether the Code should provide that any form of victimisation arising from conduct in accordance with the Code is prohibited. The principles for discussion may include that an industry participant shall not do or threaten to do any of the following as a consequence of an application or possible application made under the Code:

- Terminate or vary a contract for services that exists with the applicant, without mutual agreement;
- Injure the applicant in relation to the terms and conditions of the contract for services; or
- Alter the position of the applicant to the applicant’s prejudice;

Other Issues

Jurisdiction of the Ombudsman

Applications and/or dispute enquiries have been received by the Office of Ombudsman which raise the question of whether the particular industry sector falls within the jurisdiction of the Code. These “sectors” include:

- Wine grape;
- Chemical fertiliser;
- Seed/Nursery.

In the case of wine grape, the Commonwealth has agreed to fund the Ombudsman in mediating disputes awaiting confirmation by CAC.

In relation to chemical fertiliser, the Ombudsman has rejected three applications and not proceeded with several enquiries relating to disputes between growers and a chemical fertiliser companies as beyond jurisdiction.

Enquiries relating to royalty disputes between growers and participants in the nursery industry have also been taken. Other areas “waiting in the wings” include wool, pharmaceuticals and detergents which are sold to consumers through retail grocery outlets.

We believe that the industry needs to establish an expeditious and appropriate method of resolving questions of jurisdiction.

³ Horticulture Australia submission to the Buck Review.

In their industry discussions, parties may consider amending the Code to empower the Ombudsman to determine initial questions of jurisdiction relating to both interpretation of the dispute resolution provisions of the Code and whether a particular dispute falls under the Code. An appeal against any determination of the Ombudsman may be made to Code Administration Committee (CAC) which is responsible for administering the Code. The CAC should determine the appeal by way of resolution carried by a simple majority of all CAC members present at the meeting and entitled to vote. Any rulings should be published on the Ombudsman web-site.

Relationship with the ACCC

The Office of Ombudsman enjoys a positive relationship with the ACCC. In particular the Small Business Commissioner, John Martin, has been most helpful in working with the Office of the Ombudsman.

Under the Code there is no formal process of referral of matters considered by the Ombudsman as appropriate for investigation by the ACCC, however, in the event of such a situation, the applicant would be encouraged to refer the matter directly to the ACCC. The right of formal referral to bodies such as the ACCC or Australian Federal Police could be considered in future changes to the Code.

Contacting the Industry Ombudsman

The Office of the Retail Grocery Industry Ombudsman is provided by Mediate Today Pty Limited and reports to the Office of Small Business in the Commonwealth Department of Industry, Tourism and Resources in Canberra.

The Industry Ombudsman welcomes telephone and written enquiries.

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