

Decoding the Food & Grocery Code Downunder

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Trends in Retail Competition

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- Australian Research Council funded project over four years, 2015-2018
- Interdisciplinary team: law, economics, regulation, sociology
- Aim to investigate the objectives, dynamics and effectiveness of regulation of competition and fair trading in the grocery sector
- Case studies: supermarket-supplier relations; site acquisitions and planning

FGCC case-study - questions

1. What were the problems to which the FGCC was responding and why and how was the FGCC seen as responsive to or likely to address them?
2. To what extent has the FGCC been effective to date or is it likely to be effective in the future in addressing such problems?

FGCC case-study - method

Review and analysis of the extensive documentary record

70+ in-depth interviews with stakeholders across industry,
government and civic society

UK comparisons...

Briefly about the FGCC

Voluntary code under the *Competition and Consumer Act 2010* (CCA) introduced in 2015

Only applies to retailers or wholesalers that have elected to be bound – to date Coles and Woolworths and Aldi

Governs dealings between grocery retailer signatories and their direct suppliers only

Deals with supply agreements, payments, variations, delisting, promotions, standards, intellectual property, good faith, etc and dispute resolution

Does not override the existing provisions of the CCA relating to competition and fair trading, or general laws of contract and intellectual property

Due for review in 2018

What problems and for who?

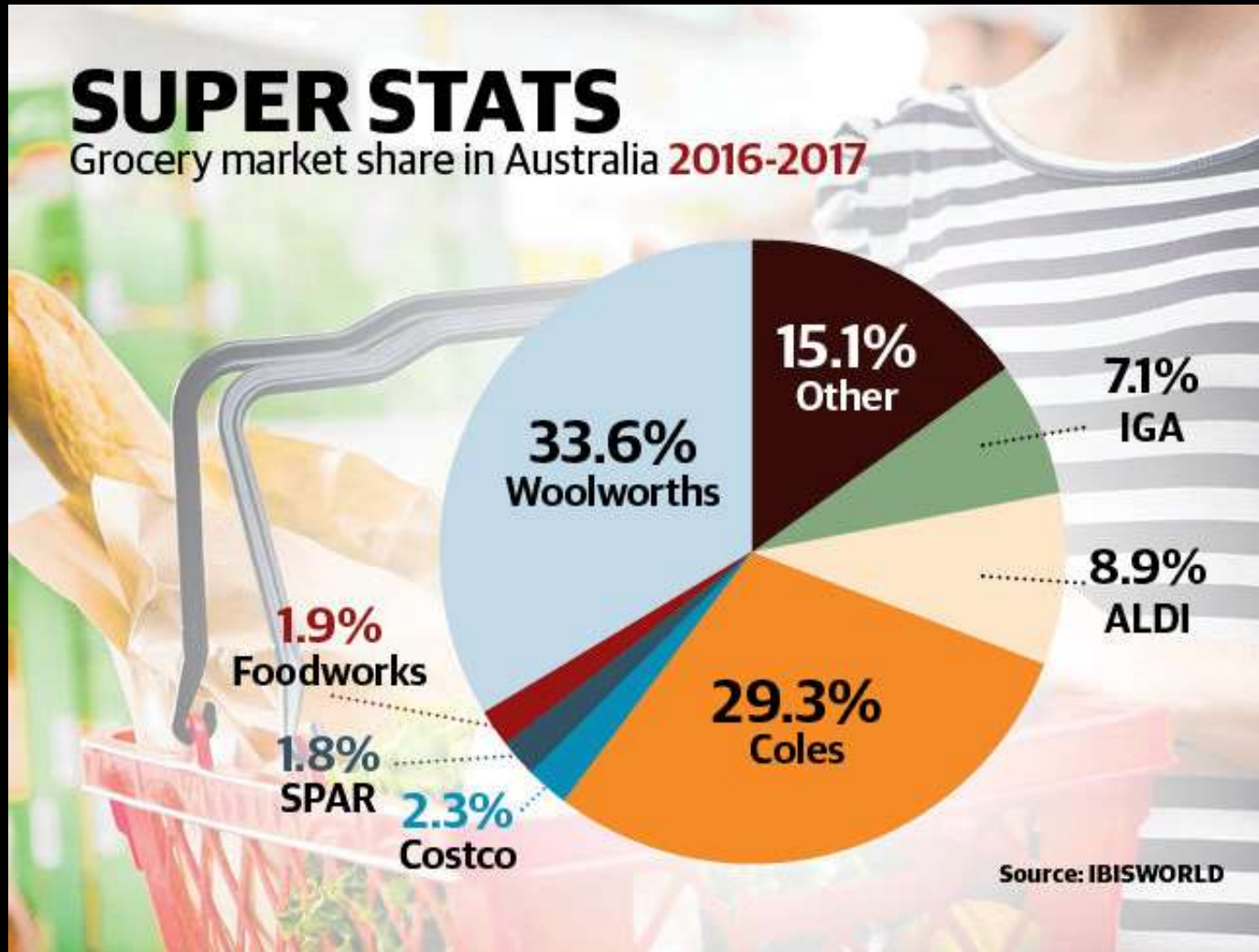
Economic problems of market structure and conduct

Socio-cultural problems of business culture and behaviour

Political problems of farmer struggles and public sympathies

Systems problems of legal rules and litigious avenues

Market structure and conduct



Market structure and conduct

Horizontal – too much concentration – not enough competition -
detriment for consumers?

NO!

[ACCC, 2008; Harper, 2015]

Market contestable – competition ‘workable’ – consumers benefitting



Intensifying retail competition

+ Regulatory burdens

+ Export challenges

Market structure and conduct

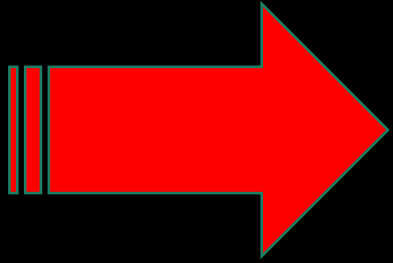
Vertical – too much concentration – imbalance in bargaining power
- dynamic inefficiency – detriment for consumers in the long run?

Possibly...in the long run

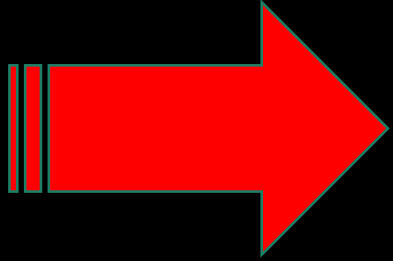
[Treasury, 2015]

To the extent that these behaviours are present, they may result in *inappropriate levels of risk being shifted on to the suppliers*. If these types of retailer behaviours occur unexpectedly or recurringly, they could result in *serious detriment to suppliers, particularly smaller ones*. This includes: forcing suppliers to bear unnecessary costs; inhibiting the ability of suppliers to plan appropriately for their businesses; increasing variability of cash flow; and imposing additional financing costs. In turn, this would *detract from the incentive for suppliers to invest, innovate, expand capacity or develop new product lines*. Ultimately, some suppliers may be *forced out of business* as a consequence.

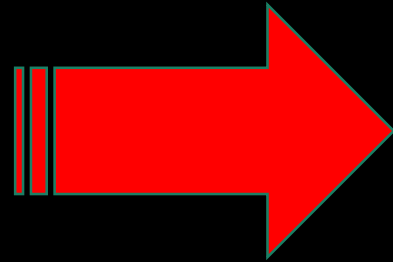
There may also be *long term detrimental effects for Australian consumers*. Erosion of the supplier base, including *deterring suppliers from investing, innovating and expanding*, may result in higher long-run prices, limited product range and variety, poorer quality products, less intense competition between suppliers, and potentially fewer new products coming to the market. This outcome would *not be in the long term interest of Australian consumers* and may *reduce the efficiency of the grocery sector*.



Lack of transparency and certainty



Lack of good faith



Lack of access to justice

Market structure and conduct

Does the FGCC address the structure problem?

No

Does the FGCC address the conduct problem (in the interim)?

Hopefully

...the effectiveness of the voluntary code is the extent to which it influences **behavioural change** ...now, obviously we won't know that for some years probably but there's **very encouraging signs**...within the retailers already ...

Awareness?

[uneven but growing]

... I do think that suppliers do feel quite **empowered** with the Code. They are quite quick to raise it ... some may understand it, but others might not, but it's a point of leverage... it's better understood and lived up to by everybody that's in the trade today than it ever has been and that will continue to improve as time goes by ..

Understanding?

[variable]

...it's being used mostly commonly and most effectively at the **negotiating** level.. as suppliers come up against an issue and put it together with the code provisions and realise the code might help, it's giving the code much more **practical relevance** to businesses and it's bringing it to life for them...

Use?

[some...]

... **[The ACCC]** asked for the records of the last 20 range reviews that we've done, and they looked at how well we had conducted those and communicated those, and done the various steps on time and effectively. And we found **issues and faults** ...

Counteracting factors – confusion and fear



- ...as soon as you put it down on paper and you start getting lawyers involved and third parties trying to make a decision as to what you meant when you said you'd do that, that's when it becomes a lot more **complicated**...
- ...there is an immense amount of **cynicism** in the marketplace, they've been beaten over the head for so many years so hard, relentlessly without apology .. there's decades of scars and bruises
- ...as a supplier you **can't afford to rock this boat**, you can't afford to have all of your eggs in one basket, you can't – so you've got to – if they say jump, you politely ask how high...

Counteracting factors – competition and culture

- ...[there is] a **gap between** the intent of what the **management** team are trying to achieve in context of code and the **behaviours at a buyer level**.. the senior guys swear blind they're not aware of that behaviour at a grass roots level.. there is an element of **conscious deniability** about that because the targets and KPI's put in place by the senior team are in many instances unattainable without poor behaviour.
- we definitely wanted to actually **change the relationships** with our suppliers, I think there'd been a period just generally where there hadn't been as much of a **focus on partnership** and we wanted to renew that, we're all in this together, we need each other, all of the negotiations we have reflect that, **we can't just do things alone** ...



The ultimate issue?



*... if you go to speak to a number of suppliers and you say, right, give me your top 10 – the list of top 10 things that cause you sleepless nights and angst. There'll be things around supply chain changes, changes to promotional plans, range reviews, the **top of that list will be the ability to generate price increases over time** so that it's often the single biggest issue that suppliers wrestle with, they've not been able to get a price increase through...**the retailers are pushing very hard now for zero price increases...***



Reality check?

*I don't believe that this code can be a **panacea** to everything. It won't be and I think [there needs to be] some **expectation management** for everybody in the industry, which is to say, look - **you still live in a competitive world**. You're still going to have trade hard. You're still going to have negotiate hard and **nobody is going to give you a free pass** on any of this stuff.*

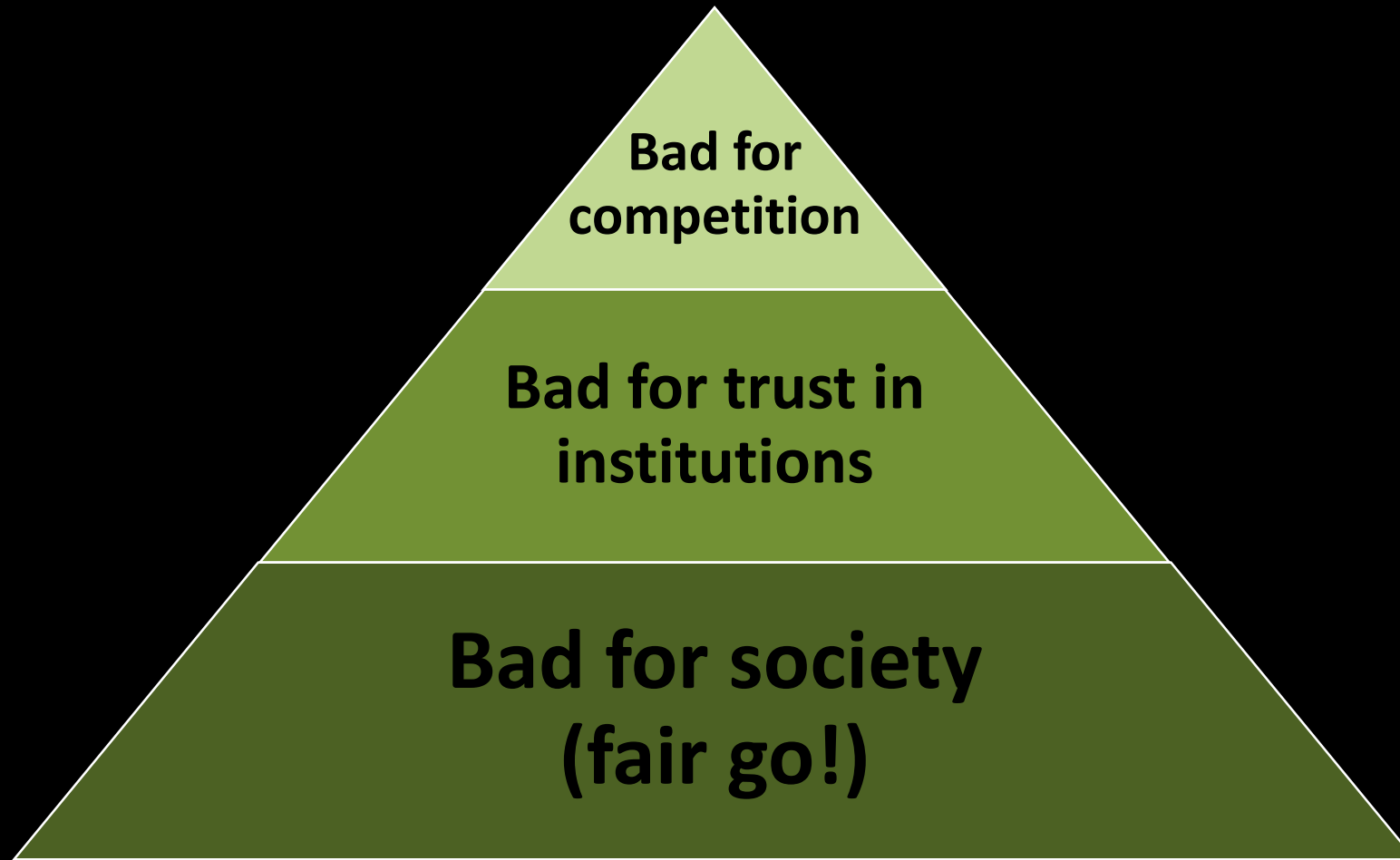


Business culture and behaviour

Unfair trading as a product of corporate culture

...it became a much more profit driven, much more hard business, much less good old boys' handshake type industry than it was. ... And, look, some of that of course was driven simply by the nature of the people who had been brought in to lead the organisations...





Business culture and behaviour

Does the FGCC address the problem of corporate culture?

No, but it may help...

Does the FGCC address the problem of trust in institutions?

No, but it may help...

Does the FGCC address the problem of a 'fair go'?

No, but it may help...

Farmer struggles and public sympathies

Low farmgate prices – threats to agricultural sustainability and social viability of rural communities

Causes:

- industry deregulation
- processor concentration
- dysfunctional wholesale markets
- seasonal fluctuations
- poor infrastructure
- high costs
- regulatory burdens
- international commodity prices
- **retail concentration**



...the most significant thing that *lit the fuse* were things like the \$1 milk, \$1 bread which *consumers love but are outraged* by at the same time...it was the perception that *farmers are being duded*, there was a very *strong vein of sympathy for farmers* across the Australian community ... so it doesn't stop them buying it but there was ... a sense of outrage or a focus. And I think there was then a bit of a *snowball of stories* about ... suppliers, truck drivers, all sorts of things that ... there were factory closures ... and *as happens with the media* often when a certain perception takes hold then things are seen through the prism of "this is further evidence of x"... And so I think by 2012 there'd been a *raft of those stories* and it transmits very quickly through to the legal *pressure for action because governments are expected...to fix things.*

Farmer struggles and public sympathies

Does the FGCC address the problem of political pressure?

Yes, even though it does not address farmer struggles

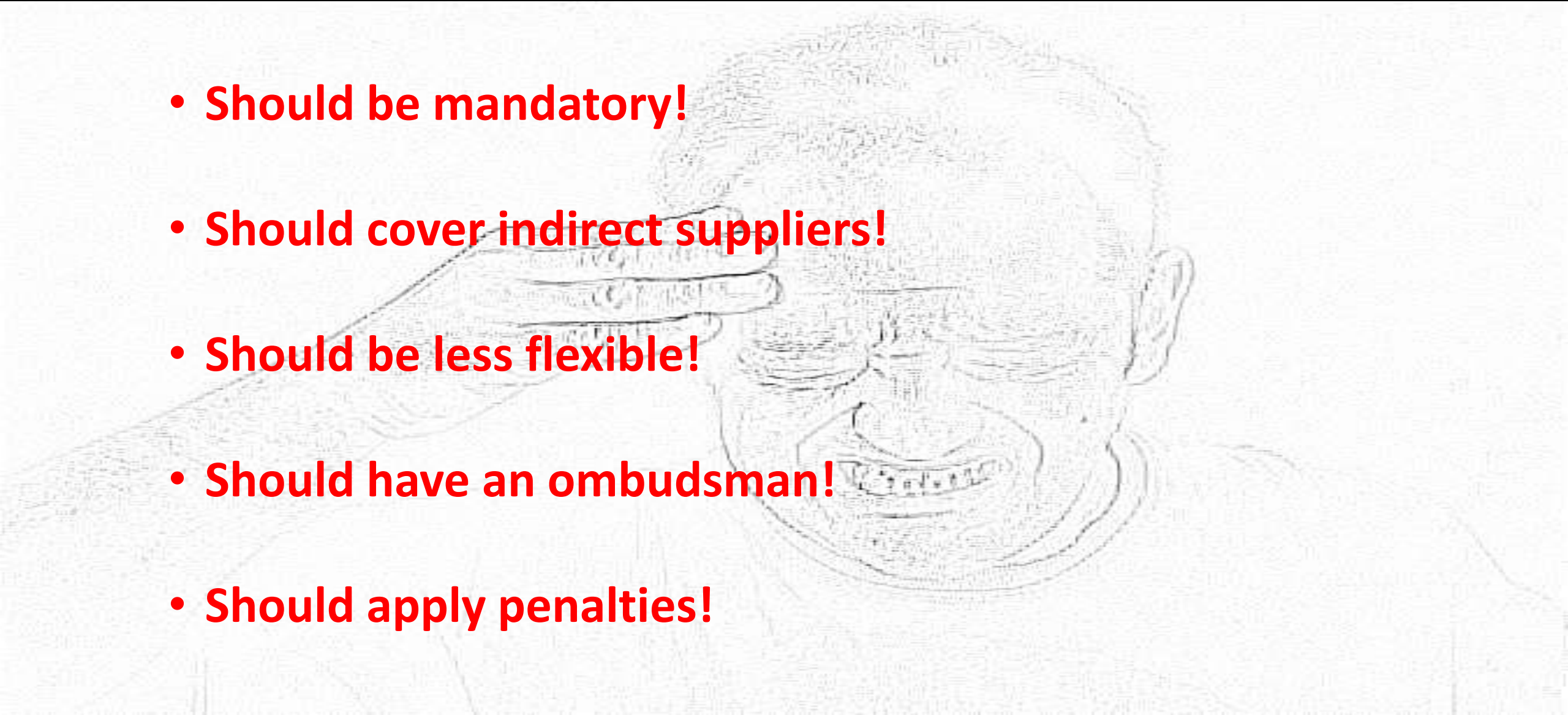
‘the industry’ has acted!

government has responded!

and there will be a review!

But the critics and concerns have not gone away...

- Should be mandatory!
- Should cover indirect suppliers!
- Should be less flexible!
- Should have an ombudsman!
- Should apply penalties!



Legal rules and litigious avenues

Laws not well understood; legal proceedings too slow and expensive and sanctions ineffectual; ACCC focus on bigger issues; suppliers (still) reluctant to complain



Code compliance
manager



Senior manager



External mediator /
arbitrator



ACCC

Legal rules and litigious avenues

Low awareness?

Low need?

Low confidence?

Compare with the UK:

- Dedicated ombudsman (GCA)
- Deep industry knowledge
- Systematic, savvy, multi-channel profile-raising and education
- Collaborative not enforcement approach
- Relationship building with CCOs
- Anonymous handling of complaints
- Coercive investigation and substantial fining powers as last resort

Final thoughts

Economic problems: short term positive impact, but ultimately immaterial?

Socio-cultural problems: largely irrelevant

Systems problems: relatively ineffectual

Political problems: solved! for now...

One perspective:

You look at a lot of these things, like the tide. It comes in, it goes out, it comes in, it goes out. And you don't really stop it. You just let the market sort that out. But you do see some people that look at the tide coming in and think it's like a river that has to be dammed. And then you stop that.

Another perspective:

[in] Australia we do prioritise fairness but economically we've also promoted free market economics and competition and [there is a] tension there ... we want all that competition brings, fierce competition, ruthless competition, but when we see that there are losers we want them protected as well and, again, this is where I see the real tensions that good regulation has to tackle and it's so tough...

Comments and questions welcome

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<http://law.unimelb.edu.au/centres/clen/research/supermarket-project>