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Watchdogs and ombudsmen: monitoring the abuse of supermarket power

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Abstract Self-regulation has become a mantra for both governments and private industry in the neoliberal era. Yet, problems remain in terms of supermarket accountability and control. Governments everywhere appear to be under increasing pressure to move beyond the self-regulatory model by enacting legislation which better monitors and polices supermarket-supplier relations. In most cases, the appointment of an oversight authority—known variously as an ombudsman, watchdog, or adjudicator—with the power to set standards and apply sanctions, and to whom suppliers can appeal in cases of perceived abuse, has been advocated. This paper investigates the role of watchdogs and ombudsmen as potential governance mechanisms for overseeing supermarket-supplier relations and explores, in detail, escalating pressure for their appointment within the UK and Australia over the last 20 years. The pursuit of regulatory frameworks to monitor, and adjudicate on, problems arising out of changing power relationships along agri-food supply chains in these two countries has been met with strong resistance from supermarkets; however, after 20 years of debate, it appears that these governments may be on the path towards legislating for an independent body to handle disputes. This paper critically examines 'self-regulation' and concludes that watchdogs and ombudsmen are only a partial solution, at best, to the problems that are arising from the neoliberal settings which govern relations between food suppliers and food retailers.

Keywords Supermarkets · Watchdogs · Ombudsmen · Self-regulation

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Introduction

Serious concerns have been expressed in recent years about the growing control that supermarkets exert over their suppliers. It has been suggested that retail sector concentration over the past four decades, along with the associated growth in 'private label' brands, and retailer control over shelf space, have contributed to the imbalance in power between large supermarket chains and the farmers and food processors who supply them (Burch and Lawrence 2007). Supermarkets, it is argued, are exploiting this situation to their own advantage in extracting ever-more favourable terms from their suppliers in order to generate greater profits. There has been a growing chorus of complaints in this regard from farmers and food processors, and increasing demands for action to regulate the behaviour of supermarkets in their dealings with suppliers.

Within Europe, this issue has generated a great deal of debate and media focus, leading to the consideration of new laws to prevent the abuse of supermarket power in Austria, Belgium, France, Hungary, Italy, Latvia, The Netherlands, Romania, the Czech Republic, Slovakia and the UK. National competition authorities in virtually all these countries have undertaken formal investigations into the abuse of supermarket buying power (Agribusiness Accountability Initiative 2009). Beyond Europe, this issue has generated formal inquiries and responses in Australia, New Zealand and South Africa, and some discussion in the

United States (US), including official acknowledgement from the US Senate, the Department of Agriculture and the Justice Department (Ganesh 2010; Starmer 2007). There has been less debate within low income countries intimately linked to, and affected by, the supply chains of European and North American supermarkets (but see Brown and Sander 2007).

The large number of countries which have initiated official responses to supplier concerns about supermarket abuse of buying power suggests that such concerns may be well-founded. The large supermarket chains have, for their part, argued that they deal fairly with their suppliers whilst delivering cheap and safe foods to consumers. Nevertheless, many governments have been compelled to respond to public and supplier opinion over supermarket-supplier relationships. Overwhelmingly, the preferred government response to this issue has been in the form of neoliberal self-regulatory approaches, comprised of voluntary codes of practice monitored by competition authorities. However, governments everywhere appear to be under increasing pressure to move beyond the self-regulatory model towards legislation policing supermarket-supplier relations. In most cases, the appointment of an oversight authority or watchdog—known variously as an ombudsman or, in the case of the UK proposals, an adjudicator, with the power to set standards and apply sanctions and to whom suppliers could appeal in cases of perceived abuse—has been advocated. This aside, the Czech Republic appears to be the only country which has introduced such an authority to-date.

This paper overviews the contemporary landscape of supermarket-supplier relations, before focusing attention on growing international pressure for new regulatory frameworks based on watchdogs and ombudsmen. It describes in detail the advocacy and policy processes in Australia and the UK, two countries in which the pursuit of legislation in this area by suppliers over many years has been met with fierce resistance from supermarkets.

Supermarket power and self-regulation in the neoliberal era

It was Karl Polanyi (1944) in *The Great Transformation* who drew academic attention to the ways social relations were becoming subordinated to market rule. He railed against an emerging ideology that enshrined self-interest, individual gain and market freedom and that condemned state interventions as being antithetical to social and economic progress. In contrast, he argued that a purely self-regulating market would threaten the social fabric: the 'free', unregulated, market would be incapable of meeting human needs. When endorsed, promoted and facilitated by the state, unregulated markets, he argued, were the vehicle for the unfettered expansion of private property. This, in turn, would produce growing inequality and subsequent social dislocation (Polanyi 1944, p. 129).

Polanyi considered that the self-regulating market placed the economy and the polity in tension. Laissez faire economic growth would advantage the wealthy and the political response from those disadvantaged would be to attempt to counteract the free market through policies of intervention aimed at taming capitalist excesses. In his famous 'double movement', protectionist social policies would arise and seek to re-capture the market so that it served the public's interest (Palacios 2001).

Despite Polanyi's critique, neoliberal ideals have, since the 1970s, become enshrined in national and global policies. The 'national interest' is now viewed as one of the state enforcing self-regulation in the marketplace, achieved through mechanisms including privatization of public services, deregulation, and wage restraint (Mendell and Salee 1991). Globally, neoliberalism is promulgated by entities such as the World Bank, IMF and WTO because it espouses the virtues of non-interventionist states and justifies, and ultimately facilitates, the expansion of transnational capital—viewed by these global players as the catalyst for future economic development (Walton and Seddon 1994).

Block (1991) has written of the 'contradictions' and problems of self-regulating markets. Self-regulating markets assume perfect competition, perfect information for producers and consumers, along with the ability of all to establish, almost instantaneously, the best course of action to maximize self-interest. Yet, these conditions are never met. Indeed, markets work best when individuals network and form relationships of trust. Networking within and between firms gives some certainty to pricing and can provide for a more stable environment in which to produce and sell. Block (1991, p. 103) argues that 'real' markets:

> represent an extremely complex mix of microeconomic choices, social regulation and state action…..The idea that allowing greater market freedom will invariably increase market efficiency is a purely ideological statement.

He agrees with Polanyi that a marketplace based on pure self-interest and self-regulation would be a 'disaster' for society, rather than its savior.

Yet, despite the concerns about market anarchy and unfair competition from retail oligopolies, neoliberal ideas and policies have become hegemonic throughout the developed world (Conway and Heynen 2006). Amidst growing concerns over the consequences of the neoliberal restructuring of agri-food systems for the environment, food producers, and society more broadly (Carolan 2011; Heynen et al. 2007; Rosin et al. 2012), global settings (via

the UN's *codex alimentarius*, and consumer protection laws in the EU and US) and local concerns over food safety have combined to produce a variety of regulations that potentially reduce profit-making opportunities through increasing demands for compliance (El Amin 2006). In such a setting, self-regulation provides an alternative to the need to understand and to abide by the complex governmental regulatory arrangements, and has been indoctrinated in the 'mantra' of the food industry. Governments, too, recognize that businesses are facing increasing competition and are achieving lower margins, at the same time as consumers are demanding greater accountability from the food industry (El Amin 2006). Also, for government, the imperatives under neoliberalism are both to reduce government expenses, and government 'interference', in the world of private enterprise.

Kolk and van Tulder (2005) refer to a 'cascade of codes' and corporate social responsibility initiatives adopted by private sectors since the early 1990s, in response to pressure from NGOs and the wider public about environmental problems, the exploitation of workers in South East Asian 'sweatshops', and child labour (Kolk and van Tulder 2005). The Global Mining Initiative, and the UK food retailers' Ethical Trading Initiative are two such instances (Hughes 2005; 2012). In relation to the latter, UK food retailers have established a code of labour conduct which is based on International Labour Organization conventions. Technical teams (in-house company technologists who are involved in product specification and quality assurance) were given the task of undertaking food quality and safety audits, however, in many instances the technical training of these people did not 'match' the tasks they were being asked to perform (Hughes 2005, p. 145). The outcome has been to contract out the auditing of suppliers along the chain, the effect of which has been to increase independent verification and, so, enhance the credibility of firms engaged in the Ethical Trading Initiative (Hughes 2005).[1]

Retailer-led corporate social responsibility initiatives are, arguably, linked first-and-foremost to the management of corporate reputational risk, as demonstrated convincingly in Hughes' (2012) recent critique of the implications of the recent global economic recession on the ethical trading initiatives of UK-based food retailers. This seriously constrains the range of issues they can reasonably be expected to address. Most notably, retailer-led initiatives have failed to convincingly address concerns about the power supermarkets hold within their supply chains, and their treatment of suppliers. As noted in the introduction, there has been a constant stream of complaints from processors and farmers in particular, but also from a range of NGOs and consumer groups, about the treatment meted out by supermarket chains.

The process by which supermarkets came to exert control over the establishment, management and operation of agri-food supply chains has been well-documented (Burch and Lawrence 2007). Up until the 1960s, what was produced, where and when a commodity was sold, and the price at which it was marketed, were decisions made by the food manufacturing sector. In many countries of Europe, resale price maintenance was applied as a means of protecting the retail sector from predatory competition. Such policies were non-problematical as long as there were few goods in post-war markets. But as expectations and incomes rose, consumers everywhere were demanding access to quality products at reasonable prices, and there were retailers willing to satisfy these demands. In the UK, 'Jack-the-Slasher' Cohen, the founder of the Tesco supermarket chain, challenged the laws and, along with others, succeeded in establishing a deregulated retail sector in which price competition emerged as a key issue. Increasingly, it was the supermarkets which began to determine the terms and conditions which their suppliers – food processors and farmers—would have to meet, including providing large discounts for volume purchases. Over time, other manifestations of supermarket dominance began to emerge. Among the most important was the development of supermarket 'own brand' or private label products, which came to compete directly with branded goods. Initially, own brand products were regarded as inferior to the proprietary brand, often being produced by those same brand manufacturers from second or third grade raw materials. However, over time, the retailers insisted on higher quality products and the private label goods began to be seen as equal to brand name products. Equally importantly, not only did the supermarket private label generate higher returns to the retailer, but allowed for the introduction of flexible sourcing of products from almost anywhere in the world.

A further impetus for supermarket control of the supply chain emerged in the form of the ready meal, first introduced by UK retailer Marks and Spencer in 1988 (see Burch and Lawrence 2007). The food industry was not known for its innovations—Heinz has boasted in its advertising that its baked beans had remain unchanged for over 100 years—and was unable to compete with the highly popular ready meals, which were marketed under a supermarket label. Of course, the other outcome of the 'own brand' revolution was that it enabled the supermarkets to charge food processors for shelf space, with 'slotting fees' being required for the right to shelf space or for a premium position on the shelves. A failure to pay slotting

[1] This is the case as long as a retailer is a subscriber to the ETI. When Somerfield, the UK supermarket chain was acquired by a private equity consortium involving Apax Partners and Robert Tchenguiz, a property developer, in 2006, one of its cost-cutting measures involved withdrawing from the ETI (see Burch and Lawrence, this volume; *The Guardian* 2006).

fees meant either no access to the supermarket shelves, or being consigned to an inferior position (on the lower shelves).[2] There were many other practices that were introduced over time as a way of extracting further profits from suppliers: delayed payment times for goods supplied; retrospective reductions in prices paid to suppliers; requiring suppliers to contribute to marketing costs (including bearing the cost of 'special' offers); and much more. Those suppliers who might object to such terms and conditions also faced the prospect of being 'de-listed'; that is, being dropped as a supplier (see Burch and Lawrence 2007). Such conditions applied across the board and were to be found in most countries in which the global retailers were operating.

Other practices which were seen as examples of supermarket power being exercised in ways which disadvantaged suppliers included delayed payment times, retrospective reductions in prices paid to suppliers, supplier contributions to marketing costs, and lump-sum payments as a condition of supply. The ability to impose such demands was also a function of the extent of concentration in the retail sector, and the ability of suppliers to choose amongst different retailers. Retail markets in most developed countries may be characterized as monopsonistic—a situation in which a large number of suppliers market their goods to a small number of purchasers. In the UK, for example, four leading supermarkets currently account for over 65 % of grocery sales (Davis and Reilly 2010), while in Australia, there are only two leading retailers—Coles and Woolworths—accounting for roughly the same market share (ACCC 2008). Even in the US, where there is greater diversity of supermarket ownership across the country as a whole, five supermarkets accounted for 46 % of total food retail sales (Starmer 2007).

It is under these circumstances that suppliers have increasingly come to express dissatisfaction with their relationships to the supermarkets, leading to calls for greater regulation, monitoring and control in order to challenge and ultimately reduce what many see as excessive supermarket power. The remainder of this paper investigates the potential of watchdogs and ombudsmen as tools for governing supermarket-supplier relations, focusing on the growing pressure for their appointment, and the political responses to this pressure, within the UK and Australia.

[2] Slotting fees can vary greatly in scale but are generally thought to add significantly to a retailer's overall profits. In France, it has been reported that in 1999, some 88 % of a retailer's margin consisted of 'hidden' charges, mostly slotting fees (Allain and Chambolle 2005). In the US, a Federal Trade Commission report (2003) found that the average value of a slotting fee varied from US$2,313 to US$21,786 per item per retailer, and that the cost in slotting fees of introducing a new grocery line nationally was between US$1.5 and US2 million (see Federal Trade Commission 2003).

Watchdogs, ombudsmen and governance

Watchdogs, in a metaphorical rather than literal sense, are individuals, groups or organizations that watch over, guard or protect what are construed to be the morals, values and standards of a particular social group or groups. It is a term employed to indicate that people are engaged in monitoring and evaluating social change to ensure that human rights are protected and social norms adhered to. The main responsibility of watchdogs is to identify violations of laws and citizens' 'rights' and to bring these to public attention, or to monitor behaviour to ensure compliance with agreed procedures or social norms.

A closely related term is that of 'ombudsman'. An ombudsman is an impartial agent who is charged with receiving and investigating complaints that have been lodged about a public or private organization (Office of the Ombudsman 2009).[3] Although ombudsmen were initially appointed to deal with complaints made by people against governments, the need for impartiality and confidentiality in dispute resolution has seen the work of the ombudsman spread to private industry, to hospitals, universities, and many other public and private entities. In the workplace, ombudsmen assist employees to voice their concerns about employers over such issues as unfair dismissal, workplace discrimination, salary disputes and sexual harassment. In wider settings, ombudsmen are charged with resolving matters relating to gender equality, children's welfare, the rights of ethnic minorities, and consumer protection.

In a sense, the watchdog's role is to expose unfair or unacceptable actions and behaviour with the aim of having them halted, while the role of the ombudsmen is to seek to address grievances which have occurred, and before they result in often-costly litigation. That is, ombudsmen seek to achieve dispute resolution in a manner that allows contesting parties to understand the other's side, to achieve outcomes in a reasonable timeframe (certainly in a shorter time than might be the case if an issue occupied the courts),

[3] 'Ombud' is derived from the Nordic term 'umbodh' with 'um' meaning 'regarding' and 'bodh' meaning 'command'. The term was first used in Sweden in 1552, but the work of ombudsmen can be traced to the Qin Dynasty in China in 200 BC, through to the Muslims in 600 AD. Influenced by what he had seen in Turkey, King Charles XII of Sweden created the 'Highest Order of Ombudsman' in 1713 (Office of the Ombudsman 2009). In 1809, the Swedish parliament appointed an ombudsman to ensure that decisions of the executive branch of government did not compromise the rights of citizens. The ombudsman was, and is, an independent official who, in helping to mediate and resolve disputes in a fair and unbiased manner, represents citizen interests. In a legal sense, the ombudsman is concerned with investigating citizen complaints and, at least in theory, must exhibit neutrality, trustworthiness, and confidentiality. Although often appointed by the state, the ombudsman does not have the power to alter laws, to police decisions, or to change administrative arrangements.

and to do so in an impartial way. In seeking resolution, ombudsmen attempt to 'smooth' over issues leading to disputation and contestation, and so keep the wheels of government and industry turning with minimal disruption, and within current politico-legal settings. The ombudsman does not engage directly in auditing or inspections, but the growth in the number of ombudsmen can at least partially be explained by the growth of the self-regulatory 'audit culture' (see Power 1997; 2003).

Watchdogs and ombudsmen in the UK grocery retail sector

In the UK, the issue of supermarket power and the treatment of suppliers emerged as an issue as early as 1987. At a time when retailers in the UK were beginning to expand their own brand lines, food processors were complaining of their treatment at the hands of the large supermarkets (Burch and Lawrence 2005). Around the same time, farmers were also reported as expressing strong dissatisfaction with the behaviour of the large retailers (Burch and Lawrence 2005), and over the subsequent decade the issue continued to be a major concern. The National Farmers Union, and many parliamentarians and NGOs argued for a legally-binding code of practice governing the relationships between the supermarkets and their suppliers, and for the establishment of an independent Ombudsman who could investigate complaints without the need to identify complainants. In 1999, the Office of Fair Trading (OFT) asked the Competition Commission (CC) to conduct an inquiry into complaints that supermarkets were abusing their market position in their dealings with suppliers. In the course of its investigations, the Competition Commission found evidence of anti-competitive behaviour on the part of the major retailers which it argued was against the public interest. In its final report released in 2000, the Commission recommended the establishment of a voluntary Supermarkets' Code of Practice, which came into effect in March 2002. This involved the establishment of mediation processes to be entered into in the case of a dispute (for details of this and subsequent audits and reviews by the OFT and the Competition Commission, as well as statements from numerous interest groups, see Tescopoly 2012).

However, this did little to change the situation and suppliers continued to express concerns about their treatment at the hands of the supermarkets. These concerns culminated in the formation of the group which came to be known as 'Breaking the Armlock', a coalition of 17 organizations representing farmers, environmentalists and consumers who took their cue from a statement by Tony Blair, then Prime Minister, to UK farmers in March 2001:

> The supermarkets have pretty much an armlock on you …We need to go back to the table, sit down and work this out on a long-term basis (Perkins 2001).

Blair subsequently reiterated these concerns publicly, but did little to remedy the situation he had identified. However, in 2003, the OFT undertook an audit and review of the operations of the Code, and concluded that the Code was not working effectively (Tescopoly 2012). It suggested that:

> Despite anecdotal evidence that the Code is not working, no cases have gone to mediation under the Code. Nor has the OFT received any detailed information from suppliers or trade associations about alleged breaches of the Code (OFT 2004).

The OFT report was widely criticized since it appeared to suggest that the absence of any complaints exonerated the retail sector from any significant wrong doing, when in fact it was suggested that the absence of formal complaints was itself evidence of supermarket abuse! Suppliers were reportedly too scared to complain, citing a 'climate of fear' in the industry, generated by the belief that to openly complain about a particular supermarket would lead to a supplier being dropped, or 'de-listed' (Hearson and Eagleton 2007; OFT 2004). Critics noted that in sample surveys conducted by the OFT during the review process, many complaints of alleged breaches of the Code of Practice were made, with 85 % of the suppliers surveyed considering the Code to be ineffective simply because suppliers were apprehensive about taking disputes with supermarkets to mediation for fear of retaliation (Hearson and Eagleton 2007; OFT 2004).

On finding that the Code was not working effectively, the OFT called an independent audit of each of the four major supermarkets which had voluntarily agreed to comply with the Code (Tesco, Asda, Sainsbury and Safeway). Based on information submitted to the 2004 Review, the main market practices to be investigated were the retailers' dealings with suppliers in terms of:

- Delayed payment times
- Retrospective reductions in prices paid to suppliers
- Supplier contributions to marketing costs
- Lump sum payments as a condition of supply
- Payments in respect of consumer complaints
- Tying of third party goods and services.

However, by May 2006, with no significant policy reform and following continued lobbying and ongoing complaints relating to anti-competitive behaviour, the OFT was forced to refer the grocery market to the Competition Commission for the second time (OFT 2006).The Commissions' 2008 final report found evidence that many of the same issues had persisted since its first investigation in 1999/2000, identifying specific concerns in two areas:

- Weak competition in the retail sector and barriers to entry for competitors
- Transfer of excessive risk and unexpected costs from retailers to suppliers (Competition Commission 2008).

The Commission found the magnitude of these concerns sufficient to warrant stronger regulation and recommended that a new Grocery Supply Code of Practice (GSCOP) be implemented. The GSCOP, which came into force in February 2010, expanded on the previous Code to include all grocery retailers with annual turnover greater than £1 billion. It would prohibit retailers from making retrospective adjustments to terms and conditions of supply, and would include an over-arching 'fair dealing' provision. In addition, the Commission recommended the establishment of an independent ombudsman to monitor and enforce compliance with the new code, albeit only with retailer permission. The ombudsman's primary functions would include proactive investigation of retailer's records relating to the GSCOP, provision and publication of guidance relating to the GSCOP, and publication of an annual report relating to the Code. While the Commission had no power to implement its recommendations, it did draft a 'remedies implementation timetable' which indicated that, should final undertakings in relation to the appointment of an ombudsman not be made in April/May 2009, the matter should be referred to the UK Government's Department for Business, Enterprise and Regulatory Reform (BERR) (Competition Commission 2008).

Unsurprisingly, retailers and industry groups including the British Retail Consortium lobbied strongly against the nomination of an independent Ombudsman. According to British Retail Consortium Director General, Stephen Robertson:

> An ombudsman is unjustifiable pandering to supplier pressure groups. It would be an expensive bureaucracy (quoted in Palmer 2009).

Despite this, in 2010, the Labour Government committed itself to the creation of an ombudsman, a decision echoed by the Conservative opposition. In May 2011, following the election of a Conservative government in Britain, the new Department of Business Innovation and Skills (formerly the BERR) introduced a draft Grocery Ombudsman Bill into Parliament. The Groceries Code Adjudicator Bill was finally published in the House of Lords on 11 May 2012 (UK Government 2012).

Watchdogs and ombudsmen in the Australian grocery retail sector

Paralleling the UK situation, complaints against the Australian retail grocery sector over 'unfair conduct' in relation to elements of the supply chain have been escalating over the last 20 years (Burch and Lawrence 2007). The Australian Government established a Parliamentary joint select committee (known as the Baird committee, after its chair Bruce Baird, Liberal MP for Cook in New South Wales) in response to these concerns in 1999. After conducting interviews with a wide range of industry players, a report entitled *Fair Market or Market Failure?* was released in August 1999 (Australian Government 1999). It concluded that 'unfair market conduct continues to undermine and damage those in less powerful positions' along the supply chain, and recommended that the retail grocery sector establish a voluntary code of conduct, with a government-appointed (and funded) ombudsman who would be involved in dispute resolution. The Government accepted these recommendations, and in February 2000, the Retail Grocery Industry Code of Conduct Committee was established, with the responsibility of developing a voluntary industry code of conduct, focusing mainly on the fruit and vegetable sector where most of the complaints appear to have been generated. Importantly, the government did agree to 'fully fund the mediation service provided by the Ombudsman and clarify its role' (Australian Government 2004).

The Code was reviewed in December 2003, and was renamed the Produce and Grocery Industry Code of Conduct in February 2005 to better reflect the interests of all those participating along the food chain (although the Code was not designed to cover consumer complaints and grievances). The objectives of the Code were:

- To promote fair and equitable trading practices among industry participants
- To encourage fair play and open communication between industry participants (as a means of avoiding disputes) and
- To provide a 'simple, accessible and non-legalistic dispute resolution mechanism' for industry participants in cases where there is disputation (Australian Government 2003).

Most of the major players in Australia's food supply chain signed up to the Code. These included the leading supermarkets—Aldi, Coles and Woolworths—and their peak body, the Australian National Retailers Association, the National Association of Retail Grocers of Australia, the Queensland Retailers and Shopkeepers Association, the Retail Association of Queensland Limited, the Australian Chamber of Fruit and Vegetable Industry Limited, The Australian Food and Grocery Council (AFGC), and the National Farmers' Federation. However, many businesses in rural and regional Australia did not realize that they were 'captured' by the Code, nor did they recognize the code as being applicable to their operations (Australian Government 200, p. 37).

The 2003 review found that the Code would have had a greater impact had it been mandatory: it was seen by some in the industry as a 'toothless tiger' and, despite the Code's operation, practices such as misleading and deceptive conduct, harassment, and restrictive trade practices continued without sanction (Australian Government 2003, p. 38; and see Richards et al. 2012). There were three main issues which concerned suppliers: transparency of interactions along the supply chain (particularly between growers and intermediaries who sold to central markets), the nature of contracts between participants (the power exerted by retailers, processes and packing houses when the deal with small businesses), and produce and product standards (simple protocols such as time frames for delivery, performance indicators, and rights of appeal, were missing) (Australian Government 2003, pp. 39–41).

Nevertheless, close to 200 dispute enquiries were received by the ombudsman between 16th July 2001 and 31st August 2003, with most enquiries coming from merchants and agents (60 %), processors and refiners (17 %) and retailers (9 %). Some 60 % of dispute enquiries did not require mediation (they were resolved before this stage). That aside, the ombudsman reported 'significant non-compliance with the code', indicating that, in about 20 % of cases, reported mediation did not take place due to the refusal of people to participate (Australian Government 2003, p. 46, p. 52).

In sum, the Review found that the voluntary Code did not work well enough to address the problems in the sector (Australian Government 2003, p. 75) and recommended that the Government develop a 'principles-based code' that would be underpinned by the Australian Competition and Consumer Commission (ACCC). The Government did not accept this recommendation, deciding instead to retain the voluntary Code but to 'work with industry to clarify and strengthen its provisions, particularly those relating to transparency and improved business practices' (Australian Government 2004). The Government effectively disagreed with a (semi) mandatory code of conduct, and reiterated its commitment to 'industry self-regulation to address marketplace problems as an alternative to regulation, wherever possible' (Australian Government 2004).

In keeping with the government's commitment, and against a backdrop of growing complaints by rural producers at the treatment meted out by buyers of their produce, the Federal Government, the National Farmers' Federation, the Horticulture Australia Council and the Australian Chamber of Fruit and Vegetable Industries, held discussions in an attempt to give effect to the voluntary code. However, when agreement had still not been reached by October 2004, the Government decided to introduce a mandatory code within 100 days, if they were returned to power with a majority in the forthcoming Federal election of October 2004 (Australian Associated Press 2004). In January 2005, following its election victory, the neoliberally-focused Coalition Government of John Howard announced its 'first step' in introducing a code of conduct, and commissioned the Centre for International Economics (CIE) to develop a 'Regulation Impact Statement', and following this, a draft of an Horticultural Code of Conduct in May (see Horticulture Australia Council and National Farmers' Federation 2005). Meanwhile, farmers' protests were intensifying and came to a head with the decision by McDonald's to shift their sourcing of potatoes from the Australian state of Tasmania to New Zealand. This resulted in a major protest involving some 200 tractors being driven from Tasmania to the national capital, Canberra, where over 800 farmers met with the Prime Minister (Daley 2005). The response to the CIE report also left the government in no doubt as to the strength of rural feeling. Indeed, so strong was the criticism of the CIE report, that it was clear that further delays were inevitable (Davison 2005).

When draft legislation for the promised mandatory code was eventually introduced into Cabinet in March 2006, it was revealed that it only related to the relationship between wholesalers operating in the fruit and vegetable markets, and their suppliers; the large supermarket chains were exempted from the latest provisions of the code. The peak body of farm groups, the National Farmers' Federation, stated that it was not concerned about the possible exemption of supermarkets, since:

> …our focus is the wholesale sector…That's where there's real lack of contractual clarity, or no contracts at all (Financial Review 2006).

The overwhelming majority of grievances reported under the Code were indeed made against the wholesale sector, with only 9 % directed at the supermarkets (see Australian Government 2003, p. 46). However, horticulture-based grower groups such Ausveg and Growcom expressed concern that the large supermarkets had not been included in the code of conduct, as well as the fact that the code was not mandatory, only 'enforceable' (Tablelands Advertiser 2006).

The code that emerged was enacted under Section 51AE of the *Trade Practices Act 1974* and certainly had the force of law; however, dispute continues today over differing understandings of 'enforceable' and 'mandatory'. Between 2006/07 and 2010/11, the number of cases (in parentheses) which were dealt with by the Produce and Grocery Industry Ombudsman (PGIO 2012) were as follows:

- 2006/7 **(39)**
- 2007/8 **(22)**
- 2008/9 **(19)**
- 2009/10 **(10)**
- 2010/11 **(20)**

The picture until quite recently, then, showed a decline in the number of complaints, which the PGIO explains by reference to its educative role and the growing awareness of its activities. It might also be explained by the continuing fear on the part of suppliers that if they complain, they may cease to be engaged as suppliers. Certainly, the great majority of complaints were from growers, with grievances mostly relating to disputes over payments and the ways supermarkets judge the quality of fresh produce.

Whatever the standing and effectiveness of the 'mandatory/enforceable' Horticultural Code of Conduct, the supermarket sector was still governed by a separate voluntary code of practice which growers insisted was ineffective when it came to monitoring and mediating the relationships between retailers and their suppliers. This issue again came under the spotlight in 2007 with the election of Kevin Rudd's federal Labor Government. Food and fuel prices had been important issues in this particular federal election, with food prices reportedly higher than in other OECD countries (Richards et al. 2012), and a key feature of Labor's election campaign had been a commitment to monitor retail food and grocery prices via the ACCC (Ooi 2007). Honoring its pre-election promise, the newly-elected Rudd Labor Government initiated the 2008 ACCC Grocery Inquiry, indicating early on what were seen to be the key issues:

- The structure of the grocery industry
- Consumer behaviour and choice of grocery retailer
- Competition in grocery retailing
- Competition in grocery wholesaling
- Buying power in grocery supply markets.

While the wholesale sector of the food and grocery supply chain was included in the analysis, the main focus was clearly on the large supermarkets, the degree of their control of the Australian food and grocery market, the effectiveness of the competitive environment, and the ways in which they dealt with their suppliers (ACCC 2008). This latter issue was the concern of many of the submissions made to the Inquiry, with Growcom, the peak representative body for the fruit and vegetable growing industry in Queensland, listing key concerns which were typical of many grower submissions. The most important of these were:

- Conflicts over pricing, and the belief amongst growers that they were not receiving a fair proportion of the consumer dollar
- Inadequate notice and/or lack of consultation before introducing changes to product packaging and quality specifications
- Market behaviour that influenced central wholesale prices which were then used to negotiate for direct suppliers
- Punitive action intended to instill desired behaviour by suppliers (issues associated with 'being made to take a holiday', and return of product), and the generation of a climate of fear of retaliation/victimization among growers
- Squeezing wholesalers on price and volumes
- Absence of a quality 'trail' to identify where problems occurred and where responsibility lay
- Delays in notification of rejected product leaving growers insufficient time to re-sell. This included returning of product after delivery occurred
- Use of quality claims as a basis for returning over-ordered stock and/or lowering the price
- Retailers continuing to push all responsibilities down the supply chain to growers, with no clear line of where fruit changed ownership. Growers appeared to be held wholly responsible until produce was sold to the consumer (Growcom 2008).

There were other issues listed by Growcom (2008), although it cannot be assumed that such experiences were widespread or affected every grower who supplied the supermarket chains. Indeed, it was not always unreasonable to expect growers to make changes to their practices in a changing retail environment, in order to meet the more reasonable expectations of the supermarkets. However, such concerns—expressed as they have been across national jurisdictions and over a long period of time—suggest that there are sufficient grounds for accepting that many suppliers have experienced severe disadvantage as a result of supermarkets exercising the power that they possess.

The ACCC released its final report on the inquiry in August 2008, indicating in its key findings that grocery retailing was 'workably competitive'; meaning 'that Coles, Woolworths and Metcash have little incentive to destroy the current balance through vigorous price competition' (reported in Taylor and Theiberger 2008). The report also concluded that 'the vast majority of grocery price increases in Australia are attributable to factors…such as supply and demand changes in international and domestic markets, increases in the costs of production and domestic weather conditions', rather than the lack of competition (ACCC 2008).

On the issue of grower concerns about retailer power in the supply chain, Graeme Samuel, then chair of the ACCC, said that:

> …we've not found anything wrong across the board with the grocery supply chain. Farm gate prices typically reflect competitive market conditions for each particular commodity. We have evidence that often Coles and Woolworths are tough to deal with,

> but there is no across the board evidence to indicate that there are significant structural problems in the supply chain (quoted in Bowen 2008).

Despite these findings, growers continued to voice concerns about the actions of the supermarkets, in particular at what was seen as predatory pricing of a range of own brand products such as milk. This issue emerged in January 2011 when Coles began to sell its own brand milk at AUD$1 per litre as part of a wider cost-cutting exercise designed to win back customers from rival chain Woolworths. Appearing before a Senate inquiry in 2011, Coles representatives argued that this would not affect the long-term viability of dairy farmers since the retailer was absorbing the costs of the decrease in prices and was carrying the burden of reduced prices in the expectation that consumption would increase. In order to remain competitive, Woolworths matched this price but expressed concern over the long-term viability of dairy farmers in Australia (Lane 2011). The Senate Inquiry which reported in December 2011 concluded that the lowering of milk prices had not harmed the dairy industry but had provided substantial benefits to consumers. This view reflected the position of the ACCC which had in its statements of 22 July 2011, and in subsequent appearances before the Senate Inquiry, that Coles had not engaged in predatory pricing nor misleading advertising and that the Coles-brand milk price cuts were pro-competitive (Australian Senate 2011; Retailbiz 2011).

However, dairy industry representatives continued to argue that the industry had been adversely affected by the actions of Coles. It was argued that while Coles might be seen to be absorbing the costs of the price reduction, the real impact was to reduce consumer demand for branded milk, which in turn led the milk processors to reduce the prices paid to farmers. In Queensland, for example, where most milk production was consumed locally as fresh milk, farmers were reportedly receiving 53 cents per litre for milk that cost 52 cents to produce, leading to a drop in income of AUD$8,000 per annum for the average size farm producing one million litres per annum. It was also reported that at such prices, the supply of fresh milk was unsustainable and that some parts of Australia could only expect to be supplied with ultra-high temperature packaged milk, rather than fresh milk. Some 30 Queensland dairy farmers had reportedly left the industry in 2011 (Tessman 2011).

While the ACCC has been widely criticized for privileging consumers above all else (Richards et al. 2012) these latest actions by the largest food retailers appear to have galvanized the ACCC into a reconsideration of the impact of retailer power and its impacts along the supply chain. In August 2011, Graeme Samuel was replaced as Chairman of the ACCC by Rod Sims, a businessman with extensive public sector experience. In a speech made soon after his appointment, the new chairman stated:

> The two major supermarkets have significant market power, with many smaller suppliers feeling they lack a real ability to negotiate supply arrangements. The ACCC can and will watch closely to ensure any such dealings do not involve unconscionable conduct by the supermarkets (Australian Food News 2011).

At the same time, the pressure continues to be applied for the Government to appoint an ombudsman. The release in February 2012 of a government report *Foodmap: An Analysis of the Australian Food Supply Chain* drew attention once more to the extent of the concentration in the retail sector: in 2010–2011, supermarkets accounted for 63 % of household food expenditure, 80 % of which was controlled by Coles and Woolworths (Spencer and Kneebone 2012). This, in turn, led to the AFGC to argue that the report provided support for the appointment of a supermarket ombudsman in order to create a 'more level playing field' for primary producers and manufacturers (Australian Food Network 2012). This issue took an interesting turn when, in March 2012, Woolworths announced the formation of its own 'complaints hotline'. This facility, called Speak Up, is:

> …a new, externally-hosted hotline – delivered by Deloitte – for Woolworths' suppliers to report trading concerns of a serious nature after standard procedures have been exhausted. Issues, which can be reported anonymously, include fraud, corruption, threatening behaviour, people or product safety risks, theft, conflict of interest, bullying and harassment. Woolworths says that the delivery by Deloitte assures a greater level of independence (Australian Food Network 2012).

In many respects, it can be argued that this decision to establish its 'own brand' ombudsman is an admission by Woolworths that there is a need for such an office. However, many will still argue that this is best achieved through government regulation, and that it is only a matter of time before Australia follows Britain in making such an appointment.

Discussion and conclusion

Karl Polanyi and many of his contemporaries viewed market self-regulation as a largely impossible goal of laissez faire economics. Not only would it disadvantage certain sections of society, but it would also create a strong reaction against the very excesses that a self-regulating market would generate. That is, a double movement of social protest and calls for intervention would emerge when free-

market forces moved more closely to the principles and practices of self-regulation (Mendell and Salee 1991).

It is through the Polanyian double movement that we can understand the emergence of watchdogs and ombudsmen in the food industry. The national and global marketplace for food has become increasingly liberalized in its structure, and power has inevitably become concentrated in capitalist firms which can take advantage of a self-regulatory environment. Supermarkets, together with other global corporations, operate beyond the remit of national and international agencies. This has rendered older systems of inspection and surveillance of food supply and distribution redundant. What has emerged to take their place—EurepGAP, GlobalGAP and HAACP among them—involve fewer inspections, along with greater responsibility being placed on the shoulders of growers/suppliers. And, while a process like third-party auditing has become the preferred mode of control of the large food retailers over their suppliers, it is not without controversy: growers continue to complain of unfair treatment at the hands of the supermarkets. They are, in this sense, demanding greater public regulation of the supermarkets. Yet, this would be tantamount to interventionism, which is anathema to national and global neoliberalism and its 'project' of creating free markets for the expansion of corporate capitalism (see McMichael 2012). The state is complicit in fostering a more liberal environment—supposedly fostering efficiency and productivity through competition.

Modern-day self-regulation involves so-called 'codes of conduct'—sets of industry-level rules and standards that shape the conduct of firms within a particular industry (Gunningham and Rees 1997). Gunningham (2004, p. 320) has argued that codes are established when there is perceived market failure, because they provide 'more efficient market outcomes' than alternative, strongly state-centered, means of controlling the neoliberal marketplace. Thus, instead of looking to curb the activities of the supermarkets, the state is seeking to redress public disquiet by undertaking minimalist actions. The creation of the office of ombudsman—which doesn't interfere with overall processes of capitalist accumulation—is one possible action. Yet, even this is viewed by the supermarkets as being something of a fetter on free-market activities.

After 20 years of debate in the UK and Australia, as well as a number of other jurisdictions, over the need for regulatory frameworks to monitor and adjudicate on problems arising out of changing power relationships along agri-food supply chains, it appears that some governments are finally preparing to enact legislation. Yet, the question must be asked: why has it taken so long to get to this point? In attempting to answer this question, it is necessary to consider the kinds of choices with which governments are confronted. There seems little doubt that in most countries where they operate, supermarkets have succeeded in delivering cheap, safe and effective systems of food provisioning with a minimum of government regulation. On the one hand, this has suited governments which, above all else, are interested in ensuring that growing urban populations have access to a secure food supply at prices that are affordable. On the other hand, farmers, in particular, have been losing not only power *vis-à-vis* the retailers who market their produce, but also political influence within a global system in which agri-food products can be sourced from all over the world.

Even in Australia—a country in which the ideals of rural life, of self-reliance, and of farming are a manifestation of quintessential Australian values—urban consumers are increasingly willing to accept that their canned tomatoes come from China, their baked beans from New Zealand, and their asparagus from Peru. In the choice between supporting the interests of rural groups which are numerically insignificant, and urban consumers who are numerically dominant, Australian governments have come down on the side of urban consumers whose preference is perceived to be for cheap (imported) food over more expensive (local) food. Despite this, governments have been dragged—kicking and screaming—into the adoption of a new regulatory framework of watchdogs and ombudsmen, perhaps because of a new realization that, ultimately, national food security is the bigger issue, and that it is not possible—or desirable—to rely on overseas sources for that most important commodity of all: food.

This is not to say, of course, that watchdogs and ombudsmen will have the capacity to act to restrain supermarket power and oversee a fairer system of grower-retailer relations. If Polanyi's double movement is to take place in the arena of food provision it will, of necessity, embrace new regulatory mechanisms to control the activities of supermarkets, to ensure that farmers receive fair prices for their produce, and to guarantee that agricultural production occurs in a sustainable (environmentally-benign) manner. To date, the regulatory architecture that would facilitate this is nowhere to be seen in an era of continuing neoliberal hegemony.

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