

7 March 2008

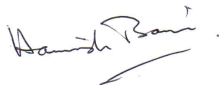
ACCC Grocery Inquiry – Submissions
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Samuel

Please find attached the Horticulture Code Committee's submission to the Australian Competition and Consumer Commission (ACCC) inquiry into the competitiveness of retail prices for standard groceries.

The Horticulture Code Committee (the Committee) was appointed to advise the Australian Government Minister for Agriculture, Fisheries and Forestry on the operation of the Horticulture Code of Conduct (the code). The submission addresses the inquiry's term of reference to evaluate the effectiveness of the code, and whether the inclusion of other major buyers such as retailers would improve the effectiveness of the code. In its submission, the Committee also wishes to highlight a number of issues raised by industry that the Committee believes should be considered when evaluating the effectiveness of the code.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hamish Bain', with a horizontal line underneath.

HAMISH BAIN
Chairman
Horticulture Code Committee

Public Submission to ACCC Grocery Inquiry by the Horticulture Code of Conduct Committee on 7/3/2008

The purpose of this submission is to advise the Australian Competition and Consumer Commission (ACCC) of issues that it has identified that may impact on the effectiveness of the Horticulture Code of Conduct (the code) and to outline the Horticulture Code Committee's (the Committee) preliminary thoughts on these issues.

Establishment and Role of the Committee

The Committee was established on 13 September 2007 to deliberate on industry issues associated with the operation and performance of the code and to provide advice to the Australian Government Minister for Agriculture, Fisheries and Forestry.

The Committee's terms of reference are to consider issues arising and to provide advice on:

1. The impact of the code including the extent to which it is improving transparency and clarity of trade;
2. How growers and wholesalers perceive the code;
3. Options and practical actions that will support the effective operation of the code;
4. Options to increase awareness of the code and its requirements; and
5. General issues relating to the code, including the provision of an annual report of the Committee's activities.

The Committee's membership is representative of the horticulture sector supply chain and includes an independent Chairman and six members representing growers, wholesalers, packers and the central wholesale markets. One wholesaler position is currently vacant. The Committee members are:

- Mr Hamish Bain, Director, Bain Business Management Pty Ltd, QLD
- Mr Brad Latham, Chief Executive Officer, Sydney Markets Limited
- Ms Trish Skinner, Australian Produce Brokers, WA
- Mr Darral Ashton, Chairman, Batlow Fruit Co-operative Limited, NSW
- Mr Mark Chown, President, Australian Citrus Growers, SA
- Mr Fabian Carniel, Mulgowie Farming Company, QLD

Effectiveness of the Code

The Committee understands that the Government asked the Australian Competition and Consumer Commission (ACCC) to evaluate the effectiveness of the code. The Committee notes that in doing so, the inquiry will consider how well the code is achieving its objectives of improving the transparency and clarity of transactions and providing a fair and equitable dispute resolution mechanism.

The Committee has met twice, on 14 November 2007 and 13 February 2008. While two meetings have not adequately allowed the Committee to reach its own position or make recommendations to the Minister, the Committee has identified a number of

issues that impact on the effectiveness of the code and its ability to increase the clarity and transparency of trade between growers and traders of fresh horticultural produce.

The Committee recognises that the code has been in place for less than twelve months. Noting that it requires behavioural changes by both growers and wholesalers it is not unexpected that there has been some initial resistance and opposition to the code. The Committee notes the experience of the ACCC with the Franchising Code of Conduct where it took a number of years for the code to be fully accepted and used within the franchising industry. However, there are a number of issues that the Committee believes may impact on the effectiveness of the code in increasing clarity and transparency in the horticulture sector.

At its first meeting the Committee identified a number of issues relating to the code that it considered warranted further consideration. These issues were:

- Impact of the code on grower-owned cooperatives;
- Impact of the code on the practice of price-averaging and, as a result, pooling of produce;
- Agents buying on behalf of retailers;
- Growers selling at central markets;
- Definition of delivery, its impact on price setting and the use of service agreements; and
- Perception, awareness and understanding by industry.

The Committee requested that industry make submissions to it on the impact and effectiveness of the code, particularly with regard to the above issues.

The Committee received 15 submissions from a wide variety of grower and wholesaler groups. The submissions were sent to the Committee on a confidential basis.

Issues raised in the submissions that may impact on the effectiveness of the code

A number of the submissions raised concerns about a lack of knowledge of the code, the Horticulture Mediation Adviser (HMA) and horticulture produce assessors. The Committee notes the work that the ACCC has carried out in educating and communicating to industry about the code and judges that there is sufficient information available about the code. The Committee is aware of a considerable amount of anecdotal and contradictory evidence regarding the code and its use by growers and wholesalers. Understanding of the code's impact would be improved by statistical information on the actual number of code compliant contracts and growers and wholesalers attitudes to the code.

However, the Committee also notes a very low level of contact with the HMA and is concerned that there may be a very low level of awareness of the HMA or a reluctance to contact the HMA for assistance. The Committee understands that under the Franchising Code of Conduct the number of enquiries to the mediation adviser was initially very low but has grown to several hundred enquiries a year. Even so, the low level of enquiries to the HMA may indicate that the second objective of the code, to provide a fair and equitable dispute resolution procedure is not being achieved. The

inquiry may wish to further investigate reasons for the lack of enquiries to the HMA and possible approaches to making the service more effective.

Similarly, the Committee is concerned that the role of horticulture produce assessors is not well understood within the industry and recommends that the inquiry also consider how awareness and understanding of the assessors' role could be improved.

At its second meeting, the Committee identified five issues that it plans to investigate further. Each of these issues has the potential to impact on the effectiveness of the code and they are therefore drawn to the attention of the inquiry.

1. The impact of the code on grower-owned cooperatives

The code is transaction based and requires growers and traders to have a horticulture produce agreement. In a transaction a trader can be either a merchant who buys a grower's produce for the purpose of resale or an agent who sells horticulture produce on behalf of a grower for a commission or fee.

A grower-owned cooperative develops when growers within an industry want to gain greater economies of scale by jointly marketing produce to buyers within the supply chain. Growers are entitled to a share of the profits of the co-operative.

Elements of the industry have raised concern about grower-owned cooperatives being captured by the first point of transaction requirements under the code. That is, the transaction between the grower and the grower-owned cooperative is regulated under the code.

Growers and grower-owned cooperatives believe that the first point of transaction that should be covered by the code is the one between the grower-owned cooperative and the trader, as this is where the actual sale of produce takes place.

2. The impact of amending the code to allow traders, in an agent transaction, to pool produce of a specific grade/class and return to growers a price averaged over a period of time

Price averaging occurs where a trader sells produce to a number of buyers and returns to each grower the average price received for all transactions rather than the prices for which the growers produce was sold.

Where a packhouse buys the produce or sells it on behalf of the grower and takes a commission the transaction is captured by the code and the parties should have a horticulture produce agreement. Packhouses in merchant transactions may sell many growers' produce over a period of time and return to each grower the average price that the pack house received over that period. The code requires that a merchant and grower agree on a price immediately upon delivery. The Committee has been informed that as prices into the future are uncertain to meet this requirement packhouses would offer prices at the lower end of expectations to prevent the packhouse from experiencing a loss if prices for the produce were lower than that achieved.

The Centre for International Economics (CIE) prepared a draft Regulation Impact Statement for the code. In their submissions to the CIE the Horticulture Australia

Council and the National Farmers Federation argued that price averaging distorts the market and should not be permitted.

However, since the code commenced a number of grower organisations and pack houses have requested that the issue of price averaging be revisited. They have argued that growers benefit from pooling and price averaging provided that it is done across produce of the same quality, with the growers full agreement prior to the transaction and includes detailed reporting by the trader.

The Committee believes that this issue is relevant to the evaluation of the code because an amendment to provide for pooling and averaging under tightly specified conditions may encourage both growers and traders to comply with the code while the reporting requirements would retain the increased transparency that the code is designed to facilitate within the industry.

3. Growers selling in the grower sheds or on grower floors of central markets

The code applies to growers who operate in a grower's shed or on the grower's floor at the central wholesale markets. These growers sell produce to the range of market customers including other growers and larger wholesale traders. Many of the transactions are for small amounts and are conducted so that a grower can fulfil a large order. The code requires that transactions between growers and other growers and growers and wholesalers are accompanied by written agreements.

In some submissions to the Committee it was argued that the requirement to enter into an agreement for grower to grower and grower to wholesaler transactions is unreasonable as the transactions are usually direct, of small scale and sales are generally carried out during trading hours to fill customer order requirements. Submissions suggested that these transactions continue to occur without a written agreement and that in this area it will be difficult to get growers to comply with the code.

The Committee recognises that these transactions are usually of low value and are transparent due to the face to face nature of the transaction and the agreement on price at the time of sale.

The Committee has not agreed to a position on such transactions but recognises that the integrity of the code may be compromised if a group is seen to be trading outside of the code without penalty. Therefore, the Committee raises this issue with the inquiry as a matter it may wish to consider in assessing if the code is effective and having an impact on market behaviour.

4. The requirements for agreeing on price in a merchant transaction

The code requires that the price to be paid by a merchant is agreed in writing. The price can be agreed either before delivery or immediately upon delivery of the produce to the merchant.

Traders argue that this requirement is unworkable as they do not have enough resources to price all the produce early in the morning when produce is delivered and

sold and at the same time to obtain a grower's written agreement to the proposed price.

Some growers and many wholesalers have argued that the setting of prices before the produce leaves the farm or immediately after delivery is very difficult and does not provide the grower with the market price signals that growers need to effectively manage their businesses. Other grower representative groups argue that it should be relatively simple to agree on price as the price should be dependent on the produce specification.

The Committee believes that much of the resistance to the code could be overcome if a more flexible method of agreeing price in merchant transactions was introduced into the code. The inquiry may be interested in this issue because the code would be more effective if there was less incentive for growers and traders to seek to operate outside the code. A change to provide for a different method of calculating price could still provide for an increased level of transparency.

5. The reluctance of traders to work as agents

In the Committee's experience very few traders are prepared to work as agents. This was also identified in some grower submissions, which also indicated that some growers would have a preference to work with agents. Other submissions and comments to the committee reported that there are barriers to traders working as agents, including: the collection of debts, the loss of turnover compared to a merchant transaction and the impact of the Goods and Services Tax. The Committee has not considered these arguments but suggests that they could be assessed by the ACCC as to whether they are real impediments to traders working as agents and thus providing growers with a choice of type of trader to deal with.

If the code is to be effective it should offer workable options for relationships between growers and wholesalers. The inquiry may wish to further consider whether the current wording of the code does provide for realistic options for trade.

Conclusion

While the Committee considers that it is too early to draw strong conclusions about the effectiveness of the code it does note that a strength of the code is that it is transaction based and includes all transactions within the sector it regulates. It is outside the Committee's terms of reference to discuss whether the code should be extended to cover other sectors of the market but the Committee considers that any extension of the code would be best if it was comprehensive with few exceptions.