



Australian National Retailers Association (ANRA)

**Public Submission re the
Horticulture Code by the
Australian National Retailers
Association**

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EXECUTIVE SUMMARY

The Australian National Retailers Association (ANRA) wishes to respond to the suggestion that retailers should be made subject to the provisions of the Horticulture Code of Conduct.

ANRA believes that there is no demonstrated public benefit to be achieved by extending the Horticulture Code to include retailers.

No evidence has been presented to the Commission to show that existing practices by retailers breach fair trading principles or legislation. No documented case has been made for government intervention.

Extending the Code to retailers would add costs without adding to the transparency of grower-retailer transactions.

The issues which prompted the creation of the Code in 2007 do not exist in the retail sector. The Code was designed to eliminate misconduct arising from ambiguous agent/merchant practices in the wholesale markets.

Producers already enjoy the benefit of clear contracts, effective dispute resolution and, in the case of contracted growers, greater certainty over future sales. All of Australia's retailers are party to a successful Produce and Grocery Industry Code of Conduct. Even grower lobby groups readily admit that the contracts offered by major retailers exceed the minimum requirements set by the Code.

Imposing the Code on retailers would inevitably add costs and, to the extent that the Code is a prescriptive document, limit the capacity of producers and retailers to develop innovative practices.

Introduction

The Australian Competition and Consumer Commission (ACCC) seeks comments on its issue paper regarding the Horticulture Code of Conduct as part of its inquiry into retail grocery prices.

The Australian National Retailers Association (ANRA) represents the leading national retailers in Australia, across a broad range of retail products and services. Members of the Association include Australia's most trusted household names in supermarket chains, department stores and speciality retailers.¹

ANRA is pleased to present the perspective of its members on the key issues raised by the Commission in its paper. In particular, ANRA wishes to respond to the suggestion raised in the terms of reference for the inquiry that the retail sector could be made subject to the provisions of the Horticulture Code of Conduct.

ANRA members support an open, competitive market. Strong competition in the market is the best guarantee of lower prices for consumers.

To ensure an efficient market, ANRA members believe in minimum effective regulation. ANRA members endorse the Council of Australian Governments' (COAG) Competition Principles Agreement and the COAG Principles of Best Practice Regulation which state that legislation should not restrict competition unless it is demonstrated that the community benefits of restricting competition outweigh the costs and that the regulatory aim can only be achieved by restricting competition.

Minimising compliance and other costs on business is especially important in 2008. Inflationary pressures are forcing up the price of consumer items, including staples such as food and dried groceries.

It would be ironic if government efforts to ease cost of living pressures on Australian households led to consumers bearing the burden of increased regulatory costs. Retailers are already subject to layers of Commonwealth, State, Territory and local government regulation which inevitably add costs.

It would be just as alarming if measures intended to protect farmers from real or perceived market misconduct led to new regulatory costs eroding producer margins.

1. ANRA's members are Woolworths; Coles; Bunnings; David Jones; Harvey Norman; Best and Less; Angus & Robertson; Borders; McDonalds; Franklins; Luxottica; Freedom and Jeans West.

Scope of the Horticulture Code of Conduct

The Horticulture Code of Conduct was developed to improve transparency in the wholesale market for horticultural produce, in particular to eliminate the practice of wholesalers acting as “agent/merchants”. The agent/merchant problem created confusion about the terms and conditions of sale between growers and wholesalers. Concerns were expressed that unscrupulous wholesalers were exploiting this confusion.

According to the Centre for International Economics, which produced the 2005 regulatory impact statement, very few sales were affected by these conduct issues. The Centre estimated that, pre-Code, “**potential** problem transactions make up less than five per cent of total sales of domestically produced fruit and vegetables”.²

The Code addressed this problem by establishing detailed requirements, for agents and merchants. The Code created a formal “horticulture produce agreement” which set trader obligations, cooling-off periods and offered an independent process of dispute resolution.

As these issues do not apply to parties such as retailers who purchase produce using direct supply agreements and similar contracts, these groups were exempted from the Code when it commenced in May 2007.

The Commonwealth has now raised the question whether coverage of the Horticulture Code should be extended to retailers.

ANRA believes that there is no public benefit in requiring parties using supply contracts to be bound by the Horticulture Code. Direct supply agreements provide clear terms and conditions for growers. Growers have the security of contracts in the event of a dispute. These conclusions are consistent with the findings of the government regulatory impact statements into the design of the Horticulture Code.

Moreover, growers are protected by the terms of the Produce and Grocery Industry Code of Conduct which covers all supply chain participants. All of Australia’s major grocery retailers – Woolworths, Coles, Aldi, members of the National Association of Retail Grocers and the National Retailers Association – are members of the Produce and Grocery Industry Code of Conduct.

The Produce and Grocery Industry Code of Conduct provides *inter alia* for:

- clear “plain English” supply contracts;
- disclosure of clear and accurate produce standards before supply contracts are agreed;
- a requirement that all written supply contracts include an appropriate dispute resolution process; and
- contracts to specify the point when responsibility for produce transfers.

2 . Centre for International Economics. *Mandatory Horticulture Code of Conduct: A Regulation Impact Statement*, Canberra, Centre for International Economics, 2005, p.8.

Through the Code, growers can use an accessible, publicly subsidised dispute resolution service (provided by the same organisation delivering dispute resolution for parties to the Horticulture Code).

In its discussion paper, the Australian Competition and Consumer Commission (ACCC) notes that “retailers have been able to achieve a competitive advantage over wholesale traders by offering growers detailed supply contracts, prompt payment, stable revenue streams and access to a dispute resolution process through the voluntary Produce and Grocery Industry Code of Conduct”.³

This point has been made, forthrightly, by a grower quoted in the Horticulture Australia Council submission to the inquiry:

Good growers go direct [to the retailers] to get away from the stupidity of Agents [wholesalers].⁴

The use of contracts clearly benefits growers and is placing pressure on the wholesale markets to offer similarly attractive terms and conditions.

Horticulture Australia Council notes in its submission to the inquiry that

The contracts agreed to by the major retailers with their direct suppliers more than meet the minimum requirements of the Code – in general, they are solid documents covering both the terms of trade arrangements and the specific agreements currently covered by the Horticulture Produce Agreement.⁵

Fruit Growers Victoria makes the same point:

The inclusion of groceries and supermarkets in the Horticulture Code of Conduct Code would have no impact except to further increase the cost of doing business ... Pricing to supermarkets is generally known before delivery so their inclusion would serve no purpose.⁶

In its analysis of direct supply agreements between Woolworths, Coles and beef producers in 2006, the ACCC found that:

- retailers’ direct supplier agreements are a response to guarantee local supply and quality in a competitive market;
- the fact that these agreements offer producers a guaranteed minimum price indicates that there is not an imbalance of market power between buyer and seller; and
- in 2006, the average prices paid for beef by Woolworths and Coles through these agreements were above the industry benchmark.⁷

3 . ACCC. *Issues Paper regarding the Horticulture Code of Conduct*, p. 4.

4 . Horticulture Council Australia. *Submission to the ACCC Inquiry*, p.5.

5 . Horticulture Council Australia. *Submission to the ACCC Inquiry*, p.5.

6 . Fruit Growers Victoria *Submission to the ACCC Inquiry*, p.4.

7 . Australian Competition and Consumer Commission. *Examination of the Prices Paid to Farmers for Livestock and the Prices Paid by Australian Consumers for Red Meat*, 2007, p.ii and p.9.

There is ample evidence that many producers are satisfied to be contracted growers for major retailers such as Woolworths and Coles. Some 80 per cent of Woolworth's contracted growers have been supplying the company for ten years or more.

A Solution in Search for a Problem

As with all good regulation, the onus of proof rests on the parties arguing for additional regulation to show market failure and to suggest ways to address this failure without creating disproportionate costs to business and the community.

The claim that some producers are not receiving what they consider to be a "fair" price is not proof of market failure.

To date, the arguments advanced for including retailers in the Horticulture Code offer no evidence that growers would benefit or that there are market conduct issues which demand such action.

Producer groups have complained to the inquiry that compliance with the Code is disappointing amongst wholesalers and other parties. Some groups go so far as to claim that the Code has failed.

The National Farmers Federation (NFF) notes in its submission to the inquiry that "it is far too early to assess the overall effectiveness of the (Horticulture) Code".⁸ By contrast, the NFF admits that

the major retail chains and processors already offer contractual clarity and transparency in their dealings with horticulture growers.⁹

These two statements would suggest that extending the Code to include retailers would be premature and unnecessary.

Nevertheless, the NFF asserts that "the Code should apply to all parties involved in the first transaction from the grower". The NFF claims that, as retailers already provide clear, transparent contracts to growers

including these parties within the Code will not add any compliance costs or regulatory burden to these businesses.¹⁰

ANRA believes that these comments are contradictory and, in the case of compliance costs, incorrect. Extending the Horticulture Code to retailers would mean that some produce would be purchased under the Horticulture Code while other produce would be subject to the Produce and Grocery Industry Code of Conduct. It is important to note that, while setting similar requirements to the Produce and Grocery Industry Code of Conduct, the Horticulture Code is considerably more prescriptive.

8. National Farmers' Federation *Submission to the ACCC Inquiry*, p.15.

9. National Farmers' Federation *Submission to the ACCC Inquiry*, p.16.

10. *ibid.*

The New South Wales Farmers' Association also argues for the inclusion of retailers under the Horticulture Code. The Association claims that this is necessary because retailers only offer "growing agreements" and produce specifications are not available for all product lines. The Association is concerned that retailers also buy produce directly from growers, a practice the Association believes justifies extending the Horticulture Code to all retailers for all transactions.

In this case, the New South Wales Farmers' Association seems to see the Code as an end in itself. The Association seems to wish to extend the Code to 'cover the field' rather than because of any evidence that an extended Code will improve market standards.

This claim ignores that the Horticulture Code was designed to address a specific problem - poor practices in the wholesale sector.

The New South Wales Farmers' Association is critical of the Produce and Grocery Industry Code of Conduct, alleging that "growers fear going to the Ombudsman for fear of commercial retaliation". The Association does not offer evidence to support this claim but, in any event, there is no explanation why a similar problem would not arise in the case of the Horticulture Code. Other producer groups have made the same criticism of the Horticulture Code.

As the above discussion attests, the arguments for extending the Code to incorporate retailers are not based on any evidence of market misconduct by retailers, assume that additional regulation will create no additional costs and are proposed despite doubts about the efficacy of the Code.

While showing little faith in the capacity of the Code to fulfil its original objective of improving conduct in wholesale markets, some groups are arguing that, after only one year of operation, the Code should be extended to cover a huge, new segment of the market. ANRA believes that such a step could only be justified with clear evidence of persistent misconduct. To date, no evidence of substance has been produced to make that case.