Public Submission

Re: Horticulture Code

by

Brismark on Tuesday 10 June 2008

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PREAMBLE

Brismark is pleased to provide a second submission to the Grocery Inquiry however it does so with some trepidation. The Issues Paper demonstrates that the Australian Competition and Consumer Commission's (ACCC) view on the Horticulture Code is already tainted against the wholesaling sector.

This view is based on statements made in the Issues Paper, as highlighted by the following examples:

Example 1

> "… 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."[1]

There are many wholesalers who provide every one of these benefits to their suppliers. In addition they promote grower's brands and build their intellectual property, they market the grower's entire crop, they do not reject consignments, they do not require an introduction claim deal or media spend and they do not charge warehouse allowance, ullage, business volume rebate and 3.75% settlement discount for 30 day payment.

Example 2

> "It has been asserted that growers are reluctant to complain to the ACCC regarding alleged breaches of the Horticulture Code for fear that they will in turn be singled out by disgruntled traders and subjected to harassment and/or commercial ruin".[2]

"It has also been asserted that many wholesalers and growers were satisfied with established trading arrangements and that "the new regulations were in many cases unsuitable or unworkable". [3]

There have also been many assertions that suppliers to the retail chains are also reluctant to complain for fear of having their supply arrangements terminated.

The fact that the ACCC appears to give weight to the assertions of the most radical peak grower organisations as the basis for further inquiry and ignore the wholesaling sector and grass roots grower organisations does not instil confidence in the current process. For the Inquiry to be fair and effective the ACCC must resist the temptation to accept that the entire process to this stage has been fair or that the propaganda used to justify its existence is either correct or justified.

[1] ACCC 2008, p.4.
[2] ACCC 2008, p.7.
[3] Brismark Submission 2008, p.23.

Issue. 1: Enforcement of the Code

Is there reluctance by growers to: complain to the ACCC regarding breaches of the Horticulture Code; or to initiate a move from an existing exempt agreement onto a Horticulture Code compliant agreement? What evidence is there to support these claims? Are there any measures that could be adopted to facilitate the reporting of Horticulture Code breaches or to enable growers to initiate a shift from an existing exempt agreement to a Code compliant agreement?

Response

The low level of complaints to the ACCC, Horticulture Code Mediation Advisor, Produce and Grocery Industry Ombudsman and Brisbane Markets Grower Hotline demonstrates that either there is reluctance by growers to complain about breaches of the Horticulture Code or there are very few complaints of substance. The low level of complaints has been an ongoing feature of the fresh fruit and vegetable industry for many years.

Prior to the introduction of the Code we argued that the paucity of complaints demonstrated that growers were generally happy with pre-Code trading arrangements. We have consistently argued that some parts of the code are unworkable and that the Central Markets could not cope with their general implementation. We submit that the vast majority of growers are also unhappy with some aspects of the current Code and are therefore not disposed to report breaches of those provisions. Growers do not want to be phoned between midnight and 4:00am to negotiate the price of produce. They do not want to miss the market as traders attempt to evaluate all incoming shipments. They do not want to receive lower prices as traders try to forecast the coming day's market. What growers want is for their produce to make market and for their return to reflect the market price and therefore they do not report practices that facilitate that outcome.

Some peak grower bodies argued that there was widespread dissatisfaction with pre-Code trading arrangements and that once an affordable and enforceable dispute resolution system was established there would be a flood of complaints. The last 12 months has shown that this is not the case.

To explain the lack of complaints the same bodies are now claiming that potential complainants fear "harassment and/or commercial ruin". Taken in the context of the number of marketing channels available to growers this argument should be seen for what it is.

The Centre for International Economics (CIE) in their Draft Regulation Impact Statement July 2005 recommended trading arrangements that included the option of price setting based on the sales price of the produce. They noted "only the third option provides a significant degree of incentive for the parties to seek to comply and use the code".[4] Rather than pursuing conspiracy theories with the goal of increased prosecutions, the ACCC should be seeking to make the Code workable so that breaches are not a necessary part of doing business.

[4] CIE 2005, p.xvii.

Issue. 2: Extension of the Code to cover retailers and their agents

Should the Horticulture Code be extended to regulate retailers? On the one hand, the regulation of retailers and their agents may provide growers with greater clarity and transparency in their transactions with retailers. On the other hand, such an extension may capture dealings that do not warrant intervention and in doing so may impose unnecessary compliance costs. Alternatively, should the Horticulture Code be extended to cover retailer's agents (and not retailers themselves) as a distinct category of trader?

Response

In 1999, the Joint Select Committee on the Retailing Sector recommended a mandatory Code to regulate the retail chains. The 2003 Report of the Review of the Retail Grocery Industry Code of Conduct (Buck Report) recommended a mandatory Code covering the entire industry including grocery retailers and processors. Submissions by Horticulture Australia Council and National Farmers Federation also called for a Code, which applied to all parties including retailers, exporters and processors.

On 1 October 2004 the Deputy Prime Minister promised a Code that would include retail chains.

> The code will give producers a fairer deal on their terms of trade and on resolving disputes with produce buyers, which are in many instances supermarket chains.[5]

The Weekly Times 21 May 2008 reported that the decision to exclude the major supermarket chains was entirely political.

> Supermarkets were excluded from the troubled Horticulture Code of Conduct as a concession to Liberal Party chiefs, senior Nationals have revealed. Nationals MPs John Forrest and Barnaby Joyce told The Weekly Times supermarkets had been excluded to appease the Liberals. 'I wanted (supermarkets included) but we didn't get it … that was the concession,' Mr Forrest said. Senator Joyce said it was 'outrageous' and 'madness' that the code covered only half the market.[6]

For the sake of fairness and equity either the mandatory code must apply to retailers, processors and exporters or wholesalers must be allowed the option of subscribing to the voluntary code and opting out of all parts of the mandatory code.

The major argument used to justify the exemption of retailers from the Code demonstrates the double standards applied throughout the whole Code process.

[5] House of Representatives Hansard, No.12, 2006, p.99.
[6] Weekly Times 2008, p.1.

> Supermarkets are likely to gain nothing from implementation of the Code due to the fact that they are largely achieving the desired objectives of the Code now but under voluntary codes of conduct. Furthermore, it may be argued that growers who have a dispute with a retailer could already use the existing dispute resolution process established under the voluntary Produce and Grocery Industry Code of Conduct.[7]

The peak body representing Central Market wholesalers is also a signatory to the Produce and Grocery Industry Code of Conduct. The CEO of that body is a member of the Grocery Industry Code Administration Committee. Complaints against wholesalers are referred to the Produce and Grocery Industry Ombudsman. Central Market wholesalers have supported the voluntary code and subscribe through their national representative body yet they are not afforded the same treatment as the major supermarket chains.

The voluntary code does not include the unworkable and expensive provisions of the mandatory code. It recognises "the right of suppliers and retailers to freely negotiate the terms and conditions of any supply contract". It does not prohibit any method of calculating prices and does not impose unworkable deadlines and onerous reporting requirements.

The CIE in their final Regulation Impact Statement noted "Additional requirements and costs brought about by the (mandatory) code will primarily impact on wholesalers." Whereas the supermarkets were "likely to gain nothing" from the Code, wholesalers have been burdened with increased expenses and decreased flexibility. As previously noted, for the sake of fairness and equity either the mandatory code must apply to retailers, processors and exporters or wholesalers must be allowed the option of subscribing to the voluntary code and opting out of the mandatory code.

Issue. 3: The Horticulture Code transitional arrangements

Should there be a cessation date on these exemptions (i.e. a sunset clause), in order to facilitate a consistent approach across the industry and to assist the ACCC's enforcement of the Horticulture Code? Would a sunset clause be an appropriate response to address the possible reluctance of growers to challenge the status quo created by the user of exempt agreements?

Response

The wholesaling sector's claim that the Code in its current form is unworkable is not rhetoric. Wholesalers will not act as agents because of the difficulty and in some cases impossibility of complying with reporting requirements, the laws in relation to GST and the threat to the intellectual property of the agent. As merchants they generally will not set prices before delivery due to the variability of the produce and the constant fluctuations in the market price.

[7] ACCC 2008, pp.8-9.

The Code then requires them to negotiate prices and confirm them in writing immediately upon delivery. There is simply not enough time, nor will on the part of the trader or the grower, to meet this requirement.

The previous prescriptive State legislation recognised the need to allow adequate time for price setting. Under the Farm Produce Marketing Act traders who operated as merchants were given until the close of business on the day after delivery of the produce to agree a price. This was the preferred method of trade under the Act.

If wholesalers today attempted to conduct all of their trade under and in compliance with the Code the wholesale markets would break down. Produce would build up while wholesalers inspected receivals and negotiated prices. Warehouses would fill to overflowing, fax machines would not be able to send and receive price agreements quickly enough, buyers would not be able to get stock.

Wholesalers have avoided system failure through a variety of methods. While a percentage of trading is in compliance with the Code, much of their trade is conducted under pre-Code agreements. Some wholesalers have culled smaller, less profitable growers from their supply chain. Some produce is received under service agreements and price setting is delayed. In some supply chains third parties are interposed between the grower and the wholesaler. Some traders have no option but to trade in breach of the Code.

Any attempt to force compliance with Code requirements through a sunset clause or greater enforcement by the ACCC is not only inappropriate but may prove to be catastrophic.

To emphasise the folly of what is being suggested we could draw the following analogy. There is currently public dissatisfaction with waiting lists for operations in the public health system. In this situation bureaucrats or politicians may feel inclined to draw up regulations for the conduct of operations. in order to promote better outcomes and greater clarity and transparency under public health system. Certain procedures and/or practices could be outlawed and other procedures and/or practices mandated.

However, such actions would not be seriously contemplated by anyone other than someone with training and experience in the conduct of medical operations. It is unfortunate that the industry regulators have up until this time preferred to listen to people with no practical experience in Central Market wholesaling or indeed those who have been strong supporters of what the pre-existing arrangements could offer.

Issue. 4: The definition of delivery and a requirement that merchants establish a price on delivery

Is the requirement that the parties agree on a price for produce either before or immediately upon delivery appropriate to achieve this goal of providing growers with clarity and certainty regarding the price they will receive? Should the Horticulture Code be amended to enable merchants to provide growers with a method or formula by which price will be established? Should this formula be restricted in any way to provide growers with greater transparency and clarity as to the price they will receive from the merchant?

Response

When evaluating whether a requirement of the Code achieves certain goals we should not ignore the overall impact of that requirement. Clarity and certainty can be achieved in a number of ways. Growers could be contracted to sell their entire crop at a low guaranteed price. This may not be fair to the grower but it would maximise both clarity and certainty. The Issues Paper states that "it should be understood that the Horticulture Code does not directly seek to achieve fair prices for growers". [8]

However, any fair-minded person would concede that fair prices are just as important as clarity and certainty.

The Central Markets provide a clearing house for growers' produce. Unlike the supermarket chains that order discreet quantities and reject produce when they over order the Central Markets accept all quantities, grades and sizes. They are the price setting mechanism for the industry and rely on forces of supply and demand to achieve an appropriate outcome for growers.

The requirement that the parties agree on a price either before or immediately upon delivery changes the very nature of the Markets. Instead of trading in a spot market and returning a market-based price to growers, wholesalers are expected to trade in 'futures'. They cannot know the levels of supply and demand before the market opens and will err on the low side when setting prices. This will reduce the return to the grower and weaken market signals. It also requires the wholesaler to rouse sleeping growers and attempt to agree prices on hundreds of lots in writing before the market opens (with the consequences described previously).

The question then is not whether the price setting requirement is appropriate for achieving the arbitrary goals of the Code but whether it is appropriate for a spot market. The function of the market, its nature and its logistics make the answer to this question a resounding no. It is for these reasons that the wholesaling sector has continued to argue that the Horticulture Code should be amended to enable merchants to provide growers with a method or formula by which the return price to the grower will be established.

[8] ACCC 2008, p.8.

Issue. 5: Service agreements

Should the Horticulture Code permit merchants to provide growers with additional services as part of their horticulture produce agreement? If so, when should ownership transfer from the grower to the merchant take place? In these circumstances, should the Horticulture Code impose further obligations upon merchants, in addition to requiring them to take due care and skill, prior to the transfer of ownership?

Response

Central Market wholesalers provide a number of services other than acting as traders. They regularly receive produce, which requires ripening and conditioning, or in some cases sorting, packing, grading and storage before the produce can be considered for sale. In these situations the produce is received under a Service Agreement.

Allowing traders to provide services under a Horticulture Produce Agreement would reduce the number of documents required to comply with the Code. Given the resistance of some growers to sign any agreement there could be some advantages in combining the two documents.

The provision of services by traders however is separate from the sale of that produce. For example, the grower may choose to have one wholesaler ripen his produce before passing the produce to another trader for sale. The selling price of the produce is generally not determined until the produce has been prepared for sale by the service provider. It is therefore imperative that the ownership of the produce remains with the grower during the time that the services are being provided.

The suggestion that traders should be subjected to further obligations above and beyond those now imposed smacks of political pandering. Traders have both common law and statutory obligations to exercise due care and skill. If they fail in their obligations growers have all the legal avenues available to every Australian business. In addition they now have the Horticulture Code Mediation Advisor and the Produce and Grocery Industry Ombudsman. These are government funded and in the case of the Code, compulsory programs to address disputes. Requiring traders to exercise super care and skill would weight the scales so far in favour of growers that traders would be forced to reconsider their provision of such services.

Issue. 6: Agents

To enable growers to collect their own debts and to encourage traders to act as agents should market credit services permit growers to use the market credit services to collect their bad debts on behalf of growers? To what extent should agent's current record keeping and reporting obligations under the Horticulture Code be reduced in order to decrease their compliance burden, while retaining adequate transparency for growers?

Response

Credit Services are generally unable to act for growers. To address this situation Brismark members wishing to act as agents may require the grower to authorise their use of the Credit Service for the recovery of agency debts. This service may be accompanied by a fee.

One factor contributing to the reluctance by traders to act as agents is the record keeping and reporting obligation. Wholesalers act as consolidators to service the needs of their customers. They may sort and repack lots received from growers and combine different lots from the same grower or from several growers to fill an order. Such activity may be ongoing during the receival and order picking period. The volume and complexity of such activity makes matching sales to each type and quantity of each lot received nigh impossible for some businesses.

Grower owned co-operatives and packing houses have also expressed difficulty in complying with Code record keeping and reporting obligations. They have requested exemptions from the requirements or changes to allow pooling. The problems that they are seeking relief from are more pronounced in the Central Markets due to the larger number of suppliers and range of products handled and the compressed timeframes experienced in the Markets.

Proponents of the status quo argue that pooling is unfair to better growers and weakens market signals. However wholesalers would argue that pooling achieves better prices for all growers by enabling buyers' requirements to be better accommodated. They would also point out that they can achieve higher prices from some buyers than others with the same quality of produce and that in these cases pooling is actually fairer.

Issue. 7: Packing houses and cooperatives

Should transactions between growers and grower-owned cooperatives/packing houses be excluded from regulation by the Horticulture Code where the cooperative/packing house 'markets' the grower's produce (i.e. act as an agent)? Should dealings between the cooperative/packing house and traders be regulated by the Horticulture Code?

Response

Some organisations have argued that the requirements of the Code are too onerous for cooperative/packing houses and that as such they should be exempt. We have argued that the requirements of the Code are too onerous for Central Market wholesalers and that the Code should be amended.

We have also argued that exemptions are unfair, placing burdens on only one part of the industry, giving other parts a competitive advantage and distorting the market. As the Central Market wholesalers have borne the greatest cost in relation to the Code we oppose any further exemptions or changes that will shift even more of the impacts of the Code on to our members.

Issue. 8: Pooling of produce and price averaging

Should the Horticulture Code be amended to provide greater flexibility within the industry for pooling and price averaging to enable growers to continue to manage their risk in circumstances where there are significant fluctuations in produce prices over time and across various markets throughout Australia. On the other hand, if the Horticulture Code were to permit pooling and price averaging, producers of high quality produce may not be treated fairly and as a result there may be less incentive to produce high quality produce. What protections should the Horticulture Code provide to growers who choose to join a pool and receive an average price?

Response

As explained previously, wholesalers act as consolidators to service the needs of their customers. They may sort and repack lots received from growers and combine different lots from the same grower or from several growers to fill an order. Wholesalers would argue that pooling achieves better prices for all growers by enabling buyers' requirements to be better accommodated. They would also point out that they can achieve higher prices from some buyers than others with the same quality of produce and that in these cases pooling is actually fairer.

We submit that growers and traders should be entitled to make informed decisions to participate in pooling or price averaging. The restrictions on free trade already imposed by the Code are not supported by the majority of industry participants and have promoted avoidance and non-compliance. Regulators should allow business to make their own choices about how they trade.

REFERENCES

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