Public Submission to the ACCC inquiry Re: Horticuture Code

10 June 2008

Introduction

The Australian Chamber of Fruit & Vegetable Industries represents the vast majority of the fresh produce wholesalers operating in Australia's six central markets.

We provide service and advice to our members on matters that may have an affect on the operation of their businesses now and in the future.

This submission is presented from the viewpoint of the wholesale sector of the horticulture industry. This sector has borne the most of the costs associated with the introduction of the Horticulture Code of Conduct (Code).

From the outset, The Australian Chamber has maintained that the Code is anti-competitive and discriminatory is its nature and flawed in its execution. It also has a very serious doubt over its validity as a true industry Code permitted under the Trade Practices Act 1974.

We have addressed the points raised in the issues paper in the order in which they were presented.

Key Exclusions under the Code

- *Retailers*

While it may be true that retailers have increasingly sought to source produce direct from growers, it has become very apparent to the retailers that there are very few growers who are singularly able to meet their requirements.

For this reason the major retailers source produce from wholesalers, packhouses, marketing groups and others in order to meet the long lines of the quality and sizes of produce demanded by their customers.

Contrary to statements contained within the issues paper, these retailers may not issue 'detailed supply contracts', they may only indicate to a grower, or other supplier, that the supplier is an approved supplier. This gives the supplier the right to supply, it does not guarantee that the retailer will give the supplier an order, intermittent or regular.

Also, 'prompt payment and stable revenue streams' may be guaranteed under such an arrangement as long as the supplier is willing to discount a percentage of the invoice amount to the retailer for the 'prompt payment'. This may be as low as 2.5% but some suppliers to these retailers have mentioned figures of up to 8%.

The paper also refers to 'product specifications and quality assurance procedures'. It should be noted that the wholesale sector was the first to adopt food safety and quality assurance procedures. It has only been in recent years that the retailers have chosen to source product direct from growers because of the uptake of food safety program by the growers.

Also disregarded is that FreshSpecs has been established as the standard specification for Class One produce across the marketing sector of the industry. These specifications were developed by the Australian Chamber in conjunction with major produce buyers, and are accepted by most major retailers.

The final point to make in regard to this section of the issues paper, is that it states that part of the reason retailers 'have been able to achieve a competitive advantage' is because their suppliers have access to the dispute resolution process under the Produce & Grocery Code of Conduct.

The paper ignores that the Australian Chamber, and the wholesalers it represents, was a foundation signatory to the voluntary code thereby making available the same dispute resolution procedure to their suppliers. Some grower organisations did not bother to become a signatory until 2005 and had actively campaigned against the code prior to becoming a signatory.

- *Existing written agreements*

Many agreements entered into prior to 15 December 2006 are in existence. These agreements preserve the productive, long standing relationships that have existed between the parties for many years. Some of these relationships span generations and in many cases these close, personal and family relationships have prospered despite the turmoils that have confronted this industry over the years.

An argument to set a 'sunset clause' on these agreements would be retrospective regulation and be at odds with the argument used to exempt retailers from the Code ie. the existence of open pre-code agreements.

- *Limitations on coverage under the Act*

The issues paper goes into some detail where the Act applies and it does not apply, dependent on the corporate status of the party to the transaction and whether the produce is traded interstate or not.

While it states that 'if one of the parties is incorporated then the Code applies' it could be argued that the Act cannot be enforced on an unincorporated entity because the Act only applies to incorporated entity.

Therefore if this Code is to be enforced, the only entity that it can be 'enforced upon' is the incorporated entity. There is no jurisdiction under the Act that applies to an unincorporated entity.

The vast majority of growers in Australia operate as family partnerships, sole traders and other such unincorporated entities. The Australian Chamber believes that neither the Code, nor the Act, can be forced onto these entities other than by restricting the trade that these entities may undertake.

The only enforcement option available is against the incorporated entity involved in the trade, if there is one. At this time we are unable to ascertain if the Mutual Recognition Act and hence free trade between States is affected by the Code.

Key obligations under the Horticulture Code
As the paper points out there are certain obligations required under the Code. The Australian Chamber has informed its members of the obligations to issue terms of trade and to have agreements in place before trading.

However, the same cannot be said for the various proponents of this Code. They have actively advised growers not to sign any agreements with wholesalers. Therefore we have a serious situation where many growers refuse to sign agreements but continue to send produce to wholesalers to trade.

While a wholesaler has many obligations under this Code, the grower only has one. That is, to sign an agreement.

Dispute resolution under the Horticulture Code.
The same industry Ombudsman, and the panel of mediators available under the voluntary Produce and Grocery Code of Conduct, manage the dispute resolution procedure under the Code. The PGICC dispute resolution has been available to all industry participants since 2000.

There is very little difference, except for the cost which is higher under the Horticulture Code.

The issues paper mentions 'produce assessors'. 'Produce assessors' have been available to inspect produce and present an independent report since the various State based Farm Produce Acts were abolished.

Since that time, this service has been available to anyone who wishes to contract the assessor's services. Prior to the repeal of the Farm Produce Acts inspections were performed at no cost by government appointed inspectors.

So there is nothing new in having independent inspectors/assessors available to inspect produce, it has been available for decades. The difference now is that the service is no longer free.

ISSUES
Enforcement of the Code
- *Pre-existing agreements*

It should be stated from the outset that 'assertions that growers are reluctant to complain to the ACCC regarding alleged breaches of the Code' is a statement that many grower organisations will use whenever they have no facts to back up their anecdotal claims.

It is unbelievable that not one grower out of the 14,000, 18,000 or 24,000 (depending upon who you ask) that they represent, would not have the fortitude

to step forward on an issue as "important" to the industry that they claim the Code to be.

Also, when referring to pre-existing agreements it should be noted that there is absolutely no requirement under any of those agreements for a grower to supply produce. In addition, either party may terminate those agreements within 7 or 14 days as they please.

The agreements are not exclusive in that a grower may supply the wholesaler, sell to another wholesaler or market, sell to a retailer, sell at a local grower's market or anywhere else that they may choose. The choice is always the grower's.

So even if a grower has a pre-existing agreement, or for that matter a Horticulture Produce Agreement under the Code, there is absolutely no obligation on the grower to supply produce under the agreement.

The reason why most growers and wholesalers prefer to trade under pre-existing agreements is because they like doing business in the manner that they have decided, not someone else.

- *Reporting breaches of the Code*

There are many avenues open for grower's to report breaches of the Code. As mentioned above, if they are an unincorporated body there is serious doubt as to whether the ACCC would be able to take action against them anyway, so they have nothing to fear from the regulators.

It also needs to be established what is a breach under the Code and what is a breach of an agreement that may exist under the Code.

To date there has been no dispute resolution procedures undertaken under the Code, however there are instances where wholesalers have been pursued by the ACCC because the ACCC has determined that there may be a breach of the Code rather than a breach of an agreement.

If every breach under a Horticulture Produce Agreement is to be pursued by the ACCC as a breach of the Code also, why bother having a dispute resolution procedure at all.

Extension of the Code to cover retailers and their agents

There are several points raised in this section of the issues paper that at odds with statements made in other parts of the paper, other points that require correction and others that need to be clarified.

On page 4 of the issues paper under 'key exclusions under the Code', it states that 'retailers have been able to achieve a competitive advantage over wholesale traders by offering growers detailed supply contracts...' Contrary to this statement, the first part of this section states that 'growers are not provided with

written supply agreements'. For further comment on these arrangements refer to the 'Retailers" section under 'Key exclusions under the Code' of this submission.

The issues paper then goes on at length about 'consolidators' and/or 'retailer's agents'. This confuses the situation even further as to who is in, and who is out, of the Code.

If a 'retailer's agent or consolidator' uses the retailer's finances to purchase produce, then they would be a true 'retailer's agent'. If an entity uses its own finances to purchase produce that is to be supplied to a retailer, that entity would be a merchant. If an entity arranges the sale of a grower's produce to a retailer for a fee or commission, then that entity would be an agent.

The Australian Chamber is unaware of any situation where an entity, separate from a retailer, uses the retailer's finances to purchase produce from growers. Such entities all use their own finances or act as grower's agents. Therefore, the entities described in the paper as 'retailer's agents or consolidators' are effectively 'merchants' or 'agents' for purposes of the Code.

If the issues paper is suggesting that any entity that purchases produce to fill an order from a retailer is a 'retailer's agent', then a large proportion of transactions conducted by wholesalers would fall into this category.

The final point in this section that requires clarification is where it states that 'it may be further argued that growers who have a dispute with a retailer could already use the existing dispute resolution process established under the voluntary PGICC'.

The point of clarification is that this dispute resolution process has been available to all participants throughout the supply chain since 2000. To suggest that it is only available to retailers is incorrect. The process is available for disputes between growers and wholesalers, wholesalers and retailers, transporters and growers etc. and anyone else involved in the industry.

- *Should the Code be extended to regulate retailers?*

It should be first asked to what gain.

If regulation of the retailers is used to address the imbalance and competitive advantage that retailers now have over wholesalers since the imposition of the Code, then yes it should be extended.

If regulation of the retailers is used to address an undefined, unsubstantiated anecdotal situation presented by various grower organisations, then no the Code should not be extended.

Therefore, if the Code is to remain and the only way to address its discriminatory, anti-competitive nature is to regulate the retailers, then the Australian Chamber would have to support such a model. In saying such, it should be noted that there

will be further compliance and regulatory burden placed on the entire industry which itself needs to be questioned.

- *Should the Code be extended to include 'retailer's agents'*

'Retailer's agents' only exist in the mind of some grower representatives and now apparently, the ACCC. Our comments above indicate our thoughts on the issues paper's description of 'retailer's agents and consolidators'.

If however, the ACCC believes that a separate 'retailer's agent' category should be created under the Code, then we would support such a move. However, they should be exempt from the Code as the are working on behalf of the retailer and retailers are exempt from the Code.

How could you have a situation where retailers are exempt but their agents would not be exempt?

The Horticulture Code transitional arrangements

While the ACCC may find that pre-existing agreements 'raise significant compliance and enforcement challenges', it should be considered that the wholesale sector has faced even greater challenges in implementing the aspects of the Code and defending themselves from allegations of non-compliance by the grower organisations and the ACCC.

Prior to the release of the final draft of the Code, we believe that the ACCC was asked to give an opinion as to whether the Code as drafted was enforceable under the Act. We are informed that the reply was in the affirmative. It was explained to the Chamber that while it would be very difficult for wholesalers to comply with all elements of the Code, it was not impossible, therefore the regulation was enforceable.

Pre-existing agreements are exactly that, they were in force prior to the Code being introduced and represent the desire of the signatories to continue to trade in the way that best suits their interests.

- *Should there be a sunset clause on pre-existing agreements?*

A decision to introduce retrospective regulation for the sole purpose of making the Code easier for the Government to enforce, while the industry has to bear the increased cost of regulatory burden, is not justification for such action.

- *Would a sunset clause encourage growers to challenge pre-existing agreements?*

Growers that are operating under pre-existing agreements are not desirous of changing the existing arrangements. As mentioned previously, there is no obligation under any agreement for a grower to supply produce under that agreement. They also have the option of terminating those agreements within 7 or 14 days.

If a grower wishes to trade under the Code they have every opportunity and choice to do so. However, many are very reluctant to do so especially after seeing the methods of trade prescribed under the Code.

The statement in the issue paper that introducing a sunset clause may 'be an appropriate response to address the possible reluctance of growers to challenge the status quo created by the use of exempt agreements' is probably a little understated.

If a sunset clause were introduced then 'reluctance' would certainly be removed, along with freedom of choice and legal rights to existing arrangements.

The definition of delivery and requirements that merchants establish a price on delivery

The requirement to agree a price either before or immediately upon delivery is a condition that only applies to 'merchants' under the Code. It does not apply to 'agents'.

If it is so vital to provide growers 'with clarity and certainty regarding the price they will receive', why are 'agents' allowed to continue operating under the code.

In an agency transaction the grower does not know the price they will receive until after the produce is sold and the commissions and costs deducted. This seems to run in the face of 'clarity and certainty of price'.

A method of price calculation should be agreed by the grower and wholesaler. If it is a method that is acceptable to both then that should be an acceptable method of establishing the price for produce.

If it is proposed that the method of price calculation be restricted in any way, then the current situation should be retained as it is restrictive enough for all who have to deal with the current pricing requirement.

Under the current requirements, it should be considered that produce is sent to the markets on the growers transport. It is unloaded by firms engaged by the transport company on the grower's behalf. The unloaders place the produce on, or in the vicinity of, the wholesaler's stand or warehouse. The transport arrives and the unloading occurs 24 hours a day, 7 days a week. Wholesalers cannot be present on that time basis just so they can negotiate a price.

It should also be considered that under the Code merchants purchase produce for the purpose of resale. Merchants do not purchase produce to store it, they do not purchase produce to ripen it, they do not purchase produce to re-stack it, they do not purchase produce to re-sort it, they purchase produce to re-sell it.

A Code compliant merchant does not purchase produce until the produce is ready and available for resale, it is at that time that a price can be determined for the produce.

Service agreements
Service agreements are a newcomer to the produce arena as there had never been a need, prior to the Code, for separate service agreements to exist. It is just one more compliance cost added to the industry by the Code.

- *Should services be included under the Code?*

The question should be asked, 'is there a need to regulate service agreements?' If the answer is no then do not regulate the services as well by including them under the horticulture produce agreements just for the sake of regulating them.

- *If so, when should ownership transfer?*

There is already enough controversy and confusion created over the current requirements of 'delivery' under the Code. Is it proposed to add a further degree of complexity to the situation?

Agents
Many of the statements made in this section of the issues paper display a lack of understanding of some issues and misconceptions of others. I will not address all of those statements.

The issues paper is correct in it's assessment that many wholesalers will not trade as agents, however the reasons stated are not necessarily correct.

- *Goods and Services Tax*

Contrary to the issue papers assertions wholesalers are not deterred from trading as agents because of the GST. All central market wholesaling businesses are registered with the ATO for GST. However, wholesalers may choose to avoid the additional complexity of collecting GST on transactions that are otherwise GST free through the supply chain.

- *Ownership of Bad Debt*

This is not an issue for agents as the Code is quite clear that 'bad debts are a debt of the grower' - Clause 3(2). This is further reinforced in Clauses 9(3)(g) & (h) which refers to 'pursuing bad debts of the grower'.

The issues paper is flawed in the concept that an 'agent is financially responsible for the recovery of the bad debt'. The Code is clear that a bad debt is a debt of the grower and to treat it otherwise would be akin to contracting out of certain elements of the Code.

If such 'contracting out' is permitted, or condoned, in this area, then other elements should also be available to 'contract out'.

- *Market Credit Services*

The Market Credit Services are independent corporate entities that have a variety of rules dependent upon the market within which they operate.

The changes proposed by the issues paper would be a decision for each individual credit service however, given the past experience where the wholesaling sector established and managed such a scheme for the grower sector, it is unlikely that they would choose to go down that path again.

- *Inspection of records*

This is the one area that the issues paper was correct. The Code does not determine who constitutes a grower's representative. At present a grower could appoint a wholesaler's competitor as its representative and the wholesaler would be compelled under the Code to make his books available for inspection by their competitor.

Packing houses and cooperatives

Our response to this section will be brief. This situation of packhouses and cooperatives has been described by grower representatives as 'an unforseen consequence of the Code'. Now they wish to rectify this consequence by exempting these entities from the Code.

So if the grower organisations proposals are accepted, we will have retailers included and packhouses excluded from the Code. It just seems a little one-sided for the rest of the industry participants.

The reality is that packhouses and cooperatives are independent trading entities and therefore should be treated as merchants or agents under the Code.

Accordingly, because these entities are 'traders' as defined by the Code, then transactions between them and other 'traders' are excluded from the Code because it is a trader to trader transaction and does not involve a grower.

Pooling of produce and price averaging

As very few wholesalers operate as agents the issue of pooling and price averaging is not a major issue.

However, it is if a grower grows and grades to a higher standard than the average, then that grower will receive a higher return if there is a demand for the higher standard. If on the other hand, a grower grows and grades to the average standard then they will receive an average price.

The prices are set by what a buyer is willing to pay for the produce and the price at which a grower is willing to sell. If the grower is demanding a price higher than the buyer is willing to pay then the produce will remain unsold.

It should also be considered that a wholesaler's customer may purchase produce from many growers in the one transaction. For instance if the customer wishes to purchase 200 trays of Class one, size 16 Mangoes, the wholesaler may have to supply produce from many growers to fill the order.

The customer does not care where the produce was grown by, only that the produce supplied will meet his requirements. The customer will pay just one price per unit for the order. He will not wish to pay $10.00 for 20 trays and $12 for 13 trays etc. He will want one price across the order of 200 trays.

If this is to be regarded as pooling and price averaging, then so be it. This is the way produce is purchased.

The same applies if a merchant is purchasing produce from many growers of the same type and grade. If the wholesaler is willing to pay $12/tray for the produce, why would he pay $14/tray to a grower who is supplying the same type and grade of produce.

Again, it is all the same type of produce all purchased at the same price. All the growers receive the same price. Is this pooling and price averaging that is prohibited under the Code?

Growers of higher quality produce will be paid more for their produce if the wholesaler has a customer that is willing to pay more for higher quality. Again if there is no demand then a higher price will not be offered.

This is how produce is marketed.

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10 June 2008