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10 June 2008

Grocery Prices Inquiry – Horticulture Code Submissions
ACCC
GPO Box 520
MELBOURNE VIC 3001

THE NSW CHAMBER OF FRUIT AND VEGETABLE INDUSTRIES INC SUBMISSION TO ACCC GROCERY INQUIRY 10 JUNE 2008

Thank you for the invitation to provide a submission relating to the Issues Paper regarding the Horticulture Code of Conduct dated 20 May 2008.

By way of background, the NSW Chamber is a not for profit industry association that traces its origins to the beginning of the 20th Century and has operated in its present form since 1935. We represent fruit and vegetable wholesalers and supporting businesses located in Sydney Markets. We are a member of The Australian Chamber of Fruit and Vegetable Industries Limited.

Sydney Markets is the largest fresh produce Markets in the Southern Hemisphere, and the leading privately owned Markets of its type in the world, supplying thousands of retailers, providores, florists and food processors on a daily basis. Formally a NSW Government owned enterprise, it was taken over in 1997 by Sydney Markets Limited, an unlisted public company owned by the Markets traders and supporting businesses. In 2002 the company purchased the Flemington site from the Government.

Sydney Markets is both a wholesale and a public markets where the general public are able to come each day to purchase fruit, vegetables, flowers, meat, eggs, fish, smallgoods and a wide range of dry goods. Approximately 120 Wholesalers, 394 Produce Growers, 172 Flower Growers-Sellers and over 160 supporting businesses are located on site at Flemington, while some 1,500 traders operate within the various community markets at Flemington and Haymarket.

The NSW Chamber membership includes nearly all the wholesalers on site, as well as grower/traders, exporters, providores, retailers, transporters and supporting businesses located here. Unlike many industry associations, particularly those in the horticulture industry, The NSW Chamber is in daily 'face to face' contact with our members and hundreds of growers and retailers who do business with them. It is pertinent that 50% of our wholesaler members are also growers and 20% are also involved in retailing outside the Markets. More than 40% of our members, or their staff, are also involved in the retail Paddys and Fresh Food Markets that operate at Sydney Markets. More than 90% of our members are small businesses, employing less than 20 personnel.

Through our various services to our members and the industry we are in daily contact with individual growers, industry organisations and Government agencies throughout Australia.

Senior office bearers and management of the NSW Chamber have extensive practical experience with Government legislation, deregulation, producer support schemes, industry regulation and Government regulation over the last two decades. Much of this experience has been gained as participants in Government appointed Committees. The writer has been personally involved in these Government and industry committees for more than fourteen years.

Despite our opposition to the Code in principle, the NSW Chamber actively participated in its introduction by encouraging our members and their growers to abide by the legislated Code regulation and by assisting our members to implement the Code requirements. Moreover, we liaised extensively with the Government agencies involved in the introduction of the Code and have provided a conduit for the dissemination of information, interpretation of Code requirements and the resolution of enquiries with our members.

Despite this cooperation and participation, our experience with the Code to date has been a less than happy one. It has cost the NSW Chamber extensive time and resources, a small fortune in legal fees, and has detracted from our efforts to foster increased grower/wholesaler cooperation. Furthermore, the NSW Chamber has suffered misrepresentation, some of our members have been subjected to false accusations and manufactured allegations of non-compliance, while others have been subjected to considerable worry, time and effort in replying to ACCC demands for information over many months. These circumstances are particularly galling considering the targeted businesses were genuinely endeavouring to comply with the Code.

While our submission includes comment on the issues raised in the ACCC Issues Paper, we believe there are more fundamental issues relating to the Horticulture Code of Conduct, which need to be confronted by the Inquiry. The ACCC Issues Paper itself is a good example of this because, it perpetuates some of the false and misleading statements that have formed the basis of the rationale for the Horticulture Code and it has failed to address key issues that have been brought forward in our past submissions and in discussions with Government and ACCC senior personnel.

We note from comments made by the Chairman of the Inquiry that there is a certain degree of frustration because of a lack of factual evidence to support the allegations being made by some of those who claim to represent growers. Unlike these people, our comments do have factual support.

While we are not seeking to hide behind ‘confidentiality provisions’ in relation to this submission, we are not prepared to publicly identify individuals or individual businesses as this disclosure could have a commercially damaging effect on our members who may have commercial relationships with these persons or firms.

Yours sincerely,

Colin Gray
Chief Executive Officer

ACCC GROCERY PRICES INQUIRY
HORTICULTURE CODE ISSUES PAPER
NSW CHAMBER SUBMISSION

THE FUNDAMENTAL ISSUES

Effectiveness of the Code – Does it Work?

The ACCC Issues Paper states 'the Government has also asked the ACCC to consider the effectiveness of the Horticulture Code of Conduct (the Code)' and this really is the nub of the issue. The main question leading on from that, which should have been asked, is - **Does the Code work and, if not, why not?**

Clearly the Code is not working, as evidenced by the numerous calls from all parties involved to have it changed and by the extensive and diverse nature of the matters raised in the ACCC Issues Paper.

It would be a miracle if it did actually work given that it did not meet the rigours of the Government's own procedures to justify its introduction. There never was any factual justification presented for establishing the Code; instead it was the product of political blackmail from certain grower groups just prior to the 2004 Federal Election. Its introduction was subsequently confirmed in September 2006 after the same grower groups were allowed by the Government to walk away from negotiations and reject reasonable alternative proposals put forward by the Government.

The final Code regulations were developed in secret by people who did not properly understand the industry or the nature of the transactions involved and without consultation with those most affected by it; the mainstream growers and wholesalers. It is significant that the main grower representatives involved in pursuing the mandatory Code were not affected by it because they were either not 'growers' as defined by the Code or were in a category exempted from the provisions of the Code.

The resulting Code regulation is unconstitutional, discriminatory, lacking in justification, wrong in concept and flawed in execution. It imposes impractical and costly regulatory requirements on growers and other small businesses in the horticulture industry. It is a direct attack on the Central Market system, the lifeblood of the small to medium grower, and it is imposing a scandalous cost on taxpayers for its implementation and enforcement. It is without doubt the most polarising and divisive issue to confront the horticulture industry in the past twenty years and does not auger well for the future of the industry.

False and Misleading

The stated Code objectives demonstrate the flawed and false nature of the Code and how it is portrayed. They fail to enunciate any tangible benefit for growers or anyone else in the horticulture industry. (No grower or grower group has ever been able to agree on what is transparency, let alone how it is measured). The objective of 'providing a fair and equitable dispute resolution' is grossly misleading because it indicates such a mechanism did not exist before the Code. The dispute mechanism under the Produce and Grocery Industry Code of Conduct stands as proof of such a lie.

The stated reasons for the exclusion of retailers from the Code is yet another example of the false and misleading nature of this Code. To differentiate retailers from wholesalers on the basis of 'detailed supply contracts, prompt payment, stable revenue streams and access to a dispute resolution process' is false. In the first instance, only a few major retailers provide terms of trade or contracts, prompt payment etc., most retailers do not. Secondly this objective fails to recognise that wholesalers:

- At considerable cost, established prompt payment schemes with growers in the late1990s, however these were discontinued after the growers involved failed to support them;
- Through The Australian Chamber, proposed written, standardised Terms of Trade and National Disputes Resolution Procedures in mid 2004, however grower groups would not support them because, as it transpired, the grower representatives were intent on having their own mandatory regulation.
- Through The Australian Chamber, have been signatories to the Produce and Grocery Industry Code of Conduct since it was introduced in 2000 and have supported that code and its dispute resolution procedures ever since.

It is disappointing that the ACCC Issues Paper fails to correct the Code's false and misleading statements.

ACCC ISSUES

Review of the Code

When a regulation is so flawed in so many respects as this Code and operates in a manner that is so detrimental to the businesses that are subject to it, no amount of time will enable it to 'bed down' and 'gain industry wide acceptance'.

The Issues Paper is correct when it states that 'industry participants are still experiencing difficulties matching their new regulatory obligations with their day to day business practices' It would be one thing if it was just a matter of adapting, however the reality is more fundamental. The issue for wholesalers is one of survival because compliance with this Code means turning business away in some cases and being unable to fulfil ongoing business arrangements in others.

The Issues Paper cites the ACCC's education program as 'addressing significant initial resistance to the Code'. Our experience is that this education program, particularly among growers, has been less than effective and, consequently, it has been left to the Chamber and our members to educate growers. The ACCC grower education sessions were poorly attended (we understand they collectively reached less than 20% of growers) and reports from those who did attend indicated they were confusing and the presenters were not able to answer the most basic of questions. To use the excuse that 'we cannot comment on the content of the Code, we just have to administer it' really doesn't stand up considering the ACCC were asked to comment on the Code before it was released and, we understand, deemed that it was possible for it to be complied with and enforced.

The poor attendances were not necessarily the fault of the ACCC. It is more a reflection of grower indifference about the Code and the failure of grower groups to connect with those they claim to represent. It is demonstrative proof that mainstream growers have not been demanding this mandatory Code; rather it shows up the grower group hierarchy as pushing a political barrow in an attempt to justify their own relevance.

On the other hand the ACCC must accept some responsibility for firstly denying any responsibility for the Code content, providing conflicting interpretations of the Code wording and then the subsequent lengthy and costly negotiations with industry and individual businesses over what constituted acceptable Code documentation. The fact that such protracted negotiations were even necessary is further evidence of the significant deficiencies in the Code regulations.

Code Enforcement

The claim that growers are fearful of complaining because 'they will be singled out ….. and subjected to harassment and/or commercial ruin' has no basis in fact. It is an 'old chestnut' that some grower representatives attempt to 'sell' as an excuse for being unable to produce anything more than a few isolated complaints.

It is our experience that growers have the luxury of being able to choose among several wholesalers in any of the Central Markets and the competitive nature of the industry means that even unreliable, difficult growers with a poor quality product will find someone to handle their produce. Growers falling out with one wholesaler and moving on to another are part and parcel of business life as happens everywhere. We have examples of known 'problem growers' who still find a home for their produce in our Markets because someone is prepared to 'give them a go'.

Approximately 1.2 million pallets of produce are unloaded each year in Sydney Markets. This represents **more than one million grower/wholesaler transactions per year** (not including transactions between wholesalers and growers based in the Markets). We encourage growers to raise issues with the Chamber in the interests of maintaining good relationships between growers and wholesalers. Our detailed records of all grower enquiries over the past seven years reveal an average of **16 enquiries per year, a ridiculously small amount given the number of transactions**. Last year there were 10 enquiries. We have no evidence of any grower ever suffering any form of victimisation for raising an issue with the Chamber.

If there was a real problem with victimisation (perceived or otherwise) as claimed by certain grower groups, then it seems logical that they would raise issues on their members' behalf. We have only ever had four matters raised by grower groups in the past fourteen years; none of these in the past five years. Incidentally, none of the issues related to any suggestion of victimisation.

This is born out by the Produce and Grocery Industry Ombudsman who has consistently stated that they have found no evidence of any victimisation of anyone for raising an issue with them under that code.

Might it just be that the reason there are so few reported complaints is because there are actually very few genuine complaints.

If any one group has been victimised, it is the wholesalers. The evidence so far indicates that the ACCC has particularly and exclusively targeted wholesalers ('traders') with their enforcement action. Discussions with ACCC personnel indicate that they expect wholesalers not only to comply with the Code but also to act as unpaid Code enforcers irrespective of the detriment to their own businesses. A breach of the Code occurs when a grower and a trader trade with each other without the required written agreements in place,

therefore both parties must be in breach. Why then is the ACCC not also placing the commensurate responsibility on growers as they do on wholesalers? Until that occurs growers will not have the incentive to comply with the Code.

The Issues Paper's comments about initiating 'a shift from an existing exempt agreement to a Code compliant agreement' indicates a disturbing lack of understanding of the real issue about pre-existing agreements. This provision was included in the Code to preserve existing business relationships that were evidenced in writing (similar logic to that claimed as the reason for excluding retailers). Growers still have the option of moving to a Code agreement if they wish. The simple fact is that when growers realise their obligations under the Code they don't want to move! For the Issues Paper to suggest that 'measures could be adopted…. to enable growers to initiate a shift…..to a code compliant agreement' implies a coerced form of retrospective legislation.

If the Code were so beneficial for growers and the industry then the ACCC would not have to be contemplating ways to force businesses into becoming subject to the Code; businesses would want to be in it.

The facts are quite simply that the overwhelming majority of growers and wholesalers don't want this Code. They just want to be left alone to get on with business.

Extending the Code

The decision to exclude large parts of the horticulture industry from the Code, eg retailers, processors and exporters, was not only flawed, it is contrary to the Constitution of Australia and has given a significant competitive advantage to the excluded businesses. The reasons given for these exclusions were questionable at the time and there has been nothing offered since that might justify them. It is interesting that, individually, the leading grower proponents of the Horticulture Code supply retailers, exporters and processors who just happen to be exempt from the Code.

If there was a genuine desire to create a level playing field and fair and open competition, (as against satisfying a decision based on political blackmail) then all groups should be included, particularly as there is no difference to the functions performed by these groups; eg there is no difference between a wholesaler in Sydney Markets (a public market) selling to a consumer, a grower next door selling to a consumer or a retailer down the street selling to a consumer, yet the wholesaler is forced to comply with the Code while the other two are not.

However, while the inclusion of currently exempted groups may overcome the Constitutional and the anti competitive aspects of the Code, it would, do very little to help achieve the Code's objectives (questionable as they are). We don't believe that it would have any significant effect on the Market behaviour of the currently excluded groups. All it would do is create more administration and cost through the supply chain and ultimately result in higher prices to the consumer.

On the other hand to exclude further groups who provide a wholesaling function (albeit by another name eg retailers agents) further exacerbates the anti competitive nature of this Code and is more proof that this Code is aimed specifically at the wholesalers operating in the Central Markets system.

Pre-existing Contracts

We have already commented on this issue above. The statement that these pre-existing contracts 'raise a significant compliance and enforcement challenge for the ACCC' demonstrates that the Issues Paper misses the reason for these agreements being exempted, shows up yet another failing of the Code regulation and is another reason why the Code is unworkable.

As indicated above, to change the status of pre-existing agreements is effectively retrospective legislation and to do it on the basis that enforcement would be easier would be taking hypocrisy to new heights.

The pre-existing agreements should be allowed to stand.

Delivery and Price

We agree with the general thrust of the points raised in the Issues Paper. Determining a fixed price at the farm gate or upon delivery (no matter how 'delivery' is defined) might give the grower a price but it will inevitably be at the lower end of the market price. This works against the grower and does not provide clarity or transparency. Providing the grower understands how the price is calculated and agrees, there should be no restriction on using a method in lieu of a fixed price.

Amending the Code to allow for a method would be a positive step forward.

Service Agreements

Separate service agreements have really only become an issue because of the Code wording that requires a 'price before or upon delivery'. If the Code was amended to allow for a method to calculate price and allow for the wholesaler to charge fees for additional services under the Code, then service agreements are not really necessary.

Agents

Nearly all wholesalers have not operated as 'agents' for more than twenty years. The wording of the Code regulation makes it impossible for wholesalers to run an effective business as an 'agent' and still fully comply with the Code.

While the Issues Paper covers a number of the issues relevant to 'agents' it does not address the key issue of conflict of interest. When a wholesaler receives produce of the same type from a number of different growers as their agent, which grower 'that he is acting in the best interests of' has the priority for a sale.

The other key issue not adequately covered in the Issues Paper is the requirement under the Code to account individually for every package sold. Considering that each pallet could have as many as 100 boxes or trays with potentially 100 buyers, including the general public in the case of public markets such as Sydney, to track each particular box and provide details of who bought it would be impossible.

The decision as to whether Market credit services should permit growers to use their services would be beyond the scope of the Code. The different Market credit services operate under constitutions that, in most if not all cases, would preclude growers from becoming members. Moreover there is a requirement for members to pay fees and to process all sales through the credit service, not just the 'bad debts'. Our experience with

our prompt payment schemes is that growers generally would not become members or pay for such services.

Packing Houses and Cooperatives

We can see no reason why a packhouse or cooperative acting as either a merchant or agent should be treated any differently to any other wholesaler under the Code. If it has something to do with being owned by or providing services to growers then 50% of our members who are also growers and all of the growers who act as agents or merchants should also be exempted from the Code. (It would certainly make the ACCC's enforcement a lot easier as there would only be a handful of businesses left that would be subject to the Code.)

For the same reason why would packhouses or cooperatives have any special right or need to have transactions with other wholesalers regulated by the Code? Would trade between two packhouses, or a cooperative and a packhouse be subject to the Code and if so why?

Packhouses and cooperatives performing a wholesaling (trading) function should be treated like any other wholesaler (trader) under the Code.

Pooling and Price Averaging

The comment that pooling practices as described in the Issues Paper 'arguably remove the ability to trace crop disease' is certainly arguable because it is false. Any practice that does not provide traceability to the supplier of that product would be unacceptable under any safe quality food program in Australia and contrary to the Food Standards. If the ACCC is aware of such practices then it is incumbent upon them to advise the relevant Food Authority as a matter of priority so that the situation can be corrected.

The comment that pooling 'provide(s) growers with little incentive to improve productivity or the quality of their produce' is also very questionable and fails to recognise that pooling is just one way a grower may decide to sell their crop or part thereof. Growers will often market their higher quality produce under a different brand while pooling the remainder. On the other hand it may suit growers to pool their entire crop because they are happy to accept an average price for each grade and size they supply.

The 'obligations' relevant to pooling might be acceptable where it involves a person acting as an 'agent' selling to just one or two buyers but it fails to address the situation confronted by wholesalers and grower/traders in the Central Markets such as Sydney where they are selling to many buyers including the general public and there is no law that requires the public to identify themselves. How does the 'agent' in these circumstances comply with the Code?

It is apparent that the Issues Paper in focussing on the packhouse 'agent' in relation to pooling has failed to consider the wider implications of pooling where an 'agent' has to subsequently consolidate several growers produce to make up an order and may have to average the price across the order.

It is evident that the amendments proposed in the Issues Paper to allow for pooling will not solve the problem.

OTHER ISSUES

Growers Markets

On many occasions, both in written submissions and in direct approaches to Government, including the ACCC, we have raised the critical issue of the application of the Code to businesses operating in the Central Markets, in particular the Growers Market. It is very disappointing that the Issues Paper fails to address this critical situation affecting nearly 400 growers in Sydney and many more in the other central Markets. In case it has been 'missed' the problem in summary is as follows:

> One of the most glaring anomalies with the Code is its application to growers selling in central Markets. These growers are not just selling to wholesalers, retailers and the general public they are selling to and buying from each other to make up orders or where they see the chance to make a profit. Moreover, because many of the Central Markets are public markets, the grower does not necessarily know who they are selling to and for what purpose. It is a similar problem for the wholesaler in markets such as Sydney Markets. (This problem was recognised in 2000 by the GST Task Force and was the reason that fresh fruit and vegetables were made 'GST free through the chain').
>
> Under the present Code regulations, if a grower wishes to sell one box of lettuce to his/her next door neighbour at the Markets then they would each be required to plough through as many as seven documents. We are not aware of any one of the 394 growers operating in Sydney Markets who wants to operate under the Code, particularly with other businesses in the Markets. It is ludicrous to require businesses operating 'face to face' to be subject to such an unnecessary administrative burden.

The absurdity of this situation has been demonstrated first hand to Government ministers, government officials and senior ACCC personnel. However no solution has been offered. This is not some theoretical matter; it is a real, practical problem that should have been included in the ACCC Issues Paper and needs to be addressed.

SUMMARY

While the Issues Paper has addressed some of the issues relevant to the Code it has failed to address some of the key matters that are fundamental to the Code.

The number and extent of the items in the Issues Paper are proof that the Code is seriously deficient.

It is concerning that the focus of the ACCC's enforcement action appears to be directed to wholesalers within the Central Markets system, while growers appear untouched. It is wrong to expect that wholesalers should be the de facto enforcers of the Code.

It is fortunate that most transactions are not covered by the Code because the Code, as presently written, is unworkable and if it applied to most transactions it would not be possible to process the present volume of daily shipments within the physical and personnel constraints of the Markets. There is insufficient room to handle and store the build up of product that would occur while detailed inspections and price negotiations with growers took place. There would also be insufficient storage facilities for product waiting to be picked up or redirected by growers.

All the effort and the time and cost of taxpayer money in promotion, education and enforcement, the cost to industry and the burden on individual small businesses has been wasted because the fundamentals of the Code are wrong. Until the Code has a practical business application and a tangible beneficial effect no amount of bandaids will make it better; it needs radical surgery.

Should the ACCC continue to fiddle piecemeal with the Code, as the Issues Paper seems to contemplate, then it is most likely that in trying fix one problem they will become victims of the Hydra and create ten more ‘unintended issues’. However, it will be the small growers, and the wholesalers they supply, who will be the real victims and do the suffering.

If the pro Code advocates have a justifiable case for continuing the Code then they should be called on to come forward and present the evidence now. If on the other hand, as we believe, they do not, then the Horticulture Code Regulation should be repealed forthwith.

End