



Submission on

Competition Policy Draft Report

**November 2014**

## **About Growcom**

Growcom is the peak representative body for the fruit and vegetable growing industry in Queensland, providing a range of advocacy, research and industry development services. We are the only organisation in Australia to deliver services across the entire horticulture industry to businesses and organisations of all commodities, sizes and regions, as well as to associated industries in the supply chain. We are constantly in contact with growers and other horticultural business operators. As a result, we are well aware of the outlook, expectations and practical needs of our industry.

The organisation was established in 1923 as a statutory body to represent and provide services to the fruit and vegetable growing industry. As a voluntary organisation since 2003, Growcom now has grower members throughout the state and works alongside other industry organisations, local producer associations and corporate members. To provide services and networks to growers, Growcom has about 30 staff located in Brisbane, Bundaberg, Townsville, Toowoomba and Tully. We are a member of a number of state and national industry organisations and use these networks to promote our members' interests and to work on issues of common interest.

## **General Comments**

Growcom supports in broad terms the submission made by the National Farmers Federation. In terms of the report we are pleased to see an introduction of an effects test in Section 46 although we are unsure of the ramifications of the caveats. We also see an amendment of the Competition and Consumer Act to enable collective bargaining as vital. We are pleased to see a more accessible notification process being proposed however, in line with the NFF submission to the competition policy review, the horticultural sector also seeks to improve the collective bargaining and boycott regimes by:

- a) relaxation of the 'public interest' test for boycott approvals, to consider the unique nature of agricultural markets;
- b) increase the threshold for primary production bargaining from \$5million;
- d) increase the ability for peak bodies to commence and progress collective bargaining and boycott applications, on behalf of their members.

We are disappointed by the cursory treatment of the issue of Industry Codes and therefore have included our submission to the Supermarket Code which comprehensively covers off on this issue. We do not agree that the recent amendments to the ACCC powers will address the concerns of the horticulture industry. We would also like to see reform of the existing Horticulture Code of Conduct and in particular the removal of the clause enabling pre-Code agreements to be legally recognised.

## **Specific Comments on the Supermarket Code**

Growcom supports the broad contention that there is an imbalance of bargaining power, with suppliers fearful of making complaints or declining requests from retailers out of concern for adverse consequences, including being delisted as a supplier.

We appreciate the efforts of Government, the Australian Food and Grocery Council (AFGC) and the major supermarkets to address the issue however we are not convinced that the Food and Grocery Code (the Code) tabled will achieve this outcome for the fruit and vegetable sector.

The fruit and vegetable sector is characterised by a large number of small suppliers trading in a highly perishable product. This puts us at a unique disadvantage in negotiating fair terms with retailers and these issues are not necessarily addressed by the Code.

#### Key Recommendations

- We see the development of this Code as pre-empting the outcome of the Competition Policy Review. We do not support the adoption of a new code in isolation from the findings of the Competition Policy Review as the imbalance of power issue has many facets.
- The Code currently contains too many "opt-out" clauses and as a basic principle, should be mandatory.
- An Ombudsman should be appointed to oversee the Code as well as oversee a strengthened mandatory Horticulture Code.

#### **Overall Comments**

As a general principle we support mandatory rather than voluntary codes due to the longstanding failure of the Produce and Grocery Code. That said, the prescribed nature of the Code would potentially overcome some of these concerns if all major retailers signed on to the Code. However, again due to the imbalance of power in the relationship, growers have no power to ensure retailers sign up to the code. At the moment only Coles and Woolworths have committed to opting in to the Code. In addition, a mandatory Code would be consistent with other industry Codes such as the Horticulture Code, which means there could be no accusations of an overly lenient approach to certain components of the supply chain.

Growcom supports the inclusion of the principle of good faith in the purpose of the Code. As per the National Farmers' Federation submission into the Australian Government competition policy review, the agricultural sector generally faces an imbalance of power in contract negotiations. This exposes producers to potential abuse of market power, both in a legal and more importantly practical sense. Producers are often offered standard-form contracts, with limited ability to negotiate terms, or on a 'take it or leave it basis'. The perishable nature of agricultural products heightens the risk of breach of good faith (depending on explicit terms of the contract). Growcom has also examined the findings of the 2013 Wein Review into the Franchising Code<sup>1</sup> and it seems on-balance, that the inclusion of a good faith clause would provide extra protection for our growers.

For some commodities (such as pineapples) negotiations around supply are made on a week by week basis. Other suppliers of horticultural commodities have up to three year supply agreements which more closely mimic the arrangements of other components of the grocery sector. Obviously those engaged in short term contracts are more vulnerable than those with longer term supply agreements.

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<sup>1</sup> Mr Alan Wein *Review of the Franchising Code of Conduct: Report to the Hon Gary Gray AO MP, Minister for Small Business, and the Hon Bernie Ripoll MP, Parliamentary Secretary for Small Business.*  
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The general consensus from growers who supply the major retailers regarding this Code is that while the provisions by and large seem sound on the surface, there are too many caveats and opportunities for alternatives to be negotiated. If the fundamental issue centres on lack of power at the negotiation table, then small suppliers are hardly likely to be able to argue against supply agreements that are not in their favour. It could be argued that the good faith provisions can be invoked, however this relies on extremely robust dispute resolution procedures which we do not think are evident in the current Draft. For specific examples of the exemptions within the Code please refer to the Victorian Farmer's Federation (VFF) submission.

The dispute resolution mechanism is too weak and does not address the inherent issues of imbalance of power as it is too reliant on an in-house complaints procedure. In line with the VFF submission, we support a mandatory code with pecuniary penalties. Based on the experience in the United Kingdom on this issue, we see the appointment of an Ombudsman as absolutely critical to the success of any Code regulating this sector. Despite having a Code in place since 2001, abuses against suppliers in the UK were ongoing and in 2013 a statutory Grocery Adjudicator was appointed. The adjudicator's role is to proactively enforce the UK Grocery Supply Code of Practice and curb abuses of power. It ensures that large supermarkets treat their direct suppliers lawfully and fairly, investigates complaints and arbitrates in disputes. The experience with the Horticulture Code has also shown that some sort of independent arbiter is required to ensure that negotiations are entered into in good faith. We note the decision by Coles to appoint their own adjudicator, however we see this should be a role performed absolutely independently of the retailers themselves and it should extend to all supermarkets.

In terms of other mechanisms to address the imbalance of power, we see an amendment of the Competition and Consumer Act to enable collective bargaining as vital. In line with the NFF submission to the competition policy review, the horticultural sector seeks to improve the collective bargaining and boycott regimes, in particular to influence the following outcomes:

- a) relaxation of the 'public interest' test for boycott approvals, to consider the unique nature of agricultural markets;
- b) increase the threshold for primary production bargaining from \$5million;
- c) allow for a more accessible notification process for primary producers; and
- d) increase the ability for peak bodies to commence and progress collective bargaining and boycott applications, on behalf of their members.

### **Specific Provisions**

As discussed above, most of the provisions seem reasonable as currently stated, although there seems to be too much opportunity to operate legally outside those provisions. Some growers have raised concerns about Section 15 which relates to de-listing of products. They are concerned these provisions will be unfairly used against suppliers of fresh produce who are at the mercy of weather events and other factors outside of their control influencing supply and could be de-listed if they don't meet quality or quantity requirements.

With respect to Section 18 which relates to product quality and standards, the fruit and vegetable industry would like to see a requirement for photographic evidence to be provided for rejected produce. This is the current industry standard. Whilst the reason for rejection must be provided within 48 hours it must be clear that notification of rejection occurs within 24 hours as product can often be re-sold

