



**Senate Economics Legislation Committee Inquiry  
into the  
Food and Grocery Code of Conduct**

**March 2015**

**NSW Farmers' Association  
35 Chandos St  
St Leonards NSW 2065**

**NSW Farmers' Association Background**

The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.



*Submission to Food and Grocery Code of Conduct*

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TABLE OF CONTENTS

Introduction .....	3
Food and Grocery Code .....	5
Mandatory Code vs Prescribed Voluntary Code .....	6
Major Provisions .....	8
Unilateral and retrospective variation .....	8
Duty of good faith.....	8
Code Enforcement.....	9
Civil penalty provisions.....	10
Establishment of a specialist agricultural advisory unit within the ACCC .....	13
Intersection with the Horticulture Code of Conduct .....	13
Purpose of the codes .....	14
Phasing in of implementation .....	16
Product quality and standards.....	17



*Submission to Food and Grocery Code of Conduct*

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## **Summary of Recommendations**

### ***NSW Farmers believes***

- ***that the Food and Grocery Code provides a start toward developing the rules required to ensure that the market power exercised by the major supermarket chains do not impede the ability of the market to return value to the farm gate.***

### ***NSW Farmers believes:***

- ***that a mandatory code of conduct with a broader scope than proposed within the Food and Grocery Code would be better suited to manage the market power exercised by supermarkets.***
- ***that the required review of the Food and Grocery Code appropriately considers the extent of participation by retailers and wholesalers.***

### ***NSW Farmers supports***

- ***the inclusion of the test of reasonableness and the explicit requirement to consider detriment caused to the supplier in any allowable unilateral or retrospective variation.***

### ***NSW Farmers supports:***

- ***the inclusion of the duty of good faith within the Food and Grocery Code as an important protection for suppliers.***

### ***NSW Farmers believes:***

- ***that the Food and Grocery Code should contain civil penalty provisions for the duties contained within Parts 2-4 to enable the use of infringement notices and pecuniary penalties to be used as tools for enforcement.***
- ***that the use of infringement notices and pecuniary penalties should be subject to an enforcement and compliance policy developed for the Food and Grocery Code by the ACCC.***

### ***NSW Farmers believes:***

- ***that the ACCC should establish a specialist agricultural advisory unit, which among other roles would inform the ACCC in its enforcement role of the Food and Grocery Code.***



*Submission to Food and Grocery Code of Conduct*

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***NSW Farmers believes:***

- ***that the Horticulture Code of Conduct should continue to operate as a mandatory code of conduct.***

***NSW Farmers believes:***

- ***that provisions within the Horticulture Code of Conduct that grandfather supply contracts in place prior to its commencement should be removed.***

***NSW Farmers believes:***

- ***the provisions regulating the rejection of fresh produce within the Food and Grocery Code should be harmonised with the rejection provisions already contained within the Horticulture Code.***



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*Submission to Food and Grocery Code of Conduct*

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## **Introduction**

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

NSW Farmers is the key state representative body for both intensive and extensive industries ranging from broad acre, meat, wool and grain producers, to more specialised producers in the horticulture, dairy, poultry meat, egg, pork, oyster and goat industries. NSW Farmers also represents the interests of rural and regional communities and the important issues associated with natural resource management.

NSW Farmers welcomes the opportunity to provide comment to the Senate Economics Legislation Committee's inquiry into the Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015 ('**the code**').

NSW Farmers seeks to make brief comment on the following issues:

- the suitability of a prescribed voluntary (opt-in) code against a mandatory code;
- the impact of the major provisions within the code on producers of agricultural produce;
- the concerns NSW Farmers holds over the enforcement provisions included within the code;
- the intersection of the code and the Horticulture Code of Conduct.

## **Food and Grocery Code**

The code was gazetted on 9 March 2015 after being initially developed by the Coles, Woolworths and the Australian Food and Grocery Council through the guise of the Retailer and Supplier Roundtable prior to the Australian Government undertaking broad consultation with stakeholders within the grocery supply chain and the public at large.

During the development of the code, NSW Farmers agreed with the concerns outlined by the consultation paper regarding the distortions that exist within the Australian food and grocery sector. Australia is unique in which two dominant participants, Coles and Woolworths, have control of the majority of the market share in this sector. As a result, producers of fresh produce and food processors are heavily reliant on these supermarkets, as the 'gatekeeper... to the consumer', in the implementation of national distribution strategies.<sup>1</sup>

The market power associated with this dynamic has given rise to behaviour in which suppliers are faced with pressure to agree to unfair trading terms, often in the form of retrospective or unilateral variation to the supply agreement or the other forms of anti-competitive behaviour.

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<sup>1</sup> Similar market dynamics have been identified in other jurisdictions for example see Andrew Hollingsworth, 'Increasing retail concentration: Evidence from the UK food retail sector', *British Food Journal*, (2004 volume 106) 629, 632.



## *Submission to Food and Grocery Code of Conduct*

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These types of behaviour have the capacity to impact on farmers in two ways. Firstly, often farmers (including horticulturalists) will be direct suppliers to a retailer and will directly incur any financial transfer arising from the imposition of unfair contractual terms. Secondly, where the supplier is a food processor or wholesaler that procures raw product from farmers the additional costs will mostly be borne by farmers as a result of cost price pass through which manifests in lower prices at the farm gate.

An example of this behaviour can be found in the litigation of Coles Supermarkets by the ACCC in 2014, in which Coles admitted to using its market power through its Active Retails Collaboration program to demand rebates from its suppliers, threatening to harm their suppliers if they failed to meet the demand.

In considering the impact of the conduct of retailers upon these intermediary stakeholders on the value chain, NSW Farmers refutes the position within the Final Assessment Regulation Impact Statement (RIS) that the 'base price' primary producers receive for their goods is not a function of the code.<sup>2</sup> To the contrary the impact that supermarkets have on the distribution of value in upstream markets for primary produce due to the exercise of their market dominance is integral to the purpose for the development and implementation of the code.

On this basis, the effort by Government to provide a counter veiling influence on this market power through an enforceable code that underpins the fair and commercial negotiations that enable proper market distribution of value is warranted. Such a position is consistent with the statement made by the Government within the consultation paper for the development of the code:

Well-functioning markets are often supported by regulation that protects the competitive processes and provides incentives for innovation and investment, which in turn enhances the wellbeing of all Australians.<sup>3</sup>

Such an approach is consistent with international efforts to deal with competitive concerns created by a concentrated retail supermarket sector.

Further in the context of the Government's objectives to grow Australia's agricultural exports, the role of the code in facilitating functioning markets is important to providing the market signal necessary to encourage the on-farm investment necessary for this growth.

### ***NSW Farmers believes***

- ***that the Food and Grocery Code provides a start toward developing the rules required to ensure that the market power exercised by the major supermarket chains do not impede the ability of the market to return value to the farm gate.***

## **Mandatory Code vs Prescribed Voluntary Code**

NSW Farmers' members hold a growing concern over the implications of the market concentration in the food and grocery sector. In particular the growing gap between the farm gate value of food and the price paid by consumers at the supermarket indicates

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<sup>2</sup> Australian Government the Treasury, 'Improving commercial relationships in the food and grocery sector' (Final Assessment Regulation Impact Statement, November 2014) 6.

<sup>3</sup> Consultation paper, 1.



*Submission to Food and Grocery Code of Conduct*

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that the capture of value in the food supply chain is dominated by the major participants in the supermarket trade.

In response to these concerns NSW Farmers supports a mandatory code for supermarkets that has a broader remit than that presently embodied within the code; however seeks to make comment on the contents of the code to assist the Federal Government in its consideration of the suitability of the code's provisions in regulating the retailer – supplier relationship to protect primary producers who are either direct suppliers, or alternatively supply food processors and wholesalers who in turn supply retailers.

Not with standing these concerns, NSW Farmers has welcomed the commencement of the Food and Grocery Code as a start toward developing the rules required to ensure that the market power exercised by the major supermarket chains do not impede the ability of the market to return value to the farm gate.

In making these comments, NSW Farmers notes that once prescribed the ACCC will have the capacity to enforce compliance against the code by signatories to the code. Therefore, dependent on adequate voluntary participation in the code and the suitability of the provisions, the code is a welcome step in restraining the use of market power with regard to costs and risks faced by suppliers caused by unfair practices that these retailers are able to undertake.

On this basis achieving adequate participation of the supermarket sector is crucial to ensuring that the code operates in a manner that is satisfactory to the farming industry, and meets the codes objectives to 'build and sustain trust and cooperation throughout [the grocery supply] chain'.<sup>4</sup>

In response to the Government's consultation on the draft code, NSW Farmers made the recommendation that after the commencement of the code that a review is undertaken to determine the proportion of retailers that had become signatories to the code. The reason behind this recommendation was to enable the consideration of whether non-participation, particularly where driven by strategic avoidance, was hindering the positive impact that the code was having on the market; and if so provide the basis for mandating the code.

NSW Farmers commends the inclusion of a mandatory review of the code within the regulation which will specifically consider the extent of participation within the code by retailers and wholesalers.<sup>5</sup>

Additionally it is important to note that due to the high market concentration in the supermarket sector, the concerns of the behaviour of the major supermarkets are not limited to the aspects to be regulated by the code. This includes issues such as misuse of market power, unconscionable conduct and the use of unfair contract terms that are not provided for within the code. NSW Farmers believes that during the scheduled review evidence relating to anti-competitive behaviours not regulated by the code should give weight to recommendations for a broader mandated code.

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<sup>4</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Schedule 1, cl 2 (a).

<sup>5</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015, Schedule 1, cl 5.



## Submission to Food and Grocery Code of Conduct

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### **NSW Farmers believes:**

- **that a mandatory code of conduct with a broader scope than proposed within the Food and Grocery Code would be better suited to manage the market power exercised by supermarkets.**
- **that the required review of the Food and Grocery Code appropriately considers the extent of participation by retailers and wholesalers.**

## **Major Provisions**

### ***Unilateral and retrospective variation***

In the development of the Code, NSW Farmers highlighted the concern that while the draft code placed a *prima facie* prohibition on participating retailers making unilateral and retrospective variations to supply agreements, the prohibitions did not apply where they were provided for within the supply agreement.

Many farmers, both direct suppliers of the major supermarkets, or alternatively supplying wholesalers or food processors who do supply retailers, make significant capital investment on the basis of contractual requirements to these retailers. Any form of unilateral variation is likely to have a direct and detrimental impact on farm gate prices. This impacts on the ability of these primary producer suppliers to generate the returns required by these capital investments impeding the market signal for farmers to make the investments necessary for Australia to grow its agricultural production and exports.

Similarly for those supplying wholesalers or processors, where supply chain intermediaries incur losses due to unilateral variations of a supermarket, these losses are ultimately borne by their farmer supply base through suppressed prices. On this basis NSW Farmers argued that scrutiny was required under the code to ensure that where the code continues to allow unilateral and retrospective variations it does not perpetuate unfair trading conditions for suppliers.

NSW Farmers welcomes the Government's inclusion of provisions within the code that tighten the circumstances under which such variation can be undertaken; specifically the new requirement that the variation is reasonable in the circumstances and that detriment to the supplier is to be taken into account when considering the reasonableness of the variation.

### **NSW Farmers supports**

- **the inclusion of the test of reasonableness and the explicit requirement to consider detriment caused to the supplier in any allowable unilateral or retrospective variation.**

### ***Duty of good faith***

NSW Farmers welcomes the inclusion of the duty of good faith; as well as the amendments to the draft code that both ensure the duty is defined by the common law





## *Submission to Food and Grocery Code of Conduct*

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within the code and provide guidance to a court in considering an alleged breach of the duty.

The matter of including a duty of good faith was recommended within the *Review of the Franchising Code of Conduct* (“Wein Review”). While Wein observed that the concept of a duty of good faith has attached with it a degree of uncertainty as to how the duty is discharged, on the basis that it requires parties to do what they are able to do to give effect to their legal relationships, he recommended that a duty be prescribed in the Franchise Code.

In his observations about a duty of good faith, Wein examined evidence placed before the review regarding questionable behaviour of franchisors, including the unilateral variation of franchise agreements. Noting the need to balance the flexibility required for commercial relationships and the graduated nature of the alleged behaviours, Wein concluded a duty of good faith to be a suitable tool to manage the identified behaviours.

In furthering his consideration over the appropriateness of the duty of good faith within a prescribed code, Wein adverted to the existence of a duty of good faith within the Oil Code. He also drew attention to the capacity for parties to enter into the code’s dispute resolution procedures for a breach of good faith as providing an incentive for duty holders not to behave in a manner that could be construed as not acting in good faith.<sup>6</sup>

NSW Farmers welcomes the inclusion of the prescribed a duty of good faith within the code. This will require retailers to make best efforts to exercise their rights under supply agreements in a manner that takes into account the interests of suppliers providing them with greater protection than that presently available.

### ***NSW Farmers supports:***

- ***the inclusion of the duty of good faith within the Food and Grocery Code as an important protection for suppliers.***

## **Code Enforcement**

It is axiomatic that effective dispute settlement and enforcement measures are crucial to ensuring that the code is able to fulfil its objects; however it is NSW Farmers experience that where an imbalance of market power exists, it is unlikely that the weaker party will utilise dispute resolution services. This is even more pronounced in instances where the more powerful party has the ability to exclude the other participant from the market. NSW Farmers believes that robust compliance and enforcement processes within the Code are vital to developing meaningful dispute resolution procedures.

The operation of the Horticulture Code of Conduct illustrates this principle. Despite many anecdotal concerns over behaviour of produce traders in the five years since 2009-10

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<sup>6</sup> 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, 30 April 2013) 80-82.



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*Submission to Food and Grocery Code of Conduct*

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only eleven mediations have been conducted under the code.<sup>7</sup> That the ACCC felt it necessary to use its powers of compulsion on suppliers of the major supermarkets to progress investigations into breaches of competition law illustrates the point. Specifically it demonstrates the need for effective enforcement mechanisms within the code to provide suppliers with the confidence that commencing dispute resolution of a breach of the code will not result in retaliation.<sup>8</sup>

### ***Civil penalty provisions***

On this basis, NSW Farmers believes that it is essential to the code meeting its objectives of building and sustaining trust and cooperation throughout the grocery supply chain that the ACCC is provided with modern compliance mechanisms in its oversight of code signatories. In particular, the provision of regulatory tools that enables an appropriately graduated approach to enforcement will better equip the ACCC to develop the right suite of incentives (both positive and deterrence) to develop the desired behaviours from market participants. To this degree, NSW Farmers is disappointed that the code has not included civil penalty provisions which would enable the ACCC to utilise infringement notices for 'relatively minor contraventions that may not otherwise be pursued through the courts'<sup>9</sup> as well as to seek the imposition of a pecuniary penalty through the courts.

While acknowledging that there are differences, the NSW Farmers support the application of the following statement made within the *Review of the Franchising Code of Conduct* ("Wein Review") to the code:

A mandatory code which lacks adequate enforcement powers will not adequately deter improper conduct and inappropriate behaviour. Parties who comply with the Code should not be concerned about any enforcement powers conferred upon the regulator.<sup>10</sup>

The Wein Review recommended, among other things, that the *Competition and Consumer Act 2010* (Cth) be amended to allow:

- civil pecuniary penalties to be available as a remedy for a breach of the Franchise Code.
- the ACCC to issue infringement notices for breaches of the Franchise Code.
- the ACCC to use its powers of audit to assess compliance with all aspects of the Franchise Code.<sup>11</sup>

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<sup>7</sup> Horticulture Mediation Advisor 'News and Information', <<http://www.hortcodema.com.au/news.html>>. Annual Reports 2009-10; 2010-11; 2011-12, 2012-13; 2013-14.

<sup>8</sup> See Alan Kohler 'ACCC readies big guns against supermarkets' *Inside Business*, ABC (17 February 2013) <<http://www.abc.net.au/insidebusiness/content/2011/s3692067.htm>>. See also Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 13 February 2013 (Mr Rod Sims, Chairman Australian Competition and Consumer Commission).

<sup>9</sup> Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2010, Explanatory Memorandum.

<sup>10</sup> 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, 30 April 2013) 146.



## *Submission to Food and Grocery Code of Conduct*

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These amendments were recently made by the Australian Parliament and commenced on 1 January 2015.<sup>12</sup>

Similarly to the Wein recommendations on the Franchise Code, the ACCC recommended that it be able to apply civil penalties and receive powers to undertake random audits of records to assist in compliance of the Horticulture Code.<sup>13</sup>

NSW Farmers recognises that the Final Assessment Regulation Impact Statement ('RIS') sought to differentiate the code from the recommendations contained within Wein using the following rationale:<sup>14</sup>

- that the introduction of civil penalties within the Franchise Code arose over many years of experience and reviews at both a state and federal level; and
- that the code is voluntary and industry led.

However NSW Farmers believes that the application of this rationale is not warranted.

The RIS's proposition that the time and process undertaken for the inclusion of civil penalties within the Franchise Code enables the code to be distinguished should be considered within the context of Wein's observations that since 1979 'almost every major review of the [Franchise] Code' recommended some form of penalties be implemented.<sup>15</sup> This observation almost immediately precedes another which noted the gravity of the consequences for breaches of the Franchise Code upon existing or potential franchisees. Inter alia, from this consideration the report draws the conclusion that the imposition of pecuniary penalties 'indicate to industry that the government considers breaches of the code to be serious matters that have consequences'.<sup>16</sup>

The above deliberation of Wein may be construed to identify persistent undesirable behaviours within that sector that significantly impact upon the stakeholder with the lesser market power; and the desirability of government to provide a clear signal that consequences should be attached to this type of behaviour.

NSW Farmers submits that similarly breaches of the code have the potential to 'significantly disadvantage' suppliers,<sup>17</sup> who range in size from smaller primary producers to more sophisticated food processors. As such on the basis of a substantive focus over the proposed process focus of the RIS, NSW Farmers believes that the imposition of

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<sup>11</sup> The Treasury, Government of Australia, *Amendments to the Franchising Code and the Competition and Consumer Act* (2 April 2014) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Franchising-Code>>.

<sup>12</sup> The Hon Bruce Billson MP 'Government moves to strengthen ACCC's powers to enforce Franchise Code of Conduct' (Media Release, 11 September 2014, BBMR/066).

<sup>13</sup> Australian Competition and Consumer Commission 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries' (Final Report, July 2008) 400.

<sup>14</sup> Australian Government the Treasury, 'Improving commercial relationships in the food and grocery sector' (Final Assessment Regulation Impact Statement, November 2014) 20-21.

<sup>15</sup> Australian Competition and Consumer Commission 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries' (Final Report, July 2008) 451.

<sup>16</sup> 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, 30 April 2013) 146.

<sup>17</sup> Ibid 145.



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*Submission to Food and Grocery Code of Conduct*

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pecuniary penalties sends a clear message from government that undertaking anti-competitive behaviour (as prohibited by the code) will be dealt with seriously.

With regard to the latter distinction, the duties contained within the code remain in a form that is not substantially different to those provided to the Government by the drafting parties, which included representation from the major supermarkets. These duties have been developed in response to a serious issue of public policy of anti-competitive conduct that have been the subject of ongoing public scrutiny, and at the high watermark have been admitted to by Coles in the Federal Court.

The development of these obligations by industry stakeholders is in line with the public policy rationale underpinning enforceable voluntary codes that industry is more likely to develop methods of compliance that are proportional to the identified mischief with regards to cost and red tape.<sup>18</sup> The additional adoption of these obligations in a meaningful manner, through becoming a signatory to the Code, indicates that the bound parties are willing to be subject to the scrutiny of the Government over their behaviour within the confines of the provisions that they have substantially developed. On this basis, NSW Farmers submits that the rationale within Wein with regard to the necessity of 'adequate enforcement powers' continues to have application. This is because these enforcement powers provide a means by which grocery supply chain participants and the public may be ensured that signatories may be adequately compelled to meet the standard of behaviour they have agreed to. Further, as proposed by Wein '[p]arties who comply with the Code should not be concerned about any enforcement powers conferred upon the regulator'.<sup>19</sup>

Further with regard to facilitating the use of infringement notices by the ACCC, inserting civil penalty provisions within the code would enable a more proactive approach by the ACCC to compliance of the code other than merely seeking outcomes through litigation. Best practice regulatory enforcement methods graduate the activities of a regulator in a way that focuses the majority of regulatory effort into empowering compliance through education and persuasion through to strategic use of litigated outcomes.<sup>20</sup> Between these two extremes there is a legitimate role for the regulator to have access to enforceable tools that it may rapidly deploy to deal with less major breaches in a way that also provides deterrence to other duty holders to engage in the prohibited conduct.<sup>21</sup> The impact of providing the ACCC with the ability to utilise infringement notices in this context would be to open up these mid-way compliance tools in its enforcement of the code.

These should be utilised by the ACCC within the context of a grocery sector enforcement and compliance policy, similar to that proposed by Wein for the Franchise Code.<sup>22</sup>

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<sup>18</sup> See Australian Government the Treasury, 'Improving commercial relationships in the food and grocery sector' (Final Assessment Regulation Impact Statement, November 2014) 7-8.

<sup>19</sup> 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, 30 April 2013) 146

<sup>20</sup> *Ibid* 136; see also Productivity Commission 'Regulator Engagement with Small Business' (Research Report September 2013) 126-131.

<sup>21</sup> *Ibid* 147-148.

<sup>22</sup> *Ibid* 149.



## *Submission to Food and Grocery Code of Conduct*

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It is the view of NSW Farmers that it would be desirable for the code to provide these modern enforcement capabilities to the ACCC. Given the context of the Code it would be reasonable for these penalty provisions to be applied to the obligations of retailers contained within Parts 2-4.

### ***NSW Farmers believes:***

- ***that the Food and Grocery Code should contain civil penalty provisions for the duties contained within Parts 2-4 to enable the use of infringement notices and pecuniary penalties to be used as tools for enforcement.***
- ***that the use of infringement notices and pecuniary penalties should be subject to an enforcement and compliance policy developed for the Food and Grocery Code by the ACCC.***

### ***Establishment of a specialist agricultural advisory unit within the ACCC***

Lastly with regard to NSW Farmers concern over the enforcement of the code, NSW Farmers supports the concerns raised by the Senate's Rural and Regional Affairs and Transport Committee about the ACCC's expertise in agricultural markets in the final report of its inquiry into the ownership arrangements of grain handling. In the context of the ACCC's merger review of the proposed takeover of GrainCorp by Archer Daniels Midland the Committee highlighted its concerns that the ACCC did not have the 'necessary expertise to undertake a full and proper review' nor did it obtain 'independent expert advice'.<sup>23</sup>

In light of this recommendation and the National Farmers Federation's call for a Fresh Produce Ombudsman as part of its calls for reform of Australia's competition law policy provided to the Harper Review of Competition Laws, NSW Farmers has formally adopted policy calling for the ACCC to establish a specialist agricultural advisory unit. NSW Farmers believe that such a unit would assist the ACCC in its enforcement role of the code.

### ***NSW Farmers believes:***

- ***that the ACCC should establish a specialist agricultural advisory unit, which among other roles would inform the ACCC in its enforcement role of the Food and Grocery Code.***

## **Intersection with the Horticulture Code of Conduct**

There is much common policy context and intent within the code and the Horticulture Code of Conduct, with both regulating important components of the food and grocery supply chain. While the code specifically excludes operation where it is in conflict with obligations owed under the Horticulture Code of Conduct, the following examines specific

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<sup>23</sup> Senate Rural and Regional Affairs and Transport Committee, Australian Parliament, *Inquiry into the ownership arrangements of grain handling* (2013) [4.2] – [4.4].





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*Submission to Food and Grocery Code of Conduct*

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characteristics of the two codes to consider the way they interact with each other. This analysis highlights NSW Farmers position that the creation of the code does not diminish the importance of maintaining the Horticulture Code of Conduct as a mandatory prescribed code. It further highlights amendments that could be made to both codes to improve the efficiency in the protections they provide to horticultural producers.

### ***Purpose of the codes***

The explanatory statement accompanying the creation of the Horticulture Code of Conduct listed three key issues that the code was intended to address. The first of these was to address the lack of certainty about when a 'wholesaler is trading as an agent or as a merchant when dealing with growers'.<sup>24</sup> This goes to the nature of the assignment of risk through the horticulture produce agreement.

A transaction between a horticulture producer and a merchant sees the trader committing to purchase the produce, assuming all risk once it is accepted in accordance with the agreement. Alternatively an agent bears no risk with the produce, rather agrees to act in the best interests of the grower in selling the produce to a third party.

Additionally the Horticulture Code of Conduct was developed with the object of addressing a failure to properly document the terms of sale transactions and providing the framework for an effective dispute resolution process.

The explanatory statement further outlines that the code would not apply to retailers, processors and exporters on the basis that they are not 'wholesale intermediaries' and predominantly operate under clear and transparent terms.<sup>25</sup>

In contrast, the code has been developed primarily to address the conduct of supermarkets in their dealings with suppliers due to concerns over the use of monopsony buying power to force unilateral and retrospective conditions upon their existing suppliers.<sup>26</sup>

Table 1 provides a comparison between the two codes with regard to the type of code, primary duty holder and the obligations imposed.

Given the more fragmented nature of market participants engaged in trading horticulture produce, NSW Farmers is doubtful that the contractual certainty provided by the Horticulture Code would be achieved if it was repealed. For such an outcome to arise, large numbers of produce traders would need to become signatories to either a voluntary code or a prescribed opt-in code. In contrast, the supermarket/grocery retail market is characterised by high market concentration, meaning that the majority of supplier transactions could be subject to the code even with relatively few signatories.

As a result, NSW Farmers believes that scope exists for the parallel existence of both codes; however recommends that the Horticulture Code of Conduct should continue to operate as a mandatory code of conduct.

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<sup>24</sup> Explanatory Statement, Trade Practice (Horticulture Code of Conduct) Regulations 2006, 1.

<sup>25</sup> Ibid, 2.

<sup>26</sup> Australian Government the Treasury, 'Improving commercial relationships in the food and grocery sector' (Final Assessment Regulation Impact Statement, November 2014)



*Submission to Food and Grocery Code of Conduct*

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***NSW Farmers believes:***

- ***that the Horticulture Code of Conduct should continue to operate as a mandatory code of conduct.***



*Submission to Food and Grocery Code of Conduct*

**Table 1: Comparison Grocery Code and Horticulture Code of Conduct**

	Grocery Code	Horticulture Code
Type of Code	<ul style="list-style-type: none"> <li>Voluntary (opt-in) prescribed code.</li> <li>ACCC enforcement of code against signatories</li> </ul>	<ul style="list-style-type: none"> <li>Mandatory prescribed code</li> <li>ACCC enforcement of code against all defined duty holders</li> </ul>
Primary duty holder	<ul style="list-style-type: none"> <li>Major supermarket chains</li> <li>other grocery retailers</li> <li>aggregators who purchase groceries from suppliers with the purpose of resale to a supermarket business</li> </ul>	<ul style="list-style-type: none"> <li>market businesses engaged in horticulture produce trading as either an agent or a merchant who wholesales ~ 430 nationwide</li> </ul>
Obligations	<ul style="list-style-type: none"> <li>To provide contractual certainty and transparency:                             <ul style="list-style-type: none"> <li>written grocery supply agreements</li> <li>prohibited conduct with regard to unilateral changes of supply arrangements and risk assignment</li> </ul> </li> <li>Duty to deal lawfully and in good faith.</li> <li>Dispute resolution, including voluntary resolution, mediation and arbitration</li> </ul>	<ul style="list-style-type: none"> <li>To provide certainty to growers on whether a produce trader is a merchant or an agent</li> <li>To provide contractual certainty and transparency:                             <ul style="list-style-type: none"> <li>written terms of trade and horticulture produce agreements</li> <li>quality specifications and rejection provisions</li> <li>where the trader is buying the produce, a clear mechanism for determining price</li> <li>where the trader is an agent the basis of any agent's fee or commission is payable</li> </ul> </li> <li>Provide duties to agents to act in growers best interests.</li> <li>To require agents to provide transparency in sales made on behalf of grower.</li> <li>Dispute resolution, including compulsory participation in mediation</li> </ul>

***Phasing in of implementation***

The code requires retailers to vary their supply agreements to be compliant with the code within 12 months of the commencement of the code, or alternatively for retailers who are not foundation signatories, twelve months from the commencement of the code or six months from that retailer becoming a signatory where this date is after the first anniversary of the code's commencement.

It is the view of NSW Farmers that these transition periods are sufficient in allowing people to negotiate pre-existing grocery supply agreements to the new terms set out in the Code. This transition period will allow suppliers to analyse any failings of their current arrangements, and bring this to the attention of the retailer.





*Submission to Food and Grocery Code of Conduct*

In contrast, the regulation mandating the Horticulture Code of Conduct contains a grandfathering clause that exempts all contracts for the supply of horticultural produce made prior to the commencement of the code on 15 December 2006. This hampers the ability of the Horticulture Code of Conduct to achieve its objectives despite commencing eight years ago.<sup>27</sup>

NSW Farmers recommends that this anomaly be removed by amendment to the Trade Practices (Horticulture Code of Conduct) Regulations 2006 omitting clause 3 (4).

**NSW Farmers believes:**

- ***that provisions within the Horticulture Code of Conduct that grandfather supply contracts in place prior to its commencement should be removed.***

**Product quality and standards**

NSW Farmers believes that the perishable nature of fresh produce, particularly horticultural produce, reduces the bargaining power of producers. In making the recommendation that the Horticulture Code of Conduct should cover all first point of sale transactions of horticultural produce that involve the grower of the produce, the ACCC pointed to ambiguity in the application of quality specifications and the ability of supermarkets to reject produce after lengthy delays increasing the vulnerability of horticulture growers.<sup>28</sup> While this recommendation was subsequently accepted by the Horticulture Code of Conduct Committee, the horticulture code is yet to be amended to extend the scope of application.

With this in mind, NSW Farmers recommends that efforts are made to harmonise the obligations of retailers with the obligations for the acceptance and rejection of fresh produce contained within the code with those within the Horticulture Code of Conduct. Further, this initiative will promote transparency across the full fresh horticulture produce value chain and reduce transaction costs to industry through applying common standards to both codes.

Table 2 excerpts the provisions of the code dealing with the rejection of fresh produce against the Horticulture Code of Conduct.

**Table 2: Provisions on rejection of fresh produce Grocery Code and Horticulture Code**

<b>Grocery Code</b>	<b>Horticulture Code of Conduct</b>
<ul style="list-style-type: none"> <li>• Grocery supply agreement must:                             <ul style="list-style-type: none"> <li>○ specify the circumstances in which groceries may be rejected [cl 8 (b)]</li> <li>○ quantity and quality requirements written in clear terms [cl 8 (e)]</li> </ul> </li> <li>• Retailer must provide any fresh produce standards or quality specifications to the supplier in clear, unambiguous terms [cl 18]</li> </ul>	<ul style="list-style-type: none"> <li>• Terms of trade must specify circumstances under which trader may reject produce, including period which the trader must notify the grower of the rejection and the consequences of rejection [cl 5 (2) (d)]</li> <li>• Horticulture Produce Agreements must contain [cl 9 (2)]:                             <ul style="list-style-type: none"> <li>○ Circumstances under which the trader may</li> </ul> </li> </ul>

<sup>27</sup> The grandfathering clause was acknowledged by the Chairman of the Australian Competition and Consumer Rod Sims as an impediment to the operation of the Horticulture Code of Conduct in evidence to the Senate Economics Legislation Committee see Evidence to Economics Legislation Committee, Parliament of Australia, Canberra, 4 June 2013, 169-170 (Mr Rod Sims).

<sup>28</sup> Australian Competition and Consumer Commission 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries' (Final Report, July 2008) 400-406.



*Submission to Food and Grocery Code of Conduct*

(1)]	reject produce; including period after receiving produce that the trader must notify the grower of the rejection and consequences of rejection <ul style="list-style-type: none"> <li>○ Quality and quantity requirements</li> <li>○ how the trader deals with horticulture produce that does not meet specified quality ...</li> </ul>
<ul style="list-style-type: none"> <li>• Retailer must accept all fresh produce meeting articulated standards [cl 18 (2)]</li> <li>• Conditions must be satisfied prior to a retailer rejecting fresh produce [18 (3)]:                         <ul style="list-style-type: none"> <li>○ Failure to meet fresh standards or quality specifications</li> <li>○ rejected within 24 hours of receipt</li> <li>○ Cannot reject once accepted</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Trader must accept produce unless one of the conditions in the agreement that allows rejection arises [cl 13 (1) – (2)]</li> </ul>
<ul style="list-style-type: none"> <li>• Retailer to provide written reasons to the supplier for rejection within 48 hours [18 (4)]</li> </ul>	<ul style="list-style-type: none"> <li>• Traders must immediately advise of rejection by phone, fax, email or other electronic means. [cl 13 (3)]</li> <li>• Trader must further advise the grower in writing about the rejection and reasons for rejection in accordance with the produce agreement [cl 13 (4)]</li> </ul>
<ul style="list-style-type: none"> <li>• retailers must not require a supplier to make any payment to cover wastage of the supplier's groceries made at the premises of the retailer or its contractors or agents; except where the wastage is caused by the supplier's negligence as defined in the grocery supply agreement [cl 12]</li> </ul>	<ul style="list-style-type: none"> <li>• Merchants must use reasonable care and skill to maintain the quality of the produce until passing of title [cl 14]</li> </ul>

In examining the differences between the obligations imposed by each of the codes with regard to the rejection of produce, the major differences are:

- the requirement under the Grocery Code to reject produce within 24 hours of receipt compared to a period provided within a Horticulture Produce Agreement within the horticulture code; and
- the requirement under the horticulture code for a trader to immediately notify the grower of the rejection, compared to the requirement of a retailer to notify a supplier of fresh produce within 48 hours of the rejection.

With regard to the first of these matters, NSW Farmers participated in the development of the Horticulture Taskforce's response to the recommendations of the ACCC and the subsequent considerations of the Horticulture Code Committee in 2011. This response rejected the Horticulture Code Committee's recommendation to adopt a 24 hour deemed acceptance rule. This was on the basis that for some commodities allowing a purchaser 24 hours before deemed acceptance could result in a deterioration of the produce and a subsequent rejection of produce despite the consignment meeting purchase specifications upon delivery. Instead the production industry believed that time limits for deemed acceptance should be dealt with in the produce agreement. To this extent, the 24 hour limit could serve as a useful default with lower timeframes established for more vulnerable commodities.



*Submission to Food and Grocery Code of Conduct*

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With regard to the latter, NSW Farmers believes that the horticulture code's requirement to immediately inform a supplier of fresh produce of any rejection of a consignment is important to their ability to seek alternative markets as a means of mitigating losses.

As such NSW Farmers believes that the provisions regulating the rejection of fresh produce contained within the code should be harmonised to the obligations contained within the Horticulture Code of Conduct.

***NSW Farmers believes:***

- ***the provisions regulating the rejection of fresh produce within the Food and Grocery Code should be harmonised with the rejection provisions already contained within the Horticulture Code.***

ENDS