



The Australian Chamber of Fruit & Vegetable Industries Ltd

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## Submission

### Inquiry into the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

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The Australian Chamber of Fruit and Vegetable Industries Limited (The Australian Chamber) is the national organisation representing each of the six Market Chambers, which themselves are organisations which represent the fruit and vegetable wholesalers located in each of Australia's six central Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In total, the organisation represents in excess of 430 Market wholesaling businesses. Market wholesalers are involved in the sale of some 50-60% of the fresh produce sold across Australia in servicing the requirements of fruit and vegetable retailers, secondary wholesalers/provedores, foodservice industry businesses, processors, exporters and the public. Over 15,000 growers supply to businesses within the Central Market system. The total turnover of businesses in the Central Markets exceeds some \$7 billion annually.

***This submission is in response to the invitation from the Senate Economics Legislation Committee.***

The Australian Chamber made a number of submissions to the Australian Government over the course of 2014 including

- Agricultural Competitiveness Green Paper (attachment A)
- Harper Review (Competition Policy) (attachment B)
- Small Business and Family Enterprise Ombudsman (attachment C)
- Red tape reduction(attachment D – includes the Food and Grocery Code submission)

These submissions address the impact of the *Horticulture Code of Conduct* (a mandatory code) on the wholesaling sector of the horticulture industry and the growers who use the Central Markets to sell their produce. There are significant inequities between the way business has been mandated across the wholesaling sector and the way that the major retail chains (supermarkets) have drafted and negotiated a voluntary code for all retailers.

#### **Horticulture Code of Conduct vs Food and Grocery Code introduction/consultation**

The Mandatory *Horticulture Code of Conduct* was introduced without a proper prior assessment of whether it was justified, or its impact on the industry. The instruction issued by the Federal Government at the time was for a Mandatory Code to be implemented, and not determine whether it was justified, or whether other alternatives existed. There was a lack of consultation regarding the introduction of the Code and The Australian Chamber, as the peak industry body representing the Market wholesalers had

- no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and
- no final say as to whether the code was workable or acceptable to those who were to be regulated by it.

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The current approach by the Federal Government in relation to the Food and Grocery Code exists in stark contrast to the process used for the Horticulture Code, and appears to be a soft and almost hands off approach.

The Food and Grocery Code Consultation Paper itself highlighted that *“rather than outright prohibition, supermarkets will be permitted to take certain actions that would otherwise be prohibited, provided that they meet certain requirements”*.

It goes on to state that *“possible alternatives for achieving commercial flexibility may involve a no disadvantage test”*.

It is a shame that when the Federal Government drafted the Mandatory *Horticulture Code of Conduct* that they didn't go to such lengths to advocate flexible commercial relationships for those bound by the *Horticulture Code of Conduct*.

In fact, in relation to the Mandatory *Horticulture Code of Conduct*, no such effort was made.

#### **New definition of Wholesaler**

The inclusion of the new definition of *wholesaler* may well apply to some fruit and vegetable wholesalers as the relationship with a supplier may be outside the jurisdiction of the *Horticulture Code of Conduct*. There has been no consultation with regards to this Grocery Code and its application to fresh fruit and vegetable wholesalers. This part of the industry already has the burden of the heavy compliance cost of the *Horticulture Code of Conduct*. Another mandatory code is strongly opposed while an opt-in may appear palatable – if a wholesaler does not opt-in then this may be publically unacceptable/detrimental.

#### **Compliance burden**

In the Regulatory Impact Statement (RIS) *“Improving commercial relationships in the food and grocery sector”* November 2014, it is stated that *“The Government has stated that it must be satisfied that the Grocery Code will contribute towards achieving fair and efficient commercial dealing in the grocery sector, while not imposing an excessive regulatory burden.”*

#### **Fair and efficient commercial dealing:**

The Market wholesaling businesses represented by The Australian Chamber have been sidelined in the attempt to establish a level playing field for all businesses in the industry, and the adoption of a consistent and commercial approach to any form of regulatory/voluntary industry Code based protection of Growers with respect to the sale of their fresh/farm produce. The wholesaling sector has not been successful in engaging meaningfully with Government as it does not have the political force of some other parts of the industry.

Despite this, the Government and the leadership of grower representative organisations have made no effort to

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implement amendments to the Code to facilitate more flexible commercial arrangements, despite ongoing requests from the Market wholesaling sector.

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a voluntary Code with flexibility which is enshrined in the Code and with exclusions from certain actions “which would otherwise be prohibited”. This will occur while the other half of the industry, and in particular Market wholesalers and the independent retailers who rely on Central Markets, labouring under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.

Even though The Australian Chamber has called for the repeal of the *Horticulture Code of Conduct* for a more workable alternative, this RIS states that “*the proposed Grocery Code does not apply to the extent it conflicts with the Horticulture Code of Conduct (that is, the Horticulture Code of Conduct would prevail)*” and that “*The rationale underlying this position is that the Code aims to regulate commercial relationships that are not covered by other codes*”. It is clear that the Australian Government has no appetite to address the inequities that exist!

#### **Cost of excessive regulatory burden:**

In addition, in maintaining a Mandatory Horticulture Code of Conduct which lacks commercial feasibility, it is creating a further cost burden for growers who support the Central Market system, and a bias in favour of both imported product, and growers selling direct to supermarkets.

In the mandatory *Horticulture Code of Conduct* Regulatory Impact Statement in 2007, it was stated that the Code would “*cost industry a total of \$7.6 million over four years (\$1.9 million per annum). This equates to an estimated average annual cost of \$2,306 for wholesalers and \$171 for growers. The average annual operating profit before tax of fruit and vegetable wholesalers is \$165,000 and \$17,000 for fruit and vegetable growers.*” In the Red Tape Reduction Submission (attachment D), an estimated cost of administration for a medium sized wholesaler including legal costs was \$510,000 since inception of the *Horticulture Code of Conduct* in 2007 (page 40). This is significant cost for a single wholesaler (there are over 900 in Australia). In 2007 terms, the average yearly cost of compliance to wholesalers was estimated as 1.4% of operating profit before tax. Clearly for the wholesaler identified here the compliance cost far exceeds the \$2,306 per year estimated and the estimated 1.4% of operating profit before tax.

Further, if a wholesaler were to opt-in to the voluntary Food and Grocery Code, they would have the burden of compliance cost from two codes.

In the Regulatory Impact Statement (RIS) “Improving commercial relationships in the food and grocery sector”

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November 2014, it is estimated that the cost to each of the three major supermarkets to set-up the cost is \$61,384.67 each with an ongoing cost of \$1,444 per year (page 40). Again even if the 2007 compliance cost to wholesalers was not indexed, the Government's approach to this issue looks very inequitable. Their support for a voluntary code based predominately on a document drafted by those parties it is to regulate, may ensure the Code is workable with lower compliance costs, but it stands in stark contrast to their approach when introducing the *Mandatory Horticulture Code of Conduct*. Furthermore, their ongoing reluctance to address the shortcomings of the *Mandatory Horticulture Code of Conduct*, shows a double standard which is entirely unjust and inappropriate.

So a situation exists whereby those growers who supply to independent retailers through a Central Market are having to work through a supply chain which is burdened by significantly higher compliance costs than those who supply directly to a supermarket who opts-in to this voluntary code.

The approach which exists therefore is one sided, it is making the Central Market system less competitive, and is imposing an uneven playing field on those growers who supply and those retailers who purchase from a Central Market wholesaler.

#### Imported produce

It also needs to be noted that the *Mandatory Horticulture Code of Conduct* does not apply to imported produce, so in this regard Australian fruit and vegetable growers who supply a Central Market wholesaler are further burdened by a regulatory system and compliance costs, which do not apply to produce being imported. Accordingly, the *Horticulture Code of Conduct* has an in-built bias against Australian growers and from a compliance perspective, contributes further to adding cost and reducing the ability of Australian growers to compete with imported product.

There would therefore, appear to be a strong argument that the Government should apply a fair and consistent approach to regulating how business is done.

#### Dispute resolution

In relation to disputes, Central Market wholesalers are not making News headlines even though they have an unworkable and inequitable mandatory Code of Conduct, whereas those who are in the headlines will be granted a voluntary Code drafted by themselves. The dispute resolution mechanism established under the *Horticulture Code of Conduct* can provide for the investigation of grower complaints. Taking into account the size of the wholesaling sector of the fresh fruit and vegetable industry which trades with in excess of four million tonnes of fresh produce worth about \$7 million annually supplied by more than 15,000 growers, the Horticulture Mediation Advisor (HMA) has only dealt with an average of some two complaints per year since the Code was introduced in 2007. According to the

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ACCC, only 9 enforceable undertakings have been issued since introduction. Moreover, the HMA has consistently reported they have not identified any systemic problems faced by the horticulture industry that conflict with the operation of the *Horticulture Code of Conduct*. By any standard these, disputes/complaints are very low, even though the *Horticulture Code of Conduct* is unworkable.

#### Benefits of dealing with a Central Market

Finally, it is important to consider the benefits which growers have in dealing with the Central Markets:

- Most competitive environment in Australia with more than 400 independent wholesalers in six Central Markets actively competing for the growers' produce.
- The grower has freedom of choice about how many wholesalers they wish to deal with and in what Markets.
- The ability to clear large volumes of produce every day.
- Able to take all the growers' marketable crop, not just certain sizes and grades.
- Long term relationships between growers and wholesalers that often cover several generations.
- Providing daily intelligence on the marketing of the growers' produce.
- Actively seeking outlets for growers' produce.
- Wholesalers support their growers in difficult times.
- The Central Markets is the ONLY true barometer of price for growers.
- Some Central Markets (e.g. Sydney and Melbourne) have large active Growers' Markets where growers are able to bring and sell their own produce each day.
- The survival of most Australian growers and the survival of independent greengrocers is dependent on the survival of the Central Markets.
- The Agricultural Competitiveness Green Paper (Page 27) recognises that growers who have alternative marketing options get better prices and better terms when dealing with (MSCs).

These benefits will be eroded over time as the uneven playing field continues with the supermarket (retailer) sector applying an opt-in voluntary code and the fresh fruit and vegetable wholesaling sector being regulated by an unworkable, mandatory code with unequitable compliance costs. The growers supplying the Central Markets are disadvantaged and the consumers of those supplied through the Central Markets are also disadvantaged. Ultimately all parts of this supply chain are disadvantaged compared to the supermarket sector supply chain.

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### **Submission**

## **Inquiry into the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015**

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### **The Australian Chambers position**

The Australian Chamber is again asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).

March 2015

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## SUBMISSION AGRICULTURAL COMPETITIVENESS GREEN PAPER

The Australian Chamber of Fruit and Vegetable Industries Limited (The Australian Chamber) is the national organisation representing each of the six Market Chambers, which themselves are organisations which represent the fruit and vegetable wholesalers located in each of Australia's six central Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In total, the organisation represents in excess of 430 Market wholesaling businesses. Market wholesalers are involved in the sale of some 50-60% of the fresh produce sold across Australia in servicing the requirements of fruit and vegetable retailers, secondary wholesalers/provedores, foodservice industry businesses, processors, exporters and the public. Over **15,000 growers** supply to businesses within the Central Market system. The total turnover of businesses in the Central Markets exceeds some \$7 billion annually.

In making this submission, we will be responding with a focus on industry codes specifically that the mandatory Horticulture Code of Conduct.

### **Fair return on investment to growers**

The Green Paper has been organised under categories – one being “Competition and Regulation” —*giving farmers the best chance to earn a fair return on investment by ensuring fairness and transparency in the supply chain; and making sure that unnecessary red and green tape is removed and that necessary regulation creates the least possible costs for business and individuals.* The Horticulture Code of Conduct is mentioned under “Competition and Regulation” - stating that the Horticulture Code *is a formal mechanism 'for' farmers that manages some supply chain dynamics.*

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) released a “Review of Selected Regulatory Burdens on Agriculture and Forestry Businesses” in November 2013.<sup>1</sup> It assessed the effectiveness and efficiency of the Horticulture Code of Conduct along with about 19 other areas of regulation in the agricultural and forestry industries.

The findings from this study suggested that potential future action by the Australian Government to improve regulatory arrangements typically fell within three broad categories:

- further action could potentially reduce unnecessary regulatory burdens
- further action could complement state and territory government efforts to reduce unnecessary regulatory burdens
- no further action required at this stage (beyond ongoing commitments).

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<sup>1</sup> Gibbs, C, Harris-Adams, K & Davidson, A 2013, Review of Selected Regulatory Burdens on Agriculture and Forestry Businesses, Australian Bureau of Agricultural and Resource Economics and Sciences report to client prepared for the Department of Agriculture, Canberra, November.



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The review continued that *under the “No further action required at this stage” [Finding 1] Horticulture Code of Conduct omissions, stated “no unnecessary regulatory burden exists”<sup>1(6)</sup>* This finding is cited in the recent Agricultural Competitiveness Issues Paper<sup>2(3)</sup>.

The validity of this proposition has not been scrutinised by and is clearly relied on in this Green Paper. To rely on this ABARES finding as it relates to the Horticulture Code of Conduct is out of touch with how the associated regulatory red tape and resultant uneven playing field is affecting growers return for their produce. The Horticulture Code of Conduct does not offer flexible commercial relationships.

The significant cost of compliance of the Horticulture Code of Conduct to Central Market wholesalers is contributed to by growers non return/signing of Horticulture Produce Agreements while continuing to supply produce with an expectation of an excellent return which in turn puts the wholesaler at regulatory risk of non-compliance with the Code and potential action by the ACCC. To reduce the cost of compliance a significant number of wholesalers have reduced their exposure to smaller growers – thus contracting the market for the smaller grower. This reduction of market may be affecting growers return for their produce. Those growers who continue to trade (inside or outside the Code regulations) will also have returns affected due to the need to pass on the cost of compliance to them.

It also needs to be noted that the Horticulture Code of Conduct does not apply to imported produce, so in this regard Australian fruit and vegetable growers who supply a Central Market wholesaler are burdened by a regulatory system and compliance costs, which do not apply to produce being imported. Accordingly, the Horticulture Code of Conduct has an in built bias against Australian growers and from a compliance perspective, contributes further to adding cost and reducing the ability of Australian growers to compete with imported product.

A situation exists whereby those growers who supply a Central Market wholesaler are having to work through a supply chain which is burdened by additional prescriptive Government red tape; while those who supply directly to a supermarket are not! Approximately 40-45% of the fresh produce sold at the retail level is sourced through Central Market wholesalers.

Supermarkets buying direct from a grower offer their own terms of trade, but have none of the scrutiny, cost, or the requirements as seen in the Mandatory Horticulture Code of Conduct.

The approach which exists therefore is one sided, it is making the Central Market system less competitive, and is imposing an uneven playing field on those growers who supply a Central Market wholesaler.

There would therefore, appear to be a strong argument that the Government should apply a fair and consistent approach to regulating how business is done. An even playing field would contribute to a fair return for growers produce.

It is clear the proposition that no further action is required at this stage regarding amendment to the Horticulture Code

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<sup>2</sup> Commonwealth of Australia 2014, Agricultural Competitiveness Issues Paper, Canberra, February.





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of Conduct is flawed. There is significant regulatory burden affecting growers return for their produce when they supply through Central Market wholesalers.

#### **Policy Idea 8 – Strengthening competition laws**

##### **Proposed Food and Grocery Code vs Mandatory Horticulture code of Conduct**

The Competition Policy Draft Report<sup>3(66)</sup> states that “Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour.” And when referring to the proposed Food and Grocery Code it states that “the introduction of a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently.”

The Food and Grocery Code Consultation Paper<sup>4</sup> dated August 2014, highlights the current approach by the Federal Government in relation to the Food and Grocery Code exists in stark contrast to the process used for the Horticulture Code, and appears to be a soft and almost hands off approach.

That discussion paper itself highlighted that ‘rather than outright prohibition, supermarkets will be permitted to take certain actions that would otherwise be prohibited, provided that they meet certain requirements’.

It goes on to state that ‘possible alternatives for achieving commercial flexibility may involve a no disadvantage test’.

It is a shame that when the Federal Government drafted the Mandatory Horticulture Code of Conduct that they didn’t go to such lengths to advocate flexible commercial relationships for those bound by the Horticulture Code of Conduct.

In fact, in relation to the Mandatory Horticulture Code of Conduct, no such effort was made.

The Mandatory Horticulture Code of Conduct was introduced without a proper prior assessment of whether it was justified, or its impact on the industry. The instruction issued by the Federal Government at the time was for a Mandatory Code to be implemented, and not determine whether it was justified, or whether other alternatives existed. There was a lack of consultation regarding the introduction of the Code and The Australian Chamber of Fruit and Vegetable Industries Limited, as the peak industry body representing the Market wholesalers had

- no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and
- no final say as to whether the code provided a flexible framework that set norms of behaviour (in fact it is ridged and unworkable) for those who were to be regulated by it.

The situation with fresh fruit and vegetables is that when any supermarket purchases product direct from a grower, these arrangements and the associated terms of trade are not presently prescribed by, or subject to regulatory oversight.

Where a retailer, and in particular an independent retailer (greengrocer), purchases product through a Central Market,

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<sup>3</sup> Source: The Australian Government Competition Policy Review 2014

<sup>4</sup> Source: The Australian Government the Treasury



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they are purchasing product from a Market wholesaler whose relationship with the grower supplier is regulated, with those regulatory requirements (the Mandatory Horticulture Code of Conduct) being prescriptive to the point of being unworkable.

The dispute resolution mechanism established under the Horticulture Code can provide for the investigation of grower complaints, but has only dealt with an average of some two complaints per year since the Code was introduced in 2007.

Despite this, the Government and the leadership of grower representative organisations have made no effort to implement amendments to the Code to facilitate more flexible commercial arrangements, despite ongoing requests from the Market wholesaling sector.

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a Code with flexibility which is enshrined in the Code and with exclusions from certain actions "*which would otherwise be prohibited*". This will occur while the other half of the industry, and in particular Market wholesalers, labour under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.

The Government's approach to this issue looks very inequitable. Their support for a Code based predominately on a document drafted by those parties it is to regulate, may ensure the Code is workable, but it stands in stark contrast to their approach when introducing the Mandatory Horticulture Code of Conduct. Furthermore, their ongoing reluctance to address the shortcomings of the Mandatory Horticulture Code of Conduct, shows a double standard which is entirely unjust and inappropriate.

### **In summary**

In maintaining a Mandatory Horticulture Code of Conduct which lacks commercial feasibility, it is continuing a cost burden for growers who support the Central Market system, and a bias in favour of both imported product, and growers selling direct to supermarkets.

It is clear the proposition that no further action is required at this stage regarding amendment to the Horticulture Code of Conduct is flawed. There is significant regulatory burden affecting growers return for their produce when they supply Central Market wholesalers.

The Australian Chamber is asking that the Government

- is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code)
- undertake of a review of the inflexible mandatory Horticulture Code of Conduct which restricts competition - to achieve a clear, predictable and reliable industry code including recommendations to reduce business

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compliance costs associated with the red tape.

**December 2014**

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#### **APPENDIX A**

Benefits which Growers have in dealing through the Central Markets:

- Most competitive environment in Australia with more than 400 independent wholesalers in six Central Markets actively competing for the growers' produce.
- The grower has freedom of choice about how many wholesalers they wish to deal with and in what Markets.
- The ability to clear large volumes of produce every day.
- Able to take all the growers' marketable crop, not just certain sizes and grades.
- Long term relationships between growers and wholesalers that often cover several generations.
- Providing daily intelligence on the marketing of the growers' produce.
- Actively seeking outlets for growers' produce.
- Wholesalers support their growers in difficult times.
- The Central Markets is the ONLY true barometer of price for growers.
- Some Central Markets (eg Sydney and Melbourne) have large active Growers' Markets where growers are able to bring and sell their own produce each day.
- The survival of most Australian growers and the survival of independent greengrocers is dependent on the survival of the Central Markets.
- The Green Paper (Page 27) recognises that growers who have alternative marketing options get better prices and better terms when dealing with (MSCs).

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## SUBMISSION COMPETITION POLICY REVIEW

The Australian Chamber of Fruit and Vegetable Industries Limited (The Australian Chamber) is the national organisation representing each of the six Market Chambers, which themselves are organisations which represent the fruit and vegetable wholesalers located in each of Australia's six central Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

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In the executive summary of the *Competition Policy Review – Draft Report* (Draft Report) it is stated that “*competition policy is aimed at improving the economic welfare of Australians. It is about making markets work properly to meet their needs and preferences*”. In the Panel's view, “*competition policy should establish competition laws and regulations that are clear, predictable and reliable*”. The executive summary goes on to state that it “*recommends that regulations restricting competition be reviewed, as well as making recommendations to reduce business compliance costs*”.

In making this submission, we will be responding with a focus on

- industry codes specifically that the mandatory Horticulture Code of Conduct, and
- misuse of market power (section 46).

### Industry Codes

The Draft Report states that “*Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour*.” And when referring to the proposed Food and Grocery Code states that “*the introduction of a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently*.”

The Food and Grocery Code Consultation Paper dated August 2014, highlights the current approach by the Federal Government in relation to the Food and Grocery Code exists in stark contrast to the process used for the Horticulture Code, and appears to be a soft and almost hands off approach.

That discussion paper itself highlighted that “*rather than outright prohibition, supermarkets will be permitted to take certain actions that would otherwise be prohibited, provided that they meet certain requirements*”.

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It is a shame that when the Federal Government drafted the Mandatory Horticulture Code of Conduct that they didn't go to such lengths to advocate flexible commercial relationships for those bound by the Horticulture Code of Conduct.

In fact, in relation to the Mandatory Horticulture Code of Conduct, no such effort was made.

The Mandatory Horticulture Code of Conduct was introduced without a proper prior assessment of whether it was justified, or its impact on the industry. The instruction issued by the Federal Government at the time was for a Mandatory Code to be implemented, and not determine whether it was justified, or whether other alternatives existed. There was a lack of consultation regarding the introduction of the Code and The Australian Chamber of Fruit and Vegetable Industries Limited, as the peak industry body representing the Market wholesalers had

- no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and
- no final say as to whether the code provided a flexible framework that set norms of behaviour (in fact it is ridged and unworkable) for those who were to be regulated by it.

The situation with fresh fruit and vegetables is that when any supermarket purchases product direct from a grower, these arrangements and the associated terms of trade are not presently prescribed by, or subject to regulatory oversight.

Where a retailer, and in particular an independent retailer (greengrocer), purchases product through a Central Market, they are purchasing product from a Market wholesaler whose relationship with the grower supplier is regulated, with those regulatory requirements (the Mandatory Horticulture Code of Conduct) being prescriptive to the point of being unworkable.

So a situation exists whereby those growers who supply to independent retailers through a Central Market are having to work through a supply chain which is burdened by additional prescriptive Government red tape; while those who supply directly to a supermarket are not!

Approximately 40-45% of the fresh produce sold at the retail level is sourced through Central Market wholesalers.

Supermarkets buying direct from a grower offer their own terms of trade, but have none of the scrutiny, cost, or the requirements as seen in the Mandatory Horticulture Code of Conduct.

The approach which exists therefore is one sided, it is making the Central Market system less competitive, and is imposing an uneven playing field on those growers who supply and those retailers who purchase from a Central Market wholesaler.

It also needs to be noted that the Mandatory Horticulture Code of Conduct does not apply to imported produce, so in this regard Australian fruit and vegetable growers who supply a Central Market wholesaler are further burdened by a regulatory system and compliance costs, which do not apply to produce being imported. Accordingly, the Horticulture Code of Conduct has an in built bias against Australian growers and from a compliance perspective, contributes further to adding cost and reducing the ability of Australian growers to complete with imported product.

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There would therefore, appear to be a strong argument that the Government should apply a fair and consistent approach to regulating how business is done.

The dispute resolution mechanism established under the Horticulture Code can provide for the investigation of grower complaints, but has only dealt with an average of some two complaints per year since the Code was introduced in 2007.

Despite this, the Government and the leadership of grower representative organisations have made no effort to implement amendments to the Code to facilitate more flexible commercial arrangements, despite ongoing requests from the Market wholesaling sector.

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a voluntary Code with flexibility which is enshrined in the Code and with exclusions from certain actions "*which would otherwise be prohibited*". This will occur while the other half of the industry, and in particular Market wholesalers and the independent retailers who rely on Central Markets, labour under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.

The Government's approach to this issue looks very inequitable. Their support for a voluntary code based predominately on a document drafted by those parties it is to regulate, may ensure the Code is workable, but it stands in stark contrast to their approach when introducing the Mandatory Horticulture Code of Conduct. Furthermore, their ongoing reluctance to address the shortcomings of the Mandatory Horticulture Code of Conduct, shows a double standard which is entirely unjust and inappropriate.

In addition, in maintaining a Mandatory Horticulture Code of Conduct which lacks commercial feasibility, it is creating a further cost burden for growers who support the Central Market system, and a bias in favour of both imported product, and growers selling direct to supermarkets.

The Australian Chamber is asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).

The Australian Chamber is asking for the support of the Panel to recommend a review of the inflexible mandatory Horticulture Code of Conduct which restricts competition - to achieve a clear, predictable and reliable industry code including recommendations to reduce business compliance costs associated with the red tape.

### **Misuse of Market Power**

In Draft Recommendation 25 — Misuse of market power, *the Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in*

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*conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct. To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:*

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and*
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.*

*The onus of proving that the defence applies should fall on the corporation engaging in the conduct.*

***The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.***

*Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of ‘take advantage’ and how the causal link between the substantial degree of power and anti-competitive purpose may be determined”.*

Not only do independent retailers of fresh produce who are supplied by a Central Market wholesaler have an uneven playing field for the supply of their produce, they also have to withstand the contraction of their market share along with an increase in the number of failed businesses. If this decline continues, one entire sector will be reduced to a point where the consumer will have their needs and preferences impacted and questionably will not benefit from the contraction of the market. The current CCA has not been able to address the damage to competitors of any arguable anti-competitive behaviour by those with market power.

The Australian Chamber agrees with the re-framing of Section 46 to introduce an ‘effects test’.

The phrase ‘substantially lessen competition’ as used in Section 50 has in practice been difficult to prove, as almost no cases under this section have been successfully run by the ACCC.

The Australian Chamber opposes the changing of what Section 46 prohibits to a ‘substantial lessening of competition test”. This is not the test used in other OECD countries.

The Australian Chamber opposes the addition of a defence to Section 46 action. It is our view that this will sanction major companies and clear the path to justify why they should be able to misuse their market power and damage competition in markets. There should be no reason (defence) for misusing market power. This is also the general position taken in OECD competition laws.

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## **In summary**

### **Industry Codes**

The Australian Chamber is asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).

The Australian Chamber is asking for the support of the Panel to recommend a review of the inflexible mandatory Horticulture Code of Conduct which restricts competition - to achieve a clear, predictable and reliable industry code including recommendations to reduce business compliance costs associated with the red tape.

### **Misuse of Market Power**

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The Australian Chamber opposes the changing of what Section 46 prohibits to a 'substantial lessening of competition test'. This is not the test used in other OECD countries.

The Australian Chamber opposes the addition of a defence to Section 46 action. It is our view that this will sanction major companies and clear the path to justify why they should be able to misuse their market power and damage competition in markets. There should be no reason (defence) for misusing market power. This is also the general position taken in OECD competition laws.

**November 2014**



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## SUBMISSION

### SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN PROPOSAL

The Australian Chamber of Fruit and Vegetable Industries Limited (The Australian Chamber) is the national organisation representing each of the six Market Chambers, which themselves are organisations which represent the fruit and vegetable wholesalers located in each of Australia's six central Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In total, the organisation represents in excess of 430 Market wholesaling businesses. Market wholesalers are involved in the sale of some 50-60% of the fresh produce sold across Australia in servicing the requirements of fruit and vegetable retailers, secondary wholesalers/provedores, foodservice industry businesses, processors, exporters and the public. Over 17,000 growers supply to businesses within the Central Market system.

Many of these businesses within the supply chain fall within a definition of a Small Business or a Family Enterprise.

The major retail chains predominately source their produce directly from growers.

We acknowledge the commitment from the Government under its deregulation agenda to removing roadblocks to small business success by reducing regulatory burden.

In making our submission, we will be responding with a focus on

1. concierge for dispute resolution as it applies to the Horticulture Code
2. Commonwealth-wide advocate for small businesses and family enterprises
3. contributor to the development of small business friendly Commonwealth laws and regulations.

#### 1. CONCIERGE FOR DISPUTE RESOLUTION

- 1.1 **What should the scope of the Ombudsman's own mediation service include? For example, small business disputes with Australian Government agencies or disputes under industry codes of conduct?**
- 1.2 **What powers should be conferred to the Ombudsman to resolve small business disputes?**
- 1.3 **Which types of dispute resolution services should the Ombudsman provide and what should be the model for providing these services? For example, should these services be outsourced or provided in-house?**

The Australian Chamber calls on the Federal Government to support the repeal of the existing Mandatory Horticulture Code of Conduct, the establishment of a level playing field for all businesses in the industry, and the adoption of a consistent and commercial approach to any form of regulatory/voluntary industry Code based protection of Growers with respect to the sale of their fresh/farm produce.

Notwithstanding the call for repeal, The Australian Chamber makes the following response.

The Horticulture Code regulates trade in horticulture produce and it applies to wholesalers and growers who trade with each other in horticulture produce. It does NOT apply to the retail chains. The Horticulture Code provides that growers and wholesalers may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them. However if one of the complainants initiates a dispute under the dispute resolution process set out in the Horticulture Code, it is mandatory that the other party participate in that process as required by the code.

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The Horticulture Mediation Adviser (HMA) can currently provide mediation services for wholesalers and growers who are parties to a dispute under the Horticulture Code.

Taking into account the size of the wholesaling sector of the fresh fruit and vegetable industry which trades in excess of 4 million tonnes of fresh produce worth approximately \$7 billion annually supplied by more than 17,000 growers, the number of mediations actually undertaken by the HMA are significantly low. As outlined in the HMA's Annual Reports<sup>1</sup> over a four year period (1 July 2009-30 June 2013) there have only been 12 direct applications for mediation; and out of the 40 enquires received only 7 were referred to mediation.

This indicates that even though the number of transactions over the period would have been very significant, only a very small number end in mediation provided for under the Code. As well the HMA has consistently reported they have not identified any systemic problems faced by the horticulture industry that conflict with the operation of the Horticulture Code. Additionally they provide an education and awareness program conducting information sessions, producing articles and meet with key industry bodies to ensure knowledge of their services is disseminated. They provide website tools to assist parties with dispute resolution.

The dispute resolution scheme does not prevent anyone from approaching the ACCC directly. The ACCC investigates alleged breaches of the Horticulture Code and can take enforcement action where appropriate. The ACCC cannot provide dispute resolution.

According to the ACCC, between 2011 and 2013 they have received 16 complaints and 14 enquires under the Horticulture Code while issuing 9 enforceable undertakings agreed since 2007.

If the Horticulture Code is not repealed or if it is amended, and even though there are few mediations, or enquiries **The Australian Chamber recommends:**

THAT if the Minister appointed Horticulture Mediation Advisor is the Small Business And Family Enterprise Ombudsman, then the supporting body (either internal or external) should hold significant understanding of the horticulture industry, its operation and a working knowledge of the Horticulture Code to ensure that the enquiries and mediations are addressed as industry specific rather than from a generic catch-all small business enquiry/dispute resolution hub

THAT the powers of the Ombudsman in relation to the Horticulture Code should be those of the Horticulture Mediation Advisor.

THAT the Ombudsman provides education and awareness of the Horticulture Codes' dispute resolution and other provisions, within all sectors of the horticulture industry covered by the Code.

## 2. COMMONWEALTH-WIDE ADVOCATE

2.1 **How can the Ombudsman be a strong advocate to the Government? Are there particular practices that the Ombudsman should focus on?**

2.2 **How can the Ombudsman be a strong advocate to larger businesses on the needs of small businesses?**

2.3 **Should the Ombudsman be conferred powers to investigate allegations of practices in the public and private sectors that**

<sup>1</sup> <http://www.hortcodema.com.au/news.html>



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**are negatively affecting small businesses?**

The Horticulture Code of Conduct is an unworkable, inefficient Code with a high level of compliance burden. It provides an uneven playing field for all businesses in the industry with an inconsistent and uncommercial approach to Code based protection of Growers with respect to the sale of their fresh/farm produce. The Horticulture Code only applies to wholesalers trading with growers (the bulk being small businesses or family enterprises). The major retail chains are not covered by the Horticulture Code.

The compliance cost of this code has profitability ramifications as part of this cost is passed onto those businesses serviced by the Central Market wholesalers such as independent fruit and vegetable retailers, secondary wholesalers/provedores, foodservice industry businesses, processors and exporters. Part and sometimes all of the compliance cost may be absorbed by wholesalers and this in turn affects their profitability.

Independent fruit and vegetable retailers (small business and family enterprises) must compete with major retail chains, and do not have the same compliance burden attached to their supply chain.

The Ombudsman must play a role in advocating for a level playing field across all parts of the horticulture industry and remove the cost of compliance from businesses that have to either absorb or pass them to the next part of the supply chain.

The Ombudsman must be a strong facilitator of industry consultation, collaboration, education and awareness for all parts of the supply chain across the horticulture industry. This would increase awareness of and advocate small business needs.

**The Australian Chamber recommends:**

THAT the Ombudsman's role be to consult and strongly advocate to the Government for a level playing field for all businesses within the horticulture industry regulated by the Horticulture Code.

THAT the Ombudsman consult with industry to repeal or reform legislative provisions that have high compliance burden and favour one part of the industry over another. (The Australian Chamber calls for the repeal of the existing Mandatory Horticulture Code of Conduct, the establishment of a level playing field for all businesses in the industry, and the adoption of a consistent and commercial approach to any form of regulatory/voluntary industry Code based protection of Growers with respect to the sale of their fresh/farm produce).

THAT the Ombudsman be a strong facilitator of industry consultation, collaboration, education and awareness for all parts of the supply chain across the horticulture industry.

**3. CONTRIBUTOR TO COMMONWEALTH LAWS AND REGULATIONS**

**3.1 How should the Ombudsman engage with small businesses and family enterprises to identify the regulatory burdens most affecting them?**

**3.2 What activities should the Ombudsman be tasked with in order to make Commonwealth laws and regulations more small business and family enterprise friendly?**

The Australian Chamber agrees with the Australian Government's aim for its deregulation agenda.

The Ombudsman should engage with the wholesaling sector of the horticulture industry to fully understand all regulatory

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burdens that apply to the sector, through its national representative industry organisation - The Australian Chamber as well as with the State Member representative bodies.

The Market wholesaling businesses represented by The Australian Chamber have been sidelined in the attempt to establish a level playing field for all businesses in the industry, and the adoption of a consistent and commercial approach to any form of regulatory/voluntary industry Code based protection of Growers with respect to the sale of their fresh/farm produce. The wholesaling sector has not been successful in engaging meaningfully with Government as it does not have the political force of some other parts of the industry.

The Ombudsman should represent all sectors of the industry with an even handed approach, without favouritism. If one part of the supply chain (the wholesaling sector) is struggling under a regulatory burden i.e. the Horticulture Code, that is consistently reported by the Horticulture Mediation Advisor has not identified any systemic problems faced by the horticulture industry that conflict with the operation of the Horticulture Code<sup>2</sup>, then it is fair to say that all parts of the supply chain that deal with that sector could be impacted financially and therefore affect the profitability and viability of many small businesses and family enterprises.

Along with action being required to repeal or reform the Horticulture Code, there is an urgent need for taxation reform and labour market reform.

The market wholesaling businesses within the Central Market system sell produce to independent fruit and vegetable retailers. These businesses support the retailers through the provision/facilitation of marketing and promotional activities. These retailers do not have a collective voice and have to compete with major retailers. The Australian Chamber is in a unique position to work closely with this sector of the industry and be a conduit to the Ombudsman.

It would be appropriate for the Ombudsman to work with the Australian Chamber in the event that any regulation impact statement was necessary and to examine the Horticulture Code with a view to nominate it for repeal or reform.

The Ombudsman role should include the provision of information and evidence to the Commonwealth Government based on consultation with The Australian Chamber and State Member Representative bodies particularly regarding the Horticulture Code and other regulatory burdens for wholesalers and independent retailers.

The Australian Chamber, its State Member bodies and Market wholesale businesses were surprised by the unworkable regulatory burden within the Horticulture Code when it was enacted. This was particularly due to the fact there had been significant input from and consultation with the sector. Ideological politics must be addressed and the Ombudsman should not have a direct reporting relationship with a Minister responsible for an industry code.

**The Australian Chamber recommends:**

THAT the Ombudsman engage with the wholesaling sector of the horticulture industry to fully understand the regulatory burden (particularly relating to but not limited to the Horticulture Code), through its national representative industry organisation - The Australian Chamber as well as with its State Member representative bodies.

THAT the Ombudsman engage with the independent fruit and vegetable retailers of the horticulture industry using The

<sup>2</sup> <http://www.hortcodema.com.au/news.html>



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Australian Chamber (and its State Member bodies) as a conduit.

THAT the Ombudsman engage early with The Australian Chamber to ensure any new legislation or requirements are not unduly burdensome.

THAT the Ombudsman not have a direct reporting relationship with a Minister responsible for an industry code.

**May 2014**

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4 December 2014

The Hon Josh Frydenberg MP  
Federal Member for Kooyong  
Parliamentary Secretary to the Prime Minister  
695 Burke Road  
CAMBERWELL VIC 3154

Dear Mr Frydenberg

### **Red Tape Reduction**

Thank you for your recent letter and the opportunity to make a further submission regarding possible options for red tape reduction.

The major area of opportunity for red tape reduction from the perspective of our Members is our ongoing request for the repeal/replacement of the Mandatory Horticulture Code of Conduct.

There are many reasons why the Mandatory Horticulture Code of Conduct should be repealed but the most persuasive reasons can be drawn from a review of the Federal Government's own Regulation Impact Statement and an assessment of the objectives identified in that document when the Code was introduced. A copy of the Regulation Impact Statement is included as Appendix 1. Other appendices are also included providing further feedback regarding the operation of the Code.

#### **1. Review of the Regulation Impact Statement (RIS)**

The RIS formed the basis by which the Federal Government justified their decision to introduce the mandatory Horticulture Code of Conduct. The paragraphs below refer to relevant sections of the RIS, a copy of which is attached, marked up to highlight the relevant content to which this letter refers.

##### **1.1 Commitment to "implement a Mandatory Horticulture Code of Conduct" (see Appendix 1 Item A)**

The initial moves to implement the Code were biased from the outset with the Federal Government committing to implement a "Mandatory Horticulture Code of Conduct". As an analysis, the RIS was not about assessing the need or justification for this Code, the Government's commitment was that the Code would be implemented. This undermines every policy there is regarding the introduction of codes of conduct, meaning the process was both biased and flawed from the outset.

##### **1.2 Breakdown in Negotiations**

The RIS makes the statement (see Appendix 1 Item B) that the Government's commitment followed a breakdown in negotiations between growers and wholesalers on minimum terms of trade under the Voluntary Produce and Grocery Industry Code of Conduct. As the wholesaling sector's representative

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organisation, we totally refute this claim. There was no breakdown in negotiations, it was simply that the growing sector representatives failed to offer a solution which was actually workable. The Government's decision to ignore the advice they were being given by "wholesaling sector's representatives" meant that the Code they introduced contained provisions which are inflexible and unworkable. This remains the situation.

### 1.3 Intense Competition

The RIS quotes IBIS World in stating that in 2003/04 the fruit and vegetable wholesaling sector comprised 960 establishments comprising 14,374 people (Appendix 1 Item C). The report went on to say there is evidence to indicate that the wholesale market is subject to intense competition (Appendix 1 Item D). Furthermore, it was highlighted that wholesaler profit margins are also lower on average than that obtained by the retail sector (Appendix 1 Item E).

### 1.4 Options for Growers

The options for growers when selling product at the farm gate were identified in diagram 2.4 (Appendix 1 Item F). There are eight options listed, that is to say, there are eight different supply channels which a grower could use when selling their produce. Of this eight, only two options are effectively regulated by the Mandatory Horticulture Code of Conduct. The above must indicate that the Code has the potential to distort the market through the imposition of regulations on just one section of the industry.

### 1.5 The Problems

This RIS seeks to identify the problems which exist in "some parts of the horticulture wholesale sector". It goes on to say that the problem of lack of clarity and transparency impact mainly on smaller scale growers. It is highlighted in the report that 55% of fruit and vegetable producers supply around 18% of produce in Australia.

The CIE went on to state that it is their estimate that "potential problem transactions make up less than 5% of total sales of domestically produced fruit and vegetables" (Appendix 1 Item G).

### 1.6 Objectives

The RIS states that three primary objectives underlie the Code:

- to address the problem identified;
- to avoid unintended side effects such as those already undertaking business best practices; and
- to ensure it is effective (Appendix 1 Item H).

Any assessment of the Code could draw no further conclusion but that it has consistently failed to meet all objectives since its introduction.

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### 1.6.1 The Problems

The “problem” identified in the Code is described as the lack of clarity and transparency. The introduction of a requirement for documented terms of trade was a positive step, which was supported by this organisation. However, the prescriptive nature of the Code made it unworkable. A defined “sales price less an agreed margin” is transparent, does provide clarity and does guarantee a grower a fair market based return.

### 1.6.2 Avoiding Unintended Consequences

While stating this as an objective, the Code prescribes a “one size fits all approach” to address a problem which the RIS itself says exists with transactions which comprise less than 5% of total sales of domestically produced fruit and vegetable sales.

In short, an anti-competitive structure is being imposed on all wholesalers and their grower suppliers with no options to contract out any of the prescribed arrangement and no options to pursue other more flexible and cost effective arrangements by mutual agreement.

**This is despite the fact that the Government’s own advisor, the CIE had indicated that there was NO problem with transactions which made up in excess of 95% of the total sales of domestically produced fruit and vegetables.**

### 1.6.3 Ensuring Effectiveness

The RIS states that there are a number of elements to the objective of “Ensuring Effectiveness” including:

- establishing a non-litigious low cost and fair dispute resolution mechanism; and
- minimising compliance costs through, amongst other things, “allowing flexibility”.

The dispute resolution mechanism has been supported by the wholesaling sector but, it has simply failed to be utilised, and there is no evidence that it serves an effective purpose.

The number of disputes, as reported by the Horticulture Mediation Advisor speak for themselves that the mediation process put into place under the Code, while being a “nice to have” has essentially remained idle for the vast majority of the time since the Code was introduced. Despite the existence of over 900 wholesalers nationally, doing business with in excess of 15,000 growers, and with millions of transactions annually, there has been no more than a trickle of complaints and investigations by the Mediation Advisor and an annual average of less than five per year.

In relation to the objective of “allowing flexibility”, the Code provides for no flexibility and the reality is that the majority of growers transacting business do so outside the terms of the Code, at their own choice.

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### 1.7 Impact Analysis

The RIS concluded that the benefits of the Code “will accrue mainly to smaller scale growers” (Appendix 1 Item I).

In reality, the Code became a tipping point which has forced many wholesalers to cease transacting business with smaller scale growers because the cost and risk of doing business with them meant that it was no longer feasible to do so.

The Code also became a reason to favour imports over domestic product, as the Code worked to add costs to domestic product which does not apply to imported product.

### 1.8 Stakeholder Consultations

The biased approach to the introduction of the Code is again reflected in the overview of the stakeholder consultation process.

In summary, in the consultation process, it was highlighted that:

- Wholesalers generally do not support application of a mandatory code, but if one is to be implemented, in addition to improved clarity and transparency “they note that it is essential that it provides the flexibility necessary to add value to produce and compete” (Appendix 1 Item J).
- That the one area where growers and wholesalers agreed, was that the code should apply broadly and provide a level playing field across all those in the industry who trade with growers (Appendix 1 Item K); and
- Supermarkets, independent retailers and other such as processors and packing sheds “said” they were not part of the problem. It went on to add that they “have dispute resolution arrangements under the voluntary code paid for by the Government” (Appendix 1 Item L).

In reviewing these three outcomes of the consultation process, the Code implemented by the Federal Government:

- failed to provide any of the flexibility requested by wholesalers;
- failed to provide the level playing field requested by growers and wholesalers; and
- failed to recognise that the voluntary code referred to by the retailers (The Voluntary Produce and Grocery Industry Code of Conduct) also applied to wholesalers and provided no justification whatsoever for retailers to be excluded from the Mandatory Horticulture Code of Conduct.

### 1.9 Implementation and Review

In making its recommendations, the Centre for International Economics stated in the RIS that “to oversee the management of the code, a Horticulture Code Policy Committee would be appointed by the Minister” (Appendix 1 Item M).

It went on to state that the first task of the Committee would be to develop its terms of reference and

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establish performance indicators to measure the Code's performance.

This has not been done and there has been no attempt made to establish objective criteria to assess the performance of the Code, its relevance or its role in improving the performance of the industry.

Significantly, the Code imposes no requirements on those who it is intended to protect, and these growers can continue to act in total ignorance of the Code and its requirements, with all the risks for non-compliance borne by the wholesaler.

## 2. Other Issues

Since the introduction of the Code in May 2007, the market wholesaling sector has repeatedly highlighted that the Code does not work, is inflexible and is not supported by a large percentage of growers. Despite what grower representative organisations say, the facts speak for themselves.

Appendix 2 gives an insight into the issues which exist with the Code and why the wholesaling sector representative organisations across Australia have argued for its repeal and replacement.

Appendix 3 includes a copy of this organisation's response into the Food and Grocery Code Consultation paper issued by the Government in August 2014. It highlights inconsistencies in the approach to the development and implementation of Industry Codes by the Federal Government and asks for justice through a fair and commercial approach.

A detailed case study is included at Appendix 4, detailing the impact, the cost of the Code on the operations of the trader, the levels of grower support for the Code and the views of the company in relation to the Code.

Appendix 5 highlights a current example which highlights some of the issues with the Code, the lack of support for the Code which exists and how the lack of support by growers exacerbates the issues for wholesalers, including requiring them to operate in breach of the Code.

## 3. Conclusions

The Regulation Impact Statement (RIS) was compiled for the Federal Government by the high profile consultancy, the Centre for International Economics (CIE). The document they produced satisfied a requirement that they develop options for the Code – not assess the justification of such a Code.

The implementation of the Code occurred despite the CIE confirming that:

- the wholesaling industry was very competitive;
- problem transactions represented less than 5% of total sales by wholesalers;
- growers have many options by which to sell their product;
- wholesalers' profit margins were lower than the average prevailing in the economy at large and lower on average than that obtained by the retail sector.

The RIS highlighted in fact that a mandatory Code was not required as it is a very competitive industry,

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there are many choices for growers and the identified area where problems exist is a very small part of the industry and total sales. Despite this a code was introduced as it had been a commitment by the Federal Government.

In addition, the Code developed and implemented by the Federal Government has clearly shown in the seven years since its introduction that it has:

- failed to meet the objectives, as detailed in the RIS;
- failed to provide flexibility to facilitate ongoing efficiencies in the transactions between wholesalers and growers;
- failed to provide the level playing field as requested by growers and wholesalers;
- failed to provide a workable set of regulations which assist improving the commercial relationship between growers and wholesalers; and
- imposed a significant cost on wholesalers, particularly when an ACCC investigation occurs, and even when that investigation highlights the efforts made by the wholesaler to be compliant and the underlying issues which exist with the Code, including the lack of cooperation by growers, many of whom actively resist requests to assist wholesalers comply.

The one partial benefit of the Code has been that it has promoted the widespread use of written terms of trade by wholesalers, and this position is strongly supported by all industry organisations representing the wholesaling sector. Having said this, the support and use of terms of trade can be actively supported without a mandatory Code, and could also be done in a manner which ensured that wholesalers and growers had access to more flexible commercial arrangements.

Accordingly, it is this organisation's request that the Federal Government repeals the Mandatory Horticulture Code of Conduct, and provides the Market wholesaling sector the opportunity to offer alternatives which can provide growers the options of flexible and documented terms of trade supported by a dispute resolution mechanism coordinated by this organisation, The Australian Chamber of Fruit and Vegetable Industries Ltd , and our member organisations in the six Central Markets throughout Australia. This approach would provide coverage of the vast majority of all Market wholesalers (in excess of 400) as an appropriate, cheaper and more flexible alternative to the existing Code.

Yours faithfully

**Andrew Young**

**Director – Australian Chamber of Fruit and Vegetable Industries Ltd**

**CEO Brismark**

**CEO Brisbane Markets Limited**

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## **Australian Chamber**

### **Key State Member Contacts**

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## **Appendix 1**

### **Mandatory Horticulture Code of Conduct**

#### **A Regulation Impact Statement (RIS)**

The Australian Chamber of Fruit and Vegetable Industries Limited is the national industry body representing wholesalers and supporting businesses in Australia's six central fruit and vegetable Markets. Collectively our members employ in excess of eight thousand people and have a combined turnover of some \$7 billion at wholesale prices

APPENDIX 1

**MANDATORY HORTICULTURE CODE OF CONDUCT**  
**A REGULATION IMPACT STATEMENT**

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## 1. Introduction

The Australian Government ('the Government') committed in the 2004 election to implement a mandatory horticulture code of conduct ('the code') to increase the clarity and transparency of trading relationships in the fresh fruit and vegetable markets. The code will include a practical and cost effective dispute resolution mechanism. This Regulation Impact Statement (RIS) assesses the regulatory proposal.

"A"

The Government's election commitment for a mandatory code followed the break down in Government brokered negotiations between growers and wholesalers on minimum terms of trade under the voluntary Produce and Grocery Industry Code of Conduct.

"B"

An independent consultant, the Centre for International Economics (CIE), was appointed by the Government to develop options for the code and conduct widespread industry consultation.

It is intended that the proposed Code be prescribed under Section 51AE of the *Trade Practices Act 1974* (TPA). The only existing mandatory Code of Conduct under the TPA, is the Franchising Code of Conduct.

The TPA regulates corporations, trade across state borders and trade within a territory (Australian Capital Territory and Northern Territory). The TPA does not cover wholesale trade in fresh fruit and vegetables by unincorporated bodies or trade within a particular state. Based on information provided by the Australian Chamber of Fruit and Vegetable Industries it is estimated that a high proportion of wholesale horticulture trade occurs across state borders and around 50 per cent of wholesaling businesses are incorporated. This means that around 80 per cent of wholesale trade will be covered under the code.

The Australian Competition and Consumer Commission (ACCC) is expected to play a major role in the enforcement of the proposed code. Complaints about non-compliance that cannot be resolved through the dispute resolution mechanisms in the code can be directed to the ACCC. The code would complement other avenues parties have to pursue legal action, including under common law.



## 2. The fruit and vegetable wholesale sector

### 2.1 Production

In 2002, fresh fruit and vegetable production in Australia was valued at \$5.8 billion by the Australian Bureau of Statistics (ABS) and \$8.2 billion by Horticulture Australia Limited. In 2003-04, there were approximately 4,298 establishments engaged in growing vegetables and 13,658 establishments engaged in fruit production, or a total of 17,956 establishments.

The vegetable growing industry is characterised by small family farms (IBISWorld 2004a). Similarly, fruit growing is comprised of many small sized participants (IBISWorld 2005a). Nearly half (about 47 per cent) of producers are classified by the ABS as having a gross value of operations of less than \$100,000.

### 2.2 Wholesalers

In 2003-04, the fruit and vegetable wholesaling sector recorded estimated sales revenue of nearly \$8.5 billion (accounting for an estimated three per cent of total wholesale revenue in Australia) and contributed \$861.4 million to the Gross Domestic Product. In that year, the industry was composed of 960 establishments, employing 14,374 people, who earned a total of \$517.5 million (IBISWorld 2005b).

According to IBISWorld (2005b), there are three broad types of wholesalers that operate within the central wholesaler markets located in Melbourne, Sydney, Newcastle, Brisbane, Adelaide and Perth:

- merchant wholesalers — who buy the produce from the grower at an agreed price and then on-sell the produce. The wholesaler owns the produce;
- grower wholesalers — who sell produce they have grown themselves in the 'growers shed'; and
- agent/broker wholesalers — who sell produce on consignment from the grower for a commission. The grower retains ownership of the produce until the sale is completed with a third party.

In practice, the distinction between merchant wholesalers and agent/broker wholesalers is blurred. Many non-grower wholesalers act as both merchants and agents/brokers depending on the quality of produce they receive from a particular grower, as well as other factors. Indeed, it is alleged that many so-called 'hybrid' wholesalers do not declare their intended role to the grower until they have already secured a transaction with a buyer.

Wholesalers report that they seek out 'good' growers and seek to maintain a business relationship over time. A range of approaches to the conduct of business is apparent from inspection of a number of wholesalers' business premises. Some transactions are recorded in writing (for example, via fax) or with a consignment notice or invoice; others are conducted on the strength of a verbal agreement.

Wholesalers have a range of customers. They include other wholesalers, retailers, providers, restaurateurs, processors, and the supermarket chains. They deal with large, as well as small, quantities to meet the needs of their customer. Inspection of market behaviour indicates that a mix of transaction types are used, including the operation of credit accounts, cheque payments and cash transactions. Verbal arrangements are not uncommon.

There is evidence to indicate that the wholesale market is subject to intense competition. Key factors follow.

W D "

- There are large numbers of traders in each marketplace. Sydney, the largest, has about 100 wholesalers. Perth has a smaller market with approximately two dozen wholesalers, although it is reported that there are a similar number (or more) of wholesalers operating in the area surrounding the market.
- There is a reasonable number of wholesalers who deal with all of the major horticulture products in most markets (see table 2.1).
- One wholesaler is a close substitute for another. This is evidenced by the fact that most wholesalers handle a wide range of horticulture produce types (with the exception of banana wholesalers). In the Sydney central market, for example, 73 per cent of wholesalers stock between six and 20 varieties of fruit and vegetables. Chart 2.2 gives an indication of the number of products sold by each wholesaler at the Sydney Markets.
- There are very few barriers to entry to becoming a wholesaler. The key factor appears to be experience, which is often learnt within families. The capital requirements are modest compared to many smaller scale businesses and the requirements for entry to trade within a central market do not appear to be onerous or pose significant constraints. Wholesalers in central markets, particularly in the Melbourne markets are subject to space constraints, but there is very little that prevents wholesalers from operating independently of the central market, in fact many do. The capital requirements to set up a wholesaling business are small relative to turnover.
- The wholesale market is not concentrated. According to IBISWorld (2005b), the four major players account for an estimated 17.7 per cent of industry sales revenue.

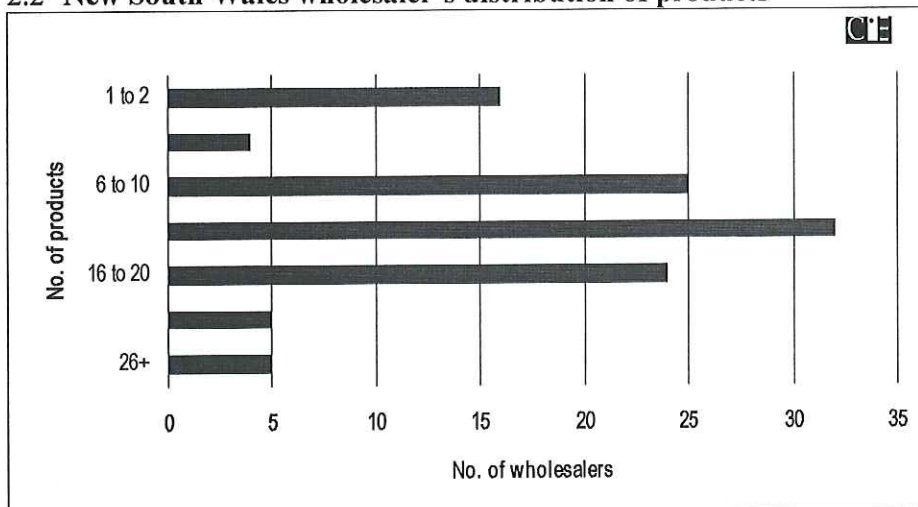
### 2.1 Number of central market wholesalers for selected fruit and vegetables

<i>Fruit/Vegetable</i>	<i>Sydney</i>	<i>Melbourne</i>	<i>Brisbane</i>	<i>Adelaide</i>
Potatoes	5	12	8	6
Carrots	5	6	2	5
Onions	4	15	9	7
Bananas	11	17	5	4
Apples	28	9	7	7
Oranges	32	10	8	7

<sup>a</sup> Wholesalers and their products are not available for the Perth and Newcastle markets.

Source: CIE estimates based on data from the Australian Chamber of Fruit and Vegetable Industries (2005).

## 2.2 New South Wales wholesaler’s distribution of products



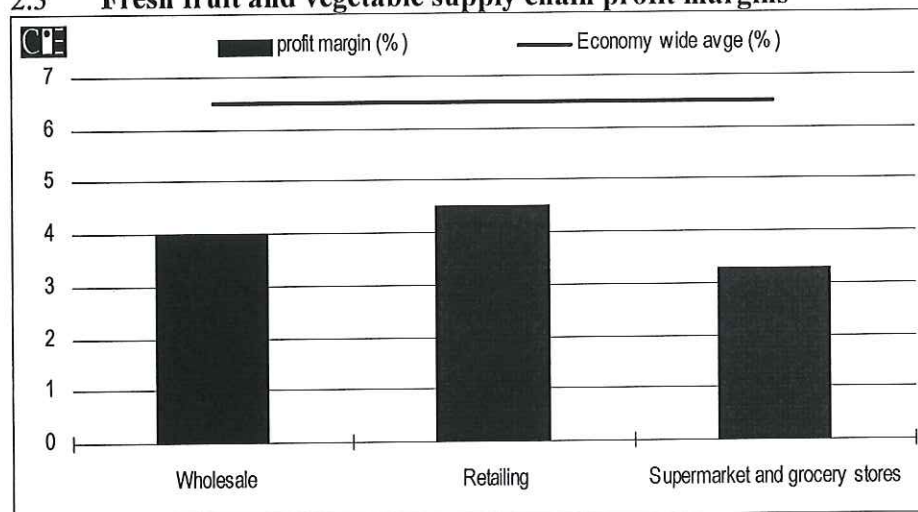
Data source: CIE estimates based on data from the Australian Chamber of Fruit and Vegetable Industries (2005).

The evidence of competition at the wholesale level is reflected in key market outcomes — particularly relatively low profit margins.

ABS data reveals that the profit margins obtained by the fruit and vegetable wholesale sector at large are lower than the average prevailing in the economy at large. Wholesalers’ profit margins are also lower on average than that obtained by the retail sector (see chart 2.3).

“E”

## 2.3 Fresh fruit and vegetable supply chain profit margins



Data source: ABS (2005b). Data for 2002-03 the latest available year.

Public audited accounts provided by the publicly listed wholesaler Chiquita Pacific show that of gross revenue of \$503 million in the past two years, it made a profit before interest and tax of \$17.5 million, a 3.5 per cent profit margin. Chiquita Pacific was previously a solely owned subsidiary of the global fruit giant Chiquita Brands International. That it is only able to sustain an average rate of return given its size and expertise is symptomatic of a highly competitive industry.

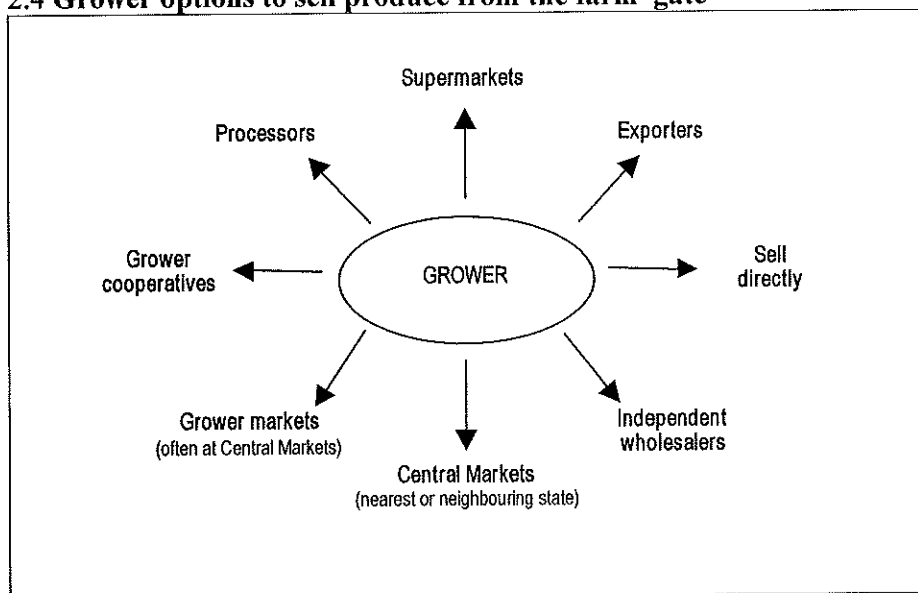
There are many other wholesalers and agents of fresh fruit and vegetables who do not operate through central wholesale markets. Often, they are regionally based.

Most major horticultural produce areas have access to wholesale facilities in a central market or one in close proximity. However, it is likely that there are regions where the wholesale options are limited, and the wholesale market is less competitive.

### 2.3 Competition

Wholesalers compete for access to fresh fruit and vegetables with other wholesalers, supermarket chains, processors and exporters. For some products, they also compete with packers and grower cooperatives who sometimes play a market intermediary role. Growers have many options when searching for a channel into the market for their produce.

### 2.4 Grower options to sell produce from the farm-gate



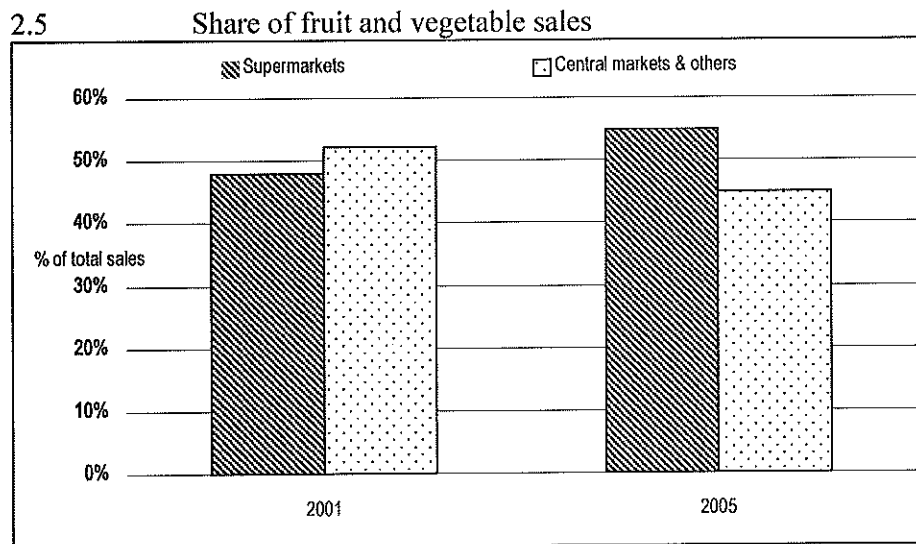
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Major retail supermarkets are increasingly assuming direct responsibility for managing and developing the distribution processes and reducing the market share of wholesalers, including the central markets.

According to Wright and Lund (2002), food retailers are extending contractual arrangements downstream and developing exclusive supply arrangements directly with farmers to facilitate greater control over stocks as well as the quality and price of produce.

Spencer (2004) found that the major supermarket chains currently source 50 to 70 per cent of their fresh fruit and vegetable offerings directly from growers, and top up the rest by purchasing from wholesalers. They maintain significant facilities in wholesale markets to support procurement and distribution of many major lines of fresh fruit and vegetables. They specify and adhere to very strict quality standards and use their purchasing power to drive hard bargains with growers, but compensate by offering them prompt payment as well as certain and more stable revenue streams.

Chart 2.5 draws upon data provided by Sydney Markets Limited. It reveals an estimate of wholesalers' loss of market share over the last five years.



Data source: Sydney Markets Limited (2005).

### 3. The problems

The key problems in the horticulture wholesale sector are information asymmetry and adverse selection of low cost, but also low clarity transactions. Due to intense competition to keep transaction costs low, it becomes difficult for traders who wish to provide clear and transparent trading terms to compete against those who have the cost advantage of not providing such information.

In some parts of the horticulture wholesale sector there is:

- an under-supply of important information, particularly in regard to prices obtained and prices paid by traders in the central markets.
- failure to invest in development of clear, written terms of trade arrangements;
- inconsistencies in the treatment of high quality produce and volatility in the returns for quality; and
- an increasing number of growers preferring to bypass wholesalers and deal direct with retailers, particularly major supermarkets, which might result in loss of competition at the wholesale level.

The problems of lack of clarity and transparency impact mainly on smaller scale growers (55 per cent of fruit and vegetable producers supply around 18 per cent of produce in Australia), growers who are a long way from the markets, growers who supply infrequently to the markets, or who are new entrants and growers who have found it difficult to overcome information problems in the market. They are 'outsiders'. These growers are currently disadvantaged as they have less access to market information, are likely to receive less attention by wholesalers, pay more for their services, face delays in payments and discover difficulties in finding a better wholesaler. The CIE estimates that potential problem transactions make up less than five per cent of total sales of domestically produced fruit and vegetables.

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Large growers, those with a long history in the industry and well-organised groups of small growers experience few problems as they are likely to have privileged access to information through well established business relationships with wholesalers. They are 'insiders'. Given the large proportion of produce supplied by these growers, problematic transactions are few.

The insider-outsider problem was reflected in the diverse views held by growers about problems in the markets. Some, particularly smaller growers distant from the market, tended to argue that the problems in the market were very serious and large, and that they lacked market power. Others, particularly larger growers or those organised into groups and those closer to markets, tended to say there were no problems and that the market was working very efficiently.

Among those arguing that serious problems existed, most complaints were about the six central wholesale markets, operating in Sydney, Melbourne, Perth, Adelaide and Newcastle, where written terms of trade are typically not provided, the provision of

transaction information is low and the rights and responsibilities of growers and wholesalers is often unclear.

Comparatively, retailers and processors (who also trade directly with growers) provide clear contractual terms and provide a high degree of transparency.

## 4. Objectives

Three primary objectives underlie the code:

- to address the problem identified;
- to avoid unintended side effects such as penalising those already undertaking business best practices; and
- to ensure it is effective.

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### 4.1 Addressing the problem

Overcoming the identified problem requires:

- (a) raising the clarity of transactions so:
  - (i) both growers and wholesalers understand the terms and conditions under which business will be conducted;
  - (ii) growers can compare what terms, conditions and opportunities are on offer from various wholesalers and marketers so that competition is transparent and effective.
- (b) raising transparency about how prices, margins and charges are determined and returned to the grower; and
- (c) empowering wholesalers to deal efficiently with costly, unsolicited and unwanted produce.

### 4.2 Avoiding unintended side effects

Minimising the economic costs of imposing the Code requires:

- (a) minimising interference in areas where problems do not exist;
- (b) ensuring flexible trading options remain so that:
  - (i) there are no prescriptive, ‘one-size-fits-all’ terms and conditions that limit choice of terms of trade and impose severe rigidities on the activities of any market participant; and
  - (ii) not imposing anti-competitive structures that might greatly favour one party over another and force some players out of the market.

### 4.3 Ensuring effectiveness

Ensuring the Code is workable and effective requires:

- (a) establishing a non-litigious, low cost and fair dispute resolution mechanism;



- (b) minimising compliance costs by:
- (i) minimising extra activities required to comply;
  - (ii) allowing flexibility and choice in ways of meeting the important objectives of the Code; and
  - (iii) establishing a code that minimises disputes and provides low-cost, but quick and effective dispute resolution.

## 5. Options

Six options are examined in the RIS. These three options developed by the CIE for industry consultations, two further options developed by the CIE following the consultation period and a preferred option developed following additional consultation on the CIE options with key grower and wholesaler industry organisations.

A 'no code' option was not considered because of the Government's election commitment.

### 5.1 Consultation RIS options

The consultation RIS developed by the CIE, included three code options:

- Option 1: drawing upon a preliminary submission received from the Horticulture Australia Council (HAC) and the National Farmers' Federation (NFF). This option sought to raise clarity and transparency by requiring all traders at the first point of sale from the farm-gate to act as agents or merchants (although wholesalers could trade using both roles for different transactions if they wished). For merchant transactions, price would be set at the farm-gate. Where a price had not been set the transaction would be deemed to be an agent arrangement. Wholesalers would provide detailed transaction information under agent arrangements. Payment would be made to growers within 14 days of the point of sale.
- Option 2: drawing upon the consultants' amalgamation of submissions received from Brismark and the Australian Chamber of Fruit and Vegetable Industries (ACFVI). This option is similar to Option 1 but proposes greater flexibility in the merchant framework for price to be set according to the market (see 'hybrid arrangements' in Option 3 below). Payment would be made to growers within 28 days of the point of sale. Wholesalers would provide limited transaction information and would not disclose the buyers of produce or the price produce was sold for.
- Option 3: drawing upon the consultants' blending of Options 1 and 2. This option proposed a compromise, taking the best features suggested by growers and wholesalers. It is based on three trading models: agent, merchant and hybrid. The hybrid was a variation seeking to clarify existing arrangements where wholesalers act as agents up until the point of sale to a third party, where they then take ownership of the produce and return a price to the grower based on what the market paid (also called market set pricing). No Goods and Services Tax is payable on hybrid transactions. Payment terms are flexible and would be negotiated between trading parties. Wholesalers are required to keep records and provide details to the grower about the price received for each sale.

## ***5.2 Options 4 and 5 (Centre for International Economics)***

Following the consultation process, the CIE developed two additional options to account for problems with Options 1 to 3 which became apparent during the consultation process and to provide greater flexibility in trading arrangements to account for the diversity of trade conducted in the horticulture industry.

The CIE's Option 4 and 5 are the same except for which sectors of the industry they propose to cover.

Option 4 proposes to cover all initial transactions between growers and buyers of horticulture produce in Australia, which includes sales to wholesalers, retailers, packing sheds, exporters and processors. This option was developed to avoid any market distortions by imposing the same regulatory conditions on all competitors for produce at the first point of sale.

Option 5 proposes to ring fence the coverage to the six central wholesale markets operating in Sydney, Melbourne, Brisbane, Perth, Adelaide and Newcastle, where the problems of transparency and clarity have been identified.

Options 4 and 5 have the following features:

- requires wholesalers dealing with single transactions to clearly disclose whether they are acting as a merchant or an agent;
- requires written terms of trade to be provided for transactions prior to the transaction setting out how and when the parties are paid and other matters such as how rejections or returns of produce are handled;
- establishes minimum written documentation for all transactions setting out what produce has been sent, what has been received and prices obtained;
- provides flexibility within the definition of merchant and agent so that parties can engage in a variety of business arrangements, including hybrid arrangements under merchant trade;
- allows parties wishing to conduct multiple and multi-period transactions to enter into mutually advantageous marketing agreements (provided that these meet minimum requirements and provide protection for growers), which allow existing pooling, period contracts and pre-existing agreements to be conducted unhindered;
- applies a dispute resolution process involving four stages, including initial resolution between the parties, verification by an independent assessor, compulsory mediation by an independent mediator, and at any stage of this process application to the Australian Competition and Consumer Commission for redress of a mischief or wrongdoing;

- applies to all initial transactions between growers and buyers of horticulture produce in Australia, unless sold to farmers' markets or directly to consumers.

### **5.3 Option 6**

Option 6 provides clarity in trading arrangements, applies the code across the wholesaling industry in a way that would have minimal market distortions and provides flexibility for growers and wholesalers to agree on terms of trade.

This option was developed following additional consultation on the CIE options with key representative groups, the NFF, HAC, ACFVI and the Central Markets Association of Australia.

Option 6:

- applies the code to all wholesalers, including the central wholesale markets, off market wholesalers and other intermediaries (transactions directly between growers and retailers, processors and exporters would be excluded);
- improves the clarity of trading arrangements by stipulating that wholesalers trade as either agents or as merchants. Under merchant arrangements the price can be set prior to or on receipt of produce as agreed between trading parties;
- wholesalers are required to prepare and publish written terms of trade containing minimum conditions on how they will trade with growers. Growers can choose to accept the conditions in the wholesaler's terms of trade or may negotiate with the wholesaler for alternative arrangements, which will be agreed in writing provided they meet the minimum conditions;
- minimum conditions in the terms of trade are simplified to key elements such as payment timeframes, pricing and fees, transaction information to be provided, and some other conditions. Flexibility is provided for growers and wholesalers to agree on the quantum of these elements;
- allows all existing written contracts to be grandfathered under the code unless renewed, extended, amended or transferred after the announcement date;
- provides a framework for growers and wholesalers to enter long-term agreements for the supply of produce;
- ensures that wholesalers do not have to disclose the identity of their buyers, except for debt recovery purposes in agent transactions. This meets a key concern of wholesalers who consider the identity of buyers to be their intellectual property and fear that growers will bypass them and approach buyers directly. Growers can request an independent assessment to confirm that produce was sold to a bona fide third party but will not have access to the identity of the buyer except for the purposes of debt recovery.
- applies a dispute resolution process as described in Chapter 6 below.

## **6. Dispute resolution**

The dispute resolution process outlined here is recommended for Options 3,4,5 and 6 and is acceptable to many stakeholders.

All of the parties to the code may seek to use the dispute resolution process set out in this code which would complement other avenues parties have to pursue legal action, including under common law. There are four levels to the proposed arrangements.

### ***Level 1***

Wholesalers are required to specify in their minimum terms of trade people who should be contacted in the first instance to discuss issues and flag problems or the existence of a dispute. This must be an employee or a director of the business and they must be able to be contacted at a time when queries would arise. Ideally, they would be at a senior level within the organisation.

### ***Level 2***

Where the initial process is not successful, and recognising the perishable nature of horticulture products, the code allows for a process of independent third party fact identification. Rapid discovery of the facts by independent parties is expected to resolve many issues and concerns.

Either party may engage the services of an independent horticulture inspector to report on the condition of their produce in the market or, in the case of agency arrangements, to confirm the price produce was sold for and that it was sold to a bona fide third party.

All of the parties are required to provide necessary access to these assessors to perform their assessment.

The assessors will be identified, accredited and placed on a register via the Office of Mediation Advisor. Technical skills as well as independence will be a central part of this process. There are horticulture surveyors available in places where produce is sold and in major produce growing areas. It would appear that produce assessment can be provided at modest cost (around \$150 plus GST) for a routine assessment in most places where produce is sold. Independent financial assessors, such as qualified accountants are also readily available.

### ***Level 3***

If the initial dispute resolution processes fail, or at any stage before that, either party has the option of elevating the dispute to a mediation service. This involves the complainant in contacting the appropriate disputes contact listed in the Terms of Trade (or the representative of a grower) in writing.

The parties are expected to agree on a mediator from the list of registered mediators. If the parties can not agree on who should be the mediator within seven days, either party may apply to the mediation adviser to appoint a mediator.

The mediator may seek to confirm the dispute with the parties and in so doing see if the dispute can be easily resolved without needed to take further and formal mediation.

The mediator decides the time and place for mediation, and all relevant parties must attend and try to resolve the dispute at this stage. They are required to attend mediation and act in good faith in the process.

Where a solution to the dispute is achieved, elements of the agreement should be prepared in writing, specifying the obligations of the parties.

#### ***Level 4***

At any time a party to a transaction in the wholesale sector of the horticulture market may approach the ACCC to seek redress for a mischief or wrong-doing.

## 7. Impact Analysis

### 7.1 Impact groups

The benefits of the code will accrue mainly to smaller scale growers, growers who are a long way from the markets, growers who supply infrequently to the markets, new entrants to the market and growers who have found it difficult to overcome information problems in the market. These growers are currently disadvantaged as they have less access to market information, are likely to receive less attention by wholesalers, pay more for their services, face delays in payments and discover difficulties in finding a better wholesaler.

Large growers and those with a long history in the industry will obtain minimal benefits from the code because they are likely to already have privileged access to information through well established business relationships with wholesalers.

The costs of the code will affect all wholesalers and growers (an estimated 1,140 wholesalers inside and outside the central wholesale markets and approximately 11,100 fruit and vegetable growers throughout Australia).

The introduction of a mandatory code will have the effect of making parties do things that they would not otherwise do, including some paper work and recording and reporting requirements. The code may also prohibit some transactions/marketing activities that currently provide benefits to growers and wholesalers.

Additional requirements and costs brought about by the code will primarily impact on wholesalers. It is possible that wholesalers will pass most of the additional costs back to growers and some costs are also likely to be passed along the supply chain to consumers given inelasticities in the demand for fruit and vegetables.

Increased transparency and clarity are expected to improve market efficiency, reduce the incidence and costs of disputes, reduce information search costs and increase demand through better information guiding the grower to produce more precisely what the market wants. Wholesalers may become a more attractive option for growers, who are increasing preferring to sell directly to major retailers. This could also increase competitiveness in the fresh fruit and vegetable markets.

### 7.2 Analysis of Options

#### *Consultation RIS options*

Analysis of option 1 indicates that it would be beneficial in raising clarity and transparency. It would, however, impose significant costs through the elimination of a wide range of trading arrangements currently undertaken in the market. There would be high costs to growers and wholesalers to comply with additional requirements of this code, including detailed recording and reporting requirements and 14-day payment timeframes. It is viewed as likely that this code would split grower communities. Some in the community, particularly those able to produce consistently high quality produce in large volumes would trade using prices established at the farm

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gate and would obtain some certainty and most of the expected increment in producer prices. Others, especially smaller growers, that produce less consistent quality or smaller quantities, are expected to be subject to greater market volatility.

Analysis of Option 2 indicates that it would provide additional clarity to agent and merchant trading arrangements although it would not improve the transparency of the price setting process. Broadly, Option 2 reflects an attempt to meet grower concerns with minimal disruption to wholesalers. This option does not provide sufficient improvements in clarity or transparency to warrant the costs of establishing the code. Option 2 may also constrain some current trading arrangements.

Analysis of Option 3 indicates that it may restrain competition by eliminating many current legitimate approaches to business. There would also be significant compliance costs involved in meeting new requirements to record and report all transactions in writing.

#### ***Options 4 and 5***

Options 4 and 5 would reduce some of the costs associated with Options 1 to 3 by providing greater flexibility to account for the wide variety of business arrangements in the horticulture industry. Options 4 and 5 would also allow growers and wholesalers to make longer term arrangements that apply to a period of time, a crop or harvest, or arrangements to apply for some years.

The CIE argues that it is essential to maintain flexibility for parties to enter into contracts. Contract arrangements between growers and wholesalers inside central markets and outside of them are important to the way that groups of smaller growers are able to compete on a level footing with large and international competitors.

Options 4 and 5 contain some prescriptive conditions including written notification of delivery, order and acceptance of produce. These options also prescribe specific requirements such as payment timeframes and procedures for the rejection of produce. The prescriptive procedures and conditions in these options could impose high costs by forcing parties to do things they would not otherwise do and reducing the flexibility needed for a wide variety of trade.

Applying the Office of Small Business's Costing Tool, Option 5 is estimated to cost industry (including 450 central market wholesalers and approximately 9,000 fruit and vegetable growers) a total \$51.4 million over four years (\$12.8 million per annum). This equates to an estimated average annual cost of \$18,848 for wholesalers and \$486 for growers.

These costs would be much higher for Option 4 because it applies to all first point of sale transactions from the farm-gate. Option 4 would impose a regulatory burden on many transactions which already meet the objectives of the code, including those transactions conducted by retailers, processors and exporters.



Option 5 confines the costs of the code by ring-fencing it to the central wholesale markets, where the main problems of lack of transparency and clarity have been identified. The risk of a ring fenced code is that it could introduce a regulatory distortion in the market by imposing additional costs associated with code compliance on only some market participants.

It is difficult to anticipate what the net effect of the application of a ring fenced code to the central markets would be. Experience with the application of a similar approach applied to the Perth Markets suggests that the measure would provide an incentive for some wholesalers to leave the central market and operate outside of the regulation, splitting the market and reducing economies of scale. It is possible that the main beneficiaries will be those that use shortened supply chains dealing direct with growers (ie, supermarkets and their suppliers).

### ***Option 6***

Option 6 improves the clarity of trading arrangements by stipulating that wholesalers trade as either agents or as merchants. This meets the key concerns of many growers who strongly rejected the inclusion of “hybrid” trading arrangements, which they claim would perpetuate existing trading arrangements where growers are disadvantaged and bear all the risks.

The proposed trading arrangements under Option 6 are expected to improve confidence in the market and remove uncertainty associated with the roles and responsibilities of growers and wholesalers.

However, there is a risk that the trading arrangements proposed under Option 6 may cause some smaller growers and those that supply the market infrequently to be disadvantaged. Wholesalers have said they will offer low prices to these growers, or refuse to deal with them, to defray the additional risks involved in trying to off-load lower quality produce or smaller consignments.

On balance, Option 6 is expected to impose a lower net cost than other options because of the additional flexibility for growers and wholesalers to agree on terms of trade.

Under Option 6, the terms of trade are simplified to key components, such as payment timeframes, pricing and fees, the transaction information to be provided, the default terms of trade and other conditions, but does not specify their quantum. This will increase transparency and protect growers’ interests, while providing the flexibility to accommodate a diversity of trading relationships and minimise compliance costs.

Applying the Office of Small Business’s Costing Tool, Option 6 is estimated to cost industry a total \$7.6 million over four years (\$1.9 million per annum). This equates to an estimated average annual cost of \$2,306 for wholesalers and \$171 for growers. The average annual operating profit before tax of fruit and vegetable wholesalers is \$165,000 and \$17,000 for fruit and vegetable growers.

The proposed coverage for Option 6, which includes all wholesalers, provides a compromise between applying the code to where the problems have been identified and ensuring that the code does not impose market distortions and encourage migration of businesses outside the central wholesale markets.

### 7.3 Summary of benefits and costs of options

Table 7.1 summarises the benefits and costs of each option relative to the current situation. All options are expected to deliver improvements in clarity and transparency. Option 5 is expected to have the lowest enforcement costs because the code is ring fenced to the central wholesale markets. Options 1 to 4 will have high enforcement costs because the code would cover all first point of sale transactions.

Option 6 is expected to have the lowest overall costs but there is a risk of unintended side effects and costs for small growers through requirements that wholesalers trade as either agents or as merchants.

#### 7.1 Benefits and costs relative to existing situation

<i>Criteria</i>	<i>Option 1 HAC/NFF</i>	<i>Option 2 Wholesalers</i>	<i>Option 3 Blended</i>	<i>Option 4 Broad scope</i>	<i>Option 5 Narrow scope</i>	<i>Option 6 Preferred option</i>
<b>Addressing the problem</b>						
Written terms of trade	Benefit	Benefit	Benefit	Benefit	Benefit	Benefit
Clarity of trading options	Benefit	Benefit	Benefit	Benefit	Benefit	Benefit
Price transparency	Benefit	No change	Benefit	Benefit	Benefit	Benefit
<b>Avoiding unintended side effects</b>						
Flexible trading options	Potential cost	Potential cost	Potential cost	No change	No change	Potential cost
Flexible terms of trade requirements	Significant cost	Significant cost	Significant cost	Significant cost	Significant cost	Small cost
<b>Ensuring effectiveness</b>						
Cost of enforcement	Significant cost	Significant cost	Significant cost	Significant cost	Small cost	Cost
Frequency of disputes	Cost	Cost	Benefit	Benefit	Benefit	Benefit
Compliance / paper work	Cost	Cost	Cost	Cost	Cost	Lowest cost
Risk / uncertainty	Significant cost	Significant cost	Significant cost	Potential cost	Potential cost	Potential cost
<b>Benefits to small growers</b>	Cost	Cost	Cost	Small benefit	Small benefit	Small benefit
<b>Net economic benefits</b>	<b>Significant cost</b>	<b>Significant cost</b>	<b>Significant cost</b>	<b>Small cost</b>	<b>Small cost</b>	<b>Lowest cost</b>

## 8. Stakeholder consultations

An extensive stakeholder consultation process was conducted as a central part of the RIS process. In total 215 written and oral submissions were received.

The formal consultation period from 22 July to 24 August (5 weeks) including public forums in five capital cities (Sydney, Melbourne, Brisbane, Hobart and Adelaide) and in three regional centres (Atherton, Humpty Doo near Darwin and Mildura), in addition to an extensive number of meetings with individual growers and grower representative groups, wholesalers at central wholesale markets in Sydney, Melbourne, Brisbane, Adelaide and Perth, independent and major retailers, processors, packing sheds, state government representatives in every state and the Northern Territory and Australian Government agencies such as the ACCC.

The stakeholder consultation process provided vital insight into the complex nature of the wholesale sector of the fresh fruit and vegetable industries and the range of views of people in the industry.

One key point observed was that problems in the market do not prevail everywhere and they probably only impact upon a small share of the market value of produce, but nonetheless impact on a reasonably large number of small growers.

The response from the stakeholder consultation process suggests that there is not unanimity in the industry about the regulatory approach to take, or even about the need for a mandatory code.

In summary, the outcomes of the consultation process were:

- Some growers strongly support the code option put forward by the HAC/NFF. Some said that they do not support it and proposed alternatives of their own, or said that they did not want a mandatory code.
- The HAC/NFF case is essentially that only simple and well-defined arrangements can provide the clarity and transparency necessary. Their view is that the flexibility found in current industry arrangements is a cause of many of the problems and that these arrangements are basically illegal.
- Wholesalers generally do not support application of a mandatory code, but if one is to be implemented, in addition to improved clarity and transparency, they note that it is essential that it provide the flexibility necessary to add value to produce and to compete.
- The compromise offered by the consultants in the draft RIS was strongly rejected by the HAC/NFF and some other growers who viewed it as offering too much flexibility. Wholesalers were concerned that the arrangements to conduct business in writing and provide additional transparency would still add significant costs as well as constrain necessary flexibility.

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- The one area where growers and wholesalers agreed was that the code should apply broadly and provide a level playing field across all those in the industry who trade with growers.
- Supermarkets, independent retailers and others such as processors and packing shed/wholesalers said that they were not part of the problem. Many of these parties already meet the requirements of the code under their existing commercial arrangements, do not have the record of disputes apparent in other areas, and have dispute resolution arrangements provided under a voluntary code and paid for by the Government. They indicated that they were strongly opposed to being included in a mandatory code.
- Many of the submissions and comments provided to the consulting team highlighted the importance businesses placed upon existing contracts, the opportunity to contract in the future, and arrangements that supported pooling of produce and prices. The effect of many of these arrangements is to allow even small growers to participate in the market on much the same terms as large national or global businesses.

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## 9. Conclusions

All options are likely to provide some improvement in transparency and clarity in trading relationships. Written terms of trade in particular provide greater clarity and certainty about transactions.

All options are likely to impose a net economic cost. Costs are expected to outweigh benefits because costs are imposed on all participants, whereas benefits will mainly accrue to a limited number of growers.

Options 1, 2 and 3 are likely to impose the highest costs because of prescriptive terms of trade requirements and trading options. Options 4 and 5 provide more flexible trading options, but include costly procedures and terms of trade requirements. Option 4 would impose higher costs than Option 5 because it applies the code to all first point of sale transactions from the farm-gate. Option 5 confines costs by ring-fencing the code to the central wholesale markets.

Option 6 is the recommended option. It is also likely to impose a net economic cost. However, it is expected to provide clarity and transparency at a lower net cost than the other options. Option 6 applies the code across the wholesaling industry in a way that would cause minimal market distortions and provides flexibility for growers and wholesalers to agree on terms of trade which will keep compliance costs low.

Maintaining the status quo by not introducing a code will also have costs because the market currently disadvantages wholesalers who wish to improve trading standards by providing clear and transparent terms as well as increasing the information search costs for many growers and reducing overall market efficiency.

The recommended option is expected to increase transparency and clarity, which could lead to improved market efficiency, a reduction in the incidence and costs of disputes, reduced information search costs and increased demand through better information guiding the grower to produce more precisely what the market wants. The key beneficiaries will be smaller scale growers, those who supply the market infrequently and growers who have found it difficult to overcome information problems in the market.

## 10. Implementation and Review

To oversee the management of the code, a Horticulture Code Policy Committee would be appointed by the Minister for Agriculture, Fisheries and Forestry ('the Minister'). The Committee would monitor the performance of the code and provide policy advice to the Minister on the working and performance of the code. The Department of Agriculture, Fisheries and Forestry ('DAFF') would provide secretariat support. Officials from relevant agencies such as the Australian Competition and Consumer Commission may be invited to observe and provide assistance about implementation matters.

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The first task of the Committee would be to develop its terms of reference and establish performance indicators to measure the code's performance in improving the quality of transactions, improving market efficiency and reducing the incidence of disputes.

The introduction of the code would be accompanied by awareness-raising and education activities conducted by DAFF, ACCC and industry.

A Horticulture Code Mediation Adviser, appointed by the Minister would establish the register of independent assessors and mediators that may be engaged by the parties affected by the code.

The costs to the Government would be around \$10.9 million to fund the operation of the code over four years. This would include:

- \$1.8 million for the Horticulture Code Committee, secretariat and public awareness campaign; and
- \$9.1 million for enforcement of the code by the ACCC.

The code would have a sunset clause and independent review provision. The review would be carried out after three to four full years of operation. The continuation of the code beyond four years would be subject to Cabinet review.

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## Appendix 2

### Ten Points about the Horticulture Code

1. The Code is discriminatory and anti-competitive because it applies to only one discrete sector of the industry and the growers who do business with that sector.
2. Those affected are primarily small to medium businesses; large retailers are not included.
3. It prescribes methods of operation that are inconsistent with the way that growers and wholesalers do business; *and want to do business*.
4. It poses an administrative and legal burden on growers and the wholesalers they do business with.
5. There was no substantive evidence of a problem to justify the introduction of the Code and the incredibly low volume of enquiries since its introduction is testament to the irrelevancy of the Code to growers and wholesalers.
6. The Government's own published documentation provides irrefutable evidence of why, in the light of the millions of transactions with growers conducted by central Markets wholesalers each year, this present Code is so unnecessary:
  - a) In the last three financial years the Horticulture Mediation Advisor's reports indicate that they have received a total of 28 enquiries including just six (6) formal requests for mediation under the Code. In the last financial year no mediations were conducted under the Code.
  - b) ACCC reports indicate that in the last three years they have taken action against just two (2) businesses for breaches of the Code and, in the most recent of these, the business involved was actually a grower acting as a wholesaler.
  - c) The latest ACCC report (Half year report No 7) indicates satisfaction with the compliance rates of businesses audited by the ACCC under the Code.
7. The Code is irrelevant to nearly all growers.
8. Nearly all growers are unaware they are equally subject to the provisions of the Code as wholesalers; including prosecution by the ACCC. However, growers are not threatened with enforcement action for breaches of the Code and are not subject to random checks
9. The substantial cost to the taxpayer of administering the Code is not justified.
10. We are not opposed to having an industry Code but it must be relevant and workable. The voluntary Code proposed recently by the major retailers is such an example. The Food and Grocery Code Consultation Paper dated August 2014, highlights that the two major retail chains (supermarkets) have a market share of up to 50% of the retail sales for fruit and vegetables and if they get a Code it will be voluntary and it will be flexible!

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## Appendix 3

### Food and Grocery Code Consultation Paper – September 2014

The situation with fresh fruit and vegetables is that when any supermarket purchases product direct from a grower, these arrangements and the associated terms of trade are not presently prescribed by, or subject to regulatory oversight.

Where a retailer, and in particular an independent retailer (greengrocer), purchases product through a Central Market, they are purchasing product from a Market wholesaler whose relationship with the grower supplier is regulated, with those regulatory requirements (the Mandatory Horticulture Code of Conduct) being prescriptive to the point of being unworkable.

So a situation exists whereby those growers who supply to independent retailers through a Central Market are having to work through a supply chain which is burdened by additional prescriptive Government red tape; while those who supply directly to a supermarket are not!

Central Markets exist in Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle and serve as a major distribution hub for fresh fruit and vegetables. Market wholesalers are supplied product by in excess of 15,000 growers from around Australia and on sell to retailers, secondary wholesalers/provedores, food service businesses, exporters and processors.

Approximately 40-45% of the fresh produce sold at the retail level is sourced through Central Market wholesalers.

Supermarkets buying direct from a grower offer their own terms of trade, but have none of the scrutiny, cost, or the requirements as seen in the Mandatory Horticulture Code of Conduct.

The approach which exists therefore is one sided, it is making the Central Market system less competitive, and is imposing an uneven playing field on those growers who supply and those retailers who purchase from a Central Market wholesaler.

It also needs to be noted that the Mandatory Horticulture Code of Conduct does not apply to imported produce, so in this regard Australian fruit and vegetable growers who supply a Central Market wholesaler are further burdened by a regulatory system and compliance costs, which do not apply to produce being imported. Accordingly, the Horticulture Code of Conduct has an in built bias against Australian growers and from a compliance perspective, contributes further to adding cost and reducing the ability of Australian growers to compete with imported product.

There would therefore, appear to be a strong argument that the Government should apply a fair and consistent approach to regulating how business is done.

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## Appendix 3

### Food and Grocery Code Consultation Paper – September 2014

The Mandatory Horticulture Code of Conduct was introduced without a proper prior assessment of whether it was justified, or its impact on the industry. The instruction issued by the Federal Government at the time was for a Mandatory Code to be implemented, and not determine whether it was justified, or whether other alternatives existed. There was a lack of consultation regarding the introduction of the Code and The Australian Chamber of Fruit and Vegetable Industries Limited, as the peak industry body representing the Market wholesalers had

- no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and
- no final say as to whether the code was workable or acceptable to those who were to be regulated by it.

The current approach by the Federal Government in relation to the Food and Grocery Code exists in stark contrast to the process used for the Horticulture Code, and appears to be a soft and almost hands off approach.

The discussion paper itself highlights that “rather than outright prohibition, supermarkets will be permitted to take certain actions that would otherwise be prohibited, provided that they meet certain requirements”.

It goes on to state that “possible alternatives for achieving commercial flexibility may involve a no disadvantage test”.

It is a shame that when the Federal Government drafted the Mandatory Horticulture Code of Conduct that they didn’t go to such lengths to advocate flexible commercial relationships for those bound by the Horticulture Code of Conduct.

In fact, in relation to the Mandatory Horticulture Code of Conduct, no such effort was made.

The dispute resolution mechanism established under the Horticulture Code can provide for the investigation of grower complaints, but has only dealt with an average of some two complaints per year since the Code was introduced in 2007.

Despite this, the Government and the leadership of grower representative organisations have made no effort to implement amendments to the Code to facilitate more flexible commercial arrangements, despite ongoing requests from the Market wholesaling sector.

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a voluntary Code with flexibility which is enshrined in the Code and with exclusions from certain actions “which would otherwise be prohibited”. This will occur while the other half of the industry, and in particular Market wholesalers and the independent retailers who rely on Central

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## Appendix 3

### Food and Grocery Code Consultation Paper – September 2014

Markets, labouring under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.

The Government's approach to this issue looks very inequitable. Their support for a voluntary code based predominately on a document drafted by those parties it is to regulate, may ensure the Code is workable, but it stands in stark contrast to their approach when introducing the Mandatory Horticulture Code of Conduct. Furthermore, their ongoing reluctance to address the shortcomings of the Mandatory Horticulture Code of Conduct, shows a double standard which is entirely unjust and in appropriate.

In addition, in maintaining a Mandatory Horticulture Code of Conduct which lacks commercial feasibility, it is creating a further cost burden for growers who support the Central Market system, and a bias in favour of both imported product, and growers selling direct to supermarkets.

The Australian Chamber is asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).

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## Appendix 4

### Case Study – Murray Bros (Wholesaler – Brisbane Produce Market)

#### Horticulture Code of Conduct (CODE) – Timeline

1. This submission is made by Stephen Edwards, Managing Director, Murray Bros.
2. Murray Bros, a company which has operated as a wholesale trader in the Brisbane Markets for over 93 years. Murray Bros are a medium to large sized wholesaler. The company has a very keen interest in the Code, not only because of its efforts to be compliant, but because it has been the subject of two ACCC investigations relating to Code compliance since 2006.
3. Implementation of Code in May 2007 by Murray Bros:
  - Refusal by some Growers to sign HPA's
  - Apathy by about 30-40% of our Growers to sign HPA's resulting in constant chasing by Murray Bros to get signed HPA's up to and after implementation of the Code, even though the Growers continued to send produce and expected Murray Bros to sell it.
4. May 2007, general feeling of our Growers:
  - Roughly 50% felt that the Code was a waste of time and would deliver no benefit to them
  - Roughly 50% were hoping that the Code may deliver some benefits to them even though they saw no obvious benefits in the written Code.
5. Early 2008, ACCC launch a Breach Notice on Murray Bros for primarily;
  - Non complying Horticulture Produce Agreements (HPA's)
  - Conducting trade before HPA's were in place
  - Conducting trade not in accordance with the Code.
6. For most of 2008, Murray Bros (and our solicitors) work with the ACCC to agree on a new HPA. In December 2008, new HPA's approved by the ACCC are rolled out to all our Growers for signing.
7. Early 2009, as directed by the ACCC, written invitations were sent by Murray Bros to all our Growers to attend an education seminar on the Code.

Only three of our 500 Growers attended (representing less 0.5% of our turnover). One Grower thought he had to attend and left early when he realised it wasn't compulsory for him. The other two said they were already in town that day and decided to go. All of our remaining Growers said they thought the

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#### Horticulture Code of Conduct (CODE) – Timeline

Horticulture Code was a waste of time. This was communicated back to the ACCC who realise the situation Murray Bros is in.

8. In early 2009, the attitude of Murray Bros growers were:
  - Approximately 20% would not sign another HPA as they see it as useless red tape, offers no benefit, they don't want to change what they are doing & know they will never be prosecuted for not signing.
  - Approximately another 40% appear to have no motivation to sign another HPA for the above reasons.
  - Approximately another 40% have signed but still view the HPA's as above.
  - None see it as offering any benefit to them.
9. The situation above was communicated to the ACCC in early 2009, who were sympathetic to the position of Murray Bros.
10. From 2009 to 2012, Murray Bros constantly chased Growers to sign the new HPA's. All were signed by around 2012.
11. The legal, accounting and other costs to Murray Bros of the ACCC action and further follow up audit by ACCC are in excess of \$95,000.

#### Cost of Administration

Murray Bros had one staff member working full time on preparing documents, sending out to Growers, chasing up signings and logging all documents from beginning of 2007 and until August 2007.

From September 2007 until now, the Code requires 0.5 (FTE) staff member each week.

To cope with the operation of the Code Murray Bros have also had to invest in information technology amendments and support, changes to logistical procedures and extra work for the Quality Assurance Manager. All of these costs equate to approximately half of a staff member each week.

Conservatively, the cost to Murray Bros of this administering of the Code since its introduction is now in excess of \$415,000 and ongoing.

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## Appendix 4

### Case Study – Murray Bros (Wholesaler – Brisbane Produce Market)

#### Horticulture Code of Conduct (CODE) – Timeline

##### Consequences

##### Cost Benefit Analysis

The operation of the Code since 2007 has cost Murray Bros in excess of \$510,000 to administer, alter logistics, legal and accounting fees.

There will not be one Grower who we can identify and who can prove that the Horticulture Code has put 1 dollar extra in their pocket.

##### Decline of Smaller Growers

Smaller growers are less commercial to deal with since the introduction of the Code. This has contributed to larger wholesale businesses in the Central Market rationalising their Grower base to reduce exposure to smaller Growers.

At Murray Bros, smaller Growers in 2014 represent less than a half of their share of OUR turnover than they did in 2006.

##### Imported Product Not Burdened by this Regulation

Imported product is not burdened by the cost of this regulation. The Code gives imported produce a free hit on locally grown Australian produce.

In the 2006-07 year (the year before the introduction of the Code) imported produce represented 5.19% of the total turnover of Murray Bros. In 2013-14, imported product represents 16.06% of the total turnover of Murray Bros. This share has tripled during the introduction of the Code and is still climbing. A major reason is that it is getting easier to deal with the Imports compared to the regulation of local. Also, the Imports have a commercial advantage in not having to deal only as prescribed by the Code.

##### Cost to Industry

Unfortunately, the Code has cost the Industry millions of dollars without being able to identify \$1.00 of extra returns to Growers.

It has also had the unintended consequences of giving a commercial advantage to Supermarkets over Independent Retailers and to imported produce over Australian grown produce. Unfortunately, nobody has the courage to fix this mess.

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##### Observations by Murray Bros

Murray Bros believes the Horticulture Code of Conduct was doomed to fail.

Problems areas in operation:

- Pre-agreed pricing involves significantly higher risk and therefore higher targeted margins. It does not reduce dissatisfaction in Wholesaler performance as it changes our relationships with our Growers to a more adversarial playing field.
- Pricing on delivery is impractical (now conceded by all industry players).
- Growers do not want Agency once they understand what Agency actually is.
- The Code requires Merchant pricing before OR upon delivery (a HPA must specify one or the other).

The growers that supply Murray Bros, this company will expect that:

- To Market the quantity of produce they need to market at any given time,
- Pay them a fair price for their produce (taking into account quality and prevailing market price ranges),  
and
- Pay them on time.

To be embraced by all sectors of the Horticulture Industry, the Code should require all Traders and Growers to have written, but flexible Terms of Trade in place. Those Terms of Trade should amongst other things include:

- How pricing is done, ie - Before delivery/ - Upon Delivery/ - Within an agreed time after delivery
- When title and risk passes
- When the Grower will be paid
- How quality issues are dealt with
- A dispute resolution process.

If all of those areas are to be agreed between the parties, they must be allowed to document the arrangement that best works for them, and will obviously need to have enough detail for contractual certainty and

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transparency. There could be certain safeguard prohibitions to protect parties (for example pricing no later than x days after delivery).

Importantly, if growers do not sign and return terms of trade documents, the traders' standard terms should automatically apply.

It is wrong that a company such as Murray Bros, can end up in breach of regulations because of a grower's failure to return a signed HPA.

Furthermore, the costs clearly outweigh the benefit of having the existing Code. The Code has come at a substantial cost to this business.

**Stephen Edwards**  
**Managing Director**  
**Murray Bros**

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## **Appendix 5**

The two major regional grower representative organisation in Queensland (Bundaberg Fruit and Vegetable Growers and the Bowen Gumlu Fruit and Vegetable Growers) have both confirmed their view that the existing Mandatory Horticulture Code of Conduct does not work. Their views in relation to this matter mirror what the vast majority of growers privately acknowledge – the Code is meaningless and offers little or no benefit to how they do business.

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