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Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011

3.1 This chapter has five main sections:

- an overview of the Bill;
- key provisions of the Bill;
- background to the Bill;
- issues raised during the inquiry; and
- committee comment.

Overview

3.2 The Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011 ('the Bill') seeks to amend the *Competition and Consumer Act 2010* ('the principal Act') by adding provisions for a new Horticulture Code of Conduct. The new Code would apply to the trade of horticulture produce and sets parameters within which terms of trade must be made, designed to provide greater protection for growers.

3.3 There is an existing Horticulture Code of Conduct operating in the form of regulations ('the 2006 HCOC').[1] Modifications have since been proposed to the 2006 HCOC; the Bill is the most recent attempt at change.

3.4 The Committee received submissions that acknowledged the positive intent of the Bill, but viewed it as faulty. Numerous and varied remedies were suggested, which are detailed within this chapter.

Key provisions of the Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011

Objectives of the Bill

3.5 Clause 51AEB of the Bill states that the Horticulture Code of Conduct (HCOC) is declared to be a mandatory industry code. The purpose of the Code is defined as being:

> ...to regulate the conduct of Agents/Merchants and Sellers of Horticultural Produce to ensure contractual clarity and transparency of all transactions and provide a cost-effective mechanism for fair and equitable dispute resolution.[2]

3.6 In a practical sense, the Bill is designed to offer greater protection to sellers (produce growers), who engage the services of intermediaries to find end-users for their produce without having direct knowledge of the obtainable sale price. These intermediaries may include 'agents' or 'merchants', for example. Whilst such third parties make payment to growers based on the obtainable price for the produce, growers are unable to necessarily trace this price and compare it against the payment received.

3.7 The Bill seeks to clarify this problem by requiring agents and merchants to disclose eventual sale prices to sellers (the growers), who could then make a comparison between prices paid and the payment received. The Bill also sets out a dispute resolution and oversight framework (both of which are already contained within the 2006 HCOC).

3.8 Clause 51AED explicitly states that 'this Code replaces the existing [HCOC] and has effect notwithstanding existing individual agreements'. From a technical perspective, the amendment Bill would have the effect of prescribing an industry code from within the principal Act instead of via

1 *Trade Practices (Horticulture Code of Conduct) Regulations 2006*, no. 376 of 2006.

2 Clause 51AEB(2).

regulation. As such, any future changes to the proposed Code would need to be made by changes to legislation, rather than by changes to regulation.

Terms of trade and 'intent to dispatch produce' notification

3.9 In clause 51AEE, a merchant or agent must provide their terms and conditions of trade in written form to sellers (these form their ongoing trade relationship). These trade relationships, by mutual agreement between traders and growers, may be modified 'provided that the Agreed Terms of Trade are consistent with the requirements of this Code.'

3.10 Prior to dispatching a consignment of horticultural produce, clause 51AEF requires that a seller must notify the merchant/agent by sending an 'Intent to Dispatch Produce Form'. Upon receiving this form, a merchant/agent must respond within 12 hours 'indicating whether or not they will receive the consignment' (clause 51AEH). No response is deemed to mean that the merchant/agent has accepted the consignment. Under clause 51AEG, if the seller fails to provide notification, the merchant/agent has the discretion to accept or return the consignment.

3.11 If the merchant/agent, after receiving notification, decides not to accept the produce, the seller must not dispatch it (clause 51AEI).

3.12 Where notification has been given and the merchant/agent has agreed to (or has been 'deemed' to) accept the consignment, 'they must accept the consignment of Horticultural Produce when delivered' (clause 51 AEJ). However, a merchant/agent reserves the right to reject the consignment if it is of the incorrect quality or quantity or if earlier advice was given to the seller indicating rejection. Sellers may appeal to the Producer Fairness Tribunal if they believe their consignment was 'arbitrarily rejected.'

3.13 The rules diverge at this point depending on whether there is an agency relationship or a merchant relationship with the seller. In the Bill, an agent means 'any person or entity that acts, or offers to act, for a Seller in an Agency Relationship'; a merchant means 'any person or entity that is, or offers to be, in a Merchant Relationship with a Seller this includes but is not limited to Wholesalers Exporters, Processors and Retailers [*sic*]' (clause 51AEC – definitions).

Agent relationships

3.14 Clause 51AEM states that ownership of the produce 'remains with the seller until sold by the Agent to a third party,' after which point 'ownership passes immediately to the third party purchaser.'

3.15 Under clause 51AEN, proceeds of the sale are required to be deposited into a trust account – at an unspecified point in time after the sale – and the agent may only deduct a commission according to the agreed terms of trade. The manger of the trust account, which the Bill envisages will likely be the Perth Metropolitan Markets, Brisbane Markets (Brismark), Sydney Markets Ltd and the Melbourne Market Authority, is permitted to deduct a 2.5% service commission. Distribution of the funds to the seller 'should' occur within seven days of the funds being deposited into the trust account (clause 51 AEO). Clause 51AES details the rules for the trust account.

3.16 Clause 51AEQ states that the agent must provide the seller with a copy of the invoice. This must be done within 28 days from the date of sale of the consignment or as negotiated (whichever is earlier) and must include details of prices, quality and grades.

Merchant relationships

3.17 Where a merchant relationship exists, the Bill states that ownership transfers at the time of delivery if an agreed price exists, or if there is no agreed price the merchant may hold the produce for 24 hours. In the latter case, 'if an agreement has not been made... then the Merchant is deemed to be an Agent,' and a default 12.5% commission would apply. Payment from the merchant to the seller must be as agreed and not later than 28 days from the date that the produce is received, or as negotiated, whichever is earlier (clauses 51AEU and 51AEV).

3.18 The merchant must provide a statement to the seller within 28 days with details of prices paid, quality and grades, 'for each consignment'. The Bill specifies that 'average prices are not acceptable', although growers may agree to be in a pooled arrangement with other growers (clause 51AEW).

Dispute resolution

3.19 The Bill also contains a dispute resolution process in the event agreements are not honoured. This begins with a report from an horticultural inspector (clause 51AEY) and escalates to the Producer Fairness Tribunal, which would be empowered to facilitate a mediation process (clauses 51AEX(2) and 51AEZ(1)). The outcome of mediation is binding on the parties, unless, following application by one or more of the parties 'a court of competent jurisdiction... makes a different decision' (clause 51AEZ).

3.20 Clause 51AEZA establishes a Horticultural Code Management Committee, responsible for educating stakeholders, accrediting inspectors and advising the Minister on the accreditation of a Produce Fairness Tribunal.

Background to the Bill

Origins of the 2006 HCOC

3.21 As noted above, there is an existing Horticultural Code of Conduct (2006 HCOC). According to the explanatory statement that accompanied the regulations establishing the 2006 HCOC, the need for an industry code arose due to a 'need to improve commercial transparency' and because 'growers and wholesalers could not agree on a voluntary code.'[3]

3.22 The process leading to the 2006 HCOC began with stakeholder consultation, undertaken by a consultant on behalf of the Australian Government. This was followed by the development of 'options' generated in the consultation process, including a 'recommended option'. These options were detailed in a draft regulatory impact statement (RIS).[4] The RIS stated that:

> 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.[5]

3.23 The RIS categorised growers into two groups: 'outsiders' (comprising the smaller and newest growers) and 'insiders' (the larger and well-organised groups). According to this analysis, the outsiders:

- have less access to market information;
- pay more for services;
- face payment delays; and
- have difficulty finding the better wholesalers.[6]

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3 'Explanatory Statement: Select Legislative Instrument 2006 no. 376', pp. 1-2.
4 'Explanatory Statement: Select Legislative Instrument 2006 no. 376', pp. 1-2.
5 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 7.
6 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 7.

3.24 Whereas the insiders:

- experience few problems and have privileged access to information through established channels.[7]

3.25 According to the draft RIS, the original public consultation process attracted diverse responses from growers generally depending on status. Smaller growers described problems as 'very serious' whereas larger growers argued 'there were no problems' and that the market worked 'very efficiently.'[8]

3.26 The consultant then went back to the stakeholders, and tested the various options from the draft RIS. Following this secondary consultation, the 'recommended option' was still seen as the best option, based on analysis showing it would offer the most benefit with the lowest cost.[9] The other options were ruled out for being too costly.

3.27 Stakeholders, nonetheless, viewed the 'recommended option' with displeasure:

> The compromise offered by the consultants in the draft RIS was strongly rejected by the HAC/NFF [Horticulture Australia Council/National Farmers' Federation] 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.[10]

3.28 In the event, the basic elements of the 'recommended option' were enacted in the 2006 HCOC. Submissions to this inquiry contained differences of opinion similar to those that were raised during the development of the 2006 HCOC.[11] These are outlined later in this chapter.

New proposals since 2006

3.29 Numerous proposals have suggested revisions to the 2006 HCOC. These include:

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7 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 7.

8 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 7.

9 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 19.

10 'Mandatory Horticulture Code of Conduct: A Regulation Impact Statement', p. 20.

11 Submission 15, Australian Chamber of Fruit and Vegetable Industries, p. 2; Submission 17, Fresh State Ltd, p. 2; Submission 11, Horticulture Taskforce, p. 5.

1. the ACCC's recommendations (July 2008) arising from its inquiry into grocery prices;
2. the Horticulture Code of Conduct Committee's response to the ACCC (August 2009), supported by the markets; and
3. the Horticulture Taskforce's response to the ACCC (August 2011), developed by a collective of peak horticulture industry bodies.

3.30 Additionally, there is now a new version of the Code as proposed within the Bill (September 2011).

3.31 As noted in the previous chapter, in 2008 the ACCC conducted an inquiry into the competitiveness of retail prices for standard groceries. The then-Assistant Treasurer and Minister for Competition Policy and Consumer Affairs requested the ACCC review the 2006 HCOC as part of the inquiry. The ACCC found that the Code could function more effectively with some changes:

> ...the diversity and complexity of the horticulture industry cause it to be a difficult industry to regulate effectively without causing unintended side effects and incurring compliance costs. Nevertheless, the ACCC believes the Horticulture Code has merit and, if amended in accordance with the recommendations outlined [in this report], the code has the potential to provide a framework which ensures transparency in transactions and fairness in dispute resolution procedures.[12]

3.32 The ACCC also suggested the Horticulture Code of Conduct Committee (a body convened by the then-Minister for Agriculture, Fisheries and Forestry) conduct a review of the Code in more detail, two or three years into the future.[13] The ACCC made recommendations in ten areas, as well as a range of more specific recommendations.

3.33 The HCOC Committee conducted the review recommended by the ACCC and reported in August 2009. It gave qualified support for most, but not all, of the ACCC's recommendations.[14]

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12 ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', July 2008, p. 390.

13 ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', July 2008, p. 390.

14 Horticulture Code of Conduct Committee, 'Implications of the Australian Competition and Consumer Commission Recommendations to Amend the Horticulture Code of Conduct', August 2009.

3.34 The Horticulture Taskforce developed a paper in response to the ACCC's recommendations.[15] The Taskforce supported one ACCC recommendation, gave qualified support for two others, and did not support the remainder.

The 2006 HCOC and the Bill

3.35 In broad comparison to the 2006 HCOC, the Bill:

- contains an alternative and broader definition of horticultural produce, defines agents and merchants differently and uses the term 'seller' in place of 'grower';
- directs parties to follow particular timelines and utilise recognised trust accounts. The timing and method of payments in the 2006 HCOC is left in the hands of growers, agents and merchants to determine by agreement;
- mandates certain procedures that must be followed as a minimum standard, such as the 'intent to dispatch produce' notification. The conditions of delivery, acceptance or rejection of produce are largely determined by agreement between growers, agents and merchants in the 2006 HCOC;
- provides that growers are entitled to receive information from agents and merchants pertaining to prices, quantities, grades and dates of purchases, as does the 2006 HCOC. However, whereas the 2006 HCOC required that a range of specific information must be contained in agreements made between growers, agents and merchants, equivalent requirements are not found in the Bill;
- contains similar provisions relating to dispute resolution, although there are procedural and administrative differences; and
- applies to any existing agreements. The 2006 HCOC contained a 'grandfather clause' whereby existing agreements could continue unaffected.

Issues raised during the inquiry

3.36 Dissatisfaction with the 2006 HCOC was a central theme in many submissions. The Australian Chamber of Fruit and Vegetable Industries

15 Submission 11, Horticulture Taskforce.

described the 2006 HCOC as 'unworkable' and described the version in the Bill as a proposal that 'falls far short'.[16] Fresh State Ltd, the representative organisation for wholesalers located within the Melbourne Markets, also gave a similar view.[17] The Horticulture Taskforce, while offering qualified support for the Bill, indicated that a code should be simple to draft provided 'all the anti-farmer interests' could be overcome.[18]

3.37 Some submissions to the inquiry held a position based upon support or rejection of past proposals to amend the 2006 HCOC. As discussed above, these proposals were:

1. the ACCC's recommendations (July 2008);
2. the HCOC Committee's response to the ACCC (August 2009); and
3. the Horticulture Taskforce's response to the ACCC (August 2011).

3.38 The Australian Chamber of Fruit and Vegetable Industries (representing the six central markets in Australia) advised that the Committee should support the HCOC Committee's proposals:

> The Australian Chamber requests that this Standing Committee makes recommendation to the House that the Minister for Agriculture, Fisheries and Forestry implements the Code Committee's recommendations from 2009 forthwith.[19]

3.39 Growers and farmers, by contrast, gave support to the Horticulture Taskforce's proposals. According to the National Farmers' Federation (NFF), these were formulated to state 'what amendments industry is seeking to the [HCOC] legislation.' However, according to the NFF, the contents of the Bill 'do not closely reflect' the Horticulture Taskforce's position:

> for this reason, the NFF encourages [the Committee] to engage with horticulture industry on this reform agenda... as a means of delivering transparency in the horticulture supply chain price setting process.[20]

3.40 In addition to the positions above, submissions from Sydney Markets Ltd and the Central Markets Association of Australia each conveyed an

16 Submission 15, Australian Chamber of Fruit and Vegetable Industries, p. 2.
17 Submission 17, Fresh State Ltd, p. 2.
18 Submission 11, Horticulture Taskforce, p. 5.
19 Submission 15, Australian Chamber of Fruit and Vegetable Industries, p. 2.
20 Submission 4, National Farmers' Federation, p. 2.

objection to this Bill 'in [its] entirety.' Both submissions also closed by commenting that the Bill lacks 'an understanding of the horticulture industry [it seeks] to regulate.'[21]

3.41 Some submissions disputed the appropriateness of the definitions used in the Bill. For example, the Horticulture Taskforce submitted that the term 'grower' should be used in preference to 'seller', 'because growers do not "sell" to an agent.'[22]

3.42 More specific issues were also raised:

- transparency and accountability;
- complexity and costs;
- status of existing agreements and contracts; and
- administration and oversight.

These issues are each discussed in the following sections.

Transparency and accountability

3.43 Submissions provided a range of perspectives in relation to the transparency of horticulture produce transactions. On one side were those who argued that transparency is already provided for through ordinary business practice, and on the other were those who pointed to systemic flaws. For example, the Mareeba District Fruit and Vegetable Growers Association (MDFVGA) challenged the degree of transparency that the 2006 HCOC provides due to a loophole whereby agents morph into merchants:

> The system... allows the wholesaler to operate as a merchant whilst working under the definition of an agent (known as the hybrid system). This allows the wholesaler to sit on a grower's produce until he finds a buyer and within a nanosecond of finding that buyer and getting a guaranteed price changes hats, becomes a merchant and purchases the produce from the grower at a sum considerably less than what he was offered by his customer.[23]

21 Sydney Markets Ltd, Submission 3; Submission 7, Central Markets Association Australia.

22 See for example Submission 11 p. 7; Submission 12 p. 4; and Submission 13 p. 2.

23 Submission 1, Scott Dixon/Mareeba District Fruit and Vegetable Growers Association Inc, p. 1.

3.44 Whilst the Horticulture Taskforce submitted that 'if a hybrid model is permitted then there is no point in having a code'[24], it is not evident that the Bill would prevent this practice. In any case, the 2006 HCOC states:

> A trader cannot act as both an agent and a merchant under the one horticulture produce agreement.[25]

3.45 The MDFVGA also argued that, unlike the 2006 HCOC, the Bill would provide for 'full transparency' because it requires 'a detailed paper trail from producer to the final retailer or processor.'[26] The 2006 HCOC, however, already requires agents and merchants to report prices received to growers.

3.46 When introducing the Bill, Mr Katter stated that in practice, retailers will deny having agreed to purchase produce if market prices change after the event:

> The game is as follows. Every farmer, for reasons we do not fully understand, will get a turn at being the first farmer off, so he will get spectacular prices—he will get $45 a box or whatever it is—for mangoes, which they will be pulling next month. But then, as all the other farmers start to come on, the price will tumble back down to $12 or $15 a box.[27]

3.47 He continued, saying that when a supermarket manager has:

> ... bought mangoes at $45 [he] thinks: 'Heavens! I'm going to lose my job here.' So he has a look at those mangoes and finds out that they are speckled and says, 'Jeez—we took these on consignment.' The truth is that he did not take them on consignment; he bought them. But there is no proof.[28]

3.48 The NSW Chamber of Fruit and Vegetable Industries Inc (Freshmark) argued in its submission that most wholesalers and growers have long-term relationships 'built on trust and reliability'.[29] Additionally:

> Being a free trade market, growers are able to choose their wholesaler not only from one market but from any market. As a result good growers end up with good wholesalers, who in turn have good retailers... Those that continually chase price and not

24 Submission 11, Horticulture Taskforce, p. 5.

25 *Trade Practices (Horticulture Code of Conduct) Regulations 2006*, no. 376 of 2006, clause 7.

26 Submission 1, Scott Dixon/Mareeba District Fruit and Vegetable Growers Association Inc, p. 3.

27 House of Representatives Hansard, 19 September 2011, p. 10429.

28 House of Representatives Hansard, 19 September 2011, p. 10429.

29 Submission 6, NSW Chamber of Fruit and Vegetable Industries, p. 2.

> focus on building long-term relationships usually end up disappointed with their outcomes.[30]

3.49 According to Freshmark, the Bill has been based on a South African model aimed at an industry with different workings to Australia. Freshmark argued that keeping growers viable is in wholesalers' interests, as 'when a grower suffers a wholesaler suffers and retailers have to cope with the flow-on effect.'[31]

3.50 Further, the Bill's trust account regime was criticised as being pointless. OneHarvest submitted:

> We can only assume that the trust account mechanism is intended to "quarantine" grower's funds from the Agent's operations to ensure that those funds are not used to pay the Agent's other creditors.[32]

3.51 However, as the same submission pointed out, in practice the funds would initially be received from a third party into the agent's account, 'mixed with' other money and would probably be 'utilised to pay the agent's other creditors' prior to reaching the trust account. Moreover, 'there is a risk that funds could ultimately be incorrectly disbursed from the trust account'.[33]

3.52 The NSW Farmers' Association (NSWFA) doubted whether any additional transparency achieved would outweigh the costs.[34] Further, the Horticulture Taskforce pointed out that 'it appears that merchants will not be required to use the trust account.'[35]

3.53 On the other hand, Mr Katter explained that trust accounts feature in other industries:

> In the real estate industry there is a trust fund. In the legal industry there is a trust fund. In the insurance industry there is a trust fund. In every industry there is a trust fund to protect the person selling. But there is no trust fund in this industry.[36]

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30 Submission 6, NSW Chamber of Fruit and Vegetable Industries, p. 2.

31 Submission 6, NSW Chamber of Fruit and Vegetable Industries, p. 2.

32 Submission 12, OneHarvest, p.8.

33 Submission 12, OneHarvest, pp. 8-9.

34 Submission 13, NSW Farmers' Association, p. 2.

35 Submission 11, Horticulture Taskforce, p. 8.

36 House of Representatives Hansard, 19 September 2011, p. 10428.

3.54 The submission from the MDFVGA supported the inclusion of the trust account in the Bill and asserted that 'growers lose millions every year by wholesalers declaring bankruptcy.'[37]

Complexity and costs

3.55 Submissions warned that, were the Bill to be enacted, transaction complexity and costs would increase. Examples of increased complexity include the 'intent to dispatch produce' notification, operation of the trust account and application of the Bill to retailers (distinct from the 2006 HCOC where retailers are exempt). OneHarvest, a produce processer and wholesaler, submitted that the Bill's provisions relating to dispatch, delivery and acceptance of produce would duplicate other routine processes, such as the generation of purchase orders, 'which already provide a sufficient paper trail to establish who ordered what, in what quantity and from whom.'[38]

3.56 The 'intent to dispatch produce' notification, for example, could lead to situations where rejection or acceptance of produce and other instructions have to be promptly communicated between sunset and sunrise.[39] OneHarvest observed:

> The fact that the existing Code [the 2006 HCOC] does not specify defined periods for response is reflective of the diverse nature of arrangements that might be in place and the fact that timelines may need to change based on the particular arrangements at hand. ... The consequences of missing a deadline can be significant.[40]

3.57 The NSWFA and the Horticulture Taskforce viewed the notification procedure envisaged in the Bill as potentially problematic. Clause 51AEJ(1)(b), on one hand, provides the merchant/agent with an 8-hour window to reject produce post-notification and acceptance, but clause 51AEU(1)(b) gives merchants the ability to refuse purchase if a price cannot be agreed within a 24-hour window. In the latter case, the merchant would be deemed to be an agent under clause 51AEU(2). NSWFA described this as 'confusing' and also 'effectively providing two opportunities for produce to be rejected.' The NSWFA contended that the price ought to be agreed 'before or at delivery in a merchant transaction.'[41]

37 Submission 1, Scott Dixon/Mareeba District Fruit and Vegetable Growers Association Inc, p. 3.
38 Submission 12, OneHarvest, p. 7.
39 Submission 12, OneHarvest, p. 7.
40 Submission 12, OneHarvest, p. 7.
41 Submission 13, NSW Farmers' Association, p. 2.

The Horticulture Taskforce advised that in a merchant transaction 'it is normal and fair for the price to be agreed at or before physical delivery'.

3.58 The Horticulture Taskforce also observed:

> ...produce is often in and out of the market within 24 hours. An allowance of up to 24 hours to agree on a price will allow the merchant to manipulate the price based on what they receive, all at the grower's risk.[42]

3.59 The trust account regime outlined in clause 51AES would, according to the submission from OneHarvest, create a 'significant compliance burden' for the trustee due to the high number of transactions, each with multiple parties involved.[43] The NSWFA submitted that 'many growers will have concerns' in relation to paying the non-negotiable 2.5% service commission. The NSWFA also questioned 'whether growers would see the additional cost as providing sufficient benefit in terms of enhanced transparency.'[44]

3.60 Retailers expressed concern that they would be unduly captured by the Bill due to the broad definition of merchant contained in the Bill (the 2006 HCOC specifies that retailers and exporters are excluded[45]). Woolworths argued that including retailers in the HCOC would 'duplicate' and 'undermine' the Produce and Grocery Industry Code of Conduct. Woolworths also argued that it 'already has open and transparent supplier relationships in place.'[46] Woolworths warned that if the HCOC included retailers:

> ...this would still leave large parts of the produce and grocery sector not covered by a code. This would also create different regimes for different parts of the farming and broader grocery sector, including manufacturers. For instance, the dairy industry is not caught by the [HCOC].[47]

3.61 ANRA submitted that the Produce and Grocery Industry Code of Conduct is 'a more appropriate means of promoting clarity and transparency in commercial relationships.'[48] ANRA added:

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42 Submission 11, Horticulture Taskforce, p. 8.

43 Submission 12, OneHarvest, p. 9.

44 Submission 13, NSW Farmers' Association, p. 2.

45 *Trade Practices (Horticulture Code of Conduct) Regulations 2006*, no. 376 of 2006, clause 3(6)(a) and (b).

46 Submission 18, Woolworths, p. 16.

47 Submission 18, Woolworths, p. 17.

48 Submission 16, Australian National Retailers Association, p. 6.

> In addition, the operational evidence of the Produce and Grocery Industry Code of Conduct [PICOC] highlights that there is little evidence to suggest that retailers and growers are not currently managing their commercial relationships in a fair and transparent manner. The Ombudsman component of the PICOC has rarely been used in relation to supermarket-grower disputes.'[49]

Status of existing agreements and contracts

3.62 The Bill's retrospective application to existing agreements and contracts would cause 'significant uncertainty', according to OneHarvest group, as there is 'no clarity' in clause 51AED regarding the status of these agreements:

> Would those agreements become void? Or would they continue to operate to the extent they are not inconsistent with the proposed new code? ... [OneHarvest] may find itself in a position where it has to choose between (on the one hand) a contractual breach (or on the other hand) a breach of the code.[50]

3.63 OneHarvest emphasised that requiring existing contracts to be updated to comply with the Bill would be an 'undesirable' outcome.[51] The NSWFA noted the absence of a transition period within the Bill to allow for current agreements and contracts to be updated.[52]

3.64 In relation to the 2006 HCOC, the NSWFA was of the view that 'all transactions should be subject to a code including those transactions made under agreements prior to 15 December 2006.'[53] The ACCC's 2008 inquiry recommended that the HCOC apply to agreements regardless of when they were agreed. The ACCC based this recommendation on evidence that these exempt agreements were now highly prized, as traders had become reluctant to enter into Code-compliant agreements due to the added risks and complexity.[54] In order to bring old agreements under the code, transition periods are generally recommended: the Horticulture Taskforce recommended a six-month transition period, for example.[55]

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49 Submission 16, Australian National Retailers Association, p. 6.

50 Submission 12, OneHarvest, p. 5.

51 Submission 12, OneHarvest, p. 5.

52 Submission 13, NSW Farmers' Association, p. 2.

53 Submission 13, NSW Farmers' Association, p. 3; Submission 14, Growcom.

54 ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', July 2008, pp.406-407.

55 Submission 11, Horticulture Taskforce, p. 7.

Administration and oversight

3.65 Additionally, the Committee wishes to draw attention to the level of administration that would be associated with the dispute resolution and oversight provisions in the Bill. In particular, the Bill would establish the Horticultural Code Producer Fairness Tribunal to mediate disputes and the Horticultural Code Management Committee. The Management Committee would have responsibility for educating stakeholders, accrediting inspectors and advising the Minister on the accreditation of a Produce Fairness Tribunal.

3.66 The Committee notes that an unknown cost will be associated with administering and supporting the work of the Tribunal and the Management Committee.

Committee comment

3.67 The Bill seeks to enshrine, in legislation, a new Horticulture Code of Conduct in place of the one that has existed since 2006 under regulations.

3.68 As the comparison of the 2006 HCOC and the Bill showed, both contain the same minimal requirements; that is, written agreements, access to information on prices and a dispute resolution process. The Bill would add two new major requirements: the 'intent to dispatch produce' notification and the trust account. Submissions pointed out that these processes could either be circumvented or were inadequate for the intended purpose.

3.69 The comparison also showed that, whereas the 2006 HCOC is more specific in relation to the information growers must receive, the Bill is less prescriptive. The application of the Bill to existing agreements is different from the 2006 HCOC. The absence of transitional provisions would likely surround existing contracts and agreements with an uncertain status.

3.70 This has led the Committee to conclude that the Bill would be unlikely to achieve its objectives and risks considerable unintended or undesired consequences.

3.71 Further, the Committee is concerned that changing the Code in ways unpalatable to growers, suppliers and end-users risks creating secondary flow-on effects. These include:

- entrenching the existing power relationships amongst the largest groups of growers and wholesalers, who may respond to the

uncertainty of new rules by excluding new participants or those without perceived credentials; or

- partial or total ignorance of the Code, by agreement, such as disregarding the proposed trust account.

3.72 Many submissions provided possible amendments to the Bill; however, these were generally of a highly technical nature and tended to be incompatible with the Bill.

3.73 For the above reasons, the Committee does not support the Bill.

Recommendation 2

3.74 **The Committee recommends that the Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011 not be passed.**

Hon Dick Adams MP

Committee Chair

14 March 2012