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The Parliament of the Commonwealth of Australia

Advisory Report on the Constitutional  
Corporations (Farm Gate to Plate) Bill 2011  
and Competition and Consumer Amendment  
(Horticultural Code of Conduct) Bill 2011

House of Representatives

Standing Committee on Agriculture, Resources, Fisheries and Forestry

March 2012  
Canberra

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## Foreword

This inquiry has considered two Bills that seek to improve the regulation of agriculture and produce markets in Australia. The Committee considered these two Bills jointly, and received a number of helpful submissions.

Whilst acknowledging the positive intent of the Bills, this report records the Committee's concerns about the impacts the Bills would have if passed. Any proposed changes to current regulation must be very carefully considered, to ensure that the overall benefits of change outweigh the costs of change. Some of the ideas put forward in these Bills have initial appeal, but in practice they would be counterproductive.

Above all, any changes to the regulation of the horticulture industry must have the broad support of the industry itself. It is clear, through submissions to the inquiry, that these Bills do not have the support of the industry.

This report provides a detailed discussion of issues raised during the inquiry, and I would like to thank those individuals and organisations that made submissions to the inquiry.

Hon Dick Adams MP  
Chair





## Membership of the Committee

Chair            Hon Dick Adams MP

Deputy Chair   Mr Alby Schultz MP

Members        Hon Bruce Billson MP\*

Mr Darren Cheeseman MP

Mr Tony Crook MP

Mr Steve Gibbons MP\*

Mr Rob Mitchell MP

Mr George Christensen MP

Hon John Cobb MP\*

Mr Laurie Ferguson MP\*

Mr Geoff Lyons MP

Mr Dan Tehan MP

\* Denotes supplementary member, appointed to the Committee for this inquiry only.

## Committee Secretariat

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## Terms of Reference

On 22 September 2011 the Selection Committee referred the following bill to the Committee for inquiry and report:

- Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011 and Constitutional Corporations (Farm Gate to Plate) Bill 2011

The Terms of Reference were the text of the Bill.

Under Standing Order 222(e), the House is taken to have adopted Selection Committee reports when they are presented.



## List of abbreviations

ACCC	Australian Competition and Consumer Commission
ANRA	Australian National Retailers Association
HCOC	Horticulture Code of Conduct
MDFVGA	Mareeba District Fruit and Vegetable Growers Association
NFF	National Farmers' Federation
NSWFA	NSW Farmers' Association
PICOC	Produce and Grocery Industry Code of Conduct
RIS	Regulatory Impact Statement



## List of recommendations

### Constitutional Corporations (Farm Gate to Plate) Bill 2011

#### Recommendation 1

The Committee recommends that the Constitutional Corporations (Farm Gate to Plate) Bill 2011 not be passed.

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

#### Recommendation 2

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



## Introduction

### Reference of the Bills to the Committee

- 1.1 On 22 September 2011 the House of Representatives Selection Committee referred the following Bills to the Committee for inquiry and report:
  - Constitutional Corporations (Farm Gate to Plate) Bill 2011; and
  - Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011.
- 1.2 The Bills were both introduced into the House on 19 September 2011 by the Hon Bob Katter MP. The text of the Bills can be found on the Committee's webpage.<sup>1</sup>
- 1.3 This Chapter outlines the objectives of the Bills and the inquiry process. Chapter 2 considers the Constitutional Corporations (Farm Gate to Plate) Bill 2011. Chapter 3 deals with the Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011.

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1 <<http://www.aph.gov.au/house/committee/arff/horticultural/index.htm>>.

## Objectives of the Bills

- 1.4 Both Bills share common ground through broadly attempting to improve transparency and accountability within the fresh fruit and vegetable supply chain in Australia. The impetus for improvement has arisen due to concerns that, in general, growers are continually receiving low returns on produce that is eventually sold to consumers at substantially higher prices. Upon introducing the Constitutional Corporations (Farm Gate to Plate) Bill 2011, Mr Katter stated:

...the village is paying twice what they should be paying for their fruit and vegetables in Australia and the farmer is getting half. In other words, the people in the middle are arguably getting 400 per cent more than they should be getting.<sup>2</sup>

- 1.5 In relation to the Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011, Mr Katter contended that the supply chain does not allow for prices to be traced:

A lot of farmers are very nice and very trusting people - foolishly trusting people, in my opinion. They do not know what their product is sold for, so, quite frankly, an agent can tell them anything. He could sell mangoes for \$40 a box and tell the farmer he sold them for \$20 a box.<sup>3</sup>

- 1.6 Speaking on the same Bill, he added:

The other issue is the supermarket giants: Woolworth and Coles. Again, we do not know what they pay for produce.<sup>4</sup>

## Inquiry Process

- 1.7 Due to the related nature of the two Bills, the Committee decided to seek submissions that addressed both Bills. The Committee called for submissions on 12 October 2011 with a deadline of 16 December 2011. The Committee also wrote to relevant State, Territory and Federal Ministers and contacted interested stakeholders, notifying them of the inquiry and inviting submissions.

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2 House of Representatives Hansard, 19 September 2011, p. 10425.

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

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

- 1.8 The Committee adopted five focus areas for the inquiry:
- the practicalities of implementing the Bills' provisions, both for practitioners and regulators, taking into account the whole supply chain;
  - the cost of implementation;
  - domestic and international linkages;
  - the interaction of any potential issues between related Federal, State and Territory laws in this area; and
  - possible amendments to the Bills, or other alternative measures, to achieve the objectives of the Bills.
- 1.9 The Committee received 21 submissions and one confidential supplementary submission. Details of submissions can be found in the Appendix.
- 1.10 While supporting the intent of the Bills, in general, submissions refrained from advising that the House should pass the Bills. This was based upon concerns that practical implementation would be difficult with some possible undesirable outcomes. One exception was the submission from the Horticulture Taskforce, a collective of peak horticulture industry bodies, which offered support for the Competition and Consumer Amendment Bill, but this position was still 'subject to some clarifications and extra considerations'.<sup>5</sup>

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5 Submission 11, Horticulture Taskforce, p. 5.





## Constitutional Corporations (Farm Gate to Plate) Bill 2011

2.1 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

2.2 The Constitutional Corporations (Farm Gate to Plate) Bill (the Bill) would require the major supermarkets to disclose and display prominently the 'farm gate' price paid for fresh fruit and vegetables. The 'farm gate' price would be visible alongside the retail price at the store, which is intended to give consumers the ability to estimate whether the retail price is appropriate. At the Bill's First Reading, Mr Katter said some fresh fruit and vegetable items are being sold to consumers at many times the price paid to farmers.<sup>1</sup>

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<sup>1</sup> House of Representatives Hansard, 19 September 2011, p. 10426.

2.3 An identical Bill was introduced into the Senate by Senator Nick Xenophon on 13 September 2011. When introducing the Bill, Senator Xenophon said:

Often, particularly in the recent drought years, producers have not been able to sell their produce at much more than the cost of growing it. The aim of this bill is to require grocery retailers to display the farm gate price of fresh produce next to the retail price, so that consumers can see how much profit each retailer earns for each product.<sup>2</sup>

## **Key provisions of the Constitutional Corporations (Farm Gate to Plate) Bill 2011**

- 2.4 The Bill applies to 'constitutional corporations' that are grocery retailers with more than 1,000m<sup>2</sup> of floor space dedicated to the display of grocery items that are primarily food-based.
- 2.5 Clause 9 of the Bill will require relevant grocery retailers to display prominently the 'producer price' (farm gate price) in close proximity to the selling price. The producer price is defined in clause 7 as 'the average farm gate price received by farmers for a specific type of produce within a specified 12-month period.' In addition, retailers must publish producer prices on their websites.
- 2.6 The farm gate price refers to the price paid for produce at 'the point at which produce leaves the farm' and produce is defined as 'fresh fruit and vegetable produce'. Other types of farm produce, such as meat and dairy, are not included within the Bill's operations.
- 2.7 Clauses 10 through 13 provide that infringement notices may be issued for breaches of clause 9. The Australian Competition and Consumer Commission (the ACCC) is authorised to issue infringement notices or to apply to the Federal Court for an order against the corporation in contravention. The penalty for breaches is fixed at 600 penalty units.

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2 Senate Hansard, 13 September 2011, p. 5906.

## Background to the Bill

- 2.8 The concept of requiring retailers to disclose 'farm gate' prices alongside retail prices has been raised before. In 2008, the ACCC examined grocery prices generally and considered the 'farm gate' price issue, though did not find grounds for implementing such a measure.
- 2.9 In 2011 the Senate Economics Legislation Committee inquired into Senator Xenophon's Bill (mentioned above). The Senate Committee recommended the Senate reject the Bill.

## Australian Competition and Consumer Commission's 2008 grocery prices inquiry

- 2.10 The ACCC's 2008 inquiry into the competitiveness of retail prices for standard groceries examined farm gate and retail pricing, in response to 'a significant concern raised at hearings and in submissions' relating to 'whether the "gap" between farm gate and retail prices for groceries has been widening in recent times.'<sup>3</sup> The ACCC found:

The relationship between the farm gate and the check-out is quite direct for fresh products, such as meat, fresh fruit and vegetables. ... In particular, there is no across-the board evidence to suggest that retail prices for fresh products are going up by a greater percentage than farm-gate prices. The gross margins of Coles, Woolworths and Metcash in fresh products have as a whole not increased significantly in recent years. ... The ACCC accepts that many Australian farmers are suffering and low prices for their product may be a significant contributing factor. However, the extent to which the market power of retailers contributes to this problem is limited.<sup>4</sup>

- 2.11 The above finding was not universally accepted, a point reflected in media coverage at the time.<sup>5</sup>

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3 ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', July 2008, p. 302.

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

5 See for example *The Land*, 'Supermarkets Bag an ACCC Bargain', 7 August 2008, p. 9; *Sydney Morning Herald*, 'Growers Defeated in Pulp Friction', 6 August 2008, p. 7.

## Senate Economics Legislation Committee inquiry

2.12 In November 2011, the Senate Economics Legislation Committee reported on the Bill introduced into the Senate by Senator Xenophon. According to the report:

In summary, the committee's view is that the evidence it has received clearly indicates that there are substantial problems with the Bill at every level, in relation to:

- the determination of a producer price;
- the unintended adverse consequences of the Bill for producers that would likely outweigh any benefit, however slight that might be;
- the potentially misleading nature of a producer price;
- the lack of evidence that the problem identified by the Bill exists;
- if the problem does exist, the Bill may not be the correct response to that problem; and
- the serious concerns of the ACCC about its capacity to enforce the Bill.<sup>6</sup>

2.13 The Senate Committee received evidence that 'the gap between farm gate prices and retail prices for fresh produce is not caused by the actions of the major retailers' and that the 'display of a producer price by itself will not add to transparency' because of the nature of the supply chain.<sup>7</sup> Rather, low returns to growers were attributed to:

- the high Australian Dollar;
- limited export markets; and
- oversupply within local markets.<sup>8</sup>

2.14 The report stated:

The evidence obtained by the Committee indicates overwhelmingly that the problem the Bill seeks to address either

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6 Senate Economics Legislation Committee, 'Constitutional Corporations (Farm Gate to Plate) Bill 2011', November 2011, p. 47.

7 Senate Economics Legislation Committee, 'Constitutional Corporations (Farm Gate to Plate) Bill 2011', November 2011, p. 46.

8 Senate Economics Legislation Committee, 'Constitutional Corporations (Farm Gate to Plate) Bill 2011', November 2011, p. 33.

does not exist or is at least extremely contentious. On that basis, the committee cannot recommend that the Bill be supported.<sup>9</sup>

- 2.15 Senator Xenophon, in a dissenting report, argued that the remedy to low farm gate prices is greater transparency in the supply chain. He stated that the Bill was not intended to solve every problem and consumers desire more information, not less, and 'would be receptive to this measure once they are aware of how it operates.' He also recommended that the Horticulture Code of Conduct 'be expanded to apply to all wholesalers and retailers' and called for the Bill to be passed.<sup>10</sup>

## Issues raised during this inquiry

- 2.16 Submissions to this inquiry presented arguments and raised themes of a similar vein to previous inquiries, which were largely oriented around the price margins of the major supermarkets.
- 2.17 The Australian National Retailers Association (ANRA) submitted that food retailers in 2009-10 achieved a pre-tax profit margin of 5.8% compared to 11.1% across all industries.<sup>11</sup> ANRA also stated that the Bill has been based on 'the mistaken belief that grocery retailers are earning 'unfair' margins.'<sup>12</sup> One submission cited the 'market monopoly exercised by Coles and Woolworths as a major obstacle for food growers in obtaining a fair price.'<sup>13</sup> Coles Supermarkets Australia Pty Ltd (Coles) submitted that farmers receive between half and two-thirds of the final retail price and 'receive a fair share of the retail price... given the other costs and players in the agri-food supply chain.'<sup>14</sup> The National Farmers' Federation (NFF) sympathised with the Bill's intent of adding transparency to the supply chain and obtaining appropriate prices for primary producers, but believed 'that this proposal will not achieve these outcomes and is potentially unworkable (or at least extremely difficult to implement) in practice.'<sup>15</sup>

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9 Senate Economics Legislation Committee, 'Constitutional Corporations (Farm Gate to Plate) Bill 2011', November 2011, p. 46.

10 Senate Economics Legislation Committee, 'Constitutional Corporations (Farm Gate to Plate) Bill 2011 - Dissenting Report by Senator Nick Xenophon', November 2011, pp. 49-52.

11 Submission 16, Australian National Retailers Association, p. 8.

12 Submission 16, ANRA, p. 8.

13 Submission 9, Louise McManus.

14 Submission 10, Coles, p. 10.

15 Submission 4, NFF, p. 1.

2.18 Three major areas of concern were raised in submissions:

- identification of the 'farm gate' price;
- display of the 'farm gate' price; and
- impacts on suppliers and retailers.

These are each discussed in turn below.

## Identification of the 'farm gate' price

2.19 According to the ANRA it would be unfeasible to identify a 'farm gate' price that could be displayed in supermarkets:

In practice, this requirement would mean that large retailers must 'discover' the prices farmers are paid for their produce. This is highly problematic, if not impossible. ... ANRA's supermarket members typically source fruit and vegetables from a variety of providers... where produce is consolidated, graded, packed etc before purchase by retailers.<sup>16</sup>

2.20 In addition, according to Coles' submission, the retail price includes many other components unrelated to the farm gate price:

The reality is that the agri-food supply chain is complex and that there are a range of parties including growers, packing shed operators, transport operators, distribution centre operators and wholesalers and retailers who all influence the final price of fresh produce.<sup>17</sup>

2.21 Woolworths similarly submitted that the Bill 'specifically excludes the majority of the costs accrued during the supply chain from the calculation of a farm gate price.'<sup>18</sup> Woolworths informed the Committee that the initial price paid to farmers is unknown 'as we only have visibility of our cost price when we purchase the product several steps into the supply chain.'<sup>19</sup> The submission added:

Not only do we not see the price paid to the majority of farmers who grow our produce, but the actual concept of a farm gate price as defined in the proposed Bill does not exist in practice.<sup>20</sup>

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16 Submission 16, ANRA, p. 7.

17 Submission 10, Coles, p. 3.

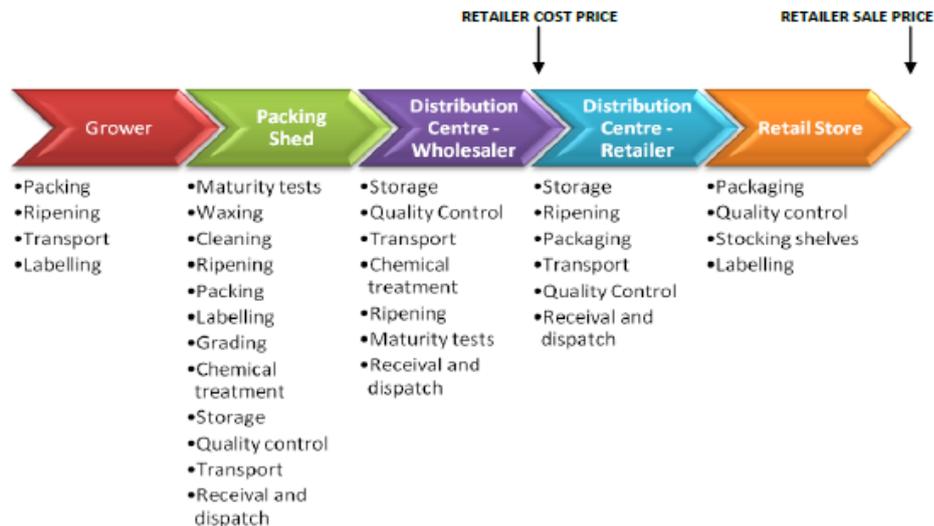
18 Submission 18, Woolworths, p. 1.

19 Submission 18, Woolworths, p. 1 and p. 7.

20 Submission 18, Woolworths, p. 1.

2.22 Woolworths provided the following diagram in its submission to show the stages of produce processing through the supply chain.

Figure 2.1: Example of the fresh produce supply chain



Source Submission 18, Woolworths, p. 8

2.23 Although the Committee was informed that the ‘farm gate’ price is non-existent and not identifiable, Coles was able to supply the Committee with illustrative examples of price margins to advance a separate argument relating to how the Bill might mislead consumers by disguising true costs and price volatility. Whilst this historic information ‘took months to complete’ and was based on ‘partial data’, Coles used the results to argue that supermarket net profit margins are ‘very low.’<sup>21</sup>

2.24 This indicates that even if ‘farm gate’ prices may be unknown, at the very least supermarket margins are identifiable.

### Display of the ‘farm gate’ price

2.25 A number of submissions were of the view that displaying the farm gate price would mislead and confuse consumers because the ‘farm gate’ price would not move in synchronisation with retail prices. Display of farm gate prices as envisaged in the Bill would be ‘highly misleading’ according to the ANRA, because customers do not necessarily understand the ‘process and costs involved in bringing fresh produce to their local food retailer.’ The ANRA also advised that confusion would arise when prices change due to seasonal variation of supply and demand, along with a ‘myriad’ of other market factors. ‘As a result, there could well be

21 Submission 10, Coles, p. 4.

instances where the average farm gate price could exceed the price offered by the food retailer,' the ANRA submitted.<sup>22</sup>

2.26 Coles and Woolworths concurred, each respectively submitting that the display of farm gate prices would cause 'confusion amongst consumers'<sup>23</sup> and 'provide misleading information to consumers.'<sup>24</sup> Woolworths explained that reporting a 'farm gate' price would be potentially unrepresentative of true costs.<sup>25</sup>

2.27 The National Farmers' Federation (NFF) also had a similar stance. The NFF, while 'supportive of a transparent value chain and obtaining appropriate prices for primary producers,' submitted:

...we believe that this proposal will not achieve these outcomes and is potentially unworkable (or at least extremely difficult to implement) in practice. The NFF does not believe that the Bill will improve farm gate prices and will instead create a confusing layer of information for consumers.<sup>26</sup>

2.28 The Queensland Law Society's submission did not support the Bill, giving on the same grounds as retailers and farmers: in essence, implementation would not be possible. Additionally, the Society pointed out that the Bill is not expressly limited only to Australian farm gate prices, creating additional price verification problems if international farm gate prices were included. The Society also argued that 'to itemise all the costs involved would be cost prohibitive and would not assist in promoting the objectives of the Bill'.<sup>27</sup>

## Impacts on suppliers and retailers

2.29 The ANRA submitted that, even if a 'farm gate' price could be identified, the task of compiling the information would be burdensome and cause retailers to bear the cost of gathering and tracking farm gate prices. The ANRA's submission stated:

Even if this information were available... attempting to compile and maintain a database of 'farm gate prices' for retailers would

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22 Submission 16, ANRA, p. 8.

23 Submission 10, Coles, p. 3.

24 Submission 18, Woolworths Ltd, p. 2.

25 Submission 18, Woolworths Ltd, p. 1.

26 Submission 4, NFF, p. 1.

27 Submission 5, Queensland Law Society, pp. 1-2.

also impose a significant regulatory impost on farmers and the wholesale businesses they supply.<sup>28</sup>

- 2.30 The Queensland Law Society's submission commented that any errors or omissions, even when price changes could be 'fluid', might amount to 'misleading or deceptive behaviour' by retailers if incorrect prices were displayed.<sup>29</sup> This, in turn, may attract financial penalties.
- 2.31 Woolworths cautioned that displaying the farm gate prices 'could actually decrease returns to farmers' as buyers through the supply chain could compare each other's prices and respond by aiming to match the lowest 'farm gate' price.<sup>30</sup> 'Additionally, such reform would create additional costs for farmers, wholesalers and retailers,' Woolworths submitted, also adding that the reform would generate increased regulation.<sup>31</sup>

## Committee comment

- 2.32 The Committee agrees with evidence received that 'farm gate' prices would be difficult for retailers to identify. Fundamentally, this is because the major retailers generally do not purchase directly from growers.
- 2.33 Even if identifiable, display of the farm gate price would be potentially misleading, as other costs added into the price of produce along the supply chain would remain undisclosed. Produce that undergoes a process of handling, shipping and packaging would need to have a farm gate price displayed without these components included. Other practical problems might also arise, for example, when produce purchased on separate occasions, at various prices, is later sold on the same shelf. There is also a risk that anomalous price trends will cause confusion and potentially deter purchases of fresh fruit and vegetables.
- 2.34 The Committee believes that the nature of the supply chain makes the Bill's implementation impractical. It is also likely that retail prices would increase to offset expenses associated with tracing and monitoring 'farm gate' prices.
- 2.35 Whilst the Committee acknowledges the Bill's positive intent and supports the principle of increased transparency and information for consumers,

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28 Submission 16, Australian National Retailers Association, p. 7.

29 Submission 5, Queensland Law Society, p. 2.

30 Submission 18, Woolworths, p. 9.

31 Submission 18, Woolworths, p. 9.

the Committee believes that the Bill may not necessarily achieve its aims and could have adverse and unintended consequences. Therefore, the Committee does not support the Bill.

### **Recommendation 1**

- 2.36 **The Committee recommends that the Constitutional Corporations (Farm Gate to Plate) Bill 2011 not be passed.**

## 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').<sup>1</sup> 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.<sup>2</sup>
- 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
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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 manager 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.'<sup>3</sup>
- 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).<sup>4</sup> 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.<sup>5</sup>
- 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.<sup>6</sup>

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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.<sup>7</sup>
- 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.’<sup>8</sup>
- 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.<sup>9</sup> 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.<sup>10</sup>
- 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.<sup>11</sup> 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.<sup>12</sup>
- 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.<sup>13</sup> 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.<sup>14</sup>

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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.<sup>15</sup> 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

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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’.<sup>16</sup> Fresh State Ltd, the representative organisation for wholesalers located within the Melbourne Markets, also gave a similar view.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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

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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.'<sup>21</sup>

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.'<sup>22</sup>

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.<sup>23</sup>

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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’<sup>24</sup>, 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.<sup>25</sup>

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.’<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

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’.<sup>29</sup> 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

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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.<sup>30</sup>

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.'<sup>31</sup>

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.<sup>32</sup>

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'.<sup>33</sup>

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

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.<sup>36</sup>

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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.’<sup>37</sup>

## 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 processor 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.’<sup>38</sup>

- 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.<sup>39</sup> 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.<sup>40</sup>

- 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.’<sup>41</sup>

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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.<sup>42</sup>

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.<sup>43</sup> 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.'<sup>44</sup>

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<sup>45</sup>). 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.'<sup>46</sup> 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].<sup>47</sup>

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.'<sup>48</sup> 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.<sup>49</sup>

## 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.<sup>50</sup>

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

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.'<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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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**

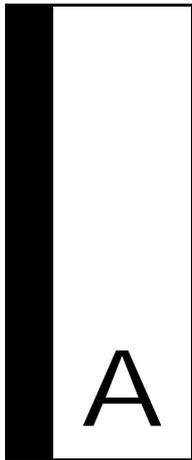
3.74 **The Committee recommends that the Competition and Consumer Amendment (Horticulture Code of Conduct) Bill 2011 not be passed.**

Hon Dick Adams MP

Committee Chair

14 March 2012





## Appendix – Submissions

- 1 Mareeba District Fruit and Vegetable Growers Association Inc
- 1.1 Supplementary Submission - CONFIDENTIAL
- 2 Sydney Markets Limited
- 3 Australian Competition & Consumer Commission
- 4 National Farmers' Federation
- 5 Queensland Law Society
- 6 Freshmark
- 7 Perth Market Authority
- 8 Tasmanian Farmers & Graziers Association
- 9 Ms Louise McManus
- 10 Coles Supermarkets Australia Pty Ltd
- 11 Horticulture Taskforce
- 12 One Harvest
- 13 NSW Farmers' Association
- 14 Growcom
- 15 The Australian Chamber of Fruit and Vegetable Industries Ltd
- 16 Australian National Retailers Association
- 17 Fresh State
- 18 Woolworths Limited
- 19 Mr Ron Fawcett

- 20 Tasmanian Government
- 21 Northern Territory Government