



SUBMISSION NO. 13 Horticultural Code and Farm Gate to Plate

House of Representatives
Standing Committee on Agriculture, Resources, Fisheries and Forestry
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

By email: arff.reps@aph.gov.au

Dear Committee Secretary,

RE: Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011

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

NSW Farmers appreciates the opportunity to provide input into the House Standing Committee on Agriculture, Resources, Fisheries and Forestry inquiry into the *Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011* (the Bill).

NSW Farmers has long sought for the fundamental issue of transparency in trading in the horticulture industry to be appropriately addressed. A robust Horticulture Code of Conduct is critical for the long term future of the horticulture industry.

The current Horticulture Code of Conduct (the current Code) was implemented in May 2007 to address market failure and provide clarity and transparency for growers and wholesalers by clarifying the rights and responsibilities of each party. It also aimed to provide a fair and equitable dispute resolution process for disputes arising under the current Code. The current Code has failed to deliver on these issues. In particular wholesalers have not been compelled to act as either an agent or a merchant. The current hybrid model used by wholesalers fails to differentiate between agents and merchants and their respective legal obligations.

NSW Farmers has made several requests of the Australian Government to make a decision in regards to the recommendations made by the Horticulture Code of Conduct Committee following the review of the current Code by the Australian Competition and Consumer Commission (ACCC) in 2008. The lack of a decision has caused confusion in the marketplace, with some growers being told by their wholesalers that a Horticulture Produce Agreement (HPA) is not required because the current Code is being reviewed, when in fact a HPA remains a legal requirement.

In August 2011 a Horticulture Code of Conduct Sub-Committee of the Horticulture Taskforce (representing horticulture peak industry bodies) developed a Position Paper on the Horticulture Code of Conduct. NSW Farmers is a member of this Sub-Committee and the Position Paper is supported by all members of the Horticulture Taskforce, state farming organisations representing horticulture in all states and territories and the National Farmers Federation. NSW Farmers refers the Committee to this Position Paper.

NSW Farmers' Association

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As NSW Farmers supports policy which brings transparency to the marketplace we strongly endorse the intent of the proposed Bill. However, some content of the Bill requires further consideration and possible clarification or amendment. NSW Farmers refers the Committee to the submission by the Horticulture Taskforce, prepared by their Horticulture Code of Conduct Sub-Committee of which NSW Farmers is a member. It provides a detailed response to the proposed Bill and we endorse the submission.

Key areas that require further consideration are:

51AEC Definition of the term “Seller”: The term “Grower” should be used rather than “Seller” and the target of the proposed Bill should be the first point of sale from the grower. The intent of the proposed Bill should be to make the wholesaler/grower relationship more transparent than to regulate all transactions in the supply chain.

51AEC Definitions of “Terms of Trade” and “Agreed Terms of Trade”: Separate definitions are given for “Terms of Trade” and “Agreed Terms of Trade”. However, the use of only “Agreed Terms of Trade” in many clauses of the proposed Bill potentially means that a range of Bill requirements are not there for those relationships using a “Terms of Trade” rather than an “Agreed Terms of Trade”.

51AED Application of the Code: A transition period of six months to sign compliant contracts is suggested as not all growers supply the market year round due to the seasonality of the commodities they produce.

51AEG Seller failure to give Intent to Dispatch Produce Notification: Unsolicited produce is provided at the growers risk and an agency relationship should be the default. It is common business practice that a grower will inform their wholesaler what and when they are going to dispatch.

51AEJ If a Merchant or Agent does accept an Intent to Dispatch Produce Notification: The Bill states that the Merchant/Agent must advise the Seller of the rejection of the consignment within the time specified in the Agreed Terms of Trade, but it must not exceed 8 hours after the time of delivery. This is confusing when provision 51AEU stipulates a 24 hour period for agreement on a price in a merchant transaction, effectively providing two opportunities for the produce to be rejected – 8 hours to actual straight out rejection and at 24 hours if the price offered is unacceptable to the grower. NSW Farmers contends that a price should be agreed before or at delivery in a merchant transaction.

51AEN, 51AEO, 51AES Payments of proceeds of sale, Commissions and Trust Account: The operation of a Trust Account and who will be required to use it requires further clarification. Many growers will have concerns that they will have to pay a non-negotiable 2.5% commission for the Trust Account service when their profit margins are already small. Existing similar mechanisms should be explored to identify an appropriate price point for commission and whether growers would see the additional cost as providing sufficient benefit in terms of enhanced transparency.

51AEU Transfer of Ownership of Horticultural Produce (Merchant Transaction): It is normal and fair for the price to be agreed at or before delivery in a merchant transaction. As such, NSW Farmers does not support the allowance in the proposed Bill for up to 24 hours to agree on a price in a merchant transaction. If a merchant does not wish to agree on a price at or on delivery they should trade as an agent. Additionally if the produce does not



meet the agreed specifications and quality standards this is a breach of contract and the merchant has the right to reject the produce.

51AEW Summary price information: There should be safeguards so that pooling and price averaging is done only across an agreed specification. This is not dealt with in the proposed Bill.

51AEY Horticultural Inspectors: The role of inspectors should be expanded to determine not just whether any rejection is fair, but that produce meets the pre-agreed product specifications.

51AEZ Mediation: A conciliation mechanism rather than a mediation mechanism should be considered.

51AEZA Oversight by the Horticultural Code Management Committee: The proposed Bill states that the Management Committee would include 3 sellers. This should be changed to 3 growers. As the definition of “seller” is wide in the proposed Bill the Management Committee could end up with no growers.

Additional recommendations: A number of issues not dealt with within the proposed Bill should be considered and addressed by any horticulture code of conduct. These include exempting face-to-face transactions that are conducted with immediate settlement on collection and providing the identity of the produce purchaser in all agency transactions.

NSW Farmers' priorities for any horticulture code of conduct are aligned with the priorities provided in the submission by the Horticulture Taskforce. These are:

1. Wholesalers must be compelled to act as either agents or merchants;
2. All transactions should be subject to a code including those transactions made under agreements prior to 15 December 2006; and
3. Dispute resolution provisions should be based on a conciliation model rather than a mediation model.

For further information regarding the views of NSW Farmers on this Bill and the Horticulture Code of Conduct, please myself on 0418 668 691 or Policy Manager – Horticulture, Alison Anderson on 02 8251 1872.

Yours sincerely,

Peter Darley
CHAIRMAN – HORTICULTURE COMMITTEE

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