

December 2011

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



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Retailers Association**

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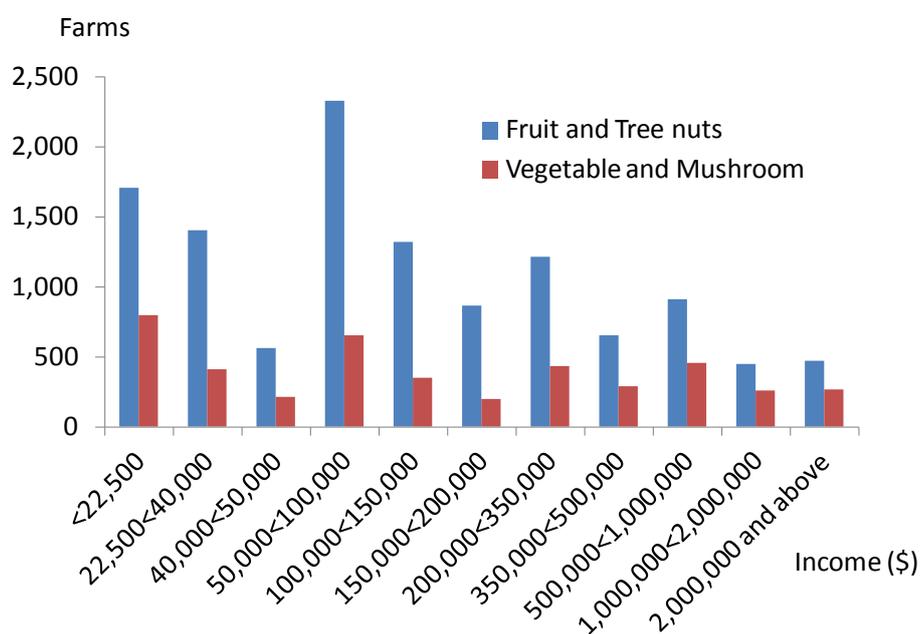
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1. Background: Produce Markets, Retailers' Conduct and Food Prices

1a. Producers in Australia

There were 4,355 vegetable and mushroom producing farms across Australia in 2009-10, 3,136 (or 72%) of which generated annual farm incomes of more than \$40,000 per annum. These farms were responsible for almost all of Australia's vegetable production.¹ By comparison, there were 11,899 fruit and tree nut growing farms across Australia in 2009-10, 8,783 (or 74%) of which generated annual farm incomes of more than \$40,000 per annum. Figure 1 displays the distribution of produce farms on the basis of annual farm income.

Figure 1



Source: ABS (2011), 71210DO002_200910 Agricultural Commodities, Australia, 2009-10

To put these numbers into context, from the large retailers' perspective, ANRA members report that they deal with 'hundreds' of fresh fruit and vegetable suppliers. These suppliers may be primary producers, wholesalers, or a combination of both. What is clear is that large grocery retailers do not have direct commercial relationships with the vast majority of Australia's fresh fruit and vegetable producers.

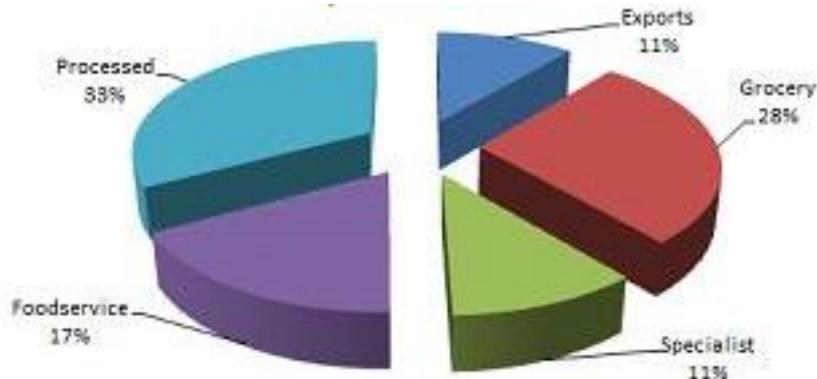
1b. Distribution of fresh fruit and vegetable produce

Australian fruit and vegetable producers supply a variety of end users via a range of distribution channels. Retailers (including specialist fruit and vegetable retailers and the hospitality industry) typically compete with food processors and export markets for available produce. Retailers may acquire fresh fruit and vegetables directly from farmers, from wholesalers (that may or may not be farmers) or from produce markets.

¹ ABS (2011), 71210DO002_200910 Agricultural Commodities, Australia, 2009-10 and ABARES (2011), 'Australian vegetable growing farms: an economic survey, 2009-10'.

Figure 2 below shows that less than two-fifths (39%) of all vegetable produce is sold through fresh food retailers – 28% through grocery and 11% through specialist retailers. The balance is distributed to food service businesses (17%), food processors (33%) and export markets (11%).²

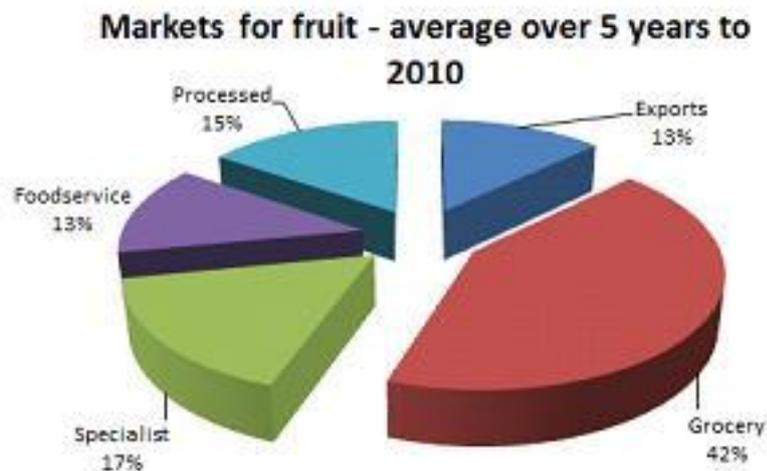
Figure 2: Average allocation of vegetables over the 5 years to 2010, by volume



Source: Fresh Logic (2011).

Figure 3 below shows that around three-fifths of all fruit produce is sold through fresh food retailers – 42% through grocery and 17% through specialist retailers.³ The balance is sold through to food service businesses (13%), food processors (15%) and export markets (13%).⁴

Figure 3: Average allocation of fruit over the 5 years to 2010, by volume



Source: Fresh Logic (2011).

² Fresh Logic (2011).

³ Ibid.

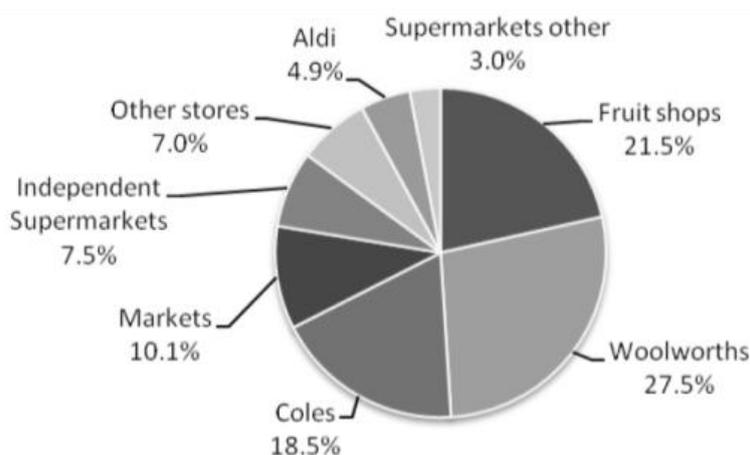
⁴ Fresh Logic (2011).

1c. Fresh fruit and vegetable sales within retail channels

ANRA's grocery members are significant supporters of Australia's primary food producers. Around 95% of the fresh food sold in supermarkets is sourced from Australian producers. Imported produce is typically only sourced to maintain supplies of customers' favoured produce throughout the year.

Figure 4 below shows that large supermarket businesses account for around half (54%) of all retail sales of fresh fruit and vegetables, with the balance made up by fruit shops (21.5%), produce markets (10.1%), independent supermarkets (7.5%) and other stores (7.0%).⁵

Figure 4: Share of fruit and vegetable purchases, by value



Source: Roy Morgan Supermarket Monitor (June 2011).

1d. Conduct of Supermarkets

The Australian Competition and Consumer Commission (ACCC) completed a comprehensive review of the conduct of major supermarket chains (MSCs) in 2008, with particular reference to pricing decisions and sourcing arrangements for standard grocery items.⁶ In terms of the general conduct of MSCs, the ACCC found:

'very little in the way of specific evidence of harsh or unconscionable conduct by the MSCs, or specific incidents of apparent abuse of their market position by the MSCs. In fact, many growers and suppliers summonsed to attend the hearings by the ACCC provided positive reports about the conduct of the MSCs' (p.326)

And when discussing the specific case of fresh fruit and vegetable pricing and the conduct of major supermarket chains (MSCs), the ACCC concluded:

'It is easy to look to the MSCs given their size and related buying power and assume that this is leading to a widening of the gap between farm gate and retail prices. However, the data available to the ACCC certainly do not support that as a universal picture. Indeed, the data contradicts it in many fruit and vegetable categories.' (p.307)

ANRA members believe this view remains representative of the current marketplace.

⁵ Roy Morgan Supermarket Monitor (June 2011).

⁶ ACCC (2008), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

1e. Food Price Inflation

Australian food prices had increased by 44% or 3.5% on average per year between the year 2000 and 2010. This occurred during a period where Australian households faced broadly similar (3.0% on average) increases in the prices of most other household expenses over the corresponding period.⁷

During this time average wages have increased by 3.5% on average per year, while the proportion of household budgets devoted to food has actually fallen from 14.4% in 1998/99 to 12.1% in 2009/10.⁸

To put these numbers into some international context, Australian food price inflation has been in line with the European experience (also 3.5%) and just ahead of New Zealand (3.1%) for the corresponding period. Food price inflation has been slightly weaker in the United Kingdom (2.9%), Canada (2.7%) and the United States (2.5%). However, with the exception of New Zealand, the economic performances of these other economies, and therefore broader inflationary pressures, have been much weaker. Table 1 below provides further details.

Table 1: Average Annual Growth in Food Prices, Real GDP (%), 2000 – 2010) and wages⁹

	<i>Food Prices</i>	<i>Real GDP</i>	<i>Wages</i>
Australia	3.5	3.0	3.5
Canada	2.7	2.2	3.2
New Zealand	3.1	2.6	n/a
OECD Europe	3.5	1.6	n/a
United Kingdom	2.9	1.7	3.2
United States	2.5	1.8	2.7

⁷ Australian Bureau of Statistics (2011), '640109 CPI Analytical series', Based on the Consumer Price Index excluding volatile items, like automotive fuel.

⁸ OECD.StatExtracts (2011) and Household Expenditure Surveys in 1998/99 and 2009/10.

⁹ Organisation for Economic Cooperation and Development (OECD) member nations in Europe.

2. Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011

2a. Extension of the Code to retailers is not necessary

ANRA is supportive of the intent of the Bill, to *'ensure contractual clarity and transparency of all transactions and provide a cost-effective mechanism for fair and equitable dispute resolution.'*¹⁰

However, ANRA does not see the justification in extending the Horticultural Code of Conduct to retailers. The code was initially developed *'to improve the clarity and transparency of transactions between growers and wholesalers of fresh fruit and vegetables.'*¹¹ That is, it was developed in response to poor business practices between growers, wholesalers and other agents in the initial stages of the horticultural produce supply chain.

As part of its 2008 inquiry the ACCC considered an extension of the existing Horticulture Code of Conduct to retailers, food processors and exporters. The ACCC recommended the Horticulture Code Committee consider extending the code to producers' first point of contact along the supply chain. However, the Horticulture Code of Conduct Committee considered that this extension of the Code would create additional compliance and administrative burdens and was concerned that the cost of these burdens may be outweighed by the benefits they would bring.

*'The full extent of these costs has not been estimated by the Committee but it is likely to be significant.'*¹²

The ACCC also clearly stated:

*'In recognition of what was understood to be relatively clear and transparent retailer horticulture produce supply arrangements, the government exempted retailers from the Horticulture Code.'*¹³

In addition, Horticultural Australia Council acknowledge that the operating practices of Australia's major supermarkets are already above and beyond the requirements of the Horticultural Code of Conduct, further adding weight to ANRA's argument that retailers should not be captured by the Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011:

*'The contracts agreed to by the major retailers with their direct suppliers more than meet the minimum requirements of the Code – in general, they are solid documents covering both the terms of trade arrangements and the specific agreements currently covered by the Horticulture Produce Agreement. These trading relationships are currently covered by the national Produce and Grocery Code. In general terms, industry has no reason to suppose that these contracts are not operating as intended.'*¹⁴

¹⁰ Subsection 51AEB(2) on p.7, *Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011*

¹¹ <http://www.accc.gov.au/content/index.phtml/itemId/783105>

¹² Horticultural Code of Conduct Committee (2009) *Implications of the Australian Competition and Consumer Commission recommendations to amend the Horticulture Code of Conduct* p.4

¹³ ACCC (2008), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* p.394

¹⁴ Horticulture Australia Council (2008) Submission to ACCC Review of Retail Grocery Pricing p.6 & 7

2b. Produce and Grocery Industry Code of Conduct more appropriate

ANRA believes the existing Produce and Grocery Industry Code of Conduct is a more appropriate means of promoting clarity and transparency in commercial relationships. The Produce and Grocery Industry Code of Conduct plays a significant role within industry, acting as a guide for 'good business practice' across the entire produce and grocery industry supply chain – not just for horticultural produce.

The objectives of the Produce and Grocery Industry Code of Conduct are to:

- promote fair and equitable trading practices amongst industry participants;
- encourage fair play and open communication between industry participants as a means of avoiding disputes; and
- provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute (via the Produce and Grocery Industry Ombudsman mediation service).¹⁵

The Produce and Grocery Industry Code of Conduct has an additional benefit in that it was developed by, and is managed by industry – with support from Government. ANRA members Coles and Woolworths both have direct representation on the Produce and Industry Code Administration Committee, alongside representatives of the broader retail and agricultural industries.

Indeed, in the opinion of the Produce and Grocery Industry Code Administration Committee, extending the Horticultural Code of Conduct to retailers may also have significant negative consequences for commercial relationships across the broader produce and grocery industry:

'Any extension to the horticulture code to cover retailers would still leave large parts of the produce and grocery industry not covered by a mandatory code and could, at the same time, remove the incentive for horticulture growers, wholesalers and retailers to remain committed to the voluntary code. Such an outcome would be detrimental to broader produce and grocery industry as it could effectively destroy an effective code that has contributed to an improvement in business practices across the entire produce and grocery industry.'

Due consideration must be given to the implications of an extension of the code to business practices across the wider supply chain.

In addition, the operational experience of the Produce and Grocery Industry Code of Conduct 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 Produce and Grocery Industry Code of Conduct has rarely been used in relation to supermarket-grower disputes. Consequently, there is little evidence to support the arguments that there needs to be an expansion of the Horticultural Code of Conduct to retailers.

¹⁵ www.produceandgrocerycode.com.au

3. Constitutional Corporations (Farm Gate to Plate) Bill 2011

3a. The Bill has been rejected by the Senate Economics Legislation Committee

ANRA notes the Senate Economics Legislation Committee conducted an earlier inquiry into this Bill and did not support the Bill, concluding that:

*'Based on the evidence obtained by the committee during its inquiry, as well as information otherwise available, the committee has reached a very strong view that... the Bill should not be passed.'*¹⁶

'The evidence obtained by the committee indicates overwhelmingly that the problem the Bill seeks to address either does not exist or is at least extremely contentious. On that basis, the committee cannot recommend that the Bill be supported.'

3b. Average 'Farm Gate Price' is Impractical

The Bill defines a 'farm gate price' as:

'the price of produce available at the farm, excluding the costs of transport, processing, storage and marketing and profit margins of any entities involved, including the grocery retailer'.

In practice this requirement would mean that large retailers' must 'discover' the prices that farmers are paid for their produce. This is highly problematic, if not impossible. Large retailers do not currently have direct access to the details of prices that fruit and vegetable farmers receive for their produce. ANRA's supermarket members typically source fruit and vegetable supplies from a variety of providers; including farmers' co-operatives, wholesalers and produce markets – where produce is consolidated, graded, packed etc before purchase by retailers.

As a result, in the clear majority (almost all) of cases the fruit and vegetable prices that large retailers' have an understanding of also incorporate their suppliers' transport, processing and marketing costs, amongst other factors – including suppliers' profit.

It is also not clear which farmers have provided the produce that large retailers are ultimately supplied with. ANRA's grocery members have minimum standards for any product they sell, and quality is a particularly important determinant of fresh fruit and vegetable prices. This gives rise to the need for wholesalers to sort and grade the produce they buy from farmers – meaning that a particular consignment of fresh fruit or vegetables is likely to have been contributed to by a variety of farmers.

Even if this information was easily obtainable, and in ANRA's view it is not, attempting to compile and maintain a database of 'farm-gate prices' for retailers to refer to would also impose a significant regulatory impost on farmers and the wholesale businesses they supply. ANRA's views on this requirement are not solitary. For example, the Produce Marketing Association Australia-New Zealand note that:

¹⁶ Senate Economics Legislation Committee (Nov 2011) p.45

'fruit and vegetable prices change almost daily, depending on supply and demand, so the task of monitoring and updating prices would be monumental'.

These views are reflected in the Senate Economics Legislation Committee's findings:

*'The evidence obtained by the committee suggests that the primary difficulty with the Bill relates to how the retailer will calculate the producer price.'*¹⁷

*'The committee believes the Bill could not operate in an economically efficient or practical manner and may, in fact, have the adverse consequence of increasing the producers' costs, with no evidence it will improve the prices they receive.'*¹⁸

3c. Likely Customer Confusion

ANRA understands the proponents of the Bill believe this requirement would provide consumers with an indication of food retailers' profit margins. ANRA has highlighted that retail food prices also reflect transport, processing, storage, handling and marketing costs, amongst others, in addition to profit margins. This is also recognised implicitly within the definition of farm gate price in section seven (7) of the Bill.

ANRA believes that even if this 'information' were available for retailers' to display it would likely be highly misleading for consumers and act to antagonise customers that do not have a full understanding of the processes and costs involved in bringing fresh produce to their local food retailer.

Indeed, it appears a primary motivator for the Bill is the mistaken belief that grocery retailers are earning 'unfair' margins. In contrast, food retailing margins are well below average. Australia's food retailers achieved a pre-tax profit margin of only 5.8% in 2009/10 – less than six cents for every dollar of sales. This compares with 5.3% for the retail sector and 11.1% across all industries.

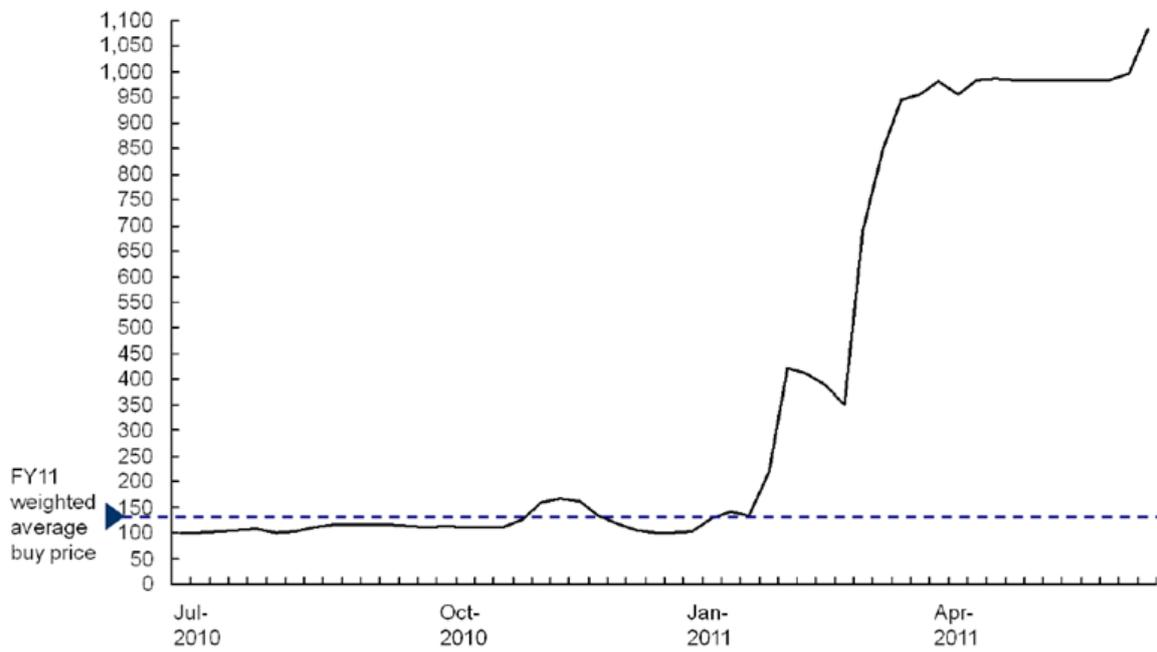
ANRA also believes that displaying an average farm gate price alongside the offered retail price will be confusing for consumers of produce that exhibits highly seasonal variation in supply and demand levels (and therefore prices). Retail prices are determined by a myriad of factors and reflect current conditions with that particular market. In contrast, the average farm gate price structure would reflect those factors over a far longer (and distant) period and would smooth out much of this seasonality. As a result, there could well be instances where the average farm gate price could exceed the price offered by the food retailer.

Consider, for example, the case of bananas. You are very likely aware that a significant portion of Australia's domestic banana supply was destroyed by natural disasters in Queensland in early 2011 and therefore prices – both at the farm gate and in food retailers – for surviving produce rose in response. This is reflected in Figure 5 below. Now that Australia's banana supplies are returning to more 'normal' levels, it is likely that prices – at both the farm gate and food retailers – will fall in response. This suggests that an average farm gate price could well be above the price offered by food retailers.

¹⁷ Senate Economics Legislation Committee (Nov 2011) p.46

¹⁸ Senate Economics Legislation Committee (Nov 2011) p.47

Figure 5: Buy Price for Bananas 2010/11 (Indexed, July 2010 = 100)



Source: Woolworths (2011), *Submission to the Senate Economics Committee Inquiry into the Constitutional Corporations (Farm Gate to Plate) Bill 2011*.

4. Concluding comments

In summary, ANRA's position is that the Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011 should not capture retailers and that the Constitutional Corporations (Farm Gate to Plate) Bill 2011 should not proceed.

ANRA members are already participants in the Produce and Industry Code of Conduct, which allows for any disputes to be referred to an ombudsman and is more extensive than the requirements of the Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011. The operational experience of the Producer and Industry Code of Conduct shows that supermarket retailers have had few issues in complying with the existing Code. That is, the suggestion that the Horticultural Code of Conduct needs to be expanded to retailers is not supported by evidence that there is a problem with grower-retailer relations.

ANRA has already made clear its views on the impracticality of the Constitutional Corporations (Farm Gate to Plate) Bill 2011, in its submission to the Senate Economics Legislation Committee inquiry into this Bill earlier this year. The requirements of the Bill are impractical from an implementation perspective and represent an additional, and unnecessary, compliance burden for Australia's fresh food industry.