



Retail Grocery Industry Ombudsman

Second Annual Report

13th September 2002 – 30th September 2003

Office of the Retail Grocery Industry Ombudsman.
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Ombudsman's Foreword

Our second Annual Report coincides with the Federal Government's review of the Retail Grocery Industry Code of Conduct (the Code). The review has been eagerly awaited by many industry participants and will undoubtedly receive numerous written submissions. The Ombudsman has met with Mr Neil Buck (the review consultant) on two occasions and submitted a comprehensive submission. Much of this annual report refers to issues which are being considered by the review.

Following some success in 2002, the Ombudsman continued a number of strategies designed to improve the awareness and confidence in the Code. Importantly we appreciated that growers pay scant attention to pamphlets and brochures as an information source. We became convinced that if growers were to have confidence in the Code and the Ombudsman, they needed to "know the individual", "establish face to face contact" and "understand their problems".

A key strategy therefore was to travel widely and meet the industry (particularly growers) in their backyard by attending conferences and regional meetings to discuss problems and increase knowledge of the key elements of the Code. A second key strategy was to have the Ombudsman undertake all mediations and develop personal credibility in the industry.

With the support of the Minister, the Office of Small Business and the Australian Competition and Consumer Commission (ACCC), these strategies have demonstrably improved awareness and confidence in the Ombudsman scheme. In the period of this report, 96 dispute enquiries were received of which 44 proceeded to application for mediation. With continued high success rates in mediation, the confidence in the Ombudsman service is growing.

Our previous Annual Report covered the period 16th September 2001 to 12th September 2002. It identified a number of systemic problems including lack of 'transparency' in market dealings particularly between growers and wholesalers (merchants/agents). Lack of transparency in market dealings continues as the major source of complaint in 2003.

Identification of systemic problems in the 2002 Annual Report has been a catalyst for the mango sector to initiate several summits to address issues and work towards the development of a "Mango Industry Code of Practice". The Ombudsman has acted as an independent Chairman for the meetings and the industry is well advanced to finalising the Code.

In particular, mango industry participants are addressing dissatisfaction from some sectors of the industry about uncertainty and risk in the marketing of mangoes including handling, packing, transporting, retailing, exporting, cool chain management and market transparency particularly relating to price and quality. Summit participants include growers, packers, transporters, unloaders, wholesalers and retailers.

The Code of Practice is also being developed to establish fair trading principles and address the following central issues:

- Improve the commercial relationship between members of the supply chain from grower to retailer;

- Provide formal communication processes promoting transparency, accountability and timeliness;
- Establish best practice cool chain management; and
- Resolve complaints and/or disputes.

We view the mango industry's initiative as a role model for sector groups to work together and collaboratively create a better industry for themselves and their customers.

Bob Gaussen and David Holst
Retail Grocery Industry Ombudsman

About the Retail Grocery Industry Code of Conduct and Ombudsman Service

The Retail Grocery Industry Code of Conduct (the Code) was introduced on the 13th September 2000 as a voluntary Code for participants in the Retail Grocery Industry.

Its objects 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.

Industry participants are involved in vertical commercial relationships in the production, preparation and sale of food, beverages and non-food grocery items, including (but not limited to) primary producers, manufacturers and/or processors, wholesalers, importers and/or distributors, brokers and/or agents and grocery retailers.

This is a vast industry which is defined by reference to both produce and product. The Code defines these terms in Section 4 "Definitions".

"Produce means yield, especially of fields or gardens, waterways, dams or oceans, including yield from plants and/or animals under cultivation and/or harvested from the wild, for sale as raw horticultural and agricultural goods. Produce includes yield of freshwater and marine life and yield which is food or non-food."

This includes fruit, vegetables, cattle meat, sheep meat, chicken and turkey meat, grains, fish, cane, dairy, cotton, eggs, rice and flowers. More controversially some industry participants assert these terms include wine grapes and seeds grown at nurseries.

"Product means that which may be generated or made by a process of industrial transformation, including any produce that has been subject to any process or treatment resulting in an alteration of its form, nature or condition, that is sold in the industry."

This includes all processed foods sold in supermarkets including products such as breakfast cereals, biscuits, breads, jams, confectionary, tinned foods and fruits of all varieties, frozen foods, bottled drinks, soups etc. More controversially some industry participants assert these terms include alcohol, wool, pharmaceuticals, detergents and all other non-food grocery products distributed to consumers through grocery retailers.

The Code was developed by the Retail Grocery Industry Code of Conduct Committee. This committee was appointed by the Federal Government upon its acceptance of a number of the recommendations by the Federal Parliamentary Joint Select Committee on the Retailing Sector in its report, "Fair Market or Market Failure?" (Baird Report)¹.

¹ Fair Market or Market Failure? A review of Australia's retailing sector. August 1999

The Commonwealth Government largely supported the recommendations of the Baird Report. Principally of relevance to the terms of this Review, the government:

- Was prepared to give the industry itself the first opportunity to rectify problems identified in the Baird Report;
- Tasked an industry funded code committee to develop a voluntary Code of Conduct for the retail grocery industry;
- Provided advice to the retail sector to assist it establish a Retail Grocery Industry Ombudsman scheme (the Ombudsman scheme);
- Fully funded the Ombudsman scheme.

The Ombudsman is required to provide an independent mediation service to the retail grocery industry in accordance with the Code. The service must be readily accessible to industry participants and be supported by a toll free telephone enquiry line which is available 24 hours a day, 7 days a week, including all public holidays. Additionally the Ombudsman has established an internet site which includes provision for electronic lodgement of dispute notifications and provision for industry members to seek specific information from the Ombudsman via email.

The dispute resolution procedures of the Code support a two staged process. Stage one (internal procedures) encourages applicants to raise disputes with the respondent and stage two (Industry Ombudsman) encourages unresolved disputes to be raised with the Ombudsman.

A stage one dispute may be accepted by the Ombudsman where:

- The respondent has failed to respond to the matter in dispute within a reasonable period or within that period stipulated in the internal procedures;
- The applicant and respondent are unable to resolve the matter under the internal procedures;
- The applicant or respondent is dissatisfied with the outcome of the internal procedures; or
- The applicant is dissatisfied with the respondent's internal processes or procedures in considering the matter or in reaching its decision.

However this process rarely occurs as few respondents have implemented internal dispute resolution procedures that are consistent with the Code. Where there are no internal procedures, Section 10.2 of the Code permits direct referral to the Ombudsman. Given the thrust of the Code is to encourage parties to resolve matters directly, the Committee responsible for managing the Code recently enhanced Section 10 "Dispute Resolution Procedure" under the heading of "Principle" to read as follows:

"All industry participants support a dispute resolution procedure in which:

- industry participants will publish internal dispute resolution principles consistent with the two-stage dispute resolution procedure described in this Code;
- all industry participants, industry associations and signatories to this Code will promote the existence of internal dispute resolution procedures in a genuine effort to resolve disputes;
- all internal dispute resolution procedures will provide both a statement to the effect that the industry participant supports the Retail Grocery Industry Code of Conduct and contact details for the Industry Ombudsman."

To assist parties comply with the new principles, the Ombudsman released to the industry and published on the website 'Recommended Internal Dispute Resolution Procedures for Retail Grocery Industry Participants'. At this time we have no way of assessing the take-up rate of these recommendations, if indeed there has been any take-up at all.

Notwithstanding there may be no internal procedures, we are reluctant to directly accept disputes without firstly encouraging negotiations between the parties. Therefore, the following procedures generally apply.

Initial contacts with the Office of Ombudsman are taken as "dispute enquiries". Details of the enquiry are recorded in a database. The enquirer is questioned as to whether the dispute has been discussed with the respondent. In most cases there has been either an inadequate attempt to negotiate or the issue has been largely ignored by the respondent. Permission is received from the enquirer to speak to the managing director, chairman or owner of the respondent company about the dispute with the purpose of strongly encouraging both parties to have direct negotiations over the next two weeks. The parties are requested to notify the Office as to the success or otherwise of their discussions. In about 50% of matters this intervention is sufficient reason for the respondent to focus on the complaint and, working with the applicant, devise a sensible commercial solution.

If negotiations fail or have not commenced within the two week period, a formal complaint is taken in the form of an application for mediation. Both parties receive correspondence advising receipt of the application and that the Ombudsman will be in personal contact shortly. Once the Ombudsman is satisfied that the parties are unlikely to make further progress in direct discussions, that the matter is within jurisdiction and is not frivolous, vexatious, repetitive or lacking in substantive merit, a mediation conference is convened at an agreed time and date with the parties.

The fact that we have had to modify Code processes is a practical reflection of the low take-up rate of internal procedures that are consistent with the Code. We are not convinced that the recent Code amendment will overcome this problem, unless there is industry education and proactive encouragement from industry organisations.

Highlights for 2003

Milestones during the period September 2002 to September 2003 include:

- Further development and maintenance of an interactive website at www.rgio.com.au which is regularly updated with key information and serves as a respected information resource for government, the industry and community. The site currently receives an average of 72 requests for information per day.
- For the 12 months to September 2003, handling 96 dispute enquiries of which approximately 46% were resolved under first stage procedures.
- For the 12 months to September 2003, receiving 44 mediation applications of which 23 have been mediated (5 applications were joined).
- Speaking at 25 industry conferences and 45 meetings across Australia in order to promote the Code, encourage better business practices and describe the two stage dispute resolution process.
- Responding to many interview requests from print, radio and television, including 'County Wide', 'Rural Hour' and current affairs reports on local television.
- Appearance on the ACCC sponsored 'Small Business Forum' and attending monthly meetings with the ACCC Small Business Commissioner and staff.
- Preparing a detailed submission to the review into the Retail Grocery Industry Code and recommending amendments to the Code.
- Preparing and distributing a template for industry participants to draft internal dispute resolution procedures consistent with the Code.
- Preparing two reports relating to the jurisdiction of the Industry Ombudsman.
- Preparing for publication, the updated Retail Grocery Industry Code of Conduct.
- Writing and preparing for publication, a new Code promotion brochure entitled "Five Steps to Successful Dispute Resolution".
- Compiling aggregated statistics on the operation of the dispute resolution provisions of the Code.
- Distribution of a series of articles "Tips from the Ombudsman" to industry journals and publications. The articles provide practical advice for readers on dealing with disputes and how to engage the services of the Ombudsman.
- Chairing three national mango summits working to develop a code of practice for the industry.

Overall, we consider our principal achievement has been to develop a sense of confidence in industry participants that the dispute resolution procedures of the Code operate fairly, impartially and achieve outcomes for parties attending mediation.

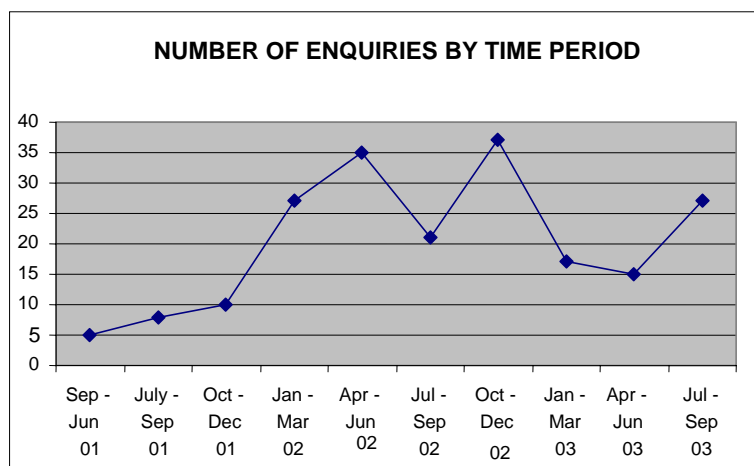
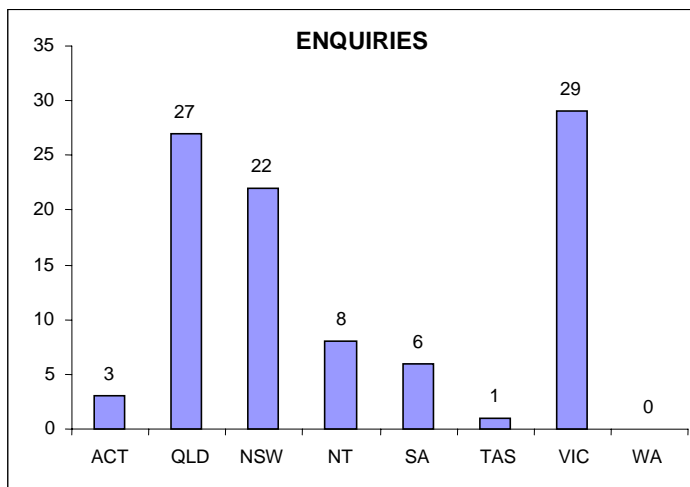
The Year in Review – Statistical Report

How many dispute enquiries?

There was a slight decrease in the number of enquiries from 101 to 96 from the previous year, however the nature of the enquiries indicated a greater knowledge of the role of the Ombudsman. The enquiries were more evenly spread across the States and Territories in 2003 with Queensland down on the previous year but still generating the highest number of requests for assistance.

NUMBER OF DISPUTE ENQUIRIES BY STATE/ TERRITORY

ACT	3
QLD	27
NSW	22
NT	8
SA	6
TAS	1
VIC	29
WA	0
Total	96

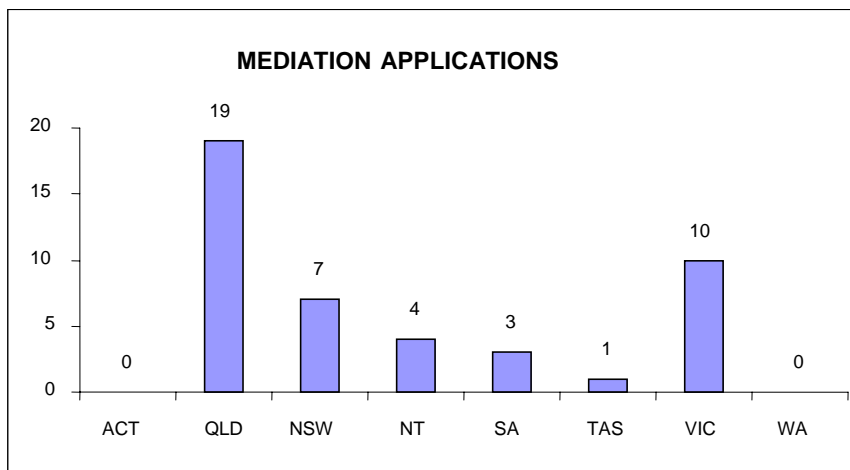


How many applications for assistance?

There were 44 applications for mediation, up 4 on the previous year which is 46% of all enquiries proceeding to formal requests for assistance.

NUMBER OF MEDIATION APPLICATIONS RECEIVED BY STATE/TERRITORY

ACT	0
QLD	19
NSW	7
NT	4
SA	3
TAS	1
VIC	10
WA	0
Total	44



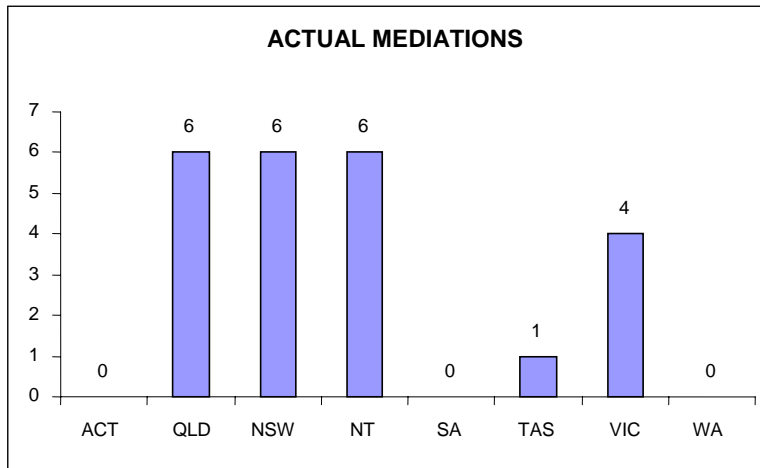
How many mediations?

The 44 mediations applications received were handled as follows:

- 23 matters mediated
- 2 matters settled by parties immediately before mediation commenced
- 5 matters outstanding – dates to be arranged
- 5 matters joined as the circumstances allowed joint resolution
- 4 matters rejected by the Ombudsman as outside jurisdiction
- 5 matters where the respondent would not participate in the Code's dispute resolution processes

NUMBER OF MEDIATIONS UNDERTAKEN BY STATE/TERRITORY

ACT	0
QLD	6
NSW	6
NT	6
SA	0
TAS	1
VIC	4
WA	0
Total	23

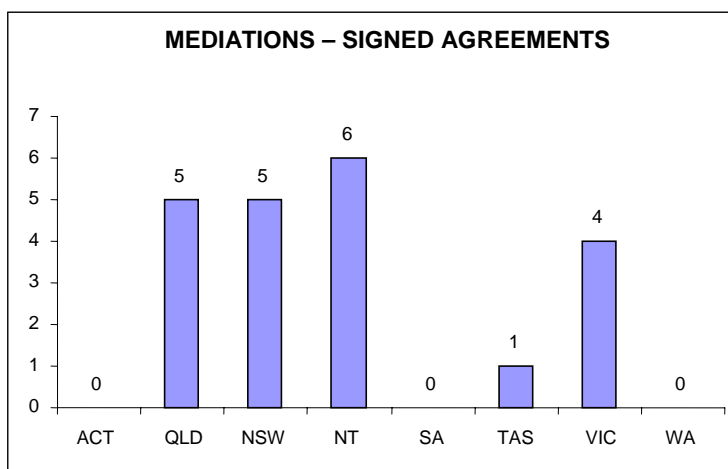


What is the success rate for mediations undertaken?

There were 23 matters that proceeded to mediation during the year, with a further 5 waiting a suitable date for mediation. There were 21 signed agreements between the parties with two matters unresolved, which is a 91% success rate for the reporting period.

NUMBER OF FORMAL MEDIATIONS RESULTING IN SIGNED AGREEMENTS BETWEEN THE PARTIES

ACT	0
QLD	5
NSW	5
NT	6
SA	0
TAS	1
VIC	4
WA	0
Total	21

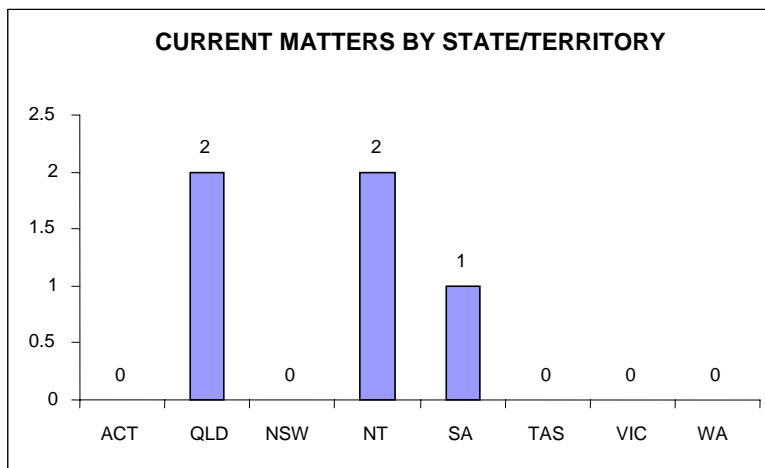


How many current matters?

There are 5 matters currently in process awaiting agreement by the parties to a time and place for mediation.

CURRENT MATTERS BY STATE/TERRITORY

ACT	0
QLD	2
NSW	0
NT	2
SA	1
TAS	0
VIC	0
WA	0
Total	5



Dispute enquiries have covered the following commodity groups:

a. Horticulture:

- Potatoes
- Oranges
- Pears
- Mangoes
- Avocados
- Capsicums
- Onions
- Wine grapes
- Table grapes
- Custard Apples
- Bananas
- Pumpkins
- Turnips
- Melons
- Tomatoes
- Lychees
- Squash
- Apples
- Broccoli

b. Non-horticulture:

- Chicken meat
- Turkey meat
- Eggs
- Confectionary
- Wheat
- Sugar cane
- Flowers

The majority of dispute enquiries and mediations are from horticulture growers and relate to complaints over price received for goods sent for sale to the central market system. The percentage distribution of dispute enquiries (based on the classification of the respondent) is set out in the table below.

CATEGORY	% DISTRIBUTION
Merchants/Agents	60%
Processors/Refiners	17%
Retailers, including the independent sector	9%
Transporters/Unloaders	6%
Exporters	5%
Packers	3%

Number of "requests" for information from web-site 23,535

Average daily number of "requests" for information from Web-site 72

Issues of Concern and/or Systemic Problems

i. Non-Compliance with the Code

There have been incidents of non-compliance with the Code which is of concern. During the past two years a number of industry participants have refused to participate in the dispute resolution procedures. These instances have resulted in the Ombudsman being powerless to respond to legitimate requests for assistance.

On several occasions an individual respondent was subject of a number of complaints. Their refusal to deal with the Ombudsman or attend mediation undermines the integrity of the Code and the Ombudsman scheme.

The table below provides details of non-compliance with the Code since 16th July 2001.

MATTER NUMBER	STRUCTURE	INDUSTRY CATERGORY	LOCATION	DESCRIPTION
1016 1019	Private Company	Wholesaler	Melbourne Markets	2 individual applications were received. The company did not respond to numerous approaches by the Ombudsman. The company is now under receivership.
1034 1046 1060	Private Company	Wholesaler	Sydney Markets	The company is not a member of the Chamber but leases premises at the Sydney Markets. 3 individual applications were received. The company did not dispute the debts and promised to pay. However these agreements "negotiated" by the Ombudsman were not honoured.
1045	Private Company	Wholesaler	Melbourne Markets	The company is a member of the Victoria Chamber but refuses to acknowledge the Code despite attempts by the Chamber to assist.
1042 1054 1057 1058 1082	Private Company	Wholesaler	Brisbane Markets	The company is not a member of the Queensland Chamber but leases premises at the Brisbane Markets. 5 individual applications were received. The company changed its trading name three times over the period. Although telephone contact was made on several occasions, the company refused to negotiate with the applicants or have the matters mediated.
1061	Public Company	Processor/ Manufacturer	Victoria	The company states that as the Code is voluntary it will not participate in mediation. The attitude of this internationally recognised company is of particular concern.

1065 1066	Private Company	Wholesaler	Queensland Market	The company was a member of the Queensland Chamber but refused to acknowledge the Code despite attempts by the Chamber to assist.
1073	Private Company	Road Transport	NSW	Initial agreement to mediate. However while the Ombudsman was travelling to North Queensland for the mediation, it withdrew and has refused to participate in further negotiations.
1085	Private Company	Processor/ Packing house	South Australia	The company refused to recognise the Industry Code and would not discuss the matter or participate in mediation.

In each instance, the Ombudsman has sought assistance from the representative of the relevant industry association which is a Code signatory. We acknowledge with gratitude that this assistance has always been provided even when the respondent was not a member of the relevant association.

There are other applications where respondents initially refused to participate in mediation but following intervention by the Ombudsman, with industry association support, subsequently changed their minds. In all cases these matters settled.

ii. Transparency in Supply Markets

Improving transparency in “vulnerable” supply markets, where growers have to deal with a range of market characteristics including perishability, market volatility and a high degree of risk exposure is imperative to the future success of the Code.

In the first annual report, the Ombudsman identified a number of systemic problems relating to an absence of transparency in market based transactions. In commenting on the central market system (these comments relate only to horticulture), we stated:

“While existing market arrangements remain, there will continue to be disputes over issues such as:

- Whether the price is an estimate or a firm offer.
- Whether the price includes all commissions and charges.
- Terms of supply eg conditions (quality, size, shape) on which produce may be refused or returned.”

In August 2003, the Fair Trading Coalition (a coalition of small business for Trade Practices Reform) released its submission to the Review of the Trade Practices Act and made similar points²:

“Many growers, who deal either through market agents or direct with the retail chains, have very good relationships with their customers and are

² Fair Trading Coalition, Submission to the Review of the Trade Practices Act. pp 44 - 45

satisfied with their trading arrangements. However, there are numerous examples where producers, in dealings with both wholesalers and retailers, have experienced situations unique to the fresh produce wholesale marketing system, including:

- A lack of clarity in the method of selling, with the wholesaler being able to operate as an agent (the grower's 'man in the market'), or a merchant (the grower's customer in the transaction) at his/her discretion. In reality, wholesalers have the best of both worlds taking the merchant's profit and purporting to carry the agent's risk which is in reality, nil, as the risk remains with the grower;
- There is no transparency in transactions and no guarantee that the grower receives payment based on what his/her product actually sold for;
- There is no clear change of ownership of, or responsibility for, the product, even after it has been through several dealers;
- There are no prudential standards (or trusts for proceeds of produce sold on consignment) to protect grower's money should a wholesaler's business fail;
- Claims against the product always come back to the grower, even if the product had subsequently been "purchased" or conditioned/held by another party;
- There is a problem with retailers sometimes returning product for spurious quality reasons, when the real reason is that they over ordered;
- Both wholesalers and growers being too afraid to complain about problems for fear of being cut out of dealing for a period – known as being 'sent on holiday';
- Having produce initially rejected on quality issues only to later see it on sale in another store;
- Buyers over ordering and sending produce back, only to later order it back at a lower price; and
- Having produce sitting on a loading dock for hours to then be sent back because it has begun to break down.

These problems persist in the system and relate to all horticulture, not just a few commodity groups. Growers believe that the wholesale marketing system requires further examination with the aim of introducing a greater level of transparency and openness in transactions between growers, wholesalers and retailers. The experience of growers makes it clear that operating on trust alone does not provide adequate protection in a commercial market subject to great variability in supply and demand, increasing costs and changing consumer expectations. There would appear to be a clear case for the introduction of measures that improve the supply chain, rather than simply policing alleged misconduct after the fact."

It is estimated that the horticulture industry has a gross value of between \$6.5 billion and \$8 billion of which approximately 50% in value passes through the central market system. Some 64,000 Australians were employed in the industry in 2000.

In the totality of the number of market transactions, the Ombudsman receives a miniscule number of complaints. However, this should not be viewed as indicative of a high degree of satisfaction. In our travels and discussions with growers, support for the manner of trading in the Central Market system is low. The predominant attitude is one of resignation and resentment. The majority of dispute enquiries received by the Ombudsman relate to a lack of transparency in market transactions. We consider that the starting point for addressing these issues is to assist the industry clarify whether business relationships are either merchant or agent.

iii. Merchant Vs Agent

It is considered that an overwhelming case exists for the Code to address the legal relationships of growers to wholesalers and retailers and promote transparent relationships in vertical commercial transactions.

The general position of a simple agency relationship is that the agent is an intermediary between the grower (the principal) and the buyer. The agent is not a party to the contract between the grower and the buyer other than to act as a conduit to bring about the contractual relationship. The agent has no property rights in the produce and must sell, return or dispose of the consignment in accordance with the grower's instructions.

Agency may also involve various types of relationship, including:

- A del credere agent who accepts the risk that the buyer will pay and they usually receive a higher rate of commission.
- A mercantile agent who is usually a factor or a broker. A factor has possession and control of the property or goods and can sell in their own name at a price they think is best. A broker does not have possession of the goods but is authorised to negotiate a purchase or sale.

An agent can be appointed in writing or by verbal agreement. The basic approach in the law of agency is "substance over form" meaning what is decisive is what the person did, not what they call themselves.

In general, an agent can only act in accordance with the authority the grower has given them. An agent who acts beyond authority must either have the matter ratified by the grower or accept liability themselves. Therefore it is critical that a grower be specific about what the agent is authorised to do. It is the duty of an agent to follow the grower's instructions and to act in good faith (fiduciary duty). An agent can be required to operate with full transparency. In particular to disclose details of any transaction, including to whom the product was sold, the date of sale, the quantity, the price and the commission retained by the agent.

Other duties of the agent include:

- To make full disclosure of any personal interest;
- Not to make a secret profit;

- To exercise reasonable care and skill;
- To keep the grower's money separate from his or her own and to keep separate accounts; and
- To maintain confidentiality.

The primary right of an agent is to receive remuneration (a commission) for the services they provide. Although fresh food is exempt from the Goods and Services Tax (GST), GST is payable on the agent's commission as it constitutes remuneration for a service.

A merchant is usually one who buys and sells commodities for profit. In primary produce matters, a merchant takes ownership of the produce from the grower and re-sells it predominantly at their own risk (ie the merchant's risk). Fresh produce has special aspects to its sale and this conventional relationship involving a merchant may be varied by agreement between the parties to accommodate quality defects in the produce that are not immediately apparent on delivery.

In merchant transactions there should be an agreed price or, at least, a mechanism for setting the price prior to the change of ownership of the goods. If the produce is subsequently rejected or returned, a merchant may have a contractual right to seek a price renegotiation with the grower. The merchant should provide notification to the grower as soon as practicable and provide reasons for the rejection or re-grading of the produce.

Typically all transactions with retailers involve a merchant transaction in which the produce is either sold at an agreed price based on product specifications or after inspection and the offer of a price. The key characteristics are that:

- Ownership of produce clearly changes hands;
- The grower has had the opportunity to accept or reject a price prior to change of ownership in the goods; and
- Once ownership has changed hands, the grower has no legal rights to transparency, including such information as to whom the product was sold, the date of sale, the quantity, the price and the merchant's margin.

As the merchant owns the goods at the point of further sale, no GST is payable on the transaction.

The method of trading in relation to any single transaction may be either as an agent or a merchant but not both.

The industry accepts that retailer's trade as merchants. However there is wide debate and discord over whether key characteristics of many central market trades should be classified as either merchant or agent transactions. The answer to this question determines whether wholesalers and growers have an obligation to collect and remit GST and the rights of parties to full transparency in the market trail.

Other Issues

i. Jurisdiction of the Code/Ombudsman

Applications and/or dispute enquiries have been received by the Office of Ombudsman which raises the question of whether the particular industry sector falls within the jurisdiction of the Code. These "sectors" are:

- Wine grape;
- Chemical fertiliser; and
- Seed/Nursery.

In the case of wine grape, the Winegrape Growers' Council of Australia (WGCA), as the peak producer group, has requested coverage under the Code. This request was deferred awaiting the outcome of the current review of the industry.

More recently, the Ombudsman rejected three applications relating to a dispute between growers and a chemical fertiliser company as beyond its jurisdiction. The applications were to mediate the entitlement to financial compensation due to contaminated fertiliser being sprayed onto farming areas with the result that the land had been sterilised and rendered unsuitable for safe farming.

In the last month, two enquiries were received while attending a conference over the business practices of the nursery industry, particularly relating to the opportunity to access supply of seeds held under licence for an overseas nursery.

We expect that it is only a matter of time before the spread of major retailers into alcohol and petroleum causes applications to be received in these areas. Other areas "waiting in the wings" include wool products, pharmaceuticals and detergents which are sold to consumers through retail grocery outlets.

The industry should establish an expeditious and appropriate method of resolving questions of jurisdiction of the Ombudsman.

ii. Whether the level of awareness of the Code within the retail grocery industry is sufficiently high to enable the Code to meet its objectives and original terms of reference

In the absence of a survey, there are two measures of awareness. Firstly, industry sector at place of origin of disputes and secondly, industry sector conferences and meetings addressed by the Ombudsman. While these may be flawed (the reason for no disputes or conference requests may be a high degree of satisfaction), they give some idea. The statistics reveal that 60% of disputes relate to merchants/agents meaning central market/horticulture disputes. Other dispute enquiries relate to chicken meat, turkey meat, eggs, wheat, sugar cane, confectionary and flowers. About 70% of conferences attended relate to horticulture.

Mediations have also been conducted in relation to chicken meat, turkey meat and egg related disputes. Largely as a consequence of these mediations, the Ombudsman was requested to address conferences for these growers and the Code of Practice and Ombudsman scheme received some publicity.

Generally speaking, with the possible exception of horticulture, awareness of the Code across industry is poor. To date we have had to marshal resources to lift awareness in horticulture, chicken and eggs. Later in 2003 a series of meetings are being planned in dairy, an area which has been identified as having substantial problems. Grains, cattle meat, sheep meat, fish, cotton, rice and flowers are areas which have not yet received adequate education programs.

We are aware that the New South Wales Farmers Federation (NSWFF) surveyed their horticultural membership in July 2003 and found that 82% of respondents were either *not very* or *not at all familiar* with the Code. In the absence of viewing the actual question and methodology of the survey we have reservations. Our anecdotal information suggests a much higher level of knowledge of the *Ombudsman scheme* than the 82% statistic *relating to the Code*. We have attended horticulture conferences when similar questions have been put to attendees before we speak and 70% plus have indicated that they were knowledgeable of the Ombudsman's work.

We consider that the level of awareness in the Code, including the Ombudsman scheme, must be heightened.

iii. Has the Code been adopted by the industry?

Until August 2003, the Code has not encouraged nor industry asked to take any simple measurable action that provides an easy answer to the question.

Under "Industry Endorsements" three retailers (Aldi, Coles and Woolworths) and seven industry associations (The Australian Chamber of Fruit and Vegetable Industries Limited, Australian Food and Grocery Council, Australian Retailers Association, National Association of Retail Grocers of Australia, National Farmers Federation, Queensland Retail Traders and Shopkeepers Association and Retailers Association of Queensland Limited) have committed to "promoting the Code and their own internal dispute resolution procedures". Section 3.2 "Scope" provides for an intention that industry participants will be guided in their conduct by the Code but this "does not constitute a contract between them".

As endorsers of the Code, the three retailers have direct obligations under the Code. However industry associations can not bind their members to the Code unless the association's Constitution describing conditions of membership is amended to provide that commitment to the Code is a prerequisite of membership.

We observe generally:

- Retailers have demonstrated a determination to enforce compliance with Code principles through junior and middle management;
- Industry associations have extended support to all requests made by the Ombudsman. However they can't force members to comply with Code provisions. Despite the best efforts of industry associations, 20% of applications received could not proceed to mediation because individual industry participants (respondents) refused to participate.

We consider that commitment to the Code by the ten endorsers is genuine.

iv. Review of Code

This report is written at a time when the review into the Code has completed receiving submissions and is writing a report to government.

The Ombudsman submission to the review is extensive and contains twenty-one recommendations for consideration. In this report we have made the deliberate decision not to canvass these recommendations as we support the review process and wish it success. At this time the reviewer has determined to keep individual submissions and recommendations confidential and we respect that decision.

We await release of the report keenly and look forward to encouraging and assisting the inevitable debate between industry participants.