



*Know-how for Horticulture™*

# **Review of Retail Grocery Industry Code of Conduct**

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Project Number: AH03005

## **AH03005**

This report is published by Horticulture Australia Ltd to pass on information concerning horticultural research and development undertaken for the Australian horticultural industry.

The research contained in this report was funded by Horticulture Australia Ltd with the financial support of the Australian horticultural industries.

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ISBN 0 7341 0732 3

Published and distributed by:  
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Version 4 – 15<sup>th</sup> September 2003

# **STRATEGIES FOR ACHIEVING FAIR COMPETITION IN AUSTRALIA'S HORTICULTURAL BUSINESS CHAINS**

**AUSTRALIAN HORTICULTURE INDUSTRY SUBMISSION TO  
THE REVIEW OF THE  
RETAIL GROCERY INDUSTRY CODE OF CONDUCT**

prepared by Primary Business Solutions Pty Ltd for

**HORTICULTURE AUSTRALIA LTD**

in association with the

**HORTICULTURE AUSTRALIA COUNCIL**

15<sup>th</sup> September 2003



**Horticulture Australia**



## FOREWORD

This submission to the review of the Retail Grocery Industry Code of Conduct (RGICC) represents a huge amount of work by a wide range of interests in an extremely short space of time. All involved, from individual growers through industry groups and peak bodies to the consultant selected and authorized with Horticulture Australia Ltd staff to initiate the work before even sighting a contract, have extracted themselves from other commitments to help.

The purpose of this short note is to formally thank these people on behalf of the Steering Committee and to document the process that brought us to this point. As the following makes clear, this process is of itself important.

Most within the industry will be aware that the Australian Mango Industry met first in Darwin then in Bundaberg in late May under the auspices of the Retail Grocery Industry Ombudsman (RGIO). The object of these meetings was to develop a Voluntary Code of Conduct for the Mango Industry. This initiative was widely discussed as having potential to provide a, "*Whole of Horticulture*", Code model.

In June, HAL's Across Industry Committee held over committing to the above course due to the belief of several members that the Industry had little awareness of the RGIO and no faith in Voluntary Codes. While the Mango Code sought to address whole of chain, it was argued that most processes were already covered by a range of specific codes of practice and that more would be achieved by focusing on the difficult areas of market power and commercial transparency.

Later in June when the federal Office of Small Business announced its intent to review the RGICC, the QFVG requested the Horticulture Australia Council to gather a small group of volunteers to shape a proposal for HAL to have a consultant canvas a consolidated industry position and then to manage the process forward. This across HAC HAL management committee selected Richard Coutts and Carole Tate of Primary Business Solutions and directed them to prepare a Whole of Industry position ... *inclusive of Major Retailer and Market attitudes*.

It is important to note that the inclusive objective of this submission has been made impossible by the extreme difference of views held between growers and market representatives on the appropriateness of commercial practices currently common within the industry. The latter are reported to desire no change because they see no need for them. The extremity of this difference of views alone makes an Ombudsman process based solely on mediation very questionable.

In conclusion, this information was gathered drafted and reviewed in fourteen days. If in finding common ground views have been expressed which are contrary to those of any member or organization contacted they should not hesitate to make this known.

As indicated, this submission is the work of many but it would be improper not to acknowledge the particular efforts of QFVG's Mark Panitz, ABGC's Tony Heidrich, HAL's Libby Abraham and of course Richard Coutts and Carole Tate from Primary Business Solutions whose personal experiences in the issues under review were invaluable.

Rob Bastian  
Chair of Steering Committee  
for Horticulture Industry Submission

15<sup>th</sup> September 2003

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## EXECUTIVE SUMMARY

***The Retail Grocery Industry Code of Conduct is intended to ensure fair competition in the horticulture sector. Has it been achieving its objectives? The emotional and intense public debate occurring within the industry at present indicates that the answer is – definitely not!!***

Commercial horticultural production and marketing is a highly competitive activity. The Australian horticulture sector comprises many small, medium and large enterprises that operate through a range of business models and supply a wide variety of markets. Market forces drive the sector, and businesses therefore rely on being able to operate in a commercial environment characterised by fair and equitable competition.

Growers in Australia's horticulture sector are extremely dissatisfied with the arrangements put in place under the *Retail Grocery Industry Code of Conduct* in 2000 by the Federal Government to bring about fair and equitable trading. They argue that:

- the balance of commercial power and advantage is unfairly and unreasonably weighted against the growing community; and
- that this situation is blocking achievement of their vision of an Australian horticulture sector characterised by world class, efficient and effective marketing systems that clearly convey market signals, reward competent businesses and disadvantage poor performers.

The RGICC is intended to promote fair and equitable trading practices, encourage fair play and open communication, and provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute. The Government has initiated the current review of the Code to determine the effectiveness of these arrangements.

One of the objectives of the current review is to enquire into the operation and effectiveness of the Code and to ensure its provisions continue to be relevant in, amongst other things, “**promoting fair and equitable trading practices amongst industry participants**”. It is the industry's strong contention that this condition has not been met.

### **Where are Unfair Trading Practices to be Found and What are They?**

A wide range of unfair trading practices is occurring within Australia's horticulture sector.

#### ***A major area for disputes is between growers/suppliers and market wholesalers***

Typical disputes between growers and wholesalers that have been brought to the attention of the RGIO involve a lack of ‘transparency in market-based transactions’ and ‘fuzziness’ surrounding the nature of contracts/trading terms and conditions. Examples include:

- uncertainty relating to the ‘fairness’ of commissions;
- growers' rights to information; and
- the timing at which ownership of produce changes.

#### ***Considerable concern is expressed by grower organisations regarding the market dominance of the two major retailers***

Issues relating to retailers that are of concern to horticulture industry organisations include:

- inadequate notice and/or lack of consultation before mandating changes to product packaging and quality specifications;
- market behaviours that influence central wholesale prices which are then used to negotiate prices for direct suppliers;

- punitive behaviours designed to enforce desired behaviours by suppliers (e.g. issues associated with “being made to take a holiday” and return of product);
- squeezing wholesalers on price and volumes; and
- fresh produce margins of major supermarkets increasing substantially in the past decade.

### ***There are problems with produce grown under contract to major processors***

The key problem areas are in relation to the weakness of growers to collectively bargain with major multi-national processing companies relating to:

- prices and other terms and conditions;
- disputes relating to prices/returns;
- quality and handling of rejected produce; and
- slow payment.

As these are the same concerns growers have been worried about for decades, a careful examination of the root causes is indicated as a basis for coming up with workable solutions.

### Contractual Uncertainty and Lack of Transparency in Transactions

***Currently, the RGICC fails to define the legal relationships between growers/suppliers and market traders, nor does it have the power to enforce them.***

The lack of certainty about the questions of, ‘when does produce change hands?’ and ‘what is the transaction process?’ have been identified by NSW Agriculture’s Market Chain Committee as root causes of many of the issues raised in the debate about horticulture sector fair trading. It certainly seems plausible to expect that clarity as to terms of trade and other contractual matters would address many of the areas of current concern, e.g. if it was clearly agreed between growers/suppliers and wholesalers in advance of consignments being initiated that the transaction was taking place on a:

- merchant basis, then the question of risk sharing between parties relating to market movements is largely removed as an issue; or
- commission agent basis, then the question of transparency as to buyers and prices is largely removed as an issue.

### Dominance of Retailers and Multi-National Food Processing Companies

***Growers lack awareness of, and confidence in, the effectiveness of the RGICC for dealing with the market power of the major retailers and multinational corporations.***

There is concern that the absence of specific complaints to the RGIO about abuse of market power is seen as reflecting satisfaction with the system, when in fact it reflects the extent of the power imbalance coupled with weaknesses in the Code for tackling systemic problems.

The potential for fear of retaliation or victimisation is most likely to be a factor in circumstances where there is great imbalance in market power between parties, and where possible adverse consequences on long-term viability are considerably greater for one party relative to the other. This type of behaviour is a deliberate abuse of market power (unlawful trading) and needs to be dealt with by the law.



## Central Market Culture and Tradition

### ***Traditional trading relationships involve a ‘fuzziness’ that is deeply embedded in the culture of the central market system.***

The market culture reflects a ‘this is the way it has always been done’ mindset that has become increasingly at odds with changing community and business values/expectations relating to the way commercial transactions should be conducted. This highlights a major cultural change aspect for both growers/suppliers and marketers. A situation that is unlikely to be resolved by the use alone of the approaches usually employed to try to convince people that ‘this is what we should be doing’. The bottom line is that, until people can genuinely think differently about an issue, their behaviours will continue to be as they always have.

The Australian Chamber of Fruit & Vegetable Industries, which is a signatory to the current Code and a member of the Code Administration Committee for the RGICC, considers that a continuation of the current arrangements is all that is necessary to deal with the issues raised about grower/supplier and wholesaler relationships. It points to comments from the RGIO regarding the success of the mediation process provided for in the Code and the high level of cooperation from parties to disputes. Further, the Chamber claims that the magnitude of the trading disputes issue is being overstated by the grower organisations.

This is, however, definitely not the view of growers/suppliers and grower representative bodies. It is interesting to note in this respect that, while there is widespread concern in the growing community about the behaviour of wholesalers, there are few if any examples of wholesalers complaining about the actions of growers!

It appears that much of the information needed to increase the knowledge of growers/suppliers and marketers about the common paths to market and the minimum legal rights and obligations, and the strengths and weaknesses of each option, is already available to industry and could provide the basis for comprehensive awareness creation and practice change activities.

## Industry Codes

### ***The horticulture industry expects a Horticulture Industry Fair Trading Code, with mandatory provisions regarding trading terms and conditions.***

The Trade Practices Act now contains provisions that enable Industry Codes of Conduct to be made enforceable. The Minister for Financial Services and Regulation, The Hon Joe Hockey, MP, has said “if industry self-regulation fails, codes prescription offers an attractive alternative”. Regulations made under the Trade Practices Act may declare all or part of a code to be either mandatory or voluntary. Mandatory codes are binding on all industry participants. Voluntary codes are binding on the members of an industry who formally subscribe to the Code.

In other industries struggling with an imbalance in commercial power, governments have enforced adoption of mandatory codes or licensing arrangements. Examples include real estate agents, auctioneers, travel agents, property developers, motor vehicle dealers, commercial agents, finance advisers and brokers credit agents and land valuers.

These codes and licences have generally been introduced when there is clear market failure or when there is potential for misuse of funds held in trust.

Wholesalers within the horticultural sector clearly hold monies in trust for growers/suppliers for the period between sale of produce and remittance of returns.

There also are obvious imbalances of power in the relationships between retailers and wholesalers and grower/suppliers. These issues have been recognised and debated constantly

since the introduction of the Trade Practices Act in the 1970s – but they have not yet been addressed. It is thus obvious that the market place cannot deliver the desired outcome.

It is clear that prerequisite conditions for mandatory codes exist within the horticultural industry and that there also are relevant precedents.

On this basis, it is our contention that a mandatory approach is appropriate and necessary to ensure commercial practices in the industry are transparent and equitable. Such a system would deliver a more transparent market chain that better passes on market signals from consumer to grower. Without such signals, the industry will continue to be dysfunctional.

### RGICC Administration

#### ***The effectiveness of the RGICC and the Retail Grocery Industry Ombudsman must be strengthened.***

Many small horticultural businesses appear to be unaware of the existence of the Code and the avenues available to them for dealing with unfair trading issues.

Further, the industry believes that the structure of the Code Administration Committee is unreasonable as it is heavily skewed in favour of price makers not price takers.

The ineffectiveness of Section 46 of the Trade Practices Act in protecting smaller competitors against corporations with significant market power led to changes during the 1990's. These sought to provide small firms with protection under various consumer protection sections of the Act, culminating in the most recent changes under Section 51AC. The changes made recognise the fact that smaller firms, like consumers, are in many instances price takers not price makers. These changes have clearly not worked for growers/suppliers. This imbalance is reinforced by the current representational structure of the RGICC Administration Committee.

This imbalance must be redressed by inclusion of more representatives from the grower sector. In fact, it is the view of grower organisations that the Code Administration Committee should be replaced by a stronger structure to enforce the provisions of the new mandatory code. An independent Horticulture Tribunal would have greater status and could legitimately expand its role beyond the current role that is purely administrative to one that addresses the improvement of commercial practices in the industry.

### **Clearly More Needs to be Done. The 'Big' Question is What?**

Commercial dealings in any production and marketing system will encompass behaviours that fall into the following three categories. Disputes can arise in each of these circumstances.

- |                               |  |
|-------------------------------|--|
| <b>Unlawful Trading:</b>      | Deliberate abuse of market power or deliberate dishonesty.<br><u>For example:</u> a wholesaler against whom a grower has made a complaint to the Ombudsman encourages other wholesalers not to deal with the grower/send the grower 'on a holiday'.                                  |
| <b>Dysfunctional Trading:</b> | Differences of opinion and conflict.<br><u>For example:</u> a grower sends produce to a central market wholesaler without notifying the wholesaler who sells it and makes a payment to the grower which is much less than expected.  |
| <b>Fair Trading:</b>          | Vigorous competition within the law and agreed industry standards/codes.<br><u>For example:</u> rejection by a retailer of all or part of a consignment of produce supplied directly by a grower because of an identifiable defect specified in agreed standards and specifications. |

The best solutions for minimising the number of cases of conflict between parties in horticulture sector supply chains where either **dysfunctional or fair trading** is indicated are believed to be:

- contractual certainty;
- whole-of-supply chain product management protocols;
- effective communication amongst supply chain participants;
- honesty and fairness in dealings; and
- effective change management processes.

The best solutions for dealing with **unlawful trading** are believed to be prosecution for anti-competitive conduct.

## Recommendations

An integrated set of strategies built around a Horticulture Industry Fair Trading Code that contains mandatory provisions relating to trading terms and conditions has been formulated during the preparation of this submission.

These strategies are seen as the minimum action necessary for quickly bringing about fair and equitable trading in Australia's horticulture sector.

### Strategies for Achieving Contractual Certainty and Transparency in Transactions

In order to remove the opportunity for 'fuzziness' in trading relationships, that give rise to disputes of an unlawful or dysfunctional trading nature, immediate action is needed to:

- R.1 Develop and implement a Horticulture Industry Fair Trading Code that specifies the contractual basis for trading terms and conditions
- the requirements of which should be prescribed under the mandatory Industry Code provisions of the Trade Practices Act
    - the intention is for this Industry Code to deal with horticulture industry specific matters, but otherwise to be entirely consistent with the more general fair and equitable trading provisions of the Retail Grocery Industry Code of Conduct (as strengthened in accordance with the strategies proposed below);
    - it is considered that the RGIO or some other appropriately constituted body should continue to settle disputes through mediation wherever possible, but where the mediation option fails or is clearly inappropriate the matter should be referred for attention by the Australian Consumer and Competition Commission.
  - in developing the Industry Code an examination should be made of the extent to which the provisions in the Brismark and Australian Mango Industry Codes of Practice relating to documentation of trading/written agreements have been successful in resolving or reducing the incidence of disputes between growers/suppliers and wholesalers.
- R.2 Establish a Horticulture Tribunal funded by industry to develop, oversee and continuously improve commercial practice through the Horticulture Sector Fair Trading Code.

### Strategies for Strengthening the Effectiveness of the Retail Grocery Industry Code of Conduct and the Retail Grocery Industry Ombudsman

In order to remove identified weaknesses with the measures introduced in 2000 by the Federal Government for "achieving fair competition" immediate action is needed to:

- R.3 Amend the currently open-ended wording of the provisions dealing with labelling, packaging and preparation requirements in the RGICC
- with a view to minimising the potential for arbitrary/unilateral decision-making by retailers that will cause economic loss to growers/suppliers.
- R.4 Give the Retail Grocery Industry Ombudsman's office increased confidence in resolving unfair trading disputes by guaranteeing the office of Ombudsman indemnity from the threat of legal action arising from the performance of his responsibilities under the RGICC.

- R.5 Investigate the insidious nature of intimidatory or retaliatory behaviours in Australia's horticultural production and marketing chains and the difficulty for small and medium-sized businesses of establishing proof quickly and cost-effectively
- with a view to providing a workable mechanism for safeguarding businesses against these types of unlawful practices.
- R.6 Ensure that the Annual Report of the existing RGICC Administrative Committee, including any dissenting opinions from members regarding the operation of the Code and its administration, be made available to industry in a timely and easily accessible manner, e.g. through the web site of the Retail Grocery Industry Ombudsman.
- R.7 Correct the major imbalance between 'price makers' and 'price takers' in the membership of the current RGICC Administration Committee
- by appointing additional members representing price takers from those sectors involving the highest incidence of disputes involving trading practices to date; and
  - by providing for equal representation from grower industry and market industry bodies on the Horticulture Tribunal proposed above (R.2).

### **Strategies for Ensuring Industry Is Well Informed About Fair Trading Matters**

In order to ensure widespread understanding of the rights and obligations of parties engaged in alternative commercial arrangements for the sale of horticultural produce/products, and to promote adoption of the approaches proposed in this submission, it is recommended that:

- R.8 A whole-of-horticulture Working Group be immediately created to prepare a 'Guide to Contractual Relationships in Australian Horticulture' educational booklet and a Terms of Trading Check List
- it is envisaged that the Working Group would include representation from the peak grower/supplier, wholesaler and retailer organisations with assistance and guidance provided by the Ombudsman, the Australian Taxation Office and the ACCC.
- R.9 A voluntary Training Program be developed and offered to growers/suppliers and marketers to assist them to increase their understanding and skills about terms and conditions of trading, Industry Codes and industry best practices.
- R.10 Horticulture industry organisations, State and Federal Government agencies and the Ombudsman give high priority to the design, implementation and monitoring of communication strategies that will effectively create wide-spread awareness of the fair competition options, rights and obligations arising from the outcomes of the current review of the RGICC
- it is envisaged that the experience gained by the Ombudsman and industry organisations over the past three years with the failure and success of various different means of awareness creation will be drawn upon to ensure the effectiveness of these communication strategies.
- R.11 Industry, the Federal Government and State Governments clearly distinguish between practices that indicate 'unlawful trading', 'dysfunctional trading', and 'fair trading' in considering and commenting on strategies for achieving fair competition in food production and marketing chains.

## **Strategies for Addressing Market Dominance by Retailers and Food Processors**

In order to ensure that the substantial market power of the major multi-national food processing corporations, and the major supermarket chains, is not unfairly or unreasonably wielded against their small to medium sized fruit, vegetable and nut suppliers, it is recommended that:

- R.12 Contract growers supplying food processors be granted authorisation under the Trade Practices Act to engage in collective bargaining activities, along similar lines to the arrangements in place for suppliers to processors in the dairy industry.
- R.13 The Federal Government in considering the outcomes from the review of the RGICC take into account the findings about the level of returns received by primary producers relative to other participants in food supply chains, from the current Agriculture, Fisheries and Forestry – Australia Study of Food Price Determination and other sources, advise industry accordingly, and propose appropriate actions.
- R.14 Any significant concerns relating to unfair or unreasonable use of market power by the major supermarkets identified during the current review of the RGICC be taken by the Federal Government as a sufficient basis for it to reconvene the Joint Select Committee on the Retailing Sector to consider and propose appropriate action.

## Abbreviations

ABARE	Australian Bureau of Agricultural and Resource Economics
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and consumer commission
AFFA	Agriculture, Fisheries and Forestry - Australia
ASIC	Australian Securities and Investments Commission
AUF	Australian United Fresh Fruit and Vegetable Association Ltd
AUSVEG	Australian Vegetable and Potato Growers Federation
Brismark	The Queensland Chamber of Fruit and Vegetable Industries Co-Operative (Union of Employers) Limited
CAC	Retail Grocery Industry Code of Conduct Administration Committee
HAC	Horticulture Australia Council
HAL	Horticulture Australia Ltd
MIAA	Mortgage Industry Association of Australia
OFT	Office of Fair Trading, UK
PACA	The United States Perishable Agricultural Commodities Act 1930
QFVG	Queensland Fruit and Vegetable Grower Ltd
RBCS	Packer Red Book Credit Services
RGICC	Retail Grocery Industry Code of Conduct
RGIO	Retail Grocery Ombudsman
TPA	Trade Practices Act
UCC	Uniform Customer Credit Code
USDA	United States Department of Agriculture



# 1. INTRODUCTION

*This submission seeks to present a positive and whole-of-horticulture sector approach for achieving the fair and equitable trading environment sought by industry.*

## Purpose of Submission

The level of sales returns to producers and the effectiveness of commercial relationships are fundamental drivers of the long-term success for businesses in Australia's horticulture sector. Problems in these areas are, therefore, of immense significance and concern to industry as evidenced by the intensity of emotion and debate about issues arising in trading relationships.

These problems are blocking achievement of an Australian horticulture sector characterised by world class, efficient and effective marketing systems that clearly convey market signals, reward competent businesses and disadvantage poor performers.

Our overall intention in making this submission is to present a systemic, whole-of-horticulture perspective on the need for strengthening the arrangements that are intended to ensure a **fair and equitable trading environment** for horticulture sector production and marketing chains. A key focus is on presenting credible input that separates causes from symptoms, reality from myths, and concrete experience from rhetoric.

The overwhelming response from industry is that the status quo is not an option, as unrest will continue until the causes are adequately dealt with, and that concerned individuals and organisations throughout the chain genuinely wish to see fair and reasonable solutions found. The only dissenting views were from organisations in the wholesaling sector.

## Approach

Our submission summarises and considers the positions advocated by a number of horticulture sector organisations with widely different views on the nature of trading problems and the action needed to overcome them. It also draws on discussions with the Retail Grocery Industry Ombudsman, government agencies involved with horticulture sector trading issues, and members of organisations representing growers/suppliers and marketers.

An invitation to provide input to the submission was made through both Horticulture Australia Ltd and the Horticulture Australia Council to more than fifty industry bodies from amongst their membership (Appendix 2). A draft submission was circulated and the feedback received was taken on board.

Industry organisations were also provided with a copy of an Unfair Trading Case Study Template (Appendix 3). This was prepared and circulated for consistency of approach and to assist industry organisations in encouraging their members to document (confidentially if they wished) the nature of their unfair trading experiences and the effectiveness of current mechanisms for dealing with the problem areas. A number of Case Studies are included with this formal submission (Appendix 9). Other Case Studies will be presented by individual industry organisations.

In putting forward ideas and suggestions for accomplishing a successful outcome, industry is conscious of the need for:

- issues to be considered from a whole-of-chain perspective;
- proposed solutions to be commercially realistic;
- maintaining effective competition in the marketplace; and
- retention of those aspects of the RGICC that appear to be working.

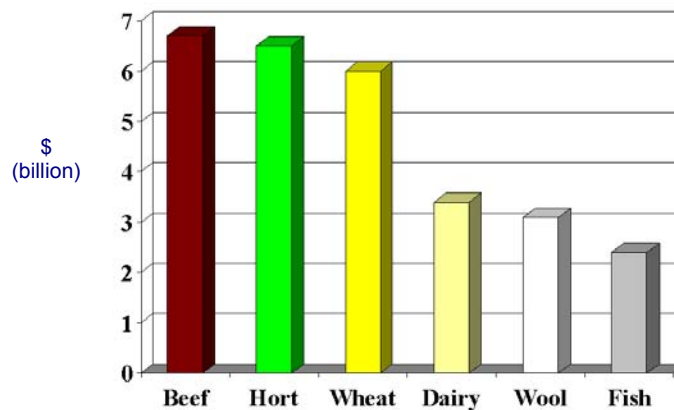


## 2. THE IMPORTANCE OF FAIR COMPETITION IN AUSTRALIA'S LOCAL HORTICULTURAL MARKETS

### Australia's Horticulture Sector

Australia's horticultural industries are a dynamic and vital component of the nation's food and beverage sector. Horticulture is both economically important and extremely diverse (marketing more than 120 types of fruit and vegetables and many hundreds more different varieties, utilising a wide range of production methods in different climates and locations). It is:

- One of Australia's biggest primary products industries
  - with a gross value of some \$8 billion in 2001/02 (Horticulture Australia Ltd estimate - higher than the ABS/ABARE estimate of \$6.5 billion)
    - sector shares are: fruit 34%, vegetables 36%, nursery (incl. cut flowers) 22%, nuts 2%, dried fruit, 1%, and all other 5%;
    - Queensland grows one-third of the nation's produce.



Source: Horticulture Australia Limited

- Growing rapidly
  - the horticulture industries have evolved significantly in the last 10 years to meet the health, taste and lifestyle needs of the ever-changing Australian consumer;
  - in the last five years (to 2001/02) the gross value of production has increased by 21.3% (ABARE).
- A major employer throughout Australia, the number of horticultural enterprises has grown by around 15% in the last four years (from 15,000 in 1996/97 to 17,273 in 2000/01)
  - in Queensland there are 6,500 growers operating 3,700 enterprises.
  - total employment in horticulture in the year 2000 represented 20% (or 64,000 people) of total Australian agricultural employment (319,074 people) having grown 26% in the last four years (from 51,000 people)
    - in Queensland, horticulture employs around 25,000 people.
- Expanding its export focus
  - fresh produce exports have increased by a massive 65% in the 7 years (from \$434m in 1993/94 to \$715m in 2000/01).

Australia's horticulture sector contributes significantly to national economic, social and environmental goals by creating benefits for local, regional and urban communities. These benefits include:

Economic benefits:

- a wide variety of fresh fruit and vegetables available to consumers and processors in all parts of Australia throughout the year, ensured by the diverse nature and geographic spread of the horticulture industries;
- generation of economic activity by local horticultural businesses which supports a host of rural communities throughout Australia;
- supply of a major resource that enables significant value-adding throughout the food processing, food service, alternative health, transport, wholesale and retail industries;
- contribution to Australia's overseas earnings through expansion into overseas markets;
- a hub for a number of emerging new industries including olives, Asian exotic tropical fruits, culinary herbs, bush foods, functional foods and nutraceuticals;
- labour-intensive businesses located in regional areas where alternative employment and industry activity can be scarce.

Social benefits:

- provision of a livelihood and a primary, or secondary, source of income for many families living in regional areas throughout Australia;
- significant direct and indirect contribution to regional economies, and is the mainstay of many regional communities.

Environmental benefits:

- a high value and efficient user of scarce water resources.

### **Achieving and Maintaining Viability is the 'Bottom Line' for Industry**

Commercial horticultural production and marketing is a highly competitive activity. The Australian horticulture sector comprises many small, medium and large enterprises that operate through a range of business models and supply a wide variety of markets.

Market forces drive the horticultural sector. Businesses therefore rely on being able to operate in a commercial environment that is characterised by fair and equitable competition.

#### What Motivates Businesses in Australia's Horticulture Sector?

The number one issue facing all businesses operating in Australia's horticultural sector is the need to derive an acceptable income from their business operations, i.e. being able to achieve and maintain a level of viability that is at least sufficient to meet personal and business needs.

This fundamental position holds true for all businesses irrespective of whether they grow horticultural produce, transform produce into value-added products or ingredients, transport, store or distribute goods, engage in sales or marketing activities, or deliver business services.

#### What Are the Critical Success Factors for Accomplishing this Outcome?

Inevitably the path to market that horticultural produce or products take depends for its success on ***purchasing decisions made by consumers***. This occurs at the point at which consumers interface with horticultural industry supply chains.

A key driver of the purchasing decisions of consumers is the value that will be created for them by tapping into the benefits they believe they will receive as a result of acquiring the horticultural produce/product, i.e. 'consumers buy benefits, they do not buy products'.

Success is therefore most likely to come to those supply chains that operate on the basis of a detailed understanding of the benefits their target consumers are seeking and which organise themselves to consistently deliver those benefits.

***Lean and efficient production and marketing systems*** focused on creating maximum value for consumers and supply chain participants are a critical success factor for business success. These systems are likely to be characterised by business models built around a strong and shared sense of purpose, close and open collaboration throughout the supply chain and a culture involving the delivery of mutual benefit.

These types of business systems contrast markedly with those that give rise to the (unfair trading) behaviours and practices that the RGICC seeks to address.

Well-performing 'pathways to market' are in the best interests of growers, consumers and Australia as a whole. They provide greater choice for consumers and clear market signals for producers and other participants in the sector.

There is increasing evidence globally that consumer-driven supply chains involving businesses that operate collaboratively as integrated, open and transparent teams outperform other types of business models and produce commercial outcomes that exceed those possible in traditional/adversarial approaches to production and marketing.

The ***capability to anticipate change*** is a further critical success factor for achieving and maintaining viability. This arises from the dynamic external environment in which horticulture sector businesses must operate. Significant, rapid and on-going change both in markets and the general business environment is taking place within Australia and globally.

The nature of these changes, which are discussed briefly below, is giving rise both to challenges and opportunities for participants in Australia's horticulture sector. They include a need to rethink many of the ways in which production and marketing chains have traditionally operated, and an emphasis on continuous improvement in every aspect of business.

#### *Consumer preferences are changing*

Consumers demand fruit and vegetables that meet their expectations in terms of freshness, appearance, taste, value for money and ease of preparation. Consumers need to know that the food they eat is safe from contamination by chemicals or pathogens. As consumers are not all the same, growers and marketers need to adapt to a wide diversity of market segments and requirements to ensure that consumer needs and preferences are satisfied and opportunities identified.

Increasingly, consumers are interested in other issues that influence their food purchasing decisions, such as specialised health benefits, the environmental impact of production and marketing methods, and the ethics of business practices.

#### *The nature of competition is changing*

Horticultural businesses operate subject to many factors including rising operating costs, market variability in supply and demand, climatic conditions, government policy and international economic conditions, making economic and marketing issues a major influence on the profitability of horticulture sector businesses.

*Convergence* is resulting in a loss of relevance of traditional concepts such as industry and sector; changing *societal values* about agricultural production are being felt at supermarket check-outs; and the *globalisation* of businesses and communities is reducing the sovereignty of national and regional governments. New technologies are emerging that have the potential to revolutionise the way food and fibre is produced, who produces it, and the way business is carried out. Concepts such as work, products, supply chains, industries, markets, location and competition are being redefined.

A major change is taking place in the way firms, regions, industries and nations compete.

The nature of competition in the marketplace is tending to shift from adversarial individual firm versus individual firm competition to whole-of-supply chain against whole-of-supply chain competition. This situation requires the development of open and cooperative relationships within individual supply chains, i.e. relationship management within supply chains involves not only passing product through the chain, but also the development of a business environment where there is a genuine sharing of data, information, risk and returns.

#### *The strategic priorities for horticulture sector businesses are changing*

The key strategic priorities for Australia's horticulture sector that arise from the changes described above include:

- the building of consumer-driven food chains that rapidly deliver clear signals about consumer needs and preferences to all chain participants;
- whole-of-food chain product safety and quality assurance programs;
- ensuring that consumers have easy access to the information they require on food production and marketing issues, product handling and nutrition;
- continuous innovation to provide the benefits sought by consumers and to increase performance and efficiency throughout the entire production and marketing chain;
- benchmarking the key aspects of production and marketing processes as a means of identifying and implementing 'better practices';
- facilitating the formation and development of food chain alliances;
- ***fair and equitable trading practices throughout food chains*** to address imbalances in market power and unethical or inappropriate commercial behaviour.

### **The Strategic Imperative for Horticulture Sector Businesses**

It is easy to see why the over-riding focus of organisations representing businesses in the Australian horticulture sector is to accomplish a business environment that is favourable to enhancing the viability of their members.

To this end, the shared belief is that horticulture sector businesses should be able to operate in a business environment:

- with transparent relationships throughout the entire production and marketing chain;
- where relationships between suppliers and customers are not distorted by market power;
- with minimal regulatory costs or red tape; and
- with a reasonable cost of doing business.

That is, in **an environment characterised by 'fair competition'**.

### 3. UNFAIR TRADING - THE ISSUES

*The Retail Grocery Industry Code of Conduct is intended to ensure fair competition in the horticulture sector.*

#### **Background to the Current Fair Competition Arrangements**

For the past three years all sections of the Australian horticultural industry that feel they may have been treated unfairly in their commercial dealings have been able to tap into new dispute resolution arrangements implemented by the Federal Government. These arrangements involve a voluntary Retail Grocery Industry Code of Conduct (RGICC) which applies to all participants in horticultural supply chains, a Retail Grocery Industry Ombudsman (RGIO), and power for the Australian Competition and Consumer Commission (ACCC) to undertake representative actions and seek damages on behalf of all, but particularly smaller, participants.

The RGICC is intended 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;
- provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute.

Growers in Australia's horticulture sector are extremely dissatisfied with the lack of effectiveness of the current arrangements. They argue that:

- the balance of commercial power and advantage is still unfairly and unreasonably weighted against the growing community; and
- that this situation is blocking achievement of their vision of an Australian horticulture sector characterised by world class, efficient and effective marketing systems that clearly convey market signals, reward competent businesses and disadvantage poor performers.

At the time of implementing the current voluntary arrangements, The Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business stated that the Federal Government was taking the action "as a demonstration of its commitment to achieving fair competition in the retail grocery sector" (13<sup>th</sup> February 2000 Media Release).

It should be noted that the Government opted for a voluntary approach even though mandatory measures were recommended by the Joint Select Committee on the Retailing Sector in its August 1999 report of its inquiry into the nature of competition in the retail sector – *Fair Market or Market Failure?*. The Committee stated that "the consistency of the evidence" it had received about "unfair conduct in the market place" had lead it to propose measures beyond those available through the Trade Practices Act to protect small businesses.

In opting for a voluntary RGICC in 2000 it appears that the Federal Government may have made the assumption that this was all that was necessary for a critical mass of industry organisations and individual businesses to change their traditional ways of behaving and bring about a fair and equitable trading environment within the industries encompassed by the Code.

If this assumption had been validly made in relation to Australia's horticulture sector, by now there would be significant evidence that participants in the industry's production and marketing chains had taken true ownership of the RGICC and energetically worked to encourage adoption of the desired trading behaviours.

These circumstances could then have been pointed to as a reasonable indicator of success for the RGICC. In practice, the reverse has happened.

This situation appears to have been anticipated by the Joint Select Committee on the Retailing Sector when it expressed (in 1999) the view that those responsible for ensuring fair trading in the retail grocery industry (which includes horticulture) should adopt a vigorous approach in dealing with systemic and on-going problems with the benefit of a mandatory Code of Conduct.

One of the objectives of the current review is to enquire into the operation and effectiveness of the RGICC and to ensure its provisions continue to be relevant in, amongst other things, **“promoting fair and equitable trading practices amongst industry participants”**.

It is the industry’s strong contention that this condition has not been met, and that reliance on nothing more than the arrangements that have been in place for the past three years will not change this position. At best it can be argued that the measures favoured by the Federal Government in 2000 were a ‘necessary’ component for tackling the circumstances that exist. As demonstrated in this submission, they are clearly not ‘sufficient’ for bringing about the desired policy outcome of fair and equitable trading within Australia’s horticulture sector.

### **What Unfair Trading Practices are Occurring?**

There is a wide range of unfair trading practices within Australia’s horticulture sector. They are, however, the same issues that have concerned growers for decades.

A strong foundation is essential for building and implementing workable solutions. A careful examination of the unfair trading issues and their root causes is an important first step.

The many examples of trading issues that are regularly highlighted in the media and in advocacy by grower organisations are grouped below under four headings.

#### **Prices/Returns**

- Conflicts over pricing, the level of sales proceeds;
- Delays in the making of payments;
- Perceptions that growers are not receiving a fair proportion of the consumer dollar – due to an inability to see ‘where the money is going’.
- Lack of prudential standards to protect growers from business failure of marketers.
- Deliberate forcing down the supply chain of disadvantageous or less cost-effective production or marketing processes by retailers.
- Delaying tactics by food processors regarding the timing of negotiations for contract prices.

#### **Handling of Product Quality Claims**

- Absence of a trail re quality – to identify where problems occur and where responsibility lies.
- Delays in notification of rejected product – insufficient time to re-sell.
- Use of quality claims as a basis for returning over-ordered stock and/or lowering the price.
- Claims always seem to come back to growers.

#### **Changes of Specification (for product labels, packaging, quality standards)**

- Insufficient notice to enable gearing up for the change.
- Use of changes to manipulate pricing or supply.

#### **Culture**

- Resistance to changing traditional ways of doing business.
- Fear of retaliation/victimisation – being ‘sent on a holiday’.



Amongst the key actions that growers and grower organisations have been calling for government bogus product quality claims; and action on to address these problem areas is:

- increased transparency in the horticulture sector production and marketing chains;
- mandatory requirements that will apply to their transactions with wholesalers and retailers;
- inquiries into whether growers are receiving a fair percentage of the consumer dollar;
- protection from
- prudential standards or trusts that can protect growers against failure by produce buyers.

Clearly, rhetoric without substance should not be a sufficient basis for taking action that will impact on or place imposts on the day-to-day competitive behaviour of businesses.

This submission, therefore presents valid reasons for strengthening the current measures and supplementing them with a range of other strategies.

The combined package is seen as the minimum action necessary for quickly bringing about fair and equitable trading in Australia's horticulture sector.

### **Where are the Unfair Trading Practices Hotspots?**

#### **With Wholesalers**

***A major area for disputes is between growers/suppliers and market wholesalers.***

Typical disputes between growers and wholesalers brought to the attention of the Ombudsman involve a lack of 'transparency in market-based transactions' and 'fuzziness' surrounding the nature of contracts/trading terms and conditions.

These may involve uncertainty as to:

- whether wholesalers are acting as agent or merchant;
- the 'fairness' of commissions;
- growers' rights to information;
- the timing at which ownership of/responsibility for produce changes;
- circumstances involving rejection of produce that does not meet specification; and
- differences of perception about pricing, e.g.
  - whether prices quoted are an estimate or firm offer;
  - whether all charges/commissions are included or excluded; and
  - whether returns are to be averaged over a number of transactions.

The RGIO reports that very few other issues involving disputes have been reported.

Commenting on dealings between growers/suppliers and central market wholesalers, the first Annual Report of the RGIO highlighted contractual uncertainty about methods of trading and ownership of produce/horticultural products as a 'systemic problem' (pp 11-12).

The Australian Chamber of Fruit and Vegetable Industries, the organisation representing central market wholesalers, does not share this point of view.

### **With Retailers**

#### ***Considerable concern is expressed by grower organisations regarding the market dominance of the two major retailers***

Issues relating to retailers that are of concern to horticulture industry organisations include:

- inadequate notice and/or lack of consultation before mandating changes to product packaging and quality specifications;
- market behaviours that influence central wholesale prices which are then used to negotiate prices for direct suppliers;
- punitive behaviours designed to enforce desired behaviours by suppliers
  - e.g. issues associated with “being made to take a holiday” and return of product;
- squeezing wholesalers on price and volumes; and
- fresh produce margins of major supermarkets increasing substantially in the past decade.

The RGIO, however, reports few issues arising concerning retailers and their active cooperation regarding matters raised with them.

Grower organisations attribute this situation to the major imbalance in market power between the two major supermarket chains and the many small to medium sized wholesalers and growers they are able to deal with.

In this respect, the Joint Select Committee on the Retailing Sector reported in August 1999 that it had “concluded that the major (supermarket) chains enjoy a substantial degree of market power”.

The Committee also found instances of abuse of the market power of the supermarket chains, e.g. predatory pricing, and noted the possible need for amendment of the ‘proof test’ in the Trade Practices Act in the event that other courses of action proved to be ineffective in establishing the existence of/preventing predatory conduct by the chains.

### **With Food Processors**

#### ***There are problems with produce grown under contract to major processors***

The key problem areas raised by organisations representing growers are in relation to:

- prices and other terms and conditions;
- disputes relating to prices/returns,
- quality and handling of rejected produce; and
- slow payment.

The Ombudsman, however, reports few issues arising in relation to processors.

Grower organisations attribute this situation to the major imbalance in market power between the multi-national food processing companies and weaknesses in their capabilities to enter into collective bargaining with these corporations.



## What Can Be Done to Achieve a Fair and Equitable Trading Environment? (Part 1)

### 1. Bring about Contractual Certainty and Transparency in Transactions

***Currently, the RGICC fails to define the legal relationships between growers/suppliers and market traders, nor does it have the power to enforce them.***

#### Background

The Australian Parliament's Joint Select Committee on the Retailing Sector said in its 1999 report, *Fair Market or Market Failure?* - "the evidence suggests that there is widespread confusion, particularly in regional and more remote parts of Australia, about legal rights of small businesses and the opportunities that they have to take action. The consequence has been that unfair business conduct continues to undermine and damage those in less powerful positions." (page x)

In the four years since these comments were made there appears to have been little change in relation to the widespread existence of contractual uncertainty between growers, suppliers and wholesalers of horticultural produce/products.

In this respect, the lack of certainty about the questions of, 'when does produce change hands?' and 'what is the transaction process?' have been identified by NSW Agriculture's Market Chain Committee as root causes of many of the issues raised in the debate about horticulture sector fair trading.

Further evidence that little has changed are:

- comments made by the RGIO about 'systemic problems' in relation to dealings between growers/suppliers and central market wholesalers;
- initiatives taken by the Australian Mango Industry Association and Brismark to develop Codes of Practice that include specific provisions relating to trading methods;
- the recent public debate between the NSW Farmers' Association and the Australian Chamber of Fruit & Vegetable Industries; and
- Case Studies submitted by industry for inclusion in this submission.

It certainly seems plausible to expect that clarity as to terms of trade and other contractual matters would address many of the areas of current concern.

For example, if it was clearly agreed between growers/suppliers and wholesalers in advance of consignments being initiated that the transaction was taking place on a:

- merchant basis, then the question of risk sharing between parties relating to market movements is largely removed as an issue; or
- commission agent basis, then the question of transparency as to buyers and prices is largely removed as an issue.

Whilst the RGICC recognises the potential for disputes arising over lack of certainty about trading terms and provides for 'retailers and suppliers to encourage the use of written contracts', it has no power to ensure that this happens.

The Australian Chamber of Fruit & Vegetable Industries, which is a signatory to the current Code and a member of the Code Administration Committee for the RGICC, considers that a continuation of the current arrangements is all that is necessary to deal with the issues raised about grower/supplier and wholesaler relationships.

The Chamber points to comments from the Ombudsman regarding the success of the mediation process provided for in the Code and the high level of cooperation from parties to disputes.

Further, the Chamber claims that the magnitude of the trading disputes issue is being overstated by the grower organisations due to:

- the relatively low number of inquiries and applications made under the Code by growers/suppliers, relative to the large number of businesses that make up Australia's horticulture sector;
- comments from the Ombudsman regarding the high level of cooperation he has received from parties involved in disputes that are brought to his office;
- the absence of demonstrated Cases Studies of systemic unfair trading practices; and
- the lack of grower/supplier support for schemes such as PromptPay in NSW which contained dispute resolution procedures.

This is, however, definitely not the view of growers/suppliers and grower representative bodies. It is interesting to note in this respect that, while there is widespread concern in the growing community about the behaviour of wholesalers, there are few if any examples of wholesalers complaining about the actions of growers!

Notwithstanding the successful mediation outcomes achieved by the RGIO to date, the current policies do appear to have failed to bring about a situation in which participants in horticulture sector supply chains can go about their day-to-day business with confidence based on a good understanding of:

- their rights and obligations (and the rights and obligations of others); and
- what is a matter for the law and what is a matter for collaborative agreement.

In recent years trading systems for fresh fruit and vegetables in Australia have undergone a process of reform and deregulation. This included the removal of a number of legislative rules and regulations governing the operation of the traditional marketing system, such as the Queensland Farm Produce Marketing Act 1964 and similar legislation in other States.

WA is the only state to that still regulates fruit and vegetable marketing. It is, however, currently reviewing the Perth Market Authority and the governing legislation, the Perth Market Act 1926. The review is addressing issues relating to the orderly marketing of fresh fruit and vegetables to ensure that no one entity in the supply chain gains a disproportionate level of power.

The December 2001 interim discussion paper for the WA review notes "the lack of price transparency clearly creates opportunities that can be exploited by operators with privileged access to market information or with particularly strong market power. It can lead to situations in which competitive conditions in the market are undermined." The paper supports the introduction of a mandatory centralised price recording system to ensure transparency across the total market. Prices would then be determined based on full information on market volumes and produce quality.

So, what are the consequences of all of this confusion and conflict about contractual relationships and the transparency of transactions in the Australian horticulture sector?

Considered against the overall goal of businesses to achieve and maintain a level of viability that delivers on their personal and business needs, the consequences are serious. The continued existence of widespread contractual uncertainty supports:

- an advantageous environment for those businesses that choose to engage in *unlawful trading* as a strategy for achieving individual commercial gain; and
- a source of inefficiency that will ultimately place participants in production and marketing chains characterised by *dysfunctional trading* at a competitive disadvantage relative to participants operating in paths to market based on *fair trading* practices.

(see Section 4 below for an explanation of the terms 'unlawful', 'dysfunctional' and 'fair' trading)

## Strategies for Achieving Contractual Certainty and Transparency in Transactions

### *The horticulture industry wants a Horticulture Industry Fair Trading Code, with mandatory provisions regarding trading terms and conditions.*

In preparing this submission the industry has formulated an integrated set of fourteen (14) strategies built around a Horticulture Industry Fair Trading Code that contains mandatory provisions relating to trading terms and conditions. These strategies are seen as the minimum action necessary for quickly bringing about fair and equitable trading in Australia's horticulture sector. The first two (2) of these strategies deal with the Horticulture Industry Fair Trading Code and are presented immediately below. These are followed by consideration of Australian and International experience with the use of voluntary and mandatory Codes as mechanisms for bringing about fair and equitable trade within industries.

In order to remove the opportunity for 'fuzziness' in trading relationships, that give rise to disputes of an unlawful or dysfunctional trading nature, immediate action is needed to:

- R.1 Develop and implement a Horticulture Industry Fair Trading Code that specifies the contractual basis for trading terms and conditions
- the requirements of which should be prescribed under the mandatory Industry Code provisions of the Trade Practices Act
    - the intention is for this Industry Code to deal with horticulture industry specific matters, but otherwise to be entirely consistent with the more general fair and equitable trading provisions of the Retail Grocery Industry Code of Conduct (as strengthened in accordance with the strategies proposed below);
    - it is considered that the Retail Grocery Industry Ombudsman or some other appropriately constituted body should continue to settle disputes through mediation wherever possible, but where the mediation option fails or is clearly inappropriate the matter should be referred for attention by the Australian Consumer and Competition Commission (ACCC).
  - in developing the Industry Code an examination should be made of the extent to which the provisions in the Brismark and Australian Mango Industry Codes of Practice relating to documentation of trading/written agreements have been successful in resolving or reducing the incidence of disputes between growers/suppliers and wholesalers.
- R.2 Establish a Horticulture Tribunal funded by industry to develop, oversee and continuously improve commercial practice through the Horticulture Sector Fair Trading Code.

Currently the RGICC operates on a voluntary basis. The Federal Government has indicated, however, (in its December 1999 response to the report of the Joint Select Committee on the Retailing Sector) that if it did not operate effectively, it would consider making it mandatory.

In this respect, the Trade Practices Act now contains provisions that enable Industry Codes of Conduct to be made enforceable. The Minister for Financial Services and Regulation, The Hon Joe Hockey, MP, has said, "if industry self-regulation fails, codes prescription offers an attractive alternative". Regulations made under the Trade Practices Act may declare all or part of a code to be either mandatory or voluntary. Mandatory codes are binding on all industry participants. Voluntary codes are binding on the members of an industry who formally subscribe to the Code.

As mentioned above, an interim discussion paper, supported by the Perth Market Authority, on the review of the Perth Market Act 1926 recommends a mandatory Code of Practice with legislative backing.

The NSW Farmers' Association has also been actively advocating a mandatory Code.

As the NSW Farmers' Association lacks confidence that the Federal Government will agree to immediately move to a mandatory Code, it has opted for a two-stage approach. This position is reflected in the following extract from the Association's submission to the review of the RGICC:

"After consultation with the RGIO and staff of the Australian Competition and Consumer Commission (ACCC), and conscious of the Government's reluctance to legislate on such matters, the Association has opted instead for a voluntary prescribed Code registered under the Trade Practices Act 1974. However, we attach a condition - if such a voluntary Code cannot be agreed within 12 months, the Government should mandate the Code..... We understand that the ACCC has no objection to accepting responsibility for such a Code".

The AUF has advised that whilst it is supportive of the implementation of a Horticulture Sector Fair Trading Code of Practice, it can see no justification for giving consideration to a mandatory Code. In this request the AUF indicates that:

"It seeks a list from the Ombudsman concerning current infringements that would give any justification for the introduction of a Mandatory Code. It is suggested that much of the contractual uncertainty can be overcome by the proposed educational booklet."

In other industries struggling with an imbalance in commercial power, governments have implemented mandatory Codes and licensing arrangements. Examples include real estate agents, auctioneers, travel agents, property developers, motor vehicle dealers, commercial agents, finance advisers and brokers credit agents and land valuers.

These Codes and licences have generally been introduced when there is clear market failure or when there is potential for misuse of funds held in trust.

Wholesalers within the horticultural sector clearly hold monies in trust for growers/suppliers for the period between sale of produce and remittance of returns. There also are obvious imbalances of power in the relationships between retailers and wholesalers and grower/suppliers. These issues have been recognised and debated constantly since the introduction of the Trade Practices Act in the 1970s – but they have not yet been addressed. It is thus obvious that the market place cannot deliver the desired outcome.

It is clear that both the prerequisite conditions for mandatory codes exist within the horticultural industry and that there are relevant precedents.

On this basis, it is our contention that a mandatory approach is appropriate and necessary to ensure commercial practices in the industry are transparent and equitable. Such a system would deliver a more transparent market chain that better passes on market signals from consumer to grower. Without such signals, the industry will continue to be dysfunctional.

#### Consideration of Experience with Industry Codes

At present, the only Code of Practice in operation in an Australian central market is the voluntary Code of Practice for Queensland Fruit and Vegetable Wholesalers, (the **Brismark Code of Practice**) which governs the conduct of Queensland fruit and vegetable wholesalers.

The Brismark Code of Practice provides for greater self-regulation within the fruit and vegetable wholesaling sector in Queensland and clarifies the methods of trade to be used in the Brisbane Market and the requirements attached to these. The Code requires subscribers "to have documented terms of trading", i.e. written agreements which establish clarity about a number of the matters listed above. It has a clear disputes resolution process and gives the Brismark the authority to impose penalties for non-compliance.

Similar arrangements do not seem to be in place for the major markets in Sydney and Melbourne, however, the Australian Chamber of Fruit and Vegetable Industries indicated that schemes which included provisions relating to trading terms and conditions and overcoming slow payment and bad debts to suppliers were (or had been) in operation in other States, e.g. the Melbourne Markets FarmPay service in Victoria and PromptPay system in New South Wales, and the QFVG Growers' Settlement Service. The NSW PromptPay scheme was said to have failed due to lack of support from growers, and support for the other services appears to be low.

The Australian Mango Industry Association, with assistance from the Ombudsman, Horticulture Australia Limited and a number of other public and private sector organisations, is nearing completion of a '**Voluntary Code of Practice for the Australian Mango Industry**'. The Australian Chamber of Fruit & Vegetable Industries has recently reviewed the draft Code and has proposed a number of amendments.

The purpose of the Voluntary Code of Practice for the Australian Mango Industry is to overcome dissatisfaction about uncertainty and risk in the marketing of fruit, including price and quality aspects, and to establish fair trading principles designed to improve practices and relationships within mango supply chains. It contains a provision that contractual arrangements between trading partners be specified in writing. The intention of the industry is to have the Code in place for the forthcoming mango season.

Many other grower organisations are showing considerable interest in the approach taken by the mango industry. These other industries have indicated an intention to take similar steps after they have a chance to consider the outcomes from the initiative of the mango industry.

But, a number of organisations, including the Australian Chamber of Fruit and Vegetable Industries, point to commercial difficulties arising from administrative and operational aspects that could arise for wholesalers, retailers, transporters etc that handle a large number of fruits and vegetables in the event that each individual industry chooses to implement its own Code.

It is instructive to observe how development and management **Codes of Practice for specific industries in other sectors of the Australian economy** have been approached. There are many examples of both voluntary and mandatory Codes of Conduct (or Codes of Practice) from that may provide insights for the review of the RGICC. Some of these are briefly outlined below, while more detail is provided in Appendix 7.

A range of professional selling groups in other sectors of the Australian economy has developed licensing and/or mandatory Codes of Practice. These include real estate agents and sales representatives, auctioneers, restricted letting agents, settlement agents, property developers, commercial agents, pastoral houses, finance brokers, motor vehicle dealers, travel agents, credit agents and land valuers.

In these industries, licensees and registered salespeople must conduct themselves and their business according to binding/mandatory Codes of Conduct when dealing with consumers. Typically, these mandatory Codes of Conduct set down principles for fair trading and establish standards for how licensees conduct their businesses. They also require licensees to have a complaint resolution system in place.

Examples of mandatory codes of conduct in Queensland are the Queensland Property Agents and Motor Dealers Act 2000 and the accompanying Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) Regulation 2001. This legislation imposes stringent regulations on interaction and dealings between property agents, motor vehicle dealers and their clients, particularly in relation to the disclosure of information, conduct and remuneration.

For example, Codes of Practice have been developed by a number of industry associations in the **financial services sector**. While the content of each of these Codes is different, they set



out the service standards for dealing with a company that subscribes to that Code. Membership of an industry code is normally voluntary. The Codes also require companies to have a fair process for dealing with complaints of non-compliance.

Codes of Practice currently operating for the financial services include the:

- Code of Banking Practice
- Building Society Code of Practice
- Credit Union Code of Practice
- General Insurance Code of Practice
- General Insurance Brokers' Code of Practice
- Life Insurance Code of Practice
- Financial Planners Code of Ethics and Rules of Professional Conduct

The Australian Securities and Investments Commission (ASIC) approves and oversees the development and operation of the Codes of Practice for the financial services sector. ASIC also has direct responsibility for monitoring industry compliance with a number of the Codes, while others are monitored by their respective industries. ASIC requires all financial services Codes of Practice to be regularly reviewed and updated.

The Code of Practice for the Australian Banking industry, the [Code of Banking Practice](#), seeks to foster good relations between Banks and their Customers and to promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their Customers.

The Code is intended to:

- describe standards of good practice and service;
- promote disclosure of information relevant and useful to Customers;
- promote informed and effective relationships between Banks and Customers; and
- require Banks to have procedures for resolution of disputes between Banks and Customers.

These objectives are to be achieved:

- with regard for the requirement of Banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system;
- consistently with the current law and to preserve certainty of contract between a Bank and its Customer; and
- to allow for flexibility in products/services and in competitive pricing.

The Australian Payments System Council may obtain from the Reserve Bank of Australia consolidated information based on reports and information provided by the Banks so that the Australian Payments System Council may provide reports to the Treasurer of the Commonwealth on compliance with the Code and its general operation.

The Mortgage Industry Association of Australia (MIAA) [Code of Practice and Mortgage Industry Ombudsman Scheme](#) provides an example of a voluntary Code of Practice in the financial services sector. The Code sets a standard for best industry practice and fair dealing between customers and MIAA Members. It recognises that customers looking for a loan need to feel confident in proceedings with what is usually the most significant financial transaction of their lives. It also acknowledges that there are now many organisations providing finance apart from traditional lending providers such as Banks, Building Societies, and Credit Unions, i.e.

“The MIAA believes that customers benefit significantly from a healthy competitive spirit in the marketplace for finance. The active involvement of individuals and small corporations in competition with each other and with large corporations and credit providers means that Customers have a wider choice of financial products at a competitively set prices.”

The MIAA Code of Practice is a statement of principles dealing with industry practices that are designed to set a standard of best industry practice and fair dealing between customers and MIAA Members. The Code of Practice exists to instil public confidence in the operations of Members. Although the Code of Practice is not enacted in legislation, it is binding on and between members; and customers may use procedures set out in the Code for dealing with complaints and the resolution of disputes. It is intended to complement the Uniform Customer Credit Code ("UCC"), the Trade Practices Act and other Fair Trading Legislation.

The objectives of the MIAA Code of Practice are:

- to establish professional standards of Customer/Member and Member/Member dealings;
- to promote commitment by Members to compliance with laws and regulations;
- to promote the maintenance of the high public standing of membership accreditation;
- to promote ethical and fair business practices;
- to promote goodwill and harmony amongst Members;
- to promote education and professional development programs for Members; and
- to specify complaint and dispute resolution mechanisms through the Mortgage Industry Ombudsman Scheme.

There are also many **examples from overseas** of both voluntary and mandatory approaches to dealing with fair and equitable trading issues. This is presented in Appendix 6 whilst a brief examples given below of a mandatory approach regarding terms of trading in the USA, which has adopted a highly regulated approach to the marketing of fresh fruit and vegetables.

The United States Perishable Agricultural Commodities Act 1930 (PACA) deals with the issue of contractual uncertainty and transparency by imposing mandatory regulations relating to the marketing of fresh fruit and vegetables in the United States. Regulations under the legislation prescribe trading terms and conditions relating to the following broad areas:

- licensing of traders, retailers and grocers including the suspension or revocation of licenses;
- accounts and records kept by commission agents, dealers and brokers;
- records of market receivers including details of produce received, sales tickets, lot numbers, returns/rejections;
- records of retailers;
- conduct of auction sales;
- duties of growers' agents and shippers;
- conversion of funds;
- disclosure of business;
- commodity inspection;
- terms of trade and details relating to copies of records, goods delivery standards, misrepresentation of miss-branding (in fact 34 possible terms of trade are described); and
- statutory trust and complaints procedures.

Complaints about unfair trading practices under the PACA may be filed with the United States Department of Agriculture (USDA). Examples of unfair trading practices relating to contractual uncertainty and transparency in transactions include failing to make full payment promptly for produce purchases, misbranding or mislabelling of produce, making false and misleading statements in connection with produce transactions, and employing individuals connected with PACA violator firms.

## **2. Tackle the Market Power of Supermarket Chains and Food Processors**

### Background

The RGIO reports that very few of the complaints of unfair trading practices received to date have involved trading issues with the supermarket chains or food processors.

Whilst the weight of current concerns (publicly stated concerns and matters raised with the RGIO) relate to the grower/supplier interface with wholesalers in the central markets, issues have also been raised, during the course of preparing this submission, about the dominant market position of the major retail chains and the potential their market power provides for imposing their will on their suppliers in direct grower/supplier to retailer and grower/supplier to wholesaler to retailer business models.

There is concern that the absence of specific complaints to the RGIO about abuse of market power by the major supermarket chains and multi-national food processors is seen as reflecting satisfaction with the system, when in fact it reflects the extent of the power imbalance coupled with weaknesses in the Code for tackling systemic problems.

The potential for fear of retaliation or victimisation is most likely to be a factor in circumstances where there is great imbalance in market power between parties, and where possible adverse consequences on long-term viability are considerably greater for one party relative to the other. This type of behaviour is a deliberate abuse of market power (unlawful trading) and needs to be dealt with by the law. This aspect is discussed further in Sections 4 and 5 below.

### **Strategies for Addressing Market Dominance by Retailers and Food Processors**

#### ***Growers lack confidence in the effectiveness of the RGICC for dealing with the market power of the major retailers and multinational corporations.***

In order to ensure that the substantial market power of the major multi-national food processing corporations, and the major supermarket chains, is not unfairly or unreasonably wielded against their small to medium sized fruit, vegetable and nut suppliers, it is recommended that:

- R.12 Contract growers supplying food processors be granted authorisation under the Trade Practices Act to engage in collective bargaining activities, along similar lines to the arrangements in place for suppliers to processors in the dairy industry.
- R.13 The Federal Government in considering the outcomes from the review of the RGICC take into account the findings about the level of returns received by primary producers relative to other participants in food supply chains, from the current AFFA Study of Food Price Determination and other sources, advise industry accordingly, and propose appropriate actions.
- R.14 Any significant concerns relating to unfair or unreasonable use of market power by the major supermarkets identified during the current review of the RGICC be taken by the Federal Government as a sufficient basis for it to reconvene the Joint Select Committee on the Retailing Sector to consider and propose appropriate action.



As previously mentioned, underlying some of the concerns of growers/suppliers is an expectation that they should receive a fair proportion of the consumer dollar for the crucial role they perform in producing the produce/products on which consumers and all other participants in horticultural production and marketing chains depend for delivering the personal and/or commercial benefits they seek. This gives rise to a need by growers/suppliers for them to feel confident that they are not being exploited by other supply chain participants who are in a position to do so either because of a power imbalance or a trading environment that impedes market signal/information flows.

In this respect it is noted that AFFA recently commissioned a study of food price determination “to provide the basis for a better understanding of the formation of food prices and the market process within the food industry from farm to consumer.” As a component of the AFFA study, prices paid by consumers will be compared to prices received by farmers and food chain intermediaries. The study has a similar timeframe to, and overlaps on some of the key issues being addressed by, the review of the RGICC initiated by the Office of Small Business.

Clearly the results of these two separate Federal Government initiatives need to be brought together in determining the additional measure required to ensure fair trading within Australia’s horticultural sector production and marketing chains.

The RGIO has indicated (personal communication) that the two major supermarket chains are signatories to the RGICC and as commercial entities have direct responsibility for the actions of their employees (unlike the position with industry representative bodies who as signatories have no direct responsibility for the commercial actions of their members).

Additionally, the major supermarket chains have nominated very senior staff members within their organisations to provide a point of contact for the RGIO to ensure prompt and serious attention to complaints about trading practices.

The RGIO’s observations regarding the position of the major supermarket chains aligns with comments by the Joint Select Committee on the Retailing Sector that “during the course of the inquiry, the major chains appear to have re-evaluated their relationships with small retailers, who have signalled this improvement in relations to the committee.” (page xi).

Notwithstanding these observations and given the considerable market power of the two major supermarket chains and the multi-national food processing corporations, a question remains as to whether the absence of specific complaints about abuse of market power is a true indicator of the existence of fair trading practices by the supermarket chains or whether the extent of the power imbalance coupled with weaknesses in the mechanisms for tackling such systemic problems is the real reason.

A Board member from the Horticulture Australia Council recently commented that “the supermarket chains are really squeezing the wholesalers not only on price but also on volumes and this flows down the chain to growers, affecting their viability”. Whilst a representative of another grower organisation claims that fresh produce margins of major supermarkets have increased substantially in the past decade, in line with a trend for the major supermarkets to take an increased share of horticulture retail sales. It noted that fair retail margins are a key factor contributing to returns to suppliers and reasonable prices to consumers, and that this could only be achieved through increased competition at the retail level.

A further issue relates to the price-making policies of the supermarkets. Because of the size of the major supermarket chains, their market behaviours have the capacity to influence central wholesale prices. These can then be used as a basis for negotiating prices for direct suppliers.

Growers who supply major multi-national food processing companies, especially those located in southern Australia, feel particularly vulnerable. Their farms are based close to processing plants in regional areas they have no alternative market outlets for much of their produce.

Access to strong collective bargaining capabilities is seen as essential for such growers in determining contract terms and conditions with major fruit and vegetable processing companies.

It is understood that dairy farmers supply regionally based milk processing plants are confronted with similar circumstances. As a consequence of the Government moves to deregulate the dairy industry in recent years, there has been a significant concentration in the ownership of dairy processing companies. In these circumstances dairy farmers have been given authorisation under the TPA to collectively bargain.

A similar major concentration in the ownership of fruit and vegetable processing plants has been naturally occurring over a period of many years, leading to a significant imbalance in market power between growers and processors.

Intimidatory behaviour by the major supermarket chains and multi-national food processors is clearly at odds with the notion espoused by the Federal Government that prices should be determined in a competitive marketplace.

**Overseas experience** provides a useful example of how market power issues are dealt with by others, and the success of measures adopted.

Competition policy in the United Kingdom is based on the Fair Trading Act 1973 and the Competition Act, originally enacted in 1980 and revamped in 1998 to, among other things, bring the United Kingdom's domestic competition laws into line with those operating elsewhere in the European Community, and in accordance with Articles 85 and 86 of the Treaty. Under the Fair Trading Act, the Director General of Fair Trading, via the Office of Fair Trading (OFT), has a general duty to review commercial activities in the United Kingdom, so that monopoly situations or uncompetitive practices can be identified.

The OFT may initiate an inquiry on their own volition or in response to a particular complaint. The OFT's focus is on whole markets rather than individual companies.

The Competition Act 1998 prohibits the abuse of market dominance by:

- imposing unfair purchase or selling prices or other conditions;
- limiting production, markets or technical development;
- applying dissimilar conditions to equivalent transactions with different trading partners; and
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which have no connection with the subject of the contracts.

In April 1999 the OFT determined, using detailed information from the top four firms covering five years of performance, that there was a level of profitability in the grocery retailing sector which warranted further investigation by the Competition Commission. The OFT raised several competition issues, which included examination of the nature of the relationship between the major grocery retail chains and their suppliers, including agricultural producers, and the ways in which buyer power is exerted.

A Supermarkets Code of Practice was introduced in the United Kingdom in March 2002, following an investigation by the UK Competition Commission into the dealings of supermarkets with their suppliers. The investigation found that the supermarket sector was working competitively, but ruled that there was evidence that the relationship supermarkets had with their suppliers could act against the public interest. "The Competition Commission (has) recommended that a Code of Practice (should) be introduced to put relations between Supermarkets and their Suppliers on a clearer and more predictable basis." The Code also states "The Supermarkets are fully committed to the objectives of this Code and undertake to operate this Code in good faith."

The UK Supermarkets Code of Practice is designed to have flexibility to allow mutually beneficial agreements to be entered into by major supermarkets and their suppliers. It seeks to ensure that agreed terms are available in writing and transparent, and that supermarkets give advance notice of changes or compensate their suppliers. The Code of Practice includes dispute resolution procedures designed to ensure that this flexibility works as intended. It is interesting to note that the UK Office of Fair Trading conducted a review of the Code of Practice in March 2003. The review followed suggestions that supermarkets covered by the Code were continuing some of the practices the Competition Commission identified as cause for concern when it had investigated retailers in 1999-2000.

Concentration is low at the national level in retailing in the United States. The top twenty supermarkets account for only 38 per cent of sales. As there is no national supermarket chain in the United States, retail acquisitions are measured regionally, or on a metropolitan basis. Some regional concentration levels are sometimes as high if not higher than those that exist in European countries. The Robinson-Patman Act 1936 makes price discrimination unlawful, where it has the effect of substantially lessening competition or creating a monopoly. This Act was introduced as a result of concerns over the increasing market power of the supermarket chains and their threat to the viability of small independent retailers. While controversy exists regarding the effectiveness of the legislation, according to the ACCC, it has been suggested that the legislation has been less than effective in its ability to protect small independents from price discrimination. It is often regarded as a little-used piece of legislation whose repeal has been widely recommended.

Recent trends in Canada indicate an increased concentration in the food grocery industry by the consolidation of the wholesale and retail sectors, leading to concern over loss of consumer choice, due to the promotion of generic label products over others, and the use of prohibitive fees manufacturers may be forced to pay supermarkets to get their products onto supermarket shelves. The issue of growing concentration in the retail grocery sector has been dealt with in Canada by the application of the merger provisions of the Competition Act. The anti-competitive threshold for mergers provides that a quasi-judicial Competition Tribunal may make an order, such as divestiture, in respect of a merger where it finds that the merger 'prevents or lessens, or is likely to prevent or lessen, competition substantially'.

In New Zealand, the basis of the competition laws for dealing with restrictive trade practices is the Commerce Act. Restrictive trade practices prohibited under the Commerce Act include:

- contracts, arrangements or understandings which contain provisions or in their entirety substantially lessen competition in a market;
- contracts, arrangements or understandings between competitors which contain provisions or in their entirety reduce the competitiveness of another rival; and
- contracts, arrangements or understandings which contain provisions or in their entirety lead to prices being fixed among competitors.

The Commerce Act prohibits collective pricing agreements, and agreements which are likely to have an anti-competitive purpose or effect.

Further examples of overseas experience with minimising deliberate unfair or dysfunctional trading are provided in Appendix 6.

## 4. WHAT IS 'FAIR COMPETITION'?

### A Classification for Considering Trading Relationship Issues

Close examination of commercial dealings in any production and marketing system, irrespective of the products or services being traded, will undoubtedly identify behaviours that fall into each of the following three categories:

- Unlawful Trading:** Deliberate abuse of market power or deliberate dishonesty.  
For example: a wholesaler against whom a grower has made a complaint to the Ombudsman encourages other wholesalers not to deal with the grower/send the grower 'on a holiday'.
- Dysfunctional Trading:** Differences of opinion and conflict.  
For example: a grower sends produce to a central market wholesaler without notifying the wholesaler who sells it and makes a payment to the grower which is much less than expected.
- Fair Trading:** Vigorous competition within the law and agreed industry standards/codes.  
For example: rejection by a retailer of all or part of a consignment of produce supplied directly by a grower because of an identifiable defect specified in agreed standards and specifications.

As these real life examples demonstrate, disputes can arise between parties trading in each of the circumstances described above. The public and private debate about fair competition and the role of the RGICC cuts across all of these categories.

It is important for third parties who may be asked to intervene, to settle disputes or take remedial action, to be clear as to the category of trading behaviour indicated by the circumstances of cases brought to their attention. This is because the 'best approach' for dealing with disputes can be expected to differ between each of the above trading categories, e.g. punitive measures for unlawful trading practices, and mediation or awareness creation for disputes arising in dysfunctional trading circumstances.

As well as having a bearing on what action is most appropriate, this cause and effect approach to thinking about how best to deal with trading disputes also has implications for who should be involved in resolving the problems.

The logic presented above underpins the comments made in this submission about problems arising from trading practices between parties in horticulture supply chains, and proposing responses for tackling the problems.

The best solutions for minimising the number of cases of conflict between parties in horticulture sector supply chains where either **dysfunctional or fair trading** is indicated are believed to be:

- contractual certainty;
- whole-of-supply chain product management protocols;
- effective communication amongst supply chain participants;
- honesty and fairness in dealings; and
- effective change management processes.

The best solutions for dealing with **unlawful trading** are believed to be prosecution for anti-competitive conduct.

## The Nature of Commercial Relationships in Different Pathways to Market

Growers/suppliers of horticultural produce and horticultural products have options as to their 'path to market'. A key aspect of each option is the nature of the commercial relationship that is intended to exist between the various linkages in production and marketing chains. This is because different legal rights and obligations are associated with different methods of trading.

It should be noted that the 'legal' position in relation to the rights and obligations associated with alternative methods of trading defines a minimum or base-line position. It is open to the discretion of parties in vertical relationships within supply chains to agree to move beyond this and voluntarily agree to a more open and collaborative approach (see comments on page 5 above regarding changes occurring globally in supply chain relationships). Discussions with participants in a number of integrated and highly collaborative grower/supplier to retailer supply chains reveal a high degree of transparency, well beyond what is legally required.

Whilst there are many different possibilities in the methods of trading for each 'path to market', they tend to fall into one of the following two categories:

- Direct sale to an intermediary in the supply chain or to a final consumer. In direct sales, ownership of the produce/product immediately passes at an agreed price to the purchaser or at a time agreed as a condition of the contract. Examples of direct sale trading methods by growers/suppliers include:
  - On-farm sales direct to the public;
  - Stalls at weekend/flea markets catering to the public;
  - Contract growing of produce for processors;
  - Contract growing of produce for exporters;
  - Contract growing of produce for marketing groups/alliances;
  - Sales to wholesalers trading on a 'merchant' basis in central markets;
  - Direct sale to a major retailer.
- Engagement of a marketing services provider to sell the produce/product on your behalf. Marketing service providers operate on a fee-for-service basis, or as a cost centre where organisations own both production and marketing businesses. Ownership of the produce/product does not pass from the grower/supplier until it is sold to a purchaser on agreed terms and conditions. Examples of trading methods that involve the engagement of marketing services by growers/suppliers include:
  - Use of a broker paid a fixed dollar amount per package for providing linkages to domestic or export market buyers;
  - Sale through a grower cooperative or grower-owned marketing company operating as a cost-centre within the overall business;
  - Use of a wholesaler as a commission agent in a central wholesale market to find buyers for your produce/product;
  - Use of a fee-for-service consolidator to find a buyer and arrange delivery of the produce/product to the buyer;
  - Use of a food service distributor on a fee or commission basis to find a buyer and arrange delivery of the produce/product to the buyer.



Irrespective of the 'path to market' chosen, the parties involved in business dealings need to be clear in advance as to:

- whether their relationship involves a direct sale or the provision of marketing services;
- the price that is to apply, or the basis for determining the amount of payment;
- the time at which ownership of the produce/produce will change;
- quality and food safety standards/specifications;
- any special product handling and storage protocols/requirements;
- the basis on which produce/product may be rejected/returned;
- procedures for dealing with rejections/returns;
- expectations about the timing and nature of information of information to be exchanged; and
- procedures for dealing with disputes.

### **Industry Awareness of the Code**

Many small businesses within the horticulture sector appear to be unaware of the existence of the RGICC and the avenues available to them for dealing with unfair trading issues that they may encounter.

A New South Wales Farmers' Association survey of its horticultural membership in July 2003 found that 82% of respondents were either *not very* or *not at all* familiar with the Code, notwithstanding the fact that the Association's publications regularly mention it.

In a similar vein, the RGIO indicated in his first Annual Report that the results achieved by his office from promoting the RGICC by means of brochures, media publicity, correspondence etc were questionable. He reported, however, that local meetings that provided an opportunity for industry participants to meet with the RGIO appear closely linked with dispute applications submitted.

QFVG is of the view that the current name of the Code is a factor in the low level of awareness. Many of its members and the media do not see a connection between it and horticulture sector fair trading issues. Publicity that mentions both the horticulture sector by name and the topic as 'unfair competition' appears to be the most successful.

Introduction of a **Horticulture Industry Fair Trading Code** (R1, page 12) should overcome the current 'badging' problems associated with the RGICC, i.e. a title that clearly conveys its relevance to those growers, suppliers and wholesalers who have the least market power and are most likely to need to avail themselves of their rights to be traded with fairly.

Additionally, an increased emphasis is indicated for the use by industry organisations and public sector agencies of the **face-to-face and other direct forms of communication** that seem to be necessary to create awareness in the horticulture sector.

Given the fundamental connection between the sustainable viability of industry participants and the minimisation of both 'unfair' and 'dysfunctional' trading, a high priority is warranted for activities that will ensure the success of fair trading awareness creation strategies.

In this respect, the Joint Select Committee on the Retailing sector flagged in its 1999 report to the Australian Parliament the need for an ongoing education program to ensure that small businesses were able to become aware of their rights and obligations and the overall benefits and safeguards provided by competition policy.

## What Can Be Done to Achieve a Fair and Equitable Trading Environment? (Part 2)

### 3. Focus on Changing Traditional Ways of Thinking and Behaving

*Traditional trading relationships involve a 'fuzziness' that is deeply embedded in the culture of the central market system.*

#### Background

As mentioned at the beginning of Section 3, 'contractual uncertainty' lies at the root of many of the disputes between parties in the horticulture sector, and the push by grower organisations for transparency in market operations, written contracts, guidance as to who is responsible for what, industry Codes of Practice, legislated/mandatory fair trading measures etc.

This 'fuzziness' that surrounds the nature of trading relationships, especially in paths to market that involve central market wholesalers, is not a new phenomenon. The market culture reflects a 'this is the way it has always been done' mindset that has become increasingly at odds with changing community and business values/expectations relating to the way commercial transactions should be conducted.

This highlights a major cultural change aspect for both growers/suppliers and marketers. A situation that is unlikely to be resolved by the use alone of the approaches usually employed to try to convince people that 'this is what we should be doing'.

#### **Strategies for Ensuring Industry Is Well Informed About Fair Trading Matters**

In order to ensure widespread understanding of the rights and obligations of parties engaged in alternative commercial arrangements for the sale of horticultural produce/products, and to promote adoption of the approaches proposed in this submission, it is recommended that:

- R.8 A whole-of-horticulture Working Group be immediately created to prepare a 'Guide to Contractual Relationships in Australian Horticulture' educational booklet and a Terms of Trading Check List
- it is envisaged that the Working Group would include representation from the peak grower/supplier, wholesaler and retailer organisations with assistance and guidance provided by the Ombudsman, the Australian Taxation Office and the ACCC.
- R.9 A voluntary Training Program be developed and offered to growers/suppliers and marketers to assist them to increase their understanding and skills about terms and conditions of trading, Industry Codes and industry best practices.
- R.10 Horticulture industry organisations, State and Federal Government agencies and the Ombudsman give high priority to the design, implementation and monitoring of communication strategies that will effectively create wide-spread awareness of the fair competition options, rights and obligations arising from the outcomes of the current review of the RGICC
- it is envisaged that the experience gained by the Ombudsman and industry organisations over the past three years with the failure and success of various different means of awareness creation will be drawn upon to ensure the effectiveness of these communication strategies.
- R.11 Industry, the Federal Government and State Governments clearly distinguish between practices that indicate 'unlawful trading', 'dysfunctional trading', and 'fair trading' in considering and commenting on strategies for achieving fair competition in food production and marketing chains.

Experience globally with activities designed to get critical masses of people to change their traditional behaviours points to a need to make deliberate use of change management strategies that encourage new ways of thinking about issues.

The bottom line is that until people can genuinely think differently about an issue, their behaviours will continue to be as they always have.

In this respect, global agribusiness financier and market research organisation, Rabobank, recently stated in relation to traditional thinking about the imbalance in market power between growers/suppliers and retailers/marketers that:

“Rather than seeing retailers as the enemy suppliers need to look at establishing new relationships focussed on presenting retailers with solutions to their issues. This may possibly involve bypassing links in the traditional chain.

The increased retailing power this provides when negotiating supply contracts is significant and these retailers prefer to deal with fewer, larger suppliers. The loss of bargaining power is a very real issue for producers as, increasingly, they become price takers. The major issue facing suppliers in many countries is how to maintain, or in some cases regain, a measure of control over their destiny.

In order for suppliers to be successful in these changing times they need to look for ways to differentiate their product and consider developing brands to ensure their product is uppermost in the consumer’s mind. They need to educate consumers and ensure they understand what the benefits of their particular product are and how it can meet the needs of the consumer.

Suppliers also need to explore opportunities to form alliances to achieve economies of scale and improve their bargaining power. Rather than seeing the retailers as the enemy they need to look at establishing new relationships focussed on presenting retailers with solutions to their issues. This may possibly involve bypassing links in the traditional chain.”

The discussion paper for the current Review of the Perth Market Act 1926 (see page 11 above) describes how some intermediaries in the Perth Market have responded to the dominance of retailers, rather than growers, in the vertical coordination of fresh fruit and vegetable value chains and the impact of this on the traditional public market structure.

In the case of the Perth Market, some intermediaries have repositioned themselves to respond to these trends by establishing themselves as category managers and introducing innovations such as product enhancement and supply chain integrity and efficiency into their operations.

In order to develop the best-possible strategies and measures for bringing about a fair and equitable trading environment for participants in Australia’s horticulture sector supply chains it is necessary to focus on root causes, not on symptoms. This position is illustrated by the following extract from the QFVG submission to the review of the RGICC:

“Making the *Retail Grocery Industry Code of Practice* and the central market codes in operation throughout Australia mandatory would be an effective means of clarifying the roles and responsibilities of participants in the supply chain. It should be noted however, that 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.”

When considered from this perspective, a range of actions is indicated on the part of horticulture sector organisations, as well as by the Federal and State governments.



For industry, the action considered necessary for minimising conflicts arising from **dysfunctional trading** practices includes:

- preparation of a range of jointly agreed educational publications;
- development of a jointly agreed/tick-the-box type of 'Terms of Trading Check List' to be exchanged between parties before product is supplied; and
- design and implementation of communication strategies for effectively promoting the educational publications and Check List to their members.

Much of the information necessary for defining the common paths to market and the minimum legal rights and obligations, and the strengths and weaknesses of each option, appears to be already available to industry, judging from the comments about the commissioning of legal opinions that have been made during the recent public debate on fair competition issues within the horticulture sector. This information could provide the basis for comprehensive awareness creation and practice change activities.

In this respect, the RGIO in his first Annual Report suggested that the adoption of better business processes within industry (relating to terms of trading) could assist parties to avoid many disputes that arise between them.

The desired outcome from the action proposed above is ensuring that all participants in Australia's horticulture sector have sufficient and independent knowledge on which to base their decisions as to choice of path to market and method of trading.

The AUF has expressed its support for Recommendation 8 (page 24 above):

"The association would encourage the preparation of a '*Guide to Contractual Relationships in Australian Horticulture*' educational booklet and a Terms of Trading Check List. As the only national representative organisation for the whole-of-chain fresh fruit and vegetable industry, the association would be keen to be involved in, or for that matter coordinate, any Working Group established to prepare the proposed 'Guide'. We concur that the Working Group should be created with some urgency."

Amongst the market information available to horticultural producers in the USA and Canada are detailed listings of firms involved in fresh produce marketing.

For example, the Packer Red Book Credit Services (RBCS) evaluates over 36,000 firms with online trading practices, business ethics and worthiness. Members have access to credit rating and market information regarding firms involved in the buying, selling and transport of fresh fruit and vegetables. The Red Book Directory contains over 20,000 detailed listings of United States and Canadian firms involved in the marketing of fresh fruit and vegetables. The International Red Book provides 16,000 listings outside the United States and Canada, with a particular emphasis on Mexico and the rest of Latin America.

## 5. AREAS THAT NEED STRENGTHENING IN THE RETAIL GROCERY INDUSTRY CODE OF CONDUCT

### What Can Be Done to Achieve a Fair and Equitable Trading Environment? (Part 3)

#### 4. Strengthen the Effectiveness of the RGICC and the RGIO

*The effectiveness of the RGICC and the Retail Grocery Industry Ombudsman must be strengthened.*

##### Background

One of the objectives of the current review is to enquire into the operation and effectiveness of the RGICC and to ensure its provisions continue to be relevant in, amongst other things, “promoting fair and equitable trading practices amongst industry participants”.

As indicated in Section 3 above, it is the industry’s strong contention that this condition has not been met, and that reliance on nothing more than the arrangements that have been in place for the past three years will not change this position. Whilst many small businesses in the horticulture sector are still unaware of the existence of the RGICC and the RGIO, it is considered that the RGIO, or some other appropriately constituted body, should continue to settle disputes through voluntary mediation wherever possible.

Where the mediation option fails or is clearly inappropriate, however, the matter should be able to be referred for attention by a body that possesses the necessary investigative and compliance powers, e.g. the ACCC.

There are problems with the structure and operation of the RGICC Administration Committee. Its structure is unreasonable as it is heavily skewed in favour of price-makers not price-takers, and there are questions as to its effectiveness in being able to reach agreement on key matters relating to the operation of the RGICC and the Office of the RGIO.

These views are not unanimously shared by horticulture industry organisations. As mentioned in Section 3 above, the Australian Chamber of Fruit and Vegetable Industries is a signatory to the current Code and a member of the RGICC Administration Committee and considers that a continuation of the current arrangements is all that is necessary to deal with the issues raised about grower/supplier and wholesaler relationships. The AUF has indicated that it would caution against “excessive powers being given to the Ombudsman.”

##### Produce Standards and Specifications

The RGICC requires that produce be fairly evaluated against clear and objective standards and specifications, but which allows for seasonal variations in produce.

The NSW Farmers’ Association believes that the current looseness of the provisions in the RGICC relating to standards and specifications (requiring only that retailers use their ‘best endeavours’ and ‘have proper regard to’) provide inadequate protection from unilateral decisions by retailers that “could involve significant economic loss to growers.”

AUSVEG expresses similar concerns and considers that the RGICC needs to be amended to provide adequate protection for growers in situations where major retailers demand a change in the specifications or labelling/packaging of produce.

It is considered by AUSVEG that provision should be made for the Ombudsman to be able to deal with these disputes against agreed notice periods that are related to production cycles.

## Overseas examples of regulation through Produce Standards and Specifications

### ***Overseas experience provides examples of how others have introduced standards and specifications for horticultural produce and products.***

In Canada, for example, the Canada Agricultural Products Act 1988 provides for national standards and grades of agricultural products. The legislation incorporates Fresh Fruit and Vegetable Regulations for the grading, packing and marking of fresh fruit and vegetables.

Also in Canada, a Code of Practice for Minimally Processed Ready-to-Eat Vegetables provides guidance for the safe manufacturing of minimally processed ready-to-eat vegetables (i.e. raw vegetables that have been peeled, sliced, chopped or shredded before packaging). The Code of Practice includes an outline of Good Agricultural Practices for the primary production and harvesting of fresh vegetables. Furthermore, a Code of Practice for the primary production and harvesting of fresh produce is currently under development, and will provide farmers with guidance for the hygienic production of fresh produce.

The Australia New Zealand Food Standards Code was introduced in December 2000 as the sole food Code applying to both countries. Chapter 4 of Code establishes primary production standards for agricultural produce. The Code also incorporates regulations relating to maximum residue limits for food, standards affecting particular classes of foods, and food hygiene issues. Details were developed following extensive public consultation, in line with a charter under the Australia New Zealand Food Authority (ANZFA) to maintain a transparent and consultative approach toward the review and development of food standards.

More details of this legislation, Codes of Practice, and further examples of overseas experience, are provided in Appendix 6.

### **Indemnity from Legal Action for the Retail Grocery Industry Ombudsman**

It seems that, unlike the position that applies for many others performing an Ombudsman role, the RGIO has no indemnity from legal action whilst performing his responsibilities under the RGICC.

This situation has the potential to weaken the capacity of the RGIO to effectively perform his intended function. The RGIO needs to feel secure that his involvement in mediating/settling disputes involving commercial matters will not give rise to the prospect of litigation against him.

In this respect, the Joint Select Committee on the Retailing Sector advised the Federal Government that those responsible for ensuring that trading need to take a vigorous approach in dealing with systemic and on-going problems.

### **Fear of Retaliation or Victimization**

The RGIO indicates that no allegations of victimisation by retailers or others have arisen from matters dealt with under the RGICC to date.

The possibility has been suggested, however, that businesses that experience unlawful trading or dysfunctional trading practices may choose not to exercise their rights under the RGICC because of a real or perceived fear of retaliation or victimisation by other parties.

In part this may reflect a concern about the insidious nature of retaliatory action and the difficulty for small and medium-sized businesses of establishing proof quickly and cost-effectively, the voluntary nature of the RGICC and the fact that the RGIO must rely upon both parties in a dispute agreeing to engage in mediation, i.e. if one party objects, mediation is not possible.

In this respect, it is likely that the potential for fear of retaliation/victimisation is most likely to be a factor in circumstances where there is great imbalance in market power between parties and where possible adverse consequences on long-term viability are considerably greater for one party relative to the other.

This type of behaviour is a deliberate abuse of market power (***unlawful trading***) and needs to be dealt with by the full force of the law.

There are many 'war stories' around the horticulture sector that, whether real or mythical, are sufficient to engender fear in those without market power. An illustration of this culture is provided by the following extract from the QFVG submission to review of RGICC:

“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’.”

Growers/suppliers and marketers who experience such instances of unlawful trading need to have confidence that the measures available offer them watertight protection when making a complaint. Clearly the currently available mechanisms are failing to give victims the confidence to take action.

### **Reporting on the Operation of the Code**

The RGICC requires both the RGIO and the RGICC Administration Committee (CAC) to report annually on the operation/ administration/effectiveness of the Code.

It is noted that the Ombudsman has prepared and published an Annual Report for the period to September 2002. He has made it publicly available on the web site of the Retail Grocery Industry Ombudsman.

The Annual Report from the CAC does not, however, appear to be available to industry. Industry is therefore unaware as to whether the views expressed by the Ombudsman are shared by the CAC, or how effectively the CAC might be operating. This situation needs to be remedied.

### **Composition of the Code Administration Committee**

The current structure of the Code Administration Committee (CAC) is unreasonable. It is heavily skewed against those engaged primarily in grower/supplier activities.

The weight of numbers lies with those segments that engage primarily in purchasing activities (price makers) and which have been identified as having significantly greater market power than growers/suppliers (price takers).

The ineffectiveness of Section 46 of the Trade Practices Act in protecting smaller competitors against corporations with significant market power led to changes during the 1990's. These sought to provide small firms with protection under various consumer protection sections of the Act, culminating in the most recent changes under Section 51AC. The changes made recognise the fact that smaller firms, like consumers, are in many instances price takers not price makers. These changes have clearly not worked for growers/suppliers. This imbalance is reinforced by the current representational structure of the RGICC Administration Committee.

This imbalance must be redressed by inclusion of more representatives from the grower sector. In fact, it is the view of grower organisations that the Code Administration Committee should be replaced by a stronger structure to enforce the provisions of the new mandatory code. An independent Horticulture Tribunal would have greater status and could legitimately expand its role beyond the current purely administrative role to one that addresses improvement of commercial practices in the industry.

## **Strategies for Strengthening the Effectiveness of the Retail Grocery Industry Code of Conduct and the Retail Grocery Industry Ombudsman**

In order to remove identified weaknesses with the measures introduced in 2000 by the Federal Government for “achieving fair competition” immediate action is needed to:

- R.3 Amend the currently open-ended wording of the provisions dealing with labelling, packaging and preparation requirements in the RGICC
  - with a view to minimising the potential for arbitrary/unilateral decision-making by retailers that will cause economic loss to growers/suppliers.
- R.4 Give the Retail Grocery Industry Ombudsman’s office increased confidence in resolving unfair trading disputes by guaranteeing the office of Ombudsman indemnity from the threat of legal action arising from the performance of his responsibilities under the RGICC.
- R.5 Investigate the insidious nature of intimidatory or retaliatory behaviours in Australia’s horticultural production and marketing chains and the difficulty for small and medium-sized businesses of establishing proof quickly and cost-effectively
  - with a view to providing a workable mechanism for safeguarding businesses against these types of unlawful practices.
- R.6 Ensure that the Annual Report of the existing RGICC Administrative Committee, including any dissenting opinions from members regarding the operation of the Code and its administration, be made available to industry in a timely and easily accessible manner, e.g. through the web site of the Retail Grocery Industry Ombudsman.
- R.7 Correct the major imbalance between ‘price makers’ and ‘price takers’ in the membership of the current RGICC Administration Committee
  - by appointing additional members representing price takers from those sectors involving the highest incidence of disputes involving trading practices to date; and
  - by providing for equal representation from grower industry and market industry bodies on the Horticulture Tribunal proposed above (R.2).

## 6. CONCLUSIONS

***Has the Retail Grocery Industry Code of Conduct been achieving its objectives by ensuring fair competition in the horticulture sector? The emotional and intense public debate occurring within the industry at present indicates that the answer is – definitely not!!***

Commercial horticultural production and marketing is a highly competitive activity. The Australian horticulture sector comprises many small, medium and large enterprises that operate through a range of business models and supply a wide variety of markets. Market forces drive the horticultural sector. Businesses therefore rely on being able to operate in a commercial environment characterised by fair and equitable competition.

The RGICC was introduced in 2000 by the Federal Government “as a demonstration of its commitment to achieving fair competition in the retail grocery sector”.

Grower organisations in Australia’s horticulture sector are, however, extremely dissatisfied with these arrangements. They argue that:

- the balance of commercial power and advantage is unfairly and unreasonably weighted against the growing community; and
- that this situation stands in the way of their vision of an Australian horticulture sector characterised by world class and efficient/effective marketing systems that clearly convey market signals, reward competent businesses and disadvantage poor performers.

The continued existence of widespread contractual uncertainty supports:

- an advantageous environment for those businesses that choose to engage in unlawful trading as a strategy for achieving individual commercial gain; and
- a source of inefficiency that will ultimately place participants in production and marketing chains characterised by dysfunctional trading at a competitive disadvantage relative to participants operating in paths to market based on fair trading practices.

At best it can be argued that the measures currently favoured by the Federal Government are a ‘necessary’ component for tackling the circumstances that exist. As indicated in this submission, they are clearly not ‘sufficient’ for bringing about the desired policy outcome. Reliance on nothing more than the arrangements that have been in place for the past three years will not bring about the required change.

In preparing this submission the industry has formulated an integrated set of fourteen (14) strategies built around a horticulture industry fair trading code that contains mandatory provisions relating to trading terms and conditions.

They arise from consideration of the issues raised by participants in Australia’s horticulture sector, experience from horticultural produce fair trading initiatives overseas and approaches by other industry sectors in Australia and overseas for dealing with similar fair trading concerns.

These strategies are seen as the minimum action necessary for quickly bringing about fair and equitable trading in Australia’s horticulture sector.



## 7. SOURCES AND RESOURCES

### Organisations Consulted

In the limited time available to prepare this submission on behalf of the Australian horticulture sector the following organisations were consulted.

Their views were canvassed through a combination of face-to-face interviews and meetings, teleconferences and email communication. Additionally, a number of organisations made available copies of the draft submissions they were preparing for separate submission to the review of the RGICC. Also considered was the feedback in response to the invitation reproduced at Appendix 2:

- Australian Agribusiness Association
- Australian Avocado Growers Federation Inc
- Australian Banana Growers' Council
- Australian Chamber of Fruit and Vegetable Industries Ltd
- Australian Custard Apple Growers Association Inc
- Australian Onion Industry Association
- Australian Pistachio Growers Association
- Australian United Fresh Fruit and Vegetable Association Ltd
- AUSVEG (Australian Vegetable & Potato Growers Federation)
- Department of Primary Industries, Queensland
- GrapeConnect, Australia
- Horticulture Australia Council (see Appendix 5 for list of current membership)
- Horticulture Australia Limited (see Appendix 4 for list of membership of HAL Across Industry Committee)
- Horticulture Market Chain Committee, New South Wales Agriculture
- New South Wales Agriculture
- Neill Buck & Associates (Reviewer of RGICC)
- New South Wales Chamber of Fruit and Vegetable Industries
- New South Wales Farmers Association
- Queensland Fruit & Vegetable Growers Ltd
- Retail Grocery Industry Ombudsman
- Tasmanian Framers & Graziers Association
- Victorian Strawberry Growers Association

## Background Material on the RGICC

A range of background documents and information sourced from the web site of the Retail Grocery Industry Ombudsman (<http://www.mediate.com.au/rgio/ombudsman.htm>) was reviewed before commencing to prepare this submission. The documents included the following:

- Government of Australia. (December 1999), Government Response to the Report of The Joint Select Committee on the Retailing Sector *Fair Market Or Market Failure*.
- Joint Select Committee on the Retailing Sector. (August 1999), "Fair Market or Market Failure? A Review of Australia's Retailing Sector", The Parliament of the Commonwealth of Australia (also referred to as 'The Baird Report').
- Neill Buck and Associates Pty Ltd. (August 2003), "Review of the Retail Grocery Industry Code of Conduct: Discussion Paper".
- Retail Grocery Industry Code of Conduct Administration Committee. (July 2003), "Retail Grocery Industry Code of Conduct".
- Retail Grocery Industry Ombudsman. (2002), "First Annual Report: 16<sup>th</sup> July 2001 to 12<sup>th</sup> September 2002", Mediate Today Pty Ltd.
- The Hon Joe Hockey, MP, Minister for Financial Services and Regulation. (May 1999), "Prescribed Codes of Conduct, Policy Guidelines on Making Industry Codes of Conduct Enforceable Under the Trade Practices Act 1974".  
<http://www.selfregulation.gov.au/publications/PrescribedCodesOfConduct/index.asp>
- The Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business, Leader Of The House Of Representatives. (17<sup>th</sup> December 1999), Government Responds To The Retail Sector", Media Release.
- The Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business, Leader Of The House Of Representatives. (13<sup>th</sup> February 2000). "Government Announces Membership Of Retail Grocery Industry Code Of Conduct Committee", Media Release.
- Trade Practices Act 1974, Volume 1,  
<http://scaleplus.law.gov.au/html/pasteact/0/115/pdf/TPA74Vol01.pdf>

## Other Background/Resource Material

Other resource material reviewed during the preparation of this submission included:

- Anon. (10<sup>th</sup> July 2002), Fair to Growers and Consumers", Sydney Morning Herald,  
<http://www.smh.com.au/articles/2002/07/09/1026185042064.html>
- Australian Securities and Investments Commission website, <http://www.asic.gov.au>
- Australian Chamber of Fruit and Vegetable Industries Ltd. (July 2003), "So You Want Us to be Agents".
- Australian Mango Industry Association Ltd. (September 2003), "A Voluntary Code of Practice for the Australian Mango Industry: Draft".
- Bradley, Michael. (8<sup>th</sup> July 2002), "Down on the Farm, A Mystery: Who Pockets the Profit?", Sydney Morning Herald, <http://www.smh.com.au/articles/2002/07/10/1026185061890.html>
- Brismark, "Brismark Code of Practice",  
<http://www.brismark.com.au/code%20of%20practice.html>

- Bullock, Gillian. (24<sup>th</sup> October 2002), "Retailers Rule in Fiefdom of Food", The Australian, <http://www.theaustralian.news.com.au/printpage/0,5942,5329767,00.htm>
- Clarke, Martin. (12<sup>th</sup> August 2003), "Central Markets Wholesaler Trading", Letter to the Editor, The Land Newspaper from the Australian Chamber of Fruit & Vegetable Industries.
- Doyle, Julie. (23<sup>rd</sup> May 2002), "Market Power" Australian Broadcasting Commission, <http://www.abc.net.au/rural/nt/stories/s562598.htm>
- "Food Regulation – the Challenges for 2002", Ian Lindenmayer, Managing Director, Australia New Zealand Food Authority, <http://www.foodstandards.gov.au>
- Mortgage Industry Association of Australia, <http://www.mia.com.au>
- NSW Agriculture, Marketing for Success: A Growers Guide", <http://www.agric.nsw.gov.au/reader/hmcc>
- Rabobank, (2<sup>nd</sup> February 2002), "The Changing Market for Horticultural Products", Infarmation, <http://www.abc.net.au/rural/nt/stories/s562598.htm>
- Review of the Perth Market Act 1926: An Interim Discussion Paper for the Fruit and Vegetable Industry, December 2001
- Rogers, John. (7<sup>th</sup> August 2003), "NSW Farmers' Association View: Produce Code Needs Teeth", The Land Newspaper

## **Desk Top Research Resource Material**

### **Primary sources of material**

#### **Overseas Experience**

- Canadian Food Inspection Agency, <http://www.inspection.gc.ca>
- Canadian Code of Practice for Minimally Processed Ready-to-Eat Vegetables, [http://www.inspection.gc.ca/english/plaveg/fresh/read-eat\\_e.shtml](http://www.inspection.gc.ca/english/plaveg/fresh/read-eat_e.shtml)
- Food Standards Australia New Zealand, <http://www.foodstandards.govt.nz>
- Lindenmayer, Ian; Managing Director, Australia New Zealand Food Authority, Presentation to NZIFST Annual Conference, University of Otago, Dunedin, NZ (28-31 August 2001).
- New Zealand Fruitgrowers Federation, <http://www.fruitgrowers.org.nz>
- Institute of Grocery Distribution (UK), <http://www.igd.org.uk>
- The Packer Red Book Credit Services, <http://www.thepacker.com>
- UK Department for Food, Environment and Rural Affairs, <http://www.defra.gov.uk>
- UK Office of Fair Trading, <http://www.offt.gov.uk>
- UK Code of Practice on Supermarkets' Dealings with Suppliers, <http://www.offt.gov.uk>
- UK Fair Trading Act 1973, <http://www.offt.gov.uk>
- US Department of Agriculture Agricultural Marketing Service, <http://www.usda.gov>
- US Perishable Agricultural Commodities Act 1930 (PACA), <http://www.ams.usda.gov/fvpaca>
- US Produce Marketing Association, <http://www.pma.com>

### **Other Industries (Australia)**

- Building Industry Code of Practice, Australian Association of Permanent Building Societies, <http://www.asic.gov.au/fido/fido.nsf/lkuppdf/FIDO+PDFW?opendocument&key=bscode>
- Code of Banking Practice 1993, Australian Bankers Association, <http://www.bankers.asn.au>
- Credit Union Code of Practice 2002, Credit Union Services Corporation (Australia), <http://acun.cu.net.au>
- “Fair and Square: A Guide to the Trade Practices Act for the Real Estate Industry”, Australian Competition and Consumer Commission, (September 2002), <http://www.reiaustralia.com.au/government/trade.asp>
- Financial Planners' Code of Ethics and Rules of Professional Conduct, Financial Planning Association, <http://cms.fpa.tzo.com/images/userimages/codeethics.pdf>
- General Insurance Code of Practice 2000, Insurance Council of Australia, <http://www.ica.com.au/codepractice>
- Lette, Bob. “Regulating Property Agents and Motor Vehicle Dealers”, Mullins and Mullins Newsletter, July 2002, <http://www.mullins-mullins.com.au/Admin/Files/100.pdf>
- Mortgage Industry Association of Australia Code of Practice 2000, Mortgage Industry Association of Australia, <http://www.mia.com.au>
- Queensland Property Agents and Motor Dealers Act 2000, <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2000/00AC062.pdf>
- Queensland Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) Regulation 2001, <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2001/01SL118.pdf>
- The Real Estate and Business Agents Supervisory Board, <http://www.reba.wa.gov.au>

### **Other resource material reviewed**

#### **Overseas Experience**

- ACNielsen Australian and New Zealand Grocery Report 2003 (condensed version), [http://www.acnielsen.com.au/en/pdf/mri/4/Grocery\\_Rpt\\_03\\_Condensed.pdf](http://www.acnielsen.com.au/en/pdf/mri/4/Grocery_Rpt_03_Condensed.pdf)
- Dearnaley, Matthew. (5<sup>th</sup> September 2003), “Grocers Scramble After ‘Skulduggery’ in Survey”, New Zealand Herald, <http://www.nzherald.co.nz>
- Food Production and Rural Areas: the Dutch Agri-Food Complex in Perspective, <http://www.minInv.nl/international>
- Grocery Manufacturers of America, <http://www.gmabrands.com>
- “Growers in Anti-Tesco Protests in the UK”, (12<sup>th</sup> January 2002), Press Release, <http://www.farmersforaction.org>
- Hewitt, Patricia, Secretary of State for Trade and Industry, UK. (31 October 2001). Transcript: “Hewitt Backs Good Behaviour Code for Supermarkets and Suppliers”, <http://www.oft.gov.uk>
- Lawrence, Felicity, (18<sup>th</sup> March 2003), “UK Farmers ‘Still Exploited by Big Retailers’”, The Guardian, <http://www.guardian.co.uk>

- Netherlands Ministry of Agriculture, Nature and Food Quality, <http://www.minInv.nl/international>
- Saphir, Nicholas (24<sup>th</sup> October 2002), “Review of London Wholesale Markets”.
- “Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom”, (10<sup>th</sup> October 2000), UK Competition Commission, <http://www.competition-commission.org.uk>
- UK Department for Food, Environment and Rural Affairs, “Horticultural Marketing Inspectorate: Code of Practice and Customer Charter” (February 2003), <http://www.defra.gov.uk>

### **Other Industries (Australia)**

- Boating Industry Association, <http://www.bia.org.au>
- “Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business”, (May 2000), <http://www.ecommerce.treasury.gov.au/documents/ecommerce.pdf>
- Electronic Funds Transfer (EFT) Code of Practice 2001, [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/eft\\_code.pdf/\\$file/eft\\_code.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/eft_code.pdf/$file/eft_code.pdf)
- General Insurance Brokers Code of Practice, National Insurance Brokers Association, <http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/brokerscode.pdf/>
- Life Insurance Code of Practice 1995, <http://www.asic.gov.au>
- National Code of Practice for the Construction Industry 1999, Australian Procurement and Construction Council Inc, <http://www.apcc.gov.au>
- WA Code of Conduct for Finance Brokers 2001, <http://www.slp.wa.gov.au>
- WA Finance Brokers Supervisory Board, <http://www.financebrokers.wa.gov.au>

Version 4 – 15<sup>th</sup> September 2003

# APPENDICES

## STRATEGIES FOR ACHIEVING FAIR COMPETITION IN AUSTRALIA'S HORTICULTURAL BUSINESS CHAINS

AUSTRALIAN HORTICULTURE INDUSTRY SUBMISSION TO  
THE REVIEW OF THE  
RETAIL GROCERY INDUSTRY CODE OF CONDUCT

prepared by Primary Business Solutions Pty Ltd for

**HORTICULTURE AUSTRALIA LTD**

in association with the

**HORTICULTURE AUSTRALIA COUNCIL**

12<sup>th</sup> September 2003



**Horticulture Australia**





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## **Appendix 1: Terms of Reference for Preparation of Horticulture Sector Submission**

### **Review of Retail Grocery Industry Code of Conduct**

#### **Terms of Reference for Consultant to Horticulture Industry:**

1. Review the discussion paper on the Code.
2. Conduct a desk top study of alternatives to the retail grocery industry code of conduct including assessment of mechanisms in the USA, Europe, United Kingdom and New Zealand eg Red Book and PACA.
3. Analysis of the current code, its practice and experience through the chain.
4. Prepare a draft submission to address the review terms of reference
5. Circulate to industry a draft submission for comments and sign off.

#### **Industry Tasks:**

1. Establish a Steering Committee.
2. Arrange for a briefing note highlighting the review and the process that industry is adopting to provide responses. This must be circulated to all industry organisations.
3. Review the draft consultancy submission when prepared.
4. All industry organisations should make supporting submissions to the central submission. This could be anything from a covering letter through to a full submission.

Industry specific examples of experience with the Code should be provided where possible.

## Appendix 2: Invitation for Input from Industry Organisations

### URGENT INVITATION FOR YOU TO HAVE YOUR SAY

#### HOW FAIR IS COMPETITION IN AUSTRALIA'S HORTICULTURAL BUSINESS CHAINS?

##### Background

For the past three years all sections of the Australian horticultural industry who feel they may have been treated unfairly in their commercial dealings have been able to tap into new dispute resolution arrangements implemented by the Federal Government. These arrangements involve a voluntary Retail Grocery Industry Code of Conduct (this applies to all participants in horticultural supply chains), a Retail Grocery Industry Ombudsman, and power for the Australian Competition and Consumer Commission to undertake representative actions and seek damages on behalf of all, but particularly smaller, participants.

The Government has recently initiated a Review of the Retail Grocery Code of Conduct to determine how effective the arrangements are as mechanisms to promote fair and equitable trading practices within industry, and as a simple/accessible mechanism for resolving disputes.

Horticulture Australia Ltd, in association with the Horticulture Australia Council, is in the process of preparing a whole-of-horticulture industry submission to present to this Review.

You are invited to participate by letting us know your experience and/or views on the issues listed below and on any other matters of relevance. If you wish to make your experience available as a Case Study (confidential if required) please advise us.

##### Key Issues

An obvious major area for disputes is between growers and market agents/merchants (wholesalers) – the Ombudsman reports that very few other issues involving disputes have been reported.

Typical disputes between growers and wholesalers involve a lack of 'transparency in market-based transactions' – these may involve: uncertainty as to whether wholesalers are acting as agent or merchant; the 'fairness' of commissions; growers' rights to information; the timing at which ownership of/responsibility for produce changes; circumstances involving rejection of produce that does not meet specification; and differences of perception about pricing, e.g. whether prices quoted are an estimate or firm offer, whether all charges/commissions are included or excluded, and whether returns are to be averaged over a number of transactions.

Poor business practices are an important factor giving rise to disputes – the Ombudsman considers that adoption of better business processes within industry will avoid disputes arising.

Many within industry may be unaware of their rights and obligations – results from promoting the Code by means of brochures, media publicity, correspondence etc have been questionable. Local meetings with the Ombudsman appear closely linked with dispute applications submitted.

Rights may not be exercised because of a fear of retaliation by other parties – the Ombudsman indicates that no allegations of victimisation by retailers or others have arisen from matters dealt with under the Code of Conduct.

Currently the Code Operates on a voluntary basis - the Government has indicated that if it is found to be not operating effectively, it may consider initiating a mandatory code.

Produce is to be fairly evaluated against clear and objective standards and specifications – the Code provides that these must allow for seasonal variations in produce.

**Please take the small amount of time needed to respond to this invitation to 'Have Your Say' and send your comments by fax or email to the nominated contact person in your Industry Association by Friday 5<sup>th</sup> September 2003.**

Feedback from industry will be collated by your Industry Association and passed to the consultant assisting with preparation of the horticulture industry submission. Confidentiality can be assured if this is your wish. Please accept our apologies for the short time for responses. Thank you for your assistance.

*This Invitation has been prepared by the consultants assisting with the industry submission, namely*

*Richard Coutts and Carole Tate, Primary Business Solutions Pty Ltd*

*Wednesday 27<sup>th</sup> August 2003*

## Appendix 3: Unfair Case Study Template

(Title Of Case Study) .....

### TAKE-HOME MESSAGE

(Summary of the key aspects of the case and the implications/learnings for others)

### ABOUT YOU

#### **Type of Produce/Products You Market**

(e.g. potatoes for processing, fresh mangoes etc)

#### **Your 'Path to Market'**

(e.g. grower to central market wholesaler, grower to retailer, grower to processor etc)

#### **Your Location**

(e.g. Katherine – NT, Griffith – NSW)

### YOUR UNFAIR PRACTICES PROBLEM(S)

#### **The Problem**

(Provide a brief outline of the nature of the unfair practices problems that you have experienced)

#### **Impact on Your Business**

(Briefly describe the financial and/or other impacts this situation has caused for your business)

#### **Frequency and Extent of Problem(s)**

(Indicate whether the problems have occurred more than once, involve a number of the people you do business with and/or whether other growers you know have had similar experiences)

## **TACKLING THE PROBLEM(S)**

### **Action Taken by You**

(Briefly describe what you did to try and resolve the problem and/or what assistance you sought from others)

### **Results**

(Indicate the outcome of your actions to try to resolve the problem and any external assistance you may have received, including whether you experienced retaliation/victimisation following the action you took)

### **Solutions**

(Based on your experience with this unfair trading problem, do you have any suggestions as to how this type of problem can be avoided for the future)

## Appendix 4: The HAL Across Industry Committee

The Horticulture Australia Across Industry Committee is a component of Horticulture Australia Ltd (HAL). It addresses strategic issues of relevance to all horticultural industries that can be dealt with most efficiently and effectively through a joint approach.

The Committee is comprised of industry representative members who provide guidance and approval on across industry issues and proposals.

Current membership of the Committee comprises:

- Apple and Pear Australia Ltd;
- SnackFruit Australia Ltd;
- Australian Dried Fruits Association Inc;
- Queensland Fruit & Vegetable Growers Ltd;
- Nursery & Garden Industry Australia Inc;
- Australian Vegetable & Potato Growers' Federation (AUSVEG);
- Australian Table Grape Association Inc;
- Australian Mushroom Growers' Association Inc;
- Australian Macadamia Society Inc;
- Australian Citrus Growers Inc;
- Australian Banana Growers' Council;
- Australian Avocado Growers Federation Inc;
- Horticulture Australia Council.

In addition to these organisations, all other organisations that make up the membership of Horticulture Australia Ltd are kept advised of the activities of the HAL Across Industry Committee, and provided with an opportunity for input on matters that are of interest to them.

The HAL Across Industry Committee meets three or four times a year, often by teleconference. It is in the process of developing a strategic direction for future investment in across horticultural issues.

HAL is a company that is the outcome of a merger of the Australian Horticultural Corporation and the Horticultural Research and Development Corporation.

The major stakeholders of HAL are the peak industry bodies, voluntary contributors, R&D partners and the Commonwealth Government. HAL has established Industry Advisory Committees and an Across Industry Committee that, in conjunction with Industry Strategic Planning activities, will be the driving force behind the funding priorities and activities of the organisation.

The intent of the horticulture sector stakeholders who created HAL was to build on the successes of both corporations, and to deliver a more integrated approach to marketing and research and development services. HAL was designed to have:

- close links to industry;
- a strong commercial focus;
- the capability to deliver
  - business solutions that will open commercial opportunities nationally and worldwide;
  - public benefit.



## **Appendix 5: The Horticultural Australia Council**

The Horticulture Australia Council Ltd (HAC) is a subscription-based organisation formed in 2000 to:

*“...represent the interests of horticulture as a whole, in any appropriate forum and to governments, statutory authorities, public bodies, international organizations, corporations, lobby groups, other industries and other sections of the food industry.”*

As a federation of peak industry bodies, Council canvasses its network fortnightly to keep its membership informed and its agenda current. It is non-party political but formed specifically to take account of such politics as are necessary to achieve high level change.

In the pursuit of its member's interests, Council recognises the immutable responsibility of governments to act in the National interest. It seeks to work positively and to define its policy objectives in public benefit terms.

Despite its huge economic contribution and rapid expansion, the horticulture sector is organisationally complex and its voice fragmented. For this reason Council is particularly committed to addressing the common concerns of smaller groups.

### **Current Strategic Objective:**

Council's most immediate strategic objective is to:

*“... position itself as the most credible, collective public voice on whole of horticulture issues for the 2004 Federal Election.”*

In pursuing this objective, Council draws on an extremely experienced membership base which targets issues whole of chain.

### **Current Priority Issues:**

From quite a long list of issues the following have been given priority by members:

- *Securing sustainable water resources to match the current growth in horticultural production,*
- *Reviewing the TPA and other Legislation to redress market imbalances that pit rural family structures against supermarket giants,*
- *Strengthening Australia's bio security,*
- *Re-addressing skilled labour shortages and promoting horticultural careers,*
- *Resourcing export market development and*
- *Lifting R&D levels.*

In addition to the above, Council has in recent months given emphasis to strengthening its internal linkages and communicative processes. Strong internal communications and trust are viewed as more important long term than specific issues because of the transient nature of the latter and the acceptance that next year will bring another crop.

**Structure:**

The Horticulture Australia Council recently transferred its national secretariat to Canberra's Parliamentary Triangle. Nominees from the following organisations cast its policies and it is governed by a board selected from their ranks:

- Apple & Pear Australia Ltd
- Australian Avocado Growers Federation Inc
- Australian Banana Growers' Council
- Australian Citrus Growers Inc
- Australian Dried Fruits Association
- Australian Mango Industry Association Ltd
- Australian Mushroom Growers Association Inc
- Australian Nut Industry Council
- Australian Passionfruit Industry Association Inc
- Ausveg
- Cherry Growers of Australia Inc
- NSW Farmers Association
- Nursery & Garden Industry Australia Inc
- Potato Growers Council
- Queensland Fruit & Vegetable Growers
- Summerfruit Australia Ltd.
- SnackFruit Australia Alliance Inc.

**The Key Contacts for HAC are:**

Chairman: Mr Bill Hatton

Tel: (02) 6687 1065

Fax: (02) 6687 1407

Chief Executive Officer: Mr Rob Bastian

Tel: (02) 6273 8638

Fax: (02) 6273 1833

## **Appendix 6: Overseas Experience with Alternatives for Minimising Unlawful/Dysfunctional Trading**

### **Horticulture Sector Approaches for Minimising Unlawful Trading**

*'Unlawful Trading', as defined for purposes of this submission, involves deliberate abuse of market power or deliberate dishonesty.*

#### **United States**

Concentration is low at the national level in the United States. The top twenty supermarkets account for only 38 per cent of sales. As there is no national supermarket chain in the United States, retail acquisitions are measured regionally, or on a metropolitan basis. Some regional concentration levels are sometimes as high if not higher than those that exist in European countries. The Robinson-Patman Act 1936 makes price discrimination unlawful, where it has the effect of substantially lessening competition or creating a monopoly. This Act was introduced as a result of concerns over the increasing market power of the supermarket chains and their threat to the viability of small independent retailers. While controversy exists regarding the effectiveness of the legislation, according to the ACCC, it has been suggested that the legislation has been less than effective in its ability to protect small independents from price discrimination. It is often regarded as a little-used piece of legislation whose repeal has been widely recommended.

The Packer Red Book Credit Services (RBCS) evaluates over 36,000 firms with online trading practices, business ethics and worthiness. Members have access to credit rating and market information regarding firms involved in the buying, selling and transport of fresh fruit and vegetables. The Red Book Directory contains over 20,000 detailed listings of United States and Canadian firms involved in the marketing of fresh fruit and vegetables. The International Red Book provides 16,000 listings outside the United States and Canada, with a particular emphasis on Mexico and the rest of Latin America.

#### **United Kingdom**

Competition policy in the United Kingdom is based on the Fair Trading Act 1973, and the Competition Act, originally enacted in 1980 and revamped in 1998 to, among other things, bring the UK's domestic competition laws into line with those operating elsewhere in the EC, and in accordance with Articles 85 and 86 of the Treaty. Under the Fair Trading Act, the Director General of Fair Trading, via the Office of Fair Trading (OFT), has a general duty to review commercial activities in the UK, so that monopoly situations or uncompetitive practices can be identified. The OFT may initiate an inquiry on their own volition or in response to a particular complaint. The OFT's focus is on whole markets rather than individual companies.

The Competition Act 1998 prohibits the abuse of market dominance by:

- imposing unfair purchase or selling prices or other conditions;
- limiting production, markets or technical development;
- applying dissimilar conditions to equivalent transactions with different trading partners; and
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which have no connection with the subject of the contracts.

The UK Office of Fair Trading (OFT) has issued guidelines on what constitutes abusive behaviour, recognising that particular problems can arise in specific industries. For example:

- Exclusive distribution – where a manufacturer supplies only one retailer in a particular geographic areas;
- Selective distribution – where a manufacturer supplies a limited number of retailers;
- Tie-in sales – where a manufacturer makes the purchase of one product conditional on the purchase of a different product;
- Full-line forcing – where a retailer is required to stock the entire range of the manufacturer's product;
- Quantity forcing – where the retailer is required to purchase a minimum quantity.

In April 1999 the OFT determined, using detailed information from the top four firms covering five years of performance, that there was a level of profitability in the grocery retailing sector which warranted further investigation by the Competition Commission. The OFT raised several competition issues, which included examination of the nature of the relationship between the major grocery retail chains and their suppliers, including agricultural producers and the ways in which buyer power is exerted.

### **New Zealand**

The basis of New Zealand's competition laws is the Commerce Act. Restrictive trade practices prohibited under the Commerce Act include:

- contracts, arrangements or understandings which contain provisions or in their entirety substantially lessen competition in a market;
- contracts, arrangements or understandings between competitors which contain provisions or in their entirety reduce the competitiveness of another rival; and
- contracts, arrangements or understandings which contain provisions or in their entirety lead to prices being fixed among competitors.

The Commerce Act prohibits collective pricing agreements, and agreements which are likely to have an anti-competitive purpose or effect.

### **Horticulture Sector Approaches for Minimising Dysfunctional Trading**

*'Dysfunctional Trading', as defined for purposes of this submission, involves differences of opinion and conflict.*

### **United States**

United States legislation relevant to the issue of market power and food markets is the Perishable Agricultural Commodities Act 1930.

The Perishable Agricultural Commodities Act 1930 (PACA) provides a highly regulated approach to the marketing of fresh fruit and vegetables in the United States. The legislation provides a comprehensive set of regulations which cover the following broad areas:

- licensing of traders, retailers and grocers including the suspension or revocation of licenses;
- accounts and records kept by commission agents, dealers and brokers;
- records of market receivers including details of produce received, sales tickets, lot numbers, returns/rejections;
- records of retailers;
- conduct of auction sales;
- duties of growers' agents and shippers;

- conversion of funds;
- disclosure of business;
- commodity inspection;
- terms of trade and details relating to copies of records, goods delivery standards, misrepresentation of miss-branding. In fact 34 possible terms of trade are described; and
- statutory trust and complaints procedures.

Complaints about unfair trading practices under the PACA may be filed with the United States Department of Agriculture (USDA). Examples of unfair trading practices include failing to make full payment promptly for produce purchases, misbranding or mislabelling of produce, making false and misleading statements in connection with produce transactions, and employing individuals responsibly connected with PACA violator firms.

### **Canada**

Recent trends in Canada indicate an increased concentration in the food grocery industry by the consolidation of the wholesale and retail sectors, leading to concern over loss of consumer choice, due to the promotion of generic label products over others, and the use of prohibitive fees manufacturers may be forced to pay supermarkets to get their products onto supermarket shelves. The issue of growing concentration in the retail grocery sector has been dealt with in Canada by the application of the merger provisions of the Competition Act. The anti-competitive threshold for mergers provides that a quasi-judicial Competition Tribunal may make an order, such as divestiture, in respect of a merger where it finds that the merger 'prevents or lessens, or is likely to prevent or lessen, competition substantially'.

A Code of Practice for Minimally Processed Ready-to-Eat Vegetables was introduced in response to the increased consumption of minimally processed ready-to-eat vegetables and the risks of food-borne illness associated with these products. The Code was developed to provide guidance for the safe manufacturing of minimally processed ready-to-eat vegetables consisting of raw vegetables that have been peeled, sliced, chopped or shredded prior to being packaged for sale in Canada. The Code also provides an outline of Good Agricultural Practices for the primary production and harvesting of fresh vegetables, to raise the awareness of its role in the safe manufacturing of minimally processed ready-to-eat vegetables. A Code of Practice for the primary production and harvesting of fresh produce is currently in development, and will provide farmers with guidance for the hygienic production of fresh produce.

The Canada Agricultural Products Act 1988 regulates the marketing of agricultural products in import, export and interprovincial trade. It also provides for national standards and grades of agricultural products, for their inspection and grading, for the registration of establishments and for standards governing establishments. The legislation incorporates Fresh Fruit and Vegetable Regulations for the grading, packing and marking of fresh fruit and vegetables.

### **United Kingdom**

A Supermarkets Code of Practice was introduced in the UK in March 2002, following the investigation by the Competition Commission into supermarkets dealings with suppliers. The investigation found that the supermarket sector was working competitively, but ruled that there was evidence that the relationship supermarkets had with their suppliers could act against the public interest. "The Competition Commission (has) recommended that a Code of Practice (should) be introduced to put relations between Supermarkets and their Suppliers on a clearer and more predictable basis." (Code of Practice on Supermarkets' Dealings with Suppliers, Schedule 2). The Code also states "The Supermarkets are fully committed to the objectives of this Code and undertake to operate this Code in good faith."

The Code of Practice was designed to be flexible enough to allow mutually beneficial agreements to be entered into freely by the major supermarkets and their suppliers. It sought to ensure that agreed terms were available in writing and transparent, and that supermarkets would give advance notice of changes or compensate their suppliers. The Code included dispute resolution procedures designed to ensure that this flexibility worked as intended.

The OFT conducted a review of the Code of Practice in March 2003 following suggestions that supermarkets covered by the Code were continuing some of the practices the Competition Commission identified as cause for concern when it investigated retailers in 2000.

### **New Zealand**

The Australia New Zealand Food Standards Code was introduced in December 2000 as the sole food code applying to both countries. A key objective of the Australia New Zealand Food Standards Code is to move from two sets of different standards to a single modern standard. This joint arrangement is designed to harmonise food standards between Australia and New Zealand, to reduce compliance costs for industry and to help remove regulatory barriers to trade in food. It also seeks to pool the food regulatory resources of the two countries and to provide economies of scale in avoiding the duplication of functions across national boundaries.

Chapter 4 of the Code establishes primary production standards for agricultural produce. The Code also incorporates regulations relating to maximum residue limits for food, standards affecting particular classes of foods, and food hygiene issues. Details were developed following extensive public consultation, in line with a charter under the Australia New Zealand Food Authority (ANZFA) to maintain a transparent and consultative approach toward the review and development of food standards. ("Food Regulation – the Challenges for 2002", Ian Lindenmayer, Managing Director, Australia New Zealand Food Authority).



## **Appendix 7: Other Australian Experience with Alternatives for Minimising Unlawful/Dysfunctional Trading**

### **Approaches in Other Sectors for Minimising Unlawful Trading**

*'Unlawful Trading' as defined for purposes of this submission involves deliberate abuse of market power or deliberate dishonesty.*

#### **Fresh Fruit and Vegetables**

The discussion paper for the Review of the Perth Market Act 1926 noted that the vertical supply chain coordination has dimmed the level of price transparency in the Western Australian fruit and vegetable industry. The lack of price transparency creates opportunities that can be exploited by operators with privileged access to market information or with particularly strong market power. It can lead to situations in which competitive conditions in the market are undermined. The paper investigated the introduction by the WA State Government of legislation requiring all transactions at the wholesale level to be recorded in a centralised point to provide a transparent market information system with respect to price, quality and volume. The discussion paper acknowledged that an advantage of a mandatory price recording system would be complete transparency across the total market. It envisaged that reporting would cover all marketing arrangements and not just those transacted in the public market arena. This would mean that prices were determined with full information on the volumes available in the market and the quality of that produce.

It also appears that vertical coordination in fresh fruit and vegetable value chains tends to be driven by retailers rather than by growers. This has occurred in Australia and will continue to impact on the traditional public market structure that is in place. In the case of the Perth Market, some intermediaries have repositioned themselves to respond to these trends by establishing themselves as category managers and introducing innovation (product enhancement, supply chain integrity and efficiency) into their operations.

The Melbourne Markets Farmpay Service has operated for more than three years and is based on an agreement between participating wholesalers and the Melbourne Market Authority (MMA). Wholesalers sign an agreement with the MMA in which they agree to take out a financial bond equivalent to 100% of their average 21 day trading cycle based on an annual turnover of up to \$10 million (or \$577,000 per 21 day trading cycle). There is no cost to growers who also have a guarantee of payment within 21 days (unless the grower agrees to extend for a further 21 days). If the wholesaler fails to pay then the grower must contact Farmpay within 14 days of non-payment and a Registrar will investigate. The limit on payouts to growers was set at 90% of the value of the produce. Take-up of the scheme by wholesalers is low at 26 out of approximately 200 wholesalers registered in the market although this represents approximately 60% of the produce consigned to the Melbourne Markets. Growers who use the scheme like it because of its simplicity as it guarantees payment on time and has the backing of a larger bond. Problems with the scheme are that there is a limit of \$577,000 limit of liability by any wholesaler which is lower than the 21 day trading figure of many intermediaries at Market City.

The NSW Prompt Pay System was established to overcome slow payments and bad debts. The system required both growers and wholesalers to register. Growers were required to pay a once only registration fee, plus an information fee per consignment of \$1 to a maximum of \$5 per week and a back-up insurance contribution of \$1 per \$1,000 to a maximum of \$10 per week. Registered wholesalers paid an annual fidelity fund contribution based on annual turnover ranging from \$1,250 for less than \$2.5 million to \$6,000 for turnover in excess of \$20 million. This system ceased operation in 01 July 2000 due to lack of support from growers.



The QFVG Growers' Settlement Service (GSS) is a service provided by Queensland Fruit and Vegetable Growers (QFVG) to its members. The GSS is a debt collection service for sellers who are registered under the scheme. Under the scheme buyers are reviewed for credit standing and worthiness prior to being admitted as a reliable buyer with whom registered sellers can trade with confidence. The GSS includes a weekly warning bulletin which contains information for sellers including a listing of sellers who do not meet their obligations. There is no cost to be a registered seller under the service, however a fee is charged for debts collected. The service is administered by the Melbourne Markets Credit Service.

### **Other Industries**

Licensing and/or mandatory codes of practice have been developed by a range of professional selling groups including real estate agents and sales representatives, auctioneers, restricted letting agents, settlement agents, property developers, commercial agents, pastoral houses, finance brokers, motor vehicle dealers, travel agents, credit agents and land valuers. In such industries, licensees and registered salespeople must conduct themselves and their business according to mandatory codes of conduct when dealing with consumers.

These codes of conduct:

- Set down principles for fair trading.
- Establish standards for how licensees conduct their businesses, including points such as:
  - Avoiding conflicts of interest.
  - A duty to obtaining the maximum sale price for clients.
  - Opening a trust account before selling clients' property etc.
- Require licensees to put a complaint resolution system in place.

Codes of Practice have been developed by a number of industry associations in the financial services sector. While the content of each of these Codes is different, they each set out the service standards for dealing with a company that subscribes to that Code. Membership of an industry code is normally voluntary. The Codes also require companies to have a fair process for dealing with complaints of non-compliance.

Codes of Practice currently operating for the financial services include the:

- Code of Banking Practice
- Building Society Code of Practice
- Credit Union Code of Practice
- General Insurance Code of Practice
- General Insurance Brokers' Code of Practice
- Life Insurance Code of Practice
- Financial Planners Code of Ethics and Rules of Professional Conduct

The Australian Securities and Investments Commission (ASIC) approves and oversees the development and operation of the Codes of Practice for the financial services sector. ASIC also has direct responsibility for monitoring industry compliance with a number of the Codes, while others are monitored by their respective industries. ASIC requires all financial services Codes of Practice to be regularly reviewed and updated.

Other examples of mandatory codes of conduct are the Queensland Property Agents and Motor Dealers Act 2000 and the accompanying Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) Regulation 2001. The legislation imposes stringent regulations on

interaction and dealings between property agents, motor vehicle dealers and their clients, particularly in relation to the disclosure of information, conduct and remuneration.

The Real Estate Industry in Western Australia provides an example of the types of structures that could be considered for the fruit and vegetable industry in Western Australia. The Real Estate and Business Agents Supervisory Board has a mandatory code of practice and a licensing system for all real estate agents issued under the Real Estate and Business Agents Act 1978. The Supervisory Board is responsible for the administration of the Act and the licensing and discipline of real estate and business agents. In addition, there is an industry association, the Real Estate Industry of WA (REIWA), which has a code for members and a separate disciplinary function but these are not under the auspices of the Act. Not all real estate and business agents are members of REIWA.

Code of Conduct for Finance Brokers in Western Australia is approved by the Finance Brokers Supervisory Board pursuant to section 81 of the Finance Brokers Control Act 1975 to take effect from 4 December 2001. This Code of Conduct addresses ethical issues likely to confront finance brokers. It imposes requirements consistent with obligations imposed on finance brokers under general law, and will assist them in fulfilling those obligations. Finance brokers must be fully acquainted and comply with all duties imposed by the Act, this Code, the Regulations and the Maximum Remuneration Schedule. In particular, finance brokers must:

- avoid any conflicts of duties or interests;
- never take improper advantage of the trust of any party in order to obtain a benefit for the finance broker or a third party; and
- as a general principle, finance brokers must fulfil all commitments made to borrowers and lenders.

A finance broker who fails to act in conformity with this Code will be liable for disciplinary action under section 83 (2)(c)(iii) of the Act.

Code of Conduct of the Australian Asset Finance Association (AAFA), the professional body of the equipment finance industry. All Members shall abide by the Rules and Regulations of AAFA and seek to further the objectives of AAFA. It is the duty of all members to exercise the utmost good faith towards clients, lenders, suppliers and Members of the Association.

- Members shall act with high standards of service, honesty, disclosure, and professionalism to their clients.
- Members are under an obligation to assist in the prompt and correct settlement of all finance transactions.
- Members, when involved in documentation preparation and execution shall use best endeavours to act in a correct and legally effective manner.
- Members shall provide where required, full and proper explanations of the general meaning and scope of the documentation to borrowers and shall not knowingly misrepresent any documentation or conditions of the transaction.
- Members are required to maintain adequate records and are under an obligation to perform the service implicit in the acceptance of brokerage.
- Members are required to adhere to the principle of confidentiality of client information.
- It is the duty of all Members to observe strict honesty in any advertising.
- Notwithstanding that it is Members role to act as advocates for the transaction, applications to lenders should be presented in such a manner that the broker does not knowingly provide misinformation, or intentionally mislead the lender by way of omission or distortion.

- Members shall disclose and obtain customer acknowledgment to the existence of third party commission payments, when applicable.
- Members shall not engage in conduct or practices so as to bring themselves or AAFA into professional disrepute.
- Members have an educational and training responsibility to ensure that they, their staff, and their agents are of a professional level whereby they can be held responsible for adhering to the terms of this Code of Conduct.

In the event that any member fails to abide by the Rules and Regulations of AAFA, AAFA may discipline that member in whatever manner or form that it deems appropriate, including suspension of that person's membership of AAFA. The circumstances whereby AAFA reserves the right to discipline and suspend a member include but are not limited to those circumstances referred to in Clause 8 of the Rules.

The Australian Boating Industry Association (BIA) has a Code of Practice for all member companies. Since its inception in 1994, the association has successfully introduced the 'Code of Ethics', which asks all renewing members to resign a commitment to the Code and what it stands for.

The Code of Practice establishes standards of conduct for all BIA members, and acts as a guideline on many issues regarding the relationship between members and customers. Some of these include:

- Assistance to members and customers in understanding their obligations and rights;
- Guidelines for fair-trading and environmental outcomes that can be achieved on an industry wide basis;
- Guide to members wanting to reduce avoidable costs and inconvenience by improving client relations and understanding principles likely to be taken into account in the resolution of complaints and enforcement of fair trading laws.

The Code of Practice demonstrates the high standards adopted by BIA Members and the advantages and protection a consumer has in using the facilities and services offered by BIA Members.

### **Approaches in Other Sectors for Minimising Dysfunctional Trading**

*'Dysfunctional Trading' as defined for purposes of this submission involves differences of opinion and conflict.*

#### **Fresh Fruit and Vegetables**

Existing marketing systems in Australia for fresh fruit and vegetables have evolved in recent years from a process of reform, deregulation and removal of a number of legislative rules and regulations governing the operation of the traditional marketing system (such as the Queensland Farm Produce Marketing Act 1964, and similar legislation in NSW and Victoria). New practices were subsequently developed by the fruit and vegetable trade throughout Australia to suit their own businesses and to tighten up loose practices.

At present, the only Code of Practice in operation in an Australian central market is the voluntary Code of Practice for Queensland Fruit and Vegetable Wholesalers, (the Brismark Code) which governs the conduct of Queensland fruit and vegetable wholesalers. The introduction of the Brismark Code was set to coincide with the repeal of the Queensland Farm Produce Marketing Act, on 30 June 2000. The Brismark Code provides for greater self

regulation within the fruit and vegetable wholesaling sector in Queensland and clarifies the methods of trade to be used in the Brisbane Market and the requirements attached to these. The Brismark Code also requires written agreements between subscribers and growers, and specifies the documentation the subscribers should hold. It has a clear disputes resolution process and gives the Queensland Chamber of Fruit and Vegetable Industries the authority to impose penalties for non-compliance of Brismark Code provisions.

In Western Australia, a review of the Perth Market Authority and the governing legislation, the Perth Market Act 1926, is currently being undertaken. The Perth Market Act was created to address problems that could be expected to arise in an unregulated market for primary produce. The review, initiated in 2000, builds on previous reviews undertaken in 1993 and 1996. Issues addressed include those relating to the orderly marketing of fresh fruit and vegetables to ensure that no one entity in the supply chain gains a disproportionate level of power. An interim discussion paper supported by the Perth Market Authority (dated December 2001) on the review of the Perth Market Act 1926 recommends a mandatory Code of Practice with legislative backing.

### **Other Industries**

The Code of Practice for the Australian Banking industry, the Code of Banking Practice, seeks to foster good relations between Banks and their Customers and to promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their Customers.

The Code is intended to -

- (i) describe standards of good practice and service;
- (ii) promote disclosure of information relevant and useful to Customers;
- (iii) promote informed and effective relationships between Banks and Customers; and
- (iv) require Banks to have procedures for resolution of disputes between Banks and Customers.

These objectives are to be achieved -

- (i) having regard to the paramount requirement of Banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system;
- (ii) consistently with the current law and so as to preserve certainty of contract between a Bank and its Customer; and
- (iii) so as to allow for flexibility in products and services and in competitive pricing.

The Australian Payments System Council may obtain from the Reserve Bank of Australia consolidated information based on reports and information provided by the Banks so that the Australian Payments System Council may provide reports to the Treasurer of the Commonwealth on compliance with the Code and its general operation.

The Mortgage Industry Association of Australia (MIAA) Code of Practice and Mortgage Industry Ombudsman Scheme provides a further example of a code of practice adopted by an industry organisation in a different industry (the "Mortgage Industry"). The MIAA comprises individuals and organisations Australia wide who are specialists in the finance sector, particularly housing finance.

The Code of Practice embodies an industry wide commitment to ensuring best industry practice and fair dealing within the Mortgage Industry. It recognises that customers looking for a loan need to feel confident in proceedings with what is usually the most significant financial transaction of their lives - confident also in the knowledge that the person with whom they are dealing has a commitment to best industry practice and fair dealing. It also acknowledges that

change is taking place and that there are now many organisations providing finance apart from traditional lending providers such as Banks, Building Societies and Credit Unions. There are now many other organisations providing finance. With so many different operators in the marketplace for finance and with so many different products available, a customer can sometimes feel daunted by the prospect of raising finance, and needs to be given access to a broad range of choices.

“The MIAA believes that customers benefit significantly from a healthy competitive spirit in the marketplace for finance. The active involvement of individuals and small corporations in competition with each other and with large corporations and credit providers means that Customers have a wider choice of financial products at a competitively set prices.”

The MIAA Code of Practice is defined as a developed statement of principles dealing with industry practices which are designed to set a standard of best industry practice and fair dealing between customers and MIAA Members. The Code of Practice exists to instill public confidence in the operations of Members. Although the Code of Practice is not legislation like an Act of Parliament, it is binding on and between members; and customers may make use of the procedures set out in the Code of Practice dealing with complaints and the resolution of disputes. It is intended to complement the Uniform Customer Credit Code ("UCC"), the Trade Practice Act and other Fair Trading Legislation.

The objectives of the MIAA Code of Practice are:

- to establish professional standards of Customer/Member and Member/Member dealings;
- to promote commitment by Members to compliance with laws and regulations and the spirit of those laws and regulations;
- to promote the maintenance of the high public standing of membership accreditation;
- to promote ethical and fair business practices to the benefit of Customers, the public and Members;
- to promote goodwill and harmony amongst Members;
- to specify Customer/Member and Member/Member complaint and dispute resolution mechanisms; and
- to promote education and professional development programs for Mortgage Originators and Mortgage Managers.

The Code also establishes a minimum set of qualifications or experience to enable a Mortgage Originator to become or remain a member. A Credit Provider needs to be confident that others in the industry who act as Mortgage Originators have the qualifications, experience and commitment to ensure that best industry practice and fair dealing are the hallmarks of the Mortgage Industry, so enhancing the public profile of the Credit Provider. *“A Customer who deals with an accredited Member can feel confident that he or she is dealing with a specialist in the Mortgage Industry who has a commitment to best industry practice and fair dealing.”*

The Mortgage Industry Ombudsman Scheme spells out how the MIAA will deal with complaints by customers against members and between members, and also how disputes will be resolved.



## Appendix 8: Prescribed Industry Codes of Conduct

The following information has been extracted from:

The Hon Joe Hockey, MP, Minister for Financial Services and Regulation. (May 1999), "Prescribed Codes of Conduct, Policy Guidelines on Making Industry Codes of Conduct Enforceable Under the Trade Practices Act 1974". <http://www.selfregulation.gov.au/publications/PrescribedCodesOfConduct/index.asp>

### Making industry codes of conduct enforceable under the *Trade Practices Act 1974*.

The Government has a continuing commitment to effective industry self-regulation as an alternative to government regulation. This was clearly set out in the Government's Codes of Conduct Policy Framework released in March 1998.

"If industry self-regulation fails, codes prescription offers an attractive alternative to industry-specific legislation". Joe Hockey, Minister for Financial Services and Regulation, May 1999.

The fair trading amendments to the Commonwealth *Trade Practices Act 1974* took effect from 1 July 1998. Amongst other important changes, the fair trading amendments provide for the underpinning of industry codes of conduct in legislation.

### Sections 51AD and 51AE: Codes of Conduct

Section 51AD gives legislative backing to prescribed industry codes of conduct and provides for the ACCC to take action against breaches of prescribed codes.<sup>1</sup> Section 51AE provides for industry codes of conduct to be prescribed in regulations proposed by the responsible Minister.<sup>2</sup>

1 Section 51AD provides that a corporation must not, in trade or commerce, contravene an applicable industry code. Sub-section (2) of 51AD defines an applicable industry code. In brief, an applicable industry code is one that is declared by regulations under section 51AE.

2 Section 51AE provides that regulations (to the Trade Practices Act) may prescribe an industry code to be mandatory or voluntary. The power to propose regulations under legislation lies with the Minister responsible for the legislation.

Regulations may declare a code to be mandatory or voluntary.

**Mandatory** codes are binding on all industry participants.

**Voluntary** codes are only binding on those members of an industry or profession who have formally subscribed to the code. Prescribed voluntary codes could, for example, apply only to members of the industry association administering the code. The Australian Competition and Consumer Commission (ACCC) will keep a public register of companies bound by voluntary codes.

For consumers and small business customers, the principal benefit of a prescribed code will be that commitments under a code are enforceable by the ACCC or by private action under the Trade Practices Act, with a wide range of remedies available, including damages.

### **Section 51AC: Unconscionable Conduct**

Regardless of whether a code of conduct is prescribed, it may still be relevant in determining if a corporation has breached the Trade Practices Act. Section 51AC directs the attention of the Court to consideration of the provisions of any relevant industry codes in determining whether or not a corporation has acted unconscionably.<sup>3</sup>

3. Section 51AC provides that, in determining whether conduct has been unconscionable, the Court may have regard to a list of eleven factors, including the requirements of any applicable industry code (that is, a Code that has been prescribed by the Minister) and the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with the code.

#### ***Who will initiate a proposal for prescription of a code?***

Formal proposals for prescription of codes of conduct will be initiated at Ministerial level, following representations from industry participants, consumers or government authorities about problems in a particular industry.

The Minister with responsibility for the administration of Part IVB of the Trade Practices Act may initiate proposals. The Minister for Financial Services and Regulation is currently the Minister with that responsibility.

When new regulation is needed to protect consumers or small businesses, the Minister will consider the potential for a prescribed code to be formulated as an alternative to new legislation.



## **Appendix 9: Australian Horticulture Sector Case Studies of Unlawful/Dysfunctional Trading**

Industry organisations were provided with a copy of an Unfair Trading Case Study Template (Appendix 3). This was prepared and circulated for purposes of consistency of approach and to assist industry organisations in encouraging their members to document (confidentially if they wished) the nature of their unfair trading experiences and the effectiveness of current mechanisms for dealing with the problem areas.

The Case Studies presented overleaf have been provided by some of the industry organisations consulted. Other industry organisations will present further Case Studies in their individual submissions.

Case Studies presented in this Appendix are:

- From a **state strawberry growers association**: a Case Study about supermarkets exercising power in the marketplace.
- From a **national vegetable industry association**: a Case Study about differences in margins in the vertical supply chain.
- From a **regional grape growers organisation**: a Case Study about transparency through the supply chain.
- From **Queensland Fruit and Vegetable Growers Ltd**: a selection of Case Studies about unfair trading terms and conditions.

## **UNFAIR PRACTICES CASE STUDY**

**A Case Study about supermarkets exercising power in the marketplace**

### **Lidded Punnet Packaged Strawberries**

#### **TAKE-HOME MESSAGE**

(Summary of the key aspects of the case and the implications/learnings for others)

Supermarket position is to stop wastage at store level by introducing lidded punnets. With this comes no consideration of the impact on sales and cost impact on growers. The extra cost will mean higher sale price lowering volume sales creating oversupply. Therefore the end result is lower prices and the cost is passed onto growers. The viability of the industry is ultimately compromised with these changes due to the limited alternative market outlets for produce.

#### **ABOUT YOU**

##### **Type of Produce/Products You Market**

Fresh prepackaged strawberries

##### **Your 'Path to Market'**

Grower to market wholesaler

##### **Your Location**

Victoria

#### **YOUR UNFAIR PRACTICES PROBLEM(S)**

##### **The Problem**

Change in packaging from overwrap to lidded punnets. Market agents and merchants are directed by supermarkets that in future all strawberries will be provided in lidded punnets. Hence market agents are directing growers to forward all produce in lidded punnets. Due to the market structure, costs will be quickly passed back to the growers which will have drastic economic consequences on small- medium operators.

##### **Impact on Your Business**

It is not cost effective (given the current market) to raise packaging costs by approximately \$2.16 per box (estimated average cost of past changes to lidded punnets). To the average grower this is an extra \$50 -60K in expenses a year with possibly no extra return which may impact on the sustainability of the business. History has shown (clam shell punnets) that while retailers sell the produce initially at a higher price a lower demand for produce is created (due to elasticity of demand with increase in price) creating a oversupply of produce. From this, prices will drop passing costs back to growers.

##### **Frequency and Extent of Problem(s)**

This problem has been experienced twice in the past five years. The outcome was to move back to the overwrap punnets with sales and volumes increasing as a consequence.

## **TACKLING THE PROBLEM(S)**

### **Action Taken by You**

The industry facilitated the independent collation of information regarding the feasibility of overwrap punnets compared to lidded punnets. This study uncovered that strawberries from Victoria's production environment are far more suited to long distance travel and extended shelf life in a overwrap punnet(Ag Vic,1996).

### **Results**

Supermarkets still believe sales are lost in overwrap punnets compared to lids. The industry believes that the quality of produce delivered to the retailer will on average be much better packaged in overwrapped punnets. Handling of fruit at store level is then the responsibility of the retailer, e.g. You don't stack loafs of bread on top of each other – you cannot do the same with fresh strawberries.

### **Solutions**

Retailers should meet and discuss with the national (and state) industry body(ies) and discuss changes needed and tackle the problems together. It is believed a mutual agreement can be reached by considering other options eg. Standard overwrap punnet at 45mm, wider awareness of standard specifications, wider awareness of recommended packing technique, conversing about not variety opportunities aimed at increasing consumption.

### **Reference**

Evaluation of Strawberry Packaging, Agriculture Victoria (Institute of Horticultural Development)  
Ian Wilkinson, Bruce Tomkins, Kerry Mason, Peter Franz, Pam Rogers, 1996.

## **UNFAIR PRACTICES CASE STUDY**

**A Case Study about differences in margins in the vertical supply chain**

### **‘Unfair returns to Growers’**

#### **TAKE-HOME MESSAGE**

- Growers’ returns for produce has not increased significantly in the last 25 years.
- Costs to Growers have increased markedly in that time.
- Retailers are making very large margins on produce for a far smaller risk and outlay.
- Growers have a right to a Quality of Life equal to that of the rest of the working community.

#### **ABOUT YOU**

##### **Type of Produce/Products You Market**

Fresh Potatoes and Onions

##### **Your ‘Path to Market’**

Grower to central market wholesaler then to retailer. Presented in take home packaging.

##### **Your Location**

Purnong, South Australia (on the River Murray)

#### **YOUR UNFAIR PRACTICES PROBLEM(S)**

##### **The Problem**

We grow, harvest, pack and deliver to wholesale market for \$X.00, only to see the produce sold by retailers for up to \$3X.00. We have large risks factors in the production side, while retailers face minimal risk components.

##### **Impact on Your Business**

Due to low returns, we cannot sustain supply at the returns imposed by retailers. They are able to mark-up by up to 300% – 500%, while we are struggling to show any profit at all.

##### **Frequency and Extent of Problem(s)**

The situation is continual, ongoing and worsening. It is prevalent across the primary producer sector.

#### **TACKLING THE PROBLEM(S)**

##### **Action Taken by You**

We have cut costs to the point where there is no more room to move.

We operate under SQF conditions to maintain market share.

We make do with outdated equipment, and minimal financial returns.

We employ a marketing officer to try to get the best returns, but continually hear that the 'buying public is resistant to price increases.'

We employ the best technology we can afford in growing and irrigating the produce, in order to get the best end product with least wastage under seasonal conditions.

We provide the size, quality, grade, and packaging, demanded by the market place, but are not rewarded for doing so.

We have participated in Industry Associations in order to try to achieve win/win outcomes, but the last tier (retailers) need to be aware that there will be no product for them to sell, until a fair market place ensures return for effort for all players.

## Results

We have not been able to receive parity in pricing for our outlay, time or risk factors. There is no attempt at the retail end to educate customers on fair pricing, or more importantly, to cut their margins to a fair level to allow us to remain viable.

Supermarkets and other retailers still dictate prices, with their margin in mind, and no regard to the producers' return. They cite customer backlash/ resistance; but still maintain their often excessive mark-up strategies.

## Solutions

### Education on price structures.

Firstly, education of the buyers who retail the product, and importantly, education of the end consumer. i.e. All consumers need to be aware of the relevant outlay / risk factors at each level of transaction, and there should be fair control of mark-ups.

e.g. Grower has to buy seed, plant, tend, fertilise, water, deal with adverse weather and water shortages, harvest, transport, pack, and deliver, at enormous outlay of time and money, and with very high risk factors. Retailer has to buy product, store, display, and sell, at much lower outlay of time, money and risk, but with a much higher profit margin.

The producer needs some control over their returns, and over the ultimate marketing of their product. For example, retailers tend to mix varieties of fruit and vegetables, and give them a generic label, which encompasses many types and grades of produce. Examples are 'Red potatoes'; 'Mangoes'; 'Onions', when these descriptions cover many different varieties and qualities. Do they want us to grow one variety and hope for the best?

If the problem is not aggressively addressed, there will ultimately be no primary production in this country. Our growers and producers are not heavily subsidised, as many overseas are. Nor are we growing in 3<sup>rd</sup> world conditions with the possible risk to quality and safety of produce. Unless this problem is aggressively addressed, and parity in pricing and returns is introduced, we will be faced with importing our 'fresh' food, as growers are forced out of business.



### A Case Study about transparency through the supply chain

GrapeConnect is a network of northern Australian table grape growers. The purpose of GrapeConnect is to foster industry unity, industry ability and grower commitment to the production and promotion of high quality early season table grapes. GrapeConnect members represent over 80 per cent of table grape production in Queensland and the Northern Territory.

The selling format for fruit and vegetables needs some formalising so that the process benefits all parties involved.

At present there are three main options available to growers to sell their product:

- *Team up with an agent and have them sell your fruit on your behalf on a commission basis* – an agent sells the fruit on the growers' behalf. Once produce arrives at the market place the agent sells it and earns a commission off the gross price of the fruit. However, the product is still the growers' responsibility thus the monies received for the fruit are also the growers, less any commission owed to the agent as per private arrangements between agent and grower.
- *Sell directly to merchants* – a merchant will buy produce from the grower and will then resell the produce at a profit. However, once the fruit is bought by the merchant it then becomes their property.
- *Direct marketing to wholesalers* – the process whereby the grower sells direct to the supermarkets etc.

In each of these processes, through-chain transparency is a necessary component of successful marketing of fruit. An impediment to through-chain transparency is the Brismark Credit Service offered by Brismark (the fruit and vegetable wholesalers' association) to retailers, which produces one consolidated statement that summarises all of their purchases from market wholesalers. Retailers make weekly payments to Brismark, which forwards them to wholesalers for a fee. While the majority of wholesalers use the service, it is not available to growers.

This process prohibits the producer from knowing exactly what price was received for their produce. The available market reports do not provide an alternative means of determining actual prices as they only provide a price range and do not show a breakdown of the true value of the sale price of the produce.

We wish to propose that an agent still markets and sells the fruit for the grower, but once sold, Brismark should be distributing the commission amount only to the agent (which has to include GST) and the balance directly to the grower. By including GST in the commission it will enable the grower to be fully aware of the exact purchase price with the ability to track the paper trail of the selling process, through records that should be kept and made available to all parties involved.

We encourage you to take an independent view of this situation and try and involve as many groups/organisations that would benefit from a change in the selling process. As growers, we need to protect ourselves from becoming victims of agents who go into liquidation or bankruptcy and ensure that since we have done all the hard work we still reap the rewards at end of the day.

## **CASE STUDIES REPORTED BY QFVG LTD**

### **A selection of Case Studies about unfair trading terms and conditions**

#### **Case Study 1**

The producer has for the last 30 years operated a vegetable, stone fruit and grazing enterprise in the Granite Belt.

The path to market is through central market wholesalers.

The producer has experienced an ongoing problem with transparency in the fresh produce market place, emphasised by the comparison with the clarity experienced in transactions of livestock involving a pastoral house.

All cattle sales through the producers' pastoral agent are individually itemised by quantity, customer and price. All fees and charges are also clear. Because the documentation the producer receives from the agent provides clear information on who the customer is and how much they paid, the producer has a better idea of the marketability of his livestock.

However, when sending fresh produce to market, calls to the wholesaler after trading has concluded, fail to give the grower information on eg the price and customers for the 5-6 pallets of vegetables sold that day, with a response from the wholesaler that they have not yet worked out the "average price". As the producer has authorised in writing (at the wholesalers' instigation) the wholesaler to act as an agent, the producer finds this lack of detail unacceptable and feels that this is the situation for most growers. The grower has sought more clarity on pricing without success.

Because the issue appears to be endemic to the sector, the producer sees little value in seeking another outlet for his produce at this stage.

The producer sees many similarities between the nature of trading in the fresh produce, livestock and real estate markets, with each being subject to variances in supply and demand, quality and the value of the commodities traded on the day.

The producer believes that growers should always be able to obtain details about each buyer of their produce, the dates and quantities of what was sold, the quality of the consignment, the price each customer paid and the fees charged by the wholesaler.

The producer argues that licensing and prudential standards are necessary for fresh produce wholesalers, just as they are for these other industries. These regulations provide sanctions for unacceptable trading practices and are a basis for licensed businesses to operate under a code of conduct.

#### **Case Study 2**

The producer operates a stone fruit growing enterprise in the Granite Belt.

The path to market is through central market wholesalers.

The producer experienced a situation where the wholesaler reported to the grower that they had sold cases of plums from between \$12 and \$16 a case. When speaking to a green grocer the producer knew, they related to the grower that they had bought the producers' fruit from the same wholesaler for a minimum for \$18 a case.



The producer contacted the wholesaler about the discrepancy between the reported price and the green grocers' buying price, with the response being that wholesalers "carry you through the low times". Regardless of any other issues surrounding the comment, the grower believed that the difference between the reported and actual prices showed an example of wholesalers profiting at growers' expense. The grower commented that in other industries, they would be prosecuted for such behaviour. This grower did not see any value in taking further action as while incurring further costs was an issue, the grower feared retaliation in terms of having his name spread around the market as a troublemaker.

The producer believes the solution lies in licensing fresh produce wholesalers, providing regulatory powers to have "fraudulent agents thrown out of the market".

### **Case Study 3**

The producer grows exotic tropical fruits and bananas in Kennedy in North Queensland.

The path to market for the grower is through central market wholesalers.

The producer in January 2003 had a problem with 6 pallets of bananas being dumped over a period of a few weeks. The grower was not immediately notified of this and only received a destruction notice, on request, eight weeks later.

The grower believes the impact on the business was the loss of 6 pallets of bananas. While the grower accepts that it is always possible for problems to arise with fresh produce, he only has "the merchant's word for it", with information on a problem only provided long after the event, with no options for either selling the produce elsewhere or fixing any problems immediately.

In this case, the grower believed it was too late to take any action to resolve the problem.

The grower believes that there must be clear methods for dealing in the marketplace that include tighter timeframes for dealing with problems that arise. The grower suggested that a compulsory code in operation in the industry may assist all participants in the sector.

### **Case Study 4**

The producer grows button squash, zucchini, silverbeet and leeks on the Granite Belt.

The path to market used by the business is through central markets in Brisbane and Sydney.

The producer experienced a situation where they received "very low" prices for their produce. When the producer queried the prices, the wholesaler sent the grower another cheque, effectively doubling the price received for the produce.

The grower believes this situation arises frequently in the market, imposing a substantial financial impact on farm business profitability.

To resolve the issue, the grower spoke directly to the wholesaler. After the issue was resolved, the grower transferred their business to another wholesaler.

The producer believes that a compulsory code of conduct is required to provide for clear recording and reporting of prices achieved for produce.

## Case Study 5

The grower operates a lychee enterprise in North Queensland.

The path to market is through central market wholesalers in Brisbane.

This grower sent 280 5kg cartons of lychees to three agents (approximately 80 cartons each) in Brisbane. While two agents returned similar prices for the fruit (averaging \$25 net per carton), the third agent returned an average price, five weeks later, of \$22 net per carton. While the lower price was not a major issue in itself, the reason given was that there was some black spotting on the fruit. The fruit had been returned by the retailer ten days after sale.

While the grower believes that the black spotting was a harmless blemish which would only have appeared on small quantities of fruit, the grower was not told who the fruit was sold to, so could do nothing to either correct the problem. Indeed, the grower could not confirm the nature and extent of the problem, so was unable to take further action.

The grower believes that it is more difficult to trace problems that arise in the supply chain since the repeal of the Queensland *Farm Produce Marketing Act 1964*, which included reporting requirements providing for greater detail (eg freight costs, quality, handling and stacking charges etc.) was recorded by licensed wholesalers. The grower argues that as there is now no regulator involved in the market, there is no incentive to thoroughly record transactions or to quickly notify suppliers of problems. The producer commented that growers “need the option of having somewhere to go for backup to get transparency in pricing and returns [of produce]”.