

28 November 2018

Food and Grocery Code of Conduct Review
FGC@treasury.gov.au

3 Glenarm Road,
Glen Iris,
VICTORIA 3146

Re: Independent Review of the Food and Grocery Code of Conduct Review

About AUSVEG:

AUSVEG is the National Peak Industry Body representing the interests of Australian vegetable and potato growers. AUSVEG represents growers from throughout Australia and works to ensure the National Vegetable Levy and the National Potato Levy are invested in areas that best meet industry needs.

AUSVEG also delivers national projects in the areas of communication, environmental sustainability, biosecurity, export development and market access on behalf of industry.

AUSVEG welcomes the opportunity to provide a response to the Independent Review of the Food and Grocery Code of Conduct, and thanks Professor Graeme Samuel AC and his team for taking an active role in the assessment.

Summary of the review:

An independent review of the Code (the Code) was announced in March 2018 to assess its impact in improving the commercial relations between grocery retailers, wholesalers and suppliers. The Review noted that the Code has generally been effective in improving dealings between suppliers (i.e. those that are signatories to the Code) and buyers. However, three main areas for improvement include:

1. Retailers and wholesalers with significant market power should become signatories

The voluntary Grocery Code has achieved good coverage across the industry – the three major supermarkets in Australia have become signatories to the Grocery Code. Other industry participants with significant market power, including those in wholesaling, should also become part of the Grocery Code. It is in the industry's best interest to maintain a single voluntary code, however, a separate targeted mandatory code may be necessary to capture key players that refuse to participate in this industry-led initiative.

2. Good faith and fair dealings

The Grocery Code should be enhanced to ensure that suppliers receive both fairness in process and fairness in outcome during their commercial dealings. This can be achieved by making the current

good faith provision clearer and easier to apply in practice. New principles of fair dealings will also be introduced to guide Code Arbiters during their dispute resolution role.

3. Grocery Code Arbiters

The dispute resolution mechanisms in the Grocery Code have been underutilised by suppliers, due to a fear of retribution for making complaints. A Code Arbiter in each signatory with the power to resolve individual complaints, make binding decisions and award compensation can dramatically improve outcomes for suppliers. On top of this, any supplier dissatisfied with the Code Arbiter process can refer their case to a government appointed Independent Reviewer to check the integrity of the dispute resolution process.

Overview response:

AUSVEG has been a vocal supporter of the Code since its inception in 2015 and continues to support the concept of a fairer and stronger relationship between suppliers and retailers/wholesalers.

The organisation has also been a strong supporter of a mandatory code and believe a mandatory code is the only truly effective option to check unconscionable or anticompetitive conduct.

The voluntary, industry-led, code has been welcomed, but AUSVEG believes that a voluntary code cannot provide the necessary coverage, protections and certainty which suppliers require. As discussed in this review, AUSVEG is a strong supporter of a mandatory code and is of the view it is the best way forward for industry.

Recommendation Responses:

Recommendation 1: *The Grocery Code should remain as a prescribed voluntary code.*

The Government should consider introducing a targeted mandatory code for industry participants with significant market power that refuse to become signatories.

Response: AUSVEG does not support this recommendation. AUSVEG is of the strong opinion that creating another code would create widespread industry confusion and inconsistency.

The industry already has the Horticulture Code of Conduct, as well as the Food and Grocery Code of Conduct. AUSVEG supports greater synergies between the existing codes, and alterations and stronger enforcement of existing codes, rather than a creation of another.

AUSVEG has concerns that the review document recognises Metcash as the only other significant retailer/wholesaler which should become a signatory of the Code. AUSVEG is a strong supporter of a mandatory code which would include businesses such as Costco, and other smaller retailer/wholesaler businesses, to become signatories.

AUSVEG supports the suggestion that Metcash become a signatory of the Code, but prefers that all retailer/wholesalers sign up under a mandatory code.

Having a mandatory code would provide clarity, consistency and confidence to all suppliers, knowing they are supported regardless of the customer. It would also ensure that any new entrants to the sector would be covered automatically.

AUSVEG also recognises the importance that should the Code become mandatory, that the process to abide by the Code remain cost-neutral, and not be major cost impost on industry.

Recommendation 2: The Grocery Code should be amended so that wholesalers are subject to the same Grocery Code obligations as retailers (including the general conduct provisions in Part 3), except for customer facing provisions that are only relevant to retailers.

Response: AUSVEG is supportive of this recommendation in concept, but would like to see greater detail on how the amendment intersects with the Horticulture Code of Conduct, as it now extends to wholesalers outside of the wholesale markets.

Recommendation 3: *That the current coverage of products under the Code remains unchanged.*

Response: AUSVEG makes no comment on this recommendation.

Recommendation 4: *Enhance the current obligation to act in good faith (clause 28), including the addition of indicators of acting in good faith that are easy to understand and apply; and to introduce the concept of 'fair dealings' as guiding principles for the Code Arbiters.*

The ACCC should be tasked with enhancing its guidance materials to include detailed examples of how the Grocery Code provisions may be interpreted and applied in practice.

Response: AUSVEG is supportive of this recommendation and would also support the same recommendation for the Horticulture Code of Conduct. AUSVEG agrees with the review that the current good faith provision is too difficult to apply in practice.

Clarity is required for both retailer/wholesalers and suppliers as to what constitutes fair dealings in order to give industry confidence in the current process.

AUSVEG would like to see greater detail on the fair dealing provision and the detailed examples of how the provisions may be interpreted.

This issue also reinforces the importance of having a mandatory code to ensure consistency throughout the sector.

Recommendation 5: The Code Compliance Manager should be replaced with an independent Code Arbiter, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.

Response: AUSVEG is supportive of an Independent Code Arbiter that is completely independent and not aligned with retailer/wholesalers or suppliers. AUSVEG strongly opposes the idea that an Independent Code Arbiter is embedded in each retailer or wholesaler.

While theoretically the Code arbiters sit separately to the functioning of the business there will be a perception that the adjudicator lacks independence and therefore will not be trusted by suppliers, and as a result, not be utilised.

Any perceived alignment with one retailer will greatly diminish the effectiveness of this position. Additionally, the benefit of an overarching adjudicator is that they can gain insights from across the sector and not just one retailer.

The current dispute resolution process is not well-known among suppliers and AUSVEG believes if an Independent Code Arbiter is assigned, there needs to be clear communication to all parties about the process, including how they are protected by the process.

While AUSVEG supports the initiative, the signatories have taken to employ a Code Compliance Manager (CCM), AUSVEG believes there is still apprehension from suppliers to undertake the current Dispute Resolution Process at fear of retribution.

AUSVEG believes for the horticulture industry to trust the process it needs to be completely independent.

AUSVEG is supportive of some elements of the United Kingdom (UK) model particularly where the Grocery Code Arbiter conducts an annual survey

AUSVEG does not support the idea that annual reporting be made public, as it is important to keep commercially sensitive information of individual suppliers and retailer/wholesalers private.

Recommendation 6: *The Government should appoint an Independent Reviewer to:*

- *review the Code Arbiters' determinations for consistency with the requirements of the Grocery Code (at the request of a supplier); and*
- *work collaboratively with Code Arbiters, signatories and the ACCC, meeting regularly to discuss issues under the Grocery Code.*

Response: AUSVEG is supportive of this recommendation.

Recommendation 7: *The ACCC should also consider adopting a collaborative approach with signatories, Code Arbiters and the Independent Reviewer to encourage more active compliance with the Grocery Code.*

Response: AUSVEG is supportive of this recommendation.

The ACCC should rely on the strength and the independence of an efficient and effective Code Arbiter to raise issues of concern or have been unable to be resolved.

Recommendation 8: *The Grocery Code should be amended to give suppliers the right to request further details on the reasons for delisting decisions, following the initial receipt of a signatory's reasons.*

The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.

Response: AUSVEG supports this recommendation.

Recommendation 9: *It should be clarified that the term Grocery Supply Agreement, as defined in clause 3 of the Grocery Code, applies to all agreements between a supplier and signatory, including freight and promotional agreements, which relate to the supply of groceries.*

Response: AUSVEG supports this recommendation.

Recommendation 10: *Clause 10 of the Code should be amended to so that there is a ban on variations to Grocery Supply Agreements that have retrospective effect.*

Response: AUSVEG supports this recommendation that there should not be retrospective variations.

Recommendation 11: *Clause 14 should be amended to protect a supplier's right to negotiate a lower wastage charge (if they have reduced their actual wastage) without it jeopardising other terms and conditions in their agreement.*

Response: Not applicable for Vegetable or Potato growers.

Recommendation 12: *To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply only to fruit and vegetables.*

Response: AUSVEG acknowledges this recommendation which is already applied to vegetable and potato produce.

Recommendation 13: A new provision relating to price rise processes should be introduced to:

1. prevent signatories from requiring a supplier to disclose commercially sensitive information;

2. require that signatories take no longer than 30 days to consider a price rise request from a supplier, unless circumstances exist that justify a reasonable extension that is negotiated with and agreed to by the supplier; and

3. require that signatories report on the times taken to make a price rise decision, to be published in the Code Arbiters' annual reports.

Response: AUSVEG is supportive of this recommendation.

Recommendation 14: *There should be a review of the Code within three to five years of implementation of any changes as a result of this Review.*

Response: AUSVEG believes a review of the code within three years is a sensible approach.

Additional recommendations for consideration: AUSVEG supports an additional recommendation that there be an educational campaign generally to raise awareness of the code and encourage suppliers to sign on. AUSVEG recognises there is a significant lack of awareness of the Code, and there needs to be extended work complete to ensure communication to all industry stakeholders is clear, consistent and thorough.

AUSVEG also supports, as listed in its responses to recommendations 1, 2 and 3, the ACCC look at greater synergies between the Food and Grocery Code of Conduct and the Horticulture Code of Conduct.

AUSVEG would like to thank Professor Graeme Samuel AC for the opportunity to respond to the review.

For more information regarding this submission please contact me on (03) 9882 0277 or at tyson.cattle@ausveg.com.au

Yours sincerely,

Tyson Cattle

National Manager – Public Affairs