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## HORTICULTURE CODE OF CONDUCT Fair Trading – or Foul ?

*'To enhance the welfare of Australians through  
the promotion of competition and fair trading and provision for consumer protection.'*  
(Trade Practices Act 1974- Sect 2 Object of the Act)

While no official announcement has been made yet, advice received last week confirms that the proposal to be put forward to Cabinet by the Minister for Agriculture, Peter McGauran MP, is that the proposed Horticulture Code, to be a mandated code under the Trade Practices Act, **will apply only to the Central Markets**. This is an amazing revelation because it is contrary to the proposals put forward by the cross section of industry and the advice of the Government's own advisors, The Centre for International Economics (CIE).

There is no justification for introducing a code that will only apply to one part of one section of the industry, particularly a part that primarily comprises small businesses.

To do so would be unfair, anti-competitive and contrary to the stated Object and fundamental principles of the Trade Practices Act. It may even be unconstitutional.

The draft CIE report expressed reservations about exclusions. It stated that *'excluding any type of transactions from the code would reduce the effectiveness of the code, provide loopholes, increased compliance costs and anticompetitive elements.'*

To regulate a business on one side of a road, while a competitor (literally) on the other side of the road, or sitting in car with a mobile phone can do what they like without regulation, is discriminatory in the extreme. To give a regulatory advantage to 'fly by night' off site operators at the expense of reputable businesses will harm the very growers the regulation is supposed to protect.

This discriminatory regulation will adversely impact upon the multiplicity of transactions between growers, wholesalers, providores, retailers, exporters, brokers, other marketers and the public that daily drive the vibrant business of the wholesale markets. It will add more complication and more administrative cost to the market chain and weaken the central markets. This will disadvantage independent retailers, make them less competitive and eventually drive more of them out of business. Consumers will end up paying more because there will be fewer independent retailers and less competition for the supermarket chains.

There will be greater incentive for businesses to move away from the regulated environment of wholesale markets and those that stay will import more produce from overseas, which will further weaken the markets. Australian growers will be the losers as there will be fewer businesses offering them lower prices for their produce.

Confining the regulation to the central markets is contrary to the proposals put forward by all grower groups including Horticulture Australia Corporation (HAC) and the National Farmers Federation (NFF). In August 2005, the joint HAC/NFF response to the CIE Regulation Impact Statement, stated: *'it (the code) should apply to all parties, including but not limited to central market wholesalers, other wholesalers, produce merchants, brokers, retailers, exporters and processors'*. In recent days, grower advocates have confirmed that they want the Code to include all those who deal with growers, including all retailers.

An independent, Roy Morgan Research Survey of more than 2,000 growers from Qld, NSW and Vic, commissioned by the Brisbane Markets and released on 3 November, revealed that:

- On a list of the nine most important issues for growers, the mandatory code rated last. First was biosecurity and foreign diseases, followed in order by foreign imports, water and dominance by the supermarket chains.
- Only 16% of growers are completely in favour of the proposed code, while a further 25% are only somewhat in favour.
- Only 13% of growers believe there has been sufficient consultation between the government and industry about the code.
- Only 6% of growers believe that major retail chains should not be included in a mandatory code.
- Only 16% expressed any form of dissatisfaction with the central markets.

While it might seem like an expedient solution to just target a small group of small businesses in the central markets, it will not help the growers and, as the survey indicates, it is not even what the growers want. This is a 'lose lose' situation with the only winners being the supermarket chains and the 'fly by night' off site operators.

The Australian Chamber represents several hundred fruit and vegetable businesses located in or related to the central markets. These are mostly small businesses and many of them are growers themselves. On behalf of these businesses and the thousands of growers, retailers and supporting businesses who rely on the central markets, we call on the Federal Government not to introduce this mandatory code in the manner proposed. Instead we ask that any mandatory code cover the industry as a whole so that it promotes the 'competition and fair trading' intended by the Trade Practices Act.



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## **HORTICULTURE CODE OF CONDUCT BRIEFING NOTES**

### **Background**

- July 2004 - Government rejects proposals that the Produce and Grocery Industry Code (PGIC), which includes horticulture, should be mandatory.
- July 2004 -The Australian Chamber proposes written terms of trade and disputes procedures under the voluntary PGIC.
- September 2004 - Agreement reached with growers by the end of the month on nearly all issues, and constructive negotiations with the National Farmers Federation (NFF) in progress.
- October 2004 - Mandatory Code announced by the Deputy Prime Minister following pre election pressure from Horticulture Australia Council (HAC) and the NFF.
- May 2005 - Government contracts the Centre for International Economics (CIE) to provide a Regulatory Impact Statement (RIS) and develop a mandatory code.
- September 2005 - The CIE's final report is submitted for assessment by DAFF and other Government Departments.

### **Draft Mandatory Code**

- After considering industry submissions, the CIE produced a draft RIS and draft Mandatory Code which provided for:
  - Application to grower's first point of sale, including grower sales direct to retailers.
  - Three trading methods Agent, Merchant and a further Merchant option similar to the way most growers currently do business.
  - All participants to have documented terms of trade.
  - Growers to send advice in writing before despatching produce.
  - An industry Code Management Committee to be established.
  - Horticulture Inspectors to be appointed by the Code Management Committee.
  - Dispute Resolution similar to the Franchising Code's 'mediator panel' system.
- The CIE's final report to Government has not yet been made public but it is expected that it will not be radically different from the draft presented to industry for comment.

### Grower Position

- HAC/NFF and some grower activist groups have made various *unsubstantiated* claims about unsatisfactory dealings with supermarkets, processors and wholesalers. HAC/NFF claim that growers want clarity and transparency in their business dealings with those they supply.
- HAC/NFF code proposals restrict the way growers do business by making it mandatory for them to sell their produce on an agency basis, unless they have a fixed 'on farm' price before sending. HAC/NFF also demand extensive transaction reporting.
- HAC/NFF reject the CIE's draft code options, which provide growers with flexibility and choice about how they do business. HAC/NFF also oppose the CIE's disputes procedure, based on a panel of mediators. HAC/NFF want a single 'disputes ombudsman'.
- HAC/NFF have not provided any evidence to demonstrate or quantify how growers will be better off under their proposals. HAC/NFF admit their proposals will *cost growers money*.

### Wholesaler Position

- The Australian Chamber opposes a mandatory code because the need has not been established. In the past ten years, three State Governments repealed their Farm Produce Acts because they were expensive, difficult to administer and did not reflect normal business practices.
- However, the Australian Chamber will cooperate with Government and industry to have a workable mandatory code that:
  - Includes all participants in the horticulture industry without discrimination;
  - Provides businesses with reciprocal rights and obligations;
  - Does not undermine existing business relationships;
  - Does not impose a costly burden on business or the community; and
  - Meets the Government's criteria for the establishment of a mandatory code.

#### Includes All Participants.

- Some industry groups and major supermarkets want exemption from the mandatory code because they claim to have systems in place and few complaints. Most small businesses in the industry could make the same claims. It is inequitable, discriminatory and an administrative nightmare to make exemptions for some businesses and not others.

#### Reciprocal Rights and Obligations.

- Quality and price have a direct relationship, so grower compliance with a standard grade/quality system is essential. Independent third party audited food safety and quality standards for growers, wholesalers and retailers are also critical.
- The 'ombudsman' system proposed by HAC/NFF will not be effective under a mandatory code. The PGIC has conflict of interest and perception of bias issues with their 'ombudsman' system. Rightly or wrongly, there is a view amongst our members that the PGIC ombudsman is a Government funded grower advocate rather than an impartial mediator. The CIE's proposal for a panel of mediators, similar to the Franchising Code, is a fairer, more workable system.

### Business Relationships.

- HAC/NFF are effectively trying to rewrite the Sale of Goods Act and Commercial Law by restricting the way a merchant transaction can occur and inventing a 'Default Agency' provision. A person cannot be an agent 'by default' when, by law, an agent must be appointed by a principal and must accept that appointment.
- The great majority of growers tell us they are happy with their present arrangements and do not want them changed. If a grower and a business they supply, agree in writing how they will do business, whatever the detailed terms of that agreement, then it should be recognised under a mandatory code.

### Cost Burden.

- The HAC/NFF proposals will commercially disadvantage the smaller growers, wholesalers and retailers by imposing costly administrative burdens on their businesses. More than 90% are small family businesses, which are least able to absorb cost and administrative imposts. They have limited opportunity to pass on additional costs because fruit and vegetable prices are determined by supply and demand. The HAC/NFF proposal, estimated to cost wholesalers and growers \$192 million per annum, is a huge cost burden when no quantifiable tangible result can be demonstrated.

### Government's Code Criteria.

- So far the consultation process has been inadequate. The CIE's tour was too limited in time and location to cover such a vastly dispersed industry. HAC/NFF have not consulted effectively with their claimed constituents because most growers know nothing about the code. There will be a significant backlash against the Horticulture Code once industry participants realise the full extent of its implications.

### Conclusion

- The Australian Chamber remains opposed to a mandatory code because there has been no tangible, quantifiable evidence presented by anyone to justify its introduction.
- However, if there is to be a mandatory code then it must be based on practical, cost effective, workable solutions that incorporate the issues raised by the wholesaling sector.
- While we have not seen the CIE's final RIS and Code proposals, we suggest they would have more practical application than the HAC/NFF's costly and unworkable propositions.
- We encourage the Government to continue with its stated intention of ensuring the proposed Horticulture Code meets its criteria for a mandatory code under the Trade Practices Act before it is introduced into legislation.
- It is ironic that at the same time as they propose a mandatory code for our industry, the Government has rejected a mandatory code proposal for the smash repair industry (alleged to have similar issues) because:

***'The Government is committed to industry self regulation to address marketplace problems as an alternative to regulation'***

*(Commonwealth Government Response to Productivity Commission Inquiry: Smash Repair and Insurance August 2005)*