



Food and Grocery Code of Conduct

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NSW Farmers' Association Background

The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.

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Summary of Recommendations

NSW Farmers believes:

- *That the market concentration within Australia's retail supermarket sector has resulted in excessive market power being held by the major supermarkets.*
- *That the market power held by supermarkets has enabled the use of unfair terms and practices in the procurement of food and groceries by Australia's major supermarkets to the detriment of competition in upstream markets.*
- *That a mandatory code is the preferred method of the agriculture industry to provide a counter veiling influence on the market power of the major supermarkets, particularly with reference to their relationship with suppliers.*
- *If an opt in prescribed code is adopted by Government to regulate the relationship between retailers and suppliers, it should be reviewed to ensure that strategic avoidance or withdrawal from the code is not exercised by retailers to undertake unfair and anti-competitive dealings with suppliers.*
- *That other behaviour of the major supermarkets negatively impacts on the ability of upstream markets to distribute value fairly and that competition policy should be amended in accordance with the recommendations made by the NFF to the Competition Policy Review.*

NSW Farmers believes:

- *The consultation paper has accurately captured the concerns of the agriculture industry with regard to impact of the market power held by the major supermarkets on their direct relationships with suppliers, including farmers, and the flow on effects to farmers providing produce to food processors or wholesalers who in turn supply the major supermarkets.*
- *That it is appropriate for Government to intervene in the relationship between retailers and suppliers to bring about fair and commercial outcomes that would occur in a market where participants both exercised reasonable market power.*

NSW Farmers believes:

- *that a mandatory code of conduct with a broader scope than proposed within the Grocery Code would be better suited to manage the market power exercised by supermarkets.*
- *that if the Grocery Code is to be gazetted as proposes the definition of retailer within the code is appropriate.*

NSW Farmers believes:

- *The consultation paper has accurately captured the concerns of the agriculture industry with regard to impact of the market power held by the major supermarkets on their direct relationships with suppliers, including farmers, and the flow on effects to farmers providing produce to food processors or wholesalers who in turn supply the major supermarkets.*
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- *that a mandatory code of conduct with a broader scope than proposed within the Grocery Code would be better suited to manage the market power exercised by supermarkets.*
- *that if the Grocery Code is to be gazetted as proposed the definition of retailer within the code is appropriate.*

NSW Farmers believes:

- *that the code should cover the supply arrangements of alcohol to retailers.*

NSW Farmers believes

- *that the arrangements for phasing the code's requirements into grocery supply agreements are appropriate.*

NSW Farmers believes:

- *that the requirements for grocery supply agreements proposed within Part 2 of the Grocery Code are appropriate.*
- *that the requirements for the Grocery Code should be supplemented by a written provision informing suppliers of their right to bring disputes under the code.*
- *scrutiny is required under the code to ensure that where the code continues to allow unilateral and retrospective variations it does not perpetuate unfair trading conditions for suppliers*
- *greater scrutiny is required for retrospective variation compared to unilateral variations.*

NSW Farmers believes:

- *the proposal for the code to provide exemptions to behaviour prohibited by Part 3 carries a risk that retailers will still be able to engage in the proscribed conduct.*
- *scrutiny should be placed on how the exemptions to prohibited conduct are utilised by retailers to determine whether the code has led to changed behaviour in line with the Grocery Code's objectives.*

NSW Farmers believes:

- *the provisions regulating the rejection of fresh produce within the code should be harmonised with the rejection provisions within the Horticulture Code.*

NSW Farmers believes:

- *the inclusion of a broad duty on retailers to deal lawfully and in good faith is an important protection that may successfully mitigate concerns surrounding the exemptions to prohibited conduct provided within the Grocery Code.*

NSW Farmers believes:

- *that a robust compliance and enforcement process within the Grocery Code is important to developing meaningful dispute resolution procedures*
- *that common dispute resolution procedures should be developed for the Horticulture Code and the Grocery Code when the dispute involves horticultural produce.*

NSW Farmers believe:

- *that the Grocery Code should be enforceable by the ACCC.*
- *that modern compliance mechanisms, including pecuniary penalties, infringement notices and audit powers should be available to the ACCC in its enforcement of the Grocery Code.*

NSW Farmers believes:

- *that the Horticulture Code should be maintained as a mandatory code of conduct if the Grocery Code is prescribed as a voluntary code of conduct*

Introduction

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

NSW Farmers is the key state representative body for both intensive and extensive industries ranging from broad acre, meat, wool and grain producers, to more specialised producers in the horticulture, dairy, poultry meat, egg, pork, oyster and goat industries. NSW Farmers also represents the interests of rural and regional communities and the important issues associated with natural resource management.

NSW Farmers welcomes the opportunity to provide comment to the Food and Grocery Code of Conduct (Grocery Code) consultation paper. NSW Farmers' members hold a growing concern over the implications of the market concentration in the food and grocery sector. In particular the growing gap between the farm gate value of food and the price paid by consumers at the supermarket indicates that the capture of value in the food supply chain is dominated by the major participants in the supermarket trade.

In response to these concerns NSW Farmers supports a mandatory code for supermarkets that has a broader remit than presently proposed by the proponents of the opt-in Grocery Code; however seeks to make comment on the contents of the code to assist the Federal Government in its consideration of the suitability of the code's provisions in regulating the retailer – supplier relationship to protect primary producers who are either direct suppliers, or alternatively supply food processors and wholesalers who in turn supply retailers.

In making these comments with regard to the proposed opt-in code, NSW Farmers notes that once prescribed the ACCC will have the capacity to enforce compliance against the code by signatories to the code. Therefore, dependent on adequate voluntary participation in the code and the suitability of the provisions, prescribing the code is a welcome step in restraining the use of market power with regard to costs and risks faced by suppliers caused by unfair practices that these retailers are able to undertake. Specifically the unfair behaviours that the code seeks to address include:

- the assignment of risk of shrinkage and waste to suppliers;
- the threat of delisting or poor placement of products in turn for rebates and other payments;
- use of market power to reject produce
- to require changes to the supply chain procedures of grocery suppliers;

- the unilateral and retrospective variation of supply agreements;

As outlined above, crucial to the regulation of these aspects being undertaken in a matter that is satisfactory to the farming industry is ensuring that the code is adopted by an adequate proportion of retailers to ensure that market players do not strategically avoid opting into the code in order to obtain benefits not open to code signatories. NSW Farmers recommends to Government that it reviews code membership to determine if strategic avoidance is being undertaken, and if so mandate the code.

Additionally it is important to note that due to the high market concentration in the supermarket sector that the concerns of the behaviour of the major supermarkets are not limited to the aspects to be regulated by the code. This includes issues such as misuse of market power, unconscionable conduct and the use of unfair contract terms that are not provided for within the code.

With regard to the other mischief identified, NSW Farmers supports the National Farmers' Federation's (NFF) submission to the Federal Government's Competition Policy Review which provides specific recommendation with regard to these three important competition policy issues. Further, NSW Farmers seeks to emphasise its support for the proposal within the NFF's submission to the National Competition Review for the establishment of a Perishable Goods Commissioner. This would ensure that enforcement agencies possess the specific experience and skills required to appropriately monitor and enforce competition law in the markets for agricultural produce to ensure that the market power of supermarkets does not negatively impact on upstream markets.

NSW Farmers believes:

- *That the market concentration within Australia's retail supermarket sector has resulted in excessive market power being held by the major supermarkets.*
- *That the market power held by supermarkets has enabled the use of unfair terms and practices in the procurement of food and groceries by Australia's major supermarkets to the detriment of competition in upstream markets.*
- *That a mandatory code is the preferred method of the agriculture industry to provide a counter veiling influence on the market power of the major supermarkets, particularly with reference to their relationship with suppliers.*
- *If an opt in prescribed code is adopted by Government to regulate the relationship between retailers and suppliers, it should be reviewed to ensure that strategic avoidance or withdrawal from the code is not exercised by retailers to undertake unfair and anti-competitive dealings with suppliers.*

- *That other behaviour of the major supermarkets negatively impacts on the ability of upstream markets to distribute value fairly and that competition policy should be amended in accordance with the recommendations made by the NFF to the Competition Policy Review.*

Part A: Policy Problem

NSW Farmers agrees with the concerns outlined by the consultation paper regarding the distortions that exist within the Australian food and grocery sector. Australia is unique in which two dominant participants, Coles and Woolworths, have control of the majority of the market share in this sector. As a result, producers of fresh produce and food processors are heavily reliant on these supermarkets, as the 'gatekeeper... to the consumer', in the implementation of national distribution strategies.¹

The market power associated with this dynamic has given rise to behaviour in which suppliers are faced with pressure to agree to unfair trading terms, often in the form of retrospective or unilateral variation to the supply agreement or the other forms of behaviour identified above.

These types of behaviour have the capacity to impact on farmers in two ways. Firstly, often farmers (including horticulturalists) will be direct suppliers to a retailer and will directly incur any financial transfer arising from the imposition of unfair contractual terms. Secondly, where the supplier is a food processor or wholesaler that procures raw product from farmers the additional costs will mostly be borne by farmers as a result of cost price pass through which manifests in lower prices at the farm gate.

An example of this behaviour can be found in reports of the evidence before the Federal Court which indicate that Coles has admitted to an active campaign seeking rebates from its suppliers. Specifically these reports outline that the campaign by Coles included warnings that it would refuse to stock new products and withhold information from suppliers if they did not engage in the rebate program.² The ACCC has alleged that this conduct is in breach of laws preventing unconscionable conduct, undue influence and misleading information.³

It is the view of NSW Farmers, regardless of whether or not this behaviour is found to be in breach of prohibitions in the existing law, that these types of behaviour would not be tolerated in a market place where participants both exercised reasonable market power. On this basis, efforts by Government to

¹ Similar market dynamics have been identified in other jurisdictions for example see Andrew Hollingsworth, 'Increasing retail concentration: Evidence from the UK food retail sector', *British Food Journal*, (2004 volume 106) 629, 632.

² Sue Mitchell, 'Coles admits it 'warned' suppliers', *Australian Financial Review* (2 July 2014).

³ *Ibid.*

provide a counter veiling influence on this market power to ensure fair and commercial negotiations that enable proper market distribution of value is warranted. Such a position is consistent with the statement made within the consultation paper that:

Well-functioning markets are often supported by regulation that protects the competitive processes and provides incentives for innovation and investment, which in turn enhances the wellbeing of all Australians.⁴

Further, as indicated within the consultation paper, such an approach is consistent with international efforts to deal with competitive concerns created by a concentrated retail supermarket sector.

NSW Farmers believes:

- *The consultation paper has accurately captured the concerns of the agriculture industry with regard to impact of the market power held by the major supermarkets on their direct relationships with suppliers, including farmers, and the flow on effects to farmers providing produce to food processors or wholesalers who in turn supply the major supermarkets.*
- *That it is appropriate for Government to intervene in the relationship between retailers and suppliers to bring about fair and commercial outcomes that would occur in a market where participants both exercised reasonable market power.*

Part B: The Grocery Code

Question 4 and 5: Duty holders and relationships

As outlined above, it is the preference of NSW Farmers to see the development of a mandatory code of conduct for the supermarket sector. In particular NSW Farmers is concerned about the ability of supermarket retailers to strategically opt out of the code, reducing the protections that are available for the farmers and food processors that are their suppliers. Further a mandatory code would enable targeted duties to be placed on supermarkets in line with the concentrated share of the market that they hold and the impact that this concentration has on the competitive process.

With regard to the proposal of an opt-in prescribed code, NSW Farmers supports the definition of retailer provided in the draft code, which broadens the possible duty holder from beyond just organisations that operate retail outlet to circumstances in which wholesalers, who may exercise significant market power, may be defined as retailers depending on their resale business model.

⁴ Consultation paper, 1.

NSW Farmers believes:

- that a mandatory code of conduct with a broader scope than proposed within the Grocery Code would be better suited to manage the market power exercised by supermarkets.
- that if the Grocery Code is to be gazetted as proposes the definition of retailer within the code is appropriate.

Question 6: Should the supply of alcohol be included within the scope of the code

The key mischief that a properly functioning Grocery Code should seek to remedy is the abuse of market power, in particular by the major supermarkets. Coles and Woolworths, through their bottle shop interests, hold a large percentage of alcohol sales in Australia. For example the Wine Makers Federation has estimated that Coles and Woolworths hold over 70% of retail wine sales.⁵ Like the remainder of the food and grocery sector, there is a growing body of evidence that the market power arising from this concentration is increasingly being used within the retail alcohol supply chain in a way that is anti-competitive. While some suppliers, such as Fosters in 2011, may have countervailing market power to react to the supermarkets, it is the view of NSW Farmers' that this is the exception and not the rule.

Similar to the supply chain arrangements for other food and grocery items, the value chain for retail alcohol often commences at the Australian farm gate, either through the growing of wine grapes for wine making or barley for malting. When this monopsony power is used in ways that adversely impacts on suppliers, compared to a properly functioning market, any costs borne by suppliers will be passed back to the farming suppliers of produce used as raw ingredients.

NSW Farmers believes:

- that the code should cover the supply arrangements of alcohol to retailers.

Question 7: Arrangements for phasing in the code

It is important that the operation of the Grocery Code not be impeded in a similar fashion to the Horticulture Code of Conduct, which has exempted all contracts for the supply of horticulture made before the commencement of the code on 15 December 2006.

⁵ Winemakers' Federation of Australia, submission no. 35 to Senate Select Committee on Australia's Food Processing Sector (October 2011) 5-6; Malcolm Knox, 'Supermarket Monsters', *The Monthly* (August 2014) <<http://www.themonthly.com.au/issue/2014/august/1406815200/malcolm-knox/supermarket-monsters>>.

It is proposed within the draft code that retailers will vary their supply agreements to be compliant with the code within 12 months of the commencement of the code, or alternatively for retailers who are not foundation signatories, the latter of twelve months from the commencement of the code or six months from that retailer becoming a signatory.

It is the view of NSW Farmers that these transition periods are sufficient in allowing people to negotiate pre-existing grocery supply agreements to the new terms set out in the Code. This transition period will allow suppliers to analyse any failings of their current arrangements, and bring this to the attention of the retailer.

NSW Farmers believes

- that the arrangements for phasing the code's requirements into grocery supply agreements are appropriate.

Question 8 and 9: Grocery Supply Agreements

NSW Farmers supports the proposal drafted within Part 2 of the code to require the following regulation of grocery supply agreements:

- grocery supply agreements to be made in writing and retained
- mandatory clauses:
 - conditions of delivery
 - circumstances under which the groceries may be rejected
 - terms of payment, and conditions under which payment may be withheld
 - if the agreement is only for a fixed time the length of time must be specified
 - quantity and quality requirements of the agreement
 - method of termination.
- prohibition of clauses requiring a supplier to make payments to the retailer for shrinkage.
- conditions for unilateral variation of the supply agreement
- conditions for the retrospective variation of the supply agreement.

To further the benefits of having transparency of rights and obligations through written agreements, NSW Farmers proposes that supply arrangements should include a written provision that informs suppliers of their right to bring disputes under the code.

With regard to the proposed regulation of conditions enabling a retailer to make either a unilateral or retrospective variation to a supply agreement, areas cited as being of concern within the consultation paper, NSW Farmers is concerned that such terms will be permissible under the code's operation. Many farmers, both direct suppliers of the major supermarkets, or alternatively supplying wholesalers

or food processors who do supply retailers, make significant capital investment on the basis of contractual requirements to these retailers. Any form of unilateral variation is likely to have a direct detrimental impact on the ability of these primary producer suppliers to generate the returns required by these capital investments. Similarly for those supplying wholesalers or processors, where supply chain intermediaries incur losses due to unilateral variations of a supermarket, these losses are ultimately borne by their farmer supply base through suppressed prices. As such scrutiny is required under the code to ensure that where the code continues to allow unilateral and retrospective variations it does not perpetuate unfair trading conditions for suppliers.

In making these comments, NSW Farmers seeks to distinguish between unilateral contract variation and those made with full consent of suppliers and retailers to manage short term supply chain matters, such as a seasonal glut of perishable produce.

In proposing a response to the specific question of whether there should be a differentiated threshold at which a supply agreement may enable a retailer to make a unilateral or retrospective variation, NSW Farmers agrees that greater scrutiny must be placed on agreements that enable retrospective variation. While all negative unilateral variations impacts on the ability to cover capital costs, retrospective variations also impact on the ability of primary producers to meet their variable costs of production.

NSW Farmers believes:

- *that the requirements for grocery supply agreements proposed within Part 2 of the Grocery Code are appropriate.*
- *that the requirements for the Grocery Code should be supplemented by a written provision informing suppliers of their right to bring disputes under the code.*
- *scrutiny is required under the code to ensure that where the code continues to allow unilateral and retrospective variations it does not perpetuate unfair trading conditions for suppliers*
- *greater scrutiny is required for retrospective variation compared to unilateral variations.*

Questions 10-12: Retailer Conduct

While NSW Farmers agrees that the proposed code has identified the major forms of conduct that have given rise to the concerns over the retailer – supplier arrangements, we are concerned over the form through which the code seeks to regulate the identified conduct.

Of greatest concern to NSW Farmers' membership is the risk that a retailer could still use undue force to allow for provisions in agreements that a supplier does not find favourable is a possibility. While NSW Farmers acknowledges the need for commercial flexibility for both retailers and suppliers in their supply arrangements, the code includes an exclusion clause for each of the types of prohibited conduct. Logically this means that if a retailer is presently utilising market power to undertake behaviour that is proposed to be proscribed, without a strong general obligation to not use this market power the exemptions will continue to enable the same conduct.

NSW Farmers has made further comment regarding the proposed good faith obligation below; however additionally believes that caution needs to be used to ensure retailers do not take advantage of suppliers during initial agreement discussions. This transition period situation should be closely monitored to determine the impact of the prohibitions, exemptions and counter veiling obligations, such as the good faith obligation to determine the code's efficacy.

NSW Farmers believes:

- *the proposal for the code to provide exemptions to behaviour prohibited by Part 3 carries a risk that retailers will still be able to engage in the proscribed conduct.*
- *scrutiny should be placed on how the exemptions to prohibited conduct are utilised by retailers to determine whether the code has led to changed behaviour in line with the Grocery Code's objectives.*

Below, NSW Farmers has made comment on selected provisions within Part 3 of the Code.

Clause 18 Product quality and standards

NSW Farmers believes that the perishable nature of fresh produce, particularly horticultural produce, reduces the bargaining power of producers. In making the recommendation that the Horticulture Code of Conduct should cover all first point of sale transactions of horticultural produce that involve the grower of the produce, the ACCC pointed to ambiguity in the application of quality specifications and the ability of supermarkets to reject produce after lengthy delays increasing the vulnerability of horticulture growers.⁶ While this recommendation was subsequently accepted by the Horticulture Code of Conduct Committee, the horticulture code is yet to be amended to extend the scope of application. As a result this policy problem remains.

⁶ Australian Competition and Consumer Commission 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries' (Final Report, July 2008) 400-406.

With this in mind, NSW Farmers recommends that efforts are made to harmonise the obligations of retailers with the obligations for the acceptance and rejection of fresh produce contained within the code with those within the Horticulture Code of Conduct. Further, this initiative will promote transparency across the full fresh horticulture produce value chain and reduce transaction costs to industry through applying common standards to both codes.

Table 1 excerpts the provisions of the code dealing with the rejection of fresh produce against the Horticulture Code of Conduct.

Table 1: Provisions on rejection of fresh produce Grocery Code and Horticulture Code

Grocery Code	Horticulture Code of Conduct
<ul style="list-style-type: none"> • Grocery supply agreement must: <ul style="list-style-type: none"> ○ specify the circumstances in which groceries may be rejected [cl 8 (b)] ○ quantity and quality requirements written in clear terms [cl 8 (e)] • Retailer must provide any fresh produce standards or quality specifications to the supplier in clear, unambiguous terms [cl 18 (1)] 	<ul style="list-style-type: none"> • Terms of trade must specify circumstances under which trader may reject produce, including period which the trader must notify the grower of the rejection and the consequences of rejection [cl 5 (2) (d)] • Horticulture Produce Agreements must contain [cl 9 (2)]: <ul style="list-style-type: none"> ○ Circumstances under which the trader may reject produce; including period after receiving produce that the trader must notify the grower of the rejection and consequences of rejection ○ Quality and quantity requirements ○ how the trader deals with horticulture produce that does not meet specified quality ...
<ul style="list-style-type: none"> • Retailer must accept all fresh produce meeting articulated standards [cl 18 (2)] • Conditions must be satisfied prior to a retailer rejecting fresh produce [18 (3)]: <ul style="list-style-type: none"> ○ Failure to meet fresh standards or quality specifications ○ rejected within 24 hours of receipt ○ Cannot reject once accepted 	<ul style="list-style-type: none"> • Trader must accept produce unless one of the conditions in the agreement that allows rejection arises [cl 13 (1) – (2)]
<ul style="list-style-type: none"> • Retailer to provide written reasons to the supplier for rejection within 48 hours [18 (4)] 	<ul style="list-style-type: none"> • Traders must immediately advise of rejection by phone, fax, email or other electronic means. [cl 13 (3)] • Trader must further advise the grower in writing about the rejection and reasons for rejection in accordance with the produce agreement [cl 13 (4)]
<ul style="list-style-type: none"> • Retailers must not require a supplier to make any payment to cover wastage of the supplier's groceries made at the premises of the retailer or its contractors or agents; except where the wastage is caused by the supplier's negligence as defined in the grocery supply agreement [cl 12] 	<ul style="list-style-type: none"> • Merchants must use reasonable care and skill to maintain the quality of the produce until passing of title [cl 14]

In examining the differences between the obligations imposed by each of the codes with regard to the rejection of produce, the major differences are:

- the requirement under the Grocery Code to reject produce within 24 hours of receipt compared to a period provided within a Horticulture Produce Agreement within the horticulture code; and
- the requirement under the horticulture code for a trader to immediately notify the grower of the rejection, compared to the requirement of a retailer to notify a supplier of fresh produce within 48 hours of the rejection.

With regard to the first of these matters, NSW Farmers participated in the development of the Horticulture Taskforce's response to the recommendations of the ACCC and the subsequent considerations of the Horticulture Code Committee in 2011. In this industry response the recommendation to adopt the 24 hour deemed acceptance rule was rejected, instead believing that this remained a matter that will differ depending on the commodity that is subject to the transaction.

With regard to the latter, NSW Farmers believes that the horticulture code's requirement to immediately inform a supplier of fresh produce of any rejection of a consignment is important to their ability to seek alternative markets as a means of mitigating losses.

As such NSW Farmers believes that the provisions regulating the rejection of fresh produce contained within the Grocery Code should be harmonised to the obligations contained within the horticulture code.

NSW Farmers believes:

- *the provisions regulating the rejection of fresh produce within the code should be harmonised with the rejection provisions within the Horticulture Code.*

Clause 19 Changes to supply chain procedures

Similar to the concerns over unilateral and retrospective variations aired above, NSW Farmers is concerned over the retailers seeking to force changes within suppliers' businesses. This concern focuses on the impact of changes on the ability of suppliers to generate the necessary returns on the capital investment necessary to meet the contracted requirements they hold with a retailer. This concern includes where a retailer seeks a change to the manner of production that does not lead to a product of different quality.

Further, NSW Farmers is concerned that changes that may be required will impact on the supplier's preferred production model. For example NSW Farmers is aware of a situation whereby in order to secure a supply contract, a processor of a wholly Australian produced food product was required to also use imported ingredients.

Questions 13-15: Good Faith Provision

As outlined above, the proposed inclusion of exemption provisions for each of the types of conduct prohibited by the code limits the ability of the code to meet its purposes of building trust and improving transparency in the grocery supply chain unless a further overriding duty limits the use of these exemptions by retailers.

The matter of including a duty of good faith was recently recommended within the *Review of the Franchising Code of Conduct* (“Wein Review”). While Wein observed that the concept of a duty of good faith has attached with it a degree of uncertainty as to how the duty is discharged, on the basis that it requires parties to do what they are able to do to give effect to their legal relationships, he recommended that a duty be prescribed in the Franchise Code.

In his observations about a duty of good faith, Wein examined evidence placed before the review regarding questionable behaviour of franchisors, including the unilateral variation of franchise agreements. Noting the need to balance the flexibility required for commercial relationships and the graduated nature of the alleged behaviours, Wein concluded a duty of good faith to be a suitable tool to manage the identified behaviours.

In furthering his consideration over the appropriateness of the duty of good faith within a prescribed code, Wein adverted to the existence of a duty of good faith within the Oil Code. He also drew attention on the capacity for parties to enter into the code’s dispute resolution procedures for a breach of good faith as providing an incentive for duty holders not to behave in a manner that could be construed as not acting in good faith.⁷

On this basis, NSW Farmers support the inclusion of prescribing a duty of good faith within the code, on the basis that it provides an enforceable duty owed by retailers to suppliers that requires them to make efforts in the way they use their contractual rights in a way that takes into account the interest of the other party.

NSW Farmers believes:

- *the inclusion of a broad duty on retailers to deal lawfully and in good faith is an important protection that may successfully mitigate concerns surrounding the exemptions to prohibited conduct provided within the Grocery Code.*

Questions 16-21: Dispute Resolution and Enforcement

It is axiomatic that effective dispute settlement and enforcement measures are crucial to ensuring that the code is able to fulfil its objects; however it is NSW

⁷ Alan Wein *Review of the Franchising Code of Conduct* (Report to the Hon Gary Gray AO MP Minister for Small Business and the Hon Bernie Ripoll MP Parliamentary Secretary for Small Business, 30 April 2013) 80-82.

Farmers experience that where an imbalance of market power exists, it is unlikely that the weaker party will utilise dispute resolution services. This is even more so in instances that the more powerful party has the ability to exclude the other participant from the market. NSW Farmers believes that a robust compliance and enforcement process within the Code is important to developing meaningful dispute resolution procedures.

The operation of the Horticulture Code of Conduct illustrates this principle. Despite many anecdotal concerns over behaviour of produce traders in the five years since 2009-10 only eleven mediations have been conducted under the code.⁸ That the ACCC felt it necessary to use its powers of compulsion on suppliers of the major supermarkets to progress investigations into breaches of competition law further demonstrates the need for enforcement mechanisms within the code to be effective to provide suppliers with the confidence that commencing dispute resolution of a breach of the code will not result in retaliation.⁹

Further, on the basis of the ACCC's recommendation that all first purchases/transactions of horticultural produce, including those purchases by retailers, should be covered by the horticulture code, NSW Farmers recommends that common dispute resolution measures should be implemented in the grocery and horticulture code where applicable. NSW Farmers has made some comments with regard to the specific provisions below.

NSW Farmers believes:

- *that a robust compliance and enforcement process within the Grocery Code is important to developing meaningful dispute resolution procedures*
- *that common dispute resolution procedures should be developed for the Horticulture Code and the Grocery Code when the dispute involves horticultural produce.*

Thresholds for bringing a dispute

Presently the code contains two major thresholds for bringing a dispute. The first of these is the requirement under cl 27 for the supplier to provide or be capable of providing sufficient information to enable an investigation, consideration and response to the complaint. A second threshold of the complaint not being

⁸ Horticulture Mediation Advisor 'News and Information', <<http://www.hortcodema.com.au/news.html>>. Annual Reports 2009-10; 2010-11; 2011-12, 2012-13; 2013-14.

⁹ See Alan Kohler 'ACCC readies big guns against supermarkets' *Inside Business*, ABC (17 February 2013) <<http://www.abc.net.au/insidebusiness/content/2011/s3692067.htm>>. See also Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 13 February 2013 (Mr Rod Sims, Chairman Australian Competition and Consumer Commission).

vexatious, trivial, misconceived or lacking in substance must also be met prior to either internal investigation or arbitration or mediation.

It is worth commenting that a requirement to engage in voluntary resolution procedures is not a threshold under the Grocery Code prior to seeking an arbitrated or mediated outcome.

NSW Farmers does not oppose the imposition of the thresholds as they assist the prioritisation of effort in resolving disputes by requiring the submission of evidence that supports the complaint to the standard of enabling a proper consideration of the facts. However as outlined above, these measures need to be supported by ensuring that suppliers have ready access to the ACCC to enable meaningful progression of concerns in circumstances that they are not willing to enter into the dispute resolution procedures of the code.

Voluntary Dispute Resolution

NSW Farmers supports the proposal for each signatory to appoint a Code Compliance Manager and the system of internal review to facilitate voluntary resolution of disputes. Further, the ability for a decision made by the retailer, either by the Code Compliance Manager or on internal review, to be subject to mediation or arbitration provides transparency to those suppliers seeking to utilise the dispute resolution measures within the code.

Mediation or Arbitration

In response to the recommendations of the ACCC and the subsequent considerations of the Horticulture Code Committee NSW Farmers collaborated with the Horticulture Taskforce to develop a preferred industry position. As part of this preferred industry position, a preference for a facilitated conciliation style of alternate dispute resolution was more preferred to the more passive mediation process for the resolution of disputes. Such a method has the ability to utilise different tools, such as developing a non-binding determination.

To further provide commercial incentives for parties to determine amicable commercial resolution to disputes, NSW Farmers proposes that where the parties are unable to reach resolution at mediation/conciliation, and arbitration can commence to provide a resolution that is binding upon the parties.

NSW Farmers recommend that each party should bear their own costs associated with mediation/conciliation; however that the rules of mediation/conciliation should establish a framework that prevents the use of deeper financial resources to obtain an advantage. In arbitrated matters, the unsuccessful party should bear the costs.

Enforcement

NSW Farmers has emphasised the importance of an adequate compliance regime within the code in achieving desirable outcomes, both in terms of the operation of dispute resolution mechanisms, but more importantly in developing trust within the grocery supply chain. Key to achieving this outcome is the enforceable nature of an opt-in prescribed code under s 51AE of the *Competition and Consumer Act 2010* (Cth). As part of developing integrity within this compliance regime, NSW Farmers recommend that the ACCC establish a compliance plan for the code, which includes a systematic approach to how it will utilise the powers provided under cl 35 which enables it to examine all records made and kept as part of the code.

Further, NSW Farmers believe that a mixture of compliance mechanisms is necessary within the code to ensure that the right suite of incentives exist to develop behaviours from market participants. While acknowledging that there are differences, the NSW Farmers support the application of the following statement made within the *Review of the Franchising Code of Conduct* (“Wein Review”) to the Grocery Code:

A mandatory code which lacks adequate enforcement powers will not adequately deter improper conduct and inappropriate behaviour. Parties who comply with the Code should not be concerned about any enforcement powers conferred upon the regulator.¹⁰

The Wein Review recommended, among other things, that the *Competition and Consumer Act 2010* (Cth) be amended to allow:

- civil pecuniary penalties to be available as a remedy for a breach of the Franchise Code.
- the ACCC to issue infringement notices for breaches of the Franchise Code.
- the ACCC to use its powers of audit to assess compliance with all aspects of the Franchise Code.¹¹

These amendments were recently made by the Australian Parliament and are scheduled to commence by 1 January 2015.¹²

¹⁰ Alan Wein *Review of the Franchising Code of Conduct* (Report to the Hon Gary Gray AO MP Minister for Small Business and the Hon Bernie Ripoll MP Parliamentary Secretary for Small Business, 30 April 2013) 146.

¹¹ The Treasury, Government of Australia, *Amendments to the Franchising Code and the Competition and Consumer Act* (2 April 2014) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Franchising-Code>>.

¹² The Hon Bruce Billson MP ‘Government moves to strengthen ACCC’s powers to enforce Franchise Code of Conduct’ (Media Release, 11 September 2014, BBMR/066).

Similarly to the Wein recommendations on the Franchise Code, the ACCC recommended that it be able to apply pecuniary penalties and receive powers to undertake random audits of records to assist in compliance of the Horticulture Code.¹³

It is the view of NSW Farmers that it would be desirable for the Grocery Code to be drafted in such a way that these modern enforcement capabilities are available to the ACCC when the legislative amendments commence. Given the context of the Code it would be reasonable for these penalty provisions to be applied to the obligations of retailers contained within Parts 2-4.

NSW Farmers believe:

- *that the Grocery Code should be enforceable by the ACCC.*
- *that modern compliance mechanisms, including pecuniary penalties, infringement notices and audit powers should be available to the ACCC in its enforcement of the Grocery Code.*

Part C: Benefits and costs of the Grocery Code

Question 26: Horticulture Code of Conduct

There is much common policy context and intent within both the Grocery Code and the horticulture code of conduct, with both regulating important components of the food and grocery supply chain once the Grocery Code is operational. However in considering whether the prescribing of the opt-in Grocery Code has any impact for the horticulture code, it is worth considering the policy objectives and the market participants regulated by the Horticulture Code of Conduct.

The explanatory statement accompanying the creation of the horticulture code of conduct listed three key issues that the code was intended to address. The first of these was to address the lack of certainty about when a 'wholesaler is trading as an agent or as a merchant when dealing with growers'.¹⁴ This goes to the nature of the assignment of risk through the horticulture produce agreement. In a transaction with a merchant sees the trader committing to purchase produce from a grower, assuming all risk associated with the produce once it is accepted in accordance with the agreement. Alternatively an agent bears no risk with the produce, rather agrees to act in the best interests of the grower in selling the produce to a third party.

¹³ Australian Competition and Consumer Commission 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries' (Final Report, July 2008) 400.

¹⁴ Explanatory Statement, Trade Practice (Horticulture Code of Conduct) Regulations 2006, 1.

The explanatory statement further outlines that the code would not apply to retailers, processors and exporters on the basis that they are not ‘wholesale intermediaries’ and predominantly operate under clear and transparent terms.¹⁵

Table 2: Comparison Grocery Code and Horticulture Code of Conduct

	Grocery Code	Horticulture Code
Type of Code	<ul style="list-style-type: none"> • Voluntary (opt-in) prescribed code. • ACCC enforcement of code against signatories 	<ul style="list-style-type: none"> • Mandatory prescribed code • ACCC enforcement of code against all defined duty holders
Primary duty holder	<ul style="list-style-type: none"> • Major supermarket chains • other grocery retailers • aggregators who purchase groceries from suppliers with the purpose of resale to a supermarket business 	<ul style="list-style-type: none"> • market businesses engaged in horticulture produce trading as either an agent or a merchant who wholesales ~ 430 nationwide
Obligations	<ul style="list-style-type: none"> • To provide contractual certainty and transparency: <ul style="list-style-type: none"> ○ written grocery supply agreements ○ prohibited conduct with regard to unilateral changes of supply arrangements and risk assignment • Duty to deal lawfully and in good faith. • Dispute resolution, including voluntary resolution, mediation and arbitration 	<ul style="list-style-type: none"> • To provide certainty to growers on whether a produce trader is a merchant or an agent • To provide contractual certainty and transparency: <ul style="list-style-type: none"> ○ written terms of trade and horticulture produce agreements ○ quality specifications and rejection provisions ○ where the trader is buying the produce, a clear mechanism for determining price ○ where the trader is an agent the basis of any agent’s fee or commission is payable • Provide duties to agents to act in growers best interests. • To require agents to provide transparency in sales made on behalf of grower. • Dispute resolution, including compulsory participation in mediation

Given the more fragmented nature of market participants engaged in trading horticulture produce, NSW Farmers is doubtful that the contractual certainty provided by the Horticulture Code would be achieved if it was repealed. For such an outcome to arise, large numbers of produce traders would need to become signatories to either a voluntary code or a prescribed opt-in code. In contrast, the

¹⁵ Ibid, 2.

supermarket/grocery retail market is characterised by high market concentration, meaning that the majority of supplier transactions could be subject to the code even with relatively few signatories.

Lastly, while there are some overlapping obligations between the two codes, NSW Farmers believes that this can be dealt with through ensuring, as far as possible, that those obligations are harmonised. This submission has indicated areas where this may be possible.

NSW Farmers believes:

- *that the Horticulture Code should be maintained as a mandatory code of conduct if the Grocery Code is prescribed as a voluntary code of conduct*

ENDS