

12 September 2014

**Manager  
Competition Policy Unit  
Small Business, Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600**

## Improving Commercial Relationships in the Food and Grocery Sector

The Victorian Farmers Federation (VFF) welcomes the opportunity to make a submission regarding the Exposure Draft of the Voluntary Supermarket Code of Conduct (the Code).

The VFF does not support the formation of a new voluntary Code.

The VFF requires such a code to be: fair and reasonable, encourage open and transparent practices and give suppliers confidence that they are going into a contract on a reasonable legal basis.

### **VFF provides the following recommendations regarding the Code:**

- **The Competition Policy Review must be completed prior to the adoption of any new code.**
- **The Produce and Grocery Industry (PGI) Code should be strengthened and made mandatory.**
- **The Federal Government appoint an Ombudsman to the PGI Code as soon as possible and investigate the appointment of an ombudsman to oversee a strengthened mandatory Horticulture Code.**

### **Key flaws in the Food and Grocery Code are:**

#### **1. It's Voluntary**

While Coles and Woolworths appear committed to voluntarily opting into the Code, others retailers are yet to make such a commitment.

The Code incorporates conditions around wastage to include retailers' contractors and agents for fresh food, but no such condition applies to other sections of the Code. This is confusing and raises many issues regarding retailers' agreements with their contractors and agents. It is also not clear whether the Code would apply to the relationship with the agents of the producers.

Horticultural producers are particularly concerned about agency relationships and contracts, as are farmers in other sectors as supermarkets move to contract more directly for a range of foods.

Those farmers who deal directly with supermarkets are also finding the supermarkets are demanding details of their costs, which puts them under even greater pressure.

It's also not clear how the voluntary code would apply to producers using agents to negotiate with retailers. It appears the code would not cover farmers who are second or third tier suppliers.

## **2. It's an Opt-in Code built on Opt-out Grocery Supply Agreements**

The supermarkets have created a voluntary opt-in Code that requires them to offer Grocery Supply Agreements that conform to fair and equitable conduct on everything from de-listing, wastage, payment, promotional contributions, product and quality standards and a raft of other issues.

However the Code's clauses also allows the retailers to negotiate with suppliers to exempt them from these conditions.

As the Government's own fact sheet on Grocery Supply Agreements states: *"It is important to note that contractual terms would still be subject to **negotiation** between each retailer and supplier – The Code would allow retailers to ask suppliers **to agree to** exemptions that permit otherwise prohibited behaviour to occur provided that the retailer meets certain conditions."*

The VFF is concerned that these exemptions to the Code will become the norm as suppliers and potential suppliers are put under pressure by the supermarkets. This pressure is driven by the simple imbalance in market power between supermarkets and most suppliers.

### **Examples of these exemptions are:**

#### **Clause 14 – payments for better positioning of groceries**

Retailers are generally prohibited from requiring suppliers to make payments to obtain a better position for their products or an increase in the shelf space allocated to their products.

However, payments can be required where the grocery supply agreement mandates that a payment be made.

#### **Clause 16 – payments to suppliers**

Retailers are generally prohibited from setting off any amount against a supplier's invoice.

However, set-off is permitted where it is provided for in a grocery supply agreement. Set-off is also permitted if they have the written agreement of the supplier, noting that retailers cannot force suppliers to consent to set-off an amount.

**This clause also states:** Retailers are generally prohibited from requiring payments toward the costs of:

- a) a buyer's visit to the supplier;
- b) artwork or packaging design;
- c) consumer or market research;
- d) the opening or refurbishing of a store; or
- e) hospitality for the retailer's staff.

However, there is an exception if the relevant grocery supply agreement allows for payments in these circumstances.

**Exemptions also exist in Clauses 12, 15 & 17.**

### **3. Poorly defined terms and conditions**

The Exposure draft of the Code is littered with poorly defined terms that leave suppliers exposed to the market power of the retailers.

Terms such as "business disruption", retailers 'risks' and 'direct result' are not adequately defined. This lack of definition greatly reduces the confidence of suppliers in a voluntary Code.

### **4. Dispute Resolution**

The VFF believes a mandatory code with pecuniary penalties is far more effective than a voluntary prescribed code based on the supermarkets' own complaints procedure, arbitration and mediation.

Any mandatory code needs an independent Ombudsman, with the power to impose penalties to balance the excessive market power of the major retailers.

The VFF maintains that the whole process, apart from the mediation and arbitration under Ss31 and 32, is confronting for suppliers.

The voluntary code's complaints procedure leaves suppliers at risk, given the lack of confidentiality around the process.

The VFF is also concerned that due to implicit or explicit pressure, there will be few complaints. This low number of complaints could then be seen as a measure of the complaint systems success, rather than its inadequacy.

### **Finding a Solution**

The VFF believes the Federal Government must continue down the path of completing its Competition Policy Review, before considering the adoption of this Code.

**Recommendation: The Competition Policy Review must be completed before any new code is developed.**

The National Farmers Federation in partnership with State Farmer Organisations and various Commodity Councils is pursuing a raft of reforms as part of its submission to this review, including a Mandatory Code. The review must be completed before embarking on any new codes.

**Recommendation: The PGI Code should be strengthened and made mandatory.**

Once the Competition Policy Review is completed the Federal Government should investigate mandating the existing voluntary Produce and Grocery Industry Code of Conduct (PGI Code), after it is appropriately strengthened.

The PGI Code refers to Terms of Trade which are detailed in the Appendix. This is a concise and clear document which has headline items which then need to be expanded to comply with the PGI Code and the law.

The PGI Code is accepted by large retailers, farmers, smaller retailers, central market agents, government and the ACCC is aware of its reach. It does need some work to become mandatory but it should be able to be prescribed with some amendments.

**Recommendation: The Federal Government appoint an Ombudsman to the PGI Code as soon as possible and investigate the appointment of an ombudsman to oversee a strengthened mandatory Horticulture Code.**

Currently there is no PGI Code Ombudsman, an issue that needs to be addressed as soon as possible. It may be appropriate to use the same Ombudsman already employed under the Franchise Code.

A mandatory and strengthened PGI Code, in conjunction with a stronger mandatory Horticulture Code and Competition and Consumer Act, would cover most of the agriculture sector's key concerns.

If you have any queries in regard to the VFF's submission please contact VFF Policy & Commodities Executive Manager Peter Hunt on (03) 9207-5523.

Yours sincerely

A handwritten signature in black ink, appearing to read 'PJT S', written in a cursive style.

**Peter Tuohey  
President  
Victorian Farmers Federation**