



## **National Farmers' Federation**

**Submission to the  
Treasury consultation paper on 'Improving  
Commercial Relationships in the Food and  
Grocery Sector' and the draft Food and  
Grocery Code of Conduct (the Grocery Code).**

## NFF Member Organisations



CANEGROWERS



CORPORATE  
AGRICULTURAL  
GROUP



COTTON  
AUSTRALIA



Goat Industry Council  
of Australia Inc.



*The Pastoralists'  
Association of  
West Darling*



**Ruralco**  
HOLDINGS LIMITED



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## **Introduction**

The National Farmers Federation (NFF) welcomes the opportunity to respond to the proposed grocery Code Consultation Paper.

The NFF is the peak national body representing farmers and the agriculture sector across Australia. The NFF's membership comprises all Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. While our members address state-based 'grass roots' or commodity specific issues, the NFF's focus is representing the interests of agriculture and progressing our national and international priorities.

There are over 130,000 farm business in Australia with the majority of these being small and medium sized enterprises. The agricultural supply chain contains many primary producers but significantly fewer retailers/wholesalers 'up' the supply chain. While many small and medium producers have strong relationships with their buyers, the current supply chain structure can result in unfair and negative outcomes for suppliers. This is the result of clear imbalances of power between stakeholders across the supply chain, lack of transparency in contractual terms and concerns over the capacity to remedy areas of concern.

The NFF is of the view that the development of a Code to monitor and improve relationships across the supply chain has specific relevance to the completion of the government's root and branch review of competition legislation. There would be significant value in the two initiatives should be considered as part of a comprehensive approach to the identified issues.

## **PART A – The Problem**

The NFF broadly agrees with the Policy Problem identified in Part A: that the dominance of major retailers in most product categories poses significant competitive problems for suppliers in fair dealing with these retailers. Further, the relatively small domestic market and spatially diverse regional markets mean there are few equivalent market alternatives to access consumers in large volumes, especially on a national basis.

NFF believes that the 'majors' dominance and focus on maintaining relative market share leads to a ratcheting up of their market power. This places suppliers in a weaker bargaining position to negotiate produce and grocery prices and trading terms than would be the case in a less concentrated market.

Added to this, many local suppliers believe that the strong focus of competition law on consumer benefit undermines the longer-term capacity of the Australian food and grocery supply chain (wholesalers and processors) to meet consumer needs for safety, quality and reliability into the future.

For these reasons, further government action is necessary.

NFF addresses Stakeholder Views on the Proposed Grocery Code and Its Implementation (Part B) in the context of the problems described above.

## **PART B – Stakeholder views**

NFF welcomes the initiative of Coles, Woolworths and Australian Food and Grocery Council to propose a Grocery Code of conduct (practice and dealing), prescribed under a regulation to the Competition and Consumer Act (2010). The proposed Code offers the hope of a more formal, open and transparent process through which the major retailers will negotiate supplier trading terms and enable them to work together to draft Supply Agreements.

Further, as the Code is being offered up in advance of the Review into National Competition Policy, it will help suppliers and these retailers to better position their commercial relationship through that process and support good management practice.

However, NFF believes that in the context of Part A comments, the proposed Code has a number of significant shortcomings:

- It is a voluntary, opt-in Code with many opt-out trading terms (clauses), which may imply a greater emphasis on commercial flexibility than ensuring fair trading.
- While the problems articulated in Part A focussed on the major supermarket retailers, such a Code would be expected to apply to all supermarket retailers that exceed an agreed market turnover/ product segment share given the desirability of universal fair dealing practice/conduct
- As the proposed Code primarily focuses on terms of trade through supply agreements, the current limited capacity of the CCA to monitor complaints and address abuses remains a major concern for many suppliers.
- The Code relates to the direct relationship between supplier and retailer and therefore has very limited bearing on other relationships and efficiencies in the whole supply chain.
- ‘Prescribed’ under CCA (2010), the Code provides for dispute remedies (excluding money penalties) but many suppliers question the independence of the dispute resolution process and even more may not have sufficient confidence to test it for fear of subsequent retribution. This situation points to the need for an independent supermarket commissioner or ombudsman.
- There is extensive overseas experience in relation to supermarket practices, competition and legislation in far less concentrated and more populated consumer markets than in Australia that suggest that the current form of the proposed grocery Code is not the best way forward as identified in the discussion paper.

The NFF does not believe the proposed Code is a sufficient solution to the problems identified in Part A, although it recognises the added formality and transparency in negotiating trading terms and documenting these in Supply Agreements as a worthwhile step forward and should go some way towards assisting in compliance.

The NFF welcomes the observation in the Consultation Paper – in relation to ‘unfair contract terms’ – that, in order to support commercial flexibility, “The (Federal) Government is committed to extending the existing protections for consumers in standard form contracts, to small business”.

The “No disadvantage test” is a worthwhile extension to the CCA (2010) in order to give market power protection to suppliers in any Grocery Supply Agreement but is mainly of relevance when suppliers are entering into negotiations with retailers.

Similarly, whether in relation to the proposed Grocery Code or any other, the Australian common law concept of ‘good faith’ is an important provision that covers honesty, cooperation, reasonableness and fairness in contractual dealings between suppliers and retailers. Such a ‘good faith’ clause has been inserted in the mandatory UK Groceries Supply Code against the background of past retailer behaviour in relation to the exercise of superior bargaining power.

In the spirit of building relationships, the NFF believes the need for good faith dealing applies equally to suppliers - irrespective of where the market power is considered to reside.

## **PART C - Policy Options Being Considered – Costs and Benefits**

For the reasons outlined in PART A (problems) and PART B (Stakeholder Views) NFF does not believe the status quo is acceptable, given the apparent need to clarify terms of trade in supply agreements and/or address perceived market power imbalances via the CCA.

NFF believes that the outcomes of the ongoing inquiry into National Competition Policy (Harper Review) and the ongoing ACCC case against Coles, are relevant because they are likely to add legal shape in key areas of market power abuse covered under the CCA. Under Schedule 2 of the Act, relevant sections are 18 which prohibits “misleading or deceptive conduct” and section 21 which prohibits “unconscionable conduct” (conduct contrary to good conscience) in certain circumstances.

In addition inquiry findings in relation to the Competitiveness of Australian Agriculture White Paper may shed further light on factors affecting sector viability and measures to support it, including post-farm gate.

The NFF believes another key area to be considered – specifically in relation to benefits and costs is whether agriculture suppliers need another Code of Conduct on the basis that there already exists:

- The (Voluntary) Produce and Grocery Industry (PGI) Code of Conduct
- The (Voluntary) Australian Wine Industry Code of Conduct
- The (Mandatory) Horticulture Code of Conduct and, most recently
- The (voluntary) WLG and WFA: Good Wine Buyers and Suppliers Principles: A Code for Fairness and Transparency. This will likely be extended to other retailers.

Recognising the shortcomings of proposed Grocery Code outlined in Part B, the NFF believes that suppliers may be better served by reviewing, amending and significantly revamping the Produce and Grocery Industry Code to cover retailer supply agreement – terms of trade.

As stated in the Consultation Paper:

“As a voluntary Code the PGICC provided high-level principles. The PGICAC considered that the strength of the PGICC was its ability to bring leaders along the supply chain together.

“The PGICC was developed in response to the 1997 report which recommended a mandatory Code. In its response, the then government supported the development of a voluntary Code, stating that ‘The operation and effectiveness of the Code would be independently reviewed after three years of operation, or sooner if the Government believes circumstances warrant an earlier review. Should a review or developments



indicate an unsatisfactory participation level, the Government could then pursue the option of a mandatory Code.’

The voluntary Code was reviewed by Neil Buck in 2004. In his report, ‘Report of the Review of the Retail Grocery Industry Code of Conduct’ Mr Buck recommended the government take steps to implement a principles based Code of conduct.

In its July 2004 response the then government acknowledged that a lack of clarity in the relationship between some market participants caused problems, but noted that it did not consider that a mandatory Code of conduct, which would impose additional regulation and compliance costs along the supply chain, would necessarily address these concerns. The then government indicated that if problems remained it would consider the appropriateness of mandating a Code, or parts of a Code, in law.

While recognising that PGICC aims were more in the nature of higher level industry aims in respect of produce quality standards, product labelling and dispute resolution (with an independent ombudsman), an aim of the PGIC specific to consideration of the proposed Grocery Code has been:

Contracts<sup>36</sup> — terms and conditions of supply contracts are to be negotiated between retailers and suppliers in clear, concise, meaningful and accurate terms; contracts are to include terms relating to dispute resolution; and the use of written agreements is encouraged;

Further in relation to dispute resolution, the Consultation Paper stated as follows:

The ombudsman provided mediation services for the produce and grocery industry in accordance with the PGICC.<sup>39</sup> Under the PGICC, parties first contact the other person and try to resolve the dispute. If the dispute cannot be resolved then the ombudsman will appoint a mediator from a panel of mediators to mediate the dispute. The dispute resolution service is open to anyone in the produce and grocery supply chain, regardless of whether they are part of an endorsing organisation.

The NFF believes the circumstances surrounding PGICC effectiveness and subsequent loss of interest in it – point to unwillingness to go the next step and bind all major supermarket retailers to a Code and/ or toughen up the competition laws. If this current proposal can be achieved by revamping and strengthening an already existing Code, there will be some administrative and compliance cost savings.

## Response to Questions Part A

1. Do the concerns outlined above accurately capture the most acute problems facing the food and grocery sector? Are there other behaviours engaged in by retailers that should be considered?
2. Are there any behaviours of suppliers that should be addressed by the Grocery Code?
3. Do you believe there is a role for Government to intervene in the market to address these concerns?

### Q.1

The current market structure within the food and grocery retail sector facilitates a level of competitive advantage that weakens the ability of suppliers to negotiate open and fair trading terms with major stakeholders.

This dominance may cause other segments of the supply chain to be captive to the actions of these players in food and grocery product innovation, ultimately leading to more supply chain concentration and reduced capacity to serve consumer interests into the future.

### Q.2

The concept of a Grocery Code that spells out acceptable conduct in the negotiation of trading terms and the preparation of supply agreements is commercially sound and necessary to effect contract law. Such an approach is also necessary to assess competition abuses, assess effectiveness of the current competition law and make changes to it if deemed necessary. Such a Code or set of principles (individually struck but the same principles) should apply to all supermarket retailers.

### Q.3

The recent decision by the ACCC to initiate action against a major retailer in respect of market power abuse in relation to supplier terms and conditions and the proposed Code are a basis for greater government involvement.

Further, the precedents for government involvement exist in many other countries that have less concentrated markets and are more populous than Australia.

4. Does the Grocery Code make it clear who the Code applies to and the scope of relationships in the food and grocery sector that it will cover?
5. Are the definitions for 'retailer' and 'supplier' sufficient to allow the Grocery Code to capture the types of supply chain relationships that present the most problems?
6. Should relationships relating to the supply of alcohol be covered? Why/why not?
7. Is the timing allowed for retailers to transition pre-existing grocery supply agreements to new agreements that conform to the Code appropriate?

#### Q.4

The proposed Grocery Code makes it very clear that it is an (individually based) Code of conduct between suppliers and major retailers. To be effective, such a Code must apply to all supermarket retailers. If the principles and practices involved in supplier and retailer dealings and negotiation of supply agreements are valid for one supermarket retailer, they are valid for all.

#### Q.5

The definitions are well supported by precedents covering the issues and wording in other overseas countries that have identified problems in negotiations and anti-competitive practices

However, issues that are identified in the ‘conduct generally’ section (detailed in Part B – 3) of the Consultation Paper would seem better covered if included in the Supply Contract – certainly from a commercial law perspective.

#### Q.6

While there is no question that the wine industry has similar issues with supplier and retailer relationships, the recent signing of a Principles Code between WFA and WLG suggests the wine industry is well across the issue and could be expected to sign-up other retailers.

A concern, however, is that the Code does not appear to be a ‘prescribed’ Code and there is no binding requirement on other retailers to negotiate and implement similar Codes with their suppliers.

The principle of ‘one in – all in’ is important when talking about fair trading practices in a commercial environment and the maintenance of competition in the marketplace. Put another way, all retailers and suppliers are operating in the same market environment and fair trading conduct is important, irrespective of market share.

#### Q.7

The timing of transitioning arrangements which essentially cover a 12month period in a range of circumstances – pending the date of sign-up to the Code– appear appropriate.

8. Do you agree with the six fundamental matters listed for inclusion in all Grocery Supply Agreements? Are there other matters that should also be considered?
9. Should there be a higher threshold for exempting retrospective variations than unilateral variations in Grocery Supply Agreements?

Q.8

Negotiations on these matters are fundamental and should be covered in the Supply Agreement but, as noted earlier, so are most of the matters covered in the ‘conduct generally’ Part B (3).

Q.9

Both categories of variations should receive equal weight and not be allowed, except as negotiated and agreed between supplier and retailer in defining trading terms and written into the Supply Agreement. There are undoubtedly situations where commercial circumstances may dictate retrospective amendment to terms and conditions but all contract variations need to be discussed, and communicated prior to amendment, in the interests of open and fair trading conduct between the parties.

10. Do you believe that these requirements under the Grocery Code will help address the range of problematic issues that can arise during the relationship between retailers and suppliers?
11. Do you believe that the exceptions accompanying the requirements are necessary to provide sufficient commercial flexibility while maintaining appropriate procedural safeguards?
12. Will the exemptions significantly reduce the effectiveness of the Code in addressing critical supply chain concerns?

Q.10

As long as the trading relationship between supplier and retailer exists, the requirements under the Code will spell out the rules of the relationship. This ongoing certainty is necessary in order to adjudicate on departures (exceptions) and abuses of them.

Q.11

The answer is ‘yes and no’. There’s a need for absolute clarity, and communication of reasons for supply agreement variations/exemptions, as well as the earliest possible advice as this is fundamental to the Code and commercial operations on both sides of a contract

Most suppliers understand that there is a need for commercial flexibility but this should not be at the cost of fairness or transparency.

What the variations do not capture – and it is difficult to see how they could - is the situation where (for example) retailer pricing policy for a particular product hurts a supplier over the long term. Competition law currently states that retail price maintenance is illegal and so suppliers are not able to prevent a retailer from retailing at what many may consider is at a loss-leading price. This (as an example) is seemingly the cross-over point between a contractual arrangement and competition policy.

## Q.12

Exemptions do reduce the effectiveness of a Code of conduct because in an ideal world they would not be there, however such allowances reflect commercial reality and should be used sparingly. But, they amount to a variation from the (original) terms of trade and this generally has relatively greater commercial consequences for suppliers than retailers.

13. Will the inclusion of a duty to act in good faith improve commercial relationships in the sector?
14. Should this obligation only apply to retailers, or do suppliers also engage in behaviours lacking in good faith that warrant them being covered by this obligation as well? Which option is most appropriate?
15. Would compliance with the duty of good faith lead to increased or decreased compliance costs?

## Q.13

Good faith dealing is acknowledged in common law and the inclusion of such a duty should (with appropriate documentation) support the courts' resolution of possible market power and/or competition abuses – if and when complaints are not able to be resolved between the parties.

## Q.14

In the context of a Code of Conduct that has fair and honest dealing as its central plank, acting in good faith should also apply to suppliers – irrespective of where market power may be considered to reside.

## Q.15

The inclusion of a duty of 'good faith' should not have significant impact on compliance cost and may well assist in the event of court resolution if a complaint cannot be resolved by the parties.

16. Do you agree with the threshold conditions in the Code that suppliers must meet in order to trigger the retailers' obligation to take part in mediation or arbitration? What impact could this have on the accessibility of the dispute resolution mechanisms in the Code?
17. Would the dispute resolution mechanisms under the Code 'provide effective, fair and equitable dispute resolution processes'?
18. How should each party allocate costs of dispute resolution?

## Q.16

Given the overriding aim is to resolve complaints internally and quickly – thereby avoiding damage to the relationship and mediation cost – the threshold conditions that might dissuade a supplier from complaint resolution are not helpful, especially in respect of the good faith condition -to trigger retailer obligations.

Many suppliers – especially small ones – may not be inclined to complain, so there should be nothing that prevents that action being addressed in a timely fashion.

The most balanced way to achieve complaint resolution is for a totally independent commissioner and ombudsman to be available, but only to be accessed by a supplier after the appropriate due process complaint information has been lodged with the retailer and time provided for response by the retailer.

It was previously noted that a supplier should have a duty of good faith.

Q.17

As the Code is currently drafted – including retailer triggers – the dispute resolution process is not fair or equitable. It is for this reason that an independent supermarket ombudsman be accessible to suppliers after due process has been followed by the supplier.

This is totally consistent with the Code aim of ‘Improving Commercial Relationships’ and, most importantly, continuing business.

However, a supplier who has acted in good faith should have access to a supermarket ombudsman who can mediate and allocate costs according to the circumstances of the case.

Q.18

The allocation of costs should be the responsibility of the supermarket ombudsman.

19. Is the range of remedies available for breaches of the Grocery Code appropriate?
20. Should penalties be included in this opt-in Code that can be enforced by a court?
21. Should the ACCC be empowered to issue infringement notices for contraventions of this opt-in Code under the CCA?

Q.19

The range of remedies falls short of what is needed to ensure the Code of conduct pushes suppliers and retailers to trade openly, fairly and honestly.

Q20

Penalties should be included in this opt-in (and out) Code that can be enforced by the court.

Q21

The ACCC should be able to issue infringement notices for contraventions of this opt-in Code under the CCA via the (proposed) supermarket ombudsman.

22. Does the proposed Grocery Code clearly set out the issues in the food and grocery sector that it seeks to address? Does it include clear requirements and obligations to address these issues?
23. Does the Code cover the key issues that it should cover in order to achieve its aims of regulating standards of business conduct, ensuring transparency and certainty in commercial transactions and building trust and cooperation in the sector?
24. Are there any unintended consequences that may arise from the operation of the proposed Grocery Code?

Q22

The Code clearly sets out the issues in the food and grocery sector that it seeks to address in relations to the negotiations process, the content of a supply agreement and obligations on the parties.

As noted in the overview, including the overseas experience, there is doubt as to whether this can be achieved voluntarily. It is also questioned whether the proposed remedies are sufficient.

Q23

The Code sets out a process and covers the key issues that should be included in supplier – retailer Supply Agreements. As previously noted, the issues dealt with in the ‘conduct generally’ section are fundamental and should be included in a comprehensive Supply Agreement; they are part and parcel of transparency and certainty in commercial food and grocery transactions.

Q24

The main unintended consequence is the added supplier and retailer cost in administration and compliance, which is the reason for suggesting that the provisions of the Grocery Code might be included in an existing but revamped Produce and Grocery Industry Code of Conduct.

25. Please provide any views on the effectiveness or otherwise of current industry codes and existing laws in addressing concerns identified in Part A of this paper.
26. If the proposed Grocery Code were to be prescribed, what should be the future of the PGICC, the Australian Wine Industry Code of Conduct and the Horticulture Code? Please provide reasons for your views.
27. What are the costs and benefits associated with maintaining the status quo?

#### Q.25

With the exception of the Horticultural Code, the current agriculture sector Codes are voluntary and have had limited success to date in addressing the intended issues.

However, with the possible exception of the PGICC, these Codes have been targeted at different relationships – in most cases excluding retailers (as stated in the discussion Paper).

Also, Codes cannot operate effectively if there is insufficient ownership and buy-in, or there is fear of retribution and/or perceived lack of enforcement.

Further, the Competition Law must run in parallel with and consistent with the Codes' aims. To some extent, unwillingness to address competition abuses may have reduced their effectiveness.

The cost of compliance and the Government's desire to avoid adding red tape in a commercial environment has been a further factor.

Against this background, it is relatively easy to conclude that the Codes have not served their purpose.

#### Q.26

A 'prescribed' Grocery Code will not necessarily mean these existing, non-mandatory Codes no longer serve a purpose as they generally target different commercial relationships. Further, a 'prescribed' Grocery Code, under the CCA, will not necessarily give full force to Competition law and remedies. We need to wait for the outcome of the Harper Review to assess the Competition Law implications.

#### Q.27

The agriculture sector is acutely aware of the need to avoid adding unnecessary red tape costs in a commercially tough environment, both domestically and internationally. However, many suppliers are also concerned to ensure they can operate in an open and fair trading environment and know they are appropriately supported by the competition law.



Currently, many of these suppliers do not believe this is the case and are increasingly concerned as relatively more produce and grocery trade is being done with retailers on a direct basis.

Accordingly, few view the status quo as acceptable. The likely added administration and compliance of the proposed Grocery Code needs to be assessed in this light.

**28. Would the benefits of prescribing a code on an opt-in basis outweigh the costs? Why do you consider this to be the case?**

**29. Are the compliance cost estimates associated with Option 2, and the underlying assumptions that have been used to estimate them (as outlined in Attachment E) accurate?**

Q.28

The benefits of a soundly based Grocery Code with the terms of trade issues properly addressed in Supply Agreements and ‘prescribed’ under the CCA – as outlined in the Consultation Paper, go much of the way towards ensuring that suppliers and retailers can meet each other’s commercial interests fairly and openly.

Further, against the background of overseas experience with supplier – retailer dealings, many suppliers believe this cost is worth incurring.

Put another way, suppliers see more to be gained from a better market power balance with retailers than currently prevails.

However, serious reservations are held with the proposed voluntary opt-in Code because fair dealing and compliance should apply across the board. A publically notified opt-out approach by retailers may be an alternative approach and produce much broader uptake and commercial motivations.

Q.29

The compliance – activity based cost estimates are likely to be a preliminary estimate as many suppliers already have compliance officers that monitor QA and maintain quality measurement standards as part of best management practice in retail supermarket dealings. For many of these suppliers, the Grocery Code would simply extend this compliance activity.

**30. Would the benefits of prescribing a mandatory code outweigh the costs, or vice versa? Why do you consider this to be the case?**

Q.30

Many reports over a long time frame have supported increased intervention. With increased direct dealing with retailers, instances of market power abuse and the overseas experience (including regulatory measures to address abuses), the agriculture sector –

especially fresh vegetable and dairy product suppliers, believe a mandatory grocery Code is necessary.

There could be potential to consider improving the PGICC by inserting the proposed Grocery Code into it. The agriculture sector, while very mindful of the cost of added compliance administration, does not wish to see another voluntary Code, with its associated costs, that fails to deliver benefits for both suppliers and supermarket retailers.

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