

1 August 2018

Food and Grocery Code Review
fgcreview@treasury.gov.au

Level 2,
273 Camberwell Road,
Camberwell,
VICTORIA 3124

Re: Independent Review of the Food and Grocery Code of Conduct - Draft Report

About AUSVEG:

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

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

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

Summary of the draft report:

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

1. *Metcash should become a signatory* to improve its dealings with suppliers and provide access to equitable dispute resolution processes.
2. *New fair dealings provision* – the current ‘good faith’ provision in the Code has been difficult to apply in practice and limited in its usefulness.
3. *An independent adjudicator* – the dispute resolution mechanisms in the Code have been under-utilised by suppliers, largely due to fear of retribution for making complaints. An independent adjudicator in each signatory with the power to resolve individual complaints, make binding decisions and award compensation could dramatically improve outcomes for suppliers.

Overview response:

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

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

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

Recommendation Responses:

Draft Recommendation 1: *The Government should introduce a separate targeted mandatory code to apply to major participants that refuse to become signatories to the voluntary Code.*

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

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

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

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

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

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

Draft Recommendation 2: *The Code should be amended so that wholesalers are subject to the same Code obligations as retailers, except for customer facing provisions that are only relevant to retailers.*

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

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

Response: AUSVEG makes no comment on this draft recommendation.

Draft Recommendation 4: *Introduce a new primary provision of fair dealings to replace the current obligation to act in good faith (clause 28). The new provision should contain indicators of fair dealings that are easy to understand and apply to the particular circumstances of the parties.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Draft Recommendation 6: *The role of the ACCC should be expanded to:*

- *have oversight responsibility of the Code Adjudicators, including regular meeting to discuss issues under the Code; and*
- *review the Code Adjudicator's annual reports and seek confidential submissions from suppliers as part of ACCC's core compliance activities for the Code.*

Response: AUSVEG is not supportive of this draft recommendation as it does not align with our response to draft recommendation 5.

The ACCC cannot perform this function adequately. The entire oversight function should be assigned to an independent adjudicator who can then work with an appropriately resourced ACCC. AUSVEG sees no tension between the regulatory function of the ACCC and an oversight and adjudication function by an independent adjudicator.

Draft Recommendation 7: *The ACCC should change its approach to conducting annual compliance checks on signatories and should only rely on its section 51ADD information gathering powers after certain conditions are met, including that matter has been raised with the Code Adjudicator and deemed not to have been resolved satisfactorily.*

Response: AUSVEG is not supportive of this draft recommendation.

In line with responses to draft recommendations 5 and 6, AUSVEG supports a Code adjudicator which is completely independent.

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

Draft Recommendation 8: *The protection and notification requirements for the delisting of a product should be extended to a significant limiting of distribution resulting from range reviews.*

Response: AUSVEG supports this draft recommendation.

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

Response: AUSVEG supports this draft recommendation.

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

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

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

Response: Not applicable for Vegetable or Potato growers.

Draft Recommendation 12: *To amend clause 21 relating to fresh produce standards and quality specifications to make it clear that the requirements apply to all fresh produce, including fruit, vegetables, meat, seafood and dairy etc.*

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

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

1. *prevent a retailer from requiring a supplier to disclose commercially sensitive information where the retailer has a competing own-brand product; and*

2. *require that retailers take no longer than 30 days to consider a price rise request made by a supplier, unless circumstances exist that justify a reasonable extension that is agreed to by the supplier.*

Response: AUSVEG is supportive of this recommendation.

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

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

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

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

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

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

Yours sincerely,

Tyson Cattle

National Manager – Public Affairs