The Australian Chamber of Fruit & Vegetable Industries Ltd
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SUBMISSION
COMPETITION POLICY REVIEW

The Australian Chamber of Fruit and Vegetable Industries Limited (The Australian Chamber) is the national organisation representing each of the six Market Chambers, which themselves are organisations which represent the fruit and vegetable wholesalers located in each of Australia's six central Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In total, the organisation represents in excess of 430 Market wholesaling businesses. Market wholesalers are involved in the sale of some 50-60% of the fresh produce sold across Australia in servicing the requirements of fruit and vegetable retailers, secondary wholesalers/provedores, foodservice industry businesses, processors, exporters and the public. Over 15,000 growers supply to businesses within the Central Market system. The total turnover of businesses in the Central Markets exceeds some $7 billion annually.

In the executive summary of the *Competition Policy Review – Draft Report (*Draft Report) it is stated that "*competition policy is aimed at improving the economic welfare of Australians. It is about making markets work properly to meet their needs and preferences*". In the Panel's view, "*competition policy should establish competition laws and regulations that are clear, predictable and reliable"*. The executive summary goes on to state that it "*recommends that regulations restricting competition be reviewed, as well as making recommendations to reduce business compliance costs*".

In making this submission, we will be responding with a focus on

- industry codes specifically that the mandatory Horticulture Code of Conduct, and
- misuse of market power (section 46).

Industry Codes

The Draft Report states that "*Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour.*" And when referring to the proposed Food and Grocery Code states that "*the introduction of a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently."*

The Food and Grocery Code Consultation Paper dated August 2014, highlights the current approach by the Federal Government in relation to the Food and Grocery Code exists in stark contrast to the process used for the Horticulture Code, and appears to be a soft and almost hands off approach.

That discussion paper itself highlighted that "*rather than outright prohibition, supermarkets will be permitted to take certain actions that would otherwise be prohibited, provided that they meet certain requirements*".

It goes on to state that "*possible alternatives for achieving commercial flexibility may involve a no disadvantage test".*

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It is a shame that when the Federal Government drafted the Mandatory Horticulture Code of Conduct that they didn't go to such lengths to advocate flexible commercial relationships for those bound by the Horticulture Code of Conduct.

In fact, in relation to the Mandatory Horticulture Code of Conduct, no such effort was made.

The Mandatory Horticulture Code of Conduct was introduced without a proper prior assessment of whether it was justified, or its impact on the industry. The instruction issued by the Federal Government at the time was for a Mandatory Code to be implemented, and not determine whether it was justified, or whether other alternatives existed. There was a lack of consultation regarding the introduction of the Code and The Australian Chamber of Fruit and Vegetable Industries Limited, as the peak industry body representing the Market wholesalers had

- no opportunity to propose a voluntary code (as is currently the situation with the major retail chains); and
- no final say as to whether the code provided a flexible framework that set norms of behaviour (in fact it is ridged and unworkable) for those who were to be regulated by it.

The situation with fresh fruit and vegetables is that when any supermarket purchases product direct from a grower, these arrangements and the associated terms of trade are not presently prescribed by, or subject to regulatory oversight.

Where a retailer, and in particular an independent retailer (greengrocer), purchases product through a Central Market, they are purchasing product from a Market wholesaler whose relationship with the grower supplier is regulated, with those regulatory requirements (the Mandatory Horticulture Code of Conduct) being prescriptive to the point of being unworkable.

So a situation exists whereby those growers who supply to independent retailers through a Central Market are having to work through a supply chain which is burdened by additional prescriptive Government red tape; while those who supply directly to a supermarket are not!

Approximately 40-45% of the fresh produce sold at the retail level is sourced through Central Market wholesalers.

Supermarkets buying direct from a grower offer their own terms of trade, but have none of the scrutiny, cost, or the requirements as seen in the Mandatory Horticulture Code of Conduct.

The approach which exists therefore is one sided, it is making the Central Market system less competitive, and is imposing an uneven playing field on those growers who supply and those retailers who purchase from a Central Market wholesaler.

It also needs to be noted that the Mandatory Horticulture Code of Conduct does not apply to imported produce, so in this regard Australian fruit and vegetable growers who supply a Central Market wholesaler are further burdened by a regulatory system and compliance costs, which do not apply to produce being imported. Accordingly, the Horticulture Code of Conduct has an in built bias against Australian growers and from a compliance perspective, contributes further to adding cost and reducing the ability of Australian growers to complete with imported product.

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There would therefore, appear to be a strong argument that the Government should apply a fair and consistent approach to regulating how business is done.

The dispute resolution mechanism established under the Horticulture Code can provide for the investigation of grower complaints, but has only dealt with an average of some two complaints per year since the Code was introduced in 2007.

Despite this, the Government and the leadership of grower representative organisations have made no effort to implement amendments to the Code to facilitate more flexible commercial arrangements, despite ongoing requests form the Market wholesaling sector.

Accordingly, what we could see therefore is one half of the industry, being supermarkets buying directly off Growers, doing so under the provisions of a voluntary Code with flexibility which is enshrined in the Code and with exclusions from certain actions "*which would otherwise be prohibited*". This will occur while the other half of the industry, and in particular Market wholesalers and the independent retailers who rely on Central Markets, labour under a Mandatory Code, the threat of ACCC intervention, a total lack of flexibility and an effective prohibition on operating in any manner which introduces the required flexibilities to remain competitive.

The Government's approach to this issue looks very inequitable. Their support for a voluntary code based predominately on a document drafted by those parties it is to regulate, may ensure the Code is workable, but it stands in stark contrast to their approach when introducing the Mandatory Horticulture Code of Conduct. Furthermore, their ongoing reluctance to address the shortcomings of the Mandatory Horticulture Code of Conduct, shows a double standard which is entirely unjust and inappropriate.

In addition, in maintaining a Mandatory Horticulture Code of Conduct which lacks commercial feasibility, it is creating a further cost burden for growers who support the Central Market system, and a bias in favour of both imported product, and growers selling direct to supermarkets.

The Australian Chamber is asking that the Government is clear in their objectives and fair in the application of policies with respect to the introduction and use of industry codes of conduct so as to ensure that they do not introduce inequities which are clearly anticompetitive in their application (as is precisely the case with the Horticulture Code, and is proposed with the current approach to the Food and Grocery Code).

The Australian Chamber is asking for the support of the Panel to recommend a review of the inflexible mandatory Horticulture Code of Conduct which restricts competition - to achieve a clear, predictable and reliable industry code including recommendations to reduce business compliance costs associated with the red tape.

Misuse of Market Power

In Draft Recommendation 25 — Misuse of market power, *the Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in*

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conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct. To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- *would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and*
- *the effect or likely effect of the conduct is to benefit the long-term interests of consumers.*

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined".

Not only do independent retailers of fresh produce who are supplied by a Central Market wholesaler have an uneven playing field for the supply of their produce, they also have to withstand the contraction of their market share along with an increase in the number of failed businesses. If this decline continues, one entire sector will be reduced to a point where the consumer will have their needs and preferences impacted and questionably will not benefit from the contraction of the market. The current CCA has not been able to address the damage to competitors of any arguable anti-competitive behaviour by those with market power.

The Australian Chamber agrees with the re-framing of Section 46 to introduce an 'effects test'.

The phrase 'substantially lessen competition' as used in Section 50 has in practice been difficult to prove, as almost no cases under this section have been successfully run by the ACCC.

The Australian Chamber opposes the changing of what Section 46 prohibits to a 'substantial lessening of competition test". This is not the test used in other OECD countries.

The Australian Chamber opposes the addition of a defence to Section 46 action. It is our view that this will sanction major companies and clear the path to justify why they should be able to misuse their market power and damage competition in markets. There should be no reason (defence) for misusing market power. This is also the general position taken in OECD competition laws.

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In summary

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November 2014

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