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Protecting businesses and consumers from unfair commercial practices

INTRODUCTION

1. Horticulture New Zealand (HortNZ) appreciates the opportunity to make a submission to the Ministry of Business, Innovation and Employment (MBIE) on protecting businesses from unfair commercial practices. HortNZ is joined in making this submission by the organisations listed at the end of this document. This submission is made following consultation with New Zealand's 4,000 commercial growers of fruit and vegetables, who are members of HortNZ.
2. The horticulture industry employs over 60,000 people, occupies some 120,000 hectares of land and provides critical regional development opportunities in Northland, Auckland, Bay of Plenty, Hawke's Bay, Marlborough, Nelson, Canterbury, Taranaki, Waikato, Manawatu, Wellington, Central Otago and Southland. The horticulture industry is valued at \$5.7 billion, with \$3.44 billion in exports to overseas markets. The industry is going through a period of significant growth with forecasts to June 2019 predicting a 12% rise to \$6 billion (MPI, 2018).

SUBMISSION

3. HortNZ and the organisations listed in support of this submission welcome this proposal as a timely and needed discussion about commercial transactions in New Zealand. Our domestic market in New Zealand is by international standards very small and as such even medium sized business can exert undue influence over both their suppliers and customers. We therefore believe that consideration of this issue is appropriate.
4. The pivotal factor with surveys and consultations on unfair commercial conduct is New Zealand's size, which means that it is not possible to even make comment anonymously. The fear of retaliation is very real and for many small operations. They feel speaking out could put them quickly out of business. Although this problem may not be evident to observers, this is not a new issue and has existed within New Zealand's domestic supply situation for a number of years. We agree that the lack of tangible evidence makes it difficult to address but that in itself should not be a reason not to grapple with this issue to find resolutions. This is because ultimately the consumer ends up paying higher prices through unfair competition. In addition efficiency and product innovation are not well served by a lack of true competition.
5. Adoption of new technology and a focus on innovation is best enabled when trading relationships give participants sufficient margin to invest time, funds and resource. The

challenges facing our businesses meeting increased wages, compliance costs and satisfying ETS targets are stretching their resources and reducing their margins. We therefore submit that fair and equal competition will assist our businesses meet these challenges.

6. We believe that it is important to distinguish different types of conduct from the focus of this consultation. To submit that as New Zealand ranks as one of the least corrupt countries in the world and, therefore as a country does not require consideration of this issue, is missing the point of the proposals. This is not about organised crime, money laundering and the like. It is about the everyday transactions that occur buying and selling goods and services. In a market where there are either one or two major suppliers and one or two major purchases of goods and services, there will also be an imbalance of negotiating and commercial power. This imbalance can easily result in those with the power using that to their commercial advantage, but that is not corruption.
7. Therefore in a country with few major suppliers or purchases in key markets, we submit that there needs to be additional controls to moderate the behaviour of the powerful when dealing with their suppliers or customers. This is particularly true in both the urban and rural sectors where the majority of the businesses are small and struggle each day for survival. These businesses have little option but to take the conditions of sale or supply that are offered to them.
8. The critical question in our submission is how best to restore the balance between suppliers and purchasers so that every day transactions are fair. Whilst the proposals are focused on conduct at a more extreme end of the spectrum, we believe that where the most assistance is needed is at the other end of the spectrum: the everyday transaction that has key elements of unfairness and the abuse of power involved in it. We submit that the way in which to effectively manage this conduct is not by further offences but by enabling a regime that provides for fair conduct.
9. We believe the consultation paper is comprehensive and covers the issues in suitable detail and appropriately asks *is there a problem?* We believe there is a problem, not at the extreme end of offending, but at the everyday transaction end of the spectrum. This is based on confidential feedback from some of our members. Our concerns are not based on there being robust and rigorous competition but rather on the power of the few being used to disadvantage smaller suppliers and competition in general. Further we are not saying that all large operations in New Zealand partake of this behaviour, but for the few that do, we believe that there needs to be a clear direction from the government that this behaviour is unacceptable.
10. We do submit however that the proposed offences do not achieve this end. We do not have evidence from our members to suggest that this is something that should be addressed by the proposed legislation. But what we do have is the need for the government to create a “level playing field” between all purchasers and suppliers. We ask that the government therefore consult on whether instituting a regime similar to that in Australia under the Competition and Consumer (Industry Codes – Horticulture) Regulations 2017 (called in this submission “the Australian Horticulture Code”).
11. Where there is a regime in place that provides for standards of conduct and standards of contract then the goals of MBIE’s consultation paper in our submission will be achieved without the need for additional offences.
12. In 2015 an independent review of the Australian Horticulture Code¹ was conducted. At the appendix to this document the foreword and executive summary are set out. The reviewers noted in their foreword:

¹ https://ris.pmc.gov.au/sites/default/files/posts/2017/06/independent_review_report.pdf

“A properly functioning Horticulture Code is vital in ensuring the sustained viability of Australia’s horticulture sector. We consider that a functioning code is one which improves the clarity and transparency in the arrangements between growers and traders and reflects the practicalities of market based issues.”

13. The reviewers found that the code was not as effective as it could be and as a result made a series of recommendations for improving the code that have now been incorporated in the code.
14. There would need to be some adjustments before the Australian Horticulture Code could be adopted in New Zealand. This is the reason why we are submitting that there should be consultation on the Australian Horticulture Code before something like it could be adopted in New Zealand. Included in those adjustments there would be need to recognise that there is a different market structure in New Zealand: we do not have a wholesale market like they do in Australia and retailers and exporters should also be considered for inclusion in the New Zealand version of the code. This is so that equal and fair competition is promoted and enabled in New Zealand.

SUBMISSIONS ON THE CONSULTATION PAPER

15. *Issue 1: Unfair Business-to-Business Contracts.* We agree with MBIE’s statement that *‘at an economy-wide level, unfair commercial practices have the potential to ultimately result in lower levels of competition, innovation, and productivity across the economy, with corresponding negative impacts for consumers’.*
16. *Standard form contracts.* We agree with MBIE that it is not feasible to prohibit the use of standard form contracts and note that it is the content of any contract that is the issue not its form. We note and endorse the approach in the Australian Horticulture Code which clearly prescribes not only should there be a contract but sets out the required terms.
17. *Small businesses’ vulnerability to unfair contract terms.* We submit that this is a very real issue that we believe could be adequately addressed by a New Zealand adaptation and version of the Australian Horticulture Code.
18. *Sufficiency of current protections to address unfairness.* We submit that the current provision does not address unfairness as affirmed by MBIE’s survey of small businesses.
19. *Issue 2: Unfair Business-to-Business Conduct.* In our submission this is the area that needs to be addressed for the reasons advanced in our submission from paragraph 3 above. There is, as the MBIE survey found, some businesses facing demands over and above the terms agreed in their existing contract, suppliers or business customers not complying with the terms of an existing contract or dealing with firms that refused a supply a good or service, or to purchase a good or service. We agree and support the principle that *‘we think there are sound economic reasons for prohibiting unfair business-to-business conduct, as well as broader ‘fairness’ justifications’.* We also agree with the point raised in paragraph 85 that that on balance, *‘it could be argued that there are stronger justifications for protecting businesses against unfair conduct than unfair contracts’.*
20. We therefore submit that the key to ensuring that business to business contracts and conduct are fair is to put in place a regime similar to the Australian Horticulture Code for the reasons stated from paragraph 3 above.
21. *Issue 3: Unfair Business-to-Consumer Conduct.* We offer no comment on this part of the consultation document as it is outside our mandate.
22. *Option 1: Prohibitions against Unconscionable and Oppressive Conduct and Unfair Commercial Practices.* The difficulty is to adequately describe the unconscionable and

oppressive conduct and unfair commercial practices so that it is clear enough to enable effective enforcement. Without a clear definition any offence will be rendered ineffective. We believe that rather than focus on an offence the way in which to achieve behaviour that is not unconscionable is to be proactive and establish the standards for businesses to operate similar to that set out in the Australian Horticulture Code, but adapted to the New Zealand situation. We believe that a positive approach will achieve more than setting out offences that will be difficult to successfully prosecute and have a profound affect across all commercial conduct covered by the code. We believe that there should be no reluctance to adapt what has been found to be a suitable and effective solution in Australia as both our economies and socio-economic factors are very similar. In the food standards areas for example both countries are aligned. We therefore recommend consultation on bringing into force something like the Australian Horticulture Code be undertaken.

23. *Option 2: Extend Unfair Contract Term Protections to Businesses.* We do not support this extension but rather submit that MBIE consult on bringing into force proactive codes such as the Australian Horticulture Code for the reasons stated above.
24. *Guidance Material.* We support any legislative change being supported by comprehensive guidance materials as set out at paragraph 110 of the discussion paper.
25. *Who should be protected?* We submit that all NZ business should be offered a proactive code such as the Australian Horticulture Code to enable the aims of the consultation paper to be achieved and that MBIE should consult on this proposal.
26. *Which transactions should be protected?* We are of the view that all transactions should be covered as the impact of unfair conduct is not relative to the size of the business.

ORGANISATIONS IN SUPPORT OF THIS SUBMISSION

The following organisations are in support of this submission: Boysenberries New Zealand Incorporated, Hawkes Bay Fruitgrowers Association Incorporated, Horticulture New Zealand Incorporated, Katikati Fruitgrowers Incorporated, New Zealand Apples and Pears Incorporated, New Zealand Feijoa Growers Incorporated, Persimmon Industry Council Incorporated, Potatoes New Zealand Incorporated, Pukekohe Vegetables Growers Association Incorporated, Tomatoes New Zealand Incorporated and Vegetables New Zealand Incorporated

We ask that we be further consulted on our submission and we are available to meet as required.

Yours faithfully



Mike Chapman
Chief Executive

Independent Review of the Horticulture Code of Conduct: Final Report

Mark Napper and Alan Wein

November 2015

Foreword

Good regulation will only remain effective if it continues to be relevant. It is for this reason that the Australian Government requested an independent review of the mandatory Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code). We were appointed to undertake this review, owing to our experience with the industry and our understanding of regulatory frameworks, including industry codes. Our role has been to provide an independent perspective on the operation of the Horticulture Code, and make recommendations on how to improve its effectiveness in the context of the horticulture industry as it currently operates. This report responds to the terms of reference noted in the issues paper, discusses the findings of the review, and provides recommendations for the future of the Horticulture Code.

A properly functioning Horticulture Code is vital in ensuring the sustained viability of Australia's horticulture sector. We consider that a functioning code is one which improves the clarity and transparency in the arrangements between growers and traders and reflects the practicalities of market based issues. In the course of this review it has become apparent that there is a broad consensus across the horticulture industry that the Horticulture Code is not effective.

In undertaking the review, we met with a range of stakeholders, sought public written submissions, conducted oral consultations, carried out our own research, and looked at the broader Australian Government agenda. We heard how the Horticulture Code has impacted on business practices for better or worse. From this we gained an in-depth understanding of the current situation within the horticulture industry, and the issues surrounding the Horticulture Code.

This report details our observations from the consultation process, and our recommendations, which we hope will improve the business practices of the wholesale horticulture sector. In developing our recommendations, we were guided by a philosophy of effective regulation that optimises outcomes for all stakeholders. This was of paramount importance to us as our recommendations have the potential to affect thousands of growers and traders, as well as other participants in the sector. Our aim in making our recommendations is to create a business environment that is ultimately profitable and sustainable for all in the horticulture industry.

We are very thankful for all of those who participated in the review process, including those we engaged with in face-to-face meetings and teleconferences, and those who lodged submissions. All stakeholder views were carefully considered, and enriched our information discovery process, which ultimately led us to providing this report to the Australian Government. We are also grateful to the Horticulture Code Review Team within the Department of Agriculture and Water Resources, who supported us in our task and provided us with the resources and data that enabled us to properly and thoroughly consider all aspects of our report to government.

Having presented our recommendations, the Australian Government will consider them and respond. The Horticulture Code will sunset in April 2017, and we are hopeful that these recommendations will inform and shape the future of the Horticulture Code and the sector.



Mark Napper

Alan Wein

Executive summary

On 3 June 2015, this independent review of the Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code) was announced by the Australian Government. This review has been undertaken to examine whether the Horticulture Code's parameters and prescriptions are still relevant to the horticulture industry.

The Horticulture Code (the code) was developed with the aim of improving transparency and business practices for transactions between growers and traders of fresh fruit and vegetables. Under the terms of reference for the review we have examined a range of issues including how:

- the trading arrangements between growers and traders currently operate
- the code is applied to trade in the horticulture industry
- disputes between growers and traders are handled under the code
- breaches of the code are enforced
- effective the code has been in improving the clarity and transparency of transactions between growers and traders.

We have made a range of findings based on the industry consultations, submissions and our own research. These findings are detailed in this report, and have informed our recommendations.

Trading arrangements

The review has highlighted that many aspects of the horticulture industry's trading arrangements have changed since the code commenced in 2007. Growers are increasingly trading directly with supermarkets and other retailers, and technological changes allow for greater transparency, improved communication on quality issues and the opportunity to improve price reporting. The review also examined issues surrounding the strict definitions of merchants and agents, and the way that traders operate in practice in the markets.

The review gave consideration to the inclusion of a good faith obligation in the code, and the evidence to support this inclusion. Our findings highlighted a range of potentially problematic conduct within the industry that could better be addressed by a good faith clause. We also note that good faith obligations have been incorporated into both the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Franchising Code) and the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Food and Grocery Code).

Application of the code

During the review it became apparent that the majority of horticulture produce transactions do not occur under the Horticulture Code. This is due to the exemption of pre-code contracts, as well as the exemption of processors, exporters and retailers from the code. The extension of the code to cover these exemptions is supported by the majority of stakeholders who participated in the review. We found significant evidence to support the inclusion of pre-code contracts in an amended code. However, our review did not find reliable evidence to indicate any substantive problems with the transparency of transactions between growers and processors, or growers and exporters.

Dispute resolution

We found that the Horticulture Code's current dispute resolution mechanism is irrelevant, inappropriate and largely not adopted by parties in the horticulture sector. In general, growers believe that the low uptake of the code's dispute resolution mechanism is due to a fear of retribution, whereas central markets contend that the reason for low uptake is that there are few disputes. Further, it is widely believed that the dispute resolution mechanism prescribed by the code does not address the majority of disputes that arise in the course of what appears to be acceptable market practice in the horticulture sector. Most disputes are related to issues of the quality and timing of the delivery of produce, payments to growers, and the transparency of prices. An amended

dispute resolution mechanism that focuses on these main points of contention is necessary for the code to be more effective.

Enforcement of the code

We found general consensus within the horticulture industry that the enforcement of the Horticulture Code is not strong enough to prevent breaches, and that stakeholders are unconcerned about complying with the code. In response to this, growers and grower bodies strongly agreed that the Australian Competition and Consumer Commission (ACCC) should be given increased enforcement powers. In its submission to the review, the ACCC detailed recommendations on how to improve its ability to enforce the code and complete audits. However, increasing the ACCC's powers to enforce the code was not supported by all stakeholders, particularly the central markets and their related industry bodies.

Effectiveness

There is also broad consensus within the horticulture industry that the Horticulture Code is not effective, which was highlighted through the review process. Although most industry stakeholders believe that the code is ineffective, there are differing views on why this is so. In general, growers and grower bodies believe that the code's lack of effectiveness is due to its inability to bring about increased transparency, whereas traders believe that the code fails because it is inflexible and does not reflect the way the industry operates. A lack of understanding of how the code operates also contributes to the code's ineffectiveness, and has caused industry stakeholders to disengage from the code. Improved education programs could improve the code's effectiveness and are generally supported by stakeholders.

Recommendations

Our report makes 13 recommendations to the Australian Government. We have made these recommendations with the expectation that they will help raise the horticulture industry's business practices if they are implemented. A summary of our recommendations is tabled in the 'Summary of recommendations' section. We believe that remaking the code with amendments is the best direction as it gives the industry an opportunity to improve the transparency of its commercial operations.