

Produce and Grocery

Industry Code of

Conduct

July 2007

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LEGISLATION

All references to legislation are current at the date of the Code's release.

INDUSTRY ENDORSEMENT

The Produce and Grocery Industry Code of Conduct is intended to cover all industry participants in the Australian produce and grocery industry on a voluntary basis.

To further the interests of the industry as a whole, the following organisations and businesses additionally commit to promoting the Code and their own internal dispute resolution procedures:

- Aldi Stores;
- Australian Chamber of Fruit and Vegetable Industries Limited;
- Australian Dairy Farmers;
- Australian Chicken Growers Council
- Australian Egg Corporation Limited;
- Australian Food and Grocery Council;
- Australian Retailers Association;
- Coles Group Limited;
- Murray Valley Winegrape Growers;
- National Association of Retail Grocers of Australia;
- National Farmers' Federation;
- National Retail Association;
- Horticulture Australia Council;
- Queensland Retail Traders and Shopkeepers Association; and
- Woolworths Limited.

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PART ONE — PRELIMINARY

1. BACKGROUND

- 1.1 This Code was originally developed for the retail grocery industry by the Retail Grocery Industry Code of Conduct Committee (RGICCC).
- 1.2 The RGICCC, an industry-funded committee appointed by the Australian Government on 13 February 2000, was established as part of the Australian Government's response to the Report of the Joint Select Committee on the Retailing Sector, Fair Market or Market Failure? (December 1999).
- 1.3 The RGICCC developed this Code according to the terms of reference provided by the Australian Government (Attachment 1).
- 1.4 On 11 February 2005 the Code Administration Committee unanimously agreed to rename the Code to better reflect the coverage of its scope within the industry. Effective from this date, the Code is to be called the Produce and Grocery Industry Code of Conduct.
- 1.5 This Code is a voluntary code of conduct for the produce and grocery industry.
- 1.6 This Code (as amended) was reviewed in December 2003—after 3 years of operation. The Code will again be independently reviewed in 3 years from the release of the Government response to the initial review (i.e. next reviewed August 2007) to evaluate progress in the sector.

2. OBJECTS

- 2.1 The objects of this Code are to:
 - promote fair and equitable trading practices amongst industry participants;
 - encourage fair play and open communication between industry participants as a means of avoiding disputes; and
 - provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute.

3. SCOPE

- 3.1 This Code applies to industry participants in their vertical relationships with one another.
- 3.2 This Code is intended to guide the conduct of industry participants but does not constitute a contract between them.
- 3.3 This Code is not intended to cover consumers.
- 3.4 This Code is not intended to be declared as either a prescribed voluntary or mandatory code under Part IV B of the Trade Practices Act 1974.
- 3.5 The provisions of this Code are subject to all applicable Commonwealth, State and Territory legislation and all rights and obligations arising under common law.

4. DEFINITIONS

- 4.1 In this Code, unless the contrary intention appears:

“applicant” means a person, corporation or other body corporate who raises or causes to be raised a dispute for resolution in accordance with Part 3 - Dispute Resolution;

“acquisitions” means acquiring a controlling interest in a retailing entity trading in the retail grocery trade within Australia by way of purchase, exchange, lease or other form of transfer, whether alone or jointly with another person, including any acquisition of any legal or equitable interest in such an entity;

“Code” means the Produce and Grocery Industry Code of Conduct, formerly the Retail Grocery Industry Code of Conduct;

“Produce and Grocery Industry Code Administration Committee” means the industry committee established to oversee the operation of this Code in accordance with Part 4 - Administration;

“Industry” means those businesses involved in the production, preparation and sale of food, beverages and non-food grocery items, including (but not limited to) primary producers, manufacturers and/or processors, wholesalers, importers and/or distributors, brokers and/or agents and grocery retailers;

“Produce and Grocery Industry Ombudsman” means the person, corporation or other body corporate appointed by the Australian Government Minister for Agriculture, Fisheries and Forestry or successor to mediate disputes in accordance with this Code;

“internal procedures” means the internal dispute resolution procedures of industry participants;

“produce” means yield, especially of fields or gardens, waterways, dams or oceans, including yield from plants and/or animals under cultivation and/or harvested from the wild, for sale as raw horticultural and agricultural goods. Produce includes yield of freshwater and marine life and yield which is food or non-food (eg. flowers);

“product” means that which may be generated or made by a process of industrial transformation, including any produce that has been subject to any process or treatment resulting in an alteration of its form, nature or condition, that is sold in the industry;

“respondent” means a person, corporation or other body corporate against whom a dispute is raised by an applicant for resolution in accordance with Part 3 – Dispute Resolution;

“support person” means a person or persons nominated by the applicant or the respondent to provide moral and personal support during mediation in accordance with Part 3 – Dispute Resolution;

“vertical relationships” means commercial relationships between suppliers and purchasers of goods or services in different stages of production or distribution in the produce and grocery industry supply chain, but not including consumers.

PART TWO — GUIDELINES

5. PRODUCE STANDARDS AND SPECIFICATIONS

Principle: All industry participants support an efficient and competitive produce and grocery industry which accords equal respect to:

- the right of retailers to buy the best produce at the best price; and
- the right of suppliers to have their produce fairly evaluated for purchase against clear and objective standards and specifications.

All industry participants recognise that produce standards and specifications must allow for seasonal variations in produce.

- 5.1 All relevant produce standards and specifications (where available) will be negotiated with, and provided to suppliers, agents or intermediaries before the supplier enters into a supply contract.
- 5.2 Retailers will communicate relevant produce standards and specifications to suppliers, agents or intermediaries in clear, meaningful and accurate terms.
- 5.3 Where produce is rejected, retailers will provide the reason or reasons to the supplier, agent or intermediary, having proper regard to the perishability of the produce in question and the retailer's operational requirements. Such reasons shall be based on the relevant produce standards and specifications or other, objective criteria.

6. CONTRACTS

Principle: All industry participants support the right of suppliers and retailers to freely negotiate the terms and conditions of any supply contracts.

- 6.1 Suppliers and retailers will negotiate the terms and conditions of their supply contracts (including terms of payment) in clear, concise, meaningful and accurate terms.
- 6.2 In a genuine effort to resolve disputes in an effective manner, suppliers and retailers should include an appropriate dispute resolution term in all written supply contracts.
- 6.3 Suppliers and retailers will encourage the use of written contracts (where appropriate) to evidence the terms and conditions of supply. Contracts should be in plain English and may include the items listed in the Terms of Trade Checklist at Appendix 2.

7. LABELLING, PACKAGING AND PREPARATION

Principle: All industry participants accept the right of retailers to determine labelling, packaging and preparation requirements, subject to the standards imposed or promoted by the relevant regulating authorities or industry associations, including any voluntary codes of conduct or practice.

- 7.1 Suppliers will supply produce and product that is labelled, packaged and prepared in accordance with Australian and New Zealand labelling and packaging standards.
- 7.2 Retailers will use their best endeavours to communicate their individual labelling, packaging and preparation requirements to suppliers in clear, meaningful and accurate terms at the time of ordering.
- 7.3 If a retailer changes its packaging requirements, the retailer will have proper regard to any balance of specialist packaging stock, produce or product that the supplier may have on hand for the purposes of supplying the retailer.
- 7.4 Any requirement for retailers to provide reasonable notice of changes to their individual labelling, packaging and preparation requirements in Clause 7.3 does not apply where the change in question is required by law or by an amendment to the Australian and New Zealand labelling and packaging standards.

8. NOTIFICATION OF ACQUISITIONS

Principle: All industry participants acknowledge that:

- the Trade Practices Act 1974 prohibits acquisitions or mergers which would have the effect or likely effect of substantially lessening competition in a market (s.50);
- there is no statutory notification requirement of acquisitions to the Australian Competition and Consumer Commission (ACCC) imposed on industry participants; and
- voluntary notification of acquisitions to the ACCC is an existing, corporate practice for many industry participants.

- 8.1 Industry participants will notify the ACCC of acquisitions.

PART THREE — DISPUTE RESOLUTION

9. DISPUTE RESOLUTION SCHEME

Principle: All industry participants support a dispute resolution scheme which:

- considers all vertical supply disputes arising between industry participants;
- gives all industry participants an opportunity to resolve disputes, in the first instance, under internal procedures;
- encourages unresolved disputes to be referred to the Produce and Grocery Industry Ombudsman as an alternative to litigation;
- considers all disputes fairly and impartially;
- will not jeopardise the underlying commercial relationship;
- respects the confidentiality of applicants and respondents; and
- encourages an equitable and timely resolution of disputes.

9.1 This Code promotes a two-stage dispute resolution scheme:

- Stage 1 encourages applicants to raise disputes with the respondent; and
- Stage 2 encourages unresolved disputes to be raised with the Produce and Grocery Industry Ombudsman.

10. DISPUTE RESOLUTION PROCEDURE

Principle: All industry participants support a dispute resolution procedure in which:

- industry participants will publish internal dispute resolution principles consistent with the two-stage dispute resolution procedure described in this Code;
- all industry participants, industry associations and signatories to this Code will promote the existence of internal dispute resolution procedures in a genuine effort to resolve disputes;
- all internal dispute resolution procedures will provide both a statement to the effect that the industry participant supports the Produce and Grocery Industry Code of Conduct and contact details for the Produce and Grocery Industry Ombudsman;

- retailers and suppliers will participate in the mediation process in a spirit of goodwill and good faith; and
- matters discussed and documents produced in the course of mediation will be treated as confidential and without prejudice.

10.1 Where a dispute arises, the following procedures will apply:

Stage 1 – Internal procedures

- 10.1.1 Applicants will raise the matter in dispute with the respondent, in accordance with the respondent's internal procedures.
- 10.1.2 Applicants and respondents will use their best efforts to resolve the matter in good faith and in accordance with the internal procedures (if any) in a climate giving respect to the ongoing commercial relationship and conducted on a confidential and without prejudice basis.
- 10.1.3 Applicants and respondents will endeavour to exhaust all internal appeal procedures.

Stage 2 – Produce and Grocery Industry Ombudsman

- 10.1.4 Stage 1 disputes may be referred to the Produce and Grocery Industry Ombudsman by either the applicant or the respondent where:
- the respondent has failed to respond to the matter in dispute within a reasonable period or within that period stipulated in the internal procedures;
 - the applicant and respondent are unable to resolve the matter under the internal procedures;
 - the applicant or respondent is dissatisfied with the outcome of the internal procedures; or
 - the applicant is dissatisfied with the respondent's internal processes or procedures in considering the matter or in reaching its decision.

- 10.2 Disputes may be directly referred to the Industry Ombudsman by either the applicant or the respondent (without having first attempted Stage 1 procedures) where:
- there are no internal procedures; or
 - the applicant or the respondent applies to the Industry Ombudsman for a direct referral of their dispute and the Industry Ombudsman determines that the circumstances warrant direct referral.
- 10.3 Once the Produce and Grocery Industry Ombudsman establishes jurisdiction to mediate a directly referred dispute under Clause 10.2, the Produce and Grocery Industry Ombudsman will contact the respondent and advise that a referral has been received.
- 10.4 Advising the respondent that a referral has been received under Clause 10.2 will not involve the release of the applicant's name, unless the applicant consents.
- 10.5 A Stage 2 dispute must be referred to the Produce and Grocery Industry Ombudsman by application.
- 10.6 Application may be made to the Produce and Grocery Industry Ombudsman by telephone, fax, letter, email or personal attendance (see Part 5 – Key Contacts).
- 10.7 An application fee of \$50 is payable.
- 10.8 An applicant may apply to the Produce and Grocery Industry Ombudsman for waiver of the application fee on the grounds of serious financial hardship. If the Produce and Grocery Industry Ombudsman determines that payment of the application fee will result in serious financial hardship for the applicant, the Industry Ombudsman may waive the application fee.
- 10.9 Following receipt of both the application and the application fee (where payable), the Produce and Grocery Industry Ombudsman will appoint an appropriate mediator to mediate the dispute. The appointed mediator will then contact the applicant and the respondent to discuss the application and agree on a time, date and venue for the mediation conference. In the event the parties can not agree the mediator may determine the time, date and venue of the mediation conference, taking into account the reasonable circumstances of the parties.
- 10.10 The Produce and Grocery Industry Ombudsman has jurisdiction to appoint mediators to mediate any dispute arising between industry participants in their vertical relationships with one another provided that the dispute is less than 12 months old.

- 10.11 In mediating a dispute under Clause 10.10, the Produce and Grocery Industry Ombudsman may have regard to circumstances arising before the date of public release of the Code.
- 10.12 Neither the applicant nor the respondent may be legally represented before the Produce and Grocery Industry Ombudsman.
- 10.13 The preclusion of a legal representative in Clause 10.12 does not preclude the attendance of a support person but must include a person authorised to settle a dispute.
- 10.14 The Produce and Grocery Industry Ombudsman may, in his or her absolute discretion, summarily dispose of any application on the grounds that the dispute is:
- frivolous;
 - vexatious;
 - repetitive;
 - lacking in substantive merit; or
 - a dispute which has been substantially previously dealt with.
- 10.15 The Produce and Grocery Industry Ombudsman and mediator will assist the applicant and the respondent explore options for and, if possible, achieve the timely resolution of the dispute by agreement.
- 10.16 In exploring options for the timely resolution of the dispute, the Produce and Grocery Industry Ombudsman and mediator will not:
- be bound by any resolution that might be achieved by negotiation or a contested trial; or
 - impose a solution on the applicant or the respondent.
- 10.17 If mediation does not result in an outcome acceptable to both the applicant and the respondent or the dispute proves incapable of resolution by mediation, the mediator will issue a certificate to the applicant and the respondent setting out:
- the parties to the dispute;
 - an outline of the dispute; and
 - a list of the unresolved issues.



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- 10.18 Any certificate issued under Clause 10.17 (including any information contained in the certificate) must remain confidential between the applicant, the respondent, the mediator, the Produce and Grocery Industry Ombudsman and any attending support person/s.
- 10.19 Disclosure of any certificate issued under Clause 10.17 (including any information contained in the certificate) to a third party requires the express consent of both the applicant and the respondent, except where the disclosure is required under law.
- 10.20 The applicant and the respondent must pay their own costs of attending mediation.

PART FOUR — ADMINISTRATION

11. PRODUCE AND GROCERY INDUSTRY CODE ADMINISTRATION COMMITTEE

- 11.1 The Produce and Grocery Industry Code Administration Committee (PGICAC) will consist of a cross section of members from the produce and grocery industry and changes will be determined by a majority of the Committee.
- 11.2 This Code will be administered by the PGICAC.
- 11.3 The PGICAC currently comprises representatives from:
- Australian Chamber of Fruit and Vegetable Industries Limited;
 - Australian Food and Grocery Council (AFGC);
 - Australian Retailers Association (ARA);
 - Two major retail grocery chains;
 - Two from the National Association of Retail Grocers of Australia (NARGA);
 - National Farmers' Federation (NFF);
 - Australian Dairy Farmers';
 - Horticulture Australia Council; and
 - Australian Egg Corporation Limited, Australian Wine Growers Council/Murray Valley Winegrape Growers, Australian Chicken Growers Council and the Victorian Farmers Federation.
- 11.4 An independent voting chairman will be appointed by agreement of the PGICAC.
- 11.5 The PGICAC will be industry-funded.
- 11.6 All decisions of the PGICAC must be made by way of a resolution passed by a simple majority of all PGICAC members entitled to vote, except for resolutions to amend the Code, which require a unanimous decision of all PGICAC members entitled to vote.
- 11.7 The PGICAC may invite other relevant authorities to act as observers when appropriate, for example the Australian Competition and Consumer Commission and State Fair Trading Departments.

12. ROLE OF THE PRODUCE AND GROCERY INDUSTRY CODE ADMINISTRATION COMMITTEE

12.1 The role of the PGICAC will be to:

- publicise and promote the Code and its dispute resolution procedures;
- monitor the operation of the Code;
- consult with industry participants (where appropriate) on proposed amendments to the Code;
- determine necessary amendments to the Code;
- provide for the adequate financing of Code administration expenses; and
- produce an annual report on the Code and its administration;
- report to the Australian Government Minister for Agriculture, Fisheries and Forestry or successor on the operation and effectiveness of the Code, as required; and
- report to the industry on the operation and effectiveness of the Code.

13. PRODUCE AND GROCERY INDUSTRY OMBUDSMAN

13.1 The Produce and Grocery Industry Ombudsman is appointed by the Australian Government under contract.

13.2 The role of the Produce and Grocery Industry Ombudsman (in addition to appointing mediators to disputes in accordance with Part 3 – Dispute Resolution) will be to:

- produce an annual report on the Office of the Produce and Grocery Industry Ombudsman; and
- report to and consult with the PGICAC on the operation and effectiveness of the Code annually, or as requested; and
- report to the Australian Government Minister for Agriculture, Fisheries and Forestry or successor on the operation and effectiveness of the Code and the Office of the Produce and Grocery Industry Ombudsman.

PART 5 — KEY CONTACTS

PRODUCE AND GROCERY INDUSTRY

Produce and Grocery Industry Code of Conduct
Internet: www.produceandgrocerycode.com.au

Produce and Grocery Industry Ombudsman Service
Freecall: 1800 206 385
Internet: www.produceandgroceryombudsman.com.au
Email: info@produceandgroceryombudsman.com.au

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

470 Northbourne Avenue
DICKSON ACT 2602

ACCC Info Centre: 1300 302 502
Facsimile: 02 6243 1199
Internet: www.accc.gov.au

DEPARTMENT OF AGRICULTURE, FISHERIES AND FORESTRY

GPO Box 858
CANBERRA ACT 2601

Telephone: 02 6272 3933
Facsimile: 02 6272 4246
Email: info@produceandgrocerycode.com.au

WHOLE OF GOVERNMENT INFORMATION

Internet: www.business.gov.au

Appendix 1

TRADE PRACTICES ACT 1974

IMPORTANT NOTICE

The purpose of this appendix is to provide a general summary of certain provisions of the *Trade Practices Act 1974*. It should be treated as general information only and is not a substitute for legal advice from a qualified legal practitioner. Some of the provisions referred to contain exceptions or important qualifications.

For further information contact the ACCC (see Part Five – Key Contacts)

The *Trade Practices Act 1974* (the Act) makes certain conduct illegal. Illegal conduct includes:

- Misleading and Deceptive Conduct

Businesses are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material information may in some circumstances be a breach of the Act.

- Unconscionable Conduct

Businesses must not engage in conduct that would be regarded as unacceptable by taking advantage of a person's special disability or vulnerability or to the extent that it offends the conscience of a reasonable person.

- Third Line Forcing

This conduct involves the supply of goods or services on condition that a purchaser acquires goods or services from a third party or a refusal to supply because the purchaser will not agree to that condition.

- Resale Price Maintenance

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale.

- Exclusive Dealing

Agreements involving the supply or acquisition of goods subject to conditions restricting the freedom of the supplier or the acquirer to deal with other suppliers or acquirers (as the case may be) are prohibited if they have the purpose or likely effect of substantially lessening competition.

- Misuse of Market Power

A business that has a substantial degree of market power is prohibited from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into any market; or deterring or preventing a person from engaging in competitive conduct in any market.



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- Collusive Contracts that Substantially Lessen Competition
Agreements between competitors to share markets, restrict the supply or acquisition of goods are prohibited.
- Price Fixing
Agreements between competitors to fix the price of goods or services are prohibited.
- Mergers and Certain Acquisitions
Mergers and acquisitions which substantially lessen competition in a market are prohibited.

Disclosing illegal conduct under this Code will not prevent that conduct being a breach of the Act. Disclosing illegal conduct cannot be used as a defence against such a breach.

Appendix 2

TERMS OF TRADE CONTRACT (Suggested Checklist Headings)

1. Business Name and ABN

(Supplier, and other parties (if any) name/s and ABN/s could be included on a separate schedule where this is the business's standard terms and conditions, otherwise include suppliers and other parties details here)

2. General Terms

(Includes method of doing business, e.g. outright purchase or other arrangement)

3. Transfer of Title and Risk

(Point at which responsibility changes, including location, date or action where relevant)

4. Supplier Obligations

(Includes reference to product/service description, specifications and quality)

5. Price Determination, Variation and Notification

(How price is determined and notified)

6. Business Obligations, Charges and Payments

(Method and timing of payments, deductions, charges and GST where applicable)

7. Complying and Non Complying Products/Services

(Procedures for rejections or returns)

8. Dispute Resolution

(Includes the effect of *force majeure*, reference to internal procedures and the PGIO)

(Note: By way of explanation; intention of *force majeure*. Neither party will be liable for any non-performance of its obligation under the Contract in the event such non-performance is caused or substantially contributed by riot, fire, flood, war, terrorist acts, Acts of God, labour dispute, government regulations and/or other force majeure events.)

Attachment

PGICAC TERMS OF REFERENCE

The Australian Government tasked the then RGICCC with developing this Code subject to the following terms of reference¹:

- address the issue of an ombudsman scheme as part of the code and how it will be structured with its jurisdiction, powers, review and reporting requirements defined and delineated;
- improving transparency in 'vulnerable' supply markets – where growers have to deal with a range of market characteristics, including perishability, market volatility and a high degree of risk exposure;
- raising product labelling and packaging standards;
- reducing contractual uncertainty, in particular, the passing of ownership of produce and the circumstances under which produce can be returned;
- branding, particularly whether businesses, which are subsidiaries of, or are substantially owned by, a listed public company or major retailer, note that association on shop front signage, in advertising, on stationery etc; and
- consideration of notification issues of retail grocery store acquisitions and of the acquisitions of grocery wholesalers by retailers and vice-versa.

¹ Government Response to the Report of the Joint Select Committee on the Retailing Sector (December 1999).