

**Review of the Horticulture Code of Conduct Report released
VFF response – Feb 2016**

Recommendations:

Recommendations		Current	Proposed and VFF Position
1	That the Horticulture Code be amended to remove the distinction between and agent and a merchant.	Currently the Code has a very clear definition of a merchant and an agent.	Support in principle so long as standard horticulture produce agreements are implemented as a minimum basis for trade between a grower and trader so it is clear to a grower the terms they are trading under. (See No 2)
2	That a standard form horticulture produce agreement (HPA) be annexed to the Horticulture Code, to be used as a minimum basis for trade in horticultural produce between growers and traders.	NFF currently has a one page standard template which is accepted by the ACCC as compliant with the Code.	Support Some tweeking of existing template could be done if new rules apply.
3	That an obligation on all parties to act in good faith be included in the Horticulture Code.	Not included in current Code.	Support Inclusion would be consistent with other industry codes It would (a) set a baseline for what is considered good business practices and (b) educate those unaware of existing common law precedent of good faith.
4	That the Hort Code be amended to allow a method or formula for determining prices paid to a grower, including pooling and price averaging where (a) parties have prior knowledge and agree to the method or formula in the HPA and (b) if pooled, the pooled produce is of the same quality.	Not supported in the past as this was the initial problem the code was trying to address	Don't support allowing a method or formula for determining prices unless it is clear to growers what the formula being used is and is agreed to in the HPA. Support pooling and price averaging so long as the product is of the same specs.

5	<p>That the govt explore the inclusion of deeming provisions in the Hort Code to ensure that where a pre-existing contract is not in place, and where a HPA is provided by a trader or sought by a grower, that the intent of the parties to enter into an HPA is deemed to have occurred.</p> <p>Such provisions should ensure that parties have time to arrange their affairs and that no party can use such provisions to enforce unfair contract terms.</p>	<p>There is currently no deeming provisions</p>	<p>Support</p> <p>This would mean that if an agreement has been sought by either party but not signed and trading takes place then the template agreement attached to the code would become the default if a dispute arose.</p>
6	<p>That the Hort Code be amended to require that where a HPA does not include specific quality specs, FreshSpecs specifications be used as the default.</p>	<p>No in current code</p>	<p>Support the need for recognized, consistent quality specs.</p> <p>Don't necessarily support FreshSpecs as the default.</p> <p>Industry won't pay to develop new specs that would be universally accepted so unless there is anything else already existing it will have to be FreshSpecs.</p>
7	<p>That the Hort Code be amended to remove the current exemption for contracts entered into prior to 15 Dec 2006.</p>	<p>Currently there are many agreements that pre-date the code with no sunset clauses and many that were also backdated.</p>	<p>Support</p> <p>This recommendation would mean that all contracts must comply with the code.</p>
8	<p>That the Hort Code be amended to regulate transactions between growers and retailers where the retailer is not a signatory to the Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015 (Food and Grocery Code).</p>		<p>Support in principle.</p> <p>While the Food and Grocery Code is voluntary the ACCC has the ability to enforce a breach including a breach of good faith.</p> <p>Report does not support the inclusion of exporters and processors as there has not been enough evidence to show lack of transparency between growers and processors/exporters.</p> <p>Report also does not support the inclusion of the wine industry in the code.</p>

9	That the Hort Code be amended to abolish the existing dispute resolution process and that it be replaced with an improved system which recognizes the need for independent, fast, accessible, expert onsite conciliation.	Currently parties must try to resolve dispute. If after 3 weeks no agreement is reached then a mediator is appointed. If mediation is reached then a legally enforceable contract is set out. If mediation is not reached then legal action could be the next option.	<p>Support</p> <p>The proposed move to a conciliation model instead of mediation to provide parties with a same day, on market inspection, determination and report regarding the dispute.</p> <p>Agree it needs to be independent, fast, accessible, expert and onsite due to the nature of perishable products.</p>
10	That the Hort Code be amended to provide that horticulture produce assessors be trained and registered.		<p>Support</p> <p>Support the report's call for an appropriately qualified expert panel to be arranged by the ACCC or the Ombudsman.</p>
11	That the Hort Code be amended to provide for civil penalties and infringement notices for breaches of the code.	Currently no infringements or civil penalties leading to low take-up of code. Report sought comment on either/both options.	<p>Support the need for infringement notices but concerned about civil penalties and the impact it could have for growers and traders.</p> <p>Strongly support ACCC being given enhanced enforcement powers.</p> <p>Franchising Code Infringement Notices for a corporation are \$9000 (50 penalty units) and \$1800 (10 units) in other cases.</p> <p>Franchising Code has civil penalties of up to 300 penalty units (\$54,000) for failure to comply. Only enforced for breaches "serious and egregious" in nature.</p>
12	That the Hort Code require that traders generate and keep relevant information on transactions in order to allow the ACCC to use its powers under Section 51ADD of the Competition and Consumer Act 2010 (its random audit powers) to assess a trader's compliance with the code.	Growers cannot check the books of traders currently and there is no requirement for records to be kept under the code.	<p>Support</p> <p>In order to implement compliance checks the ACCC is recommending a change to require traders to keep, generate and publish appropriate paperwork as well as keep a list of names of growers.</p> <p>This would assist in identifying non-compliance with the code without imposing regulatory burden as this is required for traceability already.</p> <p>More enforcement of spot checks is required and ACCC need resourcing to do this.</p>

13	That as part of its role in enforcing the Hort Code, the ACCC should engage with growers' and traders' industry bodies in the development and distribution of any educational information relating to amendments to the code.	VFF will be providing information sessions to our members when any changes have been implemented.	<p>Support</p> <p>All parties agree that education is the key to the success of the code. All grower and trader industry bodies (along with government) have been called on to inform their members of the code.</p> <p>Any education program should include education on business 'norms', rights of each party and their responsibilities under the code.</p>
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Outside of the recommendations the VFF is pleased that additional comments by the reviewers have called for a **feasibility study to be undertaken into the establishment of a horticulture price reporting system.**

OPTIONS FOR GOING FORWARD

1. Let the Horticulture Code lapse
2. Status quo with the current Horticulture Code
3. Remake the Horticulture Code with amendments

VFF supports Option 3. The report supports option 3.

Option 1 – let code lapse

The Code is due to sunset in April 2017. This would leave growers and traders to operate in accordance with general contract law and requirements under the Competition and Consumer Act 2010. This could include unfair contracts legislation if this is extended to business-to-business transactions.

Option 2 – remake current code

Current status quo under the code would be continued and an education campaign takes place to reinvigorate awareness.

Option 3 – remake code with amendments

The code could be remade with amendments including those discussed in this report. An education campaign would need to accompany successful implementation for all affected stakeholders.

VFF now calls on the government to implement the recommendations for a more workable, effective code.