



Australian Government
Department of Agriculture
and Water Resources

Australian Government response to the Independent Review of the Horticulture Code of Conduct



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Introduction

The Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Code) regulates trade in horticulture produce between growers and traders of fresh fruit and vegetables. The Code also establishes a dispute resolution procedure.

The Australian Government introduced a mandatory code to improve the clarity and transparency of transactions between growers and wholesalers of fresh fruit and vegetables. The Horticulture Code commenced on 14 May 2007. The Government's decision followed concerns expressed by the grower community over a number of years about the need to improve commercial transparency. The Government agreed to a mandatory code after it became clear that growers and wholesalers could not agree on a voluntary code.

The key issues the Code aimed to address are:

- a lack of clarity about when a wholesaler is trading as an agent or a merchant
- a failure to invest in written documents of trade, including written transaction information and trading agreements
- the need for a dispute resolution process, including independent assessment of transactions and compulsory mediation.

Concerns have been raised about the Code's overall effectiveness, especially the number of transactions occurring outside of its coverage.

An independent review of the Code was conducted by Mr Mark Napper and Mr Alan Wein and was provided to the Government in November 2015. The review made a range of findings based on industry consultations, submissions and research. These findings are detailed in the report, and informed the recommendations. The reviewers made 13 recommendations to the Government.

The Government's response to the review recommendations is detailed below.

Recommendation 1

That the Horticulture Code be amended to remove the distinction between an agent and a merchant.

Issue identified by the review

The review of the Horticulture Code put forward that the Code's definition of a trader as a merchant or agent is not reflective of widely accepted operating practices. The independent review also noted that wholesale sector practice is based upon a price determined at market. It considered that the attempt by the Horticulture Code to regulate an agreed price between the grower and merchant prior to the horticulture produce being delivered has contributed to a failure in the adoption of the Code.

Response

Reject the recommendation.

Rationale

The current agent/merchant distinction required under the Code provides necessary transparency for contracting parties.

Trader and grower representative organisations have expressed to the Government that the contractual basis for the transaction (as either an agent or a merchant) must remain clear.

The Code ultimately has been designed to ensure that there is a necessary level of transparency in the trading relationship, and clarity regarding the roles and responsibilities of the parties is necessary.

The outcomes sought by the reviewers through this recommendation in relation to flexibility in price determination can be achieved through the acceptance of recommendation 4, which concerns the ability of growers and traders to negotiate a method or formula to determine the price to be paid to the grower.

This response will not result in amendments to the Code.

Recommendation 2

That a standard form horticulture produce agreement (HPA) be annexed to the Horticulture Code, to be used as the minimum basis for trade in horticulture produce between growers and traders.

Issue identified by the review

The review of the Horticulture Code put forward that written terms of trade are not just good business practice, but are also crucial to ensuring clarity and transparency of transactions. The reviewers found that issues regarding transparency could be addressed by the development of a standard form horticulture produce agreement, which could be annexed to the Horticulture Code. The reviewers recommended a standard form horticulture produce agreement could be used as a minimum basis for trade in horticulture produce between growers and traders.

Response

Accept the recommendation in part.

Rationale and implementation

The Government agrees with the reviewers that written terms of trade are not just good business practice, but are also crucial to ensuring clarity and transparency of transactions.

However, the Government believes that it would be impractical to implement this recommendation in full. In particular, the development of a standard form agreement, which would be code compliant, and capable of being used by all stakeholders as a minimum basis of trade.

The Government is of the view that if such an agreement was developed, it may result in confusion where growers or wholesalers propose terms that go beyond the standard form, as is their right to negotiate the contractual terms they wish.

The Government is also of the view that such an agreement should not be annexed to the Code.

Instead the Australian Competition and Consumer Commission (ACCC) will develop example agreements and guidelines that will be hosted on the ACCC's website. The guidelines will provide assistance to ensure that an agreement is code compliant, and would provide all stakeholders with reference material to use when developing or considering their own horticulture produce agreements.

While this response will not result in amendments to the Code, ACCC guidelines would be produced prior to commencement of a new code.

Recommendation 3

That an obligation on all parties to act in good faith be included in the Horticulture Code.

Issue identified by the review

The review of the Horticulture Code heard examples of instances of a range of potentially problematic conduct within the horticulture industry that could better be addressed by introducing a specific duty of good faith in the Code.

Response

Accept the recommendation.

Rationale and implementation

Including a statutory obligation of good faith in the Code would build trust and improve the standard of conduct between parties to a horticulture produce agreement.

It is likely there is a broad range of behaviour in the trading relationship, which may not be considered in good faith. Therefore it is expected that this obligation will act as a deterrent to prevent such behaviour and will act as a circuit breaker in the trading relationship between growers and traders.

While the Code will not define exactly what good faith means, it will provide that the obligation of good faith is to reflect historical judge-made law (known as the 'common law').

While the obligation to act in good faith has regard to whether a party has acted honestly and not arbitrarily, it does not require a party to act in the interests of the other party. Neither does it prevent a party from acting in their own legitimate commercial interests.

The duty of good faith will apply to all parties under the Code equally.

This response will result in amendments to the Code.

Recommendation 4

That the Horticulture Code be amended to allow a method or formula for determining prices paid to a grower, including pooling and price averaging where: parties have prior knowledge and agree to the method or formula in the horticulture produce agreement; if pooled, the pooled produce is of the same quality.

Issue identified by the review

The review of the Horticulture Code put forward that the use of additional methods to determine price would provide flexibility and transparency, which would be acceptable to both the trader and grower communities.

Response

Accept the recommendation.

Rationale and implementation

The ability for traders (acting as merchants) and growers to negotiate a method or formula to determine the price to be paid to growers under horticulture produce agreements would provide the parties with additional flexibility in the trading relationship and better reflects the operation of the market.

The Government is of the view that any agreement to use a method or formula must be in writing and therefore, must be agreed under a horticulture produce agreement. Any amendments to the method or formula must also be in writing and agreed via a horticulture produce agreement.

It is proposed that growers and traders be able to negotiate freely on the method or formula used. The Code would not regulate what method or formula may be used. A sale price, less an agreed documented margin was an approach put forward by stakeholders and one which would be available under the amended Code.

The use of a method or formula will require additional transparency in the trading relationship. As such, it is proposed that the Code be amended to include a requirement that a trader must provide the following information to a grower relating to the sale of their produce via a method or formula, in writing for each reporting period:

- the date/s of the sale of the grower's horticulture produce by the merchant
- the gross sale price of the horticulture produce, including the type, quantity and quality of horticulture produce sold
- details of any horticulture produce not sold, including the type, quantity and quality of the horticulture produce
- details of any horticulture produce destroyed/to be destroyed by the merchant.

Matters for agents would remain unchanged.

It is also proposed that pooling and price averaging be permitted where the parties agree in writing to its use under a horticulture produce agreement. The pooled produce must be of the same, agreed quality. Quality would be determined under the parties agreed quality standards, or where quality standards have not been agreed, under the FreshSpecs standard (see recommendation 6).

This response will result in amendments to the Code.

Recommendation 5

That the Government explore the inclusion of deeming provisions in the Horticulture Code to ensure that where a pre-existing contract is not in place, and where a Horticulture Produce Agreement is provided by the trader or sought by the grower, that the intent of the parties to enter into a horticulture produce agreement is deemed to have occurred. 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.

Issue identified by the review

The review of the Horticulture Code put forward that there was evidence of instances where draft horticulture produce agreements had been provided to growers by traders where growers proceeded to send produce without formalising the agreements. The reviewers also put forward instances where growers sought horticulture produce agreements from traders, which had not been provided, but traders, nevertheless, continued to accept growers' produce.

Response

Note the recommendation.

Rationale

A key element of the Code is the transparency achieved by requiring horticulture produce agreements to be in place.

While the Code does not aim to unduly interfere with the parties' freedom to contract, a key outcome sought from re-making the Code is ensuring that all parties have a clear understanding of the terms they are trading under. Therefore, the Code will continue to require that both parties accept the terms of a horticulture produce agreement so that every transaction is conducted with the necessary clarity of contractual terms. Trading without a horticulture produce agreement may result in a civil penalty being applied to both parties.

The Government will however amend the Code to allow for a greater range of options for acceptance of horticulture produce agreements. Currently the code requires that an agreement must be accepted via a signature. The Government will amend the code to simply require that an agreement be accepted in writing (including electronic forms of communication). This will provide both growers and traders with additional flexibility and will allow, for example, the use of email to finalise an agreement. Evidence of the offer and acceptance of the agreement will be required.

It is hoped that this amendment will achieve a higher rate of formal acceptance of horticulture produce agreements.

This response will result in amendments to the Code.

Recommendation 6

That the Horticulture Code be amended to require that where a horticulture produce agreement does not include specific quality specifications, FreshSpecs specifications be used as the default.

Issue identified by the review

The review of the Horticulture Code put forward that lack of clarity around quality specifications can cause conflict, damage relationships and delay trade. Establishing a default quality standard in the absence of any other contractually agreed standard has the potential to reduce disputes, and will benefit both growers and traders.

Response

Accept the recommendation.

Rationale and implementation

Whilst many factors affect quality, the use of a common product description language and comprehensive quality standards is aimed at facilitating a more efficient trading system.

The minimum terms of a horticulture produce agreement will state that parties may include the specific quality specifications to be observed. Where a quality specification is not agreed or included in the horticulture produce agreement, the FreshSpecs specification would be used as a default.

Nothing in the Code would prevent the FreshSpecs specification from being updated when required.

This response will result in amendments to the Code.

Recommendation 7

That the Horticulture Code be amended to remove the current exemption for contracts entered into prior to 15 December 2006.

Issue identified by the review

The review of the Horticulture Code put forward the view that pre-code contracts, given many are still in existence, deprive the sector of the best opportunity to operate effectively and appropriately. Although some traders have suggested that these agreements reflect a workable and flexible approach to trading, the exemption creates a dual system which is complex, inconsistent, inefficient and unfair.

The reviewers were firmly of the view that these contracts should be brought within the scope of the Horticulture Code, to the extent possible, in order to provide for more uniform participation and coverage of the Horticulture Code in the wholesale horticulture sector.

Response

Accept the recommendation.

Rationale and implementation

The Government agrees that the lack of coverage of transactions has resulted in a lack of behavioural change in the trading relationship between growers and traders. As such, the Government is keen to ensure that as many transactions between growers and traders fall under the Code as possible.

The required amendments to the Code will be made, however commencement of the change will be delayed by 12 months. This transitional period will allow parties to pre-code contracts ample opportunity to modify their arrangements in line with the amended Code. Once parties to a pre-code contract finalise a new horticulture produce agreement they will become subject to the Code immediately. Following the 12 month transitional period all transactions between growers and traders would fall under the Code.

Elements of the Code will apply to all contracts, including pre-code contracts from the date of its commencement. These may include the obligation to act in good faith and the dispute resolution procedure.

The Code would also include a clause in the Code that provides that, in the event that Commonwealth legislation gives rise to an acquisition of property contrary to s51(xxxi) of the Constitution, the affected party can seek just compensation from the party who has benefited from the acquisition of their property. The inclusion of such a provision is designed to mitigate any risk that the retrospective nature of the Code's application is unconstitutional. This provision is necessary to achieve the desired policy outcome.

This response will result in amendments to the Code.

Recommendation 8

That the Horticulture 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.

Issue identified by the review

The review of the Horticulture Code put forward that retailers be required to comply with the Horticulture Code, where they are not signatories to the Food and Grocery Code.

Response

Note the recommendation.

Rationale and implementation

While the Government recognises the reviewers' desire to ensure that growers' transactions with retailers be covered by a code, the Government believes that the implementation of this recommendation is not appropriate.

The Food and Grocery Code is a voluntary code prescribed under section 51AE of the *Competition and Consumer Act 2010*. Once a retailer or wholesaler opts-in, the Food and Grocery Code is binding and, like the Horticulture Code, a breach can be enforced by the ACCC. The Government introduced the Food and Grocery Code on 2 March 2015 to improve standards of business conduct in the grocery sector.

The Food and Grocery Code arose out of an industry-led response to concerns about the conduct of retailers towards their suppliers. The Food and Grocery Code aims to regulate commercial relations between retailers, wholesalers and suppliers.

As the Food and Grocery Code is voluntary it is able to include some provisions that would not ordinarily be included under a mandatory code. For example, the Food and Grocery Code provides for arbitration of disputes between parties to a grocery supply agreement. As the Food and Grocery Code is scheduled to be reviewed in 2018, its interaction with the Horticulture Code and a range of other matters, including whether it should remain voluntary or become mandatory, would be further considered then.

There are a number of differences between the Food and Grocery Code and the Horticulture Code. In particular the Food and Grocery Code focuses on aspects such as:

- product shelf allocation and de-listing, as well as payments for shrinkage, wastage and promotional activities.

The Horticulture Code focuses on aspects such as:

- transactions occurring on a merchant or agent basis, and provision of transaction information.

Ultimately the two codes are for separate purposes, one is voluntary, one is mandatory. The requirements under each code are significantly different. The requirements of the Horticulture Code are tailored for use in the trading relationship between a trader and a grower.

Further a strong case has not been made to justify extending the Horticulture Code to independent grocers and retailers. Evidence of problematic behaviour by independent retailers has not been identified by the review and regulating them may impose unnecessary red tape burdens and cause unintended consequences.

This response will not result in amendments to the Code.

Recommendation 9

That the Horticulture Code be amended to abolish the existing dispute resolution process and that it be replaced with an improved system which recognises the need for independent, fast, accessible, expert on site conciliation.

Issue identified by the review

The review of the Horticulture Code put forward that the Code's dispute resolution mechanism is irrelevant, inappropriate and largely not adopted by parties in the horticulture sector. In particular, that the role of the Horticulture Mediation Adviser (HMA) should be phased out. Most disputes are related to issues of the quality and timing of the delivery of produce, payments to growers, and the transparency of prices. The review considered an amended dispute resolution mechanism that focuses on these main points of contention is necessary for the Code to be more effective.

Response

Accept the recommendation in part.

Rationale and implementation

The Code allows growers and traders to establish their own dispute resolution procedures under a horticulture produce agreement. Growers and traders should be able to continue to negotiate and agree upon a dispute resolution mechanism that best meets their own commercial needs, without government intervention, and without committing to a course of action that may not complement the way they do business.

Growers and traders will continue to be free to contractually set their own dispute resolution processes and nominate their preferred mediator/conciliator/arbitrator/independent expert under their horticulture produce agreement. This will provide all parties with a flexible approach to dispute resolution and will allow the use of low cost dispute resolution services where available.

Growers and traders should identify processes that reflect the commercial nature of their disputes and be flexible enough to resolve the majority of issues that may arise out of their trading relationship. The National Farmers Federation stated in its submission to the review that the use of independent expert determinations would encourage the uptake of dispute resolution and provide a more level playing field in resolving disputes. Expert determination is a procedure by which the parties to a dispute appoint an independent and neutral expert to determine the dispute. The private use of such procedures by growers and traders, acting in good faith, is encouraged.

The role of government should be limited to providing a safety net dispute resolution procedure and an early intervention service. Further, the Government is limited by the Constitution as to what extent dispute resolution procedures can be mandated between parties to an agreement. As such, mediation will continue to be the option available under the Code.

The role of the HMA will be retained. The HMA provides a single point of contact for all parties to seek advice and where necessary formalise a mediation process. The Government will consult with the HMA in order to refine its role to achieve better outcomes for the parties.

Currently the HMA provides a range of services including maintaining a public list of produce assessors who can quickly assist the parties to a dispute regarding produce quality. However the Government has been informed by stakeholders that this facility is rarely used. This may reflect a general lack of understanding within the industry of the beneficial role of the HMA and the high number of transactions occurring outside the Code.

The Government will work with the HMA to formalise a process that will provide both growers and traders with a greater awareness of a possible courses of action to help resolve any disputes and prevent them from escalating.

This response will not result in amendments to the Code.

Recommendation 10

That the Horticulture Code be amended to provide that horticulture produce assessors be registered with the Australian Competition and Consumer Commission (ACCC) or the Australian Small Business and Family Enterprise Ombudsman, be appropriately qualified, trained, accredited (as determined by the ACCC or the Ombudsman) and capable of acting as non-determinative conciliators between the parties and recording the outcome of any resolution between the parties.

Issue identified by the review

The review of the Horticulture Code put forward that the Code's dispute resolution mechanism is irrelevant, inappropriate and largely not adopted by parties in the horticulture sector. In particular, that the role of the Horticulture Mediation Adviser (HMA) should be phased out. Most disputes are related to issues of the quality and timing of the delivery of produce, payments to growers, and the transparency of prices. The review considered an amended dispute resolution mechanism that focuses on these main points of contention is necessary for the Code to be more effective.

Response

Reject the recommendation.

Rationale

It is not the role of the ACCC or the Australian Small Business and Family Enterprise Ombudsman to register horticulture produce assessors. There also may be legislative impediments to such an approach.

Further, horticulture produce assessors may not be appropriately qualified to partake in a dispute resolution process beyond their current role, and therefore it would be problematic to implement such a change to the dispute resolution process.

The HMA is currently required to maintain a publicly available list of horticulture produce assessors, including their relevant qualifications. This, along with the capacity to provide a range of services, allows the HMA to quickly assist the parties to a dispute regarding produce quality.

Further, growers and traders will be free to set their own dispute resolution procedures. It is open to the parties to include dispute resolution procedures in their agreement, which include those necessary characteristics that were identified by the review, for example, quick and determinative.

This response will not result in amendments to the Code.

Recommendation 11

That the Horticulture Code be amended to provide for civil penalties and infringement notices for breaches of the Code.

Issue identified by the review

The review of the Horticulture Code put forward that a code lacking proper enforcement powers is unlikely to deter unacceptable conduct and inappropriate behaviour. They therefore considered the enforcement powers available to the ACCC under the Code should be broadened to include civil penalties. The reviewers also stated that, infringement notices, which are designed to provide timely, cost effective enforcement outcomes in relation to relatively minor contraventions of the Code, should be able to be issued to both growers and traders.

Response

Accept the recommendation.

Rationale and implementation

The Government will introduce civil penalty provisions into key provisions of the Horticulture Code to enhance the enforcement tools available to the ACCC by allowing it to take rapid action when breaches of the Code do occur.

The ACCC takes a risk based approach to enforcement, addressing serious non-compliance through court action. For example, under the Code's current enforcement regime the ACCC may seek a declaration from the court of a breach, an injunction to stop a party from continuing to breach the Code or accept a written undertaking.

Following amendments to Part IVB of the Competition and Consumer Act 2010 (the Act), codes of conduct are now able to include civil penalty provisions. Failure to comply with a civil penalty provision could result in the ACCC taking court action seeking a financial penalty up to a maximum amount, or issuing an infringement notice for the breach. Infringement notices are a timely and cost-effective way of resolving the ACCC's concerns and avoiding legal proceedings.

The introduction of civil penalty provisions into the Horticulture Code will more effectively deter breaches of the Code and facilitate greater compliance across the sector, which may also assist in reducing disputes.

This response will result in amendments to the Code.

Recommendation 12

That the Horticulture 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 (compliance check powers) to assess a trader's compliance with the Code.

Issue identified by the review

The review of the Horticulture Code received a submission from the ACCC which recommended that in order to implement compliance checks, the Horticulture Code should be amended to require parties to keep, generate or publish appropriate paperwork. The ACCC noted that amending the Horticulture Code to require parties to generate and keep a list of parties they deal with would increase the capacity of the ACCC to identify non-compliance with the Code and would impose little regulatory burden. The independent reviewers accepted the ACCC's submission.

Response

Accept the recommendation.

Rationale and implementation

The Government's view is that the Code should provide for additional record keeping where appropriate. That is, parties to the Code should be required to generate and keep relevant information to allow the ACCC to conduct a compliance check under the Act. As such this change would apply to both growers and traders.

The ACCC currently has the capacity to require companies to provide information they are required to keep, generate or publish under the Code. Accordingly, transaction details that traders are presently required to provide to growers under the Code (see, for example, clauses 20 and 28) can also be requested by the ACCC under section 51ADD of the Act.

The ACCC proposed to the reviewers that traders generate and keep a record of growers they deal with. As it is expected that businesses should have a list of growers they trade with, this should not cause additional burden.

Similarly, a trader should be required to generate and keep a record of all buyers it deals with. This would enable the ACCC to obtain the information from traders and to check the veracity of allegations where a grower alleges a trader is not passing on the full amounts as agreed under a horticulture produce agreement. Traders should already have such a list. However, in the absence of a statement in the Code for such a list to be kept, it cannot be obtained under the section 51ADD compliance check powers.

Consistent with the above, growers should also be required by the Code to generate and keep a record of traders they deal with for the same reasons outlined. As it is expected that growers should already generate such records, this should not cause additional burden.

This response will result in changes to the Code.

Recommendation 13

That as part of its role in enforcing the Horticulture 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. Such information should be: in plain English (and other languages as appropriate); released in industry newsletters; released via an agreed timetable.

Issue identified by the review

The review of the Horticulture Code put forward that there is a significant lack of knowledge and understanding of the operation of the Horticulture Code amongst both growers and traders, which contributes to a poor level of compliance. The reviewers believed there is currently little education material on the Code provided through grower or trader industry bodies.

Response

Accept the recommendation in principle.

Rationale and implementation

The ACCC will continue to engage in consumer and industry outreach and education in relation to the Code and produce guidance on any amendments to the Code. The timing, audience and content of any such outreach will remain at the ACCC's discretion.

Some activities the ACCC has conducted for past campaigns for codes of conduct include:

- website and hard copy guidance material
- media releases
- videos
- webinars
- live presentations at events/forums/workshops
- digital advertising and ACCC social media (Twitter, Facebook, Youtube & LinkedIn)
- mailouts to subscribers of the ACCC networks (6000+ subscribers) and mailouts to key stakeholders (Consultative Committee Members, Small Business Commissioners and industry associations).

This response will not result in changes to the Code.