growcom

together we grow

Submission to the

Australian Competition and Consumer Commission

on the

Issues Paper regarding the Horticulture Code of Conduct

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1. OVERVIEW

Growcom is providing this submission to the Australian Competition and Consumer Commission (ACCC) in response to the Issues Paper regarding the Horticulture Code of Conduct (the Code) released on 20 May 2008. This submission is provided in addition to our response to the first Issues Paper released on the 11 February 2008 (submission number 069), where Growcom provided feedback on the effectiveness of the Code.

We believe the current Code, if properly enforced, will provide greater clarity and transparency around trading transactions in horticulture products. Industry was aware the implementation of the Code would be a difficult and long term process due to the major cultural shift it represented.

However, perceived inaction by the ACCC and government has allowed behaviours which are illegal under the Code to continue with very limited visible consequences and hence little deterrence impact.

Overall, Growcom seeks support for:

- Broadening the scope of compliance activities;
- Further education and training;
- Amendments based on industry needs; and
- Enhancements to the ombudsman's role and dispute resolution processes.

This submission will provide feedback on the issues outlined in the ACCC Issues Paper regarding the Horticulture Code of Conduct.

2. ABOUT GROWCOM

Growcom is the peak representative body for the fruit and vegetable growing industry in Queensland, providing a range of advocacy, research and industry development services to the sector. We are the only organisation in Australia to deliver services across the entire horticulture industry to businesses and organisations of all commodities, sizes and regions, as well as to associated industries in the supply chain. We are constantly in contact with growers and other horticultural business operators. As a result, we are well aware of the outlook, expectations and practical needs of our industry.

The organisation was established in 1923 as a statutory body to represent and provide services to the fruit and vegetable growing industry. As a voluntary organisation since 2003, Growcom now has grower members throughout the state and works alongside other industry organisations, regional producer associations and corporate members. To provide services and networks to growers, Growcom has approximately fifty staff located in offices in Brisbane, Bundaberg, Ayr, Toowoomba and Tully.

Growcom is a member of a number of state and national industry organisations and uses these networks to promote our members' interests and to work with other industry bodies on issues of common interest.

3. ABOUT THE QUEENSLAND HORTICULTURE INDUSTRY

Queensland is Australia's premier state for fruit and vegetable production, growing one-third of the nation's produce.

Horticulture is Queensland's second largest primary industry, worth almost $2 billion per annum at farm gate and directly employing around 25,000 people. Queensland's 2,800 farms produce more than 120 types of fruit and vegetables and are located from Stanthorpe in the south to the Atherton Tablelands in the far north. The state is responsible for the majority of Australia's banana, pineapple, mandarin, avocado, beetroot and fresh tomato production. There are 16 defined horticultural regions with a total area under fruit and vegetable production of approximately 100,000 hectares.

The Queensland horticulture industry is:

- A major contributor to regional economies and the mainstay of many regional communities;
- The largest high quality supplier of fresh fruit and vegetables to Australian consumers;
- A diverse industry utilising a range of production methods in different locations and climates;
- A resource base for significant value adding throughout the food, transport, wholesale and retail industries;
- The most labour intensive of all agricultural industries, with labour representing as much as 50% of the overall operating costs;
- An industry with significant links to the tourism industry, providing income for thousands of backpackers and "grey nomads" each year;
- A high value and efficient user of water resources in terms of agricultural production;
- A primary and secondary source of income for many families in regional Queensland e.g. through seasonal work in packing sheds; and
- The site for a number of emerging agricultural industries including olives, Asian exotic tropical fruits, culinary herbs, bush foods, functional foods and nutraceuticals.

4. GROWCOM'S POLICY POSITION ON THE HORTICULTURE BUSINESS ENVIRONMENT

Growcom expects that horticultural producers will be able to operate in a reasonable business environment, with opportunity for fair competition. We believe this environment should have:

- Transparent relationships in the value chain;
- Relationships between suppliers and customers that are not distorted by market power;
- Opportunity for market growth by meeting consumer demands;
- Reasonable cost of doing business; and
- Reasonable sharing of risks and rewards.

Growcom supports the mandatory Horticulture Code of Conduct as an important tool for improving the transparency and clarity of transactions between growers and traders. We aim to work with government to ensure the Code is successful in achieving its objectives. This includes strengthening compliance commitments, further education and training, amendments based on industry needs and enhancing the Ombudsman and dispute resolution processes.

5. REVIEW OF THE HORTICULTURE CODE AS PART OF THE GROCERY INQUIRY

Growcom welcomed the announcement that the ACCC food price inquiry would include the Horticulture Code of Conduct as part of its terms of reference. When making the announcement during the federal election campaign, Growcom believed it indicated that a Labor government was prepared to act to address growers' concerns about the need for stronger enforcement of the Code.

The recent change of government has also corresponded with public enforcement actions against traders in Western Australia found to be undertaking practices that contravene the regulations. Whilst this is welcome, it is almost a case of 'too little, too late'. Visible enforcement activity must be ramped up.

The first Issue Paper released on the 11 February 2008 specifically looked at questions relating to the effectiveness of the Horticulture Code in meeting its objectives to:

- Regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and
- Provide a fair and equitable dispute resolution procedure for disputes arising under the Code or a horticulture produce agreement.

Growcom is supportive of activities aimed at increasing enforcement and compliance with the Horticulture Code of Conduct that has been put in place to ensure the above objectives are achieved.

The Code was introduced on 14 May 2007, and so has now been in operation for just over a year. It is only natural for there to be a transition period and some reluctance to change business practices. The limited scope of visible enforcement activity and subsequent consequences for non-compliance has actually encouraged those unwilling to adjust to this new business model to continue doing business as they always have.

In fact, it is no exaggeration to say that the lack of enforcement activity means that Code has yet to be fully implemented. On that basis, it is generally not possible to assess its efficacy – with the exception of some clear failings with respect to circumstances not clearly understood in the development of the Code regulations.

In our view, until the Code is properly enforced, it is impossible to thoroughly determine whether it has been effective or not; and is subsequently not appropriate to undertake a thorough review.

It is therefore far too early to make any significant changes to the Code, with the exception of the aforementioned issues arising from unforeseen circumstances (eg how pack houses, other grower-owned mutualities, and retailers' agents are affected by the Code). This is especially so if there is limited opportunity for stakeholders to provide input into a consultation process.

6. EFFECTIVENESS OF THE HORTICULTURE CODE

Growcom is aware of examples that demonstrate the Horticulture Code of Conduct can be effective in achieving its objectives and lead to successful business relationships and trading behaviours between growers and traders. This includes Code-compliant merchant and agent Horticulture Produce Agreements (HPAs) successfully operating within the industry.

However, there is overall non-compliance with the Code throughout the horticulture industry. Many traders (and therefore their grower suppliers) have taken a 'business as usual' approach in terms of their trading practices. We are aware that there are still many parties trading without any contractual agreements at all; many are still trading with illegal contracts (illegally back-dated to pre-15th December 2006; or utilising non-compliant clauses). Furthermore, many traders are still refusing to negotiate contracts; and growers feel powerless to pursue a Code-compliant contract.

It is extremely difficult to determine the effectiveness of the Horticulture Code of Conduct when the majority of businesses are operating outside these regulations. Without significant and widespread enforcement, traders retain their ability to minimise risk and maximise profit by unilaterally setting produce prices and other trading terms.

As a consequence of the lack of compliance and enforcement activities, the Code has not yet addressed either the imbalance of power in the marketplace, or the issues of market failure, that it was specifically established to tackle.

The current situation can be characterised by the following:

- A large proportion of the industry is operating under contracts artificially dated before 15 December 2006;
- The vast majority of HPAs originate from the trader, with many containing non-Code complaint clauses that ultimately benefit the trader and disadvantage the grower;
- If a grower has tried to obtain a compliant HPA, generally there is no willingness by the trader to negotiate;
- There are very few examples of contracts that have originated from a grower, with the majority of these being rejected by the trader in any case;
- Many traders are continuing to confuse growers by not supplying clear and accurate information;
- Many growers have felt forced to sign contracts to just "get on with business";
- There are examples of growers being "black listed" by all traders in one or more of the central markets if they have attempted to negotiate a compliant agreement, or raise issues or complaints with the ACCC;

- There is also a clear campaign by some trader organisations to insist that their members act only as merchants and not as agents (even though in practice many are still acting in the "hybrid" manner which is specifically outlawed by the Code);
- Many growers are still being intimidated or convinced to sell their produce (frequently highly perishable and with a short season) on the traders' terms; because the alternative is to have no avenue in which to do business;
- Events in the past year have demonstrated that many traders will not operate in an open and transparent manner;
- Non-compliance with the Code by many traders has been heightened by the lack of enforcement action by the ACCC.

All of these behaviours by traders and the lack of overt action by the ACCC are undermining the intent and implementation of the Code. This is a major issue which requires immediate and intensive action, particularly emphasising enforcement.

No substantive review of the Code should be undertaken until there has been a reasonable period of enforcement of the current rules.

7. CASE STUDIES OF RECENT EVENTS

Growcom provides the following case studies which demonstrate the behaviours and activities that have been happening within the horticulture industry since the mandatory code was introduced. This is only a sample of a few of the many case studies that we have come across since the introduction of the Code. These case studies deliberately exclude the names of growers as they fear retaliation in the market place if their identities were made known, and Growcom does not wish to inadvertently place growers in this position.

Case study 1

A trader encouraged a grower to sell their high quality stone fruit through their business, as they had a prior good relationship. The grower signed a HPA with the trader prior to trading, which may not have been Code-compliant. There was, however, a clause within the HPA that stated the trader would pay the grower within 30 days.

Two months after the grower's fruit had been sold, the grower had still not been paid by the trader. When the grower made a complaint to the trader, they were told to 'stop making trouble'. The grower contacted Growcom to determine what options they had, and was subsequently directed to contact the Ombudsman.

Case study 2

A grower was sent a merchant contract by a trader, which was subsequently signed and returned. The grower began trading with the trader under the belief the HPA was valid. The trader claimed to have sold the grower's produce to a major retailer, and indicated that the retailer returned it several days later.

The trader then attempted to reduce the price paid to the grower by downgrading the product.

When the grower tried to resolve the dispute, it was found that the HPA had only been signed by the grower, and not the trader, therefore making it void and leaving the grower with no options to pursue the matter further.

Case study 3

A trader sent an HPA to a grower who produces a low turnover high value line which only a limited number of traders are prepared to handle. The grower wished to trade with this trader, but was not comfortable with some of the clauses contained in the HPA that were considered by the grower to be non-code compliant.

The grower went back to the trader advising that, if the questionable clauses were altered, they would sign the HPA which they believed would be the basis for building a successful relationship. The trader informed the grower that they have to find another trader to deal with, despite there being no other avenue for the grower to sell their product. Under these circumstances, this grower felt he had no further option but to sign the non-compliant HPA. The grower was not willing to make a formal complaint for fear of commercial retribution.

Case study 4

A national organisation representing growers of a highly seasonal niche product line has been proactive in assisting its members with the Code. Because of the nature of this product, only a limited number of traders are prepared to handle it. This limits the choice of traders available for growers to deal with.

Prior to its introduction, this organisation sent all its members copies of the agent and merchant HPAs as developed by the peak national bodies, urging their growers to choose one and send it to their trader. The majority of growers chose the agency agreement, as this was the way their product has traditionally been sold.

The response from all traders was the same - none would accept the growers' HPAs. Some traders subsequently sent their own HPAs to growers; other traders have still not provided HPAs. The traders refused to act as agents and, further, all the HPAs sent to growers were found to be non code compliant.

The merchant HPAs that have been sent to the growers did not define how the price will be agreed upon. When this was queried, the growers were told by the trader that "I'll report the price to you as I've always done – within 24 hours of receiving the fruit" meaning after the fruit was already sold. This meant that the trader was trading in the same manner as they had always done – precisely what the Code was introduced to overcome.

The industry organisation continues to urge traders and growers to develop compliant agent HPAs. However, code compliant agency HPAs are still not forthcoming.

Case study 5

A grower has a long standing relationship with a trader, who has informed them that abiding by the Code will mean that mountains of paperwork around reporting will just cause confusion and that it is too difficult to work with.

This included advice that, if the Code were to be followed, the grower would need to be prepared to accept telephone calls setting prices in the early hours of the morning, which was not seen as an attractive option.

This deliberate strategy of misinformation by the trader has convinced the grower to operate outside the Code, as they believe making it work is too difficult and time consuming for both parties.

8. ISSUES RAISED IN THE DISCUSSION PAPER

8.1 Enforcement of the code

Until recently, the ACCC has taken very limited visible enforcement action against those doing the wrong thing under the Horticulture Code of Conduct. Even now, that enforcement activity appears to have been limited to Western Australia.

As a result, feedback commonly received from growers is that the Code has no strength or impact, as there has been limited enforcement with no penalty associated with doing the wrong thing. There is thus little incentive for traders or growers to change their business practices.

This is despite the fact that the Code is relatively simple to apply. For example, Growcom developed a seven point checklist to help growers comply with the Code:

1. Get the facts on the code. Be aware of your rights and responsibilities. Visit ACCC's web site at www.accc.gov.au or Growcom at www.growcom.com.au.
2. Determine whether you want to deal with a wholesaler as an agent (selling your produce for a commission or fee) or a merchant (who will buy the grower's produce for resale).
3. Obtain copies of your preferred traders' terms of trade and consider if the terms suit your business.
4. Contact the traders you want to do business with and negotiate your horticulture produce agreement. This must include the minimum requirements under the Code including payment periods, any quality or delivery requirements, the process for terminating the agreement and agency commissions.
4. Ensure that the horticulture produce agreement is signed by both the wholesaler and yourself and file it for future reference. Start trading.
5. Where a wholesaler refuses to sign the agreement, ensure you record your attempts to negotiate the agreement with the wholesaler (e.g. dates and times contacted). Keep your preferred horticulture produce agreement on file. In the event of a dispute that can't be resolved between yourself and the wholesaler, contact the Horticulture Mediation Advisor on 1800 206 385.
6. Do not sign contracts that do not meet the requirements of the code or do not address all the issues outlined here – and seek legal advice if you are unsure of any clauses in contracts.

There should be no excuse for not abiding by the law.

However, the ACCC appears to be relying on gathering evidence via industry sources (growers, industry groups) to make a case against one or more traders in order to take enforcement action. Our experience indicates that the majority of growers are unwilling to step forward and complain for fear of retribution. Growers that have made complaints and provided non-Code compliant HPAs to the ACCC have been disappointed with the lack of action and enforcement. They feel this has left them with no option but to do as the trader tells them.

Overall, continuing bad behaviours and non-compliance with the Code by many in the wholesale sector undermines the regulations and the credibility of the ACCC, government and the industry.

Furthermore, the lack of public enforcement measures by the ACCC has resulted in the Code not yet addressing either of the major issues of the imbalance of power in the marketplace and, if anything, entrenching the very issues of market failure it was introduced to address.

Growcom submits that there must be ongoing, active and visible enforcement of the Code by the ACCC.

Reliance on legal action against non-compliant businesses is resource intensive and slow to show results. This means that only limited actions can be mounted by the ACCC and hence the deterrent effect of feared consequences for non-compliance is also limited.

We believe the ACCC needs to adopt enforcement strategies that are more likely to be successful in this industry. In our view, the ACCC needs to be more overt in their policing. It needs to adopt other, more visible strategies, such as public visits at traders' place of business to match consignments with HPAs. Such visible enforcement actions are likely to encourage greater compliance than individual legal actions, where it is still possible for operators to feel comfortable in 'running the odds' against being caught.

Furthermore, an extensive education and information campaign needs to be implemented and maintained to gain a higher level of awareness and understanding within the industry. Generally, there is limited awareness of the ombudsman and the dispute resolution processes, as there is limited promotion and no apparent communication campaign underway.

Industry will continue to view the ACCC as a "toothless tiger" while it appears to condone massive non-compliance with no penalties attached. This view is prominent across the industry. It is therefore highly unlikely that behaviours will change until the ACCC takes visible action across the country against those knowingly breaking the law. The only way recalcitrant players will be brought into compliance is through a real threat of punishment. Thus, the Code must be not only enforced appropriately by the ACCC – but it must be seen to be enforced.

8.2 Extension of the code to cover retailers and their agents

Growcom is aware of positive business relationships many growers have with the major retail chains, where contacts are established and orders/prices are known well in advance.

Growcom does not support the extension of the Code to include all first transactions from the grower. We argued strongly for the introduction of the Code to regulate one aspect – and one aspect only – of the grower transaction process: contractual clarity as to whether a sale was undertaken on an agent or a merchant basis.

Direct sales to the major retailers and to many processors are already clearly delineated as merchant transactions. There is thus no need for these sales to be governed by the Horticulture Code.

In fact, as the two major retailers have signed the much more comprehensive Produce and Grocery Code of Conduct (PGCC), these transactions are subject to far more onerous requirements than those of the Horticulture Code.

We recognise that there are some transactions which in the development of the code were not clearly defined or handled eg pack houses and intermediary companies buying on behalf of retailers. We believe these transactions can be clarified with minor modifications to the Code.

We make some specific comments related to pack houses and other grower owned entities further on in this submission.

Growcom believes the issue of retailers' agents is easily dealt with under the Code as it stands. Retailers' agents are traders as defined in the Code, as they are operating as traders in the first transaction with the grower. Where the produce ends up is irrelevant, as is who they may be acting for or the arrangement under which they may be acting. The only exemption we have ever contemplated is for direct sales to retailers (ie where there is no middleman at all). These would be reflected in a specific contract for sale (almost always on a merchant basis) signed by a nominated organisational representative of a major retailer. This exemption can only be justified where the retailer involved has signed on to the more onerous PGCC.

In our view, trying to include retailers which have signed on to the PGCC is likely to be counterproductive – and actually disadvantage growers. These retailers may decide to comply with the Horticulture Code, and not the PGCC. This would not be good for growers.

For the same reason, we would view with suspicion any suggestion that the Horticulture Code and the PGCC be merged. This would lead to a risk that the more extensive coverage of the PGCC would be watered down because not all industry players would be prepared to abide by these requirements – as is evidenced by the fact that very few market participants (and, to the best of our knowledge, no individual traders) have actually signed on to the PGCC.

As we all know, there are strong vested interests at play here. It would be advantageous to some who do not have growers' interests at heart for the industry to become embroiled in a pointless debate about inclusion of the major retailers in the Code. It would also take attention away from the main issue for which the Code was established: contractual clarity as to whether a sale was undertaken on an agent or a merchant basis.

A review has been planned after the Code has been in enforced operation for some time. If there are issues relating to first point of sale into retail (or processing) sectors, these could perhaps be reviewed at that time.

This would enable informed consideration of any outcomes of the current grocery price inquiry, which may throw some light on to behaviours in the retail sector. This is particularly important, as at this stage many of the supposed issues with respect to retailer/grower relationships are based more on anecdotal information than on documented fact.

8.3 Horticulture code transitional arrangements

Growcom is supportive of the suggestion to have a sunset clause placed on contracts dated prior to 15 December 2006.

Many of these contracts were illegally backdated following the announcement that this would be the final date for non-compliant HPAs.

Many growers signed backdated contracts under coercion or following "scare tactics" used by traders prior to and after the introduction of the Code.

Introduction of a sunset clause will ensure that all growers and all traders are in time trading under the Code regulations.

8.4 Definition of delivery & requirement that merchants establish a price on delivery

Wording in the regulations has resulted in a very loose interpretation of the term "prior to or upon delivery". This has provided the opportunity for traders to deliberately blur the line of what constitutes delivery and ownership, and subsequently the point in time in which the price is agreed upon. As a result, traders are continuing to trade in the way they always have - by taking ownership of the produce and setting the price at the point in time that best suits them. This allows them to subsequently minimise any risks they may face, while at the same time maximising their returns.

Once again, this has left growers open to abuses of market power. For most, the Code has had no real effect on their ability to negotiate a 'fair deal'. The definition of delivery needs to be clearer to limit the opportunity for traders to blur the lines.

If traders acknowledge the significant proportion of their business which is in actuality conducted on an agency basis, then the issue of price setting becomes a much lower order one.

On that basis, we believe NO formula for price-setting should be permitted. This would simply legitimise a return to the 'hybrid' model – the very practice that the Code was designed to stamp out.

It has always been industry's contention that the 'default' price decision point in a merchant transaction should be before the produce leaves the farm gate or prior to delivery. This leaves some negotiating power in the grower's hands, as they retain possession of the produce.

There is no need for the merchant to sight the produce before agreeing a price, as the price should be dependent on the product specifications.

If the produce does not meet the agreed specifications, then the trader has the right to implement the dispute resolution process and/or call in a Horticultural Produce Assessor.

8.5 Service agreements

As previously stated, the Code was introduced to regulate one aspect – and one aspect only – of the grower transaction process: contractual clarity as to whether a sale was undertaken on an agent or a merchant basis.

All other activities undertaken by a trader on behalf of a grower should therefore be separately negotiated and documented.

On that basis, Growcom believes that service agreements should remain outside the scope of HPAs.

8.6 Agents

The Code was introduced in recognition of clear market failure in the way in which growers' produce was dealt with in the marketplace. It was designed to regulate one aspect – and one aspect only – of the grower transaction process: contractual clarity as to whether a sale was undertaken on an agent or a merchant basis.

Despite attempts to position this as an esoteric and largely irrelevant issue, it is in fact at the core of market failure experienced by growers. It is worth recapping on why this is the case.

An agent sells produce on behalf of a grower. They charge a commission (service fee) for this service; and at no time do they actually own the produce. This means the trader has no risk in a transaction; but it also limits their ability to make profits as they can only charge the agreed commission. The agency relationship in this instance is the same as that of a real estate agent in a house sale. The service fee is charged for facilitating the sale.

In contrast, a merchant buys produce from a grower and on-sells it on his own behalf. This increases risk, as the merchant actually takes ownership of the produce when a price is agreed and therefore must bear any loss as a result of quality issues or poor pricing; but it also increases the profit potential, as the merchant can charge whatever price the market will bear.

Over many years, a common practice of 'hybrid' trading has developed: where a trader takes no risk (ie acts as an agent) but also has all profit upside (ie acts as a merchant). This has been presented to growers as an agency arrangement, with 'commissions' charged, but no transparency as to the final sale price, and with growers bearing all trading risks. Even more confusingly, traders have insisted they are merchants, not agents, to avoid having to provide information about final sale price (and hence their margins). It is also suggested that positioning themselves as merchants prevents them being caught in the GST net, despite the fact that they charge commissions for providing a service.

The Code was specifically introduced to address this unfair situation.

Yet there has been a clear campaign by some trader organisations to insist that their members act only as merchants and not as agents (even though in practice many are still acting in the "hybrid" manner which is specifically outlawed by the Code). This is why there have been few examples of Code-compliant agency HPAs available for growers.

Goods and Services Tax

In an agency transaction, the agent provides a service to the grower – and this service is liable for GST. Thus, some argue, traders would also be required to register with the ATO for the purposes of GST collection.

This argument is specious.

Whilst food itself is exempt from GST, all other activities undertaken by traders in their day to day businesses would attract GST. It is therefore difficult to envisage any trader business that would not already be registered for GST in order to claim refund of GST on payments made in operating their business.

At present, many grower returns from traders clearly display a 'commission' charge. Yet these traders insist they are trading as merchants rather than agents. There is no legitimate proposition that would define these 'commissions' as anything other than payment for a service. Therefore, traders charging commissions should be declaring these as income in their GST returns.

Ownership of bad debt

Debt collection from third party purchasers has also been an issue for growers dealing with agents or with traders acting in the hybrid model. In a true merchant transaction, a clearly defined payment is due from trader to grower. Growers therefore can follow up payments directly and, if required, initiate debt collection action.

However, in an agency or hybrid transaction, the grower is not aware of either the identity of the third party or of the value of the sale. This makes debt collection by the grower impossible, and the grower is thus reliant on the agent to ensure payment is made.

(As an aside, this is why Growcom was keen in the initial stages of the development of the Code to include a requirement for agents to identify both the identity of the third party or of the amount of the sale. This is normal practice in other sectors of the economy where agency transactions occur eg real estate. For obvious reasons, we were most disappointed when the final Code regulations did not include this requirement.)

Some agents have indicated that they consider debt collection on behalf of growers not their responsibility. This is clearly an issue of great concern to growers. However, there is an easy solution to this. If agents supply sales information to growers, then growers could take responsibility for collecting their own debts. This information is clearly available, as the agent must have it to collect the debts on their own behalf, so any argument about increased compliance burdens is nonsense.

Markets Credit Services

Traders have the option of 'factoring' their debts through markets credit services. These services charge traders a fee for debt management and collection. Purchasers are required to register with the credit service after undergoing credit reference checks, and traders have the option of refusing to deal with purchasers who are not registered. This limits administration of payments for traders and also their exposure to bad debts.

However, credit services are generally not open to growers.

Growcom believes it would be of great benefit to growers if they could use the markets credit services to limit their exposure to bad debts.

Agents could be instructed to deal only with registered purchasers; and then traders would have no responsibility for ensuring payments as growers could pursue this option through the credit service. Growers could also insist that they would also only enter into merchant transactions with traders registered with the market service.

Reporting to growers

It has also been suggested that the reporting requirements on traders under the Code may also deter them from acting as agents.

Growcom finds this position difficult to understand. There is nothing in the Code that requires additional record keeping and reporting obligations by traders (whether acting as agents or merchants) beyond what is required in the day-to-day management of any business. Thus, there is no 'compliance burden' beyond the ordinary costs associated with doing business.

Inspection of an agent's records

There is some concern that allowing a grower representative to inspect an agent's records could enable unfair advantage to a trader's competitors. Whilst it is not possible to entirely rule this out, it is drawing a very long bow. There would be no benefit to a grower to appoint a competing agent as their representative.

No evidence has been provided to indicate that this is a real issue. However, if it is, we would support the opening of markets credit services to growers to allow third party debt collection.

8.7 Packing houses and cooperatives

The introduction of the Code was always going to involve a learning process, as age-old business practices are updated to reflect the new regulations. It was inevitable in this process that some aspects of trade would not be adequately dealt with by the Code regulations as initially devised.

The way in which grower owned pack houses and cooperatives do business was one of the areas which has been negatively impacted by the Code regulations as implemented.

Growcom believes that the grower-owned pack houses and co-operative businesses (sometimes referred to 'grower owned mutualities') should not be classed as the first point of sale, as this essentially means that the growers are having an agreement with themselves.

Clearly, a HPA is not required in this transaction, as there is already a high level of transparency within the grower-owned cooperative trading relationship.

We believe that transactions between grower owned mutualities (GOMs) and traders should be covered by the code, rather than (as the regulations now require) transactions between the grower and the GOM. This will ensure that transparency and clarity can be bought to this trading relationship.

However, considerable thought and consultation will be necessary to identify the specific details of how this amendment of the regulations is implemented.

8.8 Pooling of produce and price averaging

Growcom emphatically opposes any proposal to allow traders to pool and price average. No formula for price-setting should be permitted – it would simply legitimise a return to the 'hybrid' model – the very practice that the Code was designed to stamp out'.

Having said that, we do recognise the need for some leeway for pooling and price averaging by pack houses and other GOMs. However, our position is that the definition of 'grower' within the Code should be expanded to include pack houses and other GOMs.

This would mean that these entities would not be defined as 'traders' for the purpose of the Code and could therefore deal with produce as agreed with their grower suppliers.

9. CONCLUSION

Growcom generally supports the recommendations outlined in the submission provided by the Horticulture Australia Council.

We do not, however, support their recommendation that the Code be expanded to include retailers. Our reasons for this position are outlined in detail above.

Growcom welcomes this opportunity to provide feedback on the implementation of the Code and anticipates that this feedback will be taken into consideration by the ACCC.

However, the extent of our response has been restricted due to the timeframes and limited resources available.

Any significant changes or implementation of recommendations relating to the Horticulture Code of Conduct would require a substantial consultation period to allow stakeholders sufficient opportunity to provide input.