

PUBLIC SUBMISSION TO THE ACCC GROCERY INQUIRY BY HORTICULTURE AUSTRALIA COUNCIL

**RESPONSE TO THE ISSUES PAPER FOR THE
HORTICULTURE CODE OF CONDUCT**

10 JUNE 2008



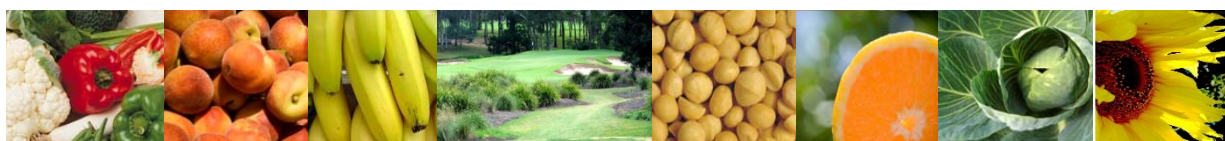
INTRODUCTION

Horticulture Australia Council (HAC) is the peak national industry body representing the Horticultural industries. Members of HAC are the national peak industry bodies (PIBs) for the Horticultural industries, and some State farmer organisations. Horticulture Australia Council (HAC) represents over 97% of the Australian horticulture industry, and its Member organisations include:

- Apple & Pear Australia
- Agricultural Investment Managers Australia
- Avocados Australia
- Australian Banana Growers' Council
- Australian Citrus Growers
- Australian Dried Fruit Association
- Australian Mushroom Growers Association
- Australian Nut Industry Council
- Australian Passionfruit Industry Association
- AUSVEG
- Cherry Growers of Australia
- Growcom
- NSW Farmers' Association
- Nursery and Garden Industry Australia
- Persimmon Industry Association
- Strawberries Australia
- Turf Producers Australia

Horticulture in Australia is intensive, generally irrigated, agriculture. Horticulture is a diverse industry, spread across the continent in a wide array of climates. Horticulture is the fastest growing industry in agriculture; with some 30,000 businesses nationally, and a farm gate value of \$7 billion. Total horticultural exports in 2006/07 were \$763 million. As the most labour intensive of all agricultural industries, Horticulture employs one-third of those employed in agriculture. The industry is the principal driver of many regions and local communities and economies in rural and regional Australia.

Horticulture welcomes the opportunity to provide additional detail in response to the Issues Paper released by the ACCC in May 2008 on the effectiveness of the Mandatory Horticulture Code of Conduct.



Summary of Recommendations

Issue - Enforcement of the Code:

- ❖ A proactive approach on behalf of the ACCC, with strong enforcement action. A major program, over several months, of random checking in all Central Markets - by authorised ACCC officials - of produce against Horticultural Produce Agreements (HPAs) and the Trader's books to ensure compliance.
- ❖ Non-compliance thus identified should merit strong enforcement action by the ACCC.
- ❖ A significant awareness-raising campaign to alert the trading parties to the roles and functions of the Mediation Advisor; particularly focussing on the types of issues dealt with, the likely costs, and the channels of approach (possibly including illustrative examples by way of 'super case-studies').

Issue - Extension of the Code to cover retailers and their agents:

- ❖ The coverage of the Code of Conduct should be expanded to include all first transactions from the grower.

Issue - The Horticulture Code transitional arrangements:

- ❖ Prompt introduction of a 'sunset clause' on all contracts dated pre-15th December 2006.

Issue - The definition of delivery and a requirement that merchants establish a price on delivery:

- ❖ The Code Regulations to be amended to place price decision point before the produce leaves the farm gate.
- ❖ NO formula for price-setting should be permitted.

Issue - Service agreements:

- ❖ Service agreements should remain outside the Horticulture Produce Agreement, and subject to a separate service provision contract.

Issue – Agents:

- ❖ Market credit services should permit growers to use the market credit services to collect their bad debts on behalf of growers.
- ❖ There is no requirement for Agent's current record keeping and reporting obligations under the Horticulture Code to be reduced – there is no 'compliance burden' beyond the ordinary costs associated with doing business.

Issue - Packing houses and cooperatives:

- ❖ The Code Regulations be amended to include all Grower-Owned Mutualities (GOMs) GOMs registered with the ATO as 'cooperative companies' under the definition of 'Grower' (i.e. "an individual, partnership, company, trust, or registered cooperative mutuality/company").

Issue – Pooling of produce and price averaging

- ❖ The Regulations be amended to deliver the intent that a range of quality specifications must be provided in the HPA.
- ❖ The ACCC further consult with industry on the possibility of amending the Code Regulations to allow Traders (particularly pack-houses) to pool and price-average produce - under certain very clear conditions (eg detailed product and quality specifications); with enhanced reporting responsibilities; and additional safe-guards for growers.

Industry stresses that there needs to be significant consultation between grower representatives, DAFF, and the ACCC to eliminate (as far as possible) ‘unintended consequences’ of any proposed changes to the Code Regulations.

RESPONSE TO ACCC ISSUES PAPER ON THE HORTICULTURE CODE OF CONDUCT

Horticulture believes that the Code, as written, provides greater clarity and transparency of transactions between growers and traders of horticultural produce. It provides for a fairer trading environment in regard to title and risk of the product, and also provides cost-effective dispute resolution processes.

Industry was aware that the implementation of the Code of Conduct would be a difficult and protracted process, as it represents a major cultural shift for all parties. There are also significant (financial) incentives for some parties (particularly Traders) to resist or avoid compliance with the Code.

The industry fully supports the intent of the Code; however we believe some issues need to be addressed within the wording of the Regulations to ensure its effective operation.

An effective Code is critical to the effective commercial operation of the fresh produce markets and consequently to the economic health of an industry valued at \$7 billion nationally.

If the intent of the Code remains unfulfilled, the Central Markets will continue to decline in favour of direct relationships with the major retailer chains. This is not in the interests of either the market Traders or the broader horticultural industry. It is certainly in growers' best interests to have a vibrant, competitive marketplace for their fresh produce.

1. Issue - Enforcement of the Code:

Is there reluctance by growers to: complain to the ACCC regarding breaches of the Horticulture Code; or to initiate a move from an existing exempt agreement onto a Horticulture Code compliant agreement? What evidence is there to support these claims? Are there any measures that could be adopted to facilitate the reporting of Horticulture Code breaches or to enable growers to initiate a shift from an existing exempt agreement to a Code compliant agreement?

We are aware that there are now some compliant HPAs and trading behaviour; and the Code has been shown to work effectively with both Merchant and Agent transactions.

There is indeed considerable reluctance by growers to complain to the ACCC regarding breaches of the Code, or to insist upon a move from an existing exempt agreement to a Horticulture Code compliant agreement. This is exacerbated by the poor results of enforcement to date, and an apprehension that confidentiality cannot be maintained once investigations by the ACCC commence.

Growers' reluctance to complain against a Trader or major retailer is partly attributable to their belief that they will be "sent on a holiday" (i.e. 'blackballed' in one or more markets by all/the majority of traders). Many growers believe that no matter how much the ACCC promises "anonymity" it is not difficult for a Trader or retailer to discover who complained - particularly as each trading condition is different, and the transaction being complained about identifies the grower.

Growers are still intimidated (or blackmailed) into selling their produce (frequently highly perishable and with a short season) on the Traders' terms; because the alternative is to let their produce rot, or not harvest it in the first instance. There have been clear attempts by some Trader organisations to encourage behaviours by Traders which are undermining the intent and implementation of the Code. This is a major issue, which requires immediate and intensive action, particularly emphasising enforcement, to address.

Industry is extremely disappointed with the poor uptake of the Code to date. For many Traders (and therefore their suppliers – large and small) it is 'business as usual' 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). While there is as yet no firm data on the extent of this massive non-compliance, the general view within industry is that it is as high as >85-95% (i.e. compliance of significantly less than 15%).

As a consequence, the Code has not yet addressed either the imbalance of power in the marketplace, or the issues of market failure, that it was established to tackle. Many Traders are still refusing to negotiate contracts; and growers feel powerless to pursue a Code-compliant contract.

Without significant and widespread enforcement, Traders retain their ability to transfer risk and unilaterally set produce prices and other trading terms.

Industry has been disappointed by the lack of enforcement activity by the ACCC in relation to the Horticulture Code of Conduct (the Code) to date. Our primary concern is to ensure that the new Code is actually operating as it was intended – which is not currently the case. Massive non-compliance with the Code makes this our first priority. Growers will not take legal action against non-complying Traders, and see the Australian Competition and Consumer Commission ('ACCC') as the only means of enforcement of the Code.

However, the current 'reactive' approach by the ACCC (waiting for grower complaints) has not shown satisfactory outcomes for a variety of reasons, including growers' fears of business repercussions.

Growers have been reluctant to provide evidence to the ACCC inquiry regarding breaches of the Code, for fear that they will be singled out for commercial retaliation by traders. Those growers who have, despite threats to their business, made complaints and provided evidence are disappointed with feedback from the ACCC that the evidence is 'insufficient'; or with the slow rate of progress on the complaint. Growers have made it clear that they will not put in writing detailed evidence of their experiences, as there is no guarantee of the confidentiality of anything committed to paper. They are however, prepared to consider any offer by the ACCC for an *in camera* session.

It is industry's contention that the most time- and cost-efficient method of ensuring compliance with the Code is to take a proactive approach - for the ACCC to have an active presence and conduct 'spot checks' in the Central Markets (i.e. the site of both major trading activity and the 'concentration point' of Horticultural Produce Agreements/contracts). That is, for ACCC inspectors to be frequently, and randomly, in the markets looking at the Traders' books on an *ad.hoc.* basis, comparing produce delivered with HPAs, etc.

We envisage a major program, over several months, of random checking in all Central Markets - by authorised ACCC officials - of produce against Horticultural Produce Agreements (HPAs) and the Trader's books. This would be intended to ensure that the transaction is compliant with the Code – rather in the manner of RBT or speed checks.

Strong enforcement action is required in follow-up. If prosecutions immediately followed every instance of any illegal activity thus exposed, we believe the instance of non-compliance would diminish rapidly, and compliant HPAs would then become the norm. The potential impact of prosecutions (in states other than WA) cannot be over-stated.

There is also confusion and lack of promotion around the dispute resolution process.

Industry has prepared a proposal for national implementation of an industry-developed, industry-delivered education program for growers in all affected horticultural regions. This is a skills-based approach to capacity-building for growers in what we hope will be the new business environment with enforcement of the Code, covering business skills including basic contract law, negotiation and basic assertion skills, and raising growers' awareness of the Mediation Advisor's services. We would be happy to discuss this proposal in greater detail at an appropriate opportunity.

Recommendation:

- ❖ **A proactive approach on behalf of the ACCC, with strong enforcement action. A major program, over several months, of random checking in all Central Markets - by authorised ACCC officials - of produce against Horticultural Produce Agreements (HPAs) and the Trader's books to ensure compliance.**
- ❖ **Non-compliance thus identified should merit strong enforcement action by the ACCC.**
- ❖ **A significant awareness-raising campaign to alert the trading parties to the roles and functions of the Mediation Advisor; particularly focussing on the types of issues dealt with, the likely costs, and the channels of approach (possibly including illustrative examples by way of 'super case-studies').**
- ❖ **Implementation of an industry-led capacity-building program for growers to assist their transition to the new business environment.**

2. Issue - Extension of the Code to cover retailers and their agents:

Should the Horticulture Code be extended to regulate retailers? On the one hand, the regulation of retailers and their agents may provide growers with greater clarity and transparency in their transactions with retailers. On the other hand, such an extension may capture dealings that do not warrant intervention and in doing so may impose unnecessary compliance costs. Alternatively, should the Horticulture Code be extended to cover retailer's agents (and not retailers themselves) as a distinct category of trader?

Industry has consistently supported the position that the Code should cover the first transaction from the grower and that it should apply to all parties; including, but not limited to, central market wholesalers (currently covered), other wholesalers and produce merchants (eg independent traders, or packhouses), brokers (Agents are currently covered, but not if they are acting directly on behalf of the retailers as Buyers' Agents), retailers, exporters and processors.

We also believe that the trading relationship beyond the first transaction from the grower should, under certain circumstances, be available for scrutiny under the provisions of the Code where it impacts adversely on parties subject to the Code. This would be applicable to ensure pricing transparency and to address issues related to trading with related parties.

We are well aware that many growers who deal directly with major retail chains have extensive contractual documentation which would more than meet the minimum requirements of the Horticulture Code. There could be no cause for objection from those retailers which are signatories to the Produce and Grocery Code, as the P&G ICAC has recently introduced guidelines for minimum requirements in contractual clarity and transparency of transactions which apply to its signatories. Nevertheless, retail chains moving towards direct purchase still don't necessarily provide growers with an agreement to do business; and not all retailers are signatories of the Produce and Grocery Code. It was pleasing to see Coles' chief operating officer come out recently in support of a single workable Code.

We understand that Coles' recent position is that they see benefits in participating in one single code of conduct. HAC's view is that this single Code should be the Mandatory Code of Conduct (with such amendments suggested herein), extended to include all retailers, processors, exporters and Traders at first transaction from growers.

Retailers should be included in the coverage of the Code, because there are not clear and transparent agreements to do business between the retailer (or their agent) and grower as at first believed. For example, while some growers don't have an issue, other growers have seen the prices of their produce change after delivery.

Such an expansion of the Code would, we believe, have significant benefits; for example:

- There would be greater acceptance by all parties if the Code covered 'first transaction from the grower'.
- Wholesalers currently believe they are being 'singled out', and have consistently signaled that they, too, would prefer a 'one in, all in' approach.
- The potential for confusion is significantly reduced if growers know that they must have an agreement with all commercial entities to which they sell their product. Minimal take-up of the Code can be attributed, in part, to confusion about who is "in" and who is "out". That is: Is the trader acting on behalf of the grower or the retailer? Is the agent selling to an exporter?

Recommendation:

- ❖ **The coverage of the Code of Conduct should be expanded to include all first transactions from the grower.**

3. Issue - The Horticulture Code transitional arrangements:

Should there be a cessation date on these exemptions (i.e. a sunset clause for prior to Dec 15th), in order to facilitate a consistent approach across the industry and to assist the ACCC's enforcement of the Horticulture Code? Would a sunset clause be an appropriate response to address the possible reluctance of growers to challenge the status quo created by the use of exempt agreements?

Industry is of the view that a sunset clause arrangement such as described would be of material benefit to the ACCC in its enforcement activities.

Such a move would encourage uniformity of implementation date. It would also be a 'blanket approach', and not require an individual grower to pursue a Trader(s) for a Code-compliant agreement.

Industry's view is that there should be a cessation date ('sunset clause') on contracts signed before 15 December 2006, with the intent that by the time the formal Review is due (after May 2009, but before May 2010) all growers and traders should be trading under current compliant agreements.

This initiative would, we believe, go a long way to address the reluctance of growers to challenge the *status quo* created by the use of 'exempt' agreements.

Recommendation:

- ❖ **Prompt introduction of a 'sunset clause' on all contracts dated pre-15th December 2006.**

4. Issue - The definition of delivery and a requirement that merchants establish a price on delivery:

Is the requirement that the parties agree on a price for produce either before or immediately upon delivery appropriate to achieve this goal of providing growers with clarity and certainty regarding the price they will receive? Should the Horticulture Code be amended to enable merchants to provide growers with a method or formula by which price will be established? Should this formula be restricted in any way to provide growers with greater transparency and clarity as to the price they will receive from the merchant?

The very loose interpretation of the term "prior to or upon delivery" in the Regulations for the agreed price for the agreed produce, has meant that Growers remain open to abuses of market power. For most, the Code has had no real effect on their ability to negotiate a 'fair deal'.

The requirement that the parties agree on a price for produce either 'before or immediately upon delivery' is not appropriate to achieve this goal of providing growers with clarity and certainty regarding the price they will receive. It is not in the Merchant's commercial interests to do so. The Merchant carries no risk - they continue to set the price, knowing that once they have possession of the produce, the grower has little option but to accept the offered price (particularly apposite in the case of highly perishable product).

It has always been industry's contention that the 'default' price decision point should be **before** the produce leaves the farm gate. At the very minimum, the Code Regulations need to be amended to make the price setting point 'prior to delivery', as it is generally understood in Australian commercial and contract law.

This leaves some negotiating power in the Grower's hands, as they retain possession of the produce.

NO formula for price-setting should be permitted – it would simply allow (legally) a return to the 'hybrid' model. The intent of the Code is to eliminate 'hybrid' transactions; i.e. for Merchants to

provide growers with a price before on-selling, and prohibiting Merchants from providing a price range or formula. There should thus be no changes to Clause 25. (1).

The ‘middle of the night’ negotiation so constantly touted by some wholesaler representatives is a “furphy” – this would be required if all negotiation on price was required to be undertaken ONLY at the point of delivery. (In the case of mangoes being dispatched from the Northern Territory, for example, there are several days between the produce leaving the farm gate and actual delivery!) Clearly, this is not in fact a requirement, and price negotiation can under the current Regulations take place at any time before ‘delivery’.

It is industry’s contention that many wholesalers/Traders have other reasons for not wishing to negotiate a price before the produce leaves the farm gate – and that these reasons are **not** related to ensuring ‘fair play’ for growers, or ensuring product quality.

It is critical to remember there is NO need for the Trader to sight the produce before agreeing a price, as the price should be dependent on clear, agreed, product specifications (outlined in the HPA). If the produce does not meet the agreed specifications, then the Trader has the right to reject the produce (as a breach of contract by the Grower), and/or call in a Horticultural Produce Assessor, and/or seek resolution of a dispute. Modern technology also allows for photos to be sent before leaving the farm-gate.

Recommendation:

- ❖ The Code Regulations to be amended to place price decision point before the produce leaves the farm gate.
- ❖ NO formula for price-setting should be permitted.

5. Issue - Service agreements:

Should the Horticulture Code permit merchants to provide growers with additional services as part of their horticulture produce agreement? If so, when should ownership transfer from the grower to the merchant take place? In these circumstances, should the Horticulture Code impose further obligations upon merchants, in addition to requiring them to take due care and skill, prior to the transfer of ownership?

Industry’s view is that service agreements (eg for ripening, or storage) should remain outside the Horticulture Produce Agreement (HPA). This would be an agreement specifically for a specified service (eg ripening) so the HPA would come into affect when the produce was ripened and ready for sale. This is analogous to the packing agreements also currently outside the Code.

If the Code Regulations are clear that the Merchant role includes taking ownership upon delivery of the product, subject to the goods being to specification, this eliminates the issue of Merchant ‘due care’ prior to transfer of ownership.

Service agreements which do not have a selling/marketing component should not be included.

Recommendation:

- ❖ Service agreements should remain outside the Horticulture Produce Agreement, and subject to a separate service provision contract.

6. Issue – Agents:

To enable growers to collect their own debts and to encourage traders to act as agents should market credit services permit growers to use the market credit services to collect their bad debts on behalf of growers? To what extent should agent's current record keeping and reporting obligations under the Horticulture Code be reduced in order to decrease their compliance burden, while retaining adequate transparency for growers?

It is an issue that growers often have to rely on Agents to collect their debts from the buyer, as they refuse to give the grower the buyer's details.

Horticulture supports a call for credit services to permit growers to use market credit services for debt collection (we believe this model is already operating in the Northern Territory).

Perhaps a time frame could be placed on the time it should take for an Agent to collect a debt, before the buyer's details are provided to the grower for collection.

There is a variety of 'explanations' offered as to the reluctance of Traders to act as Agents.

GST has been raised as an issue (on the Agents' commission fees), but industry believes most traders would be registered for GST for other parts of their business in any case. Some commission agents don't have any problem complying, as growers have discovered. There is some concern that there is still a hybrid arrangement in place to avoid GST or paperwork. It is imperative that reporting on the price growers' receives is dispatched immediately after the transaction has taken place, minus Agent commission.

However, it is industry's contention that the real reasons lie in the fact that the Merchant role offers the least risk and greatest potential commercial advantage.

Horticulture strongly queries the concept of increased 'compliance burden' (record keeping and reporting obligations). Industry believes that this is another "furphy"; the record-keeping for Agents is simply a normal task of operating a business (eg engaging with the Taxation system), and no 'additional' compliance is required.

An Agent must be required to keep records to allow proper accountability under the Code which is, in any event, consistent with good business and accounting practices. This in turn may be of assistance to the ATO in its consideration of any tax implications of the Traders' obligations, and the collection of statutory levies.

Recommendation:

- ❖ **Market credit services should permit growers to use the market credit services to collect their bad debts on behalf of growers.**
- ❖ **There is no requirement for Agent's current record keeping and reporting obligations under the Horticulture Code to be reduced – there is no 'compliance burden' beyond the ordinary costs associated with doing business.**

7. Issue - Packing houses and cooperatives:

Should transactions between growers and grower-owned cooperatives/packing houses be excluded from regulation by the Horticulture Code where the

*cooperative/packing house ‘markets’ the grower’s produce (i.e. act as an agent)?
Should dealings between the cooperative/packing house and traders be regulated by
the Horticulture Code?*

Packhouses providing a packing service and then returning the fruit to the grower should continue to be included in the Code (this is a service agreement).

Some packhouses have changed their operation to a merchant relationship where all the fruit is purchased outright and sold on to retailers, processors and exports. While growers may not get the “market price” for their produce the grower is assured of the price agreed upon and ownership then changes hands.

Industry recommends that the Code Regulations be amended to include all Grower-Owned Mutualities (GOMs) GOMs registered with the ATO as ‘cooperative companies’ under the definition of ‘Grower’ (i.e. “an individual, partnership, company, trust, or registered cooperative mutuality/company”).

This has the advantage of excluding Grower-owned mutualities (packhouse/marketing organisations) from the definition of a ‘Trader’ under the Code, and returning the ‘Trader’ relationship to the wholesaler rather than the co-operative. Trading relationships between the GOM and the Trader would thus be covered by the Code.

This change can apply only to GOMs (packhouses/marketing organisations) - it would not apply to Grower-packers acting as Traders to other growers, or to commercial packhouse/marketing organisations.

Recommendation:

- ❖ **The Code Regulations be amended to include all Grower-Owned Mutualities (GOMs) GOMs registered with the ATO as ‘cooperative companies’ under the definition of ‘Grower’ (i.e. “an individual, partnership, company, trust, or registered cooperative mutuality/company”).**

8. Issue – Pooling of produce and price averaging

Should the Horticulture Code be amended to provide greater flexibility within the industry for pooling and price averaging to enable growers to continue to manage their risk in circumstances where there are significant fluctuations in produce prices over time and across various markets throughout Australia. On the other hand, if the Horticulture Code were to permit pooling and price averaging, producers of high quality produce may not be treated fairly and as a result there may be less incentive to produce high quality produce. What protections should the Horticulture Code provide to growers who choose to join a pool and receive an average price?

One option to address this issue would require the amendment of the Regulations to allow Traders to pool and price-average produce under certain very clear conditions (eg detailed specifications) and with enhanced reporting responsibilities.

This option has the advantage of potentially excluding the Trader behaviours previously at issue, while allowing complying activity in packhouses/marketing organisations to continue (thus reducing compliance costs for those organisations).

Clear produce specifications used by Traders and growers (ideally, national product description language and quality specifications agreed with industry, not unilateral imposition of very broad product specifications), are essential if growers are to understand their supply obligations and if any disputes requiring the intervention of assessors are to be properly resolved. Industry suggests that clause 9.(2) (h). of the Regulations be amended to deliver the intent that a range of quality specifications must be provided in the agreement to facilitate clarity in both the agreement and in reporting.

However, there is significant concern within some sectors of industry that because this change will apply to all Traders (including wholesalers), there is still the possibility of abuses of market power, with reversion to problematic behaviour by some wholesalers.

Growers' views appear to be along the lines of: "They can't even deliver/enforce the Code described in the Regulations; how can we trust that there would be enforcement of any changes to pooling and price-averaging?". There would need to be a significant increase in both transparency of transactions, and enforcement activity on the Code in general, before growers will feel comfortable with such an approach.

If it were possible to legally 'quarantine' packhouse operations from the definition of 'Trader' for the purpose of any relaxation of the pooling and price-averaging requirements, this would significantly raise growers' comfort levels about any such change. It is difficult to see how, in the current interpretation of the Regulations, this could be achieved.

Recommendation:

- ❖ **The Regulations be amended to deliver the intent that a range of quality specifications must be provided in the HPA.**
- ❖ **The ACCC further consult with industry on the possibility of amending the Code Regulations to allow Traders (particularly pack-houses) to pool and price-average produce - under certain very clear conditions (eg detailed product and quality specifications); with enhanced reporting responsibilities; and additional safe-guards for growers.**

Industry stresses that there needs to be significant consultation between grower representatives (HAC is happy to coordinate grower input into this process), DAFF, and the ACCC to eliminate (as far as possible) 'unintended consequences' of any proposed changes to the Code Regulations.

HAC is also happy to coordinate an *in camera* session with growers willing to provide verbal evidence to the Commission on the issues raised in this paper.