



Australian
Competition &
Consumer
Commission

2015 review of the Horticulture Code of Conduct

ACCC submission

16 September 2015

1. Introduction

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing and promoting compliance with the *Competition and Consumer Act 2010* (CCA), including the Australia Consumer Law (ACL) and the Horticulture Code of Conduct (the Code). We achieve this in a number of ways including education, providing access to information and taking enforcement action where necessary.

The Code is prescribed under section 51AE of the CCA. A breach of the Code is a breach of section 51ACB of the CCA (previously section 51AD).

The objectives of the Code are to:

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

The Code was intended to address information asymmetries and bargaining power imbalances that were present in the horticulture industry prior to the introduction of the Code.

According to the Code's Regulation Impact Statement (2006), in some parts of the horticulture wholesale sector there was:

- an under-supply of important information, particularly in regard to prices obtained and prices paid by traders in the central markets;
- failure to invest in development of clear, written terms of trade arrangements; and
- inconsistencies in the treatment of high quality produce and volatility in the returns for quality.

The problems of lack of clarity and transparency were said to impact mainly on smaller scale growers, growers who are a long way from the markets, growers who supply infrequently to the markets, or who are new entrants. These growers were said to be disadvantaged, because they have less access to market information, face delays in payments and discover difficulties in finding a better wholesaler.

The ACCC is of the view that the Code has the potential to be effective and achieve the above objectives. However, feedback from industry indicates that a number of these original intentions haven't yet been achieved. For example, it is said that in its current form the Code has failed to cover the majority of the industry because of the current exemptions¹.

This submission outlines what the ACCC considers to be the current issues and makes recommendations to address these issues and improve the Code's effectiveness.

¹ Mareeba District Fruit and Vegetable Growers Association Inc, Submission to [House Standing Committee on Agriculture, Resources, Fisheries and Forestry](#) Horticultural Code and Farm Gate to Plate Bills, December 2011.

2. Current scope of the Code

The Code regulates wholesale trade in horticulture produce.² It applies to traders and growers that trade with each other on or after 14 May 2007.³

Horticulture produce is defined in the Code to mean unprocessed fruit, vegetables (including mushrooms and other edible fungi), nuts, herbs and other edible plants.⁴ A grower is defined as a person who grows their own horticulture produce for sale. A trader is defined as either an agent or a merchant. A merchant is defined as a person who purchases horticulture produce from a grower for the purpose of reselling that produce, and an agent is defined as a person who sells horticulture produce on behalf of a grower to another person for a commission or fee.

However, the Code does not regulate those who purchase produce for the purpose of retail, processing or export.⁵

Current exemptions to the Code

Retailers, processors and exporters

Both the draft⁶ and the final⁷ regulation impact statements reported that when the Code was introduced, supermarket retailers, exporters and processors provided growers with comparatively clear and transparent supply agreements. In recognition of what was understood to be relatively clear and transparent supply arrangements, the government exempted retailers, processors and exporters from the Code.

Existing written agreements

The Code came into effect on 14 May 2007 and automatically applied, and continues to apply, to horticulture trade that occurred on or after that date. However, if a grower and trader had a written agreement that was entered into prior to 15 December 2006⁸, the Code does not apply to trade under that agreement. Only if that agreement is varied on or after 14 May 2007, the Code will apply to trade under that agreement from the date of the variation. Any written agreement that was entered into after 15 December 2006 but before 14 May 2007 is subject to the Code from 14 May 2007.

Potato marketing schemes

The Code does not apply to growers and traders already trading under a statutory potato marketing scheme. A statutory marketing scheme is a state or territory scheme that regulates the marketing, sale or disposal of unprocessed potatoes. If the scheme is abolished the relevant conduct would become subject to the Code. The ACCC has had discussions with the WA potato marketing corporation as to the State Government's proposed abolition of the corporation in 2017.

² Clause 2 of the Horticulture Code

³ Regulation 3 of the Trade Practices (Horticulture Code of Conduct) Regulations 2006

⁴ The term 'unprocessed' is not defined in the Code. The meaning of unprocessed is determined on the circumstances of each case

⁵ Clause 3 of the Horticulture Code

⁶ Centre for International Economics, *Horticulture Code of Conduct*, draft regulation impact statement, July 2005, p. xix

⁷ DAFF, *Horticulture Code of Conduct*, regulation impact statement, December 2006, p. 9

⁸ The date the Code was registered on the Federal Registrar of Legislative Instruments

Key obligations under the Code

Trader's terms of trade

The Code requires that a trader prepare, publish and make public a document setting out the terms and conditions under which they are prepared to trade in horticulture produce with growers. A trader must give a copy of their terms of trade to any grower who asks for them.⁹ The terms of trade must comply with the Code and contain specific information.¹⁰

Horticulture produce agreements

A trader and a grower can only trade in horticulture produce with each other if they have entered into a HPA that complies with the Code.¹¹ A HPA must be in writing, signed by the parties to it and cover specific matters set out in the Code.¹²

Dispute resolution

Part 5 of the Code provides that growers and traders may use any dispute resolution procedure they choose to resolve horticulture disputes that arise between them. If a grower or trader initiates a dispute under the dispute resolution procedure set out in the Code, the other party must participate in the process as required by the Code.¹³

3. ACCC education/liaison activities

The ACCC has a team dedicated to industry codes. The team has prepared extensive materials to assist growers and traders to understand their rights and obligations under the Code and the CCA, including fact sheets and a comprehensive guide to the Code.

The ACCC has a web page devoted to the Code, with a link to the Code and other useful information about the Code and the Horticulture Mediation Adviser.

The ACCC offers a free email subscription service (Horticulture Information Network) for people who wish to be kept up-to-date with Code related developments and ACCC activities.

The ACCC also has a dedicated Small Business helpline for small businesses seeking quick guidance (1300 302 021).

The Commission regularly meets with relevant stakeholders and in 2014 the ACCC visited a number of stakeholders (including Ausveg, Brismark and the NSW Chamber of Fruit & Vegetable Industries) to discuss the Code and related issues.

⁹ Clause 4 of the Horticulture Code

¹⁰ Clause 5 of the Horticulture Code

¹¹ Clause 6 of the Horticulture Code

¹² Clause 9 of the Horticulture Code

¹³ Clause 30 of the Horticulture Code

4. Code Complaints

The ACCC receives relatively few Code related complaints (see table below).

Year	Complaints	Enquiries	Total
2015*	5	2	7
2014	2	2	4
2013	4	3	7
2012	3	4	7
2011	8	6	14
2010	16	5	21
2009	11	11	22
2008	40	35	75
2007	62	151	213
Total	151	219	370

*as at 13 August 2015

Anecdotally, the low number of complaints may be the result of growers fearing being 'blacklisted' by a trader if they lodge a complaint with the ACCC.

The ACCC has actively enforced the Code since its introduction in 2007. In this time we have taken successful court action against one trader and obtained court enforceable undertakings from nine traders.

Litigation

1. **Grove and Edgar** – failing to agree in writing the price to be paid for the produce of NT mango growers either before or immediately upon delivery (December 2008)

87B Undertakings

2. **Erceg Holdings** – trading with a non-compliant HPA (March 2008)
3. **A Giumelli and Sons** – trading without a HPA (April 2008)
4. **Karragullen Cool Storage** – trading with a non-compliant HPA and trading without a HPA (May 2008)
5. **Scamonte Ventures t/a Scalzi Produce** – trading without a HPA (June 2008)
6. **Brimcove t/a Etherington** – trading with a non-compliant HPA (June 2008)
7. **Atkinson Produce t/a Murray Bros** – trading with a non-compliant HPA (December 2008)
8. **LaManna Bananas** – trading on a non-arm's length basis (May 2009)
9. **Galdan Investments t/a Tropic Banana** – trading with growers without HPAs and without publically available terms of trade; failure to report to growers (January 2011)
10. **V & A Liangos Pty Ltd** – trading with growers without HPAs and without publically available terms of trade (February 2013)

5. Previous ACCC comments on the scope and efficacy of Code

The ACCC has previously provided views on the Code and its efficacy. On 22 January 2008, the government requested that we hold a public inquiry into the competitiveness of retail prices for standard groceries (the Grocery Inquiry). This included an assessment of the efficacy of the Code. At the time, we made 13 recommendations relevant to the Code summarised in the below table:

Recommendation	
1	Introduce civil pecuniary penalties and infringement notices for breaches of the Code and introduce random audits
2	Amend the Code to regulate first point of sale transactions between a grower and a retailer, exporter or processor
3	Amend the Code to cover agreements made before 15 December 2006
4	Amend the Code to compel a merchant to provide the price or a pricing formula for produce before delivery
5	Amend the Code to deem that produce not rejected with 24 hours is accepted
6	Amend the Code to allow a merchant to deduct cost of services from price
7	Amend the Code to allow an agent to deduct cost of services from amounts paid by purchaser before providing balance to grower
8	Amend the Code to prevent agent's competitor from inspecting agents records
9	Exempt transactions between a grower and cooperative/packing house, in which the grower has a significant interest, from the Code
10	Amend the Code to permit agents and growers to engage in pooling and price averaging
11	Exempt, other than from dispute resolutions procedures, transactions entered into in a grower shed at the central market
12	The government subsidise the cost of the dispute resolution procedures
13	ACCC implement further education initiatives

In October 2008 a Code Committee of market participants was asked to assist the government in responding to our recommendations. The Committee gave qualified support for most, but not all, of our recommendations. A summary of our recommendations and the committee's views is at pp 55-71 of the Issues Paper.

At the time of making our 2008 recommendations the Code had only been in place for a short time. Our recommendations were intended to address concerns raised by growers and traders in 28 submissions to the Grocery Inquiry. At the time, these concerns appeared to be serious and we considered that each of the amendments that we then recommended was required to make the Code workable.

We have given further consideration to our original 13 recommendations and we have set out below the issues and recommendations we wish to raise on this occasion.

6. Issues and recommendations

Recommendation 1: Expand the coverage of the Code to cover all trade in horticulture produce between a grower and a trader, including where a pre-15 December 2006 exists between the parties. Retailers should also be covered by the Code.

Issue: *The coverage of the Code is limited. In particular:*

- the Code does not apply to sales between a grower and a retailer, exporter or processor.
- the Code does not apply to agreements entered into before 15 December 2006 (unless they are subsequently varied)

Retailers, exporters and processors

As noted above, in 2008 the ACCC recommended that the Code be amended to regulate first point of sale transactions between a grower and a retailer, exporter or processor. Since that time, the ACCC has not received any information to suggest that growers are experiencing widespread issues with exporters or processors. Accordingly, we no longer consider it a priority to extend the Code to cover exporters or processors.

However, the ACCC continues to support the removal of exemptions for retailers, in order to give growers greater certainty in a trading relationship in which they lack bargaining power.

The Food and Grocery Code, in which came into effect in March 2015, aims to address problems arising from imbalances in bargaining power between supermarkets and suppliers, such as unfair transfer of commercial risk. The Horticulture Code is primarily intended to give growers transparency and certainty in their dealings with traders, particularly around price.

We note that **the Food and Grocery Code does not apply to the extent it conflicts with the Horticulture Code**. That is, where there is inconsistency between the two codes, the obligation in the Horticulture Code will prevail.

Pre-existing contracts

The ACCC understands that a significant number of horticulture produce contracts were entered into immediately before the commencement of the Code in order to avoid the obligations that would arise once the Code was in effect. Many of these contracts are written to be enduring and do not contain elements likely to require amendment, such as matters going to price. Absent termination by one of the parties, these types of contracts provide scope for the parties to operate outside the Code's requirements in perpetuity. As long as these agreements are exempt from complying with the Code, there will continue to be reluctance by traders to enter into new Code-compliant supply arrangements.

It is essential for the Code to apply to first point of sale transactions between a grower and a trader in horticulture produce. However the current structure of the Code precludes that operation for persons with pre-existing contracts.

The ACCC is of the view the best approach to achieve this is to apply the conduct obligations within the Code to pre-existing contracts without seeking to infringe upon property rights (to avoid Constitutional issues surrounding acquisition of rights on just terms). We believe the majority of conduct obligations in the Code could be applied to pre-existing contracts without giving rise to this issue.

This could be achieved by:

- (a) amending existing regulation 3(4) to provide an additional requirement that, until the agreement is varied, a trader must in relation to the agreement, comply with the disclosure requirements and other obligations set out in a schedule of the Code; and
- (b) inserting a schedule to the Code containing a self-contained statement of disclosure requirements and other obligations that reflect the provisions of the Code.

Recommendation 2: Introduce civil penalties and infringement notices for breaches of the Code. Require traders to generate and keep a list of the growers they deal with.

Issue: *Civil penalties are not available to deter breaches of the Code and the ACCC cannot issue infringement notices for a breach of the Code. Further, the ACCC cannot easily obtain details of the firms that a trader deals with.*

The current remedies available for a breach of the Code include declarations, injunctions, damages and other remedial orders (including third party redress). The ACCC can also issue a public warning notice for likely breaches of the Code.

While the ACCC can seek civil pecuniary penalties if a trader contravenes certain provisions of the Australian Consumer Law, civil pecuniary penalties are not currently available for breaches of the Code. The ACCC is also unable to issue infringement notices for likely breaches of the Code.

On 1 January 2015, the CCA was amended¹⁴ to insert provisions allowing regulations to be made that prescribe a pecuniary penalty not exceeding 300 penalty units for a breach of a civil penalty provision of an industry code.¹⁵ The CCA now also allows the ACCC to issue an infringement notice where it has reasonable grounds to believe a person has contravened a civil penalty provision of an industry code. At present the Franchising Code is the only industry code that includes civil penalty provisions.

The availability of infringement notices for breaches of the Code would allow the ACCC to more efficiently enforce the Code. Infringement notices could be utilised by the ACCC (after careful consideration) to quickly address deliberate “technical” breaches of the Code that may not warrant court action. Further, appropriate civil penalties would likely deter non-compliance with the Code.

The ACCC was given the power to conduct compliance checks (“audits”) under section 51ADD of the CCA from 1 January 2011. The power enables the ACCC to obtain from a corporation any information or documents it is required to **keep, generate or publish** under any industry code prescribed under the CCA (including the Code). The ACCC has conducted audits of 15 horticulture traders in the last four and a half years, with most traders found to be complying with the Code. In order to implement compliance checks into the Code, the Code will need to be amended to require traders to keep, generate or publish appropriate paperwork. If this requirement is introduced into the Code then the CCA will allow the ACCC to conduct compliance checks of this paperwork.

Anecdotally, a number of growers and traders are choosing not to set out their obligations in writing. Amending the Code to require traders to generate and keep a list of the growers it deals with would increase the capacity of the ACCC to identify non-compliance with the Code (we could obtain this list using the audit power) and would impose little regulatory

¹⁴ Competition and Consumer Amendment (Industry Code Penalties) Act 2014

¹⁵ While section 51AC(2) of the CCA provides the capacity for industry codes to provide for penalties, and therefore for infringement notices, the industry code regulation itself must set out that a civil penalty applies for a contravention. That penalty cannot exceed 300 penalty units.

burden, as such information should already be at hand (for example, traders should already have records of growers for taxation purposes).

Recommendation 3: Require merchants to agree on price before delivery. If the produce meets the specified quality, the merchant must accept it and pay the agreed price.

Issue: Anecdotally, some merchants do not agree on a price with growers either before delivery or immediately upon delivery (as required by the Code).

Anecdotally, some merchants wait to see what the market will pay for a grower's produce before contacting the grower to offer a price, sometimes days after the grower's produce has been delivered to the trader. By this time, the grower's produce may have begun to perish, and the grower's only real option may be to accept the price it is offered.

Therefore, we recommend an amendment to the Code that requires merchants to agree on price before delivery. If the produce meets the specified quality, the merchant must accept it and pay the agreed price. A horticulture produce assessor can be called in to report on the quality of produce if a dispute arises.

The ACCC understands that except in exceptional circumstances (e.g. the produce has been damaged in transit), it is possible to tell whether any type of produce meets agreed specifications immediately upon inspection. We understand that assessors usually prepare quality reports within 24 hours.

Traders who are unwilling to agree on a price before delivery (e.g. because of the risk of market fluctuations) can operate as an agent.

Recommendation 4: Exempt transparent, low value transactions.

Issue: Small cash transactions (e.g. those taking place in grower sheds) are currently caught by the Code, even though there is absolute transparency and immediate settlement.

In 2008, the ACCC recommended that sales in grower sheds at central markets be exempted from the Code (while allowing parties to access the Code's dispute resolution procedure) on the basis of the transparency and low value of such transactions.

The Horticulture Code Committee suggested that the same purpose could be achieved by exempting low value face-to-face transactions with immediate settlement. The ACCC supports this alternative option.

Recommendation 5: Permit agents to engage in pooling and price averaging of similar quality produce.

Issue: Pooling and price averaging appear to be supported by growers (e.g. because it limits their exposure to price fluctuations) and have obvious benefits for traders. Therefore, the prohibition against agents paying growers an average price for their produce appears unnecessary.

The Code requires that an agent pay a grower the money received for that grower's produce after subtracting any commission or agent fees permitted under the HPA and any extra amounts that may be deducted under the agreement.

The ACCC's view is that the practice of paying growers a price based on the average price received by the agent for a pool of produce (where various grades of produce from various growers are mixed together and then sent by the agent to be sold in markets throughout Australia) is not permitted under the Code.

Pooling and price averaging appear to be supported by growers (e.g. because it limits their exposure to price fluctuations) and have obvious benefits for traders. Therefore, the prohibition against agents paying growers an average price for their produce appears unnecessary.

Recommendation 6: Include an obligation to act in good faith

Issue: *The Issues Paper raises the question of whether the Code should include an obligation to act in good faith.*

The Franchising Code, Food & Grocery Code, Oilcode and Wheat Port Code all include an obligation to act in good faith. The most recent inclusion was in the Food and Grocery Code, which came into effect on 2 March 2015. The rationale of including it was to have fairness in dealings between franchisors and franchisees.

We recognise the value in introducing an obligation of good faith in the Code. Its inclusion will bring the Code into alignment with the other Industry Codes.

Recommendation 7: Consolidation of mediation advisory services in Australia

Issue: *The dispute resolution and mediation advisory regime in Australia is complex and has many options for business to business disputes. The Horticulture Mediation Adviser services appear to be underutilised.*

Each of the mandatory industry codes provide for the development of internal dispute resolution procedures and the option to refer an unresolved dispute to mediation. In some circumstances a mediation advisory service is appointed to assist with the administration of the dispute resolution procedure. These include:

- the Horticulture Mediation Adviser
- the Office of the Franchising Mediation Adviser
- the Dispute Resolution Adviser (Oilcode)

Other organisations, such as the Small Business Commissioner offices, also provide services to assist in dispute resolution process and can, if required, appoint a mediator.

It is our view that this system could be simplified. We recommend that consideration be given to consolidating mediation advisory services to a single entity; for example, the newly established office of the Small Business and Family Enterprise Ombudsman.