

ACCC inquiry into the competitiveness of retail prices for standard groceries

Issues Paper regarding the Horticulture Code of Conduct

20 May 2008

Background

On 22 January 2008, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs directed the Australian Competition and Consumer Commission (ACCC) to undertake an inquiry into grocery prices.

The Government has instructed the ACCC to take into consideration all aspects of the supply chain in the grocery industry including the nature of competition at the supply, wholesale, and retail levels of the grocery industry to ensure consumers are getting a fair deal. The Government has also asked the ACCC to consider the effectiveness of the Horticulture Code of Conduct (the Code), and whether the inclusion of other major buyers such as retailers would improve the effectiveness of the Code.

A general Issues Paper was published by the ACCC on 11 February 2008.

This is a second Issues Paper, which relates only to issues regarding the Code. The ACCC has decided to publish this second Issues Paper because the issues that have arisen in relation to the Code so far during the Inquiry are very specific and the ACCC wishes to ensure that industry participants have had an opportunity to comment.

Written submissions

Interested parties are invited to make submissions to the ACCC in relation to the Code and issues identified in this Issues Paper.

Submissions should be made to the ACCC by no later than 5:00pm, 10 June 2008. The ACCC notes that submissions must be provided by this date to enable the ACCC to consider the issues raised in the paper which is due to be completed by 31 July 2008.

As this is a public inquiry, the ACCC prefers that written submissions be made available to the public on the ACCC website in order to foster an informed, robust and consultative process.

In making a public submission to this inquiry, please title your document, "*Public Submission RE Horticulture Code by [INSERT NAME] on [INSERT DATE].*"

The ACCC understands that there may be information which parties would like to provide the ACCC on a confidential basis. The ACCC requires that any information that is provided on a confidential basis should be clearly marked 'confidential' on every page and that reasons be provided in support of the request for confidentiality. Grounds on which confidentiality could be claimed include:

- disclosure of the information or identity of the provider will be commercially damaging; and/or
- the information disclosed is a trade secret or other non-public information such as the costs of manufacturing, producing or marketing goods or the consideration paid for an asset.

The ACCC will not accede to a request for confidentiality if it would not be in the public interest to do so. If the ACCC considers the information should be disclosed (either because it is not confidential or because it would not be in the public interest to receive the information without public disclosure) the ACCC will provide the relevant party with an opportunity to withdraw the submission (or part of the submission) containing the information. If the submission (or part of the submission) is withdrawn then the ACCC will not take it into account. If a party elects not to withdraw the submission (or part of the submission) then the ACCC may disclose the information publicly.

Email provision of submissions is preferred. The ACCC encourages organisations and people to make submissions in either PDF or Microsoft Word format. PDF submissions should be comprised of machine-readable text (OCR readable text); i.e. they should be direct conversions from the word processing program, rather than scanned copies in which the text cannot be searched.

Submissions should be sent by email to:

grocerypricesinquiry@acc.gov.au (Submissions should use the word “submission” in the title of the email).

If required, submissions can also be sent by post addressed to:

Grocery prices inquiry – Horticulture Code Submissions
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

General inquiries may be directed to the Infocentre on 1300 302 502 or by email to grocerypricesinquiry@acc.gov.au

The Horticulture Code

Background to the Horticulture Code

A primary role of the ACCC under s. 51AE of the *Trade Practices Act 1974 (Cth)* (the Act) is to administer mandatory industry codes of conduct that have been prescribed (that is, made law) by the Australian Government. A prescribed mandatory industry code of conduct is binding on all industry participants. The Governor General signed the *Trade Practices (Horticulture Code of Conduct) Regulations 2006 (Cth)* on 13 December 2006 and registered on the Federal Registrar of Legislative Instruments on 15 December 2006. The Regulations were tabled in Parliament on 6 February 2007. The Horticulture Code of Conduct (the Horticulture Code) therefore commenced as a prescribed mandatory industry code of conduct under section 51AE of the Act on 14 May 2007. Section 51AD provides for the ACCC to take action against breaches of prescribed codes, such as the Horticulture Code.

The Horticulture Code regulates wholesale trade in horticulture produce. It applies to traders and growers who trade with each other in horticulture produce on and after 14 May 2007. 'Horticulture produce' is defined in the Horticulture Code to mean unprocessed fruit, vegetables (including mushrooms and other edible fungi), nuts, herbs and other edible plants. A 'grower' is defined in the Horticulture Code as a person who grows their own horticulture produce for sale. A 'trader' is defined as either an agent or a merchant. More specifically, 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. The Horticulture Code does not regulate those who purchase produce for the purpose of retail, processing or export.

The Horticulture Code's objectives are 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.

Key exclusions under the Code

• Retailers

Retailers have increasingly sought to source horticulture produce directly from growers. While growers recognise that major retailers use their purchasing power to require strict adherence to detailed produce specifications and quality assurance procedures, retailers have been able to achieve a competitive advantage over wholesale traders by offering growers detailed supply contracts, prompt payment, stable revenue streams and access to a dispute resolution process through the voluntary Produce and Grocery Industry Code of Conduct. In recognition of the

relatively clear and transparent nature of retailer's supply arrangements with growers, the Government exempted retailers from the Horticulture Code. Further discussion of this issue is set out below.

- *Existing written agreements*

If a grower or trader already has a written agreement in place that covers trade in horticulture produce, and this was entered into prior to 15 December 2006, the Horticulture Code does not apply to trade engaged in under that contract. However, if a grower or trader varies the agreement on or after 14 May 2007, the Horticulture Code will automatically apply to trade that take place under that agreement from the date of variation. Any written agreement entered into after 15 December 2006, but before the Horticulture Code commenced on 14 May 2007, will be subject to the Horticulture Code from 14 May 2007. Further discussion of this issue is set out below.

- *Limitations on coverage under the Act*

The Act regulates corporations, trade across state borders and trade within a territory (i.e. Australian Capital Territory and Northern Territory). While the Horticulture Code does apply to unincorporated bodies where the wholesaler and respective grower are in different States and / or Territories or within the same Territory, the Horticulture Code does not apply to unincorporated bodies where the wholesaler and the respective grower are within the same State and both grower and trader are unincorporated. However if one of the parties is incorporated then the Code applies if they wish to trade in horticultural produce. It is estimated that a high proportion of wholesale horticulture trade occurs across state borders and around 50 per cent of wholesaling businesses are incorporated.

Key obligations under the Horticulture Code

The Horticulture Code requires that traders and growers comply with certain obligations. These obligations are summarised below.

- *Trader's terms of trade*

A trader must prepare, publish and make publicly available a document setting out the terms and conditions under which they are prepared to trade in horticulture produce with growers. This document is called a trader's terms of trade. A trader must give a copy of their terms of trade to any grower who asks for them. The Horticulture Code specifies that a trader's terms of trade must comply with the Horticulture Code and contain certain specific information.

- *Horticulture produce agreements*

A trader and a grower can only trade in horticulture produce with each other if they have entered into a horticulture produce agreement that complies with the Horticulture Code. A horticulture produce agreement must be in writing, signed by

the parties to it and cover specific matters required by the Horticulture Code.

- *Trader's responsibilities*

In addition to requiring a terms of trade document and a horticulture produce agreement, the Horticulture Code places further obligations on all traders, both agents and merchants, as well as specific obligations for agents and specific obligations for merchants. Details of these obligations are set out in a range of Horticulture Code publications available on the ACCC website.

Dispute resolution procedures under the Horticulture Code

The Horticulture Code provides that growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them. However, if a grower or trader (the complainant) initiates a dispute under the dispute resolution process set out in the Horticulture Code, the other party (the respondent) must participate in that process as required by the code. The Horticulture Code Mediation Adviser (the Mediation Adviser) has been established to assist industry participants to resolve disputes and, on request, appoint mediators from a specialist panel of experienced mediators across Australia.

The Horticulture Code also provides growers and traders with access to horticulture produce assessors. Horticulture produce assessors are individuals that have been selected by the Mediation Adviser as having the necessary technical skills and independence to investigate and provide a report on any matter arising under a horticulture produce agreement.

While the Australian Government subsidises the mediator's fees, parties must pay their own expenses to attend mediation sessions. Parties must also share the costs for any videoconference, telephone conference, venue or travel costs incurred by the mediator. When requesting the appointment of a mediator, the person making the complaint needs to pay an application fee of \$50 to the Mediation Adviser.¹

¹ <http://www.hortcodema.com.au>.

Issues

Review of the Horticulture Code as part of the Grocery Inquiry

When the Horticulture Code was first introduced, it was intended that the Code would be reviewed following a two year implementation period, during which industry participants would need to adapt their business practices in order to bring about compliance with the Code. A Horticulture Code Committee (HCC) was therefore established on 13 September 2007 to commence deliberations on industry issues associated with the operation and performance of the Code and to provide advice to the Australian Government Minister for Agriculture, Fisheries and Forestry on the operation of the Code.

While the Horticulture Code has only been in place for 12 months, the Government has requested that the ACCC undertake a broad review of the issues related to the Code including whether it should be extended to cover retailers, as part of the Grocery Inquiry. The HCC has commented in its submission to the Inquiry that while the Committee has already met twice to discuss these issues this period of time has ‘not adequately allowed the Committee to reach its own position or make recommendations to the Minister...’, and will, following a third meeting, await the outcome of the Inquiry before undertaking any further consideration of the Code. Other groups have also commented that insufficient time has passed for the ACCC to effectively consider the full impact of the Code. The introduction of the Horticulture Code imposed a significant cultural change within the horticulture industry. The introduction of a code of conduct can only be measured when the industry has had sufficient time to assess the changes, take measures to change operational procedures to address the code, bed down and refine the changes and finally to gain industry wide acceptance.

While the ACCC has addressed significant initial resistance to the Horticulture Code, through a comprehensive education and liaison strategy, industry participants are still experiencing difficulties matching their new regulatory obligations with their day to day business practices.

However, in order to assess the effectiveness of the Horticulture Code as part of the Grocery Inquiry the ACCC now seeks further public comment on the following key issues:

Enforcement of the Code

The ACCC has received few complaints regarding non compliance with the Code. It has been asserted that growers are reluctant to complain to the ACCC regarding alleged breaches of the Horticulture Code for fear that they will in turn be singled out by disgruntled traders and subjected to harassment and/or commercial ruin. While such concerns exist in other industries, growers may have relied on an expectation that they would remain in the industry for the long term and any damage to their ability to continue to participate in the industry may cause significant harm. This reluctance of growers to provide substantiated complaints to the ACCC in turn

inhibits the ACCC's ability to take effective enforcement action and bring about compliance with the Horticulture Code.

It has also been asserted that a number of growers and traders have opted not to move from written agreements existing prior 15 December 2006 onto agreements subject to the Code, in order to avoid regulation by the Horticulture Code.

Finally, it has been asserted that growers who have non compliant trading arrangements do not wish to engage with the ACCC out of fear that they may also be prosecuted.

Issue: 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?

Extension of the Code to cover retailers and their agents

While a myriad of arrangements exist within the horticulture industry whereby produce is passed through the supply chain from grower to retailer, two primary models have emerged. Firstly, retailers may seek direct supply of produce from growers who have been approved by the retailer as preferred suppliers. In these circumstances growers are not provided with written supply agreements. Instead, retailers provide their preferred suppliers with their generic terms of trade (usually in electronic form) and then place orders with those suppliers closer to harvest time.

On the one hand, it may be argued that the Horticulture Code should be extended to cover the retail supermarket chains to ensure the major retailers do not take advantage of their market power when dealing with growers. While it may be true that in some cases growers do not receive what they believe to be a 'fair' price for their produce from the major retailers, it should be understood that the Horticulture Code does not directly seek to achieve fair prices for growers. The Horticulture Code seeks to ensure that growers are clear about the terms and conditions of the agreements into which they enter with traders (including the price) and have access to a cost effective dispute resolution procedure if a dispute should arise.

Both the draft² and the final³ Regulation Impact Statement, prepared prior to the commencement of the Code, reported that supermarket retailers provide growers with comparatively clear and transparent supply agreements. The draft Regulation Impact Statement also noted that, 'supermarkets are likely to gain nothing from implementation of the Code due to the fact that they are largely achieving the desired objectives of the Code now but under voluntary codes of conduct.'⁴ Furthermore, it

² Centre for International Economics, *Horticulture Code of Conduct, Draft Regulation Impact Statement*, July 2005, p.xix

³ Department of Agriculture, Fisheries and Forestry, *Horticulture Code of Conduct, Regulation Impact Statement*, December 2006, p. 9

⁴ Centre for International Economics, *Horticulture Code of Conduct, Draft Regulation Impact Statement*, July 2005, p.xviii

may be argued that growers who have a dispute with a retailer could already use the existing dispute resolution process established under the voluntary Produce and Grocery Industry Code of Conduct.

The alternative model by which growers may provide produce to a retailer is through a retailer's agent or consolidator (also known throughout the industry as intermediaries, service providers or retailer's agents). Consolidators are a very diverse group. They include growers who consolidate other growers' produce in order to supply a retailer, as well as wholesalers that will routinely sell grower's produce onto the retailer while also selling produce at the central markets. It is understood that consolidators do not generally provide growers with a written supply agreement. These arrangements are generally oral. The only written material provided to a grower in these circumstances is the retailer's publicly available produce specifications (although specifications are not always available for all lines).

The capacity in which the consolidator is acting in each particular transaction may not be made clear to the grower. While it may appear to a grower that a consolidator is acting as the retailer's agent in a particular transaction (based on a discussion with the consolidator) the consolidator may in fact sell the produce on the wholesale market or pool it with another grower's produce to meet a particular order. In any event, it may be unclear to the grower whether the intermediary is in fact working on their behalf as an agent (i.e. selling the grower's produce for a commission or fee), as a merchant (i.e. purchasing the produce outright from the grower) or as a retailer's agent.

It may therefore be unclear to the grower whether any particular transaction entered into with a consolidator is regulated by the Horticulture Code. The complexity and lack of transparency of these arrangements and relationships has the capacity to create confusion and frustration amongst growers that supply these intermediaries.

Issue: 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?

The Horticulture Code transitional arrangements

The exemption of pre-existing contracts (i.e. contracts entered prior to 15 December 2006) from regulation by the Horticulture Code, raise a significant compliance and enforcement challenge for the ACCC, as it is difficult to identify those industry participants that currently fall within the scope of the Horticulture Code regulations.

Issue: Should there be a cessation date on these exemptions (i.e. a sunset clause), 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?

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

The Horticulture Code uses the word 'delivery' in a number of varying contexts which may have led to confusion and uncertainty among growers and traders about how the Code should be applied in practice. It has been the ACCC's view to date that, the Horticulture Code requires a merchant to provide a grower with a price before on-selling the produce to a third party. The Horticulture Code prohibits merchants from providing growers with a formula or price range and then providing the grower with a share of the returns once the trader has secured their margin. In this way, the Horticulture Code aims to eliminate 'hybrid' transactions in which traders minimise their risk in the produce by employing elements of both the merchant and the agent model.

Prior to the commencement of the Horticulture Code, a wholesaler would commonly establish the price the grower would receive for their produce, by first advising the grower of an indicative price before the produce was sent to market. After the produce was inspected and in some cases on-sold, the wholesaler would remit the grower the proceeds of the sale less any commissions, fee or charges. While this system may provide flexibility for wholesalers to sell the produce on for a good price, this pricing method leaves the grower uncertain as to the return they can expect. On balance, the Government decided that the Horticulture Code would achieve greater clarity and transparency by requiring traders to act as either agents or merchants where price was agreed in writing before produce was despatched or immediately upon delivery of the produce to the trader.

The definition of 'delivery' in the Horticulture Code in conjunction with the requirements to agree on the price of produce either before delivery or immediately upon delivery continues to raise concerns. In particular, it may be argued that the requirement to agree on a price before or immediately upon delivery creates considerable extra paperwork, imposes the impractical requirement of contacting farmers in the very early hours of the morning to negotiate price and may result in lower prices being paid to growers as merchants seek to manage their uncertainty about the price that they can achieve for the produce in the market.

It has been suggested that the Horticulture Code should allow for a method or formula for determining the price to alleviate the difficulties associated with contacting growers in the early hours of the morning to negotiate price. However, the Horticulture Code was not intended to regulate the prices paid to growers. It was intended to provide growers with transparency and clarity regarding the price they would receive.

Issue: 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?

Service agreements

As the Horticulture Code is currently drafted, the term ‘delivery’ can have two meanings when produce requires ripening or other services. Delivery can refer to the time when produce arrives for conditioning or storage, or it can refer to the time when produce is ready for sale. As the Code does not permit a merchant to charge a grower a fee for services performed under a horticulture produce agreement, merchants have sought to enter into service agreements in order to provide growers with other services. The Code does not apply to these service agreements. Where a grower and a merchant enter into a separate service agreement:

- the grower retains ownership of the produce for the duration of the service agreement; and
- the produce may then be either physically delivered or deemed to be delivered to the merchant under the parties’ horticulture produce agreement when the service agreement for that consignment ends.

If the merchant already has custody of the consigned produce, delivery will be deemed to have taken place when the horticulture produce agreement begins.

Issue: 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?

Agents

Under the Horticulture Code a grower and an agent must enter into a horticulture produce agreement setting out how transactions between them are to take place. The Horticulture Code defines an ‘agent’ as a person who sells horticulture produce on behalf of a grower to a purchaser for a commission or fee. Under the Horticulture Code an agent must act in the best interests of the grower and sell the grower’s produce on an arm’s length basis. An agent is required to report to the grower regarding the details of the transaction. However agents are not required to give the grower the name and contact details of the buyer unless it is explicitly stated in the horticulture produce agreement that it is the responsibility of the grower to recover bad debts and that information is required in order to do so.

Since the Horticulture Code required a clear distinction between traders who act as agents and those who act as merchants, it has become apparent that very few traders at the central markets act as agents. The following reasons have been identified as to why very few traders will act as agents in their transactions with growers.

- *Goods and Services Tax*

An agent transaction attracts GST on the service the agent provides to the grower in marketing their produce. The need to register with the Australian Tax Office for the purpose of GST collection is said to deter traders who consider acting as agents because it would involve added compliance cost.

- *Ownership of bad debt*

The Horticulture Code does not oblige an agent to pursue the bad debts of a grower⁵. Instead, it allows a grower and an agent to negotiate whether recovery of bad debt is a requirement under a particular horticulture produce agreement; and if so, when, how and under what circumstances the agent must do so. Terms and conditions in a horticulture produce agreement can detail the scope of the agent's authority to act on behalf of the grower in pursuing bad debts. For example, the agent may be authorised to assign the debt to a specific credit marketing service or authorise a sub-agent, such as a debt collection agency, to pursue the debt on behalf of the grower. Where the horticulture produce agreement leaves the recovery of the bad debt to the grower, the Horticulture Code specifies that the agent must provide the grower with information that the grower may request for these purposes. However, a horticulture produce agreement that assigns the recovery of bad debts of the grower to an agent, or that specifies that the agent is financially responsible for the recovery of bad debt, may act as a disincentive for a trader to act in this way as there will be more work for the trader to complete before they receive their commission or fee.

- *Market credit services*

Currently most market credit services, which operate out of central markets, do not collect debts on behalf of growers. They operate to collect debts for their membership base (mainly wholesalers) from buyers. The Horticulture Code clearly assigns the ownership of bad debt to the grower in an agency transaction, so that when an agent must pursue bad debt under a horticulture produce agreement they generally cannot defer it to a market credit service on the grower's behalf unless the grower is a member.

- *Reporting to growers*

The reporting obligations placed on agents under the Code may act as a significant deterrent to traders that may otherwise act as agents. These obligations are significantly increased when a consignment from a grower is divided up and sold to more than one buyer. However, in some respects agents are required to undertake less complex arrangements as they do not have to calculate the price to be paid to the grower for the purchase of their produce before resale (as a merchant would be required to do). The agent's role is restricted to marketing the produce to a third party buyer at the market rate in return for their commission or fee.

⁵ Bad debts of the grower are amounts owed by a buyer to a grower in a case where an agent has arranged the transaction and the buyer has not paid the agent for some or all of the produce by the time the payment is required.

• *Inspection of an agent's records*

While the Horticulture Code permits a grower's representative to inspect an agent's records regarding the sale of their produce, the Code does not stipulate who the grower's representative can or cannot be. Potentially, this could enable a grower to appoint an agent's competitor to inspect the agent's records on the grower's behalf.

Issue: 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?

Packing houses and cooperatives

The Horticulture Code does not contain any specific reference to packing houses or cooperatives and packing houses. The application of the Horticulture Code to transactions involving these entities is therefore determined on a case by case basis. A transaction between a cooperative/packing house and a grower will be regulated by the Horticulture Code if the cooperative/packing house acts as either a merchant (purchasing and then on-selling the grower's horticulture produce) or an agent (selling the grower's horticulture produce on behalf of the grower).

If the owner of a cooperative/packing house grows their own horticulture produce for sale they will be a grower for the purposes of the Horticulture Code. However, when several growers deal with a cooperative, the Horticulture Code may apply to a horticulture produce transaction between the growers and the cooperative/packing house if the cooperative/packing house:

- is a separate legal entity from the growers (this legal entity may be owned collectively by the growers, for example, as a cooperative/packing house or by an individual grower) and
- acts as an agent, selling horticulture produce on behalf of the grower for a commission or a fee or
- acts as a merchant, buying the growers' horticulture produce to resell it.

However, the Horticulture Code does not apply to subsequent transactions in which the cooperative/packing house on-sells the produce to another trader because these will not be transactions between a grower and a trader. Instead they will be viewed as transactions between two traders.

This interpretation of the Horticulture Code ensures that all cooperatives/ packing houses that act as agents or merchants, whether they are grower-owned or not,⁶ are

⁶ However, if a grower owns a cooperative/packing house and the cooperative/packing house is the same legal entity as the grower, the Horticulture Code will not apply where the grower passes their own produce to the cooperative/packing house. The Code then applies to subsequent transactions of the

transparent in their dealings with growers. However, it should be noted that where the first transaction is between a grower and a cooperative/packing house, traders in the central markets will not be required to enter into transparent horticulture produce agreements as they will not be regulated by the Horticulture Code.

Issue: 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?

Pooling of produce and price averaging

The Horticulture Code requires that an agent must pay the grower the money received for that grower's produce after subtracting any commission or agent fees permitted under the horticulture produce agreement and any extra amounts that may be deducted under the agreement. It has been the ACCC's view to date that the practice of paying growers a price based on the average price received by the agent for a pool of produce (i.e. 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 Horticulture Code. These practices arguably remove the ability to trace crop disease and provide growers with little incentive to improve productivity or the quality of their produce as growers that produce high quality produce can only expect an average price.

However, it has been the ACCC's view that the Horticulture Code does permit agents to pool different grower's produce, as long as the agent also complies with the following obligations:

- the agent must act in the grower's best interests when selling their produce under a horticulture produce agreement
- must be able to trace and record where, to whom and for how much each grower's produce was sold
- the agent must meet all their reporting obligations (agents need only report to the grower the amount received for that grower's produce)
- the agent must let the grower inspect their records pertaining to the grower's produce
- if the grower has a role under the horticulture produce agreement in the collection of bad debts, the agent must also provide the grower with the names of these purchasers.

grower's produce between the cooperative/packing house (which is the same legal entity as the grower) and a trader (as defined in the Code).

Issue: 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?