

TRADE PRACTICES ACT 1974

**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B**

BY

BRIMCOVE PTY LTD

(ACN 080 546 041)

PERSON GIVING THIS UNDERTAKING

1. This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Brimcove Pty Ltd t/as Etherington (Etherington), of MP 12 Market City, 280 Bannister Road, Canning Vale in the State of Western Australia under section 87B of the *Trade Practices Act 1974* (TPA).

BACKGROUND

2. Etherington was incorporated in 1997 and trades as a fruit and vegetable importer, exporter and merchant in Western Australia.
 3. Section 51AD of the TPA states that a corporation must not, in trade or commerce, contravene an applicable industry code.
 4. The *Trade Practices (Horticulture Code of Conduct) Regulations 2006* (**Code**) is a prescribed industry code that came into effect on 14 May 2007 and is an applicable industry code for the purposes of section 51AD of the TPA.
 5. The Code provides that a trader and a grower may only trade in horticulture produce with each other if they enter into a written agreement that complies with the Code. That agreement must contain prescribed minimum terms as set out in the Code and must be signed by both parties.
 6. The Code also requires traders, whether trading as agents or merchants, to prepare, publish and make publicly available a document that sets out the general terms and conditions under which they will trade with growers of horticultural produce (**Terms of Trade**).
 7. Since the 14 May 2007, Etherington has traded with 16 growers (**The Growers**) in horticultural produce without having Code compliant horticultural produce agreements in place. In addition, Etherington published Terms of Trade that were not Code compliant in some aspects.
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8. Etherington acknowledges that by trading with **The Growers** without having Code compliant horticulture produce agreements in place, and by failing to publish Code compliant Terms of Trade it has contravened the Code and section 51AD of the TPA.
9. The ACCC has agreed to accept undertakings offered by Etherington in relation to this matter.

COMMENCEMENT

10. This Undertaking comes into effect when:
 - 10.1 the Undertaking is executed by Etherington; and
 - 10.2 the ACCC accepts the Undertaking so executed.
11. Upon the commencement of this Undertaking, Etherington undertakes to assume the obligations set out in paragraph 12.

UNDERTAKINGS

12. Etherington undertakes to the ACCC for the purposes of section 87B of the TPA that it will:
 - 12.1 when trading in horticultural produce that is subject to the Code, trade only with growers who have entered into a Code compliant horticulture produce agreement with them;
 - 12.2 within 2 weeks of the commencement of this Undertaking, prepare, publish and make publicly available a document that sets out its Code compliant Terms of Trade;
 - 12.3 within 3 weeks of the commencement of this Undertaking, write to **The Growers** with whom it trades as set out in **Annexure A**, enclosing a copy of its proposed Terms of Trade and horticultural produce agreements;
 - 12.4 within 7 days of writing to **The Growers** as undertaken in paragraph 12.3 it will provide the ACCC with a written statement to report whether it has complied with each undertaking in paragraph 12.3 and enclosing:
 - 12.4.1 a copy of its letter to **The Growers**;
 - 12.4.2 the names and addresses of **The Growers** to whom the letter was sent;
 - 12.4.3 a copy of its Terms of Trade; and
 - 12.4.4 a copy of its standard horticultural produce agreement(s);

- 12.5 within 6 weeks of the commencement of this Undertaking, arrange and conduct at its expense a trade practices seminar for its directors, officers and employees authorised to trade in horticulture produce on behalf of Etherington, and **The Growers** with whom it trades as may wish to attend. Such a trade practices seminar is to:
- 12.5.1 be conducted by a suitable qualified compliance professional or legal practitioner with expertise in trade practices law; and
 - 12.5.2 focus on the Code and section 51AD of the TPA;
- 12.6 within 7 days of the completion of the seminar referred to in paragraph 12.5 above, provide the ACCC with a written statement detailing:
- 12.6.1 the date of the seminar;
 - 12.6.2 the name of the person(s) that conducted the seminar;
 - 12.6.3 the names of staff members of Etherington that attended the seminar; and
 - 12.6.4 the names and business names of the growers that attended the seminar;

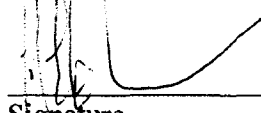
ACKNOWLEDGEMENTS

- 13. Etherington acknowledges that the ACCC will make this Undertaking available for public inspection.
 - 14. Etherington acknowledges that the ACCC will from time to time publicly refer to this Undertaking.
 - 15. Etherington acknowledges that this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.
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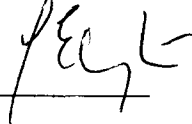
EXECUTED BY

Brimcove Pty Ltd (ACN 080 546 041) and

by its authorised officers

pursuant to section 127(1) of the *Corporations Act 2001*

Signature



LINDSAY ETHERINGTON

GRANT ETHERINGTON

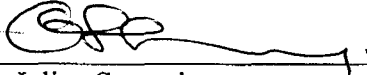
Print name

DIRECTOR

DIRECTOR

Office(s) held at Brimcove Pty Ltd

This 22 day of May 2008

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE
PRACTICES ACT 1974.Graeme Julian Samuel
Chairperson

This 5 day of June 2008

Annexure A**Dear Grower****SEMINAR ON THE HORTICULTURE CODE OF CONDUCT.**

On 14 May 2007 the Horticulture Code of Conduct (the Code) came into effect.

A purpose of the Code is to regulate the trade in horticultural products to ensure transparency and clarity in transactions. To achieve this, amongst other things, the Code requires merchants and growers to enter into a Code compliant written agreement before they trade with each other.

Unfortunately, since 14 May 2007, we:

- did not have signed Code compliant horticultural produce agreements in place when we traded with you; and
- did not publish Code compliant terms of trade on which we are prepared to trade in horticulture produce with growers.

By so doing, we contravened the Code and section 51AD of the *Trade Practices Act 1974*. Growers involved in the trading may have also contravened the Code and the *Trade Practices Act 1974*.

As part of court enforceable undertakings we gave to the Australian Competition and Consumer Commission we undertook to send you a copy of our terms of trade and our proposed horticultural produce agreement. I enclose those documents.

We also undertook to arrange and pay for a training seminar on the Code and compliance with the *Trade Practices Act 1974* for our staff and growers currently trading with non Code compliant agreements. I would urge you or your representatives to attend the seminar which is to be held:

at _____
on _____

Thank you for your attention.

Regards

Mr Grant Etherington
Brimcove Pty Ltd t/as Etherington