Horticulture Taskforce

A position paper on the Horticulture Code of Conduct

August 2011

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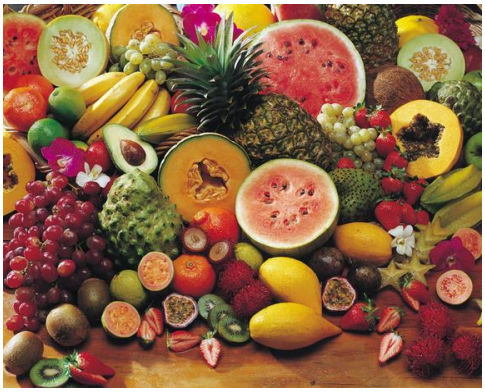

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Summary

The Horticulture Code of Conduct (the Code) was implemented on 14 May 2007. Its intent was to address market failure and provide clarity and transparency for growers and traders by clarifying the rights and responsibilities of each party. It also aimed to provide a fair and equitable dispute resolution process for disputes arising under the Code.

The Horticulture Industry continues to support the intent of the Code and believes that a robust Code is critical for the long term future of the industry. That said, the Code has failed because it has not addressed the fundamental issue of transparency in trading.

We acknowledge the reviews conducted by the ACCC and the Horticulture Code Committee and have dealt with the individual recommendations in the attached document. We have also provided additional recommendations that the Horticulture Industry sees as integral to an effective code.

Drafting an effective code is actually quite simple. It is accommodating all the anti-farmer interests which make it so complex. Most of the ACCC and Horticulture Code Committee recommendations are the function of compromises made to other interests intent on overly complicating the Code. We are gravely concerned that implementation of some of these recommendations will render the Code completely useless and unable to meet its intent.

The Horticulture Industry is not seeking a special deal; we just want transparent terms of trade to address the longstanding market failure.

The priority issues for the Horticulture Industry are outlined below. Resolution of these issues will overcome the ongoing significant issues with the Code.

- **Wholesalers must be compelled to act as either merchants or agents**. The hybrid model fails to differentiate between agents and merchants and their respective legal obligations. This is fundamental to ensure successful implementation of the Code. If the hybrid model is permitted then there is no point in having a Code.

- **All transactions should be subject to the Code including those transactions made under agreements prior to 15 December 2006**. The continued existence of this loophole undermines the capacity for any successful implementation of the Code. Many of those agreements were back-dated and growers were placed under extreme pressure by wholesalers to back-date agreements, even after the Code was put in place. This practice of backdating agreements is still going on and is used to avoid the requirements of the Code, diluting the capacity for the Code to manage the market failure.

- **The dispute resolution provisions under the Code need to move to a conciliation model rather than the current mediation model.** Mediation works best when the parties have equal resources and capacity to negotiate. This is not the case in the horticulture industry. Conciliation requires the parties to attend

any dispute resolution, provide relevant documents and can make binding agreements. This overcomes the need for expensive alternative ACCC or grower litigation.

The Horticulture Industry is seeking a competitive horticulture produce market whereby transactions are fair because they occur through honest and transparent terms of trade. Industry's position will embed the Code into the trading culture of the horticulture produce market. Honest traders acting transparently have nothing to fear from the Horticulture Code of Conduct.

Response to ACCC and Horticulture Code Committee recommendations

ACCC recommendation 2: Amend the Horticulture Code to regulate first-point-of-sale transactions of horticulture produce between a grower, a retailer, exporter or processor.

The horticulture industry **agrees** with the intent of this recommendation however as growers do not "sell" to agents we recommend the following wording:

Amend the Horticulture Code to regulate all first transactions from the grower of horticulture produce.

This recommendation can only be implemented effectively if recommendation 11 is also implemented.

This position is consistent with the position of the Code Committee.

ACCC recommendation 3: Amend the Horticulture Code to regulate the first point of sale transactions between a grower and a trader in horticulture produce, including transactions entered into under agreements made prior to 15 December 2006.

The horticulture industry **agrees** with the intent of this recommendation with the following amended wording as above:

Amend the Horticulture Code to regulate all first transactions from the grower of horticulture produce, including those transactions made under agreements made prior to 15 December 2006.

The horticulture industry contends that a transition period of 6 months is appropriate and that the 18 months proposed by the Code Committee is too long.

ACCC recommendation 4: Amend the Horticulture Code to require a merchant to provide a grower, before delivery, with either a firm price or a formula for calculating price. Any agreed method to calculate price must be by reference to the amount received by the merchant for the sale of the produce to a third-party purchaser.

The horticulture industry **does not accept** this recommendation even with the so-called safeguards put forward by the Code Committee.

The key function of the Code is to ensure contractual clarity as to whether the transaction was undertaken as a merchant or an agent. Any watering down of this principle by way of a hybrid model is unacceptable. The hybrid model allows wholesalers to take advantage of all of the benefits of an agency agreement (including no risk)

without any corresponding benefit to growers, as well as avoid paying GST on any agency commission.

If this recommendation is accepted it will completely defeat the Code's intended purpose.

We refer to page 509 of the ACCC report where it clearly states:

"It is the ACCC's view that the Horticulture Code requires a merchant to provide a grower with a set price (rather than a method or formula by which a price may be calculated) before on-selling the product to a third party. Merchants are therefore prohibited from providing the grower with a formula or a price range and the subsequently 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 may minimise their risk in the produce while maximising their return by employing elements of both the merchant and agent model."

The horticulture industry contends that the ACCC 's recommendation completely contradicts the position put forward in this statement and the long list of so-called safeguards are convoluted and unnecessary if the original clear intent of the Code and the ACCC is maintained. The Code must continue to require traders to either act as agents or merchants.

We recommend that clause 25.(1) prohibiting a price being a method for calculating an amount remains unchanged. This clause is part of the differentiation between agent ad merchant and any changes would permit the return to the 'hybrid' transaction with all its problems. If a trader wants flexibility in pricing they can opt for trading as an agent.

The reasons in the issues paper given for moving from an agreed price are the considerable extra paperwork, impracticalities of contacting growers early in the morning and the risk that lower prices are being paid. Our view on these arguments is expressed below.

It cannot possibly be argued that using a formula would reduce the amount of paperwork as one would imagine that some input values would still need to be negotiated with the grower and reporting requirements will have to stipulate each input value. Any system requires a degree of paperwork to ensure transparency and the ACCC recommendation would potentially result in more paperwork to try and compensate for the increased complexity it engenders.

According to the merchant definition, a price can be agreed before or immediately on delivery, this means there is no need to contact growers early in the morning as it can all be done beforehand. It is critical to remember there is no need for the trader to sight produce before agreeing to a price, as the price should be dependent on clear, agreed, product specifications and quality standards (as outlined in the HPA). If the produce on delivery does not meet the agreed specifications, this is a breach of contract, and the trader has the right to reject the produce, call in a Horticultural Produce Assessor, and/or seek resolution of a dispute. Modern technology allows for photos to be sent before leaving the farm-gate, to confirm that the produce meets the agreed specifications. This practice aligns with how supermarkets currently manage produce supplied direct from growers.

It might be noted that if a merchant does not wish to agree on a price at or on delivery, the Code offers the facility to trade as an agent. Indeed any hybrid model means that the merchant is effectively trading as an agent but without the obligations such a relationship imposes by law. This includes the payment of GST as all agent transactions attract GST on the services supplied to the growers in marketing their product.

In relation to the GST issue, the ACCC itself on page 512 of the report, highlights that some traders seek to continue to trade as 'merchants' while utilising the benefits of the hybrid system. It is difficult to see how the recommendation put forward by the ACCC would reduce this "tax dodging". It has been estimated that the throughput of horticulture produce is worth at least $128 million in GST revenue.

ACCC recommendation 5: Amend the Code to require that if a Merchant does not reject produce within 24 hours of physical delivery, the produce is deemed to be accepted.

The horticulture industry **does not accept** this recommendation.

There is no need to stipulate a timeframe for rejection as under the Code of Conduct (part 2, section 5 (2) (d)) it clearly states that the traders terms of trade must specify the circumstances in which the trader may reject horticulture produce delivered by a grower, including the period, after receiving the produce, during which the trader must notify the growers of the rejection and the consequences of the rejection. These terms can be negotiated between the grower and merchant in the HPA and should reflect the nature of the produce being traded.

An arbitrary timeframe for rejection/acceptance delivers no real benefit to either traders or growers as different product lines have different ripening timeframes and this should be negotiated on an individual basis in the HPA. We see this recommendation as providing an unnecessary loophole for merchants to reject produce and it would water down the current requirement to agree on a price at or before delivery.

If ACCC recommendations 4 and 5 were both implemented then the purpose of the Code would be severely compromised. Traders would be able to transfer all risk in relation to price fluctuations on to the grower and in the worst case scenario send product back within the 24 hour window even if it meets specifications if conditions on the market floor take a dive.

The Code Committee suggests that a period of acceptance should be negotiated as part of the contract which, as far as we can tell, is what happens under the current Code.

In relation to the question of unsolicited product, the horticulture industry contends that this is provided at the growers risk and that it defaults to an agency relationship.

ACCC recommendation 6: Amend the Code to enable a Merchant to deduct the cost of any services that are supplied to prepare the produce for resale as part of the price amount.

The horticulture industry **does not support** this recommendation as it is part of amendments that need to be implemented if recommendation 4 was to be accepted.

Services offered prior to sale (eg. ripening, storage) should remain outside the HPA and be covered by a Service Agreement to ensure the costs associated with each activity remain clear and transparent. Itemised invoices should be provided to growers under Service Agreements to ensure transparency in charges relating to each service provided.

Currently, a trader operating as a merchant is required to outline in their terms of reference and HPAs:

- Any requirements they have relating to delivery;
- Any requirements they have relating to quality and quantity;
- How they will deal with produce that does not meet the specified quality and quantity requirements.

If the grower and merchant have agreed on and signed a contract outlining requirements in these areas, the grower delivers produce that meets these requirements and the merchant subsequently accepts ownership of that produce, the merchant:

- Is required to pay the grower the agreed price for that produce;
- Is unable to deduct any additional charges from the grower following further preparation or value-adding of the produce as transfer of ownership to the merchant has taken place (the merchant can recoup or “pass on” any additional costs following resale to a third party purchaser).

If the produce delivered by the grower does not meet the specified requirements in the HPA, the merchant and grower can renegotiate the terms of the contract, the merchant can reject the produce or the dispute resolution process can be activated.

Implementing this recommendation would further dilute the merchant concept and again transfer more risk to the grower.

Recommendation 7: Amend the Code to only permit an Agent to recover their commission for services performed under an Agency agreement as a deduction from amounts paid by a third-party purchaser.

The horticulture industry **does not support** this recommendation as it overrides the common law of agency which we believe should apply equally to all parties under the Code.

Whilst implementation of this recommendation would be of benefit to growers we recognise that it would place unfair restrictions on agents in terms of defining the conditions of payment. We support the Code Committee’s contention that the issue this recommendation is intended to resolve should be addressed through normal contractual arrangements.

Obviously it is part of the agents general duty of care to ensure they do not trade with anyone who does not have the capacity to pay their debt.

Recommendation 8: Amend the Code to exclude persons who may be an Agent's competitor from inspecting that Agent's records on Grower's behalf.

The horticulture industry **supports** this recommendation as it gives traders the necessary commercial in-confidence status relating to their business dealings.

Recommendation 9: Amend the Code to ensure that transactions between a grower and a co-operative/packing house, in which the grower has a significant interest, are exempt from regulation under the Code.

The horticulture industry **does not support** this recommendation and supports the contention of the Code Committee that this recommendation introduces an exemption with little benefit.

It is difficult to establish what exactly constitutes a "significant interest" and for the purposes of clarity we contend that the current rules applying to packhouses are appropriate. If packhouses act as agents or merchants as per the definitions within the Code then they should be subject to the provisions of the Code.

With respect to the issue of pooling and price averaging, this is dealt with in recommendation 10.

Recommendation 10: Amend the Code to permit Agents and Growers to engage in pooling and price averaging.

The horticulture industry **supports** this recommendation provided the conditions outlined by the Code Committee are implemented. They are:

- The pooled produce must be of the same quality specifications
- Both parties must have prior knowledge and agree to the use of pooling and price averaging as part of their HPA
- A detailed report of sale must be provided to growers.

Recommendation 11: Amend the Code to exempt transactions entered into in a 'Grower Shed' at the Central Markets from regulation under the Code, while permitting parties to these transactions to access the Code's dispute resolution procedure.

The horticulture industry **does not support** this recommendation but supports the intent to provide flexibility around small scale transactions that will now be caught up in the Code should recommendation 2 be implemented.

Rather than stipulate a geographical area or even an arbitrary transaction amount, we propose the following wording:

Exempt transactions that are conducted with immediate settlement on collection.

The purpose of the Code is to ensure transparency in transactions with clear terms of trade and a clear point of transfer of ownership. An immediate settlement means there can be no ambiguity around the time of transfer of ownership nor about payment terms.

Recommendation 12: The ACCC also recommends that the costs incurred by the parties to a dispute under the Horticulture Dispute resolution procedure be subsidised by the Australian Government to the same extent as the voluntary Produce and Grocery industry Code of Conduct (PGICC).

The horticulture industry **supports** this recommendation.

Recommendation 13: The ACCC undertakes further education in relation to the Horticulture Code and its dispute resolution procedures, including the role of assessors in resolving disputes.

The horticulture industry agrees with the intent of this recommendation however, in line with the Code Committee's response, we contend that the ACCC is not the best organization to undertake the education program.

As discussed by the Code Committee, the ACCC's track record with respect to educating the relevant parties with respect to their obligations under the Code is not good. This is a contentious and complex area and any education program needs to be developed and implemented by specialists in public education in consultation with both the horticulture industry and the representatives of the wholesalers.

Additional Recommendations

In addition to those recommendations made by the ACCC, the Horticulture Taskforce believe that a number of additional changes are required to bring the full transparency and clarity aimed for by the Code.

The dispute resolution provisions under the Code needs to move to a conciliation model instead of the current mediation model.

Mediation works best when the parties have equal resources and capacity to negotiate. Lawyers have been excluded from attending mediation because of the additional time, cost and complexity their attendance would introduce. As growers seldom have access to all the information relevant to a transaction and often lack the capacity to negotiate on equal terms with market agents (much less the major supermarkets), the code needs to address the issues of production of documents and power imbalance at the mediation table between parties. The Code needs to ensure that it isn't an approval mechanism for unfair agreements. It is proposed that conciliation replace mediation as the preferred dispute resolution model. A conciliator encourages parties to resolve on their own terms but may express their own opinion during the process. In the absence of agreement, the conciliator may make a non-binding recommendation or, in the event of continued inability of the parties to reach agreement and after hearing any further views of the parties, make a binding determination, subject to normal administrative law review. It also reduces the need for costly ACCC or grower litigation. The Conciliation Advisor should also have the power to require each party to produce relevant documents to for the conciliation and to require attendance of parties at conciliation. To further strengthen the position of the proposed Conciliation Advisor, it should be required to report to the ACCC the particulars of any case referred to it, including the results of any conciliation, whether parties refused to provide appropriate evidence, and an opinion on the fairness of the outcome. There should also be the requirement that an annual report be tabled in parliament.

Produce purchaser identities be available to the grower in all agency transactions.

The provisions of the current code which block identification of the purchaser violate the common law of agency. Purchaser identification is normal practice in other market situations such as real estate and livestock. Any deviation from this will ensure the failure of any amended Code.

The repurchase of produce by an agent from another wholesaler be outlawed.

Agents often sell produce to related companies or even unrelated separate wholesalers for an artificially low price before purchasing the same product back as a merchant to increase their margin. This needs to be explicitly outlawed.

Under agency agreements, inter-wholesaler transactions need to be reported explicitly back to the grower.

Even with the requirement to identify the purchaser in agency transactions, there is no means for the grower to determine if their product is being resold within the market. This information is critical to address the possibility of inter-related entity selling and price distortion within the system.

When the terms of trade cannot be agreed the default should be an agency agreement with a commission of 10%.

When the terms of trade cannot be agreed upon by a grower and a wholesaler and a wholesaler sells the grower's produce without agreed terms of trade, then that trade will be deemed to have occurred on an agency basis with a commission of 10%. The commission in this default clause should be set at a rate which does not encourage wholesalers to use it as the standard rate, but instead encourages Horticulture Produce Agreements.

The role of the Horticulture Produce Assessor be expanded to interpret specifications as well as produce rejection and be linked to the random auditing undertaken by the ACCC.

Interpretation of pre-agreed specifications is often a point of contention within the market for both growers and wholesalers. Now that the ACCC has now been given random audit powers under the *Competition and Consumer Act*, the Horticulture Produce Assessor should accompany the ACCC when making random audits to determine not just whether any rejection is fair, but that produce meets the pre-agreed product specifications. The Horticulture Produce Assessor must also be available on request. This position will facilitate the transition from the current unfair hybrid approach to a fully transparent trading model.

Wholesalers should be required to provide all new vendors with information about their rights and obligations under the code, and inform existing vendors of any changes to the Code, should it be amended.

Summary table of recommendations

	ACCC recommendation	Code Committee response	Overall intent of HTF re ACCC recommendations	HTF recommended wording
1	*To amend the TPA to introduce civil penalties etc for breach of a Code, and to give the ACCC powers to facilitate the conduct of random audits as an enforcement mechanism under a Code*".	Support but needs to be referred to Treasury as relates to Trade Practices Act	Support	No rewording required
2	*Amend the Horticulture Code to regulate first-point-of-sale transactions of horticulture produce between a grower, a retailer, exporter or processor.*	Support in conjunction with recommendation 11	Support in conjunction with recommendation 11	Amend the Horticulture Code to regulate all first transactions from the grower of horticulture produce.
3	*Amend the Horticulture Code to regulate the first point of sale transactions between a grower and a trader in horticulture produce, including transactions entered into under agreements made prior to 15 December 2006.*	Support with a transition period of up to 18 months	Support with a transition period of 6 months	Amend the Horticulture Code to regulate all first transactions from the grower of horticulture produce, including those transactions made under agreements made prior to 15 December 2006.
4	*Amend the Horticulture Code to require a merchant to provide a grower, before delivery, with either a firm price or a formula for calculating price. Any agreed method to calculate price must be by reference to the amount received by the merchant for the sale of the produce to a third-party purchaser.*	Support with caveats	Do not support	
5	*Amend the Code to require that if a Merchant does not reject produce within 24 hours of*	Support with modification to enable flexibility around	Do not support	

	physical delivery, *the produce is deemed to be accepted.*	timeframes. Specifically excludes unsolicited product		
6	*Amend the Code to enable a Merchant to deduct the cost of any services that are supplied to prepare the produce for resale as part of the price amount.*	Support with caveats	Do not support	
7	*Amend the Code to only permit an Agent to recover their commission for services performed under an Agency agreement as a deduction from amounts paid by a third-party purchaser.*	Do not support	Do not support	
8	*Amend the Code to exclude persons who may be an Agent's competitor from inspecting that Agent's records on a Grower's behalf.*	Support	Support	No rewording required
9	*Amend the Code to ensure that transactions between a Grower and a co-operative/packing house, in which that Grower has a significant interest, are exempt from the regulation under the Code.*	Do not support	Do not support	
10	*Amend the Code to permit Agents and Growers to engage in pooling and price averaging.*	Support with safeguards	Support with safeguards	
11	*Amend the Code to exempt transactions entered into in a 'Grower Shed' at the Central Markets from regulation under the Code, while permitting parties to these transactions to access the Code's dispute resolution procedure.*	Reject with a specified alternative to manage the issue	Do not support	Amend the Horticulture Code to exempt transactions conducted with immediate settlement on collection.

12	*The ACCC also recommends that the costs incurred by the parties to a dispute under the Horticulture Dispute resolution procedure be subsidized by the Australian Government to the same extent as the voluntary Produce and Grocery industry Code of Conduct (PGICC).*	Support	Support	
13	*The ACCC undertakes further education in relation to the Horticulture Code and its dispute resolution procedures, including the role of assessors in resolving disputes.*	Support with the proviso that the training is undertaken by communications specialists in consultation with industry	Support Code Committee response	No rewording required