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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Competition and Consumer Amendment
(Horticultural Code of Conduct) Bill
2011**

No. , 2011

(Mr Katter)

A Bill for an Act to amend the *Competition and Consumer Act 2011* to provide for a code of conduct for the horticulture industry, and for related purposes

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1 **A Bill for an Act to amend the *Competition and***
2 ***Consumer Act 2011* to provide for a code of conduct**
3 **for the horticulture industry, and for related**
4 **purposes**

5 The Parliament of Australia enacts:

6 **1 Short title**

7 This Act may be cited as the *Competition and Consumer*
8 *Amendment (Horticultural Code of Conduct) Act 2011*.

9 **2 Commencement**

10 This Act commences on the day this Act receives the Royal
11 Assent.

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3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Competition and Consumer Act 2010

1 Subsection 51ACA(1) (definition of *mandatory industry code*)

After “declared by”, insert “this Act or”.

2 At the end of Part IVB

Add:

Division 7—Horticultural Code of Conduct

51AEB Horticultural Code of Conduct

Declaration of Code

- (1) The Horticultural Code of Conduct set out in this Division is declared to be a mandatory industry code.

Purpose of Code

- (2) The purpose of this Code is to regulate the conduct of Agents/Merchants and Sellers of Horticultural Produce to ensure contractual clarity and transparency of all transactions and provide a cost-effective mechanism for fair and equitable dispute resolution.

51AEC Definitions and interpretation

- (1) In this Code:

Agency Relationship means a Trading Relationship under which:

- (a) a person or entity acts on a commission basis for a Seller in relation to the sale of Horticultural Produce to a third party buyer; and
- (b) the Seller retains ownership of the Horticultural Produce until sold to a third party buyer and the Agent does not at any time acquire ownership of the Horticultural Produce.

1 **Agent** means any person or entity that acts, or offers to act, for a
2 Seller in an Agency Relationship.

3 **Agreed Term of Trade** has the meaning given in subsection
4 51AEE(5).

5 **Commencement date** means the day on which this Division
6 commences.

7 **Horticultural Code Management Committee** means the committee
8 appointed by the Minister pursuant to subsection 51AEZA(1).

9 **Horticultural Inspector** means a horticultural inspector appointed
10 by the Horticultural Code Management Committee pursuant to
11 paragraph 51AEZA(3)(c).

12 **Horticultural Produce** means fruit, vegetables, nuts and plants for
13 human consumption that are fresh and unprocessed or processed
14 only by cutting and or mixing for sale.

15 **Intent to Despatch Produce Form** means a form from a Seller
16 notifying an Agent/Merchant of an intention to despatch
17 Horticultural Produce.

18 **Market Authority** means any organisation owning, controlling or
19 administering the centralised markets where produce is bought,
20 sold and/or traded by Agents/Merchants including, but not limited
21 to Perth Metropolitan Markets, Brisbane Markets (Brismark),
22 Sydney Markets Ltd, Melbourne Market Authority.

23 **Merchant** means any person or entity that is, or offers to be, in a
24 Merchant Relationship with a Seller this includes but is not limited
25 to Wholesalers Exporters, Processors and Retailers.

26 **Merchant/Agent** means a Merchant or an Agent.

27 **Merchant Relationship** means a Trading Relationship under which
28 a Merchant acquires ownership of the Horticultural Produce from a
29 Seller.

30 **Pooling** means where prices are averaged over a period of time
31 agreed to by the growers included in the pooling arrangement.

32 **Producer Fairness Tribunal** means the Tribunal appointed by the
33 Minister pursuant to paragraph 51AEZA(3)(e).

Seller means any person or entity that sells Horticulture Produce other than to an end consumer, whether or not the person or entity is also a Merchant/Agent.

Terms of Trade has the meaning given in subsections 51AEE(1) and (2).

Trading Relationship means an Agent or Merchant Relationship with a Seller.

(2) In this Code, unless the context requires otherwise:

(g) the use of the words “include”, “including”, or similar expressions, shall not limit the generality of words that may follow; and

(a) a reference to any communication includes a communication provided in writing and delivered in person, by post, by facsimile, by electronic mail or verbally.

51AED Application of the code

(1) This Code applies on and from the commencement date and covers trading relationship between Sellers, Merchants and Agents.

(2) This Code replaces the existing Horticultural Code of Conduct and has effect despite any existing individual agreements between Sellers, Merchants and or Agents.

(3) This Code does not apply to traders and growers trading under a statutory potato marketing scheme.

51AEE Terms of Trade

(1) A Merchant/Agent must prepare and maintain a document, referred to as the ***Terms of Trade***, that sets out the terms and conditions on which they are prepared to trade with Seller.

(2) The ***Terms of Trade*** must:

(a) be consistent with the requirements of this Code; and

(b) identify the type or types of trading relationship under which they are prepared to trade and the terms and conditions applying for each such type of trading relationship; and

(c) where more than one type of trading relationship is specified—identify a default type Trading Relationship.

1 *Requirement to provide Merchant/Agent Terms of Trade*

2 (3) A Merchant/Agent must provide their Terms of Trade to any Seller
3 they choose to deal with.

4 (4) If a Merchant/Agent amends their Terms of Trade they must
5 provide a copy of the amended Terms of Trade to any Seller they
6 choose to deal with.

7 *Agreed Terms of Trade*

8 (5) A Merchant/Agent and a Seller may agree to trade under any type
9 of Trading Relationship and under terms and conditions (the
10 ***Agreed Terms of Trade***) that differ from the Merchant/Agent
11 Terms of Trade, provided that the Agreed Terms of Trade are
12 consistent with the requirements of this Code.

13 (6) In an established relationship, should a Seller send or deliver a
14 consignment of Horticultural Produce to a Merchant/Agent that is
15 accepted and where the type of Trading Relationship for that
16 particular consignment has not been arranged, the Trading
17 Relationship for the most recent previous consignment will apply.

18 *Transaction splitting*

19 (7) In the event that a Merchant/Agent and a Seller agree in advance
20 that a consignment of Horticultural Produce will be split, with
21 different parts sold under differing Types of Trading Relationship
22 and terms and conditions, each part will be treated as a separate
23 transaction with a separate Trading Relationship and Agreed Terms
24 of Trade.

25 *Application of minimum terms of trade for all Trading*
26 *Relationships*

27 (8) The provisions of sections 51AEF to 51AEK inclusive shall apply
28 to all types of Trading Relationships between a Merchant/Agent,
29 and a Seller.

30 **51AEF Grower intent to dispatch Produce Notification**

31 (1) A Seller must not dispatch a consignment of Horticultural Produce
32 without first notifying the Merchant/Agent of details of quantities

and grades. Notification can be made by telephone, but must be followed by a written summary of the consignment sent by facsimile or electronically at the time of dispatch.

(2) The Merchant/Agent Terms of Trade and Agreed Terms of Trade may include a pro forma Intent to Dispatch Produce Form, which includes information to be provided about the quantity and quality of Horticultural Produce to be delivered and the agreed type of Trading Relationship.

(3) Where the Agreed Terms of Trade include a pro forma Intent to Dispatch Produce Form a notification made under this subsection must use the pro forma Intent to Dispatch Produce Form or any agreed form of notification.

51AEG Seller failure to give Intent to Dispatch Produce Notification

(1) If a Seller dispatches a consignment of Horticultural Produce to a Merchant/Agent without first providing a notification as required under section 51AEF the Merchant/Agent must notify the Seller:

- (a) of the receipt of the consignment of Horticultural Produce within 8 (eight) hours of the consignment being received; and
- (b) whether they will accept or reject the consignment.

(2) All reasonable efforts must be made to ensure this notification is brought to the attention of the Seller.

(3) If the consignment is rejected, the Seller must, within 8 (eight) hours of receiving a notification under subsection (1), notify the Merchant/Agent if they wish to have the consignment of Horticultural Produce destroyed, or delivered to a nominated third party, or returned to the Seller.

(4) If the Seller does not notify the Merchant/Agent in accordance with subsection (3):

- (a) the Seller is deemed to have elected to have the consignment dealt with at the Merchant/Agent's discretion; and
- (b) the Seller must reimburse the Merchant/Agent for any reasonable costs incurred by them in dealing with the consignment in accordance with this section.

51AEH Merchant/Agent's obligation to respond to a Seller's Intent to Dispatch Produce Notification

- (1) If a Merchant/Agent receives an Intent to Dispatch Produce notification from a Seller in accordance with section 51AEF, they must respond in an agreed way to the Seller within the maximum number of hours specified in the Agreed Terms of Trade which must not exceed 12 (twelve) hours indicating whether or not they will receive the consignment, subject to the consignment's compliance with the Agreed Terms of Trade.
- (2) All reasonable efforts must be made to ensure this notification is brought to the attention of the Merchant/Agent and if the Merchant/Agent does not respond in the permitted time frame they will be deemed to have agreed to accept the consignment, subject to the consignment's compliance with the Agreed Terms of Trade.

51AEI If a Merchant/Agent does not accept an Intent to Dispatch Produce Notification

- (1) If a Merchant/Agent responds in the agreed way and in accordance with section 51AEH, indicating that they will not accept the consignment of Horticultural Produce, the Seller must not dispatch the consignment to them.
- (2) Section 15AEG applies to any consignment of Horticultural Produce the Seller delivers to the Merchant/Agent in breach of this requirement.

51AEJ If a Merchant or Agent does accept an Intent to Deliver Produce Notification

- (1) If a Merchant/Agent responds in accordance with section 15AEH indicating that they will accept the consignment of Horticultural Produce (or is deemed to have done so), they must accept the consignment of Horticultural Produce when delivered, unless:
 - (a) the consignment does not meet the quality or quantity requirements specified in the Intent to Despatch Produce Notification and the Agreed Terms of Trade; or
 - (b) the Merchant/Agent advises the Seller of the rejection of the consignment within the time specified in the Agreed Terms

of Trade (which must not exceed 8 (eight) hours after the time of delivery).

- (2) Sellers can appeal to the Producer Fairness Tribunal if they deem produce has been arbitrarily rejected.

51AEK Merchant/Agent/Seller Dispute Contact Details

A Merchant/Agent must specify in their Terms of Trade contact details of the Producer Fairness Tribunal whom a Seller may contact in the event of a dispute with the Merchant/Agent.

51AEL Agent Relationship

Sections 51AEL to 51AES inclusive shall apply only where an Agent and a Seller are in an Agent Relationship and shall apply in addition to the requirements of sections 51AEF to 51AER.

51AEM Transfer of Ownership of Horticultural Produce (Agency Transaction)

Ownership of Horticultural Produce remains with the Seller until sold by the Agent to a third party. At this time ownership passes immediately to the third party purchaser.

51AEN Payment of proceeds of sale

- (1) All monies received by the Agent for a consignment of Horticultural Produce must be deposited in the relevant Market Authorities Trust Account to be distributed to the Seller less the Agents commission (see section 51AEO).
- (2) Distribution of funds from relevant Market Authorities Trust Account to the Seller and Agent should take place within seven (7) days of the funds being deposited in the Trust Account.
- (3) Monies include all proceeds from the sale of the produce less:
 - (a) any commissions permitted under section 51AEO; and
 - (b) any extra costs permitted under section 51AEP.

51AEO Commissions

- (1) An Agent may only charge commissions on the basis set out in the Agreed Terms of Trade.
- (2) The rate of commission is negotiable in the Agents Terms of Trade.
- (3) In the event of no agreeable commission rate between the Seller and the Agent, the default Agent's commission rate will be 12.5%.
- (4) The relevant Market Authorities managing the Trust Account should receive 2.5% commission (non-negotiable) for this service.

51AEP Extra Costs

An Agent may only seek reimbursement for extra costs it incurs to the extent provided for, and on the basis set out, in the Agreed Terms of Trade.

51AEQ Evidence of Sale

- (1) An Agent must provide the Seller with a duplicate copy of their invoice/statement of sale that was provided to their purchaser for each consignment of Horticultural Produce sold by them on behalf of the Seller, showing:
 - (a) the total proceeds of sale of the consignment; and
 - (b) the date or dates of the sale; and
 - (c) the type, quantity and count of the Horticultural Produce sold; and
 - (d) the price received for each grade of Horticultural Produce sold; and
 - (e) the details of the buyer of the Horticultural Produce; and
 - (f) the name of the purchaser.
- (2) The statement or invoice must be provided within the period specified in the Agreed Terms of Trade or within 28 (twenty eight) days of the completion by the Agent of the sale of the consignment, whichever is the earlier.

While the Horticultural Produce is under the Agent's management:

- (a) they must exercise due care and skill in handling and storing the Horticultural Produce; and
- (b) disputes regarding due care and skill in handling can be referred to the Producers Fairness Tribunal in the event of the dispute.

- (1) The relevant Market Authority must maintain a trust account that complies with the following:
 - (a) the trust account must be in the name of the relevant Market Authority (whether individual, firm or corporation);
 - (b) the trust account name must start with the name of the relevant Market Authority, and include the words “Trust Account”;
 - (c) the words “Trust Account” must appear on all cheques drawn on the trust account;
 - (e) monies may be paid out of the trust account only by cheque or direct deposit;
 - (f) the relevant Market Authority should receive 2.5% commission to manage the Trust Account.
- (2) All monies received from a third party for Horticultural Produce by an Agent must be placed in the relevant Market Authority’s trust account.
- (3) Costs refundable to the Agent are specified in sections 51AEO and 51AEP.
- (3) The remainder of the proceeds of each sale are to be distributed to the Seller.
- (4) The relevant Market Authority must pay all fees, taxes and charges in relation to the Trust Account.
- (5) The relevant Market Authority must:
 - (a) keep all records relating to the Trust account for five years;
 - and

1 (b) have the account independently audited in each financial
2 year.

3 (6) The Producer Fairness Tribunal may require an audit report and
4 relevant records to be made available to it for inspection.

5 **51AET Merchant Relationship**

6 Sections 51AEU to 51AEW (31) inclusive shall apply to all
7 transactions by a Merchant and a Seller in a Merchant Relationship
8 in addition to the requirements of sections 51AEF to 51AER.

9 **51AEU Transfer of Ownership of Horticultural Produce (Merchant**
10 **Transaction)**

11 (1) Ownership of Horticultural Produce passes from the Seller to the
12 Merchant:

13 (a) if the price for the Horticultural Produce has been agreed by
14 the Merchant and the Seller prior to delivery—immediately
15 to the Merchant upon receipt of the produce; or

16 (b) the price for the produce has not been agreed between the
17 Merchant and the Seller prior to delivery—immediately at
18 the time the Merchant and the Seller agree on a price for the
19 produce, which can be no later than 24 hours after receipt of
20 produce by the Merchant.

21 (2) If an agreement has not been made within the time specified in
22 paragraph (1)(b), then the Merchant is deemed to be an Agent. In
23 this event the maximum commission rate should be Agent 12.5%
24 and the relevant Market Authority 2.5%.

25 (3) If both parties agree in writing the time frame in paragraph (1)(b)
26 may be extended.

27 **51AEV Payment of Horticulture Produce**

28 (1) The Merchant must pay the Seller for a consignment of
29 Horticultural Produce the price agreed in accordance with the
30 schedule of prices agreed to within the period specified in the
31 Agreed Terms of Trade.

32 (2) The period specified may not exceed 28 (twenty eight) days from
33 the date the produce is received by the Merchant.

51AEW Summary price information

- (1) A Merchant must provide a Seller with a statement for each consignment of Horticultural Produce accepted by them showing the quantity and grades of the Horticultural Produce bought and the price paid. Statements containing only average prices are not acceptable.
- (2) The statement must be provided within the period specified in the Agreed Terms of Trade or within 14 (fourteen) days of the consignment being bought by the Merchant. The time specified may not exceed 28 (twenty eight) days.
- (3) The only pooling permissible under the code is:
 - (a) by growers; and
 - (b) only where the pooling body is totally owned and controlled by the growers involved.
- (4) Pooling regulations must be given to each grower in writing.
- (5) Growers must agree in writing to be part of the pooling arrangement.
- (6) All other terms of trade within the Code apply to all transactions carried out by the pooling body.
- (7) Pooling by Merchants, Agents or Processors is not permissible.

51AEX Dispute Resolution

- (1) For the purposes of this section and section 51AEX:
- Complainant*** means the person or entity that initiates the procedure under subsection (33) or appoints a Horticultural Inspector under subsection (35).
- Parties*** mean the Complainant and the Respondent in a dispute.
- Respondent*** means the person or entity with which the Complainant has a dispute.

Initiating a dispute

- (2) A Merchant/Agent or Seller may initiate a dispute against any participant covered by the code in relation to a Trading Relationship by contacting in writing the other party and notifying them of:
- (a) the nature of the dispute; and
 - (b) the outcome the Complainant seeks; and
 - (c) the action the Complainant considers will settle the dispute.

Resolving a dispute

- (3) If a dispute is notified under subsection (2) the Parties must negotiate in good faith to resolve the dispute.
- (4) If the Parties cannot resolve the dispute within three weeks of notification of the dispute, either party may seek a referral for mediation under section 51AEZ.

51AEY Horticultural Inspectors

- (1) A Seller or a Merchant/Agent may at any time, and irrespective of whether a dispute has been notified under section 51AEZ or a mediator has been appointed under that section, appoint a Horticultural Inspector to provide a report on:
- (a) whether amounts paid by a Merchant/Agent to a Seller either directly or through the relevant Market authorities Trust Fund were calculated in accordance with the requirements of this Code and the Agreed Terms of Trade; and
 - (b) any other matter in relation to which a dispute has been notified under section 51AEX.

Assistance to Horticultural Inspectors

- (2) If a Horticultural Inspector is appointed pursuant to this section, the relevant party must:
- (a) permit the Horticultural Inspector to inspect any Horticultural Produce supplied by the Seller in possession of the Merchant/Agent; and
 - (b) in the case of an Agent—permit the Horticultural Inspector to inspect the financial and other records of the Agent that relate to the Seller or Horticultural Produce supplied by the Seller.

Horticultural Inspector's report

- (3) A Horticultural Inspector appointed pursuant to this section must prepare a report within 48 (forty eight) hours of appointment and provide a copy of that report to both Parties.
- (4) The Horticultural Inspector's report:
- (a) must not include information that a Party to the dispute is not entitled to obtain under the Agreed Terms of Trade; and
 - (b) will not be legally binding on the Parties but is intended to provide objective evidence to facilitate the dispute being resolved by good faith negotiation, by mediation, or through legal proceedings.

Costs of Horticultural Inspector

- (5) A Horticultural Inspector will be initially paid by the party requesting the inspection.
- (6) If a mediator as part of mediation appoints an inspector/assessor, each party must pay half the costs.
- (7) Reimbursement of these costs, or a portion of these costs, may be subsequently agreed by the parties or directed by the Producer Fairness Tribunal or a court.

51AEZ Mediation

- (1) Either party may by notice to the other request a dispute notified under section 51AEX to be referred for mediation.
- (2) When a party seeks referral for mediation:
- (a) the dispute will be referred in the first instance to the Producer Fairness Tribunal accredited pursuant to paragraph 51AEZA(3)(e); and
 - (b) if the other party agrees to the mediation—the Producer Fairness Tribunal will be the official mediator.
- (3) In mediating disputes, the Producer Fairness Tribunal has the following powers:
- (i) to delegate the mediation to the Tribunal office, or another mediator appointed by the Producer Fairness Tribunal;

- 1 (ii) to make decisions (whether made by the Producer
2 Fairness Tribunal, the Tribunal office or any appointed
3 mediator); and
4 (iii) to award costs in respect of the mediation.
- 5 (4) Within seven days of acceptance or delegation of the mediation,
6 the mediator must:
7 (a) decide the time of mediation (provided it is within 14
8 (fourteen) days of the acceptance or delegation of the
9 mediation) and a place of mediation (provided it is in
10 Australia); and
11 (b) notify the parties of the time and place of mediation.
- 12 (5) If both parties agree the mediation can be conducted via
13 teleconferencing or videoconferencing.
- 14 (6) Unless agreement is reached or directed otherwise, each party must
15 pay their own costs of the representations at the mediation and half
16 of any other mediation costs.
- 17 (7) The parties are bound by a decision of the mediator unless, on
18 application by one or more of the parties to a court of competent
19 jurisdiction, the court makes a different decision.

20 *Resolution of disputes*

- 21 (8) There will be no termination of a dispute without settlement either
22 by agreement negotiated between the Parties or by the Parties and
23 the mediator during the process of mediation.

24 **51AEZA Oversight by the Horticultural Code Management**
25 **Committee**

26 *Establishment of the Committee*

- 27 (1) A Horticultural Code Management Committee will be appointed
28 by the Minister and will comprise:
29 (a) an independent chairperson; and
30 (b) 3 members who are Sellers; and
31 (c) 3 members who are Merchants/Agents; and
32 (d) 2 independent members.

- (3) The Horticultural Code Management Committee will:
- (a) facilitate the introduction of the Code, including raising awareness of the Code and ensuring appropriate industry training and understanding; and
 - (b) establish guidelines and procedures for the accreditation of independent, impartial and appropriately skilled Horticultural Inspectors; and
 - (c) appoint Horticultural Inspectors so as to ensure that there are a sufficient number operating within the wholesale market, taking into consideration the geographical location of Horticultural Inspectors, the relative dispersal of skills of the Horticultural Inspectors and other criteria to be determined by the Committee; and
 - (d) ensure that Horticultural Inspectors are not based within wholesale markets but operate as independent contract consultants located outside the markets; and
 - (e) establish guidelines for the accreditation of an independent, impartial and appropriately skilled Producer Fairness Tribunal to be appointed by the Minister and to be known as the Horticultural Code Producer Fairness Tribunal whose responsibilities shall include those described in section 51AEZ and to report at least twice a year on the operation of the Code and any proposed modification required to the Code; and
 - (f) provide a report to the Minister each year detailing the work of the Committee in the preceding 12 (twelve) month period.