Independent Review of the Horticulture Code of Conduct: Final Report

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November 2015

Cataloguing data

This publication (and any material sourced from it) should be attributed as: Napper, M & Wein, A 2015, *Independent Review of the Horticulture Code of Conduct: Final Report*, Department of Agriculture and Water Resources, Canberra, November. CC BY 3.0

ISBN 978-176003-110-7

This publication is available at agriculture.gov.au/ag-farm-food/hort-policy/code-of-conduct.

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Foreword

Good regulation will only remain effective if it continues to be relevant. It is for this reason that the Australian Government requested an independent review of the mandatory Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code). We were appointed to undertake this review, owing to our experience with the industry and our understanding of regulatory frameworks, including industry codes. Our role has been to provide an independent perspective on the operation of the Horticulture Code, and make recommendations on how to improve its effectiveness in the context of the horticulture industry as it currently operates. This report responds to the terms of reference noted in the issues paper, discusses the findings of the review, and provides recommendations for the future of the Horticulture Code.

A properly functioning Horticulture Code is vital in ensuring the sustained viability of Australia's horticulture sector. We consider that a functioning code is one which improves the clarity and transparency in the arrangements between growers and traders and reflects the practicalities of market based issues. In the course of this review it has become apparent that there is a broad consensus across the horticulture industry that the Horticulture Code is not effective.

In undertaking the review, we met with a range of stakeholders, sought public written submissions, conducted oral consultations, carried out our own research, and looked at the broader Australian Government agenda. We heard how the Horticulture Code has impacted on business practices for better or worse. From this we gained an in-depth understanding of the current situation within the horticulture industry, and the issues surrounding the Horticulture Code.

This report details our observations from the consultation process, and our recommendations, which we hope will improve the business practices of the wholesale horticulture sector. In developing our recommendations, we were guided by a philosophy of effective regulation that optimises outcomes for all stakeholders. This was of paramount importance to us as our recommendations have the potential to affect thousands of growers and traders, as well as other participants in the sector. Our aim in making our recommendations is to create a business environment that is ultimately profitable and sustainable for all in the horticulture industry.

We are very thankful for all of those who participated in the review process, including those we engaged with in face-to-face meetings and teleconferences, and those who lodged submissions. All stakeholder views were carefully considered, and enriched our information discovery process, which ultimately led us to providing this report to the Australian Government. We are also grateful to the Horticulture Code Review Team within the Department of Agriculture and Water Resources, who supported us in our task and provided us with the resources and data that enabled us to properly and thoroughly consider all aspects of our report to government.

Having presented our recommendations, the Australian Government will consider them and respond. The Horticulture Code will sunset in April 2017, and we are hopeful that these recommendations will inform and shape the future of the Horticulture Code and the sector.

Mark Napper Alan Wein

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Executive summary

On 3 June 2015, this independent review of the Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code) was announced by the Australian Government. This review has been undertaken to examine whether the Horticulture Code's parameters and prescriptions are still relevant to the horticulture industry.

The Horticulture Code (the code) was developed with the aim of improving transparency and business practices for transactions between growers and traders of fresh fruit and vegetables.

Under the terms of reference for the review we have examined a range of issues including how:

- the trading arrangements between growers and traders currently operate
- the code is applied to trade in the horticulture industry
- disputes between growers and traders are handled under the code
- breaches of the code are enforced
- effective the code has been in improving the clarity and transparency of transactions between growers and traders.

We have made a range of findings based on the industry consultations, submissions and our own research. These findings are detailed in this report, and have informed our recommendations.

Trading arrangements

The review has highlighted that many aspects of the horticulture industry's trading arrangements have changed since the code commenced in 2007. Growers are increasingly trading directly with supermarkets and other retailers, and technological changes allow for greater transparency, improved communication on quality issues and the opportunity to improve price reporting. The review also examined issues surrounding the strict definitions of merchants and agents, and the way that traders operate in practice in the markets.

The review gave consideration to the inclusion of a good faith obligation in the code, and the evidence to support this inclusion. Our findings highlighted a range of potentially problematic conduct within the industry that could better be addressed by a good faith clause. We also note that good faith obligations have been incorporated into both the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Franchising Code) and the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Food and Grocery Code).

Application of the code

During the review it became apparent that the majority of horticulture produce transactions do not occur under the Horticulture Code. This is due to the exemption of pre-code contracts, as well as the exemption of processors, exporters and retailers from the code. The extension of the code to cover these exemptions is supported by the majority of stakeholders who participated in the review. We found significant evidence to support the inclusion of pre-code contracts in an amended code. However, our review did not find reliable evidence to indicate any substantive problems with the transparency of transactions between growers and processors, or growers and exporters.

Dispute resolution

We found that the Horticulture Code's current dispute resolution mechanism is irrelevant, inappropriate and largely not adopted by parties in the horticulture sector. In general, growers believe that the low uptake of the code's dispute resolution mechanism is due to a fear of retribution, whereas central markets contend that the reason for low uptake is that there are few disputes. Further, it is widely believed that the dispute resolution mechanism prescribed by the code does not address the majority of disputes that arise in the course of what appears to be acceptable market practice in the horticulture sector. Most disputes are related to issues of the quality and timing of the delivery of produce, payments to growers, and the transparency of prices. An amended dispute resolution mechanism that focuses on these main points of contention is necessary for the code to be more effective.

Enforcement of the code

We found general consensus within the horticulture industry that the enforcement of the Horticulture Code is not strong enough to prevent breaches, and that stakeholders are unconcerned about complying with the code. In response to this, growers and grower bodies strongly agreed that the Australian Competition and Consumer Commission (ACCC) should be given increased enforcement powers. In its submission to the review, the ACCC detailed recommendations on how to improve its ability to enforce the code and complete audits. However, increasing the ACCC's powers to enforce the code was not supported by all stakeholders, particularly the central markets and their related industry bodies.

Effectiveness

There is also broad consensus within the horticulture industry that the Horticulture Code is not effective, which was highlighted through the review process. Although most industry stakeholders believe that the code is ineffective, there are differing views on why this is so. In general, growers and grower bodies believe that the code's lack of effectiveness is due to its inability to bring about increased transparency, whereas traders believe that the code fails because it is inflexible and does not reflect the way the industry operates. A lack of understanding of how the code operates also contributes to the code's ineffectiveness, and has caused industry stakeholders to disengage from the code. Improved education programs could improve the code's effectiveness and are generally supported by stakeholders.

Recommendations

Our report makes 13 recommendations to the Australian Government. We have made these recommendations with the expectation that they will help raise the horticulture industry's business practices if they are implemented. A summary of our recommendations is tabled in the 'Summary of recommendations' section. We believe that remaking the code with amendments is the best direction as it gives the industry an opportunity to improve the transparency of its commercial operations.

Summary of recommendations

We recommend that Option 3: remaking the Horticulture Code of Conduct with amendments be adopted by the Australian Government. Our recommendations are as follows:

1. That the Horticulture Code be amended to remove the distinction between an agent and a merchant.
    a. That all transactions meet specific transparency requirements to be included in a revised Horticulture Code (explored further at Appendix A).
2. That a standard form horticulture produce agreement (HPA) be annexed to the Horticulture Code, to be used as the minimum basis for trade in horticulture produce between growers and traders.
3. That an obligation on all parties to act in good faith be included in the Horticulture Code.
4. That the Horticulture Code be amended to allow a method or formula for determining prices paid to a grower, including pooling and price averaging where:
    a. parties have prior knowledge and agree to the method or formula in the HPA
    b. if pooled, the pooled produce is of the same quality.
5. That the government explore the inclusion of deeming provisions in the Horticulture Code to ensure that where a pre-existing contract is not in place, and where a HPA is provided by a trader or sought by a grower, that the intent of the parties to enter into a HPA is deemed to have occurred. Such provisions should ensure that parties have time to arrange their affairs and that no party can use such provisions to enforce unfair contract terms.
6. That the Horticulture Code be amended to require that where a HPA does not include specific quality specifications, FreshSpecs specifications be used as the default.
7. That the Horticulture Code be amended to remove the current exemption for contracts entered into prior to 15 December 2006.
8. That the Horticulture Code be amended to regulate transactions between growers and retailers where the retailer is not a signatory to the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Food and Grocery Code).
9. That the Horticulture Code be amended to abolish the existing dispute resolution process and that it be replaced with an improved system which recognises the need for independent, fast, accessible, expert on site conciliation.
10. That the Horticulture Code be amended to provide that horticulture produce assessors be registered with the Australian Competition and Consumer Commission (ACCC) or the Australian Small Business and Family Enterprise Ombudsman, be appropriately qualified, trained, accredited (as determined by the ACCC or the Ombudsman) and capable of acting as non-determinative conciliators between the parties and recording the outcome of any resolution between the parties.

11. That the Horticulture Code be amended to provide for civil penalties and infringement notices for breaches of the code.

12. That the Horticulture Code require that traders generate and keep relevant information on transactions in order to allow the ACCC to use its powers under section 51ADD of the *Competition and Consumer Act 2010* (its random audit powers) to assess a trader's compliance with the code.

13. That as part of its role in enforcing the Horticulture Code, the ACCC should engage with growers' and traders' industry bodies in the development and distribution of any educational information relating to amendments to the code. Such information should be:

    a. in plain English (and other languages as appropriate)

    b. released in industry newsletters

    c. released via an agreed timetable.

Introduction

The Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code) regulates trade in horticulture produce between growers and traders of fresh fruit and vegetables. The Horticulture Code also establishes a dispute resolution procedure.

The Horticulture Code was implemented on 14 May 2007 with the aim of improving the clarity and transparency in transactions between horticulture growers and traders. Since this time concerns have been raised about its overall effectiveness, especially the number of transactions occurring outside of its coverage.

The Horticulture Code is due to sunset on 1 April 2017. This review has therefore afforded horticulture growers and traders a timely opportunity to provide feedback on how the Horticulture Code can be improved to better meet the needs of Australia's horticulture industry.

Terms of reference

The terms of reference are reproduced here as they were provided prior to the review.

The reviewers are required to look into the efficacy of the Horticulture Code of Conduct (the code).

The review will include, but not be limited to:

1) The extent to which the code currently applies to arrangements between growers and traders
2) The effectiveness of the code in meeting its purpose, including improving the clarity and transparency in current arrangements between growers and traders
3) The knowledge of the code by growers and traders
4) The extent to which to which hybrid trading arrangements occur in the industry
5) The enforcement of the code and the function of the horticultural mediation adviser
6) Options for the future of the code, including any further measures that would improve the operation of the code
7) Any other related issues raised in the Competition Policy Review and the draft Food and Grocery Code of Conduct.

The reviewers are required to prepare a report to the Minister for Agriculture, the Hon Barnaby Joyce MP, within four months of the commencement of the review. The report is to include both findings and recommendations, based on evidence presented to the reviewer and these terms of reference.

The reviewers are required to release an issues paper in response to the terms of reference, and provide stakeholders with an opportunity for comment on the issues paper. Non-confidential submissions will be published on the review website. In gathering evidence to support the findings and recommendations for the final report, the reviewers are required to undertake appropriate consultations, including with industry, traders, growers and the Australian Competition and Consumer Commission.

1 Background

Australia's horticulture industry is highly diverse, reflecting the variety of commodities and the large geographical distribution of the industry. Business practices vary widely.

Australia's horticulture industry comprises fruit, vegetables, nuts, turf, nursery, herbs and other edible plants. The industry is labour intensive and mostly seasonal. It comprises mainly small-scale family farms—however, there is a growing trend towards medium to larger scale operations (Department of Agriculture 2012).

The horticulture industry is the nation's third largest agricultural industry based on gross value of production. The horticulture industry contributes significantly to the prosperity of people living in rural and regional Australia. There were 56 700 people employed in Australia to grow fruit, vegetables and nuts for domestic and export markets in 2012–13, and the total gross value of horticulture production was approximately $8.274 billion (ABARES 2015; Department of Agriculture 2014). There appears to have been minimal growth in the horticulture industry between the Horticulture Code's introduction in 2007 and 2012–13, based on Australian Bureau of Statistics (ABS) data on value of agricultural commodities produced (ABS 2007, 2015).

The wholesale fruit and vegetable industry is comprised of over 400 traders, with a throughput volume of over 4 million tonnes, and a wholesale value of over $7 billion annually. Over 15 000 growers supply the markets (Fresh Markets Australia submission). The majority of these traders operate in central wholesale markets.

Growers of horticulture produce may also trade directly with parties outside of the wholesale markets, including exporters, retailers, processors and hospitality and food services. There are a number of different supply chain models used to get horticulture produce from the farm to the consumer. Increasingly, large retail chains are buying large volumes of produce directly from the farm gate.

What is the Horticulture Code?

The Trade Practices (Horticulture Code of Conduct) Regulations 2006 (the Horticulture Code) is a prescribed, mandatory industry code under section 51AE of the *Competition and Consumer Act 2010*. The genesis of a code to regulate supply chain behaviour in the horticulture sector was developed as a result of the Australian Government response to the Report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure?* A number of subsequent iterations resulted in the current mandatory code. A more detailed history of the code is provided at Attachment B.

The Horticulture Code (the code) regulates trade in horticulture produce between growers and traders of fresh fruit and vegetables and establishes an alternative dispute resolution procedure. It aims to improve clarity and transparency in trade between growers and traders. The code commenced in May 2007 and applies to contracts for the supply and purchase of horticulture produce signed after 15 December 2006.

The Horticulture Code requires that growers and traders of horticulture produce have written agreements in place when they trade with each other. It requires:

- traders to publish their preferred 'terms of trade'
- growers and traders to use written agreements
- transactions to be either on an agent or merchant basis
- traders to provide written transaction information to growers.

The Horticulture Code does not regulate price and does not allow practices such as pooling and price averaging and the payment of bonuses.

The Horticulture Code is due to sunset on 1 April 2017. Sunsetting provisions in legislation provide that the law ceases to have effect after a specific date unless further legislative action is taken to remake that law. The Australian Government can either allow the code to sunset or remake the code. This review will inform that decision.

Broader regulatory framework

Parties covered by the Horticulture Code operate in a broader regulatory and policy framework, including those discussed in this section.

Competition and Consumer Act 2010

The stated objective of the *Competition and Consumer Act 2010* (the Act) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection (section 2). The Act operates as a single set of laws applying to most markets and businesses within Australia. Schedule 2 of the Act sets out the Australian Consumer Law (ACL), which applies to both corporations and individuals carrying on a business within Australia.

The Horticulture Code is a prescribed, mandatory industry code under the Act. The Act states that a person must not, in trade or commerce, contravene an applicable industry code (section 51AD). Therefore, a breach of the Horticulture Code is a breach of the Act and the enforcement of the code is through the enforcement provisions of the Act. The Australian Competition and Consumer Commission (ACCC) enforces the Act.

Australian Consumer Law

The ACL is a single, national consumer law enforced and administered by the ACCC, each state and territory's consumer agency, and, in respect of financial services, the Australian Securities and Investments Commission (ASIC). Amongst its powers, the ACL prohibits misleading or deceptive conduct and unconscionable conduct. Penalties for violating these provisions may include the issuing of infringement notices by the ACCC, as well as civil penalties imposed by a court.

While the ACL does not relate specifically to the Horticulture Code, growers and traders of horticulture produce must still comply with the general requirements set out in the ACL.

The ACL requires that persons not engage in:

- misleading or deceptive conduct
- unconscionable conduct, or
- unfair contract terms.

International perspectives

During the course of the review we have been informed by international arrangements which might assist in the development of a revised code. Comparative international models were identified by a number of stakeholders as alternative ways to improve the horticulture sector. A general outline of relevant international markets is provided at Attachment F.

Based on this information, it is clear that Australia's industry is in a relatively unique position, with comparatively little regulation. This is in contrast to markets, such as the United States, which have a far greater degree of government oversight and operate at a vastly greater scale. Therefore, any applicable international models would need to be adjusted to suit an Australian context. There is no doubt that the current Horticulture Code can be improved to assist the industry in providing meaningful regulation that supports sustainable growth and opportunity for all stakeholders.

Issues paper and consultations

On 3 August 2015 we released an issues paper to facilitate discussion, and define and expand upon the purpose of the review. The paper outlined the background and operation of the Horticulture Code. It also raised questions for consideration by interested stakeholders and called for submissions by 18 September 2015. The review received 44 submissions. A range of non-confidential submissions have been referenced in the report, and these can all be read in full on the review website (Department of Agriculture and Water Resources 2015).

We also held over 50 consultations with growers, traders, and other interested stakeholders through the public consultation phase of the review during August and September. Formal consultations were held in Canberra, Melbourne, Sydney, Perth, Brisbane, Mareeba and Darwin. These meetings were attended by growers, traders, processors, retailers, industry representatives and government. We held additional teleconferences and meetings which have also informed this review.

2 Trading arrangements in the horticulture sector

Introduction

Australia's horticulture industry is highly diverse. The industry covers a large geographical area, creating a need for transportation of fresh produce over long distances to central markets or other distribution sources, to ensure continuous fresh domestic supply. This supply chain is characterised by many sellers and few buyers. Additionally, horticulture produce varies greatly in terms of perishability and whether it is fit for sale when it leaves the grower (for example, some produce, such as bananas, needs to be ripened after it passes the farm gate).

Produce quality can deteriorate significantly post the farm gate due to:

- the application of post-harvest treatments (hot water dipping, vapour heat treatment, irradiation) to control pests of biosecurity concern to the destination state or territory
- poor post-harvest management of the produce (leaving produce for long periods of time at ambient summer temperatures or lack of refrigerated transport) which speeds deterioration and reduces shelf-life
- poor packing or packing leading to crushing or bruising during transport
- chill damage.

Furthermore, external visual assessments of produce quality may not reveal internal problems, such as browning in apples or low brix to acid ratios in oranges. It is therefore, difficult for growers or wholesale traders to know, with certainty, what quality the produce will be when it arrives at market.

Given the intrinsic characteristics of the industry, the Australian Government introduced a mandatory code of conduct to improve the clarity and transparency of transactions between growers and wholesalers of fresh fruit and vegetables. This was informed by concerns expressed by the grower community over a number of years about the need to improve commercial transparency in the fresh fruit and vegetable wholesale markets.

Issues were most problematic for growers who were located long distances from markets (for example a mango grower in the Northern Territory selling their produce in the Sydney central market). These growers were often disadvantaged due to their limited ability to access market information, as well as the higher costs involved with finding and establishing a relationship with an alternate trader to handle their produce.

In introducing the Horticulture Code, the government sought to address these key issues:

- a lack of clarity about when a wholesaler is trading as an agent or as a merchant when dealing with growers
- a failure to invest in written documentation of trade, including written transaction information and written trading agreements

- the need for an effective dispute resolution process, including independent assessment of transactions and compulsory mediation.

Interestingly, the *Review of the Perth Markets Act (1926)* in 1999 defined four principle themes that impacted upon the sector, which are still relevant today:

- uncertainty as to the nature of the wholesaler's role in most transactions
- trading terms were often unwritten and left to trust
- inadequate disclosure of information regarding sales and calculation of price; growers were often unaware as to the final net price of the products they sent to market; the identity of the buyer, volumes of their product sold and price averaging practices were also unclear and uncertain
- arm's length transactions where a wholesaler is also a buyer of product.

Today's wholesale sector

Key success factors for horticulture trading businesses generally include their networks and relationships within the market, ability to guarantee supply of produce, ability to communicate and negotiate with growers, stock control and turnover, as well as financial and debt management skills (IBISWorld 2015). Arguably, these were key success factors prior to the Horticulture Code's introduction.

Since 2007, fruit and vegetable growers are increasingly trading directly with major supermarket chains and other retail outlets (IBISWorld 2015). The Australian National Retailers' Association (ANRA) stated in their response to the Agricultural Competitiveness White Paper that only 5 per cent of all farm gate produce is purchased by the retail sector—processors (33 per cent) and exporters (32 per cent), followed by the wholesale sector (16 per cent) dominate farm gate sales (ANRA 2014). In its submission to this review, the Central Markets Association of Australia (CMAA) cites that 50 per cent of horticulture produce is sold directly though the central market system and 50 per cent is sold directly to the retail sector (this excludes imported produce). The CMAA submission claims retailers are putting pressure on the central market system in an attempt to increase the retailer market share to 70 to 80 per cent.

The central market is a classic raw supply–demand model accentuated by a perishable product that has often travelled long distances to get to market. The market operates on the basis that horticulture produce comes in to markets and traders will often have a general idea of supply and demand for different horticulture produce and will either purchase produce directly from growers or sell the produce on behalf of a grower on this basis. The wholesale industry strongly operates on the basis of relationships between traders and growers. In some cases a grower may deliver produce to the wholesale trader without notification and knowledge of the market price, simply based on this relationship, and expect the trader to sell the produce at market prices.

Products that require conditioning prior to sale often come to market without a fixed price being agreed with the grower. This market practice recognises the practical nuances of the horticulture market and that product condition depends upon the type of product (usually mangoes, bananas and avocados). This conditioning process is usually conducted by the wholesaler at market and the product comes on the market floor for sale once the conditioning process has been completed. This time lag impacts upon the market price and the price achieved

by the wholesaler. This price in turn is impacted by the condition and quality of the produce following conditioning and the supply and demand for the product at that time.

It is generally accepted that supply and demand dynamics can confuse price signals about quality. Sometimes poor quality horticulture produce delivered to the market in a period of low supply can receive good prices and vice versa, good quality produce delivered in a time of abundant supply can receive low prices.

The National Farmers' Federation (NFF) through its submission to the review has expressed concern about the operations of central markets, which the NFF characterise as lacking transparency and contractual certainty for growers. The NFF believes a lack of written contracts persists, with verbal contracts overriding any written agreements, and that the operation of the hybrid model still exists. The hybrid model is where a trader does not declare to a grower whether they will act as a merchant or an agent until they have secured a buyer for the horticulture produce. The NFF further believes that there needs to be behavioural changes by both growers and traders of horticulture produce. Notwithstanding, central markets play a key role in the horticulture supply chain and there are healthy arrangements that show good business practices can work to the benefit of all parties (see, for example, Growcom's submission to the review).

It is the view of some grower stakeholders that the practice of a wholesaler 'indicating' a price below the price the produce was sold for, and then deducting a commission from the already 'skimmed' sale price has become ingrained in the culture of the sector. Additionally, it is reported that growers send horticulture produce to central markets without notice or any agreement as to price and/or agreed terms of trade.

Effect of technological changes

There have been significant technological advances since the introduction of the Horticulture Code in 2007. These advances may potentially allow for greater transparency to be introduced into the horticulture industry and enable growers to source accurate and timely information on produce prices. These improvements relate to technology available allowing for faster and clearer communication and the ability to access information on a smart phone, including market reports and photographs of produce. Additionally, electronic reporting systems, in most part, are already in place in the central markets for the purposes of food safety and traceability.

Good faith

What is good faith?

Under common law, good faith requires parties to an agreement to exercise their powers reasonably and not arbitrarily or for some irrelevant purpose. Conduct may lack good faith where one party acts dishonestly or fails to have regard to the legitimate interests of the other party. Australian courts have found business dealings to be not in good faith when they involve one party acting on an ulterior motive, or in a way that undermines or denies the other party the benefits of a contract.

We know that a statutory duty of good faith is currently included in the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Franchising Code), the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Food and Grocery Code) and the Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, as well as in relation to specific provisions regarding contract variations and

mediation under the Competition and Consumer (Industry Codes—Oilcode) Regulation 2006 (Oilcode). It is therefore beyond doubt that an obligation to act in good faith is consistent with the nature of industry codes. We might infer that the inclusion of good faith in these contexts represents the fact that a clear good faith obligation in business dealings is considered to be of increasing importance to industry.

The obligation to act in good faith has been introduced into these industry codes to provide a flexible mechanism for addressing opportunistic and unfair conduct that may fall below the threshold of more serious misconduct provisions within the ACL or the Act. We feel that including a statutory good faith obligation in the code will build trust and improve standards of conduct in the horticulture industry.

The evolving role of good faith

One concern with including a statutory obligation to act in good faith within the Horticulture Code is the risk that it may increase uncertainty. In keeping with the representation of good faith in other industry codes, the intention would be to include a statutory obligation for parties to act in good faith during all aspects of the business relationship including during negotiation, which is not covered under the common law. Leaving good faith undefined in the Horticulture Code provides flexibility, as the common law continues to evolve and develop over time. This is an issue that was also explored in detail in the 2013 Wein Review of the Franchising Code (Wein 2013).

Views differ on the degree of certainty regarding the nature of any obligation to act in good faith under the common law in Australia. On the one hand, this allows judges to decide on a case-by-case basis whether there is an obligation to act in good faith, and if so whether that obligation has been breached. This approach allows sensitivity to the individual circumstances of each case. On the other hand, it makes it more difficult for parties to know precisely what is required of them to comply with the law.

Different codes specify different matters that may be taken into account to determine where there has been a breach of the good faith obligation. For example, the Franchising Code (subsection 6(3)) outlines that a court may have regard to:

- whether the party acted honestly and not arbitrarily
- whether the party cooperated to achieve the purposes of the agreement.

Similarly, the Food and Grocery Code requires that retailers and wholesalers act in good faith towards suppliers at all times. The obligation does not extend to suppliers as the code only provides for retailers and wholesalers to elect to be bound by its obligations. In determining whether a retailer or wholesaler has acted in good faith in dealing with a supplier, these matters may be taken into account:

- whether the retailer or wholesaler's trading relationship with the supplier has been conducted without duress
- whether the retailer or wholesaler's trading relationship with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment
- whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.

Building a good faith obligation into the Horticulture Code

For many, deep relationships and mutual trust underwrite strong business relations in the horticulture industry. However, anecdotal evidence supports the view that potentially problematic conduct exists and could be addressed with an express statement of good faith. Even if contraventions of good faith don't occur on a grand scale within the wholesale horticulture sector, conduct of concern may still have a significant impact on those it affects.

Fundamentally, where two or more parties engage in a commercial relationship, intent on acting in a proper and ethical, yet commercial manner, the concept of a good faith obligation should not concern them, nor does it diminish the opportunity to bargain in the commercial relationship. The obligation merely underpins transparency, honesty and acceptable practices, conduct and behaviours.

We believe that including a statutory obligation to act in good faith would serve two purposes. Firstly, it sets a clear baseline for what in most cases is already considered to be good business practice. Furthermore, an explicit reference to good faith in the Horticulture Code might serve to educate those unaware of the already existing common law precedent of good faith. Without limiting the obligation imposed by the common law, codification of good faith can set a standard of minimum behaviour and provide an educative influence. Similar points were made in the *Regulation Impact Statement: Proposed changes to franchising legislation* (Department of the Treasury 2014).

We are also of the view that a good faith provision will create legal protections to support and improve commercial relationships in the sector, rather than add to the legal compliance obligations of growers and traders.

Evidence considered during the review

Transparency and price reporting

The Horticulture Code aims to ensure transparency and clarity of transactions relating to trade in horticulture produce between growers and traders. Arguably, this could be done simply through the provision of a written agreement so that the terms of trade are clear. Transparency can, however, extend to not just the terms of trade, but also transparency of price and how that price is determined, and transparency of decisions relating to quality. Not surprisingly, most disputes between growers and traders are over price and/or the assessed quality of produce and the timing of the advice to growers on price and quality.

The key requirements under the Horticulture Code include that:

- wholesalers must publish and make publicly available 'terms of trade' documents outlining their preferred trading conditions
- growers and wholesalers must have written agreements which specify a range of trading conditions, including whether the trader will trade as an agent or a merchant
- wholesalers must provide written transaction information to growers, particularly in regard to prices obtained and prices paid by wholesalers
- growers and wholesalers must participate in both independent assessment of transactions and mediation where there is a dispute under the Horticulture Code.

In its submission to the review, Growcom contends 'that growers are still unfairly disadvantaged by practices commonly employed by purchasers of their product across the whole supply chain'.

A survey conducted by state farming organisations for the purposes of providing information to this review highlighted concerns about the operations of wholesale markets as they are characterised by a lack of transparency and contractual certainty for producers (see, for example, the submission to the review by the Tasmanian Farmers & Graziers Association (TFGA)). This affects market signals of volume and quality of produce, which impacts upon a producer's willingness/capacity to invest in innovation.

The TFGA also stated that the same survey indicated that the lack of trust and certainty in the wholesale produce markets was affecting the attraction/retention of the next generation of growers. New entrants are less likely to invest time and capital in the horticulture industry if they are unable to perceive robust and transparent markets for produce.

Despite the requirements in the Horticulture Code, many transactions are reported as having occurred under verbal agreements, even where a written agreement may be in place. Furthermore, stakeholder consultations and submissions to the review made it clear that in most cases written agreements, if in place, are not being adhered to. Additionally, some traders raised concerns about growers not signing horticulture produce agreements. This has led to calls by the trading sector for horticulture produce agreements to be deemed to be signed where an agreement has been provided by a trader to a grower and the grower, without having signed the agreement, then sends produce to the trader (see submissions to the review by HopgoodGanim Lawyers and Fresh Markets Australia (FMA)).

Grower submissions to the review state that there is a lack of transparency regarding what happens with produce once it leaves the grower. Growers know how much the agent pays them, but not who has bought the produce, how much the purchaser bought the produce for and how much the consumer pays. In his capacity as Vice President of the Mareeba District Fruit and Vegetable Growers Association, Mr Scott Dixon stated in a submission to the review that growers are not entitled to documented evidence of who bought their produce or for how much. Mr Dixon claimed that for those growers who enter agent agreements, there is no way to test the integrity of the agent's undertakings.

Traders are currently obliged to keep records of who they sold to and the gross sale price and margin for each grade, size and variety. Some growers noted that the integrity and transparency of the system would be improved if these records were made available for audit by an independent third party. This would provide price transparency, whilst protecting the buyer's names from being directly disclosed to the grower.

In its submission to the review, Freshmark (the NSW Chamber of Fruit and Vegetable Industries) stated that 'transparency has always been available to those who seek it'. Freshmark's submission indicated that growers are provided with detailed reports. However, Freshmark also noted that growers seek summaries of these reports, not wanting all the information that can be provided to them.

Similarly, FMA noted in its submission to the review that there are price reporting services operating in all of the main markets. These services document and publish price information each trading day and are provided on a fee for service basis. FMA points out that these services

are available in addition to the communication that already takes place between a grower and trader, including the agreement that is in place, statements, reports, emails, texts and telephone calls.

Transparency concerns have also been raised in relation to produce quality. At the extreme, growers raise concerns that their produce is unfairly downgraded, whilst traders are concerned by grower behaviour where poor quality produce is hidden under better quality produce. HopgoodGanim Lawyers in its submission to the review expressed the view that the Horticulture Code does not adequately deal with produce that arrives at central markets and does not meet expected quality specifications.

Price reporting

A key aim of the Horticulture Code is to improve clarity and transparency in trade between growers and traders of fresh fruit and vegetables. One of the main points of tension in the trade between the wholesaler and the grower is transparency on price. Comments were made by growers regarding their inability to access reliable and timely market price information, despite the fact that a 'price reporting service is operating in all main Markets' (FMA submission).

AUSVEG in their submission noted that 'increased access to pricing and sales information would put growers on a better footing during negotiations and increase transparency throughout the broader supply chain'. Similarly, Growcom noted in their submission:

> …the lack of real time price information was hampering grower's ability to respond to market signals and establish if they were being treated fairly. According to growers, the current market reports are not delivered daily and by the time the information is received it is too late to act on it. It is also not a record of actual sales.

Ausmarket Consultants, owners of the existing price reporting service contend that their service is an independent service operating with the aim to 'provide accurate price data and engender the greatest level of confidence in the Reports to increase their usage'. This view is supported by the wholesalers with Brismark noting that they along with Brisbane Markets Limited invest $70 000 per annum 'to support the provision of market price reporting and produce matching services to Brismark Members and growers'.

Despite this it is apparent that many growers are unaware of the market reporting service and those that were aware, were sceptical of its credibility and critical of its timeliness and therefore value. A common criticism was that the price range reported was too large to be of any real value to growers.

Growers made it clear that they accept the fact they are operating in a market dominated by supply and demand and acknowledge the volatility that such a market exhibits. Growers also accept that the price signals and actual prices achieved, can move from day to day and that the indicative price expectation may not be achieved once the produce comes to market or conditioning of the product has been completed. However, when they send their product to market with an indicative price range they want an independent point of reference to validate the price they ultimately receive.

The lack of uptake of the existing market reporting system, whilst a source of frustration to wholesalers, demonstrates that it is not working and there is therefore a market failure.

Since the start of the Horticulture Code there have been significant advancements in the way business is undertaken. A major element of these advancements has been the huge advancements in technology, specifically digital technology. AUSVEG in their submission noted that technology could assist in solving price transparency by the 'implementation of a digital pricing system in markets, capable of providing real time trading data to growers and wholesalers'. This recommendation is supported by Growcom who also called for real time price information noting that the current market reporting system is 'not based on real sales data and is too slow'.

The concept of a real time price reporting service for horticulture has many advantages. Whilst price reporting systems operate in other industries (e.g. meat), horticulture with its breadth and diversity of product offerings presents many obstacles. While Ausmarket Consultants 'accept that there would be significant benefits from a comprehensive reporting system based on captured sales data', they acknowledged the difficulties in establishing such a system, especially 'the potential setting up costs and ongoing maintenance'.

Use of technology and price reporting

The central markets currently capture market sale data electronically. Data recorded includes:

- product line/category
- high and low market price
- date of sale
- grading
- volumes of a product/category sold.

HopgoodGanim Lawyers, in its submission to the review, stated that technology has improved transparency around product pricing and quality in the horticulture supply chain. The submission cites grower access to wholesale prices for fresh produce sold at other markets and the use of smart phones and similar devices possessing digital photography capabilities that allow instantaneous communication between traders and growers about matters of product quality and oversupply, as reasons for this increased transparency and clarity. However, as discussed, other stakeholders consider that transparency has not improved, despite technological advancements.

Price method/formula

Mr John Garrett of Garrett & Sons (a trader) noted in his submission to the review that a determination of price before trading is not clear-cut. He understands that a price needs to be agreed prior to sale, but that this may need to be determined after assessment of the market on the day.

In 2008 the ACCC recommended that the Horticulture Code be amended to require a merchant to provide a grower, before delivery, with either a price or a formula for calculating price (ACCC 2008). A number of stakeholders have recommended that the use of a method to calculate price be considered as part of this review (see, for example, the submission to the review by WA Citrus). In its submission to the review, Brisbane Markets Ltd supported the use of documented terms of trade and considered that a 'documented method of determining a return price is both clear and transparent, with an audit trail available to evidence the transaction'. Fresh State was

also supportive of including a method in the code to determine price (Fresh State submission to the review).

HopgoodGanim Lawyers in its submission to the review stated that the Horticulture Code does not reflect the reality of commercial relationships between growers and traders, being 'inflexible, commercially unrealistic and provides little incentive for wholesalers and growers to operate inside the Code'. Consistent with the 2008 ACCC recommendation, they suggested that additional and more flexible pricing options, including allowing parties to agree on price at the time produce is made available for sale and determining a price by an agreed method, may improve the workability of the code.

Freshmark stated in its submission to the review that if the Horticulture Code was modified to allow flexibility in a merchant transaction, where the return price is determined by the market sale price, it is likely that the overall returns to growers would improve. FMA in its submission to the review stated that the use of a method for determining price is their preferred way of trading.

Pooling and price averaging

In 2008 it was the view of the ACCC that paying a grower a price based on the average price received by the agent for a pool of produce (that is, various grades of produce from various growers that have been mixed together) is not permitted under the Horticulture Code (ACCC 2008). At the time the ACCC heard evidence both supportive and not supportive for this practice. The ACCC recommended that the code be amended to permit agents and growers to engage in pooling and price averaging (ACCC 2008). It is noted that this recommendation, along with the other 2008 ACCC recommendations relating specifically to the Horticulture Code, have not been implemented.

The ACCC recommended in its submission to this review that agents should be permitted to engage in pooling and price averaging of similar quality produce. Other stakeholders such as Brisbane Markets Ltd and the Victorian Farmers Federation in their submissions to the review think that there is a justification to support the pooling of produce of a similar grade/specification and/or price averaging in respect of produce of a similar grade/specification.

Stakeholders that were supportive of pooling and price averaging were also supportive of the use of a method for determining the price paid to the grower.

Only one stakeholder was against pooling and price averaging, stating in their submission to the review that produce is different in how it is produced and handled and that these factors do not support pooling produce. This stakeholder raised concerns that better quality produce could be impacted negatively where produce handled poorly later reveals quality issues.

Hybrid trading arrangements and ownership of produce

The Horticulture Code provides that a trader cannot act as both an agent and a merchant under the one horticulture produce agreement (section 7). This provision was included to provide a grower with certainty about the capacity in which their trader was acting, stopping 'hybrid' trading arrangements. Hybrid trading relationships are those in which a trader does not declare their intended role to the grower until a transaction has been secured. This often leaves all risk

with the grower. In not providing this transparency, it is also not clear which party carries the risk if the price of the produce is less than expected.

A majority of stakeholders (including both growers and traders), during consultations and through submissions, reported that traders in the central markets continue to trade under hybrid trading arrangements which the Horticulture Code sought to eradicate. This is despite referrals to their arrangement as one between a grower and a merchant or an agent (see, for example, the submission to the review by Growcom). Some stakeholders were concerned by this practice, whilst others were not. The big issue for stakeholders is not necessarily how a trader may operate in practice, acknowledging that the flexibility has the potential to benefit both the grower and trader. The main issue is that the trader operates transparently, including by providing pricing information back to the grower.

Apple & Pear Australia Ltd (APAL) members suggest that there is still confusion around the obligations of traders operating as either a merchant or an agent and that it is not uncommon for the hybrid model to be used in order to put all the market risk on the grower. The Mareeba District Fruit and Vegetable Growers Association, in its submission to the review, noted that the current arrangements allow the wholesaler to operate as a merchant whilst working under the definition of an agent. The result of this is that growers send their product to traders not knowing what, or often when, they will be paid. In some instances, it has been reported that growers are required to sign a contract agreeing to a very low minimum price per box.

AUSVEG noted in its submission to the review that it was concerned that some traders ask growers to sign both agent and merchant agreements and then use the one that gives them (traders) the most beneficial outcomes.

FMA argued that pre-code contracts are still in use because they offer parties flexibility in trading arrangements that is not possible under the Horticulture Code. Similarly, Brisbane Markets Ltd, in its submission to the review, considered that the existing hybrid transaction model offers the best outcome for both growers and traders in most situations as it offers the most cost efficient and effective transaction-based outcome.

Stakeholders have indicated that, in addition to there being a lack of transactions occurring under written agreements, transparency of transactions and price certainty was lacking. In this regard, the CMAA thinks that the Horticulture Code should contain provisions which provide for the use of documented terms of trade, without being prescriptive in defining the relationships between a grower and a trader (CMAA submission to the review). This would allow the situation to continue whereby almost all wholesaler-grower relationships operate on a verbal agreement that is entered into by the parties before the goods have been sent to the market (many of these verbal agreements have been in place for many years). However, some stakeholders would not accept this approach. The NFF, for example, outlined in their submission that the ability to differentiate between an agent and a merchant trader was a key concern for their members and that if the hybrid model is permitted to continue then there is little point in having a code.

Good faith

Though not a central theme to most submissions, a number of stakeholders discussed issues that went to the need to include an obligation to act in good faith in the Horticulture Code.

We believe that good faith can be a powerful way to improve relationships in the sector. For example, the submission by the Australian Food & Grocery Council included this express statement of obligation emphasising the benefits of a good faith provision:

> Clause 28 of the Food and Grocery Code imposes on retailers a duty "at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law as in force from time to time". This provision requires that retailers act honestly and fairly with suppliers, genuinely engaging in negotiation without pursuing extraneous unrelated objectives. It does not preclude retailers acting to protect and further their own legitimate commercial interests, and is expressly drafted in a way that allows flexibility in the concept as commercial relationships evolve. That said, it is a provision of significant persuasive force in the event of activity by retailers in the pursuit of less legitimate objectives.

A similar discussion was had in the review of the Franchising Code, with guidance material by the ACCC (n.d.) on this provision noting:

> …good faith requires a party to have due regard to the rights and interests of the other party, it does not require a party to act in the interests of the other party. Neither does it prevent a party from acting in their own legitimate commercial interests.

Any application of an obligation to act in good faith would occur in addition to existing legal requirements. These include, but are not limited to, prohibitions on misleading or deceptive conduct and unconscionable conduct.

The ACCC submitted that the inclusion of good faith in the Horticulture Code would bring it into alignment with the other industry codes. APAL were of the view that a good faith obligation would strengthen the Horticulture Code, and the NFF noted that:

> …the inclusion of a broad duty to deal lawfully and in good faith is an important protection, which may increase trust in the trader-grower relationship and thereby increase transparency.

If an explicit obligation to act in good faith is introduced, it must be determined who it should apply to and under what circumstances. In their submission, WA Citrus made the point that the obligation should be on both traders and growers. This is a position that has been supported by both FMA and Fresh State, with FMA noting:

> The Code requires amendment to include a clause relating to 'acting in good faith' to affirm the overarching intention for growers and traders to have good business relationships.

Fresh State agreed with this, submitting that *if* the Horticulture Code had to be renewed, a new clause stating that '…all parties are to act in good faith' would help make it a more '…workable code' (see Fresh State submission to the review).

Finally, the sensitivity around definition was highlighted in a submission from the Small Business Development Corporation of Western Australia (SBDC). While seeing benefit in requiring parties to act in good faith in their dealings with one another, the SBDC believes that

unless careful consideration is given to how this provision will be incorporated into the Horticulture Code it could cause confusion and other unintended consequences for parties. They noted:

> The SBDC's experience is that small business owners are typically unclear on what constitutes good faith (as well as what doesn't) and may ultimately be disappointed that it does not always provide an effective remedy to enforce their rights or resolves their disputes…by leaving this term undefined in the Code, state and federal courts are able to develop common law precedent around the meaning of the statutory good faith obligation in an unfettered way, which in turn would result in an obligation that is more in keeping with the actual experiences occurring in the relationship between growers and traders.

Credit service for growers

Submissions were received and comments made by growers outlining the need for a credit insurance service, or at least a trust account operating in each central market to protect growers from a wholesaler becoming insolvent. References were made to the credit service operating in the central markets for the benefit of wholesalers. However, there appears to be a misunderstanding by growers that the central market credit service protects the wholesaler from a bad debt incurred by their customer, where in fact it is only a credit risk assessment service.

Observations

The relationship between growers and wholesalers at central markets has been a source of contention for decades. Various legislation and other arrangements, and more recently the Horticulture Code, have attempted to wrestle with the key causes of concerns within the system relating to appropriate trading terms and transparency within a practical and workable framework. Despite various reviews and iterations of policy discussion, the system still fails to deliver on the objectives of the code. This uncertainty has led to mistrust, lack of confidence and confusion amongst stakeholders and some instability in the horticulture supply chain. The challenge for policy makers is to strike the balance between free enterprise and regulation that appropriately enables the system to be operated with integrity and confidence and not be anti-competitive.

We have heard instances where traders have been accused of bullying, intimidating and pressuring growers into unacceptable trading terms, which growers report that they accept because of the fear of retribution and not being able to sell their produce to other traders due to collusion. While we cannot ascertain the extent of such practices, we have no doubt that such activity has occurred and may still be occurring.

The current Horticulture Code does not enable all parties to trade in an efficient and appropriate manner that provides transparency and maximises profit equitably. The code's definition of a trader as a merchant or agent is not reflective of widely accepted operating practices. In reality the market sets the price for produce, which is a result of supply and demand and prevailing market conditions. This has led to the development of the hybrid trading model. Under this model, traders do not want to agree to a fixed price with the grower due to price fluctuations and they will accept the produce in a capacity as an agent, but once the goods are sold and a

fixed price determined, the trader may convert to a merchant for reasons such as a better return for them and simpler paperwork, reporting and possible taxation outcomes.

The practical nature of the market in horticulture produce is that price is generally variable and price variability is a function of supply and demand, quality grading and delivery issues. This causes the Horticulture Code's rigidity of merchant arrangements to run into difficulties, where the grower and the trader (being aware of the true market conditions and the condition of the produce) would normally accept the flexibility of price movements at market, in order to move a consignment on and not be left with unsold product. The issue is not in fact the requirement for flexibility; it is actually the transparency of the price for which produce is sold at and the actual costs, deductions and commissions or fee levied by the trader and the net sum paid to the grower. Providing simple, clear transparency in the trading relationship, where a fixed price is not agreed or varied, must be a fundamental imperative of the code.

As wholesale sector practice is based upon a price determined at market, the attempt by the Horticulture Code to regulate an agreed price between the grower and merchant prior to the horticulture produce being delivered has contributed to a failure in the adoption of the code.

Transparency and price reporting

Traders argue that growers should know market conditions and that they are able to obtain pricing information. Traders also argue that the final buyer of produce is commercially sensitive information that should not be shared with the grower. Growers on the other hand are of the view that there is a lack of transparency in what happens with their produce once it is accepted by the trader and whether they are getting the best price possible for their produce. Written terms of trade are not just good business practice, but are also crucial to ensuring clarity and transparency of transactions. We believe this issue could be addressed by the development of a standard form horticulture produce agreement (HPA), which could be annexed to the Horticulture Code. A standard form HPA could be used as a minimum basis for trade in horticulture produce between growers and traders. The Australian Government should consider establishing a working committee with relevant stakeholder representatives to finalise a standard form HPA.

We note that where a horticulture trader offers a HPA on a 'take it or leave it' basis to growers, additional protections may be available. In late October 2015, the Parliament passed the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.* This Act extends consumer unfair contract term protections to small business contracts. This means that if a grower is offered a standard form contract which contains unfair terms, those unfair contract terms may be declared void. An unfair contract terms is one which causes significant imbalance, is not reasonably necessary to protect interests or is detrimental to the other party if relied upon. Terms that may be unfair include terms that enable one party (but not the other) to:

- avoid/limit their obligations under the contract
- vary the terms of the contract
- terminate the contract
- penalise the other party for breaching/terminating the contract.

If a term is found to be unfair, a court may void that term, however the rest of the contract will continue to apply. Further discussion on this issue is at Attachment D.

Growers have concerns regarding transparency and the fact that they are at a negotiating disadvantage once goods have left the farm gate. Some growers feel that they are left with no choice but to accept the wholesaler's price (if they say no, the produce will be sent back to them and they'll have to find another wholesaler; and the produce has probably started to deteriorate).

An anonymous grower noted in their submission to the review that it is a 'mind blowing' idea that an agent would call a grower to negotiate the price of the produce in the early hours of the morning (when the grower has likely been up very late packing the produce). This raises many issues including the timing of the negotiations and the potential loss of sale to other cheaper produce while the grower and agent come to an agreement. The anonymous grower stated that growers should obtain a trader's terms of trade and if they do not like the returns or handling of produce, then they could change traders. Equally, traders have the ability to change growers if they are unhappy with the produce.

When talking about possible solutions, many stakeholders talked about the importance of having good relationships as the basis of trading and that there are different levels of ability to change trader/grower if there are concerns or trust is broken.

It was argued by some growers that wholesalers are reluctant to provide growers with full transparency of the sale transaction, which can then be used to query the ultimate net amount paid by the wholesaler to the grower. This lack of transparency has gone on for years and is one of the most significant problems with the Horticulture Code. Given the lack of price control or visibility of the sale transaction, growers feel vulnerable and are required to accept and trust their wholesalers in this regard.

These transparency concerns also exist where there are quality issues, with claims made that quality assessments are at the sole discretion of the trader. This can particularly be the case where the trader has provided conditioning services. In these instances, the use of an independent third party assessor would be beneficial for both growers and traders, helping to maintain the relationship whilst providing the grower with transparency. Although this facility currently exists, it is not always used or known to exist by some growers. Additionally, the use of smart phones by traders to take a picture and then send it to the grower can be used to help improve transparency.

Quality issues are a common point of disagreement between grower and wholesaler. Whilst many factors affect quality, we have observed that the development of a common product description language and comprehensive quality standards would facilitate a more efficient trading system whether that be digital or traditional.

There are a number of resources that are available to assist growers and traders when making an agreement on the quality standards of fresh fruit and vegetables. These resources include the Australia New Zealand Food Standards Code, which details the requirements of different types of foods that are produced and sold in Australia and New Zealand. The Codex Alimentarius Commission (Codex) is another useful resource as the Codex food standards are applied in international trade. Codex details food standards for many horticulture products, including tomatoes, limes and table grapes. Guidance can also be sought from the horticulture produce specifications that supermarkets detail for all goods they source. Woolworths provides open access to their horticulture produce specifications via their website. Finally, FreshSpecs details

FMA's specifications for horticulture produce, which details uniform product standards for a range of fruits, herbs and vegetables (FMA 2015). FMA would like FreshSpecs to be the industry standard of class one produce.

In the absence of one common quality standards framework, we recommend that the Horticulture Code be amended to require that where a HPA does not include specific quality specifications, then FreshSpecs specifications be used as the default (FMA 2015).

There also exists another class of trader in some central markets—growers that sell produce at central markets. These grower traders are often brokers or agents of other growers. We have heard that this class of trader has been able to avoid being captured by the Horticulture Code by describing themselves as a grower. It is our view that they should adhere to the code where they sell produce on behalf of other growers and provide transparency of transactions.

Greater market and price transparency would enable the growers to manage harvesting volumes, timing of deliveries and delivery destinations. The conduct of robust price negotiation and open variation of price terms, due to market conditions or grading quality issues, is standard accepted practice in the sector. However, the culture should encourage, support and positively respond to concerns raised by growers or traders, without the threat of retribution through cessation of trading or other responses that causes business hardship. This will benefit the whole horticulture produce sector.

Price reporting

While we note the enormity of the task in establishing a real time price reporting service and acknowledge that attempts have been made in the past and failed, we consider that the need is great and the potential benefit to industry is large. We note that significant advancements have been made and are continuing to be made with digital technology. There are also many new disruptive business models which provide products or services at much reduced price points. We understand that the lack of accurate and timely pricing information is an ongoing major problem.

We therefore recommend that a feasibility study be undertaken into the establishment of a horticulture price reporting system. The study should investigate the opportunity for the new system to operate on a self-funded commercial basis delivering value to the customer. Whilst it is important that the new service is run on a commercial self-funded basis there is an opportunity for the Australian Government to make available funds to undertake the study or for funds be made available through Horticulture Innovation Australia Limited where co-investors participate in the study. Given the importance and significance of such a commercial undertaking to the wholesale horticulture industry, the government may wish to nurture the project in its initial development and commercial launch.

However as discussed earlier in the chapter, any price reporting system must be underpinned by common quality standards.

Use of technology to assist price reporting

Today's technology should be able to capture all market sale data, as it is already utilised for food safety and traceability purposes. In fact, we have been told that the central markets do already electronically capture a range of information relating to sales data. Central markets should be able to electronically record all transactions and be able to provide transparency back

to growers. We heard that there can be a reluctance by growers to pay for this information and/or that growers are of the view that the information is inaccurate because traders may not provide full and accurate disclosure when providing the information. The use of technology may make access to pricing information cheaper and be seen as more reliable.

Price method/formula

A price fixed at market allows wholesalers to their hedge risk entirely and the risk is borne by the grower. Often, growers send their product to wholesalers not knowing what, or often when, they will be paid. The use of a method to determine price would provide flexibility and transparency on price that is acceptable to both the trader and grower communities.

The use of collective bargaining and additional assistance for grower associations may enable growers to improve their bargaining position and market intelligence. Additionally, as the wholesale horticulture sector has many sellers (growers) and fewer buyers (traders), there is the potential for growers to come together either through grower co-operatives or collective marketing groups which may help growers secure better prices and certainty of supply for their members' horticulture produce.

Having many sellers and few buyers is not unique to horticulture, being common to many other agricultural industries. Co-operatives have been the traditional model for farmers to organise themselves to achieve better outcomes in sale and supply negotiations. The power of co-operatives is evidenced by the $13.8 million available for co-operatives in the recently released Agricultural Competitiveness White Paper (Australian Government 2015). While there are many successful co-operatives still operating today, many have ceased trading or have moved to corporate funded and run models.

Unfortunately, many co-operatives are formed as product or supply co-operatives rather than marketing co-operatives. Today's agriculture sector, and especially the horticulture industry, is witnessing the formation of less formal marketing type co-operatives where producers are forming alliances and marketing groups to better satisfy customer demands as well as taking advantage of supply chain efficiencies.

We met with representatives of both the traditional and newer informal marketing structures and were impressed by the effective way they are addressing structural inefficiencies within horticulture. We strongly encourage the growing community to investigate more closely the co-operative marketing models as a way to increase returns and develop a sustainable business model.

Pooling and price averaging

Feedback in submissions and from stakeholder consultations that discussed pooling and price averaging was largely supportive of the practice, provided it is fully transparent and agreed in the horticulture produce agreement. It is our view that pooling produce is a common part of market practice and should be permitted where parties agree.

Hybrid trading arrangements and ownership of produce

The Horticulture Code distinguishes between a trader as an agent or merchant, depending on certain definitional criteria. Despite this, the practice has been that wholesale traders act as both

a merchant and an agent in the same transaction. For example, traders claiming to be a merchant but not having an 'agreed' price on or before delivery of the horticulture produce.

We were informed by some stakeholders that traders act only as merchants, whereas others reported that all traders acted as agents. However, on seeking further clarification on how these traders were acting, the behaviour of the trader would indicate an agency relationship which may later in the transactional process be described as that of a merchant. That is, the hybrid model of trading is the predominant method of trading being used. Consequently, it is easy to conclude that the Horticulture Code's distinction between an agent and a merchant does not align with the operation of the wholesale sector and how trade takes place in the marketplace.

This hybrid trading scenario, whilst not compliant with the current Horticulture Code, provides a workable solution to the understanding between growers and wholesalers of how trade in the market takes place. For example, in circumstances where a firm pre-delivery price is set and agreed and goods are delivered to the wholesaler acting as a merchant, the 'understanding' amongst growers and the wholesalers is that the merchant could go back to the grower and negotiate the price, once the goods had actually been sold at market. This also assists parties to maintain relationships. There appears to be no objection to this practice occurring. The key concern is transparency of the price, once the product has been sold at market, and for those operating under the code that this behaviour is in breach of the code.

The hybrid model does raise concerns about ownership and which party carries the risk. However, the issue of property ownership does not appear to be a contentious issue except when produce is delivered out of hours or where the product requires conditioning prior to sale and, if quality issues arise during a protracted sale process, who has responsibility for the produce.

Issues with the hybrid model also arise when a grower has a limited ability to test the integrity and correctness of pricing information provided to them by the trader. For example, a trader may accept produce and behave consistently like an agent, later changing their transaction status of agent to a merchant. This may be done for a number of reasons, including securing a better price for the trader and/or avoiding reporting requirements associated with being an agent, such as those reporting requirements under the Horticulture Code in relation to the sale (e.g. the price received for the produce sold) and also GST requirements.

To impose the strict legal definitions in the current Horticulture Code does not recognise market practice and may deprive the grower and wholesalers of the best price at market. The code should recognise the relevant operative factors in the market and the concerns of all the parties and develop a workable set of regulations that meets the concerns of growers and wholesalers, but encourage best practice, compliance and ability to enforce. The term 'trader' should apply to all on sellers of horticulture produce at central markets (merchant or agent), including brokers or growers selling as a trader at market, brokers or secondary wholesalers selling at central markets. This should be accompanied by requirements to be met depending on the transaction relationship.

Horticulture Produce Agreements and transparency in transactions

We believe that a horticulture produce agreement must specify, but not be limited to, terms that clarify:

- if a formula is to be used to determine price, the price formula
- any requirements with respect to the delivery, storage or maintenance of the horticulture produce
- any requirements regarding quality and grading of horticulture produce
- any pooling arrangements entered into
- how quality issues must be raised and resolved, including referencing the quality standard to be used
- circumstances in which horticulture produce may be rejected, including timeframes
- payment terms
- details of any deductions or charges by the trader
- who shall be responsible for the collection of any bad debts
- when the agreement is to be reviewed (with review periods to not extend beyond 24 months).

We believe that a trader must provide information to a grower relating to the sale of their produce including:

- confirmation when the horticulture produce arrives at market, including the type, quantity and quality of horticulture produce received
- the amount payable to the grower
- details of any deductions or charges by the trader (which are explicitly identified and agreed in the HPA).

A fixed price may be agreed in writing (including via electronic means) between a grower and a trader:

- at the farm gate
- within 24 hours of acceptance of delivery
- or within 24 hours of the horticulture produce being ready for sale, where the produce requires pre-sale conditioning by the trader.

In this situation, ownership of the produce transfers on acceptance of delivery of the produce, or acceptance of the fixed price either 24 hours after delivery or 24 hours after the product is ready for sale following conditioning, whichever is later.

We believe that where quality issues arise, the question of who bears the loss should be determined by the agreement held by the grower and trader. Where a fixed price is agreed the trader should bear the loss. Where a fixed price is not agreed, and the produce is stored correctly, the grower should bear the loss. However, where a fixed price is not agreed, and the produce is not stored correctly the trader should bear the loss.

Where a fixed price has not been agreed in the circumstances outlined, the trader must also provide the grower with this additional information:

- the date/s of the sale of the grower's horticulture produce by the trader
- the gross sale price of the horticulture produce, including the type, quantity and quality of horticulture produce sold
- details of any horticulture produce not sold, including the type, quantity and quality of the horticulture produce
- details of any horticulture produce to be destroyed by the trader (reasons for deductions must be explicitly identified and agreed in the horticulture produce agreement).

Ownership of the produce is never transferred to the trader, but moves from grower to the buyer on completion of sale.

One of the most contentious points of debate is whether there is transparency in transactions and if there is, whether this is sufficient. We consider transparency is lacking and that better business practices would improve this transparency. Within this debate, whether the trader should be required to disclose the identity of their buyer to the grower has been raised on a number of occasions. It is our view that while there may be other legal requirements for this information to be held at various points in the supply chain, for example, for food safety and traceability, it is not required to establish transparency in the horticulture sector. Therefore while we recommend increased transparency of price along the supply chain and for the identity of the buyer to be traceable for an audit enquiry, in the ordinary course of business we do not consider it necessary for the identity of the buyer to be disclosed to the grower.

Good faith

In our stakeholder consultations we were often supplied with anecdotal evidence that would not constitute dealings of good faith in the horticulture sector. Examples of anecdotal concerns or possible problematic conduct may include:

- growers and traders refusing to provide or sign HPAs
- inconsistent representations about product quality
- inappropriate cost shifting to the grower
- failure to approach dispute resolution in a reconciliatory manner.

Growers of perishable goods who often are at distance from central market or retailer distribution centres can have limited bargaining power with buyers. The perishable nature of agricultural products heightens the risk of breach of good faith. This exposes growers to potential abuse of market power, both in a legal and more importantly practical sense. Some growers repeated that they have been offered standard-form contracts, with limited ability to negotiate terms, or on a 'take it or leave it' basis.

All of these behaviours may be addressed by an obligation to act in good faith being incorporated into the Horticulture Code. Some behaviours, however, may need specific remedies rather than relying on general notions of good faith. In circumstances where that is the case, the issues are discussed elsewhere in this report.

We are of the firm view that trading relationships within the wholesale horticulture sector would be improved with the inclusion of a statutory duty of good faith in the Horticulture Code. To add an explicit duty of good faith into the Horticulture Code represents additional regulation, and therefore the merits of a good faith clause must be considered carefully with specific application to the Horticulture Code of Conduct. Should the government choose to implement an obligation to act in good faith, it should be supported by appropriate awareness raising and educational material.

Credit service for growers

It is our understanding that the in-market credit service is not bad debt insurance nor is it factoring nor a *del credere* (on trust) type arrangement. Instead, the service identifies slow payers to provide a warning or indication to wholesalers.

Credit and risk assessment is a major function of any commercial transaction involving delayed payment terms. Varying risk management tools are available to businesses, including growers, to assist in mitigating this risk. In considering the implementation of a trust account for payments we are of the view that such a system would not necessarily give growers the level of protection being sought and may indeed have the detrimental effect of increasing transaction costs and delaying payment.

We note that credit insurance is available and is common practice for transactions undertaken by livestock agents. This service is provided by an independent insurance provider for many of the independent livestock agents or by insurance companies associated with the major livestock agribusinesses. We believe there is an opportunity for private parties to investigate a credit insurance facility for horticulture.

Recommendations

1. That the Horticulture Code be amended to remove the distinction between an agent and a merchant.

    a. That all transactions meet specific transparency requirements to be included in a revised Horticulture Code (explored further at Appendix A).

2. That a standard form horticulture produce agreement (HPA) be annexed to the Horticulture Code, to be used as the minimum basis for trade in horticulture produce between growers and traders.

3. That an obligation on all parties to act in good faith be included in the Horticulture Code.

4. That the Horticulture Code be amended to allow a method or formula for determining prices paid to a grower, including pooling and price averaging where:

    a. parties have prior knowledge and agree to the method or formula in the HPA
    b. if pooled, the pooled produce is of the same quality.

5. That the government explore the inclusion of deeming provisions in the Horticulture Code to ensure that where a pre-existing contract is not in place, and where a HPA is provided by a trader or sought by a grower, that the intent of the parties to enter into a HPA is deemed to have occurred. Such provisions should ensure that parties have time to

arrange their affairs and that no party can use such provisions to enforce unfair contract terms.

6. That the Horticulture Code be amended to require that where a HPA does not include specific quality specifications, Freshspec specifications be used as the default.

3 Application of the Horticulture Code

Introduction

The Horticulture Code covers trade between growers and traders in horticulture produce (unprocessed fruits, vegetables (including mushrooms and other edible fungi), nuts, herbs, other edible plants, but not nursery products (section 3)). The application of the code extends to transactions between growers and co-operatives and growers and packhouses.

In its current form, the Horticulture Code does not apply to:

- trade between growers and processors, exporters, and retailers (subsection 3(1)); the definition of horticulture produce restricts the application of the code to unprocessed horticulture produce and the definition of merchant excludes processors, exporters and retailers
- written agreements entered into before 15 December 2006, unless these written agreements have been varied
- growers or traders operating under a statutory potato marketing scheme (subsection 3(2)).

Evidence considered during the review

Exemptions under the Horticulture Code

Consultations and submissions to the review consistently noted that a number of parties involved in the horticulture supply chain are not covered by the Horticulture Code. The Victorian Small Business Commissioner submitted that the coverage of the Horticulture Code may need be altered to reflect changes to market structures and composition, including increased trade with retailers.

Trade between growers and processors, exporters and retailers

The Explanatory Statement to the Horticulture Code states that 'the code will not apply to retailers, processors or exporters because they are not wholesale intermediaries and because they mostly trade under clear and transparent terms'.

In its 2008 inquiry into grocery pricing, the ACCC recommended that the Horticulture Code be amended to regulate first point of sale transactions of horticulture produce between a grower and a retailer, exporter or processor. The then Horticulture Code of Conduct Committee, which considered the implications of implementing this recommendation, considered in 2009 that this would standardise trading relationships across the industry, in addition to capturing restaurants, caterers, farmers' markets and farm-door sales, creating additional compliance and administrative costs (Horticulture Code of Conduct Committee 2009). The Committee was of the view that economic modelling was needed to determine the impact of the recommendation. The government did not respond to this recommendation and economic modelling has not been undertaken.

Some stakeholders supported the extension of the Horticulture Code to cover all first point of sale transactions, including those transactions between a grower and a retailer, processor and exporter (see, for example, submissions by WA Citrus, the Victorian Farmers Federation, Tasmanian Farmers and Graziers Association, and HopgoodGanim Lawyers). This support was

on the basis that this change would minimise confusion about who is covered by the Horticulture Code, reduce complexities with code administration and because they believed that the original exclusion was arbitrary, discriminatory and without basis.

The SA Chamber of Fruit and Vegetable Industries, for example, stated in its submission that there is currently an uneven playing field, where wholesale traders:

> …operate under an inflexible and unworkable mandatory code, whereas the supermarkets operate under a voluntary code which they co-wrote and which permits "certain actions that would otherwise be prohibited".

The ACCC supports the inclusion of retailers in the Horticulture Code to give growers certainty in their trading relationships where they lack bargaining power. The ACCC also noted in their submission that under paragraph 4(4)(a), the Food and Grocery Code does not apply to the extent that it conflicts with the Horticulture Code of Conduct. The impact of this is that if retailers were covered by the Horticulture Code, the Food and Grocery Code would cease to apply to the extent that it conflicts with the Horticulture Code.

In a 2015 national survey of growers initiated by state farming organisations, including Growcom, NSW Farmers and VegetablesWA, anecdotal evidence was presented that the same issues relating to transparency around pricing and rejection on the basis of quality apply to processors and exporters. In its submission to the review, Growcom cited an example of this being that, over the last few years, rejection rates for processing pineapples have significantly increased, despite it being considered that quality has increased. As such, state farming organisations are supportive of the Horticulture Code being extended to cover transactions between growers and processors and exporters.

However, not all stakeholders are supportive of extending the application of the Horticulture Code. In its submission, Coles was of the view that their inclusion under the Horticulture Code would duplicate their requirements under the Food and Grocery Code as the purposes of the two codes are aligned. Coles noted that the Food and Grocery Code is to be reviewed in three years' time and that 'given the time, resources and costs invested in developing and implementing the Food and Grocery Code', the code should be 'given the opportunity to operate'.

The Australian Food & Grocery Council (AFGC) estimated that approximately 50 per cent of fresh product retailing is covered by the Food and Grocery Code since Coles, Woolworths, Aldi and About Life have agreed to be bound by the code. Additionally, the AFGC considers that the Food and Grocery Code provides 'much stronger safeguards than the Horticulture Code in relation to fair dealing, shrinkage, wastage, unilateral and retrospective changes to contracts, listing and delisting policies, and promotional activity'. As retailers are covered by the Food and Grocery Code, the AFGC does not support the inclusion of retailers in the Horticulture Code.

The AFGC notes that the expansion of the Horticulture Code to include processors would be a significant new regulation for food and beverage processors without any evidence to support the need for the extension of the Horticulture Code and indicated that significant impacts may follow. The AFGC considers that the processing sector is 'operating transparently, in good faith, and with certainty'.

Contrasting the circumstances leading up to the negotiation of the Food and Grocery Code, the AFGC also believe that the case has not been made for the expansion of the Horticulture Code and it is not aware of concerns about the relationships between processors and growers which can be addressed through the Horticulture Code. The AFGC state that the processor has a vested interest in certainty, price predictability and transparency, which means that often the terms of the transaction are agreed in writing ahead of time.

Although the ACCC supports the inclusion of retailers in the Horticulture Code, it is of the view that there is no evidence to support the coverage of exporters and processors under the Horticulture Code.

The Ord Irrigation Co-operative (OIC) would like the Horticulture Code to be expanded to allow opt-ins for transactions between growers and exporters/processors. OIC is of the view that this will provide their members with the code's protections and remedies, in addition to avoiding knowledge gaps and confusion for growers.

FMA has stated in their submissions to the review that it does not consider exporters should be covered by the Horticulture Code, as they do not compete in the domestic market.

Written agreements entered into before 15 December 2006

The exclusion of pre-code contracts has received mixed responses from industry stakeholders. For example, the NFF considered that the exclusion has 'muddied the waters'; AUSVEG stated that pre-code agreements undermine the Horticulture Code's effectiveness; FMA provided that pre-code contracts offer parties workable trading arrangements; and J Garrett & Sons stated that sun setting pre-code agreements will interfere with their relationships with their growers, some of which have been in place for over 40 years. Despite these mixed responses, the majority of stakeholders are of the view that pre-code contracts need to be brought into the Horticulture Code's coverage. In its submission, the FMA makes a number of recommendations that it considers will make the Horticulture Code more workable. If these recommendations are implemented, the FMA also supports the inclusion of pre-code contracts.

We understand that the inclusion of pre-code contracts under the Horticulture Code may raise a number of issues with regard to the implementation of any recommendation. We are not in a position to suggest a solution to government, however we strongly believe that any potential implementation issues should not prevent the government from acting to better regulate trade under pre-code contracts.

Additionally, AUSVEG suggests in its submission that the extension to pre-code contracts should be transitional and that there should be no risk of penalty for anyone found to still be operating under pre-code arrangements. Similarly, the AFGC supports the approach adopted in the Food and Grocery Code where there was a completion date for transitional contract arrangements.

Growers or traders operating under a statutory potato marketing scheme

Currently the only statutory potato marketing scheme is operated by the West Australian Potato Marketing Corporation. The West Australian Government has committed to abolishing this scheme by 2017. Therefore, this exemption from the Horticulture Code will be unnecessary in the next iteration of the Horticulture Code.

The wine industry

Wine grape growers have called for processors of wine grapes to be included in the Horticulture Code, despite having their own voluntary, non-prescribed wine industry code of conduct. The wine industry code incorporates requirements specific to the industry.

The Winemakers' Federation of Australia (WFA), however, considers that trade in the horticulture industry is different from that in the wine industry and that the extension of the Horticulture Code to include wine grape processors would be an unnecessary regulatory burden that would add cost and complexity for growers and winemakers. Horticulture trade consists of multiple transactions between growers and traders in a harvesting season. Wine industry growers and traders on the other hand trade once, when the grapes are ready for winemaking. WFA is particularly concerned that the Horticulture Code will be a 'one size fits all approach' that does not adequately recognise the specific nature of wine and grape purchases.

Other

Some submissions to the review raised concerns about grower sheds that operate in some markets. It is claimed that these transactions are largely on a cash basis and do not have transparency. Additionally, it is claimed that agents avoid the coverage of the Horticulture Code, claiming to be a 'grower'.

In its submission to the review, the ACCC recommended that transparent, low-value transactions be exempt from the Horticulture Code. In response to the 2008 ACCC recommendations, the Horticulture Code of Conduct Committee was of the view that if the Horticulture Code was extended to regulate first point of sale transactions, small value and face-to-face transactions with immediate settlement had a high degree of transparency and should not be captured by the Horticulture Code.

An alternative view put forward by Toomey Pegg Lawyers during the course of this review was the introduction of a process where, for any growers or traders who wish to agree that the Horticulture Code will not regulate their dealings, the grower must obtain independent legal advice that states that an Australian Legal Practitioner has explained to the grower the effect of the Horticulture Code; the nature of the certificate to be given; and the effect of giving the certificate (being that the Horticulture Code will not apply to dealings between the grower and a stipulated trader or a group of stipulated traders).

Observations

The application provisions of the Horticulture Code must be examined in the context of statements that a large percentage of growers and traders do not operate under the current Horticulture Code.

The application of the Horticulture Code has been discussed in great detail over the course of the review, during stakeholder consultations and also through formal submissions. On balance, the exclusion of pre-code contracts has been described as a large contributor to the ineffectiveness of the code, rather than the application of the Horticulture Code more broadly.

It is our view that pre-code contracts, which have been estimated to cover up to 80 per cent of the sector or more, deprive the sector of the best opportunity to operate effectively and appropriately. Although some traders have suggested that these agreements reflect a workable

and flexible approach to trading, the exemption creates a dual system which is inconsistent, inefficient and unfair.

We understand that the inclusion of these pre-code contracts will require consideration by the Australian Government of how best to implement this necessary change. We acknowledge this issue, but we are firmly of the view that these contracts should be brought within the scope of the Horticulture Code, to the extent possible, in order to provide a uniform participation and coverage of the Horticulture Code in the wholesale horticulture sector.

To justify extending the Horticulture Code to cover transactions between growers and retailers, exporters and processors, there needs to be a clearly defined problem. The Horticulture Code seeks to improve transparency and clarity in trade between growers and traders of fresh fruit and vegetables. Evidence considered in the review has not revealed that there is a weight of problems with transparency in transactions between growers and retailers, exporters and processors that should be addressed by the Horticulture Code. Most submissions cited reasons for including these sectors as the need to bring parties onto a level playing field and to remove complexities in code administration—these reasons do not evidence a problem per se.

There have been a substantial number of growers who have stated, both anonymously and openly, that the major retailers place undue pressure upon them to agree to (a) lower prices than originally indicated or agreed and (b) agree to a promotional program undertaken by the retailer—both of which see the grower supply at a loss or different price than otherwise agreed or negotiated. Both activities are claimed to be disguised as agreed variations of terms.

Most, if not all these growers, do not raise issues with the retailers in fear of retribution or a trading “holiday”, as it is referred to in the horticulture sector. This perceived or implied undue influence is the root cause of the growers concerns with the major retailers and would be of interest to the ACCC. However, we have found that growers (large or small) are not prepared to jeopardise their business and come forward to lodge a complaint; without a whistle-blower prepared to give evidence, the ACCC are unable to properly investigate and act upon the allegations.

We also engaged with a number of retailers throughout the review process to hear their views on their relationships with their fresh produce suppliers. These retailers deny this alleged activity (even though it may have taken place in the past). Some retailers have sought to embrace and comply with the voluntary Food and Grocery Code and have put in place charters to deal with unacceptable retail buyer conduct in relationships with growers and other suppliers.

In relation to the major retailers, their transactions directly with growers are covered by the recently introduced Food and Grocery Code, which seeks to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between the parties. Although the Food and Grocery Code is voluntary, if a retailer subscribes to it, the ACCC has the ability to enforce a breach, including a breach of good faith. Additionally, it is undesirable for any retailer to unsubscribe to the voluntary Food and Grocery Code for a number of reasons, including public backlash and the threat of government intervention. As such, concerns of some of the growers in the horticulture sector, regarding direct transactions with retailers, are now addressed through provisions of the Food and Grocery Code.

Amending the Horticulture Code at this time to include retailers would pose a number of difficulties, including: a lack of support from retailers for inclusion, especially given there has not been enough time to measure the impacts of the Food and Grocery Code; duplication of regulation; and additional red tape. However, concerns still remain for those transactions between growers and retailers where the retailer has not signed onto the Food and Grocery Code. It is undesirable that some retailers are not regulated under either code.

We received a large number of requests for the removal of the current exemptions in the Horticulture Code for processors and exporters of horticulture produce. However, we received no substantive evidence of any particular issues or concerns of a widespread nature regarding inappropriate conduct or behaviours of any of the trading parties. The primary focus of our examination was whether the key issues of price transparency and quality issues were the source of any concerns among trading parties and we found no evidence in support.

To explore the grower–exporter and grower–processor relationships further, on our request, we were provided with some confidential examples showing problems experienced by growers in their trade in horticulture produce with exporters and processors. These examples indicated that there were transparent agreements in place, but that parties would benefit from access to dispute resolution processes, particularly where produce has been rejected or there are issues relating to quality. As there are a number of accessible dispute resolution processes already available, including the small business commissioners, we do not consider there is a problem of such magnitude that warrants it being addressed by including exporters and processors under the Horticulture Code.

We also note that wine grape growers, who trade with processors and are exempt from the Horticulture Code, called for the processor exemption under the Horticulture Code to be lifted, on the basis of some trading conditions which they perceive to be unfair and place risk on the grower. While we do not believe there is sufficient evidence for wine grape growers and processors to be included in the Horticulture Code, we do believe that analysis of the wine industry and its trading practices should be undertaken with a view to an assessment of the appropriateness of including transactions between wine grape growers and processors (wine makers) under the Horticulture Code.

It would seem appropriate that all growers that supply to processors and exporters should have clear written terms of trade, quality specifications, price and delivery details, in order to avoid the potential for disputation.

We received limited evidence of inappropriate conduct in both the trading relationships between growers and processors and exporters and therefore we see no compelling reason to recommend the removal of both exemptions at this time. Alternative sources of redress are available to growers who supply exporters and processors, without the need to remove the exemptions in place at this time. It is important, however, that the processing and exporting sectors for horticulture produce continue to be monitored so that if the dynamics of these sectors change or sufficient evidence of inappropriate practice or unacceptable conduct comes to light, the government can reconsider the current exemptions for exporters and processors under the Horticulture Code.

Any conduct that seeks to unilaterally place undue influence or threaten to cease trading if a variation of agreed terms are not agreed by a party may amount to unconscionable conduct and

the ACCC should be encouraged to investigate the existence of such conduct. Parties may also bring a private unconscionable conduct action against another party.

Recommendations

7. That the Horticulture Code be amended to remove the current exemption for contracts entered into prior to 15 December 2006.

8. That the Horticulture Code be amended to regulate transactions between growers and retailers where the retailer is not a signatory to the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Food and Grocery Code).

4 Dispute resolution under the Horticulture Code

Introduction

The Horticulture Code provides a dispute resolution mechanism, which is outlined in Part 5 of the code.

Disputes can arise out of a number of issues, including non-payment, delayed payment, discrepancy in the amount owed/paid, and quality of produce. In addition to lodging a complaint with the Horticulture Mediation Adviser (HMA), the contact for all inquiries relating to mediation under the Horticulture Code, parties can access alternative dispute resolution services from other providers, such as a state small business commissioner. Complaints can also be lodged with the ACCC when a party believes that the other party has breached the Horticulture Code. Nothing in the Horticulture Code affects the right of a party to take legal proceedings. However, if a grower or trader initiates a dispute under the dispute resolution processes outlined in the Horticulture Code, the other party must participate in that process.

After the complainant has lodged a written notice of a dispute under the Horticulture Code, parties must attempt to resolve the dispute themselves. If after three weeks no agreement has been reached, either party may seek to appoint a mediator. Both parties must then attend mediation and try to resolve the dispute. If parties reach agreement at mediation, the mediator will set out the terms of the agreement, which will become a legally enforceable contract.

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, teleconference, 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.

In 2011 the Horticulture Code's dispute resolution service was enhanced to include an early intervention service. The introduction of the early intervention dispute resolution service allows parties to:

- talk through their concerns at an early stage
- receive guidance on what their next steps might be in resolving their dispute
- address their issues of concern before they become entrenched in a dispute
- maintain ongoing commercial relationships while avoiding the time, expense and stress associated with formal dispute resolution mechanisms.

The Minister for Agriculture and Water Resources may appoint a HMA to help parties resolve disputes and, on request, appoint mediators from a specialist panel of experienced mediators. In addition, the HMA provides general advice on codes and dispute resolution processes, education, and reporting and evaluation. It is notable that general uptake of dispute resolution through the HMA is low. In 2014–15 there were only nine dispute enquiries, two mediator appointments and three mediations conducted (see Attachment E).

The role of horticulture produce assessors

The Horticulture Code provides that the HMA must compile and publish a list of persons who are to be horticulture produce assessors, including their relevant qualifications (section 39). The Horticulture Code does not specify what relevant qualifications a horticulture produce assessor must have to be listed as an assessor under the Horticulture Code. Horticulture produce assessors may also operate privately outside of the Horticulture Code.

The role of a horticulture produce assessor is to investigate and report on any matter arising under a horticulture produce agreement, including whether horticulture produce has been rejected in accordance with the horticulture produce agreement and whether the amount paid by a trader to a grower was calculated in accordance with the Horticulture Code and the horticulture produce agreement (section 40). Once the horticulture produce assessor has issued their report, they no longer have a role and it is up to the parties and/or the mediator to a dispute to act upon the findings in the report. However, there is evidence that horticulture produce assessor services are being used by parties within the wholesale horticulture sector as a method for resolving disputes relating to horticulture produce prior to formal mediation. For further information, see the *Annual Report of the Horticulture Mediation Adviser: 1 July 2013–30 June 2014* (HMA 2014).

Horticulture produce assessors may have a greater role as a faster alternative to mediation, particularly where perishable produce is concerned.

Australian Small Business and Family Enterprise Ombudsman

The Australian Government is creating an Australian Small Business and Family Enterprise Ombudsman (the Ombudsman). The Ombudsman will be a Commonwealth-wide advocate for small businesses and family enterprises; contribute to the development of small business-friendly Commonwealth laws and regulations; work as a concierge for dispute resolution; and provide its own limited, outsourced, alternative dispute resolution service.

One area where the Ombudsman will not undertake a formal role at this time is in relation to dispute resolution under the mandatory industry codes for franchising, horticulture and oil. The specific requirements under each code do not align with the operation of an ombudsman who is an advocate. However, the Ombudsman will be able to receive such enquires regarding industry codes matters, and, through its concierge role, refer businesses to the mediation or dispute resolution adviser under each code.

We note that the Ombudsman will have its own alternative dispute resolution service which will include conferencing, mediation, neutral evaluation, case appraisal, conciliation and prescribed procedures and services. However, the Ombudsman will not be able to conduct arbitration or court procedures or services.

The Act to implement the Ombudsman received Royal Assent on 10 September 2015.

Evidence considered during the review

The NFF noted in its submission to the Harper Review issues paper the low uptake of dispute resolution and the fact that many growers are unwilling to bring disputes forward due to fear of market retaliation provides evidence that the Horticulture Code is not influencing the behaviour of market participants as intended. The NFF recommended that the Horticulture Code include a

more robust and accessible dispute resolution procedure, such as expert determination, which the NFF considers would encourage uptake of dispute resolution procedures and provide a more level playing field in resolving disputes. Expert determination is a procedure by which the parties to a dispute appoint an independent and neutral expert to determine the dispute in private. Like arbitration, it allows trade secrets and other sensitive information to be kept out of the public domain. The expert will be a person with specialist or technical knowledge relevant to the dispute. Both parties are bound by expert mediation and/or arbitration.

During consultations and through submissions, stakeholders raised concerns that despite the low number of disputes lodged with the HMA, there are still a lot of disputes within the central markets and that in some cases, growers are reluctant to raise disputes with their trader for fear of retribution.

AUSVEG supported this position in their submission which stated that:

> …some growers are placed at a disadvantage compared to traders, who often have more market power and increased access to time and resources to improve their negotiating capacity. This has an impact on the effectiveness of dispute resolution within the industry, including for disputes which fall under the Horticulture Code. This fact is reflected in the general low uptake of the Horticulture Mediation Adviser over the life of the Code to date, as well as its lack of use within the vegetable industry. Growers often fear damage to their business dealings could come as a consequence of raising disputes with traders, which makes formal dispute resolution under the current Code almost non-existent.

FMA provided an alternate view, stating that:

> …despite the millions of transactions with wholesaling sector…there has been nothing more than a trickle of enquiries, complaints and investigations. The conclusion therefore is that there is both very low incidence of disputes, and a reluctance on the part of growers to utilise the avenues available to them.

FMA believes that this reluctance is due to the ability of the parties to resolve day-to-day disagreements between a trader and a grower, without the need for further action.

Brismark also stated that:

> …the Horticulture Code of Conduct has now been operating for over eight years, and millions of transactions have been conducted over that period. Good commercial business relationships between a grower and their wholesaler is the foundation stone to resolve disputes clearly reducing the need for external support. There is no objective evidence supporting any suggestion that the reason for low use of the various dispute resolution services is due to the fact that growers are reluctant to access the services due to the process being cumbersome, or that they fear retaliation.

The HMA offers early intervention dispute resolution over the phone in addition to the more lengthy written process outlined in the Horticulture Code. The HMA suggested that the code spell out the availability of these 'early steps'. In their submission, the HMA stated that most of

the matters which are referred to them are issues about non-payment and are suitable for simple process rather than formal mediation.

The WA Small Business Development Corporation believes that such early intervention services are valuable. They increase the profile and capacity of this function to provide more immediate advice and guidance to industry participants before disagreements escalate into full-blown disputes.

Reflecting this sentiment, the Victorian Small Business Commissioner (VSBC) stated that the majority of disputes between growers and traders relate to quality/price of the perishable goods on delivery and/or ownership transfers, noting that the disputes resolution process needs to accommodate the need for an urgent response to such disputes. The VSBC stated in his submission that if the nature of disputes primarily relate to quality/price, an independent, expert assessor may be a more appropriate. The assessors' determinations should be binding and appealable.

The NFF stated that a facilitated conciliation style of alternate dispute resolution was preferred to the more ad hoc mediation process. The NFF believes that such a method has the ability to utilise different tools should agreement not be reached. As such NFF recommends that the Horticulture Code should also require arbitration or expert determination should the parties fail to settle at mediation.

Growcom expanded on the possible role for conciliation under the Horticulture Code. Growcom stated that:

> …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.

Observations

We have observed that the current Horticulture Code dispute resolution process has become irrelevant, inappropriate and is largely not adopted by the parties in the wholesale horticulture sector. The current process is too cumbersome and does not address the immediate concerns of the primary dispute issues that arise in the wholesale horticulture sector.

This is largely because the current process fails to appreciate the dynamics of the wholesale horticulture sector. Concerns have been raised that an ad hoc dispute resolution process does

not work due to the perishable nature of the produce, growers' distance from market and that the processes can be detrimental to ongoing relationships.

It is clear that disputes which usually arise in the wholesale horticulture sector relate to:

- perceived produce quality
- timing of delivery of produce
- transparency of the market price and the end price paid by the trader to the grower, including deductions made by the trader
- late or non-payment to the grower.

We believe that the dispute resolution processes under the Horticulture Code, need to be:

- quickly convened
- accessible in market
- independently undertaken by an expert
- binding on all parties.

We also believe that dispute resolution under the Horticulture Code needs to move to a conciliation model instead of the current mediation model. Mediation works best when the parties have equal resources, capacity to negotiate and where time to resolve the issue is not a major concern.

A conciliation model of dispute resolution for horticulture must allow for the conciliator—whether an assessor, inspector, surveyor, arbitrator or independent expert—to provide parties with a same day, on market inspection, determination and report regarding the dispute.

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 traders, the Horticulture Code needs to address the issues of production of documents and power imbalance at the conciliation table between parties.

Accordingly any dispute resolution process mandated by the Horticulture Code must be quick and determinative. The dispute resolution process should enable the parties to have quick, on-site resolution having regard to the perishable and deteriorating quality of the stock.

A number of complementary and cascading dispute resolution processes are needed. We believe these dispute resolution processes should commence within the central market system using expert independent assessors and have the ability to be escalated to more traditional dispute resolution mechanisms, including arbitration and court enforcement. The conciliation process responds to the perishable nature of the produce, the fact that it is often impractical for the grower to attend at market and respects the relationship between the parties.

We believe that an expert panel of horticulture produce assessors, with no affiliation or connection with any of the sector participants, should be arranged through the ACCC or the Ombudsman. Panel members should be appropriately qualified in agriculture and horticulture matters and be accessible to central markets with short notice and capable of assisting the parties in resolving disputes that may arise with regard to quality, price or other trading issues.

The assessors must be appropriately accredited and registered with the ACCC or the Ombudsman and capable of acting as conciliators between the parties and recording the outcome of any resolution between the parties.

We note that under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (section 72), the Ombudsman may be able to publish a list of persons who have the qualifications and experience to conduct the alternative dispute resolution and that the Minister responsible for small business may prescribe the qualifications or experience required for persons to be included on the list.

The costs of the assessor's attendance should be shared equally by both parties in dispute. In the event that the Assessor is not able to assist the parties in resolving the dispute, the parties will be at liberty to institute legal proceedings or seek the involvement of the ACCC as appropriate.

We see the role of the HMA as inefficient for both the HMA and the sector participants, and its role should be phased out. Access and information regarding the assessors should be published by the ACCC or the Ombudsman, grower peak bodies and associations, Central Market Authorities and on the Horticulture Code website.

Matters which are not time critical can be left for more traditional dispute resolution or legal channels. The Horticulture Code does not invalidate any dispute resolution process established by parties outside of the procedures under the Horticulture Code.

Recommendations

9. That the Horticulture Code be amended to abolish the existing dispute resolution process and that it be replaced with an improved system which recognises the need for independent, fast, accessible, expert on site conciliation.

10. That the Horticulture Code be amended to provide that horticulture produce assessors be registered with the ACCC or the Australian Small Business and Family Enterprise Ombudsman, be appropriately qualified, trained, accredited (as determined by the ACCC or the Ombudsman) and capable of acting as non-determinative conciliators between the parties and recording the outcome of any resolution between the parties.

5 Enforcement of the Horticulture Code

Introduction

The *Competition and Consumer Act 2010* (the Act) states that a person must not, in trade or commerce, contravene an applicable industry code. Therefore, where an individual or corporation breaches the Horticulture Code, this is a breach of the Act and subject to enforcement. Enforcement of these breaches is the responsibility of the ACCC, an independent statutory authority with responsibility for enforcement of the Australian Government's competition, fair trading and consumer protection laws.

Possible consequences of breaching the Horticulture Code include:

- payment of compensation for loss caused by the contravening conduct (section 82)
- injunctions (i.e. orders that a party must do, or stop doing, an act) (section 80)
- remedial orders of a court including an order to void the whole or part of a contract, vary a contract, refuse to allow the enforcement of some provisions of the contract, or require the payment of refunds and/or damages to the aggrieved party (section 87)
- court enforceable undertakings to the ACCC (section 87B)
- public warning notice issued by the ACCC (section 51ADA)
- non-punitive orders, made by a court, such as a community service order, a probation order, a disclosure order and/or the publication of corrective advertisements (section 86C).

A court is able to apply a range of remedies under the Act when it determines that a breach of the Horticulture Code has occurred. These remedies are aimed at providing redress to participants in the event of a breach of an industry code (rather than being a punitive action).

Key issues that we considered during the course of this review in regards to the enforcement of the code included:

1) How effective are the current enforcement mechanisms in preventing breaches to the Horticulture Code?
2) Should the ACCC be able to issue infringement notices for breaches of the Horticulture Code?
3) Should the courts be able to apply civil penalties for breaches of the Horticulture Code?

Evidence considered during the review

The growers and grower bodies we heard from generally felt that the current enforcement of the Horticulture Code was not strong enough to deter breaches. For example, VegetablesWA stated that enforcement of the Horticulture Code was less than that required by industry. Similarly, AUSVEG noted that one of the more significant obstacles to the effectiveness of the Horticulture Code is that traders are able to act outside the code with little consequence. The NFF also noted

the concerns of a grower, who stated that 'a code without enforcement is not worth the paper it is written on'.

Some growers we spoke to felt that it was impossible to get the ACCC to take any form of action to prevent bad practices by traders. VegetablesWA noted that despite the ACCC's best endeavours, ACCC officers were either not resourced or skilled enough to uncover and then prosecute breaches of the Horticulture Code.

The 2015 national survey of growers conducted by some state farming organisations reported that only half of the respondents were aware of the ACCC's enforcement role and only 8 per cent indicated that the ACCC has used its role in a way that encourages compliant behaviour from traders. The ACCC has undertaken enforcement actions for breaches of the Horticulture Code on ten occasions since the code's introduction. This includes seven occasions in 2008, and once each in 2009, 2011 and 2013.

There was strong agreement from growers and grower bodies to the ACCC being granted enhanced enforcement powers. These enhanced powers would include the ability to apply infringement notices and apply to a court for civil penalties where individuals or corporations have breached the Horticulture Code. This was supported by the NFF, who stated that:

> …the imposition of pecuniary penalties sends a clear message from government that undertaking anti-competitive behaviour (as prohibited by the code) will be dealt with seriously.

Growcom noted that 73 per cent of respondents to the national survey of growers felt that the ACCC should be granted more flexible powers to enforce the code. This expansion of power was also supported by the ACCC in its own submission to the review. They noted that the availability of infringement notices for breaches of the code would allow the ACCC to enforce the code more efficiently, and that appropriate civil penalties would likely deter non-compliance.

The ACCC also noted that under section 51ADD of the Act, the ACCC had the power to conduct compliance checks (audits). The ACCC has conducted 15 audits relating to the Horticulture Code since 2010, with one audit revealing non-compliance. This audit power enables the ACCC to obtain any information or documents that a corporation is required to keep, generate or publish under a prescribed industry code. The ACCC therefore recommended that in order to implement compliance checks, the Horticulture Code should be amended to require traders to keep, generate or publish appropriate paperwork. The ACCC noted that amending the Horticulture Code to require traders to generate and keep a list of the growers they deal with would increase the capacity of the ACCC to identify non-compliance with the code and would impose little regulatory burden. We note that a number of submissions, including from APAL, AUSVEG and VegetablesWA, called for the ACCC to conduct random auditing of traders.

However, we also note that there was not consistent support among stakeholders for expanding the powers of the ACCC. The central markets and related industry bodies generally expressed strong opposition to any expansion of ACCC powers. Brismark noted in its submission that the Horticulture Code has been operating for over eight years, and millions of transactions have been conducted over that period, yet the ACCC had only received 30 complaints in relation to the code in that time. They also stated the good commercial business relationships between a grower and their wholesaler is the foundation stone to resolve disputes, arguing that this

reduces the need for external support. Similarly, FMA stated that there has been no evidence presented over the past eight years to support the introduction of penalty provisions. FMA strongly opposes the introduction of penalty provisions under the Horticulture Code.

Observations

Our consultations with stakeholders have indicated that across the industry complying with the Horticulture Code is not a priority. This may be in part because the code does not grant the ACCC the ability to impose penalties, which would otherwise act as a deterrent to prevent unacceptable practices, poor behaviour and/or conduct. However those wholesalers who had been subject to an audit by ACCC commented on the cost of the audit on their organisation even though no fines were imposed. Many industry stakeholders consider that the current enforcement powers under the Horticulture Code are "toothless" and not properly enforced by the regulator. For example, one stakeholder commented that they had not been paid several months after delivering produce to a trader, but they were unable to get the ACCC to take enforcement actions. Due to the lack of ACCC enforcement action in relation to the Horticulture Code, growers believe there are minimal incentives for them to raise concerns about code breaches.

A code lacking proper enforcement powers is unlikely to deter unacceptable conduct and inappropriate behaviour. We therefore consider that the ACCC should be empowered to fully initiate enforcement, as already occurs under the mandatory Franchising Code. The introduction of penalties to the Franchising Code was informed by many years of industry experience, numerous reviews and other incremental reforms over time before they were deemed necessary.

These provisions, introduced in 2015 as part of the reforms to the Franchising Code, amended Part IVB of the Act to allow industry codes to include civil penalty provisions. The Franchising Code currently allows the courts to impose a maximum civil penalty of up to 300 penalty units (currently $54 000) per contravention for failure to comply with a civil penalty provision of the Franchising Code. The Franchising Code only applies civil penalties to breaches of certain provisions of the code, deemed to be serious or egregious in nature.

Similarly, the Franchising Code allows the ACCC to issue infringement notices, which are designed to provide timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the Franchising Code. The ACCC can issue infringement notices of $9 000 (50 penalty units) for a corporation and $1 800 (10 penalty units) in any other case if the ACCC has reasonable grounds to believe that a person has contravened a civil penalty provision of an industry code. These enforcement provisions should apply to both growers and traders.

We note that the ACCC has established a dedicated Agricultural Commissioner, supported by an Agricultural Enforcement and Engagement Unit. We believe that this may improve the ACCC's capacity to enforce compliance with the Horticulture Code, including its ability to apply penalties.

In addition, to ensure that traders are complying with the provisions of the Horticulture Code, it should be a requirement that they generate and keep a list of the growers they deal with. This will improve the ACCC's ability to conduct audits. We also recommend that the ACCC should conduct increased forensic audits. To this end, the ACCC should maintain a panel of accounting

firms, capable of conducting financial audits where required or random audits of the sector. The costs of any audit should be borne by a party found to have acted inappropriately, but not for minor discrepancies or simple errors. We do not believe that such a requirement would impose a significant burden on traders. For those parties who are already complying with the Horticulture Code, there should be little concern about any increased enforcement powers.

Recommendations

11. That the Horticulture Code be amended to provide for civil penalties and infringement notices for breaches of the code.

12. That the Horticulture Code require that traders generate and keep relevant information on transactions in order to allow the ACCC to use its powers under section 51ADD of the *Competition and Consumer Act 2010* (its random audit powers) to assess a trader's compliance with the code.

6 Effectiveness of the Horticulture Code

Introduction

A properly functioning Horticulture Code is vital in ensuring the sustained viability of Australia's horticulture sector. We consider that a functioning code is one which improves the clarity and transparency in the arrangements between growers and traders and reflects the practicalities of market based issues. In the course of this review it has become apparent that there is a broad consensus across the horticulture industry that the code is not effective. Previous chapters have detailed a number of areas where we believe that the Horticulture Code is currently failing to achieve its objectives. This includes the trading arrangements between growers and traders, dispute resolution and enforcement.

To be effective, growers and traders must be properly informed, have simple and meaningful regulation of proper conduct and behaviours, and have confidence in the enforcement of those regulations. While other aspects of the effectiveness of the Horticulture Code are examined in previous chapters, during our review we also examined the education provided to support its operation. As part of its role of enforcing the Horticulture Code, the ACCC is responsible for educating industry participants about their rights and obligations. When the Horticulture Code was introduced, the ACCC developed and distributed a range of education material for stakeholders. This information was intended to provide industry participants with information about compliance. The ACCC also created the Horticulture Information Network, a free subscription service to distribute information on the Horticulture Code. The ACCC's website also provides information and the specific rights and responsibilities for participants.

In addition to this, the HMA provides educational material on the Horticulture Code on its website. It outlines the basic requirements for growers, merchants and agents, as well as the dispute resolution process. However, anecdotal evidence obtained during the review suggests that despite all of these efforts, there is a significant lack of knowledge and understanding of the operation of the Horticulture Code amongst both growers and traders which likely contributes to a poor level of compliance.

Evidence considered during the review

During the course of this review we heard from a wide range of stakeholders across the horticulture industry and the broad consensus is that the code is not effective in achieving its aims. Many growers and traders view the code as a failed instrument.

However, while both growers and traders believe that the Horticulture Code is not achieving its aims, there is a strong divide between these two groups as to the underlying cause of the codes failure. APAL, Growcom, NFF and VegetablesWA all noted in their submissions that the Horticulture Code in its current form fails to address the issue of transparency, with VegetablesWA observing that 'since the introduction of the code it has unfortunately presented as a big dud diamond—seemingly valuable but a hundred million carrots and still no clarity'. The growers we consulted with generally reported that for the Horticulture Code to succeed, it must improve the transparency in their transactions.

Traders similarly reported that they did not believe the Horticulture Code is effective. However, traders and their industry bodies believe that the code has failed because it is inflexible, and does not reflect the way in which the wholesale horticulture sector operates. FMA stated that 'the code does not meet the operational, functional or practical needs of the sector as it is too prescriptive'. This sentiment was similarly reported in the submissions from Freshmark (the NSW Chamber of Fruit and Vegetables Industries), Brisbane Markets Ltd and Fresh State Ltd. Traders generally suggested that for the Horticulture Code to be effective, it should provide greater flexibility in the trading arrangements between growers and traders. This includes allowing for mechanisms such as the ability to sell using a price method or formula.

In addition to concerns around the effectiveness of the Horticulture Code, a range of stakeholders reported that there is a poor understanding about how the code operates. While a minority of growers were aware of the Horticulture Code and its operations, a significant proportion of growers are not aware of the code or how it operates in relation to their businesses. This further undermines the effectiveness of the Horticulture Code.

One of the main reasons cited for the lack of knowledge of the Horticulture Code by growers and traders is an ambivalence towards the code itself. VegetablesWA noted that 'it is difficult for a range of stakeholders to actively promote or share information about a failed instrument which has not been appropriately reformed'. Similarly, Brismark and FMA noted that they believe that growers and traders were not engaged in the Horticulture Code as it was unworkable.

There was however general support for the value of educating growers and traders about the Horticulture Code, particularly if any changes to the code were recommended as part of this review. WA Citrus suggested that in order to successfully implement any changes to the Horticulture Code, an education campaign would be necessary. APAL also noted this, and stated that the education campaign should include education about business norms, and parties' rights and responsibilities under the code. Freshmark noted that further education is necessary, however this 'needs to be supported by the various industry associations stepping up to the plate and educating their members as well'.

Observations

Many aspects of the Horticulture Code in its current form fail to reflect how business is conducted in the wholesale horticulture sector or to reflect the needs and requirements of horticulture trading. A code which is impractical or unworkable will not improve transparency or clarity in the industry.

One significant indicator of the failure of the Horticulture Code to achieve its aims is that, even though the code has now been in operation for more than eight years, a majority of trade within the industry appears to still be occurring outside of the code. We note in particular that a national survey of growers, as reported by Growcom, found that 15 per cent of growers had not even heard of the code, and that only 34 per cent of growers were operating under the code.

In drafting our recommendations, we have sought to provide recommendations which will lead to a more workable, and therefore effective, code. However, in addition to these recommendations, it is apparent that there is a poor understanding within the horticulture industry about the Horticulture Code and how it applies to different parties. An education campaign implemented at the time of the code's introduction appears to have had minimal

lasting impact on the industry. Although the ACCC and HMA have made educational material available, it appears that this education material has not filtered through to individual growers and traders.

We consider that there is a need to improve the standard of practices and behaviours of all parties in the industry. Educating parties on their regulatory requirements and how these can be practicably implemented will help to influence the culture of the industry and, therefore, lift business practices across the industry. This requires training, education and ongoing assessment to ensure that the culture and practices of the industry are in alignment. However, we note that the Horticulture Code is not intended to substitute good business behaviours, conduct and practices, but rather to support these disciplines through simple, but effective regulation.

The Horticulture Code is currently marketed primarily through the ACCC and the HMA. To improve education, we believe that it should also be marketed through the Australian Small Business and Family Enterprise Ombudsman, state ombudsmen and through the various state Small Business Commission Offices. We also believe that, in order to reach distant growers across the country, who have limited opportunity to travel, greater emphasis should be placed upon educational programs and visits being made to regional centres.

We believe that there is also significant scope for grower and trader industry associations to educate their members on the Horticulture Code. Doing so would allow their members to improve their business practices and conduct trade in compliance with the code. We would also encourage central markets and market authorities to undertake education programs in order to assist traders with all aspects of the Horticulture Code and thus improving their relationships with growers and retailers.

We note however, that ultimately the responsibilities under the Horticulture Code fall on individual growers and traders. Therefore, there is a need for growers and traders to take ownership of their education, and their compliance with the Horticulture Code, rather than only relying on the Australian Government or industry bodies to do so.

Recommendation

13. That as part of its role in enforcing the Horticulture Code, the ACCC should engage with growers' and traders' industry bodies in the development and distribution of any educational information relating to amendments to the code. Such information should be:

    a. in plain English (and other languages as appropriate)

    b. released in industry newsletters

    c. released via an agreed timetable.

7 Options for the future of the Horticulture Code

Introduction

There are three options available to the Australian Government following this review. These are:

1) let the Horticulture Code lapse
2) remake the current Horticulture Code
3) remake the Horticulture Code with amendments.

Option 1: Let the Horticulture Code lapse

On 1 April 2017, the Horticulture Code is due to sunset. If the code is not remade by this time, the code will cease to be operational. As such, an option is to let the Horticulture Code sunset and leave growers and traders to trade horticulture produce in accordance with provisions contained in common law, general contract law and requirements under the *Competition and Consumer Act 2010*. This may also include the proposed unfair contracts legislation if it is extended to business-to-business transactions.

Advantages of Option 1

The removal of the Horticulture Code would result in less regulatory impact for the horticulture industry. Without the code, there would be no industry-specific regulations determining how business in the horticulture industry is conducted. This would allow growers and traders to conduct their business as they see fit, as long as it is in accordance with any other relevant laws and regulations. Additionally, the code's exemptions to retailers, exporters, processors and pre-code contracts have been perceived as creating an uneven playing field within the horticulture industry. The removal of the code would remove this perceived unfairness.

Disadvantages of Option 1

As the Horticulture Code has been in place for eight years, its sudden removal could result instability in trading arrangements and could lead to significant confusion. The lack of a code of conduct in the horticulture industry would result in no framework for standardised business practices within the sector. The unsatisfactory business practices within the horticulture industry could return to the way they were before the code's implementation. Arguably this will reduce transparency even further, and remove access to the specific dispute resolution framework within the Horticulture Code. In general, growers have seen the Horticulture Code as positive, and the removal of the code could negatively impact their access to standard contracts and business practices.

Option 2: Renew the current Horticulture Code

The Horticulture Code could be remade as it is currently drafted. Anecdotal evidence suggests that an education campaign to reinvigorate awareness of the code would be beneficial if this option were to be implemented.

Advantages of Option 2

The current status quo under the Horticulture Code would continue, which would provide a level of certainty and allow businesses to continue their current practices. It would also avoid any confusion that may be created if the code is amended. Further, remaking the existing Horticulture Code would result in no increase in regulatory impact on horticulture grower or traders.

Disadvantages of Option 2

The business practices of the horticulture industry are unlikely to improve without an imperative to change. The issues identified by this review which exist in the horticulture industry will continue if the Horticulture Code, in its current form, is renewed. The current code is not capable of addressing the majority of these issues. Only an appropriately amended and supported code can have the required impact on industry practices. If the Horticulture Code is not amended, the exemptions to the code will not change. Therefore, there would be a continuation of the perception of an uneven playing field within the sector.

Option 3: Remake the Horticulture Code with amendments

The Horticulture Code could be remade with amendments. The amendments could include those discussed in this report including the:

- introduction of an obligation on growers and traders covered by the code to act in good faith
- the removal of the distinction between agents and merchants
- the introduction of civil penalties and infringement notices
- improved dispute resolution services.

An education campaign to accompany an amended Horticulture Code would assist the successful implementation of this option. This campaign would need to ensure that all affected stakeholders would know how an amended code affects their business.

Advantages of Option 3

The amendments to the Horticulture Code would seek to address many of the identified issues within the wholesale horticulture sector, thus improving general business practices. The inclusion of the recommended amendments into the Horticulture Code would also align it with other industry codes.

Disadvantages of Option 3

Amendments to the Horticulture Code may increase the overall regulatory impact within the sector due to further compliance requirements. An amended Horticulture Code may raise other issues which are not currently present or visible within the sector. However, the

recommendations we have put forward are carefully considered and are not anticipated to result in any additional issues in the sector.

Evidence considered during the review

The views of stakeholders put forward during the review have illustrated that the horticulture industry does not hold a consensus view regarding the future of the Horticulture Code.

The evidence collected during the review that indicates some level of support particularly from traders for Option 1, letting the Horticulture Code lapse. In its submission to the review, Fresh State noted that 'the first and strong view of members is "to let it lapse"… this would remove an additional layer of red tape that is only unique to the wholesaler/grower sector of the fresh produce industry'. FMA also stated that 'there are clearly arguments for the Code to be repealed, or for there to be one single code covering the whole industry'. Despite this support for Option 1, there is broad support from other industry stakeholders for the Horticulture Code to continue, with the acknowledgement that the horticulture sector needs a code of conduct to better guide business practices. Those supporting an industry code of conduct include the NFF, which stated in its submission that 'while the current code has been unsuccessful in clearly meeting its primary objectives, to remove the code entirely would aggravate the situation'. AUSVEG also noted in its submission that it still supports the idea that the horticulture industry needs a robust code of conduct in order to help the long-term future of the industry.

The evidence collected during the review suggests that there is little to no industry support for Option 2—that the code to be renewed without amendments. For example, Australian Small Business Commissioner stated that 'if the Code is not broadened, the Code might as well be allowed to lapse' as the current code is not effective and is not achieving is goals of 'transparency and clarity of transactions'. Further, the majority of submissions suggested amendments to the Horticulture Code. This indicates that there is strong support within the industry for changes to be made before the code is remade.

Option 3, amending the Horticulture Code, is supported by many stakeholders within the industry. For example, the Victorian Farmers Federation stated that it 'supports a mandatory Horticulture Code of Conduct', and has suggested ways the code could be amended. Further, despite Option 1 being its first preference, FMA noted in its submission that it 'supports amendments to the Code that are required to meet the operational, functional and practical needs of the sector'. FMA's stance is supported by other parties whose first choice is also the lapsing of the Horticulture Code, including Freshmark and Brismark.

Observations

We believe that allowing the Horticulture Code to lapse is undesirable, as it is clear that the disadvantages of this option outweigh the advantages. This review was conducted with the ultimate goal of improving the business practices within the horticulture industry. We do not believe that the removal of the Horticulture Code will assist in achieving this, and it will not be beneficial for the overall horticulture industry.

We believe that Option 2 is also undesirable. If the Horticulture Code is remade in its current form, then there will most likely be no change in the unacceptable business practices of horticulture growers and traders, and the current issues within the industry will remain.

After considering the evidence, it is our view that Option 3: remaking the code with amendments, is the option preferred by most of the horticulture industry and will result in the best outcomes.

Recommendation

We recommend that Option 3: remaking the Horticulture Code of Conduct with amendments be adopted by the Australian Government (as per the recommendations for amendment).

8 Implementation and review

Following our review, it will be for the Australian Government to consider the policy recommendations made and consider what next steps are necessary to implement any reforms. We believe that this will best be achieved by including the recommended amendments as part of a new regulatory instrument, to replace the existing code when it sunsets on 1 April 2017. As part of this process, we note that there may be further opportunities for the horticulture industry to be consulted on specific details of the exposure draft regulation. We would encourage all affected stakeholders to proactively engage in the legislative process, to ensure that the resulting regulation best fits with the sector's needs.

Once the new regulation is finalised, it is our view that there needs to be sufficient time to allow the remade Horticulture Code to operate before it is reviewed again. It would be detrimental to the certainty of the industry for there to be a perpetual review of the Horticulture Code. It is important therefore, that a further full review of the code not occur until enough time has passed for the full effects of any change to be assessed. For this reason we believe that the government should allow sufficient time before conducting another review, noting that a review should be conducted before the remade regulation would sunset in 2027.

We note however that a review of the Food and Grocery Code is scheduled to occur in 2018. It is anticipated that this review will consider the interactions between the Food and Grocery Code and the Horticulture Code. This may provide an opportunity for the Australian Government to undertake a preliminary assessment of the effectiveness of any changes to the Horticulture Code, and identify any early implementation issues and the effectiveness of the two separate codes operating in overlapping sectors.

The reviewers

Mr Mark Napper has more than 30 years' experience in Australian agribusiness, 22 of which have been in horticulture. A successful producer as well as a businessman, Mr Napper owns a fruit orchard in Bangalow NSW and currently grows peaches, nectarines and custard apples. With over a decade of experience in CEO and Managing Director roles, Mr Napper has extensive background in finance and corporate governance and is currently on the Board of Horticulture Innovation Australia Limited.

Mr Alan Wein is an experienced lawyer mediator and runs a practice that specialises in commercial, franchising, trade practices and retail leasing disputes, particularly relating to small business. Mr Wein is a member of the Law Council of Australia SME Committee and is also a member of the Law Institute of Victoria Alternative Dispute Resolution Committee. In January 2013, Mr Wein was appointed by the Australian Government to review the Franchising Code of Conduct. Mr Wein is an experienced accredited mediator for the Office of the Franchising Mediation Adviser and the Office of the Small Business Commissioner in Victoria, having been previously appointed the inaugural chair of the Victorian Government Small Business Advisory Council.

Glossary

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFGC	Australian Food & Grocery Council
APAL	Apple & Pear Australia Ltd
CCA	*Competition and Consumer Act 2010*
CIE	Centre for International Economics
CMAA	Central Markets Association of Australia
Codex	Codex Alimentarius Commission
FMA	Fresh Markets Australia
Food and Grocery Code	Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015
Franchising Code	Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Franchising Code)
HMA	Horticulture Mediation Adviser
Horticulture Code	Trade Practices (Horticulture Code of Conduct) Regulations 2006
NFF	National Farmers' Federation
OIC	Ord Irrigation Cooperative
PGICC	Produce and Grocery Industry Code of Conduct
RGICCC	Retail Grocery Industry Code of Conduct Committee
RIS	Regulation impact statement
SBDC	Small Business Development Corporation of Western Australia
TFGA	Tasmanian Farmers & Graziers Association
The Ombudsman	Australian Small Business and Family Enterprise Ombudsman
VSBC	Victorian Small Business Commissioner
WFA	Winemakers' Federation of Australia

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Attachment A Summary of consultations

Submissions

From 3 August to 18 September 2015, stakeholders were invited to make a written submission to the review.

A total of 44 submissions were received, including 5 confidential submissions and one partly confidential submission. Excluding the confidential submissions, they have been made publicly available on the Department of Agriculture and Water Resources' website. Submissions were received from growers, traders, processors, exporters, retailers and associated representative bodies, government agencies, lawyers, consultants working in the industry and others.

Sub #	Submission
1	Confidential submission
2	Scott Dixon (Vice President, Mareeba District Fruit and Vegetable Growers Association)
3	Confidential submission
4	Confidential submission
5	Michael Fawcett
6	Victorian Small Business Commissioner
7	Tony Battaglene (Winemakers' Federation of Australia)
8	Confidential submission
9	David Newton (Horticulture Mediation Adviser)
10	Australian Competition and Consumer Commission
11	John Garrett (Garrett & Sons)
12	Coles
13	South Australian Chamber of Fruit and Vegetables
14	Market Fresh South Australia
15	AUSVEG
16	Market Fresh South Australia – Price Reporting Services
17	Apple & Pear Australia Ltd
18	HopgoodGanim Lawyers
19	Confidential submission
20	Fresh State Ltd
21	Australian Food & Grocery Council
22	Central Markets Association Australia
23	Confidential submission
24	Brisbane Markets Ltd
25	Ord Irrigation Cooperative Ltd
26	Sydney Produce Surveyors
27	Your Local Greengrocer

Sub #	Submission
28	NSW Chamber of Fruit and Vegetable Industries
29	Western Australian Small Business Development Corporation, Mr David Eaton (Western Australian Small Business Commissioner)
30	Brisbane Produce Markets Retailer Advisory Committee
31	Fresh Markets Australia—Response to Issues Paper
32	Brismark
33	Fresh Markets Australia—Recommended Changes to the Horticulture Code of Conduct
34	Victorian Farmers Federation
35	Fresh Markets Australia—An Assessment of the Introduction, Justification for and Performance of the Code
36	Toomey Pegg Lawyers
37	WA Citrus
38	Tasmanian Farmers & Graziers Association
39	National Farmers' Federation
40	Wine Grape Growers Australia
41	Growcom
42	VegetablesWA
43	Australian Small Business Commissioner
44	Noel Hall

Meetings

In addition to a period for the public to make written submissions, face-to-face meetings and teleconferences were held with the stakeholders listed in the table throughout August and September 2015 to discuss key issues arising out of the terms of reference. Please note this list is not complete as some meetings were confidential in nature.

Meeting details
Adelaide Produce Market, South Australian Chamber of Fruit and Vegetables
Alan Cross (Gympie Packhouse)
Australian Competition and Competition Commission
Australian Government Department of Agriculture and Water Resources
Australian Government Department of the Treasury
Australian Horticulture Exporters' Association
Australian Mango Industry Association
AUSVEG
Australian Food & Grocery Council
Australian Small Business Commissioner, Mr Mark Brennan, and Deputy Commissioner Craig Latham
The Hon. Barnaby Joyce MP, Minister for Agriculture and Water Resources, and the Hon. Bruce Billson MP (former Minister for Small Business)
The Batlow Fruit Co-operative Ltd
The Hon. Bob Katter MP, Federal Member for Kennedy (Qld)
Brisbane Markets, Brismark and traders

Meeting details
Bundaberg Fruit & Vegetable Growers
Chamber of Fruit and Vegetable Industries in Western Australia and traders
Colin Jeacocke (grower)
David Cormack (grower)
Department of Agriculture and Fisheries Queensland
Freshmark and traders
Fresh State and traders
Glenn Pearmine (grower)
Growcom
Heiko Burnett (YourCrop)
Horticulture Mediation Adviser (Accord)
Ian Baker (industry consultant)
The Hon. Joel Fitzgibbon MP, Shadow Minister for Agriculture and Shadow Minister for Rural Affairs, and the Hon. Bernie Ripoll MP, Shadow Minister Assisting the Leader for Small Business
Mr Keith Pitt MP, Federal Member for Hinkler (Qld)
Kevin Sanders (grower)
Kevin Taylor (grower)
Makse Srhoj and Brian Westwood (growers)
Matt Hood (grower)
Michael Quach (grower)
New South Wales Small Business Commissioner
Ms Nola Marino MP, Federal Member for Forrest (WA)
NSW Farmers
NT Farmers
Potato Growers Association of Western Australia
Senator the Hon. Richard Colbeck, Minister for Tourism and International Education and Minister Assisting the Minister for Trade and Investment (former Parliamentary Secretary to the Minister for Agriculture)
Ross Stuhmcke (grower)
Scott Dixon (Vice President, Mareeba District Fruit and Vegetable Growers Association) and Joe Tramarchi (growers)
Scott Montague (Montague Fresh)
Office of Senator Sean Edwards
South Australian Small Business Commissioner
Vegetable Growers' Association of Victoria
VegetablesWA, Michael Nixon (grower)
Victorian Small Business Commissioner, Mr Geoff Browne
Victorian Farmers Federation
Voice of Horticulture, Apple & Pear Australia Ltd, Citrus Australia
Vuong and Liza Nguyen, Ian Quin (growers)
Western Australian Small Business Development Corporation
Wine Grape Growers Australia

Attachment B History of the Horticulture Code

In February 2000, as part of the Australian Government response to the Report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure?*, the Retail Grocery Industry Code of Conduct Committee (RGICCC) was appointed. The RGICCC subsequently developed the voluntary Retail Grocery Industry Code of Conduct. In 2005, this code was renamed the Produce and Grocery Industry Code of Conduct (PGICC) to better reflect the coverage of its scope within the industry. The PGICC is no longer in operation. Arguably, it has been replaced with the Food and Grocery Code.

The PGICC applied to vertical transactions between all participants, except consumers, in the Australian produce and grocery industry supply chain that signed on to it. Signatories included growers, processors, wholesalers, distributors and retailers. The PGICC was a voluntary set of guidelines promoting fair trading practices in the produce and grocery industry and provided a simple dispute resolution mechanism. Trading practices covered by the PGICC were standards and specifications, contracts, product labelling, packaging and preparation, and notification of acquisitions.

In a joint submission to the 2003 independent review of the PGICC by Mr Neill Buck, the then Horticulture Australia Council and Horticulture Australia Limited noted that growers were extremely dissatisfied with the PGICC and that it should be replaced by a mandatory code. Amongst the issues raised in the submission was that a major area for disputes were between growers and wholesalers, including whether wholesalers were acting as an agent or merchant, growers' rights to information and the timing at which ownership of/responsibility for produce changes hands. Mr Buck recommended that the Australian Government implement a principles based code underpinned by regulation with simple disclosure and business practice provisions for those participating in the retail grocery industry supply chain (Buck 2003). In making this recommendation, Mr Buck noted that a major question arises in the industry concerning the relationship between grower and intermediary in sales to central markets (Buck 2003, p. 39).

Calls for a mandatory code were based on the fact that the PGICC did not require signatories to enter written contracts to evidence terms and conditions of supply, and did not enable one party to require another to participate in the mediation of a dispute.

On 1 October 2004, the Hon. John Anderson MP announced that a re-elected Coalition Government would introduce a mandatory horticulture code of conduct aimed at improving the transparency of trading transactions in the wholesale fresh fruit and vegetable sector. In 2005, the Centre for International Economics (CIE) was engaged to undertake consultation and develop a regulation impact statement (RIS) on options for a code.

Stakeholder consultations at that time found that growers and wholesalers agreed that the code should apply broadly and provide a level playing field across all those in the industry who trade with growers. However, supermarkets, independent retailers and others such as processors and packing sheds were not considered as they were meeting the requirements of the code under existing commercial arrangements. The RIS found that most complaints were made about

traders within the six central markets by those arguing serious problems existed, 'where written terms of trade are typically not provided, the transaction information is low and the rights and responsibilities of growers and wholesalers is often unclear', compared with 'retailers and processors (who also trade directly with growers) provide clear contractual terms and provide a high degree of transparency'.

In addition, the RIS identified that the 'key problems in the horticulture wholesale sector are information asymmetry and adverse selection of low cost, but also low clarity transactions'. The RIS noted that problems relating to lack of clarity and transparency impact on smaller scale growers, who are a long way from the markets, who supply infrequently to markets, or who are new entrants being the most affected.

The recommended option was to provide clarity in trading arrangements and apply a code across the wholesaling industry in a way that would have minimal market distortions and provides flexibility for growers and wholesalers to agree on terms of trade. The preferred option was to:

- apply a code to all wholesalers, including the central markets, off-market wholesalers and other intermediaries (transactions directly between growers and retailers, processors and exporters would be excluded)
- improve the clarity of trading arrangements by stipulating that wholesalers trade as either agents or as merchants
- require wholesalers to prepare and publish written terms of trade containing minimum conditions on how they will trade with growers
- simplify minimum conditions in the terms of trade to key elements such as payment timeframes, pricing and fees, transaction information to be provided, and some other conditions
- allow all existing written contracts to be grandfathered under the code unless renewed, extended, amended or transferred
- provide a framework for growers and wholesalers to enter long-term agreements for the supply of produce
- ensure that wholesalers do not have to disclose the identity of their buyers, except for debt recovery purposes in agent transactions
- apply a dispute resolution process (CIE n.d.).

The Australian Government considered the CIE regulation impact statement, public submissions on a proposed Horticulture Code and made a number of attempts to reach agreement between growers and traders before introducing the Horticulture Code. The Horticulture Code was made mandatory as it was clear to the Australian Government that growers and traders could not agree on a voluntary code.

The Horticulture Code was signed by the Governor-General on 13 December 2006. A disallowance motion was moved and debated in Parliament on 28 March 2007. The disallowance motion was on the basis that the Australian Government had not delivered on its election commitment, as the code was not introduced within 100 days and it did not include the large supermarket chains. This motion was opposed and defeated.

The Horticulture Code commenced operation on 14 May 2007 and applied to contracts signed before 15 December 2006. The key issues the proposed mandatory code aimed to address were:

- a lack of clarity about when a wholesaler is trading as an agent or as a merchant when dealing with growers
- a failure to invest in written documentation of trade, including written transaction information and written trading agreements
- the need for an effective dispute resolution process, including independent assessment of transactions and compulsory mediation.

Attachment C Previous reviews of the Horticulture Code

The Horticulture Code was reviewed as part of the 2008 Australian Competition and Consumer Commission (ACCC) Grocery Pricing Inquiry, but has remained unchanged since its introduction.

2008 ACCC Inquiry into the Horticulture Code

On 22 January 2008, the government requested that the ACCC hold a public inquiry into the competitiveness of retail prices for standard groceries, including assessing the effectiveness of the Horticulture Code and whether the inclusion of other major buyers such as retailers would improve the effectiveness of the code. The ACCC made 13 recommendations relating to the code:

1) Amend the *Trade Practices Act 1974* to introduce civil pecuniary penalties and infringement notices in relation to Part IVB provisions, such as the Horticulture Code and introduce random record audits as an enforcement mechanism available under the code.

1) Amend the Horticulture Code to regulate first point of sale transactions of horticulture produce between a grower and a retailer, exporter or processor.

2) Amend the Horticulture Code to regulate first point of sale transactions between a grower and a trader in horticulture produce, including in relation to agreements made before 15 December 2006.

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

4) Amend the Horticulture Code to require that if a merchant does not reject the produce within 24 hours of physical delivery, the produce is deemed to be accepted.

5) Amend the Horticulture Code to enable a merchant to deduct the cost of any services that are required to prepare the produce for resale as part of the price amount or as part of the method for calculating the price amount.

6) Amend the Horticulture 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.

7) Amend the Horticulture Code to exclude persons who may be an agent's competitor from inspecting that agent's records on a grower's behalf.

8) Amend the Horticulture Code to ensure that transactions between a grower and a cooperative/packing house, in which that grower has a significant interest, are exempt from regulation under the Horticulture Code.

9) Amend the Horticulture Code to permit agents and growers to engage in pooling and price averaging.

10) Amend the Horticulture 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.

11) The ACCC also recommends that the costs incurred by the parties to a dispute under the Horticulture Code dispute resolution procedure be subsidised by the Australian Government to the same extent as the voluntary PGICC.

12) The ACCC also recommends the implementation of further education initiatives regarding the Horticulture Code and its dispute resolution procedures, including the role of assessors in resolving disputes.

In making its recommendations, the ACCC noted that the code had only been in place for a short period of time, the code was designed to impose significant cultural and structural changes on the horticulture industry, and that industry feedback should be obtained before implementing the suggested changes.

Recommendation 1 relating to the ACCC enforcement powers was implemented in 2010 as part of the franchising reforms and empowered the ACCC to conduct random record of audits, issue public warning notices and provide for non-party redress from 1 January 2011.

2008 Horticulture Code of Conduct Committee Response

In October 2008, the Horticulture Code of Conduct Committee (the Committee), consisting of growers, wholesalers, market operators, packers, retailers, processors and exporters, was asked to consider the potential implications of implementing the recommendations and assist the Australian Government in responding to the recommendations made in the ACCC report.

Following extensive consultation with industry representatives from all sectors, the Committee gave qualified support for most, but not all, of the ACCC's recommendations. The Committee's report, *Implications of the Australian Competition and Consumer Commission recommendations to amend the Horticulture Code of Conduct* (August 2009) was publicly released on 1 November 2009. The Committee also noted that there was little unanimity of views for many of the recommendations. As the Chair of the Committee, Ms Christine Hawkins noted in her report, 'the divergence of views across and within industry sectors reflects the diversity of the industry itself. Although all sectors wish to see the Code improved, there are few Australian Competition and Consumer Commission's recommendations that are universally supported'.

2011 Horticulture Taskforce Response

In August 2011, the Horticulture Taskforce (the Taskforce), a collective peak horticulture industry body, provided the Australian Government with its response to the ACCC recommendations. The Taskforce consulted with grower peak bodies in the development of its response. The Taskforce supported ACCC recommendations 1, 8 and 12, and gave qualified support to recommendations 2, 3, 10 and 13. They did not support the remaining recommendations.

Attachment D Regulation of trade in horticulture produce—the broader framework

The broader regulatory and policy framework

Parties covered by the Horticulture Code operate in a broader regulatory and policy framework, including those discussed in this section.

Competition and Consumer Act 2010

The stated objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection (section 2). The Act operates as a single set of laws applying to most markets and businesses within Australia. Schedule 2 of the Act sets out the Australian Consumer Law (ACL), which applies to both corporations and individuals carrying on a business within Australia.

The Horticulture Code is a prescribed, mandatory industry code under the Act. The Act states that a person must not, in trade or commerce, contravene an applicable industry code (section 51AD). Therefore, a breach of the Horticulture Code is a breach of the Act and the enforcement of the Horticulture Code is through the enforcement provisions of the Act. The ACCC enforces the Act.

Australian Consumer Law

The ACL is a single, national consumer law enforced and administered by the ACCC, each state and territory's consumer agency, and, in respect of financial services, the Australian Securities and Investments Commission. Amongst its powers, the ACL prohibits misleading or deceptive conduct and unconscionable conduct. Penalties for violating these provisions may include the issuing of infringement notices by the ACCC, as well as pecuniary penalties being imposed by the courts.

While the ACL does not relate specifically to the Horticulture Code, growers and traders of horticulture produce must still comply with the general requirements set out in the ACL.

Misleading or deceptive conduct

Under section 18 of the ACL, a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. There is also a prohibition on making certain kinds of false or misleading representations with respect to goods or services.

These protections apply to benefit both individuals and businesses and apply to businesses regardless of whether they are operating under the Horticulture Code.

Unconscionable conduct

Under the ACL, businesses must not engage in unconscionable conduct when dealing with other businesses or their customers. While unconscionable conduct is not defined under the ACL, it is

generally understood to be conduct which is so harsh that it goes against good conscience. Australian courts have found transactions or dealings to be 'unconscionable' when they are deliberate, involve serious misconduct or involve conduct which is clearly unfair and unreasonable.

There are a number of factors a court will consider when assessing whether conduct is unconscionable, these include:

- the relative bargaining strength of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- whether the weaker party could understand the documentation used
- the use of undue influence, pressure or unfair tactics by the stronger party
- the requirements of applicable industry codes
- the willingness of the stronger party to negotiate
- the extent to which the parties acted in good faith.

Where a business is found to have acted unconscionably, there are a number of remedies available under the CCA including injunctions, damages, compensatory orders, non-punitive orders, adverse publicity orders, civil pecuniary penalties and disqualification orders. Unconscionable conduct provisions cover the relationship between growers and traders, as well as between growers and other businesses. For example, in 2014 Coles Supermarket settled two separate proceedings commenced by the ACCC, admitting that it had engaged in 'unconscionable conduct' in dealing with small food and grocery suppliers.

Unfair contract term protections

Part 2–3 of the ACL includes unfair contract term protections for consumers entering into standard form contracts. This is also replicated in the *Australian Securities and Investments Commission Act 2001* to provide protections in financial product and service contracts. These protections enable the courts to declare void a term within a standard form consumer contract that is 'unfair'. A term is 'unfair' if it causes a significant imbalance in the parties' rights and obligations under the contract, is not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and would cause detriment to a consumer if it were relied on.

Currently 'unfair' provisions in the ACL do not extend to business-to-business relationships.

The Australian Government has committed to extending the consumer unfair contract term protections to small businesses as part of its *Real Solutions Small Business Policy* (Coalition 2013).

In late October 2015, the Parliament passed the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.* This Act extends consumer unfair contract term protections to small business contracts and will allow unfair contract terms to be declared void and for the contract to continue to bind the parties if it can operate without the unfair term. This will reduce the incentive to include and enforce unfair terms in small business contracts, providing a more efficient allocation of risk in these contracts and supporting small business'

confidence in agreeing to contracts. Businesses that offer low-value standard form contracts to small businesses may need to review and amend their contracts to ensure they are compliant with the new protections.

A contract is a small business contract for the purposes of the protection against unfair contract terms if, at the time it is entered into, at least one party to the contract is a business that employs fewer than 20 persons, and the upfront price under the contract does not exceed either $100 000, or $250 000 if its duration is more than 12 months (section 8).

A standard form contract is a contract prepared by one party, not negotiated between the parties, and offered on a 'take it or leave it' basis. Section 27 of the CCA provides a number of matters the court may take into account to this effect.

This new law will protect small businesses, including small businesses covered by the Horticulture Code, from unfair contract terms. If a court were to find a contract term to be unfair under this law, it could make orders such as: declaring all or part of the contract to be void; varying a contract or arrangement as the court sees fit; or directing the respondent to repair or provide parts for a product provided under a contract at their expense. Civil penalties are not available in the event that a court declares a term unfair and void.

An unfair term in a contract does not automatically mean the whole contract is void. The remaining terms in a contract containing a void term will continue to operate unless they cannot operate without the unfair term.

The protection from unfair contract terms does not however apply to terms of a contract that sets out the main subject matter or the upfront price of the contract, or a term that is required or expressly permitted by law (ACL, subsection 26(1)). This means that unfair contract protections do not require a party to offer a 'fair' price for their goods or services.

It should be noted that the Act contains a mechanism for the Minister to exempt legislation and regulation that is deemed enforceable and equivalent to the new protections. In determining this, the Minister must take into consideration a number of prescribed matters, namely, the impact on small businesses, the impact on businesses generally and the public interest.

Food and Grocery Code of Conduct

On 2 March 2015 the Australian Government introduced the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (the Food and Grocery Code) to improve standards of business conduct in the grocery sector (Food and Grocery Code Explanatory Statement 2015, p. 1). The code arose out of an industry-led response to concerns about the conduct of retailers towards their suppliers and 'aims to regulate commercial relations between retailers and wholesalers, on the one hand, and suppliers, on the other hand, to the extent that they are not regulated by other codes' (Food and Grocery Code Explanatory Statement 2015, pp. 1–2).

The Food and Grocery Code is a voluntary industry code prescribed under section 51AE of the CCA. Once a retailer or wholesaler opts-in, the Food and Grocery Code is binding and, like the Horticulture Code, a breach can be enforced by the ACCC.

Section 2 outlines the code's four purposes as:

- regulate standards of business conduct in the grocery supply chain to build and sustain trust and cooperation throughout that chain
- ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between the parties
- provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers and suppliers
- promote and support good faith in commercial dealings between retailers and suppliers.

The Food and Grocery Code sets out certain standards of conduct that cover the life cycle of the relationship between retailers and suppliers. This includes aspects such as product shelf allocation and de-listing, fresh produce standards and quality specifications, as well as payments for shrinkage, wastage and promotional activities. The Food and Grocery Code seeks to address the potential imbalance in market power between retailers and suppliers with respect to the allocation of risk. It also recognises suppliers' need for certainty to plan appropriately for their business, invest, innovate, and expand capacity or develop new product lines. Some of the requirements have limited exceptions, and place the onus on the retailer or wholesaler of proving that an exception applies in the circumstances.

The Food and Grocery Code requires that retailers or wholesalers and suppliers have written grocery supply agreements. The Food and Grocery Code also prohibits retailers or wholesalers from engaging in certain conduct (for example, they cannot unilaterally or retrospectively vary a grocery supply agreement) unless certain exceptions apply. In most cases, these exceptions will need to be provided for in the grocery supply agreement and in certain cases are subject to a reasonableness test. The retailer or wholesaler will bear the onus of proving that the exception applies in circumstances where the supplier claims that the prohibited conduct has been engaged in. The code includes an obligation for retailers and wholesalers to deal lawfully and in good faith in their treatment of suppliers.

The Food and Grocery Code does not apply to the extent that it conflicts with the Horticulture Code (Food and Grocery Code, paragraph 4(4)(a)).

Attachment E Dispute resolution statistics

Table 1 Use of the Horticulture Mediation Adviser

Category	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14	2014–15a	Total
Number of dispute enquiries	21	7	12	7	13	8	12	9	89
Number of mediator appointments	2	0	1	4	2	0	3	2	14
Number of mediations conducted	1	0	1	3	3	0	1	3	12

a Data from 1 July 2014 to 31 March 2015.

Table 2 Horticulture Mediation Adviser dispute enquiries by state

Year	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA	Total
2007–08	0	3	0	11	2	0	5	0	21
2008–09	0	1	0	3	0	0	3	0	7
2009–10	0	0	2	3	1	0	4	2	12
2010–11	0	0	0	3	1	0	2	1	7
2011–12	0	2	0	7	0	0	1	3	13
2012–13	0	0	1	4	0	0	1	2	8
2013–14	0	2	0	6	3	0	1	0	12
Total	0	8	3	37	7	0	17	8	80

Table 3 Early intervention action taken by the Horticulture Mediation Adviser

Category	July 2011 to March 2015
Educative advice on code given	42
Explanation/ Information provided on HMA service	42
Role of ACCC explained	15
Legal advice encouraged	10
Referred to lawyer/consultant	6
Involved/referred to other organisation	5
Direct negotiation encouraged	30
HMA raised issue with other party	11
Early intervention facilitation of dispute offered	16
Early intervention facilitation of dispute occurred	4
Suggested referral to an assessor	0
Facilitated agreement re: location	3
Total applications for mediation	6
Total mediations conducted	3
Total number of enquiries	42

Note: Most enquirers receive more than one form of early intervention assistance.

Attachment F International examples

Although consultations did not extend internationally, several submissions and consultations alluded to the operation of the wholesale horticulture sector in different countries. Whilst an international model could not be adopted without deep examination of the benefits and drawbacks, lessons can be learned from the way other markets operate that may help to inform and improve the Australian horticulture sector.

The general nature of markets in the United Kingdom, United States, Canada and the Republic of South Africa have been examined. This table gives a brief summary:

Country	General operation of the horticulture sector
United Kingdom	The United Kingdom experiences similar challenges to Australia with regards to its horticulture sector. According to the National Farmers' Union (NFU), poor practices have led to calls for greater transparency and market intelligence (NFU 2015). To respond, the NFU developed a voluntary 'Fruit and Veg Pledge' which aims to 'improve relationships and balance risk between retailers, intermediaries and growers'(NFU n.d.). This complements the already existing Groceries Supply Code of Practice, which is not unlike Australia's Food and Grocery Code of Conduct.
United States	The Perishable Agricultural Commodities Act (PACA) was enacted in 1930 at the request of the fruit and vegetable industry to promote fair trade in the industry. PACA provides a comprehensive scheme for the regulation of horticulture trade, and includes buyers, sellers, commission merchants, dealers, and brokers within the fruit and vegetable industry. It encourages fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent business practices in marketing of fresh and frozen fruits and vegetables, and provides a scheme for collecting damages from any buyer or seller who fails to live up to their contractual obligations. All oversight of actions related to PACA are conducted by the Agricultural Marketing Service (AMS), an agency within the United States Department of Agriculture (USDA). With regard to transparency in pricing, the USDA provides impartial, current and reliable market estimates through the AMS. The USDA also provides quality and condition grading services.
Canada	The Department of Agriculture and Agri-Food Canada provides daily ranges of domestic and imported commodities offered for sale at the Toronto and Montreal markets via InfoHort. InfoHort's objective is to provide all components of the horticulture industry with the necessary intelligence so that they can make informed decisions about their industry (Department of Agriculture and Agri-Food Canada 2015). Organisations such as the Fruit and Vegetable Dispute Resolution Corporation (DRC) have been developed to support the horticulture industry. The DRC is a non-profit, membership-based organisation assisting with dispute resolution. Its membership includes growers, wholesalers, retailers, food service distributors, brokers and transportation intermediaries. In addition to consultation, mediation, and arbitration, DRC works closely with industry associations and governments on behalf of its members to reform legislation, make federal inspections more accessible, develop best practices, and level the playing field for participants (DRC 2015).
Republic of South Africa	South Africa's fresh produce markets have been deregulated since the mid 1990s. Similar to Australia, an increase in direct producer-retailer relationships has seen a declining role for horticulture markets in South Africa (Afesis-Corplan n.d.). National Fresh Produce Markets are principally regulated by two sets of legislation, the Agricultural Produce Agents Act, 1992 (APA Act) and municipal by-laws. Through the APA Act, the Agricultural Produce Agents Council provides a code of conduct for market agents, and facilitates fidelity funds, trust accounts and farmer compensation. In South Africa, daily prices are also available from some markets. For example, the Joburg Market (the largest fresh produce market in Africa, which sell the produce on behalf of the farmers via a commission system) updates its website with daily prices on a range of commodities. Information on market prices is also available via the Department of Agriculture, Forestry and Fisheries 'Marketing Information System' (MIS) database, which aims to provide market intelligence to growers and to 'integrate and consolidate the islands of marketing information' and make it accessible (Republic of South Africa Department of Agriculture, Forestry and Fisheries 2015). This information is also available over the phone for a fee. There is a general policy focus on supporting smallholder producers to link into formalised commercial markets (Republic of South Africa Department of Agriculture, Forestry and Fisheries 2012).

Appendix A Horticulture Produce Agreements

Horticulture Produce Agreements

A horticulture produce agreement must specify, but not be limited to, terms that clarify:

- if a formula is to be used to determine price, the price formula
- any requirements with respect to the delivery, storage or maintenance of the horticulture produce
- any requirements regarding quality and grading of horticulture produce
- any pooling arrangements entered into
- how quality issues must be raised and resolved, including referencing the quality standard to be used
- circumstances in which horticulture produce may be rejected, including timeframes
- payment terms
- details of any deductions or charges by the trader
- who shall be responsible for the collection of any bad debts
- when the agreement is to be reviewed (with review periods to not extend beyond 24 months).

Transparency in transactions

A trader must provide this information to a grower relating to the sale of their produce:

- confirmation when the horticulture produce arrives at market, including the type, quantity and quality of horticulture produce received
- the amount payable to the grower
- details of any deductions or charges by the trader (which are explicitly identified and agreed in the HPA).

A fixed price may be agreed in writing (including via electronic means) between a grower and a trader:

- at the farm gate
- within 24 hours of acceptance of delivery
- or within 24 hours of the horticulture produce being ready for sale, where the produce requires pre-sale conditioning by the trader.

In this situation, ownership of the produce transfers on acceptance of delivery of the produce, or acceptance of the fixed price either 24 hours after delivery or 24 hours after the product is ready for sale following conditioning, whichever is later.

Where a fixed price has not been agreed in the circumstances outlined, the trader must also provide the grower with this additional information:

- the date/s of the sale of the grower's horticulture produce by the trader
- the gross sale price of the horticulture produce, including the type, quantity and quality of horticulture produce sold
- details of any horticulture produce not sold, including the type, quantity and quality of the horticulture produce
- details of any horticulture produce to be destroyed by the trader (reasons for deductions must be explicitly identified and agreed in the horticulture produce agreement).

Ownership of the produce is never transferred to the trader, but moves from grower to the buyer on completion of sale.