



Competition and Consumer (Industry Codes— Horticulture) Regulations 2017

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 23 March 2017

Peter Cosgrove
Governor-General

By His Excellency's Command

Barnaby Joyce
Deputy Prime Minister and Minister for Agriculture and Water Resources
for the Minister for Small Business

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1 Name

This instrument is the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	1 April 2017.	1 April 2017

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

5 Code of conduct

For the purposes of section 51AE of the *Competition and Consumer Act 2010*, the industry code set out in Schedule 1:

- (a) is prescribed for the purposes of Part IVB; and
- (b) is declared to be a mandatory industry code.

Schedule 1—Horticulture Code of Conduct

Note: See section 5.

Part 1—Introduction

Division 1—Preliminary

1 Name

This code is the *Horticulture Code of Conduct*.

2 Purpose of code

The purpose of this code is:

- (a) to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and
- (b) to provide a fair and equitable dispute resolution procedure for disputes arising under this code or a horticulture produce agreement.

3 Application

- (1) This code applies to traders and growers.
- (2) Without limiting subclause (1), this code applies to:
 - (a) an agent who sells horticulture produce on behalf of a grower; and
 - (b) a merchant who purchases horticulture produce from a grower; and
 - (c) a grower who provides horticulture produce to an agent or sells horticulture produce to a merchant.
- (3) However, if a trader and a grower have a transitional agreement, Parts 2, 3 and 4 of this code do not apply in relation to trade in horticulture produce between the trader and the grower under the transitional agreement until:
 - (a) if the transitional agreement is varied before 1 April 2018—the day on which the agreement is varied; or
 - (b) if the transitional agreement is not varied before 1 April 2018—1 April 2018.

4 Compensation for acquisition of property

- (1) This clause applies if, apart from this clause, subclause 3(3) would result in the acquisition of property from a party to an agreement mentioned in subclause 3(3) (the *first party*) by another party to that agreement (the *second party*) otherwise than on just terms.
- (2) There is payable to the first party by the second party such amount of compensation as is agreed on between the parties, or, failing agreement, as is determined by a court of competent jurisdiction.
- (3) Any damages or compensation recovered or other remedy given in a proceeding that is commenced otherwise than under this clause is to be taken into account in

assessing compensation payable in a proceeding that is commenced under this clause and that arises out of the same event or transaction.

- (4) Any compensation payable in a proceeding that is commenced under this clause is to be taken into account in assessing any damages or compensation or other remedy to be awarded in a proceeding that is commenced otherwise than under this clause and that arises out of the same event or transaction.

- (5) In this clause:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

Division 2—Definitions

5 Definitions

In this code:

Act means the *Competition and Consumer Act 2010*.

agent means a person who sells horticulture produce on behalf of a grower to a person for a commission or fee.

agreement means the following:

- (a) a horticulture produce agreement;
- (b) a transitional agreement.

bad debt has the meaning given in clause 6.

code means the *Horticulture Code of Conduct*.

FreshSpecs Produce Specifications means produce specifications published by Fresh Markets Australia.

grower means a person who grows horticulture produce for sale.

horticulture dispute means a dispute arising under an agreement or this code.

horticulture produce has the meaning given in clause 7.

horticulture produce agreement means an agreement between a grower and a trader under Part 3.

horticulture produce assessor means a person listed by the mediation adviser under subclause 47(1).

mediation adviser means the person appointed under subclause 39(1).

mediator means a person listed by the mediation adviser under subclause 39(2).

merchant means a person who purchases horticulture produce from a grower for the purpose of resale of that horticulture produce, but does not include:

- (a) a person who purchases the produce for export by that person; or
- (b) a person who purchases the produce for retail sale by that person.

reporting period:

- (a) for a horticulture produce agreement with an agent—see subclause 29(2);
and
- (b) for a horticulture produce agreement with a merchant—see
subclause 36(2).

statement period:

- (a) for a horticulture produce agreement with an agent—see subclause 29(4);
and

- (b) for a horticulture produce agreement with a merchant—see subclause 36(4).

trader means an agent or a merchant.

trader's terms of trade, in relation to a trader, means:

- (a) a document published by the trader under subclause 10(1); or
- (b) if the document mentioned in paragraph (a) is changed by the trader, the document published by the trader under subclause 10(3).

transitional agreement means a written agreement between a trader and a grower:

- (a) covering trade in horticulture produce; and
- (b) entered into before 15 December 2006.

6 Meaning of *bad debt*

If:

- (a) an agent arranges for a person to buy the horticulture produce of a grower; and
- (b) the person does not pay the agent for some or all of the produce by the time that payment is required for the produce;

the amount owed by the person is a ***bad debt*** of the grower.

7 Meaning of *horticulture produce*

(1) ***Horticulture produce*** is the following:

- (a) unprocessed fruit;
- (b) unprocessed vegetables, including mushrooms and other edible fungi;
- (c) unprocessed nuts;
- (d) unprocessed herbs;
- (e) other unprocessed edible plants.

(2) However, ***horticulture produce*** does not include nursery products.

(3) ***Nursery products*** include the following:

- (a) trees, shrubs, plants, seeds, bulbs, corms and tubers (other than edible tubers);
- (b) propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers or foliage;
- (c) cut flowers or foliage.

Division 3—Obligation to deal in good faith

8 Obligation to deal in good faith

- (1) A trader must at all times deal with a grower in good faith within the meaning of the unwritten law as in force from time to time.

Civil penalty: 300 penalty units.

- (2) A grower must at all times deal with a trader in good faith within the meaning of the unwritten law as in force from time to time.

Civil penalty: 300 penalty units.

- (3) In determining whether the trader or the grower has dealt in good faith with the other, the following may be taken into account:

- (a) whether the trading relationship between the trader and the grower has been conducted without duress;
- (b) whether the trader or the grower acted honestly and not arbitrarily.

- (4) Subclause (3) does not limit subclause (1) or (2).

9 Agreement must not limit or exclude obligation to deal in good faith

- (1) A trader and a grower must not enter into an agreement that contains a provision that limits or excludes the obligation to deal in good faith with each other and, if it does, the provision has no effect.

- (2) An agreement must not be varied to include a provision that limits or excludes the obligation to deal in good faith and, if it does, the provision has no effect.

Part 2—Trader's terms of trade

10 Trader must prepare and publish terms of trade

- (1) A trader must prepare, publish and make publicly available a document that sets out the terms and conditions on which the trader is prepared to trade in horticulture produce with a grower.

Civil penalty: 300 penalty units.

- (2) If the trader changes the terms of trade, the trader must prepare a document that sets out the updated terms of trade so that the changes are incorporated into the terms of trade.
- (3) The trader must publish and make publicly available the updated terms of trade in the same way that the original terms of trade were published and made publicly available.

11 Contents of terms of trade

- (1) A trader's terms of trade must comply with this code.

Civil penalty: 300 penalty units.

- (2) A trader's terms of trade must specify:
- (a) if the trader is prepared to trade as an agent or a merchant, or both; and
 - (b) any requirements the trader has in respect of the delivery by a grower of horticulture produce to the trader; and
 - (c) any requirements the trader has in respect of the quality of horticulture produce delivered by a grower to the trader; and
 - (d) any circumstances in which the trader may reject horticulture produce delivered by a grower, including the period, after receiving the produce, during which the trader must notify the grower of the rejection of the produce and the consequences of the rejection; and
 - (e) if the trader is trading as an agent—the period within which the agent will pay to a grower the proceeds of a sale of the grower's horticulture produce by the agent; and
 - (f) if the trader is trading as a merchant—the period within which the merchant will pay a grower for the purchase of the grower's horticulture produce; and
 - (g) if the trader has insurance for horticulture produce under the trader's control:
 - (i) the name of the insurer; and
 - (ii) the maximum amount of insurance cover provided by the trader's insurance policy in respect of claims that may be made; and
 - (iii) whether the insurance covers fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).
- (3) For a trader who is an agent, the trader's terms of trade must also specify:

Clause 11

- (a) the basis on which any commissions, fees and extra costs, payable in relation to horticulture produce traded by the agent on a grower's behalf, will be charged (for example, on a percentage basis or a fixed basis); and
 - (b) whether the payment of any commissions, fees and extra costs is contingent on the sale of a grower's horticulture produce or any other event or kind of event; and
 - (c) if payment of any commissions, fees and extra costs is contingent on an event or a kind of event—the details of the event or the kind of event; and
 - (d) if the agent is prepared to pursue payment for bad debts of the grower and, if so, the terms applying to the pursuing of the payment.
- (4) A trader's terms of trade may include such other matters, not inconsistent with this code, that the trader considers appropriate.

Part 3—Horticulture produce agreements

12 Requirement to have a horticulture produce agreement

- (1) A trader must not trade in horticulture produce with a grower unless the trader has entered into an agreement with the grower that complies with this Part.

Civil penalty: 300 penalty units.

- (2) A grower must not trade in horticulture produce with a trader unless the grower has entered into an agreement with the trader that complies with this Part.

Civil penalty: 300 penalty units.

13 Terms of trade on which trader must trade

A trader must not trade in horticulture produce with a grower on terms and conditions other than terms and conditions specified in a horticulture produce agreement entered into with the grower.

Civil penalty: 300 penalty units.

14 Trader cannot be both an agent and merchant under the one agreement

A trader cannot act as both an agent and a merchant under the one horticulture produce agreement.

15 Requirements of horticulture produce agreements

- (1) A horticulture produce agreement must:
- (a) be in writing; and
 - (b) be accepted by the parties to it by:
 - (i) signature by both parties; or
 - (ii) a written notice of offer and a written notice of acceptance; and
 - (c) specify the matters set out in clauses 16, 17 and 18 as appropriate.

Note: For subparagraph (1)(b)(ii), an example of a written notice of offer or a written notice of acceptance is a confirmation of the offer or acceptance by email.

- (2) A horticulture produce agreement may contain such other terms and conditions (if any) not inconsistent with this code as are agreed between the trader and the grower.

16 Matters to be specified in horticulture produce agreements

A horticulture produce agreement must specify:

- (a) whether the trader is trading as an agent or a merchant under the agreement; and
- (b) any requirements the trader has in respect of delivery of horticulture produce to the trader by the grower; and

Clause 17

- (c) any circumstances, for the purposes of paragraph 22(2)(b), in which the trader may reject horticulture produce delivered by the grower; and
- (d) the period, for the purposes of subclause 22(4), within which the trader must give the grower reasons for a rejection of horticulture produce delivered by the grower; and
- (e) if the trader has insurance for horticulture produce covered by the agreement:
 - (i) the extent to which the produce is covered by the agreement; and
 - (ii) the maximum amount of insurance cover provided by the trader's insurance policy in respect of claims that may be made in relation to the produce; and
- (f) the process for varying the agreement; and
- (g) if the agreement is only to operate for a limited time—the term of the agreement; and
- (h) any quality and quantity requirements relating to horticulture produce covered by the agreement; and
- (i) the FreshSpecs Produce Specifications, or other specifications, that will be used to determine the quality of the produce; and
- (j) how the trader deals with horticulture produce, provided by the grower under the agreement, that does not meet the quality or quantity requirements (if any) specified in the agreement; and
- (k) if the trader intends to pool the horticulture produce with other produce:
 - (i) the quality requirements relating to the produce to be pooled; and
 - (ii) the specifications that will be used to determine the quality of the produce to be pooled; and
- (l) the payment period, for the purposes of subclause 35(2), for the delivery of horticulture produce under the agreement; and
- (m) the reporting period for the agreement; and
- (n) the statement period for the agreement; and
- (o) the contact details of the person that the grower should contact in the event of a dispute with the trader under the agreement or this code; and
- (p) the contact details of the person that the trader should contact in the event of a dispute with the grower under the agreement or this code; and
- (q) the process for terminating the agreement.

17 Additional matters to be specified by agents

If a trader is trading under a horticulture produce agreement as an agent, the agreement must also specify:

- (a) the period within which the agent will pay to the grower the proceeds of a sale of the grower's horticulture produce by the agent for the purposes of subclause 26(2); and
- (b) whether payment by the grower of any commissions, fees and extra costs is contingent on the sale of the horticulture produce or any other event or kind of event; and
- (c) if the agreement permits the charging of commission and agent's fees:
 - (i) whether the commission or the fees are charged on a percentage basis, fixed basis or any other basis; and

- (ii) the amounts or rates of the commissions, fees and extra costs; and
- (d) whether the agent will pursue payment for bad debts of the grower arising under the agreement; and
- (e) whether the grower will have a role in pursuing payment for bad debts mentioned in paragraph (d) and, if so, the terms applying to the pursuing of the payment.

18 Additional matters to be specified by merchants

- (1) This clause applies if a trader is trading with a grower under a horticulture produce agreement as a merchant.
- (2) The horticulture produce agreement must also specify:
 - (a) if the merchant and the grower agree that the price of horticulture produce will be determined by a method or formula—the method or formula to be used to determine the price; and
 - (b) if the merchant and the grower agree that the price of horticulture produce is to be determined before or upon delivery of the produce to the merchant—whether the price will be determined before or upon the delivery of the produce; and
 - (c) if the merchant is to perform a service under the agreement:
 - (i) the details of the service; and
 - (ii) the fees to be paid for the provision of the service.

19 Conflict between code and horticulture produce agreements

If a term of a horticulture produce agreement conflicts with this code, this code prevails.

20 Cooling-off period

- (1) If the term of a horticulture produce agreement is for a period of 90 days or more or is not specified, either party to the agreement may terminate the agreement, in writing, within:
 - (a) 14 days after the day on which the agreement is entered into (the *initial cooling-off period*); or
 - (b) such shorter or longer period as is agreed by the parties under this clause.
- (2) The initial cooling-off period must not be reduced by more than 7 days.
- (3) To avoid doubt, if a horticulture produce agreement is terminated during a period mentioned in paragraph (1)(a) or (b), any trade that has occurred under the agreement before the termination is governed by the terms of the agreement.
- (4) Subject to subclause (5), a party to a horticulture produce agreement who receives a payment (of money or other valuable consideration) for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement, must return the payment to the party who made the payment within 14 days after the day on which the agreement is terminated.

Civil penalty: 300 penalty units.

Clause 20

- (5) A party required to return a payment under subclause (4) may deduct, from the amount to be returned, reasonable expenses incurred under the agreement for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement.

Part 4—Conduct generally

Division 1—Traders

21 Application

This Division applies to a trader trading under a horticulture produce agreement that the trader has with a grower.

22 Acceptance by trader of deliveries

- (1) The trader must accept horticulture produce delivered under the horticulture produce agreement except as provided for in this clause.
- (2) The trader may reject the horticulture produce if:
 - (a) a circumstance arises in relation to the produce; and
 - (b) the circumstance is specified in the horticulture produce agreement for the purposes of this paragraph as a circumstance in which the trader may reject produce.

Note: Paragraph 16(c) provides that the circumstances in which a trader may reject horticulture produce must be specified in the agreement.

- (3) If the trader rejects the horticulture produce, the trader must, within 24 hours after the time at which the produce was rejected, advise the grower that the produce has been rejected.

Civil penalty: 300 penalty units.

- (4) After rejecting horticulture produce, the trader must advise the grower in writing of the rejection, and the reasons for the rejection, within the period specified in the horticulture produce agreement for the purposes of this subclause.

23 Pooling of horticulture produce

The trader may pool horticulture produce delivered by the grower under the horticulture produce agreement with other produce if:

- (a) the other produce is of the same quality as the horticulture produce delivered by the grower; and
- (b) the quality requirements relating to the produce to be pooled, specified in the horticulture produce agreement, have been met.

Note: Paragraph 16(k) provides for the matters that must be specified in the agreement in relation to horticulture produce that the trader intends to pool with other produce.

24 Trader must exercise reasonable care and skill

- (1) While the grower's horticulture produce is under the control of the trader, the trader must exercise all reasonable care and skill in handling and storage to ensure that the produce remains of the highest quality possible.
- (2) The care and skill must be exercised until:

Schedule 1 Horticulture Code of Conduct

Part 4 Conduct generally

Division 1 Traders

Clause 24

- (a) for a trader trading as an agent—the ownership of the produce passes to a purchaser of the produce; or
- (b) for a trader trading as a merchant—the ownership of the produce passes to the merchant.

Note: See clause 34 for when ownership passes to the merchant.

Division 2—Agents and growers

25 Application

- (1) This Division applies to a trader who is trading as an agent under a horticulture produce agreement that the agent has with a grower.
- (2) The requirements of this Division are in addition to the requirements of Division 1.

26 Payment of proceeds of sale

- (1) The agent must pay to the grower any proceeds the agent receives for the sale of produce under the horticulture produce agreement, less:
 - (a) any commissions, fees and extra costs permitted under the agreement; and
 - (b) any extra amounts that may be deducted under the agreement.
- (2) The payment must be made within the period specified in the horticulture produce agreement for the purposes of this subclause.

27 Duties of agent

- (1) The agent must act in the best interests of the grower when selling produce under the horticulture produce agreement.
- (2) The agent must not sell the grower's horticulture produce, other than on an arm's length basis, unless the agent has first obtained the grower's consent, in writing, to do so.

Civil penalty: 300 penalty units.

28 Agent's obligation to pursue bad debts

The agent must pursue a bad debt of the grower for the sale of the grower's produce under the horticulture produce agreement on the basis, and to the extent, provided for in the agreement.

29 Agent must report to grower

- (1) The agent must give the grower a statement for a reporting period, specifying for the grower's produce received by the agent during the reporting period:
 - (a) the date on which the produce was delivered to the agent; and
 - (b) the date or dates of the sale of the produce by the agent; and
 - (c) the type and quantity of the produce sold; and
 - (d) the price received for the produce sold; and
 - (e) details of each amount deducted by the agent from the sale price of the produce; and
 - (f) details of any amounts of the produce not sold by the agent during that period, including:

Schedule 1 Horticulture Code of Conduct

Part 4 Conduct generally

Division 2 Agents and growers

Clause 30

- (i) the reasons why the produce was not sold; and
- (ii) details of any amounts of the produce destroyed by the agent, and the costs incurred in destroying the produce; and
- (iii) details of any amounts of the produce held by the agent at the end of the period.

Civil penalty: 300 penalty units.

- (2) The *reporting period* is the period specified in the horticulture produce agreement as the period for which the agent must report to the grower.
- (3) The statement must be given within the statement period.
- (4) The *statement period* is the period specified in the horticulture produce agreement as the period in which a statement for a reporting period must be given.
- (5) The agent is not required to give to the grower under subclause (1) the name or contact details of the person to whom the produce was sold.

30 Ownership of horticulture produce does not pass to agent

Ownership of produce covered by the horticulture produce agreement remains with the grower until the agent sells the produce.

Division 3—Merchants and growers

31 Application

- (1) This Division applies to a trader who is trading as a merchant under a horticulture produce agreement that the merchant has with a grower.
- (2) The requirements of this Division are in addition to the requirements of Division 1.

32 Price for horticulture produce

The price that is to be paid by the merchant for the purchase of the grower's horticulture produce is:

- (a) an amount agreed in writing between the merchant and the grower either before, or immediately upon, delivery of the produce to the merchant; or
- (b) an amount calculated by a method or formula specified in the horticulture produce agreement.

Note: For the period within which the payment of the price must be paid, see clause 35.

33 Fees etc. for services

- (1) The price that is to be paid by the grower for a service provided by the merchant in relation to the grower's horticulture produce is an amount determined, in accordance with the horticulture produce agreement, immediately upon the service being completed.
- (2) The merchant must not charge the grower a fee for a service performed in accordance with the horticulture produce agreement unless the following are specified in the agreement in relation to the service:
 - (a) the details of the service;
 - (b) the fee to be paid for the provision of the service.
- (3) The merchant must not charge the grower any other amounts (including commissions) for services performed under the horticulture produce agreement.

34 Ownership of horticulture produce

The ownership of the horticulture produce passes from the grower to the merchant:

- (a) if the price of the produce, or a method or formula to calculate the price, has been agreed to by the merchant and grower before delivery—on delivery of the produce to the merchant; or
- (b) if paragraph (a) does not apply, and the merchant is to perform a service in relation to the produce—at the time the service is completed; or
- (c) if paragraphs (a) and (b) do not apply—at the time that the merchant and the grower agree on a price for the produce.

35 Time for payment

- (1) The merchant must give the grower payment for horticulture produce delivered under the horticulture produce agreement within the payment period for that delivery.
- (2) The **payment period** is the period specified in the horticulture produce agreement as the period within which payment for the delivery of horticulture produce must be given.
- (3) If the merchant has not paid an amount for the delivery of horticulture produce due to the grower within the payment period for that produce, the grower may take one or both of the following actions:
 - (a) suspend any further deliveries under the horticulture produce agreement until the amount owed is paid;
 - (b) cancel the agreement.
- (4) Before taking action under subclause (3), the grower must give written notice to the merchant of the grower's intention to take the action.

36 Merchant must report to grower

- (1) The merchant must give the grower a statement for the reporting period, specifying for the grower's horticulture produce received by the merchant during the reporting period:
 - (a) the quality and quantity of the produce bought by the merchant; and
 - (b) the date or dates of the purchases; and
 - (c) the price paid for the produce; and
 - (d) if the price for the produce was determined by a method or formula specified in the horticulture produce agreement:
 - (i) the gross sale price of the produce; and
 - (ii) the details of any produce not sold; and
 - (iii) the details of any produce destroyed, or to be destroyed, and the reason why the produce was, or is to be, destroyed; and
 - (e) the date on which the produce was delivered to the merchant.

Civil penalty: 300 penalty units.

- (2) The **reporting period** is the period specified in the horticulture produce agreement as the period for which the merchant must report to the grower.
- (3) The statement must be given within the statement period.
- (4) The **statement period** is the period specified in the horticulture produce agreement as the period in which a statement for a reporting period must be given.

Part 5—Resolving disputes

Division 1—General

37 Dispute resolution procedure

This Part sets out a dispute resolution procedure for horticulture disputes.

38 When dispute resolution procedure may be used

- (1) Growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them.
- (2) However, if a grower or trader (the *complainant*) begins the procedure set out in clause 40 to resolve a horticulture dispute with another person (the *respondent*), the respondent and the complainant must participate in the dispute resolution and mediation procedures as set out in this Part.

Division 2—Mediation adviser and mediators

39 Mediation adviser

- (1) The Minister administering the *Horticulture Marketing and Research and Development Services Act 2000* is to appoint a mediation adviser.
- (2) The mediation adviser must compile a list of persons who are to be mediators for the purposes of this Part.

Note: See clause 47 for other functions of the mediation adviser.

Division 3—Procedure

40 Procedure for dispute resolution

- (1) The procedure for dispute resolution for horticulture disputes is as set out in this clause.
- (2) The complainant must give notice in writing to the respondent of the dispute and specify that the complainant is using this procedure to resolve the dispute.
- (3) The notice must specify:
 - (a) the nature of the dispute; and
 - (b) what action the complainant thinks will settle the dispute; and
 - (c) what outcome the complainant wants.
- (4) The complainant and the respondent (the *parties*) must then try to resolve the dispute.
- (5) If the parties cannot resolve the dispute within 3 weeks after the notice being given, either party may request the mediation adviser to appoint a mediator for the dispute.
- (6) The mediation adviser must not appoint a mediator if the adviser is satisfied that the complaint giving rise to the dispute is frivolous, vexatious or has previously been the subject of a mediation under this Part.
- (7) Subject to subclause (8), the mediator must decide:
 - (a) how the mediation is to be carried out (for example, by telephone or in meetings); and
 - (b) the time and place for the mediation; and
 - (c) the day that the mediation commences for the purposes of this Part.
- (8) The mediation must be conducted in Australia.
- (9) A party to the dispute must attend the mediation and try to resolve the dispute.
Civil penalty: 300 penalty units.
- (10) For subclause (9), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.
- (11) The complainant may withdraw the dispute at any time.

Division 4—Mediation

41 Appointment of a mediator by mediation adviser

- (1) If the mediation adviser receives a request under subclause 40(5), the adviser must appoint a mediator within 14 days after receiving the request.
- (2) The mediation adviser must give the parties to the dispute details of the mediator appointed.

42 Mediator to give notice of mediation

Within 14 days after a mediation under this Part has commenced, the mediator must notify the mediation adviser that the mediation has commenced and the nature of the dispute.

Note: The mediator decides under subclause 40(7) when a mediation commences.

43 Mediator to give notice of successful mediation

- (1) If the parties have reached an agreement under a mediation under this Part, the mediator must:
 - (a) set out in writing the terms of the agreement; and
 - (b) give a copy of the terms to each of the parties; and
 - (c) notify the mediation adviser that the parties have reached an agreement.
- (2) Notice under subclause (1) must be given within 14 days after the agreement is reached.

44 Termination of mediation

- (1) The mediator of a dispute under this Part may terminate the mediation at any time if the mediator is satisfied that a resolution of the dispute is not likely to occur.
 - (2) If the complainant in a mediation under this Part asks the mediator to terminate the mediation, the mediator must do so.
 - (3) If:
 - (a) at least 30 days have elapsed since the start of the mediation of a dispute under this Part; and
 - (b) the dispute has not been resolved;the respondent may ask the mediator to terminate the mediation, and the mediator must do so.
- Note: The mediator decides under subclause 40(7) when a mediation commences.
- (4) If the mediator terminates the mediation, the mediator must issue a certificate stating:
 - (a) the names of the parties; and
 - (b) the nature of the dispute; and
 - (c) that the mediation has finished; and

- (d) that the dispute has not been resolved.
- (5) The mediator must give a copy of the certificate to:
 - (a) the mediation adviser; and
 - (b) each of the parties to the dispute.

45 Costs of mediation

- (1) Each party to a dispute involving a mediation under this Part must pay half of the costs (if any) of the mediation unless the parties to the mediation agree otherwise.
- (2) Each party to a dispute involving mediation under this Part must pay his or her own costs of attending the mediation, unless the parties agree otherwise.
- (3) In this clause, *costs of the mediation* includes all reasonable costs associated with the carrying out of the mediation.

46 Contractual rights unaffected by Part

Nothing in this Part affects the right of a party to an agreement to take legal proceedings under the agreement or this code.

Part 6—Horticulture produce assessors

47 List of horticulture produce assessors

- (1) The mediation adviser must:
 - (a) compile a list of persons who are to be horticulture produce assessors for the purposes of this Part; and
 - (b) publish the list.
- (2) The list must include, for each person on it, the qualifications the person has that are relevant to the role of a horticulture produce assessor.

48 Role of the horticulture produce assessors

- (1) The role of a horticulture produce assessor is to investigate and report on any matter arising under an agreement.
- (2) A horticulture produce assessor must be appointed under clause 49 before he or she may act.
- (3) The horticulture produce assessor must not investigate or report on a matter that is not referred to him or her under the appointment.
- (4) Without limiting subclause (1), the horticulture produce assessor may provide a report on the following matters:
 - (a) if a trader has rejected horticulture produce under the agreement—whether the rejection of the produce was in accordance with the requirements of this code and the agreement;
 - (b) whether amounts paid by a trader to a grower under the agreement were calculated in accordance with the requirements of this code and the agreement.

49 Appointment of horticulture produce assessors

A horticulture produce assessor may be appointed by:

- (a) if the parties to a horticulture produce agreement agree to the appointment of the horticulture produce assessor (regardless of whether a dispute has been notified under Division 3 of Part 5)—the parties; or
- (b) if the parties cannot agree to the appointment of a horticulture produce assessor:
 - (i) the mediation adviser; or
 - (ii) a mediator appointed under Division 4 of Part 5.

50 Assistance to horticulture produce assessors

- (1) If a horticulture produce assessor is appointed under clause 49, a party to the agreement must comply with a reasonable request made to the party by the assessor for the purposes of:
 - (a) investigating the matter referred to in the appointment; and

(b) preparing the assessor's report.

Civil penalty: 300 penalty units.

- (2) Without limiting subclause (1), if requested, a trader must permit the horticulture produce assessor to inspect:
- (a) any horticulture produce supplied by the grower under the agreement that is in the possession of the trader; and
 - (b) for a trader trading as an agent—the financial and other records of the agent that relate to the grower, or horticulture produce sold by the agent on behalf of the grower; and
 - (c) for a trader trading as a merchant—the merchant's records that relate to the merchant's trade in the grower's horticulture produce up to the day on which the ownership of the produce passed from the grower.
- (3) The records that the assessor may inspect under this clause are those records that relate to a period of up to 12 months preceding the date of the assessor's appointment.

51 Horticulture produce assessor's report

- (1) A horticulture produce assessor appointed under clause 49 must, as soon as practicable after being appointed:
- (a) prepare a report; and
 - (b) give a copy of the report to:
 - (i) the parties to the agreement; and
 - (ii) if there is a dispute for which a mediator has been appointed under Division 4 of Part 5 and the mediator has appointed the assessor—the mediator for the dispute.
- (2) The horticulture produce assessor's report must not include information that a party is not entitled to obtain under the horticulture produce agreement or under this code (although the assessor may have access to that information under clause 50).

52 Costs of horticulture produce assessors

- (1) If a horticulture produce assessor is appointed under clause 49 in relation to a matter arising under a horticulture produce agreement, the parties to the agreement must pay half of the assessor's costs arising out of the appointment, unless the parties agree otherwise.
- (2) If a mediator, as part of a mediation under Part 5, appoints a horticulture produce assessor, each of the parties to the mediation must pay half of the assessor's costs arising out of that appointment, unless the parties agree otherwise.

Part 7—Records

53 Record-keeping requirements

- (1) A trader must keep the original or a copy of the following records for the period mentioned in subclause (3):
- (a) a horticulture produce agreement entered into by the trader;
 - (b) a written notice by the trader of the offer or acceptance of a horticulture produce agreement (see clause 15);
 - (c) a written termination by the trader of a horticulture produce agreement (see clause 20);
 - (d) a notice of the rejection of produce, and reasons for the rejection, given to a grower under subclause 22(4);
 - (e) a statement for a reporting period given to a grower under subclause 29(1) or 36(1).

Civil penalty: 300 penalty units.

- (2) A grower must keep the original or a copy of the following records for the period mentioned in subclause (3):
- (a) a horticulture produce agreement entered into by the grower;
 - (b) a written notice by the grower of the offer or acceptance of a horticulture produce agreement (see clause 15);
 - (c) a written termination by the grower of a horticulture produce agreement (see clause 20).

Civil penalty: 300 penalty units.

- (3) A record must be kept:
- (a) if the record relates to a horticulture produce agreement—for the period:
 - (i) starting on the day on which the record is made or given; and
 - (ii) ending on the last day of the period of 6 years beginning on the day the horticulture produce agreement expires; or
 - (b) for any other record—for at least 6 years starting on the day on which the record is made.

54 Requirement to record names of parties dealt with

- (1) A trader must:
- (a) make a record, in writing, of the name of:
 - (i) a grower of horticulture produce that the trader deals with; or
 - (ii) a trader that the trader deals with in relation to horticulture produce;and
 - (b) retain the record for 6 years from the day on which the record is made.

Civil penalty: 300 penalty units.

- (2) A grower must:

- (a) make a record, in writing, of the name of a trader of horticulture produce that the grower deals with; and
- (b) retain the record for 6 years from the day on which the record is made.

Civil penalty: 300 penalty units.

55 Inspection of records

- (1) A person who is a grower, or a representative of a grower, may request an agent to provide for inspection of records of the agent that relate to the sale of the grower's produce under an agreement.
- (2) The records that the person, or the representative, may inspect are those records that relate to a period of up to 12 months preceding the date of the request.
- (3) The request must specify the period that the request relates to.
- (4) If requested under subclause (1), the agent must make available for inspection all of the requested records, other than the names and contact details of the persons to whom the grower's produce was sold.
- (5) However, the agent is not required to make records available to the representative for inspection if:
 - (a) the representative has not been appointed, in writing, by the grower as the grower's representative for the purposes of inspecting the records; or
 - (b) inspection of the records by the representative would result in the representative having an actual or potential conflict of interest.

56 Provision of information for debt recovery

If:

- (a) a grower has a bad debt for horticulture produce that an agent has arranged to sell under an agreement; and
- (b) the agreement gives the grower a role in the pursuing of bad debts; and
- (c) the grower asks the agent for information for the purposes of recovering the debt;

the agent must give the grower the requested information, including the name and contact details of a buyer of the produce.

Civil penalty: 300 penalty units.

Part 8—Transitional, savings and application provisions

57 Definitions

In this Part:

old regulations means the *Trade Practices (Horticulture Code of Conduct) Regulations 2006*.

58 Things done under old regulations

- (1) If:
 - (a) a thing was done for a particular purpose under the old regulations as in force immediately before those regulations were repealed; and
 - (b) the thing could be done for that purpose under this code;the thing has effect for the purposes of this code as if it had been done under this code.
- (2) Without limiting subclause (1), a reference in that subclause to a thing being done includes a reference to a notice, approval or other instrument being given or made.

59 Application—trader’s terms of trade

- (1) This clause applies in relation to a trader’s terms of trade to which Part 2 of the Schedule to the old regulations applied immediately before the repeal of the old regulations.
- (2) Part 2 of this code does not apply in relation to the trader’s terms of trade.
- (3) Despite the repeal of the old regulations, Part 2 of the Schedule to the old regulations as in force immediately before 1 April 2017, and any other provisions of those regulations necessary for the effectual operation of that Part, continue to apply in relation to the trader’s terms of trade, as if the repeal had not happened.
- (4) This clause ceases to apply in relation to a particular trader’s terms of trade:
 - (a) on 1 April 2018; or
 - (b) if the trader’s terms of trade are changed before 1 April 2018—when the change is made.

60 Application—horticulture produce agreements

- (1) This clause applies in relation to a horticulture produce agreement to which Part 3 of the Schedule to the old regulations applied immediately before the repeal of the old regulations.
- (2) Parts 3 and 4 of this code do not apply in relation to the horticulture produce agreement.
- (3) Despite the repeal of the old regulations, Parts 3 and 4 of the Schedule to the old regulations as in force immediately before 1 April 2017, and any other provisions

of those regulations necessary for the effectual operation of that Part, continue to apply in relation to the horticulture produce agreement, as if the repeal had not happened.

- (4) This clause ceases to apply in relation to a particular horticulture produce agreement:
- (a) on 1 April 2018; or
 - (b) if the horticulture produce agreement is varied before 1 April 2018—when it is varied.

61 Savings—appointment of mediation adviser

The appointment of the mediation adviser, as in force under the old regulations immediately before 1 April 2017, has effect, on and after that day, as if it had been made under subclause 39(1) of this code.

62 Savings—appointment of mediator

The appointment of a mediator, as in force under the old regulations immediately before 1 April 2017, has effect, on and after that day, as if it had been made under subclause 41(1) of this code.

63 Savings—appointment of horticulture produce assessors

The appointment of a horticulture produce assessor, as in force under the old regulations immediately before 1 April 2017, has effect, on and after that day, as if it had been made under clause 49 of this code.

Schedule 2—Repeals

Trade Practices (Horticulture Code of Conduct) Regulations 2006

1 The whole of the Regulations

Repeal the Regulations.