



RESPONSE TO ISSUES PAPER: Horticulture Code of Conduct Review Submission September 2015



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Context of Response

Fresh Markets Australia (FMA) is the national industry body representing each of the six Market Chambers, which themselves are organisations which represent wholesalers and supporting businesses in each of Australia's six central fresh fruit and vegetable Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In confirming the role the Central Markets have in the industry, it is highlighted that they:

- Are supplied by some 15,000 growers;
- Have a throughput volume of over 4 million tonnes, with a wholesale value of over \$7 billion annually on sold by over 400 traders; and
- Have over 12 million transactions conducted between growers and traders annually.

FMA and its members are keen to ensure that there is a genuine effort made to make changes to the Code so as to make it a workable and effective tool which can be used to improve the adoption of better commercial practices within the industry.

FMA is strongly opposed to amendments to the Code which create a cost burden, an uneven playing field and a barrier to growers and traders agreeing to whatever commercial agreements meet their specific needs.

The following sections of this Submission respond to the various questions raised in the Issues Paper.



Part 2 Application of the Horticulture Code

1. Should the code include any exceptions – why or why not?
2. Should the scope of the code be expanded to include processors, retailers, and Australian based exporters?

According to the Regulatory Impact Statement¹, Australia's fresh fruit and vegetable growers have up to eight channels to market their produce, yet only two channels are burdened by the current Horticulture Code of Conduct. This limited application of the code is discriminatory against the small business wholesale channel.

Recently the Food and Grocery Code of Conduct was introduced and together with the Horticulture Code of Conduct, these codes of conduct should apply to all first point of sale transactions with the exception of Exporters.

The Australian based export channel should be excluded from the application of the Code as it is exporting the produce sourced from growers and is not competing in the domestic supply chain. Exporters should be excluded only in respect of exported produce.

All other parties, including growers who act as aggregators to supply a retail chain and other retailers sourcing produce directly from a grower, should be covered by the Code.

FMA recommends that the Horticulture Code of Conduct should apply to all first point of sale transactions, including growers who act as aggregators to supply a retail chain and other retailers sourcing produce directly from a grower, and with the only exceptions being Exports in respect of exported produce and retailers who are signatories to the Food and Grocery Code of Conduct. ²

3. Are parties still operating under pre-code contracts? Why?
4. Have parties to pre-code contracts had a need to vary their contracts but refrained from doing so? Why?
5. Should pre-code contracts be captured by the code? Why or why not? How?

Yes, pre-Code agreements are still operating. Currently these agreements can continue to operate and are valid, until there is a need or a want to change the terms. The terms of the pre-Code agreements clearly continue to meet the needs of growers and their trader/s and are based on long-term business relationships that had operated without incident both before and since the introduction of the Horticulture Code of Conduct.

¹ Horticulture Code Of Conduct, A Regulation Impact Statement – page 6

² FMA Submission Horticulture Code of Conduct Review 2015, Recommended changes to the Horticulture Code of Conduct, September 2015



Where a pre-Code agreement remains in place today, eight years after the commencement of the Horticulture Code of Conduct, the terms of that agreement clearly provide flexibility and choice. Why would growers seek to vary the agreement and seek a Horticulture Produce Agreement which does not allow the flexibility and choice of the pre-Code agreement?

Conversely, growers do have a number of options available to them if their needs/wants change:

- Cancel the pre-Code contract at any time (with notice) if they wish
- Consider the terms of trade of the trader under the Horticulture Code of Conduct, and demand a Horticulture Produce Agreement
- Cease supplying produce to the trader
- Supply another trader
- Supply through alternate supply channels.

Clearly when a business need has arisen where the pre-Code contract would require 'variation', for example when a business entity changes, then of course a new Horticulture Produce Agreement based on current terms of trade would be required.

Pre-Code agreements reflect a workable and flexible approach to trading. If the current Code were to be amended to allow for workable provisions, then it may be more likely that traders and their growers would transfer to terms of trade and Horticulture Produce Agreement's that reflected those provisions.

FMA supports the maintenance of pre-Code contracts which are exempt from the Code if the current unworkable and inflexible regulations prevail.

FMA supports the annexation of pre-Code contracts under the Horticulture Code of Conduct if the Code is amended in accordance with FMA's position.³

6. Do the requirements in the code align with good business practices for trade in horticulture produce between growers and traders? Please describe these good business practices.

The Code should promote better business practices without being overly prescriptive and without adding substantial barriers to doing business.

The Code aligns with a number of good business practices. These include;

- Documented commercial terms of trade
- Quality requirements (but this requires clarity in the Code by including a 'fit for purpose' clause)

FMA has introduced FreshSpecs⁴ - produce specifications which identify; the general appearance criteria; major defects; minor defects; and consignment criteria

³ FMA Submission – Recommended changes to the Horticulture Code of Conduct

⁴ <http://freshmarkets.com.au/fresh-specs/>



- Rejection circumstances– provides the circumstances under which produce may be rejected
- The need to identify payment terms
- Dispute resolution processes
- Should not be prescriptive

FMA fundamentally supports the alignment of the Code with good commercial practices and recommends the amendment of the Code to provide greater flexibility to facilitate compliance and promote industry uptake and support.⁵

7. Does the code meet the operational, functional and practical needs of the sector? If not, what needs to be changed?
8. Do the requirements of the code prevent or limit business practices by growers and traders? If so, what are these and how are they impacted?

The Code does **not** meet the operational, functional or practical needs of the sector as it is too prescriptive.

The Code requires amendment to facilitate a market based return price, based on a ‘method of determining the price’. This style of merchant transaction is acceptable to the majority of growers, it is transparent where growers receive third party reporting information and it does ensure a fair market based return price.

The Code requires amendment to address the issue of ensuring that any produce supplied must be ‘fit for purpose’. This will codify that produce must be as ‘marked’. Purchasers of that produce currently expect the right to return that produce or claim a discount for produce that is not fit for purpose.

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.

The Code requires amendment to include a deeming provision for signing of provided HPA’s when produce continues to be sent. Currently verbally agreed HPA’s are not signed by growers who start/continue to send produce as though the agreement had been signed.

The Code requires amendment to repeal the ‘cooling off period’ clauses. There is no logic to this clause. A grower can tear-up an agreement at any time and can cease sending produce.

FMA supports amendments to the Code that are required to meet the operational, functional and practical needs of the sector.⁶

⁵ FMA Submission - Recommended changes to the Horticulture Code of Conduct

⁶ Ibid.



9. **Are template terms of trade useful for both growers and traders? Are they used as a basis for horticulture produce agreements? Is there a need to develop a simple standard contract to be used for trade in horticulture produce to be annexed to the Horticulture Code?**
10. **Do traders and growers negotiate a trader's terms of trade before entering into a horticulture produce agreement? Are there elements of the terms of trade that a trader is unwilling to negotiate?**

Template terms of trade and complementary Horticulture Produce Agreements' (HPA's) were developed at the inception of Horticulture Code of Conduct by FMA Members who represent wholesalers. These were developed due to the significant legal costs that would have been incurred by individual wholesalers should they have developed their own documents. Some wholesalers developed their own terms of trade and HPA's due to their size and capacity.

These templates are widely used by wholesalers represented by FMA. A simple search of the internet will quickly find many of these Terms of Trade.

The terms of trade used by wholesalers are quite comprehensive to strictly meet the requirements of the Code and the need for traders to have certainty and clarity about matters such as produce specifications, delivery requirements of supplied produce, the circumstances of rejection and the payment terms.

The Horticulture Code of Conduct ⁷ in relation to Terms of Trade, requires traders to prepare, publish and make them publicly available. Then if the trader changes them they must prepare a document setting out the changes and incorporate them into the terms of trade. These must then be published etc. in the same way as the original terms.

FMA is proposing that a 'standard terms of trade' be allowed under the Code and that the trader can offer and agree different terms of trade with the grower depending on the circumstances and requirements of both parties.

FMA supports the inclusion of the term 'standard terms of trade' which can allow traders to offer and agree to terms of trade with a grower which are different to the trader's standard terms of trade.⁸

FMA supports the fundamental right for a trader to negotiate commercial terms of trade with individual growers.

⁷ Subclause 4 of Horticulture Code of Conduct– traders must prepare and publish terms of trade

⁸ FMA Submission - Recommended changes to the Horticulture Code of Conduct



11. If you are a grower that has been unable to negotiate, what have you tried to negotiate, why was the negotiation of this term important and what did you do in response to the trader not wanting to negotiate?

Not relevant to the trader sector.

However, it needs to be noted that it is a Trader's right not to accept a trading term demanded by a grower. Negotiation does occur. Both sides to the transaction (grower/trader) have the option to accept/reject the commercial terms offered.

12. Is the distinction between merchant and agent clear?

The Horticulture Code of Conduct currently makes a clear distinction between merchant and agent albeit unworkable.

Under agency

- sold on behalf of grower for agreed commission or fee
- ownership (title) does not pass from the grower to the trader at any point. Payment is made to the grower from the trader within the agreed period from when the trader is paid. Note that debt recovery is the responsibility of the grower and the grower can agree that the trader will pursue them on their behalf
- commission or fees can be on a fixed or percentage basis

Under merchant

- purchased from the grower for re-sale with agreed price
 - on farm
 - immediately on delivery
- ownership (title) passes to the trader on delivery if the price is agreed on farm or if the price is agreed on delivery at that time.
- commissions or fees or not allowable

Notwithstanding the clear distinction, the requirements of the merchant and the agent under the Code do not provide the necessary flexibility that traders require to allow a fair return to growers. Ultimately if a trader is not providing a fair return the grower will go to another trader.

It is also noted though that not all agreements between growers and merchants are subject to the Code⁹, as merchants unlike an agent, cannot charge a fee as part of a HPA. A grower and a merchant can enter into a service agreement for a merchant to provide a range of services, such as storing, ripening, washing, grading and packing of produce even though this is not codified. The grower maintains ownership until physical delivery or deemed delivery occurs and the HPA begins. These services would in practice occur before 'delivery' (under the Code) to a trader for sale.

⁹ ACCC, 'Service agreements & complying with the Horticulture Code', (2011)



As the agent can charge a fee, these services would need to be included in the HPA.

For clarity, FMA recommends the identification of the additional services provided by the trader through codification in the trader's terms of trade and HPA.¹⁰

13. Are the different requirements for agents and merchants trading with a grower appropriate? If not, what changes are needed?

No.

There are two methods of negotiating price as a merchant that are allowed under the current Code.

- Price negotiated on farm
- Price negotiated immediately on delivery

The Code does not presently allow the major styles of transaction demanded by growers and utilised by traders.

One area of significant change includes the call to amend the Code to facilitate market based return price, based on a 'method of determining the price'. This style of market transaction is acceptable to the majority of growers, it is transparent and it does ensure a fair market based return price.¹¹

Support for this position has previously been expressed in the 2008 ACCC's review of the Code.¹²

14. Are the processes adequate for quick on site resolution of a problem on delivery?

Yes, in the majority of cases. Existing traders and growers are presently resolving the vast majority of issues quickly and without relying on the Code.

The Code does not specify how problems should be solved and nor should it. Basic business practices suggest that if there is a problem then it should be addressed in a professional businesslike manner.

Problems may arise from:

- Produce quality/grading
- Sizing inconsistencies
- Topping of produce (placing the best produce at the top of the carton/pallet)
- Produce defects
- Post-harvest, handling and storage treatments
- On farm administration errors
- Packaging and labelling
- Damage to the produce

¹⁰ FMA Submission - Recommended changes to the Horticulture Code of Conduct

¹¹ FMA Submission - Recommended changes to the Horticulture Code of Conduct

¹² ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', (2008)



- Oversupply/dumping/unreliable supply

Since the inception of the Code there have been significant advances in technology which support increased levels of communication between traders and growers. A large part of the industry would now communicate digitally via email and with smart phones at the least, even though the use of facsimile is still used. Traders have identified that up to 90% of growers may use digital technology.

The majority of traders and growers who communicate digitally are able to use this technology to assist in the resolution of problems particularly through the use of images.

Template terms of trade and HPA's specify delivery, quality and rejection requirements. FMA has introduced FreshSpecs as standard produce specifications for Class One produce which supports the quality requirements process for identifying; the general appearance criteria; major defects; minor defects; and consignment criteria.

It is FMA's view however that the inclusion of a 'fit for purpose' clause in the Code would confirm the requirements regarding produce quality and any specified quality specifications.

Traders and growers are directly resolving the majority of the problems/issues they have relating to produce supply/quality.

For clarity, FMA recommends the inclusion of a 'fit for purpose' clause in the Code to support the understanding of produce requirements.¹³

FMA will support changes which will assist streamlining the dispute resolution process but will oppose any prescriptive requirements which add administrative requirements and costs.

¹³ FMA Submission - Recommended changes to the Horticulture Code of Conduct



Part 3 Trading arrangements in the horticulture sector

15. Have there been any changes to the trading environment of horticulture produce since the Horticulture Code's introduction that affects the operation of the code? If yes, how?

Yes. Code compliance risk must be managed by traders. Some traders have rationalised their exposure to smaller growers given that some of these growers are less commercial to deal with i.e. failure to sign HPA's and continue to send produce with an expectation of it being sold for a good return. This is possibly an unintended consequence of the Code, but it is a logical outcome.

Some traders have transitioned to purchasing a larger proportion of imported produce as it does not have the same regulation attached as local produce.

There has been significant investment by the majority of traders in information technology from warehousing to accounting systems.

Digital technology has seen vast improvements in the speed and effectiveness of communication.

The Code has increased the amount of red tape to prove compliance (noting over 12 million transactions per year across the wholesaling sector) which in turn has increased administration expenses and the cost to do businesses.

There is continued lack of engagement by growers about the Code.

There has been investment in terms of trade and HPA's.

16. Are 'hybrid' trading relationships still occurring outside of the Horticulture Code? If so, what impact does this have?

Yes. The grower representative group labelled 'hybrid' transaction is still very prevalent because it is what is demanded by the majority of growers.

The impact of this is that growers have little interest in the Code, as it is viewed as unworkable.

17. How transparent is the horticultural supply chain today? Has the code improved transparency in the supply chain since its introduction? If not, why? How can transparency in the sector be further improved?

The lack of transparency is a term used by grower representative organisations based on rhetoric rather than evidence. It is estimated that 12 million transactions take place between growers and wholesalers represented by FMA members annually, where is the real evidence that there is a significant problem with transparency?

Central Markets operate as a market and clearing house for produce. A market price (based on supply and demand) is determined by the market, not set. The market price is reported on all trading days through market price reporting services operating in all major Markets. This independently operated and verified service is available to all traders and growers for a small investment from commercial service providers. This maintains the situation where information is available for growers and Market



traders equally, where all relevant information about the price range being achieved for commodities within Australia's major Central Markets is openly available.

There are agreements/contracts in place between Market traders and growers which specify reporting requirements. Since the inception of the Code, digital technology has developed significantly to a point where communication between trader and grower range from email, SMS, smart phone images and simple telephone calls. Accounting systems have developed to allow the provision of meaningful statements and reports for transactions. Traders report that growers have requested summary reports rather than the copious amounts of paperwork produced to comply with the Code.

Growers and market wholesalers use FMA's FreshSpecs as standard produce specifications for 'Class One' produce which supports the quality requirements process for identifying; the general appearance criteria; major defects; minor defects; and consignment criteria. FreshSpecs is customarily used in terms of trade and HPA's to deliver transparency and clarity about produce quality expectations.

As a 'food business' under Australia New Zealand Food Standards Code¹⁴, Market wholesalers have an obligation to ensure they comply with all the requirements of the Food Safety Standards. To this end growers are required under agreements to have a food safety program in place. FMA initiative FreshTest (Australian Horticulture's most comprehensive chemical and microbial residue testing program) provides low cost testing for Market wholesalers and their growers which supports food safety programs.

Transparency can be strengthened for growers if they make use of the price reporting services that are in place. Traders report that growers do use these types of services, and what is required is a base level of business skills to understand what is available and how to use it appropriately.

The government may wish to subsidise price reporting rather than the trader and grower having to pay for the service.

FMA understands the methods that support transparency in the industry either before the Code was introduced or since, include; price reporting services; reporting under HPA's and terms of trade; FreshSpecs used to determine quality standards and FreshTest to identify food safety hazards.

18. To what extent has the specialisation of wholesalers by produce or commodity lines reduced the choice of grower selling options?

The issues paper states that '*there has been a consolidation and specialization of wholesale traders*'.¹⁵ There has been some consolidation of numbers of businesses particularly the 'grower sheds' in both Sydney and Melbourne markets although this would not be considered to have impacted growers choice.

¹⁴ Australia New Zealand Food Standards Code - Standard 3.1.1, (2015)

¹⁵ Horticulture Code of Conduct Review 2015, Issues paper page 23



There is a low level of market share concentration in the industry and this contributes to intense competition.¹⁶

The number of wholesale traders represented by FMA has remained steady since the inception of the Code. While some larger wholesalers have specialised their commodity lines, the vast majority of wholesalers trade in a diverse range of commodities providing good choice for growers to sell their produce.

There is very healthy competition between traders for growers (produce).

Access to information about the commodities that are traded by individual traders can be accessed through reference to FMA members or Market websites.

FMA is of the view that growers have a good choice of traders who exist in multiple Central Markets and off-Market and who generally handle multiple lines of produce.

19. What impact has the increased presence of retailers in purchasing fresh produce had on the trading of horticulture produce within Australia?

Wholesaler bypass has had an impact on the industry's average profit margin over the last five years¹⁷. Independent retailers who compete directly with major supermarkets have demanded lower prices from wholesalers so they can remain competitive.

Major retailers buy directly from a small number of large and/or corporate growers. They are generally price setters and do not undertake transactions based on supply and demand principles alone.

Wholesalers are impacted particularly when unwanted or out of specification produce is 'dumped' on the market. Often this results in over supply and prices and therefore grower returns drop.

Direct supply has an impact on the market for fresh produce in a number of ways. It means the Central Markets become a dumping ground of suppliers produce as well as produce rejected by the retail chains. This can have a significant impact on supply volumes and obviously puts downward pressure on Market prices.

The direct supply of produce has resulted in further fragmentation of the industry, this also means that there are mixed pricing signals to growers and the ongoing downward pressure on prices which typifies Australia's retail grocery industry.

¹⁶ IBISWorld Industry Report F3605. Fruit and Vegetable Wholesaling in Australia. IBIS World Pty Ltd. Retrieved from <http://www.ibisworld.com.au>

¹⁷ Ibid.

Part 4 Dispute resolution and enforcement under the Horticulture Code

20. Are the dispute resolution and enforcement mechanisms under the Horticulture Code effective? How can these be improved?

The ACCC has the power to randomly select traders to audit. Traders will usually be targeted that have either a history of complaints or non-compliance (including prior dealings with the ACCC), or that operate in an industry that generates a disproportionate number of complaints.¹⁸ According to 'Small Business in focus'¹⁹ 15 audits have been conducted under the Horticulture Code of Conduct since they were granted powers in 2011. This is in clear contrast to the 74 audits undertaken under the Franchising Code of Conduct.

Since the inception of the Code in 2007 there have been 9 Horticulture Code actions taken by the ACCC (2008 - 6, 2009 - 1, 2011 - 1, 2013 - 1). Complaints can be made to the ACCC **anonymously**. No action has been taken against any non-compliant grower.

The dispute mechanism has been supported by the wholesaling sector but, it has simply failed to be utilised. The number of disputes, as reported by the Horticulture Mediation Advisor (HMA) speak for themselves that the mediation process put into place under the Code, while a 'nice to have' has essentially remained idle for the vast majority of time since the Code has been introduced. Despite the millions of transactions with the wholesaling sector by over 15,000 growers, there has been nothing more than a trickle of enquiries, complaints and investigations. The conclusion therefore is that there is both a very low incidence of disputes, and a reluctance on the part of growers to utilise the avenues available to them.

Basic business skills are used to resolve day to day disagreements between a trader and the grower. A key success factor for a wholesaling business is the ability to effectively communicate and negotiate²⁰ and guaranteed supply of produce. A trader will not want to lose a grower so will try to resolve all difficulties before it is escalated. Growers DO communicate with their trader.

FMA will vigorously oppose any move to introduce penalty provisions into the Code. There has been no evidence presented over the past eight years to support the introduction of penalty provisions. Traders have struggled to comply with the Code because of the unworkable prescriptive requirements of the Code and the lack for support for those unworkable requirements by grower representative organisations.

¹⁸ www.accc.gov.au/business/industry-code-audits

¹⁹ <http://www.accc.gov.au/publications/small-business-in-focus/small-business-in-focus-1-january-2015-to-30-june-2015>

²⁰ IBISWorld Industry Report F3605

FMA opposes the introduction of penalty provisions and supports that obligations under the Code must apply to both growers and traders. There must be a focus on fairness.

21. Is the Horticulture Mediation Advisor role effective? If not, how can it be improved or what should take its place, if anything?

If effectiveness is being based on being successful in producing a desired or intended result, then what is the intended result? If it is to mediate those matters brought before it, then yes it is effective.

Just because there are few enquiries does not mean the mediation advisor is not effective.

FMA is prepared to support the retention of the dispute resolution process and the HMA, while also acknowledging that more cost effective options may exist.

It needs to be noted that the FMA and its members in each main Central Market across Australia can and do offer a role in providing cost effective dispute resolution services.

On this basis, FMA would support changes to streamline the dispute resolution process, including formal recognition to the role which FMA and its members do currently play in receiving, investigating and resolving disputes.

FMA supports the existing Dispute Resolution being maintained, however, streamlining of the process and recognition of the role which can be undertaken by industry organisations would be supported.

22. Could the Horticulture Code be amended to improve the utility of assessors? If yes, that amendments could be made and why?

The HMA indicates in their Annual Reports that no appointments of assessors have been made under the Code. Additionally, assessors have indicated that they have no evidence of being appointed under the Code.

At the introduction of the Code it seems that the appointment process for the position of Horticulture Assessor included all comers – but in the main were then current employees of produce surveyor type businesses.

To address the problems a trader may experience with delivery issues, they will have business-like though sometimes robust, discussions with growers. Communication is instigated by traders and growers alike. In most circumstances these problems are able to be addressed on the spot, though a small number may need the engagement of a produce surveyor. Of all produce survey engagements, it is estimated that produce surveyors are engaged by traders in excess of 70% of occasions usually on-the-spot.

It is a business decision when these 'assessors' should be engaged. Currently it is at the engagers cost. There does not need to be regulation to allow/make a business engage an assessor.



The issues appears to be that while grower representative organisations agree strongly to access to this type of service, few want to pay for it. Similarly, growers do not want to pay for a third party service, if they can sort out any issues they have directly with the wholesaler/trader. Wholesalers do access these services directly in addressing concerns they have with produce received if they believe it is necessary.

It is fair to say, though that an assessor needs to be:

- on Market,
- experienced in the practice of assessing produce
- independent
- paid for on a fee-for-service basis.

FMA would caution against and would reject any regulation that compels traders to engage an assessor as this could be a costly and unnecessary service which could also be open to vexatious requests regardless of merit.

23. Are alternative dispute resolution services provided by those other than the HMA effective for resolving disputes arising under the Horticulture Code? If so, should state-based ombudsmen/commissioners have a greater role in enforcing the Horticulture Code?

Yes. There are other dispute resolution services than those available under the Code. All FMA members in the Central Markets across Australia, will get involved in resolving disputes between a grower and wholesaler. These services have been offered for many years and if complaints are received they are investigated and generally resolved.

The issue of disputes needs to be keep in perspective. How much of industry or public money should be spent to have a framework in place to address disputes? Surely, the total cost to industry through compliance cost requirements, administration, staffing etc., should not exceed the gross estimated value of disputes, discounted by a factor in relation to business failures (which are subject to separate legal processes) and an apportionment of blame, which will reduce the overall value of any mediated outcome.

FMA does not support claims being made that the very low incidence of grower complaints reflects that the current system is too cumbersome.

FMA and its members in each main Central Market across Australia can and do offer a role in providing cost effective dispute resolution services.

On this basis, FMA would support changes to streamline the dispute resolution process, including formal recognition to the role which FMA and its members do currently play in receiving, investigating and resolving disputes.

FMA supports the existing Dispute Resolution being maintained, however, streamlining of the process and recognition of the role which can be undertaken by industry organisations would be supported.



24. Should the Horticulture Code include the ability to impose pecuniary penalties? If so, under what circumstances and to what amount should pecuniary penalties be applied?

FMA will vigorously oppose any move to introduce penalty provisions into the Code. There has been no evidence presented over the past eight years to support the introduction of penalty provisions. Traders have struggled to comply with the Code because of the unworkable prescriptive requirements of the Code and the lack for support for those unworkable requirements by grower representative organisations.

FMA opposes the introduction of penalty provisions and supports that obligations under the Code must apply to both growers and traders. There must be a focus on fairness.

25. Is the fear of retaliation by a trader preventing a grower from making a complaint?

Many growers have a story to tell - how they feel they or some other grower was poorly treated, how they should have received more for their produce, how their produce was prime quality etc. The fact is that traders have a story to tell as well – how the market was glutted, how the grower had sent twice as much produce as the trader asked for, how the produce was poorly packed, or lacked quality etc. There are always two sides to a story.

The impression provided by grower organisations and a small section of disaffected growers, is that growers are reluctant to communicate with their trader regarding price, reporting, terms of trade and the like. This is not backed up by evidence or material facts – it is only rhetoric. Though if this is in fact the case - does this come from laziness, or the fundamental inability to act in a professional business-like manner by those growers?

The claim of “retaliation” is framed for the greatest impact as it was a decade ago when the Code was first muted and was one reason why the Code was required together with the existing Dispute Resolution process.

This claim is now over a decade old. Evidence must now be put on the table or the claim rejected!

The grower is in the driving seat – they have the fundamental right of retaliation – they can terminate supply, suspend delivery and cancel agreements. This though would mean that they would need to take care of business and find an alternate trader.

Traders have made claims of grower intimidation including

- growers withholding produce
- take all or else and
- verbal / physical threats and abuse.

A complaint to the ACCC can be **anonymous!**



Part 5 Effectiveness of the Horticulture Code

26. Do the purposes of the Horticulture Code remain appropriate?

No.

The Code should be to promote better business practices, not 'regulate trade'. The Code should not have a paternalistic purpose and should not attempt to dictate how a grower and trader should do business.

The second purpose relating to providing a fair and equitable dispute resolution procedure is very questionable given the eight year track record which clearly demonstrates that the cost of the service has far out weighted any benefits.

27. Do the requirements in the code improve transparency and clarity in the sector, as was intended? What can be done to further improve transparency and clarity in the sector?

The Centre for International Economics, Regulation Impact Statement July 2005, estimated that potential problem transactions make up less than five per cent of total sales of domestically produced fruit and vegetables. It further stated that the problems of lack of clarity and transparency impact mainly on smaller growers, growers who are a long way from the markets, growers who supply infrequently to the market or are new entrants, and growers who have found it difficult to overcome information problems in the markets.

Clarity and transparency continue to be raised by grower representative organisations as issues, without the specific context as to exactly what they mean.

Central Markets operate as a market and clearing house for produce. The clarity and transparency should come from the establishment of a market price. This occurs in all Central Markets and there are price reporting services operating in all main Markets, whereby market price information is documented and published on all trading days.

These detailed Market Price Reports are available from Market based providers on a fee-for- service basis.

In addition, Market traders have contacts in place with their growers and communicate with them in various ways including;

- Statements/reports
- Emails
- Text message
- Telephone calls.

A significant change over the past decade is the uptake of digital technology and the use of smart phones to quickly send photo messages to growers where produce quality problems arise.

These examples have not necessarily been due to the requirements of the Code, but rather been due to the need to operate in a professional manner.



FMA acknowledges however, the argument that the preferred trading option of many traders and growers, which utilises a method of determining the return price to the grower (e.g. sales price less a margin) is subject to claims of uncertainty in relation to verification of what the actual sales price is.

FMA proposes options be made available to growers to gain transparency, and changes to the Code which will address ongoing grower concerns regarding sale price transparency in relation to merchants using a method of determining a return price paid to a grower which is based upon the sale price less an agreed margin.²¹

28. What has been considered by the sector to be a variation to a contract for the purposes of bringing pre-code contracts under the code? Should more agreements be covered by the code than is perceived?

Currently pre-Code agreements can continue to operate and are valid, until there is a need or a want to change the terms. The terms of the pre-code agreements clearly continue to meet the needs of growers and their trader/s and are based on long-term business relationships that had operated without incident both before and since the introduction of the Horticulture Code of Conduct.

Where a pre-code agreement remains in place today, eight years after the commencement of the Horticulture Code of Conduct, then the terms of that agreement clearly provide flexibility and choice. Why would growers seek to vary the agreement and seek a Horticulture Produce Agreement which does not allow the flexibility and choice of the pre-code agreement?

Conversely, growers do have a number of options available to them if their needs/wants change:

- Cancel the pre-code contract at any time (with notice) if they wish
- Consider the terms of trade of the trader under the Horticulture Code of Conduct, and demand a Horticulture Produce Agreement
- Cease supplying produce to the trader
- Supply another trader
- Supply through alternate supply channels.

Clearly when a business need has arisen where the pre-code contract would require 'variation', for example when a business entity changes, then of course a new Horticulture Produce Agreement based on current terms of trade would be required.

Pre-code agreements reflect a workable and flexible approach to trading. If the current Code were to be amended to allow for workable provisions, then it may be more likely that traders and their growers would transfer to terms of trade and Horticulture Produce Agreement's that reflected those provisions.

²¹ FMA Submission – Recommended changes to the Horticulture Code of Conduct



FMA supports the maintenance of pre-code contracts which are exempt from the Code if the current unworkable and inflexible regulations prevail.

FMA supports the annexation of pre-code contracts under the Horticulture Code of Conduct if the Code is amended in accordance with the FMA Submission – Recommended changes to the Horticulture Code of Conduct.²²

29. Should the Horticulture Code be extended to cover all or some additional transactions in horticulture produce and why? Alternatively, are there other exemptions that should be considered?

According to the Regulatory Impact Statement²³ Australia's fresh fruit and vegetable growers have up to eight channels to market their produce, yet only two channels are burdened by the current Horticulture Code of Conduct. This limited application of the code is discriminatory against the small business wholesale channel.

Recently the Food and Grocery Code of Conduct was introduced and together with the Horticulture Code of Conduct, these codes of conduct should apply to all first point of sale transactions with the exception of Exporters.

The Australian based export channel should be excluded from the application of the Code as it is exporting the produce sourced from growers and is not competing in the domestic supply chain. Exporters should be excluded only in respect of exported produce.

All other parties, including growers who act as aggregators to supply a retail chain and other retailers sourcing produce directly from a grower, should be covered by the Code.

FMA proposes that the Horticulture Code of Conduct should apply to all first point of sale transactions, including growers who act as aggregators to supply a retail chain and other retailers sourcing produce directly from a grower, and with the exception of Exports in respect of exported produce and retailers who are signatories to the Food and Grocery Code of Conduct.

30. If the code is extended to cover others in the supply chain, what amendments to code, or other impacted codes, will be required, if any, to account for different business practices?

FMA has proposed changes to the Horticulture Code of Conduct²⁴ that reflect the changes that we believe are necessary.

²² FMA Submission – Recommended changes to the Horticulture Code of Conduct

²³ Horticulture Code Of Conduct, A Regulation Impact Statement – page 6

²⁴ FMA Submission



31. Should the Horticulture Code better regulate the delivery and acceptance of produce, including what happens where delivery and acceptance does not adhere to the horticulture produce agreement?

Yes. A clause is necessary to confirm requirements regarding produce quality and any specified quality specifications as well as providing flexibility in allowing a trader to deal with produce which has been received and rejected. The Code is otherwise silent on the fact that in the vast majority of instances a trader will be authorised/requested by the grower of the produce to sell produce which has otherwise been rejected, in endeavouring to achieve the best possible commercial outcome for the grower.

FMA proposes that the Code include requirements that produce supplied by growers to traders must be fit for purpose in accordance with the FMA Submission – Recommended changes to the Horticulture Code of Conduct.²⁵

32. Are the payment provisions of the code adequate? How can these be improved?

There are two methods of negotiating price as a merchant that are allowed under the current Code.

- Price negotiated on farm
- Price negotiated immediately on delivery

One area requiring significant change includes the call to amend the Code to facilitate market based return price, based on a 'method of determining the price'. This style of market transaction is acceptable to the majority of growers, it is transparent and it does ensure a fair market based return price.

Support for this position has previously been expressed in the 2008 ACCC's review of the Code.²⁶

FMA proposes options be made available to growers to gain transparency, and changes to the Code which will address ongoing grower concerns regarding sale price transparency in relation to merchants using a method of determining a return price paid to a grower which is based upon a "method of determining the price" in accordance with the FMA Submission – Recommended changes to the Horticulture Code of Conduct.²⁷

33. Does conduct prohibited by the code still occur? If yes, to what extent does it occur and what conduct is still occurring?

Yes. The predominant style of transaction preferred by growers is the 'method of determining their return price' – based generally upon the sale price less and a negotiated margin.

²⁵ FMA Submission – Recommended changes to the Horticulture Code of Conduct

²⁶ ACCC, 'Inquiry into the Competitiveness of Retail prices for Standard Groceries', (2008)

²⁷ FMA Submission



34. What sort of behaviours should the code regulate and why?

The Code should focus on promoting better business practices rather than trying to take a 'last century' approach to treating all wholesalers/traders as untrustworthy and incapable of forming professional business relationships.

The Code should include the promotion of the following better business practices:

Produce sent must be fit for purpose

The Code requires amendment to address the issue of ensuring that any produce supplied must be 'fit for purpose'. This will codify that produce must be as 'marked'. Purchasers of that produce currently expect the right to return that produce or claim a discount for produce that is not fit for purpose.

Acting in good faith

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.

Execution of HPA's

The Code requires amendment to include a deeming provision for signing of provided HPA's when produce continues to be sent. Currently verbally agreed HPA's are not signed by growers who start/continue to send produce as though the agreement had been signed.

FMA proposes the promotion of better business practices.²⁸

35. What other issues, if any, have you experienced with the code and what are the impacts of these issues? How might these issues be rectified and what impacts will any amendments have on the sector, including compliance costs?

A major issue with the Code is the lack of desire on the part of growers to comply with its prescriptive requirements.

The fact is that the vast majority of growers have a good working relationship with their wholesaler/trader. Neither growers nor traders want to incur costs when they don't believe there is a problem.

²⁸ FMA Submission – Recommended changes to the Horticulture Code of Conduct



Part 6 Other matters

36. Should the Horticulture Code include an obligation to act in good faith? What should be the nature and scope of that obligation?

This is optional, but this change has been suggested by FMA.

The Code requires amendment to include a clause relating to 'acting in good faith' to impose a requirement on all parties to the Code, and any party acting on their behalf to act in good faith in relation to their dealings relating to the Code. FMA proposes that this clause should be based on a similar clause in the Food and Grocery Code of Conduct.

The FMA Submission – Recommended changes to the Horticulture Code of Conduct, details the changes that are required.²⁹

37. What compliance costs, if any, would a good faith obligation impose on parties operating under the code?

The only costs that may be incurred would be those incurred in the event of legal action, which could have happened under common law in any event. A concern remains however that this obligation has not been previously followed in the development and implementation of the existing Code. The push for 'harsh' provisions which seek to impose a cultural change on an entire industry, without recognition of how the majority of growers and traders do business and without final reference to the representative organisation of the businesses which are going to be regulated – is NOT acting in good faith. The Government must also act in good faith in ensuring a commercially workable and affordable outcome.

38. Are there any comparable international laws or regulations covering the relationship between growers and traders that could inform the Horticulture Code review?

Unknown

39. Should the code apply to imported produce and thus provide a level playing field for all traded produce?

This would not be feasible. There is no ability to impose the Code on a grower in another country. It is imperative though to allow flexibility in the Code to ensure the removal of anti-competitiveness.

40. How effective is the current educational material in informing growers and traders about the Horticulture Code?

Is the question about – “how can a trader or grower educate themselves” rather than the “educate me” scenario?

²⁹ FMA Submission – Recommended changes to the Horticulture Code of Conduct



There was a significant effort to educate growers and traders when the Code was introduced.

The ACCC has a significant number of factsheets on its website. These are informative – but of course have to be accessed to be of any use.

FMA members provided significant education to their members when the code commenced. An educative video³⁰ was produced and remains live.

FMA members regularly print articles in industry publications.

This is more of an issue about growers and traders not being engaged about the Code, particularly when they realised it was not workable. Does anyone choose to become informed about a topic if they consider that it is of no relevance to them?

41. How could the Australian Government better inform growers and traders about the Horticulture Code? For example, what are the most effective ways to disseminate information about the code and its operation?

The Code must be readily utilised by industry associations to promote better commercial practices within the industry (i.e. let associations, such as FMA show leadership, through being prepared to support and promote compliance with an industry Code which is fair, commercial and workable).

Industry associations are in an ideal position to effectively disseminate information to their members. Importantly, relevant and practical people would have an interest in becoming informed.

The Australian Government could work collaboratively with FMA and grower representative bodies to develop a suite educative tools such as:

- Factsheets
- Case studies
- Hotlines / helpdesk
- You-tube – how to's
- Newsletters
- Blogs
- Website/pages
- Commercial business skills basics

42. How might advances in technology (increased connectivity, smartphones, digital photography etc.) support or improve the operation of the Horticulture Code? How might it improve contracting practices, delivery processes and dispute resolution, for example?

In the years since the introduction of the Code, there have been significant development of digital technology and its subsequent use.

³⁰ <http://www.cfviwa.com.au/horticulture-code-video/>



Computer applications have been developed to allow for mature reporting to support the requirements of the Code. Most traders would utilise a modern computer system to support all business functions, including accounting, stock control, and food safety requirements.

The level of reporting has been so robust, that in some cases growers have requested summary reports rather than the level of reporting that was originally provided. Reporting is a back-office function and is able to be produced on demand as well as systematically. These reports are able to be provided digitally via email or if necessary, albeit not as efficiently or cost effectively, via facsimile or traditional post. These computer systems are able to provide reporting requirements under the Code and more.

FMA developed and introduced FreshSpecs³¹ - produce specifications which identify; the general appearance criteria; major defects; minor defects; and consignment criteria. These are referenced in terms of trade and in HPA's. These specifications are easily available on the internet or through contacting the trader, a FMA member or FMA itself. These specifications provide growers with the information required to supply produce within specification and to know when produce is outside that specification.

FMA initiative FreshTest³² is the largest and most comprehensive testing program in Australian Horticulture. It provides a low cost MRL (chemical residue) and microbial testing solution for traders and their growers in Australia's Central Markets. It is run by industry for industry on a not-for-profit basis. The tests are used for verification for food safety and Quality Assurance systems.

Commercial Market Reporting Services are available across all main Central Markets. The digital age allows for easy access to data on sales prices through daily, weekly and monthly e-mail reports depending on the end-users requirements. These services provide all information that may be required about the sale price achieved on the Market.

A large number of traders have dedicated websites that provide details of the commodities that they trade, as well as terms of trade. Alternatively FMA members or market landlords have details of trader and the commodities that they trade in on their websites. This supports information that growers may require to make decisions about which traders to do business with i.e. terms of trade, contact name and numbers, commodities traded.

Mobile devices have breached the information/communication divide over the past decade. The majority of traders would communicate via mobile phone through voice, text or email with about 90% of their growers. Some growers though are still only contactable at 'smoko time' when they 'go up to the house' with them using the standard landline, some not even having access to a facsimile. These devices are able to quickly take images of problems associated with produce (e.g. temperature issues can be shown via a thermometer showing the reading of produce). Information exchange is verbose.

³¹ <http://freshmarkets.com.au/fresh-specs/>

³² <http://freshmarkets.com.au/freshtest/>



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Walk around any Central Market and see how many traders are 'attached' to their mobile phones to see how the digital landscape has changed over the last decade.

Ultimately there is little excuse for growers to be lacking information.

FMA acknowledges and supports the use of digital technology to support the information exchange and communication between traders and growers. This allows the prompt and proactive resolution of potential disputes. But this does come at a significant cost, and the take up of technology is not universal.

FMA will continue to maintain FreshSpecs as a produce specification standard.

FMA will continue to develop and provide FreshTest as a cost effective and comprehensive testing program for the verification of food safety and QA programs.



Part 7 Options for the future of the Horticulture Code

43. What option for the future of the Horticulture Code should be implemented and why? What impacts will this have on the horticulture sector?

There are clearly arguments for the Code to be repealed, or for there to be one single Code covering the whole industry.

Despite the logic of either of these outcomes, it is recognised that there is little political will for either outcome.

44. If Option 3 were implemented, what amendments should be made to the code and why?

FMA is proposing the renewal of the Code with amendments. Refer to the FMA Submission – Recommended changes to the Horticulture Code of Conduct, September 2015 for full details of amendments, rationale and impact on the horticulture sector.

FMA is proposing a range of changes so as to make the Code workable and remove or amend those requirements which add a regulatory burden with no clear reason why such a requirement exists. We are also proposing amendments which will add clarity in terms of supply of produce and improvements where transparency in relation to merchant sales are made based upon a documented method of determining the return price paid to the grower.

45. What compliance costs would be incurred if these amendments were made?

The implementation of the amendments proposed by FMA would offer a cost effective outcome.

46. Are there any other options that could be considered? If so, why and how would it achieve the objectives of transparency and clarity in transactions in the sector?

Yes, the option of a 'contract out' clause whereby a grower and a trader could, by written agreement transact business outside all or part of the requirements of the Code.

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