

Horticulture Code of Conduct Update

The Agribusiness Practice Group at Piper Alderman has been following the progress of proposed amendments to the Horticulture Code of Conduct, a mandatory industry code for the purpose of the *Trade Practices Act*. Partner, Simon Venus and Lawyer, Bianca Battistella report on the latest developments.

Introduced in May 2007, the Horticulture Code regulates trade in horticultural produce between growers and traders and agents. Traders in this context are merchants who buy produce and on-sell it and agents are people who sell on behalf of growers. "Horticultural produce" includes unprocessed fruit and vegetables, nuts, herbs and other edible plants. The Code does not cover nursery products (trees, shrubs, seeds and bulbs and so on). Nor does it apply to produce which is bought to be processed (such as by juicing or preserving) or exported or sold by retail by the trader.

Late last year the Rudd Government released a report from the Horticulture Code of Conduct Committee, recommending a range of measures to encourage greater clarity and transparency between fruit and vegetable growers and traders and in particular, to address industry concerns that growers are not always receiving a fair share of the end price paid by Australian consumers.

As reported in the March and June editions of the e-Bulletin, the Committee was asked to assist the Government in responding to the ACCC's 13 recommendations to improve the Horticulture Code of Conduct, released as part of the ACCC's inquiry into the competitiveness of retail prices for standard groceries. The recommendations were as follows:

1. Introduce civil pecuniary penalties and infringement notices for a breach of mandatory codes under the *Trade Practices Act 1974* and give the ACCC powers to facilitate random record audits.
2. Extend the Code to first point of sale transactions of horticulture produce between a grower and a retailer, exporter or processor.
3. Extend the Code to transactions entered into under agreements made prior to 15 December 2006.
4. Require a merchant to provide a grower, before delivery, with either a price or a formula for calculating price with reference to the amount received from a third-party purchaser.
5. Require that if a merchant does not reject produce within 24 hours of physical delivery, the produce be deemed to be accepted.
6. Enable a merchant to deduct the cost of services supplied to prepare produce for resale as part of the price or method for calculating price.
7. Only permit an agent to recover commission for services as a deduction from amounts paid by a third-party purchaser.
8. Exclude an agent's competitor from inspecting that agent's records on a grower's behalf.
9. Exempt transactions between a grower and a cooperative/packing house, in which that grower has a significant interest, from the Code.
10. Permit agents and growers to engage in pooling and price averaging.
11. Exempt transactions entered into in a grower shed at the central markets from the Code, whilst enabling parties to these transactions to access the Code's dispute resolution procedure.
12. The costs incurred by parties to a dispute under the Code dispute resolution procedure be subsidised by the Australian Government.
13. The ACCC undertake further education in relation to the Code and its dispute resolution procedures.

In forming its views, the Committee consulted extensively with representatives across all industry sectors. The Committee's report to the Minister for Agriculture, Fisheries and Forestry, Tony Burke, entitled "Implications of the Australian Competition and Consumer Commission recommendations to amend the Horticulture Code of Conduct", outlines both the divergence of views encountered during industry consultation and the Committee's views in relation to the practical issues that are likely to arise in implementing the recommendations.

In short, the Committee found that “the entire industry will benefit in the long run from improved efficiencies and transparency”, if the recommendations are implemented. The Committee grouped the recommendations to reflect the practical issues that are likely to arise in implementing them.

This article summarises the key recommendations and responses contained in the Committee’s report, reflecting the groupings applied by the Committee.

Group 1 – Recommendations 4,10 and 9

Most notably, the Committee was in favour of recommendation 4 (that the Code be amended to require a merchant to provide a grower with a sale price for horticulture produce, or a formula for calculating the sale price, prior to delivery).

This would assist in eliminating the current practice whereby merchants suppress the price offered to growers at or before delivery, in order to manage the risk of a fluctuating market. Amongst other conditions, the Committee proposed that it be necessary for the point of ownership transfer of the produce to be included in the Horticultural Produce Agreement and that payment be linked to the sale price obtained from a third-party purchaser. As concerns the latter condition, the Committee recommended that a grower (or its representative) be entitled to inspect the records of a trader (including sales receipts) relating to produce sold at a price calculated in accordance with a method, so as to ensure the transparency of the process.

The Committee noted the benefits of such an amendment to the pricing regime under the Code, particularly if the Code is extended to other industry sectors including exporters (recommendation 2, discussed below). The Committee did however highlight the possible difficulties that may arise with the use of the formula method for calculating sales price, if for example, the Code is extended to apply to processors, where the value contributed by produce to a processor’s final product may be undeterminable.

The Committee also saw some benefits in implementing recommendation 10 (permitting pooling and price averaging by agents and growers), provided that it is implemented in conjunction with recommendation 4. This would effectively enable merchants and packers to pool and price average, if expressly agreed in their Horticultural Produce Agreement and would constitute a beneficial risk management tool for the horticulture industry. The Committee proposed that recommendation 10 be accompanied by conditions requiring, amongst other matters, that the pooled produce be of the same quality and that both parties agree to such practice as part of their Horticultural Produce Agreement .

Finally, the Committee noted that if recommendations 4 and 10 were implemented, then recommendation 9 would be unnecessary. This is simply due to the motivation behind the recommendation being the ability of a grower and a cooperative/packing house, in which that grower has a significant interest, to pool and price average, which would be acceptable by virtue of such amendments.

Group 2 – Recommendations 2,11 and 3

Whilst the Committee was in favour of recommendation 2 (the extension of the Code to all first point of sale transactions involving growers and horticultural produce), it acknowledged that the associated increase in compliance costs may be disproportionate to the benefits of compliance, particularly in relation to face to face transactions of small value, with immediate settlement and a high degree of transparency. This would predominantly impact negatively upon restaurants, caterers, farmers’ markets and farm-door sales.

The Committee therefore recommended that this proposed extension of the Code only be implemented if done so in conjunction with recommendations 11 and 3.

Specifically the Committee proposed that if the Code is extended to apply to all relevant first point of sale transactions, then transactions valued at under \$1,000, conducted face-to-face with immediate settlement, be exempt from the Code (whilst maintaining access to the Code’s dispute resolution procedures for parties to such transactions). This proposal would achieve the intent of the ACCC surrounding recommendation 11 (that transactions occurring in a central market grower shed be exempt), without creating a geographical loop-hole for Code avoidance, whilst also eliminating compliance costs for small transactions.

Moreover, the Committee supported recommendation 3 and suggested that parties to pre-Code agreements be given a period of time to amend their contracts to be Code compliant, so as to create a uniform system across all grower-buyer relationships. This is particularly important in ensuring the application of the Code to all industry participants that may become exposed to regulation under the Code as a result of the proposed expansion of its application.

Other recommendations

For practical reasons, the Committee did not support recommendation 7 (that agents only be permitted to recover their commission as a deduction from payments received from a third-party purchaser), nor recommendation 5 (that produce be deemed to be accepted if not rejected within 24 hours of physical delivery). The Committee concluded that the issues that these recommendations were intended to resolve will be more suitably addressed through parties' contractual arrangements. In relation to recommendation 5, the Committee believed that the deadline for acceptance or rejection of produce should be a matter that the parties be required to negotiate and include in their Horticultural Produce Agreement. This would allow parties to identify when the transfer of ownership of produce would occur and would also provide them with greater flexibility in negotiations to reflect the nature of the produce being traded.

The Committee supported the following recommendations without identifying any significant negative implications arising from their implementation:

- recommendation 8 (excluding a competitor from inspecting an agent's records on a grower's behalf)
- recommendation 12 (providing for Government subsidisation of disputes under the Code) and thereby decreasing cost barriers to the dispute resolution process, with a relatively small cost increase for the Government
- recommendation 13 (providing for further Code education initiatives), particularly if the operation of Code is expanded as per the recommendations.

The Committee was also generally in support of recommendation 6 (enabling the deduction of the cost of services to prepare produce for resale by merchants as part of the price), provided that the Code:

- must not dictate how to set the price for services, but require the charge to be set out in the Horticultural Produce Agreement
- require reports including itemised invoicing detailing the charge for each service rendered, rather than detail as to how the business costs in providing each service are accrued.

These safeguards will protect growers from illegitimate service charges, whilst protecting traders from having to report commercially sensitive information to growers.

Finally recommendation 1 (relating to enforcement and penalties) was referred to the Assistant Treasurer to consider rather than the Committee as it relates to the Trade Practices Act generally and will affect all mandatory codes under the TPA.

General implications

It is important to keep in mind that despite the proposed expansion of the Code to all relevant first point of sale transactions, the Code does not prima facie capture a large number of unincorporated bodies, most commonly found within the growers sector, until those bodies enter into a transaction with an incorporated body. This is due to the way in which the Code is given force of law, as a mandatory code under the Trade Practices Act, which is limited to the regulation of incorporated bodies.

The Government is now in the process of considering the Committee's report findings and the issues raised during consultation before implementing any amendments to the Code.

For those involved in the horticultural value chain, this will be an area to watch in 2010.

The full report of the Committee can be accessed at http://www.daff.gov.au/__data/assets/pdf_file/0005/1341491/hort-code-committee.pdf