

EXPLANATORY STATEMENT

Issued by Authority of the Deputy Prime Minister and Minister for Agriculture and Water Resources

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes—Horticulture) Regulations 2017

Legislative Authority

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Regulations can be made under section 51AE of the Act to prescribe industry codes to regulate the conduct of participants in an industry towards other participants in the industry. Under the Act, being bound by a prescribed industry code may be on either a mandatory or a voluntary basis.

Purpose

The object of the Act is ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. One way it does this is by providing for the establishment of industry codes. An industry code is a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. Industry codes are co-regulatory measures, designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.

The *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (the proposed Regulations) prescribes an improved and modernised Horticulture Code of Conduct (the Code), which is a mandatory code.

The purpose of the Code is ‘to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and to provide a fair and equitable dispute resolution procedure for disputes arising under this code or a horticulture produce agreement’.

The key aspects of the Code are to require growers and traders to trade under written horticulture produce agreements, to deal with each other lawfully and in good faith, and to provide a dispute resolution procedure.

The Code:

- replaces the existing Horticulture Code of Conduct established by the *Trade Practices (Horticulture Code of Conduct) Regulations 2006* (the 2006 Code);
- updates provisions in the 2006 Code to reflect changes in the horticulture sector and modern drafting practices; and

- gives effect to the government's response to the final report of the independent review of the Horticulture Code of Conduct, conducted by Mr Napper and Mr Wein.

Background

On 3 June 2015, an independent review of the 2006 Code was announced by the Australian Government. This review was undertaken to examine whether the 2006 Code's parameters and prescriptions were still relevant to the horticulture industry. The 2006 Code was due to sunset on 1 April 2017. This review therefore afforded horticulture growers and traders a timely opportunity to provide feedback on how the Code could be improved to better meet the needs of Australia's horticulture industry.

The review considered the operation of the 2006 Code, its relevance and its enforcement. The reviewers reported in November 2015. The government has carefully considered each recommendation and has formed a view following extensive consultation with industry. On 13 February 2017 the government released its response to the review. Of the 13 recommendations, nine were accepted or partially accepted and one was noted.

Impact and Effect

The proposed Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence on 1 April 2017.

The Code has been drafted to provide increased coverage of existing and future horticulture produce agreements. Clause 3 provides that Parts 2, 3 and 4 of the Code will not apply to growers and traders who are currently operating under horticulture produce supply agreements made before 15 December 2006, for a period of 12 months, unless the agreement is varied. On 1 April 2018 the Code will apply to all transactions between a grower and a trader.

The Code will also include an obligation to act in good faith. Including a statutory obligation of good faith in the Code will build trust and improve the standard of conduct between parties to a horticulture produce agreement.

Civil penalties will also be included in the Code to enhance the enforcement tools available to the Australian Competition and Consumer Commission (ACCC) by allowing it to take rapid action when breaches of the Code do occur. Section 51AE of the Act provides that the maximum civil penalty must not exceed 300 penalty units. The introduction of civil penalties will also allow the ACCC to issue infringement notices. Section 51ACF of the Act provides that the amount of penalty to be specified in the infringement notice must equal 50 penalty units for a body corporate or 10 penalty units otherwise.

Consultation

Extensive consultation was undertaken with stakeholders during the independent review of the Horticulture Code, during the development of the Australian Government response to the review and the subsequent drafting of the Regulations.

- The independent review received formal submissions from a wide range of stakeholders including government bodies, growers, traders and their representative bodies. Face-to-face meetings with stakeholders were also held by the reviewers.

- There have been further targeted consultation with key industry stakeholders on the development of the government response to the review and refinements to the Regulation following feedback.

The Department of Agriculture and Water Resources consulted with a number of government agencies including: the Department of the Prime Minister and Cabinet; the Attorney General's Department; the Treasury; the Australian Competition and Consumer Commission and the Office of Best Practice Regulation.

The Department of Agriculture and Water Resources certified that the Independent Review of the Horticulture Code of Conduct was informed by a process and analysis equivalent to a Regulatory Impact Statement. The Horticulture Code increases regulatory costs by an estimated \$2.5 million annually (OBPR ID 19857).

Details/ Operation

Details of the Regulation are set out in Attachment A.

Other

The Regulation is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Details of the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*

Section 1 – Name

This section provides that the Regulations may be cited as the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*.

Section 2 – Commencement

This section provides for the Regulations to commence on 1 April 2017.

Section 3 – Authority

This section provides that the Regulations are made under the *Competition and Consumer Act 2010*.

Section 4 – Schedules

This section provides that each instrument specified in a schedule to this instrument is amended or repealed as set out in the schedule and any other item in a schedule to this instrument has effect according to its terms.

Section 5 – Code of Conduct

This section provides that for the purposes of section 51AE of the *Competition and Consumer Act 2010*, the Code set out in Schedule 1 to the Regulation is prescribed for the purposes of Part IVB and is declared to be a mandatory industry code.

Schedule 1 – Horticulture Code of Conduct

Part 1—Introduction

Division 1—Preliminary

Clause 1: Name

This clause provides that the name of the Code is the *Horticulture Code of Conduct* (the Code).

Clause 2: Purpose of the code

This clause provides that the purpose of the Code is to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and to provide a fair and equitable dispute resolution procedure for disputes arising under this code or a horticulture produce agreement.

Clause 3: Application

Subclause 3(1) and subclause 3(2) provide to whom the Code will apply.

The Code will apply to growers and traders of horticultural products including an agent who sells horticulture produce on behalf of a grower; a merchant who purchases horticulture produce from a grower; and a grower who provides horticulture produce to an agent or sells horticulture produce to a merchant.

Subclause 3(3) provides transitional arrangements for trade between a trader and a grower under written agreements covering trade in horticultural produce entered into before 15 December 2006 (transitional agreement, as defined in clause 5). Parts 2, 3 and 4 of the Horticulture Code will not apply to traders and growers who are currently operating under a written agreement for horticulture produce made before 15 December 2006 until the agreement is varied or, if the agreement is not varied, 1 April 2018.

Traders and growers who have been trading under these agreements will be provided with a 12 month period to develop terms of trade (Part 2), negotiate horticulture produce agreements which are Code compliant (Part 3) and are not required to comply with the conduct provision of Part 4.

These Parts will apply if the pre 15 December 2006 agreement is varied. The varied pre 15 December 2006 agreement will therefore also be required to be Code compliant.

On 1 April 2018 the Code will apply to all transactions between a grower and a trader.

Parts 1, 5, 6, 7 and 8 of the Code will apply to pre 15 December 2006 agreements. These parts include the obligation to deal in good faith and the dispute resolution procedure.

Clause 4: Compensation for acquisition of property

Clause 4 avoids possible risks of contravening the Constitution, specifically in relation to section 51(xxxi) which concerns the compulsory acquisition of property on just terms. The Government has taken this approach to provide the broadest possible coverage of existing horticulture produce agreements.

Subclause 4(1) and subclause 4(2) provide that if subclause 3(3) results in the acquisition of property from one party to a pre 15 December 2006 agreement by another party to that agreement, other than on just terms, agreed compensation is payable to the party. If an amount cannot be agreed between the parties the amount may be determined by a court of competent jurisdiction.

Further, subclause 4(3) provides that compensation or another remedy received in a proceeding not commenced under this clause is to be taken into account in assessing the compensation payable in a proceeding under this clause, and that arises out of the same event or transaction.

Subclause 4(4) provides that compensation received under this clause is to be taken into account in assessing any damages or compensation or any other remedy to be awarded in a proceeding under any other clause and that arises out of the same event or transaction.

Subclause 4(5) provides the definitions of ‘acquisition of property’ and ‘just terms’ and refers to paragraph 51(xxxi) of the Constitution.

Division 2—Definitions

Clause 5: Definitions

This clause provides definitions for a number of terms used in the Horticulture Code.

The definition of ‘Freshspecs Produce Specifications’ means produce specifications published by Fresh Markets Australia. The FreshSpecs Produce Specifications can be downloaded without charge at www.freshmarkets.com.au. The specifications are intended to be used as standard for all contracts from 1 April 2017, unless the parties agree otherwise.

Clause 6: Meaning of *bad debt*

This clause provides that a ‘bad debt’ arises where an agent arranges to sell produce for a grower and the person who purchases the produce does not pay for some or all of the produce by the time that the payment is due. The amount owing is considered a ‘bad debt’ of the grower.

Clause 7: Meaning of *horticulture produce*

Subclause 7(1) provides that the meaning of horticulture produce is unprocessed fruit; unprocessed vegetables (including mushrooms and other edible fungi); unprocessed nuts; unprocessed herbs; and other edible plants.

Subclause 7(2) excludes nursery products from horticulture produce.

Subclause 7(3) provides what nursery products include. Nursery products include trees, shrubs, plants, seeds, bulbs, corms and tubers (other than edible tubers); propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers or foliage; cut flowers or foliage.

The term ‘unprocessed’ is not defined in the Code. The meaning of unprocessed will be determined by the circumstances of each case. The ordinary meaning of unprocessed is produce that has not been converted, altered or modified in some way for the purpose of making it into a new form. The mere process of washing, grading and packing produce so that it can be assessed and priced for the purposes of trading is unlikely to constitute processing, as it may not be said to have converted, altered or modified the produce in any significant manner.

Division 3 – Obligation to deal in good faith

Clause 8: Obligation to deal in good faith

Subclause 8(1) provides that growers and traders must at all times deal with each other in good faith. A party may be liable for a civil penalty if it breaches the obligation to act in good faith.

Subclause 8(1) and subclause 8(2) provide that the obligation to act in good faith refers to good faith, within the meaning of the unwritten law from time to time. That is, the meaning of good faith under the Code takes on the same meaning that exists at common law, as it continues to develop and evolve in Australia over time. The clauses aim to ensure that consistency is maintained in relation to the interpretation of good faith under the Code as at common law.

A maximum civil penalty of 300 penalty units may be payable if these subclauses are breached.

The obligation has not been defined, however, subclause 8(3) provides that, without limiting the matters that may be considered in determining whether a party has contravened the obligation a court may have regard to:

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

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

Subclause 9(1) and subclause 9(2) provides that the obligation to deal in good faith cannot be limited or excluded by a provision of an agreement, or by a variation to an agreement. If an agreement contains such a provision, that provision has no effect.

Part 2—Trader’s terms of trade

Clause 10: Trader must prepare and publish terms of trade

Subclause 10(1) provides that a trader must prepare, publish and make public a document which outlines the terms and conditions on which the trader is willing to provide to a grower.

This document will improve the information available to growers in regards to the services provided by different traders and provide clarity to some aspects of trading. It is intended that a trader will determine how he or she wishes to make the terms publically available. This could be satisfied by displaying them on the trader’s website. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 10(2) provides that a document must be prepared that sets out any changes to the terms of trade.

Subclause 10(3) provides that the trader must publish and make publically available any changes made to the terms of trade in the same way as the original terms

Clause 11: Contents of terms of trade

It is intended that the trader's terms of trade provide standard terms which can be changed to meet the needs of individual agreements with growers. For example, the trader's terms of trade may state that a trader will pay a grower within 30 days of sale, however an individual grower and trader may agree that 14 days payment is appropriate. The terms of an individual written agreement (Horticulture Produce Agreement) which establishes a relationship between a grower and trader will prevail where there is any inconsistency.

Subclause 11(1) provides that the trader's terms of trade must comply with the Code. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 11(2) provides what information the terms of trade must contain.

Subclause 11(3) provides that where a trader declares that he or she is prepared to trade as an agent, what terms of trade must also be specified.

Subclause 11(4) provides that a trader's terms of trade may include other matters that the trader considers appropriate. The other matters must not be inconsistent with the Code.

Part 3—Horticulture produce agreements**Clause 12: Requirement to have a horticulture produce agreement**

Subclause 12(1) and subclause 12(2) provide that growers and traders must not trade in horticulture produce unless the parties have entered into a horticulture produce agreement that complies with the Code. A maximum civil penalty of 300 penalty units may be payable if these subclauses are breached.

Clause 13: Terms of trade on which trader must trade

This clause provides that a trader must not trade with a grower on terms and conditions other than those agreed with the grower under a horticulture produce agreement. A maximum civil penalty of 300 penalty units may be payable if this clause is breached.

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

This clause provides that a trader cannot act as both an agent and a merchant under the one horticulture produce agreement. This is to provide clarity in the trading relationship and prevents a trader acting as both during one transaction.

Clause 15: Requirements of horticulture produce agreements

Subclause 15(1) provides that a horticulture produce agreement must be in writing and accepted by the parties either by signature or by a written notice of offer and acceptance. An example of written notice is provided.

Subclause 15(2) provides that a horticulture produce agreement may include other matters that the trader and grower consider appropriate. The other matters must not be inconsistent with the Code.

Clause 16: Matters to be specified in horticulture produce agreements

This clause provides for matters that must be specified in a horticulture produce agreement.

Horticulture produce agreements are intended to be flexible to cater for long term transaction supply arrangements through to single spot market transactions. A trader's terms of trade will form the foundation of the agreement as each item in the terms of trade is required to be addressed in a horticulture produce agreement. Agreements can be for any term agreed between a grower and a trader

Clause 17: Additional matters to be specified by agents

This clause provides the additional matters that a trader who is trading under a horticulture produce agreement as an agent must specify.

Clause 18 Additional matters to be specified by merchants

This clause provides the additional matters that a trader who is trading under a horticulture produce agreement as a merchant must specify.

Clause 19: Conflict between code and horticulture produce agreements

This clause provides that if a term of a horticulture produce agreement is in conflict with the Code, the Code prevails. This is to ensure that obligations under the Code cannot be contracted out.

Clause 20: Cooling-off period

Subclause 20(1) and subclause 20(2) provides that where a horticulture produce agreement is to be in place for a period of 90 days or more, or if the term is not specified, either party of the agreement may terminate the agreement, in writing, within 14 days. This is known as the initial cooling off period. Growers and traders may agree to a shorter or longer cooling off period, however the initial cooling off period may not be reduced by more than 7 days.

Subclause 20(3) provides that if a horticulture produce agreement is terminated during the cooling off period all trade that has occurred under the agreement is governed by the terms of the agreement.

Subclause 20(4) further provides that any funds received by a party for the purposes of trade that would have occurred under a terminated agreement must return the payment within 14 days after termination. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 20(5) provides that a party may deduct from the amount to be returned under 20(4) any 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

Clause 21: Application

This clause provides that Division 1 of Part 4 applies to a trader trading under a horticulture produce agreement with a grower.

Clause 22: Acceptance by trader of deliveries

Subclause 22(1) and subclause 22(2) provide that a trader must accept horticulture produce delivered under a horticulture produce agreement unless a circumstance listed in the horticulture produce agreement occurs. For example, if the produce does not meet specification standards.

Subclause 22(3) provides that a trader must advise the grower that the produce has been rejected within 24 hours. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 22(4) further provides that the trader must advise the grower in writing of the rejection, and the reasons for the rejection, within the period specified under the agreement.

Clause 23: Pooling of horticulture produce

This clause provides that a trader may pool horticulture produce delivered by the grower with other produce if the other produce is of the same quality and the quality requirements of the produce under the agreement have been met.

Clause 24: Trader must exercise reasonable care and skill

This clause provides that a trader must exercise all reasonable care and skill in handling and storing the produce to ensure that it stays at the highest quality possible. Care and skill must be exercised until:

- trading as an agent – the ownership of the produce passes to a purchaser
- trading as a merchant – the ownership of the produce passes to the merchant.

Division 2—Agents and growers

Clause 25: Application

Subclause 25(1) and subclause 25(2) provide that Division 2 of Part 4 applies to a trader who is trading as an agent under a horticulture produce agreement and that the requirements of Division 2 are in addition to the requirements of Division 1.

Clause 26: Payment of proceeds of sale

Subclause 26(1) and subclause 26(2) provide that an agent must pay the grower any proceeds of sale less any commissions, fees and extra costs specified in the agreement. The payment must be made within the period specified in the agreement.

Clause 27: Duties of agent

Subclause 27(1) and subclause 27(2) provide that an agent must act in the best interests of the grower in selling the grower's produce and must only sell the produce on an arm's length basis. If the trader believes that a sale may not be viewed as on an arm's length basis, the trader should obtain consent from the grower to pursue the sale. The grower's consent must be

in writing. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Clause 28: Agent’s obligation to pursue bad debts

This clause provides that an agent is to pursue bad debts on the grower’s behalf on the basis and extent provided for in the agreement. This means that the grower and trader will decide in the agreement how bad debts will be pursued.

Clause 29: Agent must report to grower

This clause provides that an agent is to provide a statement to the grower for the reporting period agreed in the agreement, specifying: dates of delivery, dates of sale, type and quantity of produce sold, the price received, details of any amounts deducted by the agent from the sale price, any details of produce not sold, including the reasons why the produce was not sold, any produce destroyed and any associated costs, any produce held by an agent at the end of the period. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 29(3) provides that the statement must be given within the statement period.

Subclause 29(4) defines the statement period as the period specified in the horticulture produce agreement as the period in which a statement for a reporting period must be given.

Subclause 29(5) provides that an agent is not required to give the name or contact details of the person to whom the produce was sold.

Clause 30: Ownership of horticulture produce does not pass to agent

This clause provides that ownership of produce covered by the horticulture produce agreement remains with the grower until the agent sells the produce.

Division 3—Merchants and growers

Clause 31: Application

Subclause 31(1) and subclause 31(2) provides that Division 3 of Part 4 applies to a trader who is trading as a merchant under a horticulture produce agreement and that the requirements of Division 3 are in addition to the requirements of Division 1.

Clause 32: Price for horticulture produce

This clause provides that the price to be paid by a merchant for the grower’s produce is agreed to either before, or immediately upon, delivery of the produce to the merchant. The price to be paid may also be an amount calculated by a method or formula agreed in the horticulture produce agreement.

Clause 33: Fees etc. for services

Subclause 33(1) and subclause 33(2) provides that a merchant may charge fees for services provided by the merchant, in relation to the growers produce, agreed under a horticulture produce agreement. The merchant may not charge a fee unless the details of the service and the fee to be paid for the provision of the service are specified in the horticulture produce agreement.

Subclause 33(3) further provides that no other amounts (including commissions) can be charged. Fees are the only option.

Clause 34: Ownership of horticulture produce

This clause provides that the ownership of the horticulture produce passes from the grower to the merchant at different times depending on the circumstance.

- If the price, or the method or formula to calculate the price, has been agreed before delivery – ownership passes on delivery
- If the merchant is to perform a service in relation to that produce – ownership passes at the time the service is completed
- If neither of the above apply – ownership passes at the time the merchant and the grower agree on a price.

Clause 35: Time for payment

Subclause 35(1), subclause 35(2) and subclause 35(3) provide that the merchant must pay for the horticulture produce delivered within the payment period specified under a horticulture produce agreement. If this does not occur the grower may suspend any further deliveries under the horticulture produce agreement until the amount owed is paid or cancel the agreement. The grower must give written notice to the merchant of his or her intention to do so.

Clause 36: Merchant must report to grower

Subclause 36(1) provides that a merchant is to provide a statement to the grower for the reporting period agreed in the agreement, specifying: the quality and quantity of the produce bought by the merchant; the date or dates of purchase; the price paid for the produce; the date on which the produce was delivered to the merchant; and if the price was determined by a method or formula specified in the horticulture produce agreement:

- the gross sale price of the produce
- the details of any produce not sold
- the details of any produce destroyed, or to be destroyed, including reasons.

A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

The reporting period is defined for the purposes of this clause as the period specified in the horticulture produce agreement as the period for which the agent must report to the grower.

Subclause 36(3) provides that the statement must be given within the statement period.

Subclause 36(4) defines the statement period as 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

The intention of the Code is to allow growers and traders to use any dispute resolution procedures they choose to resolve a dispute. However, if a grower or a trader wishes to pursue a dispute using the Code's dispute resolution process, the other party must comply.

Nothing in the dispute resolution procedure will affect the right of a party to take legal proceedings or submit a complaint to the ACCC.

Clause 37: Dispute resolution procedure

This clause provides that Part 5 sets out a dispute resolution procedure for horticulture disputes.

Clause 38: When dispute resolution procedure may be used

Subclause 38(1) provides that growers and traders may use any dispute resolution procedure they choose to resolve a dispute. Examples may include, mediation, conciliation, arbitration, or the use of an independent expert agreed under their horticulture produce agreement. This provides all parties with a flexible approach to dispute resolution.

Subclause 38(2) provides that if a grower or trader begins the procedure to resolve a dispute with another person, both parties must participate in the dispute resolution and procedures.

Division 2—Mediation adviser and mediators

Clause 39: Mediation adviser

Subclause 39(1) and subclause 39(2) provide that the Minister administering the *Horticulture Marketing and Research and Development Services Act 2000* is to appoint a mediation adviser and that the adviser must compile and maintain a list of persons who are to be mediators.

Division 3—Procedure

Clause 40: Procedure for dispute resolution

Subclause 40(1) provides that the procedure for dispute resolution is set out in this clause.

Subclause 40(2) provides that a grower or trader (complainant) must send a written notice to the person he or she has a dispute with.

Subclause 40(3) provides that the notice must specify the nature of the dispute, the action the complainant thinks will settle the dispute and the outcome the complainant.

Subclause 40(4) states that the complainant and the respondent must then try to resolve the dispute.

Subclause 40(5) specifies that if after three weeks the dispute has not been resolved, then either party may refer the matter to the mediation adviser.

Subclause 40(6), subclause 40(7) and subclause 40(8) provide that the mediation advisor will appoint a mediator to the dispute and the mediator will decide how the mediation is to be carried out, such as by telephone or meetings and where any meetings would occur.

Subclause 40(9) provides that a party to the dispute must attend the mediation and try to resolve the dispute. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 40(10) provides that a party is taken to attend the mediation if the party is represented at the mediation by a person authorised to enter in to an agreement to settle the dispute of behalf of the party.

Subclause 40(11) provides that a complainant may withdraw the dispute at any time.

Division 4—Mediation

Clause 41: Appointment of a mediator by mediation adviser

Subclause 41(1) and subclause 41(2) provide that when the mediation adviser receives a request under subclause 40(5), a mediator must be appointed within 14 days after receiving the request and must inform the parties of the mediator's details.

Clause 42: Mediator to give notice of mediation

This clause provides that the mediator must notify the mediation adviser that the mediation has commenced and the nature of the dispute within 14 days of the mediation commencing. The mediator decides when a mediation has commenced.

Clause 43: Mediator to give notice of successful mediation

Subclause 43(1) and subclause 43(2) provide that where the parties have reached an agreement, the mediator must within 14 days of the agreement being reached:

- set out in writing the terms of the agreement
- give a copy of the terms to each of the parties, and
- notify the mediation adviser that the parties have reached an agreement.

The agreement reached between the parties will be a legally enforceable contract. Parties may pursue a breach of contract under existing laws.

Clause 44: Termination of mediation

Subclause 44(1) provides that the mediator or the complainant may terminate the mediation.

Subclause 44(2) provides that the mediator may terminate if the mediator is satisfied that a resolution is not likely.

Subclause 44(3) provides that the respondent may only request termination of the dispute after 30 days to ensure that sufficient time is provided to reach an outcome on a dispute.

The mediator will issue a certificate following a termination of mediation to the mediation adviser and the parties, which will include the names of the parties, the nature of the dispute, that the mediation has finished and that the dispute has not been resolved.

Clause 45: Costs of mediation

Subclause 45(1) provides how much each party must pay unless agreed otherwise by the parties.

Subclause 45(2) provides that each party involved in a dispute that involves mediation must pay his or her own costs unless the parties agreed otherwise.

Subclause 45(3) provides that the cost of mediation includes all reasonable cost associated with the carrying out of mediation.

Clause 46: Contractual rights unaffected by Part

This clause provides that nothing in the dispute resolution procedure will affect the right of a party to take legal proceedings.

Part 6—Horticulture produce assessors**Clause 47: List of horticulture produce assessors**

Subclause 47(1) provides that horticulture produce assessors will be identified and placed on a list by the mediation advisor.

Subclause 47(2) provides that the list will include the qualifications of the person has which are relevant to the role of horticulture produce assessor.

Clause 48: Role of horticulture produce assessors

Subclause 48(1) specifies the role of the horticulture produce assessor.

Subclause 48(2) states that the horticulture produce assessor must be appointed under clause 49 before he or she may act.

Subclause 48(3) provides that the horticulture produce assessor must not investigate or report on a matter that is not referred to him or her under the appointment.

Subclause 48(4) provides that assessor will report on two key areas of concern, whether:

- rejection of horticulture produce was in accordance with the agreement and the Code
- amounts paid by the trader were calculated in accordance with the Code, for example, that fees and charges were calculated on the basis provided for in the agreement.

Clause 49: Appointment of horticulture produce assessors

This clause provides that a horticulture assessor may be appointed by the parties to a horticulture produce agreement by agreement. If the parties cannot agree to the appointment of an assessor the mediation advisor or an appointed mediator may appoint a horticulture produce assessor. This appointment can be made regardless of whether a dispute has been notified.

Clause 50: Assistance to horticulture produce assessors

Subclause 50(1) provides that a party to an agreement must comply with any reasonable request made by a horticulture produce assessor for the purposes of investigating the matter referred to in the appointment and preparing the assessors report. A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 50(2) provides that, if requested, a trader must permit the horticulture produce assessor to inspect:

- any produce supplied by the grower that is in the possession of the trader
- for an agent – the financial and other records of the agent that relate to the grower, or produce that the agent is selling on behalf of the grower
- for a merchant – the merchant’s records that relate to the merchant’s trade in the grower’s produce up to the day on which the ownership of the produce passed from the grower.

Subclause 50(3) provides that the assessor may inspect records that relate to a period of 12 months preceding the date of the assessor appointment.

Clause 51: Horticulture produce assessor’s report

Subclause 51(1) provides that a horticulture produce assessor must as soon as practicable prepare a report and give a copy of the report to the parties of the agreement and the mediator of the dispute where applicable.

Subclause 51(2) provides that the report must not disclose information that a party is not entitled to obtain under an agreement or under the Code.

Clause 52: Costs of horticulture produce assessors

Subclause 52(1) and subclause 52(2) provide that the costs of a horticulture produce assessor acting under an appointment are to be halved by the parties, unless the parties agree otherwise.

Part 7—Records

Clause 53: Record keeping requirements

Subclause 53(1) provides that a trader must keep the original or a copy (including electronic copies) of the following records:

- a horticulture produce agreement entered into
- a written notice by the trader of the offer or acceptance of a horticulture produce agreement
- a written termination by the trader of a horticulture produce agreement
- a notice of rejection of produce and the reasons for the rejection given to a grower
- a statement for a reporting period given to a grower.

A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 53(2) provides that a grower must keep the original or a copy (including electronic copies) of the following records:

- a horticulture produce agreement entered into
- a written notice by the grower of the offer or acceptance of a horticulture produce agreement
- a written termination by the grower of a horticulture produce agreement.

A maximum civil penalty of 300 penalty units may be payable if this subclause is breached.

Subclause 53(3) provides the length of time that the records must be kept.

If the record relates to a horticulture produce agreement – for the period:

- starting on the day on which the record is made or given, and
- ending on the last day of the period of 6 years beginning on the day the horticulture produce agreement expires.

Any other record must be kept for at least 6 years starting on the day on which it was made.

Clause 54: Requirement to record names of parties dealt with

Subclause 54(1) and subclause 54(2) provide that a trader must make a record in writing of the name of any grower or other trader the trader deals with in relation to horticulture produce and must retain that record for 6 years. A grower must make a record in writing of the name of any trader the grower deals with and must retain that record for 6 years.

A maximum civil penalty of 300 penalty units may be payable if these subclauses are breached.

Clause 55: Inspection of records

Subclause 55(1) provides that a grower, or his or her representative, may inspect the records of the agent that relate to the sale of the grower's produce.

Subclause 55(2) provides that the records the person may inspect should be related to a period of up to 12 months preceding the date of the request.

Subclause 55(3) provides that the request must specify the period that the request relates to and the request can only relate to a period of up to 12 months preceding the date of the request.

Subclause 55(4) provides that the agent must make available all records requested, except the names and contact details of the people who purchased the grower's produce.

Subclause 55(5) provides that an agent is not required to make records available if the grower's representative is not appointed in writing and the inspection of the records would result in the representative having an actual or potential conflict of interest.

Clause 56: Provision of information for debt recovery

This clause provides that where an agreement gives the grower a role in the pursuing of bad debts and the grower asks the agent for information for the purpose of recovering the debt, the agent must give the grower the requested information, including the name and contact details of the buyer of the produce.

A maximum civil penalty of 300 penalty units may be payable if this clause is breached.

Part 8—Transitional, savings and application provisions

Clause 57: Definitions

This clause provides that ‘old regulations’ means the *Trade Practices (Horticulture Code of Conduct) Regulations 2006*.

Clause 58: Things done under old regulations

Subclause 58(1) provides that where a thing was done under the old regulation immediately before their repeal and the thing could be done under the Code, the thing is taken to have been done under the Code.

Subclause 58(2) provides that a thing being done may include, but not limited to, a notice, approval or other instrument being given or made.

Clause 59: Application—trader’s terms of trade

This clause provides that a trader’s terms of trade made under the old regulations continue to be valid under the Code for a period of 12 months, unless they are varied. If a trader’s terms of trade are varied before 1 April 2018, they must comply with Part 2. From 1 April 2018 all traders with existing terms of trade must have terms of trade which comply with Part 2.

Clause 60: Application—horticulture produce agreements

This clause provides that horticulture produce agreements entered into under the old regulations continue to be valid under the Code for a period of 12 months, unless it is varied. If the agreement is varied before 1 April 2018 it must comply with Part 3. From 1 April 2018 all horticulture produce agreements must comply with Part 3.

Clause 61: Savings—appointment of mediation advisor

This clause provides that the appointment of a mediation advisor under the old regulations is to be considered as if it had been made under the Code.

Clause 62: Savings—appointment of mediator

This clause provides that the appointment of a mediator under the old regulations is to be considered as if it had been made under the Code.

Clause 63: Savings—appointment of horticulture produce assessors

This clause provides that the appointment of a horticulture produce assessor under the old regulations is to be considered as if it had been made under the Code.

Schedule 2—Repeals

Trade Practices (Horticulture Code of Conduct) Regulations 2006

Clause 1: The whole of the Regulations

This clause repeals the *Trade Practices (Horticulture Code of Conduct) Regulations 2006*.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Codes – Horticulture) Regulations 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Horticulture Code is to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and to provide a fair and equitable dispute resolution procedure for disputes arising under the Code or a horticulture produce agreement.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon. Barnaby Joyce MP
Deputy Prime Minister and Minister for Agriculture and Water Resources