

**SUBMISSION TO THE
CODE COMMITTEE**

**RESPONSE TO THE ACCC RECOMMENDATIONS
ON THE HORTICULTURE CODE OF CONDUCT**



INTRODUCTION

Horticulture Australia Council (HAC) is the peak national industry body representing the Horticultural industries. Members of HAC are the national peak industry bodies (PIBs) for the Horticultural industries, and some State farmer organisations. Horticulture Australia Council (HAC) represents over 97% of the Australian horticulture industry, and its Member organisations include:

- Apple & Pear Australia
- Agricultural Investment Managers Australia
- Avocados Australia
- Australian Banana Growers' Council
- Australian Citrus Growers
- Australian Dried Fruit Association
- Australian Mushroom Growers Association
- Australian Nut Industry Council
- Australian Passionfruit Industry Association
- AUSVEG
- Cherry Growers of Australia
- Fruitgrowers Victoria
- Growcom
- NSW Farmers' Association
- Northern Territory Horticulture Association
- Nursery and Garden Industry Australia
- Persimmon Industry Association
- Strawberries Australia
- Turf Producers Australia

Horticulture in Australia is intensive, generally irrigated, agriculture. Horticulture is a diverse industry, spread across the continent in a wide array of climates. Horticulture is the fastest growing industry in agriculture; with some 30,000 businesses nationally, and a farm gate value of \$9 billion. Total horticultural exports in 2006/07 were \$763 million. As the most labour intensive of all agricultural industries, Horticulture employs approximately one-third of those employed in agriculture. The industry is the principal driver of many regions and local communities and economies in rural and regional Australia.

Horticulture welcomes the opportunity to provide a response to the Code Committee on the recommendations made by the ACCC in January 2008 on the Horticulture Code of Conduct. HAC has undertaken extensive consultations with industry - given the unfortunate timing of the summer break coinciding with the consultation period - on the potential implications of the ACCC recommendations. Many of HAC's member organisations have also made separate submissions, intended to highlight specific issues affecting their industry/state – this submission is intended to provide an overview of the feedback received to date.

Background and Issues

1. Horticulture believes it is critical to go 'Back to Basics' – What was the original intention of the Code?

The Code was implemented **to protect growers from abuse**, due to lack of market power in a demonstrated situation of market failure. Industry is looking to see a business environment which is fair and reasonable, and which offers opportunities for fair competition. This would encompass:

- ❖ Transparent relationships in the value chain;
- ❖ Relationships between suppliers and customers not distorted by market power;
- ❖ Opportunity for market growth by meeting consumer wants and needs;
- ❖ Reasonable costs of doing business; and
- ❖ A reasonable sharing of risks and rewards.

There are four key principles underlying the Code:

- 'Agent' and 'Merchant' roles are clear and distinct (i.e. no "hybrid" model);
- There is transparency in transactions and roles;
- There are clear and agreed contractual arrangements, and a paper trail;
- There is an affordable and effective dispute resolution process.

2. Key Issues of Concern

In our informal discussions with the ACCC on the thinking behind some of their recommendations, it became clear that the primary motivation behind many of the more controversial ones was that of what they described as "workability" – that is, it would be simpler for the ACCC to implement and monitor compliance with the (proposed new) Regulations because they are more acceptable to many of the Trader representatives.

Industry is concerned that, if many of these "compromise" recommendations were implemented in full, the implications would be to undermine the force, and the original intent, of the Code.

The previous Government removed the majority of responsibility for implementation from DAFF and gave it instead to the ACCC. Industry has expressed widespread dissatisfaction with the current compliance/monitoring function; and there is some concern in relation to the ACCC having been asked to 'mark its own homework' on the Code as part of the Review. In industry's view, the ACCC has proved a 'blunt instrument' in implementing and monitoring compliance with the existing Regulations. For example,

- The 'Awareness' campaign before the launch of Code did not meet its objectives (the focus was legalistic, rather than informative);
- The ACCC has taken a reactive, rather than proactive, approach to compliance and enforcement
 - it is complaints-based (which ignores the power imbalance in the trading relationship);
 - it is not actually confidential (as some of our folk have discovered to their cost!);
 - it requires written evidence, which growers are reluctant to give based on a realistic fear of reprisals;
- The level of response to breaches is inadequate to the "crime" (i.e. it lacks 'teeth');
- The ACCC response is ponderous (actually glacial!);
- The overall ACCC approach is traditionally focussed on 'Big End of Town'

- they have demonstrated that they are not familiar with the multitude of daily transactions, and abuse of market power, which characterise our industry;
- With the proposed changes to the TPA to provide a range of adequate penalties/disincentives, the ACCC may be most appropriate as “the big guns” at the end of the process, not the first step in enforcement.

As summarised earlier, the emphasis in the ACCC’s Review recommendations is on “workability” of the Regulations to the ACCC (i.e. acceptability to Traders), rather than on genuine implementation or enforcement of Code objectives:

- ❖ This is based primarily, it would appear, on a series of “furphies” continually peddled by some Trader representatives;
- ❖ The ACCC has continually demonstrated a genuine lack of understanding of the complex trading arrangements in the wholesale sector;
- ❖ The current Regulations provide for a good Code overall with some modifications (eg packing houses and grower-owned cooperatives), so Horticulture fully supports those ACCC recommendations which will enhance or fulfil the intent of the Code (for example, Recommendations 1-3);
- ❖ However, Recommendation 4 is the “hybrid” model by another route, and would make all other recommendations redundant - as there would still be no Regulations to enforce the intent of the Code in practice.

3. General comments

Some suggestions on alternative approaches to monitoring/compliance approaches include:

Consider having the ‘first port of call’ an Ombudsman-type role, rather than the ACCC. We have suggested that it might be valuable for DAFF to interview the previous Ombudsman for the Produce and Grocery Code for his views on these suggestions. Such a role might include:

- A ‘Help Desk’ to assist either or both parties (without prejudice) to strike compliant HPAs
 - the current process is too legalistic and ponderous;
- Strong investigatory powers (eg “spot checks” in Markets);
- Can request to see a Traders’ records (for any number of growers, over any period);
- Has the ability to ‘name and shame’ in Parliament;
- Can compel the parties to the table;
- Can refer matters to the Mediation Advisor;
- Can recommend to the ACCC that legal action be taken.

Once any recommended changes to implementation or the Code Regulations are accepted by the Minister, there is a critical need for an awareness-raising, and especially capacity-building, program on the new business environment for both:

- Growers (we have already put forward to Government a proposal on an industry-developed, and industry-led program); and
- Traders.

There is also a need for a significant awareness-raising campaign to alert the trading parties to the roles and functions of the Mediation Advisor; particularly focussing on the types of issues dealt with, the likely costs, and the channels of approach (possibly including illustrative examples by way of ‘super case-studies’).

Specific Response to Individual ACCC Recommendations

Recommendation 1:

Amend the TPA to introduce civil penalties etc for a breach of the Code, and to give the ACCC powers to facilitate the conduct of random record audits as an enforcement mechanism under the Code.

HAC supports both parts of this recommendation.

Industry welcomes the proposal to make the penalties for non-compliance a sufficient deterrent to encourage compliance. Currently, Traders have virtually no disincentives (though large financial incentives) for not complying with the Regulations. The likely impact of penalties sufficient to the crime is to reduce the financial incentive, and reduce the disincentives.

We also welcome the recommendation to conduct random audits as an enforcement mechanism. It has consistently been Horticulture's view that a system of random spot checks of consignments against HPAs (similar to the powers of the State Weights and Measures Inspectors already working in the Markets) will lead to genuine compliance by Traders (and therefore Growers) with the Code.

Costly and time-consuming court proceedings could be avoided by concentrating on identifying specific cases of non-compliance. Any identified cases could immediately lead to full book audits of all the transactions with all Growers on their books over a specified period (eg the last month/last 3 months). It is our belief that simply knowing that an official is in the Central Markets – one who has the power to ask at random to inspect the Code-compliant HPA which should be in place for each transaction, and the power to look further into the Trader's business if they encounter any evidence of breaches - will be a sufficient disincentive in and of itself. If prosecutions and/or other financial penalties immediately followed every instance of illegal activity thus disclosed, we believe the instance of non-compliance would diminish rapidly, and compliant HPAs would then become normal business practice.

Recommendation 2:

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

Again, we welcome this recommendation, which is consistent with the stance of industry (both Grower and Trader representatives) since the commencement of negotiations around the scope of the Code.

The primary area of market failure and concern by growers has always been the wholesale sector, especially the lack of contractual clarity, and the traditional operation of the 'hybrid' model. Industry has consistently supported the position that the Code should cover the first transaction from the grower and that it should apply to all parties; including, but not limited to, Central Market wholesalers (Traders are currently covered), other wholesalers and produce merchants (eg independent traders, or packhouses), brokers (Agents are currently covered, but not if they are acting directly on behalf of the retailers as Buyers' Agents), retailers, exporters and processors.

However, given that the current Code regulating the sale of fresh produce in the wholesale sector has yet to be implemented in fact, HAC recommends a phased approach. We anticipate that the triggering of the 'sunset clause' (Recommendation 3), and the implementation of 'spot checks' (Recommendation 1) will finally implement the Code in practice.

There is an urgent need to ensure that the activities of brokers acting in the wholesale sector (agents acting directly on behalf of the retailers as Buyers' Agents) are covered by the existing Code – this was certainly industry's understanding of the intent of the Code.

However, Horticulture is of the view that too many new 'players' being introduced simultaneously to the system may create even more confusion than currently exists, and strain the capability-building capacity of all sectors of the industry to the full.

It also our experience that many other sectors in the fresh produce sector are unaware of the requirements and intent of the Code in its current form; or implications to their business should the scope of the Code be widened to include the other 'players'.

HAC therefore recommends that:

- ❖ the initial phase (full implementation of the Code in the wholesale sector) be undertaken as soon as possible (eg 1 July 2009);
- ❖ brokers acting in the wholesale sector (agents acting directly on behalf of the retailers as Buyers' Agents) should be explicitly covered by the existing Code;
- ❖ the 3-year evaluation of the Code (as applying to the wholesale sector) proceed as planned; and
- ❖ further consultation with growers who trade directly with retailers, exporters and processors on the likely implications;
- ❖ other sectors (retailers, brokers, exporters and processors) be brought on-line after a sufficient time for awareness-raising/education on the changed business environment – perhaps 12 months later (i.e. 1 July 2010).

Recommendation 3:

Amend the Horticulture Code to regulate the first point of sale transactions between a grower and a trader in horticulture produce, including transactions entered into under agreements made prior to 15 December 2006.

Horticulture fully supports this recommendation, which will effectively provide a 'sunset clause' on all pre 15 December 2006 agreements (the majority we believe are illegal, having been signed, frequently under intense pressure from Traders, after 15 December 2006).

Many growers have been convinced by their Trader(s) that the signing of a Code-compliant HPA will immediately see the blighting of the good trading relationship they have enjoyed with their Trader! – often over a period of decades. Clearly, our view is that a compliant HPA would simply formalise and develop this good business relationship; but a widespread campaign of mis-information by some Traders has confused many growers, who are still not at all clear about the intent and scope of the Code.

Industry is strongly of the view that the implementation of this recommendation will support those growers - currently too fearful, confused, or intimidated - in insisting on signing only compliant HPAs with their Trader(s).

We believe that the implementation of this recommendation will provide a missing incentive for both Growers and Traders to seriously consider their business relationship, and ensure that ALL transactions are Code-compliant. This should make a significant difference to the level of non-compliance currently endemic within the wholesale sector, and assist to provide the necessary

culture change in our wholesale marketing sector for fresh produce – that is, provide a business environment which is fair and reasonable, and which offers opportunities for fair competition.

We recommend that this should apply promptly (i.e. within 6 months) after any proposed changes to the Code. It must be preceded by an awareness-raising and capacity-building program for both Growers (industry-led) and Traders. The intervening period should also be a period of awareness-raising ‘spot-checks’ in the markets, indicating to Traders – once the sunset clause is triggered - which (if any) aspects of their current contracts will at that time be non-compliant.

Recommendation 4:

Part A: Amend the Code to require a Merchant to provide a Grower, before delivery, with a firm price [in writing – our amendment].

We support this recommendation (as amended), as it will provide significantly more bargaining power to Growers. Once they lose control of their produce (eg it is already on its way to the Market), this buttress against misuse of market power is materially diminished. This agreed firm price **MUST** be in writing, or current practices (including significant mis-use of market power) will be enabled to continue. This is currently not occurring on a general basis, and results in a situation of a Grower’s word against a Trader’s word in the event of a dispute – the very circumstance the Code was intended to put an end to by providing contractual clarity.

Industry supports the current arrangements which allow a Trader and Grower to agree on a firm price before, or immediately upon delivery. We suggest to Growers that, when in doubt, it may be best for them to agree a firm price before the produce leaves their control; however, we acknowledge that the current arrangement allows both parties to take market fluctuations into account.

The definition of ‘delivery’ however, needs careful consideration. The original intent of the Code was that ‘delivery’ was taken to mean the moment of physical delivery on the Trader’s dock – as confirmed by the transport operator’s chit.

This definition has been “watered down” by successive interpretations of the ACCC – primarily to accommodate situations where a (supposedly separate) agreement to store and/or ripen produce saw the initial delivery of the produce to a Trader (which may not be the same business entity which ultimately buys or on-sells the produce) for that purpose. In the case of bananas, for example, the ACCC gave Growers and Traders to understand that ‘delivery’ could be defined as a period of weeks or even months to allow for the ripening process.

The ACCC’s initial reaction to the Code Regulations was to clearly distinguish the transfer of ownership and payment (i.e. **the sale**) of fresh produce - covered by the HPA - from any associated, but distinctly different services offered prior to sale (eg ripening, storage) – covered by a Service Agreement. Service agreements should remain outside the Horticulture Produce Agreement, and subject to a separate service provision contract.

It is our view that in this situation, if the service agreement is kept clearly separate from the HPA, then ‘delivery’ could be deemed to have taken place either

- ❖ on transfer of the produce from the Trader providing the service to the Trader which ultimately buys or on-sells the produce; or

- ❖ if the service agreement and HPA are with the same business entity, a pre-agreed date/quality specification (eg ripeness) could be made explicit in the HPA and taken as forming 'delivery'.

Part B: Industry's very strong view is that *Part B* of this Recommendation must be rejected. The recommendation to **allow a Merchant to provide the Grower with a formula for calculating price allows the 'hybrid' system which the Code was specifically intended to terminate.**

The 'hybrid' method of trading is the one currently in place, where the Trader acts as a Merchant or an Agent – or a mix of both – in any given transaction, at their own discretion, and always to their own advantage (and thus the Grower's disadvantage).

If this Recommendation is accepted, for reasons that the ACCC describe as 'workability' of the Code (i.e. a 'compromise' position), it will completely defeat the intended purpose of the Code, and there will be little point in making any other changes to the Code.

It is also critical to remember there is **NO need for the Trader to sight the produce before agreeing a price, as the price should be dependent on clear, agreed, product specifications and quality standards** (outlined in the HPA).

Rejection of produce (in either Merchant or Agent transactions) is already covered under the Code. Currently, all Traders are required to include in their terms of trade the circumstances under which they may reject produce, the period within which they will notify the Grower, and the consequences of that rejection. These terms of trade can be negotiated between the Grower and Trader in the HPA, and should reflect the nature of the produce being traded.

There is also a clearly-defined dispute resolution process outlined in the Code. If the produce, upon inspection, does not meet the agreed specifications, this is a breach of contract, and the Trader has the right to reject the produce (as a breach of contract by the Grower), and/or call in a Horticultural Produce Assessor, and/or seek resolution of a dispute. This process is an exact mirror of the entitlement a Grower has to seek redress if the agreed price was not paid, or not paid within the timeframe specified in the HPA (i.e. breach of contract on the part of the Trader). Modern technology also allows for photos to be sent before leaving the farm-gate, to confirm that the produce met the agreed specifications before it left the farm-gate.

Industry cannot support allowing a Merchant to provide a Grower with a formula for calculating their return price - this does not reflect a true Merchant transaction (where the Merchant takes ownership of the produce at a clear and defined point, along with the associated risk and reward). It is our view that such an approach would only further complicate Merchant transactions, allowing for the 'hybrid' model to continue. This can only perpetuate the 'blurred' lines and add to the existing confusion and lack of transparency – that is, negate the original intent of the Code, and allow for continuing market failure in the wholesale sector.

If Traders and Growers are keen to operate with greater flexibility, the Code provides for the option of an Agency agreement.

Recommendation 5:

*Amend the Code to require that if a Merchant does not reject **[unsolicited** – our amendment] produce within 24 hours of physical delivery, the produce is deemed to be accepted.*

Part A: In discussions with the ACCC, it was clear that the intent of this Recommendation was to deal with **UNSOLICITED** produce only. With this amendment, we support this part of the Recommendation, as unsolicited produce is a bane to Traders, and encourages poor practices and standards amongst Growers. Implementing this part of the recommendation would give the Merchant sufficient time to inspect and either reject or accept the unsolicited produce.

It is unnecessary to extend this provision to produce where a compliant HPA exists. Rejection of produce (in either Merchant or Agent transactions) is already covered under the Code. Currently, all Traders are required to include in their terms of trade the circumstances under which they may reject produce, the period within which they will notify the Grower, and the consequences of that rejection. These terms of trade can be negotiated between the Grower and Trader in the HPA, and should reflect the nature of the produce being traded.

There is also a clearly-defined dispute resolution process outlined in the Code. If the produce, upon inspection, does not meet the agreed specifications, this is a breach of contract, and the Trader has the right to reject the produce (as a breach of contract by the Grower), and/or call in a Horticultural Produce Assessor, and/or seek resolution of a dispute. This process is an exact mirror of the entitlement a Grower has to seek redress if the agreed price was not paid, or not paid within the timeframe specified in the HPA (i.e. breach of contract on the part of the Trader). Modern technology also allows for photos to be sent before leaving the farm-gate, to confirm that the produce met the agreed specifications before it left the farm-gate.

Recommendation 6:

Amend the Code to enable a Merchant to deduct the cost of any services that are supplied to prepare the produce for resale as part of the price amount.

Industry **cannot accept this Recommendation**. The Merchant now **owns** the produce – it is unclear to us why a Grower would bear the cost of such ‘services’ (unless they are subject to a separate service agreement, and form no part of the HPA).

The ACCC’s initial reaction to the Code Regulations was to clearly distinguish the transfer of ownership and payment (i.e. the sale) of fresh produce - covered by the HPA - from any associated, but distinctly different services offered prior to sale (eg ripening, storage) – covered by a Service Agreement. We continue to support this approach, as it makes the actual costs associated with each activity (sale, or associated service) clear and transparent, and reduces the ability of Traders to “fudge” or “bury” fees and charges. Service agreements should remain outside the Horticulture Produce Agreement, and subject to a separate service provision contract.

Currently, a trader operating as a Merchant is required to outline in their terms of trade and HPAs:

- ❖ any requirements they have relating to delivery;
- ❖ any requirements they have relating to quality and quantity;
- ❖ how they will deal with produce that does not meet the specified quality and quantity requirements.

If the Grower and Merchant have agreed on and signed a contract outlining requirements in these areas, the Grower delivers produce that meets these requirements, and the Merchant subsequently accepts ownership of that produce, the Merchant:

- ❖ is required to pay the Grower the agreed price for that produce;
- ❖ is unable to deduct any additional charges from the Grower following further preparation or value-adding of the produce as transfer of ownership to the merchant has taken place (the merchant can recoup or “pass on” any additional costs following resale to a third party purchaser).

It is our recommendation that the Code Regulations ensure that they are clear that the Merchant role includes taking ownership upon delivery of the product. That is, immediately upon physical delivery by the transport operator – as confirmed by the time stated on the transport operator’s chit – subject to the goods being to specification, this eliminates the issue of Merchant ‘due care’ prior to transfer of ownership.

Recommendation 7:

Amend the Code to only permit an Agent to recover their commission for services performed under an Agency agreement as a deduction from amounts paid by a third-party purchaser.

We support this Recommendation, as the commission should come from the new owner (i.e. as a result of the sale) of the produce, not the pocket of the Grower. All deductions (including GST on any commission charged) must be shown on all account sales/invoices.

We support the findings of the ACCC report that implementing this recommendation would reduce the number of bad debts as it would create an incentive for the agent to pursue them. The process is outlined in the *Horticulture Code Compliance Manual* published by the ACCC that states “*an agent must pay to a grower all proceeds received for the sale of produce under the HPA minus any commissions or agent’s fees permitted and any extra amounts that may be deducted under the HPA*”.

An alternative solution may be for Agents to charge a “buyer’s premium”. This is where the sale price or “winning bid” of the third party purchaser incurs a buyer’s premium which is inclusive of GST. The Agent would then be required to pay the Grower the sale price (minus the buyer’s premium).

Recommendation 8:

Amend the Code to exclude persons who may be an Agent’s competitor from inspecting that Agent’s records on a Grower’s behalf.

We support this Recommendation, as it gives Traders the necessary commercial-in-confidence status in relation to their business dealings.

Industry supports the procedure outlined in the *Horticulture Code Compliance Manual* relating to the inspection of agent’s records:

“The grower may ask to inspect the records of their agent relating to the sale of the grower’s produce under the HPA and transactions occurring on or after 14 May 2007. The grower’s request must specify the period to which the request related. This period must not exceed 12 months before the date of the request. An agent must comply with

such as request by making the records available for the grower to inspect (except the names and contact details of buyers of the grower's produce, unless the information is requested for the purposes of pursuing a bad debt)."

Recommendation 9:

Amend the Code to ensure that transactions between a Grower and a co-operative/packing house, in which that Grower has a significant interest, are exempt from the regulation under the Code.

The disadvantage of this approach is that it excludes the transaction between the Trader and the Co-operative, which has been, and is, the source of much problematic behaviour by Traders.

It is Horticulture's preferred position that the Code Regulations be amended to include all Grower-Owned Mutualities (GOMs) under the definition of 'Grower' (i.e. "an individual, partnership, company, trust, or registered co-operative mutuality/company").

We would propose utilising as a guide GOMs registered with the ATO as 'co-operative companies' as criteria for identifying *bona fide* grower-owned mutualities.

This has the advantage of excluding Grower-owned mutualities (packhouse/marketing organisations) from the definition of a 'Trader' under the Code (i.e. "having a contract with themselves"), and returning the 'Trader' relationship to the wholesaler rather than the co-operative.

Trading relationships between the GOM and the Trader would thus be covered by the Code, as was originally intended.

Industry is aware that there are many different business structures and operating environments around cooperatives and packhouses which can differ significantly amongst commodities and regions. There remains the issue that this can apply only to GOMs (packhouses/marketing organisations) – it would not apply to Grower-packers acting as Traders to other growers, or to commercial packhouse/marketing organisations.

Recommendation 10:

Amend the Code to permit Agents and Growers to engage in pooling and price averaging.

Pooling and price-averaging by cooperatives (GOMs) and some packhouses is fully accountable to the Growers involved, as they have control over these activities.

Pooling by Traders (eg in the central markets) does not have the same accountability to Growers, is not transparent and does not provide reliable market signals back to the Grower. There has been a strong point of view from industry that Traders in the central markets should not be permitted to pool or price average for these reasons.

Under certain strict conditions, Horticulture supports this Recommendation. Specifically, those conditions are:

- That pooling and price-averaging occur only with the prior written agreement of the Grower;
- That such pooling and price-averaging is to clear, agreed and detailed product specifications and quality standards; and

- That such pooling and price-averaging is subject to enhanced and rigorous reporting requirements.

This option has the advantage of potentially excluding the Trader behaviours previously at issue, while allowing complying activity in packhouses/marketing organisations to continue (thus reducing compliance costs for those organisations).

Clear produce specifications agreed and used by Traders and Growers are essential if growers are to understand their supply obligations and if any disputes requiring the intervention of assessors are to be properly resolved. Ideally, national product description language and quality specifications would be developed in partnership, and agreed with industry, not unilateral imposition of very broad product specifications. HAC renews its offer to work with the retailers, wholesalers, processors and exporters to develop such nationally-agreed product specifications and minimum standards (much work has already been undertaken by the retailers and growers in many industries).

Horticulture suggests that clause 9.(2) (h). of the Regulations be amended to deliver the intent that a range of product and quality specifications must be provided in the HPA, to facilitate clarity in both the Agreement and in reporting.

However, there is significant concern by some Growers that because such a change will apply to all Traders (including wholesalers), there is still the possibility of abuses of market power, with reversion to problematic behaviour by some wholesalers in the Central Markets which this clause of the Code Regulations was designed to eliminate.

Industry is of the view that that Government (eg DAFF and the ACCC) need to further investigate options for pooling and price averaging through their own legal professionals to interpret the issues, the Regulations, and potential solutions and impacts. This investigation should include further consultation with the industry through HAC.

Recommendation 11:

Amend the Code to exempt transactions entered into in a 'Grower Shed' at the Central Markets from regulation under the Code, while permitting parties to these transactions to access the Code's dispute resolution procedure.

It is our understanding that only two Central Markets (Sydney and Melbourne) still maintain so-called 'Growers Sheds'. The Traders at the Sydney Markets agree that most of those trading in 'D-Shed' are in fact Traders in any case, and not Growers. If these transactions are in fact between Traders and the general public, they are not in any case covered under the Code.

This recommendation is rejected, as to allow such an exemption will create a loophole – i.e. Traders could off-load produce into the 'Grower Shed', by-passing the scrutiny of the Horticulture Code. In effect, in Sydney for example, 'D-Shed' would become a *de facto* clearing-house for A, B and C Sheds, operating outside the provisions of the Code.

Recommendation 12:

Part A: That the costs incurred by the parties to a dispute under the Code dispute resolution procedure be subsidised by the Australian Government to the same extent as they are under the voluntary Produce and Grocery Industry Code of Conduct (PGICC).

This Recommendation is supported, as it will both meet the original intent of the Code (an affordable and effective dispute resolution process); and also ensure consistency of application and cost between the two Codes.

***Part B:** That the ACCC undertake further education in relation to the Code and its dispute resolution procedures, including the role of the Assessors in resolving disputes.*

Part B of this Recommendation is supported by Horticulture, with the proviso that the education/awareness program is not delivered by the ACCC, but by another (more appropriate) agency.

The ACCC's 'awareness' campaign prior to the launch of Code did not meet its objectives. It was legalistic in approach, rather than informative about the new business environment. In addition, the ACCC has continually demonstrated a genuine lack of understanding of the complex trading arrangements in the wholesale sector. Horticulture would recommend that the responsibility (and adequate resources) for ensuring that an effective capability-building program is undertaken – for both Traders and Growers – returns to DAFF.

Once any recommended changes to implementation/Regulations are accepted by the Minister, there is a **critical need for** an awareness-raising and **capacity-building program** to outline the new business environment for both Growers (we have already put forward a proposal on an industry-developed, and industry-led program) and Traders.

Generally, there is limited awareness of what the Code is, what it entails, and what it sets out to achieve. There is also limited awareness of the Horticulture Mediation Advisor, Horticulture Produce Assessors and the dispute resolution process. Awareness-raising is required around what types of issues are dealt with and by whom, the likely costs involved and the channels of approach (possibly including illustrative examples by way of 'super case-studies').

Currently, the lack of understanding of the Code by one or both parties to a transaction, can lead to/is leading to confusion, or one party taking advantage of the other. An 'even playing field' is required to ensure both parties can use the tools provided under the Horticulture Code effectively to achieve best outcomes for their businesses and maintain strong business relationships. In this endeavour, industry also supports implementing a "help desk"-type approach that ensures industry has assistance to a service that provides advice on compliant HPAs and both growers' and traders' obligations under the Regulations.

HAC's capacity-building proposal for Growers is to deliver on the extensive information and education campaign that was developed by industry groups. The objectives of this proposal were to assist growers to:

- ❖ Improve their business practices and outcomes;
- ❖ Recognise and apply critical first steps (and pitfalls) in implementing the Code in a production business; and
- ❖ Improve trading relationships to optimise outcomes for their business.
- ❖ Improved business relationships and practices are part of an ongoing capacity-building program for growers which will have implications, and benefits, well beyond the introduction of the Code. The Code has highlighted the necessity, but also provides the opportunity for, a collaborative effort by industry and government to address not just the market failure in the wholesale sector, but also improving the skills of Growers to cope with managing a greater share of market power in order to build a sustainable business.