



Australian
Competition &
Consumer
Commission

THE GUIDE TO THE HORTICULTURE CODE FOR GROWERS AND WHOLESALE TRADERS IN THE HORTICULTURE INDUSTRY





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Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601

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Important notice

The information provided here is correct at time of printing. The Horticulture Code is a mandatory industry code of conduct that has the force of law and will come into effect on 14 May 2007.

This guideline gives you basic information. It does not cover the whole of the Competition and Consumer Act, including the Horticulture code, and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act.

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FOREWORD

The Australian Government has prescribed the Horticulture Code as a mandatory industry code of conduct to come into effect on 14 May 2007.

Once an industry code of conduct is prescribed by the Australian Government under the *Competition and Consumer Act 2010* (the Act), the code has the force of law.

The Horticulture Code, as a prescribed mandatory industry code of conduct, is binding on participants in the horticulture industry.

The Horticulture Code regulates trading of horticulture produce in the horticulture produce industry. The Horticulture Code aims to provide greater clarity and commercial transparency in trade transactions between growers and wholesale traders (traders) by clarifying the rights and responsibilities of each.

The Horticulture Code also provides an effective and inexpensive way of resolving disputes that may arise between growers and traders as an alternative to litigation.

The Australian Competition and Consumer Commission (the ACCC) plays an important role in the horticulture produce industry by promoting compliance with the Horticulture Code and the Act. The ACCC achieves this through education, providing access to information and, where necessary, enforcement action.

This guide is one of several ACCC guides for business. It is designed to help you understand your rights and responsibilities under the Horticulture Code.

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GLOSSARY

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

Bad debt: if an agent arranges for a person to buy the horticulture produce of a grower, and the person does not pay the agent for some or all of the produce by the time payment is required for the produce, the amount owed by the person is a bad debt of the grower.

Grower: a person who grows their own horticulture produce for sale.

Horticulture dispute: a dispute arising under a horticulture produce agreement.

Horticulture Mediation Adviser: a person appointed as a mediation adviser by the minister under the Horticulture Code.

Horticulture produce:

Unprocessed:

- fruits
- vegetables, including mushrooms and other edible fungi
- nuts
- herbs
- other edible plants

but not nursery products.

Horticulture produce agreement: a written agreement between a grower and trader in accordance with the Horticulture Code.

Horticulture produce assessor: a person listed by the mediation adviser as a horticulture produce assessor under the Horticulture Code.

Mediator: a person listed by the Horticulture Mediation Adviser as a mediator under the Horticulture Code.

Merchant: a person who buys horticulture produce for resale, excluding those that export or retail the produce.

Nursery products:

Includes:

- trees, shrubs, plants, seeds, bulbs, corns 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 and foliage
- cut flowers and foliage.

Trader: an agent or a merchant of horticulture produce.

Trader's terms of trade: a document published by the trader setting out its current standard terms of trade under the Horticulture Code.

INTRODUCTION

This publication provides industry participants with a guide to their rights and responsibilities under the Horticulture Code.

The Horticulture Code, which has the force of law, aims to:

- help growers and traders of horticulture produce make more informed decisions by clarifying their responsibilities and obligations
- require growers and traders to disclose specific information to each other
- require growers and traders to follow nationally consistent rules in their dealings with each other.

The Horticulture Code will achieve these aims by:

- requiring traders to develop and provide growers with written terms of trade
- requiring growers and traders to address key issues in written agreements with each other
- improving the supply of important information, particularly regarding prices paid and obtained by agents for a grower's horticulture produce in wholesale markets
- providing a cost-effective and timely way for growers and traders to:
 - undertake an investigation and obtain an independent report on any matter arising under an agreement, as an alternative to litigation
 - resolve any dispute that may arise between growers and traders.

It is important to note that this document is a guide only for industry participants about their rights and responsibilities under the Horticulture Code. It is not a substitute for legal advice nor is it intended to comprehensively encapsulate the rights and/or responsibilities of industry participants under the Horticulture Code.

APPLICATION

The Horticulture Code applies to trade between growers and traders of horticulture produce after 14 May 2007.¹

Any written agreement entered into on or after 15 December 2006 will be subject to the code from 14 May 2007.

The Horticulture Code does not apply to a written agreement between a grower and trader for horticulture produce entered into before 15 December 2006.²

If, however, the agreement was entered into before 15 December 2006 and is later varied on or after 14 May 2007, the Horticulture Code will apply to any trade that takes place after the agreement is varied. An agreement will be varied if it is amended, extended or transferred.

¹ The Horticulture Code does not apply to traders and growers trading under a statutory potato marketing scheme.

² 15 December 2006 is the date of registration of the Horticulture Code on the Federal Registrar of Legislative Instruments.

Definition of horticulture produce

Horticulture produce is defined in the Horticulture Code as unprocessed fruit, vegetables (including mushrooms and other edible fungi), nuts, herbs and other edible plants.

Horticulture produce does not include nursery products.

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. Produce that remains unprocessed will be covered by the code.

Application of the Horticulture Code to growers and traders

Growers are defined in the Horticulture Code as persons who grow their own horticulture produce for sale.

Traders may only enter into agreements with growers as either an agent or a merchant.

These terms are defined as follows:

- an agent is a person who sells horticulture produce on behalf of a grower for a commission or fee
- a merchant is a person who buys horticulture produce for resale, excluding those that export or retail the produce.

A trader can be a merchant in one transaction and an agent in another.

The term ‘trader’ is used when the relevant provision of the Horticulture Code applies to both agents and merchants.

The Horticulture Code does not apply to merchants who buy produce for export or retail, even if the merchant buys produce directly from a grower.

Terms of trade

Traders must prepare and publish terms of trade

A trader's terms of trade are the terms and conditions on which a trader is prepared to trade in horticulture produce with growers.

The Horticulture Code requires that all traders, whether trading as agents or merchants, prepare, publish and make publicly available a document that sets out the general terms and conditions under which they will trade with growers of horticulture produce.

A trader must give their terms of trade to any grower who requests them. If a trader amends the terms of trade, the updated terms of trade must be prepared, published and made available in the same manner in which the original terms of trade were made available.

Traders can choose the way in which they want to make their terms of trade publicly available. The requirement may, for instance, be satisfied by displaying the terms of trade at the trader's business premise or on the trader's website.

Contents of terms of trade

The Horticulture Code requires that a trader's terms of trade specify:

- whether the trader is prepared to trade as an agent or merchant or both. If the trader is prepared to trade as both, the trader's terms of trade must specify the circumstances when the trader is trading either as an agent or a merchant. It is important to note that the Horticulture Code does not permit a trader to act as both an agent and a merchant under the one horticulture produce agreement
- any requirements the trader has for the delivery of produce by the grower
- any requirements the trader has about the quality of produce delivered by growers
- any circumstances in which a trader is entitled to reject horticulture produce delivered by a grower, including the period, after receiving the produce, when the trader must notify the grower of the rejection and the consequences of the rejection
- the period within which the trader will pay the grower for the horticulture produce.
In particular:
 - if the trader is an agent, the period within which the agent will forward to a grower the proceeds of a sale of the grower's produce by the agent
 - if the trader is a merchant, the period within which the merchant will pay a grower for the purchase of the grower's produce

- whether the trader has insurance for produce under the trader's control, and if so:
 - whether the insurance covers fire, theft and accidental damage (other than deterioration of quality or any inherent losses) and
 - the name of the insurer and the maximum amount of claims covered by the trader's policy.
- if the trader is an agent:
 - the basis on which the agent will charge the grower commission and agent's fees for the horticulture produce traded by the agent on the grower's behalf (for example a percentage of the sale price and/or a fixed fee)
 - whether payment of any commission, fees or extra costs is contingent on the sale of a grower's horticulture produce or any other event
- whether the agent is prepared to pursue the grower's bad debts and if so, the basis on which the agent will pursue those debts.

The terms of trade may also include other information that is not inconsistent with the Horticulture Code, such as the trader's business name, contact details, business hours or ABN.

Horticulture produce agreements

Essential elements of a horticulture produce agreement

The Horticulture Code requires that a trader and a grower enter into a horticulture produce agreement before they can trade in horticulture produce with each other.

A horticulture produce agreement must be in writing and signed by the parties to the agreement. However, a horticulture produce agreement may take on a number of forms.

It may, for example, be:

- a short-term standard document expressly incorporating the trader's published terms of trade
- a unique long-term agreement containing terms that have been agreed on by the parties that are different from the trader's published terms of trade, provided the agreement is not inconsistent with the Horticulture Code and includes the requisite terms of trade.

At a minimum, a horticulture produce agreement must set out:

- whether the trader is trading as an agent or a merchant
- any requirements the trader has for delivery of produce by the grower to the trader
- any circumstances in which the trader may reject horticulture produce delivered by the grower, including the period, after receiving the produce, during which the trader must notify the grower of the rejection and the consequences of the rejection
- the period within which the trader must advise the grower in writing if any of the produce has been rejected and the reasons for the rejection
- details of the trader's insurer (if any) for horticulture produce covered by the agreement, the matters covered by the insurance, and the maximum amount of claims covered by the insurance
- the process for varying or terminating the agreement
- whether the agreement will operate for a specific term or on a transaction-by-transaction basis
- any quality and quantity requirements relating to the horticulture produce traded under the horticulture produce agreement

- how the trader deals with horticulture produce, provided by the grower under the agreement, that does not meet specified quality or quantity requirements
- the contact details of the person who should be contacted by each of the parties to the agreement in the event of a dispute regarding the agreement or the Horticulture Code.

Traders cannot be agent and merchant under one agreement

The Horticulture Code does not permit a trader to act as both an agent and a merchant under the one horticulture produce agreement. The Horticulture Code requires the trader to specify particular matters in their horticulture produce agreements depending on whether the trader is acting as an agent or a merchant under that specific agreement.

Agreements where trader acts as agent

If the trader is an agent, the agreement must set out:

- the period within which the agent will forward to the grower the proceeds of the sale of the grower's produce
- the reporting period for the agreement (agents must give a statement to the grower setting out certain information relating to the grower's produce received by the agent during the reporting period)
- the statement period (the period after the end of the reporting period during which a statement must be given to the grower for the reporting period)
- the basis on which the commission and agent's fees will be charged (for example, on a percentage or fixed basis) and the amounts and rates of any commission and agent's fees
- whether the agent will be responsible for pursuing the grower's bad debts arising under the agreement
- whether the grower will have any role in pursuing bad debts under the agreement.

If the grower does have a role in pursuing bad debts under the agreement and the grower asks the trader to provide the buyer's details to recover the debt, the trader must provide the grower with these details as set out in the agreement.

Agreements where trader acts as merchant

If the trader is a merchant the agreement must set out:

- whether the price of horticulture produce will be agreed before or on delivery of the produce to the merchant

- the period within which the merchant will pay the grower for the grower's produce
- the reporting period of the agreement (the period specified in the agreement as the period for which the merchant must report to the grower)
- the statement period (the period in which the merchant must give a statement to the grower setting out certain information about the grower's produce received by the merchant).

A horticulture produce agreement may also include other matters not inconsistent with the Horticulture Code.

Conflict between terms of trade and horticulture produce agreement

If the trader's terms of trade conflict with a specific horticulture produce agreement, the specific agreement will prevail to the extent of any inconsistency.

Conflict between horticulture produce agreement and Horticulture Code

If any terms of a specific horticulture produce agreement conflict with the Horticulture Code, the requirements of the Horticulture Code will prevail to the extent of any inconsistency.

Traders to advise growers to seek independent legal advice

If a horticulture produce agreement is for a period of 90 days or more, before signing the agreement the trader must ask the grower to provide either:

- a signed statement that the grower has received independent legal advice about the agreement or
- a signed statement that the grower has been told that independent legal advice should be sought but has decided not to seek such advice.

When a horticulture produce agreement has been operating for 90 days or more:

- the trader must ask the grower for the statement within 14 days after the end of the 90-day period
- the grower must comply with the trader's request within 21 days of receiving the request.

However, where a horticulture produce agreement has been operating for 90 days or more a trader is not required to ask the grower for such a statement if the trader has previously asked the grower to provide such a statement in these circumstances in the past.

Regardless of the period of the agreement, a trader may, before entering into an agreement with a grower, ask the grower for a signed statement that it has received independent legal advice about the proposed agreement.

Cooling-off period for agreements of more than 90 days

If the agreement is for a period of 90 days or more or the term of the agreement is not set out, either party to the agreement may terminate the agreement:

- within 14 days of entering into the agreement (the initial cooling-off period) or
- within a period agreed by the parties, provided that the cooling-off period is no less than seven days. If the cooling-off period agreed by the parties is less than 14 days the trader must receive:
 - a signed statement by the grower that it has received independent legal advice about the agreement or
 - a signed statement by the grower that it has been told to seek independent legal advice but has decided not to.

If an agreement is terminated during the cooling-off period, then:

- any trade that took place during the cooling-off period is governed by the terms of the agreement
- any payment made by a party regarding trade that would have taken place after the termination of the agreement, must be returned to the party who made that payment within 14 days of the termination. A party may, however, deduct from any amount to be returned, any reasonable expenses incurred that directly relate to trade that would have taken place after the termination of the agreement.

General rights and responsibilities of growers and traders

Horticulture produce delivered under a horticulture produce agreement

A trader must accept all horticulture produce delivered under the horticulture produce agreement unless there is a circumstance specified in the agreement that allows the trader to reject the produce.

If the trader rejects a grower's horticulture produce, the trader must immediately advise the grower by telephone, fax, email or other electronic means of the rejection.

After rejecting the produce, the trader must advise the grower in writing of the rejection and the reasons for the rejection within the period specified in the agreement.

Handling and storage of grower's produce

The Horticulture Code requires that a trader must exercise all reasonable care and skill in handling and storing produce owned by a grower while it is under the trader's control to ensure the produce remains of the highest possible quality.

Trader must pay the grower for produce sold

The trader must pay the grower for produce delivered under the agreement within the period specified in the agreement.

When the trader fails to pay the grower as agreed

The Horticulture Code provides that if the trader fails to pay the amount required under the agreement the grower may:

- suspend any further deliveries under the agreement until the amount owed is paid and/or
- cancel the agreement.

The grower must give the trader written notice of its intention to suspend or cancel the agreement before doing so.

Ownership of horticulture produce

The Horticulture Code provides that ownership of horticulture produce under a horticulture produce agreement passes between the parties as follows:

- under an agent transaction, ownership of produce passes directly from the grower to the third party buyer once the produce is sold by the agent
- under a merchant transaction, ownership passes from a grower to a merchant:
 - on delivery of the produce to the merchant, if the price of the produce has been agreed on by the merchant and the grower before delivery or
 - at the time that the merchant and the grower agree on a price for the produce, if the price of the produce has not been agreed on before delivery.

Growers and merchants must agree on a price for the horticulture produce in writing either before delivery or immediately upon delivery.

The term ‘delivery’ is not defined in the Horticulture code. The meaning of delivery will be determined by the circumstances of each case and in particular the terms of the agreement reached by the parties. The parties may choose to agree on what will constitute delivery in their particular circumstances and include this in their horticulture produce agreement. Where the parties define ‘delivery’ in their agreement, both parties should obtain legal advice and ensure that the definition and the agreement are in accordance with the Horticulture code and that they are satisfied with the agreement before they sign.

Where a dispute about the meaning of ‘delivery’ arises, the parties will be able to use the dispute resolution scheme set out in the code or commence private legal action in order to obtain a resolution.

Rights and responsibilities of agents of horticulture produce

In addition to the trader's general rights and responsibilities outlined above, the Horticulture Code sets out the following specific duties that apply to a trader trading as an agent.

Proceeds that the agent must pay the grower

The agent must forward to the grower, within the period specified in the agreement, any proceeds the agent receives for the sale of produce under the agreement, less:

- any commissions and agents' fees permitted under the agreement
- any extra amounts that may be deducted under the agreement.

Agent's obligation to act in the grower's best interests

The agent must:

- act in the best interests of the grower, which means putting the interests of the grower first and not its own or that of any third party in connection with the sale
- only sell the grower's produce on an 'arm's length basis', unless the agent obtains the grower's prior consent to do otherwise. If an agent sells a grower's produce to a body corporate or individual related to the agent, this would not be at 'arm's length' and would require the grower's prior consent.

Agent's obligation to pursue bad debts for grower

An agent is only obliged to pursue bad debts on the grower's behalf to the extent (if any) provided for in the agreement. Growers and agents should therefore set out in their agreements how bad debts will be pursued.

Agent must periodically report to grower

The agent must give the grower a statement that sets out the produce received during the reporting period specified in the agreement. The statement must be provided to the grower within the statement period specified in the agreement and must include:

- the date(s) of the sale of the produce
- the time and date at which the produce was delivered to the agent
- the type and quantity of the produce sold
- the price received for the produce sold
- details of each amount deducted by the agent from the sale price of the produce
- details of any produce received but not sold by the agent during the period and the reasons why the produce was not sold
- details of any amounts of the produce not sold but destroyed during that period by the agent and details of the costs incurred in destroying the produce
- details of any amounts of the produce not sold and held by the agent at the end of the period.

The agent is not, however, required to give to the grower the name and contact details of the person to whom the produce was sold.

Agent must make records available

An agent must keep records relating to the sale of a grower's horticulture produce under a horticulture produce agreement that has taken place on or after the Horticulture Code's commencement date, for at least 12 months. The agent must allow a grower or their representative to inspect records from the previous 12 months upon request. However, an agent is not required to provide the grower with the buyer's name or contact details.

Providing the grower with buyer's names and contact details

If the grower asks the agent for information for the purposes of recovering the debt, the agent must give the grower the requested information within the period specified in the agreement including the buyer's contact name and contact details if:

- the grower has a bad debt for produce the agent has arranged to sell under the agreement and
- the agreement gives the grower a role in pursuing bad debts.

Rights and responsibilities of merchants of horticulture produce

In addition to a trader's general rights and responsibilities outlined above, the Horticulture Code sets out the following specific duties that apply to a trader trading as a merchant.

Price setting for horticulture produce

The price the merchant pays for the grower's produce must be:

- An amount (rather than a method for calculating an amount).
- Agreed in writing between the merchant and the grower either before, or immediately upon, delivery of the produce to the merchant. A merchant cannot set the price once the produce has been on-sold to a third party.

Fees for services provided under a horticulture produce agreement

The merchant must not charge the grower a fee, a commission or any other amount for services performed by the merchant under the agreement. This provision of the Horticulture Code does not prevent the merchant from deducting statutory levies from the purchase price.

Merchant must report to grower

The merchant must give the grower a statement that provides details regarding the grower's produce received by it during the reporting period specified in the agreement.

The statement must be provided to the grower within the statement period specified in the agreement. The statement must include:

- the quantity and quality of the produce bought by the merchant
- the date(s) of the purchase(s)
- the time at which the produce was delivered to the merchant
- the price paid for the produce.

Dispute resolution procedures

The Horticulture Code provides that growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them.

However, if a grower or trader (the complainant) initiates a dispute under the dispute resolution process set out in the Horticulture Code, the other party (the respondent) must participate in that process as required by the code.

Initial steps to resolve a dispute under the Horticulture Code

A party to a dispute may try to resolve a dispute under the Horticulture Code by notifying the respondent in writing of:

- the complainant's intention to use the procedure set out in the Horticulture Code to resolve the dispute
- the nature of the dispute
- what action the complainant thinks will settle the dispute
- the outcome the complainant wants.

The parties must then try to negotiate a resolution to the dispute.

Appointment of mediators

If the parties are unable to resolve the dispute within three weeks after the notice has been given, and they are unable to agree on a mediator, either party may ask the Horticulture Mediation Adviser (mediation adviser), who administers mediation services under the code, to appoint a mediator for the dispute.

The Horticulture Mediation Adviser compiles a list of suitably qualified and experienced mediators and appoints mediators to conduct mediation on disputes that arise under the Horticulture code.

The Horticulture Mediation Adviser must appoint a mediator within 14 days after receiving this request, from the list of mediators.

Circumstances where a mediator will not be appointed

If the Horticulture Mediation Adviser believes that a complaint giving rise to a dispute is frivolous, vexatious or the same dispute has been the subject of a mediation under the Horticulture Code's dispute resolution procedure before, the mediation adviser will not appoint a mediator.

Mediator will decide arrangements for mediation

The mediator will decide:

- how the mediation is to be carried out (by phone, video conferencing or face-to-face meetings)
- the time and place within Australia for the mediation
- the date that the mediation is to begin.

Parties must attend mediation

The parties, or their representatives, must attend the mediation and try to resolve the dispute. A representative that attends mediation, on behalf of a party to a dispute, must have the authority to enter into an agreement to settle the dispute on behalf of that party.

Reaching agreement

If the parties reach any agreement as a result of mediation, the mediator will:

- set out in writing the terms of the agreement
- give a copy of the terms to each of the parties
- notify the mediation adviser within 14 days of an agreement being reached, that the parties have reached an agreement as a result of mediation.

Mediation may be terminated

A mediation may be terminated by the mediator:

- at any time if the mediator is satisfied that a resolution of the dispute is not likely to occur, or
- at the request of the:
 - respondent, if the dispute has not been resolved within 30 days of the mediation commencing, or
 - complainant, at any time by withdrawing their complaint.

If the mediator terminates the dispute, the mediator will provide a certificate to the mediation adviser and to each of the parties involved that states:

- the names of the parties involved
- the nature of the dispute
- that the mediation has ended
- that the dispute has not been resolved.

Costs of mediation

The costs associated with carrying out the mediation will be subsidised by the Australian Government. However, the parties must pay their own costs of attending the mediation, unless they agree otherwise.

Horticulture produce assessor

Horticulture produce assessors are individuals that have been selected by the Horticulture Mediation Adviser as having the necessary technical skills and independence to investigate and provide a report on any matter arising under a horticulture produce agreement.

At any time, regardless of whether a dispute has been lodged under the Horticulture Code, a party to a horticulture produce agreement may appoint a horticulture produce assessor to investigate and provide a report on any matter arising under the agreement.

A mediator appointed to mediate a dispute under the Horticulture Code's dispute resolution procedures may also appoint a horticulture produce assessor to investigate and provide a report on any matter arising under the agreement in dispute.

Issues that a horticulture produce assessor can investigate or report on

The assessor may only investigate and report on issues referred to the assessor by the parties or the mediator. These issues may include whether:

- any rejection of horticulture produce was in accordance with the parties' horticulture produce agreement and the Horticulture Code
- amounts paid by a trader to a grower were calculated on the basis provided for in the horticulture produce agreement and the Horticulture Code.

Complying with reasonable requests

If a horticulture produce assessor is appointed, traders must comply with reasonable requests made by the assessor for the purpose of investigating and reporting on issues referred to the assessor by the parties or the mediator. For example, if requested, a trader must permit an assessor to inspect:

- any horticulture produce supplied by the grower that is in the trader's possession
- if the trader is trading as an agent, the agent's records that relate to the grower or horticulture produce sold by the agent on behalf of the grower
- if the trader is trading as a merchant, the merchant's records relating to the merchant's trade in the grower's horticulture produce up to the point at which ownership of the produce passed from the grower.

However, the assessor may only inspect records that relate to:

- the period of up to 12 months preceding the date of the assessor's appointment
- trade occurring on or after the commencement date of the Horticulture Code.

Information not allowed in the report

The assessor's report must not contain information that a party is not otherwise entitled to under the horticulture produce agreement or the Horticulture Code, even though the assessor may have had access to this information during the investigation.

For agent arrangements, the assessor may only report to the grower the name and contact details of the buyer of their produce if the grower has a role in the collection of bad debts and the name and the contact details relate to that bad debt.

Assessor's report to be prepared as soon as practicable

The assessor must prepare a report as soon as practicable and give a copy of the report:

- to the parties to the agreement
- to the mediator of the dispute, if there is a dispute for which a mediator has been appointed and the mediator has in turn appointed an assessor.

Costs of a horticulture produce assessor

The costs of a horticulture produce assessor are to be met by the party who appointed the assessor, unless the parties agree otherwise. If, however, a mediator, appointed under the Horticulture Code's dispute resolution procedures, appoints the assessor, each of the parties to the mediation must pay half of the assessor's costs, unless the parties agree otherwise.

Other legal action

Any action taken under the dispute resolution procedure set out in the Horticulture Code does not affect the right of a party to a horticulture produce agreement to bring their own legal proceedings under the agreement or the Horticulture Code, or from approaching the ACCC directly.

When a grower or a trader believes that there has been a breach of the Horticulture Code the affected party may be entitled to damages, court orders to stop the contraventions or other orders such as orders requiring changes to the agreement. Industry participants should seek legal advice from a solicitor on these issues.

However, court action can be costly, time consuming, relationship damaging and without guarantee that the court will provide the desired outcome. It may therefore be more practical to try and resolve the dispute through the dispute resolution scheme provided by the Horticulture Code.

The role of the ACCC

The ACCC administers:

- section 51AD of the Act that prohibits contraventions by corporations of an applicable industry code, such as the Horticulture Code
- section 51AC of the Act that allows the courts, when determining whether conduct is unconscionable, to consider the requirements of any applicable industry code, such as the Horticulture Code.

The ACCC also:

- provides guidance to industry participants about their rights and responsibilities under the Horticulture Code
- raises awareness of the Horticulture Code among industry participants
- when necessary, enforces the provisions of the Horticulture Code and other relevant provisions of the Act by seeking remedies available under the Act.

Although the ACCC records and assesses every complaint, not all complaints are pursued. The information obtained from individual complainants is recorded on the ACCC's complaints database and may be used to establish a pattern of behaviour by a particular industry participant or by a particular part of an industry. The ACCC may give priority to complaints that:

- involve a blatant disregard for the law
- will cause significant public detriment
- include unconscionable conduct against small business.

The ACCC may take action to:

- clarify the reach and meaning of the Horticulture Code and the Act
- achieve an outcome that will have an educational or deterrent effect.

The ACCC is likely to direct complaints to the Horticulture Mediation Adviser at first instance.

However, if an industry participant has blatantly disregarded the Horticulture Code or the Act, the ACCC may take immediate action.

As part of its policy responsibilities the Department of Agriculture, Fisheries and Forestry (DAFF) provides policy advice and support to the Australian Government about issues relating to the horticulture industry and the Horticulture Code. You can find further information regarding the role of DAFF on the DAFF website, www.daff.gov.au/hortcode.

Developing a compliance program

The ACCC encourages all industry participants to develop a trade practices compliance program as a mechanism to help reduce the risk of breaching the Horticulture Code and the Act and to remedy any breach that may have occurred.

For further information on how to develop an effective trade practices compliance program refer to the ACCC's *Small business guide to trade practices compliance programs* on the ACCC website, www.accc.gov.au.

CONTACTS

Horticulture Mediation Adviser

Tel: 1800 206 385
Website: www.hortcodema.com.au
Email: info@hortcodema.com.au

ACCC

Infocentre: 1300 302 502
Website: www.accc.gov.au/horticulturecode
Small business helpline: 1300 302 021
Small business email: small.business@acc.gov.au

ACT (national office)

GPO Box 3131
 CANBERRA ACT 2601
 Tel: (02) 6243 1111
 Fax: (02) 6243 1199
 Publishing unit:
 (02) 6243 1143
 Media liaison:
 (02) 6243 1108

New South Wales

GPO Box 3648
 SYDNEY NSW 2001
 Tel: (02) 9230 9133
 Fax: (02) 9223 1092

Victoria

GPO Box 520
 MELBOURNE VIC 3001
 Tel: (03) 9290 1800
 Fax: (03) 9663 3699

South Australia

GPO Box 922
 ADELAIDE SA 5001
 Tel: (08) 8213 3444
 Fax: (08) 8410 4155

Queensland

PO Box 12241
 George Street Post Shop
 BRISBANE QLD 4000
 Tel: (07) 3835 4666
 Fax: (07) 3832 0372

North Queensland

PO Box 2016
 TOWNSVILLE QLD 4810
 Tel: (07) 4729 2666
 Fax: (07) 4721 1538

Western Australia

PO Box 6381
 EAST PERTH WA 6892
 Tel: (08) 9325 0600
 Fax: (08) 9325 5976

Tasmania

GPO Box 1210
 HOBART TAS 7001
 Tel: (03) 6215 9333
 Fax: (03) 6234 7796

Northern Territory

GPO Box 3056
 DARWIN NT 0801
 Tel: (08) 8946 9666
 Fax: (08) 8946 9600

