



Australian
Competition &
Consumer
Commission

AN OVERVIEW OF THE HORTICULTURE CODE

The Horticulture Code is a mandatory industry code of conduct that has the force of law and came into effect on 14 May 2007

Application of the Horticulture Code

The Horticulture Code applies to the trade of horticulture produce between growers and wholesale traders (traders). Horticulture produce is defined 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.

Any written agreement between a grower and a trader for horticulture produce entered into on or after 15 December 2006 will be subject to the code from 14 May 2007.

The Horticulture Code does not apply if a grower and trader entered into a written agreement before 15 December 2006. 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.

The Horticulture Code requires that traders deal with growers either as an agent on behalf of a grower or as a merchant. An agent is a person who facilitates the sale of horticulture produce on behalf of a grower for a commission or fee.

A merchant is a person who buys a grower's horticulture produce to resell that produce. The term trader refers to both agents and merchants.

The Horticulture Code does not apply to a merchant who exports or retails the produce even if that merchant buys produce directly from a grower.

Terms of trade

Under the Horticulture Code all traders have to make a document publicly available setting out the general terms on which they will trade with growers.

Horticulture produce agreements

A trader and a grower may only trade in horticulture produce if they enter into a horticulture produce agreement. The Horticulture Code does not allow a trader to trade as both an agent and a merchant under the one agreement.

This agreement must be written and signed by all parties to the agreement. If the trader's general terms of trade conflict with a specific horticulture produce agreement, the agreement will prevail.

Trader obligations

A trader must:

- accept horticulture produce delivered under a horticulture produce agreement unless a circumstance specified in the agreement arises that allows the trader to reject the produce
- exercise all reasonable care and skill in handling and storing produce owned by a grower while it is under the trader's control
- pay the grower for produce delivered under the agreement within the period specified in the agreement. 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, after giving written notice of the intention to do so.

Ownership of produce

Ownership of horticulture produce under a horticulture produce agreement passes:

- in an **agent transaction**—directly from the grower to the third party buyer once the produce is sold by the agent
- in a **merchant transaction**—from a grower to a merchant on delivery of the produce to the merchant.

The term 'delivery' is not defined in the 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.



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Where the parties define 'delivery' in their agreement, both parties should obtain legal advice and ensure that the definition and agreement is in accordance with the code and that they are satisfied with the agreement before they sign.

Grower obligations

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 to seek independent legal advice but has decided not to.

Cooling-off period

If the agreement is for 90 days or more, or the term of the agreement is not provided, either party may terminate the agreement within 14 days of entering into the agreement, or within a period agreed by the parties. An agreement may not, however, provide for a cooling-off period that is less than seven days.

Dispute resolution

The parties to a dispute under a horticulture produce agreement must first attempt to resolve the dispute. If the parties cannot resolve the dispute after three weeks, then either party may refer the dispute to the Horticulture Mediation Adviser (mediation adviser) who will appoint a mediator to the dispute from a list of suitably qualified and experienced mediators.

The mediator will decide the arrangements for the mediation and try to help the parties resolve their dispute. The parties to the dispute, or their representatives, must attend the mediation and try to resolve the dispute.

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

Horticulture produce assessor

Horticulture produce assessors are individuals selected by the mediation adviser as having the technical skills and independence to investigate and report on matters arising under a horticulture produce agreement.

The assessor may only investigate and report on issues that have been referred by the parties or the mediator. The costs of appointing the assessor will be met by the party that appoints the assessor, unless the assessor is appointed by the mediator, in which case the parties will equally share the cost of the assessor, unless agreed otherwise.

Other legal action

A party is not prevented from taking any other legal action under the Horticulture Code or a horticulture produce

agreement even when they have already engaged a mediator and/or a horticulture produce assessor to help them resolve a dispute relating to a horticultural produce agreement and the Horticulture Code.

The ACCC's role

Breaches of the *Competition and Consumer Act 2010* (the Act) including breaches of the Horticulture Code, can cause serious detriment to businesses, consumers and the economy. The role of the ACCC is to ensure compliance with the Horticulture Code and the Act by informing traders and growers of their rights and obligations under the law and enforcing the law if necessary.

Other publications about the Horticulture Code

For more detailed information about your rights and responsibilities under the Horticulture Code, the ACCC has published *The guide to the Horticulture Code of Conduct*. This publication can be ordered through the ACCC Infocentre or downloaded from the ACCC website.

ACCC Contacts

Horticulture Mediation Adviser

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Website: www.hortcodema.com.au
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ACCC

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Small business email: small.business@acc.gov.au

For inquiries on the Australian Government policy for the Horticulture Code, contact the Department of Agriculture, Forestry and Fisheries at www.daff.gov.au/hortcode

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Important notice

The information provided here is correct at time of printing and may be subject to change up to 14 May 2007. 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 overview gives you basic information. It does not cover the whole of the *Competition and Consumer Act 2010*, 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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