



# Trade Practices (Horticulture Code of Conduct) Regulations 2006<sup>1</sup>

**Select Legislative Instrument 2006 No. 376**

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I, PHILIP MICHAEL JEFFERY, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Trade Practices Act 1974*.

Dated 13 December 2006

P. M. JEFFERY  
Governor-General

By His Excellency's Command

PETER McGAURAN  
Minister for Agriculture, Fisheries and Forestry for the Treasurer

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**1 Name of Regulations**

These Regulations are the *Trade Practices (Horticulture Code of Conduct) Regulations 2006*.

**2 Commencement**

These Regulations commence on 14 May 2007.

**3 Application**

- (1) Subject to this regulation, the Horticulture Code of Conduct (the *code*) set out in the Schedule applies to traders and growers on and after the commencement day.
- (2) The code does not apply to traders and growers trading under a statutory potato marketing scheme.
- (3) Without limiting subregulation (1), the code applies to:
  - (a) an agent who sells horticulture produce on behalf of a grower to a person on and after the commencement day in respect of that sale; and
  - (b) a merchant who purchases horticulture produce from a grower on and after the commencement day in respect of that purchase; and
  - (c) a grower who sells horticulture produce to an agent or merchant on and after the commencement day in respect of that sale.
- (4) If, on the commencement day:
  - (a) a trader and a grower have a written agreement covering trade in horticulture produce between the trader and the grower; and
  - (b) the agreement was entered into before the day these Regulations are registered on the Federal Register of Legislative Instruments;the code does not apply to trade in horticulture produce covered by that agreement unless the agreement is varied on or after the commencement day.

(5) If an agreement is varied as mentioned in subregulation (4), the code applies to trade in horticulture produce between the trader and the grower under that agreement that occurs after the day the agreement is varied.

(6) In this regulation:

**agent** means a person who sells horticulture produce on behalf of a grower to a person for a commission or fee.

**commencement day** means the day these Regulations commence.

**grower** means a person who grows his or her own horticulture produce for sale.

**horticulture produce** means unprocessed:

- (a) fruits; and
- (b) vegetables, including mushrooms and other edible fungi; and
- (c) nuts; and
- (d) herbs; and
- (e) other edible plants;

but does not include nursery products.

**merchant** means a person who purchases horticulture produce from a grower for the purpose of resale of that horticulture produce, but does not include:

- (a) a person who purchases the produce for export by that person; or
- (b) a person who purchases the produce for retail sale by that person.

**nursery products** includes:

- (a) trees, shrubs, plants, seeds, bulbs, corns and tubers (other than edible tubers); and
- (b) propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers and foliage; and
- (c) cut flowers and foliage.

**statutory potato marketing scheme** means a scheme, established under a State or Territory law, that regulates the marketing, sale or disposal of unprocessed potatoes.

*trader* means an agent or a merchant.

**4 Code of conduct**

For section 51AE of the *Trade Practices Act 1974*, the code set out in the Schedule:

- (a) is prescribed; and
- (b) is a mandatory industry code.

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## Schedule **Horticulture Code of Conduct** (regulation 4)

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## Part 1 Preliminary

### 1 Name of code

This code is the Horticulture Code of Conduct.

### 2 Purposes of code

The purpose of this code is:

- (a) to regulate trade in horticulture produce between growers and traders to ensure transparency and clarity of transactions; and
- (b) to provide a fair and equitable dispute resolution procedure for disputes arising under this code or a horticulture produce agreement.

### 3 Definitions

- (1) In this code:

*agent* means a person who sells horticulture produce on behalf of a grower to a person for a commission or fee.

*bad debt* has the meaning given in subclause (2).

*grower* means a person who grows his or her own horticulture produce for sale.

*horticulture dispute* means a dispute arising under a horticulture produce agreement or this code.

*horticulture produce* means unprocessed:

- (a) fruits; and
- (b) vegetables, including mushrooms and other edible fungi; and
- (c) nuts; and
- (d) herbs; and
- (e) other edible plants;

but does not include nursery products.

*horticulture produce agreement* means an agreement between a grower and a trader under Part 3.

**horticulture produce assessor** means a person listed by the mediation adviser under clause 39.

**mediation adviser** means the person appointed under subclause 31 (1).

**mediator** means a person listed by the mediation adviser under subclause 31 (2).

**merchant** means a person who purchases horticulture produce from a grower for the purpose of resale of that horticulture produce, but does not include:

- (a) a person who purchases the produce for export by that person; or
- (b) a person who purchases the produce for retail sale by that person.

**nursery products** includes:

- (a) trees, shrubs, plants, seeds, bulbs, corns and tubers (other than edible tubers); and
- (b) propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers and foliage; and
- (c) cut flowers and foliage.

**this code** means the Horticulture Code of Conduct.

**trader** means an agent or a merchant.

**trader's terms of trade**, in relation to a trader, means:

- (a) a document published by the trader under subclause 4 (1); or
- (b) if that document is changed by the trader, the document published under subclause 4 (3).

#### **Meaning of *bad debt***

(2) If:

- (a) an agent arranges for a person to buy the horticulture produce of a grower; and
- (b) the person does not pay the agent for some or all of the produce by the time that payment is required for the produce;

the amount owed by the person is a ***bad debt*** of the grower.

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## **Part 2      Trader's terms of trade**

### **4            Trader must prepare and publish terms of trade**

- (1) A trader must prepare, publish and make publicly available a document that sets out the terms and conditions on which the trader is prepared to trade in horticulture produce with growers.
- (2) If the trader changes the terms of trade the trader must prepare a document that sets out the updated terms of trade so that the changes are incorporated into the terms of trade.
- (3) The trader must publish and make the updated terms of trade publicly available in the same way that the original terms of trade were published and made publicly available.
- (4) A trader must give a copy of his or her terms of trade to a grower who asks the trader for them.

### **5            Contents of terms of trade**

- (1) A trader's terms of trade must comply with this code.
- (2) A trader's terms of trade must specify:
  - (a) if the trader is prepared to trade as an agent or a merchant, or both; and
  - (b) any requirements the trader has in respect of the delivery by growers of produce to the trader; and
  - (c) any requirements the trader has in respect of the quality of produce delivered by growers to the trader; and
  - (d) any circumstances in which the trader may reject horticulture produce delivered by a 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; and
  - (e) if the trader is trading as an agent — the period within which the agent will pay to a grower the proceeds of a sale of the grower's produce by the agent; and
  - (f) if the trader is trading as a merchant — the period within which the merchant will pay a grower for the purchase of the grower's produce; and

- (g) the following in respect of any insurance for horticulture produce that the trader may hold:
  - (i) if the trader has insurance for produce under the trader's control;
  - (ii) if the trader has insurance, whether the insurance covers fire, theft and accidental damage (other than deterioration of quality or any other inherent losses);
  - (iii) if the trader has insurance, the name of the insurer and the maximum amount of claims covered by the trader's policy.
- (3) For a trader who is an agent, the terms of trade must also specify:
  - (a) the basis on which commission and agent's fees payable by a grower to the agent, in relation to the horticulture produce traded by the agent on the grower's behalf, are charged (for example, on a percentage basis or a fixed basis); and
  - (b) if payment of any commissions, fees and extra costs is contingent on the sale of a grower's horticulture produce or any other event; and
  - (c) if the agent is prepared to pursue payment for bad debts of the grower and, if so, the terms applying to the pursuing of the payment.
- (4) A trader's terms of trade may include such other matters, not inconsistent with this code, that the trader considers appropriate.

## **Part 3 Horticulture produce agreements**

### **Division 3.1 Agreements**

#### **6 Requirement to have a horticulture produce agreement**

A trader and a grower may only trade in horticulture produce with each other if they have entered into an agreement that complies with this Part.

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**7 Trader cannot be both an agent and merchant under the one agreement**

A trader cannot act as both an agent and a merchant under the one horticulture produce agreement.

**8 Legal advice to be obtained before agreement is made**

- (1) If a horticulture produce agreement is to be for a term of 90 days or more, before executing the agreement, the trader must ask the grower to provide the trader with either:
  - (a) a signed statement by the grower that the grower has received independent legal advice about the agreement; or
  - (b) a signed statement by the grower that the grower has been told by the trader that independent legal advice should be sought about the proposed agreement but has decided not to seek that advice.
- (2) A trader under a horticulture produce agreement that has been operating for 90 days or more must ask the grower to provide the trader with a statement of a kind set out in subclause (1) unless the trader has previously asked for the statement in the circumstances set out in subclause (1).
- (3) The trader must ask the grower for the statement within 14 days after the end of the 90 day period.
- (4) The grower must comply with the request within 21 days after receiving it.
- (5) Subclause (1) does not prevent a trader from requiring a grower to give the trader a signed statement that the grower has received independent legal advice about the proposed horticulture produce agreement.

**9 Minimum terms of horticulture produce agreement**

*Requirements of horticulture produce agreement*

- (1) A horticulture produce agreement must:
  - (a) be in writing; and

- (b) be signed by the parties to it; and
- (c) specify the matters set out in subclauses (2), (3) and (4) as appropriate.

*General matters*

- (2) The agreement must specify:
  - (a) whether the trader is trading as an agent or a merchant under the agreement; and
  - (b) the requirements (if any) the trader has in respect of delivery of produce to the trader by the grower; and
  - (c) the circumstances (if any) 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; and
  - (d) the periods within which information must be given for the purposes of subclause 13 (4); and
  - (e) 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; and
  - (f) the process for varying the agreement; and
  - (g) if the agreement is only to operate for a limited time — the term of the agreement; and
  - (h) any quantity and quality requirements relating to horticulture produce covered by the agreement; and
  - (i) how the trader deals with horticulture produce, provided by the grower under the agreement, that does not meet specified quality or quantity requirements; and
  - (j) the contact details of the person that the grower should contact in the event of a dispute with the trader under the agreement or this code; and
  - (k) the contact details of the person that the trader should contact in the event of a dispute with the grower under the agreement or this code
  - (l) the process for terminating the agreement.

*Matters for agents*

- (3) If the trader is trading under the agreement as an agent the agreement must specify:
- (a) the period within which the agent will pay to the grower the proceeds of a sale of the grower's produce by the agent; and
  - (b) the reporting period for the agreement (see clause 20); and
  - (c) the period after the end of the reporting period during which a statement must be given to a grower for the reporting period (see clause 20); and
  - (e) if payment by the grower of any commissions, fees and extra costs is contingent on the sale of the horticulture produce or any other event; and
  - (f) if commission and agent's fees are charged on a percentage basis, fixed basis, or any other basis and specify the amounts or rates of the commissions and fees; and
  - (g) if the agent will pursue payment for bad debts of the grower arising under the agreement; and
  - (h) if the grower will have a role in pursuing bad debts of the grower.

*Matters for merchants*

- (4) If the trader is trading under the agreement as a merchant the agreement must specify:
- (a) if the price of horticulture produce will be agreed before or upon delivery of the produce to the merchant; and
  - (b) the period within which the merchant will pay the grower for the purchase of the grower's produce; and
  - (c) the reporting period for the agreement (see clause 28); and
  - (d) the period after the end of the reporting period during which a statement must be given to a grower for the reporting period (see clause 28).

*Other matters*

- (5) The agreement may contain such other terms and conditions (if any) not inconsistent with this code as are agreed between the trader and the grower.

**Division 3.2 Inconsistency between code and agreement etc**

**10 Inconsistency**

If a term of a horticulture produce agreement conflicts with this code, this code prevails.

**Division 3.3 Cooling-off period**

**11 Cooling-off period**

- (1) If the term of a horticulture produce agreement is for a period of 90 days or more or is not specified, either party to the agreement may terminate the agreement within:
- (a) 14 days of the agreement being entered into (the *initial cooling-off period*); or
  - (b) such shorter or longer period as is agreed under this clause.
- (2) The initial cooling-off period may be extended if the parties agree.
- (3) The initial cooling-off period may be reduced only if the trader has received a signed statement from the grower under subclause 8 (1).
- (4) The initial cooling-off period must not be reduced by more than 7 days.
- (5) To avoid doubt, if a horticulture produce agreement is terminated during a period mentioned in subclause (1), any trade that has occurred under the agreement before the termination is governed by the terms of the agreement.

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- (6) Any payment, of money or other valuable consideration, that was made for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement, must be returned to the party who made the payment, within 14 days of the termination.
  - (7) A party to the agreement may deduct from the amount to be returned under subclause (6) 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      Other matters affecting trade in horticulture produce**

### **Division 4.1   Agents and merchants**

#### **12      Application**

This Division applies to an agent or a merchant trading under a horticulture produce agreement that the agent or merchant has with a grower.

#### **13      Acceptance by trader of deliveries under an agreement**

- (1) The trader must accept horticulture produce delivered under the agreement except as provided for in this clause.
- (2) The trader may reject the horticulture produce if a circumstance specified in the agreement as a circumstance in which the trader may reject the produce arises.  
*Note* Paragraph 9 (2) (c) provides that the circumstances in which a trader may reject horticulture produce must be specified in the agreement.
- (3) If the trader rejects the horticulture produce, the trader must immediately advise the grower, by telephone, fax, email or other electronic means, that the produce has been rejected.

- (4) After rejecting 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 for the purposes of this subclause.

#### **14 Trader must exercise due care and skill**

- (1) While the grower's horticulture produce is under the control of the trader, the trader must exercise all reasonable care and skill in handling and storage to ensure that the produce remains of the highest quality possible.
- (2) The care and skill must be exercised until:
- (a) in the case of an agent — the ownership of the produce passes to a purchaser of it; or
  - (b) in the case of a merchant — the ownership of the produce passes to the merchant.

*Note* See clause 27 for when ownership passes to the merchant.

#### **15 Time for payment**

- (1) The trader must pay the grower for produce delivered under the agreement within the period specified in the agreement for the purposes of this clause.
- (2) If the trader has not paid an amount due to the grower as mentioned in subclause (1), the grower may take one or both of the following actions:
- (a) suspend any further deliveries under the agreement until the amount owed is paid;
  - (b) cancel the agreement.
- (3) Before taking action under subclause (2), the grower must give written notice to the trader of the grower's intention to take the action.

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## **Division 4.2 Agents and growers**

### **16 Application**

- (1) This Division applies to a trader who is trading as an agent under a horticulture produce agreement that the agent has with a grower.
- (2) The requirements of this Division are in addition to the requirements of Division 4.1.

### **17 Payment of proceeds of sale**

- (1) The agent must pay to the grower any proceeds the agent receives for the sale of produce under the agreement, less:
  - (a) any commissions and agents' fees permitted under the agreement; and
  - (b) any extra amounts that may be deducted under the agreement.
- (2) The payment must be made within the period specified in the agreement for the purposes of this clause.

### **18 Duties of agent**

The agent must:

- (a) act in the best interests of the grower when selling produce under the agreement; and
- (b) not sell the grower's produce, other than on an arm's length basis, unless the agent has first obtained the grower's consent to do so.

### **19 Agent's obligation to pursue bad debts**

The agent must pursue a bad debt of the grower for the sale of the grower's produce under the agreement on the basis, and to the extent, provided for in the agreement.

## 20 Agent must report to grower

- (1) The agent must give the grower a statement for the reporting period, specifying for the grower's produce received by the agent during the reporting period:
  - (a) the date or dates of the sale of the produce by the agent; and
  - (b) the type and quantity of the produce sold; and
  - (c) the price received for the produce sold; and
  - (d) details of each amount deducted by the agent from the sale price of the produce; and
  - (e) the time and date at which the produce was delivered to the agent; and
  - (f) details of any amounts of the produce received by the agent during the period and not sold by the agent during that period; and
  - (g) details of any amounts of the produce not sold during that period but destroyed by the agent and details of the costs incurred in destroying the produce; and
  - (h) details of any amounts of the produce not sold by the agent that is held by the agent at the end of that period; and
  - (i) if produce that is delivered to the agent during the period is not sold by the end of the period, the reasons why the produce was not sold.
- (2) The statement must be given within the statement period.
- (3) The agent is not required to give to the grower under subclause (1) the name or contact details of the person to whom the produce was sold.
- (4) In this clause:

***reporting period*** means the period specified in the agreement as the period for which the agent must report to the grower.

***statement period*** means the period specified in the agreement as the period in which a statement for a reporting period must be given.

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**21 Ownership of horticulture produce does not pass to agent**

Ownership of produce covered by the agreement remains with the grower until the agent sells the produce.

**22 Inspection of records**

- (1) The grower, or a representative of the grower, may ask the agent to provide for inspection by the grower, or the representative, only those records of the agent:
  - (a) that relate to the sale of the grower's produce under the agreement; and
  - (b) that deal with trade occurring on or after the commencement day.
- (2) The request must specify the period that the request relates to.
- (3) The period under subclause (2) must not exceed 12 months before the date of the request.
- (4) If requested under subclause (1), the agent must make available for inspection all of the requested records, other than the names and contact details of the persons to whom the grower's produce was sold.
- (5) In this clause:  
*commencement day* means the day the *Trade Practices (Horticulture Code of Conduct) Regulations 2006* commence.

**23 Provision of information for debt recovery**

If:

- (a) the grower has a bad debt for produce the agent has arranged to sell under the agreement; and
- (b) the agreement gives the grower a role in the pursuing of bad debts; and
- (c) the grower asks the agent for information for the purposes of recovering the debt;

the agent must give the grower the requested information, including the buyer's name and contact details.

## **Division 4.3 Merchants and growers**

### **24 Application**

- (1) This Division applies to a trader who is trading as a merchant under a horticulture produce agreement that the merchant has with a grower.
- (2) The requirements of this Division are in addition to the requirements of Division 4.1.

### **25 Price for horticulture produce**

- (1) The price that is to be paid by the merchant for the purchase of the grower's produce must only be an amount not a method for calculating an amount.
- (2) The amount must be agreed in writing between the merchant and the grower either before, or immediately upon, delivery of the produce to the merchant.

### **26 Fees and commissions**

The merchant must not charge the grower a fee, a commission or any other amount for services performed by the merchant under the agreement.

### **27 Ownership of horticulture produce**

The ownership of the produce passes from the grower to the merchant:

- (a) if the price of the produce has been agreed to by the merchant and grower before delivery — on delivery of the produce to the merchant; or
- (b) if the price of the produce has not been agreed to before delivery — at the time that the merchant and the grower agree on a price for the produce.

*Note* Under clause 25, a price must be agreed to either before the delivery or immediately upon delivery.

## **28 Merchant must report to grower**

- (1) The merchant must give the grower a statement for the reporting period, specifying for the grower's produce received by the merchant during the reporting period:
  - (a) the quantity and quality of the produce bought by the merchant; and
  - (b) the date or dates of the purchases; and
  - (c) the price paid for the produce; and
  - (d) the time at which the produce was delivered to the merchant.
- (2) The statement must be given within the statement period.
- (3) In this clause:

*reporting period* means the period specified in the agreement as the period for which the merchant must report to the grower.

*statement period* means the period specified in the agreement as the period in which a statement for a reporting period must be given.

## **Part 5 Resolving disputes**

### **Division 5.1 General**

#### **29 Dispute resolution procedure**

This Part sets out a dispute resolution procedure for horticulture disputes between growers and traders.

#### **30 When dispute resolution procedure may be used**

- (1) Growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them.

- (2) However, if a grower or trader (the *complainant*) begins the procedure set out in clause 32 to resolve a horticulture dispute with another person (the *respondent*), the respondent and the complainant must participate in the procedure as required by this Part.

## Division 5.2 Mediators and mediation adviser

### 31 Mediation adviser

- (1) The Minister may appoint a mediation adviser.
- (2) The mediation adviser must compile a list of persons who are to be mediators for the purposes of this Part.

*Note* See clause 39 for other functions of the mediation adviser.

- (3) In this clause:

*Minister* means the Minister administering the *Horticulture Marketing and Research and Development Services Act 2000*.

## Division 5.3 Procedure

### 32 Procedure for dispute resolution

- (1) The procedure for dispute resolution for horticulture disputes is as set out in this clause.
- (2) A complainant must give notice in writing to a respondent of a dispute and specify that the complainant is using this procedure to resolve the dispute.
- (3) The notice must specify:
- (a) the nature of the dispute; and
  - (b) what action the complainant thinks will settle the dispute; and
  - (c) what outcome the complainant wants.
- (4) The complainant and the respondent (the *parties*) must then try to resolve the dispute.

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- (5) If the parties cannot resolve the dispute within 3 weeks after the notice being given, either party may ask the mediation adviser to appoint a mediator for the dispute.
  - (6) The mediation adviser must not appoint a mediator if the adviser is satisfied that the complaint giving rise to the dispute is frivolous, vexatious or has been the subject of a mediation under this Part previously.
  - (7) Subject to subclause (8), the mediator must decide:
    - (a) how the mediation is to be carried out (for example, by telephone or in meetings); and
    - (b) the time and place for the mediation; and
    - (c) the day that the mediation commences for the purposes of this Part.
  - (8) The mediation must be conducted in Australia.
  - (9) The parties must attend the mediation and try to resolve the dispute.
  - (10) For subclause (9), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.
  - (11) The complainant may withdraw the dispute at any time.

## **Division 5.4 Mediation**

### **33 Appointment of a mediator by mediation adviser**

- (1) If the mediation adviser receives a request under subclause 32 (5), the adviser must appoint a mediator within 14 days after receiving the request.
- (2) The adviser must give the parties to the dispute details of the mediator appointed.

### **34 Mediator to give notice of mediation**

Within 14 days after a mediation under this Part has started, the mediator must notify the mediation adviser that the mediation has started and the nature of the dispute.

*Note* The mediator decides under subclause 32 (7) when a mediation commences.

### **35 Mediator to give notice of successful mediation**

- (1) If the parties have reached an agreement under a mediation under this Part, the mediator must:
  - (a) set out in writing the terms of the agreement; and
  - (b) give a copy of the terms to each of the parties; and
  - (c) notify the mediation adviser that the parties have reached an agreement.
- (2) Notice under subclause (1) must be given within 14 days after the agreement was reached.

### **36 Termination of mediation**

- (1) The mediator of a dispute under this Part may terminate the mediation at any time if the mediator is satisfied that a resolution of the dispute is not likely to occur.
- (2) If the complainant in a mediation under this Part asks the mediator to terminate the mediation, the mediator must do so.
- (3) If:
  - (a) at least 30 days have elapsed since the start of the mediation of a dispute under this Part; and
  - (b) the dispute has not been resolved;the respondent may ask the mediator to terminate the mediation, and the mediator must do so.

*Note* The mediator decides under subclause 32 (7) when a mediation commences.
- (4) If the mediator terminates the mediation, the mediator must issue a certificate stating:
  - (a) the names of the parties; and
  - (b) the nature of the dispute; and

- (c) that the mediation has finished; and
  - (d) that the dispute has not been resolved.
- (5) The mediator must give a copy of the certificate to:
- (a) the mediation adviser; and
  - (b) each of the parties to the dispute.

### **37 Costs of mediation**

- (1) Each party to a dispute involving a mediation under this Part must pay half of the costs (if any) of the mediation unless the parties to the mediation agree otherwise.
- (2) Each party to a dispute involving mediation under this Part must pay his or her own costs of attending the mediation, unless the parties agree otherwise.
- (3) In this clause, *costs of the mediation* includes all reasonable costs associated with the carrying out of the mediation.

### **38 Contractual rights unaffected by Part**

Nothing in this Part affects the right of a party to a horticulture produce agreement to take legal proceedings under the horticulture produce agreement or this code.

## **Part 6 Horticulture produce assessors**

### **39 List of horticulture produce assessors**

- (1) The mediation adviser must:
  - (a) compile a list of persons who are to be horticulture produce assessors for the purposes of this Part; and
  - (b) publish the list and make it publicly available.
- (2) The list must include, for each person on it, the qualifications the person has that are relevant to the role of a horticulture produce assessor.

#### **40 Role of the horticulture produce assessor**

- (1) The role of a horticulture produce assessor is to investigate and report on any matter arising under a horticulture produce agreement.
- (2) A horticulture produce assessor must be appointed under clause 41 before he or she may act.
- (3) The horticulture produce assessor must not investigate or report on a matter that is not referred to him or her under the appointment.
- (4) Without limiting subclause (1), the assessor may provide a report on the following matters:
  - (a) if a trader under a horticulture produce agreement has rejected horticulture produce under the agreement — whether the rejection of the produce was in accordance with the requirements of this code and the agreement;
  - (b) whether amounts paid by a trader to a grower under a horticulture produce agreement were calculated in accordance with the requirements of this code and the agreement.

#### **41 Appointment of horticulture produce assessor**

A horticulture produce assessor may be appointed by:

- (a) either party to a horticulture produce agreement, regardless of whether a dispute has been notified under Division 5.3; or
- (b) a mediator appointed under Division 5.4.

#### **42 Assistance to horticulture produce assessors**

- (1) If a horticulture produce assessor is appointed under clause 41, each of the parties to the agreement must comply with a reasonable request made by the assessor for the purposes of:
  - (a) investigating the matter referred to in the appointment; and
  - (b) preparing the assessor's report.

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- (2) Without limiting subclause (1), if requested, a trader must permit the horticulture produce assessor to inspect:
- (a) any horticulture produce supplied by the grower under the agreement that is in the possession of the trader; and
  - (b) for a trader trading as an agent, the financial and other records of the agent that relate to the grower, or horticulture produce sold by the agent on behalf of the grower; and
  - (c) for a trader trading as a merchant, the merchant's records that relate 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.
- (3) The records that the assessor may inspect under this clause are those records that:
- (a) relate to the period of up to 12 months preceding the date of the assessor's appointment; and
  - (b) deal with trade occurring on or after the commencement day.
- (4) In this clause:
- commencement day* means the day the *Trade Practices (Horticulture Code of Conduct) Regulations 2006* commences.

### **43 Horticulture produce assessor's report**

- (1) A horticulture produce assessor appointed under clause 41 must prepare a report as soon as practicable and give a copy of the report to:
- (a) the parties to the agreement; and
  - (b) if there is a dispute for which a mediator has been appointed under Division 5.4 and the mediator has appointed the assessor — the mediator for the dispute.
- (2) The horticulture produce assessor's report must not include information that a party is not entitled to obtain under the horticulture produce agreement or under this code (although the assessor may have access to that information under clause 42).

**44 Costs of horticulture produce assessor**

- (1) The costs of a horticulture produce assessor acting under an appointment are to be met by the party who appointed the assessor, unless the parties agree otherwise.
- (2) If a mediator, as part of a mediation under Part 5, appoints a horticulture produce assessor, each of the parties to the mediation must pay half of the assessor's costs arising out of that appointment, unless the parties agree otherwise.

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**Note**

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See [www.frli.gov.au](http://www.frli.gov.au).