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AUSTRALIA

RECOMMENDED CHANGES TO THE HORTICULTURE CODE OF CONDUCT

Horticulture Code of Conduct Review Submission September 2015



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Introduction

Fresh Markets Australia (FMA) represents the Market wholesaling sector nationally, being the main group of businesses impacted by the regulatory requirements of the Horticulture Code of Conduct.

The views of FMA and our constituent members regarding the existing Code are well documented. The Code was introduced without proper consultation, its provisions did not reflect a number of the main observations and conclusions highlighted in the report prepared for the Federal Government by the Centre for International Economics, and parts of the Code were unworkable from the outset as a number of the prescriptive requirements it contained are at complete odds with how much of the industry operates.

Having said all that, FMA and its members are keen to ensure that there is a genuine effort made to make changes to the Code so as to make it a workable and effective tool which can be used to promote the adoption of better commercial practices within the industry.

Importantly, in saying this, FMA highlights that to be effective, the Code must impose obligations on both growers and traders, and that it is impractical and effectively impossible to attempt to drive change within an industry, if obligations under the Code are only imposed on one side of the transaction.

In confirming the role which Australia's six Central Markets have in the industry, it is highlighted that Australia's six Central Markets:

- are supplied by some 15,000 growers;
- have a throughput volume of over 4 million tonnes, with a wholesale value of over \$7 billion annually on-sold by over 400 traders; and
- collectively facilitate 12 million transactions between growers and traders annually.

In reviewing and amending the Code, FMA asks that the Code:

1. Is able to be readily utilised by industry associations to promote better commercial practices within the industry (ie let associations, such as FMA show leadership, through being prepared to support and promote compliance with an industry Code which is fair, commercial and workable).
2. Fairly imposes obligations on all parties and allows growers and traders to document flexible trading relationships which meet their needs in seeking to minimise costs and maximise returns for both the grower and the trader.
3. Can operate as a tool which promotes better business practices, but which also recognises that the vast majority of commercial transactions between growers and traders occur to the satisfaction of all parties, without incident or disputes.



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FMA is therefore proposing a range of changes so as to make the Code workable and remove or amend those requirements which add a regulatory burden with no clear reason why such a requirement exists. We are also proposing amendments which will add clarity in terms of supply of produce and improvements where transparency in relation to merchant sales are made based upon a documented method of determining the return price paid to the grower.

The changes proposed reflect:

- What has been demonstrated to be acceptable to the majority of growers;
- What is considered acceptable to FMA, as the wholesaling sector's national peak industry association; and
- What is considered to be reasonable given the precedents established by the Federal Government in the adoption of the Voluntary Food and Grocery Code of Conduct.

In proposing these changes FMA highlights that:

- There are very low levels of disputation between growers and traders. With Central Market Wholesalers (traders) collectively processing in excess of an estimated 12 million transactions with growers annually, there is no evidence to support any claims that significant levels of disputation or systemic "market failure" exists.
- There is significant access to transparency and clarity available to growers through independent market price reporting services operating in all main Central Markets, the various written reports, digital communications and verbal updates by way of telephone calls made directly by traders to growers and the other services provided by the FMA's Members in each Market. There has been significant evolution and change in the uptake and use of technology over the past decade, and this is being utilised by traders and growers alike to achieve increased levels of communication and transparency. Furthermore, FMA has also introduced FreshSpecs as standard product specifications for "Class One" product and operates FreshTest as the largest national chemical and microbial testing program in the fresh produce industry.
- FMA fundamentally supports the Code providing a framework which promotes better commercial practices through provisions which provide for:
 - the use of documented terms of trade;
 - rejection of produce;
 - specified payment terms;
 - clarity regarding product requirements and being fit for purpose given the advised quality supplied by growers;
 - details regarding the other services provided by traders;
 - a dispute resolution process; and



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- o recognition as either an agent or merchant transaction, including the option for on farm pricing, pricing upon receipt or on being made available for sale, or a price determined subject to a method based around the sale price less an agreed margin.

FMA is however, strongly opposed to clauses which create a cost burden, an uneven playing field and a barrier to growers and traders agreeing to whatever commercial arrangements meet their specific needs.

In relation to changes to the Code, the following comments are made:

1. Application of Code

The stated purpose of the Code (clause 2) is to “regulate trade in horticulture between growers and traders to ensure transparency and clarity of transactions”. Importantly, the purpose specifies the term “traders” which necessarily includes all parties engaged in trading with growers. This includes wholesalers, retailers, exporters and processors. This is therefore the clear intent of the Code.

The only exceptions are provided under the definition of “merchant”, which excludes exporters and parties who “purchase produce for sale by retail”.

If the Code has the objective of providing clarity and transparency and access to a dispute resolution mechanism, it is very easy to argue that the existing exemptions are very arbitrary and without any basis. It should apply to all “traders” sourcing produce off growers.

In terms of what has changed since the introduction of the Horticulture Code, one could argue that the introduction of the Food and Grocery Code of Conduct earlier this year does provide a basis to acknowledge that any party subscribing to that Code, could be excluded from application of the Horticulture Code of Conduct. On that basis, it is logical to conclude that there is justification to conclude that the Horticulture Code of Conduct and Food and Grocery Code of Conduct should cover all parties engaged in the trade of horticulture produce with growers.

FMA is prepared to concede that the Horticulture Code of Conduct should provide an exemption for exported produce and retailers who are signatories to the Food and Grocery Code of Conduct, but believes that all other parties should comply with the Code.

This approach is in keeping with the 2008 ACCC review of the Code.

Application of the Horticulture Code of Conduct must extend right across the fresh produce industry. The only exemptions should be retailers who are subscribers to the Food and Grocery industry Code of Conduct and Exporters, in respect of produce which is exported.

2. Execution of horticulture produce agreements

One significant change proposed seeks to remove a major issue with the existing Code in providing that while having growers executing a horticulture produce agreement is preferred, if they do not execute and



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return the document, but choose instead to continue to send produce – that this behaviour in itself should establish deemed execution of the agreement and compliance with the Code. Of absolute importance is the need to remove from the Code provisions which essentially force traders to break the law simply to maintain the goodwill and support of grower suppliers, who may see little importance or significance in executing a horticulture produce agreement.

If the Government sees significant ongoing merit in the requirement that growers execute a traders horticulture produce agreement before sending produce to that trader, the Code would need to be amended to provide that penalties be imposed on growers for non-compliance.

There cannot be an underlying or unwritten assumption in the Code, as is presently the case, that a trader will sacrifice a long standing relationship with a grower and refuse to sell their produce, just because the grower won't return a horticulture produce agreement and sees no merit or purpose in doing so.

This type of approach is not supported by FMA at this stage and instead, the proposed alternative approach of providing for deemed compliance with this requirement is considered both appropriate and justified in situations where a grower continues to send to the trader.

The Code must include provisions which facilitate deemed compliance with the requirement of the Code that traders must have an executed horticulture produce agreement from each grower, in situations where a grower who has been provided an agreement and requested to return it, fails to do so, but continues to send produce to the trader.

3. Transparency

“Clarity and Transparency” continue to be raised by grower representative organisations as issues, without the specific context as to exactly what they mean.

Central Markets operate as a market and clearing house for produce. The “clarity and transparency” desired should come from the establishment of a market price. This occurs in all Central Markets and there are price reporting services operating in all main Markets, whereby market price information is documented and published. This occurs on all trading days.

Detailed Market Price Reports are available from various Market based providers of these services. These reports are provided on a fee for service basis.

In addition, Market wholesalers have contracts/agreements in place with their suppliers and communicate with their growers in various ways including statements, reports, emails, texts and telephone calls. One significant change over the past decade has been the uptake of digital technology and the use of telephones to quickly send images to growers where product quality problems arise.



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These initiatives are supported by the existence of FreshSpecs – detailed produce specification for Class One produce (see the FMA website <http://freshmarkets.com.au/fresh-specs/>) and FreshTest (<http://freshmarkets.com.au/freshtest/>) Australia's largest chemical and microbial residue testing program.

Clearly, there have been significant changes in this area, while there are also a range of options available for those who want access to more information.

FMA acknowledges however, the argument that the preferred trading option of many traders and growers, which utilises a method of determining the return price to the grower (sales price less a margin) is subject to claims of uncertainty in relation to verification of what the actual sales price is. On this basis, FMA is proposing changes to the Code so that it provides for the inclusion of the “method of determining a price” subject to a further requirement that traders utilising this option will have to disclose the gross value of sales, the deductions being made and the net proceeds of sale figure, and provide for the inspection of sales records (but not the buyer of the produce) upon request.

Options are available to growers to gain transparency, and changes to the Code are proposed by FMA which will address ongoing grower concerns regarding sale price transparency in relation to merchants using a method of determining a return price paid to a grower which is based upon the sale price less an agreed margin.

4. Merchant Transactions - include a method of determining the price

A further significant change proposed includes amending the Code to facilitate a market based return price, based on a “sale price less an agreed margin”. This style of merchant transaction is acceptable to the majority of growers, it is transparent where growers receive third party price reporting information and it does ensure a fair market based return price.

To further improve transparency, FMA is proposing that the amendments made to accommodate this style of transaction do also include requirements that:

- The summary report provided by the merchant in respect of the reporting period includes the gross sales amounts in respect of the sale of the produce by the merchant, the deductions made and the net proceeds payable to the grower, and a provision in the horticulture produce agreement, that upon request, the merchant will provide the grower reasonable access to sales records so as to verify the sale prices achieved by the merchant.
- A further proposed clause provides that sales by a merchant utilising a method of determining price, must be at arm's length.



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The inclusions of a method of determining the return price to the grower has been supported by many growers, but opposed by some grower representative organisations. The proposed changes seek to provide a compromise which gives growers and traders:

- clarity regarding the nature of the transaction;
- transparency through access to the sales prices achieved by the merchant;
- efficiencies through providing flexibility to a transaction style which can assist reducing the red tape and cost associated with agency transactions; and
- certainty in knowing that title passes immediately prior to the sale of the product by the merchant, leaving them responsible to service their customer, collect payment and recover bad debts.

Support for the inclusion of a method of determining the return price to the grower has previously been expressed in the 2008 ACCC's review of the Code.

The Code must permit the types of commercial transactions which are widely adopted and in place within the industry. FMA has proposed changes to the Code which will address grower concerns regarding transparency.

5. Fit for purpose/Acting in good faith

New clauses have been proposed to address the issue of ensuring that any product supplied must be "fit for purpose". A grower who packs produce marked "Class A" or "Grade 1" must expect that any purchasers of that produce will expect that unless disclosed otherwise, it is of a good quality, will be free from blemishes and disease and will have a reasonable shelf life. Clearly, therefore, purchasers of that produce will also expect the right to return that produce and/or claim a discount or reimbursement if it is not "fit for purpose".

A clause relating to "acting in good faith" is also proposed reflecting a similar clause in the Food and Grocery Code of Conduct. This proposed clause re-affirms the overarching intention of FMA and its Members to ensure traders have a good working relationship with their grower suppliers.

It is appropriate that the Code includes requirements that produce supplied by growers to traders must be fit for purpose, while the concept of all parties "acting in good faith" is also supported.

6. Pre-Code Contracts

The existence of "pre-Code contracts" is raised in the Issues Paper as a matter which may be impacting upon the effectiveness of the Code. This statement reflects comments being made by a number of grower representative organisations.



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FMA questions exactly what is the issue? Clearly a grower will only maintain a “pre-Code” contract if they want to be party to that contract. No grower is under any requirement to maintain any such contract or continue to supply any trader with whom they have such a contract.

Growers can tear up any contract at any time and demand a new horticulture produce agreement, they can supply another trader, or they can sell to any other trader in the supply chain.

It is very dismissive and disrespectful of any grower representative organisation to argue that growers who are party to “pre-Code” contracts do not know what they are doing, with the inference that they are all maintaining those contracts under sufferance.

On the contrary, surely this situation clearly demonstrates that the Code is not offering the flexibility and choice which growers want, and that they have acted to avoid the Code by choosing to maintain their pre-Code contracts.

Pre-Code contracts must stay in place until a workable and commercial alternative to the existing Code is in place.

7. Dispute Resolution

FMA is prepared to support the retention of the dispute resolution process detailed in the existing Code, while also acknowledging that more cost effective options may exist.

It needs to be noted that FMA and its members in each Central Market across Australia can and do offer a role in providing cost effective dispute resolution services.

On this basis, FMA would support changes to streamline the dispute resolution process, including formal recognition to the role which FMA and its members do currently play in receiving, investigating and resolving disputes.

The existing Dispute Resolution process can be maintained, however, streamlining of the process and recognition of the role which can be undertaken by industry organisations would be supported.

8. Other Matters

FMA will vigorously oppose any move to introduce penalty provisions into the Code. There has been no evidence presented over the past eight years to support the introduction of penalty provisions. Traders have struggled to comply with the Code because of the unworkable prescriptive requirements of the Code and the lack of support for those unworkable requirements by growers.

Obligations under the Code must apply to both growers and traders. There must be a focus on fairness.



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9. Endorsement and Industry Support

While the Code is mandatory and the Government can rely on the “big stick” approach to promoting industry compliance, surely what the past eight years have shown is that this does not work.

FMA is strongly of the view that any industry Code should be endorsed by industry representative organisations so that they willingly take on a role in promoting support for and compliance with the Code by those the Code is regulating.

The Code must be fair, it must apply obligations on both parties to the transaction, it must be workable and it must be commercial in its application.

Any final amended Code should be endorsed by industry organisations so that they are willingly take on a role in promoting to their members support for and compliance with the Code.

A range of other amendments have been proposed which are proposed so as to make the Code more workable.

Attached for consideration as **Attachment 1**, is a description of the proposed changes. These changes are recommended by FMA in achieving a workable and commercial Code. The proposed changes referenced are included in an amended/marked up version of the Code, which is included as **Attachment 2**. A diagrammatic summary of the proposed amendments are included as **Attachment 3**.

Further arguments supporting the FMA’s proposed amendments to the Code are contained in the other Code review submissions made by FMA.

This submission is made with the unanimous support of FMA’s members representing the Market wholesaling sector across Australia, as detailed below.

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Attachment 1

Recommended Amendments to the Trade Practices (Horticulture Code of Conduct) Regulations 2006

The references to clause and page numbers refer to the attached marked up copy of the Code.

1. Clause 3(2), page 2
Repeal clause 3(2) – This clause is no longer relevant.
2. Clause 3(4), page 2
Retain exemption for pre-Code Contracts. The FMA will not support the removal of the exemption where pre-Code contracts are in place unless increased flexibility is catered for in the amendments to the Code and the document is considered to be workable.
3. Definition of “Merchant” subclause (b) page 3 – to be repealed and the following new subclause (b) is to be included:
“(b) a person who purchases the produce for retail sale by that person, subject to that person also having agreed by written notice given to the Australian Competition and Consumer Commission to be bound by the Food and Grocery Code of Conduct”
4. Definition of “Statutory Potato Marketing Scheme”, page 4 – delete as no longer relevant.

Recommended Amendments to the Horticulture Code of Conduct

1. The Table of Contents has been updated to reflect all proposed amendments, pages 5 and 6
2. Part 1, clause 3(1), page 8
Definition “merchant” – exclusions are provided for which are not appropriate. FMA will support an exemption for exported products and retailers who are signatories to the Food and Grocery Code of Conduct. All other trading relationships should be captured by the Horticulture Code of Conduct. It is proposed that the existing exclusions in the definition are amended as follows:
“(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, subject to that person having agreed by written notice given to the Australian Competition and Consumer Commission to be bound by the Food and Grocery Code of Conduct.”
3. Part 1, clause 3(1), page 8
Definition “trader’s terms of trade”. The code needs to reflect that traders will publically offer standard terms and conditions, but may seek to customise those terms for individual grower suppliers. It is proposed therefore to add the word “standard” so as to read “trader’s standard terms of trade”.
4. Part 2 Trader’s Terms and Conditions, clause 4, page 9
Insert the new word “standard” ahead of the words “terms of trade” wherever it occurs in the clause.



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5. Add a new subclause 4(5), page 9, as follows:

“(5) A trader can offer and agree to terms of trade with a grower which are different to the trader’s standard terms of trade.”

6. Clause 5(2), page 10

Insert a new subclause (h) to facilitate the identification of the additional services provided by the trader for which a service fee/charge may apply, as follows:

“(h) the other services provided by the trader for which an additional service fee/charge may apply”.

7. Clause 8 Legal advice to be obtained before agreement is made, page 11

Clause 8 is harsh and oppressive.

Growers can get legal advice as they see fit. Growers can cease supplying a trader at any time. The current requirement of clause 8 imposes an inappropriate burden and cost on traders which is neither justified nor warranted.

No similar clause exists in the Food and Grocery Code of Conduct.

It is proposed that the entire clause be repealed.

8. Clause 9 Minimum terms of horticulture produce agreement, pages 12 and 13

A number of changes are proposed which provide for the return price to the grower being determined at the time the produce is made available for sale, or pursuant to a method of determining the price. A further change is proposed with the inclusion of a “deeming” provision such that a grower who has been provided an agreement, but who fails to execute and return it to the trader, yet continues to supply that trader, will be deemed to have executed the agreement.

There is an established need to create greater flexibility in how a merchant can operate so as to reflect how the industry wants merchant transactions to occur. There must be the flexibility for a merchant to hold produce while it is warehoused, ripened, repacked etc. In these situations there is a need for the price to be determined on a date later than the date the product is received, and logically this can occur when the product is made available for sale.

Similarly, there is a need for the recognition and inclusion of a “method of determining a price”, which relates to a merchant transaction where the return price paid to the grower could, for example, reflect the merchant’s sale price less an agreed margin. The following amendments are proposed:

- a) Amend subclause 9(1) to read:

“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) and (3) and subject to subclause 9(6) specify the matters set out in subclause (4), as appropriate.”



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- b) Amend clause 9(2), page 13, by inserting a new subclause (m) to specify the additional services offered and the specific charges to apply if those services are utilised, subject to the prior agreement of the grower, as follows:
- “(m) the additional services provided by the trader and the fees/charges to apply should those services be required, subject to the prior agreement of the grower.”
- c) Amend subclause 9(4)(a), page 14, to facilitate the additional options which exist under a merchant transaction. The proposed amendment is as follows:
- “(a) of whether the price of horticulture produce:
- i. will be agreed before or upon delivery of the produce to the merchant, or when the produce is made available for sale, or
 - ii. whether the price of horticulture produce will be determined pursuant to a method of determining the price, and if so, the method of determining the price is described.”
- d) Amend subclause 9(4), page 14, by inserting a new subclause (e) which provides that where a merchant is operating on the basis of an agreed method of determining the return price to the grower (eg the merchant’s sale price less an agreed margin), the grower who supplied the produce sold by the merchant will upon request, have reasonable access to the merchant’s sales records to verify the sales prices. The proposed new subclause is as follows:
- “(e) that where the merchant is operating on the basis of a method of determining the return price, as detailed in the agreement, the grower will upon request, have reasonable access to the sales records in relation to sales made in respect of produce supplied by the grower so as to verify the sales prices. This excludes access to any information relating to who the merchant sold the produce to.”
- e) Add a new subclause 9(6), page 15, as follows:
- “(6) Where a grower has been provided with an agreement for execution and return to the trader, and where the trader can demonstrate proof of delivery of that agreement to the grower, the supply of produce by the grower to the trader, at any time which is seven (7) days after the grower has been provided with the agreement, will be taken as proof of acceptance of the terms of the agreement and the grower will be deemed to have executed the agreement.”
- f) Add a new subclause 9(7), page 15, as follows:
- “(7) An agent, or merchant using a method of determining the return price paid to a grower, may use pooling and price averaging in determining the return price and/or amount payable to a grower. Where pooling and/or price averaging is to be used, the method of pooling and/or price averaging is to be disclosed in the trader’s standard terms of trade or in the agreement with the grower.”



Attachment 1

9. Division 3.3 Cooling off Period, page 16

This clause is neither necessary nor justified. A grower can tear up an agreement at any time and can cease supplying a trader.

There is no logic whatsoever in prescribing a “cooling-off” period.

No similar clause exists in the Food and Grocery Code of Conduct.

It is therefore proposed that the existing Division 3.3 and clause 11 Cooling-off period are repealed to be replaced by a new Division 3.3, see paragraph 10 below.

10. New Division 3.3 Fit for Purpose, page 16

This clause is necessary so as to confirm requirements regarding product quality and any specified quality specifications.

Insert new clauses 11(1), 11(2), 11(3) and 11(4) as follows:

“(1) When supplying horticulture produce a grower must specify in respect of each consignment of fresh produce the quality and specifications in respect of the fresh produce which is being supplied and the horticultural produce supplied must meet the quality and specifications advised by the grower.

(2) Horticulture produce supplied by a grower to a trader must be in accordance with the warranties and representations of the grower in respect of that horticultural produce.

(3) Horticulture produce supplied by a grower to a trader must be fit for purpose in accordance with good production and post-harvest practices, be free from any food safety hazards and it must have an appropriate shelf life having regard to the nature of the horticulture produce and to industry practice with respect to the time during which the produce is to be stored and prepared for sale. Traders can make/process claims against a grower in respect of produce which is shown to not be fit for purpose within a reasonable period of the purchase of that produce by a merchant, or sale by an agent.

(4) The trader may provide for fresh produce standards and quality specifications in their agreement and if so, product received will be assessed against those standards. The trader may reject product which does not meet any required standards and/or quality specifications in accordance with the agreement.”

11. New clause 13(5), page 17

A new clause 13(5) is proposed so as to provide flexibility in allowing a trader to deal with produce which has been received and rejected. The Code otherwise remains silent on the fact that in the vast majority of instances a trader will be authorised/requested by the grower of that product to sell produce which has otherwise been rejected, in endeavouring to achieve the best possible commercial outcome for the grower.

The proposed new clause 13(5) is as follows:

“(5) Where produce is rejected, the trader and grower may, pursuant to their agreement with the grower, accept previously rejected produce as a means of seeking to achieve a fair return for the grower supplier.”

12. Clause 19 Agents obligation to pursue bad debts, page 19



Attachment 1

This proposed change is required so as to allow an agent to recover costs they may incur in seeking to recover a bad debt incurred by a grower.

Amend clause 19 as follows:

Clause 19 Agents obligation to pursue bad debts

- a) The existing clause is to be amended to become subclause (1) and wording amended as follows:
“(1) the agent must pursue a bad debt of the grower resulting from the sale of the grower’s produce under the agreement on the basis, and to the extent, provided for in the agreement.
- b) A new subclause (2) is to be added as follows:
“(2) the agent may, subject to their agreement with the grower, recover all costs incurred in recovering a bad debt, including reasonable administration and on-costs.”

13. Clause 21 Ownership of horticulture produce does not pass to agent, page 21

This amendment is proposed to facilitate agents purchasing the tail end of consignments. This is required to create efficiencies in the processing of consignments.

Amend clause 21 as follows:

- a) The existing clause is to be renumbered subclause (1)
- b) A new subclause (2) is to be included as follows:
“(2) Where after the sale by an agent of any part of a consignment the remaining unsold produce does not constitute a readily marketable quantity, the agent and the grower may agree to the agent purchasing the remaining stock from the grower, and such agreement, despite other provisions of this code, may be on terms agreed between the trader and the grower providing the agreement is on fair and reasonable terms.”

14. Clause 25 Price for horticulture produce, pages 22 and 23

These amendments are proposed to facilitate the use of an agreed method for determining a return price to the grower.

Amend clause 25 as follows:

- a) The existing subclause (1) is to be repealed and replaced by a new subclause (1) as follows:
“(1) The Price that is to be paid by the merchant for the purchase of the grower’s produce:
 - (a) may be an amount; or
 - (b) may be an amount calculate by a method.”
- b) Subclause (2) is to be repealed and replaced with a new subclause (2) as follows:
“(2) The amount must be agreed in writing between the merchant and the grower either before or immediately upon delivery, or immediately prior to being made available for sale by the merchant, or be determined subject to a method of determining the amount as detailed in the agreement.”



Attachment 1

- c) Insert a new subclause (3) which provides that merchants paying a return price to a the grower based upon a method of determining the price, must not sell the produce other than on an arm's length basis. Insert a new subclause (3) as follows:

"(3) a merchant purchasing produce from a grower on the basis of a method of determining the return price to the grower must not sell the grower's produce other than on an arms-length basis, unless the merchant has first obtained the grower's consent to do so."

- d) Insert a new subclause (4) providing that so as to offer flexibility, an "agreed margin" can be achieved on a consignment by consignment basis, or over an agreed period of time, such as a week, or month, so as to allow flexibility to facilitate variable margins being applied depending on fluctuations in merchants selling price, given changes in supply and demand. It could for example be that the merchant and grower agree to a margin of say 16% across the year, which may result in a margin of only say 8% when the market was glutted and the sales price was low or say 20% when the produce was in short supply and the price was higher. It would be up to the merchant and grower to manage the process in accordance with their agreement. The proposed new subclause is as follows:

"(4) the method of determining the price may include a reference to the price at which the produce is sold by the trader and can be nominated as being on a per consignment basis or as relate to a nominated period of time."

15. Clause 26 Fees and charges, page 23

This amendment is required to allow merchants to appropriately charge growers for services provided including sorting, packing, signing, warehousing etc.

The Food and Grocery Code of Conduct allows retailers to charge a range of fees and charges to a supplier, so long as those fees/charges are disclosed in the supply agreement. The same should apply in relation to the Horticulture Code of Conduct.

It is proposed that the existing clause 26 be repealed and replaced with the following new Clause 26 Fees and Charges:

"26 The merchant may charge the grower a fee for services performed by the merchant pursuant to the agreement, providing the services which may be performed by the merchant, and the basis upon which the fee for the services will be determined, are set out in the agreement and that the fee which is charged is a fair and reasonable fee in the circumstances."

16. Clause 27 Ownership of Horticultural Produce, page 23

This amendment is required to provide for a clear position of when title passes under the scenario when the return price is being calculated based on an agreed method of determining the price.

Amend clause 27 by deleting the note to the clause and inserting a new subclause 27(c), as follows:

"(c) if the price of the produce is set by a method of determining the price, immediately before the price is determined by the implementation of the method."



Attachment 1

17. Clause 28 Merchant must report to grower, page 24

- a) Merchants must report to growers and the statement provided must include the information prescribed under clause 28(1). This includes the date or dates of the purchases and the price paid for the produce.

Subclause (d) requires that the merchant must also advise the “time at which the produce was delivered to the merchant”. This requirement serves no real purpose, and accordingly it is proposed that subclause (d) is repealed. What would be more appropriate would be that the report identified the date on which the produce was received by the merchant. A new subclause (d) is therefore proposed as follows:

“(d) the date, or an identifier which can confirm the date, on which the produce was received by the Merchant.”

- b) It is proposed the clause 28 is also amended by renumbering the existing subclause (3), as subclause (4) and inserting a new subclause (3) which provides that the statement provided to the grower in respect of each reporting period must detail the gross sales amount in relation to the sale of the produce by the merchant of the produce supplied by the grower, the relevant deductions made by the merchant and the net proceeds being paid to the grower. The proposed new clause is as follows: “(3) the price paid by a merchant operating on the basis of a method of determining the return price paid to the grower must be based upon the gross proceeds of the sale made by the merchant in respect of the produce supplied by the grower and the statement provided must show the gross proceeds of the sales made, deductions made by the merchant pursuant to the agreement including the merchant’s margin, and the net return to the grower.”

18. Part 5 Resolving Disputes, page 25

- a) Clause 32 Procedure for dispute resolution subclause (2)

It is proposed that this subclause is amended as follows:

“(2) A complainant must give notice in writing to a respondent of a dispute and specify that the complainant is using this procedure to dissolve the dispute. Any notice of a dispute must be given within 30 working days of the date of the transaction the subject of, or giving rise to, the dispute and unless the notice is given this Part 5 shall not apply to the transaction, the subject of, or giving rise to, the dispute.”

19. New Part 7 - Acting in Good Faith, page 31

It is proposed that the following new Part 7 and clause 45 are inserted into the Code, imposing a requirement on all parties to the Code, and any party acting on their behalf to act in good faith in relation to their dealings relating to the Code. This clause is based on a similar clause in the Food and Grocery Code of Conduct.



Attachment 1

"45(1) The trader and grower must at all times deal with each other lawfully and in good faith within the meaning of the unwritten law as in force from time to time.

(2) The trader must not enter into an agreement that contains a provision that limits or excludes the obligation to act in good faith, and if it does, the provision has no effect.

(3) In determining whether the trader has acted in good faith in dealing with a grower, the following may be taken into account:

- a) whether the trader's trading relationship with the grower has been conducted without duress;
- b) whether the trader's trading relationship with the grower has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
- c) whether, in dealing with the trader, the grower has acted in good faith.

(4) Subclause (3) does not limit subclause (1)".



Attachment 2

AMENDED VERSION OF THE HORTICULTURE CODE OF CONDUCT (FMA, SEPTEMBER 2015)



Trade Practices (Horticulture Code of Conduct) Regulations 2006¹

Select Legislative Instrument 2006 No. 376

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

**PROPOSED AMENDMENTS BY FRESH MARKETS
AUSTRALIA (FMA), SEPTEMBER 2015**

(Proposed amendments are included in red)

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. **REPEALED CLAUSE**~~
- (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, **subject to that person having agreed by written notice given to the Australian Competition and Consumer Commission to be bound by the Food and Grocery Code of Conduct.**

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.

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.

(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

The Price that is to be paid by the merchant for the purchase of the grower's produce:

May be an amount; or

May be an amount calculate G by a method.

- (2) the amount must be agreed in writing between the merchant and the grower either before or immediately upon delivery, or immediately prior to being made available for sale by the merchant, or be determined subject to a method of determining the amount as detailed in the agreement.
- (3) a merchant purchasing produce from a grower on the basis of a method of determining the return price to the grower must not sell the grower's produce other than on an arms-length basis, unless the merchant has first obtained the grower's consent to do so
- (4) the method of determining the price may include a reference to the price at which the produce is sold by the trader and can be nominated as being on a per consignment basis or relate to a nominated period of time.

26 Fees and charges

The merchant may charge the grower a fee for services performed by the merchant pursuant to the agreement, providing the services which may be performed by the merchant, and the basis upon which the fee for the services will be determined, are set out in the agreement and that the fee which is charged is a fair and reasonable fee in the circumstances

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.
- (c) if the price of the product is set by a method of determining the price, immediately before the price is determined by the implementation of the method

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 date, or an identifier which can confirm the date, on which the produce was received by the Merchant.
- (2) The statement must be given within the statement period.
- (3) the price paid by a merchant operating on the basis of a method of determining the return price paid to the grower must be based upon the gross proceeds of the sale made by the merchant in respect of the produce supplied by the grower and the statement provided must show the gross proceeds of the sales made, deductions made by the merchant pursuant to the agreement including the merchant's margin, and the net return to the grower.
- (4) 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 dissolve the dispute. **Any notice of a dispute must be given within 30 working days of the date of the transaction the subject of, or giving rise to, the dispute and unless the notice is given this Part 5 shall not apply to the transaction, the subject of, or giving rise to, 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.
- (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.
- (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.

Part 7 Acting in good faith

45 Acting in good faith

- (1) The trader and grower must at all times deal with each other lawfully and in good faith within the meaning of the unwritten law as in force from time to time.
- (2) The trader must not enter into an agreement that contains a provision that limits or excludes the obligation to act in good faith, and if it does, the provision has no effect.

- (3) In determining whether the trader has acted in good faith in dealing with a grower, the following may be taken into account:
- a) whether the trader's trading relationship with the grower has been conducted without duress;
 - b) whether the trader's trading relationship with the grower has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
 - c) whether, in dealing with the trader, the grower has acted in good faith.
- (4) Subclause (3) does not limit subclause (1).

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.



Attachment 3

DIAGRAMTIC SUMMARY OF THE PROPOSED AMENDMENTS TO THE HORTICULTURE CODE OF CONDUCT

SUMMARY OF RECOMMENDED CHANGES TO THE HORTICULTURE CODE OF CONDUCT

(Explanatory only – refer to FMA Submission – Recommended changes to Horticulture Code of Conduct, September 2015 for full detail)

CLAUSES	TRADERS				
	AGENCY	MERCHANT Agree price on farm	MERCHANT Agree price on delivery	MERCHANT Agree price immediately before being made available for sale [CI 25(2)]	MERCHANT Agree method of determining the return price [CI 25(2)] (e.g. Sales Price less a margin)
Signatory to FGCC and Exporters are exempt from the Code [CI 3(1)] Allows standard terms of trade [CI 4]					
TRANSPARENCY					
HPA – to specify how price to be agreed [CI 9(4)(a)]				✓ (i)	✓ (ii) + method
HPA – to specify that upon request the grower can have reasonable access to sales records [CI 9(4)(e)]					✓
HPA – deemed execution if delivery proof and continue to send produce [CI 9(6)]	✓	✓	✓	✓	✓
Terms of Trade/HPA – May use pooling and price averaging to determine price – to be disclosed in [CI 9(7)]	✓				✓
Price paid for produce may be an amount or a method for calculating the amount [CI 25(1)]					✓
Merchant must sell produce at arm's length unless grower consents [CI 25(3)]					✓
Agreed margin can be per consignment or a nominated period of time [CI 25(4)]					✓
Act in good faith [CI 45]	✓	✓	✓	✓	✓
DELIVERY					
FIT FOR PURPOSE					
Grower must specify and meet quality and specifications [CI 11(1)]	✓	✓	✓	✓	✓
Produce must accord with warranties and representations [CI 11(2)]	✓	✓	✓	✓	✓
Must be fit for purpose good production and post-harvest practices; free from food safety hazards, appropriate shelf life – trader can make claims if not Fit For Purpose [CI 11(3)]	✓	✓	✓	✓	✓
Traders can provide standards and quality specifications in HPA and can reject produce if not met [CI 11(4)]	✓	✓	✓	✓	✓
REJECTION					
Trader can accept previously rejected produce as means of seeking to achieve a fair return for grower [CI 13(5)]	✓	✓	✓	✓	✓
SERVICES MAY BE PROVIDED; eg warehousing, ripening, sorting, repacking					
Terms of Trade – plus: other services provided by trader – fees many apply [CI 5(2)(h)]	✓	✓	✓	✓	✓
HPA – plus: subject to prior agreement - other services provided; the fees/charges if required [CI 9(2)(m)]	✓	✓	✓	✓	✓
Merchant can charge fees subject to HPA [CI 26]		✓	✓	✓	✓
DOES TITLE CHANGE FROM GROWER TO TRADER?	No	Yes	Yes	Yes	Yes
SALE					
Payment made to grower within terms	✓	✓	✓	✓	✓
Bad debt belongs to	GROWER	MERCHANT	MERCHANT	MERCHANT	MERCHANT
If agreed in HPA – agent must pursue growers bad debts and may recover all costs incurred and reasonable administration and on-costs [CI 19(1)(2)]	✓				
MERCHANT MUST REPORT TO A GROWER					
The growers produce received on a date, or identifier which can confirm/rather than time delivered [CI 28(1)(d)]		✓	✓	✓	✓
The price paid must be based upon the gross proceeds of the sale and statement must show gross proceeds of the sales made, deductions made pursuant to HPA including margin and the net return to the grower [CI 28(3)]					✓
DISPUTE RESOLUTION					
Notice of dispute within 30 working days of transaction in dispute [CI 32(2)]	✓	✓	✓	✓	✓
Repeal - Legal advice to be obtained before agreement is made [CI 8] Cooling off Period [CI 11]					
LEGEND					
New clauses are in green	Existing clauses are in blue	Amended clauses are in orange			