

Attachment A

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by

Seven Fields Operations Pty Ltd

ACN 106 499 656

1. Person giving the Undertaking

- 1.1 This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Seven Fields Operations Pty Ltd ACN 106 499 656 for the purposes of section 87B of the *Competition and Consumer Act 2010* (CCA) (the Undertaking).

2. Background

Nutrano

- 2.1 Seven Fields Operations Pty Ltd ACN 106 499 656 t/a Nutrano (Nutrano) is principally in the business of growing fruit, but also operates a packing house and wholesale horticulture business, trading in citrus fruits.
- 2.2 Nutrano prepared, published and made publicly available a document that set out the terms and conditions of trade on which it is prepared to trade in horticulture produce with a grower (Terms of Trade).
- 2.3 Between 1 January 2022 and 24 November 2022, Nutrano also traded with 14 growers under standard form Horticulture Produce Agreements (HPAs).

The Horticulture Code

- 2.4 Schedule 1 of the *Competition and Consumer (Industry Codes – Horticulture) Regulations 2017* (Cth) (the Horticulture Code) is a mandatory industry code which applies to agents who sell horticulture produce on behalf of a grower (as defined in clause 5 of the Horticulture Code), among other parties. As an agent who sells horticulture produce on behalf of growers (in Victoria, New South Wales and Queensland), Nutrano is required to comply with the Horticulture Code.
- 2.5 The purpose of the Horticulture Code is to improve clarity and transparency of trade between growers and traders.
- 2.6 The relevant provisions of the Horticulture Code are extracted at Annexure A to this Undertaking. Clauses 11 and 16 of the Horticulture Code set out matters that must be specified in a trader's terms of trade or an HPA respectively. Clause 29 sets out the matters which must be included in a report to be given by an agent to a grower for a reporting period.

The Australian Consumer Law

- 2.7 Under section 23 of the Australian Consumer Law (ACL), which appears as Schedule 2 to the CCA, a term of a small business contract (as defined in subsection 23(4) of the ACL) is void if the term is unfair and if the contract is a standard form contract.
- 2.8 Relevantly, section 24 of the ACL states that a term of a small business contract is unfair if:
- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

Conduct of Concern

Non-compliant HPAs

- 2.9 Between July 2020 and June 2022, Nutrano entered into HPAs with 14 citrus growers. The ACCC considers the HPAs did not comply with clause 16 of the Horticulture Code, as the HPAs did not adequately specify the:
- (a) quality requirements for produce (subclause 16(h));
 - (b) produce specifications that would be used to determine the quality of the produce (subclause 16(i));
 - (c) quality requirements and produce specifications for pooled produce (subclause 16(k));
 - (d) any consequences for fruit that did not meet Nutrano's quality requirements (subclause 16(j)); and
 - (e) reporting period for which Nutrano would report to the grower under clause 29 of the Horticulture Code (subclause 16(m)).

Non-compliant Terms of Trade

- 2.10 Around December 2022, Nutrano published Terms of Trade which the ACCC considers did not comply with the requirement under clause 11(2)(c) of the Horticulture Code, as it failed to adequately specify the requirements Nutrano had in respect of the quality of horticulture produce delivered to Nutrano.

Non-compliant statements to growers

2.11 Between January 2022 and January 2023, Nutrano provided statements to growers which did not comply with subclause 29(1)(d) of the Horticulture Code because the statements failed to report the sale price that Nutrano received for the grower's produce.

Other terms in the HPAs

2.12 The ACCC is concerned that, since around June 2023, Nutrano included terms in its standard form HPA (an example of which is included at Confidential Annexure B and which have been entered with two growers) which gives Nutrano:

- (a) absolute discretion to change the produce specifications and any other criteria used for pre-grading produce (Clause 3.4 "Pre-grading"); and
- (b) the ability to store the grower's produce for a period of time at Nutrano's complete discretion. This may result in the produce being downgraded and disposed of by Nutrano (Clause 3.6 "Grower's Covenants and Acknowledgements").

2.13 The ACCC is concerned that the terms described at paragraph 2.12 are unfair terms within the meaning of section 24 of the ACL in that they:

- (a) cause a significant imbalance in the parties' rights and obligations arising under the HPA;
- (b) are not reasonably necessary in order to protect the legitimate interests of Nutrano; and
- (c) would cause detriment to the growers if Nutrano applied or relied on them,

including because the terms have the effect of denying the growers certainty as to how the quality of their produce will be determined, and whether the grower's produce will be degraded in quality as a result of Nutrano's discretion to store produce before it is sold.

3. Admissions and Resolution

3.1 In response to the ACCC's concerns, Nutrano:

- (a) acknowledges that by engaging in the conduct described in paragraphs 2.9-2.11 above, it likely contravened clauses 11, 12, 16, 23 and 29 of the Horticulture Code, and by doing so, has likely contravened section 51ACB of the CCA;
- (b) acknowledges the ACCC's concerns that the terms in its HPAs described in paragraph 2.12 may be unfair terms within the meaning of section 24 of the ACL;

- (c) has cooperated with and assisted the ACCC during its investigation; and
- (d) has offered this undertaking to the ACCC to resolve the ACCC's concerns.

4. Commencement of this Undertaking

4.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by Nutrano; and
- (b) this Undertaking so executed is accepted by the ACCC (**the Commencement Date**).

4.2 This Undertaking has effect for three years from the Commencement Date (**Term**).

4.3 Upon the commencement of this Undertaking, Nutrano undertakes to assume the obligations set out in paragraphs 5.1-5.6 and 6.1-6.2 for the purposes of section 87B of the CCA.

5. Undertaking

Cease conduct

5.1 Nutrano undertakes that for the Term of this Undertaking, when entering into new HPAs or publishing new Terms of Trade, it will include all matters required by the Horticulture Code.

Corrective action

5.2 Nutrano undertakes to within three (3) months of the Commencement Date and at its own expense to:

- (a) send, to the growers named in Confidential Annexure C, a revised statement for the reporting period 1 January 2022 to 31 December 2022 which specifies the grower's produce received by Nutrano during this period and the price received for the produce sold, including the gross sales price; and
- (b) review and amend its HPAs to comply with subclauses 16(h)-(j) of the Horticulture Code, including to specify:
 - (i) any quality requirements that Nutrano has for produce covered by the HPA;
 - (ii) the FreshSpecs Produce Specifications, or other produce specifications, that are used to determine the quality of produce;
 - (iii) how Nutrano deals with produce that does not meet the quality requirements in the HPA (if any); and

- (iv) for produce that Nutrano intends to pool, the quality requirements and specifications that will be used to determine the quality of the pooled produce.
- 5.3 Nutrano undertakes, for the Term of this Undertaking, that it will not include in its HPA terms that have the effect of providing Nutrano the sole discretion to:
 - (a) change the produce specifications and any other criteria used for pre-grading produce; or
 - (b) store the grower's produce for a period of time after which the produce can be downgraded and disposed of by Nutrano.
- 5.4 Nutrano will not breach this Undertaking by including in its HPA terms allowing Nutrano to reject produce affected by latent quality defects which only become apparent or manifest after the produce has been delivered to Nutrano, provided it acts reasonably and gives relevant growers written notice.
- 5.5 Nutrano undertakes, within three (3) months of the Commencement Date and at its own expense, to:
 - (a) provide a copy of the amended HPA to all growers with whom Nutrano currently has a signed HPA; and
 - (b) provide the ACCC with a copy of the amended statements, as provided to the growers specified in 5.2(a).

Compliance program

- 5.6 Nutrano undertakes that it will, at its own expense:
 - (a) establish and implement a Competition and Consumer Compliance Program (Compliance Program) in accordance with the requirements set out in Annexure D to this Undertaking, being a program designed to minimise Nutrano's risk of future breaches of the Horticulture Code and ACL; and
 - (b) maintain and continue to implement the Compliance Program for the term of this Undertaking.

6. ACCC Enquiries

- 6.1 For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with Nutrano and Nutrano will respond to such enquiries at its own expense and within a reasonable period of time.
- 6.2 If requested by the ACCC during the Term of this Undertaking, Nutrano will, at its own expense, cause to be produced and provide to the ACCC copies of such documents (excluding any legally privileged documents) in its power, possession

or control evidencing Nutrano's compliance with the obligations set out in this Undertaking.

7. Acknowledgements

7.1 Nutrano acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

7.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the CCA for penalties or other remedies in the event Nutrano does not fully implement and perform its obligations under this Undertaking or in relation to any other event.

Executed as an Undertaking

Executed by Seven Fields Operations Pty Ltd (ACN 106 499 656) pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of Attorney	Signature of company secretary
Jeremy Birt	Vladlen Potapenkov
Name of Attorney (print)	Name of company secretary (print)
17th October 2023	17th October 2023
Date	Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 (Cth) on:

20 October 2023

Date

and signed on behalf of the Commission:



Acting Chair

20 October 2023

Date

Annexure A

Extracts of relevant provisions in the Horticulture Code

11 Contents of terms of trade

- (1) A trader's terms of trade must comply with this code.

Civil penalty: 300 penalty units.
- (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 a grower of horticulture produce to the trader; and
 - (c) any requirements the trader has in respect of the quality of horticulture produce delivered by a grower 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 of the produce 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 horticulture 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 horticulture produce; and
 - (g) if the trader has insurance for horticulture produce under the trader's control:
 - (i) the name of the insurer; and
 - (ii) the maximum amount of insurance cover provided by the trader's insurance policy in respect of claims that may be made; and
 - (iii) whether the insurance covers fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).
- (3) For a trader who is an agent, the trader's terms of trade must also specify:
 - (a) the basis on which any commissions, fees and extra costs, payable in relation to horticulture produce traded by the agent on a grower's behalf, will be charged (for example, on a percentage basis or a fixed basis); and
 - (b) whether the payment of any commissions, fees and extra costs is contingent on the sale of a grower's horticulture produce or any other event or kind of event; and
 - (c) if payment of any commissions, fees and extra costs is contingent on an event or a kind of event—the details of the event or the kind of event; and
 - (d) 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.

12 Requirement to have a horticulture produce agreement

- (1) A trader must not trade in horticulture produce with a grower unless the trader has entered into an agreement with the grower that complies with this Part.

Civil penalty: 300 penalty units.

- (2) A grower must not trade in horticulture produce with a trader unless the grower has entered into an agreement with the trader that complies with this Part.

Civil penalty: 300 penalty units.

16 Matters to be specified in horticulture produce agreements

A horticulture produce agreement must specify:

- (a) whether the trader is trading as an agent or a merchant under the agreement; and
- (b) any requirements the trader has in respect of delivery of horticulture produce to the trader by the grower; and
- (c) any circumstances, for the purposes of paragraph 22(2)(b), in which the trader may reject horticulture produce delivered by the grower; and
- (d) the period, for the purposes of subclause 22(4), within which the trader must give the grower reasons for a rejection of horticulture produce delivered by the grower; and
- (e) if the trader has insurance for horticulture produce covered by the agreement:
 - (i) the extent to which the produce is covered by the agreement; and
 - (ii) the maximum amount of insurance cover provided by the trader's insurance policy in respect of claims that may be made in relation to the produce; 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 quality and quantity requirements relating to horticulture produce covered by the agreement; and
- (i) the FreshSpecs Produce Specifications, or other specifications, that will be used to determine the quality of the produce; and
- (j) how the trader deals with horticulture produce, provided by the grower under the agreement, that does not meet the quality or quantity requirements (if any) specified in the agreement; and
- (k) if the trader intends to pool the horticulture produce with other produce:
 - (i) the quality requirements relating to the produce to be pooled; and
 - (ii) the specifications that will be used to determine the quality of the produce to be pooled; and
- (l) the payment period, for the purposes of subclause 35(2), for the delivery of horticulture produce under the agreement; and
- (m) the reporting period for the agreement; and

- (n) the statement period for the agreement; and
- (o) 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
- (p) 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; and
- (q) the process for terminating the agreement.

23 Pooling of horticulture produce

The trader may pool horticulture produce delivered by the grower under the horticulture produce agreement with other produce if:

- (a) the other produce is of the same quality as the horticulture produce delivered by the grower; and
- (b) the quality requirements relating to the produce to be pooled, specified in the horticulture produce agreement, have been met.

Note: Paragraph 16(k) provides for the matters that must be specified in the agreement in relation to horticulture produce that the trader intends to pool with other produce.

29 Agent must report to grower

- (1) The agent must give the grower a statement for a reporting period, specifying for the grower's produce received by the agent during the reporting period:
 - (a) the date on which the produce was delivered to the agent; and
 - (b) the date or dates of the sale of the produce by the agent; and
 - (c) the type and quantity of the produce sold; and
 - (d) the price received for the produce sold; and
 - (e) details of each amount deducted by the agent from the sale price of the produce; and
 - (f) details of any amounts of the produce not sold by the agent during that period, including:
 - (i) the reasons why the produce was not sold; and
 - (ii) details of any amounts of the produce destroyed by the agent, and the costs incurred in destroying the produce; and
 - (iii) details of any amounts of the produce held by the agent at the end of the period.

Civil penalty: 300 penalty units.

- (2) The **reporting period** is the period specified in the horticulture produce agreement as the period for which the agent must report to the grower.
- (3) The statement must be given within the statement period.
- (4) The **statement period** is the period specified in the horticulture produce agreement as the period in which a statement for a reporting period must be given.
- (5) 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.

Confidential Annexure B

Example of Nutrano standard form HPA (as at June 2023)

Annexure D

HORTICULTURE CODE COMPLIANCE PROGRAM

LEVEL 1

Seven Fields Operations Pty Ltd ACN 106 499 656 t/a Nutrano (Nutrano) will establish a Horticulture Code compliance program (Compliance Program) that complies with each of the following requirements:

Appointments

1. Within one (1) month of the undertaking under s 87B of the *Competition and Consumer Act 2010* (Cth) (CCA) provided by Nutrano to the ACCC (Undertaking) coming into effect (Commencement Date), Nutrano will appoint a director or a senior manager as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (Compliance Officer).

Compliance Officer Training

2. Within four (4) months of the Commencement Date, Nutrano will ensure that the Compliance Officer attends practical training focusing on the Horticulture Code.
3. Nutrano will ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.

Staff Training and Induction

4. Nutrano will ensure that the Compliance Program includes a requirement for all directors and employees of Nutrano, whose duties could result in them being concerned with conduct that may contravene the Horticulture Code to undergo regular training that focuses on Horticulture Code compliance (Staff Training).
5. Nutrano will ensure that the Compliance Program includes a requirement that awareness of Nutrano's obligations under the Horticulture Code forms part of the induction of all new directors and employees whose duties could result in them being concerned with conduct that may contravene the Horticulture Code (Induction).
6. Nutrano will ensure that the Staff Training and Induction is conducted by the Compliance Officer (once trained) or a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
7. Within six (6) months of the Commencement Date, Nutrano will implement Staff Training on Horticulture Code compliance, and will at its own expense provide to the ACCC documents to verify that such training has occurred.
8. Following the first implementation of Staff Training, Nutrano will conduct Staff Training at least once every 12 months.

Provision of Compliance Program Documents to the ACCC

9. Nutrano will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than 4 years.
10. If requested by the ACCC during the period of 4 years following the Commencement Date, Nutrano will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 10.1. Staff Training and Induction materials;
 - 10.2. a written statement or certificate from the Trainer who conducts the training referred to in paragraphs 2 and 4, verifying that such training has occurred.

ACCC Recommendations

11. Nutrano will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that Nutrano maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.