



AFPA Submission to:

***Independent Review of the Food
and Grocery Code of Conduct
2023-24***

March 2024

About the Australian Fresh Produce Alliance

The Australian Fresh Produce Alliance (AFPA) is made up of Australia's key fresh produce growers and suppliers. The members include:

- Costa Group
- Perfection Fresh
- Montague
- Pinata Farms
- Fresh Select
- Mackay's Marketing
- Driscoll's
- Australian Produce Partners
- Premier Fresh Australia
- Rugby Farming
- Fresh Produce Group.

These businesses represent:

- half the industry turnover of the Australian fresh produce (fruit and vegetables) sector - \$10 billion total
- a quarter of the volume of fresh produce grown in Australia - 1 million of the 3.9 million tonne total
- more than a third of fresh produce exports - \$410 million of the \$1.2 billion export total
- more than 1,000 growers through commercial arrangements, and
- more than 15,000 direct employees through peak harvest, and up to 25,000 employees in the grower network.

The key issues the AFPA is focusing on include:

- packaging and the role it plays in product shelf life and reducing food waste landfill,
- labour and the need for both a permanent and temporary supply of workers,
- market access to key export markets for Australian produce,
- product integrity both within and outside of the supply chain,
- pollination and research into alternative sources, and
- water security, including clear direction as to the allocation and trading of water rights.

The AFPA's aim therefore is to become the first-choice fresh produce group that retailers and government go to for discussion and outcomes on issues involving the growing and supply of fresh produce.

Products grown by AFPA Member companies include:

Apples	Blueberries	Cherries	Nectarines	Raspberries
Apricots	Broccoli	Fioretto	Onions	Salad leaf
Asparagus	Broccolini	Green Beans	Oranges	Spinach
Avocado	Brussel Sprouts	Herbs	Peaches	Strawberries
Baby Broccoli	Butternut	Lemons	Pears	Sweet Corn
Baby Corn	Pumpkin	Lettuce	Pineapples	Table grapes
Bananas	Cabbage	Mandarins	Plums	Tomatoes
Beetroot	Cauliflower	Mango	Potatoes	Water Cress
Blackberries	Celery	Mushrooms	Cucumber	Wombok

Summary

The Australian Fresh Produce Industry (AFPA) welcomes the opportunity to provide feedback to the Independent Review of the Food and Grocery Code of Conduct (the Review).

Australia's economy is in the midst of a challenging period. As widely publicised, many Australian families are experiencing cost of living issues, having to make difficult decisions around how to allocate their household budgets, which is resulting in a softening demand for fresh produce (fruits and vegetables).

At the same time, the cost of producing fruit and vegetable has increased by 18.9% over the past four years, largely driven by increases in labour (20.7%), energy (20.0%), capital (22.3%) and other production input costs (19.3%), such as fertiliser. Labour accounts for around 52% of the total cost of production on average. While the consequences of the COVID-19 pandemic initiated many workforce challenges, the largest increase in the cost of labour, 12.1%, has occurred in the last two years due to a range of reasons, including both economy-wide changes, such as increases to the national minimum wage and superannuation, as well as more specific changes to the industry, such as amendments to the Horticulture Award and Pacific Australia Labour Mobility Scheme.

Softening demand and increasing production costs, coupled with other challenges experienced by many growers, including extreme weather events and supply-chain disruptions, has created an incredibly difficult operating environment for many fresh produce businesses, testing the industry's viability and resilience.

Of the fresh produce grown in Australia, approximately 60% is supplied to the domestic market for fresh consumption, 30% goes to processors and only 10% is exported. Of note, 97% of fresh fruit and vegetables consumed in Australia is grown in Australia. This near 100% saturation of the local market, and limited overseas market access for fresh produce, mean that the industry's growth is confined to Australia's population growth and that the fresh produce industry, unlike broader agriculture which exports around 72% of their produce, is significantly dependent on the domestic grocery retail sector.

Like many sectors of the Australian economy, the domestic grocery retail sector is highly concentrated. Growers have been operating in this environment for decades. In 1995 the share of products sold through Coles was 26% and Woolworths 32%¹ and in 2022-2023 it was Coles 28% and Woolworths 37%². There is understood to be around four hundred direct suppliers of fresh produce to the major supermarkets. Direct suppliers must meet a range of health, safety and ethical sourcing requirements and specifications and have invested in infrastructure and resources to enable them to meet orders and transact reliably, as well as work with other growers to aggregate produce for supply. The majority of direct suppliers would rely on third-party supplier growers to meet orders, and can therefore also be considered wholesalers as well.

Growers that are direct suppliers to the supermarkets and Metcash are a minority of the broader horticulture industry. ABS data indicate there are around 18,300 fruit nut and vegetable growing business, 96% are defined as small businesses (non-employed or employ between 1-19 people).

There are two Codes that currently operate in the horticulture industry, the Horticulture Code of conduct (Hort Code) and the Food and Grocery Code. These two Codes serve different purposes and apply to different components of the supply chain – together they regulate the majority of fresh produce business to business transactions.

The Hort Code is mandatory and focuses on the business relationship between supplier growers and processors or traders (aggregator growers / wholesalers). The Hort Code clearly identifies and defines trading relationships and requires all suppliers to be provided a Horticulture Produce Agreement (HPA) which outlines terms of trade, including methodology for agreement or reporting of price. The Hort Code is of most relevance to businesses that operate in one of the five central markets around Australia. These businesses are typically referred to a 'wholesalers' of fresh produce.

¹ [2020 Industry at the crossroads \(2011\)](#) – Australian Food and Grocery Council

² [Independent Review of the Food and Grocery Code of Conduct 2023-24 Consultation Paper](#) – Commonwealth Treasury

The Food and Grocery Code, the subject of this review, is a set of guidelines and principles aimed at fostering fair and transparent relationships between suppliers and dominate retailers (Woolworths, Coles, ALDI & Metcash [IGA]). The consultation paper proposes combining the Hort Code and Food and Grocery Code, however this would diminish the potential of both documents to deliver on their purpose. The two Codes should complement each other by remaining focused on separate parts of the supply chain.

The purpose of the Food and Grocery Code (the Code) remains appropriate, its objective should be to continue providing guardrails to support and set minimum-standards for fair business dealings between suppliers and major retailers, and provide an avenue to address unacceptable outlier behaviours. The Code should not be reformed to dictate everyday business transactions or regulate prices as this would undermine the free-market principles on which Australia's economy operates.

The Code should also remain voluntary, consistent with the recommendation and reasoning of the 2018 independent review of the Code by former ACCC Chair, Professor Graeme Samuel AC. The Code should not be made mandatory unless there is a strong reason to need to compel a party to become a signatory to the Code. Currently, Woolworths, Coles, ALDI and Metcash, which collectively represent 82% of the grocery retail sector, are all signatories to the Code. The Code is legally binding and enforceable by the ACCC once agreed to. The Code was introduced to address the market power imbalance that exists, and therefore the current signatories to the Code are sufficient to achieve its purpose and intent.

A mandatory Code would also create a more complex operating environment and may increase the cost of fresh produce if amendments aren't made (to the Code's definitions among other areas) to ensure growers that aggregate produce to supply retailers aren't unintentionally captured as wholesalers, adding to their regulatory burden. A voluntary code also allows for more dispute resolution options and an efficient compensation mechanism. The Code also doesn't have to be made mandatory to be made stronger, more effective or to increase supplier engagement with the Code.

The Code has made an impact as an effective deterrent and improved the trading environment as concluded by the 2018 review of the Code. While it is difficult to measure the Code's success, this improvement is partially validated by the results of the survey conducted by the Code's Independent Reviewer, Chris Leptos AO, which shows an improved trading environment in 2022/2023 compared to 2020/2021. Furthermore, in 2022/23, a majority of suppliers (86%) responded to the survey that they were fairly treated by retailers either always or mostly.

However, the survey results also confirmed issues remain that need to be addressed and, in general, fresh produce suppliers described a poorer experience dealing with retailers compared to other suppliers. This aligns to public and private commentary from growers and industry representatives that indicate changes are required to the Code, especially to better accommodate perishable produce. At a minimum, timeframes within the code relating to price negotiations (*Section 27* of the Code) and investigations of issues (*Section 35*) must be reduced to better align to the time-sensitive nature of dealing in fresh produce. The AFPA recommend Government establish a time-limited working group of fresh produce suppliers, industry representatives, retailers and other relevant stakeholders to further explore how fresh produce can be better accommodated in the Code.

Changes must also be made to improve utilisation of the Code when issues arise, including changes to Code Arbiters, charged with investigating and ruling on issues. The Independent Reviewer's Annual Report stated that 45% of suppliers believed there was an impediment to raising an issue with a Code Arbiter, chiefly *'fear of retribution'*, *'fear of damaging a commercial relationship'* and/or *'not confident confidentiality would be maintained'*. This, rightly or wrongly, indicates that suppliers have a perception of a conflict of interest between the current Code Arbiters and signatories to the Code (retailers). Further, the Independent Reviewers Report stated that Code Arbiters *"reported a significant increase in the volume of enquiries and supplier complaints raised with them"* since changes were made to allow arbiters to engage with suppliers without the need for a formal complaint to be lodged. Therefore, there is an obvious need to create greater separation between the Code Arbiters and signatories to the Code, and to ensure suppliers can engage with an independent arbiter in an informal, discreet manner.

There is also a need to consider the Codes limitations, and therefore the Arbiters abilities to engage in and resolve disputes. The Code attempts to define, encourage, and enforce retailers to deal in 'good faith' and regulate other broad areas that are complex and can be difficult to capture in specific text, although the intent is clear. Situations arise that are not specifically described in the Code, but are never-the-less unjust. There is value in providing suppliers with a mechanism for mediating those issues, or at the very least capturing them so that they can be considered for inclusion at the next review of the Code.

Government must also make an effort to better educate suppliers on the Code (post-review and amendments), and other related regulatory instruments/protections, to ensure suppliers are informed and therefore more confident to advocate for their rights.

Much of the success of the Code to date can be attributed to its effectiveness as a deterrent. Civil penalties should be included for signatories that breach the code and the current compensation limit, \$5 million, should be increased, for instances where, for example, a signatory is found to have breached the Code intentionally and consistently over a prolonged period.

The ACCC must also take a more proactive and larger role in enforcing and support the Code. The consultation paper states, *'The ACCC has indicated it will not commit extensive resources to regulate compliance with the Code as it ... does not provide the ACCC with meaningful compliance and enforcement tools'*. This must be addressed, and if the ACCC requires additional resources to effectively support the implementation of the Code, the Government should make this commitment and investment. Like all penalties and standards, they are only effective if they are enforced. The openness in which the ACCC state their reason for not to regulating compliance with the Code also undermines its effectiveness and diminishes supplier confidence to utilise the Code.

Finally, the Code should be seen by Government as just one of several avenues available to support the fresh produce industry, mitigate the challenges posed by the high-market concentration of the grocery retail sector, and get better outcomes of Australian households. For example, Government should also look to enhance international market access for Australian fresh produce to provide growers more market options and reduce their dependence on the limited number of domestic retailers. This would better position growers to negotiate fair terms and prices for their produce, as well as increase buyer competition, foster a more equitable playing field, encourage retailers to enhance their offerings, innovate, and respond more attentively to suppliers. Improving international market access will also create a more resilient fresh produce industry in Australia, drive its growth and innovation, which in turn benefits the domestic consumers by improving local supply and creating greater price stability through efficiency gains and greater economies of scale.

The fresh produce industry and its ongoing supply of nutritious and safe fruit and vegetables plays a crucial role in the health and well-being of Australia's population, underpins national food security and is a major contributor to the economy. A profitable and sustainable fresh produce industry is in Australia's national interest, and the AFPA thanks the many politicians, public figures and other parties that have recently voiced their support for making the industry more viable. The AFPA supports pragmatic solutions to our industry's issues and looks forward to engaging further in the review of the Code and the broader conversation on grocery prices and what is contributing to the increases at a farm level.

Recommendations

Recommendation 1: The Code’s primary purpose should remain addressing the imbalance of market power between supermarkets and their suppliers and, therefore, its current objectives are fit for purpose.

Recommendation 2: The Code should remain voluntary because:

- its current coverage (Woolworths, Coles, ALDI and Metcash) is sufficient to drive intended outcomes,
- a mandatory Code would create a more complex operating environment and increase the cost of fresh produce,
- a voluntary code allows for more dispute resolution options,
- a voluntary Code achieves greater buy-in from signatories, and
- the Code doesn’t have to be made mandatory to be made stronger

Recommendation 3: That the Code should not be extended to smaller retailers and green grocers, to ensure the Code’s purpose and intent remains focused on addressing the imbalance of market power between major supermarkets and their suppliers.

Recommendation 4: That the definitions provided within the Code, that outline the relationships between retailers, wholesalers and suppliers be reviewed and amended to better support the purpose and intent of the Code, and not inadvertently capture growers that aggregate produce for supply.

Recommendation 5: That the ACCC undertake a robust awareness and education campaign designed to increase supplier knowledge of the Code and its protections upon completion of this Review and any associated amendments to the Code.

Recommendation 6: Amend the Code to create greater separation between Code Arbiters and the signatories to improve perceived and real independence of the Arbiters, for example by introducing an ‘independence test’ and/or changing the arbiter appointment process.

Recommendation 7: That suppliers be provided an independent and confidential point of contact, to assist in determining if an issue is covered by the Code or another instrument, such as the *Competition and Consumer Act 2010* or *Horticulture Code of Conduct*.

Recommendation 8: That a mechanism be introduced to mediate issues not specifically covered by the Code (or another instrument), in recognition of the Code’s intent to mandate dealing in “good-faith”, but practical challenge of describing how to meet this requirement in all scenarios and conditions.

Recommendation 9: That civil penalties be introduced at an appropriate maximum sum to increase the Code’s deterrence of unfair practices and provide adequate punishment for breaches that are demonstrated to be intentional.

Recommendation 10: That supplier compensation limitations be reviewed, with the intention of increasing the current cap to ensure any instances of prolonged, intentional wrongdoing or the like can be adequately compensated.

Recommendation 11: That the Australian Competition and Consumer Commission receive appropriate resources to improve outcomes for Australian consumers and suppliers under the Code.

Recommendation 12: That a fresh produce industry working group (of suppliers, retailers, and Government representatives) be established to determine amendments to the Code that would enable it to better fulfill its purpose for (perishable) fresh produce trade.

Recommendation 13: That the Horticulture Code of Conduct and the Food and Grocery Code of Conduct remain separate regulatory instruments to ensure that both codes can be best tailored to effectively deliver their purposes and match the different trading environments.

Recommendation 14: Government seek to improve and prioritise market access for Australian fruit and vegetables as a means to better offset domestic competition challenges, support industry growth and resilience, and provide Australian consumers with improved supply security and price stability.

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1. Introduction

The Australian Fresh Produce Alliance (AFPA) welcomes the opportunity to provide feedback to the Independent Review of the Food and Grocery Code of Conduct 2023-24 (the Review).

While further improvements can be made, the Food and Grocery Code of Conduct (the Code) has become an important instrument for promoting fair and transparent dealings between retailers and suppliers in the fresh produce sector. The AFPA supports this timely review of the Code and acknowledges the efforts of all parties to help improve the Code to better deliver on its objectives. This submission aims to contribute insights from the fresh produce (fruit and vegetable) industry perspective to further enhance the effectiveness of the Code in promoting a thriving and sustainable food and grocery sector.

The submission includes important context on the current trading environment, make-up of the industry and realities of doing business in the fresh produce industry. The submission also provides a brief background on the Code, the 2018 independent review of the Code, and recent key pieces of information in the Independent Reviewers 2022/23 Annual Report. Drawing on this context and background, section 4 of this submission presents the AFPA's response to the consultation questions and recommendations.

Beyond this submission, the AFPA would welcome the opportunity to continue engaging in this Review and any forthcoming outcomes, including reviewing draft changes to the Code.

2. Context – The Fresh Produce Industry and Retailers

Horticulture is Australia's third largest agricultural sector by value and includes fruit, vegetables, nuts, flowers, turf and nursery products. The focus of this submission will be on the fruit and vegetable (fresh produce) industry within horticulture.

The fresh produce industry and its ongoing supply of nutritious and safe fruit and vegetables plays a crucial role in the health and well-being of Australia's population, underpins national food security and is a major contributor to the economy, particularly in regional communities. A profitable and sustainable fresh produce industry is in Australia's national interest.

Key Facts

The following key facts and information, sourced largely from Hort Innovation's *Australian Horticulture Statistics Handbook 2022/23*³, provide valuable context and a snapshot of the fresh produce industry:

- In 2022-23, the total production value of the fresh produce industry was \$12.15 Billion, and it is estimated to directly support between 65,000-80,000 full-time-equivalent positions⁴.
- Australia produced 6,237,739 tonnes of fresh produce, the majority for fresh supply to the domestic market (61.6%) or for processing (28.9%).
- Unlike Australia's broader agriculture industry that exports around 72% of its production⁵, the fresh produce sector only exports 9.7% of its volume to overseas markets (due to several reasons, including limited market access, despite free trade agreements with several key trading partners).
- Australia only imports 2.9% of produce for fresh supply, meaning 97.1% of fresh fruits and vegetables consumed in Australia are grown in Australia.
 - Of note, the lack of overseas growth opportunities and near 100% saturation of the local market mean that the industry's growth is confined to Australia's population growth. This is a key challenge to the long-term viability of the sector and aggravates domestic competition issues.
- Of the total local fresh supply (3,938,334 tonnes), 83.5% goes to retail for household purchase, this encompasses supermarkets, green grocers, farmers markets, etc., and 16.5% goes to food service, such as cafes, restaurants, hotels, etc., typically via the wholesale markets in each state and territory.

³ [Australian Horticulture Statistics Handbook 2022/23](#) - Hort Innovation

⁴ [Contribution of Australian horticulture industry](#) – Hort Innovation

⁵ [Snapshot of Australian Agriculture 2023](#) - DAF

Industry Profile – A large number of small businesses and a small number of large businesses

Australia’s diverse climate enables more than 100 varieties of fruit and vegetable to be grown productively in regions around the country. This advantageous environment has enabled a large-number and wide-variety of fruit and vegetable producing businesses to be established.

As of 30 June 2023, ABS data⁶ indicates there are 18,325 fruit, vegetable and nut producing businesses in Australia. Around two-thirds, 12,371, are non-employing entities and 5,217 employ between 1 to 19 people, which means 96% of the industry are ‘small businesses’ by ABS definition. Of the remaining 4% of businesses, 709 employ between 20 and 199 people and only 29 businesses employ over 200 people. This data demonstrates that the fresh produce industry is made up of a large number of small businesses and a small number of large businesses, which is further validated by additional ABS data provided in *Table 2: Fruit, vegetable & nut businesses categorised by total turnover* (below).

Table 1: Fruit, Vegetable & Nut Businesses by employment size

	Non-Employing	1 to 19 Employees	20-199 Employees	200+ Employees	Total
2023 Businesses	12371	5217	709	29	18325

Table 2: Fruit, Vegetable & Nut Businesses by total turnover

	Zero to \$49k	\$50k to \$199k	\$200k to \$1.99m	\$2m to \$4.99m	\$5m to \$9.99m	\$10m or more	Total
30 June 2023 Businesses	5,913	5,169	5,782	870	319	270	18,325

Retail sector – industry has been dealing with a concentrated market for 30 years.

In 1995, the share of products sold through Coles was 26% and Woolworths 32%⁷. In 2022-2023, the share of products sold through Coles was 28% and Woolworths 37%⁸. While ALDI’s entrance in 2001 to the Australian market can be credited for reducing the dominance of Coles and Woolworths during the early 2000’s, which peaked at a combined market share of around 88%, there has been little change to the fact that producers have been dealing with a highly concentrated market for over three decades. This has occurred during a period of further economic deregulation, especially in the agricultural sector.

Market concentration is not unique to the supermarket sector. Australia, for a variety of reasons, has several sectors in its economy where there is high market concentration such as banking, telecommunications, airlines, energy, media, etc. Factors contributing to this trend include Australia’s relatively small population, vast geography, global isolation, and (related and other) challenges for new entrants to establish a presence. Similar factors also make it advantageous in Australia for companies to achieve economies of scale, particularly when significant infrastructure and real estate is required to operate, such as distribution centres and shopfronts. This has led to a number of mergers, take-overs and the like in Australia, creating companies with superior market concentration.

There have been multiple government inquiries and reviews into Australia’s concentrated markets, including the supermarket sector, and progress has been made to improve competition and consumer outcomes. However, the reality is Australia’s market characteristics are unlikely to change in the near future, and therefore market concentration will remain in many sectors, including supermarkets. Creating a fair environment for trade in these sectors is crucial.

⁶ 8165.0 Counts of Australian Businesses, including Entries and Exits - ABS

⁷ 2020 Industry at the crossroads (2011) – Australian Food and Grocery Council

⁸ Independent Review of the Food and Grocery Code of Conduct 2023-24 Consultation Paper – Commonwealth Treasury

Retail Suppliers – Only a few hundred growers deal directly with Coles, Woolworths, and ALDI

Anecdotally, it is understood that Australia’s major retailers’ source approximately 85-90% of their fresh produce from growers/suppliers directly, and the remaining amount is “spot purchased” from one of Australia’s wholesale markets.

There is also understood to be around 400 direct suppliers of fresh fruit and vegetable to the major retailers (Coles, Woolworths, and ALDI), with approximately half of these businesses being high-volume suppliers, across multiple product lines. Not all suppliers have arrangements with every retailer, some deal exclusively with one, some deal with multiple.

Direct suppliers are often referred to as Tier 1 suppliers and must meet a range of standards and requirements to attain this status, as well as invest in the infrastructure, machinery, and people to enable them to deal in large quantities of produce. For perspective, Australians consume approximately 5,000,000 bananas every day⁹.

It’s common for direct suppliers to aggregate produce from smaller producers (Third-Party Growers) to be able to meet retailer orders and provide year-round supply. These Third-Party Growers do not directly interact with the retailer, but with the accredited supplier grower, and are commonly referred to as Tier 2 or 3 suppliers.

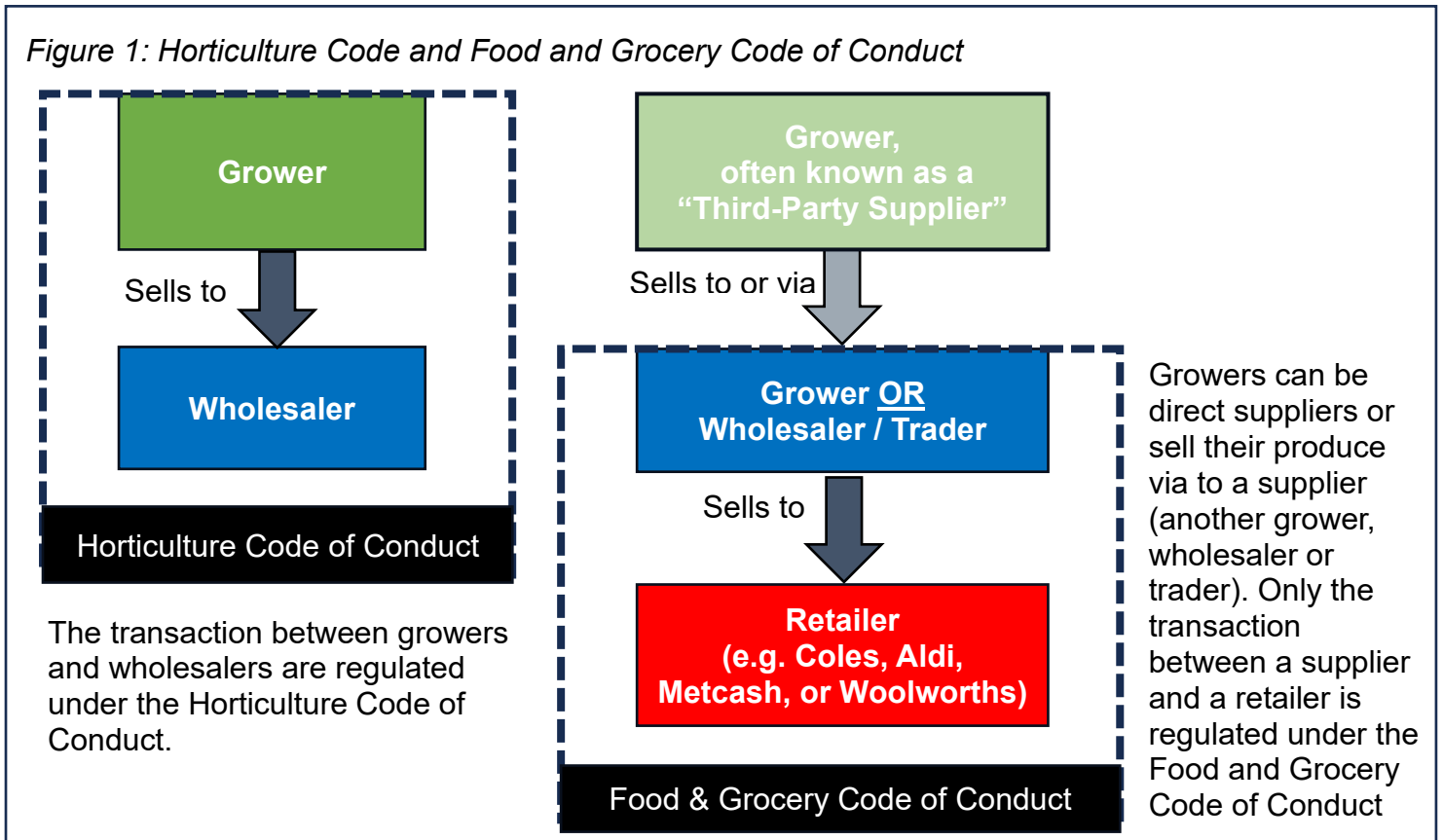
Depending on how a Teir 1 grower’s business operates and what arrangements they have with Third-Party Growers, by some definitions they can also be considered a wholesaler, this includes some grower suppliers operating trading or wholesaling businesses within Australia’s wholesale markets.

The Horticulture Code of Conduct and fresh produce wholesalers/traders

There are two Codes that currently operate in the horticulture industry, the Horticulture Code of conduct (Hort Code) and the Food and Grocery Code. These Codes serve different purposes, and apply to different components of the supply chain, as outlined in the graphic below.

The operation of both of these Codes mean that the majority of transactions in the horticulture supply chain are regulated.

Figure 1: Horticulture Code and Food and Grocery Code of Conduct



⁹ [All about bananas](#) – Australian Banana Council

The Hort Code is of most relevance to businesses that operate in one of the five central markets around Australia. These businesses are typically referred to as 'wholesalers' of fresh produce. Under the Horticulture Code of Conduct, there are two types of transactions that can occur when growers sell produce to a Wholesaler:

- **Agent Transaction:** In this transaction, the Wholesaler operates as an extension of a Grower's business and sells produce on the Grower's behalf. Typically, the Grower does not know for certain what the return/price of their produce will be until it is sold; the Agent is tasked with getting the best price. This is similar to selling on consignment.
- **Merchant Transaction:** In this transaction, the Wholesaler purchases produce from a grower at a fixed volume for a fixed price. The grower is aware of the price, volume and quality requirements before selling the goods to the Merchant.

The Hort Code, is a mandatory Code. The core focus of the Hort Code is ensuring that growers and traders accurately identify their supply relationship (i.e. Agent or Merchant), as clearly defining this relationship enables greater transparency between traders and suppliers. In addition to defining the trading relationship, the Hort Code also requires all suppliers be provided a Horticulture Produce Agreement (HPA) which clearly outlines terms of trade, including methodology for agreement or reporting of price; prior to the Code's introduction the most common complaint from suppliers was that their trading terms, and relationship with wholesalers was not transparent.

The Hort Code also covers transactions between two growers; for example, it is not uncommon for a grower to purchase additional product from a neighbouring grower of the same product when they need to 'top-up' their order. Despite neither party being considered a wholesaler or trader (i.e. neither business operates in the central market system), this transaction and both parties are still covered by the Hort Code.

Production Costs – today it costs 20% more to produce fruit and vegetables than 4 years ago

Members of the AFPA are all Tier 1 direct suppliers to one or multiple retailers that both grow produce and collectively work with around 1,000 other third-party growers to supply retailers directly, as well as supply the wholesale and export markets.

AFPA members have collated data on production cost changes over the last four years, between 2018/19 and 2022/23, and have determined that, on average, the cost of producing fruit and vegetables in Australia has increased by 18.9%.

Major cost increases have occurred in labour, energy, capital, and other production inputs, which have largely contributed to a steep increase in the total production cost, as outlined in Table 3.

Table 3: Cost increase over the last four years (2018/19 to 2022/23)

	% Cost Increase
Total Production Costs	+18.9%
Labour e.g. wages, super, allowances, administration, etc	+20.7%
Energy e.g. Electricity, gas, fuel, etc.	+20.0%
Capital costs e.g. Irrigation, machinery, infrastructure, etc.	+22.3%
Other production inputs e.g. Fertilizers, chemicals, packaging, water, etc.	+19.3%

While this steep increase in costs was initially a result of the COVID-19 pandemic and international events, the drivers behind these cost increases are now increasingly domestic, for example the greatest proportion of the increase in the cost of labour has occurred in the last two years, by 12.1% since 1 January 2022.

On average, labour costs account for 52.1% of the total cost of production. Changes of specific relevance to the industry's workforce, such as alterations to Piece Rate provisions within the Horticulture Award and changes to the Pacific Australia Labour Mobility (PALM) scheme, as well as economy wide changes, such as the increase of the superannuation guarantee, have made a significant contribution to the overall increase in the cost of production.

Economy-wide, Australia has also seen a fall in labour productivity (GDP per hour worked) since 1 January 2022 of 5.7% (to 30 September 2023¹⁰), suggesting more people in general have been required over the past two years to produce the same amount of goods, again adding to labour costs.

Energy costs has also increased significantly since 1 January 2022, by 22%. Like all manufacturing industries, fresh produce processing, packing and transportation, as well as refrigeration, requires a significant amount of energy and fuel, and gas is a major component of glasshouse production, which has also spiked in price during this period.

Most growers have never experienced cost increases of this scale in such a short duration, and it is coming at a time when the industry's resilience has already been tested on many fronts by successive challenges, including severe weather events, such as floods across the east coast, supply-chain disruptions, and labour shortages.

Between 30 June 2019 and 30 June 2023, the number of businesses in the industry has fallen from 19,884 to 18,325, by 1,559⁴, which could be interpreted as over one in every twenty fruit, vegetable and nut producers operating in 2019 having left the industry over the past four years. Of note, the largest reduction has occurred in the small business categories of business turning over between \$50,000-199,000 and employing between 1 to 19 people, -740 and -731 respectively. There has also been a large decline of 425 businesses in the category of between \$200,000 and \$1.99m in turnover.

¹⁰ [Australian National Accounts: National Income, Expenditure and Product](#) - ABS

3. Background - Food and Grocery Code of Conduct and Reviews

The Food and Grocery Code of Conduct (the Code) is a set of industry guidelines and principles aimed at fostering fair and transparent relationships between retailers and suppliers. The Code seeks to address power imbalances in the supply chain and outlines certain obligations for retailers and wholesalers, promoting fairness, efficiency, and competition within the industry. While the Code provides a framework to support fair dealing, it does not set specific prices, margins or strictly dictate terms for transactions between retailers and suppliers.

The Code was introduced in 2015, is prescribed under the Competition and Consumer Act 2010 and enforced by the Australian Competition and Consumer Commission (ACCC). The Code has four signatories, Woolworths, Coles, ALDI and Metcash, collectively representing 82% of the grocery retail sector. The Code automatically covers direct suppliers to the signatories, however not third-party (growers) suppliers to direct suppliers, e.g. wholesalers, (these transactions are covered by the Horticulture Code of Conduct).

Since its introduction, the Code has been subject to scrutiny, formal reviews, and updates, most notably a whole of Code review was conducted in 2018 that resulted in several improvements.

2018 Review the Food and Grocery Code

In 2018, the Government appointed Professor Graeme Samuel AC, former Chair of the ACCC, to conduct a review of the Code similar in scope to the current 2024 Review. The purpose of the 2018 Review was to assess the impact of the Grocery Code in improving the commercial relations between grocery retailers, wholesalers and suppliers.

In Prof. Samuel AC's forward, he summarised that:

“My overall assessment is that the Grocery Code has made a positive contribution to improving the relationship between retailers and suppliers. The broad industry feedback is that the major retailers are treating their suppliers much better now under the Grocery Code. It has helped drive cultural change within these organisations and has been effective in addressing harmful behaviours that had previously been reported by suppliers in the past.

However, there still remains room for improvement and the Review has identified specific areas of the Grocery Code that should be changed to support the industry on its journey towards achieving higher standards of business dealings.”

The recommendations of the 2018 Review, including improvements to the dispute resolution process and introduction of Code Arbiters and an Independent Reviewer, were welcomed by industry, adopted by Government in the majority and implemented by signatories where necessary. Of note, the 2018 Review also contemplated the merits of making the Code mandatory, at the time Metcash was not a signatory to the Code, however ultimately recommended against it for reasons that will be echoed in this submission.

2022/23 Independent Reviewers Report

As an outcome of the 2018 Review and resulting changes to strengthen the Code, an Independent Reviewer was introduced to oversee dispute resolutions between suppliers and signatories. The Code's Independent Reviewer, currently Chris Leptos AO, releases a report annually on their activities that includes a record of complaints by suppliers and the results of a regular supplier survey.

In 2022/23, there were no formal complaints made to any Code Arbiters¹¹ and the Independent Reviewer did not receive any supplier requests to review a complaint handling processes conducted by a Code Arbiter. In relation to there being no complaints, the 2022/23 Independent Reviewers Report stated:

“The lack of complaints may be explained, in part, by the changes adopted by the Signatories in allowing their Code Arbiters to play a more proactive role in listening to supplier concerns without the need for a formal complaint being lodged. It should be noted that Code Arbiters, during meetings with the Independent Reviewer, have reported a significant increase in the volume of enquiries and supplier complaints raised with them.”

¹¹ [2022-23 Annual Report](#) - Food and Grocery Code Independent Reviewer

The lack of formal complaints in 2022/23, despite recent widespread condemnation of retailer behaviour with some supporting evidence, is an issue that will be covered in section 3 of this Submission (*Response to Consultation Questions and Recommendations*).

As part of the Independent Reviewer's Annual Report, a survey is conducted by the Commonwealth's Treasury Department in its role as the Secretariat. Each supplier to a signatory receives a link to the survey. The survey asks for supplier feedback on the effectiveness of the Code, such as its dispute resolution arrangements, and how the signatories conducted themselves throughout the 2022/23 reporting period during their commercial dealings. A total of 279 suppliers responded to the survey, a relatively small sample of total suppliers however never-the-less insightful. Key results of the 2022/23 include:

- Fair and reasonable dealings of retailer/wholesaler towards suppliers:
 - 47% of respondents said they were **always** treated fairly and respectfully by their retailer/wholesaler.
 - 39% said **mostly** treated fairly and respectfully by their retailer/wholesaler.
 - 12% identified that their retailer/wholesaler acted unreasonably at times.
 - 2% identified that their retailer/wholesaler frequently acts unreasonable or with duress.

- Number of suppliers which experienced **no issues** with their respective retailer/wholesaler
 - 83% of suppliers to ALDI said they had not experienced any issues,
 - 71% of suppliers to Metcash,
 - 69% of suppliers to Coles, and
 - 65% of suppliers to Woolworths.
 - Of note, survey results provide further detail on the issues experienced, and indicated the two most commonly experienced issues across all signatories (between 6-8% of suppliers) were 'Deduction off invoice/remittance without consent' and 'Payment later than agreed payment terms'. Survey results also indicated that a disproportionately higher number of suppliers (8%) to Woolworths had issues with being 'Required to fund promotion despite it being unreasonable in the circumstances'.

- Prompt, constructive action taken by the retailer/wholesaler to resolve issues raised:
 - 91% of ALDI respondents, and between 78–81% of suppliers to Woolworths, Coles, and Metcash that the retailer always or usually took action to resolve issues

- Impediments to raising an issue with the buying team
 - Over 43% of respondents said there were no impediments to raising an issue or concern with their retailer/wholesaler's buying team.
 - Over 41 % of respondents to Woolworths and Coles identified fear of damaging a commercial relationship as a key impediment, compared with 28 % for Metcash, and 21% for ALDI.
 - Overall, 17 % of respondents considered fear of retribution to be an impediment to bringing a complaint to their retailer/wholesaler's buying team, with Woolworths' suppliers being the most concerned about retribution and ALDI's suppliers being the least concerned.

- Impediments to raising an issue with the Code Arbiter
 - On average, 55% of respondents said there were no impediments to raising an issue or concern with their retailer/wholesaler's Code Arbiter.
 - Over 32% of respondents to Woolworths and Coles identified fear of damaging a commercial relationship as a key impediment, compared with 23% for Metcash, and 19% for ALDI

When considering these results, it's worth noting the report stated:

*"Analysing the response results by product **shows that fruit and vegetable suppliers have reported less favourable treatment compared with other product suppliers**. This was particularly the case for measuring "deals in good faith" and "fair and reasonable dealings", where for each of these categories, a greater proportion of fruit/vegetable suppliers appeared worse off."*

4. Response to the Consultation and Recommendations

The following provides collated responses to the relevant 21 questions presented in the consultation paper. The responses draw from the context and background provided in this submission.

The Code's Objectives

1. What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?

The Purpose of the Code remains appropriate and is as follows:

- a) *to help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and*
- b) *to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and*
- c) *to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and*
- d) *to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.*

The objective of the Code should be to continue providing guardrails to support and set minimum-standards for fair business to business dealings between suppliers and major retailers, and to provide an avenue to address unacceptable outlier behaviours and actions. The Code should not be reformed to dictate the nature and outcome of everyday business transactions or regulate prices, as this would undermine the well-established and accepted free enterprise/market economy principles on which Australia successfully operates.

Furthermore, as stated in the consultation document, *'the basic reason for the Code coming into existence in 2015 was an imbalance of market power between supermarkets and their suppliers, especially smaller suppliers'*, and addressing this specific imbalance should remain its reason for existence, as reinforced by recent statements¹² from Australia's Prime Minister, Treasurer, Agriculture Minister, Assistant Minister for Competition and others in multiple public forums and communique.

Recommendation 1: The Code's primary purpose should remain addressing the imbalance of market power between supermarkets and their suppliers and, therefore, its current objectives are fit for purpose.

A Voluntary Code

13. What benefits could a mandatory code bring to suppliers?

14. If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?

15. Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

The Code should remain voluntary for the following reasons:

- **Current coverage is sufficient to drive intended outcomes.** Consistent with the recommendation and reasoning of the 2018 Review, the Code should not be made mandatory unless there is a strong reason to need to compel a party to become a signatory to the Code.

Other Industry codes are mandated primarily to ensure all parties are captured. Currently, Woolworths, Coles, ALDI and Metcash, which collectively represent 82% of the grocery retail sector, are all signatories to the Code. As the Code was designed to address market power imbalances, these are the only grocery retailers that warrant coverage at this time and the Code is legally binding and enforceable by the ACCC once agreed to. It is highly unlikely that any of the current signatories would withdraw from the voluntary Code due to reputational and other repercussions. Should a signatory withdraw, or another company enter the Australian market, gain significant market share, and not agree to the Code, then it would be appropriate to consider making the Code mandatory.

¹² [MR: Appointment of Dr Craig Emerson as Independent Reviewer of the Food and Grocery Code of Conduct](#) – PM of AUS

- **A Mandatory Code would create a more complex operating environment and increase the cost of fresh produce.** Major retailers only deal with a few hundred direct suppliers of fresh produce, many of whom source additional produce from other growers, technically making them wholesalers in the process. As described in this submission, it is common for fresh produce businesses to be direct suppliers and meet retail orders by working with other growers to consolidate and supply produce.

If the code were to be mandated with its current scope and definitions, it would likely capture all fresh produce “wholesalers”. This would create an environment where all produce suppliers to a retailer would have to concurrently operate the Hort Code and the Food and Grocery Code, delineating their obligations based on each individual transaction.

Unintentionally incorporating fresh produce wholesalers and growers as “signatories” does not improve outcomes in the industry. This kind of coverage does not align with the intent of the Code, which is focused on preventing unfair behaviours and practices of major retailers including Woolworths, Coles, ALDI and Metcash (IGA).

Should the code be made mandatory without changes to these definitions or with the direct intention of capturing fresh produce growers and wholesalers/traders that act as intermediaries to the major retailers, it would increase the cost to consumers of fruits and vegetables. This is because compliance with any kind of regulatory instrument of this nature comes with administration and other costs, such as establishing new systems and protocols. This is true for large and small businesses, so introducing a threshold to only capture certain businesses that trade in fresh produce won’t avoid cost increases on staple items.

As highlighted in this submission, the cost of production has already increased by 18.9% over the past four years, taking steps that raise costs with little benefit and to the detriment of growers and consumers alike would be strongly unsupported.

- **Voluntary code allows for more dispute resolution options.** While the current dispute resolution mechanisms require improvements, it should not be abandoned. Arbitration is a cost effective and time efficient approach to dispute resolution, particularly for smaller suppliers, and must be preserved to avoid creating more barriers to raising issues. A mandatory code would likely require suppliers to litigate issues through the court system. Through this approach, reaching outcomes would likely be more costly and lengthy, and mediation, while still available, only works when all parties are willing.
- **A voluntary Code achieves greater buy-in from signatories.** A voluntary Code invites and allows for greater involvement by stakeholders in the Code’s design and implementation. This is in part due to the flexibility of a voluntary Code and its ability to support unique solutions (such as the current arbitration approach) proposed by retailers and suppliers. The 2018 Review found that the Voluntary Code enables *“a collaborative approach between the different groups in the industry and the Government to find the right regulatory balance.”*

A mandatory code would, at the very least, be more interventionist by the Government, its components more likely contested as unfit for purpose and therefore its implementation not as widely embraced and accepted.

- **The Code doesn’t have to be made mandatory to be made stronger.** The introduction of civil penalties, making arbiters more independent (currently appointed by the signatories), and better resourcing the ACCC to better enforce the Code, can all be achieved without making the Code mandatory.

Recommendation 2: The Code should remain voluntary because:

- its current coverage (Woolworths, Coles, ALDI and Metcash) is sufficient to drive intended outcomes,
- a mandatory code would create a more complex operating environment and increase the cost of fresh produce,
- a voluntary code allows for more dispute resolution options,
- a voluntary code achieves greater buy-in from signatories, and
- the Code doesn’t have to be made mandatory to be made stronger.

The Code's Coverage

4. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

5. Should the Code be extended to cover other aspects of the food and grocery supply chain?

7. Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code's signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

Covering small retailers and grocers

As referenced earlier, the consultation document states, '*the basic reason for the Code coming into existence in 2015 was an imbalance of market power between supermarkets and their suppliers, especially smaller suppliers*'. A footnote in the Code also reinforces this intent:

Note 2: The Commonwealth has expressed the view that retailers and wholesalers that have an annual revenue of \$5 billion or more, or a market share of 5% or more, should agree to be bound by the code.

Current signatories to the Code (Woolworths, Coles, ALDI and Metcash) represent 82% of the grocery retail sector, the other businesses that make-up the remaining 18% of the sector cannot exert the same kind of market power pressure on their suppliers. Compliance with any kind of code of this nature comes with costs. The challenges for small retailers and green grocers to compete with major supermarkets are already substantial. Unless there is a clear and consistent issue occurring between suppliers and smaller retailers / green grocers that is not covered by another existing instrument, then this sector of the market should not be subject to the Code. The Government should focus on supporting this section of the market to improve competition, not introduce additional burden.

Likewise, growers who work with third-party suppliers and fresh produce wholesalers / traders who supply the supermarkets and Metcash should not be captured by the Code.

Definition of wholesalers – current and future coverage under the Code

The Code provides the following definitions of key parties and components:

retailer means a corporation:

(a) to the extent that it carries on a supermarket business in Australia for the retail supply of groceries; and

(b) to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

supermarket business means a business under which a person sells to consumers bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and other packaged food or most of those groceries.

supplier means a person carrying on (or actively seeking to carry on) a business of supplying groceries for retail sale by another person (whether or not that other person is the person supplied).

wholesaler means a corporation to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

grocery supply agreement means any agreement between a retailer and a supplier (other than a wholesaler), or between a wholesaler and a supplier, that relates to the supply of groceries to or for the purposes of a supermarket business (whether or not the agreement is the principal agreement between them relating to the supply of groceries) and includes any document:

(a) comprising the agreement; or

(b) made, from time to time, under the agreement

Currently, the Code only covers relationships that are either between a supplier and a retailer or a wholesaler and a supplier – the Code could be interpreted as excluding coverage where a transaction between a wholesaler and a retailer occurs. As outlined in this submission, this transaction (a direct supplier grower/wholesaler that has

aggregated product from multiple third party growers and then sold this produce to a retailer) is incredibly common in the fresh produce industry.

The practical implication of this, means that if a business is a wholesaler, that is supplying a retailer, that these transactions may currently be excluded from the Code, limiting the Code's coverage and effectiveness. The AFPA understands from engagement with the ACCC on this issue, that this is also their interpretation of the application of the Code.

Some would argue that the exclusion of a wholesaler-retailer relationship is not the intent of the Code, however, a plain English reading of the Code indicates that this could very well be the case. While this matter has not been tested (e.g. in court), the lack of clarity around the relationship between a wholesaler and retailer as currently defined in the Code is problematic, and should be amended as part of the Code's review.

This issue, a lack of clarity and coverage of the interaction between wholesalers and retailers, we become even more problematic should the Code become mandatory and incorporate all wholesalers. As the definitions above currently stand, this would risk extending the Code to fresh produce growers that aggregate product and on sell to retailers. In the event this occurred, this would create an environment where a business would need to operate their compliance under both the Horticulture Code and the Food and Grocery Code – adding complexity and cost for no improved outcome to industry.

Capturing growers and fresh produce businesses that aggregate produce for supply is not, and should not be, the focus of this Code. As stated above, the Code's overarching intent is to counter and better balance the market power of Australian supermarkets, originally Coles and Woolworths, but now also ALDI and Metcash.

The Code's definitions should be amended to be clearer and better reflect this nuance in the supply chain.

Recommendation 3: That the Code should not be extended to smaller retailers and green grocers, to ensure the Code's purpose and intent remains focused on addressing the imbalance of market power between major supermarkets and their suppliers.

Recommendation 4: That the definitions provided within the Code, that outline the relationships between retailers, wholesalers and suppliers be reviewed and amended to better support the purpose and intent of the Code, and not inadvertently capture growers that aggregate produce for supply.

The Code's Effectiveness, Use, Dispute Resolution Process, Penalties and Enforcement

2. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?
3. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?
12. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?
16. Are Code Arbiters perceived to be independent from the supermarkets that they oversee?
17. If not, how could the reality and perception of independence of Code Arbiters be enhanced?
18. Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?
19. Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?
20. Should civil penalties be available for breaches of the Code?
21. If civil penalties are to be applied to the Code, what penalties are appropriate?

As determined by the 2018 Review of the Code, it has improved the trading environment for suppliers. While it is difficult to measure the Code's success, this improvement is partially validated by the results of the Independent Reviewer's survey, which shows an improved trading environment in 2022/2023 compared to 2020/2021. Furthermore, in 2022/23, a majority of suppliers (86%) responded that they were fairly treated by retailers either always or mostly. However, the survey results also confirmed:

- there are ongoing issues, particularly around payments and promotions,

- that Code Arbiters, *“have reported a significant increase in the volume of enquiries and supplier complaints raised with them”* since changes were made to allow arbiters to engage with suppliers without the need for a formal complaint to be lodged; and
- an analysis of the survey results found that *“that fruit and vegetable suppliers have reported less favourable treatment compared with other product suppliers”*, indicating a clear need to improve the Code’s provisions and support for this cohort.

Anecdotal evidence in the media and provided in confidence to industry bodies also suggests that issues are ongoing. Therefore, improvements must be made to increase the Code’s effectiveness, including to the dispute resolution process, enforcement and penalties, as well as effort to improve supplier knowledge and use of the code.

Supplier Knowledge and Use of the Code

The majority of issues raised by suppliers in response to the Independent Reviewer’s survey and in the media / public realm are covered by the Code (or another regulatory instrument), however the suppliers are either unaware of this, which demonstrates a need for greater industry education, or choose not to take action, likely due to fear of retribution, other consequences or a poor outcome.

The first step to addressing this challenge is to ensure that fresh produce suppliers are more knowledgeable of what is covered by the Code and, beyond the Code, other rights and protections that may be of relevance. For example, more substantive protections within the Competition and Consumer Act 2010.

After this Review is completed and any amendments are made to the Code, the AFPA would encourage the ACCC to conduct an extensive communication and education campaign to better inform fresh produce suppliers of the Code’s content and other protections. Suppliers will be more confident advocating for their rights and raising issues if they are well informed and aware of available options to resolve issues.

While improving supplier knowledge of the Code may lead to greater use of it, both as a negotiating tool for suppliers as well as a means to address any wrongdoing, the key impediment to the Code’s effectiveness remains the fear of retribution or negative commercial outcome. This issue is difficult to address and may never be fully resolved, however steps can be taken to improve the situation and encourage more suppliers to raise issues, if only discreetly.

Engaging in the dispute resolution process and Code Arbiters

It is very difficult to assess the effectiveness of the dispute resolution process due to its historically limited use by suppliers, however that in itself indicates that it must be changed.

Currently, Code Arbiters investigate and propose resolutions to a dispute or complaint. Each of the four signatories to the Code appoint their own Code Arbiter. As referenced in this submission, the Independent Reviewer’s Annual Report stated that 45% of suppliers believed there was an impediment to raising an issue with a Code Arbiter, chiefly *‘fear of retribution’*, *‘fear of damaging a commercial relationship’* and/or *‘not confident confidentiality would be maintained’*. This, rightly or wrongly, indicates that suppliers have a perception of a conflict of interest between the current Code Arbiters and signatories to the Code.

Further, the Independent Reviewers Annual Report stated that Code Arbiters (in 2022/23) *“reported a significant increase in the volume of enquiries and supplier complaints raised with them”* since changes were made to allow arbiters to engage with suppliers without the need for a formal complaint to be lodged. Therefore, there is an obvious need to create greater separation between the Code Arbiters and signatories to the Code, and to ensure suppliers can engage with an independent arbiter in an informal, discreet manner. An arbiter or arbitrators could be subject to an ‘independent test’ or be appointed by Government to mitigate any perception of conflict and provide suppliers more assurance that a matter will be considered fairly and confidentially where necessary.

Furthermore, there is need to consider the Codes limitations. The Code attempts to define, encourage, and enforce retailers to deal in ‘good faith’ and regulate other broad areas that are complex and can be difficult to capture in specific text, although the intent is clear. Situations will arise that are not specifically described in the Code (or another

instrument, such as the *Competition and Consumer Act 2010*), but are never-the-less unjust. There is value in providing suppliers with a mechanism for mediating those issues, or at the very least capturing them so that they can be considered for inclusion at the next review of the Code. To support this, arbiters or a separate supplier support service could be incorporated into the Code to:

- help suppliers understand if an issue that has arisen is covered by the Code,
- assist suppliers in utilising the good faith provisions within the Code, and
- provide further assistance (and record keeping) for issues that are outside of the Code, this could include offering mediation if/when appropriate.

Penalties and Enforcement

Much of the success of the Code to date can be attributed to its effectiveness as a deterrent. The previous 2018 Review recommended Government consider more active compliance and as part of this civil penalties, which the ACCC has also called for. Civil penalties should be included for signatories and consideration should be given to whether the current limit on pecuniary penalties for prescribed industry codes, 300 penalty units, is enough. The AFPA would support higher penalties of more consequence to act as real deterrent. Under the Code, Arbiters can currently determine a compensation payment to a supplier of up to \$5 million, this should also be increased, particularly for instances where a signatory is found to have breached the Code intentionally and consistently over a prolonged period.

To meet these recommendations, and more generally improve adherence to the Code, the ACCC must take a more proactive and larger role in enforcing and support the Code. The consultation paper states, *'The ACCC has indicated it will not commit extensive resources to regulate compliance with the Code as it ... does not provide the ACCC with meaningful compliance and enforcement tools'*. This must be addressed, and resources committed.

If the ACCC requires additional resources to effectively support the implementation of the Code, the Government should make this commitment and investment. Like all penalties and standards, they are only effective if they are enforced. The openness in which the ACCC state their reason for not to regulating compliance with the Code also undermines its effectiveness and diminishes supplier confidence to utilise the Code.

Recommendation 5: That the ACCC undertake a robust awareness and education campaign designed to increase supplier knowledge of the Code and its protections upon completion of this Review and any associated amendments to the Code.

Recommendation 6: Amend the Code to create greater separation between Code Arbiters and the signatories to improve perceived and real independence of the Arbiters, for example by introducing an 'independence test' and / or changing the appointment process.

Recommendation 7: That suppliers be provided an independent and confidential point of contact, to assist in determining if an issue is covered by the Code or another instrument, such as the *Competition and Consumer Act 2010* or *Horticulture Code of Conduct*.

Recommendation 8: That a mechanism be introduced to mediate issues not specifically covered by the Code (or another instrument), in recognition of the Code's intent to mandate dealing in "good-faith", but practical challenge of describing how to meet this requirement in all scenarios and conditions.

Recommendation 9: That civil penalties be introduced at an appropriate maximum sum to increase the Code's deterrence of unfair practices and provide adequate punishment for breaches that are demonstrated to be intentional.

Recommendation 10: That supplier compensation limitations be reviewed, with the intention of increasing the current cap to ensure any instances of prolonged, intentional wrongdoing or the like can be adequately compensated.

Recommendation 11: That the Australian Competition and Consumer Commission receive appropriate resources to improve outcomes for Australian consumers under the Code.

The Code's Provisions and Perishable Fresh Produce

8. Do the provisions set out under the Code ensure it is fit for purpose?

9. Which provisions under the Code help or hinder suppliers? How can the provisions be improved?

Several improvements can be made to the Code to better deliver on its objectives for fresh produce suppliers, which are not adequately supported by the Code for several reasons. These reasons (expanded on below) include that all fresh produce is perishable, substitutable (i.e. unbranded), and production is naturally variable.

- *Perishability* – Fruits and vegetables are perishable, and as a result, typically the shelf life for produce can be as short as days. Some products, such as onions, can last months, while others, like tomatoes, can noticeably degrade after several days from purchase. As a result, it is not uncommon for consumers to be buying produce in the retail store that was harvested just 24-48 hours earlier. Growers and retailers both work hard to get produce from farms to stores in as little time as possible to provide consumers with the longest shelf-life possible. However, this means that price and volume negotiations must occur swiftly and regularly, and in the event that there is a dispute over pricing or terms, product is unable to be stored to achieve a more favourable price or market conditions.
- *Substitutable* - The majority of fresh produce sold in Australia at a retail level is unbranded (or branded own label/retailer branding). This means that for consumers, they are only purchasing a banana or broccoli, this decision is not informed by who produced/sold that fruit or vegetable. The lack of branding in produce, means that within a product category, for example broccoli, any broccoli supplier's product can effectively be substituted for another supplier's product without the consumer knowing. This creates significant competition among suppliers, within categories.

Arguably, this situation creates an even bigger advantage for retail buyers when negotiating with suppliers than, for example, in the confectionary or cereal categories where products are branded, and the value of that brand can be utilised by both suppliers and retailers as part of a negotiation on sale. The reverse is true in produce, due to the homogenous nature of products within a category (i.e. same variety, meeting the same pre-set specification etc.) creates an environment where price is typically the only point of negotiation with fresh produce suppliers.

There are some instances where growers have unique offerings, as they have cultivated a special variety and/or own the Intellectual Property (IP) or licence associated with a variety, for example to the *Honey Gold Mango*, *Jazz Apple* or *Autumcrisp table grapes*. This does create an identifiable product, which often provides better negotiating power to suppliers, however, these products are a minority of fresh produce.

- *Variable production* - the production of fruits and vegetables is also largely dependent on climate and weather conditions. Produce can quickly be in short supply following a severe weather event in a region during peak-production, or in abundance if conditions have been ideal. Ideal conditions deliver both higher-yields and a longer production window, for example growers in one region could have their season extended by a month or more creating an overlap with another region and therefore creating an oversupply. Retailers regularly adjust their positions on price and volume depending on how the year is unfolding. Currently in many categories there is an oversupply of produce due to ideal conditions being experienced in multiple growing seasons.

Due to these reasons business dealings (price and volume negotiations) between fresh produce suppliers and buyers often occur at a high-frequency, quickly and primarily focus on price.

The Code's provisions must better accommodate for these factors, especially the time-sensitive nature of fresh produce. Obvious areas within the Code that require attention are *Section 27 A) Price increase* and *Section 35 - Investigation by Code Arbiter*, both outlined below.

Example 1: *Section 27 A) Price increase*

(1) *This clause applies if:*

(a) *the retailer or wholesaler has a grocery supply agreement with a supplier for the supply of groceries; and*

(b) the supplier informs the retailer or wholesaler, in writing, of an increase in the price (the price increase) of groceries supplied under the agreement; and

(c) if the price increase is in respect of fresh fruit and vegetables that are supplied under the agreement and the agreement includes a mechanism to negotiate on a regular basis the price of those fresh fruit and vegetables—any negotiations about the price increase are not concluded within 5 business days after the supplier informs the retailer or wholesaler of the price increase.

(2) Within 30 days of being informed by the supplier of the price increase, the retailer or wholesaler must, in writing, notify the supplier whether the retailer or wholesaler:

(a) accepts the price increase; or

(b) accepts an increase in the price of the groceries supplied under the agreement but does not accept the amount of the price increase; or

(c) does not accept the price increase.

(3) If the supplier is notified of a matter referred to in paragraph (2)(b) or (c), the supplier may request the retailer or wholesaler to enter into negotiations about an increase in the price for the groceries.

(4) A retailer or wholesaler that enters into such negotiations must engage in the negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay.

(5) The retailer or wholesaler must not require the supplier to disclose commercially sensitive information in relation to the following:

(a) the price increase;

(b) negotiations about an increase in the price for the groceries.

Example 2: Section 35 - Investigation by Code Arbiter

(1) The Code Arbiter must take all reasonable steps to:

(a) investigate the complaint; and

*(b) conclude the investigation within **20 business days**, or a longer period as extended under subclause (2).*

Both of these provisions do not reflect the realities of fresh produce trade. As outlined above, fresh produce has a short shelf life, price negotiations must be rapid, the longer they go on, the fewer avenues a grower has available to make alternative arrangements (find a second market/buyer). Likewise, a month-long investigation will likely create a lot of food waste, particularly if there is a pause in transactions between a grower and retailer, as perishable produce cannot be stored (or unharvested) while investigations are underway.

In the case of Example 1, the Code acknowledges the industry practice to engage with retailers using a tender methodology (i.e. submission of weekly prices and volumes for purchase), but in doing this does not offer a methodology by which a supplier could raise an issue over pricing for further negotiation; the only option available for produce to suppliers, is to wait for 5 days for the issue to be covered by the Code, and then enable the retailer to respond to the price increase within the next 30 days – at which point, the majority of fresh produce items would be destroyed.

The operative clause within 27A in example 1 above, is 27A (3) which goes on to say that in the event a retailer refuses a price increase, that the supplier may then request a subsequent negotiation with the retailer. This remedy is not available to the fresh produce industry.

There are two solutions to amending the Code to better support fresh produce suppliers. The first is to introduce 'fresh produce' clauses in all relevant areas, similar to what is attempted in *Section 21 A*). The second option is to include a fresh produce (standalone) section, that could cover these provisions and introduce other clauses relevant to fresh produce. The recommended approach is to establish a time-limited working group, of suppliers, retailers and Government representatives to consider further how to better respond to the unique challenges for fresh produce in the Code. Further industry-wide consultation may also be warranted.

Recommendation 12: That a fresh produce industry working group (of suppliers, retailers, and Government representatives) be established to determine amendments to the Code that would enable it to better fulfill its purpose for (perishable) fresh produce trade.

Interaction with the Horticulture Code of Conduct

10. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

The Horticulture Code of Conduct (Hort Code) is a regulatory framework that governs the relationships between growers and fresh produce wholesalers or traders that buy their produce. The Hort Code is mandatory and establishes requirements for trade practices, including agreements between trading parties, dispute resolution mechanisms, and the provision of clear and accurate information. Like the Food and Grocery Code of Conduct, the Hort Code aims to promote fair and transparent dealings within the horticulture sector, however, covers transactions that are not covered by the Food and Grocery Code.

It is crucial to maintain the Hort Code as a distinct and separate regulatory instrument from the Food and Grocery Code. As covered in this submission, the horticulture industry presents a unique environment and challenges that warrant specialised attention and tailored regulations. The Hort Code acknowledges the specific needs and nuances of the horticulture sector, in particular with regards to the current wholesale market system.

The core focus of the Hort Code is ensuring that growers and traders accurately identify their supply relationship (i.e. Agent or Merchant), as clearly defining this relationship enables greater transparency between traders and suppliers. In addition to defining the trading relationship, the Hort Code also requires all suppliers be provided a Horticulture Produce Agreement (HPA) which clearly outlines terms of trade, including methodology for agreement or reporting of price; prior to the Code's introduction the most common complaint from suppliers was that their trading terms, and relationship with wholesalers was not transparent. The issues that are addressed (or that the Hort Code was written to address) are different to those experienced between retailers and suppliers.

Combining the Hort Code with the Food and Grocery Code would diminish the potential of both documents to deliver on their purpose. The two Codes should complement each other by remaining focused on separate parts of the supply chain, as illustrated in Figure 1 of this submission (pg. 9).

Overlap between the Hort Code and the Food and Grocery Code at an enterprise level would be imposing significant red tape on fresh produce businesses, and is explored earlier in this submission (pg. 16). It is important to maximise the benefit to suppliers of the Food and Grocery Code that the industry Codes are kept separate, and not integrated into a single Code.

Recommendation 13: That the Horticulture Code of Conduct and the Food and Grocery Code of Conduct remain separate regulatory instruments to ensure that both codes can be best tailored to effectively deliver their purposes and match the different trading environments.

Improving Competition through new and improved market access

Enhancing international market access for Australian fresh produce plays a pivotal role in mitigating the challenges posed by the high-market concentration of the grocery retail sector in Australia. Unlike Australia's broader agriculture industry that exports around 72% of its production, the fresh produce sector only exports a 9.7% of its volume to overseas markets largely due to fresh produce commodities having limited market access. Improved market access facilitates increased competition by providing domestic growers with a broader range of distribution channels and retail outlets.

By diversifying market options, growers are better positioned to negotiate fair terms and prices for their produce, reducing their dependence on a limited number of domestic retailers. This increased competition can foster a more equitable playing field, encouraging retailers to enhance their offerings, innovate, and respond more attentively to suppliers.

Improving international market access would create a more resilient industry and drive growth and innovation, which in turn benefits the domestic market by improving local supply and creating greater price stability through efficiency gains and greater economies of scale.

Recommendation 14: Government seek to improve and prioritise market access for Australian fruit and vegetables as a means to better offset domestic competition challenges, support industry growth and resilience, and provide Australian consumers with improved supply security and price stability.