



# SUBMISSION TO

## Food and Grocery Code of Conduct Review 2023–24

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**TABLE OF CONTENTS**

1. About Us..... 1

2. Scope of Submission..... 2

3. Overview of the Code..... 2

3.1. Background to the Code..... 2

3.2. Operation of the Code..... 3

3.2.1. Scope and application ..... 3

3.2.2. Code provisions ..... 3

4. Food and Grocery Code: voluntary or mandatory? ..... 4

4.1. Mandatory..... 4

4.2. To whom should a mandatory code apply? ..... 5

4.3. Threshold for Supermarkets under a Mandatory Food and Grocery Code ..... 5

5. Market power and suppliers’ fear of retributive action..... 6

5.1. The role of Code Arbiters ..... 6

5.2. Fear of Retribution ..... 6

5.3. Non-Compliance Penalties ..... 9

6. Other ..... 10

6.1. Improving Price Transparency ..... 10

6.2. Consequences of supermarket rejected produce ..... 10

6.3. Market Share – Independent Retail Sector ..... 11

7. Summary ..... 13



Fresh Markets Australia (FMA) welcomes the opportunity to take part in *Food and Grocery Code of Conduct Review 2023–24* to contribute to the assessment of the effectiveness of the Code provisions including consideration for the need for the Code to be remade as a *Mandatory Food and Grocery Code*.

## 1. About Us

FMA is the national industry body representing each of the five central market state industry bodies (Market Chambers), which themselves are organisations which represent fruit and vegetable wholesalers and supporting businesses in each of Australia's six central fresh fruit and vegetable wholesale Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle).

In confirming the role that Central Markets have in the horticulture industry in Australia, it is highlighted that they:

- are supplied by some 10,000 fruit and vegetable growers;
- have an annual throughput volume of over 4 million tonnes, with a wholesale value now over \$8 billion annually on-sold by over 400 fruit and vegetable wholesalers;
- supply more than 21,000 food service businesses, and independent fruit and vegetable retailers which rely on the Central Markets: and
- collectively employ over 17,000 people.

All fresh fruit and vegetable wholesalers' transactions with fruit and vegetable growers are regulated by *the Horticulture Code of Conduct* which is a mandatory industry code prescribed under the *Competition and Consumer Act 2010 (CCA)*. Wholesalers (acting as either a merchant or agent) receiving produce from a grower must comply with this mandatory Code. The *Food and Grocery Code* does not apply to the extent it conflicts with the *Horticulture Code of Conduct*.

The *Horticulture Code of Conduct* does not apply to:

- retailers – businesses buying produce for retail sale;
- exporters – businesses buying the produce for export; or
- processors – businesses buying the produce for processing.

Growers are afforded substantial protections under the provisions of this *Mandatory Horticulture Code of Conduct*.

The *Mandatory Horticulture Code of Conduct* imparts a compliance cost on fruit and vegetable wholesalers, thereby adding additional expenses to the fruit and vegetable supply chain, highlighting a significant compliance risk.

Many central market fruit and vegetable wholesalers are suppliers to supermarkets where those transactions are governed by the *Voluntary Food and Grocery Code*.

To gain a deeper understanding of Central Produce Markets, I encourage you watch the video "FMA Central Markets"<sup>1</sup>

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<sup>1</sup> "FMA Central Markets", 2022, <https://www.youtube.com/watch?v=eaWlqgJ5QXY>



## 2. Scope of Submission

The focus of this submission will be on the fresh fruit and vegetable sector. Central Market wholesalers are **suppliers** of fruit and vegetables to supermarkets. They on sell the fresh produce where all transactions with growers are regulated by the *Mandatory Horticulture Code of Conduct*. Additionally, this submission will delve into the challenges posed by market power imbalances and the perishable nature of fresh fruit and vegetables.

## 3. Overview of the Code

The effectiveness of the *Voluntary Food and Grocery Code* in addressing issues between supermarkets and their suppliers stemming from bargaining power imbalances is widely debated. While the code purports to promote fairness and transparency, FMA argues that its voluntary nature undermines its ability to address fundamental power differentials. Larger supermarkets, with their considerable market dominance, often dictate terms to suppliers regardless of the code's provisions. Moreover, enforcement mechanisms are weak, and meaningful non-compliance penalties are missing, rendering the code ineffectual in practice. As a result, many suppliers, especially smaller ones, continue to face unfair practices such as unilateral changes to contracts, unjustified demands, and delayed payments.

FMA asserts that, while the *Voluntary Food and Grocery Code* may serve as a token gesture towards addressing supplier-retailer relationships, it fails to meaningfully rectify the power imbalances that persist in the food and grocery (fresh fruit and vegetable) sector.

### 3.1. Background to the Code

#### *Market Power*

It is widely acknowledged and FMA agrees that a significant imbalance in market power exists between supermarkets and fruit and vegetable suppliers, exacerbated by the inherent challenges presented by the perishable nature of fresh produce. Unlike non-perishable goods, fresh produce cannot be simply returned to inventory in case of oversupply or rejection by the supermarket. This inherent vulnerability underscores the pressing need for equitable and sustainable practices within the supply chain.

Central market suppliers, along with their growers, predominantly comprise small to medium enterprises, operating with turnovers significantly lower than those of supermarkets. The stark discrepancy in financial scale underscores the considerable disparity in bargaining power within the supply chain, further magnified by the unique challenges inherent in the perishable nature of fresh produce.



## 3.2. Operation of the Code

### 3.2.1. Scope and application

The central market supply chain operates under the regulatory framework of the *Mandatory Horticulture Code of Conduct*, underscoring the critical importance of ensuring fair and transparent practices within this sector.

FMA strongly advocates that the existing signatories to the *Voluntary Food and Grocery Code* are the entities with market power within the fresh fruit and vegetable sector.

### 3.2.2. Code provisions

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

In assessing the provisions outlined under the *Voluntary Food and Grocery Code* and its suitability for the fresh fruit and vegetable sector, a critical analysis reveals numerous shortcomings that undermine its efficacy and relevance.

Firstly, the *Voluntary Food and Grocery Code's* broad and generalised provisions fail to adequately address the nuanced complexities inherent in the fresh fruit and vegetable sector. Unlike non-perishable goods, fresh produce possesses unique characteristics such as perishability, seasonality, and susceptibility to market fluctuations, necessitating tailored regulations to mitigate associated risks. However, the *Voluntary Food and Grocery Code* lacks specificity in addressing these distinctive challenges, resulting in a one-size-fits-all approach ill-suited to the dynamic nature of the sector.

Furthermore, while the *Voluntary Food and Grocery Code* purports to promote fairness and transparency in dealings between retailers and suppliers, its voluntary nature undermines its enforceability and effectiveness. Without mandatory compliance requirements, major supermarkets wield disproportionate bargaining power, leveraging their market dominance to impose unfavourable terms on suppliers. This power asymmetry perpetuates a climate of uncertainty and vulnerability for suppliers within the fresh fruit and vegetable sector, rendering the purported protections afforded by the *Voluntary Food and Grocery Code* largely ineffectual.

The dispute resolution mechanisms outlined under the *Voluntary Food and Grocery Code* lack robust enforcement measures, with non-compliance penalties insufficient to deter retailer misconduct or ensure supplier recourse in cases of contractual breaches.

In summary, the provisions delineated under the *Voluntary Food and Grocery Code* fall short of ensuring its suitability for the fresh fruit and vegetable sector. Its generic nature, voluntary compliance framework, and inadequate dispute resolution mechanisms render it ill-equipped to address the unique challenges faced by suppliers within this industry.

#### 3.2.2.2. How can we strengthen the general provisions of the Food and Grocery Code?

FMA calls for a new segment within a remade *Mandatory Food and Grocery Code* be introduced to explicitly address the unique challenges encountered in the fresh fruit and vegetable sector. This addition would serve to tailor provisions that cater to the specific needs and dynamics of the fresh produce industry, potentially extending its applicability to encompass the broader spectrum of horticulture.



FMA encourages reviewers to thoroughly examine each of the rules proposed in the consultation paper, aiming to make them practical and provide certainty and clarity to suppliers.

### 3.2.3. Interaction of the *Food & Grocery Code* with the *Mandatory Horticulture Code of Conduct*.

There are two distinct codes for the horticulture sector, namely the *Voluntary Food and Grocery Code*, which caters for direct supply by growers to supermarkets, and the *Mandatory Horticulture Code of Conduct*, which pertains to traders who on-sell the produce supplied by growers. The supply chain differences being:

For businesses regulated by the *Voluntary Food and Grocery Code*:

- Operates within a “business-to-business-to-consumer” framework.
- This means that suppliers (such as central market wholesalers or growers) sell their goods to supermarkets (business-to-business), and then supermarkets sell those goods to consumers (business-to-consumer).

For businesses regulated by the *Mandatory Horticulture Code of Conduct*:

- Operates within a “business-to-business-to-business” model.
- This means that growers sell their goods to traders (aggregators or distributors) (business-to-business) under a merchant or agent arrangement, who then sell that produce to other businesses (such as retailers or food service providers), with specific rules governing how prices are determined in these transactions.

## 4. Food and Grocery Code: voluntary or mandatory?

### 4.1. Mandatory

Growers who supply directly to supermarkets operate under the *Voluntary Food and Grocery Code of Conduct*.

Why did the Federal Government agree to the design-your-own voluntary Code of Conduct for supermarkets – which was developed by the multi-billion-dollar retailers – yet imposes a mandatory Code on independent fruit and vegetable wholesalers who are primarily small to medium family businesses? The compliance costs of the *Mandatory Horticulture Code of Conduct* impose a substantial compliance burden on these businesses. Given the urgency to transport, store, and sell produce before it spoils, wholesalers face heightened pressure to swiftly comply with regulatory requirements, often necessitating expedited processes and additional resources. The need for rapid decision-making and action exacerbates the financial and administrative burdens of compliance, as businesses must invest in efficient systems, personnel training, and monitoring mechanisms to ensure adherence within tight time constraints. This time-sensitive environment further underscores the challenges inherent in managing compliance costs within the wholesaling sector.

In terms of the fresh fruit and vegetable industry therefore, an uneven playing field exists.

#### *Two barrelled approach*

The approach where on the one hand growers trading within the central market supply chain have a regulated trading environment and on the other, a trading environment where the presumption that supermarkets will ‘self-correct’ their persistently out-of-balance bargaining power is one-sided and creates a distortion of the market (i.e. an uneven playing field) which lessens competition.



The *Mandatory Horticulture Code of Conduct* remains anti-competitive and discriminatory regulation where growers who supply to, and small independent retailers who purchase through, the central market supply chain with wholesalers operating under a mandatory Code (with significant penalty provisions) whereas the supermarkets operate under a voluntary code (with no penalties at all).

FMA asserts that there is necessity for mandatory regulatory intervention in the supermarket supply chain because the supermarkets' ability to self-correct is clearly not possible and supermarket actions may not support a sustainable horticulture industry for all participants.

FMA calls for the distortion of the market to be addressed through either the introduction of mandatory regulation for the supermarket fruit and vegetable supply chain, or the removal of the mandatory Horticulture Code of Conduct and the resultant compliance costs borne by Central Market wholesalers.

#### **4.2. To whom should a mandatory code apply?**

If the Food and Grocery Code were to be remade as mandatory, FMA propose that intermediaries involved in the trade of fresh fruit and vegetables be excluded from the definition of 'wholesaler' in a *Mandatory Food and Grocery Code* would serve to safeguard growers, as their transactions are already subject to regulation under the *Mandatory Horticulture Code of Conduct*. This exclusion acknowledges the unique dynamics of the fresh produce supply chain, where growers play a pivotal role in supplying directly to intermediaries who then can elect to on-sell to supermarkets. By exempting these intermediaries from the wholesale definition, it prevents duplicative regulatory burdens and potential conflicts between the provisions of the *Mandatory Horticulture Code of Conduct* and other regulatory frameworks. Furthermore, imposing dual compliance requirements on businesses operating within the fresh fruit and vegetable sector could create barriers to entry and stifle competition, ultimately harming consumers and limiting market efficiency.

FMA calls for the exclusion of fruit and vegetable intermediaries in the central market supply chain, from the definition of 'wholesaler' in a *Mandatory Food and Grocery Code* as being essential for promoting a fair and competitive marketplace.

#### **4.3. Threshold for Supermarkets under a Mandatory Food and Grocery Code**

The establishment of a '5% food and grocery market share' and 'multi-site supermarkets' threshold for supermarkets under a *Mandatory Food and Grocery Code* is crucial to ensure that compliance requirements do not disproportionately burden smaller independent retailers. It is imperative that this threshold be set at a sufficiently high level to avoid becoming a barrier to entry for smaller businesses, while still ensuring effective regulation within the industry.

By setting a 5% market share threshold, smaller retailers can continue operating without the undue burden of compliance costs that could threaten their viability. This allows them to remain competitive in the market and contribute to a diverse and vibrant retail landscape.

Moreover, a 5% market share threshold ensures that the regulatory focus remains on currently the four (4) largest players within the industry, where market power imbalances are more pronounced and the potential for anti-competitive behaviour is greater. This strategic allocation of regulatory resources would enhance the overall effectiveness of a *Mandatory Food and Grocery Code* in promoting fair and transparent business practices.



FMA calls for the implementation of a '5% food and grocery market share' and "multi-site supermarkets" threshold for supermarkets under a *Mandatory Food and Grocery Code* to strike a balance between regulatory oversight and supporting the continued growth and sustainability of smaller independent retailers. It fosters a competitive environment where businesses of all sizes can thrive, while still upholding the principles of fairness and transparency in the food and grocery sector.

## 5. Market power and suppliers' fear of retributive action

### 5.1. The role of Code Arbiters

FMA concurs with the ACCC's view on the inherent weakness in the system of Arbiters (Consultation paper page 15) and is of the view that Code Arbiters are not perceived as independent from the supermarkets that oversee them. The role of Code Arbiters being prescribed under a *Mandatory Food and Grocery Code* is critical to ensure their independence from the supermarkets they oversee. The perception of independence is paramount in this context, as stakeholders must have confidence in the impartiality and fairness of the arbitration process.

To enhance both the reality and perception of independence, rigorous selection criteria should be prescribed for Code Arbiters. This may include requiring them to have no prior affiliation or financial interest in any supermarket covered by the Code. Additionally, clear guidelines should be outlined to prevent any potential conflicts of interest during arbitration proceedings.

Regular monitoring and oversight mechanisms should be implemented to ensure that Code Arbiters adhere to strict ethical standards and maintain their independence throughout their tenure. Transparency in the appointment process and ongoing disclosure of any potential conflicts of interest can help reinforce stakeholders' trust in the arbitration process.

Furthermore, establishing an independent oversight body (say the ACCC) to review the performance of Code Arbiters and address any concerns regarding their independence can further bolster confidence in the arbitration process prescribed under a *Mandatory Food and Grocery Code*.

FMA calls for Code Arbiters' regulation under a *Mandatory Food and Grocery Code*, guaranteeing independence from supermarkets, to secure rigorous criteria, transparency, and oversight to bolster arbitration credibility.

### 5.2. Fear of Retribution

The fear of retribution is a palpable reality for suppliers entangled with major supermarket chain and needs to be called out. This fear stems from the stark power imbalance favouring supermarkets, which wield significant influence over supplier livelihoods. Suppliers risk severe repercussions, including slashed orders, altered payment terms, or agreement termination/no future orders, should they dare to challenge unfair treatment or advocate for their rights. This apprehension is further heightened by the limited avenues for suppliers to distribute their products independently within the tightly controlled supermarket landscape. Urgent regulatory action is imperative to shield suppliers from such retaliatory measures, securing a marketplace where equity and transparency reign supreme in fresh produce dealings.

At a macro level, overcoming the fear of retribution through regulation involves leveraging existing regulatory frameworks and implementing specific measures tailored to address the unique dynamics of the Australian market.





Here are some ways this could be achieved:

- Australian Competition and Consumer Commission (ACCC) Enforcement: Strengthen the enforcement powers of the ACCC to actively monitor and address anti-competitive behaviour in the market. This includes rigorously investigating complaints, imposing penalties for violations of competition laws, and conducting regular reviews of market concentration levels.
- Food & Grocery Code: Strengthen the 'good faith' provisions of the Code to explicitly add the 'prohibition of retribution' with associated penalties.
- Small Business Ombudsman: Enhance the role of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to provide support and advocacy for small businesses facing unfair treatment from larger retailers.

By implementing these regulatory measures within the Australian context, policymakers can help alleviate the fear of retribution among small businesses and suppliers while promoting a more competitive and fairer marketplace for all participants.

At a micro level, our member wholesalers (suppliers) report the fear of commercial retribution as being a primary reason for not escalating 'disputes' to the formal process. Some have indicated that rather than engaging in the dispute process, they do not have the energy or resources to 'fight' when they can see that an outcome would be a cessation of any contracts in the future. These businesses have 'skin in the game' and do not want to damage future contracts – some have ceased supplying to supermarkets rather than go through the process as they are aware that the result will be no future orders.

Fresh produce is not able to be put back on the shelf. There is little time to enter lengthy disputes, even if there were the resources to do so, compared to the resources and teams of the supermarkets.

#### *Regular Concerns by Suppliers*

As much as we'd like to believe professional etiquette is observed by the supermarkets, at times honouring trading relationships with the growing supply chain, the major retailers have retail sector competition management at the forefront of their decision making. This can result in supply conditions, ordering and pricing to beat retail competitors and control their market share.

FMA asserts that regulators should be even handed and disregard supermarket retailers' suggestion that they have few complaints because of a well-developed dispute resolution practices. The focus should be on the reason for supply chain concerns as well as on the resolution process for those disputes – except that having a process is worthwhile for those in the supply chain who do believe it is commercially viable to engage in the process.

Supermarkets are understood to include *any excuse* to reject produce in circumstances where they have ordered/received more than they require or conversely *any excuse* to accept out of specification produce when supply in lower than demand. It is the subjectivity of the quality of produce that causes the majority of 'knock outs' by the supermarkets that are significant potential reasons for the disputes. It is often suggested that the variability of decisions is based on competition management and/or over-supply of a particular commodity rather than the actual quality of that commodity. It is also possible that a consignment that was 'knocked out' one day would be accepted the next because of the change in the market environment.



### *Solutions – mandatory reporting*

Potential improvement could involve mandating detailed explanations being given to suppliers for rejections based on an assessment against produce specifications. This could be coupled with the introduction of mandatory reporting by supermarkets to the Australian Competition and Consumer Commission (ACCC) of rejected produce, accompanied by categorised rejection reasons, which in turn could facilitate consolidated and regular public reporting complementing the disputes reporting that currently exists. Such transparency measures would be instrumental in revealing any systemic abuses and enhancing accountability within the sector. Objective improvement measures would then be able to be developed through consultation with the supply chain.

Additionally, record keeping<sup>2</sup> at a more micro level must be made prescribed under a *Mandatory Food and Grocery Code* and be available to the ACCC as part of compliance activities and could include:

- The number and volume (size of the consignment) associated with rejected fresh produce consignments by crop/variety, by day, by supplier and the reason for the rejection with objective evidence.
- The number and volume (size of the consignment) associated with accepted fresh produce consignments by crop/variety, by day, by supplier and the purchase price of that produce and the associated deductions. *(It is crucial to underscore that the rules that apply to supplier agreements require growers/suppliers to supermarkets to provide significant rebates, discounts, early payment fees and the like which are deducted from the purchase price).* It would that the suggested reporting list the items that are deducted from the purchase price say as a percentage.
- The details of associated informal complaints/disputes as above.
- Ratios of supplier payments per year to rejections, acceptances, price and volume.
- Number of annual transactions and ratio of rejections/acceptances.

The ACCC should be given the power to undertake random audits of 'rejected' consignments which would include contacting the supplier – with the suppliers' identity always protected, to determine if the rejection details were correct and if the supplier felt pressured because of the market power of the retailer.

Pecuniary penalties should be introduced for not meeting reporting requirements and/or results of random audits demonstrating a misuse of market power.

FMA calls for mandatory reporting to suppliers with detailed explanations when produce is rejected, mandatory reporting to ACCC of consolidated details including reasons for rejection and mandatory record keeping that could be scrutinised by the ACCC during compliance activities.

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<sup>2</sup> This is predicated on the view the major supermarkets possess the necessary resources and capabilities to effectively process a wide range of reporting data.



*Solution – disputes resolution that includes mediation.*

FMA calls for a dispute resolution process be prescribed in a *Mandatory Food and Grocery Code* like those prescribed under the *Mandatory Horticulture Code of Conduct*, where dispute resolution mechanisms include negotiation, mediation, and arbitration. These processes aim to resolve disputes between growers and traders regarding contractual agreements, pricing, and other related matters. If parties cannot resolve their issues through negotiation, they may opt for mediation facilitated by an independent third party. If mediation fails, arbitration, where an impartial arbiter makes a binding decision, may be pursued. These mechanisms ensure fair resolution of disputes and compliance with code provisions.

### **5.3. Non-Compliance Penalties**

The *Mandatory Horticulture Code of Conduct* has civil pecuniary penalties for non-compliance. These penalties increase the cost of compliance due to the associated risk particularly dealing with very small growers. There are no such penalties associated with the supermarkets self-designed *Voluntary Food and Grocery Code*. This imbalance in approach to each code clearly demonstrates an uneven playing field.

In the 2018 Final Report - Independent Review of the Food and Grocery Code of Conduct<sup>3</sup>, it was stated that “a number of submissions, including the ACCC’s submission, called for the introduction of civil pecuniary penalty provisions to act as a deterrent against breaching the Grocery Code.” This ACCC call was rejected, and the *Food and Grocery Code* remained voluntary with no pecuniary penalties - unlike wholesalers regulated by the *Mandatory Horticulture Code of Conduct*.

In Australian regulations, civil penalties can be applied to individuals and businesses found to have breached various laws or regulations. This includes breaches related to areas such as workplace health and safety, consumer protection, environmental regulations, corporate governance, and competition law. Civil penalties do serve as a form of punishment for non-compliance and are intended to deter future violations. Depending on the nature and severity of the breach, civil penalties may vary in terms of monetary fines, enforceable undertakings, or other corrective actions mandated by regulatory authorities. FMA is of the view that to affect a culture change in the actions of supermarket employees is to apply civil penalties to responsible individuals.

FMA calls for the civil pecuniary penalty provisions based on the supermarkets turnover or linked to their percentage of market share, to be implemented within a *Mandatory Food and Grocery Code*.

FMA calls for penalties to be applied to responsible individuals employed by supermarkets for breaches of the provisions of a *Voluntary Food and Grocery Code*. These penalties could be akin to those found in Work Health and Safety (WHS) regulations, where supervisors can be held personally liable for breaches related to ensuring the health and safety of workers under their supervision.

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<sup>3</sup> Final Report 2018 – *Independent Review of the Food and Grocery Code of Conduct*,

<https://treasury.gov.au/sites/default/files/2019-03/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf>, pg49



## 6. Other

### 6.1. Improving Price Transparency

In late 2020, the Australian Competition and Consumer Commission (ACCC) conducted an inquiry into bargaining power imbalances in supply chains for perishable agricultural goods (PAG) in Australia. The subsequent Perishable Agricultural Goods Inquiry Report<sup>4</sup> recommended that the government and industries explore measures to foster price transparency to increase competition in those industries.

In response to this recommendation, the Australian Government committed funding to improve price and market transparency in PAG. FMA was subsequently awarded a grant for a project - *Creating FreshData – a verifiable market price reporting scheme that collects, processes, stores, manages, analyses, visualises and interprets (wholesale) market sales price and produce provenance*. The project, due for completion June 2025, aims to provide growers the ability to gauge whether prices received are competitive market prices and to deliver price signals to interpret if there is an under or over supply of produce. It envisages FreshData will provide growers with information to calibrate their investments in future supply capacity. The insights from FreshData are not intended to determine the actual price received by a wholesaler rather a range achieved on any given day.

Access to comprehensive data on supermarket purchase prices, net of payment arrangement reductions such as rebates, discounts, and early payment arrangements, is crucial for understanding pricing dynamics. This information should be thoroughly addressed in reporting to enable growers and other suppliers to assess the competitiveness of the prices they receive within their supply chain. Failure to account for these pricing dynamics may lead to inflated prices, making comparisons unreliable. This transparency would foster fair competition within the direct supply chain.

FMA offers to extend the FreshData project (with appropriate funding) to show supermarket purchase prices paid to fruit and vegetable suppliers, net of payment arrangement reductions such as rebates, discounts, early payment arrangements and the like to be deidentified, aggregated and displayed with the aim to provide growers/suppliers the ability to gauge whether prices received from supermarkets are competitive prices within their supply chain.

NOTE: more information available on request.

### 6.2. Consequences of supermarket rejected produce

As revealed in section 5.2, supermarkets are known to reject produce for various reasons, including surplus to requirements. The subjective assessment of produce often leads to the 'dumping' of rejected produce onto the central market supply chain which can wreak havoc on multiple industry stakeholders. This practice disrupts the delicate balance between supply and demand, precipitating market inefficiencies and tumultuous price fluctuations. The inundation of rejected produce floods the market with excess goods, potentially creating a surplus that drives prices down. Such actions not only harm the profitability of growers who

<sup>4</sup> <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>



rely on the central market supply chain<sup>5</sup> but also disrupt the equilibrium of the entire market. Furthermore, the deluge of rejected produce distorts market signals, misleading buyers and causing resource misallocation. This reckless behaviour intensifies supply-demand imbalances, fuelling market instability and economic inefficiency. Such practices must be vigorously opposed to safeguard the integrity and stability of the market.

FMA calls for acknowledgement that 'redirecting' produce on the central market supply disrupts the delicate balance of supply and demand and causes market instability, impact grower returns and distorts market signals.

### 6.3. Market Share – Independent Retail Sector

While the horticulture sector has grown in volume and value, the market share of independent fruit and vegetable stores (greengrocers) and small grocers have been declining in the retail sector relevant to the major supermarkets.

The decline in market share of independent fruit and vegetable stores can be attributed to several factors. Firstly, major supermarkets have expanded their presence and convenience, offering a one-stop shopping experience for consumers.

Secondly, major supermarkets have significant buying power and can afford to be hyper competitive which can be challenging for independent stores to compete on price while maintaining profitability.

Additionally, major supermarkets invest heavily in marketing and advertising, which helps them attract customers and build brand loyalty. Independent stores often have limited resources for marketing and promotion, making it difficult for them to reach and retain customers.

Maintaining the sustainability of the independent retailer sector is paramount to ensuring its resilience and vitality, with the imperative of preventing any erosion of market share, and ideally, fostering its growth. This approach not only cultivates a competitive market environment that benefits consumers but also provides vital support and opportunities for growers/suppliers.

The "A Better Choice!"<sup>6</sup> marketing and advertising program, launched by the Central Markets in 2017, serves as a strategic initiative aimed at bolstering the efforts of independent fruit and vegetable business owners throughout Australia, who are integral parts of the central market supply chain. This program not only serves as a conduit for enhancing consumer awareness

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<sup>5</sup> Central market wholesalers adopt a "whole of crop" approach when engaging with growers, emphasising a comprehensive and inclusive strategy that encompasses the entirety of the produce harvested. By taking this approach, wholesalers demonstrate a commitment to supporting growers throughout the entire lifecycle of their crops, from planting to harvesting and beyond. This entails collaborating closely with growers to understand their cultivation practices, crop yields, and quality standards. Additionally, wholesalers actively seek to utilise the entirety of each crop, minimising waste and maximising efficiency. This approach fosters a mutually beneficial partnership between wholesalers and growers, ensuring that all produce is effectively marketed and distributed to meet consumer demand. Moreover, by embracing a "whole of crop" philosophy, wholesalers contribute to sustainable agricultural practices and promote economic resilience within the supply chain.

<sup>6</sup> <https://www.abetterchoice.com.au/>



but also fosters a collaborative platform wherein consumers actively contribute to the sustainability and prosperity of business owners, central market wholesalers and the growers who supply them. Despite operating within a modest budget, significantly smaller in comparison to the marketing expenditures of major supermarket chains, the program has demonstrated notable success, showcasing its efficacy in amplifying the visibility and competitiveness of independent retailers in the marketplace.

A substantial government investment has the power to revolutionize the market share of independent fruit and vegetable retailers, ensuring their competitiveness against major supermarkets. Through dedicated financial support, these retailers can thrive, contributing to market diversity, community prosperity, and sustainable supply chains. This investment opportunity is pivotal in catalyzing enduring change and securing a vibrant future for independent retailers nationwide.

FMA urges the Government to prioritise the establishment of a competitive fruit and vegetable sector, with a focus on maintaining or growing the market share of independent fruit and vegetable retailers. This call to action involves several key strategies:

- Investment in Marketing and Advertising: The Government is encouraged to support existing programs like "A Better Choice!" to boost awareness and visibility of independent fruit and vegetable retailers among consumers.
- Influencing or Mandating Horticulture Research and Development: The Government should influence or mandate Hort Innovation to allocate fruit and vegetable levies towards initiatives that prioritise the growth and sustainability of independent retailers within the sector.
- Investment in Business Education: There is a need for investment in educational programs tailored to enhance the business skills and capabilities of independent fruit and vegetable retailers, enabling them to compete more effectively in the market.
- Development of Employment Pathways: The Government should work on developing pathways to encourage employment within the independent fruit and vegetable sector, thereby fostering growth and sustainability while providing opportunities for individuals to contribute to the industry's success.

Overall, these initiatives are crucial for ensuring the long-term viability and competitiveness of independent fruit and vegetable retailers, contributing to a diverse and resilient marketplace that benefits both consumers and stakeholders across the supply chain.

FMA urges the Government to prioritise the establishment of a competitive fruit and vegetable sector, with a focus on maintaining or growing the market share of independent fruit and vegetable retailers. This call to action involves several key strategies:

- Investment in marketing and advertising;
- Influencing or mandating Horticulture Research and Development;
- Investment in business education; and
- Development of employment pathways.



## 7. Summary

### Scope

Central Market wholesalers are suppliers of fruit and vegetables to supermarkets. They on sell the fresh produce where all transactions with growers are regulated by the Mandatory Horticulture Code of Conduct.

### Overview of the Code

FMA argues that its voluntary nature undermines its ability to address fundamental power differentials.

FMA asserts that, while the Voluntary Food and Grocery Code may serve as a token gesture towards addressing supplier-retailer relationships, it fails to meaningfully rectify the power imbalances that persist in the food and grocery (fresh fruit and vegetable) sector.

### Scope and application of the Code

FMA strongly advocates that the existing signatories to the Voluntary Food and Grocery Code are the entities with market power within the fresh fruit and vegetable sector.

### Code provisions

FMA calls for a new segment within a remade *Mandatory Food and Grocery Code* to be introduced to explicitly address the unique challenges encountered in the fresh fruit and vegetable sector. This addition would serve to tailor provisions that cater to the specific needs and dynamics of the fresh produce industry, potentially extending its applicability to encompass the broader spectrum of horticulture.

FMA encourages reviewers to thoroughly examine each of the rules proposed in the consultation paper, aiming to make them practical and provide certainty and clarity to suppliers.

### Voluntary vs Mandatory

FMA asserts that there is necessity for mandatory regulatory intervention in the supermarket supply chain because the supermarkets' ability to self-correct is clearly not possible and supermarket actions may not support a sustainable horticulture industry for all participants.

FMA calls for the distortion of the market to be addressed through either the introduction of mandatory regulation for the supermarket fruit and vegetable supply chain, or the removal of the *Mandatory Horticulture Code of Conduct* and the resultant compliance costs borne by Central Market wholesalers.

FMA calls for the exclusion of fruit and vegetable intermediaries in the central market supply chain, from the definition of 'wholesaler' in a *Mandatory Food and Grocery Code* as being essential for promoting a fair and competitive marketplace.

FMA calls for the implementation of a '5% food and grocery market share' and "multi-site supermarkets" threshold for supermarkets under a *Mandatory Food and Grocery Code* to strike a balance between regulatory oversight and supporting the continued growth and sustainability of smaller independent retailers. It fosters a competitive environment where businesses of all sizes can thrive, while still upholding the principles of fairness and transparency in the food and grocery sector.



## Market Power

FMA calls for Code Arbiters' regulation under a *Mandatory Food and Grocery Code*, guaranteeing independence from supermarkets, to secure rigorous criteria, transparency, and oversight to bolster arbitration credibility.

## Fear of retribution

FMA asserts that regulators should be even handed and disregard supermarket retailers' suggestion that they have few complaints because of a well-developed dispute resolution practices.

FMA calls for mandatory reporting to suppliers with detailed explanations when produce is rejected, mandatory reporting to ACCC of consolidated details including reasons for rejection and mandatory record keeping that could be scrutinised by the ACCC during compliance activities.

FMA calls for a dispute resolution process be prescribed in a *Mandatory Food and Grocery Code* like those prescribed under the *Mandatory Horticulture Code of Conduct*.

## Non-compliance penalties

FMA calls for the civil pecuniary penalty provisions based on the supermarkets turnover or linked to their percentage of market share, to be implemented within a *Mandatory Food and Grocery Code*.

FMA calls for penalties to be applied to responsible **individuals** employed by supermarkets for breaches of the provisions of a *Voluntary Food and Grocery Code*.

## Improving price transparency

FMA offers to extend the FreshData project (with appropriate funding) to show supermarket purchase prices paid to fruit and vegetable suppliers, net of payment arrangement reductions such as rebates, discounts, early payment arrangements and the like to be deidentified, aggregated and displayed with the aim to provide growers/suppliers the ability to gauge whether prices received from supermarkets are competitive prices within their supply chain.

## Consequences of Supermarket rejection of produce

FMA calls for acknowledgement that 'dumping' produce on the central market supply disrupts the delicate balance of supply and demand and causes market instability, impact grower returns and distorts market signals.

## Market Share – Independent Retail Sector

FMA urges the Government to prioritise the establishment of a competitive fruit and vegetable sector, with a focus on maintaining or growing the market share of independent fruit and vegetable retailers. This call to action involves several key strategies:

- Investment in marketing and advertising;
- Influencing or mandating Horticulture Research and Development;
- Investment in business education; and
- Development of employment pathways.





## FMA State Bodies



The Queensland Chamber of Fruit & Vegetable  
Industries Co-operative Limited



NSW Chamber of Fresh Produce Limited



Fresh State Limited



Chamber of Fruit and Vegetable Industries in Western  
Australia Inc.



South Australian Chamber of Fruit & Vegetable  
Industries Inc.

George Giameos