



Centre for
Decent Work
and Industry

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

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This submission was prepared for the [QUT Centre for Decent Work & Industry](#) by Associate Professor Bree Hurst, Professor Rowena Maguire, and Dr Hope Johnson

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Summary

The views in this submission have been informed by the authors' previous work, as well as a current project they are conducting to map trading practices impacting food waste in Australia (End Food Waste Australia CRC Project 1.3.7). The aforementioned project has included a review of over 300 academic and industry articles relating to unfair trading practices in the food supply chain. The next phase of this research will commence shortly; it includes research interviews and workshops to better understand and map potential solutions to key unfair trading practices in the Australian food supply chain. It is important to note that the views presented in this submission are that of the listed authors and do not represent the funding scheme or funding partners (End Food Waste Australia and Queensland Department of Environment, Science and Innovation).

Summary of key issues

The consultation paper for this review posed three key questions. The table below indicates our short answers to these questions. More detailed responses to specific consultation questions are provided in the following section.

Key issue	Answer
1. Voluntary code – should the Code be prescribed as mandatory or voluntary?	Mandatory.
2. Fear of retribution – has the Code effectively reduced suppliers' fears of retribution from raising issues with the signatories?	No.
3. Penalties – should the current enforcement powers of the ACCC be extended to include significant financial penalties?	Yes.

Responses to specific consultation questions

Question 2: Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

No. Research conducted by Devin and Richards in 2015 which investigated supermarket power in Australia found that there is substantial power imbalances between supermarkets and their suppliers, resulting in supermarkets using their power to '(a) control prices by limiting the amount of produce they purchase after delivery, or offering a lower price on delivery, thereby contributing to higher levels of waste; (b) dictate purchasing prices that do not necessarily reflect the actual costs to grow the produce; and, (c) create an "unfair food system" that is leading to dramatic changes in food supply chain and reportedly compromising the economic viability of farms; and (d) set and enforce strict standards regarding the cosmetic appearance of food.'¹ Almost a decade on, little has changed despite the introduction of the Code in 2015. Research conducted by the National Farmers Federation in 2023, for example, highlights that 83% of respondents were concerned or very concerned about the market power of processors or

¹ Bree Devin and Carol Richards, 'Food Waste, Power, and Corporate Social Responsibility in the Australian Food Supply Chain' (2018) 150 *Journal of Business Ethics* 199, 207.

supermarkets.² Similarly, current research being conducted by Hurst, Maguire, and Johnson suggests power imbalances continue to remain a significant issue between suppliers and retailers in Australia.³

In addition, previous research on the Code has found that the terms lack both the specificity and the enforcement provisions required to address the significant power imbalance that favours retailers.⁴

Question 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?

Emerging findings from Hurst, Macguire and Johnson, which includes a review of industry, government, and academic literature from across the world, suggest that market imbalances are particularly felt in the horticulture sector, largely due to the perishability of the product.⁵ This finding is also consistent with previous research by the authors looking at the horticulture sector.⁶ Of note here, however, is that there is some evidence to suggest that those suppliers who have access to alternative markets – such as export markets or processing markets – tend to be less impacted by market imbalances. This is summarised by Devin and Richards:

Through the interviews, we were also able to identify instances where the power of the supermarkets could be diminished slightly, which, in turn, could contribute to lower levels of food waste. More specifically, as one industry body representative said: “It’s very hard to go and compete [against the supermarkets] if you don’t have any bargaining power”. Access to alternative markets was seen as a way of increasing the bargaining power of growers, as it gave them more channels to distribute their produce and in turn, lower their levels of waste. These alternative markets could include export markets—which in times of scarcity of a particular product—could present greater bargaining power for the growers’ organization. Other avenues of reducing food waste and reducing costs included finding alternative markets for imperfect produce. A small number of growers’ organizations mentioned value-adding such as processing, canning, or juicing as means to maintain value in imperfect produce.⁷

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

The current Code theoretically addresses the key unfair trading practices that are noted in the academic and industry literature: (1) unilateral and retrospective contracts, (2) lack of written contracts, (3) delay of payments, and (4) cosmetic/quality specifications.⁸ However, in practice, the current Code sub-clauses in effect provide retailers with the scope to implement these unfair trading practices without technically violating the Code. For instance, under the current Code, a retailer or wholesaler can delist a supplier’s grocery product in accordance with the relevant contracts and ‘for genuine commercial reasons’, which leaves the retailer with significant discretion without further responsibilities and does not address the potential for the relevant agreements to reinforce unfair relations.⁹ In addition, the dispute resolution options under the Code do not adequately account for the power imbalance between suppliers and retailers and do not provide adequate incentive for supermarket compliance with the Code.

² National Farmers Federation and Sefton, *National Farmer Priorities Survey (2023)* <https://nff.org.au/wp-content/uploads/2023/10/National_Farmer_Priorities_Survey_Report_FINAL_Oct23.pdf>.

³ Bree Hurst, Rowena Maguire & Hope Johnson, *Understanding trading practices affecting food waste in Australia. End Food Waste CRC Project 1.3.7 (2023)*.

⁴ See, eg, Jane Dixon, Caron Beaton-Wells and Jo Paul-Taylor, *Consumer-Citizens and Competition Policy in the Era of Supermarketisation* (Melbourne Legal Studies Research Paper Series No. 872, 2020) 12.

⁵ See also, Ibid 3; Jessica Sinclair Taylor, Julian Parfitt, and Dominika Jarosz, *Regulating the Role of Unfair Trading Practices in Food Waste Generation* (EU Horizon 2020 REFRESH, 2019) 7 <<https://eu-refresh.org/regulating-role-unfair-trading-practices-food-waste-generation.html>>.

⁶ Carol Richards et al, ‘The Paradoxes of Food Waste Reduction in the Horticultural Supply Chain’ (2021) 93 *Industrial Marketing Management* 482; Rudolf Messner, Hope Johnson and Carol Richards, ‘From Surplus-to-Waste: A Study of Systemic Overproduction, Surplus and Food Waste in Horticultural Supply Chains’ (2021) 278 *Journal of Cleaner Production* 123952 (‘From Surplus-to-Waste’).

⁷ Devin and Richards (n 1) 207.

⁸ Ibid 3

⁹ *Competition and Consumer (Industry Codes- Food and Grocery) Regulation 2015* (Cth) s 19.

Question 12: What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?

Question 18: Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

Without addressing systemic issues associated with market imbalance and power, it is unlikely an effective dispute resolution model will be found, nor will any amendments to the *voluntary* Code address the fear of retribution. Unlike mandatory mechanisms, which are enforceable through binding legislation, voluntary mechanisms achieve compliance through ‘peer pressure, a sense of reciprocal obligation, intrinsic motivations, cooperative strategies, or market drivers that can subsist independently of central governmental authority’.¹⁰ Common criticisms of industry *and* voluntary instruments of regulation is that in the absence of the ‘underlying formal, substantive, procedural and institutional values that give law its legitimacy’, there is a risk of arbitrary decision making, uncertainty in knowing what the ‘law’ is or how actors should behave, and ultimately, a risk that in the negotiations and interpretations connected with the instrument, parties in weaker positions will have their rights and protections ignored.¹¹

Fear of retribution is a significant issue in the Australian food and grocery sector and has been for some time. Our own experience as researchers is that many within the sector, particularly the horticulture sector, are hesitant to participate in research for fear of potential retribution. Emerging findings from current research by Hurst, Maguire, and Johnson is further validating the view noted in the terms of reference for this inquiry that low complaints are not necessarily because there is nothing to complain about, but rather suppliers fear retribution and therefore opt not to complain.¹² This finding also aligns with research conducted as part of the Food and Grocery Code Independent Review Annual Report 2021-2023¹³.

While the United Kingdom (UK) does not have the same extent of market imbalances seen in Australia, research does suggest that fear of retribution is still a valid concern in the UK, with anecdotal evidence suggesting that suppliers who have complained to the UK’s Groceries Code Adjudicator have seen a positive outcome in the short-term (i.e., the issue they complained about was addressed), but have been penalised in the longer term due to reduction in the quantity they were asked to supply.¹⁴ Any changes to the Code need to also consider and provide mechanisms to address the potential for future retribution.

In theory, an effective dispute resolution model where market imbalances remain is one in which suppliers’ identities are not revealed, in a similar vein to the UK Groceries Code Adjudicator in which the Adjudicator has a legal duty to preserve anonymity.¹⁵ In reality, the nature and process of complaints, even with an independent arbiter, means this would likely be difficult to fully implement in practice.

Regardless, provision of an independent and accessible third-party would go some of the way to empowering suppliers, as would a platform which allows suppliers to anonymously report issues.¹⁶ Further to this, following a dispute, there should be some oversight of the relations between the supplier and the retailer by the ACCC to counteract fear of retribution, and some clear avenues for the ACCC to take action where retribution is observed. While there is no current data to suggest this, it could be hypothesised that there may be some benefit to the ACCC ‘issuing public warning notices about a suspected contravention of the Act’¹⁷, in that such an enforcement act may encourage other suppliers to report similar issues and thus create a situation where there is power in numbers, so to speak. Further consultation on this is required.

¹⁰ Andrew Lawson, ‘Farmers, Voluntary Stewardship and Collaborative Environmental Governance in Rural Australia’ (2017) 34(4) *Environmental and Planning Law Journal* 271, 277.

¹¹ See, eg, Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-Making* (Bloomsbury Publishing, 2018) 3.

¹² *Ibid* 3

¹³ Chris Leptos, *Food and Grocery Code Independent Review* (Annual Report 2021-2022, The Australian Government the Treasury, 2022) <<https://grocerycodereviewer.gov.au/reports/annual-reports/2021-22-annual-report>>.

¹⁴ Jerry Latter, ‘Groceries Code Adjudicator –The Code and Supplier Experiences 2023’ (Presentation at the 3rd Annual Groceries Code Adjudicator Conference, 28 September 2023) <https://assets.publishing.service.gov.uk/media/6516b9516dfda6000d8e38ab/GCA_Conference_2023__YouGov_survey_presentation.pdf>.

¹⁵ *Groceries Code Adjudicator Act 2013* (UK) s 18.

¹⁶ See the anonymous reporting website in the United Kingdom under the remit of the Groceries Code Adjudicator: <https://tellthegca.co.uk/>

¹⁷ *Competition and Consumer Act 2010* (Cth) s 51ADA.

Question 13: What benefits could a mandatory Code bring to suppliers?

It is widely considered regulatory best practice to move from voluntary towards a more mandatory model with a range of enforcement options responsive to the context where a voluntary approach has not achieved its objectives.¹⁸ Mandatory regulation, typically enacted through legislation, can establish obligations of conduct and or standards and create penalties for failing to comply with these obligations or standards. Legally binding obligations or standards can be *technology standards* which require use of safeguard methods in specific situations; *performance standards* which specify duties and tend to be outcome focused; or *process standards* which specify processes or steps that must be followed to mitigate risks or hazards.¹⁹

Currently, there are strong market incentives for retailers to adopt interpretations of the Code that benefit their interests over suppliers and the risk of being found not compliant with the Code are minimal given the lack of accessible, independent complaint avenues, as well as the fear of retribution suppliers hold and their lack of access to data. A mandatory code would benefit the supplier if it provides effective compliance and enforcement tools to the ACCC and therefore enables independent interpretation and application of its provisions. Such an approach creates more incentives for retailers to comply with the Code.

In the Consultation Paper, Professor Rod Sims AO commented²⁰ that the voluntary nature of the Code means "... *the supermarkets can walk away when they wish*". While this is true, Hurst's research on social licence to operate²¹ suggests it is highly unlikely supermarkets would walk away given the significant negative impact this would have on their social licence and reputation. However, there is symbolic importance in shifting to a mandatory code. The current voluntary approach, combined with the power of retailers, makes the Code appear to be more like guidelines rather than regulations that must be followed.

Question 16: Are Code Arbiters perceived to be independent from the supermarkets that they oversee?

No. Code Arbiters are selected and funded by retailers in line with the current Code; this means they are not truly independent. Commentary from industry points to the view that an independent arbiter would be preferred. This does not necessarily mean that it cannot be funded by the retailers; rather a levy paid by the retailers could fund an independent arbiter, however, the selection and appointment of such arbiter should not be determined or influenced by the retailers. Additionally, providing the ACCC with more effective compliance and enforcement tools would also help address those situations that do not suit private dispute resolution options.

¹⁸ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) ('*Responsive Regulation*').

¹⁹ Neil Gunningham, Peter N Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) ('*Smart Regulation*').

²⁰ Rod Sims, 'If the PM Thinks This Supermarket Sweep Is Enough, He's off His Trolley', *The Sydney Morning Herald* (online, 12 January 2024) <<https://www.smh.com.au/national/nsw/if-the-pm-thinks-this-supermarket-sweep-is-enough-he-s-off-his-trolley-20240111-p5ewm0.html>>.

²¹ Bree Hurst, Kim A Johnston and Anne B Lane, 'Engaging for a Social Licence to Operate (SLO)' (2020) 46(4) *Public Relations Review* 101931.