



AFPA Submission to:

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

May 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), and further responds to the discussion paper published as part of the interim report associated with 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, 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.

As detailed in this submission are responses to relevant questions raised within the interim report discussion paper. As an overarching comment, members of the AFPA continue to support a competitive horticulture industry that supports the financial sustainability of fresh produce growers. To that end, the Code, in conjunction with the Horticulture Code of Conduct, must support a trading environment that enables members of the supply chain engage constructively and fairly.

A key discussion point within the interim report is the consideration of issues that are particularly relevant to the fresh produce industry, or highly perishable products. To the extent that specific measures focusing on fresh produce are included within the Code, the AFPA would recommend that an outcome of this review be further developing these specific measures with direct suppliers and retailers to ensure that these measures, and their outcomes, are fit for purpose in improving outcomes for suppliers and retailers.

Importantly, 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.

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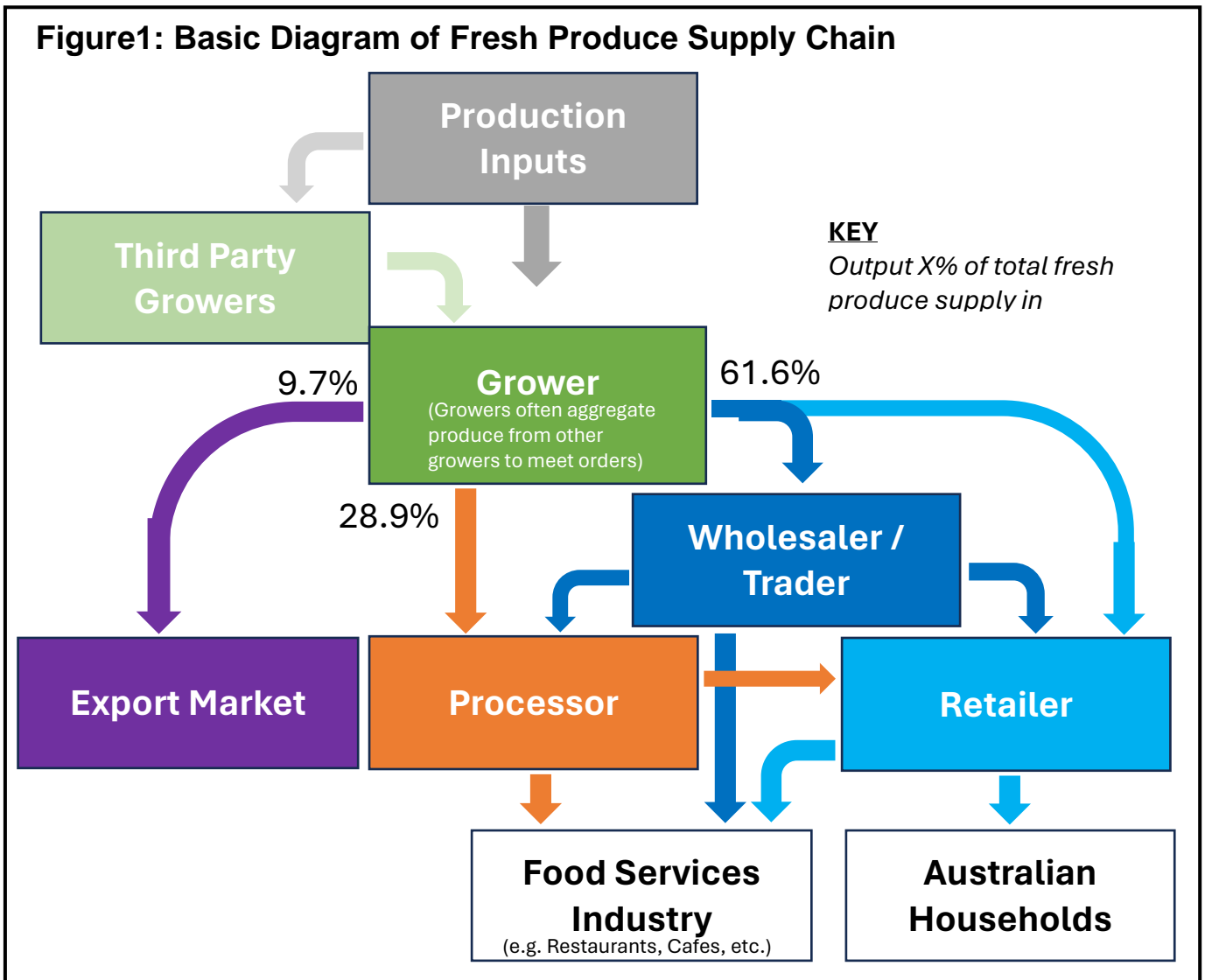
Response to the Discussion Questions and Recommendations

The following provides collated responses to the relevant 15 questions presented in the consultation paper.

1. Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?

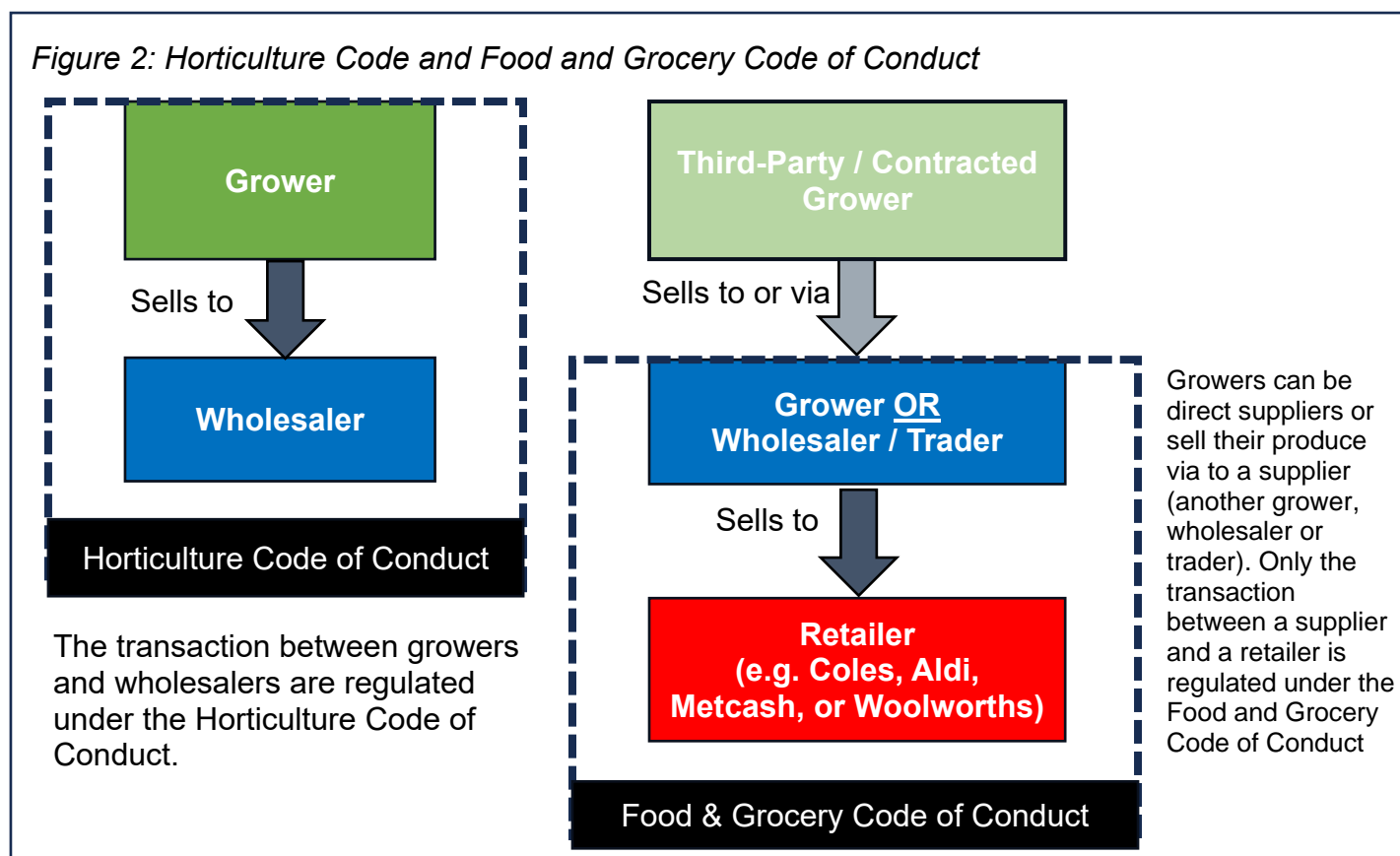
The AFPA supports firm recommendations made in the interim report that outline that all supermarkets with an annual revenue threshold of \$5 billion should be subject to the mandatory Code and that all suppliers should automatically be covered (Recommendation 2). There are no further protections required under the Code for ‘indirect’ retail suppliers within the fresh produce industry as this supply is already regulated via the Horticulture Code of Conduct (Hort Code), outlined in greater detail below. It is the firm view of the AFPA that the Hort Code must remain separate from the Food and Grocery Code in order to have the greatest positive impact on industry and protection for suppliers.

In simplest terms, direct supply under the Code could best be expressed (particularly with regards to suppliers of Coles, Woolworths and ALDI) as suppliers who hold a ‘Vendor Number’. With regard to fresh produce, many suppliers to the retail, wholesale, processor, food service and export markets are aggregators of produce; these businesses both grow their own produce and purchase produce from third party suppliers. With respect to the Code, transactions that occur (regardless of the origin of the product) using a supplier’s Vendor Number should be covered by the Code. Figure 1 (below) depicts the Fresh Produce Supply Chain, where businesses operating in the highlighted green “Grower” portion of the supply chain, would be considered suppliers under the Code.



The Horticulture Code of Conduct and fresh produce wholesalers/traders

There are two distinct 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 AFPA continues to strongly advocate that the Horticulture Code of Conduct remain a separate and standalone document from the Food and Grocery Code.



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

The 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. 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 which for many fresh produce growers, remains a significant channel through which fresh produce is traded.

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 therefore greatly diminish the potential of both documents to deliver on their intended and widely understood purpose. The two Codes should complement each other by remaining focused on separate parts of the supply chain.

Creating an overlap between the Hort Code and the Food and Grocery Code at an enterprise level would impose significant red tape on fresh produce businesses with little resultant benefit and is explored further in this submission. It is important to maximise the benefit to suppliers of the Food and Grocery Code that industry Codes are kept separate, and not formally or informally integrated into the Code.

2. Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.

The good faith provisions within the Code should be extended to suppliers. This could be contained in a separate series of clauses within Part 1A Good Faith within the existing Code, for example adding the following clauses to make Good Faith provisions relevant to suppliers.

Obligation to deal with retailer or wholesaler lawfully and in good faith

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

With respect to current Clause 6B (3), the relevant determining criteria could also be extended to supplier, however, should only be relevant when considering a matter or dispute that is utilising the dispute resolution processes within the Code.

3. Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.

4. Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

With regard to dispute resolution within the Code, the AFPA has previously contended that:

- Quick and effective dispute resolution is key.
- The Code in and of itself is an effective tool to reach an outcome - that is the very presence of the Code can act as a deterrent to questionable or unacceptable behaviour when raising an issue with a retailer; and,
- Support for suppliers (particularly smaller suppliers) is necessary to determine if a complaint/issue is able to be actioned using any mechanism provided by the Code.

The measures summarised as Recommendation 7 within the Interim Report find a balance between enabling greater enforcement and penalties under the Code and enabling quick dispute resolution. It should be noted that an inherent weakness in the dispute resolution mechanism under a mandatory code is the requirement for retailers to agree to arbitration, with compensation set at current levels enabled within the existing voluntary code; it is anticipated that it would be unlikely that retailers would not agree to this provision but is worth explicitly noting.

Ensuring that independent mediation is available to suppliers will be important in addressing concerns raised about the fear of retribution. Separately, the option to make anonymous complaints to the ACCC is also supported. It should be noted that in order to support anonymous complaints, there must be a minimum threshold of detail provided by the supplier to enable an issue to be addressed, particularly if the subject of the complaint is viewed as systemic and affects an industry, rather than solely an individual supplier.

Importantly, 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. This should be maintained in a move to a more tiered dispute resolution approach as it appears to have been an effective remedy for supplier and retailers to date.

The most important way to improve the use of the Code is for suppliers to be both better educated about the Code and better able to engage with Code Arbiters/Mediators about how the Code may apply to a particular set of circumstances. 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 the risk of 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 properly fund and 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 and readily accessible 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.

- 5. *What minimum standards of conduct, if any, should be specified in the Code that should not have exceptions? If exceptions are provided for, how should these be limited? Please provide examples to support your views.***
- 6. *Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.***

At a principles level, the AFPA does not support Recommendation 9 (*Specific obligations under the Code should set minimum standards that cannot be contracted out of in grocery supply agreements or otherwise avoided*) made in the interim report.

Notwithstanding the concerns about market power, the provisions within Division 3 of the Code that are referenced within the interim report, pertain to specific commercial arrangements that may be beneficial to both the supplier and retailer, for example the ability to fund promotional activity with a retailer. Recommendation 9 within the interim report effectively limits a commercial entity’s ability to negotiate with a retailer on terms of trade – this intervention will likely have unintended consequences while not ameliorating market power concerns.

The Interim Report outlines a range of feedback (predominantly from the fresh produce sector) on minimum standards of conduct. When reviewing this feedback, it is important to note that industry groups are effectively calling for minimum contract terms (i.e. limitations on how promotions are funded) – this is distinct from the Code’s first stated purpose which is to regulate standards of business conduct – not limit two parties’ ability to enter a contract.

The Purpose of the Code 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.*

Creating minimum contract obligations within the Code will likely create a range of adverse effects and unintended consequences; introduction of minimum terms to areas outlined in Division 3 of the Code, that cannot be contracted out of effectively constrains competition at a supplier level and will force negotiations regarding supply within the fresh produce industry to be based entirely on price as no other attributes of a supply arrangement e.g. quality, promotional ability etc. will be available as negotiation tools. Arguably, minimum contract terms that are unable to be varied by agreement have the potential to place further downward price pressure on suppliers, removing all other options available to a supplier to negotiate an agreement that could improve their own market share and profitability.

The Interim Report relies on evidence from agriculture industry groups that suggests suppliers are not able to influence or negotiate the content of their grocery supply agreement. In acknowledging the concern raised within the interim report, that is that these agreements are effectively “take it or leave it,” action against alleged “take it or leave it” behaviour or contracting, could be considered under good faith obligations within the Code, or unfair contract terms. These options are both likely more suitable to achieve the first expressed purpose of the Code, rather than preventing suppliers and retailers negotiating a mutually beneficial contract or supply agreement.

In terms of how minimum standards of conduct would apply to the fresh produce industry, the unique characteristics of the sector should be considered. For context, the fresh produce industry is categorised by predominantly unbranded product, this is a distinct difference to other products within a retail store, particularly in long life grocery where brands are common. The absence of branding or product differentiation among fresh produce create unique market dynamics for the fresh produce sector:

- **Suppliers can be easily substituted:** the absence of a brand means that suppliers can easily be substituted. This creates strong competition amongst suppliers to maintain their own market share within a category. Given the need for standard product specifications within produce, and the lack of branding, this leaves limited avenues of competition among suppliers. Suppliers therefore compete on price, product quality, reliability of supply and terms of trade.
- **Seasonal factors will influence supply:** despite any agreement to the contrary, seasonal factors including the impact of weather and climate will influence a supplier’s ability to provide product to a retailer; this includes both being short on supply and having an oversupply of product that needs to be sold.
- **Limitations of an individual supplier to grow sales within a category:** Unlike branded products, for example breakfast cereals, where an individual product, say Kellogg’s Corn Flakes may be able to undertake activity (promotions, discounting etc.) to promote both sales of their product (corn flakes) and in return increase sales for the category (breakfast cereals) this is incredibly limited in fresh produce. There is an inherent reliance from fresh produce growers on retailers, to market and grow fresh produce categories in a way that most individual companies/suppliers cannot and therefore this makes the dynamics associated with category growth strategies (quality management, reliability, promotion, price etc.) a greater partnership between retailers and fresh produce suppliers than in other grocery sectors.

With respect to the contents of Division 3 – *Requiring payments from suppliers including payments for payments for wastage, payments as a condition of being a supplier, payments for a retailer or wholesaler’s business activity and funding promotions* these provisions likely have a different application and effect in fresh produce than in other grocery sectors.

If consideration of minimum standards that cannot be contracted out of in grocery supply arrangements is being actively considered, provisions within Division 3 that are of particular relevance to the fresh produce industry include:

- Payments for wastage
- Payments for retailers or wholesalers’ business activities
- Funding promotions

Below sets out recommendations for minimum standards against relevant provisions in Division 3. These recommendations have been included should the Review hold firm on Recommendation 9 within the Interim Report.

Regardless of the implementation of Recommendation 9 (either inclusion or exclusion in the Code), any payments associated with Division 3 of the Code, particularly where these items are charged as a rebate to a supplier (for example, a percentage that is removed on remittance of payment), this remittance must indicate itemised rebates, their purpose, and their value. This supports greater transparency of charges, and their purpose, enabling producers to better engage with these requirements.

Specifically with regards to Clause 15 within Division 3 where payments can be required as a condition of being a supplier, the ability to contract out these requirements should be removed, and if not, any rebate associated with this requirement must be itemised as per above.

Payments for wastage

At a principles level, retailers and suppliers should be able to agree relevant arrangements to manage wastage within the supply chain.

The challenge that arises within fresh produce is at the point of transfer of ownership (typically delivery to distribution centre), a produce supplier is unable to ensure effective management of their products to reduce wastage. To that end, current minimum protections should focus on ensuring the retailers obligation to take reasonable steps to mitigate wastage and outlining the circumstances in which a supplier could be reasonably held responsible for wastage once the transfer of ownership has occurred.

Payments for retailers or wholesalers’ business activities

With regards to payments for retailers or wholesalers’ business activities, issues raised throughout this review process by the fresh produce industry through various roundtables and submissions indicate that supplier payments for artwork and packaging designs (Division 3, Section 17 (b)) are the most disputed.

A minimum standard could be introduced where if a change in packaging or artwork design for own-branded (i.e. retailer branded) packaging is requested by a retailer, this change should be made at the retailer’s cost. Exceptions to this are supplier branded products, where the supplier has controlled the design of the packaging.

Funding promotions

At a principles level, the ability to engage in promotional activity is critical to the fresh produce industry. This is both in terms of driving growth of categories and consumption of produce, but also in supporting producers at times of peak supply (particularly where yield was greater than anticipated) to move additional product volumes. Reducing suppliers’ ability to engage in promotional activity via various funding mechanisms will have a significant negative impact on industry.

Conceptually, this issue must be considered in two parts: above the line promotional activities and below the line

promotional activities.

- *Below the line promotion* – at its simplest, this type of promotional activity involves the supplier reducing the cost/sell price of a product to a retailer to support a promotional price then offered to consumers.
- *Above the line promotion* – this type of promotional activity would include activations such as advertising online, in print or television; in store marketing such as improved product placement or on shelf promotional materials; promotions linked to retailer loyalty programs and other marketing mechanisms.

Both above and below the line promotion should be enabled in the fresh produce industry and not be prohibited as an unintended consequence through minimum standards within the Code.

Minimum standards could contemplate the use of above the line promotion within the fresh produce industry, given that typically, this occurs at a category level (i.e. not a brand of fresh produce) and could contemplate adding specific requirements to enable suppliers within a category to opt out of promotional activity, and for information outlining proposed return on investment to be provided to suppliers ahead of promotional request.

7. Do any of the obligations under the Code need strengthening to better protect suppliers?

8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.

9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?

10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.

The AFPA and other stakeholders in the fresh produce industry have noted throughout the review process a range of factors within the fresh produce industry that are unique and differ from the supply of shelf stable groceries and even other perishable products. These characteristics were explicitly highlighted by the AFPA in our original submission to the Review.

The Interim Report outlines considerations for fresh produce specific requirements and also notes key issues raised by industry groups focusing on price and volume arrangements within the fresh produce industry.

The below outlines the context for the operation of the fresh produce industry, which inherently operates on a supply/demand traditional market basis. It should be noted that in this type of market, interventions relating to either the supply of, or demand for fresh produce will have a material impact on price. Similarly, interventions on pricing are intrinsically linked to supply and demand of fresh produce.

Operation of the fresh produce market

- The fresh produce industry, similar to many agriculture sectors, operates in a supply/demand market, which in turn impacts price. For example, the low supply of a product in fresh produce, often due to a weather event, will create an imbalance in the market that often sees a rapid and temporary increase in price until supply stabilises.
 - A recent example was the “\$12 iceberg lettuce” period in 2022, where significant rain and floods in Queensland created a shortage of iceberg lettuce that created an increase in price for growers and to consumers.
- Prices can change rapidly within the fresh produce market, as it is very sensitive to fluctuations in either demand or supply. The market sensitivity is in part driven by the short shelf life of produce, meaning that most produce

cannot be left unpicked, or held in cool rooms as inventory in an attempt to achieve a better price; this heightens the impact of all market shocks.

- Similar to other agriculture sectors (i.e. cattle auctions), Australia’s fresh produce wholesale markets, based in each state, are often credited with setting a “market price” for each product line based on the daily price achieved through the market.
 - This market price typically reflects product volume both currently within the physical market, but also takes into account intelligence shared by growers with their wholesalers about future quantity and quality of product.
- The wholesale market price, due to its availability both through collected data (public and purchased), and simple engagement in the market is, by default, what is often used to give an indication of an average price for a particular product line.
 - This means that while a comparably small volume of produce utilises Australia’s central market system, it is typically the price setting mechanism. As a result, the market price information often becomes distorted, and it is not properly representative of what is occurring in terms of volumes and price at retail.
- While there is often a relationship between the wholesale market price and the price of produce sold directly to retailers, the two are not necessarily the same price.
 - Direct to retail prices typically reflect a tender methodology, where suppliers of a product line provide major retailers a weekly quote for the price and volume of product they would like to sell. This price will reflect a range of things, including the different (and typically more expensive) requirements that have been met by that supplier to meet the retailers’ standards.
- The produce sold within the wholesale market is typically not directly comparable to the produce sold directly to retailers, meaning that the wholesale market price cannot be used reliably as anything other than a market indicator. It should therefore not be used or in any way relied upon as a suitable benchmark by which to determine average pricing for the retail market.

Fresh Produce within the Code

The AFPA strongly recommends that if the Review determines to make a recommendation that a Fresh Produce specific section of the Code be introduced, that this section is developed in close consultation between retailers, suppliers and industry representative groups. With respect to information outlined in the Interim Report, key issues highlighted with respect to fresh produce are:

- price transparency,
- volume forecasting,
- fresh produce standards/specifications and rejections, and
- promotional activity

In terms of addressing these issues, the below could be considered for inclusion in a fresh produce specific section within the Code.

Price Transparency and Volume Forecasting

As outlined above, the fresh produce market operates on what is both a dynamic and fluid supply-demand model. Therefore, interference between supply (volume) and demand (consumer purchasing) will have an impact on price and supplier returns. Likewise, constraints on price will have an impact on both supply and demand. Therefore, any interference with the existing market mechanism must be approached incredibly cautiously to avoid unintended consequences for producers, retailers, and consumers. For example, whether intended or unintended, it would not be desirable for suppliers if a circumstance is created that imposes an effective price ceiling on the supply of their products.

While much of the feedback from the fresh produce industry during the Review process has focused on price and volume, these issues are symptoms of a broader problem – namely the asymmetry that can exist with respect to the exchange of information between retailers and suppliers. Therefore, objectives to improve outcomes for suppliers should focus on ensuring suppliers have access to better and where reasonable more transparent information, in order to make more informed decisions with regard to negotiations with retailers.

Given the dynamics of the fresh produce industry, the Code should contemplate better addressing the asymmetry of information between parties – rather than regulating price or volume. Mechanisms by which this could be achieved include:

- Requiring retailers to provide suppliers on a regular basis (i.e. monthly) indications of the supplier's percentage of market share within a category.
- Requiring retailers to provide suppliers 'scan data' (which is currently available for purchase, and therefore may not be accessible to all suppliers) without charge, demonstrating category sales.

These two measures in conjunction will give suppliers a better indication of their proportion of supply to a relevant market, as well as a better indication of sales of product. These two measures will arm suppliers with improved market intelligence that will support an improved negotiating position and importantly address the asymmetry between retailers and suppliers.

Importantly these measures continue to promote competition amongst suppliers and avoid (unintended) consequences associated with publishing pricing information, volume forecasts and other measures that are likely to have a downward pressure on suppliers and reduce the ability for smaller producers to participate in direct supply to retailers.

Price Increases

It should be noted that in fresh produce a supply relationship is typically made with a retailer in two related parts;

- Agreement of trading terms; this would include components outlined in Part 2 Section 8 (matters to be covered by agreement) within the Food and Grocery Code
- Agreement of contract; this agreement is formed from time to time (typically on a weekly basis) whereby a supplier/grower will agree to supply a specific quantity of product, at a specific price, to a specific location. The agreement of a contract takes into consideration the terms of trade set out in the Grocery Supply Agreement which reflects minimum standards within the Code.

This is a similar process to what occurs within the Horticulture Code, where broad terms of trade are agreed via a Horticulture Produce Agreement, and the enactment of that agreement or those terms of trade happens from time to time when an agreed transaction occurs.

This is important in the context of the Code, as this means provisions within 27A of the current Code, which outlines the current process to engage in price increase requests is effectively unusable for fresh produce given the short-term nature of 'contracts' within the produce industry.

Similar to the requirement under the current Code for signatories to provide advice to the Code Reviewer in respect to the number of price increase requests made, and their responses, this requirement could be extended to the fresh produce industry, appropriately reflecting the unique market dynamics. A provision that would enable this could be:

- Requirement for retailers to report instances where a final agreed price was below the original quote submitted by a supplier; this could be expressed as a percentage (number of instances vs. number of agreements) across product categories.
 - This information should not be publicly available, but rather be available to the Reviewer to determine trends around pricing negotiations in the fresh produce space and therefore supporting

improved oversight via the Code.

Fresh produce specifications and rejections

Fresh produce standards are critical to the industry. Standards and specifications often set or reinforced by customers support high quality production within the supply chain and importantly, ensure consistent demand for fresh produce by meeting consumers expectations of produce quality, taste, and freshness. An example of the importance of high-quality produce has been found in the table grape industry, where industry funded research has indicated that where low quality grapes are supplied, consumers therefore have a negative eating experience:

Research has also shown that after a negative eating experience, consumers will:

- *Delay purchase for approximately six weeks*
- *Take another two to three purchases before loyalty is restored to the original level*

Because of the short table grape season, negative eating experiences that result in delayed repurchasing have an enormous impact on Table Grape demand, sales and price.¹

Given the absence of brands in fresh produce, overall category management is critical; in the case of table grapes, this means a supplier who supplies low quality grapes will impact the sales of all other suppliers for approximately 6 weeks. This means that minimum product standards and specifications are vital to all fresh produce suppliers to protect overall demand for fresh produce.

The Code should not lower or limit product specifications as this will negatively impact on fresh produce suppliers of all sizes and scales.

The current Code at Section 21 outlines the process by which fresh produce standards, quality specifications and rejections are set and managed. The provisions set out in this section are appropriate. If there is a desire to improve the management of rejections, Section 21, Clause 4 could be amended to reduce the notification time for rejections from 48 hours to 24 hours. A faster notification period better reflects the perishable nature of fresh produce and enables suppliers to better manage the resale of rejected stock to alternative markets and maximise pricing opportunities.

Promotion

As indicated earlier in this submission, promotion is vital to the fresh produce industry. It is important that the Code does not limit the ability (or attractiveness of) for retailers and suppliers to undertake promotional activities. In order to better support greater transparency in promotional activities, the Code could:

- Require retailers to provide reports to suppliers on promotional activities, where this has been funded by a supplier through an agreed levy, rebate, or charge.
- Require agreement in writing from suppliers in relation to retailer requested 'ad hoc' promotions (i.e. promotional activity agreed fewer than 6 weeks in advance)

These measures support greater information and transparency for suppliers in engaging with unscheduled or paid promotional activity. These measures would also better support a mediation process between a retailer and a supplier in the event that a dispute was raised through the Code. Greater transparency around funded promotional activity will also address concerns expressed by some industry groups related to minimum standards (Recommendation 9) and the funding of promotional activity by suppliers.

Supplier Requirements

While not highlighted in the Interim Report, fresh produce suppliers who supply retailers directly (i.e. hold a vendor

¹ Table Grape Supply Chain Quality 2017-2021 (Hort Innovation)

number) have a range of standards that they must meet in order to supply Australia's major retailers. These obligations include:

- A base level food safety scheme, audited by a third party,
- HARPS Certification, a harmonized (across all major retailers) food safety and quality program, audited by a third party,
- An ethical sourcing certification, audited by a third party,
- Other relevant requirements from time to time; these requirements are currently expanding into third party audited schemes that assess sustainability or environmental impact.

These requirements add significant cost to suppliers, which inherently means that produce sold by suppliers holding these standards should be sold at a higher price than produce that is grown by producers who do not bear these additional operating costs.

The Code should require that where retailers impose minimum standards on suppliers, retailers agree to not source outside of these minimum standards (for example purchase from suppliers who do not minimum obligations outlined above). Adding this requirement explicitly to the Code will better support the negotiating position of suppliers by ensuring that all suppliers are operating on the same minimum conditions of supply.

The Code could consider adding a penalty where a retailer has disadvantaged a supplier of produce by purchasing outside of their agreed minimum conditions for supply.

12. What level of penalties should apply to breaches of the Code? Please provide reasons.

13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.

14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

15. Does the Code adequately require covered businesses to keep information and documents for the purposes of recording their compliance and any disputes raised under the Code?

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 original consultation paper on this matter 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 lack of commitment to regulating compliance with the Code undermines its effectiveness and diminishes supplier confidence to utilise the Code.

The AFPA supports Recommendation 11 within the Interim Report to increase infringement notice amounts in the Code.