



National
Farmers
Federation

Horticulture
Council

7 May 2024

The Hon Dr Craig Emerson
Independent Reviewer
Review of the Food and Grocery Code of Conduct
The Treasury
Langton Crescent
PARKES ACT 2600

By email via: GroceryCodeReview@treasury.gov.au

Dear the Hon Dr Emerson,

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

On behalf of the NFF Horticulture Council (the Council) and the wider national horticulture industry, we welcome the opportunity to make comment in response to the consultation questions posed in the Interim Report published as part of your review of the Food and Grocery Code of Conduct (FGCC).

The Council has publicly welcomed your Interim Report and supported the firm recommendations made, particularly those recommendation concerning the enforcement of the mandatory code, and the possibility of significantly increased fines reaching up to 10 per cent of turnover.

We appreciate recognition that markets for horticultural products, given their perishable nature, require targeted interventions. This logic applies equally to fruits and vegetables as it does nursery products, and so we take this opportunity to again emphasize our need to see Bunnings covered by the FGCC.

While the Council will reaffirm and expand on recommendations made in our initial submissions concerning provisions in the FGCC specific to fresh produce, we are also recommending that additional time be set aside, and a multi-party working group be established for the purpose of making more detailed recommendations on these provisions. Supply chains and markets for fresh produce are dynamic, complex, and highly adaptive. There is a real prospect well-meaning changes to the FGCC, including those that add protections for suppliers, may result in unintended consequence, or simply moving a problem from one point to another.

The Council and its members would welcome the opportunity to discuss our responses here and any other matter concerning the FGCC as part of your planned further round of meetings with key stakeholders. To this end, please be

in contact with Richard Shannon, Executive Officer to the Council either by email at hortcouncil@nff.org.au or phone on 0448 860 630.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Burnett', with a long, sweeping underline.

JOLYON BURNETT
Chair
NFF Horticulture Council

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About the NFF Horticulture Council

The Council is the recognised peak body for forming policy and advocating on behalf of the national horticulture industry. Established in 2017, it now comprises 21 national commodity and state-based horticulture bodies, who together represent the full breadth of an incredibly diverse industry.

The efficient, transparent and fair domestic wholesale and retail markets for horticultural products has been a core policy priority of the Council since its establishment. In late 2022, the Council created its own Competition Taskforce to develop policy and advocate in this important field.

About Fresh and Fair

Fresh and Fair is the overarching title for the Council's policy development and advocacy activities as it concerns competition reform broadly. Under this title we are seeking guidance from growers and suppliers through surveys and other listening exercises, hosting forums and roundtable discussions with key stakeholders to test our thinking and potential policy prescriptions and making contributions to this and other inquiries and reviews.

Fresh and Fair are two words that together capture the central concern of the Council, that due to the especially and uniquely perishable nature of horticultural products, particular care and consideration must be given, by government, growers and buyers, to ensuring markets for these products are efficient, transparent and fair.

Introduction

On 10 January 2024, the Prime Minister, the Treasurer, the Minister for Agriculture, Fisheries and Forestry, and the Assistant Minister for Competition, Charities and Treasury announced the appointment of the Hon Dr Craig Emerson to lead the 2023-24 Review of the Food and Grocery Code of Conduct (FGCC).

The Review and its timing are prescribed under Section 5 of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (the Code). Dr Emerson is required to prepare a written report to the Assistant Minister for Competition, Charities and Treasury by 30 June 2024.

The Review will (a) assess the effectiveness of the Code provisions in achieving the purpose of the Code to improve the commercial relationship between retailers, wholesalers and suppliers in the grocery sector; and (b) consider the need for the Code, including whether it should be remade, amended or repealed.

In evaluating the purpose and features of the Code, the Review will have particular regard to:

- The impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers;
- Whether the Code's provisions should be extended to other retailers or wholesalers operating in the food and grocery sector;
- Whether the Code should be made mandatory; and
- Whether the Code should include civil penalty provisions.

To inform initial feedback, the Review published a consultation paper. With this feedback, the Review has since published an Interim Report, with both firm recommendations to the Federal Government that are unlikely to change and draft recommendations on which further advice is now sought. This document is the response of the Council to the Interim Report and the questions it poses.

Consultation paper and initial submission

The Council made a submission in response to these Terms of Reference and the consultation paper. In that submission, the Council provided an amount of background information about the national horticulture industry, including the size and significance of the domestic market for fresh produce, an overview of the regulatory environment including some of its history, performance to date of the FGCC including direct supplier feedback and testimonial, and recent policy decisions of the Federal Government which have had the effect of increasing the costs of fresh produce production, and therefore of food, in Australia. Unless directly relevant to the questions in the Interim Report, we will not rehash this important background and context again in this response.

The Council in its initial submission highlighted the following as its eight (8) main recommendations, and is glad to see some of the firm recommendations in the Interim Report reflecting these:

1. Horticultural markets require targeted interventions

The highly perishable nature of horticultural products, and particularly fresh fruits, vegetable and nursery products, make finding other buyers at short notice difficult if not impossible for growers. Other markets, including food service or export, are not large or accessible enough to serve as viable alternatives.

The domestic markets for horticultural products work entirely differently even to other less perishable goods including meat and dairy, let alone shelf stable processed foods or other household items sold in supermarkets.

The Council recommends perishable horticultural products and their domestic retail and wholesale markets are regulated, including through codes of conduct, in a way that is consistent and fit for purpose.

2. Retail market for nursery products needs attention and action

Bunnings is the single largest retailer of nursery products and plants in Australia by a country mile, maintaining a market share of between 70 and 80 percent, which is in excess of the cumulative market share held by the supermarket duopoly of Coles and Woolworths.

Their price setting and other associated trading practices are unregulated by any code of conduct and should be of no less interest and concern to the Committee than those of major supermarkets.

The Council recommends the Committee considers the national retail nursery market as a matter related to its inquiry and that this market is regulated in a way that is fit for purpose, and as far as possible, consistent with other perishable horticultural produce.

3. Introduce significant penalties to act as a deterrent

It is well understood penalties that are insignificant in terms of the benefit accrued from the prohibited behaviour or relative to the turnover of the business do not act as a deterrent and are instead viewed as a cost of doing business.

For this reason, in 2022 maximum penalties for breaches of certain provisions of the Competition and Consumer Act including the Australian Consumer Law increased five-fold, to the greater of \$50 million or three times the value derived from the relevant breach, or, if the value derived from the breach cannot be determined, 30 per cent of the company's turnover during the period it engaged in the conduct.

The Food and Grocery Code of Conduct (FGCC) regulates standards of business behaviour in the food and grocery sector, including the conduct of retailers and wholesalers towards suppliers. The Code is the only protection

supermarket suppliers have from unscrupulous practices and contains no provision for imposing penalties.

The Council recommends that the Code be amended to include significant penalties, including civil penalties for individuals, that will act as a proper deterrent to poor behaviour.

The Council recommends you give consideration to what penalties would be appropriate where a supermarket, or any large business with significant market power, has engaged in systematic and persistent practices that are either in breach of the Code or the Competition and Consumer Act. Such penalties could include, for example, a timebound cap on future expansion of market share and divestiture powers which can be used in cases of gross market power imbalances. Even if these enforcement tools are rarely used, the objective is to act as powerful disincentive against harmful behaviour.

4. Empower and resource the regulator to enforce penalties

Building on the previous recommendation, significant penalties will only act as a deterrent for poor behaviour where there is a reasonable prospect of contraventions of the FGCC being uncovered.

The Council recommends the Australian Competition and Consumer Commission (ACCC) should have power of its own to initiate price and market studies concerning the trade between retailers and wholesalers and their suppliers, not only the retail relationship between supermarkets and the general public.

The Council recommends the FGCC should apply mandatorily to all supermarkets and the ACCC should have the power to investigate the practices of any individual retailer at any time, regardless of whether they have a reasonable suspicion of any wrongdoing. These powers should include the ability to compel the sharing of historic purchase price data.

5. Dispute resolution must be entirely independent

Suppliers responding to a survey of the Independent Reviewer of the FGCC indicate fear of damaging a commercial relationship and fear of retribution were the most common reasons for not raising an issue.

The only way of raising an issue and winning any compensation is through a Code Arbiter, recruited and contracted directly by each supermarket.

The Council recommends a more trusted, accessible and entirely independent mechanism be put in place to resolve issues between supermarkets and their suppliers.

6. Transparency requires uniform and portable market data

The free flow of timely, accurate and easily interpretable information between all parties is a core characteristic of a market that could be expected to work fairly and efficiently. Forming a view today of the trade existing between supermarkets and their suppliers of fresh fruits and

vegetables is impossible, and this isn't just because no one has access to the same data.

The Council recommends you give consideration to both creating a uniform nationally applied standard for the description of fresh produce and also the mechanisms necessary for maintaining the standard that won't unduly inhibit innovation.

The Council recommends you give consideration to inserting with the FGCC a Supplier Data Right, requiring supermarkets give real time access to transaction data in a standard format to suppliers or a third party they might designate.

The Council also recommends the FGCC requires supermarkets to report publicly prices and volumes for fresh produce on a weekly basis.

7. Aim for improved grower and supply chain welfare

The single overriding purpose and objective of the Australian Consumer Law is to promote the interests and welfare of consumers. Not considered in any serious way are the interests and welfare of individual suppliers and supply chains as a whole.

The *Modern Slavery Act* requires large corporations, including major supermarkets, to take action in removing modern slavery risks to which workers are exposed along their supply chains. Yet the circumstances and conditions under which many growers find themselves supplying supermarkets could just as easily be framed as a Modern Slavery risk.

The Council recommends supplier welfare is added as an objective of the Australian Consumer Law and that supermarkets consider what risk high levels of supplier dependency in trading relationships might create additional obligations in terms of supplier welfare.

8. Review government policies impacting cost of production

The rising cost of living being experienced by Australian households due to food prices is also being impacted significantly by other factor including recent government policies.

Events including the COVID-19 pandemic and the war in Ukraine have added significantly to inflationary pressures. But so too have decisions made by the Federal Government, which have directly increased the costs of key agricultural inputs and the cost of doing business which have in turn fed through to the grocery aisle.

The Council in the body of this response will expand where necessary on these main recommendations and the additional content in its initial submission. We will adopt in our response the structure of the Interim Report.

The Code needs strengthening

The Council supports the findings of the Review to date that (a) owing to a heavy and persistent imbalance in bargaining power between supermarkets and their smaller suppliers, a strong FGCC is needed, and that (b) the FGCC is not effective in meeting its stated purpose.

The Council agrees that the stated purpose of the FGCC remains appropriate, namely:

- 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
- 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
- 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
- to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

However, as recommended in our initial submission, the Council supports adding waste minimization as a secondary purpose of the FGCC, and then configuring existing provisions of the FGCC and new provisions recommended in this submission, with this objective in mind.

We have made this recommendation because production of waste along any supply chain is usually symptomatic of the market not working as efficiently, transparently and fairly as it should. In the case of fresh fruits and vegetables, the significant amount of waste created is inarguably a product of power imbalances between major supermarket buyers and smaller suppliers.

While the FGCC inarguably needs strengthening, this cannot be achieved at any cost. Any new or updated provisions must balance the benefits they create in terms of increased efficiency, transparency, or fairness against the new costs it introduces. Currently heightened public and political interest in supermarket operations and the FGCC creates an environment where potentially unwieldy or costly provisions are introduced without achieving enough attendant benefits.

The Council recommends amending the first stated purpose of the FGCC to read:

*To regulate standards of business conduct in the grocery supply chain **as efficiently as possible** and to build and sustain trust and cooperation throughout that chain, **while maintaining public confidence in it.***

Why the Code should be made mandatory

The Council, as it had in its initial submission, supports the firm recommendation of the Review that the FGCC be made mandatory.

To whom should the mandatory Code apply

Bunnings and big box stores

As stated in our initial submission, the Council wholly supports the inclusion of so-called big box stores, and namely Bunnings.

As the Interim Report notes, the current FGCC defines a list of product types as covered by the term 'groceries' to include plants, flowers and gardening equipment, but dismisses extending application of the FGCC to Bunnings and other similar stores with only a very vague argument about the FGCC being designed to address issues specific to the supermarket industry.

The Council believes further consideration must be given to the inclusion of nursery retailers under the FGCC. It is clear that there is far more in common in the trading of fresh produce and nursery products than there is for example between fresh produce and shelf stable items such as processed foods, health, cosmetics or cleaning products. And yet the Review in its Interim Report is clearly open to accommodating the unique needs of the fresh produce industry within the FGCC. An adequate answer in the Final Report to the legitimate question of why not too the nursery industry is a reasonable expectation.

Wholesalers

An important matter requiring further clarification through the current Review is the definition of wholesaler.

Demonstrating the extent to which the current FGCC was drafted without proper consideration of the fresh produce industry, with a focus instead on shelf stable grocery items, it appears the intent of including wholesalers alongside supermarkets within the voluntary code is to capture Metcash.

As other submissions have identified, in the fresh produce industry it is very common for supermarket suppliers to aggregate produce from a number of other growers. In fact, it is not uncommon for produce to be aggregated more than once between farmgate and sale to a supermarket. It has been suggested that only some 400 growers have a direct supplier relationship with a supermarket, while there could be as many as 20,000 fruit and vegetable farms across the country.

While keeping the current definition of wholesaler would notionally capture farming businesses, the second operative criteria for inclusion within a mandatory FGCC, as a buyer and not supplier, is an annual Australian sales revenue threshold of \$5 billion. Applying this threshold today, as far as the Council is aware, would mean all fresh produce suppliers also aggregating produce and acting effectively as a wholesaler would not be captured by the FGCC.

The Council is of the view any business that does not meet both the wholesaler definition and the revenue threshold should enjoy the protections of the FGCC as a supplier to a supermarket.

As other submissions have highlighted, growers and wholesalers, whether they operate out of a central market as an agent or trader or elsewhere as an aggregator, are all captured by the Horticulture Code of Conduct.

Good faith

The Council does not support at this stage the extension of the good faith obligation to fresh produce suppliers to supermarkets covered by a mandatory FGCC.

While the Council appreciates the reasoning for extending this obligation where supermarkets are dealing directly with multinational corporations with globally recognised products and brands for which there are no or few substitutes, this relative balance in market power is patently non-existent in most supplier relationships, and particularly those dealing in fresh produce.

Consistent with the current FGCC, the Council understands acting in good faith requires supermarkets to:

- act honestly;
- cooperate to achieve the purposes of the relevant grocery supply agreement;
- not act arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- not act in a way that constitutes retribution against the supplier for past complaints and disputes;
- trade with the supplier without duress;
- trade with the supplier in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
- observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier;

It is the view of the Council, based on evidence and testimony received directly from individual suppliers and the insights collected annually by Mr Chris Leptos, Independent Reviewer of the FGCC, that supermarkets are not currently meeting their good faith obligations. There is no evidence to suggest making the FGCC mandatory and introducing penalties is going to address the market power imbalance present in the overwhelming majority of trading relationships. It is the existence of this market power imbalance that makes extending the good faith obligation to suppliers redundant.

The Council is comfortable with the good faith obligation extending only to supermarkets, with the already existing provision that whether the supplier has acted in good faith will be taken into account when determining whether the good faith obligation has been broken by a supermarket.

The Council does however recommend the effectiveness of the good faith provisions be revisited at the time of the next scheduled review of the FGCC.

Fear of retribution

The Council agrees with the finding of the Review, as outlined in the Interim Report, that many suppliers fear retribution from supermarkets if they raise complaints and that this impedes those suppliers from taking steps to resolve issues, whether formally or informally, hindering the effectiveness of the Code.

The Council is less inclined to draw a distinction between the level and nature of this fear experienced by suppliers as a product of the size of their business. Our view is that the largest fresh produce suppliers are at times most exposed commercially to maintaining, and even growing, the value of their trade with supermarkets, and so fear retribution more than other smaller suppliers.

The Council supports the introduction of all those options being considered by the Review to strengthen the prohibition against retributory conduct, including:

- Bringing protection against retribution into the purpose of the Code;
- Adding a standalone prohibition against retributory conduct and identifying a non-exhaustive list of factors that could be taken into account in determining whether a supermarket has acted in a way that constitutes retribution against the supplier;
- Introducing a higher penalty for a breach of this prohibition;
- Requiring supermarkets to ensure that any incentive schemes or payments that apply to their buying teams and category managers are consistent with the purpose of the Code;
- Requiring supermarkets put in place systems for senior managers to monitor the commercial decisions of their buying teams and category managers in respect of a supplier who has pursued a complaint; and
- Creating a complaints mechanism to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC.

The Council notes that these recommended options are consistent with the Corporate Governance Principles and Recommendations of the ASX Corporate Governance Council, and in particular Principle 3 which involves a commitment to instil a culture of acting lawfully, ethically and responsibly. As part of this principle, the ASX recommends:

- A listed entity should articulate and disclose its values, formulated in consideration of behaviours are needed from its officers and employees to

build long term sustainable value for its security holders. This includes the need for the entity to preserve and protect its reputation and standing in the community and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators; and

- A listed entity should have and disclose a code of conduct for its directors, senior executives and employees.

Dispute resolution under a mandatory Code

The Council welcomes and supports those recommendations of the Review outlined in the Interim Report as it relates to dispute resolution provisions. Namely, that a mandatory Code includes informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration.

The Council agrees this can and should be achieved by:

- Adopting the dispute-resolution provisions of other industry codes, and namely the Franchising and Dairy Codes, which provide for independent mediation and arbitration;
- Allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by the supplier, and recommend remedies that include compensation for breaches and changes to grocery supply contracts;
- Allowing suppliers to go to the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of Code Mediator's processes; or to arrange independent, professional mediation or arbitration.

The Council joins with the Review in encouraging supermarkets to commit to pay compensation of up to \$5 million to resolve disputes, as recommended by the Code Mediator and agreed by the supplier, or as an outcome of independent arbitration.

The Council supports an unchanged, ongoing role for an Independent Reviewer within the FGCC, including to produce annual reports on disputes and on the results of the confidential supplier surveys.

The Council also affirms a recommendation made in its initial submission of an investment by the Federal Government in education and raising awareness of the FGCC generally, and dispute resolution process in particular to address accessibility issues reported by suppliers, including the perceived time and resource commitment required to raise a complaint, and lack of controls in place for managing potential retribution.

The Council recommends that monitoring activities by the Code Supervisor be ongoing, rather than reliant on an annual timebound survey. Once a number of complaints regarding an issue have been raised a number of times, this should trigger a review by the Code Supervisor, into relevant areas of the Code where issues are occurring. This data should also form part of the ongoing activity reported on in the Code supervisors annual report.

Strengthening obligations under the Code

The Council reaffirms the view outlined in its initial submission that there are practices prohibited by the FGCC yet still permitted through contract or agreement, that are not reasonable. All practices that simply pass on costs from supermarkets, where there is no direct benefit or return achieved by the supplier or where the supplier has little or no ability to control or influence the outcome should be revisited. Payments by suppliers for what should be core business activities of a supermarket are particularly questionable.

The Council recommends the capacity for supermarkets to charge suppliers for the following be removed from the FGCC:

- Buyer visits to a supplier, artwork or packaging design, consumer or market research, the opening or refurbishing of a store, and any hospitality.
- Any wastage of groceries occurring after the transfer of ownership.

On wastage, while it may be the case supermarkets may seek a reduction in price to suppliers arising from taking on the risk of waste, the Council is of the view that it is better for suppliers to know up front the price being received, and be able to make decisions with that knowledge, than suffer discounts after the fact without any visibility on how those discounts are calculated. The Council also believes the transfer of risk to supermarkets will mean they will seek to manage wastage more actively and efficiently than at present.

The Council recommends Grocery Supply Agreements must be lodged periodically by supermarkets with the ACCC, and that they take a standard format enabling key terms to be machine readable so as to be easily found and interrogated. The intent of this recommendation is to give the ACCC a far better view of negotiations and put it in a better position to assess the reasonableness of supermarkets engaging in prohibited practices that are allowed only by agreement with suppliers.

The Grocery Supply Agreement, in its standard format, as a matter covered by agreement must identify which if any of the prohibited practices the supermarket and supplier have agreed to allow. If unilateral variation is allowed under an Agreement, the supermarket must be required to advise the ACCC of all instances in which it is used. Supermarkets must update the Agreement with the ACCC should any changes be made after lodgement.

Where there is a separate underpinning Vendor Agreement struck between a supermarket and supplier, this should also be added as a formal addendum to each Grocery Supply Agreement between the same parties.

Where supermarkets request payments from suppliers that are otherwise prohibited under the FGCC, that are proposed to result in a direct benefit for the supplier by way of increased sales or otherwise, including for example payments for better positioning of product or the funding of promotions, then the supermarket must at the point of request provide an estimate on the return to the supplier, and then within a reasonable period of time report to the supplier the actual outcome. For promotions, as part of its estimate and then report on

actual outcomes, the supermarket must also detail with suppliers its own contribution to the promotion, including any reduction in margin.

With regard to the operation of the term “reasonable” within the FGCC, the Council supports more rigour around the interpretation in the form of guidelines. We would also support that the Code Supervisor could be utilised to provide some guidance around what is considered reasonable.

Issues specific to fresh produce

The Council wholly welcomes recognition of the Review through the Interim Report of the need for targeted amendments to the FGCC to account for the unique needs and operating environment pertaining to fresh produce and the invitation to submit further ideas and recommendations on this matter.

The highly perishable nature of horticultural products, and particularly fresh fruits, vegetable and nursery products, make finding other buyers at short notice difficult if not impossible for growers. Other markets, including food service or export, are not large or accessible enough to serve as viable alternatives.

The domestic markets for horticultural products work entirely differently even to other less perishable goods including meat and dairy, let alone shelf stable processed foods or other household items sold in supermarkets.

Transparency on volumes

It is commonly reported by suppliers that they rarely if ever achieve the volumes sold into supermarkets as was originally signalled through the non-binding “forecast” figures in their Grocery Supply Agreements. It is a contention held among many growers that these figures are deliberately overstated so as to trigger oversupply scenarios which serve to spill excess product onto the wholesale market, providing a lower price benchmark and enabling supermarkets to apply even further downward pressure on the prices they’ll pay.

This potential practice of deliberate market manipulation, if substantiated, is perhaps one of the most serious interferences by supermarkets in the efficient and fair functioning of fresh produce markets. While we are willing to give supermarkets the benefit of the doubt, it does require further investigation, given the clear and obvious incentives to undertake this practice and the absence of any countervailing repercussions.

Currently, supermarkets through Grocery Supply Agreements are required to detail in clear terms any quantity and quality requirements relating to the groceries. The Council recommends that each Agreement concerning fresh produce must at least include a “forecast” of volume to be bought by the supermarket. Depending on the crop, as a matter of fair dealing, supermarkets should issue updated forecasts at an appropriate frequency throughout the season and in consideration of the crop dynamics.

It is the strong recommendation of the Council that supermarkets be required to publicly publish quarterly reports on variances between forecast and actual fresh

produce purchases on a category basis and provide to each supplier and the ACCC a quarterly summary of the same variance under each Grocery Supply Agreement.

The intent of this amendment is to allow the suppliers to make better decisions about future seasons, plantings and marketing based on the past performance of supermarkets in taking the amount of product originally forecast. It is also to allow the ACCC to easily identify categories and suppliers failing to meet forecast volumes and initiate inquiries with the relevant supermarket. It is a strong recommendation of the Council that significant penalties be introduced for supermarkets where there are large or persistent variances outside of an acceptable range.

Transparency on prices

The free flow of timely, accurate and easily interpretable information between all parties is a core characteristic of a market that could be expected to work fairly and efficiently. Forming a view today of the trade existing between supermarkets and their suppliers of fresh fruits and vegetables is impossible, and this isn't just because no one has access to the same data.

Comparing apples with apples can be a pointless exercise depending on what is known about them. There is currently no uniform nationally applied standard for the description of fresh produce, including varying classifications of quality, pack sizes, but also very simply the names by which fruits and vegetables are called. Applying new names and creating different pack sizes is however one of the few ways in which suppliers are able to differentiate their products in market.

The Council recommends an investment by government and invested parties in creating a uniform, nationally applied standard for the description of fresh produce and also the mechanisms necessary for maintaining the standard that won't unduly inhibit innovation.

The Federal Government adopted the Productivity Commission recommendation to create a Consumer Data Right, giving individuals and business access to their own data held by service providers, to promote greater competition and allow better decision making, among other things¹.

The Council recommends inserting with the FGCC a Supplier Data Right, requiring supermarkets give real time access to transaction data in a standard format to suppliers and any third party they might designate.

To ensure this valuable data reaches its potential, the Council recommends the Federal Government invests in grant funding to support industry-led initiatives that create greater market transparency from information provided to suppliers under the Supplier Data Right.

The Council recommends the FGCC requires supermarkets to report publicly prices and volumes for fresh produce on a weekly basis. Also, that in each Grocery Supply Agreement, supermarkets must commit to a particular methodology by which they will determine prices and the mechanisms which

¹ Productivity Commission; "Data Availability and Use Inquiry Report"; pg. 2;
<https://www.pc.gov.au/inquiries/completed/data-access/report>; accessed 21 February 2024.

signal market movements. At the moment, suppliers have no visibility of how the prices they submit to supermarkets are handled or how the retailer are determining market shifts. Through the price negotiation process at a minimum, suppliers should be able to see where their submitted price sits relative to an anonymised spread of other supplier prices that have been quoted to the retailer.

Removing rebates

It is believed that rebates were originally introduced by supermarkets when growers started supplying them directly, and not through agents in wholesale markets who were taking upwards of 15 percent in commission. Since then, it has been suggested rebates are charged where suppliers are paid earlier than otherwise agreed payment periods. Most fresh produce suppliers report rebates of between 2.5 and 5 percent.

Rebates are too often opaque and arbitrary with little transparency from a supermarket on how they're calculated and then spent or what direct value suppliers get in return. Most rebates are dictated in Vendor Agreements struck at the very start of a trading relationship and never revisited. Supermarkets are likely gouging growers annually tens of millions through rebates. We can only assume this falls straight through to their billion-dollar bottom lines.

In 2015, Coles refunded suppliers \$12 million having been found by the Federal Court to have engaged in unconscionable conduct related to the 2011 roll out of a rebate program that growers were pressured to accept and which delivered no obvious benefit.

The Council has little confidence rebates put in place since are any better, considering the serious cash recouped by supermarkets, the non-existent oversight of these arrangements by regulators, and the relatively minor repercussions when shown to be unconscionable. From all reports, while common, the use of rebates appears to vary between supermarkets and even between growers supplying the same supermarket.

This variability suggests to us supermarkets are not tightly controlling their use, creating risk they're imposed on suppliers without reason or justification.

If supermarkets can't assure regulators, the ACCC and especially their own suppliers that they're using rebates fairly, then they shouldn't be able to use them at all.

The Council recommends that the use of rebates in any form of agreement for the supply of fresh produce be removed and that the FGCC explicitly prohibits their use.

Third line forcing

There are a number of known and common supermarket practices, not considered currently by the Food and Grocery Code, that amount to the unfair transfer of costs and risks to suppliers. These practices include but are not limited to the following:

- Requiring suppliers to use their preferred third-party contractors. This can be a subsidiary of the supermarket itself or external company. There can be limited alternative options for suppliers to use.
- Charging suppliers for periods of service, including for the use of plastic crates and wooden pallets, that are far longer than would be reasonably expected given the perishability of the product concerned.

The Council recommends the FGCC expressly prohibit forcing suppliers to use services either owned by the supermarket (for example freight) or enforced through a third party (for example crates and pallets) wherever there are other competitors offering the same or similar service.

Protecting Suppliers Sensitive Information

Retailers are known to request sensitive information from suppliers such as production and supply chain costs, productivity, and business capability factors.

Further to this, under retailers' current compliance standards, growers that hold no contractual agreement with retailers but supply through an aggregator allege that they have been requested to present copies of sensitive information such as bank statements, rates notices and proof of land ownership as part of these audits.

In both instances, it remains unclear on how retailers intend to use such information to benefit the supplier.

To our knowledge, there are no protections under the current Food and Grocery Code of Conduct that prohibit such practices or afford suppliers the protection of declining such requests.

Levelling requirements

Supermarkets impose requirements on direct suppliers over and above regulated standards in the name of customer expectations at significant cost, including compliance with various food safety, packaging and ethical employment standards and certifications. It is commonly reported supermarkets will purchase product out of the wholesale market with none or only some of these assurances when short on volume or when the price is advantageous.

The Council recommends the FGCC requires all specifications, including all certifications and assurances, be clearly outlined in all Grocery Supply Agreements for fresh produce and prohibit supermarkets from setting different requirements in Agreements for fresh produce suppliers within the same category. Any change in required certifications or assurances must be made to all Grocery Supply Agreements in effect uniformly.

Further, the Council recommends that the FGCC explicitly prohibits supermarkets from purchasing product that is not compliant with their own specifications or requirements where they have volumes available to them from suppliers with whom they have a current Grocery Supply Agreement.

Quality and specification disputes

The Council affirms a recommendation made in its initial submission that consideration be given to adapting some parts of the dispute resolution procedure under the Horticulture Code of Conduct, including the function of horticulture produce assessors to make more timely determinations on disputes concerning product quality and rejections on specification.

Oversight

The Council recommends the introduction of an 'Advisory Committee' or 'Reference Group' for the fruit and vegetable sector that would meet twice a year with the proposed Code Supervisor and ACCC to discuss the FGCC. This could assist in better industry engagement and address operational issues on a timelier and more responsive basis than the current review process.

Drafting

The Council does recommend that additional time be set aside, and a multi-party working group be established for the purpose of making more detailed determinations and drafting FGCC provisions specific to fresh produce. Given the current ACCC Supermarket Inquiry 2024-25, we encourage the Review to consult closely with the ACCC as their inquiry unfolds on further context and issues that could be better addressed in The Code.

Enforcement and penalties

The Council welcomes and supports the findings and recommendations of the Review as outlined in the Interim Report concerning enforcement and penalties, and in particular penalties for major or systemic breaches of up to \$10 million, 3 times the benefit reasonably attributable to the contravention, or 10 per cent of a supermarket's annual turnover, whichever is greatest.

The Council supports the view that penalties should be applied to all substantive provisions under a mandatory FGCC and also to dispute-resolution provisions to ensure all parties engage in the process appropriately.

The Council agree with the Review that the maximum penalties for corporate entities available for the most serious breaches of the FGCC should be aligned with the higher maximum penalties allowed for in the Franchising Code of Conduct, allowing the ACCC to seek penalties for major or systemic breaches of up to \$10 million, 10 per cent of a supermarket's annual turnover, or 3 times the benefit from the breach, whichever is the greatest.

The Council notes that generally for industry codes the penalty amount for an issued infringement notice is \$15,650 or 50 penalty units for corporations; and \$3,130 or 10 penalty units for individuals but also that precedent exists under Australian Consumer Law to attach penalties of up to 600 penalty units infringement notices related to breaches of specific provisions by listed companies.

The Council recommends, given supermarkets captured by the FGCC must have at least \$5 billion in annual revenue, that infringement notices under the FGCC with penalties up to 600 units would be appropriate, with flexibility given to the ACCC to determine the exact penalty based on the nature of the breach. We assume supermarkets would have an opportunity to appeal a penalty should they believe it unreasonable or disproportionate to the breach.

As recommended in other parts of this response, the Council strongly recommends further obligations be required of supermarkets under the FGCC concerning the more detailed captured of transaction information as part of Grocery Supply Agreements, and that Agreements must be lodged with the ACCC to enable proactive monitoring and compliance.

The Council does support the introduction of divestiture powers as a tool for the regulator for use in extreme cases of continued and malicious breaches, and as the ultimate sanction where it is in the interest of the nation to do so. This will also provide a significant disincentive for corporations to employ anti-competitive practices.

Related matters

Branding and packaging of fresh produce

Alongside the perishability of fresh produce, another fundamental characteristic about these products that limits marketing by suppliers is that they're sold in supermarkets as unbranded commodities.

Commodities, including many fresh fruits and vegetables including avocados, citrus, most vegetables, apples and pears, are often standardized products that lack differentiation based on brand or quality attributes. As a result, competition among suppliers is primarily based on price, making it challenging to build brand loyalty. The absence of opportunities to brand fresh produce prohibits suppliers from interacting directly with consumers, to receive feedback and ideas for product improvement and leaves consumers to assume products in the same category are interchangeable. It also does not drive investment in quality for the consumer as they are unable to differentiate between products.

The lack of branding of these products plays into existing power imbalances and further undermines the ability of suppliers to negotiate on price or any other matter.

In other instances, where fresh produce is sold in packaging, affording an opportunity for brand placement, for example on bagged loose lettuce leaf, suppliers are required to pay for and use packaging branded by the supermarket and not themselves. As a consequence of this requirement, produce packaged for a supermarket but then rejected is almost always unable to be repurposed or sold into another market due to its branding.

It has been observed where suppliers have innovated in creating a new packaged product that has proven successful, invariably over time supermarkets have been able to oblige suppliers to replace their own private branding with their own.

The Council recommends where suppliers are required by supermarkets to use particular packaging, that a certain proportion of all useable space on the packaging be reserved for the unincumbered use of the supplier.

Collective bargaining

Legal barriers are a significant impediment to rebalancing the bargaining equilibria and delivering information symmetry to suppliers. Fresh produce supply chains are unique to the other products listed under the FGCC and therefore class exemptions to the Competition and Consumer Act (2010) that considers the nature of the industry, is an important consideration. The current collective bargaining class exemption for businesses with an aggregated turnover of less than \$10 million in the financial year is not appropriate for horticulture industries and therefore a percentage of market share should be considered.

Secondly, a second major impediment to collective bargaining in agriculture industries, is the fear and potential of commercial retribution from retailers for group members. Measures to deter retailers from placing undue pressure on suppliers not to establish collective bargaining groups or threatening commercial retribution, after collective bargaining groups have been established should be introduced into the FGCC.

With suppliers heavily reliant on retail customers for their main source of income, establishing collective bargaining groups, simply is a risk many suppliers are not willing to take. Fundamentally, this is contributing to the lack of uptake of collective bargaining in the agriculture industry and needs to be addressed to correct bargaining power imbalances that exist in the horticulture sector.

Education and awareness

The Council supports an investment by the Federal Government in education and raising awareness of the FGCC generally, and dispute resolution process. This will specifically assist in addressing accessibility issues reported by suppliers, including the perceived time and resource commitment required to raise a complaint, and lack of controls in place for managing potential retribution.

The Council supports interventions by government that have the effect of increasing competition across all domestic markets for fresh produce. This includes measures that:

- Support growers in selling fresh produce directly to consumers, including their investment in necessarily infrastructure to pivot into this market.
- Incentivise new supermarket entrants, including lowering barriers that might prohibit companies based overseas from entering the Australian market.
- Providing training in leadership, bargaining and negotiation skills to producers or support the procurement of such expertise.

Trade and market access

The Council also reaffirms its support for greater investment by the Federal Government in securing expanded trade and market access opportunities, to grow the share of fresh produce going into export markets and so lower the overall industry reliance on domestic markets.

Grounded in the experience of growers and suppliers

All policies and positions adopted by the Council are grounded in the interests, needs and lived experience of the growers who Council members represent.

The Council, in collaboration with its members, has run the *Fresh and Fair Grower and Supplier Survey* as an essential tool for capturing the views and insights of growers and suppliers concerning domestic wholesale, retail and other markets and the rules and regulations that shape behaviour and influence returns in these markets, including the FGCC.

Opened on 31 January, the survey has to date received responses from 54 growers and suppliers of various sizes, supplying supermarkets directly or indirectly with the full range of fruits and vegetables. While not an enormous sample, results of the survey can with some confidence be interpreted as being strongly indicative of all fresh produce supermarket suppliers.

Concerning those core questions for this Review, as outlined in its Terms of Reference, there are clear and unambiguous responses from growers and suppliers.

There is no agreement the FGCC has improved commercial relationships, and strong support for making the FGCC mandatory, introducing penalties including civil penalties for individuals, and for greater specification of provisions within the FGCC to account for the peculiarities of the fresh produce industry and supply chain.

The below graph illustrates the extent to which respondents agree or disagree with each statement.

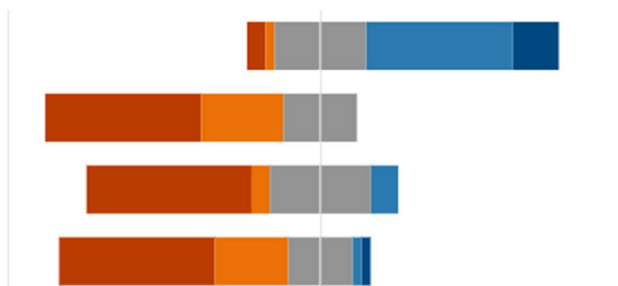
■ Strongly Agree ■ Agree ■ Neutral ■ Disagree ■ Strongly Disagree

The Code has improved the commercial relationships between grocery retailers, wholesalers and suppliers.

The Code should be made mandatory for the current signatories (ALDI, Coles, Metcash, Woolworths).

The Code should include civil penalties for breaches of the code, applicable to both individuals and the...

A new Code or separate provisions for fresh produce suppliers is required to address the unique industry...



Practices within the FGCC

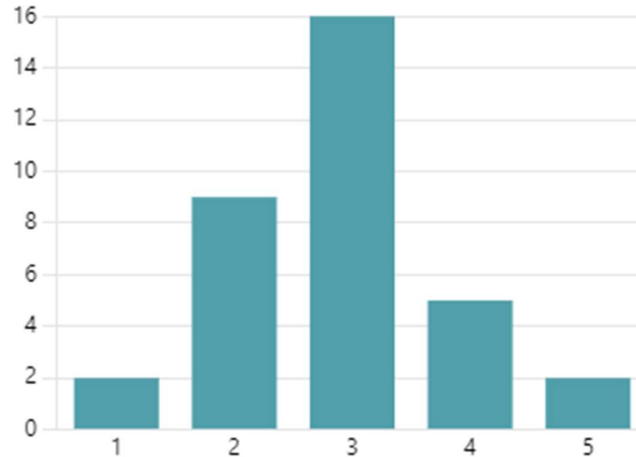
Respondents to the survey were asked to identify those practices and behaviours of supermarkets, not currently covered by the Code, that are of greatest concern for growers and suppliers. Specifically, they were asked to rate their level of agreement that each of the below practices or behaviours is very concerning and should be covered by the Code.



Most obviously, there is strong agreement all of the identified behaviours and practices are problematic in the eyes of suppliers, and therefore as part of this review consideration should be given to amending existing or adding new provisions to address them.

Relationship with supermarkets

Overall, respondents to the survey on balance painted a negative view of their relationship with a supermarket, trading with them directly or through an intermediary. On average over a five-point scale with five being the most collaborative and friendly and one being abusive or hostile, growers and suppliers rated the quality of their relationship with a supermarket and their buyers at just 2.9.



When asked, respondents to survey provided a number of examples of poor, unconscionable behaviour by supermarket and their buyers. A representative selection of responses is below:

“Holding prices back when markets are shortening. Rejections for minor issues when you are certain they have over-ordered.”

“Told by a fruit agent that it makes no difference to the supermarket what our costs are. The supermarket will decide the price.”

“They make you feel like you’re begging for them to buy from you. We are completely price takers with no thought of cost to produce.”

“Knowingly requesting purchase at below cost of production having no regard to ethics and what would be deemed fair and reasonable.”

“Supermarkets cancelling or adjusting orders abruptly, leaving us as the grower, packer & supplier with excess inventory and potential losses, especially because the products are perishable.”

“Supermarkets fail to maintain proper storage conditions or handle vegetables incorrectly, resulting in product spoilage or damage, leading to financial losses for us the grower, packer & supplier.”

“Long-term supply programs initiated by our retailers offer growers the opportunity to enter into agreements where weekly supply volumes are specified, providing a framework for growers to plan their production accordingly. However, these agreements do not guarantee that the forecasted weekly volumes will be procured by the retailer, nor do they

offer certainty regarding the price at which these volumes will be supplied.”

“Pricing drops based on forward projections regardless of the quantity of fruit in the market. In store pricing seems to have increased per kilo but farm gate pricing has not increased accordingly.”

“Supermarkets being inconsistent about adherence to their product specifications. What is passable for one grower, is not acceptable for another. Similarly, what is fine one day is not the next.”

“Not honouring agreed pricing but expecting us to honour it when it benefits them. Pushing down pricing to below the cost of production. Cancelling orders which have been packed specifically for their specifications and labelling which then have to be repacked for a different market.”

“Price manipulation by using 'moving' quality standards to reject large direct consignments which then end up in the wholesale market, resulting in a price plunge which the retailer then buys the exact same produce off the market floor at a discounted price.”

“Using planned catalogue promotion price points as an excuse to plunge prices for a commodity.”

“I think if supermarkets take ownership of the product once it hits their DC, then business decisions around pricing and promotions are theirs to make. They spend thousands of \$ on data collection to make these decisions, it's about time they take accountability for it. They might spend a bit more effort on looking after the products also, train their staff better and reduce waste.”

“If you get on the wrong side of these people, they can destroy your business overnight, and it doesn't matter where you go, they spread your name as mud and that's that, you are shut out of doing business with any of them. It is the most corrupt and colluding industry I can imagine.”