

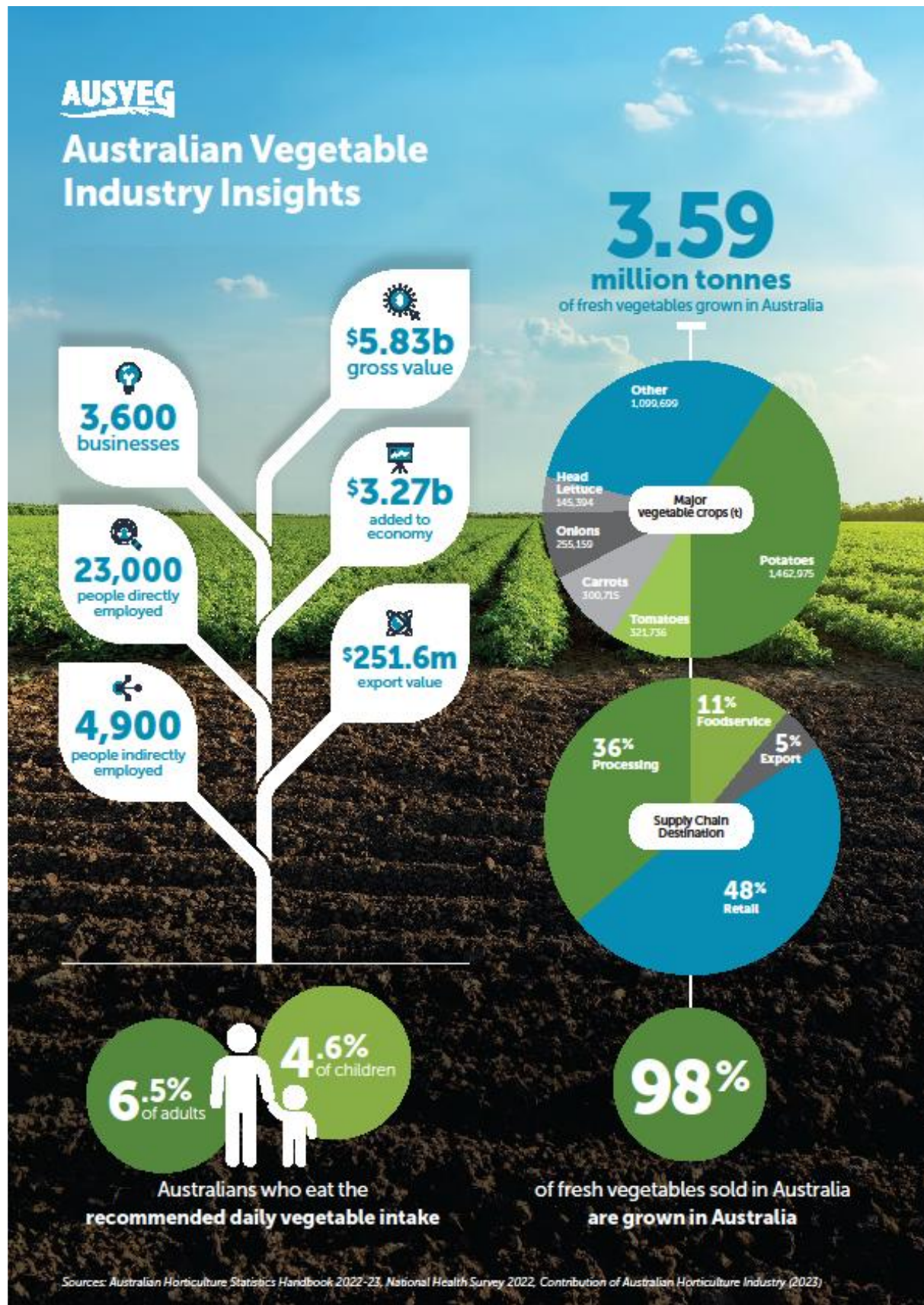


Submission in response to the

**COMPETITION AND CONSUMER
(INDUSTRY CODES— FOOD AND GROCERY)
REGULATIONS 2024
EXPOSURE DRAFT**



VEGETABLE INDUSTRY INSIGHTS



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ABOUT AUSVEG

AUSVEG is the prescribed Peak Industry Body representing the interests of the Australian vegetable, potato, and onion industry. AUSVEG is a not-for-profit, member-based organisation that is run by growers, for growers.

AUSVEG represents over 3,600 vegetable producers that account for 3.6 million tonnes of annual vegetable production, and a farmgate value of \$5.8 billion.

AUSVEG is a nationally federated body with the following members: AUSVEG VIC, AUSVEG SA, Queensland Fruit and Vegetable Growers, vegetablesWA, NSW Farmers, NT Farmers, WA Potatoes, and TasFarmers.

The purpose of AUSVEG is to advocate on behalf of industry at local, state, and federal levels with the core purpose of enhancing the economic, social, and commercial environment for growers so that the industry can continue to produce outstanding vegetables, potatoes, and onions for Australian and international consumers.

AUSVEG also delivers services for growers around Australia in the areas of extension, communication, environmental sustainability, biosecurity, export development and market access, working closely with growers to ensure their needs are reflected in this work.

In partnership with the International Fresh Produce Association A-NZ, AUSVEG hosts Hort Connections, Australia's largest horticulture conference and trade show, which attracts more than 4,000 delegates annually. This event brings growers, supply chain, government and industry members together to increase awareness and uptake of the latest industry innovations, research and development outcomes, and to facilitate vital industry networking opportunities.

For more information about the details in this document, please contact:

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SUBMISSION

AUSVEG would like to express our appreciation on the opportunity to provide input into the Exposure Draft of the Mandatory Food and Grocery Code.

As mentioned in previous submissions, the current Food and Grocery Code of Conduct was not inherently flawed, however it's application and functionality within the operational environment was. The impediments to the Code's intended operation included suppliers' fear of retribution, leading to ineffective dispute resolution, ineffective penalties to deter poor behaviour, lack of supplier knowledge on Code, and excessive flexibility for supermarkets to opt out of clauses through allowable contrary provisions.

In relation to lack of supplier knowledge on the Food and Grocery Code this pertains to a range of issues including actually not being aware that the Code exists, not understanding what the content of the Code is, and not knowing how to report non-compliances with the Code, to name a few.

Further to the revised Food and Grocery Code transitioning into operation on the 1st July 2025, AUSVEG wants to ensure that the government allocates funding for supplier training on the new Code before its implementation to ensure that that suppliers are aware of the content of the new Code and how they can use it effectively. AUSVEG also wants to ensure that there is ongoing funding for retraining, and training for new suppliers.

We are keen to see what resources that will be made available to suppliers such as factsheets, webinars, FAQ's and other resources, over and above training. It is well-documented that grower suppliers are severely disadvantaged in retail negotiations due to the lack of knowledge of the Code, while supermarkets have personnel well-trained on the intricacies of the Code. This information asymmetry partly contributes to the Code not functioning as intended.

AUSVEG is concerned about the number of contrary provisions still permitted in the Exposure Draft of the Food and Grocery Code. In the instance, that contrary provisions are still permitted AUSVEG wants to ensure that the supplier is indisputably clear what the contrary provisions in the Grocery Supply Agreement/ Vendor Agreement are. In cases where a grocery retailer includes contrary provisions in a grocery supply agreement, AUSVEG would like the contrary provisions to be clearly references and either explicitly listed in an appendix or in a separate document clearly outlining the exclusions in the supply agreement.

While not directly related to the Exposure Draft, we also wish to address the operation of the office of the Code Supervisor. Specifically, we advocate for the role of the Office to be proactive in their engagement with suppliers and other stakeholders along the supply chain, including industry representative bodies. AUSVEG would like to see the Office of the Code Supervisor to conduct regular consultation with stakeholders, including webinars and roundtables, over and above the regular annual surveys.

Having read the ACCC Supermarket Inquiry Interim Report, AUSVEG is concerned that the potential Recommendations to come out of the Final Report in February 2025 will pertain to the Food and Grocery Code, which will have already passed through the legislative process. AUSVEG wants assurance that any Recommendations in the ACCC Final Report, of relevance to the Food and Grocery Code, are appropriately dealt with in a timely manner, through appropriate consultation, and adopted (if supported) through legislation as soon as possible. AUSVEG states below that we would like a review of the Code in 2 years, we also want any Recommendations out of the ACCC

Supermarket Inquiry, that are supported by stakeholders, to be adopted without waiting for a formal review.

Please find a detailed breakdown of AUSVEG's feedback on the exposure draft below.

AUSVEG'S FEEDBACK

PART 1

DIVISION 2

Section 6 Definitions

- Add into this section a definition of a "rebate", which may include "part/ withheld/ delayed payment" (relating to Section 19 (1)(c)).
- Add into this section a definition of a "set off", which should include a rebate (relating to Section 22 (2)).
- AUSVEG would like to clarify whether "payment as a condition of stocking or listing grocery products" is defined as a rebate. If it is, then please add this to the definition of "rebate" in Section 6 Definitions.
- We would also like to get a definition of "funded promotion", in particular, whether programs such as *12 week down-down* in Coles or *prices dropped* in Woolworths come under the definition (relating to Section 33 (1)).

Section 7 Meaning of *supplier*

- (1) The current definition of "supplier" appears to only pertain to individuals and the scope of this definition needs to be changed to capture business entities larger than individuals.

Section 8 Meaning of *retribution*

- (1) We believe it is crucial to include "late cancellation orders", as a form of retribution, as it is a tactic often used against suppliers.

PART 1

DIVISION 3

Section 11 Review of Code

- Insert an additional clause requiring the Minister to cause a review of provisions within the Code specific to fresh produce commence within two (2) years of its commencement, or sooner depending on the outcome of the ACCC Supermarket Inquiry due for release in February 2025.

PART 2

DIVISION 3

Section 19 Matters to be covered by agreement

- (1)(c) For the sake of clarity, define "part/ withheld/ delayed payment" to include rebates, as this is a term that is more familiar to the industry.
- (4)(i) AUSVEG agrees that that contrary provisions should be identified in a statement but adds that these should be provided to the supplier (1) in clear and accessible language, and (2) in a document separate to the agreement or an appendix within the agreement. This will

ensure that both parties are across what provisions in the agreement are contrary to the Code.

- (5) We argue that the wording of this subsection should be as follows:
*If a grocery supply agreement relates to the supply of fresh produce, a large grocery business must not enter into the agreement unless the agreement also specifies the price, or the **pre-agreed method between the supplier and retailer** to be used to determine the price, of fresh produce.* Note that this may include a minimum floor price.
Additionally, at the moment it looks like the penalty is just for not having the price or the method for the determining the price written in the agreement. We argue that there also needs to be a separate penalty for deviating from the price or the agreed method of calculating the price, as this is also often a point of contention.
- (7) We argue that there should be an additional clause under this subsection, mandating an error tolerance to which all supermarket volume forecasts must adhere e.g. +/-10% of the supplier agreement. This will ensure that in cases where there are fluctuations, the volume is never significantly over or under what is in the agreement, giving suppliers a certain amount of security.

PART 2

DIVISION 3

Section 20 Unilateral variation of agreement

- (2)(a) We argue that all the sub dots in this section are removed.
- (2)(d)(e) Remove these subsections as well, as these allow a large grocery business too much leeway in variation from agreement; while the fresh produce supplier is at a disadvantage based on the perishability of their product.

Section 25 Payments as condition of being a supplier

- (1) AUSVEG would like to clarify whether “payment as a condition of stocking or listing grocery products” is defined as a rebate. If it is, then please add this to the definition of “rebate” in Section 6 Definitions.

Section 27 Payment for ordinary business activities

- (2)(c) AUSVEG would like to clarify whether sales data is included in “consumer or market research”. In any case, we are looking for a broader definition of consumer and market research as AUSVEG would argue that this include sales data pertaining to consumer behaviour, which we believe is an ordinary business activity.

Section 30 Retribution

- Insert an additional penalty that large grocery businesses must (a) compensate a supplier an amount equivalent to any commercial losses arising from the retribution, (b) restore any trading arrangements existing prior to the retribution.

Section 31 Policies and procedures to protect against retribution

- AUSVEG proposes that a simple anonymous online portal housed within the ACCC is added to log smaller claims of retribution (and other supermarket behaviour) as they occur, not waiting for a survey at the end of the year. We believe this will be simpler, as people typically do not remember the details of small incidents happening throughout the year.

The reports would be collated, verified and tracked, and once a certain threshold is met, the ACCC would launch an issue-wide investigation.

Section 33 Funded promotions

- (1) We would also like to get a definition of “funded promotion”, in particular, whether programs such as *12 week down-down* in Coles or *prices dropped* in Woolworths come under the definition (relating to Section 33).

Sections 34 Fresh produce standards and quality specifications

- (1) Add “changes to specifications” to this point; AUSVEG argues that the following subclauses should be added to this point: (a) that specifications may be established by industry-led consultative groups with appropriate industry representation; (b) depending on seasonal and climatic conditions, fresh produce specifications may be varied in consultation with industry organisations. Overall, we believe that these standards need to be set by industry-led consultative groups with appropriate industry representation, not by a grocery businesses, ensuring the reasonableness of specifications, while not compromising on quality.
- (3)(4)(5) Insert clauses providing for the equivalent of horticulture produce assessors under the Horticulture Code, to make more timely determinations on disputes concerning product quality and rejections on specification. Additionally, we argue that there should be a minimum threshold in value terms of produce when an inspection can be requested.
- (4)(b) We argue that because of the perishability of fresh produce, the timeframe for rejection should be reduced to within 6 hours after delivery.
- (5) Likewise, because of perishability of fresh produce, we argue that the timeframe for written reason for rejection must be provided to the supplier must be reduced to 6 hours.
- (6) AUSVEG argues that the following subclause needs to be added: (a) ensure that the notification of the labelling, packaging and/ or preparation requirements is provided in appropriate documentation such as vendor agreement or supplier agreement and cannot be varied unless reasonable time has been given to make changes.
- (8) Once again, due to the perishability of fresh produce, we argue that the 30 days’ timeline for claiming for damaged fresh produce or shortfalls be reduced to 24 hours.

Section 35 Changes to supply chain procedures

- (2)(a) AUSVEG argues that in addition to the business giving written notice of the change to the supplier, it is necessary for the supplier to also be in agreement with the changes outlined.

Section 37 Intellectual property rights

- (1) We argue that intellectual property rights should be extended to include varietal rights, post-harvest treatments, value-added products, etc.
- (3) As above.

Section 41 Price increases (1)(c) & Section 42 Information about price increases (b)

- There seems to be a contradiction: in Section 42 (b) it should be added that notifications should be within 5 days for fresh produce and 30-days for everything else, as per Section 41 (1)(c).

PART 2

DIVISION 5

Section 47 Code Mediator's functions

- Insert a clause within this section providing a function of the Code Mediator to identify emerging and systemic issues in the grocery supply chain relating to the operation of the Code and insert clauses within subsequent sections enabling their investigation and reporting of these issues.

Section 49 Referring complaints to the Code Mediator

- Grocery Supply Agreements often have confidentiality clauses in them which means that a grower (supplier) cannot share the GSA with a representative body for advice. GSA's should be able to be shared where there are no commercial concerns.
- (3) The Code Mediator must also not disclose any parameters that make the supplier identifiable. For example, in cases where that supplier may be the only or one of a few suppliers of a product line (i.e there may only be one celery grower supplying to Coles in South Australia), and they are therefore identifiable even if name, address or other identification markers are not used.

Section 60 Code Supervisor's functions

- Include a clause that the Code Supervisor's office must, as part of a collaborative process, be proactive in reaching out to industry via bi-annual stakeholder consultations, etc.

Section 65 Annual survey

- Insert a clause that as part of reporting on the survey, large grocery businesses should be required to report publicly on the error tolerance in their forecast models against a common metric (as in Section 19 (7)).
- (2)(a) We argue that in addition to distributing the annual survey to grocery suppliers, it should be more widely advertised, including advising industry bodies so that they can be more proactive in encouraging suppliers to complete the survey.

SUBDIVISION C—ADR PROCESSES

- To make it more accessible to industry, we request that dispute resolution process is provided as a flow chart outlining various avenues and escalation methods.

Section 73 Keeping records

- We argue that definition of a document must include text messages, emails and other forms of communication.

PART 3

Section 74 Application—allowable contrary provisions

- We believe that the section on contrary provisions can remain in the Code, provided that in cases where a grocery retailer includes contrary provisions in a grocery supply agreement,

AUSVEG would like the contrary provisions to be clearly references and either explicitly listed in an appendix or in a separate document clearly outlining the exclusions in the supply agreement.

- AUSVEG would like to clarify whether changes to the Food and Grocery Code will affect existing vendor and supply agreements? Of particular concern is that if growers need to negotiate new agreements, they may be forced into negotiating less favourable supply agreements.
- AUSVEG also wants to make sure that any renewed supplier agreement or vendor agreement negotiated after the 1 April does not put the supplier in a worse off position.