



*If Australia wants to eat locally grown apples, pears, cherries and berries into the future, something needs to change...*

## Response

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

February 2024

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### EXECUTIVE SUMMARY:

Fruit Producers SA represents the growers of apples, pears, cherries, strawberries and other berries in South Australia. These horticultural activities represent over \$150 million in value of production (Source: Australian Horticultural Statistics 2022/2023), over 7% of national production in these fruits.

The overwhelming majority of fruit is supplied to the domestic market.

There exists a significant power imbalance between the supermarkets and the horticultural supplier for the following reasons:

- Our product is perishable – once we pick it, or it is ripe, it needs to be moved, providing significant power in the hands of the buying teams.
- Limited branding, easily traded off against everybody else's.
- Industry made up of highly fragmented, small, family businesses scattered in regional areas, with few having access to pricing data, unlike the retailers who control it all.
- Limited viable exports, heavily dependent on domestic markets, dominated by the supermarkets
- The weekly buying cycle, managed by the retailers, compresses the decision time of sellers, who are confronted with some key decisions.
- Growers risk being labelled as difficult if they do not accept the price, risking future business.
- Growers need the cashflow because the majority of costs are incurred months before.

Current prices paid for perishable horticultural products are often below the cost of production to achieve a price for fruit which ensures all labour used in its production, harvest & preparation for market are paid a legal wage and a fair return to farmers to provide a livelihood and ability to reinvest into their farms.

When dealing with suppliers of apples, pears, cherries, strawberries and other berries, supermarkets currently engage in practices such as:

- requirement for a rebate up to 8% to be deducted from the payment to the grower to secure reasonable payment terms. In its absence, supermarkets may pay beyond 90 days.
- requirement of the supplier to fund a “special” on the product, to be included in a promotion to drive more traffic to the store (and products beyond their own),
- requirement to contribute to the cost of general store promotions,
- managing of retail pricing to impact the market price in times of seasonal shortage
- setting of quality standards which place unsustainable financial pressures on growers to achieve the standard and a higher proportion of fruit graded as inappropriate for the supermarket,
- costs of packaging standards, increasing in light of changing social attitudes, being borne solely by the supplier, and
- refusal of complete deliveries of fruit with limited basis for rejection.

The Code is not fit for purpose due to the absence of:

- oversight of Food and Grocery business by an independent authority. The need for suppliers, reliant on supermarkets for their livelihood, to trigger review of retailer behaviour is unrealistic and ineffective, and
- meaningful penalties applying in the event of breaches of the Code.

Fresh produce should be considered as a special case in the Code due to the unique nature of the industry, namely:

- the perishable nature of the product requiring timely sale,
- the fragmented nature of the industry, made up of a large number of small family businesses
- The social imperative to maintain the production of fresh food within close proximity of large population bases.

Desired objectives of the future Food & Grocery Code of Conduct should be:

- For perishable horticultural products, the Code should ensure that that the known cost of production, as independently calculated through interaction with industry, is at least matched by the price paid, including the additional costs of storage beyond harvest.
- Unfair supermarket practices born from market power imbalance, as discussed below under Question 19, should be prohibited, or addressed.
- Enforcement of the Code of Conduct must be performed by an independent regulatory body and not rely on “whistleblowing” by farmers whose future livelihood is highly dependent on business with the supermarket.

A mandatory Code of Conduct, which would require regulatory requirements to be met and meaningful penalties in the event of breaches, should be implemented. Oversight of the mandatory Code should be performed by an independent regulatory authority not dependent on the reporting by growers of inappropriate behaviour.

Supermarkets would need to act to a level of responsibility included in the Code or risk financial penalties. Dealings with suppliers would be performed in the knowledge that their actions may be reviewed by the independent regulator and assessed against the requirements of the Code.

## Consultation Questions

### 1. **What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?**

Fresh produce should be considered as a special case in the Code due to the unique nature of the industry, namely:

- the perishable nature of the product requiring timely sale,
- the fragmented nature of the industry, made up of a large number of small family businesses
- The social imperative to maintain the production of fresh food within close proximity of large population bases.

Objectives:

- a. For perishable horticultural products, the Code should ensure that that the known cost of production, as independently calculated through interaction with industry, is at least matched by the price paid. This will ensure all labour used in its production, harvest & preparation for market are paid a legal wage, and a fair return to farmers for their contributed capital and expertise.

In the case of apples and pears, provision of fruit to retailers throughout the year necessitates the investment in cold storage facilities, electricity etc., cost of which are borne by the grower. Pricing of fruit to retailers beyond harvest should reflect the additional costs of storage.

The Code's addressing of the above issue will stem the flow of growers leaving the industry due to an inability to achieve a reasonable livelihood or reinvest in their properties for future crops.

- b. Supermarket practices born from market power imbalance, as discussed below under Question 19, should be prohibited or addressed under the Code of Conduct.
- c. Enforcement of the Code of Conduct must be performed by an independent regulatory body and not rely on "whistleblowing" by farmers whose future livelihood is highly dependent on business with the supermarket.

### 2. **Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances**

No.

The Code relies on the ability for suppliers to access the Arbiter to resolve any activity stemming from bargaining power imbalances. This has been demonstrably ineffective with very few growers approaching the Arbiters with concerns. Members of the horticultural industry fear retribution by the supermarkets in the event of a complaint to an Arbiter, risking their future livelihood.

3. **Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?**

There exists a clear bargaining power imbalance for the supply of apples, pears, cherries strawberries and other berries.

Growers of fresh horticulture have limited buyer opportunities for their product.

Major supermarkets set the price based on their individual objectives and growers need to accept these terms due to the limited alternative destinations available for their fruit.

Smaller supermarkets use similar power in the knowledge that those growers not trading with the major supermarkets have even fewer options in the market.

Growers of apples, pears, cherries, strawberries and other berries are price takers and subject to the terms and conditions raised by supermarkets.

We are unable to comment beyond the supply of apples, pears, cherries strawberries and other berries.

4. **Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?**

Special rules should apply to the supply of horticultural products to supermarkets due to the magnitude of power imbalance between supplier and retailer. This is acute in respect to apples, pears, cherries, strawberries and other berries due to :

- Our product is perishable – once we pick it, or it is ripe, it needs to be moved, providing significant power in the hands of the buying teams.
- Limited branding, easily traded off against everybody else's.
- Industry made up of highly fragmented, small, family businesses scattered in regional areas, with few having access to pricing data, unlike the retailers who control it all.
- Limited viable exports, heavily dependent on domestic markets, dominated by the supermarkets
- The weekly buying cycle, managed by the retailers, compresses the decision time of sellers, who are confronted with some key decisions.
- Growers risk being labelled as difficult if they do not accept the price, risking future business.
- Growers need the cashflow because the majority of costs are incurred months before.

5. **Should the Code be extended to cover other aspects of the food and grocery supply chain?**

No comment

6. **Should some or all alcoholic beverages be included in the scope of the Code?**

No comment

7. **Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code’s signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?**

The Code is currently voluntary and “*the Commonwealth has expressed the view that retailers and wholesalers that have an annual revenue of \$5 billion or more, or a market share of 5% or more, should agree to be bound by the code*”. The Code should be mandatory and include retailers and wholesalers with a market share exceeding 5% of any individual State.

The Code should eliminate the ability for retailers to structure their business through a wholesaler, circumventing their responsibilities under the Code.

8. **Do the provisions set out under the Code ensure it is fit for purpose?**

No.

The Code is not fit for purpose due to the absence of:

- oversight of Food and Grocery business by an independent authority. The need for suppliers, reliant on supermarkets for their livelihood, to trigger review of retailer behaviour is unrealistic and ineffective, and
- meaningful penalties applying in the event of breaches of the Code.

9. **Which provisions under the Code help or hinder suppliers? How can the provisions be improved?**

The general tenet of the Code is consistent with the needs of suppliers. However, the Code allows for many of the elements to avoid application if included “*under the relevant grocery supply agreement*”, subject to a reasonableness test available only through Dispute Resolution. This allows the power imbalance to be used at the time of negotiation of supply agreements.

Code provisions should address the specific nature of horticulture for reasons discussed at Question 4.

10. **Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?**

No comment.

11. **What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?**

Internationally, specific focus is given to local producers of essential foods in the interests of food security and potential biosecurity risks from overseas.

Consideration should be given to international models which ensure farmers can sustainably (both financially and environmentally) produce fresh food locally to the benefit of the Australian population.

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

None.

In a market with so few buyers and so many sellers, dispute resolution activities by a grower within horticulture will always risk their future sales to both the retailer in question and the market in general.

The activities of retailers need to be overseen by an independent regulatory body.

13. **What benefits could a mandatory code bring to suppliers?**

A mandatory Code would require regulatory requirements to be met and meaningful penalties in the event of breaches. This would require supermarkets to act to a level of responsibility included in the Code or risk financial penalties. Dealings with suppliers would be performed in the knowledge that their actions may be reviewed by the independent regulator and assessed against the requirements of the Code.

14. **If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?**

The Code should include retailers and wholesalers with a market share exceeding 5% of any individual State.

15. **Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?**

No comment.

16. **Are Code Arbiters perceived to be independent from the supermarkets that they oversee?**

This is not the core issue. The power imbalance leads to suppliers being unwilling to risk future business (& livelihood) through the initiation of a complaint. Given that the investigation of any complaint would reveal the source to the retailer, this would still be the case if the Code Arbiters were genuinely independent of the supermarkets.

17. **If not, how could the reality and perception of independence of Code Arbiters be enhanced**

See Question 16.

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

No.

In a market with so few buyers and so many sellers, dispute resolution activities by a grower within horticulture will always risk their future sales to both the retailer in question and the market in general.

The activities of retailers need to be overseen by an independent regulatory body.

19. **Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?**

When dealing with suppliers of apples, pears, cherries, strawberries and other berries, supermarkets currently engage in practices such as:

- requirement for a rebate up to 8% to be deducted from the payment to the grower to secure reasonable payment terms. In its absence, supermarkets may pay beyond 90 days.
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- costs of packaging standards, increasing in light of changing social attitudes, being borne solely by the supplier, and
- refusal of complete deliveries of fruit with limited basis for rejection.

20. **Should civil penalties be available for breaches of the Code?**

Yes.

21. **If civil penalties are to be applied to the Code, what penalties are appropriate?**

Penalties should be financial and of the magnitude to be meaningful to, in part, equalise the power imbalance between retailers and the suppliers of fresh fruit.

**Response on behalf of:**

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