



# SUBMISSION TO

# Food and Grocery Code of

# Conduct Review 2023–24

# Interim Report

Grocery Code Review Secretariat  
Market Conduct and Digital Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600



**SUBMISSION TO THE INTERIM REPORT**

**Food and Grocery Code of Conduct Review 2023–24**

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## EXECUTIVE SUMMARY

Fresh Markets Australia (FMA) appreciates the opportunity to contribute further insights to the Food and Grocery Code of Conduct Review – Interim Report, aimed at enhancing the regulatory framework and ensuring fair trading practices within the supermarket-supplier relationship, particularly in the fresh produce sector.

### Key Endorsements

FMA endorses the firm and draft recommendations from the Interim Report which align with our objectives to mitigate power imbalances and foster a sustainable market environment. These recommendations address crucial aspects such as enforcement, code inviolability, and effective dispute resolution mechanisms.

### Consultation Responses

- **Wholesaler Protections**  
Advocacy for equal protections for fruit and vegetable wholesalers to those provided to growers, supported by insights from ACCC submissions.
- **Extension of Good Faith Obligations**  
Proposal to standardise good faith obligations across the Food and Grocery and Horticulture Codes to simplify compliance and ensure equitable business practices.

### Strategic Enhancements Proposed

- **Robust Dispute Resolution**  
Enhancements to the dispute resolution framework to align with best practices from the Horticulture Code, tailored to address the perishable nature of fresh produce.
- **Strengthening Food and Grocery Code Provisions**  
Recommendations to prevent circumvention through contractual negotiations, ensuring transparency and fairness in all dealings.

### Final Recommendations

FMA suggests incorporating a thorough impact assessment and collaborative refinement processes in the Final Report to precisely define and critically examine "reasonableness" within the Food and Grocery Code. Additionally, we advocate for significant non-compliance penalties to ensure strict adherence to the Food and Grocery Code's provisions.

### Conclusion

Through collaborative efforts with stakeholders, FMA is committed to refining these recommendations to achieve a fairer trading environment that respects and protects all market participants.



## **DETAILED SUBMISSION RESPONSE**

Fresh Markets Australia (FMA) recognises the importance of the Food and Grocery Code of Conduct Review and has actively contributed insights aimed at enhancing the regulatory framework governing the relationships between supermarkets and their suppliers, especially within the fresh produce sector.

FMA appreciates the opportunity to engage with the Draft Recommendations and Consultation Questions presented in the Interim Report. Our responses align closely with our mission to advocate for fair trading practices and improved conditions for wholesalers and suppliers in the fresh produce sector.

FMA's contributions are intended to support the development of a more effective and equitable Food and Grocery Code, ensuring a competitive and sustainable market environment for all stakeholders.

### **Draft Recommendations and Consultation Questions**

The Draft Recommendations of the interim report appear to effectively address several key concerns highlighted by FMA, particularly around strengthening enforcement, ensuring the inviolability of the Food and Grocery Code's provisions, and enhancing dispute resolution mechanisms. If implemented in line with FMA's feedback, these recommendations would significantly improve the regulatory framework governing the relationships between supermarkets and their suppliers, especially in the fresh produce sector. This would help in addressing the power imbalances and ensuring a fairer trading environment, which FMA has been vigorously advocating for.

The FMA response to the Consultation Questions aims to be formative in the development of the recommendations.

### **(Question 1) Protections for Suppliers Selling via Another Entity**

For the avoidance of doubt, a mandatory Food and Grocery Code, must explicitly afford fruit and vegetable wholesalers who are suppliers, the same protections as the grower of the produce. This request is in view of the statements made by the ACCC in their submission.<sup>1</sup>

Conversely, all fresh fruit and vegetable wholesaler's transactions with fruit and vegetable growers are regulated by the Horticulture Code of Conduct which is a mandatory industry code prescribed under the Competition and Consumer Act 2010 (CCA). Aggregators receiving produce from a grower must comply with this mandatory Code. The current Food and Grocery Code does not apply to the extent it conflicts with the Horticulture Code of Conduct.

It is to be noted that the Horticulture Code of Conduct does not apply to:

- retailers – businesses buying produce for retail sale;
- exporters – businesses buying the produce for export; or

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<sup>1</sup> ACCC, Submission to the Consultation Paper, 29 February 2024, p. 10.



- processors – businesses buying the produce for processing.

FMA view:

FMA insists that a mandatory Food and Grocery Code should explicitly provide the same protections to fruit and vegetable wholesalers, who are suppliers, as it does to the growers of the produce. This stance is supported by references to submissions made by the ACCC.

FMA asserts that no additional protections are needed in a Mandatory Food and Grocery Code where for fruit and vegetable growers who sell to a supermarket via a wholesaler, given the comprehensive protections already provided by the Horticulture Code of Conduct.

### **(Question 2) Extension of Good Faith Obligation to Suppliers**

As good faith provisions are integral to the Horticulture Code of Conduct, it stands to reason that it should also be included in a mandatory Food and Grocery Code. Implementing this principle across both codes would ensure consistency and fairness in dealings across all sectors of the fruit and vegetable supply chain, promoting equitable business practices and enhancing trust between suppliers and retailers. This alignment would also support a more uniform regulatory environment, simplifying compliance for businesses that operate under both codes.

FMA View:

FMA asserts that good faith obligations should extend to suppliers in a mandatory Food and Grocery Code of Conduct. Incorporating these obligations would enhance consistency and fairness, simplifying compliance for businesses that operate under both the Food and Grocery Code and the Horticulture Code of Conduct, thereby supporting a more uniform regulatory environment.

## **Recommendation 7: Enhancing Dispute Resolution**

### **(Question 3) Dispute-Resolution Effectiveness**

### **(Question 4) Alternative Dispute Resolution Mechanisms**

FMA supports the need for improved dispute resolution mechanisms, highlighting current inadequacies and the fear of retribution and called for mechanisms like those in the Horticulture Code, including negotiation, mediation, and arbitration, to ensure fair resolutions.

FMA emphasises the need for a robust dispute resolution process. We support the idea of having *independent* mediators and calls for dispute resolution mechanisms like those in the Horticulture Code of Conduct, which includes negotiation, mediation, and arbitration. This recommendation aligns well with FMA's call for accessible, affordable, and fair dispute resolution processes, however concern remains on the **independence** of the **Code Mediators**.



FMA explicitly advocates that Recommendation 7 mechanisms accommodate the unique challenges of the perishable nature of fresh produce. This would involve fast-tracking disputes related to perishable goods to prevent financial losses due to the time-sensitive nature of these products<sup>2</sup>.

#### **Recommendation 9: Setting Inviolable Minimum Standards**

FMA strongly advocates that the provisions of the Code cannot be circumvented through contractual negotiations, reflecting a strong alignment with this recommendation. FMA stresses the importance of fairness and transparency in the Code's application, which supports the recommendation that specific obligations under the Food and Grocery Code should be incontestable and not subject to contracting out.

FMA advocates the strengthening of Recommendation 9 by including explicit examples from the fresh produce sector where non-compliance has historically impacted the fairness and transparency of transactions<sup>3</sup>.

#### **(Question 5) Minimum Standards of Conduct**

#### **(Question 6) Effectiveness of Reasonableness Consideration**

#### **(Question 7) Strengthening Obligations under the Food and Grocery Code**

The review's focus on strengthening the obligations under the Food and Grocery Code by removing or limiting exceptions is a crucial step towards protecting suppliers, especially those with less bargaining power, and ensuring fair and ethical business practices within the supermarket supply chain.

FMA supports the findings of the Interim Report – Chapter 7. The voluntary Food and Grocery Code does fail to adequately protect suppliers and FMA has called for a mandatory Food and Grocery Code with strict standards.

To this end, FMA endorses tighter regulations that eliminate loopholes allowing supermarkets to bypass crucial Food and Grocery Code obligations, thereby creating a level playing field for all suppliers, particularly those with less bargaining power.

The Food and Grocery Code needs to better serve its purpose of leveling the playing field between supermarkets and suppliers, ensuring fair trading practices, and maintaining the integrity of the supply chain though limiting the circumstances under which supermarkets opt out of certain obligations normally required under the Food and Grocery Code are required to reduce the scope to unilaterally bypass certain rules.

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<sup>2</sup> Fresh Markets Australia: ACCC Supermarkets Inquiry Submission, 2024, p. 9

<sup>3</sup> Ibid., 7 and 8



This could involve in general terms:

- stricter criteria for exceptions - limiting exceptions to exceptional circumstances that are clearly defined and objectively verifiable.
- increased transparency - requiring explicit mutual agreement in writing for any exceptions in grocery supply agreements, with clear documentation of the reasons.
- enhanced supplier protections - preventing exceptions that disproportionately disadvantage smaller suppliers and ensuring these do not undermine the fundamental protections intended by the Food and Grocery Code.
- regular review and oversight - establishing mechanisms for ongoing review of how exceptions are applied, including oversight by regulatory bodies like the ACCC to prevent abuse.

This could specifically involve:

- unilateral variations and delisting - tighten provisions to prevent supermarkets from unilaterally changing contract terms or delisting products without a substantial and justified reason, ensuring suppliers have adequate protection and recourse.
- wastage and cost pass-on - clarify and strengthen rules to prevent supermarkets from unfairly passing wastage costs and other operational expenses onto suppliers, particularly when such costs arise from the supermarkets' actions or policies.

It is crucial to ensure that the review process does not inadvertently introduce or codify measures that could further disadvantage suppliers, particularly those already facing a significant power imbalance in their relationships with larger supermarkets. FMA underscores the importance of careful consideration in the final report to prevent such unintended consequences.

FMA urges the final report to include a recommendation for conducting a thorough impact assessment combined with a robust engagement process. This should involve roundtables or workshops focused on precisely defining and critically examining the conditions that qualify as "reasonableness" within the Food and Grocery Code. Additionally, FMA emphasises the necessity of incorporating specific, narrowly defined provisions to ensure these standards of reasonableness are not overly broad or vague, thereby ensuring they effectively protect suppliers without unintended loopholes.

#### **(Question 8) Protections for Fresh Produce Suppliers**

FMA has along with others, highlighted the unique challenges of the fresh produce sector and calls for specific provisions within a mandatory Food and Grocery Code to address these.

Potential recommendations for protections include:

- reconsideration of the rejection process - the process for rejecting produce consignments that do not meet specifications needs to be expedited. This is crucial to prevent significant losses due to the rapid depreciation in the value of fresh produce.



- handling standards - supermarkets must adhere to strict guidelines that guarantee fresh produce is stored and handled under conditions that preserve their quality and safety.
- an immediate, on-site appeal process for suppliers - this mechanism could draw inspiration from the Horticulture Code of Conduct, specifically the role of the 'horticulture produce assessor.' Under this proposed system, supermarkets would employ an assessor—like the role of a Code Mediator—who is empowered to make on-the-spot assessments of produce rejections. This would ensure that disputes regarding the quality and acceptance of produce are resolved swiftly and fairly, minimising potential spoilage and financial loss for suppliers. This role would not only streamline the dispute resolution process but also enhance transparency and trust between suppliers and supermarkets.
- rapid redistribution protocols - to optimise the efficiency of getting rejected produce to alternative market access points, it is crucial to establish mechanisms within the Food and Grocery Code that facilitate a quick turnaround time. This includes setting clear protocols that enable suppliers to swiftly redirect their goods to other markets or sale points, reducing the time produce spends in transit or waiting at facilities, which is essential for maintaining quality and minimising losses.

By implementing these recommendations, the Food and Grocery Code can offer more robust protections for fresh produce suppliers, addressing the rapid loss of value and the logistical challenges they face. This would not only help in maintaining fair trading practices but also contribute to sustainability efforts by reducing waste.

#### **(Question 9) Ordering Practices for Fresh Produce**

#### **(Question 10) Transparency Around Pricing**

#### **(Questions 11) Protections Regarding Contracted Prices and Volumes**

FMA stresses the need for improved price and supply transparency and fair-trading conditions under a strengthened Food and Grocery Code.

The review has unveiled widespread concerns among stakeholders regarding supermarkets' practices of purchasing volumes significantly lower than agreed, often at prices below those initially agreed upon, particularly in the fresh produce sector. This issue leads to uncertainty for suppliers and potentially creates an oversupply, harming the suppliers financially and contributing to wastage.

Frequently, suppliers are required to use packaging specified by supermarkets for their produce. Supermarkets sometimes renege on supply requirements. This can occur in various forms, such as unexpectedly cancelling or reducing orders, altering product specifications without notice, or not adhering to previously agreed terms regarding pricing and delivery schedules. Such actions can impose significant financial and operational strain on suppliers, particularly those who rely heavily on the business from these supermarkets and have less bargaining power. It can result in significant expenses for suppliers who





must then either repackage or unpack these goods. This process not only involves additional logistical costs but also diverts valuable resources that could be used elsewhere in the supply chain.

FMA proposes protections such as the following:

**Contractual clarity and enforcement** - all supply agreements should comprehensively detail obligations about order quantities, delivery schedules, packaging requirements, and wastage management. These agreements should include enforceable clauses that hold supermarkets accountable for any deviations from the agreed terms, such as unexpected order cancellations or changes. Specific clauses could prevent supermarkets from charging suppliers for wastage unless directly attributable to supplier negligence or non-compliance.

**Compensation for changes** - implement a mechanism within the Food and Grocery Code that requires supermarkets to compensate suppliers for additional costs incurred from abrupt changes initiated by supermarkets, such as last-minute cancellations. This could include financial penalties for supermarkets or direct reimbursements for the suppliers' associated costs.

**Transparent pricing frameworks** - supply agreements must explicitly outline the methodologies used for setting prices, incorporating factors such as production costs, market demand, and broader economic conditions. This ensures that pricing decisions are transparent and justifiable.

**Price adjustment clauses** - include specific clauses in supply agreements that define the conditions under which prices may be adjusted, ensuring clear parameters for timing and methodology, and requiring sufficient notice to suppliers.

**Adherence to fair trade practices** - regulatory oversight should be strengthened to ensure that supermarkets adhere to fair trade practices within their supply agreements, preventing practices like predatory pricing and protecting suppliers from exploitative bargaining practices.

**Periodic price reviews and inflation adjustments** - regular intervals for price reviews should be mandated to adjust prices based on market conditions, input costs, or other relevant factors. Additionally, clauses that allow price adjustments based on inflation rates or significant changes in input costs should be included to protect suppliers from cost increases that could erode margins.

**Regulatory prohibitions and Shared responsibility for wastage** - enact regulations to prevent supermarkets from charging suppliers for wastage under supermarket control and introduce a model that promotes shared responsibility for wastage, distributing costs based on where wastage occurs along the supply chain.

**Minimum notice periods and Regular review of supply agreements** - establish minimum notice periods for any changes to supply requirements and mandate regular reviews of supply agreements to ensure they remain fair and reflective of current market conditions.



Transparent reporting and Compliance audits - supermarkets should be required to submit detailed reports on wastage and order quantities, verified by independent auditors. Regular submission schedules to the ACCC should be established, and penalties for non-compliance should be clearly defined to reinforce the importance of transparency.

### **Recommendation 11: Increasing Infringement Notice Amounts**

FMA discusses at length the need for effective non-compliance penalties as part of the Food and Grocery Code to ensure it has the necessary teeth for enforcement. This aligns with the suggestion to consider increasing the amounts of infringement notices to strengthen the Food and Grocery Code's deterrent effect.

Potential Addition: Clearly link the scale of penalties to the severity of the impact on suppliers, particularly focusing on repeated non-compliance which could jeopardize the livelihood of fresh produce suppliers. This could include a tiered penalty system where repeated infringements by supermarkets incur progressively higher penalties<sup>4</sup>.

These recommendations, if refined and implemented as suggested, would more comprehensively reflect the realities faced by stakeholders in the fresh produce industry, particularly in terms of dispute resolution and enforcement measures. This alignment and enhancement are crucial for creating a regulatory environment that is both robust and responsive to the unique challenges faced by the fresh produce sector.

### **(Question 12) Penalty Levels for Breaches**

#### **(Question 13) Provisions Requiring Highest Penalties**

#### **(Question 14) Appropriateness of Penalty Units**

In considering the clauses within the Food and Grocery Code and the vulnerabilities faced by suppliers, especially in the realm of supply chain dynamics and payment terms, FMA advocates the highest infringement penalties should potentially apply to the following areas:

Unilateral Variation of Agreement (Clause 9) - given the significant impact such variations can have on suppliers, especially when they are imposed without adequate consent or negotiation, high penalties here would deter supermarkets from exploiting their bargaining power to enforce unfavourable changes.

Payments for Wastage (Clause 14) - supermarkets charging suppliers for wastage that occurs under their control can unfairly shift business risks onto the less powerful suppliers. High penalties would help ensure that supermarkets manage their operations more responsibly and equitably.

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<sup>4</sup> Ibid., 10



Delisting Products (Clause 19) - this can drastically affect a supplier's business without just cause. Strong penalties would discourage supermarkets from arbitrarily removing products, ensuring that delistings are justified and handled with due process.

Good Faith (Part 1A - Clause 6B): - high penalties for violations of the good faith obligation are crucial as these form the basis of fair commercial conduct. Enforcing this clause vigorously would help cultivate a culture of integrity and fairness in supermarket-supplier relationships.

FMA is of the view that these clauses if enforced with substantial penalties, would aid in balancing the power dynamics between large supermarkets and their suppliers, ensuring fairer and more sustainable business practices, and signalling to the industry the critical areas where compliance must be strictly adhered to.

FMA advocates that the penalty amount for an issued infringement notice under the Food and Grocery Code should be higher than 50 penalty units and commensurate with recommendation 10. This stance relies on; aligning with seriousness if breaches; consistency across Codes: effective deterrence and encouraging compliance.

#### **(Question 15) Compliance Record Keeping**

FMA emphasises the need for mandatory reporting and detailed record-keeping to monitor compliance and enforce the Food and Grocery Code.



## **APPENDIX ONE – FMA ALIGNMENT WITH THE FIRM RECOMMENDATIONS**

The Firm Recommendations from the Interim Report significantly align with the issues and solutions proposed by FMA. These recommendations, if implemented, would mark substantial progress toward creating a fairer trading environment that respects the rights and contributions of all market participants, particularly in safeguarding the interests of suppliers within the fresh produce sector. FMA remains committed to collaborating with regulatory bodies to refine these recommendations and ensure their effective implementation.

### ***Recommendation 1: Mandatory Food and Grocery Code Implementation***

FMA Alignment: FMA has consistently advocated for the Food and Grocery Code to be made mandatory, reflecting a fundamental pillar of our submission. This recommendation directly aligns with our advocacy for a robust regulatory environment that ensures compliance and fairness across the board.

### ***Recommendation 2: Revenue Threshold for Supermarkets***

FMA Alignment: FMA supports a criteria-based inclusion of supermarkets in the mandatory Food and Grocery Code. The proposed revenue threshold of \$5 billion ensures that major players capable of impacting market dynamics are appropriately regulated, which aligns with our call for accountability at all levels of operation.

### ***Recommendation 3: Emphasis on Retribution Protection***

FMA Alignment: Addressing the fear of retribution has been a critical aspect of FMA's submissions. Including explicit protections against retribution within the Food and Grocery Code's purposes strengthens the position of suppliers in negotiating and operating freely, which is a significant alignment with our objectives.

### ***Recommendation 4: Consistency with Food and Grocery Code's Purpose in Incentive Schemes***

FMA Alignment: FMA believes in fair and transparent trading practices and ensuring that incentive schemes for buying teams are consistent with the Food and Grocery Code's purpose supports this belief. This recommendation aligns with our advocacy for ethical business practices that do not undermine the Food and Grocery Code's objectives.

### ***Recommendation 5: Monitoring Systems for Decision-making Post-Complaint***

FMA Alignment: Implementing systems to monitor decisions affecting suppliers who have raised complaints is crucial for preventing retaliatory actions, a concern frequently highlighted by FMA. This initiative-taking approach in safeguarding suppliers aligns closely with our submission's focus on supplier protection.

### ***Recommendation 6: Establishment of a Complaints Mechanism***

FMA Alignment: FMA has called for effective dispute resolution mechanisms. Establishing a direct and confidential way for suppliers to raise issues with the ACCC enhances transparency and access to justice, reflecting our advocacy for more robust regulatory support systems.



***Recommendation 8: Annual Reports by Food and Grocery Code: Code Supervisor***

FMA Alignment: FMA supports increased transparency and accountability within the industry. Annual reports on disputes and confidential surveys can provide critical insights into the Food and Grocery Code's operation and effectiveness, aligning well with our calls for ongoing monitoring and evaluation.

***Recommendation 10: Penalties for Non-Compliance***

FMA Alignment: Introducing significant penalties for non-compliance is a direct response to FMA's criticism of the previous lack of effective enforcement measures. By setting substantial fines, the Food and Grocery Code will have the necessary teeth to ensure compliance, a stance strongly supported in our submissions.

**Conclusion on Final Recommendations**

The recommendations from the Interim Report significantly align with the issues and solutions proposed by Fresh Markets Australia. These recommendations, if implemented, would mark substantial progress toward creating a fairer trading environment that respects the rights and contributions of all market participants, particularly in safeguarding the interests of suppliers within the fresh produce sector. FMA remains committed to collaborating with regulatory bodies to refine these recommendations and ensure their effective implementation.



## FMA State Bodies



The Queensland Chamber of Fruit & Vegetable  
Industries Co-operative Limited



NSW Chamber of Fresh Produce Limited



Fresh State Limited



Chamber of Fruit and Vegetable Industries in Western  
Australia Inc.



South Australian Chamber of Fruit & Vegetable  
Industries Inc.