

Submission to Independent Review of the Food and Grocery Code of Conduct 2023-24 – Interim Report

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The views in this submission have been informed by the authors’ previous work, as well as a current project three of the listed authors (Hurst, Maguire, and Johnson) are conducting to map trading practices impacting food waste in Australia (End Food Waste Australia CRC Project 1.3.7). The aforementioned project has included a review of over 300 academic and industry articles relating to unfair trading practices in the food supply chain. The researchers are currently conducting in-depth interviews with actors in the supply chain to better understand and map potential solutions to key unfair trading practices in the Australian food supply chain. It is important to note that the views presented in this submission are that of the listed authors and do not represent the funding scheme or funding partners (including End Food Waste Australia and Queensland Department of Environment, Science and Innovation).

Commentary on firm recommendations:

Recommendation	Commentary
Recommendation 1	We strongly support this recommendation.
Recommendation 2	We support this recommendation, in theory, however, further clarity could be provided here which reflects the nuance of the diverse supply chains in Australia. At present, this recommendation states that “all suppliers should be automatically covered”. It is unclear whether this means suppliers that supply directly to retailers only or whether it means the Code should also apply to Tier 2/3 producers that supply to Tier 1, who in turn supply to retailers. This point aligns with Consultation Question 1, to which we would suggest that careful consideration needs to be given to the diverse and varied supply chains in Australia and ensure that these are covered by either the Horticulture Code or the Food and Grocery Code.
Recommendation 3	We support this recommendation, in theory, however, we note that while the Interim Report provides a list of potential forms of retribution against suppliers, it is not clear whether these would be stipulated in the Code. We suggest stipulating in the Code specific forms of retribution, while also acknowledging that this list may not be exhaustive and other forms of retribution beyond the list may be covered by the Code.

	<p>There are two key challenges regarding retribution that need to be addressed in the Code. Firstly, the Code needs to address the potential for longer-term retribution, that is, decisions by supermarkets that occur after a reasonable amount of time from when a complaint was made but which nonetheless are a result of the supplier's complaint. Secondly, the Code needs to expand on the meaning of “genuine commercial reason” and in particular what evidence and factors indicate a decision was made for genuine commercial reasons and not retribution.</p> <p>As part of extending the current Code to respond to the fear of retribution, there is a need to develop the principle of "good faith", which underpins the current Code and the recommendations in the Interim Report. It is highly subjective and may in fact, be employed in a manner which effectively undermines the Code. Further elaboration of the elements of good faith is required, and should engage with the need for retailers to have regard to the interests of the supplier. Alternatively, the Code could develop a new guiding principle and one that is better suited to reflecting the power imbalances between supermarkets and suppliers. In advancing a new conceptualisation of good faith, or a new guiding principle for the Code, attention must be paid to the ability of supermarkets to shape information to support their decision so either it appears an action was in good faith, or they can argue that it was on the basis of a broad interpretation of good faith.</p> <p>In answering Consultation Question 3 (see also the response below to Recommendation 7) while the avenues proposed in the Interim report would potentially allow for low-cost and quick resolution of complaints, it is questionable whether they would do so in a manner that addresses the fear of retribution. This is partly because they still rely on supermarket appointed alternative dispute resolution practitioner. While the recommendation is to provide pathways for suppliers to complain about a particular alternative dispute resolution process or appointment, in practice the suppliers are less likely to do so for fear of retribution. A purely independent process is possible. We discuss this further in relation to Recommendation 7 below.</p>
Recommendation 4	<p>We support the view that it will be crucial to drive organisational culture and buyer behavioural change, and that one mechanism to do this might be to ensure that incentive schemes and payments must be consistent with the intent of the Code, however, see comment for Recommendation 5.</p>
Recommendation 5	<p>We agree that culture plays an important role in changing behaviours that undermine the intent of the Code. However, we do question the view that the conduct of buying teams and category managers be monitored by senior managers, particularly when it is likely senior managers are those are setting the KPIs in the first place.</p> <p>This recommendation assumes that supermarkets have the capacity and the culture to effectively govern their buying teams in ways that avoid retribution against suppliers who make a complaint. Unless there are strong changes to organisational culture, the effectiveness of this recommendation is questionable.</p>

	In enacting this recommendation, it will be important to consider how compliance will be monitored, and this may include, perhaps, documented periodic training.
Recommendation 6	We agree that a complaints mechanism should be established to enable suppliers and other market participants to raise issues directly and confidentially with the ACCC. It will be crucial that any complaints mechanism enables such complaints to be dealt with confidentiality to address the fear of retribution. See Commentary for Recommendation 7 below.
Recommendation 8	We agree to this recommendation, and can point to the United Kingdom’s Grocery Code Adjudicator which does this. Arguably, the survey may provide an effective platform for suppliers to confidentially raise issues, but it may also serve as an educational tool about the Code.
Recommendation 10	No comment.

Commentary on draft recommendations:

Recommendation	Commentary
Recommendation 7	<p>We note the need to provide informal, confidential, and low-cost processes for resolving disputes, and a solution that deals with constitutional restraints around arbitration. It is our strong view that this process needs to be independent of the retailers, however. In the final report, greater clarity needs to be given on how the newly proposed Code Mediators will in fact be independent. For example, while the Interim Report notes that a “list of independent mediators and arbitrators...would be maintained by the Code Supervisor” (p. 46), elsewhere in the report, its noted that the Mediators “would be engaged by the supermarkets” and an “advantage of these Code Mediators is that they would be very familiar with the supermarkets that engaged them” (p. 43).</p> <p>Further to this, Recommendation 7 seems to put forward a number of possible avenues for dispute resolution, including “allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by suppliers” and “allowing suppliers... to seek arrange independent, professional mediation” (p. 48). It is not clear in the Interim Report whether both options will be available, or one or the other, nor is it clear whether it is recommending that suppliers should follow certain procedures in making a complaint (i.e., to the supermarket’s buyer team first, then the supermarket appointed mediator, then independent mediator).</p> <p>In line with Consultation Question 4, it is our strong view that without having a truly independent process, the fear of retribution will remain a significant weakness of any changes to the Code. A possible avenue to explore which may address the issue of independence and cost issues could be for supermarkets to fund a levee that supports the independent appointment of independent mediators/reviewers.</p>

Recommendation 9	While we agree with this in theory, careful attention will have to be paid to ensure the wording allows the flexibility to benefit both parties fairly and will not allow supermarkets to continue to wield their power in anti-competitive ways. Regarding Consultation Question 5, while it could be suggested that minimum standards should include price and volume, we would express caution in doing this, as it may negatively impact suppliers in particular (for example, where the produce ends up being of a higher grade and therefore would have attracted a higher price). We would, however, support a mechanism that enables greater transparency around volume and price.
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Commentary on selection consultation questions:

Recommendation	Commentary
Question 1	Careful consideration needs to be given to the diverse and varied supply chains in Australia and ensure that these are covered by either the Horticulture Code, or the Food and Grocery Code.
Question 2	The notion of ‘good faith’, which underpins the current Code and the recommendations in the Interim Report, is vague. This lack of detail may be exploited by supermarkets given the current market imbalance, which effectively undermines the Code. While we do understand the view that good faith should go both ways, our concern would be that the supermarkets employ this concept to further ingrain their power over suppliers. We, therefore, suggest either the Code put forward a more detailed understanding of good faith that draws on elements that emphasise the need to consider the interests of suppliers or the Code advance a new core principle that better reflects the position of supermarkets in supply chains and the impact of their actions on suppliers.
Question 3 & 4	While the avenues proposed in the Interim report would potentially allow for low-cost and quick resolution of complaints – which is particularly important in the case of perishable produce – it is questionable whether they would do so in a manner that addresses the fear of retribution. Our strong view is that without having the option for a truly independent process, the fear of retribution will remain a significant weakness of any changes to the Code. It is crucial that any mechanisms for complaints must ensure the confidentiality of the complainant to address fear of retribution.
Questions 5, 6 & 7	Work done in the European Union has outlined key recommendation regarding what should be covered in an effective grocery supply code of conduct, which should be considered in relation to any proposed changes to the Code: “The recommended elements contributing to an effective response to UTPs [unfair trading practices] include the steps necessary to establish an effective grocery supply code of practice are: <ul style="list-style-type: none"> • Having a clear and easily followed code of practice that governs behaviour relating to fair trading within the supply chain. • Providing sufficient resource to implement measures to investigate and prevent infringements of that code.

	<ul style="list-style-type: none"> • Providing sufficient deterrence to those that are found to breach the code through public disclosure of the results of investigations and a level of fine that is significant in relation to a food business' turnover. • The financial support for the organisation acting as an adjudicator to the code of practice should be on the basis of an industry levy rather than dependent on income from fines. • A mechanism to protect the anonymity of food businesses that make a case for a breach of the code of practice, to reduce the climate of fear and encourage more victims of UTPs to come forward, as well as a mechanism to accept evidence from civil society. • Ensuring that the code covers international and indirect suppliers, both within and beyond EU Member States and that those covered by the code are aware of their rights. • Measuring food waste, at Member State and business level, from the point food is mature enough to be ready to harvest through to the consumer, and the causes of this food waste, in order to get a clear sense of the scale of food waste caused by UTPs, and to understand opportunities for intervention.”¹ <p>Similarly, in relation to unfair trading practice legislation in the European Union, it was noted that at a minimal, effective regulation should consider that:</p> <ol style="list-style-type: none"> 1. “It is important that measures cover entire supply chain. 2. There are four key categories of UTP that an effective regulatory framework should target: <ol style="list-style-type: none"> a. one party should not unduly or unfairly shift its own costs or entrepreneurial risks to the other party; b. one party should not ask the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked; c. one party should not make unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions; d. there should be no unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship. 3. Approaches can vary between flexibility and rigidity in defining UTPs. Some favour general legal provisions requiring assessment on a case-by-case basis of whether there is a significant economic imbalance between two operators, and whether the stronger operator abused its position; others have come up with long lists of specific examples of practices which are illegal. 4. An effective enforcement system needs to enshrine confidentiality, to address the weaker party's fear of
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¹ Taylor, J. S., Parfitt, J., & Jarosz, D. (2019). Regulating the role of Unfair Trading Practices in food waste generation. FUSIONS EU Project: Wageningen, Poland.

	<p>compromising its commercial relationship when complaining openly to authorities about UTPs: the ‘fear factor’.”²</p> <p>Taking a broader approach, work was done that considered grocery supply contracts in the context of food waste, and suggested that changes needed to be made to “contract practices which suppress farmers’ incomes and powers to negotiate:</p> <ol style="list-style-type: none"> a. Pay fair prices to enable farmers to improve their harvesting and field management techniques. Where investments are needed to improve farming practices and target the direct drivers of farm-stage food waste, better prices are required to provide the farmer with a return on investment. To this end, paying fair prices to farmers is an integral element of reducing food waste at the farm stage. b. Introduce contractual arrangements that share risks more equitably between producers and markets. This is necessary to boost farm incomes and provide enough financial security to allow farmers to invest in food waste reduction techniques. This includes contract types (e.g whole crop purchasing and flexible production targets) that protect farmers from the financial losses associated with both gluts (e.g. additional harvesting labour) and underproduction (e.g. cancelled contracts if predicted yield is not delivered). c. Introduce contractual protections from unfair trading practices which drive up food waste at farm stage from the retail end of the supply chain. Farmers are often subjected to last-minute cancellations and changes to orders due to issues in retail operations such as forecasting changes. These behaviours may leave farmers unable to fund harvest labour, or without time to find a second market to sell the produce.”³ <p>In light of these findings, while we do advocate for a list of minimum standards, we also suggest there needs to be enough flexibility within the Code to govern situations in which an imbalance of market power has created unfair trading practices that may be beyond the list. We agree with submissions noted in the Interim Report that suppliers should not pay for promotions or price-matching.</p> <p>While we broadly agree with the current provisions listed within the Code, our key concern is that some of these appear contradictory (for example, Section 18 which specifies that “The retailer or wholesaler must not directly or indirectly require a supplier to fund part</p>
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² Barling, D., Sharpe, R., Gresham, J., Mylona, K. (2018). Characterisation framework of key policy, regulatory and governance dynamics and impacts upon European food value chains: Fairer trading practices, food integrity, and sustainability collaborations. The VALUMICS project “Understanding Food Value Chains and Network Dynamics” funded by EU Horizon 2020 G.A. No 727243. Deliverable D3.3, University of Hertfordshire, UK. See also Wunder, Stephanie, Keighley McFarland, Martin Hirschnitz-Garbers, et. al. (2018). Food waste prevention and valorisation: relevant EU policy areas. Report of the REFRESH Project, D3.3 Review of EU policy areas with relevant impact on food waste prevention and valorization.

³ WWF-UK. (2021). Driven to waste: The Global Impact of Food Loss and Waste on Farms. Woking.

	<p>or all of the costs of a promotion.” Yet, Subclause (1a) to Section 15 (a retailer or wholesaler must not require a supplier to make any payment as a condition of stocking or listing grocery products) suggests that payment is made in relation to a promotion is an exception).</p> <p>Further to this, the wording of the Code allows for amendments, variations, and effectively side-stepping of the intent of the Code, if it is agreed. Given the market imbalance within the current food supply chain in Australia, anecdotal evidence from our research points to suppliers feeling the need to agree to changes out of fear of retribution. Careful consideration needs to be given to the wording of the subclauses in future iterations of the Code, or to have an independent organisation (such as the ACCC) review contracts and changes to these contracts to determine if they are fair.</p> <p>In regard to delisting of products, the Code currently outlines that the supermarkets must provide reasonable written notice. Greater clarity is needed here as to what is considered “reasonable”, as the retailers views on this may differ considerably to a producers or suppliers (and in light of the view that some producers and suppliers are forecasting months, if not years ahead).</p> <p>In regard to wastage in particular, Section 14 of the current Code states that “The retailer or wholesaler must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred at premises of:</p> <ul style="list-style-type: none"> (a) the retailer or wholesaler; or (b) a contractor or agent of the retailer or wholesaler; or (c) any other entity that is a retailer or wholesaler.” <p>This provision needs greater clarity to explain what is meant by (a) and whether this extends to a distribution centre and at what point ownership transfers. Consideration also needs to be given to how sales and return agreements align – or do not align – with this provision. In particular, the Code should prohibit sales and return agreements that effectively result in the transfer of wastage – or the cost of waste (directly or indirectly) – onto suppliers.</p> <p>We would also suggest greater consideration needs to be given to wastage, and how supermarket practices may create a deliberate oversupply. In particular, farmers tend to produce more food because they know supermarkets will refuse a certain amount based on cosmetic standards, and that there is no oversight or strong consistency in how these cosmetic standards are applied. The Code needs to directly deal with how cosmetic standards are applied by supermarkets.</p>
Question 8	Fresh produce suppliers face additional challenges due to the perishability of the produce. This, in turn, makes them more susceptible to unfair trading practices and creates additional challenges for arbitration processes. As discussed, the Code needs to address the use of cosmetic specifications and, in particular, the need for these

	<p>standards to be applied consistently and/or in a manner in which they are used to reject produce arbitrarily to distort the market.</p> <p>Section 21(3)(b) of the Codes states the retailer or wholesaler can “rejects the produce within 24 hours after the produce is delivered to the retailer or wholesaler”. Potential tightening of this provision should be considered for perishable produce because the quality of this produce can decline rapidly within this timeframe (because of the nature of the produce itself, or because of unintentional or intentional poor handling practices, including logistics). In such situations, the supplier may (a) continue to wear costs associated with transport, including pallet hire, (b) have limited opportunities to secure an alternative market given the decline in quality, or (c) have no choice but to donate or dump the produce, at their own cost.</p>
Question 9, 10, & 11	<p>At a minimum, we recommend an independent tool or platform that provides greater transparency regarding the price and volume of fresh produce, as well as the grade (so that, for example, a price related to lower grades cannot be used to negotiate premium grade prices). Linked to this, we support the suggestion that supermarkets should be required to publish reports that outline variances between forecasts and actual purchases, aligned with the recommendation noted in the Interim Report from National Farmers’ Federation Horticulture Council.</p> <p>We would express caution in adding price and volume to contracts, as it may negatively impact suppliers (for example, where the produce ends up being of a higher grade and therefore would have attracted a higher price). However, we would, in theory, be supportive of a minimum price being added to contracts, provided that it fairly reflects growers’ costs.</p>