

**National
Farmers
Federation**

Interim Report of the Food and Grocery Code of Conduct Review

May 2024



The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

NFF Member Organisations



8 May 2024

Dr. Craig Emerson
Grocery Code Reviewer
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

Correspondence sent via email: GroceryCodeReview@treasury.gov.au

Dear Dr Emerson,

Subject: NFF submission to the Interim Report of the Independent Review of the Food and Grocery Code of Conduct

The National Farmers' Federation (NFF) welcomes the opportunity to make a submission in response to the Interim Report of the Independent Review of the Food and Grocery Code of Conduct (Interim Report). The NFF has welcomed the findings and recommendations contained in the Interim Report.

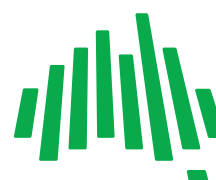
The NFF provided a detailed submission to the Independent Review of the Food and Grocery Code of Conduct Consultation Paper in February this year. This submission outlined that competition is an essential element of well-functioning markets and supply chains in Australia. This is especially important for the agricultural supply chain. Agriculture relies upon open and transparent marketplaces that promote competition within agricultural supply chains, enabling farmers to access requisite inputs and sell their produce at a competitive price.

The Australian agricultural supply chain is characterised by an uneven distribution of market concentration. Food and fibre production has one of the lowest rates of market concentration in the Australian economy. At the same time, supermarkets are one of the most concentrated sectors in Australia.

Because of this significant market share, supermarkets are one of the largest supply channels of perishable products to end customers in Australia. This market concentration impacts the competitive nature of the food supply chain. This is because the discrepancy in market concentration along the supply chain is open to abuse by firms that hold significant market power, often to the detriment of smaller businesses.

The NFF continues to maintain the view that supermarkets and retailers can use this market power to the detriment of farmers through lower prices, unfair risk burden and longer-term uncertainty that places significant pressure on individual farm businesses. This impact is felt by farmers who directly supply the major supermarkets, but also by those who are involved in supermarket supply chains through intermediaries such as processors, agents, or wholesalers.

The NFF has welcomed the proactive approach taken by Dr Emerson, the Minister for Agriculture, Fisheries & Forestry, and the review Secretariat to engage stakeholders as



part of the Review. This includes the hosting of a number of roundtables for relevant food and grocery supply chain stakeholders.

Similarly, the NFF welcomed the release of the Interim Report in April. The NFF released a public statement supporting a number of the key recommendations contained in the Interim Report.

This submission seeks to provide additional detail on the NFF's position towards the key Interim Report recommendations. For those recommendations related to more specific elements of food and grocery supply chains, as well as the specific consultation questions, we strongly encourage consideration of submissions made by NFF member organisations.

Recommendation 1: The Food and Grocery Code of Conduct should be made mandatory.

The NFF strongly supports the recommendation to make the Food and Grocery Code of Conduct (the Code) mandatory. As noted in our submission to the Consultation Paper, the NFF has supported the findings of the ACCC's Perishable Agricultural Goods Inquiry Final Report, which stated that:

“[t]o provide meaningful protection for suppliers, the Food and Grocery Code should be made mandatory, applying to all relevant retailers and wholesalers in the sector. Without being mandatory, the risk of signatories withdrawing from its coverage undermines the force of the Code and the extent to which businesses can rely on its protections. This risk could be triggered by a number of factors, such as the introduction of civil pecuniary penalties”.

The NFF draws particular attention to the reference in the above quote to a potential trigger for signatory withdrawal under a voluntary code being the introduction of increased penalties. Given Recommendation 10 in the Interim Report, which provides for a material increase in the potential penalties for code non-compliance, such a risk is increasingly real and further supports the recommendation to make the Code Mandatory.

Recommendation 5: To guard against any possible retribution, supermarkets covered by the mandatory Code should have systems in place for senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.

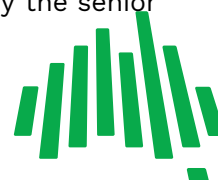
The NFF supports this recommendation. The fear of retribution has been a consistent tenet in the submissions made by agricultural representative groups to the review of the Code, as well as to many of the other current inquiries into the supermarket sector.

As noted by the NFF in its submission to the Consultation Paper, the NFF continues to hear a concerning number of reports from producers outlining that they fear commercial retribution against suppliers, and threats (both actual and implied) of commercial retribution against suppliers.

As noted by the NFF Horticulture Committee submission to the Consultation Paper:

“Fear of retribution or adverse consequences remains the consistent reason why suppliers will not make a formal complaint or permit an informal complaint to be raised with a supermarket.”

More specifically, the NFF notes the focus of Dr. Emerson on potential retribution that may occur at the buyer and category manager level, likely with less visibility by the senior



management of supermarkets. Such a focus is well founded, with many reports of commercial retribution, or the fear of such, being borne out of supplier engagement at this level.

To this end, the systems provided for in the recommendation would be a welcome addition.

To enhance the effectiveness of such an internal system, consideration should be given to the role of the recommended Code Supervisor in overseeing the development, implementation and functioning of such systems by supermarkets, including in their annual reporting.

Recommendation 6: A complaints mechanism should be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC.

The NFF agrees with this recommendation as one means to raise issues alongside more direct dispute and resolution processes. Such a mechanism may allow for greater visibility by the ACCC of both specific examples and patterns of behaviour that may constitute non-compliance with the Code. This in turn, may facilitate their ability to trigger and undertake investigative actions.

It is important however that appropriate resources are provided to ensure producers and supply chain participants are made aware of such a compliant mechanism. The NFF has consistently stated that for complaints mechanisms to be effective, they must be appropriately known and understood by suppliers.

This is supported in the NFF Horticulture Council submission to the Consultation Paper, which stated that:

“The Council supports an investment by the Federal Government in education and raising awareness of the FGCC generally, and dispute resolution process”.

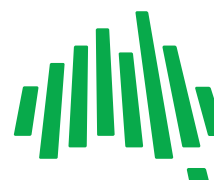
Recommendation 10: Penalties for non-compliance should apply, with penalties for more harmful breaches of the Code being the greatest of \$10 million, 10 per cent of turnover, or 3 times the benefit gained from the contravening conduct. Penalties for more minor breaches would be 600 penalty units (\$187,800 at present).

The NFF strongly supports the introduction of materially increased penalties for non-compliance as outlined in recommendation 10.

It is clear that the current lack of financial penalties significantly undermines the effectiveness of the Code. The recommendation for such materially increased penalties has been a long-held and consistent call from the agricultural sector.

As noted in the NFF submission to the Consultation Paper, the NFF strongly supports the continued calls from the ACCC for increased penalties. As outlined in the ACCC’s Perishable Agricultural Goods Inquiry Final Report (December 2020):

“[t]he Food and Grocery Code should be updated to make significant civil pecuniary penalties and infringement notices available for contraventions. As it currently stands, the Code does not provide the ACCC with the necessary enforcement tools to protect suppliers against signatories that fail to comply with its requirements. Submissions to this inquiry have indicated that they are unwilling to raise complaints because of the risk to their



business, and the fact that there will be no genuine consequences for the retailers under the Code.”

This position was again stated by the ACCC in their submission to the Consultation Paper:

“There is a lack of strong specific or general deterrence for breaching the code due to the absence of penalties. The availability of meaningful civil pecuniary penalties (and infringement notices) is important to enable the ACCC to promote compliance not only through the taking of enforcement action against the business but by signalling to others covered by the code that the cost of non-compliance will be significant.”

The confluence of calls for such increased penalties by agricultural groups and the ACCC should ensure that the Recommendation remains for the Final report and that it is adopted by Government.

Recommendation 7: The mandatory Code should include informal, confidential and low cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:

- ***Adopting the dispute-resolution provisions of other industry 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; and***
- ***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.***

Supermarkets are encouraged 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.

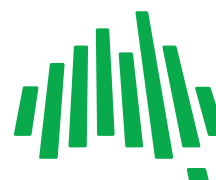
The NFF supports efforts to put in place a mechanism for enhanced “informal, confidential and low-cost processes for resolving disputes” as one means to reduce the barriers for complaints to be raised and disputes resolved.

As noted in the NFF submission to the Consultation Paper:

“In addition to implementing fair contract terms, access to justice mechanisms must be easier to access for farmers and small businesses with lower barriers to challenge unfair contract terms or misconduct. Where farmers have contracts with supermarkets or other retailers, there is no effective mechanism to contest issues or breaches of the contract.

In the current system, unfair terms and compliance with contracts must be decided by courts. This adds a clear barrier for farmers to contest issues in contracts. Relying on the legal system as the sole avenue to contest contracts reduces the efficacy of existing unfair contract term legislation. It also allows the ongoing prevalence of unfair contract terms within the agricultural supply chain”.

In addition to the comments provided above relating to the Interim report recommendations, the NFF would like to take this opportunity to make some additional comments on matters we believe should be considered in the final report.



The first relates to the potential extension of the Code to cover nursery retailers, such as Bunnings. As noted in the Interim Report:

'[t]he Interim Report considers that the case for extending the Code to other retail markets has not yet been made in full given that the Code has been designed to address issues specific to the supermarket industry.'

The NFF strongly encouraged further consideration to be given to include coverage of nursery retailers in the final report. The NFF has heard numerous examples of nursery growers experiencing similar trading issues and inequities as those who supply supermarkets, and yet are not protected by any similar code. Further still, this case has further merit considering “plants, flowers and gardening equipment” are already covered by the Code.

We would urge Dr. Emerson to consider the merits of extending the coverage of the Code to nursery retailers in the final report.

Finally, the NFF strongly encourages the final report to include a clear recommendation regarding a material increase in the resources of the ACCC to undertake its education, investigative, compliance and enforcement activities.

As the NFF noted in its submission to the Consultation Paper”

“The under-resourcing of the ACCC has meant it is unable to investigate and prosecute the full extent of firms that break existing laws and regulations. The ACCC has also not been able to adopt new capabilities to proactively monitor firms and supply chains for increasing market concentration, abuse of market power and the use of unfair business practices. The ACCC is also not able to review natural changes in the distribution of firms that impact market concentration. This includes changes in the location of activities and changes in market share due to organic firm growth.”

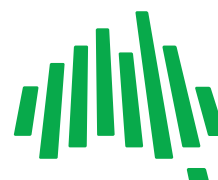
While the above commentary speaks to the capacity of the ACCC in a manner broader than just as it relates to the Code, the NFF believes that a recommendation for increased resourcing in the Final Report will be critical to ensuring the effectiveness of the Code into the future. This requirement will only be increased if the Government accepts the recommendation outlined in the Interim Report which will increase the role the ACCC plays in overseeing the Code, such as recommendations 1, 6 & 10.

Should you seek any further information, please do not hesitate to contact Mr. Christopher Young, NFF General Manager Trade and Economics via cyoung@nff.org.au or at 02 6269 5666.

Yours sincerely,



Tony Mahar
Chief Executive Officer





National
Farmers
Federation

Leading
Australian
Agriculture

NFF House
14-16 Brisbane Avenue
Barton ACT 2600

Locked Bag 9
Kingston ACT 2604

(02) 6269 5666
reception@nff.org.au
nff.org.au



National Farmers Federation



@NationalFarmers
