



QUEENSLAND FRUIT
& VEGETABLE GROWERS

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

2 May 2024



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The Hon Dr Craig Emerson
Independent Reviewer
Review of the Food and Grocery Code of Conduct
The Treasury
Langton Crescent
PARKES ACT 2600

By email via: GroceryCodeReview@treasury.gov.au

Dear the Hon Dr Emerson,

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

As the state industry body representing Queensland's commercial fruit, vegetable, and nut growers, we welcome the opportunity to make a submission in response to your Interim Report of the Food and Grocery Code of Conduct (FGCC).

It was pleasing to see QFVG's submission align with what has been discovered in your report being an imbalance in market power, incentivised poor retailer market behaviour and real fear of commercial retribution. This is a validation for suppliers and the many gagged voices that make up our industry.

Whilst the central recommendation that the currently voluntary Code be made mandatory and include substantial and enforceable penalties, is very much appreciated, we would like to clearly reiterate, this process will only be of benefit if we are able to ensure a system in which growers feel fully protected and supported when speaking up.

We thank you for noting the use of buyer incentives that "reward maximising retail margins and penalise low margins" effectively incentivising the category managers to squeeze suppliers (growers) as hard as possible. Further to this, we believe signatories should investigate including 'sustainability' of suppliers as one of their key performance indicators given the key role they play in ensuring food security and therefore national security of all Australians.

We welcome the recommendations you have made in your interim report and thank you for considering the specific needs of the horticulture industry due to significant information asymmetry and power imbalances that exist in horticulture supply chains which sees perishability being used as a weapon.

Further to this consideration, as repeatedly demonstrated, fresh produce is extremely diverse and complex, each grower, different to the next. Each with their own unique story. Each growing various commodities, in different regions, using various business models and utilising a variety of supply chains to get their fresh produce from farm to consumer.

As way of example, tree crops are fundamentally different business models to vegetable crops in the way the code can be applied, and the worst possible outcome from now is that we don't spend



time to understand both intended and unintended consequences of any code changes, across these business models.

As an industry, we have been collaborating extensively on this issue at a national level. Therefore, we respectfully request the formation of a horticulture-specific working group to ensure that any recommendations from the Independent Reviewer are considerate to the industry's needs.

We encourage close consultation with those actively involved in the FGCC to gain insights into how potential system changes may function in practice and to understand potential pitfalls of well-meaning adjustments.

We also encourage recommendations to government which serve to *future proof* these issues. The retail sector is a rapidly changing beast, and we would not like to be here again in two terms of government trying to define who should be in and out of the code. The code needs to protect all fresh produce (including those from Bunnings) from its perishability being used as a weapon and it needs to protect suppliers from rapidly changing retail models. Please ensure we are not back here again in the foreseeable future.

Thank you for your attention to these matters, and we look forward to continued collaboration for the betterment of our industry.

Kind regards,

A handwritten signature in black ink, appearing to read 'Rachel Chambers', enclosed in a circular scribble.

Rachel Chambers
Chief Executive Officer
QLD Fruit & Vegetable Growers

Consultation Question 1.

Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?

1. Terminology, definitions interpretations need to be made clear.

As way of example, terms such as wholesale in the code can mean multiple entities outside the code; is a special, a promotion or do they each have different meanings? When speaking of a grocery supply agreement (also known as SSA's or SA's) are they an agreement, order, or contract?

Although growers have understood these agreements are not contracts given the amounts being continually adjusted at the supermarkets whim, interesting Coles representatives in the Senate inquiry referred to them as being 'ordered' produce', further confusing the issue.

"Ms Bon: As you said, Leah, that's volume over and above what Coles said that we wanted to range. It's not uncommon—we might order 100 apples. The season might great, and the grower may have 200. We didn't order 200; we just need 100." (Proof Committee Hansard

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The definition of a supplier also needs to be made clear.

Those with vendor numbers are direct suppliers however wholesalers also act as suppliers and need to be picked up under the code along with aggregated suppliers who are still suppliers.

2. Removing Supplier Rebates

Unless Coles and Woolworths (Aldi excluded due to non-use) can provide transparency around why they collect rebates, the methodology on which they are based, and the terms suppliers can negotiate them, we would suggest removing them altogether as if these questions cannot be answered adequately. Rebates were just another means of taking money from growers to increase supermarket profits.

Consultation Question 2.

Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.

As per the status quo:

The code lists several factors that may be considered when deciding whether a retailer or wholesaler has acted in good faith when dealing with a supplier.

For example, whether the retailer or wholesaler has:

- acted honestly
- cooperated to achieve the purposes of the grocery supply agreement
- not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives
- not acted in a way that is retribution for past complaints and disputes
- conducted their trading relationship with the supplier without duress
- conducted their trading relationship with the supplier in a way that recognises the need for certainty about the risks and costs of trading — particularly in relation to production, delivery and payment
- observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier.

Whether the supplier has acted in good faith in dealing with the retailer or wholesaler may also be considered.

Good faith, although a fundamental element of the code is so broad in its definitions that we would consider the need to initially work on providing detailed and robust guidance as to what 'everyday dealings' could be picked up by this mechanism.

It would only be after that was made clear, that we could give advice as to whether this could then also be extended to suppliers.

Consultation Question 3.

Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.

This interim report did not have enough detail for us to answer this question fully.

Various monitoring mechanisms need to be available for the grower to feel most able to come forward.

QFVG support the interim reports Recommendation 6 in principle, (a mechanism be established to enable suppliers and any other market participants to raise issues directly and confidentially with the ACCC) however industry requires clarity on how ACCC would investigate and prosecute on issues.

Many growers are currently unaware of the dispute-resolution arrangements available to them – we would suggest once all processes are sorted, there will be a need to educate growers as to how to use them.

Some of the suggestions such a senior managers monitoring buying teams are in our eyes, a waste of time.

If the supermarkets were interested in our viewpoints up until this point, this would have already been the case. It is the culture within the supermarkets, driving the behaviours that we need to change. They are big entities and need some external support and drivers to achieve a cultural shift.

Consultation Question 4.

Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

QFVG supports a range of mechanisms to ensure the highest possible uptake.

- A complaints mechanism to raise issues directly and confidentially with the ACCC.
- The ability for industry bodies to confidentially collect grower information and share with the ACCC once themes are established – thereby protecting growers identity.
- Fully independent code mediators.
- Ability to access independent arbitration when the supermarket and suppliers cannot agree to mediation.
- Appointment of a Code Supervisor (replacing the Independent Reviewer) to pick up its functions, provide information to suppliers, and receive informal or confidential complaints.
- Unannounced ACCC audits of retailers if themes are emerging.
- A confidential ACCC portal, that growers can use to report issues such as late changes to orders, late cancellations, unexplainable rejections – once again seeking themes.
- The proposed Code Supervisor (replacing the existing Independent Reviewer) develop an online portal for suppliers to lodge complaints,
- Increased education and awareness activities in regard to dispute resolution mechanisms and processes.
- Suppliers being able to appoint a third party to represent them on matters, so their identity is protected.

Consultation Question 5.

What minimum standards of conduct, if any, should be specified in the Code that should not have exceptions? If exceptions are provided for, how should these be limited? Please provide examples to support your views.

Retailers should not be able to contract out of, or unilateral vary, agreements (which also begs the question – are they contracts or agreements?)

All variations to trading terms and **agreements should be made with consent with the supplier concerned and documented. Records should be kept by both parties.**

Code signatories should not be able to contract out of the provisions the Code listed under Unilateral Variation (Clause 7, section 9), in trading agreements.

- Unilateral variation of a grocery supply agreement without the consent of the supplier concerned.
- Payments by suppliers to cover any wastage of groceries incurred at supermarket premises.
- Payments by suppliers towards the costs of any business activity undertaken by supermarket, specifically, the opening or refurbishing of a store.

1. The playing field needs to be levelled with data.

Currently, data is provided to the retailer by suppliers with virtually only cost of production data held by the grower. In many cases and for many years this cost of production data has been requested by retailers under the premise that they can then use it for pricing negotiations.

However, growers who have been previously burnt by this exercise and pattern of behaviour, are extremely protective and dubious of the retailers' intentions given this data is the only missing link in their entire data warehouse.

Even SEDEX used by the retailers as a verification and audit service delivers a wide range of data on suppliers back to the retailers.

We are yet to reach the understanding as to how we can currently regard this market as a free and fair market when we believe supermarkets have a very decent understanding of ALL available supply of ALL commodities across ALL of Australia.

(Please don't be bamboozled by 'direct' vs indirect growers – remember wholesaling agents still quote expected produce available and aggregated direct suppliers still use many non-direct growers to supply direct – these also operate under supplier agreements, so retailers have all this information also).

On the demand side retailers also have all the demand information collated from many years of consumer studies and data collection.

Growers have only their data on previous experience and general consumer behaviour eg root vegetables sell in winter and salads in summer to go on.

2. Cost of production

The price determination process of retailers remains unclear and warrants further investigation by the ACCC, including consultation with suppliers. Through this investigation, the ACCC and Independent Reviewer should examine all sources of information the retailers use to determine price, including how retailers weight the sources during the process and to inform their negotiations.

Currently cost of production is not a key feature in any retail negotiation – this is a major problem! How can any business, particularly a business subject to 30-65% increases in costs, not have these reflected in some increased return and survive? Retailers have highlighted their increasing costs of production as an concern with their own viability, growers are under the same economic pressures without levers to pull in a supply and demand only market.

Sustainability is a pillar on which supermarkets like to pride themselves but are **effectively blind to sustainability of the grower** which has been traded for profitability for shareholders.

The process of quoting needs substantial investigation given the many and varied examples we have collected of buyers pressuring suppliers to lower their own quoted price based on 'market' conditions. No evidence can be provided nor any methodology as to how these 'market' prices were determined and how the quality, size, variety, origins and compliance have played a in any 'value'.

3. The role of the central markets pricing (wholesale markets) in retail pricing

QFVG would strongly encourage the ACCC to review the role of the wholesale price in retail pricing decisions. We suggest starting with unpacking what is a 'traditional market system' and how the 'wholesale market in reference to central markets' play in pricing - particularly given the evidence supplied by Hansard page 12.

Senator STERLE: But do the growers have that ability? Because they have the variables too where they're exposed to rapid fertiliser costs and shortages of fertiliser and rising fuel costs—do they have that same ability?

Mr Banducci: In fruit and veg across Australia, it runs to this traditional market system of supply and demand. So, it runs in a very different way in fruit and veg in Australia.

Senator STERLE: How?

Mr Banducci: As I say, it's about what volume is available, and therefore you agree on a price for that volume—

Senator STERLE: Before you pick it up? Sorry, I don't mean to interrupt you, Mr Banducci.

Mr Banducci: No, no.

Senator STERLE: Do they have the ability to sit with your people prior to the planting and say, 'Righto, at present, this is our cost to put in the lettuces,' or whatever it might be? Or is it just a case of, 'We've picked it all, we've cut them all, they're sitting in the cold store waiting'. And then your people come in and go, 'Well, this is what we're going to pay now'. This is what I'm hearing, and if I've got it wrong I just—

Mr Banducci: No, no. It's a traditional market system, so we would give a demand forecast. Within a two week period though, we would then confirm with the grower—or the wholesaler in our case—whether they had the volume available, given the variability of the growing season, and, if they had the volume available, what price we could buy it at. We would then agree that price with the aggregator or wholesaler, and the price would be for delivery into, generally, the closest distribution centre to that particular wholesaler so they could optimise the transport cost.

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Given growers strongly disagree with the above statement as they, only have a one-week window of price negotiations (not two week as presented), and that tree crops don't 'plant' upon demand like vegetables and are subject to wildly different volumes year on year, and given the terms aggregator and wholesaler are not currently well defined, **we would like to see a significant investment in understanding the price dynamics at play within the supply chain our sector.**

Currently perishability is being used as a **weapon** against fruit and vegetables with limited viable alternative markets, and a lack of transparency of market information, suppliers have little choice but to accept the prices offered by the retailer – whether or not they are beneath their costs.

Consultation Question 6.

Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.

What is reasonable? What are the definitions? How will our growers determine reasonableness? Please refer to Question 1.1 response.

Once again, a clear definition with examples (guidelines) growers and supermarkets can use to help them determine the intent of the term is required. This would then need to be understood in terms of the legal interpretation of the term also.

The variety in fresh would also need to be considered here as reasonable for a vegetable such as a zucchini, may not be reasonable for a tree crop such as a mango.

Consultation Question 7.

Do any of the obligations under the Code need strengthening to better protect suppliers?

Many obligations under the Code need strengthening to better protect suppliers in the horticulture industry, given the existing obligations do not consider the nature of the industry or the limited bargaining power of suppliers.

1. Recommendation of a horticulture working group

We recommend the Code Reviewer establish a **horticulture working group** to further determine which obligations under the Code need strengthening, specific to the Horticulture industry.

We reiterate as per our cover letter, *“Further to this consideration, as repeatedly demonstrated, fresh produce is extremely diverse and complex, each grower, different to the next. Each with their own unique story. Each growing various commodities, in different regions, using various business models and utilising a variety of supply chains to get their fresh produce from farm to consumer.*

As way of example, tree crops are fundamentally different business models to vegetable crops in the way the code can be applied, and the worst possible outcome from now is that we don’t spend time to understand both intended and unintended consequences of any code changes, across these business models.

As an industry, we have been collaborating extensively on this issue at a national level. Therefore, we respectfully request the formation of a horticulture-specific working group to ensure that any recommendations from the Independent Reviewer are considerate to the industry’s needs.

We encourage close consultation with those actively involved in the FGCC to gain insights into how potential system changes may function in practice and to understand potential pitfalls of well-meaning adjustments.”

2. Consistency of terminology throughout The Code

As highlighted in response under consultation question 1

3. Provision 18 & 20 – Funding Promotions

Provisions 18 & 20, needs further strengthening as it is unclear what is defined as “promotions”.

Typically, promotions have included activity such as catalogues, electronic direct mail and in-store activity. However, we have growers who have also been asked to fund retailers own brand magazines, in-store radio and the like.

Growers are clear, their own role is to grow high quality produce of retail specifications – the retailer’s role is to sell it – why are growers paying for retailer marketing activity? And if they are, why are they not being afforded a say in its direction nor an invoice of activities undertaken?

4. Provision 22 – Changes to Supply Chain Procedures

QFVG would like further clarification around Provision 22, particularly what constitutes a material change, in the specific context of fresh produce supply chains – is it retailer specific packaging such as labels, tray liners, outer packaging? Once again the lack of clarity only serves to complicate an already complicated system.

Further to this, third line/party forcing is commonplace with suppliers, and we would like the code reviewer to further investigate this practice.

5. Provisions 24, 25 & 27A (5b) – Protecting suppliers' sensitive information

As previously stated, suppliers are very wary of giving supermarkets more data which would further serve to increase the data asymmetry. Given we are unsure how this data is or could be used within the retailers' own systems we would suggest Provision 24 & 25 (intellectual property rights and confidential information held by the supplier) may need to be expanded or a separate provision added that compels retailers to respect sensitive information of the supplier such as costs of production, productivity and profit margins.

Currently, this is not covered under the code, with the exception to provision 27B Information about Price Increases, and retailers are requesting this information from suppliers.

6. Division 3 - Requiring Rebate Payments from Suppliers

Division 3 of The Code sets out payments from suppliers for a range of activity including shrinkage, wastage, condition as being a supplier, better positioning, retailer's or wholesaler's business activities.

It is unclear where supplier rebates fit into these provisions and what protections suppliers are afforded into retailer rebates and the ability to reject or re-negotiate rebate amounts throughout the trading relationship.

As has been consistently reiterated QFVG questions whether rebates should be allowed at all under the code.



7. Provision 14 – Payments for Wastage

Payments for wastage by suppliers to retailers, should be a prohibited practice and retailers should not have the ability to unilaterally vary or contract out of this provision.

Retailers have the capabilities to conduct stock inspections upon arrival to the DC and determine whether to accept or reject the stock. If retailers accept the stock, then the onus should be on them to cover losses incurred in their supply chain.

Consultation Question 8.

What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.

Protection from the use of perishability as a weapon.

The establishment of a Horticulture working group to work through additional protections needed for the sector to support the Code Reviewer, is highly recommended.

1. Protection of Sensitive Information

In recent times, retailers have been known to ask sensitive questions from suppliers such as production and supply chain costs, productivity, and business capability. **To our knowledge, there are no protections under the current Food and Grocery Code of Conduct that prohibit such practices or afford suppliers the protection of declining such requests.**

Further to this, under retailers current compliance standards, we have received multiple reports from growers that hold no contractual agreement with retailers, that during these audits the growers are requested to present copies of sensitive information for the retail auditors such as bank statements, rates notices and proof of land ownership.

In both instances, it remains unclear on how retailers intend to use such information.

Consultation Question 9.

What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?

QFVG emphasises the variations in supply dynamics between tree and seed crops. Where seed crops such as vegetables, may be seeking more definitive contracts prior to planting due to the higher predictability of yield for these crops. It is difficult to forecast yield in tree crops such as avocados, and therefore binding supply agreements could be difficult to implement and detrimental for suppliers.

For tree crops, if suppliers were afforded data on short and long-term demand forecasts, this would enable suppliers to better plan and manage their crop flow on an individual level.

Further to this, allowing horticulture industries to be collaborative through granting a class exemption to provisions of the Competition and Consumer Act (2010) would enable the industry to better manage supply dynamics across the multiple growing regions and varieties.

Incidents of suppliers receiving their supply agreements well into their harvest have been reported at times. Secondly, there is no obligation for the retailer to notify suppliers if they anticipate significant variations to the original supply agreements.

Minimum notice periods for both issuing supply agreements, varying supply agreements and changing supply chain arrangements could be a step towards balance risk. The minimum notice periods, would have to be established through further consultation with industry, via a horticulture industry working group.

Requiring the retailers to publish data on forecasted demand vs actual demand for the past quarter by month and forecasted demand for the next quarter, by month, to the ACCC would deliver an increased level of accountability and support suppliers understanding and management of supply.

This data could be aggregated and de-identified by the ACCC and provided to industry to support their management of risk and as a consorted effort to reduce waste.

Consultation Question 10.

Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

QFVG recommends the Code Reviewer engage with the ACCC as part of the ACCC Supermarket Inquiry 2024-25 to understand the extent of information asymmetry of the negotiations around price as growers lack understanding and are not privy to information as to the methodology of pricing except for 'supply and demand'.

Growers would benefit from understanding the processes supermarkets use to determine price along with any other pieces of information and data that would serve to level up the playing field and see more informed business decisions from growers.

We would suggest the ACCC begin with how retailers are currently using the central market (wholesale) pricing in their own pricing model considering a 'retail spec' piece of produce is a very different value than 'spec free' produce in the central markets, let alone the compliance layers required to serve a retailer which is not placed upon the central (wholesale) growers.

The information currently provided to growers about the pricing dynamics is verbal, and taken on face value alone, leaving growers at the mercy of buyers 'good faith' nationally.

Verbal negotiation serves to protect the retailers from any future investigations as nothing is documented. If this one practice alone was ceased, and instead written correspondence when negotiating was used, we would quickly either uncover various behaviour issues which exist in the buyer/supplier relationship.

Consultation Question 11.

What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.

Suppliers cannot determine if the price they are offered is the lowest price offered, a weighted average, the highest price offered, reflective of their product, or determined by a supply and demand model.

Suppliers simply have no reference point validate retailer claims of competitive price and volume quotes and with a perishable product already in the supply chain, suppliers have little choice but to accept the retailers' offer.

Growers knowledge of volumes buyers need are limited to what they themselves have been requested. If growers had a greater understanding of supply volumes required nationally potentially it would support them into making better business decisions.

Mechanisms to overcome the information asymmetry would provide suppliers improved bargaining positions without having to intervene with the free nature of the market.

Consultation Question 12.

**What level of penalties should apply to breaches of the Code?
Please provide reasons.**

QFVG supports the findings and recommendations of the Review concerning increasing enforcement and penalties however would like to note large penalties are rendered ineffective if the underlying processes fail to function properly.

This is clearly demonstrated by the Code Arbiters already having authority to resolve supplier complaints and issue binding compensation orders of up to \$5 million, which has not been utilised by growers who have no faith in the process of reporting and resolution.

We also note that we support individual pecuniary penalties as a way of ensuring culture change in large corporates. We have been told time and time again that there is no place for 'bad' behaviour in these supermarkets yet 'bad' behaviour is consistently experienced by our growers.

Suppliers should be afforded transparency of and compensation by the supermarkets when a breach has occurred.



Consultation Question 13.

Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.

The two main areas subject to poor outcomes include:

- Part 1A: Good Faith
- Part 2: Grocery Supply Agreements

As previously stated, good faith is extremely vague and needs clarification or penalties would not be able to be applied. (An outcome we are particularly concerned about).



Consultation Question 14.

Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

QFVG is unable to make comment on this question as infringement notices are not our speciality knowledge area.

Consultation Question 15.

Does the Code adequately require covered businesses to keep information and documents for the purposes of recording their compliance and any disputes raised under the Code?

The Code does not adequately require businesses to keep documents and information for disputes that may arise under the updated Code.

QFVG supports broadening the scope of documentation that is required to be kept under the Food and Grocery Code.

Schedule Supply Agreements

Supply Agreements (also known as SSA's) are issued seasonally to suppliers by retailers, setting out the unit volume and period, for which the retailer intends to purchase from the supplier. These agreements are not legally binding and therefore it is unclear, how SSA's are covered by retailers' obligations to act in good faith.

In data given to QFVG, the difference between the amounts indicated by retailers that they will purchase from the grower and the actual amount purchased can be up to a total deficit of 40%.

Planning and profit are both impacted with this system of 'promised purchasing' with 'no guarantee'. It is our belief that retailers use the loopholes of supplier agreements to both ensure market supply and drive down market prices by purposeful oversupply nationally.

Purchase Orders

Purchase Orders are raised generally on a weekly basis for suppliers, after the price negotiation process has occurred. Purchase orders stipulate the quantity and price retailers will pay.

Retailers can currently request price revisions from suppliers **after price negotiations** have been finalised, **and prior to stock being delivered** in accordance with the raised purchase order. This is termed, agile tendering. Agile tendering often results in suppliers being asked to reduce pricing from Retailer A to compete with the pricing of Retailer B. Consideration should be given, to **prohibit agile tendering** for perishable goods, under the Food and Grocery Code of Conduct.