



16 February 2024

Select Committee on Supermarket Prices
PO Box 6100
Parliament House
Canberra ACT 2600

By email: supermarketprices.sen@aph.gov.au

To the Select Committee,

RE: Price setting practices and market power of major supermarkets

On behalf of the NFF Horticulture Council (the Council) and the wider national horticulture industry, we thank the Senate for establishing the Select Committee on Supermarket Prices (the Committee), to inquire into and report on the price setting practices and market power of major supermarkets.

The major supermarkets, commonly understood to include Coles and Woolworths, but also both Aldi and Metcash as the other signatories to the Food and Grocery Code of Conduct, are an essential and valued part of the Australian fresh produce supply chain. We have a keen and vested interest in their remaining our profitable, sustainable and reliable partners. Many growers supplying these supermarkets will report satisfaction with their trading relationship.

Millions of Australians will enter their stores on a weekly basis to secure the necessities of life. Thousands of small businesses, and the hundreds of thousands of Australians they employ, play equally important roles in a supply chain that turns seed, soil, water and energy into fantastic, fresh and healthy produce that ends up in grocery aisles of major supermarkets across the country.

The price setting and other associated price setting practices of major retailers, together with the market power they exercise, are then of legitimate interest and concern for the Australian Parliament and the Federal Government due to the outsized impact they have on Australian consumers and the supply chains they rely upon.

Efficient, transparent and fair domestic wholesale and retail markets for horticultural products deliver not just resilient supply chains, sustainable and innovative agricultural business, and secure regional jobs but also wider public goods, including safe, nutritious and affordable food for households and food security for the nation.

These domestic markets have however for some time been failing to deliver the fairness and equity the public should expect and the returns on risk and

investment many businesses in the horticulture industry need to remain financially secure and sustainable.

Relatedly, the Council is concerned about the domestic market for nursery products and the practices of retailers commonly referred to as big box stores, of which Bunnings is by far the largest. Nursery growers experience similar trading inequities as those supplying supermarkets and yet are not protected by any code of practice regulating behaviour. Given the size and value of the Australian nursery products sector, this needs urgent rectification.

The inflationary period we are currently in, driven by factors outside Australia and our control including the COVID-19 pandemic and war in Ukraine, have brought into sharper relief the already existing deficiencies in these markets, and especially the inability of fresh fruit, vegetable, nut and nursery growers to pass on quickly escalating costs of production.

The often narrow margins many horticultural businesses operate on, due to the concentration of market power at the retail end of the supply chain, have in the last three years only evaporated further. Many small and large businesses alike are reporting eating into or totally consuming what remaining capital reserves they have on hand, even their own superannuation, to stay afloat. If businesses haven't already opted to exit the industry, many will be seriously reconsidering their future in the industry over the next six to twelve months.

Historically, fresh produce markets have been in the literal public square. Despite now being far less visible, given the outcomes delivered, the public has a legitimate interest in ensuring they operate fairly and according with their values.

Current public discourse and this and other recently initiated inquiries and reviews have created a rare opportunity to recalibrate these markets to accord with our values and priorities as a society. They may also, importantly, give a shot of confidence to the hundreds of thousands of Australians who rely on the fresh produce supply chain to put food on their own kitchen tables that better days may be ahead.

The Council would welcome further engagement with the Committee as their inquiry unfolds. We would recommend in particular that the Committee seeks out the direct testimony of those who directly supply major supermarkets and put in place arrangements for them to do so anonymously.

To discuss this, any of the above or the following submissions further, please be in contact with [REDACTED], Executive Officer to the Council either by email at [REDACTED] or phone on [REDACTED]

Yours sincerely,

[REDACTED]

JOLYON BURNETT
Chair
NFF Horticulture Council

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About the NFF Horticulture Council

The Council is the recognised peak body for forming policy and advocating on behalf of the national horticulture industry. Established in 2017, it now comprises 21 national commodity and state-based horticulture bodies, who together represent the full breadth of an incredibly diverse industry.

The efficient, transparent and fair domestic wholesale and retail markets for horticultural products has been a core policy priority of the Council since its establishment. In late 2022, the Council created its own Competition Taskforce to develop policy and advocate in this important field.

About Fresh and Fair

Fresh and Fair is the overarching title for the Council's policy development and advocacy activities as it concerns competition reform broadly. Under this title we are seeking guidance from growers and suppliers through surveys and other listening exercises, hosting forums and roundtable discussions with key stakeholders to test our thinking and potential policy prescriptions and making contributions to this and other inquiries and reviews.

Fresh and Fair are two words that together capture the central concern of the Council, that due to the especially and uniquely perishable nature of horticultural products, particular care and consideration must be given, by government, growers and buyers, to ensuring markets for these products are efficient, transparent and fair.

Recommendations

The following is a summary of the main recommendations made in this submission, offered to inform and shape the thinking of the Senate Select Committee as its inquiry unfolds, of other Members and Senators of the Australian Parliament, and of Ministers of the Federal Government.

1. Horticultural markets require targeted interventions

The highly perishable nature of horticultural products, and particularly fresh fruits, vegetable and nursery products, make finding other buyers at short notice difficult if not impossible for growers. Other markets, including food service or export, are not large or accessible enough to serve as viable alternatives.

The domestic markets for horticultural products work entirely differently even to other less perishable goods including meat and dairy, let alone shelf stable processed foods or other household items sold in supermarkets.

The Council recommends perishable horticultural products and their domestic retail and wholesale markets are regulated, including through codes of conduct, in a way that is consistent and fit for purpose.

2. Retail market for nursery products needs attention and action

Bunnings is the single largest retailer of nursery products and plants in Australia by a country mile, maintaining a market share of between 70 and 80 percent, which is in excess of the cumulative market share held by the supermarket duopoly of Coles and Woolworths.

Their price setting and other associated trading practices are unregulated by any code of conduct and should be of no less interest and concern to the Committee than those of major supermarkets.

The Council recommends the Committee considers the national retail nursery market as a matter related to its inquiry and that this market is regulated in a way that is fit for purpose, and as far as possible, consistent with other perishable horticultural produce.

3. Only significant penalties act as a deterrent

It is well understood penalties that are insignificant in terms of the benefit accrued from the prohibited behaviour or relative to the turnover of the business do not act as a deterrent and are instead viewed as a cost of doing business.

For this reason, in 2022 maximum penalties for breaches of certain provisions of the Competition and Consumer Act including the Australian Consumer Law increased five-fold, to the greater of \$50 million or three times the value derived from the relevant breach, or, if the value derived from the breach cannot be determined, 30 per cent of the company's turnover during the period it engaged in the conduct.

The Food and Grocery Code of Conduct regulates standards of business behaviour in the food and grocery sector, including the conduct of retailers and wholesalers towards suppliers. The Code is the only protection supermarket suppliers have from unscrupulous practices and contains no provision for imposing penalties.

The Council recommends that the Code be amended to include significant penalties that will act as a proper deterrent to poor behaviour.

The Council recommends the Committee give consideration to what penalties would be appropriate where a supermarket, or any large business with significant market power, has engaged in systematic and persistent practices that are either in breach of the Code or the Competition and Consumer Act. Such penalties could include, for example, a timebound cap on future expansion of market share and divestiture powers which can be used in cases of gross market power imbalances. Even if these enforcement tools are rarely used, the objective is to act as powerful disincentive against harmful behaviour.

4. Only an empowered regulator can enforce penalties

Building on the previous recommendation, significant penalties will only act as a deterrent for poor behaviour where there is a reasonable prospect of contraventions of the Food and Grocery Code of Conduct being uncovered.

The Council recommends the Australian Competition and Consumer Commission (ACCC) should have power of its own to initiate price and market studies concerning the trade between retailers and wholesalers and their suppliers, not only the retail relationship between supermarkets and the general public.

The Council recommends the Food and Grocery Code of Conduct should apply mandatorily to all supermarkets and the ACCC should have the power to investigate the practices of any individual retailer at any time, regardless of whether they have a reasonable suspicion of any wrongdoing. These powers should include the ability to compel the sharing of historic purchase price data.

5. Dispute resolution must be entirely independent

Suppliers responding to a survey of the Independent Reviewer of the Food and Grocery Code of Conduct indicate fear of damaging a commercial relationship and fear of retribution were the most common reasons for not raising an issue.

The only way of raising an issue and winning any compensation is through a Code Arbiter, recruited and contracted directly by each supermarket.

The Council recommends a more trusted, accessible and entirely independent mechanism be put in place to resolve issues between supermarkets and their suppliers.

6. Grower and supply chain welfare matters

The single overriding purpose and objective of the Australian Consumer Law is to promote the interests and welfare of consumers. Not considered in any serious way are the interests and welfare of individual suppliers and supply chains as a whole.

The *Modern Slavery Act* requires large corporations, including major supermarkets, to take action in removing modern slavery risks to which workers are exposed along their supply chains. Yet the circumstances and conditions under which many growers find themselves supplying supermarkets could just as easily be framed as a Modern Slavery risk.

The Council recommends supplier welfare is added as an objective of the Australian Consumer Law and that supermarkets consider what risk high levels of supplier dependency in trading relationships might create additional obligations in terms of supplier welfare.

7. Government policies impact cost of production

The rising cost of living being experienced by Australian households due to food prices is also being impacted significantly by other factor including recent government policies.

Events including the COVID-19 pandemic and the war in Ukraine have added significantly to inflationary pressures. But so too have decisions made by the Federal Government, which have directly increased the costs of key agricultural inputs and the cost of doing business which have in turn fed through to the grocery aisle.

The harm that arises from this can take many forms including growers receiving prices below their marginal cost of production. This is exacerbated in the market context where grower suppliers have limited bargaining power to negotiate price increases with buyers.

The Council recommends the Committee inquire into the extent these policy decisions of government have applied upward pressure on grocery prices.

Introduction

The Senate Select Committee has been established to inquire into and report on the price setting practices and market power of major supermarkets.

Within this scope, it is most important at the outset to appreciate that there are two distinct prices that supermarkets pay, which are subject to their own unique practices, each no more or less worthy of attention through this inquiry.

Those two prices are (a) the price paid to suppliers, better known in the agriculture industry as the “farmgate price”, and (b) the price paid by consumers in the grocery aisle, better known as the “retail price”. The setting of both these prices and associated practices arguably lacks equity, transparency and fairness.

The Council, given its membership and expertise, in this submission will primarily focus on the price setting practices and market power of major supermarkets as it concerns the farmgate price. As such, this submission will deal mostly with that term of reference relating to the frameworks protecting suppliers when interacting with the major supermarkets.

While retail pricing and price gouging, understood to be where excess profits are taken in instances of short supply or an inflationary period, are of concern to the Council and its members, it's not our main focus in making this submission.

It should be noted however, that there is not always a direct or in some instances any relationship between farmgate and retail prices. There are many situations where supermarkets can and will ignore the strictures of supply and demand, including:

- The practice of “loss leading” by selling a product below cost in order to attract customers.
- Not allowing a staple product to rise too far in price, despite low supply, in order to match consumer expectations.
- Not lowering a price despite strong supply of a product, preferring instead to make a higher margin on less volume than the other way around.

The national horticulture industry and its markets

Horticulture is typically understood as having two main parts, being “ornamental horticulture” including nursery, turf and flower products and “production horticulture” or “fresh produce” including edible products like mushrooms, vegetables and fruits. While horticultural businesses supply flowers and potted plants to supermarkets, we understand the primary focus of the Committee to be on edible or food products.

Horticulture is Australia's third largest agricultural industry. Altogether, horticulture production values are forecast to rise by 5% to a record of

\$17.3 billion in 2023–24¹. The value all products was similarly estimated² in 2020–21 with an attendant employment of 69,697 fulltime equivalent positions and a value added contribution of over \$10 billion as follows:

	GVP	Value added	Employment
	\$m	\$m	FTE
Fruit	5,752.3	3,985.9	22,916
Nuts	1,196.2	878.1	4,460
Vegetables	4,913.8	2,561.0	23,277
Nursery, cut flowers and turf	3,387.7	2,186.2	13,993
Horticulture processing	2,558.1	547.1	5,051
Total	17,808.1	10,158.3	69,697

For many regional communities across Australia, horticulture is a significant contributor in their economies, creating local jobs and demand for goods and services. Few other industries, within or beyond agriculture, are able to transform raw inputs of water, soil, energy and labour into wealth as efficiently and at the same scale as horticulture. The price setting practices and market power of major supermarkets affect these regional communities disproportionately, and to the extent they work unfairly in the favour of supermarkets, have the effect of transferring wealth from these regional communities directly to supermarket shareholders.

Despite challenging operating environments, horticultural industries are projected to keep growing into the future. A recent study suggests an average annual growth rate to 2030 of 2.3 percent will result in a gross value of production reaching \$21.8 billion³. The primary driver for this growth is an expanding domestic population and associated demand.

Size and significance of domestic and export markets

Across “fresh produce”, involving fresh fruits and vegetables, there are four (4) primary markets at the point of leaving the farmgate, being (i) retail markets, including major supermarkets and also independent grocery stores, (ii) food service, including restaurants and catering, (iii) processing, including minimal transformation into more easily stored products, and (iv) export, including by sea and air.

Exposure to or dependence on any one of these markets for a grower is a product of a number of factors, including but not limited to its perishability or shelf life, distance to market, barriers to entry for domestic competitors, ability to legally enter overseas markets and costs of production relative to competing overseas

¹ ABARES, “Outlook for crops”, <https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/outlook-crops#daff-page-main>; accessed 11 February 2024.

² The Centre for International Economics, “Contribution of Australian horticulture industry”, <https://www.horticulture.com.au/growers/help-your-business-grow/research-reports-publications-fact-sheets-and-more/mt21010/>; pg. 4; accessed 11 February 2024.

³ Ibid; pg. 9; accessed 11 February 2024.

countries. Each factor varies in importance depending on the crop grown, and to a lesser extent its production location.

Despite this diversity, table grapes are the only fresh fruit or vegetable crop that is not reliant on the domestic market for taking a majority of its product. Many crops have no exports at all, while for others export opportunities are minimal and their entry into these markets are opportunistic. Just 5 percent of all fresh vegetables and 16 percent of all fresh fruits are exported⁴.

Growing for export is often a specific undertaking by a grower to meet the needs of that market, including unique protocols concerning the application of chemicals, the treatment for pests and diseases, and moreover, growing particular varieties of crops to a specification in demand in these markets and not in Australia. For these reasons, domestic and export markets are not interchangeable for many growers. It is worth noting, again for perspective, total horticultural exports from Australia are smaller by value (\$2.79 billion) than total imports (\$3.14 billion)⁵.

With regard to processing, 36 percent of all vegetables and 19 percent of all fruit by volume are sent to this market⁶. While exceptions exist, the value and significance of this market is relatively low where product is processed for juicing, freezing or preserving. In many instances, product in excess of demand or not meeting specifications in retail markets is sold into the processing market, at times below the cost of production in order to recoup some value.

The remaining 72 percent, or over 200,000 tonnes, of all fresh vegetables and fruit is sent from a farm to either a distribution centre or wholesale market, where it lands in either the food service industry or in the grocery aisle of a major supermarket or independent grocer. Both in terms of value and volume, product sold in retail markets (\$658 million and 180,000 tonnes) far exceeds that sold through food service (\$92 million and 25,000 tonnes)⁷.

As with export markets, supplying a supermarket customer is a specific undertaking by a grower, to meet unique compliance requirements and product specifications. For almost all medium, large and even small sized fruit or vegetable growing business in Australia, in order to achieve necessary scale and ultimately make themselves sustainable by moving enough volume at a reasonably consistent price, selling to a supermarket is a necessity.

Distinctions with other groceries

The markets for fresh produce are quite different even to other perishable agricultural products, including dairy and meat, let alone shelf stable items such as processed foods, health, cosmetics, and cleaning products.

Both dairy and meat products are typically sold under longer-term agreements, for at least a few months, that defines both price and volume. For fresh produce, both price and volume are agreed with only a few days' notice on a weekly basis. For more on this process see 'Purchasing practices of supermarkets' (pg.17). Not

⁴ Hort Innovation, "Australian Horticulture Statistics Handbook 2022/23"; <https://www.horticulture.com.au/growers/help-your-business-grow/research-reports-publications-fact-sheets-and-more/australian-horticulture-statistics-handbook/>; accessed 12 February 2024.

⁵ Ibid; accessed 12 February 2024.

⁶ Ibid; accessed 12 February 2024.

⁷ Ibid; accessed 12 February 2024.

only are these other products transacted with more surety they also have better access to large and established export markets.

Market share of major supermarkets

The two largest supermarkets, Coles and Woolworths, are known to control a substantial portion of the retail market for fresh produce, often estimated to be around 28 percent and 37 percent respectively⁸, for a combined share of 60-70 percent.

The trend over a longer period of time, since holding a combined share of 40 percent in the 1970's, has been for the market power of these two major supermarkets to steadily expand over time, at the expense particularly of independent grocers⁹. More recently, their share is thought to have declined somewhat with the entry of Aldi, now with 10 percent market share, and latterly Costco.

As noted earlier in this submission, Bunnings Warehouse maintains a far more dominant, almost monopolistic retail market share for home improvement goods, including potted plants, of between 70 and 80 percent.

Impacts of market power and price setting practices

Typically, there are a number of negative impacts, directly for suppliers, the wider supply chain and for the economy and society more broadly arising from instances where buyers enjoy significant market power which they wield through price setting and other associated practices. Behaviours and their associated impacts include the following:

- Dominant buyers may engage in exploitative behaviour towards suppliers, such as demanding discounts under threat of contract termination, delaying payments, or shifting excessive costs onto suppliers. This can create a lopsided power dynamic and harm the long-term viability of suppliers.
- Powerful buyers may impose unfavourable contract terms on suppliers, such as extended payment terms, exclusivity agreements, or excessive penalties for non-compliance. This can limit the bargaining power of suppliers and erode their ability to negotiate fair terms.
- Buyers with significant market power can demand lower prices from suppliers, squeezing their profit margins. This can lead to reduced profitability for suppliers and potentially force them to cut costs, lower wages, or compromise on product quality.
- Suppliers may become overly dependent on a small number of large buyers, especially if these buyers control a significant portion of the

⁸ Hunt Export Advice; "Australia Market Overview 2024"; <https://www.huntexportadvice.com/post/australia-market-overview-2021>; accessed 12 February 2024.

⁹ Merrett, T, "The Making of Australia's Supermarket Duopoly, 1958-2000," <https://rest.neptune-prod.its.unimelb.edu.au/server/api/core/bitstreams/16832c85-f8cf-5a97-91a6-b5ebfb4e7e48/content>, accessed 5 February 2024.

market. This dependency can leave suppliers vulnerable to sudden changes in demand, pricing, or contractual terms imposed by the buyer.

- Dominant buyers may restrict market access for smaller suppliers by favouring established suppliers or imposing stringent requirements for entry into the supply chain. This can hinder competition and innovation in the market and limit opportunities for smaller suppliers to grow and succeed.
- The pressure to meet the demands of powerful buyers at low prices may discourage suppliers from investing in product quality, innovation, or sustainability initiatives. This can have negative long-term consequences for the competitiveness and sustainability of the supply chain.

There is strong evidence to suggest that each of these behaviours and associated impacts are present and prevalent in the trading relationships between the major supermarkets in Australia and the fresh produce growers and horticulture industry that supplies them.

Other factors impacting prices and profitability

At this point, it is important to understand and emphasise there are other factors that have and continue to influence both the current prices for fresh produce in the grocery aisles of major supermarkets and the squeeze on supplier profits, which have nothing at all to do with the market power they hold or practices they use. The harm that arises from this can mean that growers receive prices below their marginal cost of production and are unable to negotiate price increases with buyers due to limited bargain power resulting from market concentration.

The inflationary period we are currently in has been inarguably influenced by factors outside Australia and the control of the domestic supply chain and Federal Government, including the COVID-19 pandemic and war in Ukraine. Both of these events have restricted the movement of goods and people, pushing the prices of many key agricultural inputs like fertiliser, fuel, chemicals and packaging, many of which must be sourced overseas, much higher. In addition, natural disasters including fire and floods, have served to increase other costs, including of finance, insurance and transport.

There are however another set of cost drivers also influencing our grocery prices that are not just within the control of the Federal Government but entirely at their discretion to shift. These drivers are decisions of the Federal Government, and also their state and territory counterparts, that have had the direct effect of increasing the costs of production for the growers of fresh produce. Recent examples of government decisions that have or will impact grocery prices includes, but is not limited to the following:

- The broadening of eligible industries in which the specified work requirement can be undertaken for visa extensions under the Working Holiday Maker program has reduced available labour and increased its cost. The removal of the work requirement for UK visa holders from 1 July will exacerbate this effect.

- The introduction of new and expanded obligations for Approved Employers under the Pacific Australia Labour Mobility (PALM) scheme has both increased labour costs significantly and reduced the scenarios in which use of PALM workers is economically viable.
- The removal of water available to agriculture within the Murray Darling Basin, pushing the price of water higher.
- The imposition of a new tax on agriculture, effective 1 July this year, to fund the delivery at the national border of biosecurity services to importing businesses by the Department of Agriculture, Fisheries and Forestry.
- The heavy vehicle road user charge will increase by 6 percent each year of the next three (3) years, from 28.8 cents per litre for petrol and diesel now to 32.4 cents per litre in 2025–26, significantly lifting transport costs.
- The prices for water and energy charged by state owned entities at rates disconnected from supply and demand, and more often designed to raise revenues than cover the costs of delivery an essential utility.

In addition, past and pending decisions of the Fair Work Commission (FWC) concerning the Horticulture Award are also pushing the cost of production and of groceries to record highs, keeping in mind for fresh produce, depending on the crop, labour can make up between 30 and 60 percent of total input costs. These FWC decisions include:

- The introduction of overtime payments for casual workers.
- Amendments to piece rate provisions, including the introduction of a floor equivalent to the minimum hourly rate.
- Requiring workers on the entry level hourly rate (C14) automatically transition the next highest rate having worked in the industry for a minimum period of time.

The current regulatory environment

The sale of fresh produce in both domestic wholesale and retail markets is regulated by various laws and standards aimed at ensuring food safety, quality, and fair-trading practices.

Two (2) key regulations that apply are the Food Standards Code (FSC), a national set of standards developed by Food Standards Australia New Zealand (FSANZ) that governs the composition, labelling, handling, and sale of food products in Australia. Specific standards within the FSC pertain to fruits and vegetables, ensuring they meet certain quality and safety criteria.

Also, the Australian Consumer Law (ACL) is a national law that protects consumers and ensures fair trading practices. It covers aspects such as misleading or deceptive conduct, false representations, and unfair contract terms. This law applies to the sale of fruits and vegetables in both wholesale and retail

markets, ensuring that consumers are not misled about the quality, origin, or characteristics of the produce they purchase.

It should be noted here, relevant to the Terms of Reference of the Committee, that the Treasury has recently undertaken consultation¹⁰ on potential new prohibitions on unfair trading practices, also known as ‘unfair business practices’ or ‘unfair commercial practices’, which are particular types of commercial conduct not covered by existing provisions of Australia’s consumer laws such as misleading or deceptive or unconscionable conduct, but nevertheless can distort competition and result in significant consumer and small business harm.

In response, the Council has supported further investigation into the introduction of both a general prohibition of unfair practices and also of specific practices that cause harm in horticulture, including but not limited to the following:

- Contract terms that inefficiently allocate risk, including unreasonable payment terms;
- Harmful use of bargaining power, including changing supply volumes for perishable products at very short notice after they had been agreed;
- Lack of transparency in relation to price and non-price factors, including no visibility over what supermarkets pay for their produce when sold through wholesale market agents; and
- Producers making growing and investment decisions with no certainty, including concerning plantings with no forward price or contract.

There is currently no law, code or other regulation that deals directly with the prices paid at farmgate to growers of fresh produce or the prices paid by consumers in retail markets, or with the profit margins of growers or retailers. For clarity, the Council does not support any regulation with this aim or effect.

Overview of codes of conduct

There are two (2) codes of conduct that deal with the trading relationships respectively between growers and buyers in wholesale markets, and between major supermarkets and the fresh produce suppliers who deal with them.

The Horticulture Code of Conduct is a mandatory industry code, established in 2007, that regulates the trading relationship between growers and wholesalers of fresh produce in Australia specifically. It aims to promote transparency, fairness, and clarity in contractual arrangements, including issues related to pricing, payments, and dispute resolution. The ACCC is responsible for monitoring and enforcing compliance with this code¹¹.

Most relevant to this Committee and its inquiry is the Food and Grocery Code of Conduct, a voluntary industry code established in 2015 with the same broad aims as the Horticulture Code of Conduct, to which its current four (4) supermarket signatories are bound by law to comply with requirements concerning trading and

¹⁰ The Department of the Treasury, “Unfair Trading Practices – Consultation Regulation Impact Statement”, <https://treasury.gov.au/consultation/c2023-430458>; accessed 5 February 2024.

¹¹ ACCC, “Horticulture Code of Conduct”; <https://www.accc.gov.au/business/industry-codes/horticulture-code-of-conduct>; accessed 12 February 2024.

pricing practices. The ACCC is also responsible for monitoring and enforcing compliance with this code¹².

Performance and reviews of the Food and Grocery Code

The Food and Grocery Code of Conduct establishes the role of an Independent Reviewer to oversee compliance with the code. The Independent Reviewer plays a crucial role in ensuring that the code is effectively implemented and that disputes between suppliers and retailers are resolved fairly.

As part of discharging their role, the Independent Reviewer submits regular reports to the ACCC, including findings on compliance levels, trends in disputes, recommendations for improvements, and any systemic issues identified. Key findings of the latest report for 2022-23 are as follows¹³:

- Supermarkets, with the exception of Aldi, broadly failed to meet the standard of practice of responding to price increase requests within 30 days.
 - Coles entered negotiations with suppliers on 667 of the 3,804 price rise requests in 2022-23, of which 87 percent (580 negotiations) were not concluded within the 30 days of the request.
 - Woolworths entered negotiations with suppliers on 1,535 of the 2,049 price rise requests in 2022-23, of which 70 percent (1,076 negotiations) were not concluded within 30 days of the request.
 - Metcash entered negotiations with suppliers on 23 of the 1,062 price rise requests in 2022-23, of which 91 percent (21 negotiations) were not concluded within 30 days of the request.
 - Aldi entered negotiations with suppliers on 34 of the 1,396 price rise requests in 2022-23, of which none were not concluded within 30 days of the request.
 - Disappointingly, all supermarkets entered negotiations in responses to just a fraction of all price rise requests last financial year, which is not a matter considered or regulated by the Food and Grocery Code.
- 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.
- While 47 percent of all suppliers indicated that they were always treated fairly and respectfully by a supermarket, 12 per cent identified their supermarket buyer acted unreasonably at times and 2 percent that their buyer frequently acts unreasonable or with duress.
 - Fruit and vegetable suppliers have reported less favourable treatment compared with other product suppliers. This was particularly the case for measuring “deals in good faith” and “fair and

¹² ACCC; “Food and Grocery Code of Conduct”; <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>; accessed 12 February 2024.

¹³ The Department of the Treasury, “Food and Grocery Code Independent Reviewer Annual Report 2022-23”; <https://grocerycodereviewer.gov.au/reports/annual-reports/2022-23-annual-report>; accessed 12 February 2024.

reasonable dealings”, where for each of these categories, a greater proportion of fruit and vegetable suppliers appeared worse off.

- Only 2 per cent of businesses with a turnover greater than \$250 million experienced being frequently treated unreasonably or with duress, while the proportion of those with a turnover less than \$250 million identifying they are always treated fairly and respectfully has decreased since last year, suggesting that larger suppliers may have greater bargaining power.
- The proportion of suppliers identifying they receive payment later than agreed remains just under 8 per cent, which is a marginal increase when compared with the previous year.
- The number of suppliers reporting deductions off invoice or remittance without consent has increased to 7 per cent.

Dispute resolution review

The *Competition and Consumer (Industry Codes-Food and Grocery Code) Regulation 2015* requires a review of the dispute resolution provisions in Part 5 of the Food and Grocery Code be undertaken. This review process has just concluded.

In response the Council, the Independent Reviewer and the ACCC all recommended replacing the current framework with an alternative independent dispute resolution process that doesn’t involve the selection or appointment of Code Arbiters for dispute resolution roles by the supermarket signatories¹⁴. This advice was uniformly based on the appreciation that just five (5) disputes were escalated to Code Arbiters reflects a vanishingly small proportion of all potential disputes suppliers could initiate and that every cause for suppliers to fear retribution from raising an issue, including the perceived potential bias of Code Arbiters, should be removed.

Despite this advice from those with the closest working experience with the Code and its dispute resolution process, the Federal Government opted to rely on Treasury recommendations that no changes be made.

The Council recommends the Committee revisit this matter in detail and that a more trusted, accessible and entirely independent mechanism be put in place to resolve issues between supermarkets and their suppliers.

Review of the rest of the code

As the Committee will be aware, there is currently underway a review of the remainder of the Code, not including the dispute resolution provisions in Part 5. The Federal Government has recently appointed Hon Dr Craig Emerson to lead this review on their behalf, with a requirement to report back by 30 June.

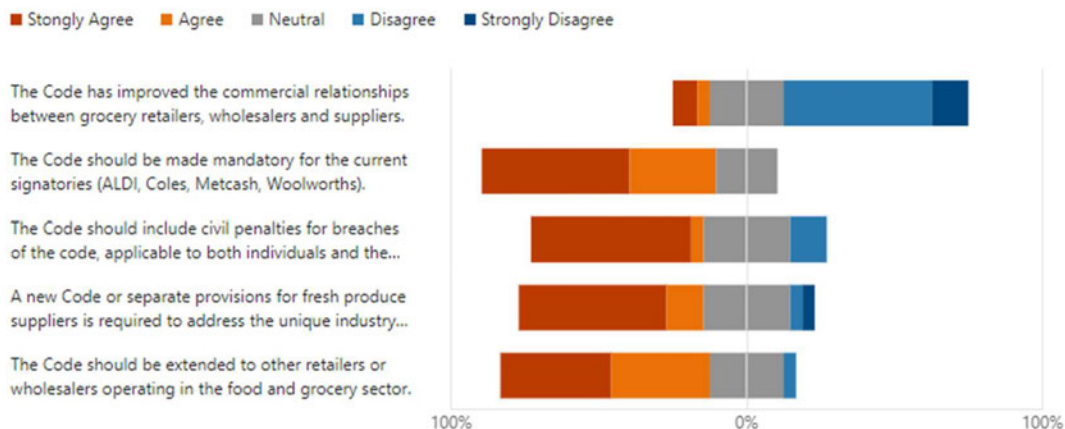
The deadline for submissions in response to this review is Thursday 29 February. The Council will be making a comprehensive submission for which we will hold

¹⁴ The Department of the Treasury; “Food and Grocery Code of Conduct Review 2022–23 – final report”; <https://treasury.gov.au/publication/p2023-479632-final-report>; accessed 13 February.

over more detailed recommendations on the design and implementation of the Code.

To inform its submission, the Council will be relying on the advice and guidance of growers and suppliers who operate under the Code on a daily basis or deal directly with others who do. Initial responses to a survey of growers and suppliers of fresh produce to supermarkets suggest the Code has not improved commercial relationships and strong support for making it mandatory and introducing penalties for breaches applies to both individuals and businesses.

The below graph outlines the extent to which growers and suppliers broadly agree with statements made about the Code and its effectiveness.



Purchasing practices of the supermarkets

Though a requirement of the Food and Grocery Code, not all fresh produce suppliers of the major supermarkets have a Grocery Supply Agreement in place. Some growers report only having made verbal agreements with a supermarket for several years.

Grocery Supply Agreements must at a minimum cover the following matters¹⁵:

- Any requirements the retailer or wholesaler has in respect of the delivery of the groceries.
- Any circumstances in which the retailer or wholesaler may reject the groceries.
- The period within which the retailer or wholesaler must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed.
- If the agreement is intended to operate for a limited time only—the term of the agreement.

¹⁵ Australian Parliament; "Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015"; <https://www.legislation.gov.au/F2015L00242/latest/text>; accessed 13 February 2024.

- If the agreement provides for termination by one or more parties to it—the circumstances in which it may be terminated.
- In clear terms, any quantity and quality requirements relating to the groceries.

On the last of these matters, concerning quantity in particular, suppliers of fresh produce will typically have only a non-binding “forecast” of volumes the supermarket will purchase in the Grocery Supply Agreement which will cover a season or harvest window of a few weeks to many months depending on the crop and the scale of the supplier. The forecast is normally framed as a volume of product expected to be purchased each week within the season or window.

Price is not stipulated at all in Grocery Supply Agreements and are instead negotiated on a rolling weekly basis within the harvest window, anywhere between a few days and week from harvest. Practically, this is conducted through a two-step process that determines the farmgate price.

As a first step, growers or suppliers will be required to submit a price and volume for their produce to the supermarket every Monday. This provides a near-national snapshot of both volume and prices, while growers only have their own data.

As the second step, on Tuesday the supermarkets will contact growers to advise them of what they consider the price to be for the week and the volume of product they’re willing to buy. The growers have a very limited capacity to contest these price points or information used to determine the price as they do not have access to the wider market prices. They similarly have little ability to query the volumes given.

This provides a significant commercial advantage to supermarkets to leverage their asymmetric data to offer the farmgate price paid to growers. This situation is compounded by a lack of transparency in how the price is determined. While numerous factors determine how a price is determined, farmers are not provided any information to determine how the price was set. For example, farmers cannot determine if the price they are offered is the lowest price offered, a weighted average, or determined by a supply and demand model that matches the elasticities of other similar agricultural products.

It is commonly reported by suppliers that they rarely if ever achieve the volumes sold into supermarkets as was originally signalled through the non-binding “forecast” figures in their Grocery Supply Agreements. It is a contention held among many growers that these figures are deliberately overstated so as to trigger oversupply scenarios which serve to spill excess product onto the wholesale market, providing a lower price benchmark and enabling supermarkets to apply even further downward pressure on the prices they’ll pay.

This potential practice of deliberate market manipulation, if substantiated, is perhaps one of the most serious interferences by supermarkets in the efficient and fair functioning of fresh produce markets. While we are willing to give supermarkets the benefit of the doubt, it does require further investigation, given the clear and obvious incentives to undertake this practice and the absence of any countervailing repercussions.

Contracting out of prohibited practices

The Food and Grocery Code lists a series of practices it prohibits by major supermarkets that are yet permitted so long as there is an agreement in place with the supplier to allow it. These prohibited practices that are permitted through contract or agreement include¹⁶:

- 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 as a condition of stocking or listing grocery products.
- Payments by suppliers to secure for a grocery product either better positioning or an increase in allocation of shelf space.
- Payments by suppliers towards the costs of any business activity undertaken by supermarket, including:
 - A buyer's visit to the supplier.
 - Artwork or packaging design.
 - Consumer or market research.
 - The opening or refurbishing of a store.
 - Hospitality for the retailer's or wholesaler's staff.
- Funding from suppliers for part or all of the costs of a promotion.

Fresh produce suppliers are known to be in a poor position to push back on supermarkets requests to contract out of these practices otherwise prohibited by the Code, by virtue of have less bargaining power or low visibility of how commonly other supplier refuse these requests.

Still, even if suppliers were in a better position, there are still practices permitted through contract or agreement that might not pass the pub test. Payments by suppliers for what should be core business activities of a supermarket are particularly questionable. All practices that simply pass on costs from supermarkets, where there is no direct benefit or return achieved by the supplier or where the supplier has little or no ability to control or influence the outcome should be revisited. For example, requiring suppliers to cover waste created by supermarkets in their own stores is arguably unfair as this waste is largely if not entirely outside the control of the supplier, but perhaps more importantly, this removes any incentive for supermarkets to manage and reduce their waste.

Feedback received to date through the Council's *Fresh and Fair Grower and Supplier Survey* signals strong support for removing the ability to contract out of some, but not all, of these practices.

Poor practices outside the Code

There are a number of known and common supermarket practices, not considered currently by the Food and Grocery Code, that might amount to the unfair transfer

¹⁶ Australian Parliament; "Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015"; <https://www.legislation.gov.au/F2015L00242/latest/text>; accessed 13 February 2024.

of costs and risks to suppliers. These practices include but are not limited to the following:

- Requiring suppliers to use their preferred third-party contractors. This can be a subsidiary of the supermarket itself or external company. There can be limited alternative options for suppliers to use.
- Charging suppliers for periods of service, including for the use of plastic crates and wooden pallets, that are far longer than would be reasonably expected given the perishability of the product concerned.

Branding and packaging of fresh produce

Alongside the perishability of fresh produce, another fundamental characteristic about these products that limits marketing by suppliers is that they're sold in supermarkets as unbranded commodities.

Commodities, including many fresh fruits and vegetables including avocados, citrus, most vegetables, apples and pears, are often standardized products that lack differentiation based on brand or quality attributes. As a result, competition among suppliers is primarily based on price, making it challenging to build brand loyalty. The absence of opportunities to brand fresh produce prohibits suppliers from interacting directly with consumers, to receive feedback and ideas for product improvement and leaves consumers to assume products in the same category are interchangeable.

The lack of branding of these products plays into existing power imbalances and further undermines the ability of suppliers to negotiate on price or any other matter.

In other instances, where fresh produce is sold in packaging, affording an opportunity for brand placement, for example on bagged loose lettuce leaf, suppliers are required to pay for and use packaging branded by the supermarket and not themselves. As a consequence of this requirement, produce packaged for a supermarket but then rejected is almost always unable to be repurposed or sold into another market due to its branding.

It has been observed where suppliers have innovated in creating a new packaged product that has proven successful, invariably over time supermarkets have been able to oblige suppliers to replace their own private branding with their own.

Related matters

The Council supports an investment by the Federal Government in education and raising awareness of the Food and Grocery Code generally, and dispute resolution process specifically, to assist in addressing accessibility issues reported by suppliers, including the perceived time and resource commitment required to raise a complaint, and lack of controls in place for managing potential retribution.

The Council supports interventions by government that have the effect of increasing competition across all domestic markets for fresh produce. This includes measures that:

- Support growers in selling fresh produce directly to consumers, including their investment in necessarily infrastructure to pivot into this market.
- Incentivise new supermarket entrants, including barriers that might prohibit companies based overseas from entering the Australian market.

The Council also reaffirms its support for greater investment by the Federal Government in securing expanded trade and market access opportunities, to grow the share of fresh produce going into export markets and so lower the overall industry reliance on domestic markets.

Conclusion

Efficient, transparent and fair domestic wholesale and retail markets for horticultural products deliver affordable food for Australian households, resilient supply chains, sustainable and innovative agricultural business, and secure regional jobs.

Only those markets described as “perfect”, characterised by a free and open flow of information between all participants of equal bargaining power, will deliver efficiency and fairness without intervention. Domestic markets for horticultural products are far less than perfect and given the flow of information and power of supermarkets, could be more accurately described as “perfectly imperfect”.

While greater intervention, in the form of government regulation, is arguably required in our markets, this too creates its own frictions and costs. Any new intervention must balance the benefits it creates in terms of increased efficiency, transparency, or fairness against the new costs it introduces.

Historically, fresh produce markets have been in the literal public square. Despite now being far less visible, given the outcomes delivered, the public has a legitimate interest in ensuring they operate fairly and according with their values. Current public discourse and government-initiated inquiries and reviews have created a rare opportunity to recalibrate these markets to accord with our values and priorities as a society.