# Submission to the review of the Dispute Resolution Provisions in the Food and Grocery Code

February 2023

## About AUSVEG

AUSVEG is the prescribed Peak Industry Body representing the interests of the Australian vegetable and potato industry. AUSVEG is a not-for-profit, member-based organisation that is run by growers, for growers.

AUSVEG represents over 3,600 vegetable producers that account for 3.83 million tonnes of vegetable production worth $4.91 billion in farmgate value and over $5.2 billion in retail value annually.

AUSVEG is a nationally federated body with the following members: AUSVEG VIC, AUSVEG SA, Growcom, vegetablesWA, NSW Farmers, NT Farmers, WA Potatoes, and the Tasmanian Farmers and Graziers Association (TFGA).

AUSVEG advocates on behalf of industry at local, state, and federal levels with the core purpose to enhance the economic, social, and commercial environment for growers so that the industry can continue to produce outstanding vegetables and potatoes for local and international consumers.

AUSVEG delivers projects for growers around Australia in the areas of extension, communication, environmental sustainability, biosecurity, export development and market access. We work closely with Australia's growers to ensure their needs are reflected in this work.

AUSVEG also hosts Hort Connections with the International Fresh Produce Association. This annual event is the largest conference in Australian horticulture and brings growers, supply chain and industry members together to increase awareness and uptake of the latest industry innovations and research, facilitate industry networking and recognises the industry's leading contributors through the National Awards for Excellence.

For more information about the details in this document, please contact the following:

Michael Coote
AUSVEG CEO
03 9882 0277
michael.coote@ausveg.com.au

Lucy Gregg
National Public Affairs Manager
03 9882 0277
lucy.gregg@ausveg.com.au

Chloe Betts
AUSVEG Policy Officer
03 9882 0277
chloe.betts@ausveg.com.au

## Introduction

The vegetable and potato industries relationship with the Food and Grocery Code of Conduct (FGCC) is complicated. The highly perishable nature of some vegetables means many of the codes processes do not fit squarely into the systems used by vegetable suppliers in the operation of their businesses.

The negotiation process between buyers and suppliers is very different for a perishable product compared to a shelf stable grocery item which the Code is more suited towards.

The perishability of vegetables means there is a very narrow window for the vegetable suppliers to sell their produce to retailers when it comes time for harvest. This small window puts vegetable growers in a vulnerable position, giving retailers the bargaining power from the start.

The Australian retail sector is dominated by a duopoly who control 65 per cent of the market, followed by the 3rd and 4th largest retailers who control 16.4 per cent. The market concentration fails to create a competitive wholesale environment for growers. Combined with reduced export opportunities, growers supplying retailers have very limited wholesale options. If a grower sets a price a retailer doesn't like, the retailer can just go to the next grower offering a lower price.

Therefore, the commercial relationships between the grower and retailer are very important, particularly as some growers have a large proportion of their business focused on supplying a single retailer. Complaining about the price of one week's order is not worth the risk of losing a grower's biggest customer long term or even short term. Especially with a season's crop in the ground that can't be delayed or stored.

Supermarkets have more visibility of the market price because of the number of growers they consult with. The supermarkets will set their price and potentially play growers against one another as they are the only ones that have visibility over prices and also have the market power. There needs to be greater transparency over the market price so that growers have greater oversight and are in a better position to negotiate a fair price.

Product rejections also cause growers angst, especially when there appears to be no consistency in the application of product specifications when goods are delivered. For example, a leafy vegetable may be rejected for being one degree off the product specification on one day but is accepted three days later for being two degrees above product specification. Once again growers do not pursue dispute resolutions in fear that commercial retribution will occur.

## The Dispute Resolution Process

It is because of these delicate commercial relationships that vegetable growers do not utilise the dispute resolution process and why the number of complaints to retailers is so low. The fear of retribution outweighs the desire to file a complaint.

The other factors such as lack of awareness of the processes and Code in general, and slow processing times also impact vegetable suppliers utilising the Code's processes.

The dispute resolution process is useless for vegetable suppliers because of the different system they use to negotiate and the power imbalance repercussions. Thus, it makes it difficult to comment solely on the dispute resolution part alone.

Issues such as over-ordering on 'specials' week and cancelling orders late also financially impacts growers but the current dispute resolution process is not a suitable mechanism for growers to pursue unfair practices such as this.

## Receiving an unfair price

During the covid pandemic the prices of core inputs such as fertiliser, chemicals, and fuel skyrocketed. In June 2022, prices of some inputs had increased over 200 per cent since the start of 2020. On average growers experienced a 25 per cent increase across all of their inputs.

Most vegetable suppliers to retailers would have needed a price increase to be able to cover their increased costs.

During this period the price of vegetables increased 11.4 per cent; an increase barely enough to cover the 25 per cent increases in grower inputs.

If the dispute resolution process was fair and equitable, growers would have received a fair price for their produce. They did not, growers shouldered this increase.

## Code Arbiters Independence

The Food and Grocery code currently allows code arbiters to hold market shares and be engaged in another capacity during a financial year by the retailer or wholesaler they represent. This makes the code arbiter impartial and creates a potential barrier for a supplier when raising a complaint.

From the Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Part 5: Dispute resolution, Section 32: Who can be appointed Code Arbiter;

*(1) A Code Arbiter must not be engaged by the retailer or wholesaler in any capacity other than as Code Arbiter.*

*(2) Despite subclause (1), a Code Arbiter appointed by a retailer or wholesaler may be engaged by the retailer or wholesaler in another capacity during a financial year if the retailer's or wholesaler's market share:*

*(a) is less than 15% in that financial year; or*

*(b) was less than 15% in either of the previous 2 financial years*

The code needs to provide a genuinely independent dispute resolution process. The arbiter should not be able to work for or have shares in the retailer or wholesalers' business. This would give suppliers more confidence in using the dispute resolution process.

Clause (2) from Section 32 should be removed from the Food and Grocery Code.

## Recommendations

1. Create a more transparent price market system to ensure there is a more equitable power balance during price negotiations.
2. The code needs to take into consideration the systems used by different perishable and dry goods and adjust its timelines and processes accordingly.
3. Develop meaningful long-term contracts (e.g. annual) for relevant vegetables such as potatoes and onions.
4. Streamline the Collective Bargaining Class Exemption – the revenue turnover of less than $10 million is too low. The market imbalance is so large with the retailers that the government should make the Class Exemption accessible by increasing the limit.
5. Investment by the Australian Government to educate and raise awareness of the code and its processes.
6. Code Arbiters should do more to promote the code and the dispute resolution process.

7. Clause (2) from Part 5: Section 32 should be removed from the Food and Grocery Code.

AUSVEG is supportive of the recommendations made by the Independent Reviewer in the 2021-22 Annual Report. Including:

- Change the Code to permit supplier concerns to be raised with Code Arbiters informally.
- Authorise the Independent Reviewer to access the Code Arbiters' complaint files to evaluate the adequacy and consistency of the Code Arbiters' processes.
- Require the ACCC to conduct an investigation when requested by the Independent Reviewer; and
- Introduce financial penalties for material non-compliance with the Code.

AUSVEG looks forward to contributing to discussions and submissions on potential reforms to the whole Food and Grocery Code coming up for review at the end of 2023.