

29 February 2024

Grocery Code Review Secretariat
Market Conduct and Digital Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: GroceryCodeReview@treasury.gov.au

Re: Review of the Food and Grocery Code of Conduct

Greenlife Industry Australia (GIA) is pleased to contribute to the review led by Dr Craig Emerson to review the Food and Grocery Code of Conduct.

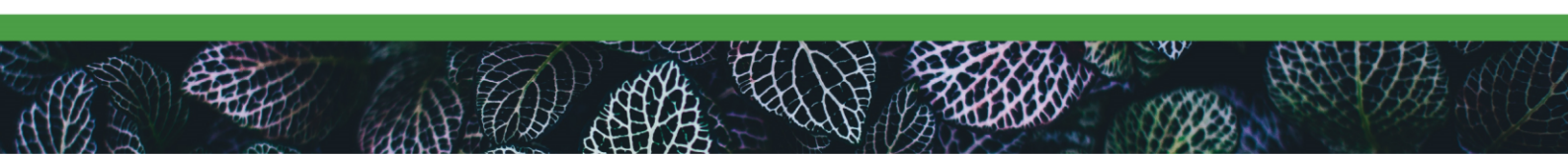
GIA is the peak national body representing commercial growers of plants (known as greenlife growers) across all states and territories of Australia. The greenlife industry is a significant component of the Australian horticultural sector employing over 25,000 people and generating a farm gate value of \$2.8 billion annually. GIA belongs to the NFF Horticulture Council and is a committee member of its Competition Taskforce; a body that is engaged in making the case for improved regulation of the domestic markets for suppliers of fruit, vegetables and plants.

The Code already includes plants

The Food & Grocery Code includes in its definition of groceries “plants, flowers and gardening equipment” and whilst many supermarkets sell these products, it is Bunnings that is Australia’s biggest retailer of plants, yet this retailer and other ‘big box’ retailers such as Mitre 10 and IKEA are not bound by the Code. Greenlife growers experience similar trading inequities as growers of fruit and vegetables supplying supermarkets and yet those growers supplying big box retailers are not protected by the Code or by any other code of practice regulating behaviour. (For the avoidance of doubt, the Horticulture Code of Conduct does not apply to greenlife growers or big box retailers).

The dominance of big box stores in the greenlife retail market

Bunnings is by far the biggest of the big box stores, maintaining a national greenlife market share of 70%, rising to over 80% in some regions and towns (which outstrips the combined market power of the two major supermarkets, Coles and Woolworths). In 2023, Bunnings reported a revenue increase of 4.4% to \$18.5 billion. By volume of units sold in their stores, plants are second only to tins of paint.



The much smaller remainder of the greenlife retail market is made up of garden centres, supermarkets, markets and lifestyle stores. Greenlife growers also supply the landscaping sector but this is small and specialised when compared to the retail market.

The market for greenlife products is almost wholly domestic with virtually no export market. Many of the plants greenlife growers supply such as seedlings, herbs, food plants and annuals are as perishable as fresh fruit and vegetables and must be dispatched within days of reaching maturity and unlike fruit and vegetables cannot be cold-stored to preserve shelf life. Typically, these plants are low value, commoditised products that must be sold in high volumes to be profitable.

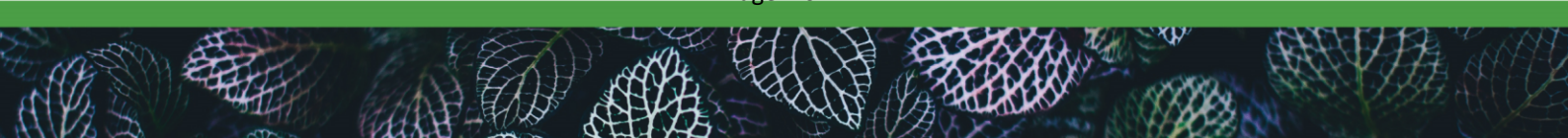
Given the extent to which Bunnings dominates the plant retail market, the vulnerability and perishability of plants, along with the high volume and low value of greenlife products, there are few alternative markets for greenlife growers in Australia. If a greenlife grower is determined to make a living growing plants commercially for the retail supply chain, it is likely that they will supply Bunnings, as the majority of growers do, either directly or via third party suppliers.

Greenlife growers are profoundly disadvantaged

Bunnings and other big box stores are an essential part of the plant retail market and greenlife growers have a keen and vested interest in the ability of these retailers to thrive and prosper. In the absence of meaningful competitors however, big box retailers are able to dictate terms of trade, set the prices and control the supply of greenlife products in the retail supply chain. The ability of individual growers to challenge any of these arrangements and find last minute alternative markets for their plants is almost nil. Without a code of practice, growers have no way of expressing concerns or raising a complaint. The fear of retribution leading to loss of business is genuine, deeply felt and has been experienced: greenlife growers feel completely powerless in their relationship with big box retailers.

Whilst greenlife growers are reluctant to raise concerns or make complaints with big box retailers, many have shared accounts of their experiences with GIA. Examples of big box retailer behaviour that should be regulated by the Code include:

- **Asymmetry of information** about price: whereas the big box retailer has access to every price offered by every grower of each product line they stock and can make use of this information to exert downwards pressure on price, the growers themselves cannot discuss or share information about their prices, costs or terms without risking collusion. This often encourages a “take it or leave it” attitude on the part of big box retailers and without alternative markets for their products, growers typically take the price – even if this means selling at a reduced margin or loss.
- **Absence of contractual commitments** from big box retailers to volumes by, for example, limiting their buying commitment to non-binding product allocations rather than supplier agreements. Bunnings reserve the right to take fewer or none of



the plants allocated to them with some growers reporting that over 12 months, less than 50% of the plants grown for and allocated to Bunnings were actually purchased by them. This means that growers are obliged to bear all the risks of investing in their businesses and plant large volumes of greenlife products, often with the encouragement of the buyer or category manager, in the hope - rather than expectation - that they will be sold.

Other tactics reported included limiting the retailer's contractual commitment to one single plant or requiring growers to re-tender (at short notice) to become a preferred supplier.

- **Imposition of home-branding and commoditisation** of greenlife products by for example, requiring growers to repackage their plants in generic black unbranded containers and replace their own plant labels with home brand labels. Increasingly, Bunnings in particular specifies non-standard container sizes, rather than the standard industry sizes. It is not unusual for such demands to be made at short notice – as little as 24 hours' notice has been reported - with the entire cost burden of changing to home branding and non-standard sizes falling on the grower.

Such tactics, which are widespread, deny the grower the ability to control their brand, capitalise on investments they may have made in sustainable growing methods and promote their best practice accreditations. Growers have no alternative market for home branded plants packaged in non-industry standard sized containers and growers carry all the risk of being left with redundant stock.

- **Questionable behaviour** by big box retailers through actions such as asking growers to sell at or below cost of production from time to time to demonstrate that they are a “team player” with the implication that if they don't agree, they will be excluded from the team.
- **Prevalence of informal, verbal arrangements** in place of enforceable contracts. Many growers report difficulties obtaining detailed supplier agreements from big box retailers with some examples of growers supplying large volumes of plants without any written agreement whatsoever. Even those with supplier agreements report that variations to such agreements are common but are rarely documented.
- **Rebates are a common feature** of the trading relationship between growers and big box retailers, whereby growers are required to accept further discounts on their prices in certain circumstances that ‘advantage’ the grower. Examples where the grower is required to give the retailer a rebate include supplying into a new store, subjecting their products to in-store merchandising and participating in special promotions (such as Mother's Day, Valentine's Day etc). Whilst it might seem reasonable for the retailer to charge for some of these initiatives, rebates are



sometimes imposed on growers, whether or not they want the associated benefit, resulting in a further margin squeeze on the prices growers receive.

- **Third line forcing**, for example in relation to freight. Many growers supplying big box retailers have been obliged to switch to retailer mandated freight arrangements. We have received many reports of growers' costs increasing significantly as a result, whilst other growers report examples of the negative consequences they experience, such as the cancellation of product allocations, if they reserve the right to continue to use their own freight.
- **Complete imbalance of power** in the big box retailer- nursery grower transaction. Fear of retribution is genuine and widespread amongst growers: being dropped as a supplier has the potential to be absolutely catastrophic for their business. This has been painfully demonstrated by some growers who have ceased trading as a direct consequence of being dropped by a big box retailer.

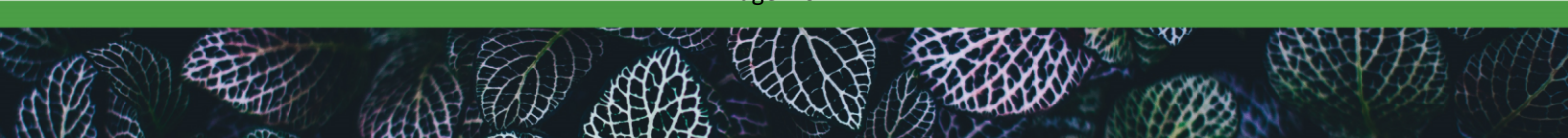
Importance of plants to consumers

The Code defines plants as groceries and whilst greenlife products might not be regarded as staples, they are still very important for consumers. In recent years, the number of people growing their own food, investing more in their gardens and establishing indoor and balcony gardens in urban environments has increased – and grew exponentially during the COVID pandemic. The importance of plant life and gardening in the well-being and overall health of human beings is well-documented. There is no doubt that consumers want ready access to a wide range of good quality, affordable plants for their gardens, farms, homes and allotments as facilitated by Bunnings and other big box stores.

We appreciate that the existing Code currently only applies to supermarket retailers and the growers that supply them. However, on the basis that plants are already included within the Code, it would seem logical to ensure the biggest retailers of these products are signatories given that the biggest of these, Bunnings, is so dominant in this market. Big box retailers might not be supermarkets as such, but share many of the same characteristics, including scale, market dominance and questionable behaviour.

The Food & Grocery Code of Conduct exists to address harmful practices in the grocery sector stemming from an imbalance of bargaining powers between retailers and their suppliers. There is no doubt that in a market dominated by one retailer holding a 70% market share, there is an imbalance of bargaining power and greenlife growers experience harmful practices as a result. The stated objectives of the Code, as currently legislated, go to the heart of what is absent in the greenlife sector and form the basic wish list for growers of plants supplying big box retailers:

1. Help regulate standards of business conduct in the supply chain and build trust and cooperation throughout that chain;



2. Ensure transparency and certainty in commercial transactions in the supply chain and minimise disputes arising from a lack of certainty;
3. Provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes; and
4. Promote and support good faith in commercial dealings between retailers and suppliers.

The Code provides the opportunity to extend these protections to greenlife growers. Some amendments will be required to make this possible, but our assessment is that these can be simply achieved at the same time as other features of the Code are remade. We are encouraged that this review is considering whether or not it should be extended to other retailers. If the review is considering extending the Code to cover superstores such as Costco and Amazon, it would seem perverse not to also include Bunnings, Mitre 10 and IKEA. There is no better opportunity to help level the playing field for greenlife growers than through this review.

Our responses to the relevant consultation questions in the terms of reference:

a. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

No, because it does not currently apply to the big box retailers of plants, even though plants, flowers and gardening equipment are specified in its definition of groceries. The bargaining power imbalances between growers of plants and big box retailers such as Bunnings is of no less concern than that between supermarkets and their suppliers, and should therefore be included in this review.

b. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?

Suppliers of perishable, low-value goods such as fruit, vegetables and plants are especially disadvantaged since they typically have no alternative markets in which to sell their product within the limited time available before the life of the product expires. Without meaningful competitors or alternative markets such as export, the ability of growers to find last minute alternative markets for their plants is almost nil. Growers of plants are especially disadvantaged because Bunnings controls 70% of the greenlife retail market.

c. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

The markets for fresh produce are quite different even from other perishable agricultural products, including dairy and meat, let alone shelf stable items such as processed foods, pet food, cosmetics, and cleaning products. Many of these products are typically sold under longer-term agreements that define both price and volume. For fresh produce, including plants, both price and volume can remain uncertain until the day of dispatch which gives all the bargaining power to the

retailer. We believe that the Code should include provisions that recognise the particular vulnerability of suppliers of perishable goods.

d. Should the Code be extended to cover other aspects of the food and grocery supply chain?

Yes. Plants, flowers and gardening equipment are included within the Code's definition of groceries, and yet the biggest retailers of these products, namely big box stores such as Bunnings, are not signatories to the Code. It follows that growers of plants are not protected by the Code, or any other code of practice. Greenlife growers are seeking equity with other growers who do enjoy code of practice protection.

e. Do the provisions set out under the Code ensure it is fit for purpose?

Yes and no. Most of the problematic behaviours greenlife growers report to GIA are prohibited under the Code and as a first principle, we are seeking their inclusion within it to discourage these behaviours. However, we share the view expressed by those growers already protected under the Code that it would benefit from strengthening to ensure that it is fit for purpose.

Our recommendations

Our recommendations are made in response to those features of the Code identified as of particular interest to Dr Emerson in his review:

1. The impact of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers

Most of the behaviours growers experience in their trading relationships with supermarkets and big box retailers are prohibited by the Code. It is our strong belief that protecting greenlife growers under the Code would without doubt improve commercial relations between suppliers of the plants and retailers of the same, without damaging those relationships in any way.

Recommendation

Recognise that the Food & Grocery Code already includes plants in its definition of groceries and that it should therefore protect suppliers of these products in all major supply chains in the same way that growers of fruit and vegetables are protected by the Code.

2. Whether the Code's provisions should be extended to other retailers or wholesalers operating in the food and grocery sector

Plants are defined as groceries in the Code and whilst supermarkets do sell plants, the largest retailers of plants are Bunnings and other big box stores. Since the Code was designed to provide some regulation of markets in which retailers hold the overwhelming majority of the power, extending the provisions of the Code to



Bunnings, whose relevant market share is greater than that of Coles and Woolworths combined, is logical and appropriate.

Since most greenlife growers sell directly to retailers, the question of whether the Code should be extended to wholesalers is irrelevant to us.

Recommendation

Include the big box retailers of plants, namely Bunnings, Mitre 10 and IKEA and other retailers of greenlife products, with a turnover of \$1bn+, in the Food & Grocery Code of Conduct.

3. Whether the Code should be made mandatory

Greenlife growers have much in common with growers of fruit and vegetables who express a strong preference for a mandatory Code.

Recommendation

Make the Code of Conduct mandatory, rather than voluntary.

4. Whether the Code should include civil penalty provisions

We have no doubt that penalty provisions will act as best possible deterrent to bad behaviour.

Recommendation

Ensure the Code contains significant penalties – at corporate and individual level – for breaches.

Create a robust dispute resolution mechanism that is overseen by a genuinely independent arbiter and protects complaints from retribution.

Provide the Australian Competition and Consumer Commission (ACCC) with sufficient powers to initiate inquiries into the trading relationship between greenlife growers and big box retailers.

GIA would welcome further engagement with the Grocery Code Secretariat through the course of its review. We urge Dr Emerson to seek the direct testimony of greenlife growers and to put in place arrangements for them to do this anonymously.

To receive assistance with this, or any other aspects of this submission, please contact Joanna Cave, Chief Executive either by email jo.cave@greenlifeindustry.com.au or phone on 0468 368961.

Yours sincerely



Joanna Cave, Chief Executive