
IN THE FAIR WORK COMMISSION

Matter No: B2019/5259

Matter Name: Review of certain C14 rates in modern awards (**C14 Review**)

SUBMISSIONS IN REPLY – THE AUSTRALIAN WORKERS’ UNION

Response to matters raised by Ai Group, and Australian Business Industrial and NSW Business Chamber

Additional entitlements under modern awards

1. The Ai Group and Australian Business Industrial and NSW Business Chamber (**ABI**) have referred to modern awards, unlike the National Minimum Wage Order (**NMW**), including a range of additional entitlements that enhance earnings, for example, overtime rates, penalties, loadings and allowances.¹
2. The Australian Workers’ Union (**AWU**) submits that such additional entitlements are fundamentally not relevant to the C14 review, which is focused on classification structures and base rates of pay. The additional benefits referred to are typically contingent entitlements and relate to particular disabilities of employment or expenses.
3. The submissions made below in respect of additional entitlements payable under the Horticulture Award 2020 serve to illustrate how many lower level modern award-reliant workers are rarely afforded such entitlements, with the exception of the casual loading (which extends to employees covered by the NMW).

Work value considerations

4. To the extent any variations made as part of the C14 Review are to minimum wages, it is acknowledged that the FWC must be satisfied the variations are justified by work value reasons, in accordance with s 157(2)(a) of the *Fair Work Act 2009* (**FW Act**).² ‘Work value reasons’ relate to the nature of the particular kind of work, the level of skill or responsibility involved and the conditions under which the work is done.³

¹ Ai Group Submission, 6 November 2023, at [4] and [18]-[20]; ABI Submission, 3 November 2023, at [7].

² As referred to in Ai Group Submissions, 6 November 2023, at [40]-[43] and ABI Submission, 3 November 2023, at [17] and [43].

³ FW Act, s 157(2A).

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5. In the context of the C14 Review, work value considerations should be applied in light of the findings of the Expert Panel in the *Annual Wage Review Decision 2022 (AWR 2023 Decision)*. The Expert Panel concluded that the C14 rate “does not constitute a proper minimum wage safety net for award/agreement free employees in ongoing employment”.⁴
 6. In performing the statutory task of establishing and maintaining a safety net of fair minimum wages, taking into account the broad range of matters in s 284(1) of the FW Act, the Expert Panel determined that the NMW should be aligned with the C13 rate.
 7. That conclusion was drawn without regard to the value of any specific kind of work. It is noted in that regard that it is difficult to discern the extent to which the NMW applies and which work it applies to, particularly in light of the broad scope of the Miscellaneous Award 2020.⁵
 8. In the AWU’s submission, the clear implication of the *AWR 2023 decision* is that all ongoing productive work is of a value that justifies payment of at least the C13 rate.
 9. There is considerable overlap between the minimum wages objective and the modern awards objective. The relative living standards and the needs of the low paid, as well as economic and business considerations, are core considerations under both objectives.⁶ In the AWU’s submission, ensuring minimum rates for ongoing employment do not dip below the NMW is necessary to ensure that the modern award minimum safety net remains “fair and relevant”.⁷
 10. The finding in the *AWR 2023 decision* that all ongoing productive work justifies payment of at least the C13 rate is consistent with the Full Bench’s provisional view in the C14 Review, as set out in its Statement of 22 September 2023.
 11. It follows that the Full Bench should not need to adopt an overly forensic approach to satisfying itself that variations intended to move ongoing employees to at least the C13 rate are justified by work value reasons.

Response to matters raised by the Australian Fresh Produce Alliance in relation to the Horticulture Award

12. The AWU makes the following submissions in respect of the Horticulture Award and in response to the submissions made by the Australian Fresh Produce Alliance (**AFPA**) and

⁴ *AWR 2023 Decision* at [8].

⁵ *4 Yearly Review of Modern Award – Miscellaneous Award 2010* [2020] FWCFB 754; [2020] FWCFB 1589; PR717774.

⁶ FW Act, ss 134(1) and 284(1).

⁷ FW Act, s 134(1).

statement of Mr Carl John Phillips, Chief People Officer at Costa Group Holdings Ltd (**Costa**), dated 10 November 2023.

13. The AWU continues to rely on its earlier submissions, dated 3 November 2023, and the witness statements of Mr Shane Roulstone (AWU National Organising Director, dated 3 November 2023), Mr Steven Carter (AWU, NSW North Coast Organiser, dated 2 November 2023), and Mr Anthony Beven (AWU, Tasmanian Branch, Organiser, dated 2 November 2023).

14. Mr Roulstone has also made a second statement, dated 29 November 2023 (filed with these submissions).

Fruit and vegetable picking (but not pruning) fall exclusively within Level 1

15. At paragraph 25 of the AFPA's submissions, it is stated in respect of the Level 1 (C14) classification that "[t]here is no scope for picking, thinning, or pruning work in any other classification in the Horticulture Award".

16. This is incorrect in the case of pruning, which at least in theory can fall within Level 2. The list of indicative duties at clause A.2.3 includes "pruning under general supervision".

17. Paragraphs 26, 29 and 40 of the AFPA's submission include similar assertions that fruit and vegetable pickers ordinarily cannot progress beyond Level 1.

18. The AWU submits that to the extent that the classification structure does not allow any progression beyond Level 1, this restriction lends strong support for the proposals to lift the Level 1 rate to C13 or require progression after 76 hours' work in the industry.

Additional entitlements beyond the base rate

19. At paragraphs 30 and 31, the AFPA refers to a range of "additional earnings-enhancing benefits" under the Horticulture Award which do not apply to award/agreement free employees covered by the NMW.

20. In the AWU's view, the additional entitlements are not relevant to the C14 Review, which is fundamentally about classification structures and base rates of pay.

21. The 25% casual loading, as referred to by the AFPA, is intended to compensate employees for the loss of entitlements available to permanent employees, including paid leave, and in any event, also applies to employees covered by the NMW.

22. The recently introduced requirement for minimum hourly rates to underpin piece rates, also referred to by the AFPA, can only be a relevant consideration insofar as it underscores the need to ensure base rates provide an appropriate safety net.

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23. The availability of penalty rates and overtime rates for Level 1 employees in the Horticultural sector is highly limited.
24. It is telling that Mr Phillips, at paragraph 4(c) of his statement, dated 10 November 2023, has referred to the payment of overtime rates as “labour leakage”.
25. A significant majority of Level 1 employees in the industry are engaged on a casual basis, as a consequence of which they are not entitled to annual leave loading, and are generally only entitled to overtime or penalty rates if they work between 8.31 pm and 4.59 am, for more than 12 hours in a shift, or for more than 304 hours over an eight week period.⁸
26. Further, Costa’s longstanding practice is to purport to enter into ‘arrangements’ with its workforce under which its much smaller cohort of permanent employees are not generally entitled to overtime payments for working on Saturdays or between 8 and 12 hours per shift.⁹
27. The allowances in clause 18 under the Horticulture Award are not all-purpose and are available in a narrow range of circumstances. The leading hand allowance in clause 18.2(a) is only paid to employees designated as being in charge of other employees. The wet work allowance in clause 18.2(c) applies on an hourly basis when an employee’s clothing becomes saturated or when they have to stand in water or slush so that their feet become wet. The first aid allowance in clause 18.2(d) appears to be payable where an employee is both qualified and appointed to perform first aid duty. Other allowances are expense related and confined. For example, the meal allowance in clause 18.2(c) only applies where overtime is worked without adequate notification and is not payable to pieceworkers.¹⁰
28. Moreover, the additional benefits under the Horticultural Award that the AFPA has referred to should be afforded little, if any, weight when considering the need to lift employees to at least the C13 rate.

Economic outlook for horticultural sector

29. At paragraph 12 of Mr Phillips’ statement, he refers to Costa’s revenue being dependent on prices negotiated with retailers and Costa sometimes having a lack of real bargaining power in its dealing with retailers.

⁸ Horticulture Award, cl 13.2.

⁹ Horticulture Award, cl 13.1; see cl15.1 of the *Costa (Berry Category) Enterprise Agreement 2019-2023*; see also proposed cl 15.1 of the proposed *Costa (Berry Category) Enterprise Agreement 2023-2027 (AG2023/4025)*.

¹⁰ Horticulture Award, cl 15.2(g).

30. Information concerning the current economic outlook for the horticultural industry, published on 5 September 2023 by the specialist Australian Bureau of Agricultural and Resource Economics and Sciences (**ABARES**), within the Department of Agriculture, Fisheries and Forestry, is attached to Mr Roulstone's second witness statement and marked **SR-5**.

31. Key take-aways from ABARES' 'Outlook for Horticulture' are as follows:

- a) Gross value of production to rise to \$17.6 billion in 2023–24 driven by higher production, up by 6% from the previous financial year;
- b) Exports to rise by 9% to \$3.7 billion in 2023–24 driven by higher production;
- c) Drier conditions are unlikely to have a major impact on Australian horticulture production;
- d) Growth in global supply expected to outpace global demand in 2023–24.

THE AUSTRALIAN WORKERS' UNION

1 December 2023

IN THE FAIR WORK COMMISSION

Matter No: B2019/5259

Matter Name: Review of certain C14 rates in modern awards (**C14 Review**)

SECOND STATEMENT OF SHANE ROULSTONE

I, Shane Roulstone, of 16 Good Street Granville NSW, National Organising Director with the Australian Workers' Union (**AWU**), make the following statement:

Background

1. The details of my employment with the AWU and knowledge of the horticultural industry are set out in my earlier statement of 3 November 2023.
2. This second statement is in response to the submission made by the Australian Fresh Produce Alliance (**AFPA**) and the statement of Mr Carl John Phillips, Chief People Officer at Costa Group Holdings Ltd, dated 10 November 2023.

Additional entitlements under the Horticulture Award

3. At paragraphs 30 and 31 of its submission, the AFPA refers to a range additional benefits under the Horticulture Award.
4. In my experience, businesses in the horticultural industry that are members of the AFPA, such as Costa, are extremely adept at avoiding paying overtime to Level 1 workers.
5. This arises as a result of a heavily casualised workforce and the various flexibilities built in to the Horticulture Award. For example, casuals generally only become entitled to overtime if they work more than 12 hours in a shift or 304 hours in eight weeks.
6. In my experience, Level 1 workers in the industry rarely get paid overtime or penalties.
7. Smaller businesses sometimes pay overtime because they can't structure their business in such a way that the large providers can.
8. The only time overtime payments tend to arise is when there is a large crop that unexpectedly needs to be picked earlier for environmental reasons.
9. Some large employers pay a leading hand allowance but this is a small sum which in practice only gets paid if the employee is supervising or managing 20 or 30 workers and in circumstances where they should really be progressed to a higher classification.
10. In my experience, Costa and other members of the AFPA simply do not pay the travel allowance referred to in clause 18.3(a) of the Award.

11. Prior to the introduction of a minimum wage floor for pieceworkers in early 2022, the vast majority of piece rates workers I spoke to were getting paid between \$8 and \$12 per hour.

Training and time to become a proficient worker

12. At paragraph 26 of the AFPA's submission there is a reference to employees "undertaking structured training so as to perform the duties of Level 2". In my experience, the vast majority of Level 1 workers do not receive any structured training. Managerial staff and tradies receive training but new workers get a 'buddy' or 'mentor' on the job, usually for the first few days.

13. At paragraphs 47 and 48 of the AFPA's submission and from paragraph 26 of Mr Phillips' statement, it is asserted that it takes between 3 to 12 months to become proficient at fruit picking or harvesting, depending on the type of produce.

14. From my observations in the industry, this is simply not true, and it is not consistent with Costa's practice of performance managing underperforming employees out after one month. At Costa workplaces, an underperforming employee who is not picking correctly and at the right quantity after around two weeks will receive some form of on-the-job coaching. If they have not reached the required standard after a month, the employee will be moved out of that employment.

15. To become proficient at 'twist picking' of oranges takes 2-3 days.

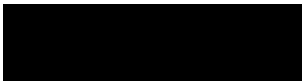
16. To become proficient at 'strip picking' oranges, or 'snipping' or 'snapping' mandarins, takes 2 to 3 days.

17. To gain proficiency at picking various types of berries takes less than 2 weeks. You need to be kind and gentle with the berries and if you are not competent after that time, you are unlikely to ever be competent.

18. To become proficient at picking mushrooms takes 2 weeks.

Economic Outlook

19. I have had regard to the recent 'Outlook for Horticulture', published on 5 September 2023 by the Australian Bureau of Agricultural and Resource Economics and Sciences (**ABARES**), within the Department of Agriculture, Fisheries and Forestry. It is attached to this statement and marked **SR-5**.



Shane Roulstone
29 November 2023

Outlook for Horticulture

Christian Creed

\$18b

Value of
production
in 2023–24



Horticulture

Value of horticulture
production reaches new
record.



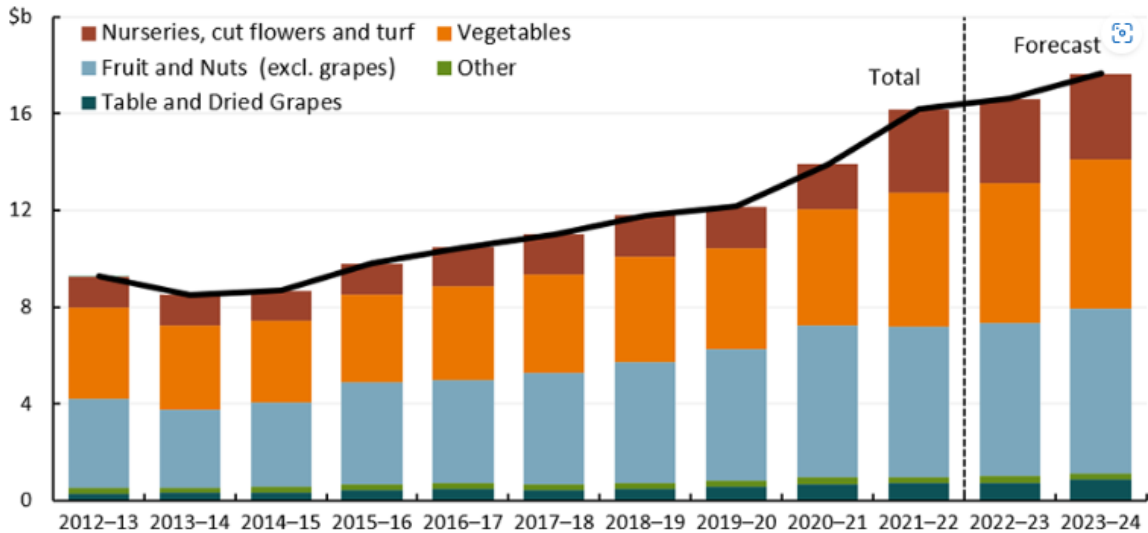
Key points

- Gross value of production to rise to \$17.6 billion in 2023–24 driven by higher production.
- Exports to rise by 9% to \$3.7 billion in 2023–24 driven by higher production.
- Drier conditions are unlikely to have a major impact on Australian horticulture production.
- Growth in global supply expected to outpace global demand in 2023–24.

Higher production volumes push up production values

In 2023–24, the gross value of horticulture production is forecast to rise to a record \$17.6 billion, up by 6% from \$16.6 billion in 2022–23 (Figure 1.1). The expected rise in production value reflects higher production volumes. Despite drier seasonal conditions expected in major horticultural regions, high water levels and improving labour availability are expected to boost production volumes throughout 2023–24.

Figure 1.1 Annual value of horticultural production



Note: Data to the right of the dotted line indicate estimates and forecasts.

Source: ABARES; ABS

The increase in horticulture production value in 2023–24 is driven by:

- Fruit and nuts (excluding table grapes), forecast to increase by 8% to \$6.8 billion.
- Vegetables, forecast to grow by 6% to \$6.2 billion.

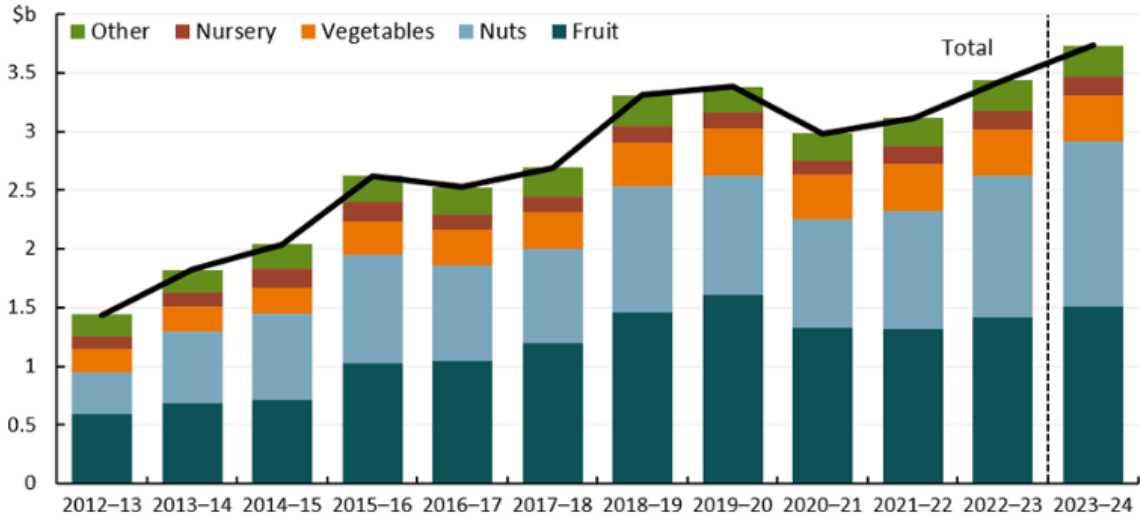
The gross value of horticulture production forecast for 2023–24 is around \$500 million lower than expectations in the *June Agricultural Commodities Report*. This reflects a slight downwards revision to production volumes accounting for lower expected yields for some fruit and vegetables.

Higher export volumes push export values to record high



The value of horticulture exports in 2023–24 is expected to rise by 9% to a record \$3.7 billion, driven by higher horticultural production volumes (Figure 1.2). A low Australian dollar, relative to currencies of other major trading partners and export competitors, is also expected to support demand for Australian horticultural products in 2023–24. The value of fruit and nut exports are expected to see the largest rise, growing by 6% and 17% respectively.

Figure 1.2 Annual value of horticultural exports



Note: Data to the right of the dotted line indicates forecasts.

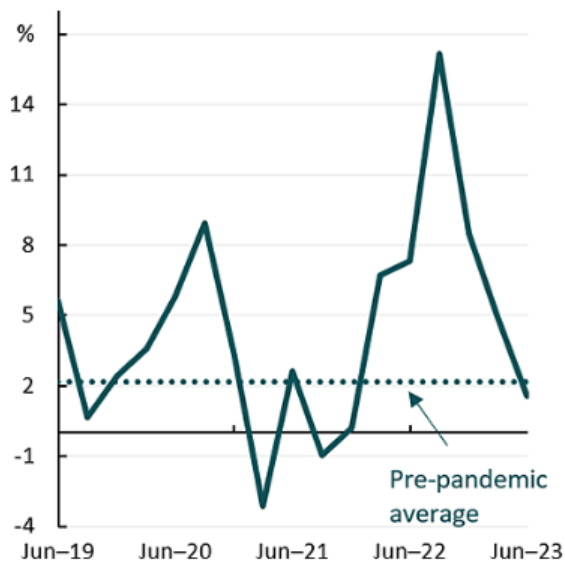
Source: ABARES; ABS

National fruit and vegetable inflation returning to pre-flood growth

Nationally, growth in fruit and vegetable prices has declined considerably. In 2021–22, severe flooding in key horticulture regions of Queensland and New South Wales reduced the availability of some fresh fruit and vegetables, driving up domestic price growth.

However, the effects of the flooding on production have subsided, leading to a moderation in price growth. Quarterly data for June 2023 shows that year-ended fruit and vegetable inflation is currently at 1.6%. This is broadly in line with the pre-pandemic year-ended average quarterly inflation growth of 1.4% (Figure 1.3).

Figure 1.3 Quarterly fruit and vegetable inflation, year-on-year change

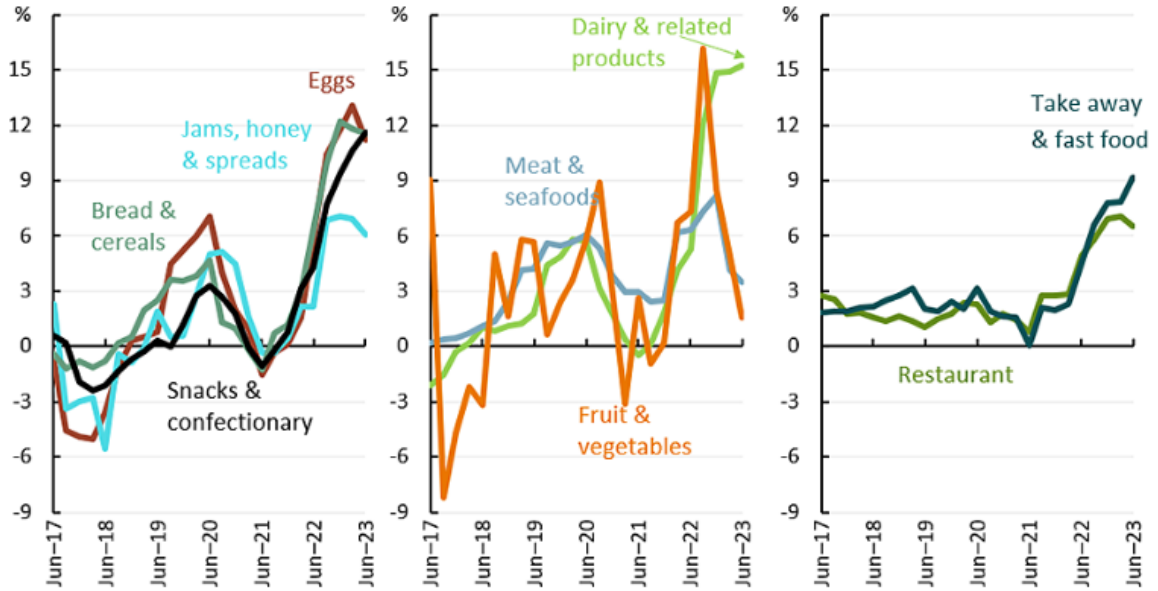


Note: *5-year year-ended quarterly average to Dec-2019.

Source: ABS

While the level of current fruit and vegetable inflation is still high, growth is lower than other food categories (Figure 1.4). Easing fruit and vegetable prices relative to other food options are likely to support demand for these products; ongoing price growth differences could see some consumers substitute away from other food groups such as breads and cereals towards fresh produce.

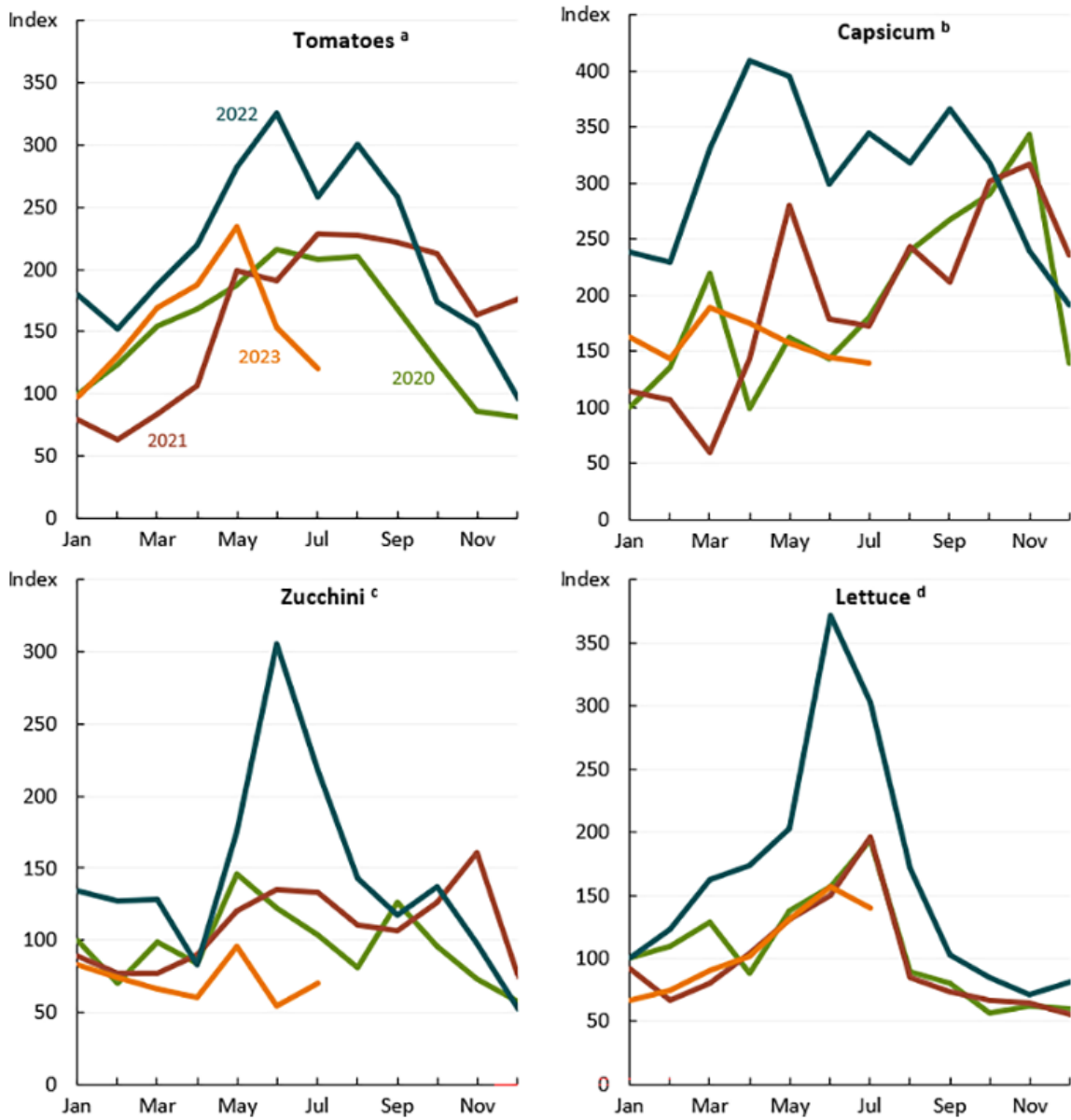
Figure 1.4 Quarterly Australian food inflation, year-on-year change



Source: ABS

Although fruit and vegetable prices are still increasing, some retail prices of individual products are lower in 2023 compared to 2020 to 2022 (Figure 1.5). This is likely to further support demand for these products.

Figure 1.5 Monthly retail fruit and vegetable prices, selected produce



Note: Index 100 = Jan 2020; a) 5kg truss tomato carton; b) 10kg red capsicum carton; c) 10kg green zucchini carton; d) Carton Iceberg.
Source: ABARES; Data fresh

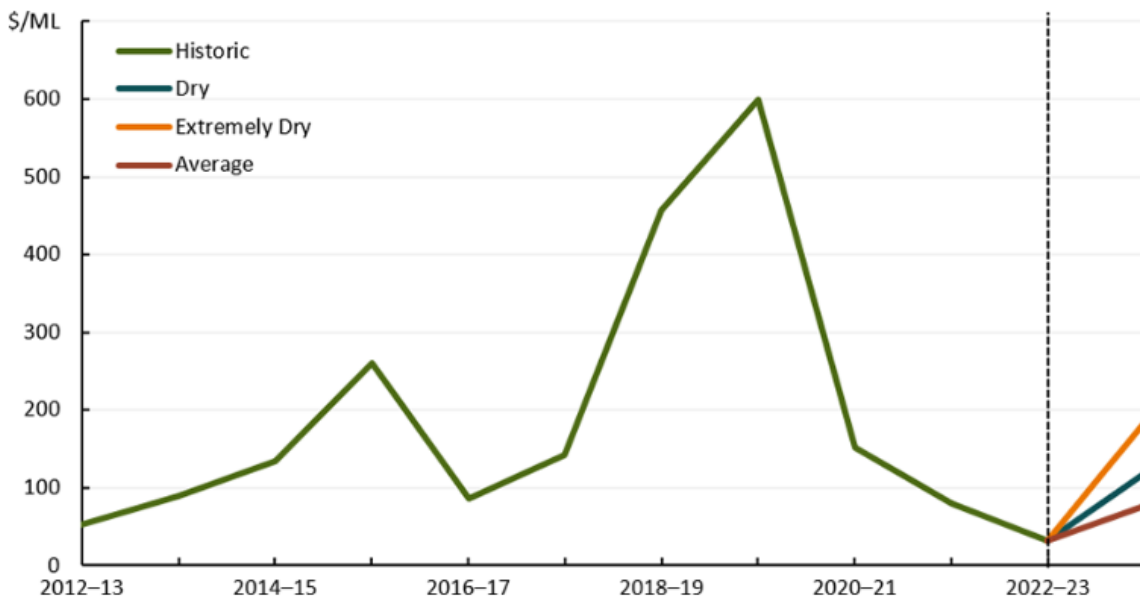


Horticultural production volumes are expected to rise by 7% in 2023–24. This is underpinned by a 7% increase in vegetable production to 2,808 thousand tonnes. Historically low water prices and high water storage levels to date, will help mitigate the impacts on yield from expected drier seasonal conditions in 2023–24. Other factors supporting production include improved labour availability and strong expected demand from overseas markets for key products such as almonds.

Historically low water prices will mitigate the impact of drier conditions

The expected onset of El Niño in 2023–24 is likely to lead to drier conditions across Australia, particularly across much of Eastern Australia. Drier conditions are likely to put upwards pressure on water prices. However, historically low water prices and high water storage levels currently observed are expected to moderate the pressure on water prices. ABARES' latest [Water Market Outlook](#) reported that under the likely average scenario, average water allocation prices are expected to remain well below recent highs (Figure 1.6). Ongoing low water prices will continue to support horticultural production.

Figure 1.6 Annual Australian water allocation price, varying climate scenarios



Source: ABARES

Note: ABARES Scenario analysis refers to the average water allocation price for all regions in the Murray-Darling Basin and is based on rainfall and inflows to storages of the following percentiles: Average scenario - Rainfall is in the 50th percentile of historical levels and, in 50 years out of 100, inflows to storages exceed those experienced in this scenario. Dry Scenario - Rainfall is in the 10th percentile of historical levels and, in 90 years out of 100, inflows to storages exceed those experienced in this scenario. Extreme Dry Scenario - Rainfall is in the 1st percentile of historical levels and, in 99 years out of 100, inflows to storages exceed those experienced in this scenario.

A recovery in horticultural labour supply to boost production

The recovery of the seasonal workforce to pre-pandemic levels is expected to support a rise in horticultural production in 2023-24. In 2019-20 and 2020-21, COVID-19-induced border closures constrained horticultural production by reducing the availability of seasonal workers; this impacted horticultural labour supply given the sector's reliance on the short-term seasonal workforce:

- Worker availability for short periods during the year is critical for labour-intensive operations (such as planting and harvest) on many horticulture farms.
- These short-term periods when labour-intensive operations occur can suit the labour availability of some overseas workers, such as Working Holiday Makers (WHM).

The Working Holiday Maker (WHM) visa approval rate fell sharply at the start of the pandemic, reaching a low of around 3,000 approvals in September 2021. During 2021-22, labour shortages in horticulture resulted in reduced volumes of harvested produce in some regions, with around [17% of horticulture farms](#) indicating lack of labour as a leading cause of crop loss in that year. WHM visa holder numbers have recovered following the reopening of international borders and have now exceeded pre-pandemic levels (Figure 1.7).

Figure 1.7 Working Holiday Maker Visa approvals



Source: Department of Home Affairs

The expansion of the **Pacific Australia Labour Mobility (PALM)** scheme over the last two years has also boosted labour supply for agriculture. Current estimates suggest that roughly 30 thousand PALM scheme workers are employed across agriculture.

While horticultural labour supply has improved overall in recent years, broadening the scope of occupations for WHM regional work requirements to accommodate economy-wide labour shortages has reduced the number of WHM visa holders in horticulture. Pre-COVID-19 estimates for WHM visa holders employed in agriculture were around 25–30% and post COVID estimates are around 15%, with horticulture using around 90% of WHM-labour in agriculture. Compounding this, the Australia-UK Free Trade Agreement (A-UKFTA), entered into force on 31 May 2023, removed the requirement for British backpackers to complete farm work as previously required; this has also reduced the availability of short-term labour from the seasonal workforce.

While labour supply has improved, labour costs have also increased across the economy (see [Economic Overview](#)). Ongoing high labour and other input costs are pressuring some farm margins which could temper the expected increase in horticultural production in 2023–24.

Free trade agreements and other trade initiatives to boost Australian exports

Horticulture export volumes are expected to increase by 6% to 787 thousand tonnes in 2023–24, driven by higher production volumes. Recent free-trade agreements that have improved market access through lower tariffs and higher quotas will also support export volume growth:

- The A-UKFTA saw the immediate elimination of tariffs often larger than 10% on most Australian horticultural exports.
- The Australia-India Economic Cooperation and Trade Agreement (ECTA) which entered into force on 29 December 2022 includes reduced tariffs for key horticultural exports (for example, citrus fruits, almonds, macadamia nuts, avocados, and berries).

In addition, a new government-industry partnership is expected to invest \$130 million to support export biosecurity measures and market access for Australian horticultural exports through the Fresh and Secure Trade Alliance (FASTA). This program is expected to enhance Australian horticultural producers' biosecurity surveillance and detection procedures, data collection processes and risk management strategies. All of these measures are expected to improve market access for horticultural exporters.



World supply expected to increase

Global horticulture supply is anticipated to rise modestly, primarily driven by better growing conditions in major producing countries. Changing weather patterns towards conditions associated with an El Niño weather system are likely to support overall production volumes. However, conditions are likely to have varying effects on the different major horticultural producers and exporters. Over the next three months, horticultural regions across parts of India are likely to experience drier than average conditions. However, much of China, the EU as well as southern parts of the US are predicted to record average or better than average rainfall. This will ultimately impact the yield and production of horticulture in these regions.

US citrus supply affected by a production shock

Despite improved growing conditions and rising global supply, the gross value of horticultural production in the United States is not expected to grow strongly over the next few years. This is largely attributed to shifting consumer preferences towards more competitively priced fruit and vegetable imports.

In addition, some US horticultural industries have faced challenges recently; the US citrus crop fell by 26% in 2022–23, after a colder-than-average season and Hurricane Ian affected production volumes. An outbreak of citrus greening is also forecast to deplete the 2023–24 crop, reducing production volumes by around 50% from 2022–23. This is likely to reduce US citrus export volumes for 2023–24.

World horticulture demand expected to grow modestly

Global demand for horticultural commodities is expected to increase modestly in 2023–24 but be outpaced by growth in global supply. Steadily rising populations and real incomes across several emerging markets will support increases in demand. However, ongoing high inflation in many advanced economies will weigh on real incomes of consumers, partially offsetting this rise.



Major export markets present opportunities for growth

Changes to global citrus production opens opportunities for Australian exporters

Falling citrus production in major producing markets has provided an opportunity for Australian exporters to meet excess demand in regions such as the United States. Additionally, lower export volumes from the major producers provides a large opportunity for Australian exporters in other key citrus export markets such as Japan, Canada, and the Republic of Korea.

Extreme weather events endanger horticultural growing regions

High rainfall over the previous three years has led to exceptional [growing conditions for vegetation](#) in many agricultural areas. Wetter years have also made it more difficult to conduct hazard reduction burns. As such, fire warnings have highlighted the increased likelihood of bushfires throughout southeastern Australia and much of northern NSW, key growing regions for horticulture. Bushfire risk presents ongoing challenges for horticultural and other agricultural producers.