



Protecting consumers from unfair trading practices

Give us a fair go

November 2023

Introduction

Freshmark welcomes the opportunity to provide a submission to Treasury on *protecting consumers from unfair trading practices*.

Food, and especially fresh produce, is possibly the most important purchase for Australian consumers. Our members play a critical role in the fresh produce supply chain, and the effects of unfair trading practices on those members has an inevitable impact on consumers, even though most of our members do not interact directly with the consumer.

In essence, unfair trading practices within the fresh produce sector value chain put this entire sector under pressure, and threaten the viability of the sector outside the big supermarket chains.

Unfair practices that drive down prices paid to wholesalers, growers and others in the value chain may appear, sometimes, on face value to benefit consumers, by reducing prices at the point of sale – but if the entire sector collapses, as some genuinely fear it will, then the impact on the consumer could be catastrophic. A [recent survey](#) found that 38% of Australian farmers are considering exiting the industry, and almost half of those say it is because they struggle to make a living.

It is important to note that unfair business practices in this sector do not only have financial implications for consumers, but also health implications. Where an imbalance of power or an unfair business practice impacts the fresh produce sector, there are potential ramifications relating to the ability of consumers to access fresh food, which is a significant and important consideration.

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About Freshmark

Freshmark is the trading name of the NSW Chamber of Fresh Produce Limited, which is dedicated to improving the central market system, helping wholesalers, growers, retailers, and the fresh produce sector achieve and maintain profitability. Freshmark is based in the heart of Sydney Markets, the largest central market in Australia, transacting approximately \$3 billion in produce per annum.

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Development of this submission

Freshmark relied on the expert insights of our board and staff, relevant studies and research, and feedback from market participants. This included a broad survey of members completed online and in-person on the market floor as well as one-on-one detailed interviews.

Important background

- Major supermarket chains operate under the voluntary Food and Grocery Code of Conduct. Primary and secondary wholesalers, however, operate under the very strict requirements of the Horticultural Code of Conduct, including the requirement for complete transparency in the purchase and sale of produce. Many of our members view supermarkets as the powerbrokers in the current system.
- Neither Freshmark nor our members are under the illusion that unfair trading practices are the sole domain of the supermarkets. We recognise that changing levels of supply and demand impact the direction and scale of power imbalances in the sector – but very rarely in favour of the wholesaler. Wholesalers operate, by and large, on a maximum-margin basis. That means that when prices are low, supermarkets are in a stronger position, and when they are high, growers are in a position to benefit. Because they are contracted to operate within a set maximum margin (across all products, and across a defined period which might be a season or a whole year), the wholesaler becomes the pivot point, almost never holding the balance of power.
- We recognise that this review is to assess the impact of unfair trading practices on consumers. The fresh product sector is, simply put, essential. Practices that put pressure on this sector will only ever lead to poor outcomes for consumers. The worst-case scenario is the complete collapse of the independent fresh food sector – which is not out of the realm of possibility. Central markets participants are operating on increasingly slender margins, under the constant threat of weather and other conditions that could wipe out their business.

Issues and experiences around unfair trading practices

Experiences of unfair practice are common

One of the biggest challenges around unfair business practices in this sector is that they can be hidden or misrepresented. For example, buyers have the right to reject produce that does not meet their standards. This seems fair and reasonable on the surface but in practice, many wholesalers believe the rules are easily bent, particularly when the retailer finds they have over-ordered or they have found a better price. Even when applied fairly, the rules can lead to rejected produce being left on a dock to deteriorate, meaning its value for re-sale on return to the wholesaler is greatly diminished.

In most circumstances, rejected produce makes its way back to the central market system where wholesalers do their level best to sell it, but because it has aged the price received for the grower may not be as high. Consumers who shop at independent retailers may benefit from greater availability of product at a better price, but it can mean they are buying poorer quality produce.

Reduced supply on the shelves of the big chains because they rejected the stock also means prices are driven up and the consumer ultimately pays more.

Our members report that the wholesaler and sometimes the grower often take a business hit when a buyer uses a spurious reason to back out of a purchase arrangement.

“Sometimes a buyer will dump produce because they say it does not meet standards, but the suspicion is that really they just ordered too much. Other times the buyer will recommend growers plant or wholesalers stock particular lines based on their forecasting, but then decide not to take the product after all, leaving the grower and/or wholesaler to carry the loss.” – fresh produce wholesaler

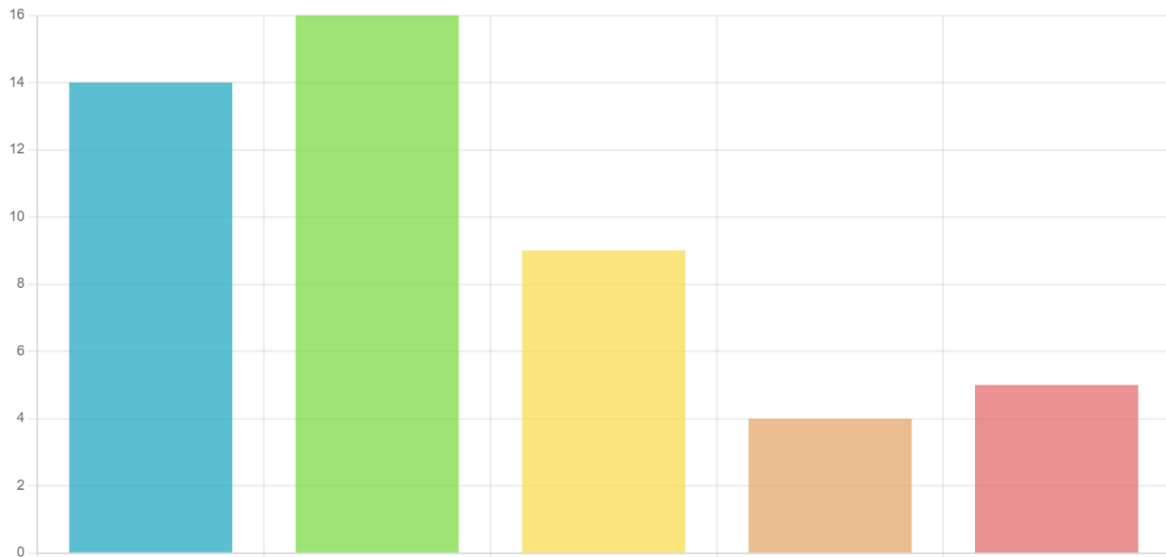
Virtually all our survey participants have experienced some form of unfair trading practice. Most commonly, it involves a buyer – often a supermarket – agreeing to a set price but then taking their business elsewhere when a better price can be secured with another supplier. The original wholesaler is left out of pocket sometimes to the tune of tens of thousands of dollars not only in product that now has no buyer but sometimes in specific packaging required by the retailer that cannot be used for other buyers and cannot be disposed of in general waste.

Similarly, sellers are left hanging when a purchaser commits to buy a certain volume then either reduces the order or does not order at all. In some cases, they are able to cut off a supplier by simply not ordering, without having to exit or breach a contract.

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Have you ever experienced any of these situations?



67%

someone committed to buy a certain quantity of product, but then did not

76%

someone agreed to a particular price, but then said they had found better prices and either asked you to lower your price or bought elsewhere

43%

someone you had a commercial agreement with went around you to deal directly with a grower

19%

your contract partner just stopped buying from you, without technically ending the contract

24%

Something else you would consider unfair business practice or unfair commercial practice

Growers are not immune, either. This [recent article](#) references a farmer walking away from a zucchini crop because inflated supermarket prices put the produce out of reach for consumers, who can't afford to buy it. His only other option to gain a financial return is to flood the central market, increasing supply and thus reducing the product's sales price. This increases the grower's risk of making a loss because his pricing may not cover his fixed input costs including fuel, transport and wages. This grower, a former wholesaler, would also know that flooding the market would financially squeeze other wholesalers and growers selling the same product at the same time.

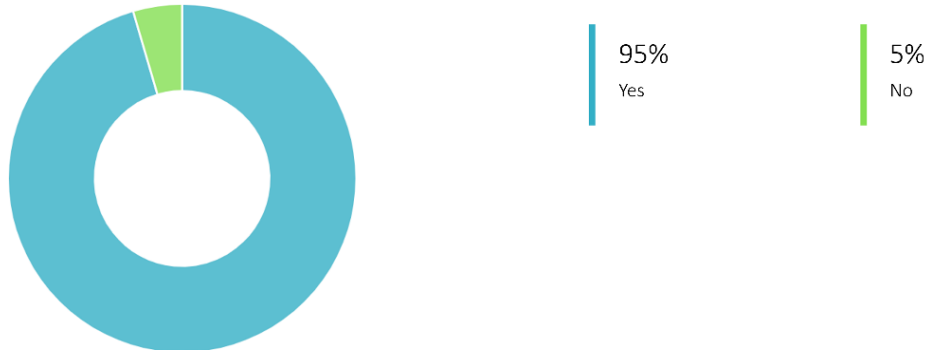
Unfair practices are difficult to address

Almost every surveyed member has heard of instances of unfair business practices – some note that this included unfair practices within the markets environment but by and large they see these practices perpetuated by buyers who have the scope and scale to exert power.

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Are you aware of such practices impacting other businesses in the fresh produce sector?

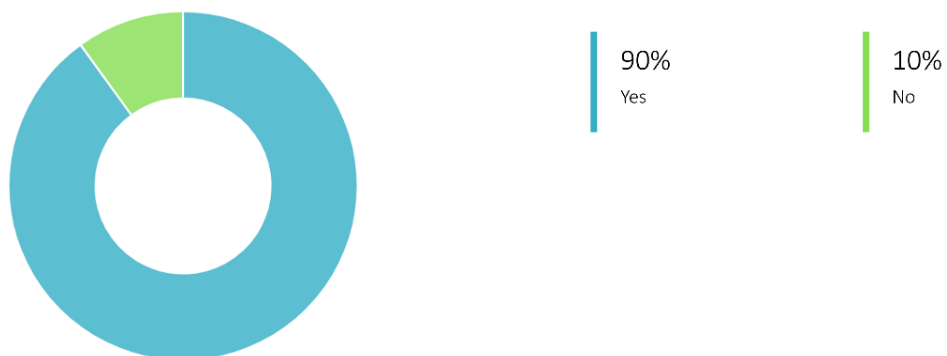


Many members say they fear speaking up about unfair practices

“We fear retribution if we were to complain”

– fresh produce wholesaler

Do you think there are power imbalances across the fresh produce supply chain?



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“The supermarkets have more power and want to control the market. We had to give our cucumbers to Food Bank or they would have had to be thrown out.”

– fresh produce wholesaler

While imbalances are broadly acknowledged, not everyone believes they can or should be addressed.

“We have had buyers brush past us and move onto the next person. There are lots of options so the power is sitting with buyer. We accept that’s the way it is. If (product) scarcity exists then we get more power.”

The consumer is always the ultimate loser

As noted above, the impact for the consumer is concerning. This is because without resolution, power imbalances enable unfair practices that threaten the commercial viability of the markets system. In the worst case scenario:

- The markets system could collapse, removing an important competitive pillar from the fresh produce sector, with price implications for consumers
- Access to fresh fruit and vegetables could be compromised.

While large retailers have other levers they could pull to help maintain lower fresh produce prices (across other non-essential grocery lines, for instance) the supermarket price for fresh produce remains volatile, suggesting that retailers do not always recognise their social responsibility around providing access to fresh produce.

“Every notch that the bar is raised by supermarkets, it increases the cost of production, and that formula is never made apparent to the consumer or the market.”

It bears reiterating that without the independent produce sector, food security in Australia is under genuine threat. Many in the sector feel the future is very uncertain and far from assured, including wholesalers, growers and independent retailers.

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“We are fighting for our survival.”

The central markets system supports access to affordable fresh food by:

- Providing a sales channel that is over, under or outside supermarket spec
- Providing a sales channel for overproduction, allowing growers to recoup some sunk costs
- Filling the shelves of providores and independent grocers
- Creating alternative options for consumers, outside the supermarket framework

“There are different rules for chain stores vs retailers.
It’s very unfair.”

“Soon there will be no small wholesalers left.”

The challenge is real but the solution is complicated

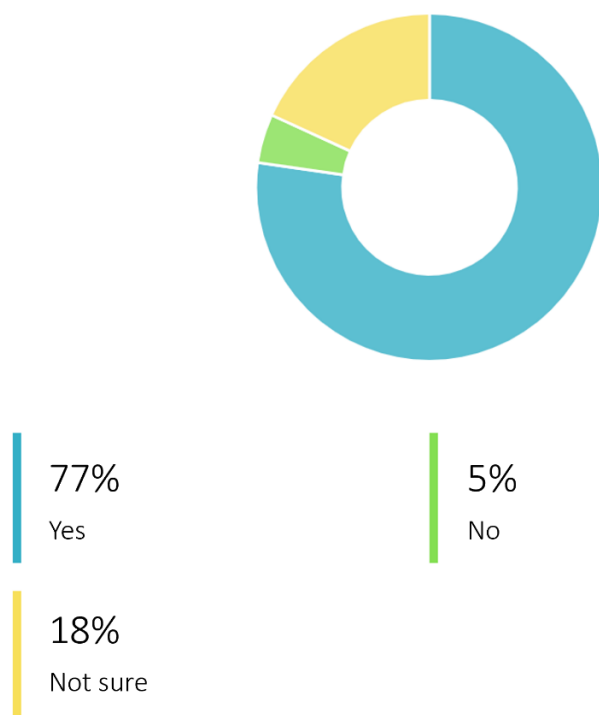
Freshmark does not have a view on the best way forward, including whether a general prohibition on unfair trading would be useful.

In our survey, 74 per cent of respondents said the issue of unfair trading practices has a significant or major impact on the industry. However, the sector is already faced with an uneven playing field when it comes to regulation, and our members are very concerned about the financial impacts of any new compliance requirements.

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Are you concerned about the cost of compliance if additional unfair trading practice legislation was put in place?



“If it’s going to be an unregulated market, it should be unregulated for everyone. Less regulation will create opportunity for independents to be able to compete.”

What we seek

We ask that in determining next steps, due consideration be given to:

- whether a general unfair practices prohibition could actually address the challenges outlined in this submission
- where the cost burden of compliance with any new legislation should and would sit
- whether any legislation would stretch to cover the many verbal contracts in play in our sector
- how any proposed changes can help ensure a more level playing field, including the creation of an avenue through which businesses can take action in relation to unfair business practices without fear of retribution.

Ultimately, we seek a system that provides education and guidance around what constitutes unfair business practice and how to address it, and creates a voice in legislation for those parties which are almost always on the wrong side of the balance-of-power equation.

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