



# Food and Grocery Code Review

February 2024

# Freshmark

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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.

This submission represents the specific views of Freshmark and reflects our policy positions and the input of our members and industry stakeholders in NSW. Freshmark has also contributed to and broadly supports a submission developed by Fresh Markets Australia, our national industry body.

**Freshmark**  
**Food and Grocery Code Review**

## **Introduction**

Freshmark welcomes the opportunity to provide a submission to the independent review of the Food and Grocery Code.

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. Compliance and red tape are among the biggest challenges our members and our industry face, and one of the sector's biggest bugbears is that the codes under which supermarkets and other fresh produce industry participants operate are not equivalent in terms of the responsibilities they confer, the protections they offer or the deterrents they provide for breaches.

### **Our broad position is that**

a sound regulatory framework is one that is fair, properly matched to the needs of the sector it serves and the businesses in that sector, and adequately resourced for enforcement when necessary.

We welcome the opportunity for this review to consider how the Food and Grocery Code can help foster a collaborative industry which is well-supported to ensure food security. With [37% of produce growers](#) reportedly considering leaving the sector in the next few years, we are at a critical juncture. Getting the regulatory settings right is essential to the future of the fresh produce sector and to ensuring all Australians can access fresh fruit and vegetables.

## Regulatory and other context

### *Fresh produce means greater vulnerability*

Our members deal in products that are perishable. If an order is cancelled or rejected, produce cannot be returned to the warehouse until a new deal is done – its value diminishes every second it is sitting on a delivery dock, and a new sales channel must be urgently found. This means businesses in the fresh produce supply chain are especially vulnerable to unfair practices.

### *The differing codes*

Wholesalers in the fresh produce sector are bound by the mandatory Horticulture Code of Conduct prescribed under the Competition and Consumer Act 2010 (CCA). The mandatory Horticulture Code of Conduct provides significant protection to growers who sell their produce via a wholesaler. However, this code does not apply to retailers, including supermarkets, who are covered by the Food and Grocery Code, nor to exporters or processors, who are covered by neither code.

In many instances, wholesalers are the *buyers* for primary producers and also *suppliers/sellers* to supermarkets. Those supplier transactions fall under the voluntary Food and Grocery Code, although wholesale suppliers are typically not provided with the same level of reporting which supermarkets are required to provide other suppliers (i.e. direct grower sellers).

### *One code*

Overall, Freshmark would like to see one code which applies to the whole of the fresh produce sector, including processors and exporters (with exemptions for small independent retailers) so that all sector participants are covered by a single, scalable compliance scheme, properly resourced and independently overseen.

While it is our hope that the two current codes may be harmonised in future, we have assumed for the purposes of this submission that both codes will be retained. Our insights and recommendations reflect this assumption.

## Freshmark Food and Grocery Code Review

Freshmark has addressed a number of the questions put forward in the consultation paper.

### **1. Do we need the Food and Grocery Code and should it be mandatory?**

Freshmark believes in fair and appropriate regulation.

As a voluntary code, the Food and Grocery Code has limited capacity to ensure true fairness in the sector. Major supermarkets enjoy a far more powerful position than other supply chain participants, providing them with potential to dictate terms to suppliers, outside the provisions and the spirit of the code, and enforcement is poor and penalties insufficient.

The Food and Grocery Code requires revision to help address the inconsistent application of compliance burden across the fresh produce sector, and it must be made mandatory.

### **2. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?**

The Food and Grocery Code does not operate effectively alongside the Horticulture Code of Conduct.

There are incompatibilities between the two codes that mean those businesses which meet the fresh produce requirements under the Food and Grocery Code do not automatically fulfill their obligations under the Horticulture Code of Conduct and vice versa. In addition, the degree of accountability is very different between codes.

This not only adds considerably to the compliance burden in the industry, it engenders a deep sense of unfairness, given the much higher thresholds of accountability under the Horticulture Code of Conduct.

Additionally, the Food and Grocery Code is very broad, in line with the wide product range on offer in supermarkets, but this means it currently does not adequately recognise some of the complexities inherent in the fresh fruit and vegetable sector, including seasonality and perishability. The fresh produce sector is volatile in a way that many other supermarket lines are not.

At a minimum, the two codes should be consistent and fit-for-purpose. This may require the inclusion of a specific section on fresh produce within the Food and Grocery Code.

### **3. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?**

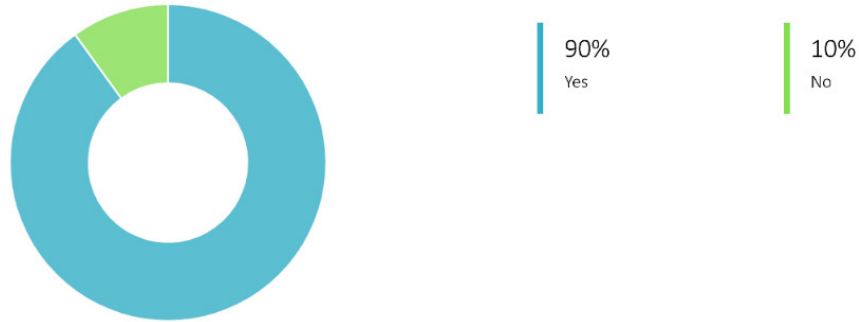
There must be an adequately-resourced, independent, centralised complaints process for the fresh produce sector. The Food and Grocery Code in its current form does not provide this.

It has limited enforcement measures and there is a (perceived) lack of independence around dispute resolution. A system which relies on arbiters appointed by the supermarkets themselves is unacceptable, and the low number of complaints lodged through the current system demonstrates that it does not work. Those in the fresh produce sector, in particular, need a rapid and robust dispute resolution system. The perishable nature of their product means they cannot wait through a protracted process, especially where they have little faith there will be a fair outcome.

# Freshmark Food and Grocery Code Review

Freshmark recently asked members whether they believed there was a power imbalance in favour of supermarkets, and whether they felt they were able to raise issues with supermarkets. The results are compelling:

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



Many of our members say they have either directly experienced or are aware of instances where supermarkets have ended or altered commercial arrangements on spurious grounds.

**“We fear retribution if we were to complain”**  
– fresh produce wholesaler

The following graphic outlines some of the most common experiences:

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

# Freshmark

## Food and Grocery Code Review

### 3.1 Why an Ombudsman should be appointed

Freshmark notes that the fresh produce sector has previously had an ombudsman; the [Produce and Grocery Industry Ombudsman](#). We advocate the reinstatement of an ombudsman, funded by Government, who can offer privacy for complainants and appropriate transparent reporting via the ACCC. A fresh produce ombudsman could potentially be appointed to address issues relating to both the Food and Grocery Code and the Horticulture Code of Conduct. This approach would create a single line of sight across the sector, as well as simplifying the complaints procedure for growers, who are currently expected to work within two different codes.

We recommend that the Ombudsman be empowered to review and assess complaints and where complaints are substantiated, to pass them to the ACCC for further action. Our view is that the ACCC should employ mechanisms of coaching and guidance, moving to enforcement only as a last resort.

In the alternative, and as a minimum, Freshmark would support a robust arbiter code of conduct that would ensure arbiters are independent and can guarantee confidentiality for vulnerable complainants.

Whatever shape the revised disputes resolution process takes – whether that be regulation of arbiters, introduction of an ombudsman or something else – consideration must be given to the cost and compliance burden that comes with it.

### 4. Should civil penalties be available for breaches of the Code?

Freshmark endorses calls for civil pecuniary penalty provisions based on a supermarket's turnover or linked to their percentage of market share.

Penalties must be scalable in order to carry sufficient deterrent value. The maximum penalty under the Horticulture Code of Conduct would provide very little disincentive to a multi-billion-dollar corporation.

Penalties must be:

- Sufficient to act as a genuine deterrent to poor corporate behaviour
- Applied to wilful acts of poor behaviour, with room for other kinds of redress around genuine accidental or unavoidable breaches (for example, when the action or inaction of a third party makes it impossible to comply)
- Supported by a properly resourced industry watchdog.

In addition to endorsing appropriate corporate penalties, Freshmark believes individuals must also be held to account for behaviour that causes or contributes to a breach of the code.

We would also like to see a focus on encouraging corporate cultures of compliance and recognising this as a corporate responsibility. Companies covered by the code must disincentivise poor behaviour.

The recent [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) found that in that sector, poor behaviour was incentivised by bonus and commission schemes which focused on sales and targets, not on compliance with conduct standards. Freshmark submits that there are strong parallels in the fresh produce sector, with the current Food and Grocery Code structured to enable such poor behaviours.

## Freshmark Food and Grocery Code Review

For example, under sections 17 and 18 of the code, supermarkets are prohibited from requiring additional payments from their suppliers. However, those prohibitions can be overridden by direct contract terms.

It is common practice in the sector for supermarkets to charge 'paybacks', which require wholesalers to provide a rebate on sales prices. Because the supermarkets have such massive buying power, wholesalers feel they have no option other than to agree to such contractual clauses, which are not only unfair but inconsistent from one wholesaler supplier to the next.

### **5. Is the coverage of the code to the current signatories sufficient to address bargaining power issues across the supply chain?**

The three major supermarket chains currently account for 75% of fresh produce sales in Australia. It is critical that our independent retailer sector is viable and sustainable to ensure consumer choice and competition.

We support the adoption of a mandatory Food and Grocery Code but note that an increased compliance burden on small retailers has the potential to drive them out of business, in turn limiting competition and consumer choice.

The Food and Grocery Code must:

- Exclude small independent retailers (see below)
- Exclude wholesalers in their capacity as *buyers* of produce (as these relationships are already covered by the Horticulture Code of Conduct)
- Include wholesalers in their capacity as *suppliers* of produce, affording them the same rights and protections as other sellers, primarily produce growers. Supermarkets are currently required under the Food and Grocery Code to share price reporting with the suppliers of their fresh produce, but this is generally interpreted to mean they must report to growers. However, wholesalers also sell produce to supermarkets. Wholesalers are compelled to provide price reporting to their suppliers; so too should supermarkets be compelled to provide transparent reporting to wholesalers.
- Include processors and exporters, who are currently outside both the Food and Grocery Code and the Horticulture Code of Conduct

#### **5.1 Threshold for inclusion under a mandatory code**

If Australia is to maintain a robust, vibrant, competitive sector with real consumer choice, protecting the viability of the independent retail sector is paramount. Great care must be taken to ensure the burden of compliance is not out of step with the size of the business.

We propose that parameters for inclusion under the scope of the Food and Grocery Code be based on factors like market share, turnover and number of store locations/sites. The thresholds around these factors need evaluation by regulators to ensure that both large and mid-tier supermarkets are covered by the Code while exempting operators at the smallest end of the market.



## **What we'd like to see**

We recognise that regulation is a necessary part of doing business, and critical to ensuring consumers and other supply chain participants are treated fairly. Ultimately, we seek an approach to regulation which is fair, reasonable, and reflects the critical nature of what our members do. With this in mind, we call for:

- The Food and Grocery Code to be made mandatory
- The Food and Grocery Code to include processors and exporters and for thresholds to be set around the inclusion of smaller retailers to ensure the sector can remain sustainable and provide consumer choice
- Inclusion of new provisions in the Food and Grocery Code recognising factors which are unique to the fresh produce sector, including seasonality and perishability
- Supermarkets to be compelled to report to all of their supplier partners; wholesalers as well as growers
- Exclusion of the wholesaler as a buyer of produce from the Food and Grocery Code. This business activity is already covered by the Horticulture Code of Conduct
- An independent complaints process to be implemented, ideally in the form of an ombudsman that enables complaints to be put forward without fear of retribution from commercial partners with whom there is a great power imbalance. This process must operate at minimal to no cost to complainants and include public reporting of outcomes while protecting privacy of complainants
- Development of scalable and right-sized penalties that match the scope and scale of businesses found to have breached the code
- Individuals found to have breached the code to be held to account
- Ensure the Food and Grocery Code be made consistent with the Horticulture Code of Conduct, particularly with regard to food safety requirements, such that businesses which meet the requirements under the Horticulture Code of Conduct be deemed to have also met the requirements of the Food and Grocery Code.