



**Submission to  
ACCC Supermarkets Inquiry**

**April 2024**

Freshmark  
ACCC Supermarkets Inquiry

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**Freshmark**  
**ACCC Supermarkets Inquiry**

**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 broadly supports a submission developed by Fresh Markets Australia, our national industry body.

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

**Meegan George**  
**Chief Executive Officer**  
**Freshmark**



**Steve Barnes**  
**Chair, Industry Advocacy Committee**  
**Freshmark**



# Freshmark

## ACCC Supermarkets Inquiry

### Introduction

The three major supermarket chains currently account for 75% of fresh produce sales in Australia. Small retailers and independent grocers offer some competition to the large chains, and the central markets system is critical in maintaining this framework, but the supermarkets carry a disproportionate share of market power which impacts the competitive capacity of the rest of the sector.

It is critical that those retailers outside the major supermarket chain's structure, are viable and sustainable to ensure consumer choice and competition.

### Market structure

There are multiple pathways to market for fresh produce, including:

- Farmers' markets and other direct-to-public sales models, which represent a tiny proportion of the segment
- Via providores and the food processor/food service sector
- Through import/export channels into supermarkets and other retailers
- Direct grower engagement with supermarket chains
- Wholesaler supply to smaller chains, independent grocers and other non-major supermarket retailers
- Three types of engagement with supermarket chains via a wholesaler:
  - The wholesaler has a supplier agreement with a major supermarket. The wholesaler receives produce from the grower at the central markets and it is dispatched to the supermarket distribution centre.
  - The wholesaler has a supplier agreement with a major supermarket and the grower transports produce direct to the supermarket distribution centre. This option is often utilised when the entire shipment is going to the supermarket, to reduce on-costs associated with receiving into and dispatching out of the central markets.
  - The wholesaler has a supplier relationship with a supermarket and sells to other suppliers to help them fill their supermarket orders.

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Where a grower sells produce via a wholesaler, reasons may include:

- The grower is unable to or uninterested in securing a vendor number with a supermarket chain. In some cases, this is because the grower's operation is smaller than those typically preferred by the supermarkets. By selling via the wholesaler/markets system, growers have the option to maintain a smaller, often family-run operation.
- The grower produces lines not well-matched with supermarket product preferences. This may include highly specialised, boutique products.
- To provide produce that meets the short lead time needs of providers, food service or the export market.

It is important to recognise that the central markets have a critical role to play in supplying produce to all parts of the produce retail sector, and in ensuring that all growers have an opportunity sell their product and cover their production costs.

### Industry regulation

We support appropriate regulation 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.

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).

There is a strong need for an appropriate complaints and enforcement system in the fresh produce supply chain. Freshmark notes that the fresh produce sector has previously had an ombudsman; the [Produce and Grocery Industry Ombudsman](#). We advocate for 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

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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 the application of the mediation process articulated under *Parts 5 - Resolving Disputes* of the Horticulture Code of Conduct to other participants in the supply chain. We seek greater transparency regarding the number and nature of the disputes and frequency of referrals to mediators to ensure a transparent fair and effective system. We would also support more detailed guides to increase understanding of the process and its application.

### **Barriers to entry**

ACCC seeks to assess a number of factors which may be barriers for competitors seeking to enter the Australian supermarket sector, including the ability for retailers to secure wholesale supply.

In terms of accessing fresh produce, Freshmark is of the strong view that supply is no barrier. If anything, there is an oversupply in many produce lines. We would welcome and can readily accommodate growth in the retail fresh produce sector with the volume of produce already grown.

The central market in Sydney has extensive capacity and would be well-positioned to comfortably increase the volume of product transacted through the system.

To that end, we note:

- The capacity of the markets system is not stretched.
- The Sydney markets currently operate five days per week but could expand to six- or seven-day operation if there was additional demand.
- The markets have already demonstrated their ability to provide continuous supply in challenging circumstances, operating every single day throughout Covid to maintain supply to customers in the non-major chain retail sector.
- The markets trade in a far greater range of fruits and vegetables than the major supermarkets, which have very narrow specs and limited shelf space for uncommon product types. We take a grower's entire crop load and can offer products at variable pricing levels to suit a wider range of retailers and consumers while also helping ensure growers are able to generate a return on their entire harvest.

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While Freshmark is a NSW organisation based around the Sydney markets, the fresh produce sector is a vast network with a national and global footprint. Markets across Australia have a collaborative and cooperative approach which means produce from other states can be secured to fill any gaps in local supply.

In addition, we note that in terms of competition, growers have the choice of sending their produce to five different central markets, accessing thousands of potential customers. This is particularly important down the eastern seaboard where there are many growers who have access to three central markets. Transport costs do become a barrier in some instances but nonetheless the value of a broad central markets system is clear.

### **Contracting practices and other trading arrangements**

Supermarkets tend to buy fresh produce on an agreed price model. On the surface, this would appear to favour best-price outcomes for consumers and competitiveness across the fresh produce sector.

However, in practice, there are several issues with this approach to pricing, including:

- Agreed pricing does not always reflect true pricing because of the rebates/paybacks. Under Sections 17 and 18 of the Food and Grocery Code, supermarkets are prohibited from requiring additional payments from their suppliers. However, those prohibitions can be overridden by direct contract terms. Because the supermarkets have such massive buying power, wholesalers feel they have no option other than to agree to such contractual clauses.
- Paybacks require wholesalers to provide a rebate on sales prices, around which there is very little transparency.

These scenarios can make it difficult for wholesalers to do business as their margins are squeezed, because the true sales price is distorted. The potential flow on effect is the loss of a vibrant wholesale sector, leaving growers with no realistic option but to sell produce to the supermarket chains, which in turn would severely impact the independent retailer sector.

### *Other contract/trading issues*

Supermarkets are able to change order volumes or reject orders outright. We acknowledge that buyers (supermarkets) should have the right to reject produce which does not meet specifications, but in practice, many suppliers believe the rules are easily bent, particularly when the retailer finds they have over-ordered, or they have found a better price.

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Supply chain participants including growers and wholesalers have limited capacity to insist on a competitive supermarket environment because the perishable nature of fresh produce leaves them with little power to influence competitive practice.

The vast majority of trading arrangements within the supermarket environment come in the form of manufactured (largely branded) goods. These companies are able to negotiate annual trading terms inclusive of pricing (RRP), total trade spend (TTS) for promotional discounting activity as well as bolstering external advertising support (media and marketing) and spend through supermarket loyalty programs. These manufacturing companies also have a final tactic in order to have some weight in the negotiation: the ability to withhold product if terms are not agreed to.

None of these levers are available to fresh produce suppliers. Fresh produce suppliers have less equality in the negotiation with supermarkets and are truly at the mercy of supermarket buyers.

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.

Even when rejection rules are applied fairly, two issues emerge:

1. Suppliers have to either discard produce or find a new buyer for their product, often at lower cost because the product has deteriorated while sitting on a dock. This impacts the supplier's business and in turn wider competitiveness in the sector.
2. Often the central markets system is the place where rejected produce comes for re-sale. This is an important and critical mechanism which can allow growers and suppliers to recoup some of their costs, but it can also have a detrimental impact on pricing when a large volume of a single product line (for example, an entire shipment of zucchinis or apples) is suddenly pushed into the market system. Again, this may offer short-term consumer benefits as prices plummet, but it impacts sector sustainability and therefore competition.

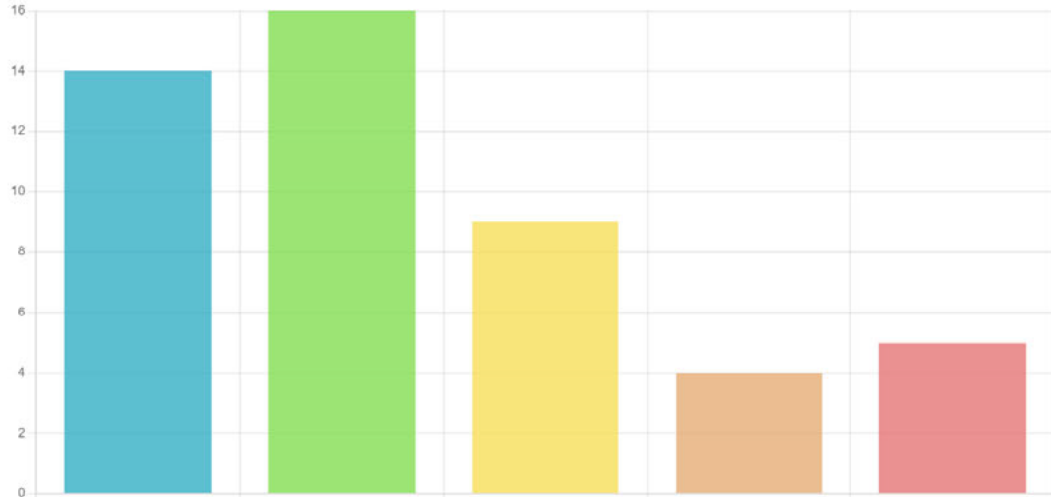
Virtually all respondents in a recent survey of market participants have experienced some form of unfair trading practice. Most commonly, it involves a buyer – often a supermarket – agreeing to a set price but then taking their business elsewhere when a better price can be secured with another supplier. 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.



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Similarly, sellers have sometimes found that 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.

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%

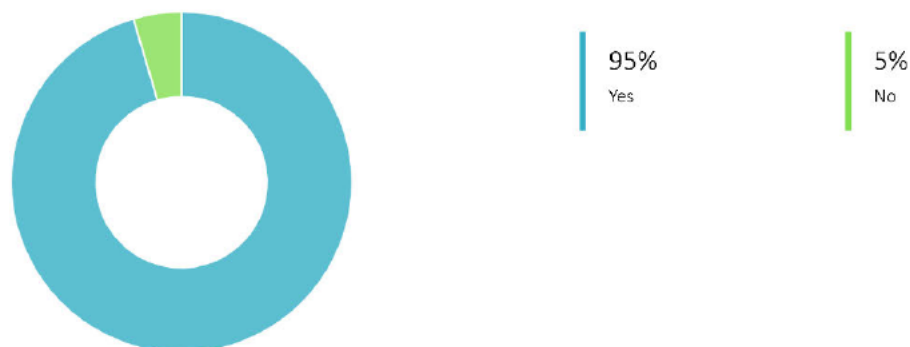
Something else you would consider unfair business practice or unfair commercial practice

### *Unfair practices are difficult to address*

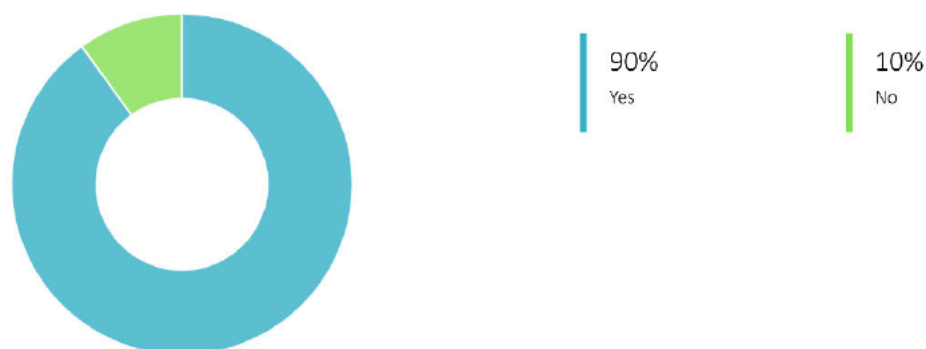
Almost every surveyed member has heard of instances of unfair business practices – some note that this included unfair practices within the markets environment but by and large they see these practices perpetuated by buyers who have the scope and scale to exert power.

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



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



### *General terms – quality thresholds*

Major supermarkets typically have very specific requirements around product grade and size.

The markets system, on the other hand, can almost always find a buyer for produce, and in addition, offers a greater diversification of product grades to enable growers to be appropriately remunerated and for consumers to have greater say in the type of produce they purchase.

Supermarkets will typically allocate fruit, for instance, to one of two categories, if accepted: juice or Price Look Up (PLU) grade. Market wholesalers will sell four grades of product from the same bin on fruit: premium, general, composite and juicing. These additional layers of grading allow growers who have invested in premium varieties to be rewarded as well as ensuring there is a buyer for products at lower grades, which in turn is critical to the competitiveness and sustainability of the sector.

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### *Private label and boutique products*

Almost all fruit and vegetable products on the supermarket shelf is a generic PLU product, with some exceptions for lines like broccolini, some snacking tomato varieties and specialty apples like Kazi or Jazz.

A Batlow pink lady apple, which comes with 100 years of brand legacy, is simply a pink lady in the chain supermarkets, whereas it might be a branded, premium, higher-priced product from a specialty grocer. The markets enable this kind of differentiation and product competition, in addition to trading in a large range of fruit and vegetable products that are almost unheard of in a chain supermarket, like hybrid varieties and more niche lines. Ensuring there is room for exclusive products is an important element in competitive practice. The supermarkets do not reflect the entirety of the fresh produce industry, but the central markets do.

### **Margins and price transparency**

#### *Reporting*

There is a distinct lack of price transparency from the supermarkets which makes it very difficult to assess profit margins for specific products. Wholesalers are required under the Horticulture Code of Conduct to share price reporting with growers. Likewise, 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 only to growers. However, wholesalers also sell produce to supermarkets. There is a need for accurate and transparent reporting across the entire supply chain in order to understand what supermarkets are paying for produce and what they are selling it for.

#### *Price movements*

Sydney Markets respond to price fluctuations in real time. For example, if tomatoes are in strong supply, prices fall, and that change is reflected immediately on the market floor. Independent and smaller retailers are generally able to respond rapidly to market price changes, while the major chains can be slower to adjust prices.

It is important to note that the chains also have a strong impact on pricing at the markets. If a large consignment is rejected by a supermarket, it very often ends up at the central markets for re-sale. Often, because the goods are perishable and some shelf life has been lost by the time it arrives, the goods are downgraded. This drives down prices for the entire product line on that day. Wholesalers always have the right to reject product, but in practice this virtually never happens, as we recognise our critical role in reducing food waste and maximising returns for growers, so we will almost always find a sale for whatever produce comes into the markets.

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### Ability to respond to shocks

Throughout the Covid-19 shutdowns, Sydney's central markets operated every day, without disruption, and in fact moved more produce than usual.

While the complexities of the chain supermarkets' distribution centre structure meant they were not able to pivot to meet the challenges of Covid, the central markets honoured contracts and kept product on the shelves of independent and smaller retailers.

Maintaining a competitive environment with alternatives to the major chain supermarkets is critical for food security in Australia.

### Conclusion and asks

To enhance competition in the fresh produce sector, Freshmark proposes the following measures for consideration:

#### *Consistent regulatory framework*

- Establish a uniform regulatory framework that applies to all participants across the supply chain. This consistency will promote fair competition and create a level playing field.

#### *Independent complaints process*

- Reinstatement of an ombudsman, funded by Government and with a single line of sight across the sector, who can offer privacy for complainants and appropriate transparent reporting via the ACCC.

#### *Openness to new entrants*

- Foster an environment that encourages new players to enter the sector ensuring choice and affordability of fresh produce to all buyers across the supply chain. The Sydney market has experience and available capacity to service this demand and growth.

#### *Recognition and support for the central markets system*

- Recommendations by the ACCC to support the continued sustainability of the central market system given its:
  - Vital role in transacting 'whole of crop' produce for the growers,
  - Ability to offer private label and boutique products to bolster product differentiation for independent retailers and consumer choice; and
  - Resilience to shocks (e.g. COVID, severe weather events) that can impact availability of fresh produce to major retailers and ultimately consumers.