



Food and Grocery Code Review Response to Interim Report

April 2024

Freshmark
Food and Grocery Code Review

Table of Contents

About Freshmark 3

Introduction 4

General remarks – firm and draft recommendations 5

Consultation questions 6

Conclusion and asks 12

Freshmark
Food and Grocery Code Review

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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Freshmark
Food and Grocery Code Review

Introduction

Freshmark welcomes the opportunity to respond to the Interim Report of the review of the Food and Grocery Code. As the representative body for the fresh produce sector in NSW, including independent retailers, primary wholesalers and secondary wholesalers (providores) as well as businesses across other parts of the supply chain, we are very keen to see fair and appropriate regulation of the supermarket sector.

Our members and stakeholders report that, unfortunately, supermarket behaviour has not improved under recent scrutiny. Retailers pursue suppliers with endless surveys and requests for feedback, but our members have seen no positive change in response. The view within industry is very much that supermarkets are still not listening, so this review process is incredibly important, and we appreciate the opportunity to participate.

It is critical that those retailers outside the major supermarket chain's structure are viable and sustainable to ensure consumer choice and competition. 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 to sell their product and cover their production costs. The impact of the Food and Grocery Code extends well beyond the supermarket checkout.

General remarks – firm and draft recommendations

We welcome the firm recommendations of the interim report and note that they align with our original submission.

We agree with draft recommendations 9 and 11 and hope to see both adopted into the final report. With regard to draft recommendation 7, which addresses dispute resolution processes, we reiterate our very strong view that the process must be independent, and we express concern about the second option listed in recommendation 7, which references supermarket-appointed code regulators.

We maintain our view that an industry ombudsman with a remit across both the Food and Grocery Code and the Horticulture Code of Conduct would be the best solution to ensuring independent, fair, confidential conflict resolution in which our members and other stakeholders could have confidence, particularly in relation to the avoidance of retributive action from supermarkets in response to complaints.

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 Grocery Code and the Horticulture Code of Conduct.

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.

Consultation questions

We offer the following responses to select consultation questions where we believe we can offer valuable and relevant insights. Note we have submitted a combined response to questions 9 and 11.

4. Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

As outlined in our comments on draft recommendation 7 above, it remains our view that a fresh produce ombudsman would provide the best outcomes for industry. 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.

8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.

Once fresh produce is harvested, a clock begins ticking. This is true of all fresh produce but is especially the case for 'soft' produce like berries and green leafy vegetables, which has a product lifespan of just days.

Freshmark Food and Grocery Code Review

While Freshmark accepts that supermarkets are entitled to reject produce consignments which do not meet spec, there is an urgent need to reconsider the rejection process. Redirecting rejected produce from a supermarket distribution centre (DC) to a central market for resale is not a quick or simple matter.

The following issues apply:

- Produce is typically packaged in supermarket branding. It must be de-labelled and often re-boxed or re-bagged before it can be sold through the markets. The unusable packaging must be disposed of at the supplier's expense.
- Stock is held up in DCs, sometimes for days. The value of the produce declines with every passing hour, and at the same time, the supplier is paying for equipment including hired pallets which cannot be returned until they are released from the DC. It is typical for a wholesaler to spend upwards of \$100,000 per year on pallet hire.
- Stock is stored improperly. Produce that requires four degree refrigeration is often left in the heat. Produce that requires a 12 degree environment is often damaged in chillers. Pallets and crates are rammed or dropped.
- Timely collection is difficult. Supplier transporters are often stuck for hours waiting to access produce, and the supplier is billed for their wasted time. Sometimes transporters find their drivers having to operate illegally, outside their maximum hours, because they are waiting in the DC for up to 10 hours.
- Stock is frequently lost for hours or days
- The application of rejection criteria is inconsistent. Sometimes produce from the same supply batch is sent to two different DCs. One will accept it, one will reject it.

Freshmark Food and Grocery Code Review

- There is very limited opportunity to appeal a rejection. Most DCs will no longer offer conditional acceptance and review by a technical expert is either unavailable or so untimely as to be virtually pointless.

Example

One wholesale supplier reports that a delivery of tropical produce was rejected by a supermarket DC in Victoria. An eventual review by a technical manager found no valid explanation for the rejection. By the time this review was completed, the produce had been at the DC for three days. The initial agreed price to the supermarket was \$28 per box. The aged product could only be sold at the central markets for \$5 per box.

At the same time as the product price was dropping due to perishability, the supplier was continuing to pay for equipment use and hire – indeed, this often becomes the bigger liability than the value of the produce. The supplier also had to de-crate, de-box and re-package the product, which had been originally supplied in supermarket specified packaging, adding labour and disposal costs to the process and creating significant packaging waste.

What we need under the code:

- A timely right of appeal, with an inspection by a technical manager within the same shift during which the delivery is made.
- Responsibility for the appropriate storage of produce to rest with the supermarket until such time as the supplier can remove it from the DC. This includes safe handling and appropriate temperature storage.
- Enforceable return timeslots so that suppliers are not running up costs with transporters and pallet/crate hire partners while produce is stuck at the DC.

Freshmark Food and Grocery Code Review

- The opportunity for rejected produce to be considered for inclusion in supermarkets' imperfect produce range.

9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?

11. What other recommended protections in respect of contracted prices and volumes are appropriate? Provide details to support your views.

Supermarkets are able to change order volumes or cancel orders entirely and are also known to forecast increased demand for produce which they don't then go on to buy. These practices leave growers and suppliers to carry the liability of (variously) producing, packaging, transporting, and finding new buyers for produce. The central markets system is well positioned to help producers manage product overage and therefore limit wastage, but cost recovery is an issue – when produce initially bound for a supermarket is instead redirected via the markets, it is almost always sold at a lower price than originally anticipated and can also drag down prices available for other producers already selling through the markets. It is worth noting as a point of interest, also, that supermarkets offer suppliers the option of 'donating' rejected produce to food recycling programs like OzHarvest, which does reduce waste but again does nothing to limit financial losses, and as an added sting, supermarkets then lay claim to these donations which actually come at the expense of the supplier.

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

Freshmark Food and Grocery Code Review

ability to withhold product if terms are not agreed to. None of these levers are available to fresh produce suppliers.

In addition, suppliers carry liability in relation to a large number of supermarket requirements which equate to sunk costs when an order is rejected, reduced or cancelled. These include:

- Bespoke packaging required by supermarkets
- Extensive transport logistics requirements: using specified vehicle types to suit the DC environment, set pallet heights and layouts that mean trailer space is not fully or efficiently utilised, multi-step labelling of trays, containers, pallets to supermarket specifications.

Example

Suppliers are required to cover freight cost to supermarket distribution centres, at a cost of approximately \$200 per space. When produce is rejected, there is an additional \$100-\$200 freight cost. The supplier, often without their own warehousing facilities, may then need to hire a third-party space to de-crate, de-bag and re-pack produce in a format suitable for sale at the markets, then pay for transport once again. The final sale price is typically less than 30% of original value.

What we need under the code:

- A methodology that recognises the additional costs to the supplier of providing produce to the supermarkets, which range from having to use specified vehicle types to suit the DC capabilities, to meeting specific pallet stacking heights, labelling and branding requirements and waiting times.
- Clearer ordering processes and better resolution of complaints around order rejection, reduction or cancellation.

Freshmark
Food and Grocery Code Review

10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

Agreed pricing does not always reflect true pricing because of rebates/paybacks, which are essentially volume discounts which typically range from 2% to 5%.

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. There is very little transparency around these rebates and paybacks.

What we need under the code:

At the very minimum, reporting around price paid to the supplier should be made publicly available. In addition, supermarkets should be required to report sale price data to wholesalers, not just to direct grower suppliers.

13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.

Unfair practices relating to seasonal supply agreements are the most damaging to businesses in the fresh produce supply chain and thus Freshmark calls for the highest penalties to apply to those practices, including and especially those which encourage producers to grow crops at volume then fail to honour the agreement to buy or which drive pricing down, which in turn send risks back into the supply chain.

14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

Freshmark Food and Grocery Code Review

It is Freshmark's view that the penalty scheme for supermarkets under the Food and Grocery Code should match that of the Franchising Code of Conduct. The current maximum penalty (excluding the four categories of most egregious breach) of \$187,000 is both insufficient to act as a true disincentive for very large businesses, and much too low in comparison with the \$10 million/10% of turnover proposed for serious breaches.

We note that wholesalers are suppliers to supermarkets in this relationship and any transaction entered into with growers to purchase stock to supply to supermarkets is captured under the Horticulture Code of Conduct.

Conclusion and asks

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

Adoption of draft recommendations

- We support the adoption of draft recommendations 9 and 11. We would like to see draft recommendation 7 adjusted to ensure the complaints and dispute resolution mechanisms available under the Food and Grocery Code are independent.

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.

Protections for fresh produce suppliers and their perishable product

- The right to timely appeal when produce is rejected
- Buyer to maintain responsibility for appropriate storage of produce until such time as the supplier can remove it
- Enforceable return timeslots

Ordering practices and contracts

- Recognition of additional costs to the supplier of providing produce to the supermarkets.

Freshmark Food and Grocery Code Review

- Clearer ordering processes and better resolution of complaints around order rejection, reduction or cancellation

Price transparency

- Public reporting around price paid to the supplier, and supermarkets required to report sale price data to wholesalers, not just to direct grower suppliers.

Penalties

- Unfair practices relating to seasonal supply agreements to attract the highest penalties
- Penalty scheme to match that under the Franchising Code