



National
Farmers
Federation

Horticulture
Council

15 April 2024

Gina Cass-Gottlieb
Chair
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Via the ACCC online submissions portal

Dear Ms Cass-Gottlieb,

RE: ACCC Supermarkets inquiry 2024-25

On behalf of the NFF Horticulture Council, we welcome the opportunity to make a submission in response to the issues paper the Australian Competition and Consumer Commission (ACCC) released as part of your Supermarkets inquiry 2024-25.

While there is a strong focus on the effect of market concentration on consumer prices, there is a need to also ensure that there is a balance of market power between the retailers and their suppliers, particularly in the fresh fruit, vegetable, and nursery sector.

The horticulture sector of Australia provides 98% of Australia's fresh food and vegetables. It underpins our national food security, is one of the most sustainable food groups and is fundamental to a healthy diet. In addition, it provides almost all of Australia's plant nursery requirements.

However, due to the perishable nature of fresh fruit, vegetables, and nursery products (and limited exports), it is highly vulnerable to the power imbalance resulting from the market domination of the major retailers.

There is a need to increase the powers of the regulator to protect the horticulture sector, including:

- Expanding the breadth of review to include Bunnings
- Provide meaningful powers and resources to the ACCC to be able to do their job effectively, including document discovery powers to allow regulators to accurately monitor supermarket prices and gross margins
- Introduce measure to manage existing duopolies and monopolies,
- Create a standalone policy to protect horticulture sector, and
- Ensure supermarkets behave ethically.
- Making company Boards and CEO accountable for the unethical, coercive and manipulative behaviour of fresh produce and nursery stock buyers

Without a viable horticulture sector, long-term consumers will be exposed to higher prices, less food certainty, and less choice.

To discuss this, any of the above or the following submissions further, please be in contact with Richard Shannon, Executive Officer to the Council either by [REDACTED]

Yours sincerely,

[REDACTED]

JOLYON BURNETT

Chair

NFF Horticulture Council

Executive Summary

The Australian horticulture sector grows 98% of Australia's fresh food and vegetables. It also provides almost all of Australia's plant nursery requirements.

Due to the perishable nature of fresh fruit, vegetables, and nursery products it is highly vulnerable to the major retailers who control 65 per cent, and Bunnings with even more.

The supermarkets can set *'take it or leave it'* prices, knowing growers have almost no choice but to accept them.

This issue has been going on for decades. Growers have reported that they have not received price increases for up to 15 years.

Many growers will not speak out due to the fear of commercial retribution.

Duopolies distort the market by increasing prices paid by consumers, reducing returns to suppliers, and lowering both economic growth and employment. If the government is going to allow duopolies and monopolies to exist, there needs to be a much higher level of standards and expectations placed upon them.

The NFF Horticulture Council has made a series of recommendations to address the anti-competitive market including:

Empowering the regulator

- Expand the breadth of Review to include Bunnings.
- Increase the powers of the ACCC to be able to effectively prosecute supermarkets for anti-competitive behaviour – legislation is too restrictive and not practical.
- Dramatically increase the fines associated with anti-competitive behaviour.
- Make senior executives and board members liable for any anti-competitive behaviour.
- Introduce legislation to control duopolies and monopolies, including divestiture powers for malicious breaches.

Creating a standalone policy to protect the horticulture sector

- Introduce a 'simple to use' Class Exemption (under CCA) for the horticulture sector.
- Protect growers from commercial retribution.
- Add supplier welfare as an objective of the Australian Consumer Law
- Allow growers to brand their own produce.

Ensure the major retailers behave ethically

- Either ban or regulate rebates and fees imposed by supermarkets
- Properly monitor the buying teams and category managers
- Ensure Grocery Supply Agreements (GSAs) are meaningful.
- Remove the ability for supermarkets to make suppliers 'opt out' of otherwise prohibited contract clauses.
- Ensure ACCC has proper powers and resources to properly monitor the supermarkets, including document discovery powers to allow the ability to monitor prices and gross margins.
- Reduce incentives for supermarkets to encourage growers to oversupply.

Background

On 1 February 2024, the Treasurer, the Hon Jim Chalmers MP, directed the Australian Competition and Consumer Commission (ACCC) to hold an inquiry into pricing and competition in Australia's supermarket sector.

The Inquiry will examine competitive dynamics in the retail supply of groceries and in associated supply chains. The ACCC will have regard to how prices are set at different levels of the supply chain, and the associated margins.

The ACCC will submit an interim report to the Treasurer by 31 August 2024, and submit a final report to the Treasurer by 28 February 2025.

Recommendation: *Include Bunnings as part of this review. The issues faced by this sector are identical to the challenges faced by fruit and vegetable growers*

About the NFF Horticulture Council

The Council is the recognised peak body for forming policy and advocating on behalf of the national horticulture industry. Established in 2017, it now comprises 21 national commodity and state-based horticulture bodies, who together represent the full breadth of an incredibly diverse industry.

The efficient, transparent, and fair domestic wholesale and retail markets for horticultural products has been a core policy priority of the Council since its establishment. In late 2022, the Council created its own Competition Taskforce to develop policy and advocate in this important field.

The importance and uniqueness of the Australian Horticulture Sector

The Australian Horticulture sector that provides 98%¹ of Australia's fresh fruit and vegetables. The sector also includes nursery, turf, and flower products.

Horticulture production values are forecasted to be \$17.3 billion in 2023–24², and employees 69,697 fulltime equivalent positions.

For many regional communities across Australia, horticulture is a significant contributor in their economies, creating local jobs and demand for goods and services.

It is a sector that underpins Australia's food security but due to a specific and in some case, unique issues, is highly exposed and vulnerable to market practices of the major supermarkets.

1. Woolworths' and Coles' market share

The major supermarkets, Woolworths, Coles and ALDI, account for over 75% of industry revenue. Woolworths and Coles make up 65% of the market.³ This makes Australia one of the most concentrated retail duopolies in the world.

¹ Hort Innovation, "Australian Horticultural Statistics Handbook," 2022/23 p19 and p23

² ABARES, "Outlook for crops", <https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/outlook-crops#daff-page-main>; accessed 11 February 2024.

³ Ibid p XII

As a result, growers highly reliant on two key supermarkets to distribute their product.

2. A perishable product significantly reduces ability to negotiate.

Horticulture products are perishable and subject to limited selling windows. For example, cherries have a self-life of five days once picked.

Overall, this ‘window’ limits the negotiating power of growers as there is less flexibility in selling, as well as limiting the ability to ‘sit out’ of the market if prices are too low. Supermarkets have the potential to leverage this, knowing the product needs to be sold.

This was highlighted by the ACCC in its Perishable Goods Inquiry:

“The more perishable a product, the weaker the producer’s position from which to negotiate favourable terms of supply with the buyers of their goods, and the more vulnerable they are to take-it-or-leave-it terms from buyers or exploitative conduct.”⁴

3. Limited exports increase reliance on domestic market.

Geographical isolation, perishability and high labour costs puts the Australian horticulture sector at a competitive disadvantage when exporting. In total we export only 12%⁵ of our horticultural production, with citrus, table grapes, carrots and nuts making up 80%⁶ of this total volume.

This results in the sector being heavily reliant on the domestic market.

4. Limited branding reduces ability for growers to negotiate

The horticulture sector has minimal branding (compared to majority of supermarket products). This significantly reduces the growers’ ability to develop brand equity with consumers. It allows the supermarkets to easily substitute between growers as their product is essentially ‘homogenous’.

5. Processing is low value add

36 percent of all vegetables and 19 percent of all fruit by volume are sent to be processed⁷. While exceptions exist, the value and significance of this market is relatively low where product is processed for juicing, freezing, or preserving.

⁴ Ibid p IX

⁵ Ibid p21

⁶ Hort Innovation, “Australian Horticultural Statistics Handbook,” 2022/23 p21

⁷ Ibid, accessed 12 February 2024.

6. Fear of retribution

Growers have regularly highlighted the fear of potential commercial retribution for raising a concern with the supermarkets. The *Annual Report for the Food Grocery Code* noted that growers did not want to raise an issue due to the “*fear of damaging a commercial relationship and fear of retribution*”.⁸

Given their over-reliance on the supermarkets to sell their product, such concerns are reasonably based.

7. Information asymmetry favouring the major supermarkets

The major supermarkets have access to more meaningful data. Real-time sales data across all categories provides significant market insights into elasticities and cross-elasticities.

Also, because of an estimated 65 per cent combined market share, the supermarkets can develop detailed insights into national volumes and prices, not only for individual varieties but also for the whole horticulture sector. Growers only have access to their sales data, putting them at a commercial disadvantage and limiting their ability to plan and price effectively, as well as not being able to contest the offered ‘*market*’ price.

As a result of these issues, the horticulture sector is one (if not the most) vulnerable and exposed sectors to the supermarket duopoly.

⁸ Chris Leptos, “*Food and Grocery Code Independent Reviewer Annual Report*,” 2022

Discussion

The issue of whether there has been a lack of competition in the supermarket sector in Australia has been debated for decades⁹.

The ACCC last considered the issue of competition in the horticulture and supermarket industry in their 2020 ACCC Perishable Agricultural Goods (PAG) Inquiry in which it concluded:

“All perishable agriculture goods (PAG) markets considered in this inquiry have characteristics likely to lead to bargaining power imbalances.”¹⁰

“Together, these features mean PAG supply chains can be particularly susceptible to market failure in the form of a lack of competition, information asymmetry, and the inappropriate (inefficient) allocation of risk. The level of susceptibility will vary across different PAG markets depending on a range of factors, including market structures, the availability of export markets, and the degree of perishability of produce. There is limited global trade of unprocessed and highly perishable PAG products.”¹¹

Reports that growers have not received price increase for up to 15 years

Supporting this conclusion is through data provided in confidence to the NFF Horticulture Council indicating that some growers have not received price increases over extended periods of time, in some cases for up to 15 years.

Studies undertaken by AgFirst between 2012 and 2023 show that the cost of production in the apple and pear industry has increased from \$1.81 to \$2.54 per kg, an increase of 40%.¹² This would potentially discount the argument that prices paid by supermarkets have not increased due to increases in productivity.

Previous Court Finding

Probably one of the most indicative insights into the market powers of the major retailers was in 2011, when the Federal Court found that Coles had deliberately introduced a program that involved demanding payments from their suppliers and then threatening them if they did not pay.

The judge found that *“Coles’ practices, demands and threats were deliberate, orchestrated, and relentless”*. They *“demanded payments to which they were not entitled to by threatening harm to suppliers that did not comply”*, and *“withholding money from suppliers it had no right to withhold”*. The \$10 million fine was inconsequential to the company’s operations.

This behaviour clearly indicates a very dominant and exploitive market position.

⁹ It is important to distinguish between key anti-competitive behaviours - Oligopsony (buying) and Oligopoly (selling). The key concern for the NFF Horticulture Council relates to the buying power of the supermarkets. It should be noted, if the ACCC cannot conclude that supermarkets are exploiting consumers, it does not necessarily mean a lack of market power. If supermarkets possess oligopsony (buying) powers, they may be able to purchase products at heavily reduced prices but are required to sell them at more competitive prices. This may reduce the supermarkets’ overall margins but does not reduce their anti-competitive buying powers. Also, all horticultural products are not the same, with some having significantly different “vulnerability profiles depending on the period of perishability and the ability to export. Some horticulture products may be able to negotiate “fair prices”⁹ with the supermarkets, while others will have significantly reduced bargaining positions.

¹⁰ ACCC, “Perishable Agricultural Goods Inquiry,” 2020 p IX

¹¹ Ibid p IX

¹² AgFirst, “Australian Pome Fruit Industry Orchard Business Analysis Report,” 2023, p37, and AgFirst, “Australian Pipfruit Industry Orchard Business Analysis Report,” 2011, p20

Recommendation

- Ensure ACCC can effectively prosecute supermarkets for anti-competitive behaviour, including ensuring that the bar for both unconscionable conduct and unfair trading practices are not set too high.
- Ensure fines are meaningful including commensurate with overall profits.

Research indicates competition has been on the decline for 40 years in Australia

The issue of excessive supermarket power is not unique to Australia, with multiple developed economies reporting similar concerns. Recent inquiries from the UK, NZ and Canada highlight this issue.

It is also not a new phenomenon. A major US study accessed the financial reports of all publicly listed companies in the US from 1950 to 2014 and identified some key issues:

- In 1980, on average, US companies marked up products by only 18% and this had been consistent for nearly 20 years.
- However, by 2014, this had increased to 67%¹³

These markups are directly linked to the rise in market power from 1980 onwards¹⁴ because of massive market consolidation into a few large corporations in most sectors. Due to their market power, these corporations could influence both the prices they purchased from suppliers and the prices they sold to consumers.

Similar studies have been undertaken in Australia, particularly *Product Market Power and Its Implications for the Australian Economy*, which found that “*markups have increased by around 5 per cent since the mid 2000s*”. This has been partially attributed to an increase in market power.¹⁵

Therefore, any assessment of market power needs to be considered in the context of long-term trends. Based on this evidence, competition has been declining for nearly 40 years. Also, simply comparing the profitability of Australian supermarkets against other countries as one method of diffusing anti-competitive behaviours needs to be balanced. There is a strong argument that a lack of competition exists in many developed economies and direct comparisons will not be informative.

Duopolies can distort the market by increasing prices paid by consumers, reducing returns to suppliers, and lowering economic growth and employment. This position is supported by recent comments by the ACCC Chair, “*Concentrated markets are generally not good for consumers – or indeed for economic growth and productivity*”.¹⁶

Access to historical data to review long-term trends in competition

One of the key concerns that most inquiries have shown is that there is a lack of meaningful data to make informed policy decisions. Much of the data will exist with the supermarkets, however.

There is a strong argument to allow the regulator greater access to historical buy and sell data from the supermarkets. While some powers exist, they could be strengthened, including allowing for

¹³ Jan De Loecker and Jan Eeckhout “*The Rise of Market Power and the Macroeconomic Implications*,” 2017 p2

¹⁴ Ibid p16

¹⁵ Jonathon Hambur, “*Product Market Power and Its Implications for the Australian Economy*,” 2021, Abstract

¹⁶ Sheedy C (2023) ‘A lack of competition is hurting consumers and the economy’ The Institute of Public Accountants, 15 November. Available at: www.publicaccountant.com.au/features/a-lack-of-competition-is-hurting-consumers-and-the-economy-2

random audits of data. This would allow the ACCC to determine whether the supermarkets have been able to increase their margins over a period, which is one of the key determinants of whether an organisation has excessive market power. By only allowing the regulator (ACCC) to access to the information, it would protect the retailer's commercial in-confidence data.

Importantly, as highlighted in the recent Canadian inquiry, it is important to look at the long-term historical data. The report stated, *“Canada’s largest grocers’ food gross margins generally increase by a modest yet meaningful amount over the last five years.”*¹⁷

Small margin increases can look innocuous on a year-to-year basis and with agriculture goods there can be annual and seasonal variations, therefore, looking at historical pricing (e.g. 20 years plus) is important to get a clear trend.

It should also be noted that the supermarkets may not be willing to share this information. The recent Canadian inquiry flagged that:¹⁸

“The level of cooperation varied significantly and was not fulsome. In many instances, the Bureau was not able to obtain complete and precise financial data, despite its repeated requests.”

Recommendation

- Ensure ACCC has access to historical buy and sell data (15 years plus) from the supermarkets to monitor ‘long-term’ shifts in competition.

Divesture Powers

Given the significant distortion in market powers in Australia, particularly those dealing with the agriculture sector, there is an argument for the government to have access to divestment powers, to influence the behaviour of major duopolies (including Bunnings).

It should be noted many developed countries already have divestment powers in place, including the USA, EU, Canada, and the UK¹⁹.

Research has indicated that they are rarely used, however, the main advantage is that they act as a deterrent to ‘bad behaviour’. Alan Fels, former Chair of the ACCC recently noted the *“possibility of divestiture would have a powerful effect on retailer duopoly behaviour”*.²⁰

Fels also supports greater powers to force a company to divest by proving to the Federal Court that a company had breached the law.²¹ However, he has flagged divestment can lead to unintended consequences and that the powers should be used, as stated, to influence the use of any anti-competitive behaviour.

He also noted that current legislation²², which prohibits companies with substantial market power from *“taking advantage”* of their rivals, is *“relatively ineffective”* with *“very minor”* penalties. This

¹⁷ Competition Bureau of Canada, *“Canada Needs More Grocery Competition; Competition Bureau Retail Grocery Market Study,”* 2023 P21

¹⁸ Ibid p24

¹⁹ Sheedy C (2023) ‘A lack of competition is hurting consumers and the economy’ The Institute of Public Accountants, 15 November. Available at: www.publicaccountant.com.au/features/a-lack-of-competition-is-hurting-consumers-and-the-economy-2

²⁰ Kelly, J (2018) ‘Competition tsar pans new power’ The Australian, 21 August. Available at: www.theaustralian.com.au/national-affairs/competition-tsar-pans-new-power/news-story/54858f3a11fe4ef4499977aed2924e5f

²¹ Yun, J (2024) ‘ACCC break-up powers would be a ‘big stick’ to corporate Australia: Fels’ The Sydney Morning Herald, 21 February. Available at: www.smh.com.au/business/companies/accc-break-up-powers-would-be-a-big-stick-to-corporate-australia-fels-20240220-p5f6ce.html

²² Section 46, Competition and Consumer Act

makes it difficult for smaller business to win cases against large companies with significant resources.²³ It is expected that the primary focus of the legislation will be to act as a deterrent to stop duopolies employing anti-competitive behaviours.

In addition, to this there is a need to considerably strengthen the merger and acquisition laws to restrict the formation of the duopolies in the first place. To undertake its role effectively, the regulator needs to be properly funded to monitor and undertake ongoing audits to identify anti-competitive behaviours. The ability to review contracts, communications (emails, text messages and phone calls), request insights into how supply targets, market prices, rebates and standards are set etc. can significantly increase the accountability of supermarkets.

Individuals and management who deliberately abuse their market power position should be held personally accountable.

Recommendation:

- *Ensure ACCC has appropriate powers to limit further growth of duopolies including limiting both horizontal and vertical growth.*
- *Introduce divesture powers to act as ultimate sanction to gross and malicious breaches of market power.*
- *Create a stand-alone policy to ensure fair competition for the horticulture sector.*
- *Ensure the ACCC has proper resources undertake effective monitoring, including the ability to regularly undertake random audits.*

Grocery Supply Chains

The main concerns for the Horticulture sector relate directly to the grocery supply chains. As highlighted, growers (vendors) are highly reliant upon a select few supermarkets to buy their produce.

Given the supermarkets (and Bunnings) dominant market positions, these organisations dictate the buying process. It can be argued that every aspect is structured in such a manner to favour them. They determine the payment terms, from who and when the product is bought, the quality standards, who bears the risk, the volume and ultimately the price.

1. Grocery Supply Agreements (GSAs) are not effective and easily avoided.

Though a requirement of the Food and Grocery Code of Conduct (FGCC), not all fresh produce suppliers have a Grocery Supply Agreement in place, which at minimum cover the following matters²⁴:

- Any requirements the retailer or wholesaler has in respect of the delivery of the groceries.
- Any circumstances in which the retailer or wholesaler may reject the groceries.
- The period within which the retailer or wholesaler must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed.
- If the agreement is intended to operate for a limited time only—the term of the agreement.
- If the agreement provides for termination by one or more parties to it—the circumstances in which it may be terminated.

²³ Yun, J (2024) 'ACCC break-up powers would be a 'big stick' to corporate Australia: Fels' *The Sydney Morning Herald*, 21 February. Available at: www.smh.com.au/business/companies/accc-break-up-powers-would-be-a-big-stick-to-corporate-australia-fels-20240220-p5f6ce.html

²⁴ Australian Parliament; "Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015"; <https://www.legislation.gov.au/F2015L00242/latest/text>; accessed 13 February 2024.

- In clear terms, any quantity and quality requirements relating to the groceries.

Some growers report only having made verbal agreements with a supermarket for several years and that the agreements that they have general and meaningless.

Recommendation:

- *Supermarkets to ensure GSAs are unambiguous, transparent, and up to date.*
- *A lack of a current and transparent GSAs considered to be 'not in good faith' and subject to penalties.*

2. Almost no pre-existing contracts.

Notwithstanding the long lead time for many growers (orchards et al), there are very few pre-existing contracts with the major supermarkets. Almost all prices and volumes are determined on a weekly basis. The lack of contracts significantly disadvantages the growers as their product is perishable. With no guaranteed sales, growers' options are severely limited.

Both dairy and meat products are typically sold under longer-term agreements, for at least a few months, that defines both price and volume.

As best, suppliers of fresh produce will typically have only a non-binding "forecast" of volumes the supermarket will purchase. The forecast is normally framed as a volume of product expected to be purchase each week within the season or window.

Price is not stipulated at all in Grocery Supply Agreements (GSAs) and are instead negotiated on a rolling weekly basis within the harvest window, anywhere between a few days and week from harvest. Practically, this is conducted through a two-step process that determines the farmgate price.

As a first step, growers or suppliers will be required to submit a price and volume for their produce to the supermarket every Monday. This provides a near-national snapshot of both volume and prices, while growers only have their own data.

As the second step, on Tuesday the supermarkets will contact growers to advise them of what they consider the price to be for the week and the volume of product they're willing to buy. The growers have a very limited capacity to contest these price points or information used to determine the price as they do not have access to the wider market prices. They similarly have little ability to query the volumes given.

This provides a significant commercial advantage to supermarkets to leverage their asymmetric data to offer the farmgate price paid to growers.

This allows supermarkets to offer 'take it or leave'²⁵ pricing.

This situation is compounded by a lack of transparency in how the price is determined. For example, farmers cannot determine if the price they are offered is the lowest price offered, a

²⁵ Keogh, M (2021) 'Competition in Australian agriculture keynote address' 21 June

weighted average, or determined by a supply and demand model that matches the elasticities of other similar agricultural products.

3. Incentive exists for supermarkets to inflate the amount of produce required.

It is commonly reported by suppliers that they rarely if ever achieve the volumes sold into supermarkets that were originally signalled through the non-binding “forecast” figures.

Potentially, these figures maybe deliberately overstated to trigger oversupply scenarios which can both guarantee supply to the supermarkets, while also providing downward pressure on the prices paid.

This potential practice of deliberate market manipulation, if substantiated, is perhaps one of the most serious interferences by supermarkets in the efficient and fair functioning of fresh produce markets. Without any policing, there is a clear commercial incentive for the supermarkets to undertake such activity.

Recommendation: Reduce incentive for supermarkets to encourage growers to oversupply.

- Supermarkets to provide summary on variance from forecast to actual purchases.
- Deliberate misleading to be considered ‘not in good faith’ and subject to penalties.
- Regular monitoring by Code Arbiters.

4. Supermarkets can easily ‘contract out’ prohibited practices.

The Food and Grocery Code lists a series of practices it prohibits. However, supermarkets are allowed to include them if the supplier agrees. Given the lack of bargaining power, suppliers typically have little choice but to agree to their inclusion. This allows Supermarkets to include a wide range of fees and terms including:²⁶

- Unilateral variation of a GSA without the consent of the supplier.
- Payments for wastage of groceries.
- Payments for stocking products.
- Payments for better positioning or shelf space.
- Payments towards the costs of:
 - A buyer’s visit to the supplier.
 - Artwork or packaging design.
 - Consumer or market research.
 - The opening or refurbishing of a store.
 - Hospitality for the retailer’s or wholesaler’s staff.
 - Funding from suppliers the cost of a promotion.

Payments by suppliers for what should be core business activities of a supermarket are particularly questionable.

²⁶ Australian Parliament; “Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015”; <https://www.legislation.gov.au/F2015L00242/latest/text>; accessed 13 February 2024.

All practices that simply pass on costs from supermarkets, where there is no direct benefit or return achieved by the supplier or where the supplier has little or no ability to control or influence the outcome should be revisited.

Recommendation: Remove the ability for supermarkets to make suppliers to 'opt out' of otherwise prohibited GSA contract clauses.

5. Excessive and opaque rebates and payments

Flowing on from this issue is that the supermarkets are then able to impose a myriad of payments and rebates on growers. Many growers feel they have little choice but to accept these charges and payments and argue they are opaque and unclear.

Reported examples include, companies paying:

- \$100,000's to have their products listed
- 15% if volume targets achieved
- 5% to get paid early, and
- 10% plus to fund (or part fund) monthly promotions (which they have no choice in participating in)

When added together this can reduce the actual agreed price by over 30%.

It can be argued that supermarkets are exploiting their market power to add on unjustified fees onto suppliers, with many growers unclear as what they are paying for and why.

Recommendation: ACCC to review existing rebates and fees imposed with view of banning certain practices or ensuring clear transparency and fairness.

- Code Arbiter to regularly review rebates and fees imposed.

6. Limited branding reduces ability for growers to negotiate.

The horticulture sector has minimal branding (compared to majority of supermarket products). This significantly reduces the growers' ability to develop brand equity with consumers. It allows the supermarkets to substitute between growers as their product is essentially 'homogenous'.

The absence of opportunities to brand fresh produce prohibits suppliers from interacting directly with consumers, to receive feedback and ideas for product improvement and leaves consumers to assume products in the same category are interchangeable. It also does not drive investment in quality for the consumer as they are unable to differentiate between products.

The lack of branding of these products plays into existing power imbalances and further undermines the ability of suppliers to negotiate on price or any other matter.

In other instances, where fresh produce is sold in packaging, affording an opportunity for brand placement, for example on bagged loose lettuce leaf, suppliers are required to pay for and use packaging branded by the supermarket and not themselves. Because of this requirement, produce packaged for a supermarket but then rejected is almost always unable to be repurposed or sold into another market due to its branding.

It has been observed where suppliers have innovated in creating a new packaged product that has proven successful, invariably over time supermarkets have been able to oblige suppliers to replace their own private branding with their own.

Recommendation: Allow suppliers to brand their products, specifically on pre-packaged packs.

7. Information on other trading arrangements

There are several common supermarket practices, not considered currently by the Food and Grocery Code, that might amount to the unfair transfer of costs and risks to suppliers. These practices include but are not limited to the following:

- Requiring suppliers to use their preferred third-party contractors. This can be a subsidiary of the supermarket itself or external company. There can be limited alternative options for suppliers to use.
- Charging suppliers for periods of service, including for the use of plastic crates and wooden pallets, that are far longer than would be reasonably expected given the perishability of the product concerned.
- Imposing onerous requirements on direct suppliers in the name of customer expectations at significant cost, including compliance with various food safety, packaging and ethical employment standards and certifications, only to purchase product out of the wholesale market with none of these assurances when short on volume or when the price is advantageous.

8. Price transparency (including margins) in grocery supply chains.

Forming a view today of the trade existing between supermarkets and their suppliers of fresh fruits and vegetables is impossible, and this isn't just because no one has access to the same data.

Comparing apples with apples can be a pointless exercise depending on what is known about them. There is currently no uniform nationally applied standard for the description of fresh produce, including varying classifications of quality, pack sizes, but also very simply the names by which fruits and vegetables are called. Applying new names and creating different pack sizes is however one of the few ways in which suppliers can differentiate their products in market.

Recommendation: Create a nationally applied standard for the description of fresh produce.

9. Access to data

The Federal Government adopted the Productivity Commission recommendation to create a Consumer Data Right, giving individuals and business access to their own data held by service providers, to promote greater competition and allow better decision making, among other things²⁷.

²⁷ Productivity Commission: "Data Availability and Use Inquiry Report"; pg. 2; <https://www.pc.gov.au/inquiries/completed/data-access/report>; accessed 21 February 2024.

Recommendation:

- *Create a supplier data right, requiring supermarkets give real time access to transaction data.*
- *The Federal Government invests to create greater market transparency.*

10. Culture and incentives within supermarkets

The performance metrics that are imposed upon the buying teams will provide a clearer indication of the main drivers of an organisation. Both companies are publicly listed are essentially (overwhelmingly) rewarded on financial performance. The ability for members of the buying teams to buy lower and sell higher, with increased volume will be the primary metric (regardless of the public rhetoric about helping growers etc).

If the supermarkets have a dominant buying position (as per horticulture), they will be incentivised to exploit it.

The 2011 Federal Court Case highlighted this behaviour where Coles “*demanded payments to which they were not entitled to by threatening harm to suppliers that did not comply.*”

This is highly problematic to regulate with the only effective solution is ensuring effective competition in the sector.

Recommendation:

- *Ensure any incentive schemes that apply to buying teams are aligned with the purpose and contents of the Food and Grocery Code.*
- *The conduct of buying teams to be monitored by senior management.*
- *Incentives and buying practices to be randomly audited by Code Arbiters.*

11. Education and awareness

The Council supports an investment by the Federal Government in education and raising awareness of the FGCC generally, and dispute resolution process. This will specifically assist in addressing accessibility issues reported by suppliers, including the perceived time and resource commitment required to raise a complaint, and lack of controls in place for managing potential retribution.

The Council supports interventions by government that have the effect of increasing competition across all domestic markets for fresh produce. This includes measures that:

- Support growers in selling fresh produce directly to consumers, including their investment in necessarily infrastructure to pivot into this market.
- Incentivise new supermarket entrants, including lowering barriers that might prohibit companies based overseas from entering the Australian market.

Recommendation:

- *Increase growers' understanding of Food and Grocery Code of Conduct.*
- *Improve Federal Government measures to increase competition in the retail of fresh produce.*

12. Trade and market access

The Council also reaffirms its support for greater investment by the Federal Government in securing expanded trade and market access opportunities, to grow the share of fresh produce going into export markets and so lower the overall industry reliance on domestic markets.

13. Collective bargaining

The ACCC should investigate providing a class exemption for horticulture industries, to exempt retail vendors and producers from the Competition and Consumer Act (2010) due to the significant power imbalances and unique characteristics of the industry.

Due to the geographical diversity, perishability, restricted branding and low levels of supplier concentration, such exemptions would be highly unlikely to lessen competition in a manner that negatively impacts consumers. The current threshold of \$10m under the Collective Bargaining is manifestly too low.

Recommendation: *ACCC to review how to introduce a 'simple to use' class exemption to the Competition and Consumer Act (2010) specific for the horticulture sector, while ensuring growers are protected from commercial retribution for participating.*

14. Improved grower and supply chain welfare

The single overriding purpose and objective of the Australian Consumer Law is to promote the interests and welfare of consumers. Not considered in any serious way are the interests and welfare of individual suppliers and supply chain.

The Modern Slavery Act requires large corporations to act in removing modern slavery risks to which workers are exposed along their supply chains. Yet the circumstances and conditions under which many growers find themselves supplying supermarkets could just as easily be framed as a Modern Slavery risk.

Recommendation: *That supplier welfare is added as an objective of the Australian Consumer Law and that supermarkets consider what risk high levels of supplier dependency might create.*

Recommendations

Expand the breadth of the Review

- Include Bunnings as part of this review. The issues faced by this sector are identical to the challenges faced by fruit and vegetable growers

Empower the ACCC

- Ensure ACCC can effectively prosecute supermarkets for anti-competitive behaviour, including ensuring that the bar for both *unconscionable conduct* and *unfair trading practices* are not set too high.
- Ensure fines are meaningful, including commensurate with overall profits.
- Make individuals personally liable for intentional anti-competitive behaviour.
- Ensure ACCC has access to historical buy and sell data (15 years plus) from the supermarkets to monitor 'long-term' shifts in competition.
- Ensure the ACCC has proper resources to undertake effective monitoring, including the ability to regularly undertake random audits.

Control the growth of duopolies

- Ensure ACCC can effectively limit growth of duopolies, including both horizontal and vertical growth.
- Introduce divesture powers to act as ultimate sanction to gross and malicious breaches of market power.
- Improve Federal Government measures to increase competition in the retail of fresh produce.

Create a standalone policy to protect the horticulture sector

- Create a stand-alone policy to ensure fair competition for the horticulture sector.
- ACCC to develop 'simple to use' Class Exemption (under CCA) for the horticulture sector, while ensuring no commercial retribution for participating.
- Add supplier welfare as an objective of the Australian Consumer Law.
- Create supplier data right, including real-time access to transaction data.
- The Federal Government invests to create greater market transparency.
- Create a nationally applied standard for the description of fresh produce.
- Increase the growers' understanding of the *Food and Grocery Code of Conduct*.
- Allow suppliers to brand their products, specifically on pre-packaged packs.

Ensure Supermarkets behave ethically

- *Ensure buying teams and category managers are properly monitored*
 - Ensure any incentive schemes that apply to buying teams are aligned with the purpose and contents of the *Food and Grocery Code*.
 - The conduct of buying teams is to be monitored by senior management.
 - Incentives and buying practices to be randomly audited by Code Arbiters.
- *Ensure Grocery Supply Agreements (GSAs) are meaningful*
 - Code Auditors to ensure GSAs are unambiguous, transparent, and up to date.

- Remove the ability for supermarkets to make suppliers to 'opt out' of otherwise prohibited GSA contract clauses.
 - A lack of current or transparent GSAs to be considered '*not in good faith*'.
- Reduce incentives for supermarkets to encourage growers to oversupply.
 - Supermarkets to provide summary on variance from forecast to actual purchases.
 - Deliberate misleading to be considered '*not in good faith*' and subject to penalties.
- Properly monitor and regulate rebates and fees
 - ACCC to review existing rebates and fees imposed with a view to banning certain practices or ensuring clear transparency and fairness.
 - *Code Arbiter* to regularly review rebates and fees imposed.

Conclusion

A duopoly is never good for any economy, they slow economic growth, reduce employment, increase prices to consumers, while unfairly reducing prices paid to suppliers.

Unchecked, it will undermine the viability of the entire horticulture sector, and long-term consumers will be exposed to higher prices, and less food security.

This current duopoly has a privileged position and therefore the highest levels of standards need to be applied to them.

There is a need to drastically increase the powers of the regulator to protect the horticulture sector, including creating a stand-alone policy to protect the sector, and empowering the regulators so it can do its job effectively.

Regardless, the existence of such a dominant duopoly is unfortunate for our nation and is resulting in negative economic and social outcomes.