NSW Farmers' submission

ACCC Supermarkets inquiry 2024-25

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About NSW Farmers

NSW Farmers is Australia's largest state farming organisation, representing the interests of its farmer members in the state and across all agricultural commodities. We speak up on issues that matter to farmers, whether it's the environment, biosecurity, water, animal welfare, economics, trade, workforce, or rural and regional affairs.

Agriculture is an economic 'engine' industry in New South Wales. Despite having faced extreme weather conditions, pandemic and natural disasters in the past three years, farmers contributed more than $23 billion in 2021-22, or around 25 per cent of total national production, and positively contributed to the state's total exports. Agriculture is the heartbeat of regional communities, directly employing almost two per cent of the state's workers and supporting roles in processing, manufacturing, retail, and hospitality across regional and metropolitan areas. The sector aims to grow this contribution even further by working toward the target of $30 billion in economic output by 2030.

Our state's diverse geography and climatic conditions mean a wide variety of crops and livestock can be cultivated here. We represent the interests of farmers from a broad range of commodities – from avocados and tomatoes, apples, bananas and berries, through grains, pulses and lentils to oysters, cattle, dairy, goats, sheep, pigs and chickens.

We have teams working across regional New South Wales and in Sydney to ensure key policies and messages travel from paddock to Parliament. Our regional branch network ensures local voices guide and shape our positions on issues affecting real people in real communities. Our Branch members bring policy ideas, our member Advisory Committees provide specialist, practical advice to decision makers on issues affecting the sector, and our 60-member Executive Council makes the final decision on the policies we advocate on.

As well as advocating for farmers on issues that shape agriculture and regional areas, we provide direct business support and advice to our members. Our workplace relations team has a history of providing tailored, affordable business advice that can save our members thousands of dollars. Meanwhile, we maintain partnerships and alliances with like-minded organisations, universities, government agencies and commercial businesses across Australia. We are also a proud founding member of the National Farmers' Federation.

Overview

NSW Farmers welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (ACCC) Supermarket Inquiry 2024-25.

NSW Farmers' members have considerable concerns for the implications of high market concentration in the food and grocery sector. Markets with many producers but few major retailers can lead to market failure in the form of market power. The harm that arises from this can take many forms including producers receiving prices below their marginal cost of production. As such, NSW Farmers has continued to call for competition reform to address concentration in the supermarket sector.

To address the harmful behaviour of market power in the food and grocery supply chain NSW Farmers recommends that the ACCC:

1. collect data on the average costs of large supermarket chains in Australia, and conduct an empirical analysis into the presence of economies of scale in supermarket operations for the purpose of attributing the cause of supermarket concentration in Australia to 'natural monopolies' or anti-competitive practices.
2. investigate the claims of anti-competitive practices by supermarkets that exclude competitors from entering the market, including land-banking and excessive control over tenancy agreements.
3. subject to an empirical review into economies of scale of supermarket firms in Australia, identify the 'minimum viable firm' which is likely to be profitable in Australia for the purposes of calibrating possible actions to increase competition in the sector, including enforced divestiture of sites and limitations on the number of sites that supermarket chains may lease or purchase within a given area.
4. collects data on the distribution (amount and frequency) of unit-prices paid to farmers for a range of major product groups in order to determine the extent to which information asymmetries account for distortions in the market – noting that a large spread of unit prices paid to farmers (after controlling for transport costs and seasonal variations) is evidence of market manipulation arising from information asymmetry.
5. moves to address information asymmetries in the market for agricultural produce, for example, by establishing an independent online database akin to the Petrol Price Portal and the USDA National Weekly Cattle Net Price Distribution report, paid for and contributed to by major supermarket chains which publishes distribution of unit prices paid to suppliers on an annual basis.
6. investigates claims of aggressive and anti-competitive price competition that served to exclude competitors from entering the market, limits the ability of suppliers to negotiate on price, and pushes the costs of sales and discounts onto suppliers.
7. investigate the claims of anti-competitive non-price tactics used by supermarkets used in the supply chain process against producers, including quality and packaging controls, the imposition of onerous food safety and ESG requirements without compensation, and control over branding.
8. investigate how monopolistic power exercised by supermarket chains has meant that increasing producer costs and declining Farmer Terms of Trade, and increasing consumer costs of living, have failed to translate to a decline in supermarket profitability, especially during the 2020-2023 period corresponding to global supply-chain disruptions due to COVID-19 and geopolitical unrest.
9. investigate why the CPI for some agricultural product groups increased over 20% in the period 2021-23, and the extent to which monopolistic power exercised by supermarket chains, and specific vulnerabilities experienced by producers and suppliers (especially for perishable goods) in those markets have contributed to those price increases.
10. investigate and collect a large sample of contracts and agreements offered to farmers, and scrutinise those contracts for evidence of uncompetitive, onerous packaging and ESG requirements, and unfair terms of trade that disadvantage producers and increase supermarket profits.
11. investigate allegations of explicit or implicit examples or threats of retribution leveraged against farmers in retaliation for registering a complaint under the Food and Grocery Code of Conduct, or supplying other chains.

12. investigate the issues raised by and consider the impact of implementing Option 4 from the Commonwealth Treasury's Consultation Regulatory Impact Statement on Unfair Trading Practices.
13. collect data on the extent and incidence of breaches of the FGCC from a wide sample of farmers, and make such data collection a regular part of the review of the FGCC.
14. investigate the extent to which the issues noted above contribute to and exacerbate issues with trading terms and practices between farmers and supermarket chains, and appropriate policy responses to those, in particular to:
    i. recognise and address the specific vulnerabilities faced by suppliers who supply perishable goods including agricultural produce.
    ii. make mandatory the FGCC for all retailers and wholesalers.
    iii. have the ability to apply significant civil pecuniary penalties when it is breached including necessary enforcement tools for the ACCC to protect suppliers against signatories that fail to comply with its requirements.
    iv. ensure a genuinely independent dispute process to resolve supplier complaints.
    v. enable the appropriate enforcement tools to be available to the ACCC to act on issues identified.
15. consider the range of options available to it to administer financial and non-financial penalties on supermarkets found to have engaged in anti-competitive behaviours, and whether they are providing an adequate disincentive against those behaviours. Furthermore, that ACCC should evaluation any additional powers and funding necessary to undertake enforcement activities to act as a disincentive against harmful behaviour.
16. consider the effect of a lack of divestiture enforcement mechanism against supermarket retail chains on the behaviour of participants in the market, and the case for the introduction of divestiture powers which can be used in cases of gross market power imbalances that are against the national interest.
17. examine the impact of the current mergers and acquisitions framework, and the extent to which it acts as an appropriate disincentive to the types of anti-competitive practices outlined in this submission. Furthermore, the ACCC should consider the effect of adopting of a formal mergers and acquisitions framework that identifies the ACCC as the primary decision maker and that decisions take into account structural market conditions.

Introduction

Food is a basic need, or in economic terms, part of non-discretionary spending. This means households will always need to purchase it, which has another economic implication; it is relatively price inelastic. That is, when price increases, demand only decreases marginally, if at all.

Conversely, food production is also a relatively inelastic process. Once farmers make a decision to till, plant, and harvest a crop on a given area of land, that choice is locked in regardless of how the price for their goods changes in that period. In addition, the choice is typically between producing or not producing on their entire farm, since it will typically not be profitable to work only a proportion of it in response to lower prices. The perishable nature of most agricultural products also means that supply cannot be stored until favourable market conditions return.

Between consumers and farmers sit the supermarket retail chains, the two largest of which, Woolworths and Coles, command 70% of the market share in Australia. This submission argues that they have been able to achieve this by exploiting scarce commercial land and employing aggressive tactics to exclude market entry by competitors, and not as is typically argued by taking advantage of economies of scale.

The supermarkets have been able to wield significant monopolistic market power to drive a wedge between the inelastic demand of consumers, and the inelastic supply of farmers by exploiting information asymmetries that allows supermarkets to appropriate farmer profits, and onerous and unfair trading and contracting practices that further limits choice. This enables them to effectively dictate the quantity and quality of supply, and the prices charged to consumers and producers respectively.

As a result, supermarkets have been able to generate significant super-profits with a return on investment of 22%, far in excess of their cost of capital. These profits represent 'economic rents', profits generated by extracting surpluses from consumers and producers, as opposed to genuine value-adding activity. Furthermore, by restricting supply and choice, these actions represent a real handbrake on output in Australia's biggest consumer sector – a reduction in the quantity and range of supply, and in consumption. In plain economic terms, a real and significant reduction in GDP and household welfare. For example, researchers have raised alarms on the potential for supermarket concentration in Australia to limit the availability of healthy food to households, impacting quality of life, and increasing public health costs[1].

Finally, this submission identifies several shortcomings in the legal and regulatory framework of the ACCC, noting that these factors are as much a part of market function as the nature of the supply chain itself. In particular the inability to gather evidence of anti-competitive behaviour and then apply appropriate disincentives in the form of penalties and divestiture orders is a 'green light' to the types of behaviours described in detail here.

[1] Wardle, J., & Baranovic, M. (2009). Is lack of retail competition in the grocery sector a public health issue? Australian and New Zealand Journal of Public Health, 33(5), 477–481. https://doi.org/10.1111/j.1753-6405.2009.00433.x

Terms of reference

Agricultural markets are characterised by many producers, but few processors and retailers. As an example, there are approximately 55,000 small businesses in the agriculture, forestry, and fishing industries in NSW alone[2] and Dairy Cattle Farming was identified as the least concentrated industry by ANZSIC Division in 2019[3]. By comparison the supermarket sector in Australia is dominated by Coles and Woolworths, accounting for 70% market share. Many products cannot be stored and must be delivered within a short period, which prevents their ability to hold out for better terms and conditions of sale. These market characteristics limit the bargaining power of producers, and makes them especially vulnerable to strategies which force them to be price-takers, rather than genuine participants in the market. The following sections describe in detail the mechanisms through which supermarkets exercise monopolistic power in the Australian market, and its impact in particular on Australian farmers.

The following sections address the terms of reference outlined in the ACCC Supermarket Inquiry Issues paper.

Market Structure

Causes of market concentration and monopolistic power in the supermarket sector

Australia has a concentrated economy, which is not unusual for developed countries. Most large, concentrated sectors are not any more concentrated in Australia than in other high-income countries. The exception, however, is in supermarkets. As shown in the figures below, concentration in supermarket retailing is higher in Australia than in other high-income countries. The four largest supermarket chains have around 90 per cent of the market in Australia, and nearly 70 per cent is concentrated in just two firms, Coles, and Woolworths. This is much higher than in large, high-income countries such as the US, the UK, France, and Germany, where the four-firm market share is 70 per cent or less. Italy and Spain are even less concentrated.[4]

Within the framework of economic analysis, monopolies and oligopolies are able to achieve supernormal profits – that is, profits that exceed the cost of equity, or what shareholders have invested into the company – because they are able to set prices for their goods well above their costs of production. Notwithstanding that Woolworths and Coles have consistently argued that their Net Operating margins are not extraordinary (3.4% and 3.8% respectively in 2022[5]), this must be taken in context of the fact that they have historically been able to achieve a 22% return on equity (ROE) while their costs of equity are only 8%, akin to other very-low risk sectors like Airport, Toll Road, Freight and Port Operations[6] many of which are considered 'natural monopolies', and regulated as such through IPART or other statutory instruments. The typical ROE for large cap ASX-listed companies in the consumer staples segment is 11.2%, and the 90th percentile achieved 29.0%[7], whereas Woolworths was able to achieve a ROE of 33.5% and 25.9%[8], and

[2] NSW Small Business Commissioner (2014) *Small Business in NSW: Our Story*

[3] Source: MLA

[4] Minfie, J (2017) *Competition in Australia: Too little of a good thing?* The Grattan Institute

[5] Source: companiesmarketcap.com

[6] Minfie, J (2017) *Competition in Australia: Too little of a good thing?* The Grattan Institute. Data for Graphs, Figure 4.4.

[7] Chartered Accountants Australia New Zealand (2021) Australian Financial Reporting Benchmarks. June 2021 Volume 1.

[8] Source: stock analysis.com - https://stockanalysis.com/quote/asx/WOW/financials/ratios/

Coles was able to achieve an ROE of 31.2% and 33.2%[9] in FY 2024 and 2023 respectively, marking their profits as extraordinarily high. In fact, the ability for Coles and Woolworths to raise capital at a far lower cost than their competitors has been identified as a driving force of their growing market power, enabling them to rapidly grow their footprint and crowd out would-be competitors[10].

The mechanism through which monopolistic businesses are able to increase prices for consumers is by restricting supply and choice for their customers to a level lower than a competitive market would provide. Conversely, by reducing their demand for inputs, monopolies drive the prices that they pay to their suppliers downwards. Examples of tactics used by supermarkets to extract higher prices from consumers, and lower prices from farmers, are therefore not separate and unrelated, if undesirable, activities. They are two sides of the same coin enabling monopolistic retailers to generate extraordinary profits. This is the essence of the market failure which currently dictates market dynamics in the retail sector for agricultural produce in Australia.

Monopolies and monopolistic market power arises through two mechanisms:

1. The presence of economies of scale, which means that average costs are lower for larger firms. Economies of scale act as an incentive for firms to merge, since fewer larger firms are able to achieve greater profits than more smaller firms. Such monopolies are sometimes termed 'natural monopolies' due to their tendency to arise from fundamental market forces.
2. Ownership and control over limited or unique factors of production, such as land or intellectual property (IP). Firms may keep competitors out of a market by exercising their control over a scarce resource or infrastructure such as ports or other commercial land.

While there is some analysis and commentary to support the idea that the large supermarkets have managed to achieve significant economies of scale, which drives their dominance in the market[11][12], there is also significant evidence to suggest that the economies of scale experienced by supermarkets has been exaggerated and in fact may not exist. For example, a review of 2,000 USA Supermarket stores by King and Park found that economies of scale were constant[13], and a similar review by the Centre for Food Policy over 60 years of data in the UK find that the evidence for economies of scales in supermarket operations is scarce[14]. Despite the fact that empirical and reviews into the nature and cause of supermarket concentration and diversity have occurred in other countries, there is limited evidence and similar research in Australia.

The Cost Disadvantage Ratio is used to investigate economies of scale for different businesses based on the number of employees to value-add[15]. While public data to undertake that analysis for Australian Supermarkets is unavailable, the same logic can be applied to the ratio of profits to total income, larger businesses should be able to generate greater profits per dollar turnover is economies of scale are present.

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9 Source: Intelligent Investor.com.au - https://www.intelligentinvestor.com.au/shares/asx-col/coles-group-limited/financials

10 Merrett, D. T. (2020). The Making of Australia's Supermarket Duopoly, 1958–2000. Australian Economic History Review, 60(3), 301–321. https://doi.org/10.1111/aehr.12172

11 For example see: Trail. W (2006) The Rapid Rise of Supermarkets. Development Policy Review, 24 (2)

12 USDA. The Economics of Supermarket and Grocery Store Location. Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences. Chapter 6

13 King, R., Park, T. (2002) Modeling Scale Economies in Supermarket Operations: Incorporating the Impacts of Store characteristics in Information Technologies. Selected Paper for the 2002 American Agricultural Economics Association Annual Meeting.

14 Jack, L. (2021) The secrets of supermarketing: A model balanced on a knife-edge. Food and Research Collaboration. Centre for Food Policy. London

15 OECD. (2021). Methodologies to measure market competition (OECD Competition Committee Issues Paper). https://www.oecd.org/daf/competition/methodologies-to-measure-market-competition-2021.pdf

Using nine years of income and tax data from the Australian Taxation Office, as shown in Figure 1 a cursory analysis indicates that for supermarkets with annual incomes between $5-50 billion per annum, there is no clear evidence that supermarkets benefit from economies of scale. The implication is the very largest chains, Woolworths and Coles, could be up to an order to magnitude smaller with little impact on efficiency and profitability – and that economies of scale cannot explain the degree of market concentration in the Australian context alone. While the analysis here is limited, it only serves to highlight the fact that the ACCC must investigate the economics of supermarkets in greater detail.

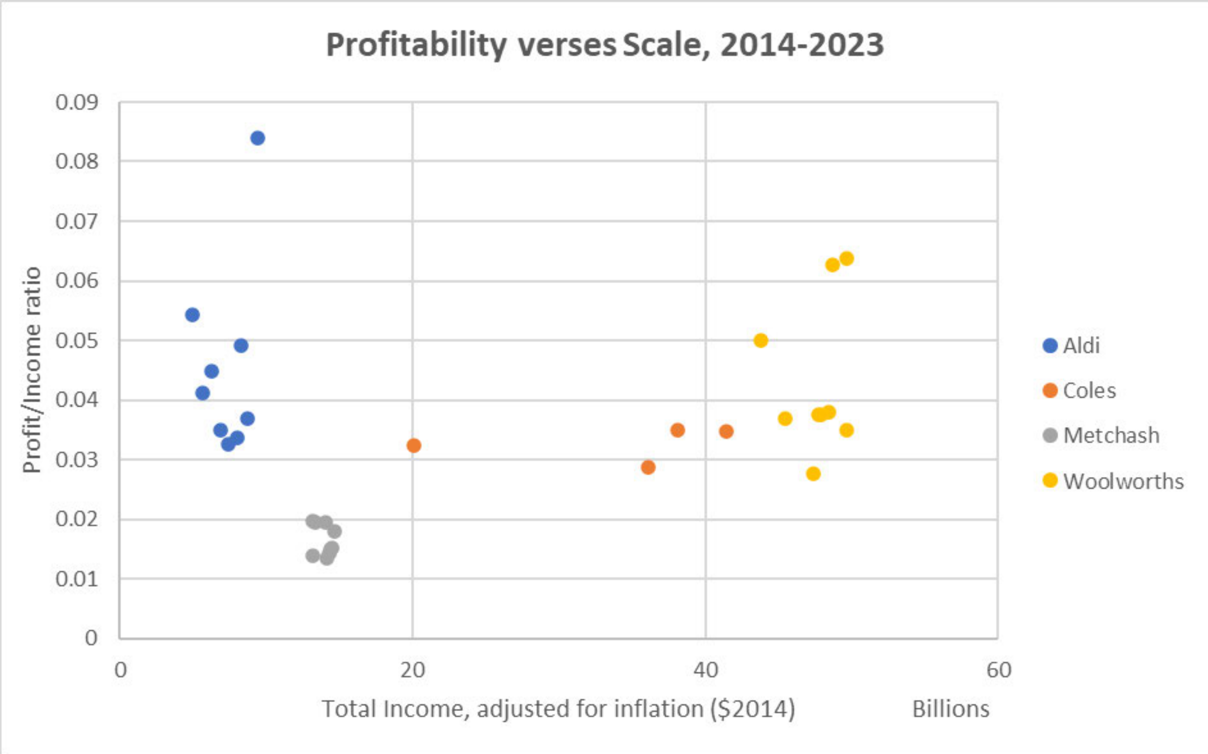

Figure 1: Profit/Income ratios for the four major supermarket chains in Australia verses total income. Source Australian Taxation Office. (2024). Corporate Tax Transparency [dataset]. https://data.gov.au/data/dataset/corporate-transparency.

NSW Farmers notes that the ACCC terms of reference state that an analysis of supermarket profits over 5 to 10 years will inform views on whether or not there is sufficient competition in the market, it is NSW Farmers view that at least 25 years of data (including periods where firms such as Franklins and Aldi left and entered the market) is needed to establish a robust and statistically significant analysis.

In addition, there is evidence that the large Supermarket chains in Australia have used anti-competitive behaviour to obtain market power by exerting control over limited resources, especially commercial land. Allegations of tactics used to entrench the market power of the supermarkets include:

- Land banking, which describes the act of purchasing and holding land in new or future development sites in some cases for many years before they acquire permission to build. German supermarket chain Kaufland withdrew from plans to open stores in Australia. One of the reasons reported in the media was they could not find enough appropriate sites for their stores. Further evidence of land-banking and siting strategies are recorded by Arup et al (2017) who interview several retail and executive economists who research and consult to the sector[16].

[16] Arup, C., Beaton-Wells, C., & Paul-Taylor, J. (2017). Regulating Supermarkets: The Competition for Space. University of New South Wales Law Journal, 40(3). https://doi.org/10.53637/DWAZ3984

- Restrictive leases and contractual arrangements. For example, the case of Woolworths preventing a competitor Harris Farm from opening a store in Double Bay by blocking a tenant, organic grocer About Life, from transferring its 1,140m^2 site lease by claiming right of first refusal. Five years later Woolworths opened a small format Metro store in the space, **despite the fact that it already operates a large-scale store in the same shopping centre.**

The implications of the root cause of supermarket power concentration in Australia with respect to appropriate policy responses to market concentration in the supermarket are extremely consequential for the ACCC. Where monopolistic market structures arise due to economies of scale, the appropriate policy response may not be forced divestiture, since multiple smaller firms may have higher costs and therefore the benefits to farmers and consumers will be limited. Indeed, this is what is implied by Coles CEO Leah Weckert when she noted that “Australia has about a third of the population of the UK, but we operate stores on a geographic footprint which is 30 times the size. And so those considerations need to be taken into account when those margins are compared”[17]. However, if market concentration in Australia arises primarily through the exercise of control over limited commercial land and other non-competitive practices that keep competitors from entering the market, then the evidence to support divestment and other strategies to directly intervene in the market and increase competition is much higher.

A study by PwC commissioned by Aldi in 2019 found that customers of other supermarkets had saved $450 million due to the price competition it had introduced. This shows that not only did shopper of Aldi benefit from their lower prices, but they also lowered the prices of Coles and Woolworths[18]. While the increased competition from Aldi has been a positive step, there continues to be excessive levels of concentration in supermarkets.

***Recommendation**:*	That the ACCC collect data on the average costs of large supermarket chains in Australia, and conduct an empirical analysis into the presence of economies of scale in supermarket operations for the purpose of attributing the cause of supermarket concentration in Australia to ‘natural monopolies’ or anti-competitive practices.
***Recommendation**:*	That the ACCC investigate the claims of anti-competitive practices by supermarkets that exclude competitors from entering the market, including land-banking and excessive control over tenancy agreements.
***Recommendation**:*	That the ACCC, subject to an empirical review into economies of scale of supermarket firms in Australia, identify the ‘minimum viable firm’ which is likely to be profitable in Australia for the purposes of calibrating possible actions to increase competition in the sector, including enforced divestiture of sites and limitations on the number of sites that supermarket chains may lease or purchase within a given area.

Price and non-price competition

Price competition

There are multiple methods through which supermarket retail businesses in Australia have been able to exert undue control the quantity, quality and prices of agricultural products which they purchase and sell-

17 ABC (2024) Super Power: The cost of living with Coles and Woolworths. Four Corners.

18 PwC (2019) *Making a good difference: How ALDI contributes to the Australian economy* https://www.aldiunpacked.com.au/storage/2019/10/ALDI-Making-a-good-difference-report.pdf

on to consumers. The clearest example of market power exercised on price competition is the inability for farmers to negotiate on price at all, combined with explicit and implicit threats that they may be blacklisted in the future if they fail to take the price on offer. Without a diverse market of buyers, farmers simply have no choice but to take prices as dictated by supermarkets.

Other methods through which supermarkets exert market power over prices include:

- Control over pricing and consumption data, which offers supermarket chains an overwhelming advantage in negotiating prices.
  Perfect, or at least adequate, information is a prerequisite for well-functioning markets. Conversely, information asymmetry, in this case in the favour of supermarket chains, is a well-established cause of market failure. Specifically, supermarkets are able to negotiate from the 'bottom-up', purchasing from farmers in order of lowest to highest prices, whereas farmers can only take prices as offered. In economic terms as shown in Figure 2, supermarkets see farmers' entire supply (marginal cost) curve and can pay the lowest prices individual farmers are willing to accept at each step of it, whereas each individual farmer only sees the price as given by the supermarkets, leading to a near total reallocation of producer surplus from farmers to supermarkets.
- Pushing the costs of delivering in-store discounts and specials onto suppliers, and dictating the timing, frequency and magnitude of those discounts to suppliers.
- An inability to negotiate contracts for future prices for goods, which are an established method for farmers to hedge their price risks and share them equitably with buyers in many agricultural markets[19], meaning that farmers become spot-price takers long after planting and harvesting decisions have been made.

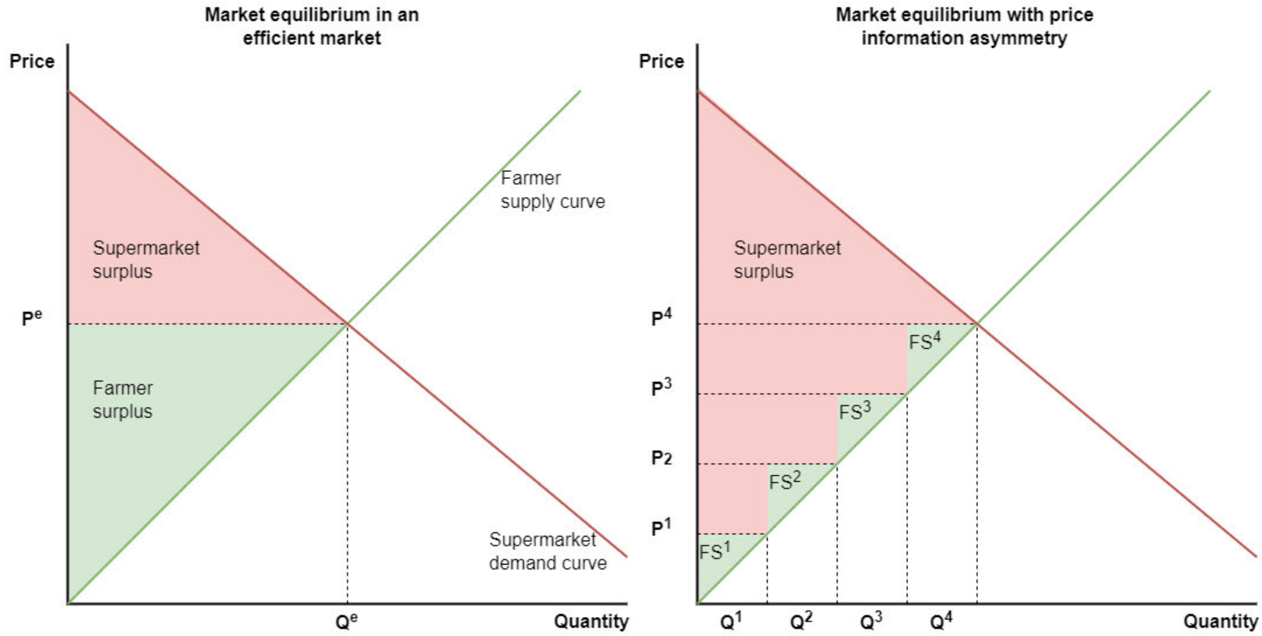

Figure 2: Comparison of a well-functioning efficient market between farmers and supermarkets where all participants see and experience a single equilibrium price (P^e) and a total equilibrium quantity (Q^e) is supplied (left), and a market distorted by price

[19] University of Southern Queensland & CelsiusPro. (2020). On-Farm Financial Risk Management Project: Sub-Project 2—Physical, forward contracts, futures, options, swap-markets, and associated product options for Australian farmers. National Farmer's Federation. https://nff.org.au/wp-content/uploads/2021/06/Sub-project-2-Hedging.pdf

information asymmetry in favour of supermarkets where supermarkets can charge four different prices (P^{1-4}) to four groups of farmers each supplying a proportion (Q^{1-4}) of the whole market (right).

While the ability to leverage market data assists supermarkets in lowering prices paid to farmers, and capturing a share surplus greater than they would in an efficient market, the long-term effect of this activity is to ultimately reduce the quantity and diversity of goods produced by farmers. This is because lower farmer profits translate to lower re-investment into new farm capital that can increase supply, and innovation into new varieties or better product quality that can attract higher consumer demand. As described above, limiting supply is a key mechanism through which monopolies exercise market power.

In addition, the lack of historical price information, and an adversarial market has been found to have severely limited the use of sophisticated contracting arrangements that allow farmers to hedge against price risks. This means that risk-transfer solutions for some markets like horticulture, livestock and viticulture are non-existent, and others remain thin and not regularly used by most farmers[20]. The EU agri-food data portal, EU market observatories[21], and USDA Market News National Weekly Cattle Net Price Distribution Reports[22] are international examples of regulatory instruments aimed at addressing price transparency and increasing market efficiency.

In Australia, the Australian Bureau of Statistics and the Australian Bureau of Agricultural and Resource Economics do not collect price data that would assist policy in identifying issues such as monopolistic power. By way of comparison the United States Department of Agriculture's (USDA) Economic Research Service (ERS) compares prices consumers pay for food with prices farmers receive for corresponding commodities. Comparisons are made for individual foods and groupings of foods—market baskets—that represent what a typical U.S. household buys at retail in a year. The retail costs of these baskets are compared to the money farmers receive for a corresponding basket of agricultural commodities.

The ERS also conducts research on:

- trends in wholesale sales by type of outlets, wholesalers, and products;
- sales and sales growth of traditional and non-traditional retail food stores;
- retail industry competition and organization;
- trends and developments in various types of food stores; and
- public policy topics such as access to affordable and nutritious food and the development of local food systems.

It is considered that the lack of comparable data collection and analysis in the Australian agricultural supply chain is a significant barrier to the identification of issues raised throughout this submission, and the appropriate policy responses necessary to addressing them.

Recommendation:	That ACCC collects data on the distribution (amount and frequency) of unit-prices paid to farmers for a range of major product groups in order to determine the extent to which information asymmetries account for distortions in the market – noting that a

20 University of Southern Queensland & CelsiusPro. (2020). On-Farm Financial Risk Management Project: Sub-Project 2—Physical, forward contracts, futures, options, swap-markets, and associated product options for Australian farmers. National Farmer's Federation. https://nff.org.au/wp-content/uploads/2021/06/Sub-project-2-Hedging.pdf

21 European Commission. (2019). Fairness in the food supply chain [Text]. European Commission - European Commission. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2629

22 USDA. (2021). New USDA Market News Reports to Enhance Price Transparency in Cattle Markets | Agricultural Marketing Service. https://www.ams.usda.gov/press-release/new-usda-market-news-reports-enhance-price-transparency-cattle-markets

large spread of unit prices paid to farmers (after controlling for transport costs and seasonal variations) is evidence of market manipulation arising from information asymmetry.

***Recommendation**:* That ACCC moves to address information asymmetries in the market for agricultural produce, for example, by establishing an independent online database akin to the Petrol Price Portal[23] and the USDA National Weekly Cattle Net Price Distribution report, paid for and contributed to by major supermarket chains which publishes distribution of unit prices paid to suppliers on an annual basis.

***Recommendation**:* That ACCC investigates claims of aggressive and anti-competitive price competition that served to exclude competitors from entering the market, limits the ability of suppliers to negotiate on price, and pushes the costs of sales and discounts onto suppliers.

Non-price competition

There are also several tactics which supermarkets use to exert undue control over product quality (non-price competition), which also has the effect of increasing producer costs and ultimately reducing the supply of goods and choice available to consumers. These include:

- Onerous quality standards, which give supermarkets the power to unilaterally reject whole consignments of goods due to a failure of a small percentage of those goods to meet the standard.
- Specific packaging requirements imposed on producers, which require large significant investments in processing equipment that effectively 'lock-in' those farmers to exclusively supplying those supermarkets. Sudden changes in packaging requirements render productive packaging equipment and materials obsolete, leaving producers to absorb losses and find additional funding in order to "comply to supply".
- The imposition of food safety standards, duplicating and additional to what is already required by law, which are introduced without adequate consultation or consideration of impact to producer costs.
- Increasing requirements for non-product related quality standards, including environmental, social and governance (ESG) standards, which come with demanding, time-consuming and costly data collection and certification obligations. While ESG certifications are notionally an opportunity for some farmers to obtain higher prices from consumers willing to pay to compensate for higher production costs, the current arrangements mean that supermarkets gain all the profits for enhancing ESG standards, while producers bear most of the costs.
  For example, poultry certification schemes like RSPCA and FREIPA introduced by supermarkets as a point of difference attracted incentive payments to farmers as compensation for higher production costs. However, since those products have become ubiquitous and widespread, and are no longer considered 'premium' products, farmers are no longer paid additional incentives, regardless of the additional costs of production.
- A refusal by supermarkets to brand-label produce, especially fruit and vegetables, which reduces producer brand awareness amongst consumers. This has the effect of homogenising all goods in the eyes of consumers, reducing the choice available to a single good with a single price. Producers

[23] ACCC. Petrol price cycles in major cities. https://www.accc.gov.au/consumers/petrol-and-fuel/petrol-price-cycles-in-major-cities

are therefore unable to differentiate their products, a critical aspect of competition in a health market, and negotiate on price or quantity.

While high farm produce standards are ostensibly a good thing for consumers. The ultimate effect of these 'non-price' competition factors is ultimately to reduce the supply of goods to consumers, and restrict their choice to produce that meets extreme aesthetic standards, where they might reasonably be willing to pay less for produce with an equivalent nutritional quality and a few blemishes. As explained above, any mechanism which allows a monopolist to control quantities, allows them to control prices and extract super-profits from suppliers and customers.

***Recommendation**:*	That the ACCC investigate the claims of anti-competitive non-price tactics used by supermarkets used in the supply chain process against producers, including quality and packaging controls, the imposition of onerous food safety and ESG requirements without compensation, and control over branding.

Supply chain dynamics

Evidence of the market power imbalance between producers and supermarket retail chains can be observed in the movement of the Farmers' Terms of Trade Index (FTOT), which provides an indicator of the ratio of prices received for agricultural products relative to the costs of production. As shown in Figure 3, the FTOT is driven by a combination of climatic conditions as well as local and global economic factors such as commodity and input prices.

In the period since 2020-21 following a brief peak, the FToT fell dramatically in response to deteriorating economic conditions driven by COVID-19 related increases in input costs, including materials and labour. **For the period 2023-24, the FToT index is forecasted to fall to the lowest level since the worst years of the Millenium Drought, while over the same period profits for the major supermarket chains have grown.**

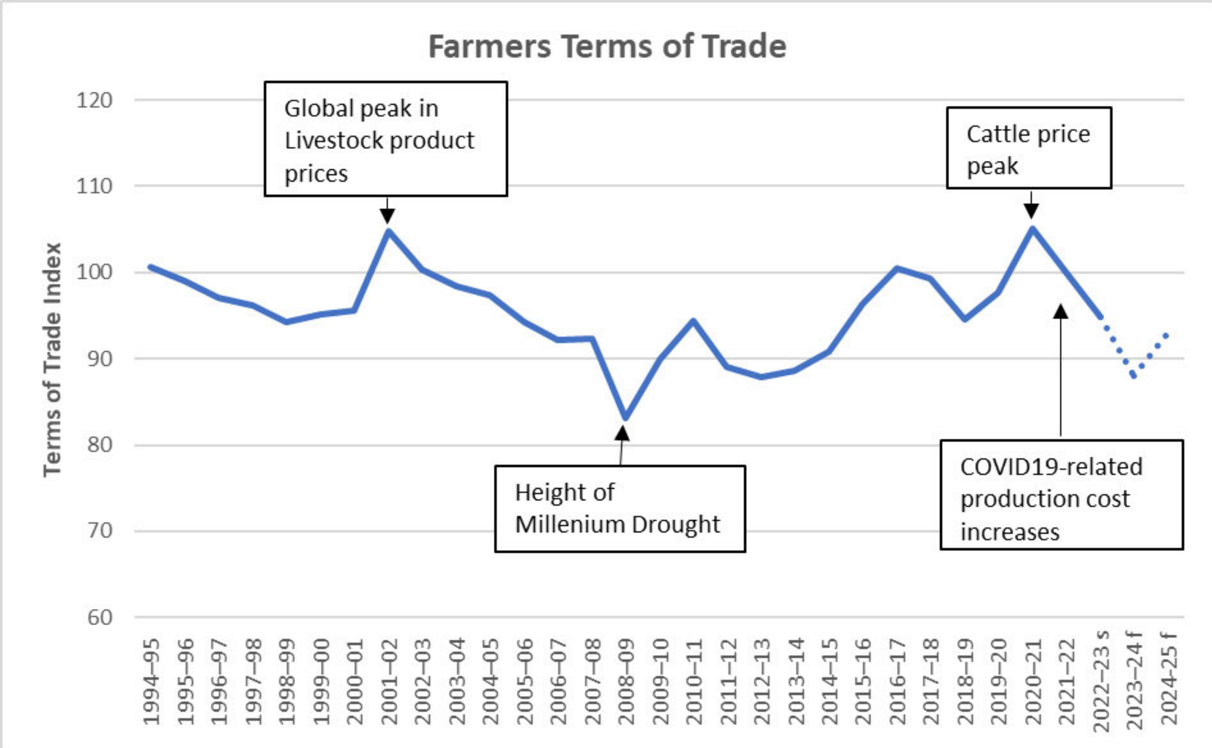

Figure 3: Farmers' Terms of Trade over time, illustrating the effect of climate, global prices, and supply-chain dynamics on the profitability of producers. Source: ABARES Agricultural commodities and trade data, Agricultural commodities: March quarter 2024 – Statistical tables.

The asymmetric impact of global supply chain disruptions on farmers and supermarkets costs and profits is a clear indicator of market distortions caused by an exercise of monopolistic power. In a well-functioning and competitive market, an increase in producer costs should result in increased producer prices since the 'competitive equilibrium market price' should be equal to the marginal costs of production.

Conversely, where agricultural product prices are low due to favourable conditions, lower farmgate prices should translate to lower consumer prices. However, as illustrated in Figure 4, the Food and Non-Alcoholic Group within the Consumer Price Index (CPI) have not moved in-line with domestic farmgate prices. Between 2010 and 2021, consumer food prices increased at a constant rate of 0.4% per quarter. However, between Dec 2021 and Dec 2023, food prices increased dramatically by 14.1%. Moreover, this sudden increase was driven largely by food sub-groups which had historically lagged behind the CPI, including bread (+27.5%), breakfast cereals (+37.7%), poultry (+24.2%), dairy products (+22.7%), fruit (+31.1%), and eggs (+18.2%).

Research undertaken by the ABS indicates that vegetables, fruit, meat and other perishable products like bread were amongst the most price inelastic products, based on supermarket scanner data[24], the same product categories that saw extreme retail-price increases between 2021-23. The finding from this research may inform the ACCC on the likelihood that supermarkets are able to exploit market power to increase profits to themselves while maintaining low prices to suppliers.

[24] Ewing, R., Merrington, L., & Ateyo, P. (nd). How do consumers react to the price of food and evidence from supermarket micro data.pdf. Australian Bureau of Statistics. https://www.abs.gov.au/system/files/documents/3c5d0beaf792cdb58fdaa07d1015e22d/How%20do%20consumers%20react%20to%20the%20price%20of%20food%20and%20evidence%20from%20supermarket%20micro%20data.pdf

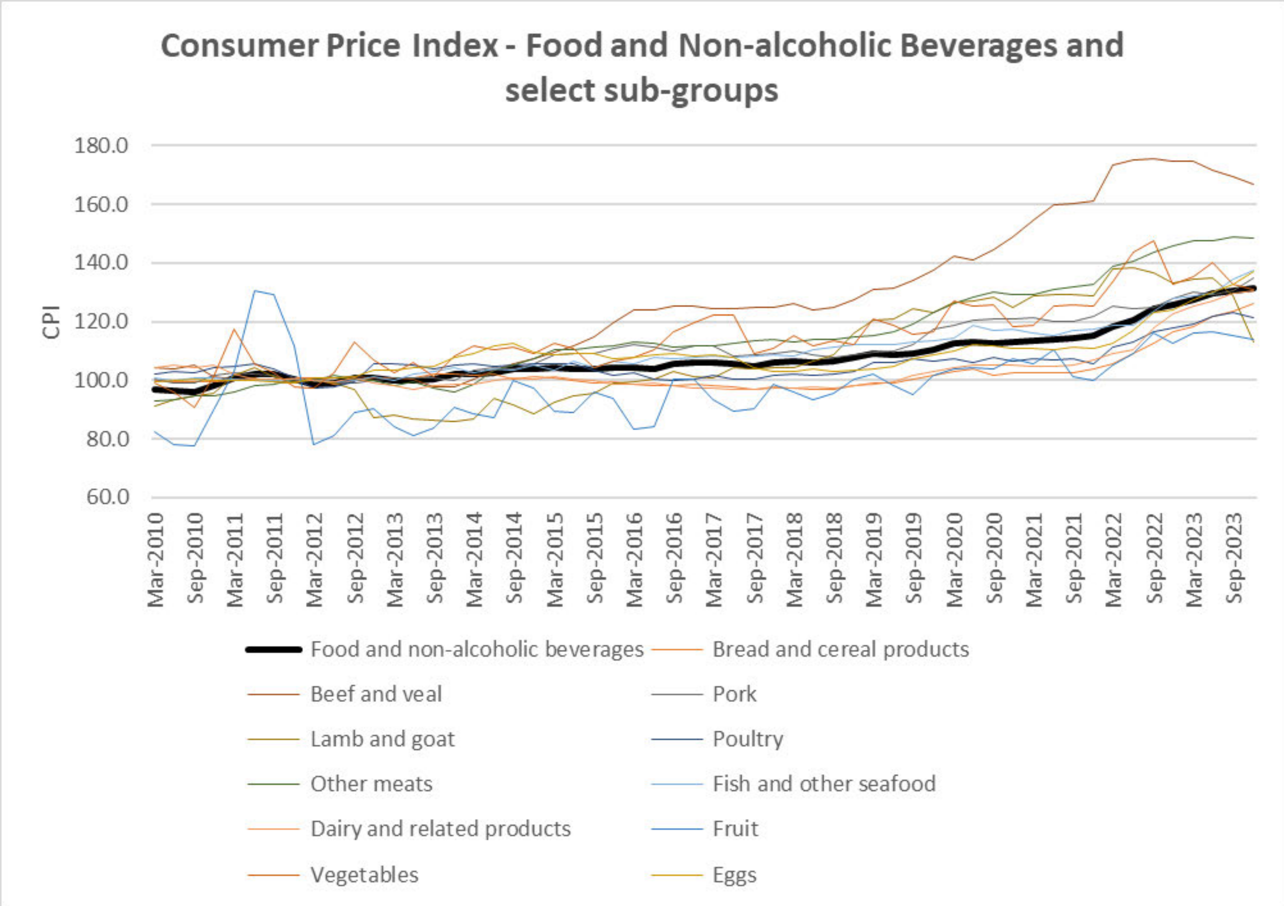

Figure 4: Consumer Price Index for Food and Non-alcoholic Beverages and select sub-groups. Source: Australia Bureau of Statistics, Consumer Price Index, Australia. Table 7.

Export, import and domestic market dynamics

According to economic theory, the impact of local supermarket monopolies on agricultural product prices is expected to be different depending on the amount and type of international trade that occurs. The framework outlined by Freebairn[25] indicates that:

- For exporting industries, such as grains and beef, the effect of monopoly power may be limited by the fact that producers can sell overseas at the prevailing world price.
- For industries that face competition from imported products, such as pork and processed horticulture, monopoly power to set purchasing prices is limited, since it is determined by the world price. However, the monopolist still has the power to limit the quantity available to consumers, and therefore charge a monopolistic consumer price.
- For industries that are not traded internationally, such as fresh horticulture, poultry and eggs, there is an opportunity for monopolistic supermarkets to increase their profits by setting a farmer price below the competitive level, since their production is relatively inelastic.

With respect to non-imported goods, Freebairn notes that the ability for farmers to switch their production to exportable products may, in principle, limit the ability for monopolistic supermarkets to exert market

[25] Freebairn, J. (2018). Effects of supermarket monopsony pricing on agriculture. Australian Journal of Agricultural and Resource Economics, 62(4), 548–562. https://doi.org/10.1111/1467-8489.12251

power over farmgate prices. However, experience shows that there are several reasons to expect that this does not happen, even over the very long-term:

- Orchard fruit horticulture relies on trees, which take several years to decades to reach full productivity, and have very long payback periods. Fruit farmers are therefore locked into production decisions for a very long time and cannot easily change quantities harvested.
- Similarly, products such as perennial horticulture, poultry and eggs have very large and specialised capital requirements, including greenhouses, irrigation systems and animal-specific sheds, which also have long payback periods that limit the ability of the farmer to transition to new outputs without taking on significant losses, and making large investments in new capital and machinery which banks may be unwilling to finance if loans on previous capital are yet to be repaid.
- Farmer management and expertise in heavily embedded in the outputs they produce. It takes many years for a farmer with decades of experience growing vegetables to transition to growing broadacre crops or raising cattle, and achieve a baseline level of productivity.

Producer competition with imported agricultural goods is also an important factor to consider when analysis the supply chain dynamics at play. Imported agricultural products, especially processed goods, are not subject to the same unfavourable market conditions described throughout this report as Australian farmers. However, Australian farmers increasingly find themselves competing with international markets for shelf-space in supermarket aisles. Suppliers have reported that the intense competition for the Australian consumer’s attention have let to supermarkets facilitating bidding wars between suppliers in order to secure deep discounts. Australian farmers report that due to their already high costs of production, and other impositions such as the need to comply with ESG requirements, they often lose out in this contest against international brands not subject to the same barriers.

With respect to product groups which have shown extreme CPI growth over the past 3 years, as illustrated in the section above, compared to groups that have not seen the same inflation effects, it is strongly argued in this submission that the monopolistic market structure of local supermarkets can explain a significant proportion of the differences in prices charged to consumers.

***Recommendation**:*	That the ACCC investigate how monopolistic power exercised by supermarket chains has meant that increasing producer costs and declining FToT, and increasing consumer costs of living, have failed to translate to a decline in supermarket profitability, especially during the 2020-2023 period corresponding to global supply-chain disruptions due to COVID-19 and geopolitical unrest.
***Recommendation**:*	That the ACCC investigate why the CPI for some agricultural product groups, as discussed above, increased over 20% in the period 2021-23, and the extent to which monopolistic power exercised by supermarket chains, and specific vulnerabilities experienced by producers and suppliers (especially for perishable goods) in those markets have contributed to those price increases.

Trading terms and practices

Contracting and agreements

Evidence of the fact that supermarkets have exerted disproportionate influence over price and quality competition can be observed in the grossly unfavourable trading terms experienced by farmers.

Notwithstanding that the specific operation or scope of the voluntary Food and Grocery Code of Conduct (FGCC) is beyond the current ACCC review, the fact that only 5 formal complaints been registered with the arbiter since 2020 points to the fact that it has been an ineffective instrument against poor trading practices. The toothless nature of the Code is also evidence of a level of 'regulatory capture' also typical of monopolistic market structures[26].

As a result, several undesirable trading, negotiating and contracting practices have been allowed to proliferate. Examples of these include:

- Contract terms offered to farmers on a take it or leave it basis, which farmers are forced to take in a market where there are extremely limited alternative markets.
- Deductions on final payments to producers in the order of 2.5-5.0% per instance, commonly known as 'rebates', charged in an opaque and arbitrary manner for reasons such as timely payment of invoices without any actual service provided by supermarkets[27].
- An ability for supermarkets to unilaterally, and without prior notice, cause or compensation, change agreed supply volumes after all planting and harvesting decisions have been made by farmers.
- Explicit and implicit exclusivity clauses, locking producer in to supplying only one supermarket. Alarmingly there have been reports suppliers in fresh food would not supply Kaufman because of feared retribution from Coles and Woolworths[28].
- A lack of information provided to farmers regarding quality control tests undertaken by supermarkets, and the reasons why goods have been rejected.
- Practices by supermarkets requiring suppliers to disclose confidential financial information or intellectual property during price negotiations.
- Requirements imposed upon producers to pay to access data about a product's sales in order to understand its sales performance.
- Payments to farmers made on the basis of a pool system, as is prevalent in the poultry industry. While pool-payment systems can work well when established on a model of grower involvement and redistribution of a standard fee, their increasing misuse by certain processors (of which there are only 2 in NSW) based on a refusal to negotiate collectively, short-term contracts (<5 years) less than the lifetime of sheds and other farm infrastructure (15-20 years), and caps on price growth (2%p.a.) that has seen return systematically lag behind inflation, while imposing a collective pricing method based on performance benchmarks that reward farmers for achieving productivity gains based on inputs that processors themselves provide and control the quality for.

Recommendation:	That the ACCC investigate and collect a large sample of contracts and agreements offered to farmers, and scrutinise those contracts for evidence of uncompetitive, onerous packaging and ESG requirements, and unfair terms of trade that disadvantage producers and increase supermarket profits.
Recommendation:	That the ACCC investigate allegations of explicit or implicit examples or threats of retribution leveraged against farmers in retaliation for registering a complaint under the Food and Grocery Code of Conduct, or supplying other chains.

26 Bo, D. E (2006) Regulatory Capture: A Review. Oxford Review of Economic Policy. Vol 22, No 2

27 National Farmers Federation: Supermarkets gouge growing millions in rebates alone. https://nff.org.au/media-release/supermarkets-gouge-growers-millions-in-rebates-alone/

28 ABC (2024) *How did Coles and Woolworths become so powerful? The story of the big two supermarkets*, https://www.abc.net.au/news/2024-02-23/a-history-of-the-duopoly-coles-woolworths/103494070

Principles for addressing unfair trading practices

As noted throughout this submission, many Farmers in NSW and Australia are exposed to unfair trading practices. As part of the Unfair trading practices – Consultation Regulation Impact Statement, NSW Farmers prefers Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices for the following reasons:

- It is the strongest of the options in protecting small businesses against unfair trading practices, which are prevalent across agriculture.
- The specific prohibitions list will provide greater protection for agricultural businesses, as the courts have been shown to require a high threshold and are also a process that small businesses will be highly unlikely to use due to fear of retribution, low understanding of legislation compared to other larger businesses, and the high costs of undertaking court proceedings.
- The general prohibitions will provide flexibility.
- It aligns with international best practice, especially in the EU which even has specific legislation against unfair trading practices across agricultural supply chains.

The following practices specifically covering the agricultural industry should be specifically prohibited:

- Payments later than 30 days for perishable agricultural and food products
- Payment later than 60 days for other agri-food products
- Short-notice cancellations of perishable agri-food products
- Risk of loss and deterioration transferred to the supplier
- Refusal of a written confirmation of a supply agreement by the buyer, despite request from the supplier
- Misuse of trade secrets by the buyer
- Commercial retaliation by the buyer
- Transferring the costs of examining customer complaints to the supplier
- Threatening to blacklist a supplier
- Refusal to negotiate prices by a buyer
- Using standards and specifications as a way to lock in suppliers
- Unilaterally requiring suppliers to adhere to standards with no compensation for the costs that they impose
- Unilaterally requiring suppliers to adhere to standards that are unreasonably onerous and divergent from broader industry standard

***Recommendation**:*	That the ACCC investigate the issues raised by and consider the impact of implementing Option 4 from the Commonwealth Treasury's Consultation Regulatory Impact Statement on Unfair Trading Practices.

Regulatory factors impeding efficient markets

NSW Farmers considers that in the face of extreme market concentration and exercise of monopolistic market power by Supermarket retail chains, the most significant factor impeding the operation of efficient markets is a lack of regulation and enforcement from the ACCC. Since the legal and regulatory frameworks are as important to market function and design as the industry and supply chain itself, it is important to raise those issues here. The following section details specific issues with the regulatory and legal frameworks and instruments available to police monopolistic and oligopolistic conduct in the agriculture supply chain.

Food and Grocery Code of Conduct

The 2022-23 Annual Report[29] delivered by the FGCC Independent reviewer found that 29% of suppliers experienced issues in dealings with the major supermarkets in the previous 12 months. In addition, 51% of suppliers believe that there are significant impediments to raising issues with the buying team, including the fear of damaging a commercial relationship (34%) and fear of retribution (17%). Noting that not all farmers will have issues in all years, but the majority of farmers are likely to experience at least one significant issue over a number of years, it is NSW Farmer's position that these percentages are far beyond the critical mass necessary to drastically influence the behaviour of market participants in favour of the large supermarket chains. However, a lack of data regarding how many of these issues likely constitute a gross infringement of the code, given that so few complaints are raised, has limited the ability of the of the regulatory regime to respond to breeches and act as a disincentive against further undesirable practices.

Since the FGCC has, to date, failed to act as an instrument to catalogue and address grower complaints and issues with the ways supermarkets interact with farmers, there is a large information gap regarding the actual number of instances of any of the issues listed above. As with other data gaps identified in this report, it is a significant barrier to identifying the scope and nature of issues, and appropriate policy responses. In particular, many growers have registered dissatisfaction with the FGCC in relation to the fact that it:

1. Does not recognise the and address the specific vulnerabilities faced by suppliers who supply perishable goods, especially in the agriculture industry.
2. Is not mandatory for all retailer and wholesalers.
3. Does not include enforcement tools, or the ability to apply civil pecuniary penalties when it is breached.
4. Provide a genuinely independent dispute process to resolve supplier complaints.
5. Give the ACCC the appropriate enforcement tools to act on issues.

It is considered that the code currently fails to recognise and addresses the specific vulnerabilities faced by suppliers who supply perishable goods including agricultural produce. In particular with respect to the impact that supply decisions made by supermarkets have on producers who must make and lock-in and bear the cost of planting, growing and harvesting decisions in advance.

NSW Farmers notes that many of the provisions in the FGCC apply only if there is a grocery supply agreement in place. However, there are multiple reports that farmers find themselves unable to negotiate a grocery supply agreement, and instead fall-back on informal, often verbal, arrangements to supply a volume of produce at a future date.

Informal arrangements under the current FGCC can have perverse consequences if:

- A farmer is not covered for reasonable contingencies. For example, natural variations in ripening due to climate can mean that a producer feels as if they have to harvest too early, or too late, in

[29] Food and Grocery Code Independent Reviewer (2023) 2022-23 Annual Report. https://grocerycodereviewer.gov.au/reports/annual-reports/2022-23-annual-report

order to hit a narrow delivery window set out in an informal agreement. As a consequence, their produce may be rejected on quality grounds.

- A purchaser gives a forecast volume which is too large, and end us purchasing only a proportion of the agreed-upon amount. This can lead to farmers rapidly trying to dump produce on the wholesale market, which has negative flow-on effects to other producers and buyers.

In addition, the fact that the FGCC is not mandatory for all major supermarkets and wholesalers means that it cannot drive better behaviour between supermarkets and their suppliers in the fresh food sector. Without being mandatory, the risk of signatories withdrawing from its coverage undermines the force of the code and the extent to which businesses can rely on its protections. This is applicable to both farmers that supply supermarkets directly, or supply intermediaries such as food processors and wholesalers, who in turn supply retailers. As such, it is also critical to ensure appropriate protections are consistent throughout the supply chain, including for wholesalers and processors. Minimum standards in this code must also be equivalent with other industry codes that govern trade between suppliers and buyers (for example the Horticulture and Dairy Codes).

For example, horticulture growers who sell to a trader are governed by the mandatory Horticulture Code, in contrast to those who sell directly to a supermarket which are governed by the FGCC. In practice this means that growers who sell fruit and vegetables directly to a supermarket have less protections and price information than when suppling traders (i.e. wholesalers). The requirements and minimum standards for trade between horticultural growers and supermarkets must be at the very least equivalent to those standards set for growers and traders under the Horticulture Code.

The lack of penalties for non-compliance inhibits compliance and effective dispute resolutions, since supermarkets have no material incentive to engage with the Code or with determinations made under it. Pecuniary penalties, such as those within the Horticulture and Dairy Codes, should be introduced to provide more confidence to suppliers in the objectives of the Code. As it currently stands, the code does not provide the ACCC with the necessary enforcement tools to protect suppliers against signatories that fail to comply with its requirements. The code needs the ability to apply significant civil pecuniary penalties when it is breached including necessary enforcement tools for the ACCC to protect suppliers against signatories that fail to comply with its requirements.

NSW Farmers has major concerns about the true independence in the existing dispute resolution process due to code arbiter's alignment with each retailer, which means market power imbalances persist in the dispute process. The perceived independence of the code arbiters is problematic given they are appointed by individual code signatories. This results in a reluctance to raise disputes due to fear of retribution by retailers. The Food and Grocery Code needs to provide a genuinely independent dispute resolution process, so that suppliers are not deterred from using it because of concerns over confidentiality, bias, or commercial retaliation by retailers or wholesalers.

***Recommendation**:*	That the ACCC collect data on the extent and incidence of breaches of the FGCC from a wide sample of farmers, and make such data collection a regular part of the review of the FGCC.
***Recommendation**:*	That the ACCC investigate the extent to which the issues noted above contribute to and exacerbate issues with trading terms and practices between farmers and supermarket chains, and appropriate policy responses to those, in particular for the FGCC to:

1. recognise and address the specific vulnerabilities faced by suppliers who supply perishable goods including agricultural produce.
2. be mandatory for all retailers and wholesalers.
3. have the ability to apply significant civil pecuniary penalties when it is breached including necessary enforcement tools for the ACCC to protect suppliers against signatories that fail to comply with its requirements.
4. ensure a genuinely independent dispute process to resolve supplier complaints.
5. enable the appropriate enforcement tools to be available to the ACCC to act on issues identified.

Penalties for anti-competitive behaviour

Section 155 of the *Competition and Consumer Act 2010* grants the ACCC compulsory information gathering powers to obtain certain information, documents and evidence in relation to its enforcement functions. This power is only used under certain circumstances such as, if they believe there has been a breach of the CCA or on matters such as 'designated water and communication matters'. Powers such as theses may provide benefits to the agricultural industry to prevent or identify harmful anti-competitive behaviour.

NSW Farmers recommends that this inquiry consider the appropriate powers needed to bolster the ACCC's ability to undertake effective investigations and enforcement to prevent harmful behaviour in the agricultural supply chain, for example trade between producers and supermarkets.

EU legislation on unfair trading practices notes:

> *The existence of a deterrent, such as the power to impose, or initiate proceedings, for the imposition of, fines and other equally effective penalties, and to publish investigation results, including the publication of information relating to buyers that have committed infringements, can encourage behavioural changes and pre-litigation solutions between the parties, and should therefore be part of the powers of the enforcement authorities. Fines may be particularly effective and dissuasive.*[30]

AN OECD report, *Pecuniary Penalties for Competition Law Infringements in Australia,* found that penalties imposed by the Courts for competition law breaches were significantly lower than in other jurisdictions, especially for large firms or long-standing anti-competitive behaviour. Penalty rates would have to be increased by 12.6 times to be comparable with the level of the average penalty in other OECD countries. Fines and penalties should not be an accepted cost of doing business, but large enough to be a deterrent for anti-competitive behaviour.

There has been a patchy history of enforcement activities by the ACCC due to resource constraints. This has impacted the ACCC's compliance and enforcement activities. Cases on the misuse of market power and unconscionable conduct are extremely rare. In the case ACCC v Woolworths (2016), the ACCC failed to convince the Federal Court that Woolworths acted unconscionability. The Court noted that the prosecution failed because the ACCC could not gather specific evidence on harm with respect to the unconscionable conduct. Only evidence comprising materials produced under compulsory notices were produced by the ACCC, it was incomplete since suppliers would not testify.

[30] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0633

NSW Farmers notes that in 2017 the Australian Parliament Passed the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017,* which includes an ‘effects’ test for the misuse of market power. While the Act and related Bills do substantially expand the scope of what ACCC may identify as market power and its abuse, its provisions have yet to act as a deterrent against poor behaviour by supermarkets. Powers to act are therefore not sufficient to produce competitive markets alone, they must be paired with a demonstrated willingness to apply them when necessary.

Without adequate enforcement and compliance, it is difficult to instil the healthy competitive norms and culture within markets. The lack of enforcement is of particular concern within food supply chains, where many farmers and suppliers are reluctant to come forward against powerful organisations for fear of being locked out of supply chains. This means the investigative work of the ACCC, particularly via the ACCC Agriculture Unit, vital in uncovering any potential system breaches of competition provisions. The Federal Government needs to increase funding and resourcing to the ACCC Agriculture Unit on an ongoing basis.

***Recommendation**:*	That the ACCC consider the range of options available to it to administer financial and non-financial penalties on supermarkets found to have engaged in anti-competitive behaviours, and whether they are provide an adequate disincentive against those behaviours. Furthermore, that ACCC should evaluation any additional powers and funding necessary to undertake enforcement activities to act as a disincentive against harmful behaviour.

Divestiture powers

As noted in previous sections, divestiture is an appropriate policy response to monopolistic market concentration particularly where it arises as a result of the control over limited or scarce resources (as opposed to natural monopolies which arise from economies of scale). It is noted above my NSW Farmers that it is potentially likely that the economies of scale experienced by supermarkets is not a significant factor in their ability command such a large market share, and consequently it is much more likely that it arises from their control over land, prices and other anti-competitive practices.

While there have been some examples of divestiture powers used by ACCC, including:

- 2023 - the ACCC commenced investigation into several completed acquisitions over a six-year period by Petstock and accepted a court-enforceable undertaking to divest a package of 41 sites and assets.
- 2015 - Primary Health Care did not notify the ACCC prior to its acquisition of pathology sites from Healthscope which were subsequently divested after the ACCC conducted a lengthy investigation.

It is considered that in general the authority and ability of ACCC to enact divestiture proceedings against firms which have been found to have reduced competition in the market. The Treasurer can call in investments for review that are ‘reviewable national security actions’ which are not otherwise notified to the FIRB. If an action is called in for review, the *Foreign Acquisitions and Takeovers Act 1975* allows the Treasurer to issue a no objection notification, impose conditions, prohibit the action, or require divestment. Divestiture powers, therefore, are restricted to foreign investments and to seek damages after a merger (must be within 3 years post-completion of a merger). These should be expanded to allow for divestiture of industries which are in the interest of national security - such as food.

It is considered that the lack of a general-purpose disincentive to undertake anti-competitive business practices in the form of strong divestiture laws means that in effect there is no reason for firms not to take part in the types of behaviour outlined in this submission.

***Recommendation**:*	That the ACCC consider the effect of a lack of divestiture enforcement mechanism against supermarket retail chains on the behaviour of participants in the market, and the case for the introduction of divestiture powers which can be used in cases of gross market power imbalances that are against the national interest.

Regulation of mergers and acquisitions

NSW Farmers believes there needs to be an overhaul of Australia's merger and acquisition framework. The current process allows multiple ways to gain merger authorisation, which can lead to forum shopping. Under the current system, there are different processes that can be used for a merger to take place. You do not need authorisation from the ACCC to merge, however, if they form a view that the merger will substantially lessen competition, they can take court action to prevent or unwind the transaction. There are two ways through the ACCC to gain merger authority, an informal merger review and merger authorisation.

The ***formal merger*** authorisation is a legal process under the *Competition and Consumer Act 2010* (CCA) that provides legal protection for businesses to merge and manage competition law risk. If a merger authorisation is granted, it prevents the ACCC or third parties from taking legal action for a breach of section 50 of the CCA. Merger authorisation decisions can be appealed to the Australian Competition Tribunal, made up of Federal Court judges and economic and business members, which may review any determination by the ACCC. Thereafter, any questions of law arising from the Tribunal can be appealed to the Federal Court.

The ***informal merger*** review is, where merger parties seek the ACCC's view of whether a proposed merger or acquisition is likely to substantially lessen competition. Unlike the formal merger authorisation, this process does not protect the parties from legal action by the ACCC or other parties. If the merger is opposed, the ACCC can apply to the court for orders such as an injunction, divestiture and penalties. An informal review can be public or private depending on the public importance.

Currently, it is difficult to gather evidence for a merger that is believed to be anti-competitive. It is hard to find suppliers and customers on the record, in fear of retribution. The Court also does not focus on how the structural market conditions will change with reduced competition and places weight on evidence from the company's chief-executives about their future plans. The process is skewed towards clearance and has allowed many mergers to go ahead which the ACCC opposes.

There needs to be a formalised merger regime and process. Acquisitions above a specific threshold should be subject to mandatory notification and notified acquisitions cannot be completed until clearance has been granted by the ACCC.

There also needs to be an expansion of merger factors considered before granting authorisation under section 10 of the CCA when making an authorisation decision. It is important that structural factors should be considered such as whether an acquisition may result in the loss of a potential competitive rival.

There needs to be the inclusion of a deeming provision, which will fix the way a court judges market power. This would apply to acquisitions if one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would likely be entrenched, materially increased or materially extended. This proposed new provision would, for certain matters, focus the assessment on preserving the structural conditions for competition in markets most at risk of the exercise of market power.

The current 'substantially lessen competition' test, takes the Courts down an evidentiary rabbit hole in the name of identifying precisely how competition will play out in the future - with and without the proposed transaction. Which is how judges, whose role is to systematically establish facts to the requisite standard of proof, make decisions. The test of whether a deal substantially lessened competition should be changed to include "entrenching, materially increasing or materially extending a position of substantial market power".

The agricultural sector has seen mergers in recent years which affect the way industry works - including JBS taking over Primo and Riverlea; Saputo's acquisition of Murray Goulburn; Zoetis taking over Jurox; Landmark buying out Ruralco, and Woolworths acquisition of PFD Food Services. Though the new proposed changes may not have affected these mergers, nor were the mergers necessarily bad for market outcomes, however any new merger in the agriculture space needs to be rigorously checked against a stronger mechanism.

In the case of Woolworths acquisition of PDF Food Services, the ACCC believed there would be a negative impact on suppliers but could not gather enough evidence that it would substantially lessen competition, as currently defined in the CCA, in the $18 billion food distribution sector.

Recommendation:	That the ACCC examine the impact of the current mergers and acquisitions framework, and the extent to which it acts as an appropriate disincentive to the types of anti-competitive practices outlined in this submission. Furthermore, the ACCC should consider the effect of adopting of a formal mergers and acquisitions framework that identifies the ACCC as the primary decision maker and that decisions take into account structural market conditions.

International inquiries into supermarket concentration

This ACCC Inquiry and Issues Paper does not stand alone in addressing the problem of supermarket concentration and its detrimental impacts on suppliers and consumers. The following sections outline the experience and outcomes of similar inquiries in New Zealand and Canada respectively, and provide a precedent for many of the recommendations put forward by NSW Farmers in the submission above.

New Zealand

New Zealand has an even more concentrated market than Australia, with their main two supermarkets Countdown and Foodstuffs having 80 per cent of the market. The Commerce Commission (New Zealand's competition and consumer watchdog) did an inquiry into supermarkets[31]. It found that:

> *"…competition is not working well for consumers in the retail grocery sector. If competition was more effective, the major grocery retailers would face stronger pressures to deliver the right prices, quality and range to satisfy a diverse range of consumer preferences."*

Under the existing market conditions, it was found that there is little chance of new entrants due to the scale and geographic coverage required to compete effectively with the major grocery retailers. Barriers to entry include a lack of suitable sites for store development, difficulty in sourcing wholesale supply of a sufficient supply of products, and the need to gain vertical integration to create cost efficiencies.

In addition, analysis found that the major grocery retailers have achieved higher levels of profitability than expected in a competitive market for a period of at least the five years prior to the COVID-19 pandemic. Return on average capital employed for the two major grocery retailers were 12.7 per cent for Woolworths NZ, and 12.8 per cent and 13.1 per cent for Foodstuffs South Island and North Island respectively. This compared to the normal rate of return for grocery retailing in New Zealand of 5.5 per cent, based on the weighted average cost of capital.

The Grocery Industry Competition Bill was passed on the back of this inquiry which included the following:

- A new Grocery Supply Code of Conduct, with obligations on regulated grocery retailers such as acting in good faith, ensuring supply agreements are in plain English, and not requiring a supplier to use a particular transport or logistics service.
- Smaller retailers can now request wholesale supply through regulated retailers.
- Grocery supply agreements are now subject to Unfair Contract Terms legislation.
- An out of court dispute resolution scheme will be established for resolving conflicts between wholesale customers, suppliers, and regulated grocery retailers.

Canada

Canada held a broad competition review in 2022-23 which included a Retail Grocery Market Study Report.32 This was conducted against the backdrop of a changing economy and concerns over the effects

[31] https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector

[32] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada

of business concentration, notably on affordability, Canada's innovation performance and the resilience of supply chains.

Canada at that stage did not have the powers to compel companies to provide confidential data so the report was based on submissions from the public. Still, it found that the food gross margins of the largest grocers increased by a modest yet meaningful amount over the previous five years. This pre-dated the supply chain disruptions faced during COVID-19 and the current inflationary period. Despite the relative lack of market dominance in Canada compared to Australia (the top two grocer's market share are 28% and 20% respectively), their sector still required statutory intervention.

It made the important observation that when prices rise, if margins remain the same in percentage terms that means they have already increased in absolute dollar terms, and increased input costs have already been reflected. If margins increase, then they can indicate that a business is successfully raising its prices over and above any increase in costs. Consider a grocer selling a can of soup. If a grocer is paying $1 for that can, and selling it to you for $1.20, they are making a 17% margin. They earn $0.20 per can of soup sold. Now, what happens if the grocer's cost for that can of soup goes up to $1.10, and they apply that same 17% margin? The price of that can of soup now goes up to $1.32. The grocer still makes a 17% margin, but now they get $0.22 cents to put toward their profit.

- When its costs rise, a business does not need to increase its margin in order to increase its profit. High rates of food inflation can significantly increase grocers' profits even if their gross margins remain constant or increase only modestly. The retail Grocery Market Study Report made four recommendations: from this report:
- Canada needs a Grocery Innovation Strategy aimed at supporting the emergence of new types of grocery businesses and expanding consumer choice.
- Federal, provincial, and territorial support for the Canadian grocery industry should encourage the growth of independent grocers and the entry of international grocers into the Canadian market.
- Provincial and territorial governments should consider introducing accessible and harmonized unit pricing requirements.
- Provincial and territorial governments should take measures to limit property controls in the grocery industry, which could include banning their use.

Leading on from the competition review the Government of Canada passed a bill to amend the Competition Act to:

- provide the Competition Bureau with powers to compel the production of information to conduct effective and complete market studies;
- remove the efficiencies defence, which currently allows anti-competitive mergers to survive challenges if corporate efficiencies offset the harm to competition, even when Canadian consumers would pay higher prices and have fewer choices; and
- empower the Bureau to take action against collaborations that stifle competition and consumer choice, in particular situations where large grocers prevent smaller competitors from establishing operations nearby.