



**Small Business
Development Corporation**

Our ref: D24/2046

Supermarkets Inquiry
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

supermarkets@acc.gov.au

Dear Sir/Madam

SUPERMARKETS INQUIRY 2024-25

The Small Business Development Corporation (**SBDC**) welcomes this opportunity to provide feedback¹ on the Australian Competition and Consumer Commission's (**ACCC**) issues paper for the Supermarkets inquiry (**the Inquiry**).

About the SBDC

The SBDC is an independent statutory authority of the Government of Western Australia, established in 1984 to support and facilitate the growth and development of small businesses in the State.

In early 2012, the SBDC's structure and governing legislation² was enriched with the introduction of the role of Western Australian Small Business Commissioner (**the Commissioner**) and establishment of dispute resolution services (**DRS**) for small businesses. The Commissioner is also the Chief Executive Officer and in this dual role, is responsible for the day-to-day operation of the SBDC and the provision of its key services, including general small business and specialist commercial tenancy advisory, dispute resolution, policy review and development, and advocacy and advice to government.

The DRS can assist small businesses based in Western Australia with disputes relating to a range of matters including contracts, retail tenancy leases, non-payment or non-performance, and unfair terms. The service assists disputing parties to clarify the issue in question and attempt resolution, including identifying when further legal assistance may be necessary. The DRS also offers access to a subsidised, low-cost mediation service (at a cost of \$125 per party per mediation session), which can provide a valuable opportunity for parties to resolve specific concerns and fulfil their contractual obligations.

¹ This submission outlines the views of the SBDC and does not necessarily represent the views of the Western Australian Government.

² See Part 3 of the *Small Business Development Corporation Act 1984 (WA)*.

In 2020, the Commissioner was granted greater ability to inquire into conduct that is having an adverse impact upon small business in Western Australia. To this end, the Commissioner has established an Investigations and Inquiry Unit (**IIU**) whose role, amongst others, is to investigate and inquire into poor and unfair business practices that affect the commercial activities of small businesses.

Among its key strategic objectives, the SBDC also plays a critical role in ensuring the interests of the Western Australian small business sector is represented to all tiers of government and in advocating for a fair operating environment and improved access to justice for small businesses. In line with this, the SBDC works closely with, and feeds relevant issues and emerging trends to, relevant authorities including the ACCC.

Feedback on the issues paper

In our current challenging economic environment, it is unsurprising that more and more consumers and suppliers – often small and medium-sized enterprises (**SMEs**) – have been raising concerns about the conduct and practices of Australia’s supermarket giants. The grocery sector is currently in the spotlight as the major chains come under increasing political and consumer backlash for their pricing and margin-setting practices and high profits amidst a cost-of-living squeeze.

Primary producers and other SME suppliers have criticised the pricing practices of the supermarket majors and the relationship between wholesale (including farmgate) and retail prices, all the while contending with sharply rising costs of doing business, persistent labour shortages and climate change.

Under this backdrop, the Inquiry seeks to examine:

- competition in the retail supply of groceries and associated supply chains
- how prices are set at different levels of the supply chain, and the associated margins.

The following feedback complements the SBDC’s recent submission to the Treasury-led independent 2023-24 Review of the Food and Grocery Code of Conduct (**the Grocery Code**). As expressed in that submission, the SBDC is hopeful that the Inquiry will ultimately enhance competition in the grocery sector and lead to higher prices for suppliers and lower prices for consumers.

Market structure

The SBDC notes that the highly concentrated supermarkets and grocery stores market in Australia is dominated by three major supermarket chains and a wholesaler, who combined hold over 80 per cent market share, as per below:

- Woolworths Group: 37 per cent.
- Coles Group: 28 per cent.
- Aldi: 10 per cent.
- Metcash (wholesaler to the IGA Group): 7 per cent.

Industry revenue has grown at a compound annual growth rate of 1.2 per cent over the past five years, reaching an estimated \$135.1 billion in 2023.³

Over the last decade, the market has observed some slight shifts. For example, likely driven by the current economic conditions, an increasing number of consumers are turning toward low-cost supermarkets Aldi and Costco for their grocery needs.

The discount supermarket chain Aldi has aggressively grown its market share since arriving in Australia in 2001, and by the end of 2013 overtook the IGA Group to become the third biggest player in the sector. Despite growth slowing down during the COVID-19 pandemic⁴, Aldi has reached a market share of 10 per cent in 2023.⁵ Its growth, along that of Costco's, has contributed to a marginal decline of Woolworths' and Coles' market share over the past five years.⁶

Aldi's rise to become a significant player may demonstrate that the supermarkets and grocery stores sector is not completely immutable and is able to be re-shaped by consumer behaviours, however, the SBDC believes both the current regulatory landscape and competition dynamics make it extremely challenging for smaller grocery retailers and suppliers to enter the market and compete in a fair operating environment on an even keel.

While consumer behaviours continue to change (such as the rise in online shopping and home delivery), and may present competitive opportunities, the Woolworths-Coles duopoly remains strong in Australia and many of its practices limit the entry and growth of other businesses across the supply chain.

The SBDC believes that a meaningful market restructure to facilitate a healthy level of competition will require more than consumer behavioural changes; it also necessitates legislative and policy reform.

Competition in grocery supply chains

As highlighted in the issues paper, a lack of competition at any level of a supply chain can have flow-on effects throughout the supply chain. Examples are many and can often result in lower prices for suppliers, higher prices for consumers, and profiteering by supermarkets.

While the lack of competition is predominantly the consequence of the practices of the supermarket giants and the ineffectiveness or lack of regulation around those, the SBDC is aware that in some instances certain regulations can also themselves present obstacles.

³ <https://www.ibisworld.com/au/industry/supermarkets-grocery-stores/1834/#IndustryStatisticsAndTrends>

⁴ <https://www.afr.com/companies/retail/woolworths-aldi-winning-the-supermarket-wars-suppliers-20230714-p5do8s>

⁵ <https://www.statista.com/statistics/994601/grocery-retailer-market-share-australia/>

^{6,7} <https://www.huntexportadvice.com/post/australia-market-overview-2021#:~:text=Market%20Share,-The%204%20main&text=The%20Woolworths%20Group%20is%20the,growth%20of%20Aldi%20and%20Costco.>

- The practice of wholesale bypass and impact on competition

Wholesalers typically leverage their ability to buy in bulk and pass on cost savings to smaller retail businesses (such as small grocery stores) who would be unable to obtain such deals independently.

With rising costs in logistics, the SBDC is aware that the supply chain model of 'wholesale bypass' (i.e. where retailers bypass wholesalers and deal directly with suppliers) has become increasingly common, with large e-commerce companies like Amazon and Alibaba popularising this practice. Along with other factors such as unstable growing conditions for fresh produce and limited food and beverage outlets' patronage during the pandemic, this practice has made wholesale businesses more vulnerable in recent years.⁷

According to the Australian Bureau of Statistics, Wholesale Trade was one of the top three industry divisions recording falls in business turnover in December 2023, compared to December 2022.⁸ The trend is concerning for not only wholesaling businesses but also small grocery stores which consequently have seen their ability to compete on prices further compromised.

While influencing large retailers to continue working with wholesalers seems unfeasible, it is important to be aware of the wholesale bypass trend and its aggravating impacts on competition across the supply chain.

- Regulatory hurdles and impact on competition

Regulatory hurdles set by governments can significantly impact competition in the supermarkets' supply chain by creating barriers to entry and constraining the ability of smaller players to compete with larger supermarket chains. Regulatory requirements, including business licensing, zoning regulations and food safety standards, increase compliance costs and administrative burdens disproportionately for small suppliers and independent retailers.

Data exclusively provided to the SBDC by Stenning & Associates demonstrates that for example, the number of regulatory requirements for a small nougat manufacturer in Margaret River (in regional Western Australia) can amount to 27 across all tiers of government. To establish a strawberry farm in Wanneroo (in the Perth Metropolitan area), up to 60 regulatory steps are required.

Further, the analysis reveals that the number of regulatory hurdles has increased over the last decade, with 15 of the 60 requirements for the strawberry farm in Wanneroo and four of the 27 for the nougat manufacturer being introduced during this period. Further details on these case studies can be found in the Appendix.

Complying with this multitude of red tape comes of course on top of the actual production of food, that is the core business of the nougat manufacturer or strawberry farmer. New market entrants may find it too difficult to allocate the time or resources needed in order to address the regulatory barriers before any produce can even be

⁷ <https://insidemcgc.com.au/2018/08/09/what-is-driving-wholesale-bypass/>

⁸ https://www.abs.gov.au/statistics/economy/business-indicators/monthly-business-turnover-indicator/dec-2023?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

cultivated. Arguably, government regulations can be a substantial impediment to stimulating healthy competition in the supermarket supply chain.

The SBDC has long advocated for the cumulative burden of compliance on small business to be minimised. In recent years, through its whole-of-government Streamline WA initiative, the Western Australian Government has had a focus on making it easier to do business in this State by improving regulation and regulatory practice. The initiative aims to deliver better services and outcomes for Western Australian businesses and communities.

In 2020, the SBDC received \$2.2 million in funding from Streamline WA to deliver the Small Business Friendly Approvals Program over three years. Under the program, the SBDC partnered with 22 local government authorities (**LGAs**) to improve approvals processes for small businesses by understanding their pain points and needs using a human-centred design methodology.

The program has proven immensely successful as participating LGAs have been able to work more efficiently and collaboratively with small businesses, making it easier for them to obtain their required development, building and health approvals within reasonable timeframes. For example, one leading LGA partner improved its development application determination timeframes by 63 per cent, reducing the average number of days taken from 49.80 in 2020 to 18.26 in 2022. Several other participating LGAs implemented fast-track processes for low-risk applications, while another LGA partner removed the requirement for business signage approval by revoking a local law.

Overall, the program has made it easier for small businesses in these participating LGAs to enter the market, establish their operations and grow. Economic modelling commissioned by the SBDC projected the program's net benefit to the economy over ten years would exceed \$73.8 million.

The SBDC believes there are opportunities to apply similar methodologies across all tiers of government to simplify regulation for small businesses. While simplifying regulations relating to business establishment and expansion is an extremely complex exercise where risks to consumers/citizens and business needs must be adequately balanced, it can ultimately streamline approvals processes and boost competition throughout the economy.

- Potential impact of deregulating retail trading hours in Western Australia

Over the years, some industry groups and associations have been advocating for the deregulation of retail trading hours in Western Australia. Specifically, short of calling for total trading hour deregulation, lobbyists have called for trading hours on weekends and public holidays to be increased, arguing that this would give more (read: larger) businesses flexibility to earn as much revenue and employ as many people as they can.

The SBDC opposes this view, concerned that further deregulation of trading hours would exacerbate the struggle small retailers face in trying to remain competitive in an operating environment which is already advantaging large retailers. While the State's retail trading hour regime has been criticised as being amongst the most restrictive in

Australia, small retail shops already operate under unregulated trading hours and are free to open 24 hours a day every day of the year if they choose.⁹ Deregulation of retail trading hours would therefore only benefit large retailers like Coles and Woolworths, tilting the playing field yet even more in their favour.

Price and non-price competition

The Australian grocery sector has witnessed intensified competition in recent years, primarily driven by the establishment and expansion of low-cost retailers such as Aldi and Costco. This has compelled the established duopoly of Woolworths and Coles to employ various strategies (some of which involve questionable practices, as recently highlighted in the media) to maintain price competitiveness and market share.

These strategies include discounted pricing, loyalty programs, bulk discounts, private and phantom labels, and convenience offerings such as online shopping and extended opening hours to cater to evolving consumer preferences, particularly in the wake of the pandemic.

- Private and phantom labels

Private labels are products developed and branded by the supermarkets themselves and which can offer lower-priced alternatives to national brands, fostering increased market share and customer loyalty. The proliferation of private labels in supermarkets is evident in the market share data. In 2004, private labels accounted for approximately nine percent of the products stocked by Coles and Woolworths, rising to 30 percent of Coles' sales by 2019. It has been reported that Woolworths similarly expanded its private-label range in response to competitive pressures from Aldi.¹⁰

Phantom labels are products manufactured by national brand manufacturers but sold under a retailer's brand name. Phantom labels yield higher profit margins compared to national brands due to increased control over production and marketing costs.

Both private and phantom labels play integral roles in supermarkets' price and non-price competition, allowing them to differentiate offerings and drive profitability. These strategies impact suppliers who face increased pressure to meet the unique requirements and demands of larger retailers. Suppliers may also experience changes in demand patterns or pricing negotiations as supermarkets prioritise their own branded products or exclusive partnerships over the commercial brands.

To complement these strategies, the large supermarket chains have also adopted fierce price competition techniques, as outlined below, which are exceedingly difficult for smaller, independent grocery stores to match.

- Special buys

The supermarket giants have adopted Aldi's successful strategy of bi-weekly 'special buys', offering heavily discounted items not typically sold in supermarkets. This strategy generates excitement and a 'fear of missing out' among consumers, driving

⁹ <https://www.commerce.wa.gov.au/consumer-protection/retail-trading-hours>

¹⁰ <https://www.abc.net.au/news/2021-01-22/aldi-changed-supermarket-shopping-in-australia-in-two-decades/13079180>

foot traffic and sales. Both Woolworths and Coles have introduced their versions of fortnightly 'special buys' to emulate Aldi's success.

- Loss leaders

Supermarkets offer certain products at prices below cost, known as 'loss leaders', to attract customers into the store. While the supermarket may incur a loss on these items, the goal is to entice customers to purchase other, higher-margin products during their visit.

- Clearance sales

Clearance sales are another common tactic used by supermarkets to clear excess inventory or discontinued products. By offering steep discounts on these items, supermarkets can generate quick sales and free up shelf space for new merchandise.

- Dynamic pricing

Using digital technologies, supermarkets employ dynamic pricing strategies that adjust the prices of certain products in real-time based on factors such as demand, competition, and inventory levels. This allows supermarkets to optimise prices for maximum profitability.

The SBDC notes there is a significant divide between the digital capability and capacity of the major supermarkets and that of (typical) small business suppliers. Based on the Australian Bureau of Statistics' experimental Digital Intensity Index (**Index**),¹¹ as of June 2022, approximately two thirds of the Agriculture, Forestry and Fishing industry (i.e. primary producers) were at Baseline Index and a third at the Developing Index (on a spectrum ranging from Non-digital to Advanced). No businesses in the Agriculture, Forestry and Fishing industry were reported to be Established or Advanced in the Index.

These practices and strategies demonstrate that smaller grocery stores and independent supermarkets face intensive price and non-price competition from the large chains. As they do not typically have the resources or buyer power to implement similar strategies, they struggle to be as attractive to consumers as large supermarkets and therefore see their growth curtailed.

What is further concerning is the fact that compounding the use of these practices is that supermarkets regularly resort to false and misleading claims such as announcing prices are discounted when they actually are not. This type of conduct can deceive consumers and damage competition, and are rightly prohibited under the *Competition and Consumer Act 2010*.¹²

It is noted that significant penalties for breaching Australian Consumer Law, such as false and misleading claims, can be imposed on corporations, specifically *the greater of*:

- \$50,000,000

¹¹ <https://www.abs.gov.au/articles/development-composite-indicator-business-digital-intensity-australia-digital-intensity-index>

¹² <https://www.accc.gov.au/business/competition-and-exemptions/competition-and-anti-competitive-behaviour>

- *if the Court can determine the value of the ‘reasonably attributable’ benefit obtained, 3 times that value, or*
- *if the Court cannot determine the value of the ‘reasonably attributable’ benefit, 30% of the corporation’s adjusted turnover during the breach turnover period for the contravention.*¹³

The SBDC believes a successful outcome of this Inquiry would be to see the maximum of these penalties imposed on supermarkets where alleged malpractices (such as unconscionable conduct toward suppliers and price gouging of consumers) are substantiated. This would send the strongest message to corporate Australia that anti-competitive conduct of this kind will not be tolerated and would subsequently make for an operating environment in which smaller businesses across the supply chain can compete more fairly.

The impact of buyer power on trading arrangements

The relationship between supermarkets and other players in the supply chain are heavily shaped by buyer power. The SBDC notes that the Grocery Code was introduced in 2015 to address harmful practices in the grocery sector stemming from this imbalance of bargaining power between supermarkets and their suppliers, especially smaller suppliers.

As outlined in our submission to the review of the Grocery Code, there is sufficient evidence that demonstrates that the introduction of the voluntary code has not noticeably improved relations between grocery retailers, wholesalers, and suppliers. Indeed, it is alarming that an increasing number of small suppliers are reporting concerns about the market dominance of the major supermarkets.

In fact, ‘market power of processors/supermarkets’ ranked first among 15 issues raised in the National Farmers Federation’s (NFF) 2023 National Farmer Priorities Survey, with 83 per cent of farmers responding they were ‘concerned’ or ‘very concerned’ by the issue.¹⁴ On the survey’s release, NFF President Fiona Simson stated:¹⁵

What we’ve heard through this survey is that farmers are feeling frustrated. They’re being squeezed by a lack of government support on a wide range of fronts [including] the unchecked market power of supply chain players...

According to peak industry body AUSVEG, specific examples of issues imposed on small suppliers by large retailers and wholesalers include unscheduled specials, unauthorised deductions, questionable rejections, lack of written supply agreements, and late cancellations of orders.¹⁶ AUSVEG states that while such behaviour is not permitted under the Grocery Code, growers’ feedback indicates it is part of doing business with supermarkets.

¹³ <https://www.accc.gov.au/business/compliance-and-enforcement/finer-and-penalties>

¹⁴ https://nff.org.au/wp-content/uploads/2023/10/National_Farmer_Priorities_Survey_Report_FINAL_Oct23.pdf

¹⁵ <https://nff.org.au/media-release/national-farmer-survey-reveals-angst-over-government-agenda/>

¹⁶ <https://ausveg.com.au/articles/ausveg-proposes-solutions-to-grower-retailer-power-imbalance/>

The SBDC is also aware of claims by farmers and other small business suppliers of a large discrepancy between the amount they receive for their produce at the farmgate, and the prices consumers are paying at the supermarket checkout. Consequently, concerns have been raised about alleged price gouging and the pricing and margin-setting practices of the major supermarket brands. Among these practices is the imposition of rebates by some supermarkets should smaller suppliers wish to be paid in a timely manner. These 'rebate charges' can represent up to four per cent of a supplier's invoice.¹⁷

Further, as revealed by NSW Farmers, growers face uncertainties regarding price and volume, often being compelled to accept below-cost offers due to asymmetrical data flow favouring retailers. These uncertainties extend to supply agreements, where growers bear all the risks associated with fluctuating demands and pricing negotiations. Additionally, the stringent cosmetic standards set by supermarkets contribute to significant wastage, further impacting growers' profitability.¹⁸

The issues and behaviours outlined by the likes of AUSVEG and NSW Farmers were corroborated with the SBDC by a range of growers and smaller wholesalers in Western Australia who claimed that this was standard practice in the grocery market. Without written supply contracts to fall back on, with the concomitant legal protections against unfair contract terms and abuse of power, growers and wholesalers are largely at the caprice of the supermarket giants in their dealings with them.

The largely one-sided relationship between supermarkets and suppliers, with its 'take it or leave it' approach, can leave producers between a rock and a hard place – accept a below-cost price for their goods or dump the produce and waste perfectly edible food. The latter contributes to Australia's major problem with food waste, where it is estimated that around 7.6 million tonnes of food across the food supply chain is thrown away each year, at a cost to the economy of \$36.6 billion annually.¹⁹

The lack of transparency in pricing negotiations and the absence of regulatory prohibitions against high grocery prices perpetuate the challenges faced by suppliers. Supermarkets' ability to maintain high margins without passing on cost reductions exacerbates the situation, raising concerns about coordinated pricing practices.

The SBDC is of the opinion that the regulator (the ACCC) should require supermarkets to disclose pricing information upfront to their suppliers, including the terms of trade and the basis for pricing decisions. Price transparency requirements may help prevent unfair pricing practices and ensure that suppliers have access to the information they need to negotiate fair deals with supermarkets.

Unless addressed, these issues inherent to buyer power will continue to threaten the viability of suppliers, contribute to significant food waste, and ultimately drive retail prices higher as food suppliers leave the industry, supply reduces, and markets concentrate. It is crucial to ensure suppliers can benefit from fair trading arrangements.

¹⁷ <https://www.theguardian.com/business/2024/feb/13/supermarket-giants-hit-farmers-who-want-early-payment-with-hefty-fees>

¹⁸ <https://www.smh.com.au/business/consumer-affairs/australia-s-vegetable-industry-in-serious-jeopardy-suppliers-warn-20240301-p5f925.html>

¹⁹ <https://www.dcceew.gov.au/environment/protection/waste/food-waste>

AUSVEG reveals that in many instances, suppliers do not attempt to raise these issues with the retailer or access available complaints mechanisms (such as those under the Grocery Code) as they fear commercial retribution and/or they are unaware these unfair trading practices are not permitted.

The SBDC believes the ACCC should play a more active outreach and education role which may be supported by industry associations and State-based small business commissions. This could include further education on dispute resolution mechanisms (including the SBDC's DRS) as well as the utilisation of anonymous reporting tools such as *Safe2Say* (i.e. a platform powered by CrimeStoppersWA which allows the anonymous reporting of behaviours having an adverse impact on small businesses in Western Australia, anonymous communication with the SBDC as a matter progresses, and the ability to monitor the status of the report without having to reveal one's identity).

It is evident that despite the various laws and prohibitions in place, small business suppliers are continuing to fall foul of conduct that seeks to restrict information and take advantage of power imbalances.

Given this and as stated in our recent submission to the Treasury's Consultation Regulatory Impact Statement '*Protecting consumers from unfair trading practices*', the SBDC strongly supports regulatory intervention to address unfair trading practices. In the context of the relationship between supermarkets and suppliers, the SBDC would encourage the development of an unfair trading practices framework specifically relating to food and grocery.

Concluding statement

The SBDC is hopeful that the major power imbalances affecting competition across the supermarkets' supply chain will be addressed through appropriate policy and regulatory reforms as well as better access to justice and stronger enforcement oversight from the regulator.

Thank you for the opportunity to provide feedback in response to the issues paper. If you would like to discuss this submission in more detail, please contact Karine Soares, A/Assistant Director Policy and Advocacy on [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Yours sincerely

[REDACTED]

David Eaton PSM
Small Business Commissioner

9 April 2024

APPENDIX: Case studies – Government regulatory hurdles

The regulatory hurdles occur at Local, State, and Federal levels of Government.

For example, of the 27 regulatory requirements a nougat manufacturer in Margaret River must comply with:

- 10 are from Local Government
- 6 from State Government
- 10 from Federal Government
- one non-government (the Australasian Performing Right Association for workplace and telephone on-hold music).

Of the 60 regulatory requirements a strawberry farmer in Wanneroo must comply with:

- 11 are from Local Government
- 26 from State Government
- 22 from Federal Government
- one non-government (Australasian Performing Right Association for workplace and telephone on-hold music).

One specific activity can be subjected to several regulatory requirements from different departments. For example, to operate a drone in order to monitor crops, there are five certificates and licences to apply for from the Civil Aviation Safety Authority, and using the remotely piloted aircraft to deliver pesticides also requires compliance from the Western Australian Department of Primary Industries and Regional Development (**DPIRD**).

Further, the use of pesticide necessitates:

- 4 regulatory requirements from the Australian Pesticides and Veterinary Medicines Authority,
- 2 from DPIRD, and
- 1 from the Western Australian Department of Health.

Fertiliser/ammonium nitrate use necessitates compliance with eight further requirements from the Western Australian Department of Energy, Mines, Industry Regulation and Safety.