NSW Farmers' submission

Senate Select Committee on Supermarket Prices Inquiry

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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 Senate Select Committee's inquiry on Supermarket Prices.

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 correct market power imbalances in the food and grocery supply chain, NSW Farmers makes the following recommendations to this inquiry which are explored further throughout this submission.

RECOMMENDATIONS:

- Introduce divestiture powers which can be used in cases of gross market power imbalances which are against the national interest.
- Develop options to attract new entrants in the supermarket sector to increase competition.
- Increase price transparency and data collection across the food supply chain, especially regarding farmgate-retail price spreads.
- Implement the recommendations of the ACCC's Perishable Agricultural Goods Inquiry related to the Food and Grocery Code, making it mandatory with the ability to apply penalties when it is breached.
- Provide the ACCC with more powers and funding to undertake enforcement activities to act as a disincentive against harmful behaviour. This includes more reporting of breaches of the Codes of Conduct, including the Food and Grocery Code.
- Implement Option 4 from Treasury's Consultation Regulatory Impact Statement on Unfair Trading Practices.

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. Food is a large proportion of the household budget. Therefore, price increases are difficult to accept by consumers, meaning there is a lot less money leftover in the budget to spend on other needs. The following data tells this story.

The most recent data on the household budget is from 2015/16 through the ABS Household Expenditure Survey. Weekly household spending on food and non-alcoholic beverages was $237, an increase of $33 or 16.1 per cent from 2009/10. This was only slightly higher than the 15 per cent increase in total household spending over the same period. Spending on food was the second highest category, only slightly behind housing costs which were at $279 per week. To put food spending into perspective, it is more than five times that of spending on utilities which is at $41 per week.[1]

According to a recent Finder survey, the average weekly cost of groceries has increased by $37 from $148 in February 2022 to $185 per week in February 2023. This is higher than the increase in total food spending from 2009/10 to 2015/16 as reported by the ABS. [2]

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.[3]

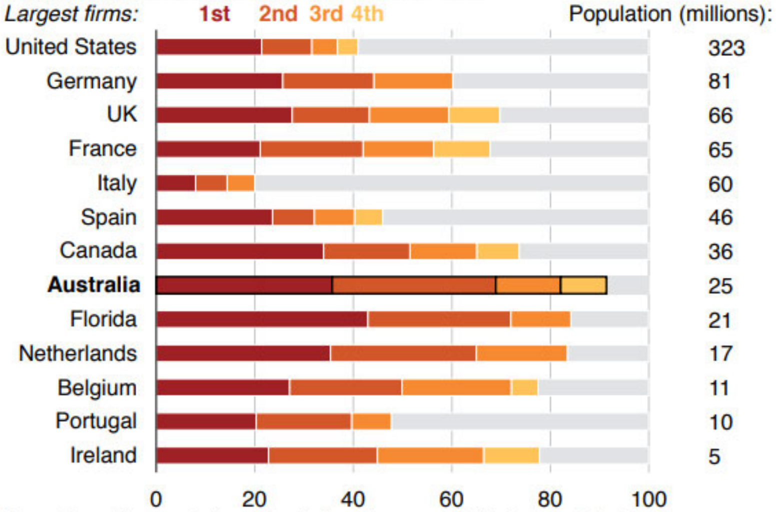
The current level of market concentration has led to market power, which in turn has led to excessive profits. Market power is a large incentive for firms to invest and innovate, so is not necessarily negative, and can even lead to higher quality goods and services for consumers. However, excessive market power can lead to firms charging higher prices than in a competitive market thus distorting the market, underinvestment, anticompetitive behaviour and barriers to new potentially more innovative firms.

There is evidence of excessive market power in the supermarket sector in the form of supernormal profits. A firm typically seeks to earn profits that exceed the cost of the equity shareholders have invested in it. Supernormal profits are those that exceed the estimated cost of equity and are more than that estimated return required by shareholders.

[1] ABS (2017) *Household Expenditure Survey, Australia: Summary of Results,* https://www.abs.gov.au/statistics/economy/finance/household-expenditure-survey-australia-summary-results/2015-16
[2] Finder (2023) Australian household spending statistics, https://www.finder.com.au/australian-household-spending-statistics
[3] Minfie, J (2017) *Competition in Australia: Too little of a good thing?* The Grattan Institute

Figure 2.3: Supermarket retailing in Australia is concentrated

Top four-firm market shares by revenue, per cent

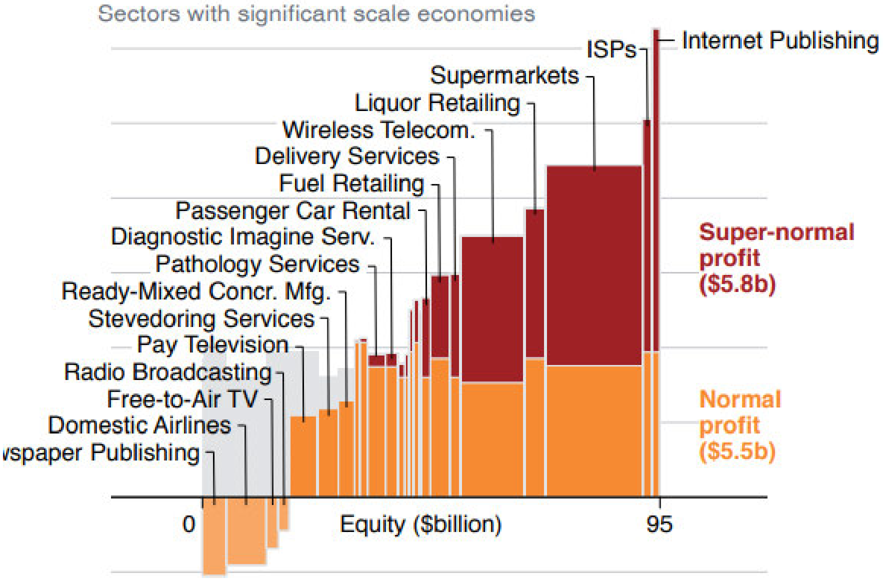


Note: Sorted by population. Fourth firm data unavailable for Italy, Florida, the Netherlands, and Portugal.

Source: Grattan analysis of Statista (2017a), Lööf (2011), Statista (2013a), Pinckaers and Smith (2012), Dutch News (2017), Roy Morgan Australia (2017), UFCW (2010), Statista (2017b), Statista (2013b), Statista (2017c), Statista (2017d) and Peterson (2017).

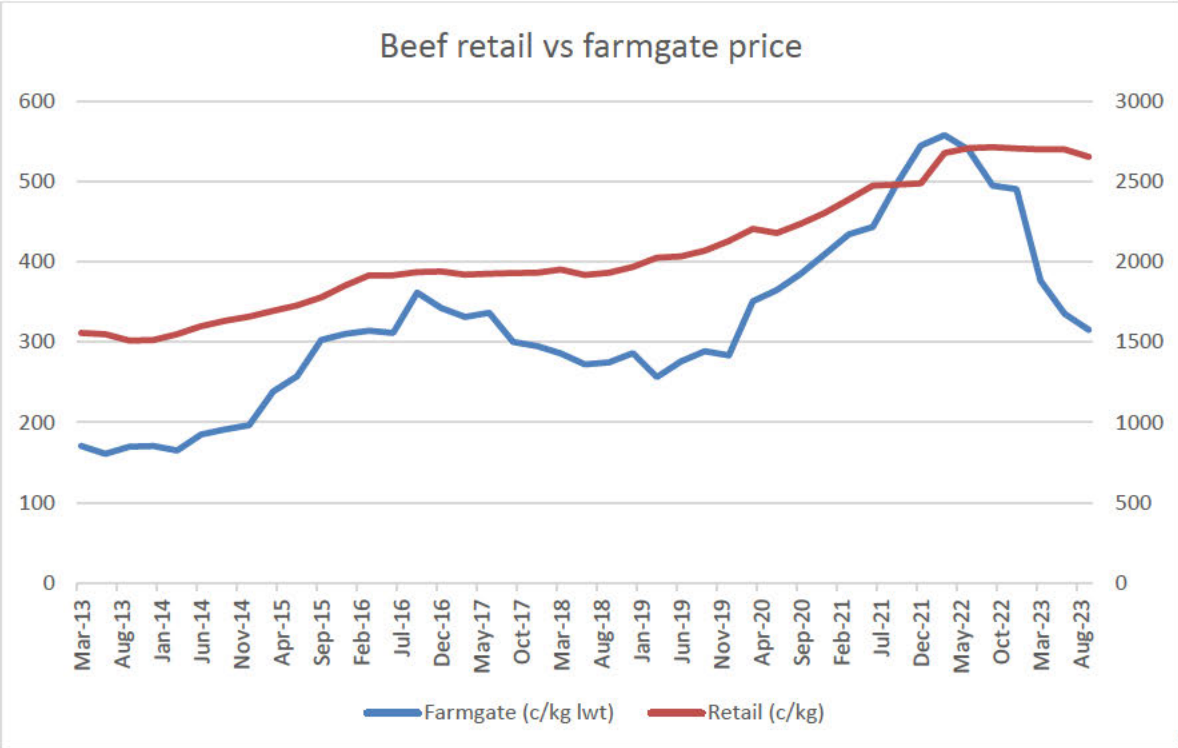
About 50 per cent of total profits in scale-economy sectors, which includes supermarkets, are above the cost of equity. As shown in the figure below, supermarkets are even at the high end of this group. Super-normal profits account for more than half of total profits in supermarkets, liquor retailing, and wireless telecommunications. This is compared to under 20 per cent of total profits earned in the low-barriers sectors (such as construction, agriculture, and road freight transport) exceed the cost of equity.

Sectors with significant scale economies



On a more granular level, there is also evidence of markups above the cost of production. Over a five-year period, Coles and Woolworths financial accounts show they were able to profit due to increased prices and increased quantities being sold. Gross margins at Coles increased from 24.7% shortly before the pandemic to 26.5% at its most recent disclosure. Margins at Woolworths increased from 29.1% to 30.7%.[4]

Another indicator of market power is asymmetric price transmission. For the supermarket retailers this would be passing on cost increases to consumers immediately and in full, while passing on cost savings only partially and very slowly. The starkest case of this is in meat prices, which have collapsed at the farmgate, and are now less than half of what they were 12 months ago. Retail prices, however, have taken almost a year to decrease, and only marginally. We can see that the opposite has occurred when farmgate beef prices have increased in the past, with retail prices increasing immediately and significantly. Horticulturalists have delt with this issue for years however, lack of price transparency has made this difficult to demonstrate, while the livestock industry, through sale yard data, we are able to see this clearly.



[5]

Impacts of market power

The Perishable Agricultural Goods Inquiry conducted by the ACCC sets out many of the instances of market power imbalances across agricultural supply chains and the impacts of these on the agriculture industry and the broader economy. Agricultural markets are characterised by many producers, but few processors and retailers. As an example, Dairy Cattle Farming was identified as the least concentrated industry by ANZSIC Division in 2019[6]. 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. Both market characteristics limit the bargaining power of producers.

[4] The Guardian (2023) *Australia's big supermarkets increases profit margins through pandemic and cost-of-living crisis, analysis reveals*, https://www.theguardian.com/business/2023/may/22/australias-big-supermarkets-increased-profit-margins-through-pandemic-and-cost-of-living-crisis-analysis-reveals
[5] Source: MLA
6

In supply chains where one part has a stronger bargaining position, this part will extract more favourable terms. The following practices have been observed that harm producers:

- Contract terms offered on a take it or leave it basis and the weaker party is not able to reduce their risk due to having few alternative options, a lack of visibility over potential risks, or the product no longer being in their control.
- Weaker parties have not transparency over quality testing.
- Weaker parties have no visibility over price because there is a lack of transparency or prices are released after planting decisions must be made.
- Changing supply volumes for perishable products at very short notice after volumes have been agreed.
- Supermarkets at times requiring suppliers[7] to disclose confidential financial information or intellectual property during cost increase negotiations.
- Producers have to pay for access to data about a product's sales to understand its sales performance.
- Supermarkets requiring suppliers to comply with onerous food safety standards which are introduced without adequate consultation and duplicate the requirements of basic food safety standards.
- Producers are reluctant to report concerning conduct by buyers due to fear of retribution, such as having their product de-listed, or purchase volumes reduced.
- Producers required to change packaging with little to no consultation. Large investments already acquired in equipment are now obsolete and more funding is required to "comply in order to supply."

These practices can lead to the following market failures and harm producers in the following ways:

- Firms increasing prices above marginal cost, which excludes some suppliers from the market who would otherwise participate.
- Firms not being constrained in their pricing or other behaviour by the threat of new entrants, diminishing their incentive to innovate or invest in more cost-effective production methods.
- Production efficiency is lost as producers do not have enough information to make informed decisions.
- Inequitable distribution of profits throughout the supply chain.
- Suppliers have less capacity to innovate and take on risk.
- Suppliers unable to make investment decisions due to information failures, thin margins, and disproportionate exposure to risk.
- Prices producers receive increasing at a slower rate than prices paid for inputs.
- Supermarkets using their power when they don't raise price to pay producers less or the same while the producer faces rising costs.
- Supermarkets refuse to brand label their produce, especially fruit and vegetables. This reduces producers brand awareness; this gives consumers no choice to express their desired choice of product/produce and takes away the producers' ability to bargain for a better price.

Our members were very reluctant to come forward with examples of their experience of market power abuses due to fear of retribution. Some examples, however, were provided:

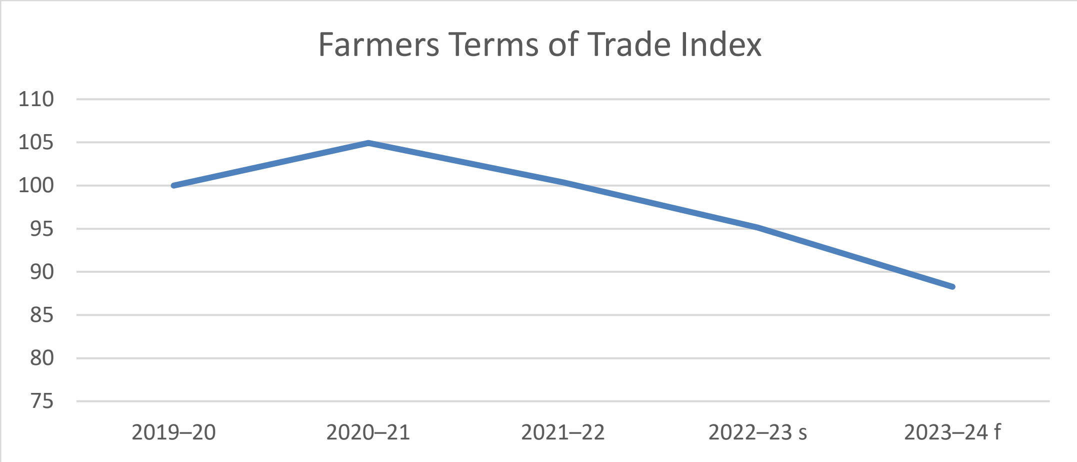
[7] Suppliers refers to farmers.

- Prices and terms being offered on a take it or leave it basis. The decrease in price offered was then below the producers cost of production, and there was no justification for this price decrease in an inflationary environment.
- Buyers threatening to never purchase the products again if the producer did not accept the price being offered.
- Payments based on a pool system, where payment is determined by a measure of performance. The performance, however, is determined by factors outside the growers' control, such as the inputs they are provided by the processor. There is also often a lack of transparency in this process, with growers having no visibility of how their position in the pool system was determined. These payment systems are prevalent in the poultry meat industry.
- Growers have had their produce summarily rejected by buyers when there is any indication that the grower has sold their produce another buyer.
- Being locked into a certain buyer due to the need to adhere to different specifications and requirements across different buyers. This is especially an emerging issue with sustainability and ESG standards, with each buyer having their own certification schemes. These are damaging in two ways; they put costs on producers to comply with them with no associated benefits, and they lock producers into one buyer as to switch buyers they would also need to overhaul their ESG reporting which would prove too costly and time-consuming.
- Forced price cuts to suit supermarket campaign wars. E.g., Supermarkets engaging in a discount war by offering a 'special' or a promotion on a product. They force the lower prices onto the producers. There are no changes in supply issues they are simply using their market power to force suppliers to supply at below cost. All while the producer faces higher costs.

One indicator of the deteriorating conditions facing producers is the terms of trade. The farmers' terms of trade (FToT) refer to a suite of indicators that measure average changes to prices and farm costs of the agricultural sector. Price indexes measure the average growth in prices that farmers receive at the farm gate for their product, and in the prices paid for inputs to production. Total farm costs and net returns to the agricultural sector are also estimated. Forecasts of these indicators are produced and updated by ABARES on a quarterly basis.

The headline indicator of the FToT is the FToT index. This index measures changes in the price of outputs compared with the inputs used in their production. Specifically, it is the ratio of the prices received index and the prices paid index. A declining FToT index means that growth in input prices paid by Australian farmers is rising faster than the growth in prices received for their products at the farm gate.

The FToT index is a useful summary of Australian agriculture's operating environment. The interaction between prices received and prices paid can provide information about profitability of the sector and structural change pressure. The figure below indicates the pressure the agriculture industry is currently under, with the terms of trade decreasing significantly over the past three years. It shows that the prices farmers are receiving for their products is not keeping up with their increasing input costs. The supermarkets, on the other hand, have been able to increase their prices at an even faster rate than their rising input costs, shown by increasing profit margins.



This not only harms producers but also consumers. As producers cannot confidently invest in their business operations due to the dynamics listed above, productivity gains are reduced, leading to less efficient production than would otherwise occur and higher prices for consumers in the long-term. It also leads to retailers charging higher food prices to consumers than they would in a competitive market. If Australia wants to continue being a food secure nation, then agribusiness and food supply chains need to be made competitive.

Another area not mentioned in the Terms of Reference but is impacted by market power imbalances and cost-price pressures on farmers is the sustainability credentials of the industry. Producers are increasingly expected to carry the burden of emissions reductions and biodiversity improvements without being compensated or even incentivised for their efforts. There is a high risk that players up the supply chain will unilaterally impose conditions on farmers under the lens of ESG while capturing the price premiums from these improvements themselves.

Case Study: The dairy industry

Deregulation reforms can affect productivity growth through two main avenues. Firstly, it facilitates the uptake of new technologies and therefore increases within-farm production efficiency. Secondly, in a competitive market environment, resources are likely to shift from less productive to more productive farms, generating productivity gains for the industry.

Historically, the Australian dairy industry has been highly regulated. Before 2000, the rate of industry assistance was 51 per cent, far higher than the current industry average of 2 per cent mentioned above. This was mainly done through quotas and subsidies, which led to controlled prices which departed from the competitive price. As a result, there was an oversupply of milk in some markets and high price premiums imposed on domestic consumers.

In 2000 the industry was deregulated through the restoration of a market-based mechanism for the setting of milk prices. During the decade following deregulation, the total number of dairy farms declined from 12,960 to 7,514 and average farm size nearly doubled. A 2019 study found that the deregulation reforms positively contributed to aggregate productivity growth at the industry level. From 1990 to 2000 resource reallocation subtracted 0.6 per cent per annum from productivity growth. However, following deregulation in 2000 resource reallocation effects became positive, contributing 0.2 per cent per annum[1].

While the dairy industry itself is now exposed to market forces, other layers of the supply chain, in particular the retailers, are not. An inquiry into the competitiveness, trading practices and supply *chain in the Australian dairy industry was completed by the ACCC in 2018 after concerns were raised by dairy farmers of unfair treatment.*

The ultimate finding of this inquiry was that there are significant market power imbalances at each level of the dairy supply chain. Retailers exercise their bargaining power to elicit lower wholesale prices from milk processors, while processors can mitigate this exposure through trade and differentiated products. Farmers, on the other hand, have limited scope to deal with this as the generic nature of raw milk and large number of farmers relative to processors means that contract negotiations between farmers and processors are unlikely to occur. Farmers are also disadvantaged by a significant imbalance in the amount of pricing, market, and product information available to them compared to processors. Bargaining power imbalances and information asymmetry result in practices that transfer disproportionate risk to farmers and soften competition across the rest of the supply chain.

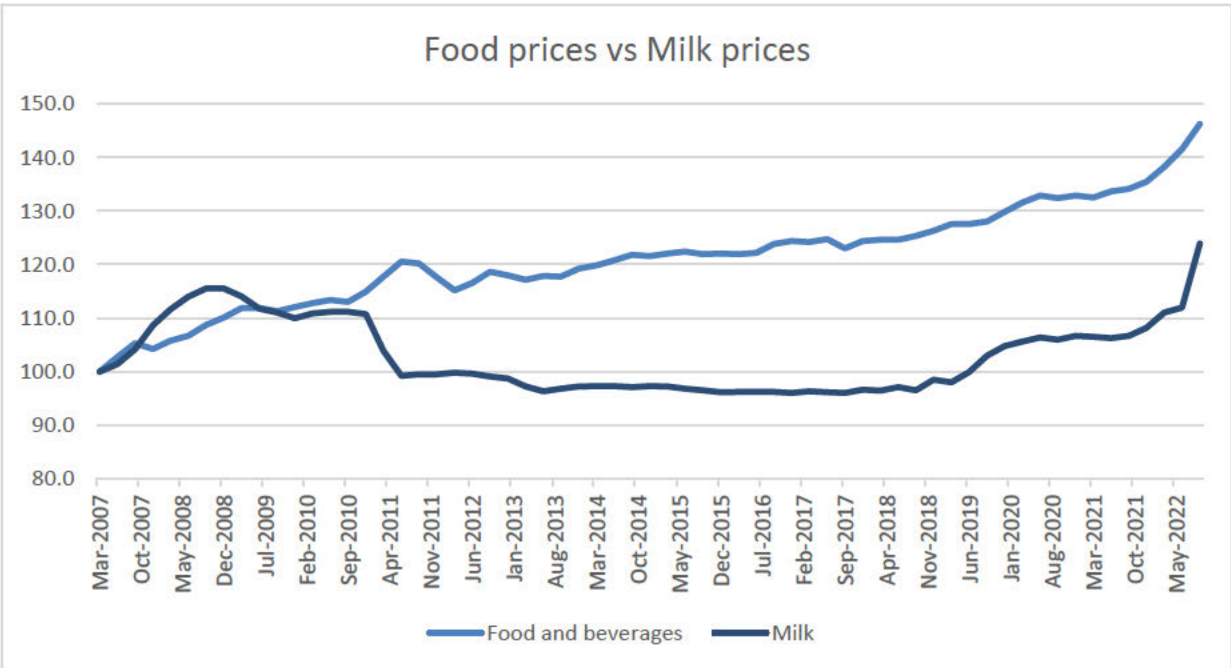
This ultimately leads to two main long-term concerns which ultimately reduce the efficient functioning of the market:

- *Bargaining power imbalances deter productivity-enhancing investments by farmers if they are unable to capture a sufficient share of the returns to make their investment worthwhile.*
- *Restrictions on switching soften competition between processors and reinforce farmers' poor bargaining position.*

Following this inquiry, a mandatory Code of Conduct was introduced to regulate the conduct of buyers of raw milk from dairy farmers. Raw milk must only be bought from dairy farmers under a milk supply agreement that complies the Code.

The figure below shows how retail pricing of milk changed from its depressed level between 2011 and 2018, to more closely following the trend line of food prices in aggregate following the dairy inquiry in 2018. These examples of activity by Government across the dairy supply chain show the importance of competition in encouraging and allowing businesses to invest in productivity enhancements to improve their business operations.

Similar rigour and legislative action need to be taken into broader supermarket pricing and behaviour, as mentioned in the following sections.



ACCC inquiry into supermarket pricing

NSW Farmers is pleased that the Treasurer has compelled the ACCC to conduct an inquiry into supermarket pricing and behaviour. While there are indicators of excessive market power, many of which are listed in this submission, they are only proxies and do not fully indicate the existence of price gouging behaviour. Without an inquiry, the circular argument would continue where supermarkets can claim that price increases and burgeoning profits are due to normal supply and demand dynamics, and it is impossible to question this without more robust evidence.

An ACCC inquiry will rely upon rigorous analysis of prices being paid to suppliers and prices being charged to consumers, as well as the costs of goods and services faced by supermarkets and the costs of goods and services faced by suppliers, to look at price gouging behaviour. It will be vital that the Government listens to and acts on the ACCC's recommendations from this report, which have historically been ignored.

A similar inquiry was conducted in New Zealand in 2020, with the aim of examining competition in the grocery sector and what could be done to improve it. 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 held a broad Competition Review in 2022-23, which included a Retail Grocery Market Study Report. 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 20% 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 20% margin? The price of that can of soup now goes up to $1.32. The grocer still makes a 20% 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. There were four recommendations coming out 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.

Note that the final two recommendations were introduced in Australia following the 2008 supermarket inquiry. However, the weakness of Australia's merger and acquisition laws have allowed increased concentration in the sector.

Policy options

Divestiture powers

Divestiture powers exist in some countries, mainly to safeguard essential security interests. There is a history of divestitures across sectors in Australia, including:

- 2023 - the ACCC commenced investigation into several completed acquisitions over a six-year period by Petstock and is currently consulting on possible divestiture undertakings.
- 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.

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), which correct markets rife with market power imbalances and anti-competitive behaviour. Even if these divestiture powers are very rarely used, they will act as a powerful disincentive against harmful behaviour.

Strengthening merger and acquisition laws

There needs to be an overhaul of Australia's merger and acquisition framework. The current process allows for multiple ways to gain merger authorisation, which can lead to forum shopping. There needs to be a formalised merger regime and process and is proposing that acquisitions above a specific threshold be subject to mandatory notification and notified acquisitions cannot be completed until clearance has been granted by the ACCC. There needs to be an expansion of merger factors considered before granting authorisation under section 10 of the Competition & Consumer Act 2010 and the inclusion of a deeming provision which would apply to acquisitions where 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.

The agricultural sector has seen mergers in recent years especially in the processing sector 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. 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 legislation in the $18 billion food distribution sector.

Attracting new entrants

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. The annual survey of suppliers to supermarkets as part of the Food and Grocery Code also shows that Aldi treats their suppliers in the fairest manners of all signatories to the Code. Whilst the increased competition from Aldi has been a positive step, there still continues to be excessive levels of concentration in supermarkets.

Australia should follow the Canadian example of looking in detail at how to attract new entrants to the supermarket sector, including removing barriers to entry.

Price transparency and data collection

There is a startling lack of data collection related to food prices and food security in Australia. Due to this dearth of collection by Government, other institutions have had to step in to provide this valuable information. Two examples:

- The most recent Household Expenditure Survey by the ABS was in 2015-16. This includes valuable information about household spending, income and wealth based on various characteristics. Due to this long gap in detailed spending information, Finder's Consumer Sentiment Tracker is the next best source of information. It found that groceries were the second most stressful bill in 2023, with 41 per cent of respondents saying they feel bill stress from this source, just behind rent/mortgage bills at 41 per cent of respondents.

- There are no official statistics on food security in Australia. A report by the Australian Institute of Family Studies in 2020 stated, "In Australia, food security is not measured at a population level regularly or consistently. However, estimates suggest that between 4% and 13% of the general population are food insecure; and 22% to 32% of the Indigenous population, depending on location." This has left the burden on a charity, FoodBank, to compile food security statistics. The Foodbank Hunger Report 2023 revealed that 3.7 million households in Australia have run out of food in the last year, with the cost of living crisis being one of the main reasons.

It is damning that Australia is experiencing a cost-of-living crisis yet there is no rigorous data available on the cost-of-living experience of households. This severely hampers the decision-making ability of Governments.

The other area where there is a lack of information is on prices that are paid to farmers and those being charged to consumers. This means there has been no possibility of analysis and interrogation of the farmgate-retail price spread.

Food processors, manufacturers, wholesalers, retailers, and foodservice providers transform raw agricultural commodities into convenient food products for U.S. consumers. Value added to commodities through these companies' marketing services accounts for a substantial portion of consumer food prices.

USDA, Economic Research Service (ERS) compares prices consumers pay for food with prices farmers receive for corresponding commodities. This dataset reports these comparisons for a variety of foods sold through retail stores such as supermarkets and supercentres.

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.

Long-run trends in farm-to-consumer price spreads may reflect a variety of underlying economic conditions. These underlying conditions include advances in technology used to process and distribute food, and changes in prices for inputs such as labour, energy, and raw agricultural commodities.

The Economic Research Service as part of the USDA 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.

ABARES, the ABS, and RDCs should work together to increase data collection on food prices to properly inform food policy decisions.

Food and Grocery Code

The Perishable Agricultural Goods Inquiry sums up the state of the Food and Grocery Code:

The Food and Grocery Code is intended to cover certain conduct by grocery retailers and wholesalers in their dealings with suppliers. However, the code has serious weaknesses that undermine its ability to effectively regulate misconduct.

The ACCC considers that many of the recent changes to the Food and Grocery Code do not address these key weaknesses, and that further changes are necessary to address the harmful effects of bargaining power imbalances.

Firstly, the Food and Grocery Code should be made into a mandatory code, applying to all relevant retailers and wholesalers in the 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.

Secondly, the ability to contract out of important protections in the Food and Grocery Code should be removed. The Code is intended to address the fact that retailers and wholesalers hold the bargaining power in negotiations with suppliers. Allowing them to contract out of Code obligations fatally undermines this purpose.

Thirdly, the Food and Grocery Code should be updated to make significant civil pecuniary penalties and infringement notices available for contraventions. 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.

Finally, 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.

It is disappointing that none of these recommendations have been implemented over the more than three years since this report was released. Compounding this are the findings of a review by Treasury into the dispute resolution mechanism as part of the code. This review took over 12 months to be completed, for a 33-page report which endorsed the status quo dispute resolution mechanism. This level of inaction is confusing and disappointing. The ACCC's submission to this review stated:

The ACCC remains of the view that a dispute resolution process where the decision-maker is appointed by and represents one of the parties to the dispute cannot be considered genuinely independent. Fear of retribution and the possible loss of access to volume markets are key factors that would inhibit suppliers from raising issues with a body so closely associated with the retailer/wholesaler they supply to. We maintain that the code and the businesses (particularly small businesses) that make up so much of Australia's grocery supply chains require a genuinely independent dispute resolution process. This process should ensure that those considering and determining disputes are, and are perceived to be, fully independent from the retailers and wholesalers who hold the bargaining power advantage in dealings with suppliers.

... we note the low uptake amongst suppliers of the compulsory, binding process introduced by the Government in 2020. Only five complaints have been lodged with the Code Arbiters over the lifetime of the current dispute resolution model and each complaint related to the same signatory. We do not consider this to be an accurate reflection of the challenges encountered by suppliers in their daily commercial dealings with signatories. For example, the Independent Reviewer's annual

survey for 2021-2024 indicated that fewer than half the respondent suppliers considered that Woolworths, Coles, and Metcash 'always' treated them fairly and respectfully. Further, fewer than half considered that Woolworths, Coles, and Metcash 'always' took prompt, constructive action to resolve issues that were raised with them. Of the respondent suppliers who identified an impediment to them raising an issue with the signatory's buying team, over one-third of suppliers to Woolworths and Coles identified 'fear of damaging a commercial relationship' as a key impediment.

It is disappointing that the review sided with the supermarkets rather than suppliers and the competition experts at the ACCC. It is imperative that government prioritise addressing the impacts of excessive market concentration.

This must not be repeated with the recently announced review of the Food and Grocery Code, and that calls for it to be made mandatory will be listened to. A mandatory code, with the ability of the regulator to seek meaningful and proportionate penalties for non-compliance, would drive better behaviour across the sector.

More powers and acting on the recommendations of the ACCC

The examples above show how the recommendations from the expert competition body continually and consistently are ignored. This has happened across reviews of the Horticulture Code of Conduct, Wheat Port Code, and now the Food and Grocery Code dispute resolution process. Hopefully the ACCC will not be ignored in the current work being undertaken by Treasury across mergers and acquisitions, unfair trading practices, and the broader Food and Grocery Code Review.

The ACCC needs to have more powers to act as a deterrent for anti-competitive behaviour. 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.[8]

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.

Unfair Trading Practices

There are approximately 55,000 small businesses in the agriculture, forestry, and fishing industries in NSW alone[9]. Many of these are exposed to unfair trading practices. As part of the Unfair trading practices –

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0633
[9] NSW Small Business Commissioner (2014) *Small Business in NSW: Our Story*

Consultation Regulation Impact Statement, prefers Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices is preferred 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