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Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: IndigenousAffairs.reps@aph.gov.au

Dear Secretariat

Re: ACCC submission to the Committee's Inquiry into food pricing and food security in remote Indigenous communities

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the House of Representatives Standing Committee on Indigenous Affairs Inquiry into food pricing and food security in remote Indigenous communities (the Inquiry).

The ACCC understands the important role that community stores have, in remote Indigenous communities, to enable access to food and grocery products in circumstances where there are often no viable alternatives. We recognise that there is a balance to be struck between consumers having access to fresh and reasonably priced food and grocery products, while also ensuring that community stores remain viable businesses for the benefit of the community.

The ACCC acknowledges that Indigenous Australians in remote communities do not have the same access to fresh and reasonably priced food and grocery products when compared with consumers in regional or metropolitan areas. The ACCC has been exposed to these issues from time to time and identified that these higher retail prices are due to a number of contributing factors, impacting particularly the wholesale cost of goods. In its various exposures to the issues, the ACCC has not found evidence to indicate unlawful conduct by community stores associated with its pricing.

Given the limited application of consumer laws to address perceivably high retail prices, the ACCC considers that, should the Inquiry find that action is required to reduce retail prices in remote communities, a policy response, for example subsidising or supporting elements of the supply chain, is likely to be a more appropriate means to address.

The purpose of the ACCC's submission is to:

1. outline the role of the ACCC,
2. outline the ACCC's understanding of pricing issues in remote Indigenous communities, and
3. highlight the limited application of the Australian Consumer Law (ACL), contained at Schedule 2 to the *Competition and Consumer Act 2020* (Cth) (CCA) in relation to allegations of high retail prices.

The role of the ACCC

The ACCC is a Commonwealth statutory authority responsible for administering the CCA, including the ACL. The CCA contains a number of provisions which give the ACCC scope for addressing anti-competitive conduct and consumer protection issues across all of Australia. A key function of the ACCC is to investigate potential breaches of the CCA and, where appropriate, take enforcement action to remedy any harm.

The ACCC's approach to achieving compliance with the CCA, as well as to the exercise of the ACCC's enforcement powers and functions are outlined in the [ACCC's Compliance and Enforcement Policy \(the Policy\)](#).

The ACCC reviews its enforcement and compliance priorities annually, following consultation with industry, consumer and other stakeholder groups. The Policy sets out the principles the ACCC adopts to achieve compliance with the CCA, including the ACL, and outlines its compliance and enforcement functions, strategies and tools.

Conduct impacting Indigenous Australians is an enduring priority for the ACCC. Under this priority, the ACCC recognises that, amongst other things, Indigenous consumers living in remote areas face particular challenges in relation to asserting their consumer rights, therefore, work in this area will always be prioritised by the ACCC while these challenges remain.

The ACCC receives complaints and enquiries in respect of this priority area through a number of means, including the ACCC's Indigenous Infoline, during outreach visits to remote communities, and referrals from stakeholders. From time-to-time, the ACCC receives reports about high prices being charged by community stores for particular grocery items.

Pricing issues in remote Indigenous communities

In many remote communities, the normal competitive market forces which deliver competitive prices and innovation for consumers are unlikely to be present. Prices for retail food and grocery items are constrained by the level of competition and competitive behaviour, supply chain arrangements, logistics and supply costs, and consumer ability to pay for the goods. Unfortunately remote community stores often do not face competitive constraints as reflected elsewhere in Australia. For many remote communities, these stores are often the only supplier of essential goods and services for many hundreds of kilometres.

The ACCC understands that a number of factors contribute to higher retail food prices in remote communities, including but not limited to the following.

Business model

Community stores generally operate independently of each other and therefore do not have the economies of scale that larger retailers rely on. Individual stores therefore do not have

the option of sharing costs to create consistent pricing among remote stores. Each store will have different costs depending on remoteness and size of the community in which they operate.

Storage and community size

In some cases, remote community stores may have limited storage capacity for items purchased in bulk quantities. For some other stores in very remote locations, small population numbers mean that stores in those locations are also unlikely to be able to purchase in bulk quantities. In both cases, economies of scale are impacted and may contribute to higher end prices for consumers.

Freight

Freight to community stores is higher, given the remote locations of those stores, including some communities that require air or sea freight in addition to road freight. For the reasons outlined above, these freight costs are unable to be shared between community stores to ensure consistent pricing for more remote communities.

Cost of goods

The higher retail price paid by consumers in remote communities, as opposed to regional or metropolitan areas, can in part be attributed to the cost price of those goods to the community store including as a result from turnover of stock and buying power of those stores.

In assessing whether pricing by remote community stores is excessive, it is necessary to consider whether there are significant differences between wholesale costs and retail prices. A proper examination of the pricing margins, including more comprehensive data for remote community stores on both wholesale costs and retail prices is required to assess this issue.

The ACCC notes that retail prices for some essential items sold in remote community stores are often much higher than the same items sold through major supermarkets, especially those located in metropolitan areas. However the fact of such retail price differences is not sufficient to demonstrate a breach of the CCA or ACL is occurring. Further, the ACCC does not consider metropolitan pricing to be an appropriate comparator to remote community stores, given the significant difference in circumstances between a large, metropolitan retailer and an independent store in a remote community.

The ACCC also notes that many remote community stores provide additional benefits to the communities in which they operate, through benevolent programs and/or returning profits back to that community.

COVID impacts on grocery supply chain

The ACCC is also aware of numerous reports about the price of essential items in various remote Indigenous communities during COVID-19. The ACCC has continued to actively engage with stakeholders during this time, and understands that COVID-19 has exacerbated the supply chain challenges that are normally experienced by remote community stores, which in turn has led to consumers paying even higher retail prices on these products than is usual.

As a result of COVID-19 there was an unprecedented demand for supermarket goods right across Australia, which created shortages across a range of product lines, and in turn impacted supply. There were a number of concerns raised by consumers generally, not just in remote communities, and the ACCC notes that these circumstances are exceptional and unlikely to prevail in a post-COVID-19 environment.

The application of the CCA and ACL in relation to allegations of high retail prices

The range of provisions that prohibit anti-competitive conduct are contained in Part IV of the CCA. These provisions prohibit unlawful anti-competitive conduct across all sectors of the economy.

The anti-competitive conduct provisions in Part IV of the CCA include:

- cartel conduct, including price fixing, bid rigging and market sharing
- primary and secondary boycotts
- the misuse of market power
- agreements that substantially lessen competition
- resale price maintenance
- exclusive dealing.

The ACL contains a range of fair trading and consumer protection provisions, such as those prohibiting misleading, deceptive and unconscionable conduct. Some provisions of the ACL, such as those prohibiting unconscionable conduct, apply in relation to business-to-business conduct as well as to protect consumers.

The CCA does not contain a specific prohibition in relation to excessive pricing, and businesses are generally free to set their own prices, which reflect the market dynamics in which they operate. In some, very limited circumstances, excessive pricing might raise concerns under prohibitions in the ACL relating to misleading or deceptive conduct, false or misleading representations or unconscionable conduct.

Misleading or deceptive and false or misleading representations

If a remote community store, or a supplier to that store, made inaccurate or false statements as a justification for high pricing or the reasons for price increases, then this conduct may contravene the ACL.

Unconscionable conduct

In some limited circumstances, excessive pricing may be indicative of unconscionable conduct under the ACL. However courts appear to be reticent to find conduct to reach the statutory standard of being unconscionable under the ACL. In fact something more than the conduct being “unfair” or “unjust” is required and previous court decisions have found that to be unconscionable, the conduct must be contrary to good conscience.

Considering this, the ACCC considers that a court would be unlikely to find that high retail prices alone would be sufficient to support an allegation of unconscionable conduct. Instead other factors would need to be present such that it could be said that the relevant business had acted in a manner that seeks to unreasonably profit from the vulnerability of consumers in remote communities and their lack of alternatives.

While the ACCC has examined a number of complaints regarding excessive pricing, it has yet to uncover any evidence of conduct that could be said to be misleading or deceptive or unconscionable. Rather, in its assessment of specific pricing complaints, the ACCC has found that high retail prices are generally reflective of the high cost of goods to the community store, and are not indicative of community stores increasing profit margins. The ACCC will continue to consider all complaints and enquiries on a case-by-case basis and will not hesitate to take action in the event that it finds evidence that a community store is making false or misleading representations to consumers, or charging excessive prices in an unconscionable manner.

Yours sincerely



Rod Sims
Chair