




# **NSW Farmers' submission to the Inquiry into promoting economic dynamism, competition and business formation**

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## **Inquiry into economic dynamism**

### **About NSW Farmers**

NSW Farmers is Australia's largest state farming organisation, representing the interests of its farmer members in the state. We are Australia's only state-based farming organisation that represents farmers across all agricultural commodities. We also 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 across the state produced more than \$23 billion in 2021-22, or around 25 per cent of total national production, and contribute significantly 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 hopes 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 to Annual Conference, our 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.

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### Executive summary

NSW Farmers recommends the following to correct market power imbalances in agricultural supply chains which will ultimately increase dynamism in these markets and bring about benefits to producers and consumers:

1. Increased auditing of compliance against the relevant Codes of Conduct covering the agriculture sector.
2. Increased reporting of performance of the relevant Codes of Conduct, similar to the reporting completed by the Independent Reviewer of the Food and Grocery Code.
3. All recommendations of the ACCC Perishable agricultural goods inquiry be implemented as a matter of urgency, including that:
  - a. The business-to-business unfair contract terms framework should be strengthened;
  - b. An economy-wide provision covering unfair trading practices be introduced;
  - c. The Food and Grocery Code of Conduct be strengthened and made mandatory.
4. Reduce arbitrary quality requirements of fruit and vegetables based on aesthetics by supermarkets.
5. Task an independent organisation with collecting, analysing, and publishing market data in a timely and usable fashion to help inform market participants, especially in the horticulture industry.
6. Conduct supply chain profit analysis, with a focus on markups and potential price gouging by supermarkets.
7. Improve supply chain data collection across the grains industry, including more detailed reporting required by relevant parties in the Wheat Ports Code.
8. The ACCC conduct a market inquiry into the grains supply chain to validate and diagnose inefficiencies.
9. Conduct an immediate review of the Wheat Port Code as recommended by the ACCC in their latest monitoring report.
10. Implement a mandatory Code of Conduct in the poultry meat industry.

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# **The effect of a diverse and dynamic business environment on Productivity, prices, and better-paid jobs**

A diverse and dynamic food and agribusiness supply chain would include a profitable agriculture industry. If an industry is not profitable then there are dire implications for its sustainability, as it will not be able to attract investment and businesses will leave the industry. This will in turn have consequences for food security as supply will diminish ultimately leading to upward price pressures and a lack of long-term investment into its sustainability.

The pursuit of profits is ultimately what drives investment and innovations which increase productivity. Deregulation of the Australian agriculture industry has led to it being one of the most dynamic and competitive in the world. Australian farmers are the second-least subsidized in the world, second only to New Zealand. As measured by the OECD, just over 2 per cent of Australian farmer revenues in 2016-18 were derived from government support, compared to 55 per cent in Europe. This was in line with competition policy of the 1980s and 1990s, with government support now focused on R&D and risk management tools to manage climate variations<sup>1</sup>.

These deregulations have partly driven productivity enhancements across Australian agriculture that have made Australian producers internationally competitive and kept food prices low for consumers. However, as shown by the example of the dairy industry, while farmers are exposed to high levels of competition, processors and retailers are not. This will be explored in detail throughout the submission.

Agricultural wages are another area where market dynamics are not delivering fair outcomes. In order to continually reduce the cost of inputs wages remain stagnant and producers are restricted in their ability to improve labour conditions. This results in labour shifting away from rural and remote areas, and difficulty in attracting workers to the industry. For example, enrolments in agriculture, environment, and related studies have increased by 18.6 per cent from 2001 to 2020, the lowest of any field, with the next lowest being education which has increased by 61.7 per cent.

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<sup>1</sup> Greenville, J. (2020) Analysis of government support for Australian agricultural producers, *ABARES Research report 20.12*

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### **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 as a whole.

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<sup>1</sup>.

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.

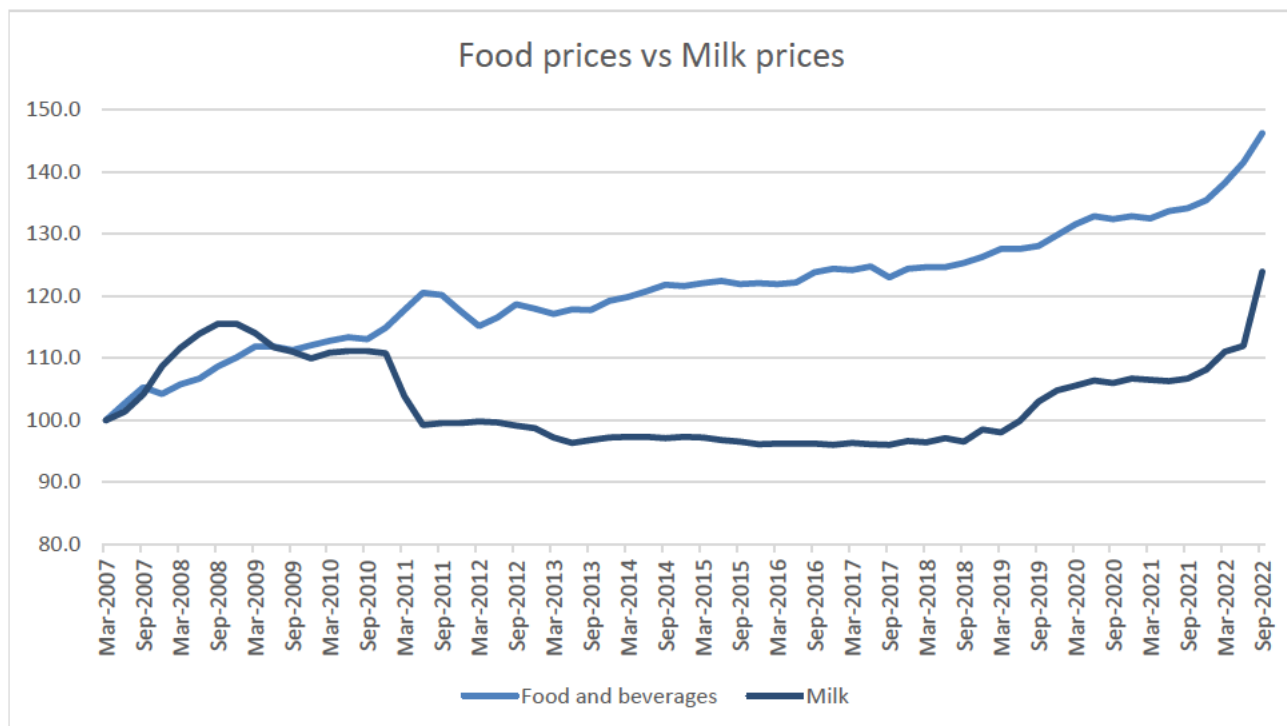
This ultimately leads to two main long-term concerns which ultimately reduce the efficient functioning of the market:

- 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.

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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.



## The extent to which anti-competitive behaviour and changes in industry structures have contributed to rising market concentration in Australia

Analysis by the RBA in 2018 indicated that the supermarket sector is the second-most concentrated of all retail sectors. The combined market share of Coles and Woolworths increased from around 30 per cent of total retail trade in 2001 to peak at about 40 per cent in 2013. It was also found that there was a correlation between concentration and mark-ups; retail industries that experienced larger increases in concentration also tended to experience larger increase in markups<sup>2</sup>. Greater analysis of markups and price

<sup>2</sup> Hambur, J. and La Cava, G. (2018) *Business Concentration and Mark-ups in the Retail Trade Sector*, RBA Bulletin – December 2018



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spreads across food supply chains is required to diagnose the full extent of anti-competitive behaviour by supermarkets and other supply chain actors.

One specific way this behaviour manifests is supermarkets imposing aesthetic produce standards that don't impact the quality, taste or edibility of produce and result in producers bearing the cost through lost revenue and increased disposal costs.

#### **Case Study: Grains industry**

In a perfectly competitive market, prices between markets are determined by transfer costs among regions. These transfer costs include the full suite of post-farmgate costs including logistics, transport, administration, and trade barriers. This is more commonly known as the 'law of one price'. The 'one price' in this case is the world wheat price. As Australia is a relatively small player in the global wheat market, it has very little influence on this price. Therefore, the farmgate price is the world price minus transfer costs.

Another important general rule is that the price in the domestic market is set by the world price. If the domestic price is lower than the world price, then all wheat would be exported, and domestic demand would not be met. The domestic market has much lower transfer costs, so can therefore offer a slightly higher price than the world market. There are two implications of this:

1. Domestic demand for wheat is met and then excess supply is sent for export.
2. The domestic price moves in tandem with the world price minus transfer costs to the world market. If transfer costs increase, then the domestic market can decrease its price to levels just above this and still have its demand met.

Therefore, any inefficiencies in the supply chain which increase transfer costs result in a lower farmgate price for wheat to both the export and domestic market.

Data from the Australian Export Industry Grains Council indicates that Australia has higher costs in terms of dollars per tonne per km of wheat transported than other countries, and that NSW has the highest costs of any state.

*Table 1. Upcountry receival and storage fees charged by the major providers of grain storage services, 2021<sup>1</sup>*

	CBH (WA)	Bunge (WA)	Viterra (SA)	Cargill (SA)	Emerald (Vic)	Cargill (NSW/Vic/Qld)	GrainCorp (NSW)
Receival at upcountry storage	9.15	10.80	13.93	10.02	12.50	10.05	10.04
Storage	0	0	4.95	4.04	4.95	4.31	4.19
Shrinkage and dust cost	1.25	1.25	1.5	1.5	1.75	1.76	1.75
Outturn fee	7.5	0	3.35	7.03	3.00	5.10	8.09
Total cost	17.90	12.05	23.73	22.59	22.20	21.22	24.07

The costs for the major service providers are shown in Table 1 above. NSW, through GrainCorp, has the highest charges of any state.



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Table 2. Fee components of port charges at six major grain port terminals, 2021<sup>1</sup>

	CBH Kwinana	Viterra Adelaide	Emerald Melbourne	GrainCorp Port Kembla	Quattro Port Kembla	NAT Newcastle
In-take fee	0	4	7	2.07	4	6
Vessel nomination	0	5	8	8	8	8
Vessel loading	10.55	14.55	7.50	9.97	7.60	8.00
Inspection	0.35	0.26	0.25	0.33	0.25	0.50
Wharf fees	1.90	2.58	2.78	2.74	1.12	1.03
Stevedoring charges	0.60	0	0	0.38	0.32	0.50
Shrinkage and dust	0.63	0.38	0	0.75	1.00	0.50
Total cost	14.03	26.77	25.53	24.24	22.29	24.53

Table 2 illustrates a similar story for port charges, with costs significantly higher for the eastern states than Western Australia.

The sources of these inefficiencies in the grains supply chain are multifaceted and listed below.

### Market concentration

There are large entry barriers to operating at certain stages in the grain supply chain. At the bulk handling stage, the high cost of accessing rail and setting up receival sites prevents new entrants to the market. The duplication of handling infrastructure would also be an inefficient outcome as it would lead to underutilized assets, driving up per tonne handling costs. Therefore, market concentration can be an efficient outcome, but requires some oversight to ensure monopolistic behaviour does not occur.

Grain shippers are captive to a single railroad, with no access to competitive rail options or alternative transport options.

### Information asymmetries

Knowledge and information can be seen as an input into production and is jointly used by different steps in the production process. The fragmented supply chain and market concentration at certain stages contributes to some post-farmgate supply chain participants holding information that would be helpful to others and lead to more efficient operation across the supply chain.

Changes in market conditions and supply chain operations require communication and alignment of actions. For example, in large production seasons there is the need for greater coordination to reduce bottlenecks and find the optimal split between road and rail freight.

The public good nature of information means it is best supplied through government action, drawing on or sometimes requiring industry collaboration. Such information and analysis can facilitate better investment and risk management decisions by industry, leading to market developments and greater market diversification from which the entire economy can benefit.

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### Underinvestment in rail infrastructure

Underinvestment in regional rail lines has occurred due to the low level of cost recovery from users of these lines. In many instances the rail access fees paid by operators covers just 1 per cent of the total maintenance costs. The NSW Government is required to fund the majority of maintenance costs for low-volume lines, and there is an absence of funding for actual improvement of rail infrastructure.

GrainCorp in its submission to the Senate Committee Inquiry into Grain Export Networks states “rail transport costs in eastern Australia are estimated to be \$10 per tonne above best practice, due to the lack investment rail loading and track infrastructure.”

The Government, through bodies such as the ACCC, should gather evidence to validate and diagnose issues across the grains supply chain. Evidence-based policy making and investment across the supply chain that benefit industry and the community is the ultimate goal and would struggle to be achieved with current available information.

A key component of the National Freight and Supply Chain Strategy, as outlined by DITCRD (2019)<sup>1</sup> was the need to better measure freight and supply chain performance to aid government and industry to improve freight productivity and help evaluate where infrastructure was required.

The Productivity Commission has identified that governments should aid the management of supply chains through provision of information, especially for risk identification<sup>2</sup>. The ACCC could be granted the statutory powers to gather the required information from industry to closely examine margins throughout the grain supply chain. This would be used to ensure there is no excessive use of market power and that information flows are sufficient to encourage both competition and more efficient decision-making across the supply chain.

1 Department of Infrastructure, Transport, Cities and Regional Development (2019) *National Freight and Supply Chain Strategy*, Canberra

2 Productivity Commission (2021) *Vulnerable Supply Chains*, Study Report, Canberra

## The extent to which economic barriers – such as regulatory costs and barriers to finance, infrastructure, suppliers, customers and workers – contribute to rising market concentration and slowing business formation rates in Australia

### Telecommunications

New information and communications technology could deliver the next wave of productivity growth in Australian agriculture. The use of digital agriculture could increase production through optimising input use, more timely decision-making, labour savings, and improved market access. It has been estimated that fully implementing all currently available digital technology could increase production by up to 25 per cent compared with 2014-15 levels.

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A survey of broadacre, dairy and vegetable farms in 2018<sup>3</sup> found the following:

- The overwhelming majority (96 per cent) of Australian farmers owned and used ICT assets, and 95 per cent were connected to the internet.
- The availability and quality of internet services influences farmers' access to and use of ICT. Farmers in relatively remote areas using mobile phones or satellite-based internet connections were more likely to report inadequate internet access as an impediment to their use of ICT and to the operation of their businesses more generally.

One example of ICT adoption is in the grains industry, where investment in GPS-guided equipment is widespread. In 2016-17 grain farms held ICT assets with an estimated replacement value of \$34,000, with 80 per cent of this value in GPS equipment. Similar success stories are impeded by on-farm connectivity. A survey by NSW Farmers in 2021 showed that over 78 per cent of respondents are unsatisfied or very unsatisfied with their mobile network coverage and 66 per cent have experienced a slight to significant decline in mobile network coverage. Agriculture has received the lowest score for digital capability out of any sector analysed in McKinsey's Digitisation Index<sup>4</sup> and Telstra's Australian Digital Inclusion Index.<sup>5</sup>

This lack of telecommunications infrastructure acts as a barrier to attracting investment, workers, and new businesses to the agriculture industry.

## **Regulations facing producers**

Farm business are subject to a vast and complex number of regulations, leading to a substantial cumulative burden on producers. They apply at every level of the supply chain and come from all levels of government. While there is a need for regulation of agriculture, such as in the biosecurity sphere, some are overly burdensome, ineffective, or duplicative. It is estimated that one beef producer is required to comply with, or consider, over 300 Acts, regulations, and codes.

Regulatory burden is especially important for the agricultural sector due to its high dependence on international markets. As many producers are price takers on international markets, any increase in production costs from excessive regulations result in the erosion of international competitiveness. Most Australian farms are small businesses, meaning any excessive regulatory burden has a disproportionate impact, and takes farmers time away from more productivity-enhancing activities.

A Productivity Commission into the Regulation of Australian Agriculture<sup>6</sup> found some regulations need to be reformed, including:

- Native vegetation and biodiversity conservation regulations need fundamental change so that risks and impacts are considered at landscape-wide scale. Environmental regulatory decisions also need to consider economic and social factors.
- International evidence could be put to greater use in assessing agricultural and veterinary chemicals, reducing the time and cost taken to grant registration.

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<sup>3</sup> Duffy, N. and Jackson, T. (2018) Information and communication technology use in Australian agriculture, *ABARES Research report 18.15*

<sup>4</sup> McKinsey Global Institute (2019), Twenty-five years of digitisation: Ten insights into how to play it right. Available at: <https://www.mckinsey.com/~media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/twenty-five%20years%20of%20digitization%20ten%20insights%20into%20how%20to%20play%20it%20right/mgi-briefing-note-twenty-five-years-of-digitization-may-2019.ashx>

<sup>5</sup> Telstra (2021), Australian Digital Inclusion Index. Available at: <https://www.digitalinclusionindex.org.au/>

<sup>6</sup> Productivity Commission (2016), Regulation of Australian Agriculture, Report no.79, Canberra

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- Road access arrangements for heavy vehicles should be streamlined and simplified.

Other broader lessons were the need to reduce inconsistency across jurisdictions which make it difficult for farmers to understand their requirements, improve consultation and engagement practices to support landholders to understand environmental regulations, and ensure that regulatory impact assessment processes are used to support regulation making rather than as a compliance exercise.

## **Supply chain inefficiencies and lack of data**

Agricultural supply chains have unique properties and are becoming more complex in structure, and thus more susceptible to different risks and inefficiencies. Food needs to be frequently purchased and consumed daily, meaning even temporary disruptions significantly affect households. Food production is also seasonal and exposed to environmental stresses, which makes the supply task variable throughout the year. The evidence available suggests that agricultural supply chains are underperforming which makes it more difficult for new entrants to justify significant upfront costs due to the high risks present.

Our ports are essential gateways for agriculture and need to be as efficient as possible for Australia to compete in international markets. Analysis of in-port time performance of 351 container ports across the world by the World Bank found that 4 Australian major container ports, including Sydney, were in the worst-performing 15 percent<sup>7</sup>. Given that there is a growing trend of containerised grain exports, this puts Australia at a competitive disadvantage to overseas exporters.

The market for stevedoring services is very concentrated and contributes to this. The 2021-22 ACCC container stevedoring monitoring report shows that operating profits of Australian container stevedores have increased from 13 per cent in 2019-20 to 25 per cent in 2021-22<sup>8</sup>. The performance of bulk grain handling ports has also come into question, with the 2021-22 Bulk Grains Monitoring Report showing that some port terminal facilities have one or two dominant exporters. For example, at the Port of Newcastle, GrainCorp accounted for 63% of its own throughput, while Arrow and CHS accounted for 97% of Newcastle Agri Terminal's (NAT) throughput<sup>9</sup>.

Inefficiencies in freight movements, particularly for high volume primary produce, add costs and time imposts for farmers. Our farms produce high quality, high value product that attracts premium prices both domestically and internationally. Any inefficiencies and productivity gains attained on-farm will be lost without a concerted effort to establish and maintain infrastructure for road and rail across regional NSW. This is particularly important for NSW relative to other states and territories, given that the state manages the second-highest trade volume in the country at 28 per cent of Australia's total imports and exports.

Regional supply chains are critical not only for industry but also to supply communities with basic needs. However, local governments tasked with maintaining critical transport infrastructure are often inadequately resourced over an extended time-frame to manage a priority activity list. Improvements to regional road and rail will improve access for the agribusiness supply chain, in addition to enhancing liveability in regional centres. Consideration must also be given to improving the governance of regional road networks, which the Australian Infrastructure Audit describes as inconsistent and lacking transparency.

## **Climate change**

Agriculture is particularly exposed to the physical risks of climate change, especially with the large proportion of agricultural production in the Murray-Darling Basin. The World Economic Forum has noted

<sup>7</sup> World Bank Group (2022) The Container Port Performance Index 2021, Washington

<sup>8</sup> ACCC (2022) Container stevedoring monitoring report, Canberra

<sup>9</sup> ACCC (2022) Bulk grains ports monitoring report – data update 2021-22, Canberra

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that Australia is 'in the region most vulnerable to the impact of climate change, including security threats, resulting from both the onset of long-term trends and increased extreme weather events', and that 'the security and humanitarian risk' in Australia 'is significantly higher than in other regions of the world'<sup>10</sup>.

While our level production allows us to meet domestic demand prior to exporting any excess production, extreme events in the past five years have shown that there are vulnerabilities. For example, during drought in 2019 Australia imported wheat for the first time in twelve years<sup>11</sup>. Indeed, ongoing floods, drought, and bushfires, and have been identified by the Senate Foreign Affairs, Defence and Trade References Committee as being significant national security threats<sup>12</sup>.

## **The extent to which businesses consolidating their market power has undermined productivity, stifled wages, made markets more fragile and led to higher mark-ups**

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<sup>13</sup>. Many products cannot be stored by the producer 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.

In supply chains where one party has a stronger bargaining position, this party 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 having few outside options, a lack of visibility over potential risks, or the product no longer being in their control.
- Weaker parties have no visibility over price because there is a lack of transparency or prices are released after planting decisions must be made.
- Weaker parties have no transparency over quality testing.
- Changing supply volumes for perishable products at very short notice after volumes have been agreed.
- Supermarkets at times requiring suppliers to disclose confidential financial information or intellectual property during cost increase negotiations.
- Producers having 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 base food safety standards.

<sup>10</sup> World Economic Forum, 'The Global Risks Report 2020' (Report) 15 January 2020

<sup>11</sup> The Guardian (2019), Australia to import wheat for first time in 12 years as drought eats into grain production

<sup>12</sup> The Senate Foreign Affairs, Defence and Trade References Committee, 'Implication of climate change for Australia's National Security', Australian Government (Report), May 2018

<sup>13</sup> Bakhtiari (2019) Trends in Market Concentration of Australian Industries, Department of Industry, Innovation and Science Research Paper 8/2019

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- 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.

These practices can lead to market failures and harm to producers such as:

- 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 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 information failures, thin margins, and disproportionate exposure to risk.
- Prices producers receive increasing at a slower rate than prices paid for inputs.



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### **Case Study: The Horticulture industry and its governing Code of Conduct**

In general, the horticulture industry is characterised by many producers in a given region for a given product. By contrast, there are typically fewer processors' wholesalers in that region. The major supermarkets account for a significant proportion of supply to consumers. Production of fruit and vegetables is volatile and seasonal, resulting in large fluctuations coming to market, and therefore wholesale and retail prices. Growers have insufficient access to supply and demand information, which reduces their ability to accurately value their produce.

Growers are also increasing trading directly with supermarkets, who are only covered by the Food and Grocery Code, and not the stronger Horticulture Code. Moving these arrangements under the Horticulture Code would correct this imbalance in power between growers and retailers. Producers who supply indirectly to supermarkets are also impacted by the weak nature of the Food and Grocery Code when they supply to, for example, a wholesaler or merchant who supplies directly to a retailer. These are important supply chain intermediaries, particularly for smaller producers as they provide them access to these markets and are subject to comparable challenges with market power imbalances. It has been reported by horticulture growers that if their produce is unfairly rejected by retailers then they do not get paid by their wholesaler.

The Horticulture Code aims to ensure transparency and clarity of transactions relating to trade in horticulture produce between growers and traders. This includes transparency of the terms of trade, price transparency and how that price is determined, and transparency of decisions relating to quality.

The 2016 review of the Horticulture Code found that enforcement is not strong enough to prevent breaches, and that stakeholders are unconcerned with compliance. It also found that the Code does not do enough increase transparency. The review also found that comparatively to international models, Australia's horticulture market faces very little regulation.

Auditing associated with the Perishable Agricultural Goods Inquiry found that a number of traders were operating without Horticulture Produce Agreements, which was also a finding of the 2016 review. This auditing should occur on a more consistent basis to improve monitoring of the Horticulture Code against its aims and increase the transparency of supply chain actors' compliance. A review of the Horticulture Code would also be timely given the previous review was completed in 2016 and there have been changes in the market over this time.

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

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unilaterally impose conditions on farmers under the lens of ESG while capturing the price premiums from these improvements themselves.

## **Drawing on international examples, how Australia could lower economic barriers to competition and business formation, further limit anti-competitive behaviour, and better manage changes in industry structure that would entrench, increase or extend market power**

Australia's competition laws are aimed at preserving the current level of competition rather than correcting them and their inefficiencies, such as the harmful effects of power imbalances that have been identified above.

### **Stronger Unfair Contract Terms Law in the EU**

The imbalance of power between farmers and concentrated downstream market actors such as retailers and processors has been addressed in some other countries. In 2019, the European Commission developed a Directive to protect weaker suppliers of food and agricultural goods and reduce unfair trading practices. It prohibits outright 10 unfair trading practices:

1. Payment later than 30 days for agricultural and food products
2. Payment later than 60 days for other agri-food products
3. Short-notice cancellation of perishable agri-food products
4. Unilateral contract changes by the buyer
5. Payments not related to a specific transaction
6. Risk of loss and deterioration transferred to the supplier
7. Refusal of a written confirmation of a supply agreement by the buyer, despite request of the supplier
8. Misuse of trade secrets by the buyer
9. Commercial retaliation by the buyer
10. Transferring the costs of examining customer complaints to the supplier

These prohibitions go further than Australian competition law as they are mandatory, cover a broader range of products (Codes of Conduct are of varying strength and not all products are covered), and require greater levels of enforcement. Reform of the unconscionable conduct provisions in the *Competition and Consumer Act 2010* to more clearly specify business practices, contractual arrangements and principles that constitute 'unconscionable conduct' would bring Australian competition law more in line with international best practice. Recent reform of unfair contract terms was an important action that signifies progress towards fair and competitive supply chain interactions. However, unfair contract terms are limited in their applicability to the contents of a contract and therefore cannot capture those behaviours that fall outside of the contract, including behaviour during contractual negotiations and behaviour that occurs once the contract is in force.

### **Better reporting of supply chain performance by the USDA**

The USDA provides a good example of the provision of timely economic information which is useful for the decision making of private and public agricultural supply chain actors. For example, the Office of the Chief Economist at the USDA routinely monitors key items that might indicate disruptions in the agriculture and food supply chain. This information includes:

## **Inquiry into economic dynamism**

- Tracking of live animal prices against wholesale meat prices and retail meat prices to identify any anomalies that might indicate supply chain constraints.
- Tracking of critical data around inputs relevant for agriculture such as gas consumption. The same type of analysis is done in aggregate looking at the producer price index (PPI) for the agricultural sector as compared to the consumer price index (CPI) for food.
- The Agricultural Marketing Service (AMS) provides free, unbiased price and sales information assist in the marketing and distribution of farm commodities. The reports give farmers the information they need to evaluate market conditions, identify trends, make purchasing decisions and evaluate transportation equipment needs.
- AMS maintains an online open data platform, AgTransport 3.0, which allows customers to access data related to several transportation reports, including the weekly Grain Transportation Report. This has selected grain price data, volume and price data for refrigerated truck movements of fruit and vegetables, ocean vessel fleet data for bulk and container shipments, and other information on commodity flows.

One example of how this information has influenced Government decision making is the consolidation of the rail industry. The Surface Transportation Board's annual rail rate index study in 2020 showed that grain shippers have disproportionately borne the costs of past rail mergers and deregulation, with grain rail rates above their levels prior to deregulation. The lack of effective rail competition has also been reflected in increased input prices paid by farmers that depend on rail service. This resulted in regulatory changes to enhance competition, such as obligations for reporting of service quality, improving the ability of agricultural shippers to challenge excessive rates, and making shifting between existing carriers easier.

## **Recommendations**

NSW Farmers recommends the following to correct market power imbalances in agricultural supply chains which will ultimately increase dynamism in these markets and bring about benefits to producers and consumers:

1. Increased auditing of compliance against the relevant Codes of Conduct covering the agriculture sector.
2. Increased reporting of performance of the relevant Codes of Conduct, similar to the reporting completed by the Independent Reviewer of the Food and Grocery Code.
3. All recommendations of the ACCC Perishable agricultural goods inquiry be implemented as a matter of urgency, including that:
  - a. The business-to-business unfair contract terms framework should be strengthened;
  - b. An economy-wide provision covering unfair trading practices be introduced;
  - c. The Food and Grocery Code of Conduct be strengthened and made mandatory.
4. Reduce arbitrary quality requirements of fruit and vegetables based on aesthetics by supermarkets.
5. Task an independent organisation with collecting, analysing, and publishing market data in a timely and usable fashion to help inform market participants, especially in the horticulture industry.
6. Conduct supply chain profit analysis, with a focus on markups and potential price gouging by supermarkets.
7. Improve supply chain data collection across the grains industry, including more detailed reporting required by relevant parties in the Wheat Ports Code.
8. ACCC conduct a market inquiry into the grains supply chain to validate and diagnose inefficiencies.
9. Conduct an immediate review of the Wheat Port Code as recommended by the ACCC in their latest monitoring report.
10. Implement a mandatory Code of Conduct in the poultry meat industry.