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Select Committee on Supermarket Prices
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: supermarketprices.sen@aph.gov.au

Subject: Competition and Consumer Amendment (Divestiture Powers) Bill 2024

Thank you for the opportunity to submit a response to the Competition and Consumer Amendment (Divestiture Powers) Bill 2024. NSW Farmers (NSWFA) supports the powers outlined in the amendment to enable the Competition and Consumer Act 2010 to offer a real disincentive against activities that substantially reduce competition in the market.¹ The proposed provisions are in fact weaker than those in other capitalist democracies such as France, the United Kingdom, the United States of America, Germany, Canada, Iceland, Italy, Japan, Mexico, Spain.

NSWFA notes that the proposed amendments, as outlined in 80AD(1) only applies to corporations with substantial market power that have been shown to have significantly reduced competition under subsection 46(1) of the Act. Existing monopolies or oligopolies which do open themselves to new competition have nothing to fear from the proposed divestiture provisions. Furthermore, as outlined in 80AD(2), the Court may only make such a divestiture order upon the application of the ACCC, which has regard to whether such an intervention is in the national interest and would result in a more efficient and equitable market.

Far from being an extreme measure against any and all businesses that wish to grow, as is their right, this is a reasonable middle-of-the-road amendment that establishes the fact that once a corporation has grown to such a size as to be able to shape their market, they have an obligation to meet a higher standard of behaviour for the sake of the national interest. Enabling the Courts to enforce this standard of behaviour through a divestiture mechanism is the only counterweight to the other fiduciary obligation that corporations have to their shareholders to maximise their market power and profits.

¹ NSW Farmers policy: 12 EC-May That in collaboration with other State Farmer Organisations, the National Farmers' Federation and other relevant organisations, the NSW Farmers' Association seeks such review, amendment or the establishment of new legislation, that may be required to place appropriate limits on the concentration of market power among our supermarkets or among other relevant industries. 3129

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NSWFA has made several recommendations to the Senate Inquiry on Supermarket Prices for important competition reforms needed to address significant concerns about the harmful implications of high market concentration in the food and grocery sector for agricultural producers.²

This has included the recommendation that divestiture powers should be introduced which can be applied where it is in the interest of the nation to do so. Evidence provided by the NSWFA, other industry organisations, and consumer groups to numerous inquiries into the supermarket sector have identified multiple examples of how Woolworths and Coles have used anti-competitive practices to crowd out competition, including land-banking and restrictive tenancy agreements. Furthermore, they have been able to leverage their market power to increase their net profits far beyond what is necessary to achieve a 'normal' rate of return on equity for their shareholders by squeezing both their suppliers and consumers. Coles and Woolworths have been able to increase their net profits and achieve a return on equity for their shareholders in excess of 30% during a period where farmer's terms of trade are expected to fall to their lowest levels since the worst years of the millennium drought, and households have seen their real incomes fall backwards in the face of the highest levels of inflation since 1990.

A brief summary of some of the practices inflicted on farmers includes:

- Control over market data, which enables supermarkets to take advantage of information asymmetries to pay farmers the lowest rate possible, as opposed to adhering to a transparent and efficient market price.
- Pushing the costs of discounts and specials onto farmers, and dictating the frequency and magnitude of those discounts.
- Imposing onerous quality, food safety, and packaging standards onto farmers without offering compensation for higher production costs, which has the effect of lowering the quantity and choice available to consumers.
- Unilaterally rejecting produce or ending supply arrangements without explanation or compensation.
- Contract terms offered to farmers on a 'take-it-or-leave-it' basis, which include unfair provisions such as deductions on final payments, and exclusivity clauses.
- Implicit and explicit threats to blacklist or cease all future commercial relationships with farmers that seek better deals elsewhere, contest unfair arrangements under the Food and Grocery Code of Conduct, or otherwise speak up against poor behaviour.

While all suppliers to retailers are impacted by concentrated market power in the supermarket sector, NSWFA specifically highlights the vulnerabilities of agricultural suppliers producing highly perishable goods to the domestic market, such as horticulture, poultry meat, red meat, dairy, eggs, and pork. For example, to produce these commodities require significant upfront capital investments in orchards and sheds that take decades to pay-off. Fresh fruit and vegetable producers in particular, are exposed to adverse market concentration as planting, production, and harvesting decisions must be made long before supermarkets choose to pay for their products, locking farmers into being spot-price takers.

All of the above have the effect of limiting the range and quantity of produce ultimately available to consumers, who have no choice but to pay inflated prices for a limited number of goods that may be of high quality in some measures, such as aesthetics, but are otherwise offer no greater nutritional

² NSW Farmers' submission to the Senate Select Committee on Supermarket Prices Inquiry - February 2024.

value than what some farmers could produce at a lower price. While this is an unconscionable state of affairs in one of the wealthiest nations on the planet where families still struggle to put food on the table, it is nothing except the mechanism through which monopolies and oligopolies are known to maximise their profits when they are not appropriately regulated. As a result, their actions also have the effect of lowering output of the economy - that is, the market power exploited by Supermarkets is a real handbrake on productivity, and by definition GDP, incomes, and the health and wellbeing of the nation.

NSW Farmers is supportive of the intent of the Divestiture Powers Bill 2024 to enable an appropriate tool for the regulator to disincentivise harmful misuse of market power in the supermarket sector and urges the Parliament to act in the national interest to pass this amendment.

Should the Select Committee require further information from NSW Farmers for this inquiry, please contact NSW Farmers Head of Policy and Advocacy, Kathy Rankin

Yours sincerely

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