

**National
Farmers
Federation**

**Submission to the
Independent Review of the
Food and Grocery Code of
Conduct 2023-24**

February 2024



NFF Members



About the NFF

The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

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NFF Submission to the Food and Grocery Code of Conduct Review

The NFF welcomes the opportunity to provide a submission to the Independent Review of the Food and Grocery Code of Conduct 2023-24.

Competition is an essential element of well-functioning markets and supply chains in Australia. This is especially important for the agricultural supply chain. Agriculture relies upon open and transparent marketplaces that promote competition within agricultural supply chains, enabling farmers to access requisite inputs and sell their produce at a competitive price.

The Australian agricultural supply chain is characterised by an uneven distribution of market concentration. Food and fibre production has one of the lowest rates of market concentration in the Australian economy.¹ At the same time, supermarkets are one of the most concentrated sectors in Australia.

In 2022–23 Coles and Woolworths held a combined 65 per cent share of Australia’s food and grocery market², significantly more than the two following largest firms, Aldi (10 per cent) and Metcash (7 per cent).³ Coles, Woolworths and Aldi account for more than 75 per cent of industry revenue.⁴ Combined, the four largest firms hold approximately 82 per cent of the market in the food and grocery sector.⁵ This market share of the top four firms is significantly higher in the food and grocery sector than most other sectors in Australia’s economy.⁶

Because of this significant market share, supermarkets are one of the largest supply channels of perishable products to end customers in Australia.⁷ This market concentration impacts the competitive nature of the food supply chain. This is because the discrepancy in market concentration along the supply chain is open to abuse by firms that hold significant market power, often to the detriment of smaller businesses.⁸

It is the NFF’s view that supermarkets and retailers can use this market power to the detriment of farmers through lower prices, unfair risk burden and longer-term uncertainty that places significant pressure on individual farm businesses. This impact is felt by farmers who directly supply the major supermarkets, but also by those who are involved in supermarket supply chains through intermediaries such

¹ Leigh A & Triggs T 2016, Markets, Monopolies and Moguls: The Relationship between Inequality and Competition, *The Australian Economic Review*, vol. 49, no.4, pp. 389–412

² Leptos, C. 2023, ‘Food and Grocery Code Independent Reviewer – Annual Report 2022–23’, The Treasury, Australian Government, Canberra, Australia.

³ *ibid*

⁴ IBISWorld, An Industry (ANZSIC) Report G4111—Supermarkets and Grocery Stores in Australia, November 2020, pp. 35, 37 and 39.

⁵ Leptos, C. 2023, ‘Food and Grocery Code Independent Reviewer – Annual Report 2022–23’, The Treasury, Australian Government, Canberra, Australia

⁶ Andrews, D., Dwyers, E. & Triggs, A. 2023, ‘The State of Competition in Australia’ e61 Institute, Sydney, Australia.

⁷ Australian Competition and Consumer Commission 2020, ‘Perishable Agricultural Goods Inquiry’ Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

⁸ *ibid*

as processors, agents or wholesalers. Australia has a wide and diverse range of distinct food supply chains, and it is important to acknowledge that the significance of this impact is greater for particular commodities and supply chains, such as the supply of fruits and vegetables.

As it currently stands, Australia's competition law has been ineffective at preventing the misuse or abuse of market concentration. Instead, the existing structures and tools in place have allowed the development of a concerning level of market concentration and the misuse of market power to the detriment of Australian farmers and farm businesses. This includes the Food and Grocery Code of Conduct (the Code) in its current form.

Industry codes of conduct, including the Code, provide a set of rules or minimum standards for an industry. The Code should work to address the current, significant bargaining power imbalance between major supermarket signatories and their suppliers, including farmers.

The Code is failing to do its job effectively. Bargaining power imbalance and a lack of market price transparency continue to be used against farmers in their negotiations with supermarkets. The impact is most significant in perishable goods supply chains where produce must be sold within a specific period before it spoils or degrades in value.

The NFF National Farmer Priorities Survey (October 2023) identified that over 80% of farmers surveyed were either concerned or very concerned about the market power of processors and supermarkets.

The NFF, through our members, continues to hear extremely concerning reports of supermarkets acting in contravention of the Code, including:

- A lack of information to validate claims made by retailers to suppliers;
- Manipulating markets through over or inaccurate forecasting of consumer trends;
- Unfair and intimidating trading behaviours and negotiation tactics;
- Commercial retribution against suppliers, and threats (both actual and implied) of commercial retribution against suppliers;
- Transferring business risks and costs down the supply chain onto suppliers;
- Suppliers funding retailer marketing and promotion activities
- Requiring suppliers to make and fund changes to their supply chain for unclear reasons
- Reducing or cancelling orders, often 'last minute', for unfair or unknown reasons;
- Ineffective and a serious lack of confidence in dispute resolution pathways; and

- Failure to pay suppliers in a reasonable time or in accordance with contract terms.

The NFF strongly supports the findings of the ACCC's Perishable Agricultural Goods Inquiry Final Report (December 2020), including that '...weaknesses in the Food and Grocery Code constitute an important under-regulation of practices that have significantly economically harmful effects.'

The NFF strongly supports the recommendation by the ACCC to strengthen the Code, by making it mandatory for retailers and wholesalers and introducing significant penalties for contraventions. We refer Dr Emerson to consider and adopt the ACCC's full suite of recommendations relevant to the Code, including:

Firstly, to provide meaningful protection for suppliers, the Food and Grocery Code should be made mandatory, 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. This risk could be triggered by a number of factors, such as the introduction of civil pecuniary penalties.

Secondly, the ability of retailers or wholesalers 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. Throughout this inquiry, the ACCC has heard concerns that many suppliers are unlikely to oppose requests from retailers owing to a fear of losing a significant component of their business.

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. Submissions to this inquiry have indicated that they are unwilling to raise complaints because of the risk to their business, and the fact that there will be no genuine consequences for the retailers under the Code.

Fourthly, the Food and Grocery Code needs to provide a genuinely independent dispute resolution, so that suppliers are not deterred from using it because of concerns over confidentiality, bias, or commercial retaliation by retailers or wholesalers. The ACCC considers the employment relationship between the Code Arbiter and the retailer or wholesaler erodes the actual and perceived independence of the Arbiter, and that the Independent Reviewer will not resolve the Arbiters' lack of independence.

While the NFF acknowledges and welcomes the government's commitment to support all recommendations from the Review of Part 5 of the Code, there is still a long way to go in making the Code effective for farmers and small businesses across Australia.

Finally, the NFF unequivocally acknowledges the importance of the retail sector to our industry. Approximately 30% of our agricultural production goes into Australia's domestic market. Ultimately, the agriculture sector and consumers alike need a strong, viable and competitive food retail sector.

Producers of fresh, perishable commodities rely on access to the domestic market, often having few or no export market alternatives. As an example, approximately 72% of Australia's fresh vegetables and fruit lands in either the food service industry or in a grocery store aisle. Both in terms of value and volume, products sold in retail markets (\$658 million and 180,000 tonnes) far exceeds that sold through service (\$92 million and 25,000 tonnes).⁹

Agricultural supply chains beyond the farm gate are highly consolidated and we acknowledge the benefits of achieving greater efficiency in domestic food supply chains. However, the consequences of this long-term consolidation are being suffered by producers, which is unsustainable. Enforcing a more level playing field and enabling greater transparency along these supply chains will go a significant way to ensuring a thriving agriculture sector that can support a thriving retail sector.

The NFF refers Dr Emerson to consider the submissions of our member organisations, which provide further evidence as to the consequences of deficiencies of the Code in its current form.

For further information, the NFF has attached our Competition Policy and relevant elements of our submission to the Senate Select Committee Inquiry into Supermarket Prices, which describes the harmful impacts of high concentration in the supermarket sector and broader frameworks to protect suppliers in their interactions with the major supermarkets.

⁹ Hort Innovation, "Australian Horticulture Statistics Handbook 2022/23"; <https://www.horticulture.com.au/growers/help-your-businessgrow/research-reports-publications-fact-sheets-and-more/australian-horticulture-statistics-handbook/>; accessed 12 February 2024.

Competition Policy (November 2022)

Policy Position

The National Farmers' Federation (NFF) supports highly competitive industries in Australia, especially along the agricultural supply chain.

The NFF regards competitive markets as a fundamental driver of industry efficiency, productivity, innovation, investment and international competitiveness. It is critical that competition laws effectively maintain and improve competition at all levels.

The NFF believes in free and fair markets which promote competition, price transparency, timely and appropriate information flows and do not allow supply chain participants to exercise undue market power.

Background

Agriculture relies upon open and transparent marketplaces that promote competition within agricultural supply chains, enabling farmers to access requisite inputs and sell their produce at a competitive price.

Food and fibre production is a highly competitive industry with one of the lowest rates of market concentration in Australia. However, the agricultural supply chain does not share this competitive structure, with significant market concentration along the supply chain.

The farming sector is generally made up of small to medium enterprises in regional and remote areas. These producers are sandwiched between highly concentrated input markets and highly concentrated output markets. This makes effective competition policy important for farmers to prevent exploitation by firms with significant market power.

The imbalance in the agricultural supply chain leaves farmers vulnerable to exploitation. Existing competition laws and regulations allow supermarkets, processors, input providers and other firms to leverage their market power to the detriment of farmers. Australian agriculture has little influence on the price of produce in the market. This leaves many farm businesses economically vulnerable. This vulnerability and the broader imbalance between farmers and other concentrated players in the supply chain is perpetuated by additional factors such as global supply disruptions, fluctuations in input costs, limitations in infrastructure, and the perishable nature of produce.

The size and power disparity between these supply chain actors and farm businesses creates significant bargaining power issues and empowers anti-competitive behaviour. For example, this often includes:

- Pricing and commercial terms that are not in keeping with those expected of competitive markets;
- Poor value-for-money for inputs and services provided to farmers; and
- Inappropriate apportionment of risk between farmers and monopoly/oligopoly/monopsony commercial partners.

Due to the nature of the supply chains, this conduct has a substantial impact on the profitability, resilience and viability of farm businesses, and competition in agricultural supply chains more broadly.

Agricultural supply chains require measures which increase price transparency, address information asymmetries, and enable information flow through to consumers. The NFF recognises that each agricultural industry and its supply chain experience competition in different ways and this requires diverse actions to prevent the exploitation of Australian farmers.

The issue

Current competition law has proven ineffective at ensuring competitive markets in Australia. Agricultural supply chains now operate across highly concentrated markets, have poor geographical distribution, and face ongoing use of unconscionable conduct.

Agricultural supply chains see farmers subject to practices that reduce their competitiveness, profitability, and long-term economic sustainability. In some cases, this leaves farmers unable to operate profitable businesses. These practices include:

- abuse of bargaining power imbalance;
- unfair contract terms; and
- commercial terms that transfer risks and responsibilities that should be held elsewhere.

The existing competition policy frameworks have failed to provide farmers with the requisite protections from unfair use of market power:

- Misuse of market power provisions are very consumer-centric and provide minimal protections to supply chain abuses;
- Fair trading provisions are equally focused on consumers; and
- Unconscionable conduct provisions are so narrowly defined to render them of little use for small to medium enterprises, such as farmers.

These issues have been compounded by the under-resourcing of the Australian Competition and Consumer Commission who are unable to investigate and prosecute the full extent of firms who break existing laws and regulations.

Existing competition issues continue to have an impact on investment in Australian farms, reducing long-term productivity and profitability. Individual producer uncertainty in relation to produce pricing and the placement of undue risk on their businesses has discouraged strategic capital investment.

Australian agricultural supply chains are also impacted by planning and zoning laws and regulations in each state and territory. This reduces the ability of new firms to enter the market and offer additional opportunity to purchase inputs and sell products. Increasing the ease of new firms entering the market will support competition in agricultural supply chains in addition to reform of competition and consumer legislation.

What the industry needs

Australia needs broad, economy wide competition reform to ensure long-term competitiveness and dynamism, especially in agricultural supply chains. To redress the lack of competition, price transparency and power imbalances in agricultural chains, the National Farmers' Federation recommends:

- An unfair business practice framework be implemented to outlaw such behaviour, above and beyond unfair contract terms.
- Agricultural supply chains with significant market concentration, such as poultry meat, be governed by mandatory codes of conduct restricting unfair and uncompetitive behaviours (including the potential to explore a broader code for perishable agricultural goods).
- Increased penalties for anti-competitive conduct, including the use of unfair contract terms.
- Increased awareness of the ACCC collective bargaining class exemption.
- Initiatives that increase competition and options to consumers, such as the right to repair for agricultural machinery, be prioritised in any government legislative agenda.
- All recommendations of the ACCC Perishable agricultural goods inquiry (November 2020) be implemented as a matter of urgency, including that:
 - The business-to-business unfair contract terms framework should be strengthened;
 - An economy-wide provision unfair trading practices be introduced; and
 - The Food and Grocery Code of Conduct be strengthened and made mandatory.
- Support for the ACCC reforms to merger and acquisition provisions requiring:
 - Formal notification of mergers to ACCC above a certain financial threshold and mergers need to wait for approval by ACCC before the transaction goes ahead;
 - A greater focus on the competition implications of proposed mergers including the structural conditions that are changed by the acquisition, significance of the assets being acquired to that market etc;
 - Change the evidentiary burden of proof to challenge a merger by changing provisions to state lessening of competition is 'likely' as opposed to 'on the balance of probabilities';
 - Where one of the merger parties has substantial market power, an acquisition will be deemed to substantially lessen competition where it entrenches, materially increases or materially extends that market power;
 - The competitive effects of other agreements entered into by merger parties can be considered together with the merger as part of the substantial lessening of competition assessment (look at more than just the merger);
 - a public consultations process whenever there is a proposed merger within a concentrated market; and
 - Require an analysis of company ownership as part of reviews into proposed mergers and acquisitions.
- Commitment to funding and expanding the resourcing of the ACCC Agriculture Unit indefinitely.

- A state-by-state review into planning and zoning laws that prevent new businesses from opening and providing new opportunities to purchase inputs and sell products.
- A nation-wide analysis on the barriers to entry faced by new firms in the broader agricultural supply chain.
- Outlaw 'open book pricing' where supermarkets, processors and other supply chain firms require farmers to show them their margins and set a price for goods based on this information.

NFF Submission to the Senate Select Committee on Supermarket Prices

The effect of market concentration and the exercise of corporate power on the price of food and groceries

Australian agriculture is a successful, dynamic industry. Farmers across the country have continually taken advantage of new opportunities to become more efficient, productive, sustainable, and internationally competitive.¹⁰

However, increasing concentration in Australia's agricultural supply chain may dampen the long-term ability of farmers to continually increase their efficiency and productivity.^{11,12} While the direct impacts differ between agricultural commodities, decreased competition in the agricultural supply chain risks reducing or delaying the long-term investment in productivity enhancing infrastructure, expansion of farm businesses, and implementation of new practices.

Agriculture relies upon open and transparent marketplaces that promote competition within agricultural supply chains, enabling farmers to access requisite inputs and sell their produce at a competitive price. The Australian agricultural supply chain has an uneven distribution of market concentration which threatens the economic conditions essential for dynamic, productive and profitable farms. While food and fibre production is one of the least concentrated sectors in Australia, supermarkets are one of the most concentrated.^{13,14,15}

Currently, Australia's supermarkets and retail sector is characterised by significant market concentration. This has significant impacts on the competitive nature of the food supply chain. In 2022–23 Coles and Woolworths held a combined 65 per cent share of Australia's food and grocery market.¹⁶ This is significantly larger than the two following largest firms, Aldi (10 per cent) and Metcash (7 per cent).¹⁷ Coles, Woolworths and Aldi account for more than 75 per cent of industry revenue.¹⁸ Combined, the four largest firms hold approximately 82 per cent of the market in the food and grocery sector.¹⁹ This market share of the top four firms is significantly higher in the food and grocery sector than most other sectors in

¹⁰ Berger-Thomas L., Breusch J. & Lilley L., 2018, Australia's experience with economic reform. *Treasury working paper*, The Treasury, Australian Government, Canberra, Australia.

¹¹ Australian Farm Institute 2020, *How the relative bargaining power of Australian agricultural value chain actors affects trading practices – and this the efficient operation of these markets*.

¹² Sorrentino, A., Russo, C. & Cacchiarelli, L. 2018. "Market Power and Bargaining Power in the EU Food Supply Chain: The Role of Producer Organizations." *New Medit: Mediterranean Journal of Economics, Agriculture and Environment* 17(4):21–31.

¹³ Leigh, A. & Triggs, T. 2016, Markets, Monopolies and Moguls: The Relationship between Inequality and Competition, *The Australian Economic Review*, vol. 49, no.4, pp. 389–412

¹⁴ Leptos, C. 2023, 'Food and Grocery Code Independent Reviewer – Annual Report 2022–23', The Treasury, Australian Government, Canberra, Australia

¹⁵ Leigh A & Triggs T 2016, Markets, Monopolies and Moguls: The Relationship between Inequality and Competition, *The Australian Economic Review*, vol. 49, no.4, pp. 389–412

¹⁶ Leptos, C. 2023, 'Food and Grocery Code Independent Reviewer – Annual Report 2022–23', The Treasury, Australian Government, Canberra, Australia

¹⁷ *ibid*

¹⁸ IBISWorld, An Industry (ANZSIC) Report G4111—Supermarkets and Grocery Stores in Australia, November 2020, pp. 35, 37 and 39.

¹⁹ Leptos, C. 2023, 'Food and Grocery Code Independent Reviewer – Annual Report 2022–23', The Treasury, Australian Government, Canberra, Australia

Australia's economy.²⁰ In addition to their significant market share, supermarkets are one of the largest supply channels of perishable products to end customers.²¹

In addition to this market concentration, Australia's major supermarkets also account for a significant majority of the sale of perishable agricultural goods to end consumers. For example:²²

- 81 per cent of domestically retailed fresh meat is sold by supermarkets, with butchers making up the other 19%²³
- 59 per cent of drinking milk produced is sold by supermarkets, with 51% of this being private label²⁴
- 45 per cent of eggs produced are sold by the major supermarkets²⁵
- around half of domestically retailed fresh fruit and vegetables are sold through Coles and Woolworths.²⁶

Perishable agricultural goods are an important element of supermarkets' product offering to consumers. Fresh meat is a key example, making up the largest category of supermarket sales (excluding liquor and tobacco).^{27,28}

This discrepancy in market concentration along the supply chain is open to abuse by firms that hold significant market power, often to the detriment of farmers. Practices used by firms with significant market power have been well documented, including by the ACCC. In the 2020 Perishable Agricultural Goods (PAG) Inquiry, the ACCC outlines that the relationship between suppliers and supermarkets can be characterised as:

- Supermarkets hold significantly more bargaining power due to their concentration in the market
- Suppliers must commit a considerable amount of time and evidence to negotiate a wholesale price increase with supermarkets.
- Supermarkets can extract a disproportionate level of profits from products.
- Supermarkets require suppliers to comply with onerous compliance standards.²⁹

Because of this, the ACCC identified that supermarkets can engage in activities that go beyond hard bargaining and are harmful to the efficient functioning of the market. These practices include:

- Commercial retribution against individual businesses by de-listing suppliers products which can dampen suppliers ability to attempt negotiations
- Requiring suppliers to inefficiently allocate their resources through requiring cost increases to be offset

²⁰ Andrews, A., Dwyers, E. & Triggs, A. 2023, 'The State of Competition in Australia' e61 Institute, Sydney, Australia.

²¹ ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

²² ibid

²³ Meat & Livestock Australia 2020, Market snapshot – beef & sheepmeat, MLA, Sydney, 0

²⁴ ACCC analysis of data from Dairy Australia 2019, The Australian Dairy Industry In Focus 2019.

²⁵ ACCC analysis of 2018–19 production and sales data from Australian Eggs Limited 2020, Australian Eggs, Sydney, www.australianeggs.org.au/egg-industry/, viewed 9 November 2020.

²⁶ Roy Morgan 2018, Coles and Woolworths continue to gain share in fresh fruit and vegetable market, Roy Morgan, Melbourne <www.roymorgan.com/findings/7597-coles-and-woolworths-continue-to-gain-share-in-fresh-fruit-and-vegetablemarket-201805220618>.

²⁷ Meat & Livestock Australia 2020, Market snapshot—beef & sheepmeat, MLA, Sydney.

²⁸ ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

²⁹ ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

- Requiring suppliers to disclose confidential information to the supermarket.³⁰

In some cases, the supply relationship between farmers and supermarkets influences different industries' views of the impact of supermarket concentration and these views can change over time. For example, the ACCC received significant reports of concern about the supermarket concentration in the dairy and horticulture industries due to the supermarket's bargaining power and industry-specific supply structures.³¹ At the time of the PAG Inquiry, the ACCC received fewer concerns from the beef, sheep meat and seafood sectors due to their highly diversified supply channels.³² However, in 2023 many sheep and beef producers were concerned about a lack of retail price changes from supermarkets in response to large reductions in the farm gate price.³³

The differences between industries are most clear where there are long-term supply agreements with supermarkets. Some supermarket supply agreements allow suppliers' costs to 'pass-through' to the wholesale price or seek a price review in response to increases or decreases in certain cost components. However, not all contracts are long-term and do not contain pass-through mechanisms. Horticulture is a key example of this discrepancy. Some horticulture produce arrangements are negotiated and agreed on a weekly basis.

The pattern of price setting between the two major supermarket chains

The NFF appreciates that strong competition between supermarkets can benefit consumers. That is, efforts to compete on price can lower prices for consumers, leading to better consumer welfare. However, it is the NFF's view that this competition comes at the expense of prices paid to suppliers. Under existing competition legislation, this behaviour has been allowed to occur, meaning that the lower prices through competition come at the expense of prices paid to farmers. To overcome this, Australia's competition laws and regulations, including the Food and Grocery Code of Conduct, must be fit for purpose and provide clear direction on behaviour in the supply chain and penalties for any breaches.

In many cases, the impact on producers occurs through pricing in the supply chain. Price is a key tool to transfer information within a market and a supply chain. It is the NFF's view that supermarket's significant market concentration can be used to manipulate pricing within the agricultural supply chain. This occurs by exploiting a lack of market price transparency within the supply chain.

Market price transparency is a key issue within the agricultural supply chain that can be exploited in situations where there is little competition or high levels of market concentration. Market price transparency refers to the information available to a farmer to accurately compare the price offered with product supply, demand, market conditions, and prices paid to other farmers. In other words, can a farmer know they are being offered a fair price for what the market demands?

It is the NFF's view that supermarkets are increasingly using their market power to exploit the lack of price transparency, alternative markets or competitors within the supply chain,

³⁰ ibid

³¹ ibid

³² ibid

³³ Cole, H. & Jeffery, C. 2023, 'Cattle prices fall 40 per cent in recent months with supermarket meat prices slowly starting to fall', ABC Rural, < <https://www.abc.net.au/news/rural/2023-04-16/cattle-price-fall-finally-making-it-to-supermarkets/102216872>>

and data asymmetry in determining prices to pay farmers and agricultural firms less for their produce than they would otherwise receive in a more competitive market. That is, a supermarket will take advantage of a farmer's limited options to pay them less than they should for their product.

Horticultural produce provides a clear example. Horticultural produce arrangements are negotiated and agreed on a weekly basis. That is goods are bought and sold week-by-week with prices dictated by the market price. Because there are many sellers and only a few buyers in the supply chain, wholesalers and retailers can have broad access to data on the price and volume offered for produce across the whole supply chain. At the same time, farmers can only see their own data. This provides a significant commercial advantage to supermarkets to leverage their asymmetric data to offer the price paid to farmers for the product.

Practically, this is conducted through a two-step process that determines prices in the market. Commonly growers will be required to submit a price and volume for their produce to the supermarket every Monday. This provides a near-national snapshot of both volume and prices, while growers only have their own data. On Tuesday the supermarkets will contact growers to advise them of what they consider the price to be for the week. The growers cannot contest these price points or information used to determine the price as they do not have access to the wider market prices.

This situation is compounded by a lack of transparency in how the 'market' price is determined. While numerous factors determine how a price is determined, farmers are not provided any information to determine how the price was set. For example, farmers cannot determine if the price they are offered is the lowest price offered, a weighted average, or determined by a supply and demand model that matches the elasticities of other similar agricultural products.

While the asymmetric information often disadvantages farmers, they are often required to accept the prices offered. For example, perishable products must be sold within a specific timeframe before it spoils or degrades in value. This reduces the farmers' bargaining power because products cannot be stored for long periods. Additionally, farmers face potential commercial retribution for their decisions regarding accepting or rejecting the market price.

These practices are in-line with findings from the ACCC. In its PAG Inquiry, the ACCC outlines there is often no close link between retail pricing for perishable agricultural goods and the cost of production.³⁴ The ACCC claims that this is due to price smoothing so that retail prices are less volatile compared to wholesale and farmgate prices.³⁵ For example, milk prices maintain consistent retail pricing despite different geographical and seasonal production costs.³⁶ However, the ACCC highlights that supermarkets can exploit price-smoothing information asymmetries to prevent consumers from valuing products accurately. In the PAG Inquiry, the ACCC uses the example of branded milk:

“For example, there appears to be a commonly held perception that farmers receive a higher farmgate price from the sale of branded milk products relative to private label milk. However, this is not the case. The Dairy Inquiry found that farmers are not paid according to the type or value of the end product that their milk is used in, and that there is no direct relationship between retail private label milk prices and farmgate prices. Indeed, processors

³⁴ ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

³⁵ *ibid*

³⁶ *ibid*

and major retailers appear to offset lower margins on private label products with the higher margins earned on branded products.^{37,38}

The significant market concentration of supermarkets provides an inherent advantage in price negotiations over farmers and suppliers. In some cases, this can include controlling the wholesale price a supplier can charge as they purchase a product and also determining the retail price of the product.³⁹ This creates a difficult situation for suppliers to try and negotiate a fair price or a price increase. In the PAG Inquiry, the ACCC considers that there the supermarkets use this concentration to conduct practices during price negotiations that are harmful to market efficiency.⁴⁰

In the PAG Inquiry, the ACCC outlines a number of examples of the misuse of supermarket market concentration. These examples include:

- Suppliers being asked to disclose commercially sensitive information, which can remove any information advantage they have in the negotiation. This includes providing intellectual property or details of input providers, which is of particular concern when the supermarket also retails a competing private label product.⁴¹
- Pressuring suppliers of perishable agricultural goods to provide supermarkets with some form of offset in exchange for an increase in wholesale prices. This includes paying for promotional activity to an extent that almost negates the price increase.⁴²
- Retribution for initiating a cost increase discussion, by the de-listing of other products on some occasions.⁴³
- Using tender processes to procure the supply of chicken meat to increasingly reduce margins to barely viable levels, as supermarkets are able to bargain down prices with reference to price guides that may not be current or are below viability.⁴⁴
- Providing a supplier with very little time to negotiate prices in circumstances where their products have a very short shelf life.⁴⁵

These practices reflect the commercial reality of negotiations which favour the stronger party.⁴⁶ However, it is clear that these practices move beyond hard bargaining into damaging conduct.

In addition to these actions, there are emerging trends within specific agricultural industries where processors will obtain and control production data, enabling them to set prices paid to farmers as a cost-plus basis. This practice eliminates the incentives for farmers to invest in productivity improvements, since any cost savings resulting from these investments will cause a lowering of the output price. The access to and use of this data is compounded by increasing vertical integration of the supply chain where the producer and retailer have access to production data that can be directly compared to other external farmers.

³⁷ *ibid*

³⁸ Australian Competition and Consumer Commission 2018, Dairy Inquiry final report, ACCC, Australian Government, Canberra, Australia, p.xxi.

³⁹ ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² ACCC 2020, 'Perishable Agricultural Goods Inquiry' Australian Competition and Consumer Commission, Australian Government, Canberra, Australia.

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ *ibid*

The reduced pricing through asymmetric information is a key contributor to increased fragility within the agricultural supply chain. Farmers are often not able to receive a significant return for their product, increasing their susceptibility to disruption through market changes, natural disasters, and other unexpected changes. Increasing this fragility and associated risk undermines the long-term productivity of industry, reduces wages paid to employees and reduces the overall market signals that support supply and demand.

Frameworks to protect suppliers when interacting with the major supermarkets

The NFF believes that Australia's existing competition policy frameworks are not fit-for-purpose to prevent the abuse of market power that occurs in Australia's agricultural supply chain. This is primarily due to:

- consumer-centric focus on market power provisions, providing minimal protections to supply chain abuses
- equal consumer centric focus of fair-trading provisions
- unconscionable conduct provisions are so narrowly defined to render them of little use for small to medium businesses, such as farmers.

In addition to these failings, the legislative and regulatory tools available to the ACCC have not been able to prevent increased market concentration. The under-resourcing of the ACCC has meant it is unable to investigate and prosecute the full extent of firms that break existing laws and regulations. The ACCC has also not been able to adopt new capabilities to proactively monitor firms and supply chains for increasing market concentration, abuse of market power and the use of unfair business practices. The ACCC is also not able to review natural changes in the distribution of firms that impact market concentration. This includes changes in the location of activities and changes in market share due to organic firm growth.

To address the lack of competition and subsequent impacts in Australian agricultural supply chains, the NFF recommends a series of policy options. Effectively implemented, these policies will increase fairness, transparency, and competitiveness across the agricultural supply chain. While the recommendations are focussed on supermarkets, they can be applied to broad supply chain participants to improve competitive dynamics in the Australian economy.

1. Mandatory Price Reporting and Disclosure

Require supermarkets to disclose information used to determine pricing offers. This may include:

- how prices are determined
- volumes offered
- average pricing
- any contractual terms

Price reporting and disclosure will improve farmers understanding of how supermarkets determine prices paid to suppliers. This would include providing clear guidelines and documentation to ensure consistency and clarity. However, this scheme must be carefully designed to ensure the increase in price transparency does not come with unintended consequences. Previous price transparency schemes have resulted in tacit price collusion, reducing the competitive outcomes intended through the policy. As such, the agricultural pricing scheme should focus on providing greater transparency to farmers to support their business decision-making without increasing awareness within retail competitors.

2. Price Reporting Platforms

The Committee should recommend the greater development and promotion of digital platforms that provide real-time market price information to farmers. These platforms can aggregate data from various sources to help farmers make informed decisions about when and where to sell their products.

The Australian Government has supported the development of these platforms in targeted agricultural industries, including dairy, wine and horticulture. These platforms provide a tool to collect, collate and communicate price information through online analytics platforms.

While these platforms offer a market-driven tool to support greater price transparency within agricultural industries, it is essential they have the right regulatory framework to ensure they function to provide long-term benefits. The development of these platforms may not have broad support along the supply chain. As such, there may be disincentives for some supply chain participants to not participate or not provide effective information. This would undermine the effective functioning of the online tools.

The Australian Government should explore options of mandatory compliance to ensure long-term participation and compliance to ensure successful long-term application.

3. Fair Contract Terms

The Committee should recommend strengthening legislation and regulations to ensure contracts in agricultural supply chains are fair, transparent and enforceable. This includes clear terms on pricing, delivery schedules, and dispute resolution mechanisms. This will ensure clarity and surety in the relationship between farmers and purchasers of goods. These changes should be additional to the unfair contract terms reforms implemented in 2022.

4. Access to assistance and justice mechanisms

In addition to implementing fair contract terms, access to justice mechanisms must be easier to access for farmers and small businesses with lower barriers to challenge unfair contract terms or misconduct. Where farmers have contracts with supermarkets or other retailers, there is no effective mechanism to contest issues or breaches of the contract.

In the current system, unfair terms and compliance with contracts must be decided by courts. This adds a clear barrier for farmers to contest issues in contracts. Relying on the legal system as the sole avenue to contest contracts reduces the efficacy of existing unfair contract term legislation. It also allows the ongoing prevalence of unfair contract terms within the agricultural supply chain.

Not only does legal action provide a financial barrier to contesting contract issues, but it also exposes individuals to potential commercial retribution. As such, access to justice mechanisms should also include whistleblower protection. This would include protections for farmers and industry insiders who expose unfair or anti-competitive practices within the supply chain. This can encourage more individuals to come forward with information about market abuses.

These mechanisms may take the form of enforceable codes of conduct within agricultural industries with significant market concentration along the supply chain. Effective design of these codes may present clear options for dispute resolution and whistleblower protection to provide farmers with confidence without adding significant cost burden on the supply chain. Easier access to dispute resolution mechanism can support farmers through better access to existing protections and better functioning of the existing regulatory framework.

The Dairy Code of Conduct provides an example of an appropriate avenue for dispute resolution between farmers and processors. The Dairy Code of Conduct provides clear guidance and framework for dispute resolution options and provides better information for farmers to decide how to address issues in their relationship with their suppliers. This is

supported by the positive role of the Australian Small Business and Family Enterprise Ombudsman providing information and support to farmers and small businesses.

This contrasts to the Food and Grocery Code. Under the Food and Grocery Code, supermarkets appoint their own Code Arbiter is responsible for investigating and resolving supplier complaints in relation to conduct regulated by the Code. However, the direct appointment of the Code Arbiter by the supermarket reduces farmers' confidence that the complaints process will be fair and independent. The 2022 Independent Review of the Food and Grocery Code has suggested this may be responsible for the proportionally low number of complaints being brought to the Code Arbiters, compared with the number of informal complaints filtering through other avenues, including reports made to industry bodies.

The Committee may also consider the proposal put forward by the Small Business and Family Enterprise Ombudsman. Under this proposal, the Australian Government could introduce a Federal Small Business and Codes List into the Federal Circuit Court of Australia. This could provide a low-cost alternative for small businesses and regulators to seek redress and timely enforcement action from unfair conduct by large entities in a cost-effective and timely manner. Disputes appearing on the list would be capped at \$1 million (award or fine) and delivered via online hearings, significantly reducing the time and cost burden on a small business. Critically, the list would:

- operate as a 'no costs' jurisdiction
- include a reduced or capped 'court book' evidentiary entitlement
- provide a guaranteed turnaround time
- include compulsory pre-hearing alternative dispute resolution.

This reform could reduce barriers to justice for small businesses and entrepreneurs by supporting them in protecting their own commercial interests in a way that is affordable, timely and able to deliver adequate sanctions, interventions and recompense from counterparties engaging in anticompetitive or unfair conduct.

5. Education and Training

Understanding the market is an essential element of effectively navigating the complex environment of the agricultural supply chain. As such, training and education programs are important tools in supporting farmers. These programs could focus on supporting farmers to improve their negotiation skills and understanding of market dynamics. This can empower them to navigate price negotiations better.

This education and training should also extend to using and adopting price and risk management tools. Australian agriculture has been successful in the use of sophisticated price management tools. These include physical sales, forward contracts, futures, options, swap markets and index derivatives. While these tools have increased, their adoption is not even across the sector.

To support greater uptake and use of these tools, the should recommend the development and promotion of tools and strategies to increase the uptake of price management tools. These include tools that help farmers manage price risk, such as futures contracts or insurance products.

6. Promote the ACCC collective bargaining provision

The collective bargaining 'class exemption' allows eligible small businesses to bargain collectively without breaching competition laws. While this exemption provides a model for farmer collaboration, its implementation has hindered effective uptake.

The ACCC should develop additional resources to help farmers and industry groups understand how to navigate the collective bargaining provision. As it stands, there is often confusion and apprehension about exploring the collective bargaining provisions. These

concerns are due to concerns about inadvertent or accidental misconduct or cartel behaviour.

Increasing awareness of the collective bargaining provisions will provide more clarity and confidence in their use. This will support the formation and use of producer cooperatives that can collectively negotiate prices and contract terms on behalf of their members, giving farmers more bargaining power.

In addition, the Committee should recommend the Government increase the existing limit on businesses that can access this provision. As it stands, the exemption is capped at an aggregated turnover of \$10 million. This cap should be increased to allow a more effective uptake by farm businesses without distorting the policy's intention.

7. Increased ACCC powers to access data from supply chain companies

The ACCC has an important role in monitoring and analysing markets. This often occurs through ongoing market studies that examine the operation of markets, sectors and industries. These studies provide a positive tool for identifying potential new and emerging competition issues and recommending potential policy solutions.

However, these market investigations are limited by the ACCC existing powers and ability to request information. Under current legislation, the ACCC can only compel companies and supply chain actors to provide information and documents if their investigation is directed by the Minister. If the study is instigated by the ACCC, there are no powers to compel companies to comply. This limits the ACCC's ability to respond to conduct thorough investigations with clear information and data from supply chain actors.

The Committee should recommend the ACCC be granted broader powers to request, collect, and analyse data from all participants in the agricultural supply chain. This includes data related to pricing, procurement, distribution, and other relevant operational aspects. With increased data access, the ACCC can more proactively analyse industry and market data to identify patterns or practices that might indicate anti-competitive behaviour or a lack of price transparency. Periodic reports should be published to inform stakeholders, including farmers, about market conditions and potential areas of concern.

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