



**SUBMISSION FROM
HON BOB KATTER MP, FEDERAL MEMBER FOR KENNEDY
TO THE
FOOD AND GROCERY CODE OF CONDUCT REVIEW 2023-
24 - INTERIM REPORT**

2024

Introduction

In April 2024 an Independent Review of the Food and Grocery Code of Conduct – Interim Report was released for consultation, including a list of consultation questions.

However, the Interim Report noted that despite advocating further consultation many of the recommendations the Report contain were firm and would not be changed. It is therefore curious why further consultation is even being undertaken.

Broadly the Interim Report acknowledges many of the failings of the current Code. It acknowledges that the current Code is not effective, provides no real penalties or enforcement and allows broad exceptions

It is actually contended, and supported by various submissions that the supermarket giants have long been using the Code to further enshrine their market power. The very real fear of retribution has led to many suppliers failing to use the Code as a method to hold the supermarkets to account.

However, even though some submissions have been critical, almost all attempts to level the playing field have been met with contempt. The reality is these reforms will still require producers to compete against each other with the most compliant to the whims of the supermarket giants being the victor. Anyone who would dare to speak out or use the avenues of complaint regarding unfair practices will be blacklisted and banned from future purchasing agreements.

This submission notes that:

- **making the Code mandatory does very little**, already all the major supermarkets are signatories to the current Code;
- **increasing penalties and providing more enforcement tools does very little**, unless the enforcer has a proven ability to actually undertake enforcement action;
- **providing dispute-resolution arrangements does very little**, because of the huge power imbalance and very real threat of retribution;
- **independent reporting does very little**, as it fails to recognise the close connection between supermarkets and suppliers by the issuing of vendor numbers and the powers that suppliers have over producers;
- **offering additional protections against retribution does very little**, if such protections involve supermarket executives ‘better’ over-sighting buying teams and category managers – this is Caesar judging Caesar – if self regulation is the answer why have we had 15 reviews in as many years?

The recommendations in the Interim Report, like those in previous inquiries led by successive Federal and State Governments, will do nothing to alter the current regime.

Significant reform, such as divestiture and proven enforcer oversight, has been arbitrarily discounted without thorough investigation.

Community expects significant reform to better support our farmers and consumers. However, this report offers no hope of such reform.

This submission is provided in similar terms to the submission made by Hon. Bob Katter earlier this year to the Federal Inquiry into Supermarket pricing.

Substantial and real reform must be immediately taken to totally change the power of the Australian supermarket duopoly.

It is recommended that the Code be abolished and replaced with significant reform that includes:

- **mandatory and staged divestiture**
- **maximum mark-up of 100% on produce**
- **Investigation, enforcement with severe penalties**

These actions will place in jeopardy the huge supermarket profits of over \$1 billion/yr. As such, they will be ridiculed and fought against tenaciously by those with a vested interest in the existing duopoly.

Reform is not for the faint of heart, but it is absolutely essential if cost-of-living pressures are to be addressed and Australian primary producers are to continue to feed Australia.

“ THE POWER THE SUPERMARKETS HAVE OVER AUSTRALIAN CONSUMERS AND PRODUCERS IS UNPARALLELED. ”



Recommendations

ABOLISH THE CODE

- Abolish the Food and Grocery Code of Conduct. By its very nature the Code is a form of self-regulation that has been proven to be ineffective to address the power imbalance
- Implement a regime for divestiture
- Replace the Code with oversight by a proven enforcer, such as the AFP, with the willingness, powers and functions to ensure significant reform

DIVESTITURE POWERS

- Provide for the forced divestiture of businesses that hold a near-monopoly or duopoly control over the grocery market to sell down assets to a maximum of 20% over 5 years
- Give similar divestiture powers to the Australian courts to order divestiture to not only penalise, but also prevent, abuse of market power
- Prohibit colluding activity between divested assets.
- Prohibit unfair or biased purchasing arrangements or other practices that allow dominant market share behaviour
- Prohibit the expansion of supermarket branded products that are available exclusively at a particular supermarket.
- Prohibit anti competitive-behaviour including creeping acquisitions, greenfield acquisitions and restrictive covenants

MAXIMUM 100% MARKUP

- Define and cap the charges that a supermarket can put on producers / suppliers
- Require supermarkets to publicly state on a weekly basis:
 - price paid to suppliers for produce;
 - all the costs the producer must bear ie. ripening, transportation, storage;
 - the price charged to consumers.
- Introduce a maximum markup of 100% on all fresh produce

INVESTIGATION & ENFORCEMENT WITH SEVERE PENALTIES

- Strong proven government enforcement body, such as AFP, with extensive investigation powers and severe penalties
- Mechanisms that allow consumers to express concerns about pricing without having to demonstrate a technical breach of the law
- Mechanisms that allow farmers and agents to confidentially express concerns about pricing without fear of repercussions or having to demonstrate a technical breach of the law
- Measures that compel Supermarket Directors and Executives to provide robust and frank information to oversight bodies



**FARMERS HAVE BEEN
STRETCHED TOO FAR**

Critical detail

DIVESTITURE POWERS

Divestiture powers can be used to force the break-up of dominant businesses. These powers already exist in competition policies of a number of overseas nations, including the USA. In practice these powers are generally used to force the sale of certain assets in merger proposals (ie. US Bell Telephone breakup). However, they might also be used to force the sale of certain assets when a business has become too dominant.

In Australia, the top two supermarkets account for more than 70% of the nation's grocery market. This concentration of power creates an imbalance that appears to have led to vast profits at the expense of consumers and producers.

Historically attempts by the Australian Government to open the grocery sectors have failed. The major supermarkets have bargained their way around various restrictions favouring smaller players such as reducing trading hours and floor sizes. They have successfully lobbied government for the removal of such restrictions and entered into anti-competition lease agreements so they can gain more market share, crushing those smaller groups that were established or trying to emerge in the grocery sector.

Divestiture appears to be one of the few options remaining to force the break-up of the 2 major dominant supermarkets in Australia. Divestiture could limit their combined market share to a rate more comparable to those overseas ie. 43% combined market share of Britain's top two supermarkets and 34% combined market share of the US's top four supermarkets.

Australian divestiture legislation would need to:

- Give divestiture powers to the Australian Government to force businesses that hold a near-monopoly or duopoly control over a market to sell down assets, as a means of ensuring concentrated markets remain competitive
- Give similar divestiture powers to the Australian courts to order divestiture to not only penalise, but also prevent, abuse of market power.
- Establish a Commissioner with functions that include the oversight of divestiture and options of significant penalties.
- Restrict market share to 20% for corporations in the grocery sector.
- Prohibit colluding activity between divested assets.

Critical detail

MAXIMUM 100% MARK UP

Separately to this Inquiry is a Federal review of the Food and Grocery Code of Conduct. A cynic could argue that the Food and Grocery Code of Conduct has in recent years been used by the supermarket duopoly to impose restrictions and gain maximum control over the producer/supplier.

One only needs to consider the price given to the farmer (often referred to as the “farm-gate price”) and the price paid by the consumer.

However, before we can make this point it should be clarified that calling the price given to the farmer the “farm gate price” is somewhat misleading as not only does the farmer have to pay for the production costs, wages, fertilisers, land, irrigation, machinery but the farmers also has to pay the costs for transport to the markets, ripening and inspection of the produce, and if rejected, dumping fees.

Supermarkets on the other hand, have arguably much smaller costs, relating to retailing the product given to them in final form.

Despite this significant disparity in costs often the supermarket double or even quadruple the price they pay the farmer when they charge the consumer.

As detailed on the graphics in the next page, bananas purchased for \$1.50/kg are often on sold to the consumer at \$4/5 kg.

You don't have to be great at maths to work out where the \$1 billion in annual profit is coming from.

If government is serious about tackling the cost of living, supporting Australian farmers and consumers and ensuring access to fresh fruit and vegetable it should immediately

- Define and cap the charges that a supermarket can put on producers / suppliers;
- Require supermarkets to publicly state on a weekly basis:
 - the price paid to suppliers for produce;
 - all the costs that are included in this price, including the costs of ripening, transportation and storage; and
 - the price charged to consumers;
- Introduce a maximum markup of 100% that supermarkets can charge only all produce.
- Scrap the Food and Grocery Code of Conduct, calling it out for what it really is – a measure that has been long abused by the supermarkets to control and restrain suppliers/producers. It does nothing to address the power imbalance rather it enforces and capitalises on that power imbalance.

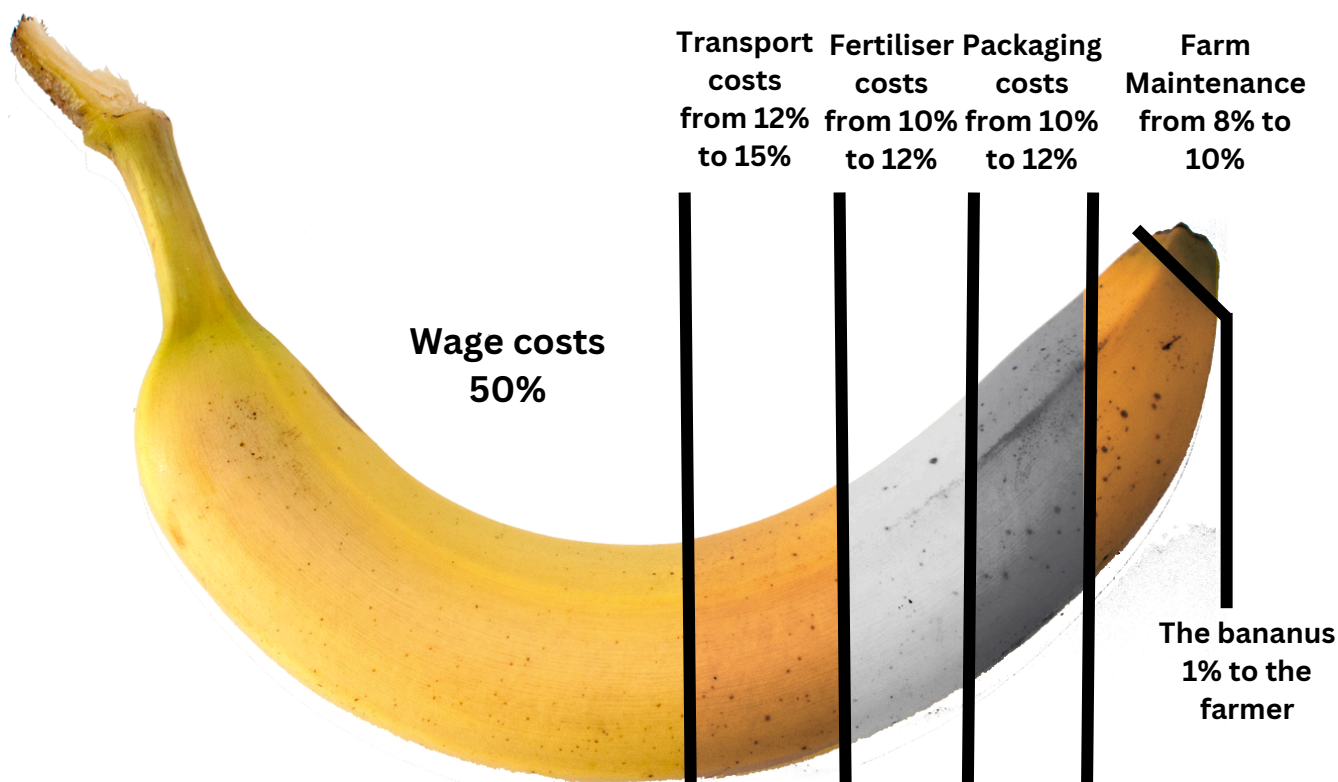
Farming costs

The following graphic highlights the costs involved in producing fresh food and getting that food to market.

For example, if the farmer is receiving \$1.50 for a kilo, he actually takes home less than 2c once costs are covered. The Supermarket on the other hand retails the same product at \$4-5/kg.



Out of that \$1.50, farmers pay



Costs that farmers have to bear

Critical detail

INVESTIGATION & ENFORCEMENT WITH SEVERE PENALTIES

Predatory practices and behaviours should be thoroughly investigated and, if proven, met with severe penalties. Often it is difficult to call out such behaviours and even more difficult to prove they have occurred in the “eyes of the law”. Retribution from those that are accused can be swift and severe.

The power imbalance that the supermarkets giants have is clear. Evidence is also readily available that such practices and behaviours have been used to stamp out competition, manipulate suppliers and consumers and further instill the power imbalance and increase profits.

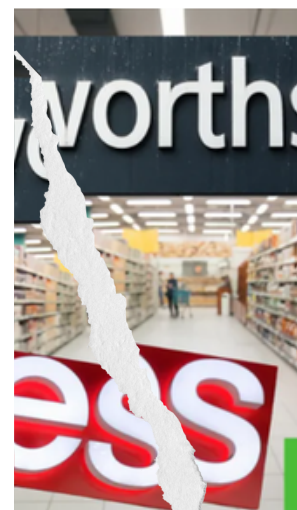
Actions such as price gouging, creeping acquisitions, greenfield acquisitions, restrictive covenants can weed out competition limiting options for suppliers and consumers and ensure continuing expansion of market power.

Such actions in the fresh food sector has been the subject to a series of inquiries and reports over the last 20 years. However, little has been done to reign in these practice. Laws in this area need to be urgently and significantly strengthened.

If real supermarket reform is to occur then urgent and significant laws must be implemented to ensure appropriate investigation and enforcement, including severe penalties.

Recommendations

- Strong, proven government enforcement body with extensive investigation powers and severe penalties (over \$100 million (or 1/10th annual profit) for corporations and over \$10 million for individuals – rather than the current corporate penalty of \$64,000 under the Food and Grocery Code);
- Mechanisms that allow consumers to express concerns about pricing without having to demonstrate a technical breach of the law;
- Mechanisms that allow farmers and agents to confidentially express concerns about pricing without fear of repercussions or having to demonstrate a technical breach of the law;
- Measures that compel Supermarket Directors and Executives to provide robust and frank information to oversight bodies.



**FARMERS ARE THE END OF
THE LINE. THE BOTTOM OF
THE SUPPLY CHAIN.**



Response to Consultation Questions

1. Are there any other protections that should be included in the Code for suppliers that sell to a supermarket via another entity?

This question touches on the complex arrangements established by the supermarkets to only exclusively deal with third party agents by providing a limited amount of vendor numbers. Unless one has such 'exclusive access', one cannot supply a supermarket with their produce.

A minor number of producers have vendor numbers allowing for direct supply to the supermarkets while the vast majority of producers can only supply supermarkets via agents that have this 'exclusive access'.

The code, rather than protecting producers, further enshrines and facilitates this arrangement allowing the supermarkets to indirectly wield their power through third party agents.

The Code review should further explore these relationships and critically assess how the Code itself supports and perpetuates the power imbalance by severely restricting the avenues by which producers can supply supermarkets.

2. Are there reasons why the good faith obligation should not be extended to suppliers? Please detail your reasons, including any case studies that might demonstrate your concerns.

Again the answer to this question depends significantly on the definition of the supplier. If the supplier is the third party agent with 'exclusive access' then the Code should acknowledge and address the way they use their 'exclusive access' to the supermarket buyers to control the market place.

But a good faith obligation is only as useful as the oversight and enforcement. The power imbalance is such that 'good faith obligations' are generally only useful as buzz words on annual reports and have limited if any value in promoting fairness when the power imbalance is so significant.

An effective 'good faith' obligation needs a proven enforcer, significant penalties and a regime by which there is a far greater access to supply the supermarket giants.

Response to Consultation Questions

3. Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.

No, the dispute-resolution arrangements fail to consider the complexities of the existing regime and the pre-existing power imbalance.

Only producers leaving the market with nothing to lose would pursue outcomes under the procedures outlined. It is perplexing how producers would not have a fear of retribution when all the options to retribution still remain and the supermarket are tasked with 'better' regulating themselves.

4. Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

Dispute resolution will always be an option of last resort for producers when the power imbalance is so high, the supermarket so well resourced and the options for alternative avenues for market almost nonexistent.

Forced divestiture offering alternate markets appears to be the only option by which producers will seek dispute resolution.

5. What minimum standards of conduct, if any, should be specified in the Code that should not have exceptions? If exceptions are provided for, how should these be limited? Please provide examples to support your views.

Minimum standards of conduct are strictly imposed on suppliers and producers by annual auditing regimes required by the supermarkets – Freshcare, Freshcare Environmental, HARPS, Fair Farms etc.

Producers can be heavily penalised if they fail these regimes. Significant onerous requirements are imposed under such regimes which have little to do with the quality of the produce and appear to be more focused on coercive control over farming practices and procedures.

The Supermarkets have no such regimes imposed, monitored and penalised by the producers or suppliers. No-one is holding the supermarket to such account.

Response to Consultation Questions

6. Will the reasonableness consideration operate more effectively if the Code is mandatory and there are penalty provisions? If not, which of the reasonableness exceptions should be refined and how? Please provide reasons for your response.

Considerations such as 'reasonableness' will only operate effectively if such impositions are effectively investigated, enforced and penalised. This is not currently proposed.

The concept of 'reasonableness' creates a legal argument to which the Supermarkets are likely to apply the millions of dollars and a suite of lawyers.

Producers simply do not have the time or money to fight against or prove such concepts. In reality, adding the requirement of "reasonableness" will just create yet another exception by which any strength that the Code have will be eroded.

7. Do any of the obligations under the Code need strengthening to better protect suppliers?

The Code as a form of supermarket self-regulation has failed and will continually fail to protect producers. Suppliers that hold 'exclusive access' to supermarkets are often complicit in practices of retribution and can even wield such powers in isolation.

If indeed there is genuine interest in ensuring the Code better protects producers, all self-regulation by the supermarkets and exceptions to compliance and arguable concepts such as reasonableness need to be removed, a proven enforcer with broad investigation powers and heavy penalties implemented and more options created in the market through a mechanism such as forced divestiture.

This would transfer the Code into something completely different and abolish the underlying concept which is of self-regulation.

Response to Consultation Questions

8. What additional protections are needed specifically for suppliers of fresh produce? Please provide examples of specific conduct that should be addressed in relation to fresh produce.

As raised in point 7 all forms of Supermarket self-regulation and legally arguable concepts such as reasonableness need to be removed from the Code.

A proven enforcer, such as the AFP, should be brought in with extensive investigation and enforcement powers, and substantial penalty provisions.

Additional protections should include forced divestiture to allow other players to enter the market and give producers an alternative to sell their produce.

9. What additional obligations or mechanisms could be used to ensure ordering practices relating to fresh produce that do not pass most of the risk onto suppliers or result in excess wastage?

The specifications imposed by the supermarkets are so strict, that if they wish, all fresh produce could be rejected.

Under these specifications fresh produce can be arbitrarily rejected. Over and under ordering is also used to control market prices. Replacement produce is often fresher and purchased at a cheaper price.

Standards and specifications are inconsistently applied between and within distribution centres. There is more incentive to reject fruit than to accept. When fruit is rejected the supermarket often benefits by replacing with cheaper, fresher produce but also charges the producer (via the supplier) transport costs, dumping fees associated with the rejection and even remove the producer from future supply orders.

10. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

Transparency on the price fundamentally misses the point. The producer is well aware of the price they receive and the risk they have to take.

Greater transparency should be offered to the consumer on:

- price paid to the producer and the costs the producer had to bear and the risks involved;
- price charged to the consumer and the costs and risk the supermarket had to bear.

Recommendations in this submission on 100% mark-up offers such transparency.

Response to Consultation Questions

Question 10 cont...

To regulate charges imposed by supermarkets on producers/suppliers, the submission suggests defining and capping these charges. It also proposes requiring supermarkets to publicly disclose weekly: the price paid to suppliers for produce, associated costs, and consumer prices, and a maximum markup limit of 100% on all produce.

11. Should the grocery supply agreement provide greater transparency around price, such as the process that supermarkets use to determine price? Please provide details to support your views.

As provided in Question 10 and also raised in the recommendations – significant supermarket reform is required.

Additional protections must include 100% maximum mark-up and clear transparency on the costing and risks, and appropriate significant oversight, enforcement and penalties.

12. What level of penalties should apply to breaches of the Code? Please provide reasons.

The penalties applied should offer a significant deterrent from continued action. The amount should consider annual profits and turn-over.

However, the penalties need to be matched with equally strong investigative and enforcement powers. The Code needs to remove forms of self-regulation and exceptions and legally arguable measures such as 'reasonableness'.

The Supermarket can afford significant legal teams and can provide strong legal technical arguments to avoid penalties and unflattering findings.

Unless coupled with strong investigation and enforcement powers and a body that has a willingness to use such powers, significant penalties will be nothing more than offer buzz words for annual reports to justify maintenance of the current regime.

Response to Consultation Questions

13. Which provisions, obligations, or requirements should be subject to the highest penalties? Please provide reasons.

It is anticipated that the highest penalties will also be those that the Supermarket provide the most resources to argue against. High penalties should not be considered in isolation but within the context of investigation and enforcement.

The penalties under the current Code are pitiful when compared to the annual profits of the Supermarkets, but even so the current penalties have not been imposed.

High penalties must be matched with powerful investigation and enforcement powers.

14. Is 50 penalty units an appropriate amount for infringement notices issued under the Code? Should there be any differentiation in infringement notice amounts according to the provision contravened?

As per the response to Question 13, this point needs to be considered in the context of investigation and enforcement.

15. Does the Code adequately require covered businesses to keep information and documents for the purposes of recording their compliance and any disputes raised under the Code?

One has to look no further than responses, or lack there of, to various government inquiries by the Supermarkets to answer such a question.

If there is no body that has appropriate powers and a willingness to wield such powers, then the keeping of information and documents is a moot point.

This question, as many in the Report, cannot be adequately assessed when the entire premise of the Code is continued self-regulation by the Supermarkets.



**CONSUMERS NEED FAIR
PRICES AT THE CHECKOUT**

Conclusion

The Australian supermarket duopoly boast annual profits of over \$1 billion for each entity. Manufacturers are seeing increased competition from import home brand products, farmers are seeing lower returns and increasing costs applied to these returns and consumers are paying more for groceries.

Record profits can only be achieved at the detriment of both suppliers and consumers. Serious and fundamental reform as proposed in this submission needs to be immediately actioned to tackle the negative impacts of market concentration and over exercise of corporate power.

This submission recommends:

1. Abolish the Code: This submission finds that the Code, by its very nature, is a form of self-regulation by the Supermarkets on themselves that has long failed producers and consumers. Rather it has been used to enshrine the power imbalance.

2. Divestiture powers: The submission advocates for the forced divestiture of the supermarket giants. It suggests restricting market share to 20% for corporations in the grocery sector, prohibiting colluding activity between divested assets, and limiting the expansion of supermarket-branded products available exclusively at specific stores.

3. Maximum 100% markup: To regulate charges imposed by supermarkets on producers/suppliers, the submission suggests defining and capping these charges. It also proposes requiring supermarkets to publicly disclose weekly: the price paid to suppliers for produce, associated costs, and consumer prices, while introducing a maximum markup limit of 100% on all produce.

4. Investigation and enforcement with severe penalties: This includes establishing a robust government enforcement body, such as the AFP, with extensive powers to investigate and impose severe penalties, along with mechanisms for consumers and farmers to express pricing concerns confidentially without needing to prove legal breaches. Additionally, it suggests compelling supermarket directors and executives to provide transparent information to oversight bodies.

ULTIMATELY, this submission calls for the Food and Grocery Code of Conduct to be abolished. The fundamental premise of the Code is to provide for self-regulation. Even if such self-regulation is improved it is clear that this will do very little to address the power imbalance and provide for the significant reform that consumers and producers are calling for.

The recommendations provided in this report detail how such significant reform can be achieved and as such, should be thoroughly examined and implemented.

ACKNOWLEDGEMENTS

The Office of Bob Katter MP would like to sincerely thank all parties that have assisted in the development of this submission.

It is greatly appreciated.