

26 August 2021

Commerce Commission
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By email: marketstudies@comcom.govt.nz

**SUBMISSION on "Market study into the retail grocery sector:
Draft report"**

1. Introduction

- 1.1 Thank you for the opportunity to make a submission on the "Market study into the retail grocery sector: Draft report". This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

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2. General comments

- 2.1 Consumer NZ welcomes the commission's draft market study report. The evidence provided in the report confirms that the high degree of concentration in the sector is resulting in major adverse outcomes for consumers and suppliers.
- 2.2 As the draft report describes, this is a sector characterised by high prices, "persistently high margins" and high barriers to entry. Consumers are further disadvantaged by confusing (and potentially misleading) price promotions and loyalty programmes.
- 2.3 We strongly agree with the commission's view that intervention in the market is justified. The likelihood of one or more competitors entering the market is low and we don't foresee necessary changes occurring under current conditions.
- 2.4 Given the limited time available for comments, our submission sets out what we consider the priorities for action. We have also proposed

timeframes for implementation. Interventions should be progressed as quickly as possible to address the significant problems identified.

3. Response to proposals

3.1 *Interventions at the wholesale level*

We have identified five key interventions at the wholesale level to help address the problems evidenced in New Zealand's highly concentrated supermarket sector. We consider these interventions would be able to be progressed relatively quickly.

These interventions are as follows:

a) Introduce a mandatory code of conduct

We strongly support the proposal for a mandatory code of conduct to govern relations between grocery suppliers and supermarkets.

To ensure this code is effective, it must:

- have legislative backing
- contain fair conduct obligations, and
- set out penalties for non-compliance.

As the draft report notes, similar codes of conduct have already been introduced in Australia and the UK.

We agree with the commission that a code would be beneficial in our market but would need to be mandatory. The Australian experience shows that a voluntary code is unlikely to be sufficient to deliver required changes in behaviour.

As the commission notes, there is a significant imbalance of power between major supermarkets and many suppliers. We therefore agree a voluntary code would fail to provide suppliers with sufficient confidence to raise issues without fear of retaliation.

In December 2020, the Australian Competition and Consumer Commission (ACCC) recommended Australia's voluntary Food and Grocery Code be made mandatory and include penalties for contraventions.¹

These recommendations resulted from the ACCC's inquiry into the perishable goods market, which found voluntary arrangements had failed to meet expectations and address "harmful practices arising from bargaining power imbalances".²

The ACCC's inquiry also recommended introducing an unfair trading practices prohibition to address harms being caused in grocery supply

¹ Australian Competition and Consumer Commission. November 2020. *Perishable agricultural goods inquiry*. Canberra. Retrieved 20/8/21 from <https://www.accc.gov.au/system/files/Perishable%20Agricultural%20Goods%20Inquiry%20-%20Final%20Report%20-%20December%202020.pdf>

² Australian Competition and Consumer Commission. Media release, 10/10/20. "New fair trading law needed to enhance Australia's perishable agricultural markets." Retrieved 20/8/21 from <https://www.accc.gov.au/media-release/new-fair-trading-law-needed-to-enhance-australias-perishable-agricultural-markets>

chains. We recommend a similar prohibition is contained in a mandatory grocery code here or in legislation.

We note the commission's view (in para 9.120) that consideration should be given to the benefits of aligning a New Zealand code with Australia's code. We agree there are benefits in alignment, provided any code here reflects the ACCC's recent recommendations.

We would also like to see the code place restrictions on the use of private label brands, preventing their use in a way that is likely to harm suppliers. As suggested in para 9.126, this could include prohibiting supermarkets:

- discriminating in favour of their own-brand products in ranging and space allocation decisions
- infringing suppliers' intellectual property through the use of own brands.

Timeframe for implementation: we recommend development of a mandatory code be given priority and introduced within six to 12 months.

b) Appoint a supermarket commissioner

To ensure the code is monitored and enforced, we recommend a supermarket commissioner is appointed.

The supermarket commissioner must have the power to independently investigate complaints and impose penalties for non-compliance. We agree with the commission that the role should have an inquisitorial mandate, rather than be purely adjudicative.

The supermarket commissioner must also have sufficient resources to carry out its functions and actively monitor the market, rather than simply respond to complaints. Given the significant issues in the sector, an active regulator is essential.

We suggest the supermarket commissioner's role could sit within the Commerce Commission.

We also suggest this commissioner have a wider role monitoring margins and prices. This monitoring must be undertaken to assess whether interventions have been successful in addressing the high prices and high margins evidenced in the industry.

We discuss the need for retail price monitoring further under section 3.2 below.

Timeframe for implementation: we recommend appointment of a supermarket commissioner be given priority and introduced within six to 12 months.

c) Allow collective bargaining on behalf of suppliers

We consider allowing collective bargaining on behalf of suppliers would also help redress the significant imbalance of power between suppliers and supermarkets. Negotiations could cover both terms of conditions of supply and price.

Collective bargaining is likely to be particularly beneficial in fresh produce markets. Evidence shows suppliers in these markets are often vulnerable to exploitation as the perishable nature of their produce means they have little ability to hold out for better terms.

We believe collective bargaining would complement a mandatory code and provide a cost-effective intervention.

We note the recent changes to the Fair Trading Act, which prohibit unconscionable conduct as well as unfair terms in business-to-business contracts (where the annual value of the contract is less than \$220,000 plus GST).

While these changes have the potential to improve outcomes, relying on individual businesses to take action under the provisions would provide a piecemeal approach to securing required changes. Court action would also likely be cost-prohibitive for many.

Further, traders have no ability to directly challenge unfair terms. At present, the Fair Trading Act only allows the Commerce Commission to seek a declaration from the courts that a term is unfair. This places a significant limitation on the use of the unfair terms provisions.

We strongly support amending the act to allow direct challenges to unfair terms by the affected party.

We note that any amendment to the Fair Trading Act providing suppliers with the ability to challenge contract terms will only be effective if they feel confident exercising their legal rights, free from direct or indirect commercial repercussions.

Amendments to the act should therefore be seen as part of a suite of interventions designed to redress the imbalance of power between supermarkets and suppliers. This suite of measures needs to include a mandatory code of conduct and supermarket commissioner.

Timeframe for implementation: within six months, develop a fast-track process to authorise applications for collective bargaining by suppliers, and introduce legislation to amend the Fair Trading Act.

d) Require supermarkets to supply other retailers with groceries at competitive wholesale prices

We consider there is merit in the proposal to require supermarkets to supply other retailers with groceries at competitive wholesale prices. This would improve access to the grocery supply chain and facilitate retail competition on price and product range.

In our view, it's unlikely voluntary commercial arrangements would be effective. We therefore consider either an enforceable access undertaking or a regulatory access regime is likely to be required to achieve desired outcomes.

We agree with the commission's point in para 9.41 that it's unlikely major supermarkets, of their own volition, would agree to supply other retailers on competitive terms. There has been every opportunity for them to do this if they'd so wished.

We also agree that potential competitors will require a high degree of confidence in their wholesale supply arrangements before investing in grocery retailing. In the current market, this confidence will only be achieved through some form of enforceable access regime.

A regime similar to that under the Dairy Industry Restructuring Act could be considered. For example, major supermarkets could be required to make available a proportion of their wholesale supply to others (similar to the requirement for Fonterra to supply raw milk to other processors).

An access regime could be prioritised for perishable goods, such as fruit and vegetables. We understand supermarkets often apply a higher margin to the retail price of these products. Opening up supply to retailers that apply a lower margin therefore has the potential to reduce prices.

We agree any regime will need to be independently monitored. We suggest this role should rest with the Commerce Commission. The commission will also need to be adequately resourced to take on this role.

Timeframe for implementation: develop an access regime within six to 12 months.

e) Prevent supermarkets placing restrictive and exclusivity covenants on land use

We consider the evidence in the draft report provides grounds for intervening to prevent supermarkets placing restrictive and exclusivity covenants. Given current market conditions, we cannot see a justification for these covenants and their widespread use.

We note the commission's comment (in para 6.91) that enforcement action is being considered under sections 27 and 28 of the Commerce Act, which prohibit contracts and covenants with the effect, likely effect or purpose of substantially lessening competition.

We consider there is a strong case for enforcement action. However, we also note the costs of taking action under section 28 can be significant. We recommend changes should be made to reduce enforcement costs.

We support the proposal in para 9.96 to shift the burden of proof in relation to certain covenants, making them presumptively unlawful. This would also assist potential new entrants in challenging covenants, particularly those with excessive periods of duration.

Timeframe for implementation: progress changes to section 28 of the Commerce Act within six months.

3.2 Interventions in the retail market

We have identified five key interventions at the retail level to help address the significant problems faced by consumers. As with the wholesale market interventions discussed above, we consider these measures would be able to be progressed relatively quickly.

These interventions are as follows:

a) Introduce a mandatory unit pricing standard

We strongly support the proposal for mandatory unit pricing. As the commission notes, consistent unit pricing can help consumers compare the price of goods, and assess value for money of different brands and pack sizes.

Supermarkets have voluntarily introduced unit pricing. However, as we observed in our previous submission, the use of this information by the stores is inconsistent and often poorly displayed. Mandatory requirements for unit pricing are therefore justified.

We agree that the easiest way to mandate unit pricing would be by way of a consumer information standard under the Fair Trading Act. A consumer information standard can be implemented by order in council and does not require legislation to be passed.

The information outlined in para 9.153 should be included in the standard. We consider the standard should cover grocery products sold loose from bulk bins, as well as pre-packaged items sold in constant measures.

We note the commission suggests there are potential benefits in aligning requirements between New Zealand and Australia (where unit pricing is already mandatory). However, we consider lessons can be learnt from Australia's experience.

For example, Australia's rules only require unit pricing to be displayed in very large stores (above 1000sqm). We consider such a rule would be inappropriate in our market and significantly limit the benefits of unit pricing.

We recommend a unit pricing standard for New Zealand should aim to be "best in class", drawing on international experience (not just experience in Australia) and recognised guidance such as *ISO 21041:2018 Guidance on unit pricing*.

Timeframe for implementation: develop consumer information standard on unit pricing within three to six months.

b) Introduce consumer information standard on supermarket price displays and promotions

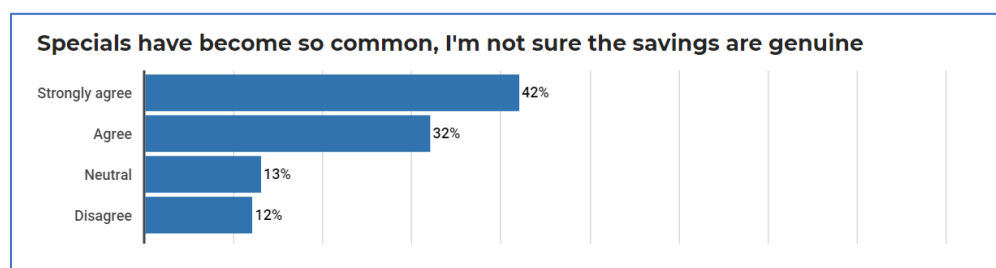
We agree the pricing and promotional strategies used by supermarkets make it difficult for consumers to compare products and assess value for money. We consider these strategies are deliberately designed to create confusion.

In our latest survey, six out of 10 consumers strongly agreed they were more likely to buy a product if it was on special and assumed it

would offer better value for money.³ However, many questioned whether advertised discounts were offering real savings.

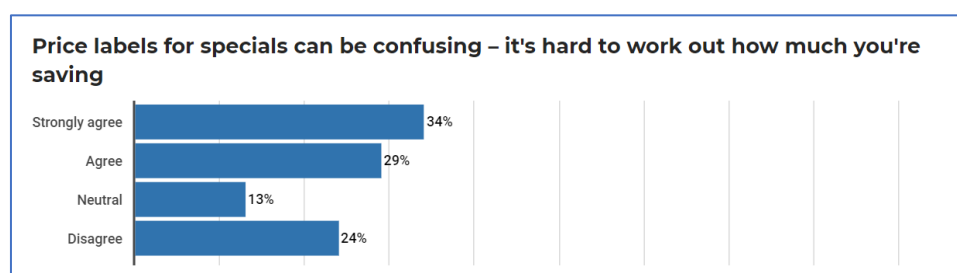
Seventy-four percent agreed or strongly agreed that specials had become so common they weren't sure the savings were genuine (Figure 1).

Figure 1: Trust in special offers



Price labels for specials were also problematic for many consumers. Sixty-three percent agreed or strongly agreed these labels could be confusing, making it difficult to work out the actual savings (Figure 2).

Figure 2: Price labels for specials



We continue to receive regular complaints about supermarkets' pricing, including complaints from people charged more than the advertised price.⁴ We recently reported the experience of a Pak'nSave shopper charged incorrectly three times in a month.⁵

We note the commission's comment that supermarkets are intending to decrease promotional pricing and increase use of "everyday low pricing" (para 9.146).

However, we do not consider required improvements will be achieved by relying on supermarkets to voluntarily amend their pricing practices. We believe many consumers will also find a voluntary approach unacceptable.

³ Consumer NZ. 8 April 2021. "Supermarket survey: Shoppers doubt discounts are real." Retrieved 26/8/21 from <https://www.consumer.org.nz/articles/supermarket-consumer-survey>

⁴ Consumer NZ. 27 July 2021. "Supermarket complaints: When the price isn't right." Retrieved 26/8/21 from <https://www.consumer.org.nz/articles/supermarket-complaints-when-the-price-isn-t-right>

⁵ Ibid.

We recommend a consumer information standard be developed, setting requirements for price displays and promotions. Without this intervention, there is no reason to believe pricing practices will improve.

Timeframe for implementation: develop consumer information standard on grocery pricing within three to six months.

c) Prevent supermarkets offering price discounts only to loyalty card holders

We have significant concerns about supermarkets' loyalty programmes. While they're advertised to consumers as a way to get extra discounts, their main purpose is to provide supermarkets with data on customers' shopping behaviour.

In our view, the programmes are resulting in price discrimination against consumers who don't want to belong. There are valid reasons why consumers choose not to sign up, including that they don't want to share their personal information with the stores.

We consider many consumers are also likely to be "reluctant" members, forced to join to get advertised discounts.

Both Countdown and New World require customers to sign up to their loyalty programmes (Onecard and Clubcard respectively) to get access to certain prices. Customers without a card are penalised by being charged higher prices.

As noted in our previous submission, New World changed its approach in 2020 to require customers to have a card in order to get "Club Deals". Previously, checkout staff passed on the deal price regardless of whether the customer had a card.⁶

In such a highly concentrated market, we consider linking price discounts to the compulsory collection of personal information to be unfair and likely to breach the unfair terms provisions of the Fair Trading Act.

Consumers who have no choice where to shop are effectively required to join the store's loyalty programme to obtain groceries at the advertised price. Price conscious shoppers are also forced to join if they want access to loyalty programme "discounts".

In markets where there is reasonable competition, member-only loyalty discounts are unlikely to raise issues. Consumers can opt to shop elsewhere if they don't wish to join a particular store's loyalty scheme.

However, this is not the case in the supermarket sector. We therefore consider intervention is required to prevent stores from offering price discounts only to customers who are loyalty scheme members.

⁶ Consumer NZ. 28 August 2020. "No card, no discount: New World limits 'Club Deals' to card-carrying customers." Retrieved 24/8/21 from <https://www.consumer.org.nz/articles/no-card-no-discount-new-world-limits-club-deals-to-card-carrying-customers>

We disagree that the solution is simply for supermarkets to ensure member-only discounts are clearly labelled (para 9.147). This does not address the fundamental problem that, in a concentrated market, these discounts constitute an unfair practice.

As the commission's report notes (para 6.182), the programmes also reduce price transparency and can create conditions that impede or slow entry (by giving stores access to a significant amount of consumer data that's unavailable to other firms).

We therefore consider there are strong grounds for intervention. Where supermarkets choose to offer loyalty programmes, we believe they should be prevented from linking the programme benefits to specific price discounts for their products.

Timeframe for implementation: develop regulatory option within three to six months to prevent supermarkets offering price discounts only to loyalty programme members.

d) Require monitoring of retail prices and annual report on retail margins

To gauge the effectiveness of interventions put in place, we consider there must be regular monitoring of retail prices and stores' margins. Work done by the commission to date will provide a baseline for this monitoring.

We consider the commission or a supermarket commissioner (as discussed above) would be best placed to carry out this work.

Ongoing monitoring is justified given the major problems identified in the market. Supermarkets need to be aware their practices will be under scrutiny. Without this scrutiny, there will be much less incentive for them to amend their behaviour.

Given the essential nature of the grocery sector, consumers are also entitled to expect there will be closer scrutiny of the market to protect their legitimate interests.

Timeframe for implementation: establish requirements within 12 months for regular price and margin monitoring.

e) Increase Fair Trading Act penalties for misleading pricing and expand commission's ability to issue infringement notice fines

We consider penalties under the Fair Trading Act for misleading pricing must be increased to provide a sufficient deterrent to offending. Maximum penalties should at least be consistent with those under the Financial Markets Conduct Act.

As noted in our previous submission, in the recent prosecution of Pak'nSave Mangere for misleading pricing, the court imposed a fine of only \$78,000. It's possible the supermarket earned more than this in sales from the items it misleadingly promoted.

Further, the Fair Trading Act should be amended to enable the commission to issue infringement notice fines for misleading

behaviour. We consider this would allow penalties to be applied in clear-cut cases without the need to pursue court action.

These amendments would improve the effectiveness of the act and outcomes for consumers.

Timeframe for implementation: introduce amendments within 12 months.

3.3 **Proposals to separate the supermarkets**

Our recommendations above are directed at actions that we consider should be taken in the next three to 12 months. However, if annual monitoring shows no or little change in stores' margins, then we consider further intervention will be required.

The option to break up the supermarkets must remain live. If there is no change in the market within 24 to 36 months, the next step would be to look at structural interventions, including requiring the supermarkets to sell off some stores to reduce their market power.

3.4 **Privacy issues raised by loyalty programmes**

The draft report identifies significant issues relating to supermarkets' data collection and use practices under their loyalty programmes.

As the commission notes, many consumers are unaware how their personal data is collected and used. Stores' privacy policies lack sufficient detail about who data is shared with and for what purposes. It's therefore impossible for a consumer to make an informed choice about signing up.⁷

We note the commission's preliminary recommendation in para 9.167 for supermarkets to voluntarily make improvements to their terms and conditions. However, we consider the shortcomings identified raise potential issues under principles 1 and 10 of the Privacy Act.

We therefore recommend the Privacy Commissioner be requested to review the terms for compliance with the act and initiate an inquiry under section 17(1)(i). Given the significant power imbalance between consumers and the stores, we consider this is an area where intervention is required.

ENDS

⁷ See, for example, <https://www.newworld.co.nz/privacy-policy>.