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S21.19

Submission to the Commerce Commission on the Market study into the retail grocery sector

Introduction

1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing over 200 organisations affiliated at either national level or to one of our 14 branches. In addition, about 450 people are individual members. Collectively our reach is over 450,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
2. This submission has been prepared by the NCWNZ Consumer Affairs Standing Committee after consultation with the membership of NCWNZ.

Introduction

3. NCWNZ welcomes the Commerce Commission's Market Study into the Grocery sector and its preliminary finding that the grocery retail market has become so consolidated, and the buying power of supermarkets so extensive, that it poses a risk to consumers interests as well as to suppliers and the wider economy, by limiting competition, controlling retail and wholesale food markets, imposing high margins on food, pushing up food prices and squeezing suppliers.
4. We share the Commission's concern that the major retailers, Woolworths NZ and Foodstuffs supermarket chains, are a duopoly, having acquired an 85% market share of New Zealand's \$22 billion dollar grocery market, and that they have been able to use their dominant market power to make 'persistently high profits' –of around 24.8% a year return on their capital (for Foodstuffs) and 22% (in the case of Woolworths) which

are well above the profits that companies in a normal, competitive market would typically earn, of round 4.6% - 6.1%¹.

5. Our members are especially concerned that, instead of passing some of their profits onto consumers and making food more affordable, the two supermarket chains have been driving up food prices by imposing high margins of around 20-50% on the food they sell, including on fresh, healthy produce such as fruit and vegetables, putting them out of reach of many families. As a result, New Zealand consumers paid the sixth highest food prices out of 38 OECD countries in 2017 and spent on average around \$234 a week on groceries (the second highest expense for most householders)².
6. NCWNZ is concerned that the high cost of supermarket food is adversely affecting the health and well-being of women and children and especially low-income families and single mothers and all those who cannot afford to purchase healthy food. We note that women (and children in their care) suffer disproportionately from food insecurity as a direct result of excessively high food prices. The inability to purchase healthy food options contributes to poor health and causes distress and reduces wellbeing.
7. We are also concerned that there is no transparency around how supermarkets operate in New Zealand; no rules as to what constitutes fair, or unfair, business practices; no oversight or scrutiny over the way supermarkets do business with suppliers, to ensure they do not abuse their market power; and that competitors wanting to enter the grocery retail market or expand their operations, face significant challenges, including a lack of competitively priced wholesale supply and a lack of suitable sites for large scale stores.
8. We are concerned that, in the absence of rules or transparency in the grocery retail sector, supermarkets have been able to use their dominant market power to dictate terms and conditions to suppliers, use unfair trading practices and push excess risks, costs and uncertainty onto suppliers. Suppliers report that they cannot afford to get offside with the two dominant supermarket chains or refuse any of their requests, no matter how unreasonable they may seem, as they have no bargaining power and are dependent on supermarkets for their survival. In practical terms, most suppliers are faced with the prospect of capitulating to the demands of supermarkets, or going out of business if their products are removed from supermarket shelves.
9. For all of these reasons, NCWNZ agrees with the Commission's findings that the high degree of market concentration in our grocery trade needs to be curtailed and competition in the sector increased. We agree that, without intervention, increased competition in the sector is unlikely, and we therefore support the various options the

¹ Commerce Commission. 2021. *Market study into the retail grocery sector: Draft report*, p. 7-8.
https://comcom.govt.nz/data/assets/pdf_file/0025/260377/Market-study-into-the-retail-grocery-sector-Draft-report-29-July-2021.pdf

² Ibid, p. 8.

Commission has put forward to increase competition in the sector and provide some protection to consumers and suppliers against the excessive and undue power supermarkets are able to wield.

Lack of informed choice for consumers

10. NCWNZ is very concerned at the high price New Zealand consumers pay for their food, and we believe that intervention is needed to increase competition in the grocery retail sector and reduce food prices. We would support the imposition of a cap on the profit margins supermarkets are able to impose on food, for example.
11. We are also concerned at the Commission's finding that supermarkets routinely use 'confusion marketing,' including opaque pricing, loyalty schemes and other promotional practices that make it difficult for consumers to compare the value of products sold in supermarkets or to make informed purchasing decisions.
12. We note that a Consumer NZ survey³ found that some food products are on 'special' for months at a time, and that 1/8th of products sold in supermarkets are on 'promotions' for more than ¾ of the year. Having so many products on 'special' at any one time is misleading and makes it difficult for consumers to work out which products are genuinely being sold at a reduced price.
13. The absence of uniform unit pricing in our supermarkets contributes to the difficulty consumers have in comparing products and making informed choices.
14. NCWNZ therefore supports the Commission's proposal that a consumer information standard should be developed, under the Fair Trading Act 1986⁴, that would require all stores in New Zealand to prominently display the cost per unit in standardised fonts on all food sold in the grocery sector, and not simply the retail price. This would enable consumers to easily compare the value of different products and save money. We also support the proposal that major retailers should be required to simplify their pricing and promotional practices and ensure that the terms and conditions relating to their loyalty programmes are clear and that supermarkets should be prevented from offering discounts only to loyalty card holders. We would like to see penalties under the Fair Trading Act 1986 increased for misleading pricing and an expansion of the Commission's ability to issue infringement notice fines. We would like the Commission to monitor food prices annually and require supermarkets to report annually on their retail margin.

Mandatory Supermarket Code of Conduct

15. NCWNZ is concerned at the Commission's finding that the two major supermarket chains routinely use their dominant market power to engage in anti-competitive trading

³ Consumer NZ. 2020. Supermarket "specials" risk misleading shoppers.

<https://www.consumer.org.nz/articles/supermarket-specials-risk-misleading-shoppers>

⁴ Fair Trading Act 1986.

https://www.legislation.govt.nz/act/public/1986/0121/latest/DLM96439.html?search=ta_act%40act_F_ac%40ainf%40anif_an%40bn%40rn_25_a&p=1

practices such as: forcing suppliers to accept difficult terms or risk being de-listed from supermarket shelves; restricting the ability of suppliers to deal with other retailers; favouring their own in-house brands by giving them superior shelf space and display positioning and reduced margins; penalising suppliers if they supply another supermarket chain or threatening to de-list them; requiring suppliers to pay for the cost of 'specials' and promotions and to pick up more and more costs such as freight, warehousing, food handling and changing orders retrospectively; making unreasonably frequent changes to specifications.

16. NCWNZ strongly supports the Commission's recommendation for a mandatory code of conduct that would set out some basic rules for how supermarket chains should treat food suppliers; bring certainty, fairness, transparency, and clarity to the supply chain, and allow suppliers to safely complain to an independent adjudicator and have their complaints fully investigated. We recommend that the code is determined by regulation, rather than industry self-regulation, and that a general code-making power is built into the Commerce Act, as the Market study recommends⁵. We note that similar codes already exist in Australia and the United Kingdom.
17. We recommend that the mandatory code of conduct includes provisions that supermarkets could only delist a supplier for genuine commercial reasons; that suppliers should not be obliged to pay for shelf space or be responsible for wastage that occurs within stores: that contractual undertakings should not be changed at the last minute; that there should be no changes to supply chain procedures without reasonable notice, or full compensation for the costs incurred; that payment for goods would be in accordance with a supply agreement and within a reasonable time; that retailers could not require suppliers to contribute to their marketing costs unless this was provided for in the supply agreement.
18. The mandatory code of conduct should be incorporated into every contract between large grocery retailers and their suppliers, and should have legal backing, fair contract term obligations and a penalty regime for non-compliance. We recommend that the Commerce Commission appoint a Grocery Code Adjudicator to enforce the code and resolve disputes. To protect suppliers, complaints would need to be handled anonymously.

⁵ Commerce Commission. 2021. *Market study into the retail grocery sector: Draft report*, p. 21.
https://comcom.govt.nz/_data/assets/pdf_file/0025/260377/Market-study-into-the-retail-grocery-sector-Draft-report-29-July-2021.pdf

Other Options

19. NCWNZ supports the various options outlined by the Commerce Commission in its report, to improve competition in the sector and strengthen suppliers bargaining power with retailers, including the option of allowing suppliers to maximise their selling power to supermarkets by enabling them to bargain collectively.
20. We support measures to improve access to a wide range of wholesale prices at competitive prices, including the option of requiring the two major supermarket chains to separate their wholesale arms from their retail business, similar to the enforced separation of Telecom that occurred in 2011, and the option of establishing a regulated market access regime that would require supermarket chains to supply other retailers with groceries at a competitive wholesale price.
21. We support measures to make new sites available for grocery retailing, including the option of a regulatory change to prevent supermarkets from using land covenants to 'bank' land, or putting restrictive covenants on land use that would prevent new supermarkets from being built near existing ones. Competition law should prohibit a corporation with a substantial degree of power from using its position to eliminate or substantially damage a competitor. The restrictive covenants supermarket have used to prevent a competitor locating nearby is a clear example of abuse of power and a deliberate attempt to eliminate competition.
22. We support the option of directly stimulating retail competition in the sector and facilitating the entry of another independent retailer into the sector by requiring supermarkets to sell off some of their stores — for example, requiring Foodstuffs to sell off Pak'n Save and the Four Square chains —this would pave the way for a third supermarket chain to enter the market. As a last resort we would support further intervention to enable a third supermarket chain to enter the market.
23. We would also support the Commission using its regulatory powers to investigate the anti-competitive practices that it uncovered during its investigation.
24. Finally, we would like to point out that the infrastructure and exemptions that are required to operate as a food retailer under the Covid lockdowns favour the supermarket duopoly and have further marginalised small operators such as butchers, fruit shops and delicatessens and in so doing has exacerbated the supply chain power imbalance.

Conclusions

25. NCWNZ supports the preliminary findings of the Commerce Commission's *Market study into the retail grocery sector*, including its conclusion that intervention into the grocery retail market is needed to stimulate more competition in the sector.
26. We agree that, without intervention, increased competition in the sector is unlikely, and we therefore support the various options the Commission has put forward to increase

competition in the sector and provide some protection to consumers and suppliers against the excessive and undue power supermarkets are able to wield.

A handwritten signature in black ink, appearing to read 'Suzanne Manning', with a stylized flourish at the end.

Suzanne Manning
NCWNZ Board

Sue Kedgley
Convenor NCWNZ Consumer Affairs Standing Committee