

Article

Dispute Resolution & Insolvency



Massive Fines Loom for Supermarkets as Food and Grocery Code of Conduct Set to Become Mandatory

By Joe De Ruvo

A Greens-led inquiry has found that large Australian Supermarkets abuse their market power, which has led to the Australian Federal Government announcing that it will impose a mandatory code of behaviour, enforced by significant penalties, to help regulate the supermarket sector.

Today, the Australian supermarket sector is one of the most concentrated in the world. It is worth \$135 billion, with three leading vertically integrated chains (Woolworths, Coles and ALDI). The four largest retailers (Woolworths, Coles and ALDI) and wholesalers (Metcash) hold a market share of 80%, and in some regions, the combined market share of the two major chains, Coles and Woolworths, is over 90%. This has left customers with limited competitive tension.

Laws that govern the Australian supermarket sector

The *Competition and Consumer Act 2010* (**Competition Act**) and the *Australian Consumer Law (ACL)* are some of the broad legislative instruments that govern the supermarket sector in Australia and are enforced by the ACCC.

Under the Competition Act, a voluntary Food and Grocery Code of Conduct is prescribed, which offers rights and protections to suppliers who do business with retailers or wholesalers. However, the code lacks the enforcement powers and penalty provisions that typically incentivise businesses to comply with Australian laws. The only signatories of the code are Woolworths, Coles, Aldi and Metcash, and since the introduction of the Code Arbitrator model in 2021, only 5 complaints have been made to the Arbitrator. Critics of the code argue that suppliers are fearful of raising disputes due to the market power of retailers and wholesalers.

Suppliers and small businesses are afforded other protections under the Competition Act and the ACL. For

example, the ACCC can prosecute companies that have engaged in unconscionable, misleading, or deceptive conduct, and the Competition Act makes it an offence to collude with other businesses to engage in 'Anti-Competitive Pricing'.

Price gouging in the supermarket sector

Price gouging refers to when companies exploit a lack of competition in the market by making unjustified decisions to substantially increase prices well above the cost price and what would be considered reasonable or fair for the purchase of a product or service. This act is not illegal unless some form of anti-competitive behaviour can be proven.² It is illegal for a company to report false or misleading information about the reason for the price increase.

The question of whether price gouging exists in the supermarket sector was at the heart of the inquiry. It ultimately found that supermarkets use their market power to unfairly profit off suppliers, competitors, and customers.

Inquiry recommendations

In the final report, 14 recommendations were made. Key to the recommendations was to eliminate price gouging by making it illegal and to bolster the Competition Act with divestiture powers specific to the supermarket sector, where a supermarket has engaged in unconscionable conduct. The committee also called for substantial penalties for breaches and for breaches to be prosecuted by the ACCC.

The 14 recommendations made in the report were:

1. Amend the Competition and Consumer Act 2010 to create divestiture powers in the supermarket
2. Australian Competition and Consumer Commission, [Setting prices: what's allowed](#) (accessed 3 May 2024).

sector following findings of market power abuse or unconscionable conduct.

2. Modify section 46 of the Competition and Consumer Act 2010 to prohibit excess pricing (price gouging).
3. Establish a commission on prices and competition to oversee supermarket pricing transparency, conduct market studies, and ensure fair competition, with powers to enforce and publish findings.
4. Grant the Australian Competition and Consumer Commission (ACCC) authority to investigate and prosecute unfair trading practices.
5. Mandate the Food and Grocery Code of Conduct with penalties for breaches and protections against retaliation, incorporating the Dairy and Horticulture Codes by September 2024.
6. Clarify that the mandatory Food and Grocery Code of Conduct covers greenlife industries and large retailers stocking food and grocery products.
7. Implement merger reforms, including mandatory notification thresholds, clearance tests by the ACCC, and amendments to focus on impacts on market competition.
8. Enable the ACCC to investigate and recommend measures to address land banking in the supermarket sector as part of merger law reforms.
9. Update the Unit Pricing Code to standardise unit pricing information and improve transparency in discount terms, with enhanced regulatory powers for the ACCC.
10. Increase funding for the ACCC to effectively regulate competition policies, including enforcement of codes and handling unfair trading practices.
11. Update the National Food Waste Strategy to reform food labelling, address cosmetic standards, and require supermarkets to report food waste data.
12. Ensure supermarkets enhance health and safety protections for their employees against customer abuse.
13. Refer matters concerning multinational food manufacturers' role in the Australian supermarket

industry to the Economics References Committee for inquiry by February 2025.

14. Refer matters concerning 'big box' retailers' pricing practices and market behaviour to the Economics References Committee for inquiry by February 2025.

Parliamentary response

The introduction of divesture powers has been repeatedly ruled out by Labour and rejected by the Coalition. The only recommendation that has gained parliamentary support is to make the Food and Grocery Code of Conduct mandatory.³ However, on Sunday, 23 June, the Federal Government, under Treasurer Jim Chalmers, announced they would adopt all 14 report recommendations. This move will introduce significant penalties for breaches such as market abuse and unfair pricing practices. The proposed maximum penalty for serious or widespread breaches will be the greatest of \$10 million, three times the profit gained from the breach, or 10% of turnover from the preceding 12 months. The competition watchdog will oversee an anonymous complaints process, ensuring issues are resolved efficiently through mediation and arbitration. This will prevent the potential burden on the courts from prolonged litigation.

The code excludes some products and retailers, but in the future, the Federal Government intends to cover all major players, including potential new entrants like Amazon.

If you would like to discuss any aspects of the report and its recommendations, please contact Joe De Ruvo, a leading expert in this field of law.

³ Recommendation 5.



MORE INFO

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