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A Toothless Chihuahua? The ACCC, Neoliberalism and Supermarket Power in Australia

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Abstract

During the Senate Inquiry into 'milk price wars' in 2011, Senator Nick Xenophon accused the Australian Competition and Consumer Commission (ACCC) of being 'less effective than a toothless Chihuahua'. This follows the ACCC's lack of action regarding the reported abuse of market power of Australia's supermarket duopoly, where an extensive inquiry into the competitiveness of retail prices in 2008 found grocery retailing to be 'workably competitive' despite numerous claims to the contrary. How can farmers' submissions to the inquiry that cite market abuse be reconciled with the ACCC's finding that all is well in the food supply chain? Following an in-depth examination of 53 farmer submissions to the inquiry, we conclude that the findings of the ACCC are commensurate with the neoliberal economisation of the political sphere, where commercial entities 'legitimately' govern beyond their corporate boundaries, often using disciplinary measures that were once exclusive to governments. We argue that such clear structural inequalities between farmers and major corporations is reason to re-regulate markets and reinsert a stronger role for government to 'level the playing field'.

Key words: Supermarkets; Farmers; ACCC; Neoliberalism; Economisation

Introduction

In recent years, there has been a proliferation of official investigations and inquiries into the conduct of major supermarket chains (MSCs) globally. This study focuses upon Australia, but also draws upon the experiences of other nations to reflect the emerging trends in food retail, retail power, and the consequences of this power along the food supply chain. The Australian food retail sector has undergone a number of inquiries within the last few years. At the national level, the Australian Competition and Consumer Commission (ACCC) conducted an '*Inquiry into the Competitiveness of Retail Prices for Standard Groceries*' in 2008, finding that the grocery retail in Australia was 'workably competitive'. This was followed by two Senate inquiries into milk pricing in 2010 and 2011. Such inquiries also reflect the recent experience of many other developed countries. For instance, the UK's Competition Commission reported on two major inquiries (2000 and 2008) into food retail, as well as a number of 'off-shoot' inquiries to examine specific aspects of the supply chain, with milk pricing also coming under scrutiny. Norway has also concluded its investigation into the food chain (Landbruks og Matdepartementet, 2011) and others have also taken place in Germany, Italy, Romania and the European Union to name but a few. Interestingly, the Norwegian and the British inquiries raised concerns about the abuse of market power by major supermarket chains, and proposed market re-regulation in the form of an Ombudsman (Competition Commission 2009; Landbruks og Matdepartementet, 2011). All of these inquiries were instigated due to growing concerns from actors along agri-food production chains (farmers, manufacturers, processors and consumers) that the major supermarkets were abusing their dominant market presence.

In Australia, there has also been disquiet about the practices of supermarkets and the pricing of groceries beyond the level of inflation. This concern is not without foundation. In 2009, there was considerable debate in the public media relating to the release of OECD figures which showed that Australia's food prices had risen 40% in the decade from 2000 – more than any other economically-developed country (Robinson and Vasek, 2009). Some argued that this was due to the Australia food retail duopoly (Zumbo, 2009a), whilst the then ACCC Chair Graeme Samuel claimed that price rises were due to adverse climatic conditions and the subsequent drop in the production of Australian produce (Robinson and Vasek 2009).

At the time of writing, a 'Senate Inquiry into Milk Price Wars' was underway. This was instigated by Senator Xenophon who proposed an inquiry on:

> …the impact of the dairy industry supply chain by the recent decision by Coles supermarket (followed by Woolworths, Aldi and Franklins) to heavily discount the price of milk (to $1 per litre) and other dairy products on the Australian dairy industry… (Parliament of Australia, 2011, p. 36).

This inquiry was instigated only nine months after the publication of a report from another Senate Inquiry: "Milking it for all it's worth – competition and pricing in the Australian dairy industry" (Senate Economics Reference Committee, 2010). A total of 15 recommendations were made in this report, including: a request that the Productivity Commission review and evaluate the effectiveness of the National Competition Policy; a review of some of the provisions of the (now superseded) *Trade Practices Act 1974* (the legislative framework that governed the operation of the ACCC during its 2008 inquiry); a call for the ACCC to monitor dairy-related pricing practices; a more-encompassing definition of 'market power'; and further investigations, by the ACCC, of the broader ramifications (including food security, economic and environmental sustainability, and economic viability of farmers and processors) of the increasing market share given over to supermarket own-brand products.

The 2008 ACCC Inquiry was conducted through a combination of public hearings and written submissions. Twenty-two hearings were held across Australia, with 77 witnesses giving evidence, and over 250 written submissions being received by the Commission. Key parties were also summonsed to give evidence. Given the commercially sensitive nature of the hearings, some parts of the hearing were moved into a 'confidential phase' where the public were excluded (ACCC, 2008). It is apparent from recommendations of the 2008 ACCC report and the necessity for the Senate to launch yet another inquiry, that there are systematic failings not only in competition within Australia's food supply chain, but also in the regulatory functioning of the State. Senator Xenophon's criticism of the ACCC as a 'toothless Chihuahua' reflects a widespread concern, particularly within the food industry, of the reluctance of the State to reprimand the supermarkets for their abuse of market power. For many, the 2008 ACCC inquiry into retail prices was an opportunity missed. As shown in this paper, this is often attributed to the nature of the evidentiary burden upon farmer and producer submissions. Ultimately, this disjuncture between the farmers' submissions and the ACCC's findings, leads us to consider supermarket power and the regulatory function of such public institutions under market neoliberalism.

Retailer Market Power, Economisation and Public Authority

The global proliferation of public inquiries into supermarkets' practices is a direct result of the increased market dominance of supermarkets since the 1990s. Until then, the food manufacturing sector, in a position to organise production, food standards and, to some extent, price, dominated the agri-food supply chain (Burch and Lawrence 2005; Konefal, Bain, Mascarenhas and Busch 2007). However, there has been a detectable shift of power along the supply chain in favour of the major supermarket chains. These have occurred as a result of a number of factors, which can be summarised as follows:

- The move by supermarket chains from the purchase of foods from 'spot' markets to integrated supply chain management (for example, 'just in time' logistics);

- The development of ‘private label’, ‘own brand’ and home meal replacement product lines;
- Reconfigured labour relations based on a flexible and casualised labour force which favours women and young people - lowering wages and boosting profits;
- Development and roll out of cool chain supply around chilled rather than frozen meats to be supplied to the supermarkets;
- Competition among supermarkets on the grounds of quality, with pressures exerted on suppliers to improve performance, and with increased use of private regulatory standards and auditing as a means of guaranteeing compliance; and
- Application of latest computer and food technologies to reduce product cost, improve product life, reduce waste, and allow increased efficiencies as food moves along the supply chain (Burch and Lawrence 2007; Dixon, 2008; Campbell and Le Heron 2007; Hughes 2007; Konefal et al. 2007).

Since the 1990s, consolidation within the supermarket sector has resulted in retail oligopolies with significant structural and instrumental power (Clapp and Fuchs, 2009) that have been able to dictate the terms of engagement with firms along the food supply chain. As a means of increasing profits, the supermarkets have exerted pressure on suppliers to lower the costs of production and have used a variety of devices (such as slotting fees, customer loyalty schemes, and so forth) to increase their profits while passing on costs along the supply chain (Konefal et al. 2007). We might ask what pressure supermarkets are under, and why they engage in these activities. However as actors at the end point of the supply chain, and the direct link to the consumer, they hold an advantageous position. Indeed, in recent years major supermarket chains have returned exceptional profits. In 2011, Tesco, Britain’s largest retailer, made a record profit of £3.8 billion (Hawkes, 2011). In Australia, Woolworths reported of $1.2bn in the six month period prior to January 2011 (Australian Food News, 2011) and the US based Wal-Mart topped the Fortune Global 500 as the world’s largest company in both 2010 and 2011 (CNN Money, 2011).

Although there remain a number of smaller players in food retailing in Australia, it is the supermarkets that dominate trade within the sector. The main industry participants are ALDI, Coles, Franklins, and Woolworths, along with the Independent Grocery Association (IGA) supplied by the wholesalers, Metcash. Australia’s retail sector is heavily concentrated with two supermarkets, Coles, Woolworths and the wholesaler, Metcash (supplying smaller retailers such as IGA), holding a combined market share of around 70-80 percent (ACCC 2008; Lawrence and Burch, 2007). Both Coles and Woolworths are major enterprises in the Australian retail landscape. In its 2010 Annual Report, Woolworths Ltd claimed to have 3,199 ‘bricks and mortar’ stores, and a growing portfolio of online businesses (Woolworths Ltd, 2011), including non-food outlets such as Big W, Dick Smith, Tandy, Woolworths Liquor, BWS and Dan Murphy’s (ACCC, 2008, p. 42). Similarly, in its Annual Report, Wesfarmers (2010) states that Coles operate 2,223 retail outlets, including supermarkets, liquor stores, hotels and convenience stores. The Wesfarmers company, which took over Coles in 2007, also owns Bunnings, Office Works, KMart and Target and a range of chemical and fertiliser businesses.

One way to understand the concentration of food retail, the abuse of market power, and seeming reluctance of the state to intervene, is to consider the political-economic context of market relations. Under the philosophy of neoliberalism, which is now the driving principle of many nation states and global governance structures, it is believed that the state should reduce its regulatory function in favour of market self-regulation (e.g. Lockie and Higgins, 2006). In a departure from classic liberalism where governments adopted a *laissez-faire* approach in which the interference with the market was minimal, the new liberalism, or neoliberalism, requires the government to be at the service of the market (Busch, 2011). We may ask whether it is more or less 'neoliberal' to have stronger competition law. Intuitively, stronger competition fits the doctrine of the free market economy, whereas state intervention and regulation do not. This is a complex area, and not within the scope of this paper to unravel the workings of competition law and how this might look under a purist expression of neoliberalism. Suffice to say that neoliberalism is an ideology and neither evenly nor consistently applied across all segments of the social and economic world.

What does help in making sense of these darker corners of the economy and public governance is scholarly work on 'economisation'. Economisation refers to the elevation of the economic aspects of society above other all others, where "state and non-state institutions in fields such as health, education, security and welfare are transfigured to act is if embedded in a competitive environment where the laws of economics reign" (Shamir, 2008, p. 1). Parker (2011) uses the term 'blind economics' to describe a similar situation, whereby the substance of regulation and governance are evaluated via reductionist measures of economic rationalism that sit outside of moral, social or political frames of reference. The neoliberal economisation of political functions endorses governance through corporate power, thus undermining the traditional instruments of public authority (Shamir, 2008). Under such governance structures, the political functions of the state are effectively 'economised' through their subsumption into corporate and private realms – reflecting what has often been termed a 'hollowed out state' (Peck, 2001).

This retreat leaves regulatory gaps, which are filled by the private sector in developing new areas for economisation to blossom. Whereas the state was once the dominant actor involved in overseeing food safety, for instance, we now see a number of private actors, such as supermarkets, applying and enforcing their own 'private standards' along the supply chain. In Australia, produce supplied to Woolworths and Coles supermarkets is required to be certified against Woolworths' Quality Assurance standards, and the British Retail Consortium standards, respectively (Richards, Lawrence and Burch, 2011). This certification mechanism provides a regulatory avenue for private actors, in this case a powerful duopoly, to discipline other actors along the supply chain while at the same time effectively restructuring the food system (see Konefal, Mascarehas and Hatanaka 2005). Such disciplinary power occurs in numerous forms as will be shown later, but includes pressuring suppliers to reduce costs, passing supermarket operating costs along the supply chain and, ultimately, disciplining those failing to comply by excluding them from market access.

Shamir (2008, p.3) argues that this shift from the state governance to private or corporate governance has reframed social and moral concerns from "within the instrumental rationality of capitalist markets". Within such rationalities, the cultural, social and, indeed, moral importance of, for instance, maintaining the family farm through the fair recompense to farmers for their labour would be viewed as a welfarist ideology. Within the neoliberal paradigm, it is the market that should dictate whether society values institutions such as the family farm. However, the cause and effect relationship of buying cheap food from supermarkets and the demise of the family farm may not be immediately apparent to consumers. There is something of an irony here. As noted by Shamir (2008), private companies are now routinely engaged in the moral entrepreneurship of public 'corporate social responsibility' activities, but many of their 'behind the scenes' practices compromise the livelihoods of less-powerful actors, such as farmers. While publicly claiming to be good corporate citizens, the supermarkets' less-transparent actions accumulate as social problems for others. Konefal, Mascarenhas and Hatanka (2005) highlight how regulation is essentially moving from the front stage, to the back stage, away from the conventions of democracy and public scrutiny. Both Coles and Woolworths include statements about their corporate social responsibility in their annual reports, yet there is widespread recognition that some of their practices are detrimental to those with whom they deal, as will be shown later in this paper.

Where does this leave public institutions such as the ACCC? Under neoliberalism, independent statutory agencies, such as the ACCC, are established to oversee the functioning of the market, and help avoid the inevitable descent into market monopoly as identified by Polyani (1944). Although nation-state sovereignty in terms of food governance has arguably been subsumed to the project of globalisation, nation states remain an important institution in terms of their 'real authority' at the local level (Oosterveer, 2007). The ACCC describe their mandate as "promoting competition and fair trade in the market place to benefit consumers, businesses and the community" (ACCC, 2011a). Further, the ACCCs 'compliance and enforcement' policy website states (ACCC, 2011b):

> The ACCC is an independent statutory government authority serving the public interest. Most of the ACCC's enforcement work is conducted under the provisions of the Competition and Consumer Act 2010. The purpose of the Competition and Consumer Act is to enhance the welfare of Australians by:
>
> • promoting competition among business
>
> • promoting fair trading by business

• providing for the protection of consumers in their dealings with business.

However, there has been much criticism amongst farmers and farmer peak bodies that the ACCC privileges consumers above all else. Certainly, the greater emphasis placed on the costs to consumers at the checkout rather than fair trade between powerful corporations and farmers is consistent with Parker's (2011) 'blind economics' evaluation. Indeed, both the public and business worlds have looked to the real authority of this institution to protect them from abuses of market power, a common theme identified in farmer submissions to the ACCC.

Methods

Of the 250 submissions made available publicly on the ACCC website, 53 of these were made by farmers/producers and/or their industry bodies, and it is these 53 submissions that form the data for this research. These submissions were analysed using the sociological tools of document analysis where naturally occurring textual data, in this case submission texts, were systematically coded in the pursuit of common and re-occurring themes (Mason, 2006, Strauss and Corbin, 1990). We take the ontological position that texts, documents and records are meaningful reflections of the social world and that epistemologically, these documents provide evidence and make knowable the behind the scenes relationships of power that underpin these transactions (Mason, 2006). Two members of the research team coded the documents using an indexing system to identify key and recurrent themes, and select portions of the text that best expressed these collective sentiments. The next step was interpretive and collaborative, with the two researchers organising the codes into broader theoretical themes, which are reported below.

As always with research, sampling or selection of data raises issues of representativeness. It is important to note that whilst some submissions are from a small number of what can be termed 'private farmers', that is, individual farmers writing on their own behalf, many submissions are from large farmers' organisations that have a mandate to represent the voice of farmers. As such, we take these texts as reflecting the aggregate concerns of a significant sector of the farming community. Importantly, as will be also shown in this paper, many individual farmers have been unable to risk their livelihoods by speaking openly about their experiences of conducting business with supermarkets, due to the concentrated nature of food retail in Australia.

Findings

A number of themes were recurrent throughout the 53 submissions from producers and producer bodies. Business practices of the Major Supermarket Chains (MSCs) were seen by many as coercive, resulting from their concentrated market power which had allowed them to exert their will upon others in the supply chain. The specific practices cited are numerous, but include:

- delays in notifying the producer if a product was rejected after delivery and not allowing sufficient time for the resale of perishable items;
- supermarket chains taking ownership of the product and removing reference to the grower or the farm;
- passing fees for auditing onto producers;
- expectations that growers could immediately deliver on the demands of retailers (for example, change packaging);
- squeezing wholesalers on prices and volumes, and then going direct to producers to negotiate on prices; and,
- passing the losses from supermarket 'specials' on to suppliers.

This section does not deal with all of the concerns that farmers and their peak bodies raised during the inquiry. Rather, it concentrates on three recurring key themes that were raised in the submissions: firstly, the MSC's subjugation of suppliers and their weakened bargaining position; secondly, power exercised by threat and subsequent problems of evidence; and, finally, the lack of accountability and transparency along the supply chain.

1. Subjugation of suppliers and weakened bargaining position

Many producers expressed concerns that the ever-increasing costs of operating a farm, particularly in relation to key inputs, are not reflected in the price that growers receive for their produce. They noted such things as climate, access to water and distance to markets that influence cost structures but cannot be recovered due to 'price taker' status of growers. In their submissions to the inquiry, farmers argued that these issues are compounded by the concentration of the domestic fresh food market within the two major retailers and that there is clear trend of these retailers using their market power to push costs, risks and responsibilities further down the supply chain. Most reported that the balance of commercial power and advantage is unfairly and unreasonably weighted against the growing community. Growcom, representing the horticulture industry, argue that this reduction in farm profits has been rapid, with growers receiving approximately 50 percent of retail price around 10 years ago, compared with a margin of less than 20 percent today. Of particular concern is that this is occurring, "…while the profit margins of major retailers remain at record highs" (Growcom[1]).

[1] Whilst quotes would ordinarily contain page numbers, the submissions to the 2008 inquiry varied in format, some in letter form on single pieces of paper, and others more lengthy, not all were numbered. For consistency, page numbers have not been

A submission made by Fruit Growers Victoria Ltd sums up the gravity of retailer market power and how it can render suppliers powerless:

> Market power is a very serious issue. It is more serious for suppliers than consumers because it can determine the viability of farm businesses. A commonly held belief is that volume purchasing provides economy of scale which in a competitive environment translates to lower consumer prices. However, the opposite can be the case, when market dominance is achieved and the retailer is at liberty to base the purchase and selling price solely on the retailers own determination. This is to the detriment of both supplier and consumer.

A private farmer[2], clearly angry about his business relationship with a supermarket, also raised concerns about this 'cost price squeeze', and in particular, the claims that were made by the MSCs that the drought conditions in Australia were responsible for the increased prices of food in the supermarkets:

> Let's get one thing straight. Yes, the drought has forced the price of feeding livestock (growing produce) upwards from the prices of past years. However, it is the producer (farmer) that bears this cost, NOT the supermarket chain who buys the product AFTER the input costs have been applied. Do they pay for these increased costs? NO they do NOT! They are now paying LESS for the meat (produce) than they did 6 years ago (original emphasis maintained).

Many producer groups have made submissions indicating that the duopolistic market concentration has resulted both in an increased cost to consumers and a decreased profitability to producers. However, the Apple and Pear Industry also recognised that a relatively new food retailer to Australia, Aldi, has, "been ruthlessly tough on suppliers compared to the MSCs and as a result they tend toward the end of the list of preferred outlets for growers".

Like many of its counterparts, the Apple and Pear Industry stated that there exists a "deliberate forcing down the supply chain of disadvantageous or less cost-effective production or marketing processes by retailers". Likewise, the National Farmers' Federation report, "the markets that farmers sell to are often concentrated, so that buyers can exercise market power by driving prices down or placing onerous contract requirements on farmers". The Victorian Farmers' Federation acknowledged the role of drought and fuel prices in pushing up food prices but also noted, "… duopsony power can be used to influence sellers and can effectively lower market prices for their suppliers".

In many of the submissions, farmers and their peak bodies welcomed the high prices as some members, such as grain growers, had seen better returns. However, the Western Australian Farmers' Federation (WAFF) noted that for other producers, the higher input costs could not be passed on to retailers.

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cited, however, electronic copies of the submissions may be obtained online (see reference list) for as long as the ACCC maintain the site.

[2] Names of individual farmers will not be reported here, but are available amongst the public submissions on the ACCC website.

WAFF refer to the market domination of the two retailers, which became concentrated after independent retailers lost market share:

> Milk vendors, whose main business is servicing the independent sector, became innocent casualties, caught in the crossfire, as the independents lost market share, although this has been somewhat tempered in WA, as the market domination of the two retailers, Woolworths and Coles, is not as complete as in the Eastern States. However, it became clear that while price cutting pressures are applied at the market level, the loss in retailer margin was being passed down the chain to farmers.

WAFF further expressed concern that the low level of profit margins in milk due to supermarket pricing "has left many dairy farmers questioning their future". This is a particularly pertinent point given that this statement was made prior to the supermarket 'milk wars' of 2011, as described in the Introduction.

The Victorian Farmers' Federation submission challenges the assertion that there is true competition in the food retailer sector as it currently stands due to there being reduced choice in where growers can sell – and reduced choice of products for customers. As the retail market share of the major supermarket chains has increased, agricultural producers have become more heavily dependent on trading with them for their livelihoods. As noted by the Apple and Pear Industry submission, "sellers are forced to accept terms/prices at lower than preferred levels due to the lack of alternative outlets for volume".

It is not only pricing that suppliers report as constrictive to business. A number of respondents expressed concern about the governance and private regulation over the product or commodity. The Apple and Pear Industry also noted:

> Some growers/producers argue that the duopoly power exerted by the two major supermarket chains(MSCs) unfairly effects their viability by demanding higher and higher compliance standards in effect to quality (which include size, shape and colour specifications which in turn limits available produce) and extracting an unreasonable or higher than expected margin in the price paid by consumers.

Many of the submissions contained statements that Australian producers were 'price takers not price makers'. Indeed, farmers essentially buy their agricultural inputs at a retail prices but sell their produce to retailers at a wholesale price. The 'price takers' phrase is regularly used to highlight how primary producers do not have any control over setting the terms of business. Arguably, this highlights how power is concentrated in the retail end of the supply chain, as one mango and grape grower notes, "the producer is at the mercy of the market, and can be forced to sell below cost of production". The submission made by the organisation, Vegetables WA, expressly states that "the number one issue facing vegetable growers today is their lack of influence in the supply chain, vegetable growers are price takers for their fresh vegetable products". The Victorian Farmers' Federation echoed these concerns, stating that as a result of 'ag-flation' the profits are reportedly contained by the retail sector, with Victorian farmers claiming that that there is a mark up of around 120 percent from farm gate to checkout. Whilst is it difficult to see know with any certainty which segment of the supply chain absorbs the lions share of such profit due to the lack of transparency, fresh fruit and vegetable growers draw attention to the considerably shorter supply chain for their produce as it tends not to be value-added along the way.

It is well understood that farmers' status as 'price takers' can be attributed to the global political economy of agriculture and in particular, the negative effects of neoliberal capitalism (Robinson 2004). This extends beyond the influence of Australia's MSCs. However, the global concentration of grocery retail into a small number of large firms, where growing 'supermarketisation' in both the developed and developing world (for example, see McMichael and Friedmann, 2007) does inevitably reduce the negotiating power of producers.

2. Power exercised by threat and the problem of evidence

It is inevitable that a supply chain with an excessively concentrated retail sector creates a considerable power imbalance in favour of retailers. Although harder for farmers to report, given potential recriminations, some producers and producer groups attempted to draw the issue of corporate bullying to the attention of the ACCC. As stated by Fruit Growers Victoria, "the two dominant Australian grocery retailers have significant market power which is exercised openly. It is also exercised subtly by implied threat in many ways". Growcom also reported that there was "punitive behaviour designed to enforce desired behaviours by suppliers (eg. 'being made to take a holiday' and return of product). There is a fear of retaliation/victimisation amongst growers".

In some of the submissions, there was reference to the 'bullying tactics' of supermarket chains, however, these were rarely backed by specific examples, perhaps due to concerns of recrimination from the MSCs. One private farmer wrote about the "corruption of the marketplace" in that the "supermarket chains…will deny a supplier a space in the supermarket unless the supplier provides special advertising or promotional funds…on top of the special bonus and discount deals already obtained". In making his case, he also stated:

> A producer, believing that a relationship with a supermarket chain will allow him to diversify, or expand production, or develop a particular specialist product over a long period, will incur substantial debts and engage staff, build infrastructure, etc. in the belief that the supermarket chain will honour its agreement, only to find that the agreement has been violated by the supermarket chain on a whim, or a more favourable temporary arrangement with another gullible producer.

A number of industry participants complained it is not an uncommon practice for the MSCs to ask suppliers to reduce a negotiated price so an MSC can match a competing retailer's offer. Some industry participants contend while the suggestion is made in the form of a request, it is more of a demand, where the implication of not agreeing to change the price is that the volume of orders could be reduced the following week (ACCC, 2008, p. 252).

Despite closed sessions of the inquiry, many farmers reported they feared repercussions from the major supermarket chains. It is rational that farmers would not risk their livelihoods to give evidence against those with the power to put them out of business – particularly when there was no guarantee such evidence would result in major changes to the system. This reluctance of suppliers to submit evidence from fear of retribution generates a very narrow avenue for redress and the absence of specific details of such practices should not be read as if they do not exist:

> There is concern that in the absence of specific complaints to the Ombudsman about abuse of market power [this will be taken as] reflecting satisfaction within the system, when it in fact reflects the extent of the power imbalance…the potential for fear of retaliation or victimisation is most likely to be a factor in circumstances where there is a great imbalance in market power between the parties, and where possible adverse consequences on long-term viability are considerably greater for one party relative to the other (Growcom).

Many farmers report that supply agreements are not enshrined in contracts. Rather, they are based on goodwill, or a handshake. Although this method of doing business may have worked in the past, the current cut-and-thrust way of doing business might warrant contractual agreements, not only to protect both parties in the case of a dispute, but to allow for an evidentiary trail. In light of the lack of contractual evidence available between producers and agents/retailers/wholesalers, the prospect of establishing an inference between anecdotal accounts of events and the effect in the market place is considerably low, as was found in this inquiry (ACCC, 2008).

3. Transparency and Accountability

A large proportion of the submissions made by the farming sector called for greater transparency in relation to commercial dealings. Horticulture Australia Ltd (HAL) was more specific than most in the reasons for this request, citing the problem of low-price "ghost or dummy bids … being used in an unscrupulous manner by the MSCs to further drive down the prices of suppliers". Further, HAL raised concerns that suppliers also have to compete for shelf space and pay 'listing fees' (also known as 'pay-to-stay' fees) in order to secure limited shelf space. This added a further dimension to the returns that suppliers receive for goods. Interestingly, HAL protested that suppliers often offer goods at reduced costs, in an attempt to increase their sales to consumers. However, "…there is no guarantee that the discount is actually passed on to consumers. There have been numerous instances of product discounts being pocketed by the MSCs with no effect on the shelf price" (HAL).

The submission from Australian Pork Ltd also calls for greater transparency, particularly in relation to practices of imported bacon being falsely labelled as Australian. As there are numerous players in the pig meat supply chain, it is difficult to ascertain the point at which such discrepancies can occur. However, again, such problems are linked to the constant exertion of price pressure by MSCs on other actors along the supply chain. In this case, it is reported that the cost pressures experienced by pork processors from retailers has encouraged processors to import cheaper products from overseas. This call for transparency is related to supermarket practices, but extends beyond the scope of supermarkets themselves into the realm of state-auspiced labelling.

In identifying a concern regarding supermarket consumer relations, the National Farmers' Federation call for scrutiny of the whole supply chain:

> Transparency, competition, fairness and understanding of price determination through the complete supply chain must be addressed in order to ensure that the farm sector, as price takers, do not incur the major impact of any price reductions at the retail end of the chain…

Many of the allegations presented to the ACCC were indeed anecdotal and lacking in the 'hard evidence' sought by the Commission. However, the low transparency of the supply chain meant that farmers had no access to hard data or additional evidence to present to the ACCC to substantiate their claims of market abuse. Such minimal transparency formed the core of many independent submissions from farmers, including an individual farmer who stated:

> The main concern with the transaction is the lack of transparency in the supply chain after our product changes hands from us to the agent…the agent does not have to supply us with evidence of the price as he asks for the same product when he on sells it to the next step in the chain.

Issues of transparency and accountability have been raised more recently in Australia following the successful prosecution of both Coles and Woolworths due to misleading country of origin labelling. The New South Wales Food Authority fined Woolworths in Newington, Sydney $1,540 for selling US lemons with 'Product of Australia' labelling. Similarly, Coles at St Mary's, Sydney were fined $880 for displaying grapefruit for sale without a country of origin label (Eckersley, 2011).

Economisation and 'toothlessness' in public authority

The findings from this inquiry did not result in significant action being taken against the major supermarket chains in relation to purported misconduct. In its report, the ACCC (2008, p. 64) concluded:

> [while] the sector is concentrated…the level of concentration in the sector, and in particular the positions of Coles and Woolworths, does not represent a level which, of itself, requires market reform….Although the dominant position of Coles and Woolworths in the [large store] segment

> of the grocery sector may indicate that other operators face difficulties in establishing large, full-line supermarkets, it does not seem to have prevented speciality stores and smaller supermarket operators from competing in most product categories.

The basis for such an assessment is the consideration of the level of concentration of particular segments within the MSCs. The ACCC (2008, p. 57) has estimated that Coles and Woolworths have the following shares of sales: packaged groceries (approximately 70%), fruit and vegetables (up to 50%), fresh meat (approximately 50%), bakery products (up to 50%), dairy products (50-60%), delicatessen products (50-60%) and eggs (approximately 50%). That is, none of these product lines reaches 75%, the indicator which the ACCC accepts as an indicator of markets being over-concentrated. Their report states:

> Broadly speaking, public debate overstates the structural problems within grocery retailing. The MSCs maintain a large share of sales for packaged groceries and this may raise concerns, but this position needs to be assessed in conjunction with other factors such as barriers to entry and expansion before any conclusions are drawn… The level of concentration in the Australian market, although not optimal, is not at an uncompetitive level (ACCC, 2008, p. 67).

Evidence was presented to the inquiry that showed food prices in Australia have increased at a greater rate than the CPI since 1997, food price inflation has accelerated since 2006 with 'large price increases' occurring in relation to staples such as fruit, vegetables, eggs, bread, milk and cheese, and the rate of food price inflation in Australia has been greater than that occurring in many OECD nations (ACCC 2008:13). The ACCC concluded that there were two main factors at play in food price inflation in Australia. The first was climatic conditions, such as droughts, cyclones and floods, which had the effect of reducing supplies of key agricultural products and therefore driving up prices. The second was the international commodities boom which both raised the cost of farming inputs (and therefore the price of foods) and the sales of products abroad, thereby lowering domestic supply, and hence raising prices in Australia (ACCC, 2008, p. 13). However, given many products sold at supermarkets are imported, the drought argument proposed by the supermarkets and the ACCC is questionable (Zumbo, 2009b). Likewise, farmers claim they, rather than the supermarkets, tend to absorb these costs. Summing up the situation for agricultural producers, the ACCC (2008, p. 220) stated:

> ...farmers, growers and graziers [are] essentially price takers. Prices are dictated by supply-and-demand conditions in the marketplace at the time the growers' products are ready for market. The ACCC has no concerns about the competitiveness of any market at this level.

While the Commission concluded the power of the supermarkets was not being exercised in an 'unconscionable' manner that might reduce competition, it did concede:

> there were some complaints of buyer power being exercised where the complainant appeared to be genuinely reluctant to provide information to the ACCC out of concern about retribution if details were provided to the ACCC and investigated (ACCC, 2008, p. 357).

It is apparent from the ACCC report that the evidence they did receive about unconscionable practice was considered anecdotal and insufficiently specific to pursue charges. However, as noted above, there is little transparency, and therefore evidence, in the business transactions between farmers and supermarkets. In broadly discussing allegations and evidence presented under its policy objectives, the ACCC emphasised:

> The inquiry was provided with little evidence to substantiate anecdotal allegations of buyer power being exercised in an anti-competitive or unconscionable manner rather than simply to drive a bargain that was harder than the supplier would have preferred.

One area where evidence was forthcoming was in relation to restrictive covenants in shopping centres whereby:

> Coles and Woolworths did engage in deliberate strategies designed to ensure they maintain exclusive access to prime sites, including terms in their leases which effectively prevent centre managers leasing space in centres to competing supermarkets. These restrictive provisions usually take the form of an outright prohibition on the centre owner introducing a second, or third, supermarket into the centre for a specified period (usually 10 years) or make provision for a sufficient financial penalty via rents which renders it commercially unviable for the centre owner to introduce a competing supermarket (ACCC, 2008, p. 177).

Here, the ACCC was able to accept these concrete contractual documents to substantiate purpose, which can be easily inferred from a restrictive clause in a contract. This is indicative of the highly onerous evidential burden placed on producers to provide documentary evidence that could overtly establish, with little inference, a purpose to abuse market power.

These concerns are indicative of the ‘toothless’ nature of the ACCC undertakings. According to Growcom:

> …this impression [of toothless-ness] is prominent in the wholesaler sector and therefore it is highly unlikely that the current situation will not change until the ACCC takes visible action against those knowingly breaking the law… The ACCC appears to be relying on gathering evidence via industry sources (growers, industry groups) to make a case against one or more wholesalers. However, experience indicates that growers are unwilling to step forward and complain for fear of retribution. The ACCC needs to adopt enforcement strategies that are more likely to be successful in this industry.

The inability of the ACCC to accept and apply farmer submissions in the form they were submitted is illustrated in statements made by the ACCC Chairman, Graeme Samuel in an inquiry on the Australian Broadcasting Commission’s television program Four Corners into abuses of market power (Long and Cohen, 2008):

> I'm sure you can give me an anecdote that that will dispel the nature of all the statistical evidence that's produced by the Australian Bureau of Statistics and others but we have to operate on the basis not just of anecdotes of particular pumpkin growers in a particular location and what might otherwise appear on the shelf.

The overriding view asserted in the ACCC report is although the retail market remains competitive, consumers will benefit from the more aggressive relationship between retailers and suppliers as cost savings will be translated along the supply chain, purportedly satisfying a policy objective to work in the best interests of the public.

Interestingly, the outcome of the ACCC inquiry has been quite different from a similar inquiry in the UK where the Competition Commission (2000, pp. 97-98) reported "…any main party with more than 8 per cent of grocery purchases for resale from its stores, … are, for the most part able to control their relationships with suppliers to their own advantage". Here, we see a number of major players, and less market concentration than experienced in Australia, yet resulting in a thoroughly different interpretation of competition and market power. Possibly, as Zumbo (2009a) argues, this is due to Australia having one of the weakest competition laws akin with the neoliberal orthodoxy of market enabling rather than regulation. The UK inquiry called for voluntary self-regulation in its earlier inquiry (2000). On establishing that adherence to voluntary codes was less than satisfactory, it later called for re-regulation via a supermarkets Ombudsman (Competition Commission, 2008). Whilst both the UK and Australia employ neoliberal forms of governance, Australia's brand seemingly reflects a hardline neoliberalism where the ethos of economisation is strong and Keynesian economics has been more wholeheartedly rejected. Indeed, the economic policy of Government has aligned so strongly with market principles some observers have noted state agencies mimic private corporations (Western *et al.* 2007).

Conclusion

For many, market concentration to the extent that a supermarket duopoly can exert control over suppliers is cause for alarm, yet a key event in Australia's history to redress this, the ACCC's 2008 inquiry into grocery prices, was a failure in many ways. Fundamentally, there was not enough evidence presented that allowed the ACCC to find that the retail sector was engaged in anti-competitive behaviour. This in itself could be interpreted as an expression of the power imbalance between retailers and farmers, with the ACCC themselves recognising the difficult situation of farmers. In a concentrated retail sector where only two retailer and one wholesaler control 70-80 percent of the market, complainants risk being locked out of markets if they give unfavourable evidence. Interestingly, where evidence was given that did not compromise individual livelihoods, such as the restrictive covenants on shopping centre contracts, supermarkets were found to be acting anti-competitively by the ACCC.

As suggested by many of the farmers and their representatives in the submissions to the ACCC inquiry, there is a case for greater transparency and accountability at the point of business exchanges between supermarkets and suppliers. Even a degree of doubt about the ability of farmers to speak openly about their experiences, beyond the level at which their information is considered anecdotal, could have alerted the ACCC to the necessity of an independent watchdog to scrutinise these retailer/supplier relations in the future. This has been a recommendation of inquiries in Norway and the UK, countries with less market concentration and more competition in the food retail sector than Australia.

Despite the neoliberal fetish that markets effectively ‘self-regulate’ human behaviour (Guthman, 2007), there is evidence that not only do concentrated markets enable powerful food retailers to subjugate small-scale business operators, such as farmers, but the regulatory bodies set up to discipline such actors may fail to do so. It is evident that Australia is experiencing a supermarket duopsony and this in itself should be cause for concern, as was the case in Britain’s competition inquiry. Shamir’s (2008) assessment of the ‘neoliberal economisation of the political sphere’ presents a robust theoretical framework for interpreting the disjuncture between farmers’ experiences of business relationships with major supermarket chains and the findings by the ACCC. These theoretical insights are useful in determining how a regulatory body, such as the ACCC, is popularly assessed as lacking in ‘teeth’. Under such governance structures, the traditional political functions of the state are effectively ‘economised’ through their subsumption into corporate and private realms. This shift from state governance to private or corporate governance has indeed reframed social and moral concerns from “within the instrumental rationality of capitalist markets” (Shamir, 2008, p. 3). Within such rationalities, maintenance of the family farm is not viewed as a priority: the market will determine who stays and who goes within a competitive framework. It is clear, however, this is not a level playing field. The philosophy of neoliberal economisation devolves moral imperatives to the private sector, which, despite rhetoric of corporate social responsibility, possesses a short-term economic view that favours profit over long-term viability of the family-farm or sustainable rural livelihoods in Australia.

A key barrier to state invention in regulating markets is neoliberalism itself, with its strong ethos of economisation and deregulation. In Australia, farmers will most likely continue to struggle to maintain their rights, and inquiries will continue to deliver little to alleviate this problem if underpinned by the same market rationality and neoliberal ideology. A dedicated supermarket ombudsman could help redress the power imbalance to some extent, so long as the ombudsman role is empowered to moderate both the economic and non-economic aspects of business relationships along the whole supply chain, and paying particular attention to the ‘public goods’ activities, such as sustainable livelihoods, that have slipped off the agenda under neoliberalism. However, caution would need to be exercised in instituting a supermarket ombudsmen, to ensure that this office does concern itself with levelling-out power imbalances and addressing market abuses and not becoming another instrument of economisation and another ‘toothless Chihuahua’.

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