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REPORT 1: Overview

Understanding trading practices

Project 1.3.7: Understanding how trading practices affect food loss and waste in Australia

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Executive Summary

This is Report 1 from the project 'Understanding how trading practices affect food loss and waste in Australia'. The project investigates how trading practices impact on food loss and waste in Australia and what are the solutions to situations where a trading practice is contributing to food loss and waste. This report aims to provide an overview of the Australian context relevant to trading practices and summarise existing and emerging regulation in Australia and internationally regarding trading practices relevant to food loss and waste. In doing so, it engages with recent government inquiries relevant to trading practices and key provisions in Australian competition and consumer law. Based on this analysis, Report 1 identifies the following key points:

1. Australia's food supply chains are significantly influenced by trading practices due to the structure of food supply chains and the market power of relevant actors.
2. Unfair trading practices is a central concept in improving trading practices and, relatedly, addressing trading practices associated with food loss and waste, however, the meaning of the concept is unsettled and context-dependent.
3. While Australia has some laws that address unfair trading practices, it does not have a systematic approach and relatedly central definition of unfair trading practices.
4. Recent reviews of trading practices in Australia have identified several issues and weaknesses in the current regulatory approach and as a result significant legislative reform may follow.
5. Some jurisdictions have sought to improve their regulatory responses to unfair trading practices, but the outcomes for food loss and waste reduction are uncertain at this stage.

In making these key points, Report 1 provides necessary context for the following project reports (2-5) and facilitates understandings of, and engagement with, these subsequent reports.

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1. Introduction

The Sector Action Plans (SAP) developed by End Food Waste Australia have revealed a number of trading practices that are contributing to substantial food loss and waste (FLW) in Australia. For example, the Bread and Bakery SAP found that retailer ‘sales and return’ agreements can cause up to 16-20% of the daily waste of bread and bakery products. In South Australia however, where these agreements are prohibited by law, bread waste in retail is between 2-4% each day. In horticulture, retail specifications – which are often linked to cosmetic standards – cause growers to overproduce to ensure they have sufficient produce to meet their contractual obligations (see also, Devin & Richards, 2018; Messner et al., 2020, 2021; Richards et al., 2021). In dairy and other fresh food categories, retailers may specify potentially unreasonable ‘minimum life on receipt’ parameters, which if not met, requires products to be rejected at their distribution centres. These examples illustrate that trading practices – which are defined as “commercial transactions that take place between trading partners at any stage in the supply chain” (Barling et al., 2019, p. 80) and are often enforced on actors within the supply chain by other organisations or government – can hamper efforts to reduce FLW.

Tackling unfair trading practices (UTPs) has therefore been recognised as a means to reduce FLW in Australia (see, for example, Intervention Regs. 9 (FIAL, 2021)), and was noted as a high priority research area at the Food Waste Policy Workshop, held in Canberra in November 2022 (Karunasena et al., 2023). Research work from the European Union (EU) and United Kingdom (UK) has also identified the relationship between certain trading practices and FLW, and has provided suggestions about ways to mitigate unfair trading practices within these jurisdictions (see Piras et al., 2018; Taylor et al., 2019; Wiewiórowska–Domagalska et al., 2015). Within the Australian context, there is limited information to date about how much FLW is generated due to specific trading practices, nor has there been any systematic mapping to identify the various trading practices contributing to FLW, and in turn, what can be done to effect change. While the work done in the EU and UK is a useful starting point, the unique regulatory, legislative, and market landscape in Australia meant research was needed to investigate the specific trading practices in this context, and what measures to effect change are viable. In particular, Australia has especially high market consolidation, which Food Innovation Australia Limited (FIAL) suggests results in a “need to understand the impact of potential ‘unfair trading practice’ on FLW” (FIAL, 2021, p. 5).

By developing an understanding of how and why trading practices are impacting FLW – in either positive or negative ways – and identifying who has the power to affect change to these trading practices, this project aimed to help industry overcome barriers to reducing FLW. More specifically, this project aimed to provide a comprehensive understanding of what, and how, trading practices are impacting FLW – in either positive or negative ways – as well as identify the interventions and changes needed to mitigate, or at least lessen, the impact of negative trading practices. To do this, the research team:

1. Undertook a broad scan of literature relating to trading practices (linked to government regulation and other ‘policy’ measures, such as retail trading practices) that could drive or reduce food waste in the food value chain and develop an understanding of why these practices exist (Phase 1). The focus was particularly on horticulture and bakery, spanning primary production through to retail.
2. Interviewed industry stakeholders to (a) identify both positive and negative trading practices contributing to FLW in Australia specifically, and (b) establish if data is available to quantify food loss and waste (or food loss and waste saved) resulting from trading practices, and where possible, estimate the impact and extent of these trading practices (Phase 2).
3. Investigated, via the literature and through the interviews, what existing interventions and changes to policies, practices and standards are being applied to reduce waste in Australia and overseas (Phase 3).

Using the findings from this research, the project team conducted a deep dive into three proposed solutions that may address trading practices: data transparency, relevant industry codes, and whole crop purchasing. Resultingly, the outcome of this project is series of actionable recommendations to industry and government with regard to trading practices contributing to food loss and waste in Australia (outlined in Report 5).

This report is the first report of a total of five reports that were written for this project:

- Report 1 provides findings from a review of the Australian context regarding trading practices including: food loss and waste (FLW) in Australia, supply chain characteristics, the regulatory environment, and relevant government inquiries related to either trading practices and/or the food supply chain. It then goes on to provide an overview of trading practices, including defining unfair trading practices and outlining relevant aspects of Australian competition and consumer law. Attention is then given to international and Australian legislation and regulations relating to unfair trading practices in the context of agriculture and the food supply chain.
- Report 2 presents the findings from Phase 1 of the project, whereby a literature review was conducted to map trading practices that contributed to FLW, both internationally and in Australia.
- Report 3 provides findings from Phase 2 of the project, in which interviews were conducted with industry stakeholders in the Australian food supply chain to develop an understanding of relevant trading practices contributing to FLW. This report provides an overview of the method and highlights key themes that emerged from the data, including in relation, but not limited, to market imbalances, 'contracts' that require or facilitate overproduction, oversupply and/or FLW, lack of data/transparency, and lack of alternative markets. This report concludes by making connections between the themes and issues that emerged during the interviews with the unfair trading practices recognised as per *EU Directive on Unfair Trading Practices* (EU 2019/633 of the European Parliament and of the Council of 17 April 2019 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain, 2019). Limitations of this aspect of the project are also outlined within Report 3. It is important to note here that the *EU Directive on Unfair Trading Practices* was used throughout the research because it provides a clear definition and list of unfair trading practices, unlike in Australia where a legal definition and set list of practices does not currently exist. It is recognised however, that what is 'fair' or 'unfair' is partly dependent on cultural context, and so what is considered fair or unfair within Australia may differ from the EU. Nonetheless, the EU context provides a useful example of what practices could be considered unfair and what practices may be considered 'grey' or ambiguous.
- Report 4 delivers the findings from Phase 3 of the project. This report provides a 'deep dive' of three potential solutions that may aid in addressing some of the practices and issues noted in Report 3. Specifically, it (1) explores strengths and limitations of industry codes; (2) considers how data transparency could be addressed; and (3) investigates the potential of whole crop purchasing in mitigating oversupply.
- Report 5 brings together the key insights across Reports 1-4 and provides a summary of the project. Importantly, this final report builds on insights across the entire project to offer recommendations with respect to trading practices and FLW.

2. The landscape in Australia: Setting the context

The section provides information that helps set the context for this report, including an overview of food loss and waste (FLW) in Australia, supply chain characteristics, an overview of the regulatory environment, and government inquiries that are of relevance to this project.

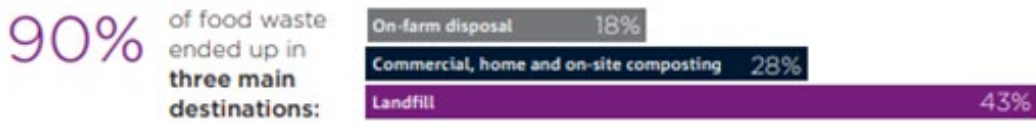
2.1 Food loss and waste in Australia

According to the *National Food Waste Strategy Feasibility Study* (hereon in, Feasibility Study) (FIAL, 2021), almost 7.7 million tonnes of food is lost and/or wasted annually in Australia. Of this, almost 90% ends up in either landfill (43%), compost (28%), or is left on the farm (18%) (CSIRO Futures, 2023, p. 17). Estimates suggest food waste costs the Australian economy \$36.6 billion each year (FIAL, 2021). In addition to financial costs, FLW also comes with significant environmental costs (see Figure 1 which provides a snapshot of FLW figures and environmental impacts).

Of relevance to this study, just over 3.7 million tonnes of food are lost or wasted between the primary production and retail stages of the supply chain, as calculated based on data shown in the Feasibility Study (FIAL, 2021; Appendix 3: National food waste baseline update Bontinck et al., 2021, p. 14). This includes over 1.1 million tonnes of vegetables (inclusive of fresh root, brassicas, other non-root vegetables, and vegetables for processing), over 735,000 tonnes of fruit, and over 35,000 tonnes of bread that is lost or wasted between primary production and retail.

In relation to primary production for horticulture more specifically, the Australian Bureau of Agriculture and Resources Economics and Sciences (ABARES), which is a division of Department of Agriculture, Fisheries and Forestry (DAFF), provides yearly visualisations into crop loss and waste in Australia, with data based on a survey involving a weighted sample of horticulture farms across Australia. These visualisations highlight a breakdown of the percentage of crop loss/waste per farm by crop type, as well as what participants noted to be the cause of the crop loss/waste and what was done with the crop loss/waste. According to the most recent data at the time of writing this report (2022-2023 results), weather events were noted by participants as being the main cause of crop loss or waste (63%), followed by pest and disease (35%), then quality not to specification (11%), change in commodity prices (11%), lack of labour (7%), other (6%) and excess production (5%) (Slatter, 2023). While useful, the data does not highlight the amount of waste linked to a specific cause, nor does it illustrate the interconnectedness between the causes. For instance, a weather event may lead to pest and disease issues or limit ability to meet quality specifications.

Australian food loss and waste (2018–19)



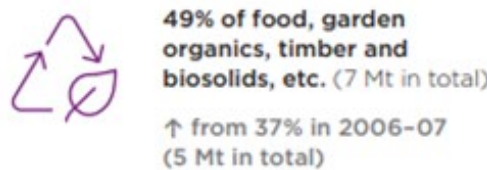
Climate resilient water sources (2014–15)



Packaging waste (2020–21)



Recycling rate of organic material (2018–19)



Food production losses pre-retail (2017–18)

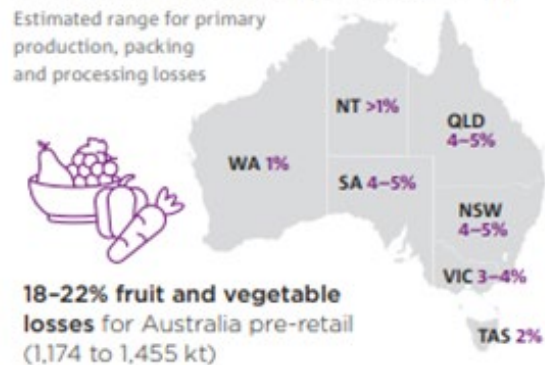


Figure 1. Overview of food loss and waste in Australia

Source: (CSIRO Futures, 2023, p. 17 Reshaping Australian Food Systems).

2.2 Supply chain characteristics

The Australian food supply chain has been characterised as being “a complex and nationally distributed system” and is “generally owned and operated by the private sector” (Department of Agriculture, Fisheries and Forestry, 2023). Added to this, research highlights that Australia’s food system is “quite unique” due to:

- Australia being a significant producer and exporter of food per capita;
- Low levels of cold storage capacity per capita;
- High market consolidation within grocery retailing; and
- High levels of environmental stresses (3Keel LLP, Oxford, 2021a, p. 2).

Of relevance to this study is the high levels of market consolidation observed in the supermarket sector. While market consolidation is a trend observed in other OECD jurisdictions, the situation in Australia is particularly unique given that two of the major supermarkets – Woolworths and Coles – collectively hold 65% of the market share (IBISWorld, 2023, p. 11; see also Emerson, 2024). It has been suggested that such high levels of market consolidation in Australia have the “potential to increase the risk of ‘unfair trading practices’ increasing food waste in the pre-retail stages of the value chain” (3Keel LLP, Oxford, 2021a, p. 3), and in turn, conditions which “encourage supplier behaviours that exacerbate food loss and waste” (3Keel LLP, Oxford, 2021a, p. 2). Thus, a key suggestion of the Feasibility Study was to understand the “impact of potential ‘unfair trading practices’ on FLW” (3Keel LLP, Oxford, 2021a, p. 2).

2.2.1 Horticulture supply chain

Focusing on the horticulture supply chain more specifically, of the 6.2 million tonnes of fresh produce produced in Australia annually, almost 62% stays as fresh produce within the domestic markets, with a further 29% going to processing (Hort Innovation, 2023). Whilst the Feasibility Study suggests Australia is a significant exporter of food, just under 10% of fresh produce goes to export markets, which industry has suggested is because of limited access to markets (see Australian Fresh Produce Alliance, 2024). Further to this, data suggests Australia imports just under 3% fresh produce, thus highlighting that the remaining 97% of fresh produce available for consumption is grown within Australia (Hort Innovation, 2023; see also Australian Fresh Produce Alliance, 2024). The low level of exports and high level of domestic supply and consumption means growers are especially dependent on the domestic grocery retail sector (Australian Fresh Produce Alliance, 2024), however, it also underscores the strong reliance Australia has on domestically produced fresh produce from a food security perspective.

Figure 2 provides a simplistic diagram of the fresh produce supply chain in Australia, though, as the Australian Fresh Produce Alliance (2024) notes, “in reality it is not this linear or segregated, and there is frequently multiple layers of supply arrangements and business / trading relationships which occur concurrently within the industry” (p. 6). Here, it is important to acknowledge that direct suppliers (shown as growers in the figure; also referred to as Tier 1 growers) may either produce enough on their own to supply to the retailers, processors or exporters, or they may aggregate produce from other growers (shown as third party growers in the figure; also referred to as Tier 2 or Tier 3 growers) to ensure a consistent supply and/or to meet supply agreements¹. In relation to the supply of fresh produce that goes to retailers, Woolworths’ submission to the Select Senate Committee on Supermarket Prices indicated that supermarkets source 85-90% of fresh produce directly from growers (which may include produce that the grower has sourced from third party growers), with the remaining 10% being sourced from wholesale markets (Woolworths Group, 2024, p. 8; see also Australian Fresh Produce Alliance, 2024, p. 8). Where growers supply directly to the supermarkets, typically,

¹The Australian Fresh Produce Alliance submission to the ACCC Supermarket Inquiry 2024 provides an excellent, and more detailed, explanation of the fresh produce supply chain in Australia, including specific examples.

they pay the cost of transport to the supermarkets' distribution centre/s and it is only after the produce is accepted at the distribution centre that it enters the supermarket's supply chain (i.e., distribution centres to stores).

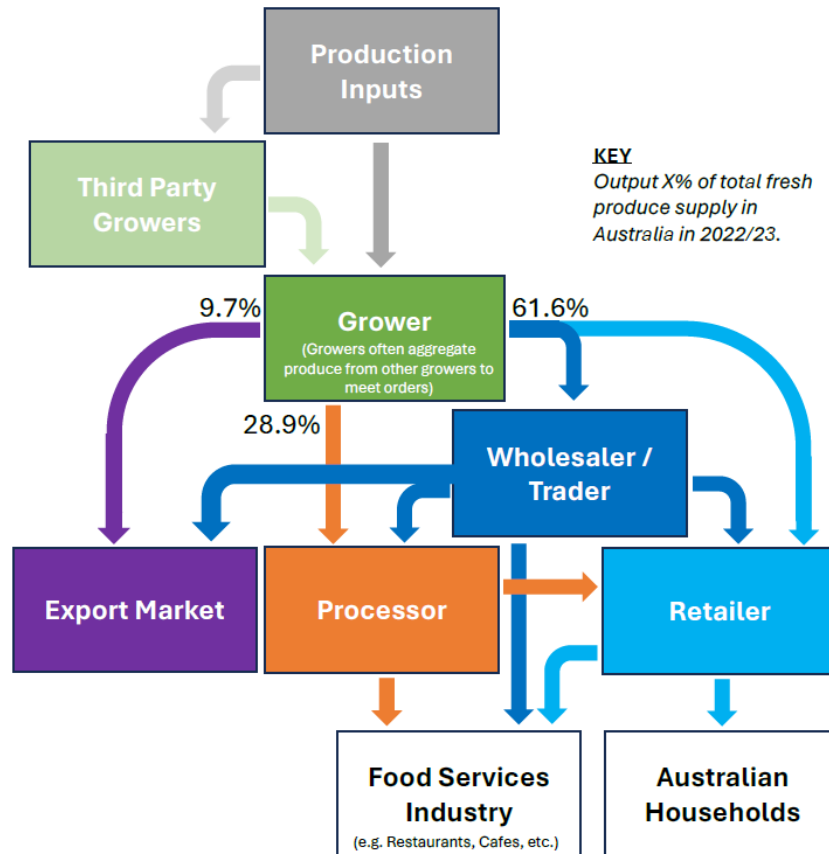


Figure 2. Basic model of fresh produce supply chain in Australia

Source: (Australian Fresh Produce Alliance, 2024, p. 6).

In its submission to the Senate Select Committee's Inquiry on Supermarket Prices (2024), AUSVEG provided an illustration (see Figure 3) that summarises the grower-retailer supply relationship. As this illustration highlights, retailers typically enter into supply chain agreements with the grower, and in turn, the grower plants the crops to align with the forecasted volumes. Price, as illustrated by AUSVEG, is typically confirmed after the crop has been harvested and can be negotiated by the supermarkets, however, what the illustration does not clearly show is when the grower is paid for the produce. Given this arrangement, by the time the price is being negotiated, the grower has already incurred the expense of growing and harvesting the crop, and as they have limited market channels, they tend to have less ability to influence the end price (see AUSVEG, 2024, p. 5, and also Report 3)



Figure 3. Grower-retailer relationship

Source: (AUSVEG, 2024, p. 13).

2.2.2 Bakery supply chain

The bakery sector in Australia includes, “the value chain for short shelf-life baked products that are primarily flour-based or equivalent, such as bread, buns, pastries, cakes, and excludes biscuits or meat pies” (End Food Waste Australia & RAWTEC, 2022, p. 6). According to End Food Waste Australia’s ‘Sector Action Plan, Bread & Bakery’, “[t]he value chain includes primary production, storage (silos), milling, manufacturing (bakeries), retail, and consumers (foodservice and households)” (p. 6)

The sector, which is “in a period of change”, has seen a rise in health conscious consumers, with customers opting to purchase “high-quality fresh bread and baked goods” as opposed to the more traditional bakery items (Richardson, 2024). In addition to this, the sector has seen a rise in supermarket in-store bakeries. According to IBIS World report, Bakery Product Manufacturing in Australia, “[i]ndependent and chain bakeries face intensifying competitive pressures from the rising number of instore bakeries operated by major supermarket chains” (Richardson, 2024). This challenge has been exacerbated by supermarkets offering instore supermarket bakeries to sell both artisanal and traditional breads. Despite these trends in consumer behaviour and retail operations, overall the bakery sector revenue is projected to “grow modestly at an annualised 1.7% over the five years through 2029-30, to \$5.9 billion”(Richardson, 2024).

The bakery sector is part of a larger supply chain which involves various actors including suppliers such as grain growers, sugar manufacturing and flour and grain mill manufacturing, and buyers such as cafes, general line grocery wholesalers and supermarkets and grocery stores. Figure 4 provides an illustration of the relationship between the various supply chain actors in the manufacturing of an artisan bakery product.

Bakery Product Manufacturing in Australia

Supply Chain

Direct and indirect supplier and buyer industries related to this industry



Figure 4 Direct and indirect supplier and buyer industries related to this industry

Source: (Richardson, 2024).

Alongside changes in consumer purchasing and retail market share, there are concerns regarding waste within the sector. The bakery industry is responsible for more than “319,400 tonnes per year of food that is wasted” across the bakery supply chain (End Food Waste Australia & RAWTEC, 2022, p. 2)². There are several aspects of the bakery value chain that contribute to the issues of food waste including: machine failure, human error and over production. Significantly, it is estimated that 104,000 tonnes per year of bakery in retail is either wasted or diverted to animal feed, including through unsold bread (End Food Waste Australia & RAWTEC, 2022, p. 14). In an attempt to address some of the issues with wastage in the sector, End Food Waste Australia, in connection with the Australian Government and RAWTEC created a sector action plan (End Food Waste Australia & RAWTEC, 2022). The action plan notes that the problems associated with waste within the bakery sector are significant, and requires a “collaborative, system-wide approach” (End Food Waste Australia & RAWTEC, 2022), one that covers the entire bakery supply chain.

Whilst there are minimal regulations and policies that specifically impact the bakery sector, those working within it are required to meet relevant food safety standards and laws (Richardson, 2024). In addition to these formal regulations, there are informal trade related practices, including those around take-back agreements and unsold bakery items, which impact the operation of the sector.

2.3 Regulatory environment

Across Federal, state/territory and local government levels, there is evidence of regulatory support to address FLW. This section focuses on the national level, which is the primary focus throughout the project’s reports.

Nationally, the Federal Government published the National Food Waste Strategy in 2017, in which it committed to halving Australia’s food loss and waste by 2030, in alignment with the United Nations Sustainable Development Goal 12.3, as articulated in the National Food Waste Strategy ((Department of Climate Change, Energy, the Environment and Water, 2017). As noted in the Strategy however, “Australia’s food and waste systems are underpinned by various national, state and territory legislative frameworks—for example, legislation to protect human health and the appropriate disposal of food waste” (Department of Climate

² This figure spans the entire supply chain, including household.

Change, Energy, the Environment and Water, 2017, p. 20). However, as CSIRO Futures (2023, p.3) highlight in the report *Shaping Australian Food Systems*, the approach to food regulation and legislation more broadly in Australia (and thus not just food waste specifically) is fragmented, noting:

Fragmented governance structures and data gaps impede decision-making processes. Food production, distribution and consumption in Australia are overseen by multiple layers of government. Ministerial responsibility covers many different parts of food systems, with no one minister overseeing food as a whole. According to stakeholders consulted, this means decision making is fragmented, creates competing priorities, and restricts the forming of cooperative strategies; particularly when a systems lens is not uniformly adopted.

Work by Naudiyal et al. (2021) has previously mapped food policy in Australia, looking at the role of different Federal Government organisations. Their work highlights how aspects of food policy are 'owned' by different departments and agencies at the national level, thus supporting the view that ministerial responsibility for food is fragmented. While Naudiyal and colleagues' work provides a useful diagram illustrating how the various government departments and their respective roles, this was in the context of food policy more broadly (so includes, for example health, social services, and education) and a number of government departments have changed since this work was published. In the context of food waste more specifically, Figure 5 highlights the national government departments and agencies that are relevant in the context of trading practices and FLW, some more broadly than others.

The fragmentation of ministerial and departmental responsibility for food related policy in Australia has led to calls to create a Minister for Food, something that was also suggested as part of the inquiry into food security in Australia (see House of Representatives Standing Committee on Agriculture, 2023). More specifically, Recommendation 1 and 2 of the final report to come out of the food security inquiry, titled *Australian Food Story: Feeding the Nation and Beyond*, highlighted the need for the Australian Government to develop a comprehensive National Food Plan and that the Government should appoint a Minister for Food who would sit within the portfolio of the Prime Minister and Cabinet. Of particular relevance to this project is Recommendation 18, which recommends the need to incorporate measures to eliminate food waste into the proposed National Food Plan.

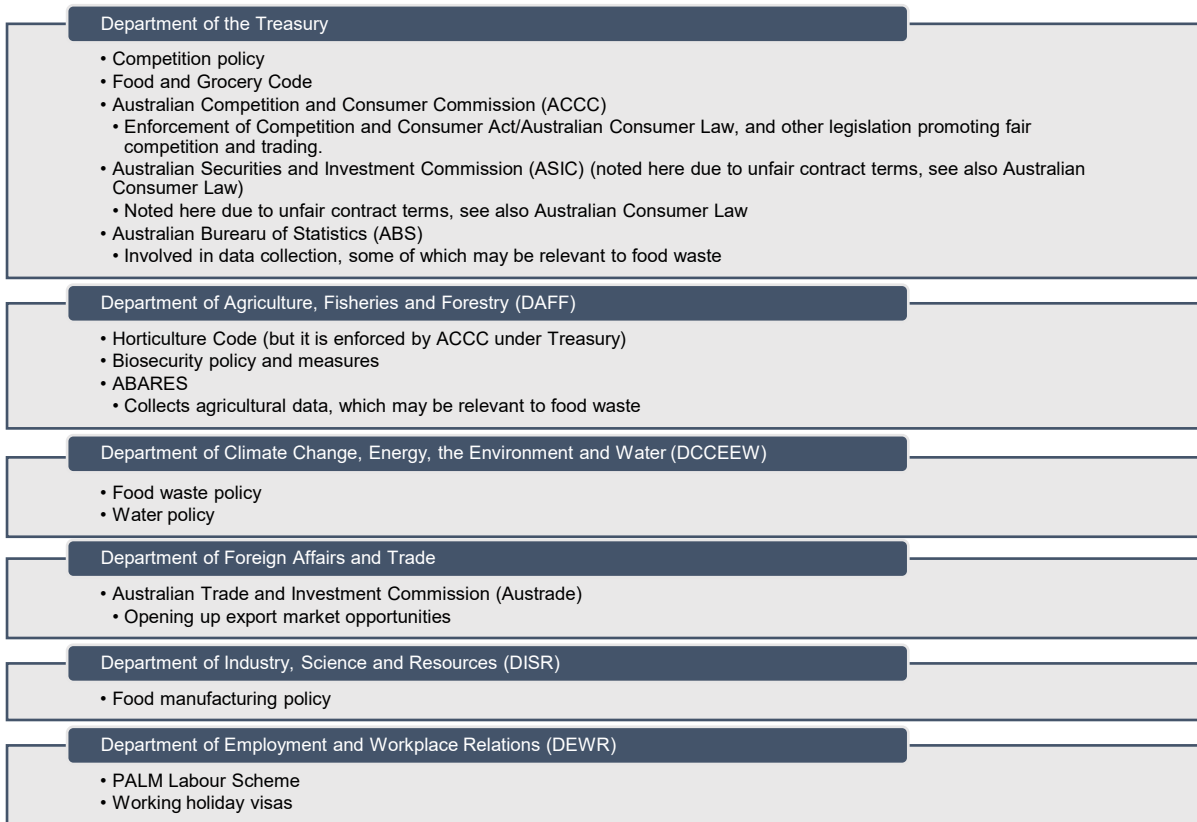


Figure 5. Federal departments and agencies with a connection to FLW in Australia

Source: Developed with reference to (Naudiyal et al., 2021; Australian Government, n.d.) and personal communication with government officials.

Focusing on FLW specifically, the National Food Waste Strategy (Department of Climate Change, Energy, the Environment and Water, 2017, p. 20) highlights the need to enable legislation to better support food waste reduction and repurposing, inferring that consistency and harmonisation across national, state, and local jurisdictions is required:

Improving our understanding of where existing legislation is inhibiting the adoption of practices, or where it is required to facilitate improved outcomes for food waste, will be important. These changes could include amending or developing new legislation to provide more flexibility or incentives to redirect food waste to charities or convert it for other purposes, avoiding its disposal in landfill. It could also include legislative measures such as mandating food waste recycling where this is considered appropriate. All governments can work together to identify and support changes to achieve national consistency.

In a similar vein, CSIRO Futures (2023, p. 3) also emphasises the need for a review of food waste policy and legislation frameworks within Australia, highlighting that “policy levers that create barriers to reducing waste and food distribution could be reviewed”. Suggested policy levers include mandatory measurement and reporting of food waste, reviewing Good Samaritan laws related to liability of food donations, implementing a National Food Donation Tax Incentive³, and introducing policies to “prevent waste-producing trading practices, such as unilateral or retroactive changes to contracts, industry reduction of ‘aesthetically imperfect’ products, and contract inflexibility that does not account for variability in demand and supply of food products” (CSIRO Futures, 2023, p. 3).

Finally, it is worth noting here that while there is policy and legislation that intersects and/or relates to food waste, the Australian Government’s approach to FLW reduction itself is largely voluntary, in that organisations are not mandated to measure/report on and/or reduce FLW. Food waste reduction efforts rely heavily on industry self-regulation and collaboration between government and industry stakeholders, which is similar to food waste reduction initiatives in the UK (see Bradshaw and Wentworth, 2024; Perovic and Johnson, 2023). In the UK context, recent work has highlighted that “policymakers have to decide whether to specifically target food waste prevention, or to achieve that as part of broader approaches that make food supply chains sustainable” and that “substantial reductions in food waste are unlikely to be achieved through a single [policy] intervention” (Bradshaw and Wentworth, 2024, p. 21). Further to this, the authors suggest that policymakers will likely have to introduce policy with “limited evidence” (Bradshaw and Wentworth, 2024, p. 21) It is likely Australian policymakers, based on the findings of this project (as outlined across the project’s reports), will face a similar situation.

2.4 Relevant inquiries

To give further context to this project, it is necessary to highlight a number of government inquiries that, while not focused on FLW specifically, are broadly relevant to this project. Appendix A outlines these relevant inquiries, including those that were still ongoing at the time of writing this report, were completed recently, and/or were conducted in the past tracing as far back as the Reid Committee into fair trading in 1997. While Appendix A presents these inquiries in chronological order, these inquiries can broadly be thematically categorised as:

1. Supermarket and/or food and grocery supply chain specific inquiries (e.g., ACCC Supermarket sector inquiry; Senate Select Committee on Supermarket Prices; Select Committee on Grocery Pricing in South Australia; Select Committee into Supermarket Pricing Queensland; Parliament of Victoria Inquiry into securing the Victorian food supply; Independent Review of the Food and Grocery Code of Conduct; House of Representatives Standing Committee on Agriculture Inquiry into Food Security in Australia; ACCC’s Perishable Agricultural Goods Inquiry; ACCC Dairy Inquiry; Senate Inquiry: Milking it for all it’s worth – competition and pricing in the Australian dairy industry; ACCC Grocery Inquiry)
2. Pricing and/or cost of living inquiries (e.g., Select Committee on Cost of Living; Australian Council Of Trade Unions Inquiry into price gouging and unfair pricing practice)
3. Competition and/or fair trading inquiries (e.g., Competition Review; Treasury Consultation Regulation Impact Statement on Protecting consumers from unfair trading practices; ACCC Feedback on draft ‘Sustainability collaborations and Australian competition law guide’; Inquiry into promoting economic dynamism, competition and business formation; Baird Inquiry: ‘Fair market or market failure—review of Australia’s retailing sector’; Reid Committee).

³ At the time of writing this report, the Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024 was before federal parliament.

This research also found that the inquiries into digital media (including ACCC Digital Platform Services Inquiry; ACCC Digital Platforms Inquiry; ACCC Digital Advertising Services Inquiry) were relevant, giving the findings of these inquiries made recommendations in relation to UTP provisions.

More detail on each of the inquiries and how they relate to this project, can be found in Appendix A. Please also note that while a number of the submissions to these inquiries pertained information relating to trading practices between supermarkets and suppliers, it was beyond the scope of this project to systematically analyse all of the submissions.

3. Understanding trading practices

Regulators and other stakeholders tend to focus on 'unfair' trading practices, as opposed to trading practices in general, with fairness being used as the measure to determine when trading practices should be subject to interventions. Here, it is acknowledged that there is a risk in focusing just on UTPs, in that trading practices that are 'fair' but which contribute to food loss and waste can be overlooked. However, UTPs has a broad and context-dependent meaning, making it a term that can capture a range of practices related to FLW. In this project, the focus has been predominately on UTPs, largely because, as outlined in Report 3, participants involved in this study tended to focus more so on 'unfair' trading practices, as opposed to 'fair' trading practices.

This section defines 'unfair' trading practices broadly and highlights relevant legislation and regulation in Australia and recent developments in the context of unfair trading practices. Following this, this section focuses in on trading practices specific to agriculture and the food supply chain and outlines relevant international and Australian legislation and regulation to this context.

3.1 Defining 'unfair' trading practices

Before defining UTPs, it is important first to define trading practice. Broadly, trading practices refer to "commercial transactions that take place between trading partners at any stage in the supply chain" (Barling et al., 2019, p. 80). Trading practices include both business to business relationships (B2B) and business to consumer (B2C) relationships. Under 'normal' or appropriate market conditions, trading practices should, at least theoretically, result in a situation where the allocation of resources is beneficial to all parties (Falkowski et al., 2017).

An unfair trading practice (UTP), then, is said to be a "concession that a weaker party with limited bargaining power grants (under coercion) to a stronger party with superior bargaining power" (Russo et al., 2023, p. 1). As Russo and colleagues go on to suggest, "[t]he essence of this argument is that unfairness arises from the weaker party's lack of alternatives, because a firm would not accept the UTPs if other alternatives were available. From this perspective, UTPs violate the free trade principle because they emerge when the "weaker party is unable to refuse an unfair agreement due to coercion or threats from the other party" (Russo et al., 2023, p 1). The notion of UTPs resulting from imbalances in bargaining power is commonly noted across the literature (see, for example Taylor et al., 2019; Russo et al., 2023; Falkowski et al., 2017; Wunder et al., 2018, and also Report 2).

Drawing on the European Commission's (European Commission, 2014) definition of UTPs, Falkowski et al. (2017, p. 6) highlight that UTPs in the context of B2B relationships (which are of relevance to this project) are "practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another". The European Commission suggests that UTPs typically occur within four main categories:

1. Costs and risks; specifically, where these are 'unfairly' shifted from one party to another.
2. Benefits and advantages; specifically, where certain benefits or advantages are requested by one party without their being any reciprocal benefit or advantage being offered to the other party.
3. Changes to contracts; specifically unilateral or retrospective changes to contracts, unless these are allowable under fair trade terms.
4. Termination; specifically, where a contract is 'unfairly' terminated, or where there is an 'unjustifiable' threat of termination (European Commission, 2018; see also Taylor et al., 2019).

In addition to this, UTPs can be categorised as either 'isolated' or 'systemic' (Cafaggi & Iamiceli, 2019): the former refers to situations where the UTPs is a one-off, or affecting a limited number of actors; whilst the latter is where UTPs affect a large number of actors, often because they are embedded in supply chain governance. An example of an isolated UTP, therefore, would be where an actor unfairly terminates the contract of another actor. On the other hand, Daskalova (2020, p. 14) suggests Woolworth 'Mind the Gap' scheme and Coles' 'Active Retail Collaboration' programs are examples of systemic unfair trading practice, highlighting that these schemes saw "retailers asking suppliers for cash contributions to the bottom line, payments for mergers, and charges for various services" (see also Perishable Agricultural Goods Inquiry, 2020; ACCC, 2016c, 2014).

Whilst the above has highlighted how UTPs can be defined and conceptualised, clearly identifying and defining UTPs in practice is difficult because it relies on how fairness – or conversely unfairness – is interpreted and such interpretations are shaped by context and typically rooted in social norms, values, and beliefs (Falkowski et al., 2017, p. 73). Further to this, whilst there is growing literature exploring UTPs, researchers have suggested that there is still limited knowledge about what interventions (regulatory or otherwise) can actually overcome problems related to UTPs (for example, Falkowski et al., 2017). This lack of knowledge is partly due to the diversity of what can be considered a UTP (for example, Swinnen et al. (2021, p. 18) notes, "[t]he notion of fairness further depends on the context under consideration: an unfair practice in one situation may be tolerated or even encouraged in different circumstances") due to different perceptions of what is, or is not, 'unfair'. This, as Falkowski et al., (2017, p. 69) suggest, makes it difficult to draw "conclusive recommendations for policy-makers". This is reiterated by Treasury in the 2023 'Protecting consumers from unfair trading practices: Consultation Regulation Impact Statement' (Australian Government, 2023b, p. 19):

Unfairness is an inherently subjective concept, thus highlighting the need for a calibrated policy response. A reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce. On the other hand, an excessively narrow approach could be ineffective, and might not capture the full range of unfair and harmful practices.

In this report, Treasury notes how 'unfair' has been defined in various legislation from the United States (US), European Union (EU), United Kingdom (UK), and Singapore, concluding that legislative approaches "vary widely in design, scope and potential effect" (Australian Government, 2023b, p. 19).

3.2 Relevant Australian legislation and regulation relating to unfair trading practices

At the time of writing this report, there is currently no statutory definition of 'unfair trading practices' in Australian law. While Section 3.2.3 highlights some recent developments in relation to regulating unfair trading practices and Section 3.3 identifies legislation and/or regulation specific to agriculture and the food supply chain, this section largely focuses on those aspects of competition and consumer law and policy in Australia that intersect with UTPs. This provides important context, particularly for Report 4 and 5 of this project.

Australia's competition law is contained in the *Competition and Consumer Act 2010 (Cth)* (formerly *Trading Practices Act 1974 (Cth)* (CCA). The CCA is a "national law that governs how all businesses in Australia must deal with their competitors, suppliers, and customers" (ACCC, 2016a, p. 2). The CCA operates at the Federal level in Australia and is also enacted through various laws at the state and territory level. Broadly, it is designed to enable fair and open markets and ensure businesses treat consumers fairly. As the name suggests, Australia's competition law covers practices that impact competition, including those that lessen or

undermine competition and the misuse of market power (Australian Government, 2023b). The CCA also covers product safety and labelling; unfair market practices/anti-competitive behaviours; price monitoring; industry codes, industry regulation for specific sectors; and mergers and acquisitions. Schedule 2 of the CCA contains the Australian Consumer Law (ACL) which focuses on interactions between business and consumers (including other small businesses) and includes provisions relating to misleading and deceptive conduct, unconscionable conduct, and unfair practices, amongst others. Only the ACCC enforces competition law, whilst State, Territory, and Federal regulators, including the ACCC, enforce the ACL (ACCC, 2016).

The rest of this section summarises key provisions of the CCA that are of specific relevance to this project (and have been referred to in subsequent project reports) and to UTPs, including those provisions that may have implications for the recommendations. This includes provisions relating to: anti-competitive practices (including cartels, misuse of market power, cooperation among businesses, and collective bargaining and collective boycotting); exemptions to the CCA; industry codes; and industry associations, and those falling under consumer law: unconscionable conduct and unfair contract terms.

3.2.1 Competition law

This section focuses specifically on competition law, which includes anti-competitive practices and industry codes.

3.2.1.1 Anti-competitive practices

Anti-competitive competitive practices are practices that “have the purpose, effect or likely effect of substantially lessening competition in a market” (ACCC, 2024j, p. 4, see also 2018, pp. 9–12). Here, it is important to note however that there is no legislative definition of ‘substantially lessen competition’, however, it has been developed through case law (see ACCC, 2018). Business practices that are prohibited in certain contexts under the CCA include: (1) cartels; (2) collective bargaining and collective boycotts; (3) cooperation among business; (4) exclusive dealings; (5) minimum resale prices; and (6) misuse of market power (see ACCC, 2023c, 2024i). These are briefly outlined in the below in Table 1. Prohibited Business Practices.

Table 1. Prohibited Business Practices

Business Practice	Description of Business Practice
Cartels	Cartels occurs when two or more independent businesses agree to work together, or in other words, collude. Any form of cartel behaviour is strictly prohibited under CCA, however, if the businesses acting together are owned by the same company, this is not considered to be a cartel. Cartel behaviours include where two or more competitors agree to (1) fix prices, including, but not limited to setting minimum prices; (2) divide or allocate market share; (3) agree to control outputs, including limiting the amount of goods that will be made available; and (4) rig bids (ACCC, 2023c, 2024c, 2024j, 2024i).
Collective bargaining and collective boycotts	Under competition law, businesses must make independent decisions. If competitors work together to make joint decisions around terms and conditions, who they will deal with, and pricing, they risk breaching competition law (ACCC, 2024d). However, there are times when collective bargaining benefits the public interest, the ACCC can grant an exemption to allow it to occur (see ACCC, 2008 for examples that have been granted relevant to the food supply chain).

Business Practice	Description of Business Practice
Cooperation among businesses	Cooperation among business is where contracts, arrangements, understandings and/or concerted practices are made between two or more businesses which in effective substantially lessen competition, but do not meet the strict definition of cartel. Concerted practices are said to be less than a contract, arrangement and/or understanding, but typically involve the sharing of commercially sensitive information, which in turn, can then be used others within the industry to forecast and make pricing decisions and thus lessen competition (ACCC, 2018, 2024i). As yet, Australian courts have not yet considered concerted practices (ACCC, 2024k).
Exclusive dealing	Exclusive dealing occurs when one business trading with another, puts conditions on the other's freedom to choose: (1) what it buys or sells; (2) who it does business with; and/or (3) where it trades (see ACCC, 2024e). Here, it is important to note that exclusive dealing is common in business arrangements and is only illegal when it substantially lessens competition.
Misuse of market power	Whilst it is not illegal for businesses to possess or use their market power, CCA does prohibit a firm who has substantial market power from using it in a way that aims to, is likely to or does in fact substantially lessen competition. Practices considered to fall under the misuse of market power include, but are not limited to, refusal to deal, restricting access to inputs, predatory pricing, and margin or price squeezing. Of particular note, predatory pricing is when a business reduces its prices below the cost of supply for a sustained period of time, which in turn, may cause competitors to leave the market or discourage new competitors from entering the market (see ACCC, 2024o). Whilst such practices may impact an individual competitor, for it to violate the law, the practice must have the effect, or likely effect, of substantially reducing competition within the market as a whole (ACCC, 2024f). Margin or price squeezing, on the other hand, is where a business with substantial market power produces a key input needed by downstream markets and charges a price that effectively reduces the margins competitors can make, thus limiting competition (ACCC, 2024f).

3.2.1.2 Exemptions to competition law

In certain circumstances, businesses can apply to be exempt from competition law, typically via an authorisation or notification applied to, and issued by, the ACCC. Authorisations can be requested for activities that may ordinarily breach competition law (specifically agreements between competitors, concerted practices, cartel conduct, or misuse of market power), but is being requested due to an industry code, levy, joint venture, as well as to enable coordination of a supply chain or allow some forms of collective bargaining⁴ where it is in the public interest (ACCC, 2024b). Notifications, on the other hand, can be made specifically in relation to exclusive dealing, resale price minimums, and some collective bargaining and boycotts (see footnote) (ACCC, 2024g). The ACCC also allows exemptions to some concerted practices, as specifically listed in Section 51 of the CCA. Of particular note,

⁴ Collective bargaining by small businesses (including those with a turnover under \$10 million, franchisees – regardless of turnover – negotiating with franchiser) is covered by the collective bargaining class exemption, however, they must submit an exemption notification form to the ACCC to be covered by the class exemption (ACCC, 2024d, see 2024g).

this includes concerted practices related to standards prepared or approved by Standards Australia (see s.51(2)(c), noted here due to the upcoming standard on food waste) (ACCC, 2018).

In July 2024, the ACCC released a draft 'Sustainability collaborations and Australian competition law' to consider where competition law may limit or prohibit sustainability collaborations and provide guidance about how this can be resolved. This guidance broadly aligns with the work done by the Competition and Markets Authority in the UK to ensure that environmental initiatives are not hampered by competition law (Competition and Markets Authority, 2023). Of specific relevance to this project, the ACCC provides an example relating to food waste (ACCC, 2024j, p. 20 see Case Study 9: Sharing of information and coordination activities to reduce food waste):

Two large food retailers operate complex supply chains and work with many primary producers, distributors and other suppliers. The retailers recognise an issue with food waste in their industry, with produce that cannot be sold often perishing before it can be redistributed. The retailers would like to reduce food waste across their industry. They agree to share information with each other as well as third parties about where excess food is located, where food is required and when it will expire. They consider this will result in more food being reallocated before it perishes.

This agreement may risk breaching the Act as it involves the sharing of commercially sensitive information between competitors (such as volumes) and has the potential to spill over into agreements regarding who the competitors will and won't acquire from and on what terms.

In these circumstances, the retailers may decide to seek certainty about potential competition law risk by applying for authorisation from the ACCC. This is the type of agreement that could potentially be authorised by the ACCC.

Relevant factors in the ACCC's consideration would be, for example:

- *understanding what is preventing the retailers from each acting unilaterally to address this issue*
- *whether there are clear food waste reduction public benefits likely to result*
- *the extent to which the sharing of information is likely to affect competition between the retailers in the acquisition and supply of fresh produce.*

3.2.1.3 Industry codes

Industry codes set the rules or minimum standards for specific industries. Some industry codes are prescribed as regulation under the CCA, and thus are mandatory and enforced by the ACCC. Other codes are not prescribed and so are not enforced by the ACCC. At the time of writing this report, mandatory codes include the Dairy Code of Conduct, Franchising Code of Conduct, Horticulture Code of Conduct and Unit Pricing Code (ACCC, 2024h). The Food and Grocery Code is currently voluntarily, but in light of the independent review conducted in 2024 (see Appendix A) will become mandatory. More information on the Horticulture Code and Food and Grocery Code is provided in Report 4.

3.2.1.4 Industry associations

The ACCC provides guidance to industry associations regarding competition and exemptions to ensure they do not contravene competition law. Of particular note, associations may breach the CCA if, amongst others, the association: (a) shares information between members in a way that substantially lessen competition; (b) provides members with recommended pricing which aids in price fixing; (c) begins collective bargaining without an approved exemption from the ACCC (ACCC, 2024k). In relation to points (a)

and (b) more specifically, industry associations can breach the law if, for example, they share members' commercially sensitive information, provide members with recommended pricing structures or schedules, and/or facilitate the sharing of members' current or future prices. Of note, however, associations would not contravene the law, by sharing, for example, aggregate wage data and average historical pricing data, providing that the data was de-identified and made clear that members were not required to use the data (ACCC, 2024k). This information is particularly relevant for Report 4.

3.2.2 Consumer law

This section focuses specifically on unconscionable conduct and unfair contract terms, highlighting what is covered, and importantly, what is not covered. Here, it is important to note that ACL, as the name suggests, focuses on the relationship businesses have with consumers, as well as other small businesses.

3.2.2.1 Unconscionable conduct

Unconscionable conduct is defined as "behaviour so harsh that it goes against good conscience" (ACCC, 2023a). Whilst there is no legislative definition of what constitutes 'unconscionable', it has been developed through case law and, importantly, is about behaviour towards consumers and/or other [typically small] business that is more than being 'unfair' (ACCC, 2023a see unconscionable conduct). In determining whether a behaviour is unconscionable, courts can take into consideration bargaining power, the requirements of industry codes, and whether the parties acted in good faith, as examples (see Section 22 of ACL). Generally, however, one factor alone is not sufficient for a court to rule that conduct is 'unconscionable'. Here, it is important to note that according to Treasury (Australian Government, 2023b, p. 14), "[s]tatutory unconscionable conduct is limited in its ability to address unfair practices because it is not the same as unfair conduct and it requires a high threshold of misconduct to be met". Thus, as Treasury notes "there are cases where courts have determined that conduct falls short of the high threshold, even though that conduct would be considered by many as unfair and was likely to result in significant consumer detriment".

3.2.2.2 Unfair contract terms

Unfair contracts are considered 'unfair' if they cause significant imbalance, are not reasonably necessary, and/or cause financial harm enforced. This includes:

- "terms that allow one party (but not the other) to avoid or limit their responsibilities under the contract
- terms that allow one party (but not the other) to end the contract
- terms that penalise one party (but not the other) for breaching or ending the contract
- terms that allow one party (but not the other) to change the terms of the contract" (ACCC, 2023b see unfair contract terms).

Like unconscionable conduct, the courts determine what constitutes 'unfair' depending on the context. The ACCC has, however, identified several clauses (often included in standard form contracts within the food supply chain), as 'problematic' including clauses that: give businesses broad rights to reject produce, significantly restrict a supplier's ability to sell produce in excess of the amount committed under the contract, allow for late indicative or variable pricing or permit unilateral variations to contracts (ACCC, 2016b).

However, as noted by a number of actors within the horticulture industry (see, for example, AUSVEG, 2024) in the recent inquiries (see also primary data in Report 3), as well as by Treasury in its Consultation Regulation Impact Statement on unfair practices (Australian Government, 2023b), there are a number of limitations to Australia's current unfair contract provisions. This includes, for example, that unfair contract terms apply only to contracts, and thus, this aspect of ACL does not apply to behaviours that fall outside of contract terms. This may present issues with respect to informal supply agreements and further, raises issues for suppliers in terms of understanding what amounts to a contract and what their legal rights are (See Report 3). Similarly, the

provisions do not extend to unfair conduct that occurs prior to entering into contracts, or where a business applies what would be considered a fair contract term in an unfair manner (see Australian Government, 2023b).

3.2.3 *Unfair trading practices in Australia – current developments*

Building on work done as part of the Digital Platform Services Inquiry 2020-2025, Treasury released a Consultation Regulation Impact Statement (Statement) in August 2023 outlining proposed reforms to regulate UTPs, with the objective of informing consideration of options for addressing UTPs. As Treasury (Australian Government, 2023b, p. 4) noted:

Unfair trading practices, also known as ‘unfair business practices’ or ‘unfair commercial practices’, are particular types of commercial conduct which are not covered by existing provisions of Australia’s consumer laws (such as misleading or deceptive or unconscionable conduct), but nevertheless can result in significant consumer and small business harm.

The Statement provides a range of examples of conduct that may be potentially considered as UTPs, but which are not currently prohibited and could be the subject of proposed reforms (see Commonwealth of Australia, 2023, p. 9). As the ACCC (ACCC, 2023d) highlights, UTPs can include those that: (1) are harmful, but do not reach the legal threshold to be considered as unconscionable conduct; (2) create confusion, hide or omit relevant information that distorts consumer choice, but do not meet the definition of misleading and deceptive conduct; and/or (3) are not captured by the unfair contract provisions, as the conduct in question relates to business practices occurring outside of the contract, or where a ‘fair’ contract provision has been applied in an ‘unfair’ way (see also, Australian Government, 2023b).

As part of the Statement, Treasury acknowledged that “[u]nfairness is an inherently subjective concept”, meaning that careful consideration is needed in order to create an appropriate policy response especially if governments were to define UTPs in legislation (Australian Government, 2023b, p. 19). In elaborating on this point, Treasury acknowledged that, “[a] reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce. On the other hand, an excessively narrow approach could be ineffective, and might not capture the full range of unfair and harmful practices” (Australian Government, 2023b, p. 19). The Statement then goes on to highlight what the process to amend ACL (as per Schedule 2 of CCA) to incorporate provisions on UTPs would involve, and details four potential policy options (see Australian Government, 2023b, p. 21), with reference to work being done internationally in the space (see Statement’s Appendix A):

1. Option 1: Status quo (no change).
2. Option 2: Amend statutory unconscionable conduct.
3. Option 3: Introduce a general prohibition on unfair trading practices.
4. Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices.

At the time of writing this report, it is unclear what direction the government may take in relation to changing ACL to regulate UTPs.

3.3 Trading practices relevant to agriculture and the food supply chain

Previous research has made connections between market imbalances and UTPs (see, for example Falkowski et al., 2017; Daskalova, 2020) in that sectors with significant imbalances of bargaining power are more likely to see higher rates of UTPs. Agriculture and food supply chains around the world have increasingly become concentrated especially at the processing, retail and wholesale points of the supply chain which, in turn, creates a situation where there are significant imbalances in market power between actors within the food supply chain (Falkowski et al., 2017; Taylor et al., 2019; Wunder et al., 2018; Deconinck, 2021). Accordingly, the issue of UTPs in food supply chains is increasingly being addressed by regulatory interventions and scholarship beyond Australia. This section specifically focuses on how UTPs in the agriculture and food supply chain are regulated internationally and in Australia.

3.3.1 International legislation and regulation

There are two approaches to regulating UTPs in the agriculture supply chain: (1) regulating UTPs specifically, or (2) regulation reform to reduce market imbalances with the agriculture supply chain. (Russo et al., 2023). These two approaches can be used individually or in combination. The Consultation Regulation Impact Statement released by Treasury in 2023 (noted in Section 3.2.3) provides an overview of international approaches to regulating unfair trading practices more broadly (Australian Government, 2023b). Of note too, is the work by Cafaggi and Iamiceli (2019), Falkowski et al., (2017) and Piras et al. (2018) who provide a comprehensive review of UTP legislation in the EU. Rather than restating the information contained in these reports, this section briefly explains how the USA, UK, and EU address UTPs in the agriculture supply chain via legislation and regulation.

In the USA, the Perishable Agricultural Commodities Act (PACA) (1930) is a federal law designed to regulate the buying and selling of perishable agricultural commodities, and in particular, to promote fair business practices and help resolve disputes (USDA, n.d.). Section 499(b), which is a relatively small part of the overall Act, outlines what is considered unfair conduct, which includes, for example, deceptive conduct in weighing or counting produce or misrepresenting the grade of produce (see *U.S.C Title 7, Chapter 20A*).

In the UK, the Groceries (Supply Chain Practices) Market Investigation Order requires designated retailers to comply with the Groceries Supply Code of Practice (GSCOP) (Competition and Markets Authority, 2022, 2009b). The purpose of the Order and the GSCOP is predominately to reduce the potential for consumers to be negatively impacted, however, it does “control practices that transfer excessive risks and unexpected costs to suppliers, and have an impact on suppliers’ quality, innovation and willingness to invest”(Competition and Markets Authority, 2022). Part 2 of the GSCOP (Competition and Markets Authority, 2009a) explicitly outlines the principle of fair dealing between retailers and suppliers, and states that:

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

The GSCOP then details requirements of the code, including: (1) variation of supply agreements and terms of supply, (2) changes to supply chain procedures; (3) no delays in payments; (4) no obligation to contribute to marketing costs; (5) no payments for shrinkage; (6) payments for wastage; (7) limited circumstances for payments as a condition of being a supplier; (8) compensation for forecasting errors; (9) no tying of third party goods and services for payment; (10) promotions; (11) due care when ordering for promotions; (12) no unjustified payments for consumer complaints; (13) duties in relation to de-listing; and (14) requirements of senior buyers. Of particular note (in light of findings in Report 3) is compensation for forecasting errors, whereby:

(1) A Retailer must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error in relation to Grocery products and attributable to that Retailer unless:

(a) that Retailer has prepared those forecasts in good faith and with due care, and following consultation with the Supplier; or (b) the Supply Agreement includes an express and unambiguous provision that full compensation is not appropriate.

(2) A Retailer must ensure that the basis on which it prepares any forecast has been communicated to the Supplier. (Competition and Markets Authority, 2009a).

The EU *Directive on Unfair Trading Practices* (Directive) (EU 2019/633) was adopted by the European Parliament and Council in 2019, and in turn, had to be transposed into national law by EU member states by 2021 (European Commission, 2024b). This Directive is part of a wider governance agenda within the EU to create a “more efficient and fairer food supply chain” and improve “farmers’ position in the food supply chain” (European Commission, 2024b). This legislation effectively bans 16 unfair trading practices; however, 10 of these are what the EU has labelled “black” unfair trading practices which are prohibited; whilst the remaining six have been labelled “grey” unfair trading practices and are only allowed “if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner” (European Commission, 2024b). Table 2 summarises the ‘black’ versus ‘grey’ unfair trading practices. As noted in the Introduction to this report (see Section 1), this list of UTPs will be referred to in subsequent project reports.

Table 2. EU Directive on Unfair Trading Practices

Black unfair trading practices	Grey unfair trading practices
<p>The directive prohibits the following unfair trading practices in any circumstances:</p> <ol style="list-style-type: none"> 1. payment later than 30 days for perishable agricultural and food products; 2. payment later than 60 days for other agricultural and food products; 3. short-notice cancellations of perishable agricultural and food products; 4. unilateral changes to the terms of the supply agreement by the buyer; 5. payments requested by the buyer that are not related to the sale of an agricultural and food product; 6. payments requested by the buyer for the deterioration or loss of agricultural and food products where such deterioration or loss is not caused by the negligence or fault of the supplier; 7. refusal by the buyer to provide a written confirmation of a supply agreement, despite the supplier’s request; 8. misuse of the supplier’s trade secrets by the buyer; 9. commercial retaliation actions by the buyer against the supplier if the supplier exercises their contractual or legal rights; 10. transferring costs for examining customer complaints to the supplier’s products despite the absence of negligence or fault on the part of the supplier. 	<p>The directive prohibits the following unfair trading practices unless the supplier and the buyer have agreed to it in clear and unambiguous terms:</p> <ol style="list-style-type: none"> 1. the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both; 2. the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market; 3. the buyer asks the supplier to pay for discounts on agricultural and food products sold by the buyer as part of a promotion; 4. the buyer asks the supplier to pay for the advertising, or marketing by the buyer of agricultural and food products; 6. the buyer charges the supplier for staff for fitting out premises used for the sale of the supplier’s products.

Source: (European Union, 2019)

Jurisdictions abroad provide more detailed guidance upon what UTP than what currently exists in Australia, and may be useful for Australia when considering reform. However, it will be important to recognise that making determinations about what is – or is not –

an UTP will be difficult due to perceptions about what is fair based on the actors' positions within the relationship. Furthermore, while the three international examples above illustrates what trading practices are considered to be unfair in the context of the agricultural and food supply chain, it is important to highlight two points.

First, the extent to which the regulation actually reduces unfair trading practices within the agricultural and food supply chain is not fully understood. For example, whilst the Grocery Code Adjudicator's annual survey on the GCSOP (Annual Report and Accounts: Improving Fairness for Suppliers, 2024) illustrates a reduction in suppliers reporting issues aligned with the Code from 2014 to 2024, some researchers suggested that unfair trading practices still continue (Bradshaw and Wentworth, 2024, pp. 30–31). Similarly, while the European Commission's report (European Commission, 2024a) on the implementation of EU *Directive on Unfair Trading Practices* highlights that enforcement is gaining traction and reports on the number of investigations and infringements being issued, this does not necessarily lend itself to the evaluation that the legislation is preventing the trading practices. Rather, it could simply illustrate that there are now mechanisms in place to report and penalise the practices. Further to this, the European Commission (European Commission, 2024a) notes that the Directive is scheduled for evaluation in 2025, at which point adjustments may be needed to the Directive itself.

Second, this legislation and regulation was not specifically designed to address FLW. This is highlighted by (Bradshaw and Wentworth, 2024, pp. 30–31) in a UK parliamentary brief on food waste in which they summarise existing research and note: "The Groceries Supply Code of Practice (GSCOP) was not designed with food waste prevention in mind. However, some suggest GSCOP has the potential to reduce food waste on farms (and in manufacturing). This is because GSCOP regulates some practices that cause FLW. However, there is limited research, with qualitative studies suggesting "the impact of GSCOP on food waste is unclear" (Bradshaw and Wentworth, 2024, p. 30)

Finally, whilst not explicitly relevant to regulation on trading practices, it is worth noting here that recent research looking at food waste regulation in the US suggests that state-based bans on companies (including retailers) sending food waste to landfill appear to be very limited in their impact unless supported by, for instance, effective infrastructure and enforceability mechanisms. One study found that, of the five jurisdictions examined, only in Massachusetts did the ban cause a discernible reduction in food waste, which the researchers suggest was because of the improved composting infrastructure, the lack of exemptions, comparatively high levels of monitoring and effectively priced fines within Massachusetts (see Anglou et al., 2024). In the context of any possible UTP regulation, this study highlights the need for effective enforceability mechanisms.

3.3.2 Australian legislation and regulation

As previously noted, Australia's competition laws prohibit practices which lessen or undermine competition, including the misuse of market power. Industry codes provide rules or minimum standards for businesses in specific sectors where bargaining power imbalances exist, some of which include protections against practices which would be considered unfair (Australian Government, 2023b). Of particular relevance to this project is the Horticulture Code and the Food and Grocery Code, as both codes cover the horticulture supply chain in Australia, with the Food and Grocery Code also covering relationships between suppliers and retailers (including bakery items to supermarkets). The Australian Fresh Produce Alliance (AFPA) provides a useful diagram that summarises what transactions are regulated under the two codes (see Figure 6) (Australian Fresh Produce Alliance, 2024).

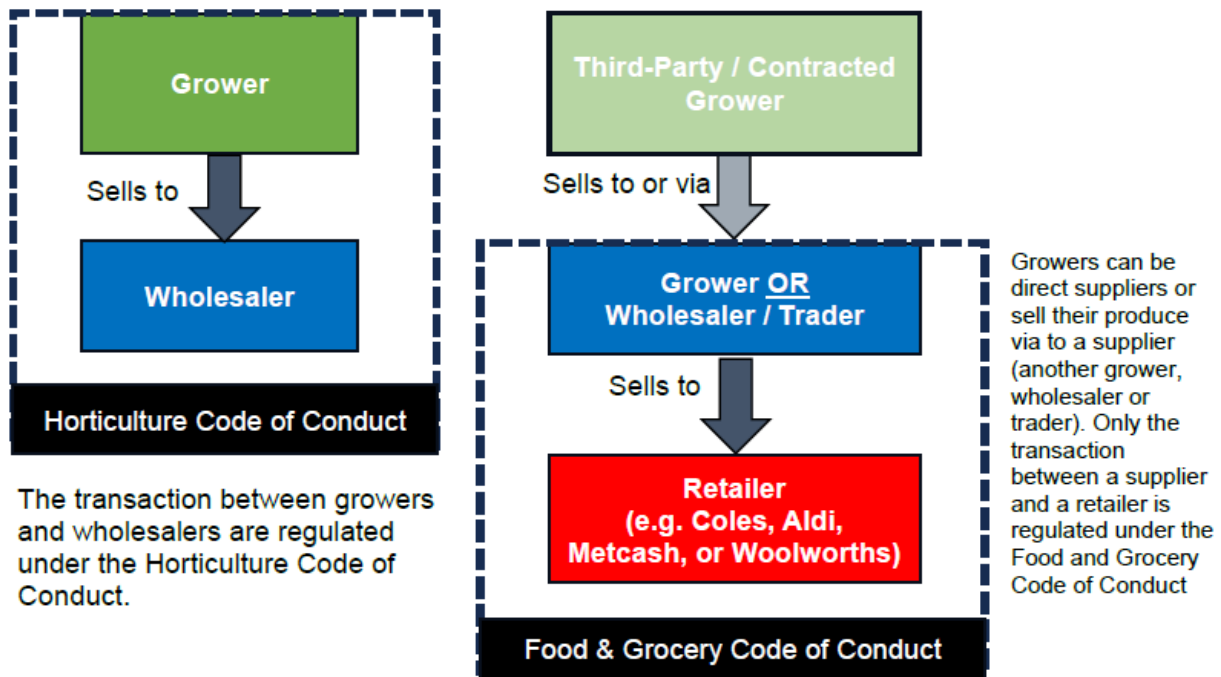


Figure 6. Horticulture Code versus Food and Grocery Code

Source: (Australian Fresh Produce Alliance, 2024).

Report 3 provides a detailed overview of these Codes and how they address known UTPs. Broadly however, the Horticulture Code of Conduct (Hort Code) regulates trade between growers and traders and aims to promote transparency and fair trade (see Report 4). Pursuant to the code, a trader is either an agent or a merchant:

- An agent sells produce on behalf of a grower to a person for a commission or fee; and
- A merchant purchases produce from a grower and resells but excludes merchants purchasing for the purpose of exporting or retailing (Emerson, 2024, pp. 17–18).

Several issues have been raised with the Hort Code by stakeholders within the supply chain including concerns with respect to compliance. Due to its mandatory nature, the Hort Code applies to all transactions that meet the requirements set out in Clause 3 of the Hort Code (*Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*). As noted by Fresh Markets Australia, for example, compliance with the Hort Code can be costly and, despite the code being mandatory, it applies only where growers and wholesalers have an executed Horticulture Produce Agreement (HPA). While Clause 12 of the Code requires a HPA, anecdotal evidence indicates that many growers refuse to sign and be bound by the code (for reasons such as cost), and as such, wholesalers are often in breach of the code for trading with growers in the absence of a HPA (Fresh Markets Australia, n.d).

The Food and Grocery Code (the F&GC), on the other hand, aims to “regulate standards of business conduct”, “ensure transparency and certainty in commercial transactions”, “minimise disputes”, “provide a dispute resolution process”, and “promote and support good faith in commercial dealings” between suppliers and retailers (*Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015* Schedule 1, Food and Grocery Code of Conduct). Under the F&GC, retailers agree to be bound by the code and are prohibited from engaging in certain conduct, which is broadly in line with what could be considered

UTPs. See, for example, Figure 7 in Food and Grocery Code Independent Review Annual Report 2022-2023 (Australian Government, 2023a) highlights issues experienced by suppliers with their wholesaler/retailer, many of which could be classified as an UTP. At the time of writing this report, and when data was collected for this project, however, the F&GC is the only code of conduct that – while prescribed – is voluntary and applies by election. Due to this, “a supermarket can, at any time, elect to withdraw its agreement to be bound by the Code by written notice to the ACCC” (Emerson, 2024, p. 24).

Like the Hort Code, the F&GC also faces key criticisms which, as mirrored in the data collected for this project (see Report 3), include its voluntary nature, the absence of enforceable penalties, options for dispute resolution between the parties and concerns that the good faith provisions do not go far enough to support good faith in commercial dealings. However, with the code due to sunset in 2025, an Independent Review of the Food and Grocery Code of Conduct was conducted in 2024. This review resulted in the recommendation that the F&GC be made mandatory, and penalties are imposed for noncompliance. In late 2024, draft legislation reflecting proposed changes to the F&GC were released for consultation, however, at the time of writing this report, the legislation has not yet been put before parliament

4. Conclusion

This report has provided an overview of UTPs and how these are being regulated both in Australia and internationally. Australia's current approach to regulating UTPs could be described as piecemeal, given that it does not currently have legislative provisions that directly address UTPs as a whole. Rather, it has a range of provisions within the CCA that could address certain kinds of UTPs depending on the context. Even then, a particular UTP may not meet the threshold to be classified as violating the law, for instance, it may be difficult to prove that it substantially lessens competition, and/or a UTP may not be brought to the regulator's attention by supply chain actors. Industry codes, to an extent, can deal with UTPs, but as briefly noted here, and highlighted in more detail in Reports 3 and 4, they are not without limitations. There are examples of countries that have sought to address UTPs more systematically, but studies on their effectiveness are limited in part because they are relatively new.

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and valorisation D3.3 Screening of EU policy areas with relevant impact on food waste prevention and valorisation (Final No. Deliverable 3.3; p. 127).

APPENDIX A – Relevant inquiries

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
CURRENT/ONGOING			
National			
ACCC Supermarket sector inquiry (2024-2025)	The inquiry is examining the pricing practices of the supermarkets and the relationship between wholesale, including farmgate, and retail prices. The legal basis for the inquiry is via Part VIIA of the Competition and Consumer Act 2010, in which the Treasurer can direct the ACCC to hold a price inquiry into a particular matter.	The ACCC's interim report was released on 27 September 2024. The report noted key concerns from suppliers including: <ul style="list-style-type: none"> The price received from supermarkets and their inability to negotiate Concerns around quality assessment and rejection processes Disproportionate risk on suppliers vs supermarkets Lack of transparency; and Payments that suppliers are required to make (or pressured to make) (ACCC, 2024a, 2024n). Many of these concerns were raised by participants of this project (see Report 3).	At the time of writing, the final report for this is yet to be released. The final report is due for release no later than 28 February 2025. ACCC have initiated proceedings against Woolworths and Coles over alleged misleading prices (ACCC, 2024m). The year has seen both supermarket retailers frequently in the news headlines, with brand image experts noting, the image of the supermarkets may be "beyond repair" (Ainsworth, 2024; Stein, 2024). According to the ACCC in their interim report, "many Australians have lost trust in supermarkets" (ACCC, 2024a; Lowrey, 2024). Additionally, the supermarkets are facing scrutiny over land-banking allegations (Ainsworth, 2024).
Select Committee on Cost of Living (2022-2024)	The Senate Committee was established to inquire into and report on: <ul style="list-style-type: none"> the cost of living pressures facing Australians; the Government's fiscal policy response to the cost of living; ways to ease cost of living pressures through the tax and transfer system; measures to ease the cost of living through the provision of Government services; and any other related matter. Food and groceries have been a line of inquiry.	Recommendations relevant to this project include: <ul style="list-style-type: none"> Recommendation 4: The committee recommends that the Australian Government introduce carefully designed divestiture powers as a last resort to manage poor supermarket behaviour and address supermarket price-gouging. Recommendation 8: The committee recommends that the Australian Government support the passage of the Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024. 	At the time of writing, it is unclear whether these recommendations will be supported in Parliament.

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
Competition Review (2020-2025)	This Treasury Review looks at competition laws, policies and institutions to ensure they remain fit-for-purpose for the modern economy, with a focus on reforms that would increase productivity, reduce the cost of living and/or lift wages.	Not available at the time of completing this project.	The Competition Review team will not issue a single report but undertake rolling policy projects. The Review team will publicly consult and issue papers on specific reform topics over the next two years. It is not clear if supermarkets will be the subject of a review at this stage.
Treasury Consultation Regulation Impact Statement on Protecting consumers from unfair trading practices (2022-2023)	The Commonwealth has led a public consultation on options to address unfair trading practices on behalf of all jurisdictions. The purpose of the consultation was to seek evidence on the nature of unfair trading practices in Australia and the extent of consumer and small business harm arising from potential gaps in the existing Australian Consumer Law. Additionally, feedback was sought on potential policy options for addressing unfair trading practices.	Not available at the time of completing this project.	While the consultation period has closed, and submissions are available online, the final report has not been released. Unfair trading practices are discussed in more detail in Section 3 of this report.
ACCC consulting on guide to sustainability collaborations (2024-ongoing)	The ACCC is seeking feedback on its draft guide which (a) seeks to address misconceptions about the operation of the Act which might stop businesses from jointly pursuing environmental initiatives which are not prohibited by the Act, (b) explains that where competition law risks do arise, but the sustainability collaboration is in the public interest, an ACCC authorisation may be appropriate, and (c) provides information about the authorisation process so that businesses can understand the options available to them in Australia.	Case study 9 of the draft (see page 20) highlights an example of sharing information and coordination activities to reduce food waste. Specifically, it highlights how retailers might like to share information with each other and other third parties about where excess food is located, where food is required and when it will expire. The guidelines suggest that agreement may risk breaching the Act, as it involves the sharing of commercially sensitive information between competitors (such as volumes) and has the potential to spill over into agreements regarding who the competitors will and won't acquire from and on what terms. The recommendation then, is to apply for an authorisation from the ACCC before engaging in such practice.	Submission period has closed, but final guidelines have not been released. It is worth noting that the guidelines seem to align with the UK's Competition and Market Authority's Green Agreements Guide. Of particular relevance is the need to carefully consider how practices aimed at addressing sustainability, including reducing food waste, may contravene Competition Law. More information on Competition Law is provided in Section 3.2.1 of this report. See also, Reports 4 and 5.

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
ACCC Digital Platform Services Inquiry (2020-2025)	<p>In 2020, the Australian Government directed the ACCC to conduct an inquiry into markets for the supply of digital platform services. Matters to be considered by the inquiry include:</p> <ul style="list-style-type: none"> the intensity of competition in markets for the supply of digital platform services, with particular regard to the concentration of power, the behaviour of suppliers, mergers and acquisitions, barriers to entry or expansion and changes in the range of services offered by suppliers of digital platform services practices of suppliers in digital platform services markets which may result in consumer harm market trends that may affect the nature and characteristics of digital platform services developments in markets for the supply of digital platform services outside Australia. 	<p>While not specific to food or food waste, the first six interim reports by the ACCC as part of this inquiry note recommendations related to unfair contract provisions and prohibition on certain unfair trading practices.</p> <p>Recommendation 1 of the fifth interim report on regulatory reform, for example, (p. 16) states: The ACCC continues to recommend the introduction of new and expanded economy-wide consumer measures, including an economy-wide prohibition against unfair trading practices and strengthening of the unfair contract terms laws.</p>	<p>More information about potential unfair contract provisions and prohibitions on unfair trading practices is provided in Section 3.3.</p>
State			
Select Committee on Grocery Pricing in South Australia (2024 -ongoing)	<p>This inquiry explores:</p> <ul style="list-style-type: none"> The prices for groceries and staple goods and products at South Australian supermarkets and grocery stores, compared to other states in Australia; The disparities in grocery pricing between metropolitan and regional areas; The prices paid to local growers, producers and suppliers for goods and services compared to prices charged to consumers in South Australian supermarkets and grocery stores, and the reasons for these disparities; 	<p>Not available at the time of completing this project.</p>	<p>Submissions closed April 2024. The Select Committee travelled to Mt Gambier in September 2024 to hear evidence. However, at the time of writing there were no further updates on when the final report would be released.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
	<ul style="list-style-type: none"> The impact of retail consumer pricing on consumers, particularly for those on low incomes; The prevalence of food insecurity in South Australia; The prevalence of price gouging practices and anti-competitive behaviour among grocery retailers and the impact on consumers; Potential opportunities for price monitoring, transparency in retail pricing and further regulation of pricing; and Any other related matters. 		
Parliament of Victoria Inquiry into securing the Victorian food supply (2023-2024)	Inquiry into securing the Victorian food supply in the context of urban sprawl and the impact of population growth on the farming industry and arable land to the Environment and Planning Standing Committee for consideration	Not available at the time of completing this project.	Final report due 31 December 2024.
RECENTLY COMPLETED			
National			
Senate Select Committee on Supermarket Prices (2023-2024)	The Senate Select Committee on Supermarket Prices was appointed to inquire into, and report on, the price setting practices and market power of major supermarkets. This inquiry was also linked to the Competition and Consumer Amendment (Divestiture Powers) Bill 2024	A number of recommendations were tabled to address market power. These included: <ul style="list-style-type: none"> Amendments to the Competition and Consumer Act 2010 to create divestiture powers specific to the supermarket sector where a supermarket was found to misuse their market power or engage in unconscionable conduct. Prohibiting price gouging Establish a Commission on Prices and Competition to examine prices and price setting practices. This would include, but not limited to, monitoring and investigating prices along the supply chain, requiring 	The Divestiture Bill was not supported by parliament. Further to this, while there seems to be mixed support from the different Parties for these recommendations, the response from Labor Senators [current government] highlighted a lack of support for the recommendations and/or that many of the recommendations will be considered pending the outcomes of other inquiries. For example, the commentary to the final report highlighted Labor's view that the current Australian Competition Law already contains significant provisions to address misleading and deceptive conduct, and that any consideration of additional

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		<p>supermarkets to publish historical pricing data.</p> <ul style="list-style-type: none"> • Ensure the ACCC is adequately funded and resources, given the powers to investigate and prosecute unfair trading practices, and have appropriate legislation such that the ACCC can compel information. • Making the Food and Grocery Code mandatory • Update the National Food Waste Strategy, with regard, but not limited to, reforms to use-by versus best before dates, whether unrealistic cosmetic standards are adversely affecting farmers and the quantity of food waste across the country, and requiring supermarkets to publish data on food waste volumes, including food rejected for cosmetics reasons and food donated. 	<p>powers for the ACCC will only occur upon completion of the [current] ACCC inquiry. Similarly, in regard to reforms to address unfair trading practices, Labor noted this is currently being considered.</p>
<p>Independent Review of the Food and Grocery Code of Conduct (2023-2024)</p>	<p>This review was required due to the current Food and Grocery Code sunseting in April 2025. The purpose of the review was to:</p> <ul style="list-style-type: none"> • Assess the effectiveness of the Code provisions in achieving the purpose of the Code to improve the commercial relationship between retailers, wholesalers and suppliers in the grocery sector; and • Consider the need for the Code, including whether it should be remade, amended or repealed. 	<p>The Final Report makes 11 recommendations for improving the Code, including making the Code mandatory. Other recommendations include, but are not limited to, changes to the Code to address fear of retribution, providing an anonymous complaints mechanism, requiring the Code Supervisor to conduct annual surveys and produce annual reports and that education for suppliers is provided. Of particular relevance to this project is Recommendation 8: To address issues relating to fresh produce, the Code should require that:</p> <ul style="list-style-type: none"> • Grocery supply agreements must include the basis for determining prices; • All forecasts of required volumes are conducted with due care; and • Fresh produce standards and specifications must be reasonable. 	<p>The Federal Government has agreed to make the Code mandatory for supermarket businesses with over \$5 billion in annual review. (Australian Government, 2024) A detailed analysis of the Food and Grocery Code in relation to the Horticulture Code and unfair trading practices is provided in Report 4. See also Section 3.2.1.3 and 3.3.2 of this report.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
<p>Australian Council Of Trade Unions Inquiry into price gouging and unfair pricing practices (2023-2024)</p>	<p>Sometimes referred to as the Fels inquiry or Price gouging inquiry, the purpose of this inquiry was to consider:</p> <ul style="list-style-type: none"> • The extent of price gouging facing working people on essential items, • The disproportionate effect experienced by cohorts of workers and vulnerable groups, and • The effect of price gouging on the safety and mental health of workers providing essential goods and services. 	<p>While the inquiry was not specific to fresh produce and/or supermarkets, Food and Groceries were specifically highlighted (alongside a number of other sectors) in the final report. The inquiry found:</p> <ul style="list-style-type: none"> • There is insufficient competition in the food and grocery sector as evidenced by poor price transmission to final consumers. • Market power is exercised over farmers and many other suppliers. In addition, the gain in profits from this is not passed on, certainly not promptly or fully, to consumers because of market power and a lack of competition in the product market. • Price transparency for those down the supply chain of supermarkets is low, and this is one barrier to effective price transmission. • Supermarkets have not been transparent with customers about price histories of their displayed items and their correlated discounts. <p>In turn, the report made the following recommendations:</p> <ul style="list-style-type: none"> • There should be a comprehensive ACCC inquiry into competition and prices in the retail food and grocery industry. • The Food and Grocery Code should be fully mandatory i.e. membership of retailers is mandatory and the rules are mandatory. • The Food and Grocery Code should investigate creating a price register for farmers to assist them in understanding market prices across primary industries 	<p>The notion of a price register for farmers is considered in more detail in Report 4 and Report 5.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
<p>Inquiry into promoting economic dynamism, competition and business formation (2023-2024)</p>	<p>The inquiry sought to consider:</p> <ul style="list-style-type: none"> • The effect of a diverse and dynamic business environment on: <ul style="list-style-type: none"> ○ productivity, prices and better-paid jobs ○ our supply chain resilience to disruption. • The extent to which anti-competitive behaviour and changes in industry structures have contributed to rising market concentration in Australia. • The extent to which economic barriers—such as regulatory costs and barriers to finance, infrastructure, suppliers, customers and workers—contribute to rising market concentration and slowing business formation rates in Australia. • The extent to which businesses consolidating their market power has undermined productivity, stifled wages, made markets more fragile and led to higher mark-ups. • Drawing on international examples, how Australia could lower economic barriers to competition and business formation, further limit anti-competitive behaviour, and better manage changes in industry structure that would entrench, increase or extend market power. 	<p>This inquiry is broadly relevant due to the focus on competition. Of note is Recommendation 7, which states: “That the Australian Competition and Consumer Commission be given oversight of market concentration powers.”</p>	<p>Market concentration is discussed across Reports 1-5.</p>
<p>House of Representatives Standing Committee on Agriculture Inquiry into Food Security in Australia (2022-2023)</p>	<p>The purpose of this inquiry was to consider:</p> <ul style="list-style-type: none"> • National production, consumption and export of food; • Access to key inputs such as fuel, fertiliser and labour, and their impact on production costs; 	<p>A number of recommendations put forward in the final report are broadly relevant to this project, including:</p> <ul style="list-style-type: none"> • Creating a comprehensive National Food Plan; • Appointing a Minister for Food; • Establishing a National Food Council; 	<p>Section 2.3 highlights the various government agencies connected to food waste. Given the span of agencies, it is feasible to suggest there is merit in appointing a Minister for Food.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
	<ul style="list-style-type: none"> The impact of supply chain distribution on the cost and availability of food; and The potential opportunities and threats of climate change on food production in Australia. 	<ul style="list-style-type: none"> Developing a National Food Supply Chain Map; Measures to facilitate innovation in the production of food; and Measures to eliminate food waste. <p>Of specific note is Recommendation 18: The Committee recommends that the Australian Government incorporate measures to eliminate food waste into the proposed National Food Plan, including:</p> <ul style="list-style-type: none"> A national public education campaign aimed at the elimination of household food waste. Repurposing food waste—for example as animal feed or processed food. Supporting food donation. Establishing regional food hubs. Better management of the cold chain. Improving data sharing across the food supply chain. Increasing federal funding for the food relief sector. Creating a circular economy. <p>Recommendation 19 also provides support for the Food Waste Tax Incentive.</p>	
<p>ACCC's Perishable Agricultural Goods Inquiry (2020)</p>	<p>The inquiry examined trading practices throughout supply chains, including the relationships between farmers, processors, and retailers, and the extent to which any potential bargaining power imbalances in these relationships adversely impacted the efficient operation of these markets. The inquiry also examined the ability of current laws and regulations to address the harmful effects of bargaining power imbalances.</p>	<p>Key points from the final report include:</p> <ul style="list-style-type: none"> Bargaining power imbalances are a common feature of markets for perishable agricultural goods. Economies of scale at the processing and retail levels result in market structures where there are a relatively small number of buyers acquiring the majority of produce. The more perishable a product, the more vulnerable the producer is to being subject to 	<p>These themes are noted in Report 3.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		<p>take-it-or-leave-it terms from buyers. In contrast to agricultural goods which can be stored, there is limited or no ability to delay or withhold supply to negotiate better supply terms.</p> <ul style="list-style-type: none"> • Market failure from insufficient competition and information failures can undermine the efficiency of perishable agricultural goods markets. This exacerbates bargaining power imbalances along the supply chain, particularly between producers and processors. • Bargaining power imbalances and market failures are also features at the wholesale level of supply chains for perishable agriculture goods. • Hard bargaining and low profits are features of a competitive market and do not necessarily indicate market failure. Strong and effective competition between market participants, including producers, also rewards the most efficient businesses through greater profits and growth, at the expense of the decline and exit of the higher cost businesses. • Markets that operate efficiently often do not result in an equitable distribution of profits along the supply chain. However, when traders can use their bargaining power to engage in behaviour or impose supply terms which place undue risk and uncertainty on suppliers, it undermines confidence in the supply chain and deters investment and efficient levels of supply. 	

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		<p>While all four recommendations in the final report are broadly relevant, of particular note is Recommendation 2: An economy-wide prohibition on unfair trading practices should be introduced into the ACL.</p> <p>The preamble to the report notes: the findings of this report provide further evidence that an economy-wide unfair trading practices provision is needed. Introducing a prohibition on unfair trading practices to the ACL is necessary to reduce the significant harms that are not currently captured by the provisions of the ACL, and which will not be covered by the proposed reforms to unfair contract terms laws.</p>	
<p>ACCC Digital Platforms Inquiry (2019)</p>	<p>In 2017, the ACCC was directed to consider the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets. In accordance with the Terms of Reference, the ACCC has examined the implications of these impacts for media content creators, advertisers and consumers, focussing, in particular, on the impact on news and journalism.</p>	<p>While the inquiry itself was not relevant to this project, the final reports recommends: that the Australian Consumer Law be amended to include a prohibition on certain unfair trading practices, noting that such prohibitions have been used to address similar practices overseas.</p>	<p>Section 3.3.1 considers how unfair trading practices are regulated overseas. Further to this, Report 4 highlights how the proposed changes to the Food and Grocery code align with EU laws on unfair trading practices.</p>
<p>ACCC Digital Advertising Services Inquiry (2020-2021)</p>	<p>This inquiry centred on the markets for the supply of ad tech services and ad agency services.</p>	<p>While the inquiry itself was not relevant to this project, the final report did recommend that: the Australian Consumer Law (ACL) should be amended to introduce a prohibition on certain unfair trading practices. In explaining this recommendation the report notes: We [ACCC] remain of the view that such a prohibition would enable the ACCC to undertake strategic enforcement action to address the risk of ad tech providers, advertisers, publishers, and digital platforms collecting or using data in ways that have the potential to result in substantial consumer</p>	<p>Australian Consumer Law and how trading practices are current regulated in Australia are discussed in more detail in Section 3.2.2.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		harm, but is conduct not captured by the existing provisions of the ACL.	
State			
Select Committee into Supermarket Pricing (Queensland) (2024)	<p>This state-level inquiry was tasked with considering:</p> <ul style="list-style-type: none"> rising grocery prices in Queensland and discrepancies between retail and wholesale and farmgate prices, including different-sized businesses; the variability in supermarket offerings and pricing across the state, particularly in regional Queensland and in remote Aboriginal and Torres Strait Islander communities; the long-term trends in profits accruing along the supply chain for perishable produce, with particular regard to impediments to the profitability of primary producers; the conduct of retailers in negotiations with Queensland producers, and the prevalence and effects of information asymmetry between these parties; improvements to Queensland's policy environment to increase transparency for producers, including what data will reduce information asymmetry, and/or reduce prices for consumers; and any other reviews or inquiries occurring in Australia regarding this matter, with a view to complement these analyses by focusing on potential Queensland Government responses. 	<p>A number of recommendations were put forward, including support to make the Food and Grocery Code mandatory. Of particular note is the inquiry recommendation, which has been supported by the Queensland Government, that involves creating a statutory Queensland Food Farmers Commissioner to undertake functions including, but not limited to:</p> <ul style="list-style-type: none"> promoting understanding of, and helping producers to navigate, the existing arrangements governing the relationships between supermarkets and their suppliers developing relationships with other institutions, including the Australian Competition and Consumer Commission (ACCC) and supermarket Code Arbiters to enable the referral of disputes on a confidential basis monitoring and advising the Queensland Government on developments in the national arrangements governing the relationships between supermarkets and their suppliers reporting concerns of any improper behaviours and business practices adversely impacting Queensland farmers and consumers scoping the need and feasibility of a process for mediation of disputes between supermarkets and rural suppliers. 	<p>The proposed changes to the Food and Grocery Code are discussed in more detail in Report 4.</p> <p>Charles Burke has been appointed the Queensland Food Farmers' Commissioner. The former Agforce CEO will work alongside the ACCC and 'report supermarket behaviours that impact farmers and consumers' (Marie, 2024).</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
PAST			
National			
ACCC Grocery Inquiry (2008)	<p>Matters considered by the inquiry included:</p> <ul style="list-style-type: none"> the current structure of the grocery industry including mergers and acquisitions by the national retailers the nature of competition of the grocery industry the competitive position of small and independent retailers the pricing practices of the national grocery retailers and the representation of grocery prices to consumers factors influencing the pricing of inputs along the supply chain for standard grocery items any impediments to efficient pricing of inputs along the supply chain and the effectiveness of the Horticulture Code of Conduct, and whether the inclusion of other major buyers such as retailers would improve the effectiveness of the code. 	<p>The final report put forward recommendations with respect to the Horticulture Code of Conduct, unit pricing and planning laws. Of particular note was the following statements:</p> <ul style="list-style-type: none"> The ACCC has not identified anything that is fundamentally wrong with the grocery supply chain. Evidence provided to the inquiry does not support the proposition that retail prices have risen while farm-gate prices have stagnated or declined. While there may be some instances where this has occurred, generally movements in farm-gate pricing are set by supply and demand in competitive markets. Changes in the wholesale prices that Coles, Woolworths and Metcash pay suppliers are reflected in movements in shelf prices over time. Coles, Woolworths and Metcash have significant buyer power in relation to many packaged grocery products because many suppliers effectively have little option other than to deal with these buyers. Competition between retailers is, however, sufficient to ensure that Coles and Woolworths cannot simply retain all of the benefits of the lower wholesale prices they extract—at least some of the benefits flow to consumers in the form of lower retail prices. 	<p>Since this inquiry, a number of more recent inquiries have highlights market imbalances between the supermarkets and suppliers. Added to this, recent inquiries do cast doubt on price gouging practices and whether consumers benefit from lower wholesale prices.</p>
ACCC Dairy Inquiry (2016-2018)	<p>This inquiry investigated the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry.</p>	<p>While dairy was not a focus of this report, it is worth noting that the the ACCC: identified a range of market failures resulting from the strong bargaining power imbalance and information asymmetry in farmer-processor relationships. According to the ACCC: Neither the existing</p>	<p>Contracting is discussed in more detail in Reports 3, 4, and 5.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		<p>provisions of the Competition and Consumer Act 2010 (CCA), nor a voluntary code of conduct, sufficiently address these market failures. Eight recommendations were suggested to improve transparency and allocation of risk in the commercial relationship between Australian dairy processors and farmers. This inquiry also led to the Dairy Code of Conduct becoming mandatory. Of particular note is Recommendation 1: Processors and farmers should acknowledge in writing the terms and conditions for milk supply.</p>	
<p>Senate Inquiry: Milking it for all it's worth – competition and pricing in the Australian dairy industry (2010)</p>	<p>This inquiry considered competition and pricing in the Australian dairy industry.</p>	<p>While not explicitly within the context of this project, a number of recommendations but forward in the final report are broadly relevant, including:</p> <ul style="list-style-type: none"> • Requesting that the ACCC use its powers to investigate pricing practices to consider if predatory pricing or misuse of market power is occurring. • Reviewing collective bargaining provisions. 	<p>Collective bargaining is noted in Section 3.2.1.1 and is considered in Report 4.</p>
<p>Baird Inquiry: 'Fair market or market failure—review of Australia's retailing sector' (1999)</p>	<p>The Committee was asked to inquire into and report on the degree of industry concentration within the retailing sector in Australia, overseas development with respect to this issue and possible courses of action by the federal government.</p>	<p>The inquiry found that while the retail sector in Australia is the market is heavily concentrated and oligopolistic in nature, divestiture was not recommended. However, the Hansard record of Baird highlights that: at some time in the future, provisions should be written into the Trade Practices Act [now Competition and Consumer Act] to enable possible divestiture if market dominance continued and was shown in other retail sectors. Recommendation 5 also called for a mandatory retail code of conduct.</p>	<p>Divestiture was explored as part of the Divestiture Powers Bill (2024) which was not supported by Government.</p>
<p>Reid Committee (1997)</p>	<p>The inquiry centred on fair trading in Australia and considered misuse of market power and legislative protection against unfair conduct.</p>	<p>The recommendations highlighted the need to be proactive in promoting compliance with unfair conduct provisions and ensuring the ACCC had the power to investigate and enforce the Trading Practices Act (now Competition and Consumer Act).</p>	<p>Recommendation 4.2 highlights that submissions to the inquiry detailed misuse of market power in the retail sector as early as 1997.</p>

Inquiry	Overview*	Key recommendations/points relevant to this project*	Other notes
		<p>Of particular note is Recommendation 4.2: The Committee recommends that the Australian Competition and Consumer Commission make investigation of complaints, and enforcement of the law, in relation to the misuse of market power in the retail sector a top priority in light of the high degree of concentration in that sector and the disturbing evidence submitted to the Fair Trading inquiry.</p>	

*Most of the information in the overview and key recommendations columns of the report has been taken verbatim from the relevant inquiry documents.

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