

SUBMISSION TO THE SENATE SELECT COMMITTEE ON SUPERMARKET PRICES - INQUIRY INTO PRICE SETTING PRACTICES AND MARKET POWER OF MAJOR SUPERMARKETS

Per Capita
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Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia, based on fairness, shared prosperity, and social justice. We welcome the opportunity to provide this submission to the Senate Select Committee on Supermarket Prices' 2024 *Inquiry into Price Setting and Market Power of Major Supermarkets*.

The last few years have been extremely rough on people in Australia. After a decade of wage stagnation, inflation has eaten into real wages. Consequently, hardship has increased, particularly for those in the bottom two quintiles of income, including the working poor and those dependent on welfare payments. The global pandemic, severe weather events, disruptions to international and domestic supply chains and energy shortages have all contributed to increases in the prices of essential goods. Determining what constitutes a reasonable price in these circumstances is not easy for the everyday consumer. To what extent are price spikes due to external factors and resulting supply chain disruptions? To what extent are they due to firms taking advantage of these circumstances? This is near impossible for consumers to determine at the checkout.

What is clear, as data on sales, revenues, prices and profits for the past few years shows, is that Australian competition, consumer and industrial relations laws are not working as they ought to. Gaps and loopholes have been revealed. While this period has been unusually challenging, we should not assume that we live in extraordinary times. In the coming decades our planet will experience an increase in extreme weather events.¹ This will bring, alongside other devastating consequences, increased economic disruption.²

Our submission discusses how highly concentrated markets, and the substantial market power of Australia's supermarket duopoly can harm consumers, workers, and fuel inequality. It makes several recommendations for the committee to consider.

Spotlight on supermarket pricing practises

The pricing practises and market power of Australian supermarkets have been under a spotlight in recent months, most notably through ACTU's *Inquiry into Price Gouging* in September 2023, chaired by Alan Fels. Since then, that spotlight has turned to a flood light.

¹ Intergovernmental panel on Climate Change, *Climate Change 2023* (Synthesis Report, 2023) 68-90.

² Australian Treasury, *Intergenerational Report 2023: Australia's Future to 2063* (Report, 24 August 2023).

Late in 2023, the Senate established this Select Committee on Supermarket Prices, and The Hon. Dr Craig Emerson was appointed to lead the review of the Food and Grocery Code.³ Early in 2024, Queensland Premier Steven Miles announced a parliamentary inquiry into the price of groceries,⁴ and the Australian Government announced that it will direct the ACCC to conduct an inquiry into the supermarket sector, the first in 16 years.⁵

The increased political and public scrutiny on supermarket pricing has had an immediate effect, with both major players in Australia's supermarket duopoly, Coles and Woolworths, slashing prices of red meat in recent months.⁶ The price of livestock plummeted in 2023 while the amount consumers paid remained relatively stable.⁷ While changes in retail prices typically lag behind changes in livestock saleyard prices, that major supermarkets Coles and Woolworths who both posted profits in excess of \$1 billion in 2023, can so rapidly alter prices in the face of increased scrutiny indicates that they may be overpricing and profiting from delaying passing price reductions onto consumers.

Fels has noted in his report on the ACTU inquiry (still to be published) that the fact 'that downward price transmission is not fast is evidence of a lack of competitive forces in [the supermarket] sector'.⁸ The biggest losers from this are Australian consumers, who are already struggling under increased cost of living pressures.

Australia's Competition Problem - Super Supermarkets

Australian supermarket giants exist in a highly concentrated market.⁹ Anyone shopping at major supermarkets like Coles and Woolworths will have noticed that many prices have soared. This has led to suggestions that these companies are price gouging during the cost-of-living crisis and actually making inflation worse.¹⁰

Price gouging has no formal definition in the economics discipline, but colloquially refers to sudden increases in prices that people think are too high and without justification.¹¹ It also connotes that firms are in a position in which they can raise prices in order to take profits without significant consequences.

UBS Australia's Evidence Lab tracked online prices of 60,000 grocery items at Coles and Woolworths and found that prices had outpaced inflation over the last financial year.¹² Across the duopoly prices increased

³ As per *Competition and Consumer (Industry Codes–Food and Grocery Code) Regulation 2015* s 5; Australian Government Treasury, 'Food and Grocery Code of Conduct Review 2023–24' (Web Page, 2023) < <https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review-2023>>.

⁴ Matt Eaton and Ciara Jones, 'Supermarkets to Face Queensland Parliamentary Inquiry into High Cost of Groceries and Low Farmgate Prices' *ABC news* (Online, 19 January 2024) <<https://www.abc.net.au/news/2024-01-19/qld-grocery-prices-parliamentary-inquiry-woolworths-coles/103367088>>.

⁵ ACCC, 'ACCC to Examine Prices and Competition in Supermarket Sector' (Media Release 06/24, ACCC, 25 January 2024).

⁶ Ayesha De Krester, 'Woolworths Slashes Meat Prices as Heat Rises on Gouging Claims' *The Australian Financial Review* (Online, 24 January 2024) < <https://www.afr.com/companies/retail/woolworths-slashes-meat-prices-as-heat-rises-on-gouging-claims-20240122-p5ez3c>>.

⁷ Alistair Read and Jasmine Rollan, 'Livestock Prices', *Australian Government Department of Agricultural Fisheries and Forestry* (Web Page, 5 December 2023) < <https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/livestock-prices#retail-meat-prices-have-fallen-but-by-less-than-livestock-prices>>.

⁸ Jonathan Barrett, 'ACCC Should Scrutinise Coles and Woolworths' Market Power, Former Watchdog Chair Says', *The Guardian* (Online, 25 January 2024) <<https://www.theguardian.com/australia-news/2024/jan/23/accc-supermarket-price-gouging-inquiry-grocery-prices-woolworths-coles>>.

⁹ Adam Triggs and Andrew Leigh, 'A Giant Problem: The Influence of the Chicago School on Australian Competition Law, Economic Dynamism and Inequality', (2019) 47(4) *Federal Law Review* 696, 698 ('A Giant Problem').

¹⁰ See eg, Matt Saunders and Richard, *Wage Price Spiral or Price Wage Spiral? The Role of Profits in Causing Inflation* (Report, May 2022).

¹¹ This is how it is described by the ACCC: 'Setting Prices: What's Allowed', *Australian Competition and Consumer Commission* (Web Page) < <https://www.accc.gov.au/business/pricing/setting-prices-whats-allowed>>.

¹² Jessica Bahr, 'How Much Have Grocery Prices Increased in Australia?', *SBS News* (Online, 24 May 2023) <<https://www.sbs.com.au/news/article/how-much-have-grocery-prices-increased-in-australia/ocrfv5zut>>.

9.6% in the 12 months to April 2023.¹³ This is higher than the CPI figures for food and non-alcoholic beverages, which increased 7.9% over the same period.¹⁴

Shortly after, both supermarket giants recorded profits exceeding \$1 billion for the 2023 financial year. Coles posted a NPAT of \$1.1 billion, up 4.8% from 2022,¹⁵ and Woolworths posted a NPAT of \$1.62 billion, up 4.6% from 2022.¹⁶ The profits of these companies are unusual by international standards. Coles and Woolworths are generating significantly higher profits compared to their British counterparts, reporting a profit margin of 5.3% and 5.9% respectively, compared to Tesco and Sainsbury's whose profit margins were 3.8% and 3% respectively.¹⁷

Highly concentrated (super)markets

Together, Coles and Woolworths account for 65% of Australia's grocery retail market.¹⁸ By contrast, Tesco and Sainsbury's control 42% of the UK market.¹⁹ In addition to their online stores, Coles and Woolworths have a total of 2895 store locations across Australia.²⁰ The smaller scale of the Australian grocery market makes it all the more imperative to address the behaviour of dominant firms.

Food is a necessity. It is an unavoidable expense. Moreover, in this highly concentrated market, it's difficult for consumers to shop around for a better deal.

It is not only supermarkets that are highly concentrated in Australia: we are home to numerous highly concentrated industries, many of which we rely on for essential goods and services. Research into industry concentration in Australia, measuring 481 industries, found that the weighted average market share of the largest four firms was 36%.²¹ In some industries, including department stores, newspapers, banking, health insurance, supermarkets, and domestic airlines, the biggest four firms control more than 80% of the market.²² Research published by the e61 Institute in 2023, shows that in 2017 Australian industries were more concentrated than their US counterparts and, since, have become even more concentrated.²³ The average CR4 measure across all industries increased by approximately 2.5 percentage points between 2017 and 2020.²⁴ This means that choice is declining for Australian consumers when it comes to where they purchase goods and services.

¹³ Ibid.

¹⁴ Australia Bureau of Statistics, *Monthly Consumer Price Index Indicator April 2023* (Catalogue Number 6401.0, 31 May 2023).

¹⁵ Coles Group, *2023 Annual Report* (Report, 2023) 6.

¹⁶ Woolworths Group, *2023 Annual Report* (Report, 2023) 22.

¹⁷ Jonathan Barrett, 'Australian Food Giants Making More Profit from Grocery Sales than Overseas Peers', *The Guardian* (Online, 27 July 2023) <<https://www.theguardian.com/australia-news/2023/jul/27/australian-supermarket-profits-rise-woolworths-coles>>.

¹⁸ Followed by Aldi and Metcash: 'Australia Market Overview 2023', *Hunt Export Advice* (Web Page, 2023) <<https://www.huntexportadvice.com/post/australia-market-overview-2021>>.

¹⁹ <https://www.retailgazette.co.uk/blog/2023/09/tesco-sainsbury-market-share/>

²⁰ 1800 for Woolworths and 1095 for Coles: Woolworths Group, *2023 Annual Report* (Report, 2023) 2; Coles Group, *2023 Annual Report* (Report, 2023) 6.

²¹ Andrew Leigh and Adam Triggs, 'Markets, Monopolies and Moguls: The Relationship Between Inequality and Competition' (2016) 49(4) *The Australian Economic Review* 389.

²² Ibid.

²³ Dan Andrews, Elyse Dwyer, Adam Triggs, 'The State of Competition in Australia' (Research Note no 9, 30 August 2023).

²⁴ *ibid.* Four-firm concentration ratio (CR4) refers to the market share of the four largest firms. The higher the concentration ratio, the more concentrated the industry. A market is generally considered highly concentrated if the CR4 is greater than 50 percent.

Highly concentrated industries that manifest unfettered pricing, place consumers, workers and productivity growth at a disadvantage.²⁵ Additionally, the evidence that there is a relationship between reduced competition and rising inequality continues to grow.²⁶

Firms can operate outside of the best interest of consumers in a market in which their share of sales is large enough to influence the price of goods or services sold – this is known as price setting. In such an environment, price setting firms can raise prices for reasons other than as a response to increased costs, or for other purposes such as expanding investment or for productivity improvements. Where competitors arise, they can be quashed through a variety of tactics such as controlling specific supply chains in groceries, or pricing out competitors even at a loss. The tendency over time is not toward greater competition but towards concentration.

It is now clear that the unwavering trust that many governments, including those in Australia, have previously put in the market's capacity to self-regulate and produce competitive and benevolent results has been misplaced.²⁷

The ability to generate price mark-ups that we have witnessed in major supermarkets will remain present so long as the current regulatory settings allow for it. Left unchecked, this will likely continue to contribute to inflation and increased hardship for households, especially those in the lower half of the income distribution.

Lack of competition affects consumers

Conditions that allow businesses to systematically take advantage of vulnerable consumers are far too common in Australia. Many business practises seem unfair, or unjust, but remain legal under *Australian Consumer Law (ACL)*.²⁸

Take for example the story of Newcastle resident Rachel King, told by Guardian Australia journalist Johnathan Barret in June last year. King began tracking the price of a coffee product she regularly bought from Woolworths. In the 18 months from the end of 2021 the product could normally be bought for about \$14 as part of the store's *prices dropped* promotion. However, at the beginning of 2023 'the price went from \$14 to \$22 and then discounted to \$15, with the latter advertised as a *cost saving*, even though it was above the price charged just weeks earlier.'²⁹

This sort of marketing strategy can fool even the most astute of shoppers. It is one of the tricks supermarkets use to get consumers to buy more. Jana Bowden, Professor of Marketing and Consumer Behaviour at Macquarie University, explains how these marketing tricks 'get us to impulse-buy or buy more in order to qualify for the deal – and when we get a deal, we get a temporary shopper's dopamine high'.³⁰

²⁵ See, eg Stephen Nickell, 'Competition and Corporate Performance' (1996) 104(4) *Journal of Political Economy* 724,741. In this British study Nickell found that a 25% increase in market concentration leads to a 1% decrease in productivity.

²⁶ Sean Ennis, Pedro Gonzaga and Chris Pike, 'Inequality: A Hidden Cost of Market Power' (Discussion Paper, OECD Competition Division, 2017).

²⁷ Triggs and Leigh, 'A Giant Problem' (n 9) 709.

²⁸ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

²⁹ Jonathan Barrett, 'What the Price of Nescafé at Woolworths Tells Us about Supermarket Promotion Tactics', *The Guardian* (Online, 11 June 2023) <<https://www.theguardian.com/business/2023/jun/11/what-the-price-of-nescafe-at-woolworths-tells-us-about-supermarket-promotion-tactics>>.

³⁰ Jenny Baldwin, 'Supermarket Psychology: Tactics to Get You to Spend More', *Choice* (Online, 10 January 2023) <<https://www.choice.com.au/shopping/everyday-shopping/supermarkets/articles/supermarket-sales-tricks>>.

Price promotions are recognised as a ‘particularly persuasive tactic’ that can ‘strongly influence purchasing decisions’.³¹ It is widely recognised that the perceived cost and affordability of food play a crucial role in shaping food preferences, especially among individuals from lower socioeconomic backgrounds.³² Analysis of ABS data by Guardian Australia in January 2024 found that ‘[s]upermarket promotional items can sell at up to 70 times their normal rate...[and is] a sign of the market power the grocery giants exert over Australian households’.³³

The ability for major supermarkets to use price promotions as a major competitive weapon may carry short term benefits for consumers, especially when the two major players are engaged in a supermarket price war. Firms may even be selling some items at a loss. But in the long run *the house always wins*. This tactic used by supermarket giants disincentivises new entrants to an unattractive market where those with the lowest prices survive, and squeezes out other marginal players, or leads to take overs by larger firms, such as the 2009 acquisition of Macro Wholefoods Market by Woolworths.³⁴ In the long run, when price promotions dwindle at major supermarkets, consumers are left with a little option but to continue purchasing from these stores.

There are numerous examples of market giants misleading or deceiving consumers. Such practices harm consumers and competitors. One example is when Coles marketed *Freshly Baked In-Store* bread that had been partially baked and frozen off-site.³⁵ This action was misleading to customers and likely carried consequences for smaller bakery businesses that actually do freshly bake bread each day in store. In this situation Coles was found to have made false or misleading representations and was ordered to pay \$2.5 million in penalties.³⁶ However other conduct like that described by King (above) might seem dishonest, but if it doesn’t reach the threshold for misleading, deceptive, or unconscionable conduct, then it is not against the law.³⁷ Without a prohibition on unfair trading that plugs the gap between s 18 and s 20-1 of the *ACL* (misleading or deceptive conduct and unconscionable conduct), systematic conduct that might otherwise not be considered unconscionable or misleading will continue to occur.

Weak competition and more consumer complaints

The environment of weakening competition allows consumers to be treated even more poorly, and they are. One way that this can be seen is by looking at the number and nature of complaints received each year by the Australian Competition and Consumer Commission (ACCC). Between the 2014 and 2020 financial years the number of complaints received by the ACCC related to alleged breaches of the *ACL* almost doubled (see Figure 1).

³¹ Lily Grigsby-Duffy et al, ‘The Healthiness of Food and Beverages on Price Promotion at Promotional Displays: A Cross-Sectional Audit of Australian Supermarkets’ (2020) 17(23) *International Journal of Environmental Research and Public Health*.

³² Ibid. See also, Joreintje D Mackenbach et al, ‘A Systematic Review on Socioeconomic Differences in the Association between the Food Environment and Dietary Behaviors’ (2019) 11(9) *Nutrients* 2215; Nicole Darmon and Adam Drewnowski, ‘Contribution of Food Prices and Diet Cost to Socioeconomic Disparities in Diet Quality and Health: A Systematic Review and Analysis’ (2015) 73(10) *Nutrition Reviews* 643.

³³ Jonathan Barrett, ‘Groceries on Special Fly off Australian Supermarket Shelves at 70 Times Normal Rate’, The Guardian (Online, 21 January 2024) <<https://www.theguardian.com/business/2024/jan/21/australia-supermarket-grocery-specials-deals-sales-data-unhealthy-food>>.

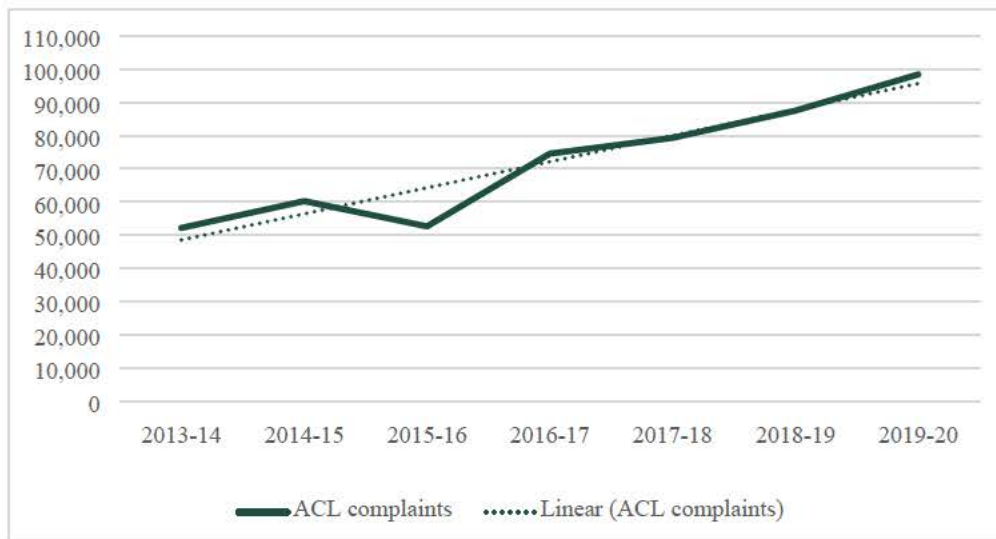
³⁴ See, SMH ‘Do Consumers Really Benefit from the Supermarket Price Wars?’, *The Sydney Morning Herald* (Online, 9 April 2011) <<https://www.smh.com.au/politics/federal/do-consumers-really-benefit-from-the-supermarket-price-wars-20110408-1d7g6.html>>.

³⁵ Australian Competition and Consumer Commission, ‘Coles to Pay \$2.5m for Misleading “Baked Today” and “Freshly Baked In-Store” Bread Promotion’ (Media Release 58/15, ACCC, 10 April 2015).

³⁶ Ibid.

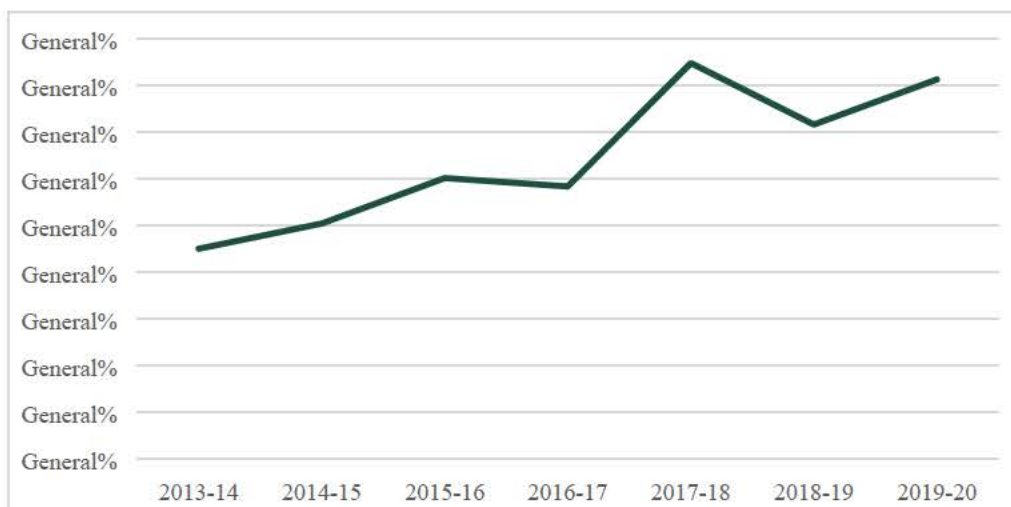
³⁷ *Australian Consumer Law* (n 28) ss 18, 20-22. There have been successful actions brought under s 18(1) regarding misleading statements as to current and former pricing but these included a WAS and NOW price where the goods had never been sold at the higher price. This is not the case in the coffee example, prices had dropped: see, *Australian Competition and Consumer Commission v Allans Music Group Pty Ltd* [2002] FCA 1552; *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd* (No 2) [2008] FCA 476.

Figure 1.
Number of complaints received by the ACCC related to Australian Consumer Law



While the number of total contacts to the ACCC has increased at a similar rate,³⁸ the number concerning misleading or deceptive conduct,³⁹ and false representations⁴⁰ more than tripled between 2014 and 2020, reaching 41% of all complaints (see Figure 2).

Figure 2
Percentage of ACL complaints relating to misleading or deceptive conduct and false representations



Source: authors own calculations based on ACCC annual reports 2013-14 to 2019-20.

The need for a prohibition on unfair trading

The *ACL* prohibitions on misleading, deceptive, and unconscionable conduct, along with recent enhancements made to the unfair contract terms provisions,⁴¹ are intended to provide consumers with a general protection against predatory business practise. Yet there remain systematic unfair business practices that target

³⁸ Using ACCC annual reports, *ACL* complaints increased 88.09% and total complaint increased 76.3% between 2014 and 2020 financial years.

³⁹ *Australian Consumer Law* (n 28) s 18.

⁴⁰ *Ibid* s 29.

⁴¹ *Australian Consumer Law* (n 28) ss 24-8; *Treasury Law Amendment (More Competition, Better Prices) Act 2022* (Cth).

vulnerable consumers, which are not caught by these prohibitions.⁴² These include manipulative digital market strategies, enabled by a growth in digital technologies like the use of data collection and predictive analytics that allow businesses to individualise its approach to consumers and ‘which promote an illusion of choice where none actually exists’.⁴³

Prohibitions on unconscionable conduct, based on equitable principles related to conscience and morality, have proven outdated in today’s services driven economy.⁴⁴ Statutory unconscionable conduct,⁴⁵ which was intended to be unshackled from the *unwritten law*, has been consistently interpreted by the High Court in a way that gives weight to a conservative model, ironically based on the restrictive equitable doctrine.⁴⁶ The prohibition imposes a high threshold before conduct can be considered unconscionable, so that conduct that is simply unfair or unjust is not captured.⁴⁷

Several difficulties arise when enforcing unconscionable conduct provisions. There are evidentiary challenges. Victims who are often vulnerable or disadvantaged may be less willing to complain and, when they do, are more easily intimidated, or have limited time to allocate to the issue.⁴⁸ The term itself is complex, demanding an understanding of the interplay between judge-made and statutory law. It is difficult for consumers to recognise when conduct qualifies as *unconscionable*.⁴⁹

One solution is the introduction of a prohibition on unfair trading in the *ACL*. We note that adopting a prohibition on unfair trading practises has been recommended by the ACCC,⁵⁰ and that a public consultation has recently concluded on options for addressing unfair trading practises.⁵¹

Conduct that is not necessarily misleading, or doesn’t reach the threshold for unconscionability, can distort competition and harm consumers. Capturing this conduct under consumer laws will aid in empowering consumers to address the sorts of unfair business practises that we have witnessed over recent years, which have helped to deliver massive profits for big companies and made it more difficult for small businesses to enter the market during a cost-of-living crisis.

⁴² Jeannie Paterson and Elise Bant, ‘Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online’ (2021) 44 *Journal of Consumer Policy* 12-5; Gerard Brody and Katherine Temple, ‘Unfair but Not Illegal: Are Australia’s Consumer Protection Laws Allowing Predatory Businesses to Flourish?’ (2016) 41(3) *Alternative Law Journal* 161, 161-2 (‘Unfair but Not Illegal’)

⁴³ Ibid 13.

⁴⁴ Brody and Temple, ‘Unfair but Not Illegal’ (n 42) 161.

⁴⁵ *Australian Consumer Law* (n 28) s 21.

⁴⁶ See, Chris Maxwell, ‘Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce’ (Victorian Law Foundation Oration, 14 August 2019); *ASIC v Kobelt* (2019) 368 CLR 1, 25, 31. *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409 failed to liberate statutory unconscionability from this conservative approach instead ‘suggested a closer relationship between equitable principles underpinning the broader unconscionability doctrine and the doctrine’s statutory varieties...[and] has also left the door ajar for moral obloquy to return’: Mark Giancaspro ‘Still Jammed! Lingering Questions About the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409’, (2023) 35(1) *Bond Law Review* 1, 36.

⁴⁷ *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121].

⁴⁸ See, Australian Law Reform Commission, *Uniform Evidence Law: Examination and Cross Examination of Witnesses* (ALRC Report No 102, 8 February 2006) ch 5.

⁴⁹ Brody and Temple, ‘Unfair but Not Illegal’ (n 42) 163.

⁵⁰ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) rec 21. See also, Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, 2017) 48.

⁵¹ Australian Treasury, ‘Unfair trading practices - Consultation Regulation Impact Statement’ (Web Page) <<https://treasury.gov.au/consultation/c2023-430458#:~:text=Unfair%20trading%20practices%20are%20particular,consumer%20and%20small%20business%20harm.>>

Competition and inequality

Australians live in a rich country, one of the richest in the world.⁵² In 2023 Australia ranked 10th highest GDP per capita in the world and third highest among the world's 20 largest economies.⁵³

But in our wealthy country, more than 90% of the gains from economic growth go to the top 10 % of income earners.⁵⁴ Company profits are soaring, while real wages are falling.⁵⁵ The number of Australians working multiple jobs has hit a record high as people do what they can to survive during a cost-of-living crisis.⁵⁶ A job is no longer necessarily enough to stave off poverty in our country, with around 5% of full-time and 14% of part-time workers being in poverty prior to the recent inflationary period.⁵⁷ The evidence suggests that more Australians are turning to charities just to meet their basic needs.⁵⁸

At a time when 36% of Australian households are experiencing moderate to severe food insecurity,⁵⁹ a third of all the food we produce in Australia is going to waste.⁶⁰ Researchers at Queensland University of Technology contend that much of the food wastage in Australia can be attributed to the market power of our supermarket duopoly, noting that '[f]ood waste is one symptom of excessive market power'.⁶¹

Other nations have taken legislative action to limit supermarket food waste. For example, in 2016 France passed the Loi Garot, or *law on the fight against food waste* which requires supermarkets to donate unsold food to charities and food banks. But if the root cause of the problem is excessive market power, then such laws, while potentially helpful, do little to address that cause.

Reducing concentration in Australian industry can play a significant role in reducing inequality. As Adam Triggs and Andrew Leigh point out in their 2019 article for the *Federal Law Review*: 'a growing body of evidence suggests that the rise in inequality and the fall in competition are not merely coincidental'.⁶² Among other studies, they point to:

- An analysis of eight economies⁶³ that suggests that market power and higher prices increase the wealth of the richest 10% of the population in those eight OECD countries by between 12% and 21%, while at the same time reducing the disposable income of the poorest 20% by between 14% and 19%.⁶⁴

⁵² Australia has the 13th largest economy in the world, based on gross domestic product in terms of nominal value: International Monetary Fund, *World Economic Outlook* (April 2023).

⁵³ Ibid.

⁵⁴ David Richardson and Matt Grudnoff, *Inequality on Steroids: The Distribution of Economic Growth in Australia* (Report, April 2023).

⁵⁵ Australian Bureau of Statistics, *Business Indicators Australia, March 2023* (Catalogue no 5676.0, 5 June 2023); Australian Bureau of Statistics, *Consumer Price Index, Australia, March 2023* (Catalogue no 6401.0, 26 April 2023); Australian Bureau of Statistics, *Wage Price Index, Australia, March 2023* (Catalogue no 6345.0, 17 May 2023).

⁵⁶ Australian Bureau of Statistics, *Labour Account Australia, March 2023* (Catalogue no 6150.0.55.003, 9 June 2023).

⁵⁷ Urban Sila and Valéry Dugain, 'Income Poverty of Households in Australia: Evidence from the Hilda Survey' (Economics Department Working Paper No 1539, OECD, 14 February 2019).

⁵⁸ Australian Council of Social Services, *Poverty in Australia 2018* (Report, 2018) 13.

⁵⁹ Ipsos and Foodbank, *Foodbank Hunger Report 2023: National Key Findings Report* (Report, 25 September 2023).

⁶⁰ CSIRO, 'The Challenge of Ending Food Waste and Food Insecurity in Australia', *CSIRO* (Web Page, 17 November 2023) <<https://www.csiro.au/en/news/all/articles/2023/november/food-waste-food-insecurity>>.

⁶¹ Carol Richards and Bree Hurst, 'Powerful Supermarkets Push the Cost of Food Waste onto Suppliers, Charities', *The Conversation* (Online, February 29, 2016) <<https://theconversation.com/powerful-supermarkets-push-the-cost-of-food-waste-onto-suppliers-charities-54654>>.

⁶² Triggs and Leigh, 'A Giant Problem' (n 9) 708.

⁶³ Canada, France Germany, Korea, Japan, Spain, UK and the US

⁶⁴ Ennis, Gonzaga and Pike, 'Inequality: A Hidden Cost of Market Power' (n 26) 3.

- 1998 research, using Australian Household Expenditure Survey data, which revealed that the welfare loss linked to monopoly control has a more pronounced impact on low-income compared to high-income households.⁶⁵
- Research by World Bank economists who reviewed literature on the economies in developed and developing countries and concluded that low competition in food markets disproportionately harms poor consumers and households.⁶⁶

There is a solution: the enforcement and effective deployment of competition law and other policy tools can be used to address concerns about increasing inequality. This was the conclusion of researchers from the Centre for Competition Law and Policy at the University of Oxford, who analysed decisions made under European and UK Competition law over a 15-year period to 2020. They found that competition law enforcement resulted in greater proportional savings for low-income and average-income households compared to high-income households.⁶⁷

Competition at the root of the problem

Implementing laws like Frances's food waste law or changes to the ACL could help consumers with the consequences of excessive market power that major supermarkets have in Australia, but they do little to combat the root of the problem. These are symptoms of excessive market power.

While we strongly encourage the implementation of a prohibition on unfair trading in the *ACL*, the market power of major supermarkets needs more scrutiny. The ACCC inquiry announced in January 2024 is a step in the right direction but strengthening the powers of, and increasing resources to, the ACCC so it can actively monitor market supply chains and take swifter action on competition and consumer issues is needed.

Australian competition law lacks powers that many competition laws in other advanced economies include.⁶⁸ The merger control regime is supposed to protect against harmful anticompetitive behaviour but, as Rod Sims, then chair of the ACCC, said in 2021, merger control laws are 'no longer fit for purpose'.⁶⁹ He pointed to the merger control regime's insufficient focus on structural conditions for competition and that the regime is skewed towards clearance.⁷⁰

While Section 50 of the *Competition and Consumer Act 2010* (Cth) ('CCA') prohibits mergers that 'would have the effect, or be likely to have the effect, of substantially lessening competition in any market',⁷¹ there is no mandatory obligation for pre-merger notification to the ACCC. This puts Australian laws out of step with other regimes and makes it difficult for the ACCC to catch undesirable mergers.⁷²

Indeed, early findings from the Federal Government's Competition Review⁷³ reveal that an alarming number of mergers involving Australian companies are escaping the notice of the ACCC due to the voluntary notification system. In an address unveiling these initial findings on 30 January 2024, Assistant Minister for Competition, Charities and Treasury The Hon. Dr Andrew Leigh said:

⁶⁵ John Creedy and Robert Dixon, 'The Relative Burden of Monopoly on Households with Different Incomes' (1998) 65(258) *Economica* 285, 285

⁶⁶ Tania Begazo and Sara Nyman, 'Competition and Poverty: How Competition Affects the Distribution of Welfare' (Viewpoint, 1 March 2016) 7.

⁶⁷ Christopher Decker et al, 'Competition Law Enforcement and Household Inequality in the United Kingdom' (2022) 18(4) *Journal of Competition Law and Economics* 905, 932.

⁶⁸ See, Annalisa Heger and Allan Fels AO, 'The future of merger law in Australia' (2023) 30(1) *Competition & Consumer Law Journal* 1.

⁶⁹ Rod Sims, 'Protecting and Promoting Competition in Australia Keynote Speech' (Speech, Competition and Consumer Workshop 2021, Law Council of Australia, 27 August 2021).

⁷⁰ Ibid.

⁷¹ Competition and Consumer Act 2010 (Cth) s 50(1).

⁷² See, Annalisa Heger and Allan Fels AO, 'The future of merger law in Australia' (2023) 30(1) *Competition & Consumer Law Journal* 1.

⁷³ <https://treasury.gov.au/review/competition-review-2023>

Under the voluntary notification system, the Australian Competition and Consumer Commission has considered about 330 mergers each year on average over the past decade. Initial results from the mergers database tracking labour flows suggests there are many more mergers than this each year, somewhere between 1,000 and 1,500. For every merger that is notified to the Australian Competition and Consumer Commission, there are two to three more mergers and acquisitions that take place⁷⁴.

We welcome the focus of the Competition Review on the many weaknesses in our competition laws and note that these issues are also being considered by the House of Representative Standing Committee on Economics' *Inquiry into Promoting Economic Dynamism, Competition and Business Formation*.

In Fels' submission to this parliamentary inquiry he made several recommendations, including that courts be given the power to order divestiture, when appropriate, in circumstances where firms abuse market power in breach of s 46 CCA.⁷⁵ A similar idea was put in 2014 in Xenophon's *Competition and Consumer Amendment (Misuse of Market Power) Bill 2014* (Cth), which aimed to give courts powers to order divestiture for corporations that breach s 46 and which was very clearly aimed at supermarkets. This Bill was not passed.

Divestiture powers have always been controversial. They have been considered by several competition policy reviews and rejected. However, in 2019 the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* (Cth) introduced divestiture powers in limited circumstances as a court-ordered remedy for companies engaging in prohibited misconduct.

Considering the consequences that have emerged due to the price setting power of supermarkets, divestiture powers for market abuse should be considered. Market power is hurting Australian consumers and concentration in the grocery retail trade is increasing. As Sims noted '[w]ithout action, market power in Australia will become further entrenched; and will certainly not reduce'.⁷⁶

Competition and workers

Anti-competitive behaviour harms consumers, but it also harms workers. Triggs and Leigh note that wages are driven by competition and, thus, less competition means a lower wage share in national income.⁷⁷

In Australia, industries with higher market concentration tend to have a lower wage share.⁷⁸ Research undertaken at the US National Bureau of Economic Research found that American industries that had experience increased product market concentration between 1982 and 2016 had experienced a larger decline in labour share.⁷⁹

Workers have not been equally or adequately rewarded for their work, as their real wages have consistently lagged labour productivity growth.

With high market concentration, like that in the Australian grocery sector, there are fewer options for workers to move within the industry. This reduces their bargaining power and makes them more vulnerable to breaches of their rights and entitlements.

⁷⁴ <https://ministers.dewr.gov.au/leigh/game-changer-harnessing-microdata-fairer-competition-landscape>

⁷⁵ Alen Fels, Submission No 31 to House of Representatives Standing Committee on Economics, Parliament of Australia, Inquiry into Promoting Economic Dynamism, Competition and Business Formation (19 April 2023).

⁷⁶ Rod Sims, 'Protecting and Promoting Competition in Australia Keynote Speech' (Speech, Competition and Consumer Workshop 2021, Law Council of Australia, 27 August 2021).

⁷⁷ Triggs and Leigh 'A Giant Problem' (n 9) 699

⁷⁸ Ibid 700, citing Leigh and Triggs, 'Markets, Monopolies and Moguls' (n 21) 401.

⁷⁹ David Autor et al, 'The Fall of the Labor Share and the Rise of Superstar Firms' (NBER Working Paper No 23396, May 2017) 3, 25.

We have seen this on a massive scale in big supermarket chains. The Fair Work Ombudsman ('FWO') alleges that 7,805 salaried employees were underpaid a total of \$113.8 million by Coles Supermarkets between 1 January 2017 and 31 March 2020. The FWO alleges that one employee was underpaid \$469,921 and 44 were underpaid in excess of \$100,000.⁸⁰ Running alongside the regulatory proceedings brought by the FWO, is a Coles class action, regulatory proceedings against Woolworths, and a Woolworths class action. The FWO also alleges that Woolworths underpaid 70 employees a total of \$1,172,282 between March 2018 and March 2019.⁸¹

Industrial Relations reform

There are a number of loopholes in our existing Industrial Relations laws which the government is seeking to address in legislation that is currently before the Parliament.⁸² It is our strong position that, in light of the challenges faced by Australian workers, many working in highly concentrated industries, the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) should be passed into law.

Introducing a new definition for casual employees and an easier employee choice pathway to permanent employment, and reinstating the multi-factorial test to determine whether a worker is an employee or independent contractor, will help lift wages and reduce insecure work that makes high inflation even more difficult for Australian workers. In addition, the above-mentioned conduct by Coles and Woolworths presents a strong case for the implementation of criminal penalties for wage theft, which was passed into law in the first part of the Closing Loopholes Bill 2023.

Conclusion

Concentrated markets allow market giants to more easily capitalise on difficult times. This harms consumers, workers and competitors, and plays a role in exacerbating inequality. In our submission we have focused on the issues that have faced consumers and workers during the last few years, and potential legislative amendments that aim to give these cohorts more power. These should occur in concert with competition law reforms that bring Australia into line with the competition laws found in many similar economies.

The last three years have been difficult, but more tough times are coming. One way to combat this, although by no means the only way, is by reforming provisions in existing laws, the *CCA*, *ACL* and the *Fair Work Act 2009* (Cth), which are no longer functioning in the best interests of the Australian public. These are on the government's agenda, but the speed in which big businesses are innovating and finding new ways to rip off consumers and workers, calls for swift reforms.

Per Capita is grateful for the opportunity to make this submission and looks forward to the inquiry's findings.

Recommendations

- ☐ Legislate a prohibition on unfair trading practises in the *ACL*.
- ☐ Increased resourcing for the ACCC to actively monitor pricing practises of supermarkets and better respond to growing consumer complaints.

⁸⁰ Fair Work Ombudsman, 'FWO Takes Action against Coles Supermarkets' (Media Release, 10 January 2023).

⁸¹ Fair Work Ombudsman, 'FWO Takes Action against Woolworths' (Media Release, 18 June 2021).

⁸² Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth).

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- ☐ Legislate for compulsory premerger notification to the ACCC.
- ☐ Legislate for Courts to be given the power to order divestiture as a remedy for corporations that abuse market power (in breach of s 46 *CCA*).
- ☐ Pass the remainder of the Closing Loopholes Bill in its entirety.