

ACCC Supermarkets Inquiry 2024-25

Submission of The Australian Workers' Union and Retail Supply Chain Alliance

April 2024



Introduction

The Australian Workers' Union (AWU) is one of Australia's largest and most diverse unions. We represent around 72,000 workers, including thousands of workers in agriculture, meat processing, food manufacturing and packing. From fruit and vegetables to mince, bread, chips and sugar, our union has a role in feeding millions of Australians. This is a highly diverse workforce - located across regional and suburban Australia and counting citizens, members of the PALM scheme and other migrant cohorts among its ranks.

The Retail Supply Chain Alliance (RSCA) is a joint initiative between the AWU, the Transport Workers' Union and the Shop Distributive & Allied Employees Association. We represent and advocate for workers in every facet of Australia's horticulture supply chain – supporting fairness from the farm to the front gate. The alliance was formed in 2019 with the principal goal of ending worker exploitation in this supply chain.

The ACCC's Supermarkets Inquiry 2024-25 ('the inquiry') touches directly on our unions' interests. Across the supply chain and in grocery retail, our members are affected by the inordinate market power possessed by Australia's major supermarkets. A fair, genuinely competitive and well-regulated sector will support better pay and conditions for our members at work - as well as lower prices for all workers at the checkout. Reform to strengthen the *Competition and Consumer Act 2010* (CCA) is, in our view, key to facilitating these outcomes.

We also implore the ACCC to use the inquiry to advocate rather than merely inform government. Concerns around many of the issues that have informed the project are both widespread and acute. This is also an area with a long history of inquiries. The issues explored in this submission, the need for more effective competition and fair trading policy, and many of the solutions we propose will be familiar to engaged stakeholders. The time for deferral and delay has long passed.

The AWU and RSCA are pleased to provide the following submission, exploring issues related to the inquiry's terms of reference, below.

Market power, supermarkets and the supply chain

The position of Coles and Woolworth in much of Australia's food and grocery supply chain is a matter of enduring concern to the AWU and RSCA. The major supermarkets are empowered to exploit a position of dominance in relation to both their suppliers and customers - with adverse impacts for workers across the supply chain.

In our firm submission, the excess market power of Coles and Woolworths is beyond reasonable contention. Collectively, these organisations account for 65% of Australia's retail food and grocery market. No other retailer enjoys a share above 10%.¹ By way of comparison, the United Kingdom's two largest grocery retailers command 33% of the market. In the United States, the figure is 42%.² Despite the disparity between Coles and Woolworths and their competitors, these figures may in fact understate their position: Almost nine in ten Australians say they primarily shop at one of the 'big two'.³

Ultimately, the unchecked expansion of Coles and Woolworths has become nearly self-perpetuating. In the current economic and regulatory environment, it is very difficult for potential competitors to achieve the scale required to meaningfully compete with Coles and Woolworths. The absence of even prospective like-for-like competition entrenches the major supermarkets and empowers them to pursue still greater market share.

As a result of their dominance, the major supermarkets often represent an agricultural or grocery supplier's primary or even sole buyer. Coles and Woolworths have pursued supply chain integration to deal directly with suppliers wherever practicable. They have acquired other retailers or select stores. They have also incorporated a number of wholesalers into their operations, and sidelined others by selling products acquired directly under in-house labels.⁴

The capacity of many suppliers to circumvent the narrow buyers' landscape by prioritising export markets is limited. While primary producers of products such as grain and sugar do principally sell into foreign markets, this not the case for suppliers of highly perishable goods such as fruit and dairy products.⁵ In the grocery space, exports account for barely more than a quarter of revenue.⁶

Thus, major supermarkets hold disproportionate power over food and grocery suppliers. Coles and Woolworths can and do exert unfair pressure on suppliers in a way that would not occur in a competitive, well-regulated market. Dictation of prices and terms of supply is commonplace. So, too, is exploitation of information asymmetries arising from the uncompetitive dynamic. These issues are strongly reflected in several past inquiries,⁷ in submissions to the ongoing *Senate Select Committee on Supermarket Prices*,⁸ and in our direct engagement with workers and employers.

The impacts of such practices are felt across the food supply chain, but especially by suppliers and their workers. The imposition of unfair prices and terms on suppliers ultimately impacts their capacity to offer higher wages to their workers and, in severe cases, may incentivise wage theft. It also reduces suppliers' capacity to invest, and to attract outside investment – restraining productivity growth and suppressing wages further.⁹

In the supermarket sector itself, Coles and Woolworths' predominance affords them inordinate power over their own workers in bargaining. The capacity of workers at major supermarkets to seek outside employment in response to uncompetitive wages and conditions is restrained by a dearth of comparable alternative employers.

It also impacts all AWU and RSCA members, and all working Australians, in the form of higher grocery prices than a competitive and effectively regulated market would provide. Coles and Woolworths' dominance allows them to avoid reducing prices wherever possible.¹⁰ Except in rare instances of demonstrable cartel conduct, this practice is entirely legal. Indeed, the major supermarkets have reported markedly increased profits as a percentage of revenue in recent years, despite rising input costs.¹¹ This suggests they have capitalised on expectations of high prices arising from inflation, rather than bearing the burden of increased input costs via reduced profits, as competitive market conditions would suggest. For example, the Australian Meat Industry Employees Union provides that the price of kangaroo mince has doubled over the last three years despite no significant shift in the market.¹²

Such practices would be egregious at any time, but are especially so during an economy-wide cost of living crisis. Depending on household composition, average expenditure on food as a proportion of household income is ranges from 7% to nearly 12%.¹³ This makes the supermarket spend a large component of most households' overall budget. Indeed, *Finder's Consumer Sentiment Tracker Survey* suggests that Australians rank groceries as the most stressful household expense – ahead, even, of rent and mortgage payments.¹⁴

Finding: Coles and Woolworths possess inordinate market power in much of Australia's food and grocery supply chain. This affords them substantially greater power over both suppliers and their own employees than a competitive market would provide.

Finding: Coles and Woolworths' market power affords them the capacity to charge higher retail prices than a competitive market would provide.

The scope of this power imbalance, and its adverse implications for millions of workers, shoppers and suppliers alike, necessitates a much stronger regulatory hand from government. In the AWU and RSCA's firm submission, a suite of reforms are required to adequately address power imbalance in the food and

grocery supply chain. As we outline below, these should centre around expanding the scope of the CCA. Collectively, they would:

- Support enhanced regulation of unfair and anti-competitive practices by the ACCC;
- Deliver government enhanced powers to intervene in relation to mergers; and
- Improve supplier access to information to address information asymmetries.

Fair trading regulation

The AWU and RSCA support the ACCC's call to reform the CCA to prohibit 'unfair trading practices'. This would afford the ACCC enhanced power to police unfair and anti-competitive conduct by the major supermarkets against suppliers and shoppers.¹⁵ The Act should provide the Commission scope to impose penalties for unfair trading. The maximum penalty should be suitably large as to empower the ACCC to pursue a fine proportionate to the scope of any misconduct.

A provision of such generality and scope is necessary because the CCA in its present form does not provide the commission with sufficient power to police unfair conduct. While the Act does prohibit 'unconscionable conduct', it sets the standard for the offence so high as to afford bad actors wide scope for unfair and anti-competitive behaviour. Unconscionable conduct, as prescribed in the CCA, requires that the offending conduct is "*particularly harsh or oppressive or where one party knowingly exploits the special disadvantage of another...it must be against conscience.*"¹⁶ As such, the offence is only called upon to address instances of especially poor behaviour. For example, Coles was fined \$10 million in 2010 for demanding that over 200 suppliers make payments to which the supermarket was not entitled by threatening harm in the event of non-compliance.¹⁷ Likewise, the CCA's prohibition on unfair contract terms is narrow in its scope. These protections apply only to small businesses and cannot capture conduct falling outside the terms of a standard form contract.¹⁸

Recommendation: The Commonwealth should:

- Amend the *Competition and Consumer Act* to prohibit 'unfair trading practices'; and
- Afford the ACCC scope to impose penalties for unfair trading proportionate to misconduct captured by the provision.

The AWU and RSCA also support the recommendation in Professor Allan Fels AO's report into price gouging that the CCA should prescribe an offence of 'charging excessive prices'. The provision's design should be similar to that of the European Union's competition regulation. This prohibits a 'dominant firm' from charging prices that are determined to be unfair in relation to a competitive benchmark. The benchmark is set with reference to 'an appropriate measure of costs or comparison with prices charged in a comparable situation'. The offence hinges on exploitation of buyers rather than broader harm to competition.¹⁹

Given the potential for unintended adverse consequences from stringent price regulation, the CCA should mandate a high threshold for intervention by the Commission. This, too, would reflect the approach taken by EU member-states; "*There is a growing consensus among competition agencies that controlling prices should be limited to exceptional circumstances. Moreover, where such circumstances justify them...price controls should be based on a sound economic analysis of market circumstances and carried out with the utmost caution.*"²⁰

Recommendation: The Commonwealth should:

- Amend the *Competition and Consumer Act* to prohibit 'charging excessive prices';
- Afford the ACCC scope to impose penalties for charging excessive prices proportionate to any misconduct captured; and
- Mandate a high threshold for conduct that makes out the offence.

Merger regulation

The AWU and RSCA support an expansion of the CCA's regime of oversight and control of mergers, to afford the ACCC genuine capacity to restrain anti-competitive mergers. At present, the Act broadly prohibits a merger where it would, or is likely to, substantially limit competition. A merger proponent may apply to the ACCC for assessment and authorisation before the fact (though it is not required to do so).

We suggest reform is required to address a number of shortcomings in this regime. For instance, the voluntary assessment and authorisation process does not empower the ACCC to require the provision of information. Assessment is conducted largely on an informal basis and at the discretion of the proponent. This supports proponents to withhold or delay the provision of information, and to otherwise engage with the regulator in bad faith.²¹ Australia is one of only three OECD member-states without a mandatory merger control regime.²²

Further, the ACCC is not able to determine that a proposed merger offends the CCA in its own right. Any such decision is reserved for the judiciary, with the ACCC required to demonstrate to a court that the action is in breach of the Act. This constrains the Commission - complicating and increasing the cost of enforcement.

The regime is also ill-equipped to deal with supermarkets' 'creeping' acquisition of competitors – that is, the practice of acquiring a small number of stores per transaction, repeatedly and over time.²³ While one such acquisition, in itself, is unlikely to substantially lessen competition, the practice in aggregate meaningfully contributes to further concentration in food and grocery retail.

In our submission, an enhanced merger regime should:

- Require prior notification for assessment and authorisation of all mergers above a prescribed value threshold, with the ACCC afforded a 'call in' for mergers below that threshold;
- Empower the ACCC as decision-maker. That is, the Commission, rather than the judiciary, would authorise a merger following assessment, with an unsuccessful proponent afforded a right to judicial review; and
- Allow the ACCC to determine that a merger offends the regime if, while not violating the CCA in isolation, it forms part of a series of transactions that are anti-competitive in aggregate.

Concerns that enhanced merger regulation would unduly increase transaction times and costs are unwarranted. The regime we propose would simply support the competition regulator to properly fulfil its mandate. The ACCC estimates that enhanced anti-merger provisions, of the type we advocate, would still result in over 90% of transactions being approved without the need for prolonged assessment.²⁴

Recommendation: The merger regime in the *Competition and Consumer Act* should be reformed to:

- Require prior assessment and authorisation of all mergers above a prescribed value threshold, with a 'call in' for mergers below that threshold;
- Empower the ACCC to authorise or prohibit a proposed merger, with a judicial right of review; and
- Allow the ACCC determine that a merger is prohibited if it forms part of a series of transactions that are anti-competitive (even if not likely to substantially lessen competition in its own right).

Data provision and analysis

While excess market power is the principal driver of dysfunction in supermarket-supplier relations, the AWU and RSCA are also concerned by information asymmetries in this space. Due to their wide market share and reach across their supply chains, major supermarkets have ready access to information on supplier costs. Suppliers, by contrast, have little to no visibility of competitors' prices or the margins applied by retailers and any intermediaries.²⁵ In effect, suppliers are required to fly blind in negotiation with the major supermarkets - placing them at further disadvantage.

To mitigate this disparity and support suppliers in negotiations, the Commonwealth should require the major supermarkets to publish detailed data on prices and margins throughout their supply chains. Supermarkets should be required to update this information on a regular and recurrent basis.

While such data cannot restore equilibrium to a fundamentally imbalanced market, it will at least empower suppliers to enter negotiations with a basic understanding of the true state of the market they operate in.

Recommendation: The Commonwealth should require major supermarkets to periodically publish detailed data on prices and margins throughout their supply chains.

The AWU and RSCA also welcome the Fels report's recommendation that the Commonwealth establish a permanent Commission on Prices and Competition as a dedicated price watchdog. Its brief should extend to both the retail space and prices paid further up the supply chain. It would monitor prices and assess the impacts on insufficient competition on pricing. It would both advise the government and inform the public as to its findings.

The commission could also be responsible for the gathering and publication of supply chain data, as outlined above.

While the envisaged role of the Commission on Prices and Competition overlaps somewhat with that of the ACCC, its responsibilities, powers and policy interests would be much narrower. We therefore submit that it would complement the ACCC and strengthen competition and fair trading regulation overall.

Recommendation: The Commonwealth should establish a Commission on Prices and Competition.



Food and Grocery Code of Conduct

The recent history of inquiries into the supermarket sector has focused heavily on the *Food and Grocery Code of Conduct* (the code). The code is intended as the principal instrument governing Australia's food and grocery sector. It aims to promote good faith, transparency, certainty, and high business standards, with a strong focus on bargaining between suppliers and retailers and wholesalers.²⁶ The code is a 'prescribed voluntary' instrument. That is, adherence is only required by retailers and wholesalers that have signed up to the regulation. Coles and Woolworths, as well as Aldi and Metcash, are signatories.

The Code underwent a comprehensive review in 2018 and 2019, and its dispute resolution provisions were subjected to a separate inquiry in 2022 and 2023. In January 2024, the Commonwealth announced the appointment of Dr Craig Emerson to review the instrument once again. As with the 2018-19 review, Dr Emerson's work will dedicate notable attention to whether the code should be made mandatory for grocery retailers and wholesalers above a certain size.

That capture by the code is voluntary, and even current signatories may elect to opt out at any time, appears at first instance to obviously hinder effective regulation of supermarket-supplier bargaining. However, we suggest that a mandatory code is unlikely to empower suppliers to resist unfair and anticompetitive bargaining tactics employed by major supermarkets. Our employer engagement suggests the large majority of suppliers are not calling for a mandatory code, or state that such a reform would not influence their approach to bargaining. This is true of both primary producers and downstream manufacturers.

This attitude – ranging from indifference to resistance – is, in our submission, a reflection of the reality of excess market power in the food and grocery supply chain. Regardless of whether the code is voluntary or mandatory, suppliers that rely on Coles or Woolworths as their principal or only buyer are highly unlikely to pursue a company for misconduct in bargaining. Even where breach of the code is easily demonstrated, a supplier is likely to be punished for use of the instrument via the loss of its key customer. This cannot be overcome by binding retailers to the code, because the disincentive to act does not stem from a signatory's capacity to abandon the instrument should it choose to do so.

However, the prospect of the ACCC pursuing penalties for non-compliance, should penalty provisions be prescribed for breach, appears to be greater than that of a supplier negotiating more effectively. The Commission, plainly, is not burdened by the same incentives not to pursue action against the code's signatories. We therefore suggest that prescribing penalty provisions for non-compliance should be the focus of reform to the code. These should allow for penalties proportionate to misconduct captured, and sufficiently large as to disincentivise bad practice by what are very large corporations.

While this, too, represents an incomplete solution, it would afford the ACCC an additional tool to pursue major supermarkets for unfair and anti-competitive behaviour towards suppliers.

Recommendation: The *Food and Grocery Code of Conduct* should be reformed to empower the ACCC to impose penalties on signatories for non-compliance with its provisions.



More information

Supporting genuine competition and fairness in food and grocery retail and supply is first order business for the AWU and RSCA. While the necessary reforms in this space are often focused on business-to-business relations, they will advance the interests of workers throughout the supply chain. Ultimately, they will also support all our members, and all working Australians, struggling with the cost of living.

We would therefore welcome the opportunity to further assist the ACCC with the Supermarkets Inquiry 2024-25. For more information, please contact Thomas Mortimer, Australian Workers' Union National Policy Director, at [REDACTED].

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