



Inquiry into 'Big Box' retailer price setting

**ACCC submission to the Senate Economics References
Committee on price setting practices of 'big box' and
large format retailers.**

September 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission
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ACCC 08/23
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1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the Senate Economics References Committee inquiry into the price setting practices of 'big box' and large format retailers.

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth), regulate national infrastructure and undertake market studies.

'Big box' retailers, which include those operating in the hardware and broader retailing markets, may acquire significant market power by leveraging their large-scale operations and extensive supplier networks. This submission outlines how the ACCC has approached competition issues arising from the conduct of these retailers, with a specific focus on the enforcement of laws that prevent anti-competitive conduct practices such as resale price maintenance and the misuse of market power.

In addition to the enforcement work, this submission provides an overview of the ACCC's role in authorisations and mergers related to 'big box' retailers, as well as our monitoring of acquisitions of land that may affect market competition. Further, the Food and Grocery Code of Conduct has recently been reviewed by Treasury, and this submission will touch on its relevance to the inquiry and how it intersects with the issues faced in the 'big box' sector.

2. Competition, market power and buyer behaviour in supply chains

The object of the *Competition and Consumer Act 2010* (Cth) (CCA) is to enhance the welfare of Australians through the promotion of competition, fair trading and consumer protection. Competitive markets benefit all Australians by delivering lower prices, better quality products and more choice.

By promoting competition, the CCA and the ACCC focus on ensuring that markets deliver for consumers. In competitive markets, if businesses charge too high a price or supply inferior products, they will lose customers to their competitors. Under the CCA, it is illegal to engage in certain conduct that undermines the process of competition or is inconsistent with fair trading.

The CCA protects competition in markets through prohibiting:

- cartel conduct, such as price fixing, bid rigging, restricting output, or market allocation;
- agreements, exclusive arrangements and concerted practices that substantially lessen competition;
- conduct by businesses with substantial market power that substantially lessen competition;
- resale price maintenance; and
- mergers and acquisitions that substantially lessen competition.

The CCA through the Australian Consumer Law (ACL) also prohibits certain practices that affect the proper functioning of markets such as misleading or deceptive conduct, unconscionable conduct, and the use of unfair contract terms in standard form consumer and small business contracts. The ACL is jointly enforced by the ACCC and consumer protection regulators in each state and territory, under a one law, multiple regulator model.

Some sectors of the economy are also subject to voluntary or mandatory codes under the CCA. The Food and Grocery Code of Conduct, discussed in this submission, is an example of a voluntary prescribed code made under the CCA.

The ACCC uses a range of compliance and enforcement tools to encourage compliance with the Competition and Consumer Act as outlined in the ACCC's compliance and enforcement policy and priorities. In deciding which compliance or enforcement tool (or combination of such tools) to use, our first priority is always to achieve the best possible outcome for the community and to manage risk proportionately. Our enforcement actions seek to maximise impact and leverage any outcomes across an industry sector to encourage compliance with the law.

ACCC enforcement action in addressing price fixing

Companies that compete with one another should make independent decisions as to price. When independent decision making is compromised, this harms competition and may result in higher prices for consumers.

There does not need to be an agreement about price to contravene competition law. The Competition and Consumer Act prohibits concerted practices, which involve communication or cooperative behaviour between businesses that may not amount to an understanding but goes beyond a business independently responding to market conditions.

ACCC enforcement action - Court enforceable undertaking from Lawn Solutions Australia Group Pty Ltd

In November 2022, Lawn Solutions Australia Group Pty Ltd provided a court-enforceable undertaking to address ACCC concerns that it may have engaged in a concerted practice by communicating with turf growers and resellers about the prices for turf.

Lawn Solutions Australia circulated price surveys with requests that growers and resellers set their prices in line with its RRP. The communications also put pressure on individual growers or resellers to increase prices if they sold turf at a price below the RRP. Lawn Solutions Australia also contacted a rival turf breeder about the prices of the competitor's products.

The ACCC was concerned that the exchange of price information by Lawn Solutions Australia to its growers and resellers had the capacity, and appears to have been intended, to suppress or hinder price competition, including by facilitating cooperation between competitors.

Investigations into allegations of misuse of market power

Markets function well where businesses strive to develop and offer products that are more attractive to customers than the products offered by their rivals. A business with substantial market power may be able to damage this competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. That is, a business with substantial market power may maintain or advance its position by restricting or undermining its rivals' ability to compete, rather than by offering a more attractive product. Sometimes this is referred to as 'exclusionary conduct'. Such conduct undermines the effective operation of markets and the economy.

Preventing businesses with a substantial degree of market power from engaging in conduct that has the purpose or effect of substantially lessening competition is a central limb of Australia's competition laws. Where section 46 of the CCA has been contravened, we will take action to protect the competitive process and address consumer harm.

Section 46 does not prohibit a business from obtaining a substantial degree of market power. Nor does it prohibit a business with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of businesses that are less skilful or efficient. This conduct is part of the competitive process, which drives businesses to improve their performance and develop and offer products that are more attractive to customers.

ACCC enforcement action - Proceedings against Mastercard

The ACCC continues to progress its proceedings against Mastercard Asia/Pacific Pte Ltd and Mastercard Asia/Pacific (Australia) Pty Ltd for allegedly engaging in conduct with the purpose of substantially lessening competition in the supply of debit card acceptance services.

Mastercard's alleged anti-competitive conduct commenced in late 2017 in the context of the Reserve Bank of Australia's least cost routing initiative.

The RBA's least cost routing initiative aimed to increase competition in the supply of debit card acceptance services and reduce payment costs for businesses by allowing them to choose the lowest cost network to process their transactions. This enabled businesses to choose whether their debit transactions were processed by Visa, Mastercard or eftpos, with eftpos often being the cheapest option.

The ACCC alleges that in response to the least cost routing initiative, Mastercard entered into agreements with more than 20 major retail businesses, including supermarkets, fast food chains and clothing retailers.

The agreements gave these businesses discounted rates for Mastercard credit card transactions, provided they committed to processing all or most of their Mastercard-eftpos debit card transactions through Mastercard rather than the eftpos network. This meant that these businesses would not process significant debit card volumes through the eftpos network even though eftpos was often the lowest cost provider.

The ACCC is concerned that Mastercard's alleged conduct meant that businesses did not receive the full benefit of the increased competition that was intended to flow from the least cost routing initiative. Reducing costs for businesses enables them to offer their customers better prices.

The matter is set down for hearing in the Federal Court in 2025.

Impacts of larger buyers and larger suppliers on competition

In Australia, businesses are generally able to set their own prices reflecting the supply and demand conditions of the market.

Barriers to entry and expansion are a key factor affecting the competitiveness of a market. A market will be more competitive when suppliers are constrained by rivals, or the threat of entry by new businesses.

If barriers to entry or expansion are high, existing businesses will have a degree of confidence that a new business will have difficulty entering the market even if it increases prices. Contractual arrangements between existing suppliers and retailers can create or contribute to barriers to entry for potential competitors. The ACCC will take action to protect the competitive process and address harm to consumers or small businesses.

ACCC enforcement action - Exclusive dealing by Peters Ice Cream

In March 2022, following proceedings brought by the ACCC, the Federal Court ordered Australasian Food Group, trading as Peters Ice Cream (Peters), to pay a \$12 million penalty for anti-competitive conduct in relation to the distribution of ice creams sold in petrol stations and convenience stores.

Peters admitted that it had an exclusivity arrangement with PFD Food Services, Australia's largest distributor of single-serve ice creams. The arrangement restricted PFD from distributing other manufacturers' ice cream products and was likely to substantially lessen competition in the market for the supply by manufacturers of single-serve ice cream and frozen confectionary products.

Peters also admitted that, had it not been for the arrangement, it was likely that one or more potential competitors would have entered or expanded in the market.

Efficiency of distribution networks and competitive product range may also impact entry and expansion. The behaviour of retailers, and particularly large retailers, can disrupt the efficiency of distribution networks and the product range offers to consumers.

ACCC enforcement action - Unconscionable conduct by Coles

In May 2014 the ACCC commenced proceedings against Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd in respect of the Coles Active Retail Collaboration program. The ACCC alleged that Coles had engaged in unconscionable conduct towards 200 of its smaller suppliers by, among other things:

- providing misleading information to suppliers about the savings and value to them from the changes Coles had made;
- using undue influence and unfair tactics against suppliers to obtain payments of the rebate;
- taking advantage of its superior bargaining position by, amongst other things, seeking payments when it had no legitimate basis for seeking them; and
- requiring those suppliers to agree to the ongoing ARC rebate without providing them with sufficient time to assess the value, if any, of the purported benefits of the ARC program to their small business.

In October 2014 the ACCC instituted further proceedings against Coles arising out of the same investigation relating to the May 2014 court proceedings. In the October 2014 proceedings, the ACCC alleged that in 2011 Coles, outside of its trading terms with the suppliers, pursued agreements to pay Coles for 'profit gaps' on a supplier's goods, and imposed fines or penalties on suppliers for short or late deliveries.

In December 2014 Coles was ordered to pay pecuniary penalties of \$10 million and costs for unconscionable conduct. Coles engaged the Hon Jeff Kennett AC as an independent arbiter, who instructed Coles to refund over \$12 million to suppliers.

ACCC enforcement actions in addressing resale price maintenance

It is illegal for suppliers to ask or induce resellers to not resell their products below a minimum price. This is known as resale price maintenance. For example, suppliers must not:

- set minimum prices in formal policies or agreements
- offer retailers a discount if they sell at or above a minimum price
- refuse to supply retailers that sell below a minimum price
- punish retailers for selling below a set price, for example, by taking away a discount or sending a warning.

Resale price maintenance is illegal because it stops retailers competing on price, increasing what consumers pay.

It is not illegal resale price maintenance for suppliers to recommend appropriate prices, for example, by providing a recommended resale price (RRP) list. It is also not illegal for suppliers to set a maximum retail price.

ACCC enforcement actions - Resale price maintenance by Techtronic

In December 2023, following proceedings brought by the ACCC, the Federal Court ordered power tool supplier Techtronic to pay penalties totalling \$15 million after admitting it had engaged in resale price maintenance conduct in relation to Milwaukee branded products, including power tools, hand tools and accessories. This is the highest penalty imposed for resale price maintenance in Australia.

Techtronic entered into 97 agreements with retailers and dealers which restricted the sale of Milwaukee products below a specified minimum price. Techtronic enforced the restrictive resale price maintenance provisions in its contracts 29 times, for example by issuing warnings to dealers who offered to sell, or sold, Milwaukee branded products below the specified minimum price, or by withholding supply from two dealers.

3. Authorisations, mergers and land acquisition

Overview of ACCC's role in authorising mergers in the 'big box' sector

The ACCC also promotes competitive markets by assessing potential mergers and acquisitions to determine whether they would be likely to substantially lessen competition in any market.¹

The ACCC compares the market conditions that are likely to exist in the future if the acquisition did not proceed, with the market conditions likely to exist after the proposed acquisition takes effect.

The ACCC considers various different ways in which a potential acquisition may lessen competition. The ACCC cannot oppose a merger due to community preferences, national interest considerations, or other reasons that are not related to competition.

The current merger review regime in Australia is a voluntary and informal one, meaning firms are not required to notify the ACCC or seek its approval before proceeding with an acquisition, even where certain market shares or market capitalisation levels are met.²

Treasury is currently consulting on draft legislation that would modernise Australia's merger review regime. Under the proposed regime, from 1 January 2026, Australia would move to a mandatory, suspensory merger clearance regime in which mergers and acquisitions above a certain threshold will be required to be notified to and assessed by the ACCC before they are able to proceed. The features and details of this new regime are still being finalised, and the legislation that will underpin the regime remains subject to parliamentary approval.

In respect to 'big box' retailers, a merger or acquisition may involve proposed acquisitions of independent competitors (the 'target') by a potential acquirer, or of sites where a competing

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

² Furthermore, Australian law does not have market share caps or other rules that stop a chain from growing above a particular size. This is consistent with laws in many other countries, including the United States.

outlet could potentially be established in the future. In matters involving big box retailers acquiring smaller competitors or sites, the geographic dimension (and features) of the market may warrant a closer consideration. Issues the ACCC considers in these types of transactions may include:

- a loss of competitive restraint by the target, especially where the target differentiates its offer to compete with the chain (this may happen at a local level, where firms adapt to respond to the tastes and preferences of local customers)
- relatedly, a loss of actual or potential competitive response by the acquirer, if the acquirer historically has varied aspects of its offer on a local basis (whether that be price, product offering, quality, opening hours, or some other feature)
- increased barriers to entry, and therefore loss of potential competition, for example where there are few or no other suitable sites available for competitors or where the acquisition by the merged firm increases other strategic barriers.

Acquisitions in the big box sector, for example those involving hardware stores, can be incremental in nature and occur over time rather than occurring via a large acquisition involving many sites. Small serial acquisitions over time can cumulatively have the potential to enable the acquiring firm to achieve a position of substantial market power, which may erode competition in that market – for example by raising barriers to entry for potential market entrants and limiting the ability of smaller competitors to expand their operations. These types of acquisitions can be used by firms that already benefit from a position of substantial market power to further extend or entrench that power.

The ACCC can face evidentiary challenges in preventing small serial acquisitions (sometimes referred to as 'creeping acquisitions'), even where the net impact of those acquisitions over time may be a significant increase in broader market concentration. The current mergers test and the approach by the courts has tended to focus on the incremental effect of the merger rather than the broader structural changes in markets and incremental increases in market power over time.

One important focus of the current merger reform proposals is to ensure that the ACCC is better able to respond to serial acquisitions. The draft legislation proposes to enable the ACCC to consider the cumulative effect of acquisitions over the past three years. This aims to ensure that serial acquisitions that may raise competition concerns, including in sectors prone to these types of acquisitions, are able to be assessed by the ACCC and that the relevant tests that are applied are able to capture the competition effects of these acquisitions.

ACCC's assessment of competitive effects from land acquisitions

The ACCC may investigate transactions where a big box company acquires freehold or leasehold interests in land. In doing so, the ACCC may focus its review on a local market surrounding the relevant site, which could be as narrow as a few kilometres.

The ACCC is more likely to identify competition concerns with an acquisition of land interests if the acquiring chain already has a significant presence in the area and the likely alternative to the acquisition is that a competing retailer would operate on that site.

The ACCC will also consider barriers to new entry or expansion in the area, including whether the site is in an area where there is limited availability of alternative sites for potential competitors in the local market.

An acquisition of land interests could have impacts on competition beyond the local area, for example through increasing the scale of the acquiring chain.

Recent case studies in hardware and retailing markets

The ACCC often examines mergers and acquisitions in the hardware and retailing sectors. The ACCC's decisions are based on the specific circumstances of the cases before it. The way in which big box retailers compete with specialised retailers, for example, and the potential impact on customers and manufacturers, varies depending on the product and market circumstances. Any future expansion by big box retailers into more specialist retailing categories through the acquisition of existing competitors will be very carefully considered by the ACCC.

Woolworths' proposed acquisition of SUPA IGA in Karabar, New South Wales (2023)

In 2023, the ACCC opposed Woolworths' proposed acquisition of the SUPA IGA store in Karabar, NSW, and its attached liquor store. The ACCC considered that the proposed acquisition would be likely to substantially lessen competition in the supply of groceries in the local area. The proposed acquisition would increase concentration in an already concentrated market – seeing Woolworths operate three out of six supermarkets in the Queanbeyan / Jerrabomberra area – and remove the only independent supermarket in that geographic market. The ACCC found that the SUPA IGA offered a different shopping experience from Woolworths, Coles and ALDI, competing on factors such as product range, levels of service, and promotional cycles. This differentiated shopping experience generated competitive tension in the local area, which would be lost if the SUPA IGA was acquired by Woolworths. The proposed acquisition would also have affected various suppliers who supplied the SUPA IGA, particularly those who provided products not stocked by Woolworths.

The ACCC had previously opposed Woolworths' proposed acquisition of the Karabar Supermarket in 2008 (then under different ownership and trading under the "Supabarn" brand) and in reviewing this again in 2023 found that the market conditions had not materially changed.

Bunnings acquisition of Beaumont tiles (2021)

In 2021, the ACCC did not oppose Bunnings' proposed acquisition of specialist tile retailer Beaumont Tiles. The ACCC found there were significant differences between the offerings of this specialist retailer and of Bunnings, and therefore the proposed acquisition was unlikely to result in a substantial lessening of competition in the relevant market. Bunnings generally sells small volumes of tiles in store to Do-It-Yourself customers, tilers and other trades people undertaking small jobs. In comparison, Beaumont Tiles and other specialist tile retailers have a far more extensive product range, along with dedicated tile showrooms and specialist staff who provide design and product advice to customers and referrals to tilers. Specialist tile retailers also have stronger relationships with large builders, and usually deliver tiles direct to work sites. The ACCC also found that following the proposed acquisition, several large and small specialist retailers would remain to compete with Bunnings in every state and territory.

Bunnings' proposed acquisition of Adelaide Tools and Oakland Motor Centre (2020)

In 2019, Bunnings proposed to acquire Adelaide Tools and the Oakland Motor Centre. Adelaide Tools was one of the three largest retailers of tools in Adelaide at the time. The ACCC had preliminary concerns that the acquisition would result in the number of significant market players being reduced from three to two, with the combined entity having a significant market share. However, the ACCC ultimately concluded that it was unlikely that Bunnings' acquisition of Adelaide Tools would result in a substantial lessening of competition in any relevant market. The reasons for this included the small overall size of Adelaide Tools, the presence of Total Tools (the second main competitor), and the potential entrance of Sydney Tools into South Australia. In relation to wholesale markets and Bunnings' purchasing power, the ACCC found that its sales to Adelaide Tools constituted a very small proportion of the key upstream tool and equipment suppliers' Australian sales. Therefore, any incremental increase in Bunnings' purchasing power arising from the proposed acquisition was unlikely to be substantial.

4. Food and Grocery Code of Conduct

The *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Code) is a voluntary prescribed code of conduct under the Competition and Consumer Act. The Code has four signatories: Woolworths, Coles, Aldi and Metcash (Signatories). Suppliers to these Signatories are automatically covered by the Code. The Code was established in 2015 to seek to address the imbalance in bargaining power between the major supermarkets and their suppliers.

The Code covers suppliers in direct grocery supply relationships with a Signatory. The Code applies to a defined list of "grocery products" including:

- food including fresh produce, meat and dairy items (other than items sold for in-store consumption)
- pet food
- non-alcoholic drinks (other than drinks sold for in-store consumption)
- cleaning products
- toiletries, perfumes and cosmetics
- household goods, electrical appliances and kitchenware
- clothing
- "do-it-yourself" products
- pharmaceuticals
- books, newspapers, magazines and greeting cards
- CDs, DVDs, videos and audio tapes
- toys
- plants, flowers and gardening equipment
- tobacco and tobacco products

The Code applies to a “supermarket business” being a business under which a person sells to consumers bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and other packaged food or most of these groceries.

The Code sets out minimum obligations and behavioural standards for signatories in relation to their conduct with their suppliers.

It requires that Signatories:

- act in good faith when dealing with their suppliers,
- put grocery supply agreements in writing and retain them
- ensure grocery supply agreements contain certain provisions, and procedures for unilateral and retrospective variation.

The Code imposes a range of rules relating to “relationship management” matters including, payment arrangements, delisting, promotions, fresh produce standards, supply chain changes, product range review and price increases. The Code also requires Signatories to have appropriate Code compliance mechanisms in place. The Code operates alongside several other Codes of Conduct, covering Horticulture, Sugar and Dairy such that producers and some suppliers are covered by more than one Code of Conduct.

On 10 January 2024, the Prime Minister, the Treasurer, the Minister for Agriculture, Fisheries and Forestry, and the Assistant Minister for Competition, Charities and Treasury, announced the appointment of the Hon Dr Craig Emerson to lead an independent review of the Code (the Review). The Review and its timing was determined by the Code, which sunsets on 1 April 2025.

A [consultation paper](#) was released on 5 February 2024, and an [interim report](#) was released on 8 April 2024. The ACCC made a [submission to the consultation paper](#) and a [submission to the interim report](#). The Government [has committed to adopting](#) the 11 recommendations set out in the Review’s [final report](#). On 23 September 2024, Treasury released the Mandatory Food and Grocery Code exposure draft regulations. The exposure draft regulations make amendments to the Food and Grocery Code of Conduct to implement the government response to Dr Craig Emerson’s independent review of the code.

The Government has undertaken to make the Code mandatory and apply it to all supermarkets with annual Australian revenue exceeding \$5B. This will bring Woolworths, Coles, ALDI and Metcash within the coverage of a future mandatory Code and is likely to bring Costco under the Code in the near future. When making the Code mandatory the Government has undertaken to modernise the definition of “groceries”.

The Review considered whether the Code should be amended to apply to a broader range of retailers, including Amazon, Bunnings, Chemist Warehouse and Costco. The Review found that:

Expanding the Code to cover businesses such as Bunnings, Chemist Warehouse and liquor retailers would involve a change in the policy intent of the Code. That intent is to regulate supermarkets as they are ordinarily understood... The review notes that Bunnings and Chemist Warehouse supply some ‘groceries’ as they are defined in the Code. However, families do not complete their weekly food and grocery shopping at Bunnings or Chemist Warehouse. The Review considers that Bunnings and Chemist Warehouse should not be regulated under the Code merely on the basis that they supply some grocery products.³

³ Review final report, p33.

The ACCC has not formed a view as to whether the Code should be amended to cover a broader range of market participants including big-box retailers.

A decision to regulate big-box retailers under an industry code, whether an amended Food and Grocery Code or otherwise, is a matter for government. The policy framework⁴ advises that a prescribed code of conduct is only appropriate where:

- there is an identified market failure, this could include abuse of superior bargaining position, information asymmetry or externalities
- any existing regulation is inadequate to address the market failure
- the obligations that an industry code can be used to introduce are expected to resolve the identified market failure, and
- a net public benefit is expected.

⁴ [Commonwealth Policy Framework](#)