



# Inquiry into Supermarket Prices

**ACCC submission to the Senate Select Committee on Supermarket Prices' Inquiry into price setting and market power of major supermarkets.**

February 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 Consumer and Competition Commission (ACCC) welcomes the opportunity to provide a submission to the Senate Select Committee on Supermarket Prices.

This submission outlines the ACCC's role in relation to the supermarket sector and provides a summary of relevant competition, fair trading and consumer law provisions, including industry codes of conduct. The ACCC acknowledges there are a number of current inquiries and reviews relating to the supermarket sector and have noted some of these in this submission. A number of proposed policy or legislative changes the ACCC considers will improve the regulatory framework have also been included in this submission.

The ACCC administers and enforces the *Competition and Consumer Act 2010* which provides a number of protections to both consumers and suppliers through the promotion of competition and fair trading. Competitive markets increase the prosperity and welfare of Australians by delivering lower prices, better quality products and more choice.

In Australia, businesses are generally able to set their own prices which may comprise of costs to recover expenses, earn a profit and reflect conditions in the market, such as demand and supply. However, grocery prices have become a major concern for the millions of Australians experiencing cost of living pressures.

The ACCC welcomes the Treasurer's direction on 1 February 2024 for the ACCC to conduct an inquiry into markets for the supply of groceries, including pricing practices of supermarkets and the nature and level of competition at all levels of the supply chain.

The ACCC Supermarkets Inquiry 2024-25<sup>1</sup> will run for one year. An issues paper is expected to be published in February 2024 seeking views on the key issues to be considered in the inquiry. An interim report will be provided to the Australian Government by 31 August 2024 and a final report is due to be provided by 28 February 2025.

This follows a previous inquiry undertaken by the ACCC in 2008 in relation to the competitiveness of retail prices for standard groceries<sup>2</sup>. The inquiry noted that while it is challenging to precisely quantify the impact of these factors on food price inflation, the weakening of price competition in grocery retailing was considered a limited contributor, accounting for at most one-twentieth of the price increases over the prior five years.

The ACCC 2008 inquiry found that grocery retailing in Australian was workably competitive, but that Coles, Woolworths and Metcash had significant buyer power in relation to many items, and there were a number of factors that limited the level of price competition. These included high barriers to entry and expansion, limited incentives for Coles and Woolworths to compete aggressively on price and limited price competition from the independent sector.

The recommendations made by the ACCC included:

- that all appropriate levels of government consider ways in which zoning and planning laws should have specific regard to competition between supermarkets
- the introduction of a mandatory, nationally consistent unit pricing regime, and
- that the Horticulture Code Committee consider a number of recommendations in relation to improving the effectiveness of the Horticulture Code.

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<sup>1</sup> ACCC, 2024, [Supermarkets inquiry 2024-25](#)

<sup>2</sup> ACCC, 2008, [Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries](#)

The ACCC also indicated that it would investigate restrictive provisions in supermarket leases in shopping centres, which lead to undertakings to phase out restrictive covenants announced in late 2009.

The government broadly adopted the recommendations of the 2008 report.

The ACCC's 2024-25 Supermarkets Inquiry provides the opportunity to examine how competition in the supermarket sector has changed since the ACCC's last inquiry with a specific focus on the pricing practices of supermarkets. The ACCC 2008 inquiry found that ALDI had a significant effect on the pricing of major supermarket chains. At the time, there were only around 170 ALDI stores operating across Australia, which has since grown to 591 stores<sup>3</sup>.

The ACCC's Supermarkets Inquiry 2024-25 will also consider issues broader than pricing, which include but are not limited to, the structure of the markets for the supply of groceries by suppliers, wholesalers and retailers, loyalty programs and discounts offered by retailers for future purchases of groceries or other goods or services. The inquiry will complement the Australian Government's review of the voluntary prescribed Food and Grocery Code of Conduct<sup>4</sup> being undertaken by Dr Craig Emerson. The purpose of the code is to improve standards of business conduct in the food and grocery sector. The code was introduced in response to concerns raised in public debate about the conduct of retailers, in particular, supermarkets, towards their suppliers. The code was not intended to address market concentration in the grocery sector or to bring about lower consumer prices.

The ACCC welcomes the review of the code and has consistently advocated for it to be strengthened by making it mandatory. The ACCC continues to consider that such changes are necessary to improve the effectiveness of the code and intends to make a submission to the review of the code which will outline in greater detail further proposed improvements.

There are a number of existing provisions of the Competition and Consumer Act that already apply to the supermarket sector, including provisions relating to false and misleading representations, price fixing, resale price maintenance, unfair contract terms and the assessment of mergers and acquisitions to determine whether they would be likely to substantially lessen competition.

The ACCC considers that existing provisions can be strengthened through the introduction of an unfair trading practices prohibition and reform of current merger laws.

The Australian Government has recently consulted on options to address unfair trading practices<sup>5</sup> which will afford greater protections to consumers and small businesses. The ACCC supports the introduction of an economy-wide prohibition on unfair trading practices and considers this will set an improved standard for business behaviour and promote better conduct across all markets, including the financial services sector. This would empower the ACCC to address unfair practices in the supermarket sector and across the economy which are not currently captured by existing laws.

The Australian Government announced in late 2023 the commencement of a Competition Review<sup>6</sup> which included a specific focus on Merger Reform<sup>7</sup>. The ACCC has for some time raised concerns that Australia's current merger regime – which is based on voluntary notification, an informal review process, and an enforcement-based model – should be made more fit-for-purpose. The ACCC has made submissions to the Competition Review

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<sup>3</sup> ALDI, [ALDI Stores webpage](#), accessed 8 February 2024

<sup>4</sup> The Treasury, 2023, [Food and Grocery Code of Conduct Review 2023-24](#)

<sup>5</sup> The Treasury, 2023, [Unfair trading practices – Consultation Regulation Impact Statement](#)

<sup>6</sup> The Treasury, 2023, [Competition Review](#)

<sup>7</sup> The Treasury, 2023, [Merger Reform](#)

proposing reforms that would establish an administrative approval regime that is balanced and targeted which would ensure that non-contentious acquisitions (which account for the vast majority of mergers) can be dealt with expeditiously with minimal regulatory burden, and the small number of complex and contentious acquisitions which raise potential competition concerns can be carefully scrutinised via a structured, transparent, and timely process. One feature that the ACCC has proposed, that has particular relevance to the supermarket sector, is inclusion of necessary tools to deal with serial acquisitions. Under the proposal, the ACCC would be the first instance decision maker, with review by the Tribunal available to merger parties and third parties. Merger parties would be required: (i) to notify the ACCC of mergers that meet clear, certain and objective thresholds for notification; and (ii) not to complete the transaction without ACCC or Tribunal approval, or unless the ACCC grants a 'fast-track waiver' from the full notification and approval requirements.

## 2. Supermarket Sector

Australian consumers are experiencing price increases in a wide range of goods and services, including food and groceries. Some key factors for higher grocery prices in Australia include global supply chain disruptions, higher global fuel and energy prices and various natural disasters and other significant weather events.

Data released from the Australian Bureau of Statistics (ABS) on 31 January 2024<sup>8</sup> showed the monthly Consumer Price Index (CPI) indicator rose 3.4% in 12 months to December. The most significant price rises were Housing (+5.2%), Food and non-alcoholic beverages (+4.0%), Alcohol and tobacco (+6.8%) and Insurance and financial services (+8.2%). The main contributors to Food and non-alcoholic beverages were Meals out and takeaway food (+5.7%), Food products n.e.c. (+6.8%) and Bread and cereal products (+7.7%). Both Fruit and vegetable (-2.2%) and Meat and seafood (-1.9%) prices fell in the 12 months to December.

The 2015-16 Household Expenditure Survey<sup>9</sup> conducted by the ABS found that in FY16 households spent in aggregate around \$155 billion, constituting 23% of their expenditure, on supermarket products, residential mortgage products, petrol, health insurance, electricity, mobile communication services, beer, gas, domestic air travel and fixed broadband services. It is likely that households in aggregate spend over \$200 billion per annum on these products today<sup>10</sup>.

The largest expenditure of this class was packaged groceries from supermarkets, excluding fresh products, in which households spent in FY16 in aggregate around \$44 billion, constituting 28.6% of these combined expenses.

### Household expenditure by product, FY16

Product	Household Expenditure (\$ billion)
Packaged groceries* (supermarkets)	44.2
Mortgage repayments – Interest component	37.5
Petrol	17.5
Health insurance	15.6
Electricity	13.9

<sup>8</sup> Australian Bureau of Statistics, [Monthly Consumer Price Index Indicator](#)

<sup>9</sup> Australian Bureau of Statistics, [Household Expenditure Survey, Australian: Summary of Results 2015-16](#)

<sup>10</sup> ACCC, 2024, [Submission to Treasury – Competition Taskforce, Merger Reform – Consultation Paper, Attachment A – economic analysis by the ACCC's former chief economist Dr Graeme Woodbridge.](#)

Mobile communication services	9.1
Beer	5.4
Gas	4.2
Domestic air travel (holiday travel)	4.1
Internet services	3.0
Total	154.6
Percentage of total household expenditure	23%

\* Does not include fresh products including fresh meat, fruit and vegetables.

Over the past several months, the ACCC has been receiving elevated levels of contacts raising concerns about pricing practices by supermarket retailers. The ACCC has also seen an increase in consumers raising similar concerns across general media, social media and online forums.

The reports received by the ACCC include concerns about inflation or costs of living in general, general complaints about price increases or high prices, and contacts alleging misleading price representations, including alleged misleading 'was/now' advertising. There are also allegations that in some circumstances where prices stay the same but there is a reduction in the size of the good (aka 'shrinkflation').

These reports include consumers complaining about conduct that would not breach the Consumer and Competition Act, such as general complaints about price increases or complaints about the increase in the overall price of groceries.

Through its Supermarkets Inquiry, the ACCC expects to consider the extent of price increases for groceries and the factors contributing to them.

## Competitive dynamics

The ACCC's 2008 inquiry into the competitiveness of retail prices for standard groceries included findings in relation to barriers to entry in grocery retailing which resulted in further action by the ACCC following the inquiry.

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.

The 2008 inquiry identified barriers to entry and expansion that were impacting competition in supermarket retailing. These included

- the need to obtain the necessary scale to be competitive,
- natural barriers to entry (which may mean there is limited room for more major grocery retailers), and
- the need to obtain wholesale groceries at a price that enables other retailers to compete with the major supermarket chains.

Efficiency of distribution networks and competitive product range may also impact entry and expansion. The ACCC 2008 inquiry also highlighted access to suitable sites for supermarkets as a key barrier to entry in grocery retailing. The ACCC found that developers and shopping centre managers preferred to lease space to the major supermarkets over other supermarkets, which significantly impeded the ability of competing supermarkets to access prime locations.

The ACCC also found that the major supermarkets engaged in deliberate strategies designed to ensure they maintain exclusive access to prime sites, and included terms in their leases that effectively prevented centre managers leasing space in centres to competing supermarkets.

Following the release of the inquiry report, the ACCC conducted an industry-wide investigation into whether restrictive provisions in supermarket lease agreements had the purpose, effect or were likely to have the effect of substantially lessening competition in markets for the acquisition of supermarket space and/or in retail grocery markets.

The ACCC's investigation identified more than 700 potentially restrictive leases and resulted in the ACCC accepting court enforceable undertakings under section 87B of the Trade Practices Act offered by Woolworths, Coles, Aldi, Metcash, SPAR, and Foodworks. The undertakings require the relevant supermarkets to not give effect to existing restrictive provisions in lease agreements and to not enter into new lease agreements containing restrictive provisions.

Through its Supermarkets Inquiry, the ACCC expects to consider barriers to entry and expansion in grocery retailing. This will include any changes to the nature and extent of barriers since 2008.

## **ACCC enforcement action in relation to supermarkets**

### **Coles unconscionable conduct**

In 2014 the ACCC took action against Coles Supermarkets Australia Pty Ltd (Coles) for engaging in unconscionable conduct in its dealings with some of its suppliers. The Federal Court made orders by consent that Coles pay \$10 million in pecuniary penalties and costs. Coles also provided a court enforceable undertaking to the ACCC that it would implement a program that sought to provide redress to over 200 of its suppliers. Coles returned over \$12 million to suppliers under this program.

### **Woolworths Mind the Gap**

In December 2015 the ACCC instituted unconscionable conduct proceedings against Woolworths Ltd (Woolworths) in relation to its 'Mind the Gap' scheme. The ACCC alleged that under the scheme, Woolworths systematically sought to obtain payments from over 800 suppliers ranging from \$4,291 to \$1.4 million to urgently reduce Woolworths' expected significant half year gross profit shortfall. The ACCC further alleged that Woolworths was in a significantly stronger bargaining position than its suppliers and had no pre-existing contractual right to the payments. Woolworths sought over \$60 million in payments and ultimately captured over \$18 million in payments from suppliers pursuant to this scheme. The Federal Court dismissed the ACCC's case, considering that such action by Woolworths was a normal part of their arrangements with suppliers, and therefore not unconscionable.

### **Laundry detergent cartel**

In 2013, the ACCC took action against Colgate-Palmolive Pty Ltd (Colgate), PZ Cussons Australia (Cussons), Mr Paul Ansell (a former Colgate executive) and Woolworths Ltd alleging the parties agreed to stop supplying standard concentrate detergent in favour of ultra-concentrate detergent. In 2016, Colgate and Mr Ansell, and Woolworths admitted they engaged in anti-competitive conduct in the laundry detergent market. Colgate and Woolworths paid penalties of \$18 million and \$9 million respectively. The ACCC's case against Cussons was dismissed in December 2017. The ACCC lodged an appeal of this decision in February 2018. The Full Court of the Federal Court dismissed the ACCC's appeal in May of 2019.

## Shopper dockets

In December 2013, the ACCC accepted voluntary court enforceable undertakings by Coles and Woolworths to stop offering fuel discounts which they wholly or partly funded outside their fuel retailing businesses. Coles and Woolworths agreed from 1 January 2014 to limit fuel discounts linked to supermarket purchases to a maximum of four cents per litre. The ACCC was concerned that, while large shopper docket discounts might benefit customers in the short term, the discounts might harm other fuel retailers and over time reduce competition, driving up fuel prices. The ACCC accepted the undertakings because they addressed the main competition concerns quickly and efficiently.

From January 2014, Woolworths continued to offer bundled fuel discounts of eight cents per litre and, in early February 2014, Coles began to offer bundled fuel savings of 14 cents per litre. On 25 February 2014, the ACCC took Coles and Woolworths to court, alleging they had breached their voluntary undertakings. In April 2014, the Federal Court found that Woolworths' earlier bundled discount of eight cents per litre breached its undertaking because the discount was only available to customers who had made a qualifying supermarket purchase. The Court dismissed two other allegations against Coles and Woolworths.

The undertakings continue to prevent Coles and Woolworths offering fuel discounts that are subsidised by their supermarket operations and to prevent both from bundling supermarket fuel offers greater than four cents per litre.

## Merger reviews

The ACCC has reviewed the acquisition of many independent supermarkets, supermarket sites and wholesale grocery businesses over recent years. Those which were found not to raise competition concerns were generally cleared within a short time. In those cases where the ACCC identified competition concerns following a public review, the parties have in some cases abandoned the transaction, changed the nature of the proposal to acquire less sites or offered a divestiture to address the ACCC's concerns. For example:

- Coles' acquisition of Supabarn sites in 2016 – Coles modified the transaction
- Woolworths' acquisition of the SUPA IGA Karabar independent supermarket in NSW – ACCC opposed the transaction
- Woolworths' acquisition of a supermarket site at Glenmore Ridge NSW in 2013 – ACCC opposed the transaction in 2023, and opposed an acquisition of the then Karabar Supabarn in 2008
- Coles acquisition of a new supermarket at Lakeland, NSW in 2015 – the ACCC did not oppose the acquisition after accepting an undertaking to divest a nearby supermarket development site .

# 3. The ACCC's role and relevant areas of competition, fair trading and consumer laws

The object of the Competition and Consumer Act 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 Competition and Consumer Act 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.

The Competition and Consumer Act makes it illegal to engage in certain conduct that undermines the process of competition or is inconsistent with fair trading.

The Competition and Consumer Act protects competition in markets through prohibiting:

- cartel conduct, which is price fixing, bid rigging, restricting output, or market allocation
- agreements and 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 Competition and Consumer Act (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 Competition and Consumer Act. The Food and Grocery Code of Conduct, discussed further below, is an example of a voluntary code made under the Competition and Consumer Act.

The ACCC uses a range of compliance and enforcement tools to encourage compliance with the Competition and Consumer Act as outlined in the ACCC' compliance and enforcement policy and priorities<sup>11</sup>. 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.

## **The Competition and Consumer Act does not prohibit price gouging or excessive pricing**

In Australia's market economy, businesses are generally able to set their own prices. Businesses decide the prices of their goods and services based on a variety of factors, including:

- recovering the costs they incur in supplying the goods or services
- earning a profit
- the degree of competition
- conditions in the market – demand and supply for those goods or services.

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<sup>11</sup> ACCC, [Compliance and enforcement policy and priorities](#)

The ACCC often hears concerns from the community about a particular business' charges being too high. This is sometimes referred to as 'price gouging' or 'excessive pricing'. Charging high prices is not illegal under the Competition and Consumer Act.

The Competition and Consumer Act prohibits certain pricing conduct that distorts competition in a market. This includes:

- making false or misleading representations
- price fixing
- resale price maintenance
- contracts, arrangements, understandings concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

The ACCC's Supermarket Inquiry is not limited to conduct that would breach the Competition and Consumer Act. The ACCC has been directed to take into consideration factors affecting the price of inputs along the supply chain for groceries, including any difference between the prices paid, and prices charged, by suppliers, wholesalers and retailers for groceries. In this sense, the inquiry should be able to test concerns raised about excessive pricing and to consider the underlying causes of higher prices.

## **False or misleading representations**

Under the ACL, it is illegal for businesses to make false or misleading representations about prices, including the reason for price increases or how a price may have changed (such as 'was/now' pricing). The ACCC is conscious that "was/now" and other pricing "specials" significantly influence consumers' purchasing decisions. For some time now, the ACCC has been closely considering the reports received from consumers alleged false or misleading "was/now" or other pricing "specials" advertising by supermarkets, and whether they may raise concerns under the ACL. These assessments are ongoing, so ACCC is unable to comment further.

False or misleading representations about prices inhibit the efficient operation of markets, undermine confidence in the market economy and results in harm to consumers. The ACCC takes action against businesses that engage in misleading or deceptive conduct or make false or misleading representations, including in relation to prices.

## **Price fixing**

Competition relies on businesses making independent decisions. When businesses communicate and cooperate, this can weaken competition. For this reason, the Competition and Consumer Act restricts how businesses can work together, including by making cartel conduct illegal.

Price fixing is one form of cartel conduct and occurs when competitors agree on pricing instead of competing against each other. The agreement or understanding can be about:

- prices for selling or buying goods or services
- minimum prices
- a formula for pricing or discounting goods and services
- rebates, allowances or credit terms.

Cartels cheat consumers and other businesses. They restrict healthy economic growth, drive up prices and reduce innovation and investment.

The ACCC has a long history of enforcement of the cartel laws. The ACCC can bring civil proceedings for cartel conduct or refer a matter to the Commonwealth Department of Public Prosecutions for consideration of whether to file criminal charges for cartel conduct.

Sometimes, businesses independently change their prices to match their competitors' prices. This may be an increase or a decrease in price.

Businesses that change their prices in response to competitors' prices can create price changes that may look like price fixing. However, so long as each business is making independent decisions about its prices it is unlikely to be cartel conduct.

## 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.

### **Case example – Resale price maintenance by Techtronic**

In December 2023 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.

Techtronic admitted that, between January 2016 and July 2021, it entered into 97 agreements with retailers and dealers which restricted the sale of Milwaukee products below a specified minimum price. Techtronic also admitted it enforced the restrictive RPM provisions in its contracts 29 times between December 2016 and May 2020, 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.

The penalties were the result of proceedings brought by the ACCC and the total penalties are the highest imposed for resale price maintenance in Australia.

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.

## Mergers and Acquisitions

The ACCC also promotes competitive markets by assessing potential mergers or acquisitions to determine whether they would be likely to substantially lessen competition in any market<sup>12</sup>. In respect of supermarkets, this may include reviewing proposed acquisitions of independent supermarkets or competitors, or sites where a supermarket could be established.

Acquisitions in some sectors, including those involving supermarkets, can tend to be incremental in nature and occur over time rather than via a large acquisition involving many supermarket sites. Small serial acquisitions over time can cumulatively have the potential to enable the acquiring firm to achieve a position of substantial market power, and potentially erode competition in that market – for example by potentially raising barriers to entry for potential rivals and limiting the ability of smaller competitors to expand their operations. They can also be used by firms that already benefit from a position of substantial market power to further extend or entrench it.

The ACCC can face evidentiary challenges in preventing small serial acquisitions (sometimes referred to as creeping acquisitions), even where the net impact of these 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 before it rather than the broader structural changes in markets and incremental increases in market power over time.

One important focus of the ACCC merger reform proposals is to ensure that the ACCC is better able to respond to serial acquisitions. The ACCC's reforms are intended to ensure that serial acquisitions that may raise competition concerns, including in sectors prone to serial acquisitions, are able to be assessed by the ACCC and that the test for approval is capable of taking into account the particular competition effects raised by serial acquisitions.

## Unfair contract terms

The ACL prohibits businesses from proposing, using, or relying on unfair contract terms in standard form contracts with consumers and small businesses. A standard form contract is one that is pre-written and essentially offered on a 'take it or leave it' basis. This law is designed to protect consumers and small businesses who often have limited bargaining power, expertise, and/or ability to negotiate or assess standard form contracts.

Under the ACL, contract terms are unfair if they:

- cause a significant imbalance in the rights and obligations of the parties under the contract,
- are not reasonably necessary to protect the legitimate interests of the party who gets an advantage from the term, and
- would cause financial or other harm to the other party if enforced.

The unfair contract terms laws apply to consumer and small business contracts. From 9 November 2023, the threshold for "a small business contract" has changed. This has expanded the protections to a greater range of small businesses. A small business is now defined as having fewer than 100 employees or making less than \$10 million in annual turnover. The changes apply to:

- standard form contracts made or renewed on or after 9 November 2023.

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<sup>12</sup> *Competition and Consumer Act (Cth) 2010* at s50

- a term of a contract that is varied or added on or after 9 November 2023.

For standard form contracts entered into or renewed prior to 9 November, the relevant “small business contract” threshold is where:

- the small business has 20 or fewer employees, and
- the upfront price payable is under \$300,000, or \$1 million for contracts lasting more than 12 months.

## The need for an unfair trading practices prohibition

The ACCC has for over a number of years identified unfair trading practices across many sectors in the economy which cause harm to consumers and small businesses, and which are not adequately addressed by the existing provisions of the ACL. Such conduct can be:

- harmful but does not reach the legal threshold for unconscionable conduct;
- not misleading or deceptive, but distorts consumer choice by creating confusion or hiding or omitting relevant information, or
- not captured by the unfair contract term provisions because the conduct is not undertaken pursuant to a written term of a contract or is otherwise outside the scope of a contract;

As an example, the ACCC’s 2020 Perishable Agricultural Goods Inquiry found potential unregulated unfair practices from participants in the perishable agricultural goods supply chain, which can cause significant harm to primary producers, including dairy and chicken farmers.<sup>13</sup>

The Government has recently consulted on options to address unfair trading practices.<sup>14</sup> The ACCC supports the introduction of an economy-wide prohibition, including the financial services sector, on unfair trading practices. The ACCC considers this will set an improved standard for business behaviour and promote better conduct across all markets. It will give increased confidence to consumers and small businesses, which in turn will promote well-functioning markets and economic dynamism.

An unfair trading practices prohibition, if implemented, could provide a further avenue for the ACL to better address some under-regulated or un-regulated harms in the supermarket sector. However, this reform would not be a complete solution to address all of the harms to consumers and small businesses identified in this Inquiry.

## 4. Codes of Conduct

Industry codes are a set of rules or standards of conduct for a particular industry, often regulating how parties in that industry relate to one another. The ACCC promotes compliance with industry codes of conduct that are prescribed under the Competition and Consumer Act. There are two types of prescribed industry codes:

- Mandatory codes which are automatically binding on all industry participants that meet the relevant criteria. Examples of these are the dairy and horticulture codes. The majority of prescribed industry codes are mandatory.

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<sup>13</sup> ACCC, 2020, [Perishable agricultural goods inquiry report](#)

<sup>14</sup> The Treasury, 2023, [Unfair trading practices – Consultation Regulation Impact Statement](#)

- Voluntary codes which are only binding when an industry participant gives notice that it agrees to be bound by the code. Currently the only voluntary prescribed code the ACCC regulates is the Food and Grocery Code.

As explained in the Treasury's Industry codes of conduct policy framework (2017), prescribed codes are introduced 'where there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit.'<sup>15</sup>

Prescribed codes differ from industry-led voluntary codes of conduct, which are a form of industry self-regulation. Such codes may set standards for the way industry participants deal with each other and their customers but do not have the force of law.

There are a number of prescribed industry codes that are relevant to the grocery sector, including the grocery supply chain more broadly. These codes are:

- The Food and Grocery Code
- Horticulture Code
- Dairy Code
- Unit Pricing Code.

## Food and Grocery Code

The Food and Grocery Code is a voluntary prescribed code which regulates certain aspects of the commercial relationships between grocery retailers or grocery wholesalers and their suppliers. The current retail and wholesale signatories are ALDI, Coles, Woolworths and Metcash. The ACCC is the regulator responsible for enforcing compliance with the Food and Grocery Code.

The purpose of the code is to regulate standards of business conduct, ensure transparency and certainty in commercial transactions, provide effective, fair and equitable dispute resolution process for complaints, and promote good faith in commercial dealings between signatories and suppliers.

The code requires signatories to act in good faith towards suppliers, have a dispute resolution process, and enter into written grocery supply agreements for the supply of groceries.

The code does not regulate pricing or competition in the grocery sector. The code was introduced in response to concerns about the conduct of supermarkets in their dealings with suppliers. While the efficient operation of the grocery supply chain, including fair treatment of suppliers, is in the long-term interests of consumers, amendments to the code on its own are unlikely to contribute to a decrease in grocery prices for consumers.

While the code has led to improvements in dealings between signatories and suppliers, it is the ACCC's view as the regulator of the code<sup>16</sup> that it is not achieving all its intended

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<sup>15</sup> The Treasury, [Industry codes of conduct policy framework](#), November 2017, p8, accessed 29 January 2024.

<sup>16</sup> The ACCC made submissions to [2018](#) and [2023](#) reviews of the Food and Grocery Code outlining these issues and recommendations to address them. The ACCC also commented on issues within the code in the 2020 [Perishable Agriculture Goods Inquiry \(PAG\) Report](#).

purposes and improvements can be made to address these issues. The ACCC continues to advocate for 3 key changes:

- the code should be made mandatory
- there should be financial penalties available for non-compliance with the code
- signatories should not be able to opt out of minimum standards set out in the code.

## **The Food and Grocery Code should be mandatory**

As a voluntary code, the Food and Grocery Code only applies to a grocery retailer or wholesaler that has agreed to be bound by it. Once a retailer or wholesaler has signed up, they must comply with the provisions of the code. A signatory can withdraw from the code's obligations at any time by providing written notice to the ACCC.

In circumstances where there are identified harms in a sector that require a regulatory response, as the Government has decided with the grocery supply chain, the ACCC considers parties should not be able to withdraw from that regulatory measure, as they can do under the Food and Grocery Code.

The voluntary nature of the code and ability to withdraw at any time can undermine its effectiveness. It is the ACCC's longstanding view that the code should be mandatory. This does not necessarily mean expanding the coverage to include all grocery retailers and wholesalers. The scope of the code could be limited by turnover, the number of employees or another method to limit traders covered by it.

The ACCC's submissions to both the 2018 and 2023 code reviews as well as the Perishable Agriculture Goods Inquiry (PAG) Report recommended that the code should be remade as a mandatory prescribed code.

## **Meaningful compliance and enforcement tools are needed**

There are no penalties for breaching the Food and Grocery Code. The ACCC is limited to the following courses of action when a signatory has allegedly breached the code:

- issuing public warning notices to alert the public
- seeking injunctions to compel or restrain certain conduct by the signatory, or
- initiating court proceedings to compel the signatory to redress or prevent any loss or damage caused by the signatory's misconduct.

The ACCC considers that there is a lack of strong specific or general deterrence for breaching the code due to the absence of penalties. The availability of civil pecuniary penalties and infringement notices at the appropriate amounts would act as a significant incentive for signatories to ensure their compliance with the code's obligations.

The ACCC has consistently advocated for the introduction of civil pecuniary penalties for non-compliance with the code, including in the PAG report and our 2023 submission.

## Opt-out protections should be removed from the code

The code requires signatories to enter into written grocery supply agreements with suppliers. The code places obligations and restrictions on some types of conduct,<sup>17</sup> such as limiting the ability of signatories to unilaterally vary the agreement, not allowing signatories to require payment to secure certain positioning and limiting the ability of signatories to require a supplier to pay to cover wastage. These obligations and prohibitions exist to give protection to suppliers. However, the code allows a signatory to 'opt-out' of these obligations and restrictions by adding terms to that effect in their grocery supply agreements.

The ACCC's main concern is the ability to opt-out of these obligations and restrictions undermines the very protections the code exists to provide. An effective code should clearly set out minimum standards of conduct to regulate behaviour. The Dairy Code, for example, sets out what needs to be included in agreements for the supply of milk, and these requirements cannot be opted-out of.

While the opt-outs are only allowed where the conduct is 'reasonable', our concerns remain as signatories may be able to use their superior bargaining power to get suppliers to agree to something they would otherwise not. Secondly, the opt-out provisions may impact on suppliers' protections against unfair contract terms under the Competition and Consumer Act because terms required, or expressly permitted by a law of the Commonwealth are excluded from the UCT regime.

The ACCC's 2023 and 2018 submission recommended changes be made so signatories are unable to opt-out of obligations, and to establish minimum standards of conduct. The PAG report also commented that signatories should not be able to contract out of protections.

## Horticulture Code

The ACCC has heard significant concerns over time about the challenges fruit and vegetable growers experience when supplying retailers. This is reinforced by the Food and Grocery Code Independent Reviewer's 2022-23 Annual Report survey, which reported that 'fruit and vegetable suppliers have reported less favourable treatment compared with other product suppliers. This was particularly the case for measuring "deals in good faith" and "fair and reasonable dealings"'.<sup>17</sup>

The key concerns raised with the ACCC include a lack of price transparency and a general lack of ability to negotiate on price. The supply of fruit and vegetables has unique market dynamics when compared to many other products sold by retailers, due to the seasonal and perishable nature of produce and the comparatively smaller scale of many farmer suppliers. The ACCC's 2020 PAG Inquiry found that, generally speaking, the more perishable a product is, the weaker the producer's position from which to negotiate favourable terms of supply with the buyers of their goods.

The Horticulture Code is administered by the ACCC and aims to improve the clarity and transparency of trade between growers and traders of fresh produce. This is a mandatory code and there are penalties for non-compliance. The Horticulture Code contains a range of obligations, including requirements around specifying how prices will be determined. However, retailers are exempt from the Horticulture Code, meaning that when growers trade directly with retailers, this trade is only subject to the Food and Grocery Code. As indicated above, the Food and Grocery Code contains a range of weaknesses and limitations. In

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<sup>17</sup> See, subclauses 9(2), 12(3), 14(2), 15(2), 16(2), 17(2), and 18(2) of the Code.



practice, this means that fruit and vegetable growers have greater protections and price information when supplying wholesalers than they do when supplying a major retailer.

The Food and Grocery Code requires grocery retailers and grocery signatories to enter into 'grocery supply agreements' with their suppliers. However, the definition of 'grocery supply agreement' explicitly excludes the relationship between a retailer and wholesale supplier. This can create problematic interactions with the Horticulture Code. For example, a merchant under the Horticulture Code is, among other things, required to have a written agreement with growers that details how prices are to be set. However, the wholesaler exemption in the Food and Grocery Code means that this code's protections are not afforded to wholesalers that supply a retailer. This therefore creates enhanced risk throughout the supply chain for some wholesalers and ultimately growers.

## Dairy Code

To the extent that the major retailers acquire raw milk directly from farmers, they are also regulated by the Dairy Code. The Dairy Code is a mandatory code and penalties can be imposed for non-compliance. Under the Dairy Code, retailers have the same obligations as dairy processors that acquire raw milk from farmers. These include obligations to have compliant Milk Supply Agreements, set minimum prices, and follow dispute resolution procedures.

The ACCC monitors compliance with the Dairy Code closely, including in terms of the requirements to publish agreements and price information before 2pm on 1 June each year.

The Dairy Code does not regulate the relationship between retailers and dairy processors. This relationship is covered by the Food and Grocery Code.

## Unit Pricing Code

Unit pricing is a labelling system that empowers consumers through greater price transparency to make more informed decisions about grocery purchases. Comparing the unit price across brands, sizes, packaging and retailers can help consumers find the best value for money. This does not necessarily mean buying the cheapest product available. Where consumers make well-informed purchasing decisions, markets perform better.

The Unit Pricing Code is a mandatory industry code of conduct prescribed under the Competition and Consumer Act. The code applies to both bricks-and-mortar and online grocery retailers who meet certain minimum requirements.<sup>18</sup> The parameters built into the code recognise that most household spending on groceries occurs in major supermarket chains and large independent stores. Accordingly, the larger supermarket chains (Aldi, Coles, Woolworths) are captured but few small, independent retailers are bound by the code.

Under the code, the unit price for a grocery item must be:

- displayed prominently and in close proximity to the selling price for the grocery item
- legible and unambiguous.

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<sup>18</sup> Retailers must sell a minimum range of food-based grocery items. Store-based retailers must additionally have more than 1,000 square metres of floor space dedicated to the display of grocery items and the premises must be used primarily for the sale of food-based grocery items.

The Unit Pricing Code was reviewed in 2019 by the Government without any substantive changes being implemented when the code was remade in 2021. The review concluded that the code promoted price competition and supported value for money assessments by consumers, while minimising regulatory costs for small grocery stores and specialty retailers.<sup>19</sup>

On average the ACCC receives less than 15 unit pricing contacts annually. Where non-compliance is identified and there is a risk of widespread harm to consumers, the ACCC takes an educative approach to address non-compliance.

While non-compliance with the code has tended to reflect isolated errors by retailers, rather than substantive non-compliance or disregard for the law, the Government could consider the benefits of including more prescriptive requirements to improve the legibility and prominence of unit prices in the next review. Such a change could be pro-consumer by improving consumers' access to unit pricing.

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<sup>19</sup> The Treasury, [Grocery Unit Pricing Code Review, Review outcomes](#)