

# **Submission to the Australian Council of Trade Unions: Inquiry into Price Gouging and Unfair Pricing Practices**

## SUBMISSION TO THE AUSTRALIAN COUNCIL OF TRADE UNIONS - INQUIRY INTO PRICE GOUGING AND UNFAIR PRICING PRACTICES.

Per Capita

September 2023

Per Capita welcomes the opportunity to provide this submission to the Australian Council of Trade Unions (ACTU) for consideration in their 2023 Inquiry into Price Gouging and Unfair Pricing Practices.

Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia, based on fairness, shared prosperity, and social justice.

The last few years have been extremely rough on Australians. After a decade of wage stagnation, inflation has eaten into real wages and hardship has increased particularly for those on lower incomes. Alongside that loss of purchasing power, the global pandemic, severe weather events, disruptions to supply chains, and energy shortages, have all contributed to increases in the prices of everyday essential items. Determining what constitutes a reasonable price in these circumstances is not easy for the everyday consumer. To what extent are price spikes due to external factors and resulting supply chain disruptions, and to what extent are they due to firms taking opportunistic advantage of these circumstances? This is not entirely clear, and its near impossible to determine at the checkout.

What is clear, as data on sales, revenues, prices and profits for the past few years has highlighted, is that Australian competition, consumer, and industrial relations law are not working as they should. Whilst this period has been unusually challenging, we should not assume that we live in extraordinary times. In the coming decades our planet will experience an increase in extreme weather events.<sup>1</sup> This will bring, alongside other devastating consequences, increased economic disruption.<sup>2</sup> Simultaneously, stability in trade relationships and arrangements is in decline.

Our submission discusses how the state of competition in Australian industries, particularly those which we rely on for essential items and services, can harm consumers and workers, and fuel

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

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

inequality. It advocates for expeditious reforms to our consumer and industrial law, to empower consumers and workers, and lessen the effect of future shocks.

## Australia's Competition Problem - Super Supermarkets and Other Giants

Australian supermarket giants exist in a highly concentrated market. This is also true for the major players in many other industries we rely on for essential goods and services.<sup>3</sup> Anyone shopping at major supermarkets like Coles and Woolworths will have noticed that many prices have soared. This has led to suggestions that these companies are price gouging during the cost-of-living crisis, making inflation worse.<sup>4</sup>

Price gouging has no formal definition in the economics discipline, but colloquially refers to sudden increases in prices that people think are too high.<sup>5</sup> It also connotes that firms are in a position where they can raise prices in order to take profits without significant consequences.

UBS Australia's Evidence Lab tracked online prices of 60,000 grocery items at Coles and Woolworths and found that prices had outpaced inflation over the last year.<sup>6</sup> Across the duopoly prices increased 9.6% in the 12 months to April 2023.<sup>7</sup> This is higher than the CPI figures for food and non-alcoholic beverages, which increased 7.9% over the same period.<sup>8</sup> Shortly after, both supermarket giants recorded profits exceeding \$1 billion for the 2023 financial year. Coles posted a NPAT of \$1.1 billion, up 4.8% from 2022,<sup>9</sup> and Woolworths posted a NPAT of \$1.62 billion, up 4.6% from 2022.<sup>10</sup> The profits of these companies is unusual by international standards. Coles and Woolworths are generating significantly higher profits compared to their British counterparts,

<sup>3</sup> Adam Triggs and Andrew Leigh, 'A Giant Problem: The Influence of the Chicago School on Australian Competition Law, Economic Dynamism and Inequality', (2019) 47(4) *Federal Law Review* 696, 698 ('A Giant Problem').

<sup>4</sup> See eg, Matt Saunders and Richard, *Wage Price Spiral or Price Wage Spiral? The Role of Profits in Causing Inflation* (Report, May 2022).

<sup>5</sup> This is how it is described by the ACCC: 'Setting Prices: What's Allowed', *Australian Competition and Consumer Commission* (Web Page) < <https://www.accc.gov.au/business/pricing/setting-prices-whats-allowed>>.

<sup>6</sup> Jessica Bahr, 'How Much Have Grocery Prices Increased in Australia?', *SBS News* (Online, 24 May 2023) <<https://www.sbs.com.au/news/article/how-much-have-grocery-prices-increased-in-australia/ocrfv5zut>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Australia Bureau of Statistics, *Monthly Consumer Price Index Indicator April 2023* (Catalogue Number 6401.0, 31 May 2023).

<sup>9</sup> Coles Group, *2023 Annual Report* (Report, 2023) 6.

<sup>10</sup> Woolworths Group, *2023 Annual Report* (Report, 2023) 22.

reporting a profit margin of 5.3% and 5.9% respectively, compared to Tesco and Sainsbury's whose profit margins were 3.8% and 3% respectively.<sup>11</sup>

Coles and Woolworths dispute they are price gouging or profiteering. Instead, claiming their higher prices are a consequence of rising inflation and supply chain disruptions, and that increased profits can be explained by better productivity.<sup>12</sup>

### Highly concentrated markets

Together, Coles and Woolworths account for 65% of Australia's grocery retail market.<sup>13</sup> By contrast, Tesco and Sainsbury's, control 42% of the equivalent market.<sup>14</sup> In addition to their online stores, Coles and Woolworths have a total of 2895 store locations across Australia.<sup>15</sup> Step outside 123 Queen Street, where the Melbourne hearing for this inquiry is being held, and you'll find 3 Coles stores and 7 Woolworths stores within just a 15-minute walk.

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

It is not only supermarkets that are highly concentrated in Australia. We are home to numerous highly concentrated industries, many of which we rely on for essential goods and services. There is Medibank and Bupa in private health insurance with a market share of 26.3% and 25.5% respectively;<sup>16</sup> Qantas Group and Virgin in Aviation with a market share of 60.8% and 37.7% respectively;<sup>17</sup> and in banking the ANZ, CBA, Westpac and NAB dominate, controlling 72% of retail banking between them.<sup>18</sup> This level of concentration is made easier due to the small size of the Australian market and relative isolation from major trading blocks, as well as technological and regulatory barriers to entry.

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<sup>11</sup> Jonathan Barrett, 'Australian Food Giants Making More Profit from Grocery Sales than Overseas Peers', *The Guardian* (Online, 27 July 2023) <<https://www.theguardian.com/australia-news/2023/jul/27/australian-supermarket-profits-rise-woolworths-coles>>.

<sup>12</sup> Jonathan Barrett, 'How Supermarkets Are Profiting from Australia's Cost-of-Living Crisis', *The Guardian* (Online, 28 July 2023) <<https://www.theguardian.com/australia-news/2023/jul/28/cost-of-living-supermarket-grocery-price-rises-australia-woolworths-coles-aldi>>.

<sup>13</sup> Followed by Aldi and Metcash: 'Australia Market Overview 2023', *Hunt Export Advice* (Web Page, 2023) <<https://www.huntexportadvice.com/post/australia-market-overview-2021>>.

<sup>14</sup> <https://www.retailgazette.co.uk/blog/2023/09/tesco-sainsbury-market-share/>

<sup>15</sup> 1800 for Woolworths and 1095 for Coles: Woolworths Group, *2023 Annual Report* (Report, 2023) 2; Coles Group, *2023 Annual Report* (Report, 2023) 6.

<sup>16</sup> Australian Competition and Consumer Commission, *Report to the Australian Senate on Anti-competitive and Other Practices by Health Insurers and Providers in Relation to Private Health Insurance* (Report, 1 December 2022) 9.

<sup>17</sup> Australian Competition and Consumer Commission, *Airline Competition in Australia* (Final Report, June 2023) 19.

<sup>18</sup> Ranina Sanglap and Mohammad Taqi, 'As Australia's Big Banks Keep Getting Bigger, Competition Concerns Grow', *S&P Global Market Intelligence* (Online, 9 October 2022) <<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/as-australia-s-big-banks-keep-getting-bigger-competition-concerns-grow-72178924>>.

Research into industry concentration in Australia, measuring 481 industries, found that weighted average market share of the largest four firms was 36%.<sup>19</sup> In some industries, including department stores, newspapers, banking, health insurance, supermarkets, and domestic airlines, the biggest four firms control more than 80% of the market.<sup>20</sup> Research published by the e61 Institute in 2023, shows that in 2017 Australian industries were more concentrated than their US counterparts. Since then, markets have become even more concentrated. The average CR4 measure across all industries increased by approximately 2.5 percentage points between 2017 and 2020.<sup>21</sup> This means that choice is declining for Australian consumers when it comes to where they purchase goods and services.

Highly concentrated industries that manifest unfettered pricing, place consumers, workers, and productivity growth at a disadvantage.<sup>22</sup> The evidence that there is a relationship between reduced competition and rising inequality continues to grow.<sup>23</sup>

Firms can continue to prevail in a market in which they sell amounts big enough to influence the price of goods or services sold (price setters). In such an environment, price setting firms can raise prices for reasons other than as a response to increased costs (or for other purposes such as expanding investment or for productivity improvements). Where competitors arise, they can be quashed through a variety of tactics, whether it is through “slot hogging” in aviation, controlling specific supply chains in groceries, or pricing out competitors even at a loss. The tendency over time is not toward greater competition but to concentration. It is now clear that the unwavering trust that many governments, including those in Australia, have previously put in the market's capacity to self-regulate and produce competitive and benevolent results, has been misplaced.<sup>24</sup> Indeed, there are examples of firms using their size and lobbying power to gain government protection from the market, rather than governments protecting markets from the power of large firms.

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

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<sup>19</sup> Andrew Leigh and Adam Triggs, ‘Markets, Monopolies and Moguls: The Relationship Between Inequality and Competition’ (2016) 49(4) *The Australian Economic Review* 389.

<sup>20</sup> *Ibid.*

<sup>21</sup> Dan Andrews, Elyse Dwyer, Adam Triggs, ‘The State of Competition in Australia’ (Research Note no 9, 30 August 2023).

<sup>22</sup> See, eg Stephen Nickell, ‘Competition and Corporate Performance’ (1996) 104(4) *Journal of Political Economy* 724,741. In this British study Nickell found that a 25% increase in market concentration leads to a 1% decrease in productivity.

<sup>23</sup> Sean Ennis, Pedro Gonzaga and Chris Pike, ‘Inequality: A Hidden Cost of Market Power’ (Discussion Paper, OECD Competition Division, 2017).

<sup>24</sup> Triggs and Leigh, ‘A Giant Problem’ (n 3) 709.

## Lack of competition affects consumers

Conditions that allow predatory businesses to systematically take advantage of vulnerable consumers are far too common in Australia. Many business practises seem unfair, or unjust, but remain legal under *Australian Consumer Law (ACL)*.<sup>25</sup>

Take for example the story of Newcastle resident Rachel King, told by Guardian Australia journalist Johnathan Barret in June this year. King begun tracking the price of a coffee product she regularly bought from Woolworths. In the 18 months from the end of 2021 the product could normally be bought for about \$14 as part of the store's *prices dropped* promotion. However, at the beginning of 2023 'the price went from \$14 to \$22 and then discounted to \$15, with the latter advertised as a *cost saving*, even though it was above the price charged just weeks earlier'.<sup>26</sup>

This sort of marketing strategy can affect even the most astute of shoppers. These are the sort of tricks supermarkets use to get consumers to buy more. Jana Bowden, Professor of Marketing and Consumer Behaviour at Macquarie University, explains how these tricks 'get us to impulse-buy or buy more in order to qualify for the deal – and when we get a deal, we get a temporary shopper's dopamine high'.<sup>27</sup>

Conduct like this might seem dishonest, it might seem unfair, but if it doesn't reach the threshold for misleading, deceptive, or unconscionable conduct, then it is not against the law.<sup>28</sup> Without a prohibition on unfair trading the plugs the gap between s 18 and s 20-1 of the ACL (misleading or deceptive conduct and unconscionable conduct), systematic conduct that mightn't otherwise be considered unconscionable or misleading will continue to occur.

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<sup>25</sup> *Competition and Consumer Act 2010 (Cth)* sch 2 ('*Australian Consumer Law*').

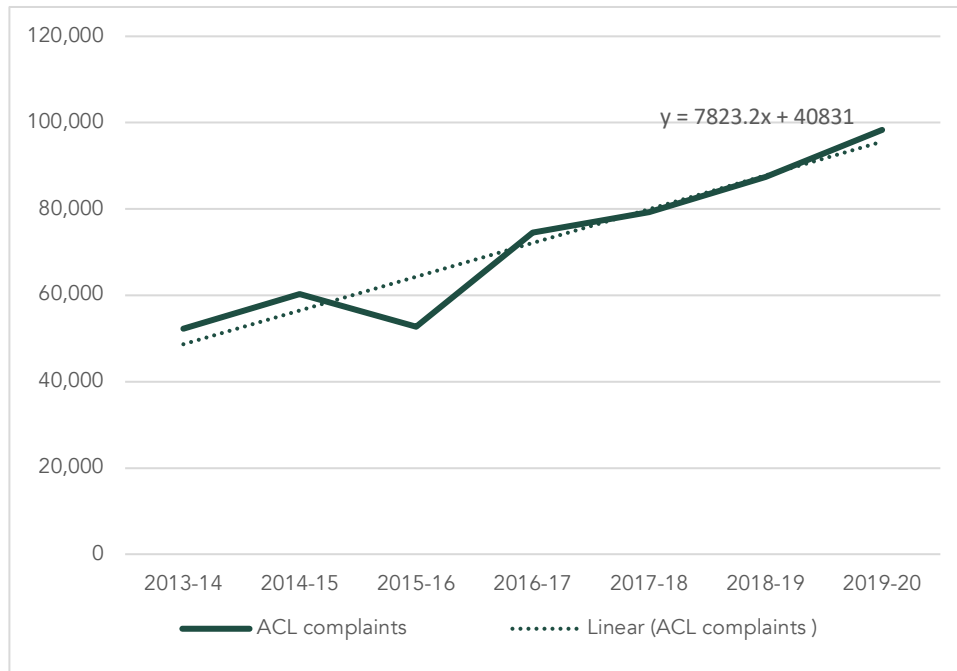
<sup>26</sup> Jonathan Barrett, 'What the Price of Nescafé at Woolworths Tells Us about Supermarket Promotion Tactics', *The Guardian* (Online, 11 June 2023) < <https://www.theguardian.com/business/2023/jun/11/what-the-price-of-nescafe-at-woolworths-tells-us-about-supermarket-promotion-tactics>>.

<sup>27</sup> Jenny Baldwin, 'Supermarket Psychology: Tactics to Get You to Spend More', *Choice* (Online, 10 January 2023) < <https://www.choice.com.au/shopping/everyday-shopping/supermarkets/articles/supermarket-sales-tricks>>.

<sup>28</sup> *Australian Consumer Law* (n 24) ss 18, 20-22. There have been successful actions brought under s 18(1) regarding misleading statements as to current and former pricing but these included a WAS and NOW price where the goods had never been sold at the higher price. This is not the case in the coffee example, prices had dropped: see, *Australian Competition and Consumer Commission v Allans Music Group Pty Ltd* [2002] FCA 1552; *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd (No 2)* [2008] FCA 476.

Figure 1.

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



### Weak competition and more consumer complaints

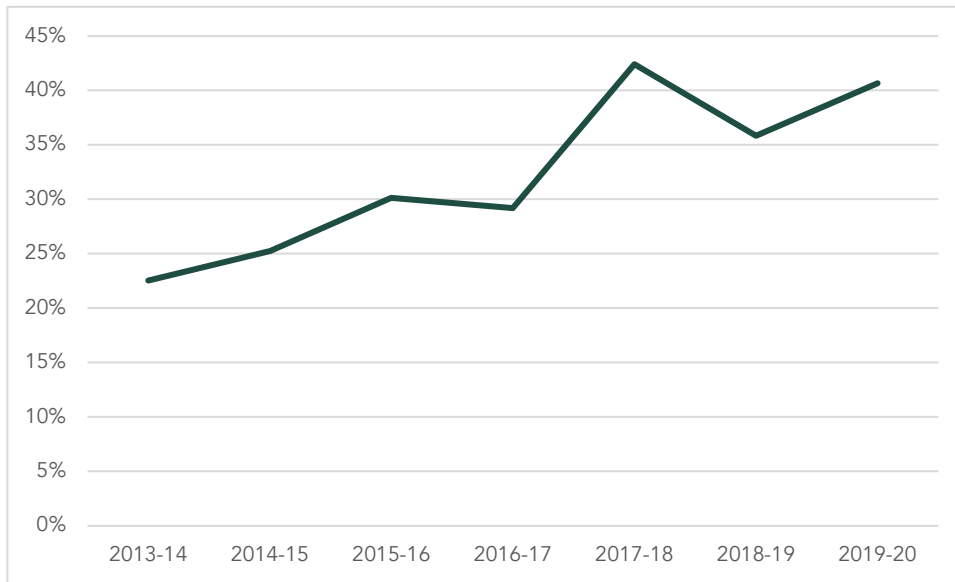
The environment of weakening competition allows consumers to be treated even more poorly, and they are. One way that we can see this is by looking at the number and nature of complaints received each year by the Australian Competition and Consumer Commission (ACCC). Between the 2014 and 2020 financial years the number of complaints received by the ACCC related to alleged breaches of the ACL almost doubled (Figure 1). Whilst the number of total contacts to the ACCC has increased at a similar rate,<sup>29</sup> the number concerning misleading or deceptive conduct,<sup>30</sup> and false representations<sup>31</sup> more than tripled between 2014 and 2020, reaching 41% of all ACL related complaints (Figure 2).

<sup>29</sup> Using ACCC annual reports, ACL complaints increased 88.09% and total complaint increased 76.3% between 2014 and 2020 financial years.

<sup>30</sup> Australian Consumer Law (n 24) s 18.

<sup>31</sup> Ibid (n24) s 29.

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



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

There are numerous examples of market giants misleading or deceiving consumers. These harm consumers, and they harm competitors too. We have Qantas Airways who advertised tickets for flights that had already been cancelled,<sup>32</sup> Coles supermarkets who marketed *Freshly Baked In-Store* bread that had actually been partially baked and frozen off-site,<sup>33</sup> and Onavo, a subsidiary of social media giant Meta, who marketed a virtual private network service to Australian consumers promising to *Keep You and Your Data Safe* when instead, Meta was collecting personal data for commercial benefit.<sup>34</sup>

### What’s not working?

The ACL prohibitions on misleading, deceptive, and unconscionable conduct along with recent enhancements made to the unfair contract terms provisions<sup>35</sup> are all intended to provide consumers with a general protection against predatory business practise. Yet there remains systematic predatory business practices that target vulnerable consumers, but that are not caught

<sup>32</sup> Australian Competition and Consumer Commission, ‘ACCC Takes Court Action Alleging Qantas Advertised Flights It Had Already Cancelled’ (Media Release 108/23, ACCC, 31 August 2023).

<sup>33</sup> Australian Competition and Consumer Commission, ‘Coles to Pay \$2.5m for Misleading “Baked Today” and “Freshly Baked In-Store” Bread Promotion’ (Media Release 58/15, ACCC, 10 April 2015).

<sup>34</sup> Australian Competition and Consumer Commission, ‘\$20M Penalty for Meta Companies for Conduct Liable to Mislead Consumers about Use of Their Data’ (Media Release 89/23, ACCC, 26 July 2023).

<sup>35</sup> *Australian Consumer Law* (n 24) ss 24-8; *Treasury Law Amendment (More Competition, Better Prices) Act 2022* (Cth).



by these prohibitions.<sup>36</sup> These unfair business practises include manipulative digital market strategies, enabled by a growth in digital technologies, like the use of data collection and predictive analytics that allow businesses to individualise a business's approach to consumers and 'which promote an illusion of choice where none actually exists'.<sup>37</sup>

Prohibitions on unconscionable conduct, based on equitable principles related to conscience and morality, have proven outdated in today's modern services driven economy.<sup>38</sup> Statutory unconscionable conduct,<sup>39</sup> which was intended to be unshackled from the *unwritten law*, has been consistently interpreted by the High Court in a way that gives weight to a conservative model, based on the ironically restrictive equitable doctrine.<sup>40</sup> The prohibition imposes a high threshold before conduct can be considered unconscionable, meaning conduct that is simply unfair or unjust will not be sufficient.<sup>41</sup>

Additionally, several difficulties arise when enforcing unconscionable conduct provisions. There are evidentiary challenges. Victims who are often vulnerable or disadvantaged may be less willing to complain, but when they do, are more easily intimidated, or have more limited time to allocate to the issue.<sup>42</sup> The term itself is complex, demanding an understanding of the interplay between judge-made and statutory law. It is not readily understood, and thus it is difficult for consumers to recognise when conduct can qualify as *unconscionable*.<sup>43</sup>

The solution is a prohibition on unfair trading in the ACL. We note that adopting a prohibition on unfair trading practises has been recommended by the ACCC,<sup>44</sup> and that a public consultation is currently underway on options for addressing unfair trading practises.<sup>45</sup>

<sup>36</sup> Jeannie Paterson and Elise Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 12-5; Gerard Brody and Katherine Temple, 'Unfair but Not Illegal: Are Australia's Consumer Protection Laws Allowing Predatory Businesses to Flourish?' (2016)41(3) *Alternative Law Journal* 161, 161-2 ('Unfair but Not Illegal')

<sup>37</sup> *Ibid* 13.

<sup>38</sup> Brody and Temple, 'Unfair but Not Illegal' (n 35) 161.

<sup>39</sup> *Australian Consumer Law* (n 24) s 21.

<sup>40</sup> See, Chris Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Victorian Law Foundation Oration, 14 August 2019); *ASIC v Kobelt* (2019) 368 CLR 1, 25, 31. *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409 failed to liberate statutory unconscionability from this conservative approach instead 'suggested a closer relationship between equitable principles underpinning the broader unconscionability doctrine and the doctrine's statutory varieties...[and] has also left the door ajar for moral obloquy to return': Mark Giancaspro 'Still Jammed! Lingering Questions About the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409', (2023) 35(1) *Bond Law Review* 1, 36.

<sup>41</sup> *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121].

<sup>42</sup> See, Australian Law Reform Commission, *Uniform Evidence Law: Examination and Cross Examination of Witnesses* (ALRC Report No 102, 8 February 2006) ch 5.

<sup>43</sup> Brody and Temple, 'Unfair but Not Illegal' (n 35) 163.

<sup>44</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) rec 21. See also, Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, 2017) 48.

<sup>45</sup> Australian Treasury, 'Unfair trading practices - Consultation Regulation Impact Statement' (Web

Page)<[https://treasury.gov.au/consultation/c2023-](https://treasury.gov.au/consultation/c2023-430458#:~:text=Unfair%20trading%20practices%20are%20particular,consumer%20and%20small%20business%20harm.)

430458#:~:text=Unfair%20trading%20practices%20are%20particular,consumer%20and%20small%20business%20harm.>

Conduct that is not necessarily misleading or doesn't reach the threshold for unconscionability, is still able to distort competition and harm consumers. Capturing this conduct under consumer laws will aid in empowering consumers to address the sorts of unfair business practises that we have witnessed over the last few years. Those which have helped to deliver massive profits for mega companies and made it more difficult for small businesses to enter the market, all while Australians struggle under a cost-of-living crisis.

### Lack of competition and inequality

Australians live in a rich country - one of the richest in the world.<sup>46</sup> In 2023 Australia ranked 10th highest GDP per capita in the world and third highest among the world's 20 largest economies.<sup>47</sup>

But in our rich country, more than 90% of the gains from economic growth go to the top 10 % of income earners.<sup>48</sup> Company profits are soaring, while real wages are falling.<sup>49</sup> The number of Australians working multiple jobs has hit a record high as people do what they can to survive during a cost-of-living crisis.<sup>50</sup> A job is no longer necessarily enough to stave off poverty in our country, with around 5% of full-time, and 14% of part-time workers being in poverty prior to the recent inflationary period.<sup>51</sup> The evidence suggests that more Australians are turning to charities just to meet their basic needs.<sup>52</sup>

Reducing concentration in Australian industry can play a significant role in reducing inequality. As Adam Triggs and Andrew Leigh point out in their 2019 article for the *Federal Law Review*: 'a growing body of evidence suggests that the rise in inequality and the fall in competition are not merely coincidental'.<sup>53</sup> Among other studies, they point to:

- Analysis of eight economies<sup>54</sup> conducted by Sean Ennis, Pedro Gonzaga and Chris Pike that suggests that market power and higher prices increase the wealth of the richest 10% of the

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<sup>46</sup> Australia has the 13<sup>th</sup> largest economy in the world, based on gross domestic product in terms of nominal value: International Monetary Fund, *World Economic Outlook* (April 2023).

<sup>47</sup> Ibid.

<sup>48</sup> David Richardson and Matt Grudnoff, *Inequality on Steroids: The Distribution of Economic Growth in Australia* (Report, April 2023).

<sup>49</sup> Australian Bureau of Statistics, *Business Indicators Australia, March 2023* (Catalogue no 5676.0, 5 June 2023); Australian Bureau of Statistics, *Consumer Price Index, Australia, March 2023* (Catalogue no 6401.0, 26 April 2023); Australian Bureau of Statistics, *Wage Price Index, Australia, March 2023* (Catalogue no 6345.0, 17 May 2023).

<sup>50</sup> Australian Bureau of Statistics, *Labour Account Australia, March 2023* (Catalogue no 6150.0.55.003, 9 June 2023).

<sup>51</sup> Urban Sila and Valéry Dugain, 'Income Poverty of Households in Australia: Evidence from the Hilda Survey' (Economics Department Working Paper No 1539, OECD, 14 February 2019).

<sup>52</sup> Australian Council of Social Services, *Poverty in Australia 2018* (Report, 2018) 13.

<sup>53</sup> Triggs and Leigh, 'A Giant Problem' (n 3) 708.

<sup>54</sup> Canada, France Germany, Korea, Japan, Spain, UK and the US

population in those eight OECD countries by between 12% and 21%, while at the same time reducing the disposable income of the poorest 20% by between 14% and 19%.<sup>55</sup>

- 1998 research from John Creedy and Robert Dixon, using Australian Household Expenditure Survey data, which revealed that the welfare loss linked to monopoly control has a more pronounced impact on low-income compared to high-income households.<sup>56</sup>
- Research by World Bank economists, Tania Begazo and Sara Nyman who reviewed literature on the economies in developed and developing countries and concluded that low competition in food markets disproportionately harms poor consumers and households.<sup>57</sup>

There is a solution; the enforcement and the effective deployment of competition law and other policy tools can be used to address concerns about increasing inequality. This was the conclusion of researchers from the Centre for Competition Law and Policy at the University of Oxford who analysed decisions made under European and UK Competition law over a 15-year period to 2020. They found that competition law enforcement resulted in greater proportional savings for low-income and average-income households compared to high-income households.<sup>58</sup>

### Competition and workers

Anti-competitive behaviour harms consumers, but it also harms workers. Triggs and Leigh contend that wages are driven by competition, and thus, less competition means lower wages.<sup>59</sup> In Australia, industries with higher market concentration tend to have a lower wage share.<sup>60</sup> Similarly, research on the US Economic Census, undertaken by researchers at the US National Bureau of Economic Research, found that American industries that had experience increased product market concentration between 1982 and 2016 had also experience a larger decline in labour share.<sup>61</sup>

<sup>55</sup> Ennis, Gonzaga and Pike, 'Inequality: A Hidden Cost of Market Power' (n 22) 3.

<sup>56</sup> John Creedy and Robert Dixon, 'The Relative Burden of Monopoly on Households with Different Incomes' (1998) 65(258) *Economica* 285, 285

<sup>57</sup> Tania Begazo and Sara Nyman, 'Competition and Poverty: How Competition Affects the Distribution of Welfare' (Viewpoint, 1 March 2016) 7.

<sup>58</sup> Christopher Decker et al, 'Competition Law Enforcement and Household Inequality in the United Kingdom' (2022) 18(4) *Journal of Competition Law and Economics* 905, 932. *Journal of*

<sup>59</sup> Triggs and Leigh 'A Giant Problem' (n 3) 699

<sup>60</sup> Ibid 700, citing Leigh and Triggs, 'Markets, Monopolies and Moguls' (n 18) 401.

<sup>61</sup> David Autor et al, 'The Fall of the Labor Share and the Rise of Superstar Firms' (NBER Working Paper No 23396, May 2017) 3, 25.

Since 1980, labour productivity has increased dramatically, with every Australian worker contributing to that achievement.<sup>62</sup> But workers have not been equally or adequately rewarded for their work, as their real wages have consistently lagged behind labour productivity.<sup>63</sup>

With high market concentration, like that in the grocery sector, there's less options for workers to move within the industry. This reduces their bargaining power and makes them more vulnerable to breaches of their rights and entitlements. We have seen this on a mammoth scale in big supermarket chains. The Fair Work Ombudsman ('FWO') alleges that 7,805 salaried employees were underpaid a total of \$113.8 million by Coles Supermarkets between 1 January 2017 and 31 March 2020. The FWO alleges that one employee was underpaid \$469,921 and 44 were underpaid in excess of \$100,000.<sup>64</sup> Running alongside the regulatory proceedings brought by the FWO, is a Coles class action, regulatory proceedings against Woolworths, and a Woolworths class action. The FWO alleges that Woolworths underpaid 70 employees a total of \$1,172,282 between March 2018 and March 2019.<sup>65</sup>

### IR reform

There are a number of loopholes in our existing Industrial relations law which the government is seeking to address in proposed legislation that is currently before the Parliament.<sup>66</sup> It is our strong position that in light of the challenges faced by Australian workers, many working in highly concentrated industries, that the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) be passed into law.

Introducing a new definition for casual employees and an easier employee choice pathway to permanent employment; reinstating the multi-factorial test to determine whether a worker is an employee or independent contractor; and preventing wages in enterprise agreements from being undercut using labour hire, will all help lift wages and reduce insecure work which makes inflationary periods even more difficult for Australian workers. In addition, the above-mentioned conduct by Coles and Woolworths argues strongly for the implementation of criminal penalties for

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<sup>62</sup> 'Has Worker Compensation Reflected Labour Productivity Growth?' Australian Bureau of Statistics (Web Article, 13 December 2022) <<https://www.abs.gov.au/articles/has-worker-compensation-reflected-labour-productivity-growth>>.

<sup>63</sup> Jim Stanford, 'Is productivity really a magical fix?', *The University of Sydney* (News post, 26 August 2022) <<https://www.sydney.edu.au/news-opinion/news/2022/08/26/is-productivity-really-a-magical-fix-.html>>.

<sup>64</sup> Fair Work Ombudsman, 'FWO Takes Action against Coles Supermarkets' (Media Release, 10 January 2023).

<sup>65</sup> Fair Work Ombudsman, 'FWO Takes Action against Woolworths' (Media Release, 18 June 2021).

<sup>66</sup> Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth).

wage theft which is also proposed in the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth).

## Conclusion

Concentrated markets allow market giants to more easily capitalise on difficult times. This harms consumers, workers and competitors, and plays a role in exacerbating inequality. There are potential reforms, not discussed in this submission, that directly target market concentration. These might include reforms to merger provisions, or land planning regulation reforms at the state and territory level.<sup>67</sup> In our submission we have focused on the issues that have faced consumers and workers during the last few years, and potential legislative amendments which aim to give these cohorts more power.

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

Per Capita commends the ACTU for holding this inquiry. We are grateful for the opportunity to make this submission and look forward to the inquiry's findings.

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<sup>67</sup> See, Australian Competition and Consumer Commission, 'Reform of Merger Laws Critical for Australia's Economic Transition' (Media Release 34/23, 12 April 2023) Christopher Arup, Caron Beaton-Wells and Jo Paul-Taylor, 'Regulating Supermarkets: The Competition for Space' (2017) 40(3) University New South Wales Law Journal 1035.