

6 November 2025

Director
Consumer Policy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Treasury,

Proposed introduction of excessive pricing prohibition for supermarket and grocery retailers

1. The Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on Treasury's consultation paper 'Introducing an excessive pricing prohibition for supermarkets: Consultation paper' (the **Consultation Paper**).
2. In summary, the Committee has considered the proposed excessive pricing prohibition and strongly cautions against its introduction for the following reasons:
 - (a) Those in support of the proposed prohibition suggest that if the major supermarkets are pricing competitively then the supermarkets should have no concerns about the proposed prohibition. This is a significant oversimplification of the issues and disregards the fact that regulatory overreach, particularly when it intervenes in pricing outcomes, can distort investment signals and raise barriers to entry and expansion, which ultimately reduces competition. This is the opposite of what the proposed reforms are designed to achieve.
 - (b) Pricing regulation in any form reflects a major intrusion into market dynamics and ought not to be introduced unless there is a clear and demonstrable need for it. In this case, the ACCC recently completed an in depth 12-month inquiry into pricing and competitiveness in supermarkets. It found that cost price increase requests from suppliers were the predominant reason for increases in retail grocery prices and that it expected grocery prices to stabilise as input cost increases continued to moderate. Significantly, the ACCC did **not** recommend any regulation of supermarket pricing but, rather, measures to lower barriers to entry such as simplification and harmonisation of planning and zoning laws.

- (c) While the Government has explicitly stated that it has had regard to international approaches to excessive pricing regulation in the UK, EU and South Africa,¹ these jurisdictions do **not** employ specific prohibitions on price gouging at all, but instead explicitly include ‘excessive pricing’ (or equivalent terms) as abuses of market power. Australia already has an equivalent prohibition in the *Competition and Consumer Act 2010* (Cth) (**CCA**), being the prohibition against misuse of market power.
- (d) The Committee does not consider that the proposed prohibition would meaningfully strengthen or expand the existing protections under the CCA. Rather, it will introduce uncertainty and ambiguity as to what amounts to excessive supermarket pricing and may deter businesses from entering or expanding their supermarket operations in Australia.

The case for the proposed prohibition has not been made

- 3. The Government’s stated policy intent in introducing the proposed prohibition is ‘to safeguard consumers from excessive pricing caused by insufficient competition in the supermarket sector, and in doing so, fix a key gap in Australia’s competition and consumer protection framework’.²
- 4. In Australia, there are currently only a handful of legislated prohibitions against price gouging or excessive pricing, and these apply in highly limited circumstances. For example:
 - (a) A price gouging prohibition in relation to hand sanitiser and personal protection equipment was introduced in April 2020 under the *Biosecurity Act 2015* (Cth) during the COVID-19 pandemic to address concerns regarding exploitative practices in the sale of emergency medical supplies.³
 - (b) In Victoria, the *Major Events Act 2009* (Vic) prohibits individuals and businesses from reselling tickets to ‘major’ events at inflated prices to address concerns about scalping and profiteering practices and to ensure fair access to events.
- 5. These prohibitions are targeted and confined and were introduced following widespread and persistent community concern about accessing these goods at inflated prices. This stands in stark contrast to the proposed prohibition which would apply broadly to *all* grocery products sold by the major supermarkets and in circumstances where there has been **no** finding of supermarket price gouging by the ACCC following its year-long Supermarkets Inquiry, recently completed in March 2025. In fact, the ACCC concluded that most grocery price increases from July 2019 to June 2024 were attributable to increases in input and operating costs across the economy.⁴ Notably, the ACCC did **not** recommend any pricing regulation of

¹ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 7.

² Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* (October 2025), page 6.

³ Commonwealth of Australia, Department of Home Affairs, *Measures to prevent essential goods being exported and price gouged during the fight against COVID-19 – Press release* ([April 2020](#)).

⁴ ACCC, *Supermarkets Inquiry Final Report* ([March 2025](#)), page 400.

supermarkets, instead making recommendations to reduce barriers to entry and expansion such as simplification and harmonisation of planning laws.⁵

6. The Committee considers that any pricing regulation of this kind should be supported by a clear policy rationale, which has not been demonstrated in this case, and an in-depth consultation process instead of the rapid process applied here. Indeed, inflation on food and grocery prices is currently sitting at around 3% to June 2025,⁶ and the most recent CHOICE consumer survey also found relatively marginal differences between the cost of groceries at the larger supermarket chains.⁷ Without including specials, the basket of 15 items cost \$55.34 at Aldi, \$56.75 at Coles, \$57.20 at Woolworths and \$65.56 at IGA. When specials available at the time of shopping are taken into account, the same basket cost \$55.26 at Aldi, \$56.75 at Coles, \$56.96 at Woolworths, and \$64.02 at IGA. This raises the question as to whether a specific prohibition on excessive pricing by the major supermarkets is needed at all.

Existing legislation provides adequate protections against excessive pricing

7. The Committee acknowledges that government intervention in the free market can be justified where it is proportionate and reasonably directed to promoting competition or preventing demonstrable consumer harm. However, the proposed prohibition does not meet these criteria.
8. Australia already has a robust competition and consumer protection framework under the CCA, which includes mechanisms to address anti-competitive conduct and administer significant penalties for contraventions.
9. In particular, section 46 of the CCA contains a misuse of market power prohibition which captures a wide range of conduct, including pricing strategies. If a business, such as a supermarket, misuses its substantial market power in any way that has the purpose, effect or likely effect of substantially lessening competition, it would fall foul of the law. Where they depart from accepted community norms and principles, excessive prices could also be unconscionable under the Australian Consumer Law. Moreover, where businesses provide false or misleading information (or fail to provide material information) about the reasons for price increases, this can contravene the prohibitions against misleading conduct and false representations.
10. The Explanatory Statement asserts that the prohibition is intended to complement Australia's existing competition and consumer law framework under the CCA whilst operating as a specific safeguard against excessive grocery prices enabled by insufficient competition in grocery product markets.⁸ The Committee urges Treasury to carefully consider whether, in light of the existing competition and consumer law safeguards, any actual gaps exist that would justify the imposition of additional regulation and the associated costs to Australians.

⁵ ACCC, *Supermarkets Inquiry Final Report* ([March 2025](#)), page 174.

⁶ Australian Bureau of Statistics, *The Consumer Price Index, Australia* ([June Quarter 2025](#)).

⁷ Choice, *Which supermarket has the cheapest groceries* ([September 2025](#)).

⁸ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 11.

The proposed prohibition would introduce uncertainty and ambiguity as to what constitutes an excessive price

11. The Committee considers that the proposed prohibition introduces ambiguity around what constitutes an 'excessive' price, an inherently subjective concept, creating compliance uncertainty and significant enforcement costs in the absence of any identifiable regulatory gap while not meaningfully strengthening the existing CCA protections.
12. The exposure draft legislation does not currently prescribe how an 'excessive price' will be determined, although the Explanatory Statement to the exposure draft provides that the determination of an excessive price is intended to include the following two steps:⁹
 - (a) Determination of a benchmark price: by reference to prices in comparable markets or attributable costs of supplying the grocery product plus a reasonable return, which the Explanatory Statement suggests would establish a price that the retailer *may* be able to supply that product if faced with 'workable competition' (not defined); and
 - (b) Conducting a comparison between the benchmark price (established pursuant to step above) and the relevant price at which the grocery product was supplied or offered for supply with an excessive price being one that is '*significantly and persistently*' above the benchmark price. A price significantly above the benchmark price is described as one where there is a '*significant*' difference between the benchmark price and the price at which the grocery product was offered for supply. A price is *persistently* above the benchmark price if it is significantly above the benchmark price for a '*sufficient period*'.¹⁰

This specific test is unique and not an express feature of excessive pricing prohibitions in international jurisdictions, as outlined below.
13. Notably absent from the proposed two-step process for determining whether a price is excessive is:
 - (a) any condition or element of substantiality, which is a cornerstone of competition law jurisprudence across jurisdictions in assessing the competitive dynamics of markets. This means that there is a significant disconnect between the potential operation of the prohibition and the vice to which it is purportedly directed;
 - (b) clarity as to when a period will amount to '*a sufficient period to imply that the relevant grocery product market is not workably competitive, and intervention is needed to enhance consumer welfare*'.¹¹; and

⁹ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), pages 10-11.

¹⁰ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), page 11.

¹¹ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), page 11.

- (c) provision for any assessment—once a price is determined to exceed the selected benchmark price—of other factors which might otherwise serve to justify the price as fair and not abusive, as is seen in comparable jurisdictions (discussed further below).¹²
14. In respect of 13(b) above, an appropriately lengthy period to enable an assessment of the competitive state of the market would necessarily involve an assessment of a kind that is not dissimilar to that involved in assessing whether conduct has had the effect or likely effect of substantially lessening competition in the relevant market. This makes unclear what the excessive pricing prohibition would achieve that the existing section 46 of the CCA does not already achieve, other than potentially extending the remit of section 46 of the CCA to any ‘*very large retailers*’ that may not have the requisite degree of market power to enliven the section 46 prohibition on misuse of market power.
15. Furthermore, reliance on concepts such as ‘*the cost of supplying the relevant kind of grocery product plus a reasonable return*’¹³ to determine the benchmark price is unlikely to provide consumers or businesses with sufficient clarity to understand the operation of the proposed prohibition or the obligations that it would impose on businesses.

The proposed legislation departs from the prevailing approach in other jurisdictions

16. In developing the policy underlying the excessive pricing prohibition in the exposure draft, the Government has explicitly stated that it has had regard to international approaches to excessive pricing regulation in the UK, EU and South Africa.¹⁴ However, these jurisdictions do **not** employ specific prohibitions on price gouging, but instead explicitly include ‘excessive pricing’ (or terms equivalent to) as abuses of market power.¹⁵ The jurisprudence arising from these jurisdictions is illustrative of the challenges faced in the enforcement of excessive pricing prohibitions.
17. There are also differing views as to the methodology that should be applied to determine abuse of market power or dominance through excessive pricing, and there is a broader policy question as to whether competition regulators and Courts should in fact intervene in such pricing regulation at all, including because such regulation may be an anathema to competition. This is an important caveat to the complex and variable application of the approach in practice elsewhere that does not translate well to the Australian context.
18. The proposed prohibition differs from international approaches in two important respects: the absence of a threshold requirement that the relevant firm possess substantial market power, and there being no assessment of unfairness or other qualitative features of the conduct.

¹² See, eg, *CMA v Flynn Pharma Limited and Ors* [2020] EWCA Civ 339, [97](v).

¹³ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement (October 2025)*, page 10.

¹⁴ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper (October 2025)*, page 7.

¹⁵ Article 102, *Treaty on the Functioning of the European Union* (EU); Section 18 of the *Competition Act 1998* (UK); Section 8 of *Competition Act, 89 of 1998* (South Africa).

(a) No threshold test for substantial market power

19. As noted in the Consultation Paper, abuse of dominance laws in the United Kingdom and the European Union apply to businesses with a dominant position.¹⁶ Likewise, the threshold question in any excessive pricing case in South Africa is a finding that a firm is 'dominant'.¹⁷ A dominant position is typically understood as being equivalent to having a substantial degree of power in a market under Australian law.¹⁸ Economists would generally agree that prohibitions on excessive prices are only appropriate when barriers to entry are found to be high and non-transitory,¹⁹ and intervention may only be justified when a firm enjoys a monopoly, or near monopoly position.²⁰
20. However, no requirement of substantial market power is included in the prohibition proposed in the Exposure Draft. Instead, the prohibition applies to 'very large retailers' only, on the basis that they have the greatest capacity to influence price competition. It is proposed that a retailer will be a 'very large retailer' if its total covered revenue in its annual accounts exceeds \$30 billion in revenue for the previous financial year,²¹ regardless of whether they have a substantial degree of power in a market. The Committee understands that this threshold means that the prohibition will at introduction apply only to Coles and Woolworths.²²
21. Not requiring proof of market dominance as a threshold question marks a significant departure from the practice of other jurisdictions, and the apparent justification is the findings of the ACCC's Supermarket Inquiry report. Importantly, the ACCC did not reach a finding that either Coles or Woolworths possess substantial market power on an individual basis. While there is reference to them possessing "market power", there is no finding that this market power is substantial.
22. On the contrary, the ACCC finds that Coles and Woolworths compete with one another, and that ALDI 'is an important source of price constraint on them, placing downward pressure on prices to the extent of its product overlap'.²³ Moreover, the ACCC estimates Woolworths has only 38% of supermarket grocery sales nationally,

¹⁶ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 5.

¹⁷ *Section 78 of the Competition Act* (89 of 1998) (South Africa).

¹⁸ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 5.

¹⁹ See, for example, Motta, M., 2004, *Competition Policy Theory and Practice*, Cambridge University Press, page 25; Paulis, E., 2007, Article 82 EC and Exploitative conduct in *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, eds. Ehlermann and Marquis; and Padilla, J., and O'Donoghue, 2020, *The Law and Economics of Article 102 TFEU* (3rd Ed), page 295.

²⁰ See Motta, M., and De Streel, A., 2007, Excessive Pricing in Competition Law: Never Say Never? in *The Pros and Cons of High Prices*, eds. Konkurrensverket – Swedish Competition Authority; and Evans, D., and Padilla, J., 2005, Excessive Prices: Using Economics to Define Administrable Legal Rules", *Journal of Competition Law and Economics* 97 (2005).

²¹ See Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 8; Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), page 4; *Competition and Consumer (Industry Codes – Food and Grocery) Amendment (Supermarkets Excessive Pricing Prohibition) Regulations 2025: Exposure Draft*, item 37.

²² Consultation Paper, page 5.

²³ ACCC, *Supermarkets Inquiry Final Report* ([March 2025](#)), page 1.

and Coles has only 29%.²⁴ This casts significant doubt on whether either Coles or Woolworths would be found to possess a substantial degree of market power were a full and proper assessment to be undertaken, or if a Court was required to determine the issue.

23. The implication of this is twofold:

- (a) First, the absence of any requirement to establish substantial market power inappropriately lowers the bar for intervention and risks intervention that is void of economic justification.
- (b) Second, and as discussed in more detail below, the absence of any requirement to establish substantial market power also significantly increases the risk of muting important price signals.

(b) No additional requirement of unfairness or no relation to economic value

24. In the context of the overseas laws from which guidance on the interpretation and application of the proposed new excessive pricing prohibition is intended to draw, a second, non-duplicative, stage of analysis is not accounted for in the proposed Australian test.

25. The landmark case on excessive pricing in the European Union is the 1978 case of *United Brands Company and United Brands Continental BV v EC Commission*, ECLI:EU:C:1978:22.²⁵ In that case, the Court of Justice of the European Union (**ECJ**) ruled that a price is considered excessive if “*it has no reasonable relation to the economic value of the product supplied*”.²⁶ The ECJ found that there were two questions to be established in order to prove that a price is excessive (which has become known as the United Brands test):

- (a) whether the difference between the costs actually incurred and the price actually charged is excessive (excessiveness limb);²⁷ and
- (b) if the answer to (a) above is in the affirmative, whether the price imposed is either unfair in itself or when compared to other competing products (unfairness limb).²⁸

26. On the excessiveness limb, the European Commission (**EC**) has subsequently noted that, while there does not appear to be a consistent approach to how this exercise is to be conducted, nor is there a definitive marker of when prices will be considered ‘excessive’, many cases use a ‘cost-plus’ approach which involves comparing prices to total costs, increased by a reasonable markup.²⁹

27. On the unfairness limb, the two prongs (‘unfair in itself’ or ‘unfair when compared to others’) have been applied alternatively, not cumulatively.³⁰

²⁴ ACCC, *Supermarkets Inquiry Final Report* (March 2025), page 1.

²⁵ *United Brands Company and United Brands Continental BV v EC Commission* [1978] ECR 207.

²⁶ *United Brands Company and United Brands Continental BV v EC Commission* [1978] ECR 207, [250].

²⁷ *United Brands Company and United Brands Continental BV v EC Commission* [1978] ECR 207, [252].

²⁸ *United Brands Company and United Brands Continental BV v EC Commission* [1978] ECR 207, [252].

²⁹ Commission Decision (EU) C(2021) 5120 final, Case AT.40394 - Aspen [2021] OJ C 372/6, 108-109.

³⁰ Commission Decision (EU) C(2021) 5120 final, Case AT.40394 - Aspen [2021] OJ C 372/6, 92.

28. In the United Kingdom, the Competition and Markets Authority (**CMA**), having established that the company holds a position of dominance within a relevant market,³¹ has also relied upon the United Brands test to establish excessive pricing.³² However, the Competition Appeal Tribunal (**CAT**), has warned that pure unfair pricing cases are ‘*rare in competition law*’ and difficult to bring,³³ and that ‘*ex post price regulation through the medium of competition law presents many problems.*’³⁴ In 2024, the CAT proposed two additional tests to determine excessive pricing, being that the ‘excess ought to be demonstrable’ and that there should be consideration of whether there was a *persistent* high profit margin.³⁵
29. In late December 2024, the CAT handed down its judgment in *Justin Le Patourel v BT Group Plc and British Telecommunications*,³⁶ a class action brought against British Telecommunications seeking £1.1 billion in damages for alleged abuses of its dominant position in the residential telephone landline service by alleged excessive pricing. The CAT dismissed the Applicant’s claim in that case, in which it:
- (a) found that the prices were excessive (concluding that any excess is *significant* if over 20% or more of the competitive benchmark);³⁷ but
 - (b) did not ultimately find an abuse of dominance by BT on the basis that the prices were not unfair.

The CAT also found that a price is not presumed to be ‘*unfair*’ merely because the price was found to be excessive under the first limb of the United Brands test. The CAT considered the distinctive value offered by BT and adopted a broad approach to the interpretation of economic value, which includes consideration of less quantifiable aspects such as brand value and certain customer offerings.³⁸

30. In South Africa, when determining whether a price is an ‘excessive price’, two limbs must be satisfied:
- (a) that the price is higher than a competitive price, and
 - (b) the difference between the price and the competitive price is unreasonable.³⁹

³¹ The assessment of dominance has included looking at the characteristics of the market, level of competition, whether there are high barriers to entry into the market (i.e. due to regulatory challenges) or the company having a very large market share. In the pharmaceutical industry this has also included lack of countervailing bargaining power, for example, if generic versions of the medicines were not available.

³² Decision of the Competition and Markets Authority: Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK: Case CE/9742-13 (7 December 2016), 285, 339, 343; *Flynn Pharma v CMA* [2020] EWCA Civ 617, [273].

³³ *Flynn Pharma Limited, Flynn Pharma (Holdings) v Competition and Markets Authority and Pfizer Inc, Pfizer Limited v Competition and Markets Authority* [2018] CAT 11 [3].

³⁴ *Flynn Pharma Limited, Flynn Pharma (Holdings) v Competition and Markets Authority and Pfizer Inc, Pfizer Limited v Competition and Markets Authority* [2018] CAT 11 [3].

³⁵ *Competition and Markets Authority v Flynn Pharma Ltd & Ors* [2024] CAT 65, [79].

³⁶ *Justin Le Patourel v BT Group Plc and British Telecommunications* [2024] CAT 76.

³⁷ *Justin Le Patourel v BT Group Plc and British Telecommunications* [2024] CAT 76, [926].

³⁸ *Justin Le Patourel v BT Group Plc and British Telecommunications* [2024] CAT 76, [1136].

³⁹ *Competition Amendment Act 18* of 2018 was passed on 14 February 2019. New excessive pricing provisions were effective from 12 July 2019. See Section 8(3) of the *Competition Act* (89 of 1998).

31. There are numerous factors that may be taken into account when conducting the assessment under the second limb.⁴⁰ These factors include the firm's price-cost margin, internal rate of return, return on capital invested or profit history, competitor prices and comparative levels of profit, and the length of time the prices have been charged at that level, and structural characteristics of the relevant market.⁴¹
32. In each of the comparator jurisdictions described above,⁴² establishing that a price is objectively 'higher than competitive' or 'excessive' is just one, preliminary, part of assessing whether in fact a misuse or abuse of market power is taking place. If the proposed legislation proceeds in the present form, Australia would be alone in not requiring any assessment of qualitative factors including unfairness, the nature of the relevant market, or the behaviour of other players. In other jurisdictions, the entirety of the proposed Australian assessment forms just one limb of analysis.
33. The second-stage analysis is materially different from the calculation of a benchmark price. It is a qualitative legal policy assessment undertaken to ensure that there is no justification for the differential between the prices charged and benchmark price in all the circumstances. It therefore serves to mitigate the risk of Type II errors. The intended approach therefore omits a critical element of the approach to controlling unfair prices under the EU and UK regimes. This omission will also make it difficult for the ACCC and the Court to be guided by jurisprudence in other jurisdictions as proposed, if only part of the analysis is undertaken.

'Significant and persistent' test not suitable to address whether conduct has relevantly affected consumer welfare or is a reflection of a market that is not workably competitive

34. It is not clear that a requirement of pricing that is '*significantly*' above a benchmark price is well suited to the pricing of food and groceries by supermarkets. As noted in the Consultation Paper, the EU and UK prohibitions on unfair pricing have not been applied to pricing by supermarkets; nor have they been applied to food and groceries otherwise supplied directly to consumers.
35. By contrast, the *United Brands* case involved the wholesale supply of Chiquita branded bananas.⁴³ The EC took issue with prices for customers in Belgium-Luxembourg, Denmark, The Netherlands and Germany, which were considerably higher, sometimes by as much as 100% higher, than for customers in Ireland and

⁴⁰ Pamela Bodlo, 'The First Prosecution of Excessive Pricing of Face Masks Amid COVID-19 by the Competition Tribunal of South Africa', MBA Incorporated (website, 26 October 2021): <<https://mbaincorporated.co.za/thought-leadership-articles/posts/the-first-prosecution-of-excessive-pricing-of-face-masks-amid-covid-19-by-the-competition-tribunal-of-south-africa>>

⁴¹ *Section 8(3) of the Competition Act* (89 of 1998).

⁴² Additionally, in the US, there are presently no federal laws which specifically prohibit price gouging or excessive pricing. At a state level, 39 states have price gouging laws with varying definitions of price gouging, but only Michigan's law applies outside of declared emergencies by the government. The Michigan Consumer Protection Act 1976 includes "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold" as an unfair, unconscionable, or deceptive trade practice.⁴² Here, and in several other US States' emergency price gouging laws, we see a secondary test of unfairness, unconscionability, or deceptive practices.

⁴³ Case 27/76, *United Brands Company and United Brands Continental BV v Commission of the European Communities*, 1978 ECR 207.

between 30 to 40% higher than the prices of unbranded bananas sold by United Brands.⁴⁴

36. Similarly, recent EU and UK cases on excessive and unfair pricing have involved prices for products supplied at prices at least approximately double the benchmark price:

<i>EU</i>	
Case C-177/16— AKKA/ LAA ⁴⁵	Collecting society rates in Latvia were at least twice as high as those applied in Estonia and in Lithuania, and between 50% and 100% higher than the average level of EU rates. Only rates charged in Romania were higher than the fees in Latvia.
Case AT.40394— Aspen ⁴⁶	The EC assessed the pricing for six cancer medications based on a cost-plus benchmark. In total, the differential between the benchmark price was above EUR 200 million in the period FY2013 to FY2019, or 280–300%. Five products were sold at a differential above 90–100%, including one sold at above 380–400% (Purinethol). The sixth product was sold at a differential of 40–50% (Lanvis).
<i>UK</i>	
Case 50395— Liothyronine ⁴⁷	Between 2009 and 2017, the prices for Liothyronine tablets exceeded the cost-plus benchmark by 900% to around 2500%. Even accounting for a more generous benchmark price, the differential ranged from above 300% in 2009 to almost 2,000% by 2017. It also involved a 1110% overall price increase during that period.
Case 50908— Phenytoin sodium capsules ⁴⁸	In relation to supply by Flynn Pharma, the differential based on a cost-plus benchmark was 148% for 25mg capsules, 82% for 50mg, 35% for 100mg and 44% for 300mg. In relation to supply by Pfizer, again based on a cost-plus benchmark, the differential was 38% for 25mg capsules, but exceeded 100% for 50mg and 700% for 100mg and 300mg capsules; its total monthly revenues for each capsule was GBP 12,647, 72,938, 634,679, and 410,803.60 respectively.

⁴⁴ European Commission Decision of 17 December 1975 relating to a proceeding under Article 86 of the EEC Treaty (IV/26699 - Chiquita) (76/353/EEC), pages 15-16.

⁴⁵ Case C-177/16, *Biedrība 'Autortiesību un komunikāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome (AKKA/ LAA)* ECLI:EU:C:2017:689, [54].

⁴⁶ European Commission, Article 9 Regulation (EC) 1/2003, 10 February 2021, p 26, [141].

⁴⁷ *HG Capital LLP and Ors v CMA* [2023] CAT 52, [85], [91], [229]. The CAT's judgement was upheld on appeal: [2025] EWCA Civ 578, [110].

⁴⁸ *Pfizer Inc and Anor v CMA; Flynn Pharma Limited and Anor v CMA* [2024] CAT 65, [307], [313] (subject to appeal).

<i>Dr Rachel Kent v Apple Inc and Anor</i> ⁴⁹	The differential between the price of services in the App Store and the benchmark based on costs plus ROR, ROA and ROCE was above, 74%, 120% and 351% respectively.
--	---

37. As noted above, inflation on food and grocery prices in Australia is currently sitting at around 3% to June 2025,⁵⁰ and the most recent CHOICE consumer survey also found relatively marginal differences between the cost of groceries at the major supermarkets.⁵¹ In the context of the EU and UK cases, it is difficult to see how the marginal increases in food and grocery prices in issue could be characterised as significant.
38. As to the “persistently” limb, if it is applied to fill the substantiality void, it may then render a specific prohibition on excessive pricing unnecessary and undesirable. To the extent that the assessment of whether a price has remained significantly above the benchmark for a sufficiently persistent period involves an assessment of the state of competition in the market, that assessment will not be dissimilar to that involved in assessing whether conduct has had the effect or likely effect of substantially lessening competition in the relevant market. This then raises the question as to the necessity of a specific prohibition on excessive pricing in the first place.

There is a real risk that important price signals are muted, potentially leading to adverse and unintended consequences

39. Prices play an important role in markets. In particular, they send important signals to both consumers and producers.
- (a) For consumers, the price provides a signal of the relative scarcity of the product/service. In free markets, prices change in response to changes in supply and demand. This price mechanism serves to allocate scarce supply more efficiently between consumers (i.e., such that the product/service is consumed by those consumers who value it most). If demand exceeds available supply, an increase in the price of the product/service means that customers who value it less (and have a lower willingness to pay) will choose not to consume the product or service.
- (b) For producers, an increase in price signals the need for additional supply or capacity. According to economic theory, it is only the marginal firm that earns zero economic profits in a perfectly competitive market. This means that it is only the most efficient firms that will supply the product/service. Firms with higher marginal costs will not enter the market unless prices increase. As such, price increases may result in firms with comparatively higher costs electing to enter in order to supply the excess demand.
40. Given the important role played by prices, intervention is only warranted when it is clear that the potential upsides from the intervention outweigh the potentially significant downsides. An appropriately high bar should therefore be applied to any

⁴⁹ [2025] CAT 67, [610] (Subject to appeal).

⁵⁰ Australian Bureau of Statistics, *The Consumer Price Index, Australia* ([June Quarter 2025](#)).

⁵¹ Choice, *Which supermarket has the cheapest groceries* ([September 2025](#)).

excessive pricing interventions (which risk placing an artificial ceiling on prices, muting the important signals that they send).

41. From an economics perspective, this should include a requirement to establish that:
 - (a) the firm in question possesses a substantial degree of market power, such that price signals are unlikely to be effective in incentivising new entry or expansion by competitors; and
 - (b) prices have *persistently* and *significantly* exceeded a reliable benchmark for the price that would be expected in an effectively competitive market, in order to avoid erroneously identifying effectively competitive prices as being excessive.
42. In the absence of such requirements effective price signals may be muted, thereby undermining entry and expansion in competitive markets, leading to under-investment over the longer term. To incentivise investment, it may be necessary for prices to significantly exceed economic costs in the short run in order to signal the available returns from that investment. If intervention prevents this mechanism from operating it is likely to cause under-supply/reduced output, and a potential reduction in quality or variety over the longer-term.⁵²
43. Moreover, the threshold of \$30 billion risks actively disincentivising supermarkets other than Coles and Woolworths from expanding. If firms, or their investors, believe that there is a significant possibility that their future returns will be curtailed by over enforcement, they are likely to revise their expected returns downwards with the result that their funds will be invested in other industries, possibly outside Australia.

It is misguided to suggest that the challenges of establishing excessive prices can be mitigated by the record keeping requirement

44. The record keeping obligation would impose additional costs on supermarkets while not materially mitigating the fundamental evidentiary challenges in establishing whether prices are excessive.
45. Under the Exposure Draft, very large retailers will be required to keep records of ‘pricing information’ (including prices, costs, and any payments, discounts, rebates, allowances or benefits given to the retailer by suppliers) for a period of at least three years.⁵³ This requirement is limited to information or documents that these retailers create or are given as part of their normal business operations.⁵⁴ The Consultation Paper suggests that the intention behind the record keeping requirement is to “support the enforceability of the prohibition by mitigating the evidentiary challenge of establishing excessive pricing in the Australian supermarket sector”.⁵⁵

⁵² See, for example, See Motta, M., and De Streel, A., 2007, Excessive Pricing in Competition Law: Never Say Never? in *The Pros and Cons of High Prices*, eds. Konkurrensverket – Swedish Competition Authority.

⁵³ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), pages 4, 11.

⁵⁴ Commonwealth of Australia, Department of Treasury, *Exposure Draft Explanatory Statement* ([October 2025](#)), page 12.

⁵⁵ Commonwealth of Australia, Department of Treasury, *Introducing an excessive pricing prohibition for supermarkets – Consultation paper* ([October 2025](#)), page 5.

46. This is misguided. The availability of accounting records of prices and costs that a retailer might create as part of their normal business operations will not significantly mitigate the evidentiary challenge.
47. First and foremost, the primary challenge in determining whether a price is 'excessive' (i.e., significantly and persistently in excess of prices in a workably competitive market), is determining the competitive price level.⁵⁶ This is extremely challenging in practice. Prices will exceed costs by a material amount in many markets, which makes it difficult to distinguish between differences that might be found under conditions of effective competition and those that are so high as to be excessive.
48. Requiring supermarkets to keep extensive records of their prices and costs does not in any way mitigate the very significant challenge of identifying reliable benchmarks for a return in a workably competitive market. This typically requires finding comparators that are sufficiently similar in terms of demand and cost conditions such that they can serve as reliable benchmarks for effective competition. Such comparators may not exist.
49. Second, in order to provide any meaningful insight into whether a price is excessive, regard needs to be had to economic rather than accounting profits. It is widely accepted that adjustments need to be made to accounting data before it is capable of providing meaningful insights into economic profitability.⁵⁷ These adjustments can include the need to revalue assets to reflect their Modern Equivalent Asset value (where the principle of prudence in accounting may lead to the value of assets being understated). In addition, the approach taken to allocating any common costs to individual lines of business or products also needs to be considered. While account needs to be taken of all of the costs incurred by a firm in supplying a good/service, allocations of these costs down to individual products or product categories will be arbitrary from an economics perspective.⁵⁸
50. Therefore, even if accounting data on prices and costs are readily available, significant challenges will remain when seeking to reliably calculate the profit, or return, that is earned by a firm on specific products or category of products.

⁵⁶ See, for example, Bishop, S. and Walker, M. (2010) *The Economics of EC Competition Law: Concepts, application and measurement*. 3. ed. - London: Sweet & Maxwell (page, 237).

⁵⁷ See, for example, Office of Fair Trading, *Assessing profitability in competition policy analysis*, Economic Discussion Paper 6, July 2003.

⁵⁸ While such allocations of common costs may be undertaken by firms in the ordinary course of business (e.g., to monitor the relative performance of different divisions over time), that is not done for the purpose of assessing whether prices are above competitive levels. For a discussion of why cost allocations are arbitrary from an economics perspective, see for example, Baumol, W. J., 1979. *Minimum and Maximum Pricing Principles for Residual Regulation*. *Eastern Economic Journal*, Vol. 5, No. 1/2 (Jan–Apr, 1979), pp. 235-248, page 238). Baumol discusses a hypothetical example where the costs of a railroad need to be allocated across three users of that railroad: a train that hauled platinum, a train that hauled steel and a train that hauled feathers. In principle, it would be credible to allocate the costs of the railroad in terms of either the value hauled, the weight hauled, or the volume hauled. However, the choice would have very different implications for the downstream operators' profits. Baumol notes that "*the steel shippers can be relied upon to fight against the use of weight as a basis for assigning 'cost responsibility'. The feather shippers will combat the use of volume for that purpose, and the platinum shippers will fight tooth and nail against market value as the criterion of cost allocation*".

The costs of implementing the record-keeping requirements and compliance processes will be significant

51. The compliance costs will be significant for each very large retailer (and for any retailer who may near the monetary threshold) given the breadth of the proposed prohibition and the sheer number of products it covers. Compliance costs are much broader than paying for legal advice on interpretation:
 - (a) there will be various one-off costs at the start to train staff, update software and implement new processes;
 - (b) staff costs and system maintenance costs will be ongoing; and;
 - (c) there will also be material costs associated with complying with the ACCC notices issued under its monitoring powers (even if a business is fully compliant and there are no formal ACCC investigations).
52. For example, mandatory ACCC pricing related notices (e.g., in gas and electricity) routinely result in businesses being required to spend significant time and resources not only producing documents and records already in existence but also organising information to suit the ACCC's detailed requirements.
53. It is stated that the fact supermarkets will not be required to generate new information or documents is intended to limit regulatory burden, and that only information or documents produced as part of normal business operations are to be retained. However, this overlooks the practical reality of how a large business goes about organising its records in the relevant circumstances, namely when proposed legislation introduces a compliance obligation and a record keeping obligation, falling short of these obligations may attract significant civil penalties, and there is clear expectation that the enforcement agency will investigate compliance with the new obligation.
54. The requirement to retain pricing information (which is broadly defined) necessarily requires, in anticipation of a real possibility of an ACCC notice or investigation, organisation of that information, including the implementation of collation and storage processes, and governance and training procedures on compliance and record-keeping. There will also be significant data storage costs given the quantity of data to be kept for 3 years.
55. Within each *very large retailer*, there will be project team required to carry out the necessary changes and once operational, the extra compliance arrangements will likely be an additional task for many staff across the retailer in addition to their usual jobs. This will result in less time for other work (or higher out of hours workloads). If extra staff are needed, this may occur over time following business cases being prepared and approved.

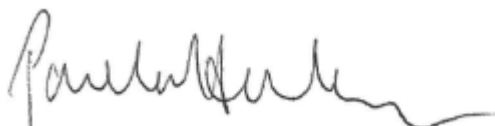
56. It is therefore not sufficient for the Treasury to base these many costs on public information as that information cannot estimate the true costs.⁵⁹ The significant compliance costs may also have the negative consequences of:
- (a) deterring new entrants who would be best placed to increase competition and innovation to the benefit of consumers; and
 - (b) increasing the prices paid by consumers due to the rise in operating costs for the affected businesses.

Conclusion and further contact

57. The Committee would be pleased to discuss any aspect of this submission.

58. Please contact the chair of the Committee Peta Stevenson ■
■■■■■■■■■■■■■■■■■■■■ or Committee member Rosannah Healy ■
■■■■■■■■■■■■■■■■■■■■ if you would like to do so.

Yours sincerely



Dr Pamela Hanrahan
Chair, Business Law Section

⁵⁹ Australian Government policy impact analysis requires compliance cost estimates in dollar terms – including a breakdown of hours required by different staff, such as senior executive staff, working-level staff, and in-house senior or junior legal staff (or any external legal costs) – over the first 10 years: Australian Government, Department of the Prime Minister and Cabinet, *Regulatory Burden Measurement Framework* ([February 2024](#)).