

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Purchasing Power and Buyers' Cartels – Note by Australia**

22 June 2022

This document reproduces a written contribution from Australia submitted for Item 4 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

Antonio CAPOBIANCO  
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

**JT03496757**

## *Australia*

### 1. Introduction

1. The Australian Competition & Consumer Commission (ACCC) has a range of functions, including conducting market studies, enforcing compliance with Australia's competition laws and fair trading laws, and administering industry-specific regulation (known as industry codes).
2. Accordingly, the ACCC has considered purchasing power in a number of contexts, including merger assessments, applications for authorisation of otherwise anti-competitive conduct, competition and fair trading enforcement actions, and market studies and price inquiries. These have identified a number of issues, particularly in the food supply sector, where there are significant imbalances in power in the acquirer's favour between producers and wholesalers, and between wholesalers and supermarkets.
3. The ACCC's legislation deals with purchasing power in four key ways:
  - Firstly, the ACCC is empowered to self-initiate market studies, and can be directed by the Government to conduct price inquiries, into particular sectors. These processes allow us to gather information on, and make recommendations about, competition, fair trading, or consumer protection issues that may arise in those sectors. In past market studies (such as the Cattle and beef market study and the Wine grapes market study) and past price inquiries (such as the Dairy Inquiry and the Perishable Agricultural Goods Inquiry), we have identified significant purchasing power as an important issue which impacts both competition and fair trading and have made recommendations to combat its harmful effects.
  - Secondly, competition laws (including merger laws and authorisation for otherwise anti-competitive conduct) provide economy-wide protections that focus on the threat to the competitive process posed by acquirers with significant purchasing power.
  - Thirdly, fair trading laws (like the Australian Consumer Law's unfair contract terms framework and prohibitions on unconscionable conduct) provide economy-wide protections that prohibit unfair or unconscionable commercial practices that acquirers with significant purchasing power may engage in.
  - Fourthly, industry codes (like the Dairy Code, the Horticulture Code, and the Food & Grocery Code) provide sector-specific protections that focus on particular problems that arise from significant purchasing power in those sectors.
4. This submission will set out the ACCC's experiences in each of these four categories.

### 2. Purchasing power

#### 2.1. Market studies and price inquiries

5. Market studies are used by the ACCC to help promote effective competition in markets. Market studies are normally undertaken where a number of concerns about market conduct have been raised, and a detailed examination of market characteristics could help

to determine whether market intervention, including new policy proposals, regulatory solutions or enforcement action is warranted. Market studies are self-initiated by the ACCC where areas of focus are informed by intelligence from our enforcement, compliance, mergers and economic regulation work.

6. Under the *Competition and Consumer Act 2010* (CCA), the ACCC can also be directed to undertake in-depth inquiries into certain matters. The ACCC has longstanding roles in conducting inquiries into gas, electricity, financial services and digital platforms markets as well as monitoring prices, costs and profits in the airports and aviation, fuel, and waterfront and shipping industries.

7. The ACCC has conducted several market inquiries where buyers' power was a significant and relevant concern, these inquiries include:

- [Cattle and beef market study](#)
- [Dairy Inquiry](#)
- [Wine grape market study](#)
- [Perishable Agricultural Goods Inquiry](#)

8. This submission focusses on our most recent inquiry, the Perishable Agricultural Goods (PAG) inquiry as an example of the nature of economic harm that may arise in situations where there is unequal bargaining power in favour of buyers.

### *2.1.1. Perishable Agricultural Goods Inquiry*

9. In late 2020, the ACCC conducted a three-month inquiry into bargaining power imbalances in supply chains for perishable agricultural products in Australia. The inquiry looked at perishable agricultural goods (PAG) including meat products (chicken, pork, beef and lamb), eggs, seafood, dairy products and horticultural goods and culminated in the release of the *Perishable agricultural goods inquiry report* (the Report).<sup>1</sup>

10. The inquiry examined trading practices throughout PAG supply chains, including the relationships between farmers, processors, and retailers, and the extent to which any potential bargaining power imbalances in these relationships adversely impacted the efficient operation of these markets.

#### *Features of perishable goods markets*

11. The ACCC identified the following features in PAG markets that were likely to lead to bargaining imbalances.

- *the degree of perishability of goods* in these industries influences the way that market structures evolve. The more perishable a product, the weaker the producer's position from which to negotiate favourable terms of supply with the buyers of their goods, and the more vulnerable they are to take-it-or-leave-it terms from buyers or exploitative conduct.
- PAG markets are often characterised by *many producers, but few processors and major retailers*. Economies of scale at the processing and retail levels result in market structures where there is a relatively small number of buyers acquiring the majority of produce.

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<sup>1</sup> See: <https://www.accc.gov.au/publications/perishable-agricultural-goods-inquiry-report>

- Together, these features mean PAG supply chains can be particularly susceptible to market failure in the form of a lack of competition, information asymmetry, and the inappropriate (inefficient) allocation of risk.

12. Through this inquiry and previous work in PAG markets, the ACCC has identified a range of harmful practices associated with bargaining power imbalances and market failures which arise in the processor-producer and supermarket-supplier relationships.

#### *Processor—producer relationships*

13. The inquiry found that imbalances in bargaining power in the processor-to-producer relationship manifest in a range of ways, including:

- one-sided contracting practices reflecting imbalances in bargaining power, including potential unfair contract terms regularly being present in producer supply agreements
- practices that go beyond hard bargaining, including to inefficiently allocate risk to producers or suppliers, which often puts producers at risk of significant financial detriment
- a lack of transparency in relation to prices or quality assessment processes across a number of PAG markets
- resulting from all of the above, reduced confidence and investment by producers, potentially limiting productivity growth.

14. Through the ACCC's studies into the PAG, dairy and wine grape industries, and through our fair trading enforcement function, the ACCC has frequently identified contract terms that shift significant uncertainty and risk onto producers and may be unfair contract terms within the meaning of the Australian Consumer Law (ACL). For example, the ACCC has identified many terms that allow a processor to unilaterally vary key elements of an agreement, such as the price or quality specifications of produce, which can greatly affect a producer's income.

#### *Supermarket-processor relationships*

15. There are also imbalances of bargaining power at the wholesale level of PAG supply chains. The major supermarkets in Australia: Woolworths, Coles and ALDI, account for over 75% of industry revenue, with Woolworths and Coles making up 65% of the market.

16. Despite the high levels of concentration in the industry, supermarkets compete strongly on prices of certain products, particularly perishable goods. In addition, some of the major supermarkets compete directly with processors and wholesalers at the farmgate and retail levels, by entering markets to acquire produce directly from producers, or selling products at retail under their own private labels, or both. These features combine to create a highly contested and tough bargaining and negotiating environment for processors and wholesalers.

17. While hard bargaining between retailers and suppliers is an inherent part of commercial dealings, the ACCC expressed concern where behaviours move beyond this to create potential harmful impacts on markets. For example, the ACCC has received claims that retailers sometimes require some suppliers to offset any wholesale price increases with trade spends. Over the longer term, this has the potential to limit supplier investment and diminish overall supply chain efficiency.

### *Conclusions of the ACCC's inquiry into perishable goods*

18. As a result of the above inquiry the ACCC recommended that Australia's perishable agricultural goods markets required a new general prohibition against unfair trading practices to address harmful practices arising from bargaining power imbalances that are not covered by current competition or fair trading laws in Australia. The ACCC's final report also recommended the strengthening of:

- the small business unfair contract term protections, by making it a contravention of the law for unfair contract terms to be used (rather than simply voiding the terms) and attaching pecuniary penalties, and
- the Food and Grocery Code of Conduct, by making it a mandatory code and attaching pecuniary penalties.

## **2.2. Competition laws**

19. Australia's key competition law provisions are contained in Part IV of the CCA which covers cartels, restrictive trade practices and mergers.

20. Of particular relevance is section 50 of the CCA which prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

21. In contrast to the formal merger regimes that apply in the majority of OECD countries, Australia is one of a small number of countries that operate under an informal, voluntary merger notification regime. While merger parties are not legally required to notify the ACCC of transactions, the ACCC reviews mergers primarily through an informal review process which enables merger parties to manage risk by seeking the ACCC's view prior to the completion of a merger.

22. Authorisation is available for all forms of conduct prohibited by Part IV of the CCA.

23. Accordingly, merger parties may seek statutory protection from legal action under section 50 of the CCA by lodging an application for merger authorisation. While the merger authorisation is in force, the authorised parties will be able to acquire the relevant shares or assets without risk of the ACCC or third parties taking legal action for a contravention of section 50 of the Act.

24. The ACCC may not grant authorisation unless it is satisfied that either:

- the proposed acquisition would not be likely to substantially lessen competition or
- the likely public benefit from the proposed acquisition outweighs the likely public detriment, including any lessening of competition.<sup>2</sup>

### **2.2.1. Mergers**

25. Buyer power is also an issue that arises in relation to certain mergers. In *Woolworths Group Limited - PFD Food Services Pty Limited* one of the issues of concern for the ACCC was whether the proposed merger of a major supermarket retailer and a wholesale food distribution business, had the potential to increase Woolworths' upstream

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<sup>2</sup> For conduct that involves a potential or actual per se breach of the CCA (conduct that is prohibited outright), such as cartel conduct, the ACCC may grant authorisation only if the second limb is satisfied.

buyer power. The ACCC had preliminary concerns that the proposed acquisition would increase Woolworths' already strong bargaining power in dealing with suppliers, as well as remove an important alternative buyer, which may lead to a substantial lessening of competition in the acquisition of food products from suppliers.

26. Indeed PFD's competitors were concerned that Woolworths may leverage its buyer power in the acquisition of food and grocery products to gain better prices for PFD, leading competing wholesale food distributors to exit. However, in the final assessment, and based on extensive market enquiries, the ACCC concluded that the proposed acquisition would not be likely to substantially lessen competition in the acquisition of food and groceries. The ACCC found that post-acquisition, there would likely remain a number of alternate distributors that would continue to constrain PFD, including the distributors and buying groups.<sup>3</sup>

### 2.2.2. Authorisations

27. As noted above, in Australia, businesses can seek authorisation from the ACCC if they are concerned that their proposed conduct may give rise to a breach of the competition provisions of the CCA.

28. In the context of considering purchasing power, a number of authorisation applications concern collective bargaining or tendering arrangements, where a group of competitors seek to collectively bargain in the acquisition of goods or services or collectively tender for the acquisition of goods or services.

29. A recent example of where the ACCC granted authorisation was an application by a group of councils collectively tendering and contracting for waste and recycling collection, transport, sorting and processing services.<sup>4</sup> The ACCC considered the collective tender arrangement was likely to result in public benefits in the form of environmental benefits, increased efficiency, increased competition, and transaction cost savings.

30. We considered that there was limited public detriment because: the tender process will be competitive and transparent; participation is voluntary for the Participating Councils and for potential suppliers of the various services; suppliers of the various services are able to bid to supply a single Council or groups of Councils which will facilitate participation by various smaller local waste service providers, as well as larger ones; and each Participating Council will independently decide which supply option best suits its needs, either from the options available through the joint tender process or through separately contracting with a supplier.

31. In considering the likely public detriments of a proposal, the ACCC considers whether the buying group comprises a substantial portion of the market and, therefore, whether it reduces competition for providers of the relevant services.

32. The ACCC also considers that information sharing in collective bargaining arrangements is of concern if it allows the parties to co-ordinate their conduct beyond that for which authorisation is granted; for example, if it facilitates collusion or provides a focal

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<sup>3</sup> See: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/woolworths-group-limited-pfd-food-services-pty-limited>.  
See also: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/saputo-dairy-australia-pty-ltd-proposes-to-acquire-murray-goulburns-operating-assets>

<sup>4</sup> See: <https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2014.04.22%20-%20PR%20-%20AA1000596%20Albury.pdf>

point for competitors to align their behaviours in related markets such as the downstream supply of services to consumers.

33. The ACCC has denied authorisation in some instances where these detriments were significant. The following are examples of where the ACCC considered whether to authorise collective bargaining.

34. In *Bendigo and Adelaide Bank and others* (2017), the ACCC denied authorisation for banks to engage in limited collective bargaining and limited collective boycott of Apple Pay. In this case, the acquirers (including the major banks) were seeking authorisation to increase their purchasing power. Ultimately, however, it was found that the proposed coordination would have reduced competition in payment cards.<sup>5</sup>

35. The ACCC has also granted authorisation for collective bargaining by coal producers with the Port of Newcastle, an example perhaps of acquirers seeking authorisation to increase their purchasing power. In the initial decision, the ACCC found the conduct was likely to result in minimal detriment because participation was voluntary and public benefits were likely to result from the bargaining group having greater input into the terms and conditions of access and greater transparency around capital expenditure plans and cost allocation at the port.<sup>6</sup> However, the ACCC's authorisation was recently reviewed and overturned by the Australian Competition Tribunal on the basis of there not being sufficient evidence to support the claimed public benefits.<sup>7</sup>

36. The ACCC has granted authorisation to many applications from small businesses to collectively bargain to acquire goods and services and from councils collectively tendering for waste services.

37. In the case of small businesses collective bargaining, the ACCC has granted a class exemption that allows eligible small businesses to collectively bargain without breaching competition laws.<sup>8</sup> The class exemption does not compel any business to join a collective bargaining group, or require a customer, supplier or franchisor to deal with the bargaining group if they do not want to. The class exemption simply removes the risk that collective bargaining by eligible businesses will breach competition law.

### 2.3. Fair trading laws

38. As noted above, we have relevant experience dealing with buyers' power in the context of fair trading enforcement, particularly in relation to unfair contract terms and unconscionable conduct.

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<sup>5</sup> See: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/bendigo-and-adelaide-bank-ors-authorisation-a91546-a91547>

<sup>6</sup> See: <https://www.accc.gov.au/media-release/coal-producers-allowed-to-collectively-bargain-with-port-of-newcastle-operations>

<sup>7</sup> See: [https://www.competitiontribunal.gov.au/home/decisions?sq\\_content\\_src=%2BdXJsPWh0dHBzJT\\_NBJTJGJTJGd3d3Lmp1ZGdtZW50cy5mZWJRjb3VydC5nb3YuYXUIMkZqdWRnbWVudHMIMkZKdWRnbWVudHMIMkZ0cmliW5hbHMIMkZhY29tcHQIMkYyMDIyJTJGMjAyMmFjb21w dDAwMDEmYWxsPTE%3D](https://www.competitiontribunal.gov.au/home/decisions?sq_content_src=%2BdXJsPWh0dHBzJT_NBJTJGJTJGd3d3Lmp1ZGdtZW50cy5mZWJRjb3VydC5nb3YuYXUIMkZqdWRnbWVudHMIMkZKdWRnbWVudHMIMkZ0cmliW5hbHMIMkZhY29tcHQIMkYyMDIyJTJGMjAyMmFjb21w dDAwMDEmYWxsPTE%3D)

<sup>8</sup> Note, the class exemption is restricted to businesses with an aggregated turnover of less than \$10m; and to franchisees and fuel retailers to collectively bargain with their franchisor or fuel wholesaler (respectively) regardless of size.

### 2.3.1. *Unfair contract terms*

39. The Australian Consumer Law protects small businesses from unfair terms in standard form contracts. A standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it is offered on a ‘take it or leave it’ basis.

40. The law sets out examples of terms that may be unfair, including:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract
- terms that enable one party (but not another) to terminate the contract
- terms that penalise one party (but not another) for breaching or terminating the contract
- terms that enable one party (but not another) to vary the terms of the contract.

41. Ultimately, only a court or tribunal (not the ACCC) can decide that a term is unfair.

42. The following are examples of the ACCC’s interventions in relation to potentially unfair contract terms used by businesses with strong purchasing or bargaining power.

43. In 2018, prior to the introduction of the Dairy Code, the ACCC engaged with Warrnambool Cheese and Butter Factory Company Holdings Limited (WCB), a milk processor, regarding potentially unfair contract terms in its milk supply agreements which the ACCC was concerned had the potential to harm its dairy farmer customers.

44. As a result of this engagement WCB altered terms in its milk supply agreements and milk supply handbook. Previously WCB’s contracts with farmers contained terms that allowed it to unilaterally vary the milk price and other milk supply terms, with the farmer unable to terminate the milk supply agreement early without incurring a financial penalty. They also included restrictions on farmers selling their farm.<sup>9</sup>

45. In June 2020, as a result of ACCC engagement, some of Australia’s biggest winemakers agreed to change their supply agreements with grape growers after the ACCC raised concerns that the contracts contained terms which were likely to be unfair.<sup>10</sup>

46. The ACCC contacted a number of large winemakers following its 2019 wine grape market study which showed that there was a significant bargaining power imbalance between large wine makers and wine grape growers, reflected in many wine grape supply agreements that forced growers to carry substantial risk.

47. Following the ACCC’s investigation, several winemakers agreed to change contract terms covering contractual disputes with growers, as well as terms relating to wine grape quality assessments.

### 2.3.2. *Unconscionable conduct*

48. Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. Under the Australian Consumer Law, businesses must not engage in unconscionable conduct when dealing with other businesses or their customers.

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<sup>9</sup> ACCC, [Warrnambool Cheese and Butter amends contract terms](#). See also: [Dairy processors agree to amend farmer contract terms](#)

<sup>10</sup> ACCC, [Fairer terms for wine grape growers but concerns remain about payment periods](#)

49. Certain conduct may be unconscionable if it is particularly harsh or oppressive or where one party knowingly exploits the special disadvantage of another. Unconscionable conduct is more than just hard commercial bargaining; it must be against conscience as judged against the norms of society.

50. The law sets out a list of factors that courts may consider when deciding whether conduct is unconscionable, including:

- the relative bargaining strength of the parties
- whether the stronger party used undue influence, pressure or unfair tactics
- the extent to which the parties acted in good faith.

51. The following are examples of action taken by the ACCC in relation to alleged unconscionable conduct by businesses with strong purchasing or bargaining power.

52. In 2014, in one of the first Australian examples of business-to-business unconscionable conduct, Coles Supermarkets Australian Pty Ltd was fined \$10 million in relation to its conduct involving over 200 suppliers. The Federal Court found that Coles misused its bargaining power and that its conduct was contrary to conscience. Coles was found to have demanded payments from suppliers to which it was not entitled by threatening harm and withheld money from suppliers it had no right to withhold.<sup>11</sup>

53. The ACCC's unconscionable conduct action in 2014 against another major Australian supermarket, Woolworths, was ultimately unsuccessful as the Federal Court found Woolworths had not acted unconscionably within the meaning of the Australian Consumer Law.<sup>12</sup> The ACCC took action against Woolworths after it had developed the "Mind the Gap" scheme to reduce a significant half-year gross profit shortfall, with category managers and buyers contacting many suppliers to ask for urgent payments ranging from \$4,291 to \$1.4 million. The ACCC pursued Woolworths because we considered that its behaviour went well beyond hard commercial bargaining and was not consistent with business and community values. The ACCC considered that subjecting a supplier to arbitrary demands, makes it very hard for suppliers to make future investment decisions in the face of financial uncertainty. While this example was not ultimately successful, it does help to illustrate the way in which buyers' power manifests in practice and the need to find effective forms of redress and solutions.

## 2.4. Industry codes

54. The ACCC regulates voluntary codes and mandatory industry codes that are prescribed under the CCA. Industry codes (like the Dairy Code, the Horticulture Code, and the Food & Grocery Code) provide sector-specific protections that focus on particular problems that arise from significant purchasing power and related harms in those sectors.

55. These Codes regulate specific behaviour between suppliers and purchasers in these industries, including mandating or prohibiting certain terms in their agreements. The Dairy and Horticulture Codes are mandatory codes of conduct under the CCA and penalties can apply if businesses act in breach of their requirements under these Codes. The Food and Grocery Code of Conduct is different in that it is a voluntary code prescribed under the

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<sup>11</sup> ACCC, [Court finds Coles engaged in unconscionable conduct and orders Coles pay \\$10 million penalties](#)

<sup>12</sup> ACCC, [Woolworths' "Mind the Gap" scheme not unconscionable.](#)

CCA. This means it is only mandatory under law for retailers or wholesalers who voluntarily sign up to the Code. There are no penalties available for breaches of this Code.

#### **2.4.1. Dairy Code Enforcement**

56. The ACCC is also responsible for enforcing the Dairy Industry Code of Conduct which regulates the conduct of farmers and milk processors in their dealings with one another.<sup>13</sup>

57. The mandatory dairy code of conduct was a key recommendation of the ACCC's 2018 [dairy inquiry](#), which found significant imbalances in bargaining power at each level of the dairy supply chain. The Code came into effect on 1 January 2020 and applies to dealings between a dairy farmer and any corporation that purchases milk directly from them, including supermarkets, milk brokers, and cooperatives. The Code may apply to collective bargaining arrangements in some circumstances.

58. The Code requires processors and farmers to deal with each other in good faith and sets out key requirements for milk supply agreements. The Dairy Code of Conduct contains penalty provisions and the ACCC has taken court action for potential breaches of the code. The ACCC regularly conducts audits of compliance with the Dairy Code of Conduct and has pursued enforcement action for breaches of the Code.<sup>14</sup>

#### **2.4.2. Horticulture Code**

59. The [Horticulture Code of Conduct](#) is a mandatory industry code prescribed under the CCA which contains enforceable penalty provisions. The Code requires traders to prepare and publish their terms of trade which must contain certain information up front about how they will deal with growers, including when traders can reject produce and how long traders will take to pay growers. The Code also requires growers and traders to have in place a horticulture produce agreement before they trade that sets out certain minimum terms.

60. In addition to transparency, the Code also:

- requires all parties to deal with each other in good faith, which aims to deter parties from undermining each other's rights under the horticulture produce agreement
- sets out a way for parties to resolve disputes without going to court.

#### **2.4.3. Food and Grocery Code**

61. The Food and Grocery Code is a voluntary code that governs certain conduct by grocery retailers and wholesalers in their dealings with suppliers.<sup>15</sup> The four signatories to the Code are the three large retailers and largest wholesaler (supplying most other independent retailers) in Australia. The Code provides protections for suppliers and imposes key standards of conduct a retailer or wholesaler signatory is expected to demonstrate when dealing with suppliers, including in relation to payment, promotions,

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<sup>13</sup> <https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct/dairy-code>

<sup>14</sup> See for example: [Lactalis Australia in court for alleged Dairy Code breaches](#), [Dairy Farmers Milk Co-operative pays penalty for alleged Dairy Code breach](#), and [Brownes Dairy pays penalties for alleged breaches of Dairy Code](#)

<sup>15</sup> ACCC: <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

price rises, product standards and delisting. While there are no pecuniary penalties, the Code does include other remedies such as injunctive relief and damages.

62. All of the above sector-specific industry codes can be characterised as targeted responses to buyers' power and related conduct. Industry codes remain an important tool for the ACCC's overall response to these issues.

### 3. Conclusion

63. From the Australian perspective, our market studies in a range of sectors demonstrate that buyers' power, and the inequality of bargaining power that underlies it, creates real risks of potential harm to the effective operation of markets. In seeking to address particular conduct we have predominantly relied on enforcement of our fair trading laws as well as industry-specific regulation. We also consider buyers' power a relevant factor that informs our decision making in our assessment of mergers and authorisations under the CCA.