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**Submission**

to

**The Trade Practices Review**

by

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## **1.0 Executive Summary**

This submission asserts that Australia loses 0.5% of GDP or A\$3.6 billion per annum, and loses opportunities for a more innovative, entrepreneurial and export oriented approach by major Australian businesses.

Using material from the *Global Competitiveness Report – 2001/02* and research work undertaken by Professor Michael Porter from the Department of Economics at Harvard and an adviser on the US Presidents Commission on Industrial Competitiveness it is possible to benchmark Australia's competitiveness and outcomes from competition policy against the US.

The result is disappointing and paints a picture of major Australian businesses as inward looking, hesitant to employ global strategies and deterred by arrogance, lack of domestic rivalry, an unwillingness to upset the status quo and sacrifice current profits to compete innovatively abroad.

Porter draws a causal link between strong competition policy encouraging robust domestic rivalry and companies' willingness to be innovative and increase productivity. He also asserts that strong domestic rivalry between firms contributes to national prosperity in terms of GDP per capita.

A lack of effective competition policy allows firms to engage in "zero sum competition" or imitation/price discounting which results from dominance of an industry. Such businesses achieve profits and growth largely by price exploitation of suppliers and customers and by simply redistributing income rather than growing national wealth through innovation.

This is most clearly seen in the grocery supermarket chains exploitation of prices. Over the last ten years the price paid to vegetable suppliers has dropped by 7.5% while the prices paid by consumers has increased by 14.2%.

It has forced families out of horticultural areas in my electorate of Dawson because the mis-use of market power provisions of the Trade Practices Act (TPA) do not incorporate an "effects test" .

### **Recommendation 1**

The Trade Practices Act must incorporate an "effects test " such that firms cannot become dominant and mis-use their market power to have the effect of damaging competition.

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To restore public confidence in the role of competition policy and government's determination to punish serious breaches of the TPA the punishments must reflect the crime with criminal sanctions for what is simply major theft.

**Recommendation 2**

Criminal sanctions, including jail sentences, should be imposed for serious breaches of the TPA.

Sunwater is a monopoly supplier of irrigation water and abuses its position with monopoly pricing.

**Recommendation 3**

The TPA must include powers for the Australian Competition and Consumer Commission ACCC to investigate effective monopolies, effective monopoly pricing and order divestiture or break-up of effective monopolies. It should have the power to seek substantial fines for perpetrators and restitution for those affected.

**Recommendation 4**

The TPA be amended to allow the ACCC to issue "cease and desist" orders where there is a strong belief that a misuse of market power has occurred.

Small businesses are disadvantaged by not being able to purchase supplies on the same terms and price as larger competitors or are refused supply entirely.

**Recommendation 5**

The TPA should include a provision that supply not is unreasonably refused and those competing businesses in a regional market are able to purchase on "like terms".

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The National Competition Council is quite arbitrary in applying National Competition policy and seeks to impose competition on vulnerable sectors while disregarding more serious targets for competition.

It should be replaced by a body more responsive and responsible to the Parliament and the national interest.

**Recommendation 6**

The National Competition Council should be replaced by an all party Standing Committee of the Parliament to ensure that decisions reflect the national and regional interest and that there is responsibility to the Parliament and the people.

**Recommendation 7**

National Competition payments made by the Commonwealth to the States to compensate for implementing competition in various industries should be paid not to the State but directly to those who have suffered disadvantage to rebuild their communities.

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## **2.0 The Federal electorate of Dawson**

Dawson is a rural and regional Queensland seat, which takes in the major city of Mackay, population 80,000 people and the smaller towns of Proserpine, Airlie Beach, Bowen, Ayr, Home Hill and Sarina.

The population is 135,000 and the major industries are sugar cane growing and milling, the export of raw sugar, engineering support to the coal industry and export of coal through the ports of Hay Point, Dalrymple, Bay and Abbott Point, tourism in centres such as the Whitsunday's, horticultural production in the Burdekin, Gumlu, Guthalungra and Bowen and retail trade in the towns and cities.

The average median income in Mackay is \$25,000 per annum. Dawson has 6,201 employers and own account workers and is in the top 37 of federal electorates with the greatest number of "owner operators".

I am therefore well placed to see the effect of competition legislation on small businesses and the communities that depend on them.

The lack of effective competition legislation is not serving my electorate well.

From my own observations there is a growing gap between rural and regional incomes and those in the major cities. While this is due to a multiplicity of factors including commodity prices, adverse seasons and an appreciating Australian dollar there is also a contribution from the ineffective provisions of the Trade Practices Act. Families are leaving horticultural communities in my electorate.

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## 2.1 Small business as a wealth hazard

There is a clear correlation between the proportion of small businesses in the 148 federal electorates and subsequent low median family incomes. While there may be other factors involved there is no doubt that an area with a high percentage of self employed people also has a high percentage of low median income families as can be seen from the Department of Parliamentary Library – *Electorate Rankings :Census 1996*.

The exercise is undertaken for the first 20 electorates ranked by proportion of self-employed.

Electorate	Ranked by Proportion of Employers		Ranked by weekly Median Family Income.	
	Rank	%	Rank	Income
O'Connor	1	19.7	39	624
Barker	2	17.1	11	568
Mallee	3	16.8	13	571
Gwydir	4	16.7	10	562
Maranoa	5	16.7	26	600
Gippsland	6	16.5	9	560
Wannon	7	16.5	24	592
Murray	8	15.2	29	601
Cowper	9	15.1	1	486
Wide Bay	10	15.1	2	493
Richmond	11	15.0	4	508
Wakefield	23	14.8	23	591
Fairfax	13	14.5	5	535
New England	14	14.4	16	576
Parkes	15	13.9	22	589
Lyne	16	13.5	3	495
Grey	17	13.5	15	576
Page	18	13.4	6	543
Farrer	19	13.2	36	619
Pearce	20	12.9	74	712

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It begs the question as to why incomes are lower in areas where there is a high proportion of self employed people. Is it because self employed people are less skilled and unable to pay themselves and their employees more, or are they held back in part by artificial constraints that redistribute income from the self employed sector to big business?

To support the former one would have to assume that every self-employed person in Australia lacks ability and enterprise. Demonstrably this is not the case therefore the latter must apply.

There are artificial constraints on the ability of self-employed people to generate wealth in their home areas. These factors are open to argument and could include lack of infrastructure, less buying power, higher charges however this submission will assert that a contributing factor is weak competition laws.

### **3.0 Status of Competition laws in the United States.**

US Anti-trust laws are demonstrably more robust and carry much tougher penalties than Australian competition laws. The effect of this will be examined.

The objectives of US anti-trust legislation are best expressed by the US Department of Justice **“The historic goal of the anti-trust laws is to protect economic freedom and opportunity by promoting competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anti-competitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad.”**

There are other benefits such as dispersing economic and political power, redistributing income from large corporations to small business and consumers and ensuring local control of business to protect against labor dislocation.

Under US law restraint of trade carries a \$10 million fine for a corporation and \$350,000 for an individual or three years imprisonment or both. Monopolising trade is a felony and carries the above punishments.

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### **The Clayton Act has key provisions which:**

- Prohibit excessive dealing, if it would have the effect of substantially lessening competition.
- Prohibit mergers that would substantially lessen competition. Require prior notification of large mergers to both the Federal Trade Commission (FTC) and the Justice Department.

The FTC, which administers competition law, is empowered to

- Prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.
- Seek monetary redress and other relief for conduct injurious to consumers.
- Prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices.
- Conduct investigations relating to the organisations, business practices and management of entities engaged in commerce.
- Make reports and legislative recommendations to Congress.

### **3.1 The role of Competition Law in national economic performance**

Strong domestic rivalry between firms contributes to prosperity in terms of GDP per capita.

Professor Michael Porter of Harvard University in his book “The Competitive Advantage of Nations” states:

**“A strong anti-trust policy – especially for horizontal mergers, alliances and collusive behavior is fundamental to innovation. While it is fashionable today to call for mergers and alliances in the name of globalisation and the creation of national champions, these often undermine the creation of competitive advantage. Real national competitiveness requires governments to disallow mergers, acquisitions and alliances that involve industry leaders”**

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Porter also identifies a problem that is endemic to Australian supermarket chains and other businesses, namely a clubish, complacent domination of the industry.

**“One of the most common, and often the most fatal, causes of national lost advantage is the ebbing of domestic rivalry, since pressure to improve and adjust is often lost with it. ...One or two firms come to dominate the industry. Alternatively, market sharing, informal agreements, or widespread co-operation can turn a group of aggressive rivals into a club”**

Porter also identifies another Australian industry trait resulting from the loss of domestic rivalry, namely calls for government intervention similar to the current pleas of big business to weaken even further the Trade Practices laws.

**“A diminished taste for rivalry, is also sometimes reflected in efforts to enlist government support or intervention. Successful national industries often gain some political power and the temptation is great to exercise it.”**

There is a more serious consequence of diminished domestic rivalry and that is arrogant indifference to change and innovation.

**“Lack of pressure and challenge means that firms fail to look constantly for and interpret new buyer needs, new technologies, and new processes. They lose the stomach to make old competitive advantages obsolete in the process of creating new ones. ...They are deterred by arrogance, lack of rivalry, and an unwillingness to upset the status quo and sacrifice current profits.”**

Porter equates a lack of domestic rivalry with lack of productivity and the worst form of competition namely that based on imitation/price discounting. This is plainly seen in the supermarket chains in Australia where there are homogenous products, low prices, imitation of best practices, little true customer choice and a “zero-sum competition”.

The only benefit for customers is ever-lowering prices but no real innovation, choice or tailoring of products and value chains.

However this cosy clubish lack of domestic rivalry has two further consequences. The first is a tendency to drive profits and increased share price off predatory exploitation of domestic suppliers and competitors rather than off innovative and dynamic business practices. The second, which is directly related to the first, is that a comfortable domestic regime negates the need to seek export markets.

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There are no Australian supermarkets opening in overseas destinations for the simple reason that they do not have to do so.

#### **4.0 Case Studies in ineffective Australian Competition Law**

There are some serious deficiencies with the Trade Practices Act. The first is the inability of the Australian Competition and Consumer Commission to investigate monopolies and monopoly pricing or to order divestiture, fines or jail sentences.

The case of Sunwater is a classic example of this inability to act on monopolies.

The case of the horticulture industry and the major supermarket chains is a classic case of the effect of damaged competition where the major supermarket chains withdraw from a market and force down prices, where they bully and threaten suppliers and they exploit both suppliers and customers through price manipulation.

##### **4.1 Sunwater and Monopoly Water Pricing**

Under National Competition Policy and the COAG agreement on Water Reform, the Queensland Government set up a corporate entity, Sunwater, to administer all irrigation water in the State. There are only two shareholders in Sunwater, both State government Ministers and it is a monopoly supplier. Farmers have no other means of obtaining water supplies.

There is great disquiet with the approach and policies of Sunwater.

Farmers are apparently willing to pay a competitive price, which reflects true cost recovery however Sunwater will not be transparent with the figures.

##### **Uncompetitive Pricing by Sunwater**

Sunwater supplies water to Burdekin irrigators at a gazetted price of \$36 per megalitre or \$36/ML from the Burdekin Channel and \$11.70 for water from the Burdekin River. This includes the administration costs of Sunwater, which has its office in Brisbane and is called by the farmers the “Brisbane charge”.

There is a private enterprise water supplier in the Burdekin called the South Burdekin Water Board (SBWB) which supplies water to 200 farmers in the Burdekin on an area based water charge of \$49 per hectare which equates to

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\$3.76/ML for water pumped from the Burdekin River. This charge includes all administration costs for the SBWB office in Home Hill including the wages and salaries of 6 staff.

	<b>Sunwater \$/ML</b>	<b>South Burdekin Water Board \$/ML</b>
Burdekin Channel	36.00	
Burdekin River	11.70	3.76

If SBWB can supply water with full cost recovery and a rate of return at \$3.76/ML then farmers are entitled to ask why their monopoly supplier Sunwater cannot compete with this private enterprise seller and why Sunwater is not compelled to match SBWB's cost of supply.

### **Lack of Transparency and compliance with NCP**

An independent study by the Queensland government consultants the Water Reform Unit WRU has established that the efficient cost of operating, maintaining and renewing the Burdekin scheme requires a BRIA, Burdekin River Irrigation Area channel charge of \$28/ML.

- Sunwater refuses to make its charges transparent therefore farmers have no way of knowing whether their charges are compliant with NCP and the TPA.
- Sunwater gazettes water charges at \$36/ML or 29% above the figure of \$28/ML determined by the WRU and considerably more than the SBWB charges.
- The Commonwealth government in 1983 contributed the majority of the capital cost of the Burdekin Dam and yet Sunwater continues to extract full cost recovery and a rate of return from an asset, which they made no capital contribution towards.
- Sunwater has threatened farmers who are withholding the difference between \$36.13/ML and \$28/ML and only paying for the efficient running of the scheme. Farmers who withhold monies are being threatened with foreclosure.

Sunwater are a monopoly seller behaving in an anticompetitive manner compared to the other private enterprise water suppliers in the Burdekin and maintaining their charges through threatening behavior. They are allowing a bloated and uncompetitive administrative structure to be reflected in their water charges.

Submissions have been made to both the NCC and the ACCC. The NCC claims not to have authority to enforce transparency or compliance with NCP while the ACCC is helpful but does not have the necessary powers under the Trade Practices Act.

#### **4.2 Horticulture and the major Supermarket Chains**

The major supermarket chains exploit both suppliers and customers. This is clearly demonstrated by the fact that since 1989/90 the fruit price paid to producers has increased by 23.9% while the price paid by consumers has increased by 53.6%, For vegetables the price increase paid to producers has fallen by 7.5% and the price paid by consumers has increased by 14.2%.

<b>1989/90 to 2002</b>	<b>% change price to producers</b>	<b>% change price by consumers</b>	<b>Exploited by chains</b>
Fruit	+ 23.9%	+ 53.9%	30 %
Vegetables	- 7.5%	+ 14.2%	21.7%

(Source – *ABS Average Prices of Selected Items*, catalogue number 6403.0)

The clearest way to demonstrate the lack of effective competition law in the horticulture industry which is made of numerous small growers and a few large supermarket chains is to reproduce below an article I wrote for the Australian Financial Review and which was published on 12 July 2002.

“The farmer was in his own words ‘sick in the stomach’ when the agent offered 2 cents a kilo for his prize Jap pumpkins, which cost 70 cents to grow, what with fertiliser, water charges and fuel. But the real hurt was the retail price of 50 cents to \$1.20 per kilo – a prospective mark-up of 2500% although not all to the supermarket.

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“They were ripping off the public and that upsets me” said the farmer, who will not allow his name to be used. Rather than give into a system that the farmer describes as one where “the chain stores got total control of everything and they dictate”, he ploughed in his seven acres of pumpkins.

The horticultural industry doesn't encourage whistleblowers because growers that speak out are black banned until they have learnt their lesson. The Ombudsman appointed by the federal government tries hard for just outcomes but his powers are limited.

This leaves only the Australian Competition and Consumer Commission and its Chairman Alan Fels as the real referee in an uneven contest between the overweening power of big business and the increasingly desperate small businesses that supply and compete with them. As one farmer said, “ If the ACCC goes, it's the end of us, they could do what they want with us”.

Competition is a one-way street from the perspective of the farmers, who have to compete with imports and each other. Not so the major supermarket chains, of which Woolworth's and Coles comprise 70% of the national market, they withdraw from a market when the price of fruit rises, wait until the stocks build up and the price drops and re-enter the market at the lower price. Prices to farmers, allowing for seasonal variations, are less now than five years ago. As the family farms are crippled, the local communities shrink – the number of children at Gumlu school has dropped from 33 to 7 this year.

Its tougher when the supermarkets over-order and then return fruit to the market without payment particularly when growers live thousands of kilometers from the metropolitan markets and cannot check the veracity of claims. One local grower had 2000 cases of tomatoes ordered by a major supermarket which kept them for a month and then returned them unpaid claiming they had “ gone bad”.

When the Quality Assurance code did not match the supposedly spoilt consignment he was going to complain but was told he would be black banned and may suffer the fate of another grower whose fruit was returned to the market in his distinctly labeled boxes with “condemned” stickers attached to ensure that both his consignment and reputation were destroyed.

While executives of Australia's biggest companies condone standover tactics, exploitation, and deception they shrilly attract publicity by condemning Professor Alan Fels and the ACCC of.... attracting publicity by using standover tactics, exploitation and deception.

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This does not sit well when some CEO's annual salary could buy an entire country town, share options for CEO's encourage myopic decision making and corporate governance means yet another photograph of an executive with their defense lawyer.

Australia must upgrade competition legislation to the standard of the United States Anti-trust laws which disperse economic and political power, redistribute income from large corporations to small business and consumers, ensure local control of businesses against labour dislocation and most importantly harden companies to compete abroad.

These laws have hardened US firms to export in 2000/2001 \$ 22.4 Billion to Australia against our cosseted firms \$ 11.7 Billion to the US. If major Australian companies want to take on the world, as they claim, then they have to take on world best competition legislation."

## 5.0 Competition Law and Australia's national economic performance

Porter states that " **the fundamental benefit of competition is to drive productivity growth through innovation, where innovation is defined broadly to include not only products, but also processes and methods... The only means of achieving sustained productivity growth in an economy is through innovation**"

Australian business's record on innovation is poor and was examined in the Final Report of the Innovation Summit Implementation Group, August 2000 titled "***Unlocking the Future***".

It had the following to say " **Results of a world wide study on innovation management reveal that our innovation performance is not at best practice. For example we are well behind the United States and the Asia Pacific region in terms of vision, attitude, and strategic approach to innovation. Another study concludes that the entrepreneurial expertise of our managers lags behind five other countries – including Japan, the United kingdom, and the United States – in areas including entrepreneurial skills, willingness to take advantage of new business, willingness to take financial risks, initiative in making friends with business people from another country and creativity in generating new business advantages.**"

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This dismal record was previously examined in the Report of the Industry Taskforce on Leadership and Management Skills, April 1995 entitled "*Enterprising Nation*" when it stated **"a survey of Australia's customers in the Asian region , including Singapore, Indonesia, and Japan, rates Australia a long way behind the five other major trading nations in Asia who are our competitors on six key measures of entrepreneurial skill"**

It seems that the intervening five years did not change this poor record of innovation from Australia's businesses.

Porter goes on to draw a direct causal link between innovation, strong domestic competition, productivity growth and national standard of living **" Innovation, in this broad sense, is driven by competition, While technological innovation is the result of a variety of factors, there is no doubt that healthy competition is an essential part. One need only review the dismal innovation record of countries lacking strong competition to be convinces of this fact....This provides the soundest explanation for why anti-trust must protect competition; it is the key to a nation's economic prosperity "**

Significantly he goes on to state **" the effectiveness of anti-trust policy proves to be one of the variables with the strongest positive association with the variation in GDP per capita across countries"**

Where then does Australia rank in terms of competition. The results of the "Global Competitiveness Report " 2001 – 02 are attached and show Australia on Chart 8.01 - Intensity of local competition ranked 19 with a score of 5.6 behind Estonia, Chile and India to name a few. The United States is ranked number 1 with a score of 6.5.

In Chart 8.02 – Extent of locally based competitors, Australia is ranked 35 with a score of 4.7 behind countries such as Colombia, Indonesia, Mexico and Argentina. Again the United States ranks number 1 with a score of 5.8.

However it is Chart 8.07 – Effectiveness of anti-trust policy that is most significant because this can be linked to GDP. On this chart Australia is ranked 9 with a score of 5.7 meanwhile the United States is ranked 4 with a score of 6.0.

While this may seem a minor deviation from the United States ranking it has quite an effect on GDP. It is acknowledged that there are a multitude of factors that impact on GDP and it is challenging to quantify the contribution of a particular measure. In the richest 19 countries the effectiveness of anti-trust policy was not

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statistically significant in influencing GDP per capita however it is a significant factor in explaining GDP per capita over all 75 countries in the survey and it thus a useful tool in estimating the effect of competition policy on Australia's GDP per capita.

Nonetheless the regression result of Professor Porter published in the " The Global Competitiveness Report – 2001 – 02 do provide a basis for making an estimate. The regressions sought to assess the contribution of a range of factors to GDP in 2000. In the 19 richest countries in the survey Porter found that an increase of 1 point in the assessment of the effectiveness of anti-trust policy should lead to a US\$358.22 increase in GDP per capita.

Extrapolating from these figures to obtain an estimate of the increase in GDP that would accrue to Australia if the measure of our competition law increased from 5.7 to 6.0 (the same as the US).

Estimated GDP Change =  $0.3 \times 358.22 \times 19.6$  million (Australian population )  
= US\$2.1 billion.  
= A\$3.6 billion  
= 0.5% of GDP.

This is a sobering cost for Australia to lose A\$3.6 billion per annum because our competition laws are not up to world's best practice.

It does not provide a case for further lessening of competition but rather a compelling case for making Australian competition law as robust as the US anti-trust laws.

## 6.0 Benchmarking Australian competition outcomes against the US.

US anti-trust legislation has as one of its aims the testing and hardening of US firms at home to better equip them to export and compete abroad. What then is the comparison of US exports to Australia and the reverse Australia's exports to the US.

The attached "*Composition of Trade – Australia 2000 – 01* shows the following.

US exports to Australia	A\$22.3 billion
Australia exports to the US	A\$11.6 billion

However the principal exports between the countries are also of interest.

US exports to Australia	Aircraft and parts	A\$1.6 billion
	Telecommunications equipment	A\$1.4 billion
	Computers	A\$0.9 billion
	Computer parts	A\$0.7 billion
Australian exports to US	Bovine meat	A\$1.4 billion
	Crude petroleum	A\$1.0 billion
	Alcoholic Drinks	A\$0.5 billion
	Passenger vehicles	A\$0.5 billion

It is significant that while the US exports advanced manufactures to Australia the best that Australian business can do is to depend mainly on the rural and resource sector for our principal exports to the US in term of meat, oil, alcohol with some cars for good measure. Where are the major Australian businesses with their advanced manufactures, financial services and others. They have not been tested and hardened at home sufficiently to enable them to compete abroad with US firms.

It would be helpful to benchmark Australia against the aims of US Anti-trust legislation. These remarks refer to the grocery and supermarket chains however they are symptomatic of other industries.

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### **US Anti-Trust legislation**

Promotes competition in the market

Consumers benefit with lower prices, better quality and greater choice.

Business compete on price and quality, In an open market and level playing field.

Competition tests and hardens US firms home, the better to succeed abroad.

Dispersing economic and political power.

Redistributing income from big corporations to small business and consumers.

### **Australian competition legislation**

Allows effective lessening of competition.

Consumers are exploited by paying more as producers receive less, quality is replicated and choice is limited to major suppliers.

Businesses effectively lessen competition and manipulate prices paid for produce. The market is dominated and with an unlevel playing field.

Lessening of competition at lack of innovation and a stay at home approach, which discourages exports.

Concentrates economic and political power e.g. the correlation between low income and level of self employment as well as the big business demands for less rigorous competition laws.

Allows consumes to pay more while small producers receive less e.g. fruit & vegetable prices.

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