

# ACCC continues its push for a new fair trading law both in the context of perishable agricultural goods and more broadly

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The ACCC is continuing to make a concerted push for a broad and flexible, economy-wide prohibition on unfair trading practices to add to its weaponry in the Australian Consumer Law.

The need for a new fair trading law is the leading recommendation of the ACCC in the report<sup>1</sup> published earlier this month following its accelerated, three month inquiry into perishable agricultural goods markets (**PAG Inquiry**). For the PAG Inquiry, the ACCC was specifically tasked by the Treasurer back in August 2020 to examine markets for the supply of meat, fish, eggs, dairy products and horticultural/viticultural produce (**PAG**), looking at both the structure and dynamics of these markets and analysing factors that affect the bargaining power of farmers, processors and retailers especially where this can lead to economic harm.

On the back of 80 submissions from stakeholders, many of which were made confidentially, the PAG Inquiry has uncovered bargaining power imbalances in the various PAG markets and other harmful practices that the ACCC considers are not adequately addressed by current competition and consumer laws and industry codes.

*ACCC Media release, 10 December 2020 - "Australia's perishable agricultural goods markets need a new fair trading law to address harmful practices arising from bargaining power imbalances that are not covered by current laws, the ACCC has found."*

The ACCC's recommendation to introduce a new statutory prohibition in the context of PAG markets and the ACCC's other findings from the PAG Inquiry are set out in a 144 page report which details the bargaining power imbalances and harmful practices that the ACCC has identified in PAG markets. These harmful practices include contract terms that inefficiently allocate risk and that are one-sided in favour of processors and go beyond hard bargaining, the harmful use of bargaining power, a lack of pricing and contract term transparency and instances of commercial retribution against farmers.

The PAG Inquiry continues the ACCC's focus on agri-business and comes on the back of the Dairy Inquiry (2016-2018) and the Wine Grape Market Study (2019), but it is clear the ACCC is wanting the new fair trading law to extend beyond agribusiness and PAG markets and cover all commercial dealings in Australia. This has been previously flagged by the ACCC when it made comparable recommendations in its final reports from the Digital Platforms Inquiry (July 2019) and Customer Loyalty Schemes Review (December 2019).

Whilst the introduction of a general prohibition on unfair practices would bring Australia into line with the United States and the European Union, the precise scope of the prohibition is going to need very careful

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<sup>1</sup> *Perishable agricultural goods inquiry report*, November 2020 –<https://www.accc.gov.au/publications/perishable-agricultural-goods-inquiry-report>

consideration to ensure it is sufficiently defined and targeted, with appropriate legal safeguards and guidance put in place so as to minimise uncertainty for businesses.

### Other PAG Inquiry recommendations

In addition to the ACCC's fair trading law recommendation, the ACCC has made various other recommendations in the report on the PAG Inquiry. These include the following:

- Whilst the **Dairy Code** has increased transparency of pricing and contractual arrangements in the dairy industry and reduced barriers to farmers switching between processors which encourages competition, the ACCC has conceded there may be room for improvement in some aspects of the Code. Given that the Code has been in place for less than 12 months though, the ACCC has recommended that the Code remain "as is" for the time being and that it be comprehensively reviewed in 2021, as mandated.
- The **Food and Grocery Code** should be strengthened by making it mandatory for retailers and wholesalers (so they can't opt out of the Code's obligations) and by introducing significant civil penalties for contraventions and infringement notices and to provide a more independent dispute resolution process.

These recommended changes are in addition to the legislative reforms that are already in the pipeline, including:

- *Changes to strengthen the current UCT regime in the ACL* – the ACCC supports the strengthening of the unfair contract term regime in the ACL as has been agreed to by federal, state and territory governments in November 2020, including the expansion of the definition of "small business", the introduction of an unfair contract term prohibition which will make unfair contract terms unlawful (and not just void) and giving courts the power to impose civil penalties on companies that include them;
- *Small business class exemption to allow collective bargaining* – the small business collective bargaining class exemption recently made by the ACCC which is likely to come in effect in early 2021 and will allow agribusinesses that meet certain criteria to gain immediate legal protection for collective bargaining conduct with no fee or complex notification requirement. The ACCC will in fact be engaging directly with the agricultural industry associations in 2021 to explain the benefits of the new class exemption and how its protections can be accessed.

### So where to from here?

We wait to see what approach the federal government will take with introducing a new fair trading law in 2021 but if it gets the parliamentary green light, it will potentially have huge ramifications for businesses of all sizes (especially dominant players) and across all industries.

Watch this space!



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