

20D066

18 September 2020

Director
Perishable Agricultural Goods Inquiry
Australian Competition and Consumer Commission
GPO Box 3131, Canberra ACT 2601
Per: aginquiry@accc.gov.au



Dear Director,

The South Australian Dairyfarmers' Association (SADA) thanks you for the opportunity to write to you regarding the ACCC's perishable agricultural goods inquiry.

SADA is aware of the Australian Dairy Farmers' submission and we support its contents.

Due to the short time frames to make submissions to this inquiry, SADA has determined to make this submission independently as we consider the issues raised in this submission merit stating.

This submission will attend to several issues that relate to the perishable supply chain and the ACCC's relationship to it.

It is SADA's position that even without the incorporation changes to the various codes, which govern dairy, groceries and horticulture as examples, there is a role for the ACCC to adopt a more pre-emptive approach in their policing.

SADA does not support excessive regulation. SADA actually supports limited regulation but where regulation does occur SADA expresses the view that such regulation should be effectively policed.

The essence of this submission will respectfully argue that the ACCC is an organisation that is granted by its charter to police fairness of the commercial environment and that in a substantively deregulated environment however, that role should be more aggressively pursued by the regulator in those areas that remain regulated.

Conflict in the perishable supply chain is nearly always expressed between farmers/growers/producers and processors. In turn the processors feel that they are often at the mercy of the major supermarkets, (who in turn are at the mercy of consumer sentiment). From the farmers' perspective they often feel they are at the vulnerable end of the power relationship as they feel they are at the mercy of the 'big guys'.

The temptation to deal with a power imbalance is the creation of regulation. The risk is that can soon become manifest in excessive regulation. While we support the dairy industry code we believe that regulation should be nevertheless limited where possible. One of the attractive components of the dairy industry code is its relative simplicity. Compliance does not impose an excessive burden on the industry and in many respects has had the positive effect of tidying up loose practices.

Limited regulation however, does not amount to an absence of law. What it means is that where there are less laws in the commercial environment the laws that are there need to be carefully attended to.

Therefore, in the opinion of SADA the regulator should approach their policing role in substantial part as the copper on the beat as distinct to the copper in the police station waiting for a complaint.

If the intent of Government was to leave the commercial environment exclusively to the courts, then Government would never have enacted the Trade Practices Act back in the 1970s or subsequent Governments would have repealed the legislation. This has not occurred. What has evolved is the creation of the ACCC and Australia's consumer laws. The ACCC isn't a court it is a police officer.

The present inquiry is a part of an investigation to inform government. It is conceivable that the recommendations will be some broad and all-encompassing code that can replace the various codes that operate in the space now. Introduction of such a broad code would be a matter of public policy.

However, that new regulation should it become manifest, like current regulations will only be as good as its regulator.

The laws which exist now are crafted in many ways to be a shield in the marketplace to protect the minnows from the sharks.

This submission will identify a number of areas where the ACCC should not only see its role as the bearer of that shield but as a farmer representative organisation we will urge the ACCC to also unsheathe its sword to protect the smaller players against actual breaches and emerging breaches of the legislation and codes in a timely fashion. A police officer is allowed to counsel or caution a person they think may be about to break the law as well as arrest them afterward should a law be broken.

Not every action necessarily means a court action.

Farmgate prices

Much of the recent activity by the Parliament and the Government in inquiring into the perishable supply chain has been driven by the poor results for farmers at the farm gate. In the dairy industry many farmers have historically reported that the cost of production has outstripped the prices being paid. Depending on who is arguing the case there are a number of reasons being given as to why this has occurred. In truth, in the years 2016-2018 had been a perfect storm in the Dairy market particularly for Australian producers.

The perfect storm has been an amalgam of European quotas being lifted and Russia's trade walls in the dairy industry. Commercial decisions by Murray Goulburn and Fonterra also amplified the impact on Australian farmers, not least of which, farmers who work in South Australia. Being able to point at European quotas or Russian sanctions did not automatically absolve processors or retailers from culpability and unfair trade practices. The Government agreed with that proposition and in turn that led to the introduction of the dairy industry code.

We are mindful that the ACCC is limited to the operation of Australian Consumer Law (formerly the Trade Practices Act), and how that law reflects on the operation of business in this country. During

the various inquiries into the dairy supply chain over the past 4 years it was clear from submissions to inquiries such as the Senate Economics Committee review of the dairy supply chain that there was a deep concern and disillusionment harboured by many producers about the supply chain and how vulnerable producers are to the arrangements that are being made by processors and supermarkets.

The relationship between Murray Goulburn and Coles was the leading example. Such arrangements quickly lead many people to believe that collusive or other anti-competitive conduct was occurring. There can be little doubt that those sorts of arrangements had a deep impact on the confidence that many producers had in the marketplace. While this has now to a degree, abated it has not gone away. This sort of conduct is precisely why the ACCC exists.

One of the matters that the ACCC has historically turned its mind to were the relative bargaining positions that existed between the producers and processors. What was found is that a relationship imbalance had existed for a long time and has been known about for many years. In good times that imbalance was not particularly corrosive however, in times of stress that imbalance led to pronounced public concern manifest in protests, Senate inquiries, political noise and numerous other expressions of disquiet.

From a dairy perspective, but likely in a number of other industries in the primary sector at least, the ACCC is in an excellent position to be more proactive or assertive than it historically has been.

Like many regulatory authorities the ACCC often responds to a complaint. Nevertheless, there are circumstances where various regulatory bodies should pre-emptively move to police a law, ostensibly becoming the beat cop on the street corner in a tough neighbourhood. Simply expressed, it is this notion of the ACCC taking up its functions as the bearer of a sword as well as a shield.

With the greatest of respect to the ACCC (and for that matter ASIC), if they had been more assertive in their policing roles in the industry environment five years ago, SADA suggests its presence may have made the difference between a response leading to a \$200,000 fine in the case of Gary Helou (Murray Goulburn) and better management practice had there been an earlier response by the ACCC.

Simply expressed, the mere existence of a legislative instrument is often not enough to ensure compliance. There needs to be a presence that is part responsive and part cautionary.

Loss Leading by Supermarkets

The practice of loss leading by supermarkets is an area that deserves scrutiny across a number of products. Milk is an example. By way of example the cost of milk on the shelf, when a supermarket seeks to loss lead, can cost less than bottled water at room temperature. This is a practice that needs to be closely monitored by the ACCC.

If a retailer chooses to sell a product at a loss that is essentially a matter for them. SADA is not concerned when a supermarket chooses to engage in such conduct. This practice however should not be allowed to lead to supermarkets demanding lower prices from the supply chain so that producers are pushed to the point of insolvency. The supermarkets can recover the loss on other products, producers cannot. If a commercial decision is made to loss lead by a supermarket then it should do so at a loss they incur themselves, not a loss they seek to mitigate by using their market power to telegraph the loss into the supply chain. Such conduct should be expressly declared to be unconscionable.

A major supermarket chain does have leverage over the processor and it is still in the interest of the supermarket to minimise the loss as much as possible on behalf of their business and shareholders. A processor negotiating with a supermarket will enjoy economies of scale when supplying large amounts of milk to a single consumer. As processors are businesses like any other they will seek to retain savings for themselves. Because of the nature of the milk supply contracts between producers and processors, producers are often locked into supplying milk for a price obtained by the processor. The price is then set primarily by the processor who passes that price onto the producer. The 'step up' or worse 'step down', impacts that were imposed on farmers have now been effectively banned in such circumstances, but it still needs to be policed.

Of course, the primary example of the effect of the 'step down' arrangement were the events that have led to an earlier ACCC investigation, particularly into the conduct of Murray Goulburn who were continuing to overstate the price of milk long after most in the industry were aware that Murray Goulburn's projections were unsupported. Nevertheless, they kept on purchasing the milk with the expectation that they would be able to claw back losses through the step-down process. Whether this amounts to a fraud or unconscionable conduct should have been a matter for a court to determine should but sadly that only occurred after the damage had been done.

What the system does highlight is the vulnerability of producers to decisions and conduct of others which is far beyond the producer's control, particularly given the disparity between producers, processors and the retail giants that operate in this space.

Contractual Oversight

SADA welcomes the work being done by the ACCC regarding oversighting of the contracts demanded by the new dairy industry code. However, thus far that work appears to be limited to the function of reviewing the standard form contracts which have been posted by processors on line. Whilst having downloaded those contracts there has been no indication from the ACCC thus far as to how many have been reviewed and how many remedial actions have been taken. Even so, the review of the standard form contracts is in reality a 'inch deep mile wide' approach. SADA is not aware if there has been any follow up by the ACCC into how these contracts are being adjusted at the kitchen table when field officers and farmers meet.

SADA would welcome an approach of spot checks with farmers to determine that the intent of the code is being realized and not being subverted inside the boundary of the farm gate by processors. SADA does do similar monitoring work with our farmers and usually deals with breaches by way of communication with the processors directly. To the credit of SA processors this has been quite successful because of the care that has been taken in this jurisdiction to build relationships with processors.

The same cannot be said for other jurisdictions in Australia.

Collective Bargaining

Whilst at first blush anticompetitive in nature Australian Consumer Law does embrace the notion that commodity producers may engage in collective bargaining agreements. This may be done by either application or notification.

Again, there is a role here for the ACCC to create a more assertive presence. The approach by the ACCC in this space is by attraction rather than promotion. SADA suggests that in industries, such as the dairy industry, there is an immediate and obvious bargaining disparity between two producers and processors. Nevertheless, the ACCC being the keeper of the commercial playing field generally remains quiet about what steps are available until there is a complaint.

The ACCC should consider a policy based on active conduct and promotion of the right to collectively bargain rather than the mere presentation of the possibility by way of attraction. Again, these observations are about the way the ACCC chooses to position itself in the environment that it oversees.

SADA accepts that the primary industry sector does not easily come together for collective bargaining purposes but that does not absolve government agencies of their duty to inform industries of the possibility.

The ACCC may also consider preemptive approaches to examine collective bargaining groups to determine if there has been any approach used by processors to wedge group members against each other.

Deregulation demands a stronger police presence

In any environment that is deregulated there will sadly be those organisations which will seek to bend and break the rules. As a regulated market demands regulatory oversight a deregulated market demands even stronger scrutiny of the fewer rules that remain. The essence of this submission is that the ACCC should be more assertive in its role of being the police officer in their corner of a tough neighbourhood.

If you have any questions regarding this matter, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'John Hunt', written in a cursive style.

John Hunt,
President SA Dairyfarmers Association Inc. (SADA)