

THE RISE (AND RISE) OF CONCERNS WITH BARGAINING POWER IMBALANCES: A LOOK AT THE ACCC'S PERISHABLE AGRICULTURAL GOODS REPORT

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By George Siolis & Jennifer Swart

Hard bargaining between two trading parties operating at different levels of the supply chain can be consistent with competitive markets and can deliver benefits to consumers. Hard bargaining between two trading parties operating at different levels of the supply chain can also create inefficiencies which lead to economic harm. How can competition agencies tell the difference and prohibit hard bargaining that crosses the line? This question was at the heart of the Australian Competition and Consumer Commission's recent inquiry into Perishable Agricultural Goods released at the end of 2020. This article sets out when hard bargaining between trading parties risks causing economic harm and comments on the approach taken by the ACCC in its recent inquiry.

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I. INTRODUCTION

*“Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to “injure” each other in this way.”*²

Those comments by two High Court justices in the *Queensland Wire* case described the nature of competition between two firms competing against each other at the *same* level of the supply chain – that is, firms competing in a horizontal relationship. Firms in such a relationship are expected – and, indeed, are driven by the profit motive – to act ruthlessly (and lawfully) to exploit any advantage they have to succeed in the market and this generally delivers desirable outcomes.

But what should be expected of the interaction between two trading parties operating at *different* levels of the supply chain; that is, among firms operating in a vertical relationship? Should evidence of the same ruthlessness being displayed in the interaction between firms that produce agricultural goods (“producers”) and the firms that purchase those goods (“processors”) be characterised in the same terms as identified by the court in *Queensland Wire*? Should a buyer in a stronger bargaining position than a seller it trades with be entitled and indeed encouraged to use that strength to drive as hard a bargain as it can? Does it matter whether that allows it to gain an edge in a downstream market where it supplies products to end customers?

Throughout 2020, the answer to these questions, at least in Australia, seemed to be “maybe not.” Even though the same profit motive that drives firms competing against each other (in a horizontal relationship) to act ruthlessly also drives firms in a (vertical) trading relationship, the ACCC seemed to suggest that a firm may need to temper any bargaining advantage it has in some circumstances.

The questions that this short article tries to answer are why and when. What is the problem if firms operating in a vertical relationship display the same ruthlessness as firms in horizontal relationships? Are we worried about efficiency considerations or are concerns about fairness at the heart of the heightened concern about bargaining power imbalances in Australia? And does it matter if the benefits arising from those bargaining advantages are passed on to consumers in downstream markets?

The article starts by describing the potential economic harms that could come about because of an imbalance in bargaining power between two trading parties and then discusses how the concern was addressed in the Australian Competition and Consumer Commission’s (“ACCC’s”) inquiry into Perishable Agricultural Goods. It then concludes by commenting on the “gap” that the ACCC identified when considering ways to deal with some of what it describes as the “significant harmful practices” created by

imbalances in bargaining power in perishable agricultural goods (“PAG”) markets.

II. BRIEF OVERVIEW OF ECONOMIC CONCERNS WITH AN IMBALANCE OF BARGAINING POWER

Many commercial negotiations between firms operating in a vertical relationship (which we refer to as trading parties in this article) are aimed first at creating value and then sharing that value. This section first sets out how economists generally view the value that is shared in a commercial negotiation between trading parties and then identifies some of the potential concerns with the agreements struck by trading parties when the parties have unequal bargaining power.

A. Aggregate Surplus vs. Distribution of Surplus Between Firms

Negotiations between trading parties usually boil down to a debate about how the “surplus” is divided among the trading parties although they can also affect the size of that surplus.

In general, economists (and policy makers) have not focused on how that aggregate surplus is divided between the buyer and seller, unless efficiency considerations are at stake. That is, unless the size of the aggregate surplus is affected. Disputes about how the aggregate surplus is divided are often considered to be matters of fairness or equity rather than efficiency concerns. It is the latter set of concerns that usually interest economists; that is, making sure that the aggregate surplus for society is maximised.

Surplus is essentially created by buyers and sellers interacting or trading with each other to create something of value to society. As part of the trading process that enables that surplus to be realised, the buyer and seller will enter into a commercial agreement that will (implicitly) establish whether and how that value will be created and how that aggregate value will be divided between the two parties.³

² *Queensland Wire Industries v. BHP* (1989) 167 CLR 177 [22].

³ The welfare or surplus is the value to the buyer or seller from participating in the market. The welfare or surplus that the “buyer” receives is the difference between a buyer’s willingness to pay (measured by a demand curve) and the amount that the buyer actually pays. The welfare or surplus of the seller measures the difference between what the supplier actually sold and the seller’s (opportunity) cost.

The economic focus on aggregate surplus rather than the division of that surplus between parties can be explained through the following example. Suppose that there is a negotiation between a dairy producer, that operates in what we can define in this case as the upstream layer of the supply chain, and a processor that operates in the downstream layer of the supply chain. Suppose too that the processor purchases dairy products from a number of different dairy producers to sell (in more processed form) to supermarkets or directly to consumers.

In a negotiation between the dairy producer and the processor, the dairy producer will be trying to secure as high a price as possible from the processor for its dairy products, while the processor will be trying to pay as low a price as possible for the same dairy products.

The negotiation between the dairy producer and the processor is essentially a negotiation over how they will divide the value (or the aggregate surplus) that they create by trading with each other. The outcome of the negotiation will typically depend on the alternative buyers and sellers available to the producers and processors respectively (which are referred to their “outside options”) as well as the degree of patience and the negotiating skill of the trading parties.

A low price will mean that the dairy producer extracts less value from the bargaining process than the processor and results in a lower share of the aggregate surplus going to the producer. More of the aggregate surplus is effectively allocated to the processor as a result. In this example, the welfare of the processor is increased at the expense of the dairy producer.

Conversely, a high price will mean that the dairy producer extracts more value from the bargaining process than the processor and results in a higher share of the aggregate surplus going to the dairy producer. This higher surplus comes at the expense of the processor who ends up with a lower surplus. In this case, the welfare of the dairy producer is increased at the expense of the processor.

B. Should Governments Intervene in Commercial Negotiations?

Competition agencies have become increasingly concerned about the role that a bargaining power imbalance between two trading parties has on their ability to divide the aggregate surplus between themselves in a way that benefits society. The concerns can be categorised into the following two areas.

First, agencies may be concerned that a firm in a stronger bargaining position than its trading party may be in a position **to**

exploit that strong bargaining power and extract more from the commercial negotiation with the weaker party than it would have if the exercise of bargaining power was constrained by effective competition. This sort of concern around exploitative conduct is similar to a concern that a firm with market power may exploit customers by charging an excessive price for its good or service.

This concern was examined by the ACCC in its 2008 report into the Competitiveness of Retail Prices for Standard Groceries (“the Groceries inquiry”) which focused on the market power of major supermarket chains and investigated whether those supermarket chains exploited their strong bargaining power. In the Groceries Inquiry, the ACCC appeared to accept that although a supplier in a weaker bargaining position may be exploited, that harm needed to be weighed against the benefits to end consumers of the major supermarket chains driving down the costs of goods purchased from those suppliers. In that inquiry the ACCC investigated the extent to which the benefits of lower wholesale prices that supermarkets were able to extract from suppliers were passed on to consumers in the form of lower retail prices. They found that competition between supermarkets was sufficient to ensure that they passed on at least some of the benefits to consumers.⁴ Downstream competition was deemed to be effective despite the presence of buyer power.

Second, agencies might be concerned if an imbalance in bargaining power might **create an inefficiency in one part of the supply chain, affecting the overall surplus available to society.** An inefficiency could arise if a processor introduced a contract term which led to an inefficient allocation of risk to producers, for instance, which reduced that producers’ incentive to invest. In turn, this may lead to increased costs of production in the long term (although the agency would need to understand why a processor would want to harm its supply chain and consequently increase its own long-term costs in this way).

The next section summarises the main findings from the ACCC’s PAG inquiry and examines the reasons why the ACCC recommended that government may need to intervene in the commercial negotiations between producers and processors in that case.

III. THE ACCC’S PERISHABLE AGRICULTURAL GOODS INQUIRY

In August 2020, the ACCC launched a three-month investigation into perishable agricultural goods (“PAG”) markets. These encompass horticulture products, eggs, dairy products, meat products and seafood. In its final report, released in December 2020, the ACCC identified gaps in the ability of the *Competition and Consumer Act 2010* (“CCA”) to deal with the economic harms caused by bargaining power imbalances.⁵

4 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008. p. xiv.

5 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. viii.

A. A Focus on Bargaining Power Imbalance

The ACCC evaluated the bargaining power of firms operating across all levels of the supply chain, and how the relationships between firms at different levels affected bargaining outcomes.

One of the main reasons why bargaining power was a key focus of the inquiry was because the ACCC found that PAG markets often have characteristics that are likely to bring about bargaining power *imbalances*.

The ACCC also argued that market structure contributed to bargaining power imbalance. In particular, it argued that in markets with an imbalance in the number of buyers and suppliers (i.e. an oligopoly or oligopsony market structure on one side of the market), as is common in PAG markets, the outcome will, in general, be less efficient and less desirable than the competitive outcome that the ACCC believed would be delivered in a more “balanced” market.⁶ Its reasoning is shaped by the consideration of the outside options available to buyers and sellers. The stronger bargaining position resides with the party with the better outside option, which allows it to negotiate better terms in commercial or contractual agreements.

B. The Nature of the Concern

The ACCC’s concern in the PAG inquiry covered both of the concerns outlined in section 2.2 of this article – concerns with exploitative conduct, concerns about the nature of competition, and concerns around inefficiencies caused by market failure.

In terms of concerns relating to the firm in a stronger bargaining position (usually a processor) exploiting a firm in a weaker bargaining position (usually a producer), the ACCC argued that “*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.*”⁷

In terms of concerns around competition, the ACCC found that PAG markets were highly predisposed to market failure in the form of insufficient competition, but this was not really the focus of the PAG inquiry. Interestingly, in the PAG inquiry the ACCC did not appear to place any weight on the argument that bargaining power imbalances upstream – that is at the level of producer/processor interactions – were less concerning if the

benefits from any low prices were passed on to end consumers; that is, if consumer welfare (measured at the level of end customers) was increased. Its focus, instead, was on whether hard bargaining between producers and processors removed value from that layer of the supply chain to the ultimate detriment of producers.

The main concern raised by the ACCC in its PAG report was that the presence of bargaining power imbalances would impact the efficiency of these PAG markets and result in harm to consumers. Here the ACCC looked separately at two different layers of the PAG market.

First, with regard to processor-producer relationships, the ACCC found that imbalances in bargaining power manifest in a range of ways, including:⁸

- *one-sided contracting practices, including potential “unfair” contract terms regularly being present in producer supply agreements;*
- *practices that go beyond hard bargaining, including inefficiently allocating 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, affecting a number of PAG markets; and*
- *resulting from all of the above, reduced confidence and investment by producers, potentially limiting productivity growth.*

It concluded that these features could affect the efficiency of the market – that is, they undermined producers’ ability to make sound decisions about what and how much to produce and where they can obtain the best price for their produce.⁹

Second, with regard to supermarket-processor relationships, the ACCC noted the strong competition at the retail level for certain products, particularly perishable goods, despite the high levels of concentration in the industry. It found that:¹⁰

“This inquiry and previous studies have found that the profit margins of processors have decreased substantially over time in PAG and other industries. There are related concerns that,

6 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

7 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. ix.

8 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

9 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

10 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

while consumers may benefit from these practices and situations, value is being removed from PAG industries to the ultimate detriment of producers. While there is some evidence that retail pricing places substantial pressure on suppliers, based on this inquiry, there is no substantial evidence to indicate the efficient supply of goods is threatened over the longer term.”

C. Is There a “Gap” in the Law When it Comes to Bargaining Power Imbalances?

Assuming the ACCC’s assessment of bargaining power imbalances is reasonable, the next question for the ACCC was whether it had the tools available to address the economic harm it believed flowed from those imbalances.

It argued that the tools currently at its disposal were limited. It found that the competition laws in the CCA were not intended to inhibit all harmful effects of bargaining power imbalances nor to restore competition. As a result, it felt that competition laws could not address all of the harm caused to producers arising from bargaining power imbalances.

Instead, the ACCC found that the Australian Consumer Law (“ACL”) and industry codes were the better tools to address the harm it identified.¹¹ However, although the ACL protects against unfair contract terms in standard contracts for small businesses, including through the business-to-business unfair contract terms framework, the ACCC identified some central weaknesses in this framework. It found, for example, that unfair contract terms were not illegal under the CCA and financial punishments to companies that include such terms cannot be ordered by a court.¹²

The ACCC also considered whether “codes of conduct” such as the Dairy Code, Horticulture Code and the Food and Grocery Code could also protect businesses from “non-contractual” behaviour arising from bargaining power imbalances.¹³ But while the ACCC considered industry codes could be highly effective in tackling issues of bargaining power and lack of transparency in the appropriate markets, their effectiveness would be limited

if these Codes are not enforceable or do not guarantee credible penalties for contravention.¹⁴

As a result, the ACCC recommended reinforcing existing laws in order to combat unfair negotiations between trading partners at different levels of the supply chain.

D. The ACCC’s Recommendations

The ACCC provided a set of four legislative recommendations following the PAG markets inquiry.

The first recommendation was to strengthen the business-to-business unfair contract terms framework which seek to protect small businesses. Currently, it is not illegal to include unfair contract terms in standard contracts under the CCA, and the ACCC used the PAG inquiry to advocate for the outright prohibition of unfair contract terms.

The second recommendation was to introduce an economy-wide ban on unfair trading practices in the ACL.¹⁵ The ACCC stated that this is necessary to address the economic harm that is not currently being addressed by the ACL and which is not covered in the proposed unfair contract terms legislative reforms currently being considered by the Government.¹⁶

The third recommendation was to strengthen the Food and Grocery Code, which is a voluntary code prescribed to improve standards of business conduct in the food and grocery sector, by making it a mandatory code which will apply to all applicable retailers and wholesalers in the industry and bolstered by the introduction of significant penalties for any party that contravenes the Code.¹⁷

Finally, the fourth recommendation was to explore actions to improve price transparency in PAG markets. The ACCC has previously given advice on enhancing transparency in some specific markets (in past studies relating to cattle and beef, wine grapes and dairy markets) but did not seek to provide specific recommendations in the PAG inquiry, in order to avoid “unintended consequences”.¹⁸

11 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

12 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

13 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

14 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiv.

15 The ACCC has suggested drawing on the approach taken in the U.S and in the European Commission to define an unfair trading practice. See p. 124 of the PAG report.

16 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xvii.

17 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xvii.

18 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 1.

IV. INSIGHTS FROM THE PAG INQUIRY

Several recent investigations by the ACCC present clear examples of the increasing frequency of cases concerning negotiations between trading partners operating at different levels of the supply chain.

In April 2020, for example, the ACCC was approached by the Australian Government to develop a mandatory bargaining code to address a perceived bargaining power imbalance between digital platform operators and Australian news media publishers. In December 2020, the ACCC released its Statement of Issues setting out a concern that Woolworths' proposed acquisition of 65 percent of the shares in PFD Food Services will 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. And also, in December 2020, in New Zealand, the Commerce Commission released a preliminary issues paper for its retail grocery sector investigation and indicated that it would investigate the relative bargaining power of both retailers and suppliers at all levels of the grocery market supply chain as supermarkets are recognised to have significant bargaining power over suppliers of grocery products in New Zealand.

Given the heightened concern with bargaining power imbalances, competition agencies in other jurisdictions may pay close attention to the PAG inquiry to see whether it provides a sound template for assessing whether bargaining power imbalances are likely to lead to economic harm in the particular market that they are investigating.

In our view, the PAG report provides the following insights for other agencies when considering the effect of bargaining power imbalances in a market:

There is a gap when dealing with concerns around bargaining power imbalances, at least in Australia.

The main concern when looking at bargaining power imbalances is the risk to economic efficiency.

Intervention should be limited to those cases where serious economic harm is caused by bargaining power imbalances.

A structural approach to identifying the sources of bargaining power imbalances ignores other factors that affect the outcome of a commercial negotiation.

It is difficult to provide any meaningful guidance on when conduct crosses the line between (socially beneficial) hard bargaining and harmful conduct that damages markets.

We discuss each of these below.

A. There is a Gap When Dealing with Concerns Around Bargaining Power Imbalances, at Least in Australia

Competition law in Australia – and in particular, the prohibition on misuse of market power – is aimed at exclusionary conduct. A firm with a substantial degree of market power is prohibited from engaging in conduct that damages the competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. Exploitative conduct – where a firm exploits its market power by charging supra-competitive prices – is not prohibited (although certain regulated industries are subject to price regulation under industry-specific regimes).

The inability of Australia's competition laws to prohibit exploitative conduct matters when dealing with an imbalance in bargaining power. There is no prohibition that prevents or prohibits a firm with a substantial degree of bargaining power from using that power to extract better terms of trade in a commercial negotiation with a trading party in a weaker position.

Generally, competition laws are also not well suited to deal with the potential inefficiencies that arise when a firm in a stronger bargaining position deals with a firm in a weaker position in a way that extracts value (or surplus) from the market and leads to economic harm.

As a result of these gaps, the ACCC has had to rely on vague laws around prohibiting “unfair trading practices” or “unfair contract terms.” One of the risks with this approach is that it relies on laws that depend on subjective, undefined and unclear notions of fairness to address concerns that are actually about efficiency. Another is that it is concerned about the welfare of producers without considering the effect of the conduct (in terms of delivering benefits to) on consumers. This is discussed further below.

B. The Main Concern When Looking at Bargaining Power Imbalances is the Risk to Economic Efficiency

Although the ACCC argued that imbalances in bargaining power raised concerns with exploitative conduct (which it cannot address through Australia's competition law) and potentially competition (because of concentration at the processor layer of the supply chain), the main concern it raised was that the imbalance in bargaining power might lead to outcomes that were inefficient in the sense that they might discourage investment and/or cause otherwise efficient firms to exit the market in one part of the supply chain.

We agree that this is the main concern when looking at potential harms from an imbalance in bargaining power. The challenges,

however, are that there are often few laws or suitable remedies available to address the concern (discussed above) and that it is often difficult to identify when the inefficiency created by the imbalance of bargaining power is serious enough to warrant intervention (discussed below).

We note, however, that there is a risk when focussing on the potential inefficiency created by an imbalance in bargaining power, that the substantial benefits that hard bargaining might deliver to consumers in downstream markets might be overlooked.. The balancing of those upstream costs (to society) against the benefits (to downstream customers) is ultimately a task for policy makers, but the (upstream) efficiency effects of bargaining power imbalances should not be considered in isolation without considering their effects on other markets.

C. Is intervention Limited to Cases Where Hard Bargaining Leads to Serious Economic Harm?

In the PAG report the ACCC set out how efficiency might be affected by a bargaining power imbalance. In relation to the producer-processor layer of the supply chain, for example, the ACCC pointed to the risk of several “harmful” practices, including unfair or one-sided contract terms, inefficient allocation of risk to producers, and inadequate transparency of price and quality assessments at lower levels of the supply chain. According to the ACCC, these practices were likely to reduce a producers’ incentive to invest and diminish their overall confidence in PAG markets.

Unfortunately, one of the weaknesses of the PAG report is that the ACCC was not able to first demonstrate that those harms were significant enough to warrant intervention and second, to establish that costs of intervention did not exceed the inefficiencies it identified as a result of the bargaining power imbalance. For instance, while the ACCC found that some harms may have occurred in PAG industries as a result of reported market failures, it acknowledged that it had “*not been able to quantify the extent to which this has occurred.*”¹⁹ In fact, not only was the ACCC unable to quantify the harm, it was also not able to even substantiate a number of the claims that it had heard about how processors with a stronger bargaining position behaved.

This could have been excused if the ACCC was confident that the conduct it identified would lead to harm in the round, but it admitted that it wasn’t certain that it did. Its conclusions, for example, state that the “*information submitted to the ACCC for this inquiry indicates some harm has **likely** resulted from imbalances in bargaining power in PAG supply chains.*”²⁰ And that “*while not all suppliers and producers are likely to have been impacted equally, there are **some trends** in behaviour which are **likely** to lead to inefficient outcomes.*”²¹

It is concerning that, on the basis of these findings, the ACCC felt that it could make wide-ranging and far-reaching recommendations to introduce vague and undefined prohibitions to deal with “unfair” contract terms or “unfair” trading practices that may or not have led to harm that may or may not be significant. At a minimum, further analysis of the potential costs of intervention – such as raising transaction costs by prohibiting standard form contracts or increasing the risks of coordination by promoting price transparency – should be undertaken to ensure that these will not exceed the benefits.

D. A Structural View of the Sources of Bargaining Power Imbalances is Too Narrow

In the PAG report, the ACCC argued that the *number* of competitors at each level of the supply chain determines how trading parties interact with each other across that supply chain.²²

The view that the “*intensity of competition and efficiency of outcomes generally change in accordance with the number of buyers and sellers on each side of the market*”²³ ignores the large number of factors other than market structure that affect bargaining power.

For instance, its 2019 inquiry into the *Economic Regulation of Airports*, the Productivity Commission (PC) in Australia noted the following factors, which it claimed determine the nature of the interaction between trading parties:²⁴

- alternative buyers or sellers (outside options) — a party has more bargaining power if it is able to choose between alternative buyers or sellers, than if it has few or no alternatives. For example, an airport that services

19 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 50.

20 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 72.

21 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 72.

22 Its view was that a market structure which has many buyers and many sellers is optimal for competition and efficiency, but is less common in PAG markets and that a greater degree of regulatory intervention can be warranted in markets with the least efficient outcomes, as the cost of intervention is more likely to be offset by the greater efficiency gains to be made. See ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

23 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

24 Productivity Commission, *Economic Regulation of Airports*, Report no. 92, June 2019. p. 122.

several airlines may have more bargaining power over an individual airline than if it has a single airline customer

- access to information — a party has more bargaining power if it is privy to information that could influence the transaction and that other negotiating parties do not know. This could include information on, for example, market conditions such as demand forecasts, or information specific to the bargaining position of other parties, such as a seller's cost structure or a buyer's willingness to pay
- previous commitments — a party can undertake actions prior to or during negotiations that commit it to a particular position
- the risk of breakdown — a party has more bargaining power if it is unconcerned about a breakdown or “stalemate” in negotiations
- patience — a party that has a higher opportunity cost of negotiating and a greater relative benefit from reaching an agreement typically has less bargaining power²⁵

In our view, the approach taken by the PC to identify the factors that determine the nature of the interaction between trading parties should be preferred as it discusses the strength or credibility of the *outside options* available to parties rather than just the market structure. Although a large number of outside options may be preferable to a smaller number of outside options, it is the strength and credibility of those options that matter rather than the number of them.

E. It Is Difficult to Provide Meaningful Guidance on When Conduct Crosses the Line

In the PAG report, the ACCC accepted that there was a line between hard bargaining that is a feature of a competitive market and which can help to improve overall market outcomes and hard bargaining that causes economic harm. The former can help to promote efficient allocation of resources and helps to ensure prices do not increase above competitive levels, which would be harmful to end customers and the broader economy.²⁶ The latter may lead to a market failure which risks misallocating resources.

But what was missing from the PAG report was any serious attempt to identify the type of conduct that goes “*beyond hard bargaining*,” to constitute significantly harmful practices.²⁷

The approach that the ACCC took to identify when bargaining was too hard was to present some specific examples where some of the potential outcomes of harmful conduct *may* have happened.

A problem with the ACCC's approach, however, it is often very difficult to distinguish bargaining that is a feature of a competitive market and bargaining which causes economic harm. The only attempt made by the ACCC to draw a distinction was to identify conduct that appeared to cause commercial harm to one part of the supply chain.

For instance, the contracts that the ACCC pejoratively defines as “take-it-or-leave-it” contracts are often simply standard form contracts that reduce the transaction costs incurred by both parties when entering into an agreement. A blanket prohibition on such contracts will increase the costs associated with contracting and may deter mutually beneficially transactions and actually make it harder for producers and processors to remain viable.

Similarly, a concern that a powerful buyer could push down the price that it pays to producers below the competitive level²⁸ may simply reflect the choice made by a producer to accept a lower price in exchange for a longer-term agreement that provides certainty of sales.

The approach taken by the ACCC in the PAG inquiry risks too quickly condemning conduct that may not necessarily lead to market failure and recommends changes to laws that will apply to markets well beyond the PAG markets which the ACCC felt were particularly susceptible to bargaining power imbalances. This leads to the risk that the intervention may be worse than a (potential) inefficiency identified by the ACCC that may be relevant to only a small sub-set of markets.

V. CONCLUSION

The comprehensive Competition Policy Review chaired by Ian Harper recognised the difficulty with drawing a line between hard bargaining that is a feature of a competitive market and which can help to improve overall market outcomes and hard bargaining that causes economic harm. That review noted that “[w]hile

25 Concina, L. 2015, *Negotiation and Economics: basics*, The Foundation for an Industrial Safety Culture (Foncsi), <https://www.foncsi.org/fr/blog/publication-nouveau-regardnegociation-economie>; Muthoo, A. 2000, “A Non-Technical Introduction to Bargaining Theory,” *World Economics*, vol. 1, no. 2, p. 145–166.

26 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 47.

27 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 47.

28 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

*imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited. . . such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors [...].*²⁹

The ACCC's PAG inquiry paid lip service to that difference but failed to grapple with the challenges it represented. The ACCC's approach in the PAG report does not provide a robust method of identifying when efficiency and investment in related markets is seriously damaged by bargaining power imbalances and suggests an increased willingness to intervene in commercial negotiations in a way that simply re-allocates economic rents (that is, the surplus discussed earlier) across the supply chain when efficiency considerations are not at stake. What is even more disappointing, however, is that on the basis of scant evidence and no quantification, the ACCC sought more powers to intervene in commercial negotiations between trading parties in industries well beyond those it considered during the relatively short PAG inquiry. ■

29 Harper *et al*, Competition Policy Review: Final Report, Competition Policy Review Panel, Commonwealth of Australia, 2015, page 334.

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