



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Small business in focus

Small business, franchising & agriculture news—Report no. 19

July—December 2019



In the last six months



696 000

page views of our small business resources



\$1.4 million

reported small business scam losses¹



2 administrative resolutions² and **2** court outcomes³ obtained on matters affecting small business and franchising

5 franchising compliance checks completed

29 mail outs through our Small Business, Franchising and Oil Information Networks

A profile of the typical businesses contacting the ACCC⁴



Around one third (36%) are established businesses that have operated for 10+ years

▼ **5%**

Two-thirds are micro-sized businesses with 0-4 staff (66% of contacts)

▼ **4%**



Most commonly reported misleading or deceptive conduct (27% of contacts)

▲ **1%**

Coming up this year

- Implementing the new mandatory dairy industry code
- Franchising Taskforce to advise Government on franchising reforms
- Australian Government's consultation on the business-to-business unfair contract terms law
- Compliance and enforcement policy and priorities for 2020 to be announced shortly

¹ \$2.4 million including medium-sized businesses.

² The ACCC obtained an administrative resolution from Uber Eats in July 2019 and from Coles Group Limited in December 2019.

³ In proceedings taken by the ACCC against Ultra Tune Australia and Mitolo Group Pty Ltd.

⁴ ACCC data of contacts where business size and age was stated (excludes scam reports). Percentage increases are based on comparisons with the previous Small business in focus (January to June 2019).

Who's contacting us⁵

Contact type	Small business		Franchising		Agriculture	
	Jan-Jun 2019	Jul-Dec 2019	Jan-Jun 2019	Jul-Dec 2019	Jan-Jun 2019	Jul-Dec 2019
Reports	2 433	2 586	229	236	97	76
Enquiries	815	792	56	51	32	26
Total	3 248	3 378	285	287	129	102

Reports by key issue⁶

Issues	Small business		Franchising		Agriculture	
	Jan-Jun 2019	Jul-Dec 2019	Jan-Jun 2019	Jul-Dec 2019	Jan-Jun 2019	Jul-Dec 2019
Consumer law related issues						
Misleading conduct/false representations	846	910	36	37	14	13
Consumer guarantees	405	489	1	1	6	3
Product safety	25	31	0	0	4	1
Unconscionable conduct	38	38	7	10	3	3
Business-to-business unfair contract terms	-	231	-	2	-	6
Wrongly accepting payment	151	151	0	5	2	1
Unsolicited goods and services	38	19	0	0	0	0
Other Australian Consumer Law (ACL) issues ⁷	279	74	4	5	2	0
Competition related issues						
Misuse of market power	68	97	0	2	5	5
Exclusive dealing	36	58	4	0	1	2
Other competition issues	45	40	1	2	1	3
Franchising Code related issues						
Inadequate disclosure	-	-	25	34	-	-
Not acting in good faith	-	-	49	50	-	-
Improper termination of agreement	-	-	5	5	-	-

Enforcing the law

Ensuring that small and agricultural businesses receive the protections under the *Competition and Consumer Act 2010* remained a priority for the ACCC in 2019, during which the ACCC took action that resulted in:

- the Full Federal Court [confirming important franchisor obligations](#) in an appeal by Ultra Tune Australia Pty Ltd (Ultra Tune). The Court upheld the primary judge's determination that Ultra Tune had breached the Franchising Code of Conduct, but reduced the penalty imposed from \$2.6 million to \$2 million. This decision was the first consideration by the Full Federal Court
- of the 'sufficient detail' requirement in the Franchising Code for marketing fund statements
- [Uber Eats agreeing to change contract terms](#) that the ACCC considered were unfair. From at least 2016, Uber Eats' contract terms made restaurants responsible for problems with food deliveries that were due to factors outside of their control. Uber Eats has agreed to amend these terms to clarify that restaurants will only be responsible for matters within their control such as incorrect food items or incorrect and missing orders

⁵ Refers to contacts received from various sources, disaggregated by reports (of potential misconduct) and enquiries. Further investigations of these reports may not reveal a breach of legislation. Care should be taken when drawing any conclusions from this data and when making comparisons with other ACCC data, as records may be modified after this time period resulting in differences over time. Small business, Franchising and Agriculture contacts are separate datasets, which are not a sub-set of each other.

⁶ Some reports are categorised as having more than one issue. Excludes reports not within the remit of the ACCC. Small business, Franchising and Agriculture reports are separate datasets, which are not a sub-set of each other.

⁷ Data on reports relating to business-to-business unfair contract terms was previously counted as a key issue under Other ACL issues. This attributes to the significantly lower number of Other ACL issues compared to the previous six months.

- the Full Court ordering [CLA Trading Pty Ltd \(Europcar\)](#) to pay \$350 000 in penalties for excessive credit card payment surcharges. Between July and November 2017, Europcar charged surcharges of up to 1.43 per cent on credit card payments, although the rates varied over time and by the type of card. The company admitted that these surcharges were higher than what it was being charged by its bank for accepting these payments.

Exemptions

Sometimes conduct that may breach Australia's competition laws can have some wider public benefits that outweigh the harm to competition. In those cases, businesses can lodge an authorisation or notification with the ACCC seeking an exemption to engage in the conduct. During the last six months, exemptions have included:

- a group of potato growers from the Central Highlands region of Victoria seeking to share information and collectively negotiate with potato processors
- a group of irrigators in the Virginia region of South Australia seeking to collectively negotiate with the South Australian Water Corporation for the supply of recycled water from the Virginia Pipeline Scheme
- the Association of Professional Engineers, Scientists and Managers, Australia seeking to collectively negotiate terms of engagement of members who provide translator and interpreter services, and to advise them in relation to appropriate fee levels and other terms of contracts for service
- Seedwise seeking to collectively negotiate, on behalf of participating royalty managers, with grain buyers over the terms and conditions on which royalties are collected from grain buyers and remitted to participating royalty managers.

From 6 November 2017, we have been able to issue a 'class exemption' for conduct that poses very little risk to competition, or is likely to result in a net public benefit. A class exemption provides a 'safe harbour' for eligible businesses, allowing them to engage in specified conduct without lodging a specific authorisation or notification.

We are continuing with our work to develop a class exemption to allow:

- small businesses including agribusinesses (with turnover of less than \$10 million) to form collective bargaining groups to negotiate on the supply or acquisition of goods or services
- all franchisees to collectively bargain with their franchisor.

To take advantage of the class exemption, eligible businesses will be required to provide the ACCC with details about the bargaining group they are forming or joining and this information will be publicly available.

We expect to make a final decision about the small business collective bargaining class exemption in the first half of 2020.

Franchising Code

In November 2019, the inter-agency Franchising Taskforce released its [Regulation Impact Statement](#) which sought feedback on potential options for reform in the franchising sector. The Taskforce will provide advice to Government based on its findings from the consultation.

On 27 August 2019 we released the [Disclosure practices in food franchising report](#) which presented the key findings from compliance checks on 12 franchisors. The compliance checks found that many franchisors were providing inadequate information to prospective franchisees and that the franchisors made it difficult for franchisees to contact former franchisees. For the franchisors we looked at, over 40 per cent of prospective franchisees did not seek any independent professional advice before entering into a franchise agreement.

The ACCC released new and updated guidance, including:

- the [franchising model disclosure document](#), which sets out the recommended format for a franchisor's disclosure document and includes tips to assist franchisors in meeting their disclosure obligations
- the [quick guide to a franchise disclosure document](#) to help prospective franchisees read and understand their franchise disclosure document.

Agriculture

In the last six months the ACCC's key outcomes in the agriculture sector included:

- welcoming the announcement of the introduction of a [dairy code of conduct](#). This mandatory code was a key recommendation of the ACCC's 2018 dairy inquiry, which found significant imbalances in bargaining power between dairy processors and farmers. The ACCC will be responsible for enforcing the code, which came into effect from 1 January 2020, and will work with dairy farmers, processors, and our new Dairy Consultative Committee as the code is implemented
- the first meeting of the ACCC Dairy Consultative Committee was held on 18 December 2019 to discuss strategies to educate the industry, especially farmers and processors, on compliance with the code
- the release of the [final report](#) of the ACCC Wine Grape Market Study on 24 September 2019. The report made ten recommendations to improve the efficiency and fairness of wine grape markets in Australia's warm climate grape growing regions, where most of Australia's wine is produced
- the [Federal Court declaring](#) in August 2019 that certain terms in contracts between Australia's largest potato wholesaler, Mitolo Group Pty Ltd, and potato growers that were entered into between December 2016 and February 2018 were unfair and therefore void. Mitolo was also ordered to pay a pecuniary penalty of \$240 000 for contraventions of the Horticulture Code
- [Coles Group Limited agreeing](#) to pay Norco Co-operative Limited around \$5.25 million for distribution to its dairy farmer members in December 2019. The payments follow an ACCC investigation into whether Coles fully passed on to Norco a 10 cents per litre price rise it charged consumers for Coles branded fresh milk, as it claimed it would do.

New Electricity Retail Code

From 1 July 2019 the [new Electricity Retail Code](#) came into force. The Code applies to all retailers that supply electricity to consumers including small businesses in the applicable distribution regions of New South Wales, South Australia and south-east Queensland. It sets a cap on standing offer prices and specifies how prices and discounts must be advertised, published or offered.

Country of origin food labelling

The ACCC has continued to ensure businesses are presenting accurate information about country of origin to their consumers in line with the *Country of Origin Food Labelling Information Standard 2016*. Further information is available in our [compliance and enforcement approach for country of origin labelling](#).

In October 2019 the ACCC made a [submission](#) to the Department of Industry, Innovation and Science regarding changes to the complementary medicines sector's eligibility to make Australian origin claims on their products. In December 2019 the regulations for country of origin labelling for complementary medicines changed. More information about the [Resolution for Australian Made Complementary Medicines](#) is available on the Department's website.

Scams

Between 1 July and 31 December 2019, the ACCC's Scamwatch website received 2021 scam reports from Australian small businesses (2530 including medium-sized enterprises) with \$1.4 million losses (\$2.4 million including medium-sized enterprises). The reports indicate that while some scams target businesses, small businesses are also experiencing the same scams that affect many consumers.

Robocall scams, remote access scams, phishing scams and fake charity scams have the potential to have a greater impact on small businesses than the ordinary consumer. For example, robocall scams can impact sales by tying up business phone lines and preventing genuine customers from getting through.

Fake advertising, false billing, business email compromise and overpayment scams are all targeted towards businesses. Fake advertising scams resulted in \$62 000 of reported losses in 2019. Scammers will send an invoice to a business claiming that they had agreed to advertise in a particular publication months ago, and payment is now due. The business is told they cannot renegotiate, and is harassed until they pay the invoice, only to discover that the publication doesn't exist. Small businesses should check invoices to ensure they have agreed to the goods/services, and research the company charging the invoice if they have doubts.

Australian businesses are encouraged to visit www.scamwatch.gov.au to learn more about scams targeting them and how to protect themselves. They can follow [@scamwatch_gov](#) on Twitter and subscribe to [scam alert emails](#).

New safety duty for businesses

The ACCC has been supporting reforms to strengthen and 'future-proof' the consumer law and to create a more responsive and adaptable product safety system. This includes the potential introduction of a new safety duty which would place a legal obligation on both small and large businesses to ensure their products meet reasonable expectations of safety.

The Commonwealth Treasury has been leading the assessment process for the introduction of the new safety duty, with the ACCC providing ongoing technical support and advice on the operation of the product safety provisions under the ACL.

Treasury's public consultations to seek views from stakeholders including small businesses on [improving the effectiveness of the consumer product safety system](#) closed on 30 November 2019.

Consumer Data Right

The ACCC is progressing work on the Consumer Data Right (CDR), which will provide individuals and businesses (consumers) with a right to access specified data about them held by businesses, and allow consumers to authorise the secure disclosure of that data to accredited third parties.

We released a [consultation paper](#) seeking views from interested parties on how best to permit the use of intermediaries in the CDR ecosystem, the disclosure of CDR data to non-accredited third parties and what controls are appropriate having regard to the importance of privacy and security of CDR data. Submissions closed on 3 February 2020.

Recent in-depth inquiries

Final reports from a number of inquiries were published:

- the final report of the [digital platforms inquiry](#) contains 23 recommendations, spanning competition law, consumer protection, media regulation and privacy law. In the course of the inquiry, the ACCC identified a number of adverse effects associated with digital platforms, such as the market power of Google and Facebook having distorted the ability of businesses to compete on their merits in advertising, media and a range of other markets
- the [foreign currency conversion services inquiry](#) final report highlights competition and consumer issues affecting individuals and small businesses who use international money transfers, foreign cash, travel cards, and credit cards or debit cards for transactions in foreign currencies
- the final report of the [customer loyalty schemes review](#) reinforces recommendations from the digital platforms inquiry final report, which calls for certain changes to consumer and privacy law. It also recommends that loyalty schemes better inform consumers, improve their data practices and stop automatically linking members' payment cards to their loyalty scheme profiles
- the final report of the [wine grape market study](#) examined competition, contracting practices, transparency and risk allocation issues in wine grape supply chains.

A third [report](#) was published in December 2019 as part of the ACCC's ongoing [inquiry into the national electricity market](#). The inquiry examines prices, profits and margins in the supply of electricity in the National Electricity Market. Other ongoing inquiries include:

- [gas inquiry 2017-2025](#) (see [July 2019 interim report](#))
- [northern Australia insurance inquiry](#)
- [Murray-Darling Basin water markets inquiry](#).

Online programs

How well do you and your staff know your rights and obligations under Australia's competition and consumer laws? Take advantage of our free online education programs to find out more or refresh your knowledge at www.accc.gov.au/ccaeducation. To date, the small business education program, together with a similar program for tertiary students, has been accessed by over 96 000 users since their launch in 2013.

We also support the provision of a free [pre-entry franchise education program](#), delivered by FranchiseED, to help prospective franchisees assess business opportunities and understand what is involved in buying a franchise business.

Publications and fact sheets

New and updated resources:

[Franchisor compliance manual](#)
[Franchising model disclosure document](#)
[Quick guide to a franchise disclosure document](#)

Other franchising and small business resources:

[Buying a franchise? Know the risks \(website\)](#)
[Franchising: what you need to know](#)
[The franchisee manual](#)
[Guide to the Electricity Code](#)
[Country of origin food labelling](#)
[Small Business & the Competition and Consumer Act](#)

Contact us

ACCC Small Business Helpline: 1300 302 021

ACCC website: www.accc.gov.au/smallbusiness

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