Australian Competition & Consumer Commission	**Australian Food & Grocery Council** **Industry Leaders Forum** ***Competition and consumer issues: State of play in the food and grocery sector*** **ACCC Chairman, Rod Sims** **11 October 2012, Canberra** **Rod Sims, Chairman**

It's good to speak to so many food and grocery manufacturers in the one room. As a consumer, I feel like I know you well. As a regulator, I've got to know your sector particularly well.

The food and grocery sector is facing many competition and consumer issues. This includes carbon claims, market power, mergers, and labelling, all of which I will touch on today.

Today, I am announcing that the ACCC will be taking new steps to provide consumers with advice about country of origin labelling claims. Made in Australia, Product of Australia, Grown in Australia; we believe this is an area where consumers need more information so that they can to make informed decisions about the products they buy.

I will also launch the ACCC's guide to buying olive oil. Again, it is important that shoppers understand the terms commonly used on olive oil packaging, so they can choose and purchase products with confidence.

1. Carbon: The first 100 days

But to start, I would like to cover the first 100 days of the carbon price. It is fitting to use this milestone to reflect on the volume of complaints and enquiries which have come across our desk so far, and how the ACCC has dealt with them.

The ACCC's job is to ensure carbon claims do not mislead or deceive. This is not new. Under the *Competition and Consumer Act 2010* (the Act), you must not make false, misleading or deceptive claims about the price of goods or services.

This includes false, misleading or deceptive claims linking price rises to the carbon price.

We have been very clear from the start, even well before the start, that it is business as usual. You are free to increase your prices as you see fit. However, if you make claims about the impact of the carbon price these claims need to be truthful and have a reasonable basis.

The ACCC's approach to ensuring compliance with the law in the area of carbon claims I believe has been well balanced and comprehensive. We ran an extensive education campaign in the lead up to the introduction of the carbon price mechanism and have quickly pursued some early compliance outcomes.

We started providing guidance for businesses in November 2011. We took feedback on that advice from business and continued to provide further information where required. We set up a phone hotline for complaints and enquiries.

In August, the ACCC hosted a webinar to provide small businesses with an opportunity to ask questions about carbon price claims in 'real time', to engage directly with businesses and broader industry representatives and to understand emerging carbon price claims

issues across sectors. Around 200 registrants participated and thirty questions were addressed at the time. We've also been in regular contact with individual businesses and various industry groups including your Council.

The ACCC has kept its approach in perspective and in, the absence of widespread conduct of concern, has been able to avoid the use of a sledgehammer to crack the nut.

In total the ACCC has conducted 15 in-depth investigations and 50 initial investigations. We have moved quickly to resolve matters using educative letters, infringement notices and undertakings. We believe our response has been proportionate to the conduct.

Between 1 July 2012 and the end September 2012, the ACCC has received close to 2,500 carbon price complaints and enquiries.

As noted in previous updates, it is important to put this figure in context. In the same three month period across all topics the ACCC received just over 43,000 complaints and enquiries. That is, six per cent of our total complaints related to carbon.

The majority of contacts have come from consumers and small businesses seeking information or wishing to report concerns about carbon price claims. Across the course of the first three months, the average daily complaint figures have dropped substantially from around 60 per day at the beginning to around 10 to 15 per day. In recent weeks daily numbers have been as low as four.

Of the complaints we received, more than 40 per cent have concerned the energy sector. This is to be expected given the most prominent effect of the carbon price has been on electricity prices.

People have contacted us to check or confirm the price increase claims made by electricity retailers and asked about the accuracy of statements required to be placed on some bills by state legislation.

The ACCC has had close engagement with electricity retailers, and to date has not found carbon price representations which raise concerns.

With the first quarter electricity bills arriving in letterboxes, we expect energy complaints to continue.

There has also been a subset of complaints raising concern with the effect of the carbon price on electricity supplied under Greenpower contracts. Basically, the carbon price mechanism raises the price of all electricity across the NEM, with Greenpower consumers consuming electricity from a mix of sources that are affected by the carbon price.

One area the food sector is particularly interested in is refrigerants. The refrigerant sector stands out as another area attracting a large number of complaints. Investigations into the air conditioning and refrigeration repair sector have yielded a number of outcomes. We have had one administrative outcome, with a further four anticipated, and one court enforceable undertaking relating to alleged false and misleading representations regarding the carbon levy on the price of refrigerant gas. Whilst slowing, the ACCC continues to receive complaints about refrigerant gas price increases. We are working with the refrigerant industry to provide them with guidance to avoid making misleading statements.

Overall, the balance between education and the quick pursuit of early enforcement has helped show business how to do the right thing. The low complaint levels certainly show that most businesses have acted in accordance with the law during the first 100 days of carbon price representations. When they have not, we have contacted them quickly and worked with them to help them comply.

Proof of this is the more than 40 formal and informal warning letters we have sent to traders in various sectors. We also sent out over 50 educative letters to traders providing them with

information and guidance material about carbon price claims and the role of the ACCC. This approach has enabled us to move quickly to address representations such as:

- the regional Queensland medical practice increasing charges for facsimile messages that in the ACCC's view was inappropriately linked to the carbon price.
- the New South Wales flying school raising tuition fees due to the carbon price with concerns over full attribution.
- A WA refrigerant gas supplier passing on price increases that in the ACCCs view may have attributed all the increase to the carbon price, when this was not the case.

2. Supermarket supplier issues

Turning to my second issue, I know the power of the major supermarket chains is of immense interest, in fact at last year's event Coles and Woolworths were the subject of much discussion. Today, I will make it clear where the ACCC is directing its enforcement resources and outline the misuse of market power and unconscionable conduct laws.

Since coming to my role, I have discussed not only the benefits of a market economy, but the role of the ACCC in ensuring that the strong profit motive works to the benefit of consumers.

This point, of course, raises the fine line between behaviour that represents combative capitalism that benefits society, and that which represents a breach of the law, which damages society.

Two provisions of the Act stand out in my mind when trying to decide which side of the line particular behaviour sits. These are the provisions relating to the misuse of market power (section 46 of the Act) and unconscionable conduct (sections 20 to 22 of the Australian Consumer Law). Over many years our Parliament has wrestled with the wording to ensure the 'fine line' I just described is drawn in the right place.

For the ACCC to determine that there has been a misuse of market power it must demonstrate to a court that:

- a company has market power
- the company has taken advantage of that power, rather than acted in a way that does not draw on that power, and
- the power was used for an anti-competitive purpose; that is we must show what was intended rather than what was the effect of the behaviour.

Unconscionable conduct is also a provision that involves drawing the line between the cut and thrust of hard negotiations or bargaining and what behaviour should be prohibited.

In broad terms the courts have considered the threshold for unconscionable conduct to be conduct that goes beyond robust commercial dealings or the notion of unfairness, to that which shows no regard for conscience and is irreconcilable with what is right or reasonable.

As a result of history and sheer geography, Australia has many sectors that may raise potential competition concerns and therefore require close scrutiny.

While there are many issues and sectors under examination which, of course, must remain confidential, the ACCC has announced active examinations in three areas:

- We are focusing on issues relating to the treatment of suppliers by the major supermarket chains which include allegations of misuse of market power as well as allegations of unconscionable conduct towards those suppliers;

- We are investigating the sharing of information about prices in the fuel retailing sector; and
- We are examining the longer term competition implications of the large and frequent shopper docket discounts provided between the fuel and supermarket sectors in particular.

The ACCC has not yet formed a view whether or not breaches of the Act are occurring. As you would understand, assessments of this nature are complex and generally involve extensive evidence gathering followed by much legal and economic analysis. Given this, the ACCC anticipates these assessments will take some time.

There is nothing wrong with taking the time to get these assessments right. Whatever conclusions we eventually draw from these investigations will have important implications for and set the boundaries around how companies can behave.

The ACCC has also taken an initial look at claims from Masters Grocers Australia that the major chains are cross-subsidising loss-making supermarkets for anti-competitive purposes. Issues relating to 'store saturation' and 'over-sized store' strategies were raised.

I have said previously that the fact that a new store will operate at a loss in its early days is usually considered normal commercial behaviour. Similarly, if you open a new store, that by definition will bring more capacity than the market needs, because the market needs were presumably already close to being met.

Some have interpreted my comments on the Master Grocers report as saying our laws are deficient in that they limit our ability to deal with the problems raised in the report. This is not so. My point was a different one.

I was saying that, on its face and in general, initial loss making and providing capacity beyond initial market needs would usually fall on the right side of the dividing line I referred to earlier, as it likely represents combative capitalism, that benefits society.

We will, however, closely examine particular acquisitions and new stores in the food and grocery and related sectors to see if they do cause a breach of our Act under section 50 or section 46.

3. Mergers and acquisitions

Merger reviews in the food and beverage sector

Section 50 of the *Competition and Consumer Act 2010* prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition. Our role is to identify which acquisitions require review and, of those, which raise competition concerns.

One high profile review was Asahi's acquisition of P&N Beverages which we considered last year. Asahi owns Schweppes Australia and manufactures a range of non-alcoholic beverages while P&N Beverages also supplied a wide range of branded and non-branded non-alcoholic beverages. The ACCC cleared that merger but only after an undertaking was received to divest P&N's cordial and carbonated soft drinks business to Tru Blue Beverages.

As well as mergers between food and beverage manufacturers, the ACCC also looks closely at mergers between suppliers of key inputs into food and beverage manufacturing. In conducting such reviews a key focus for the ACCC is whether the supplier would, as a result of the merger, be able to increase the price at which these inputs are supplied to its downstream customers.

An example is the packaging sector which has become increasingly concentrated. The ACCC has reviewed numerous mergers in this sector in the past two years. This involved

speaking to a wide range of packaging customers, including food and beverage manufacturers. The ACCC carefully considered and benefitted from customers' views in each review.

The ACCC has also reviewed mergers involving suppliers of other important inputs into food and beverage manufacturing. One example was Cargill's proposed acquisition of Goodman Fielder's edible fats and oil business, which are important inputs into a wide range of manufactured foods. The ACCC spoke to a number of food manufacturers during its review of that transaction.

The Cargill/Goodman Fielder proposal raised a number of complex issues and the ACCC ultimately decided to oppose that acquisition in May 2010. Cargill came back to us again this year with the same proposal but withdrew its request for clearance before the ACCC reached a final decision. The ACCC is now reviewing a proposal by GrainCorp to buy Goodman Fielder's fats and oil business.

Still on the mergers front, but moving to the retail side of things, and much closer to the issues raised in the Master Grocers report. The ACCC has been paying close attention to incremental acquisitions in the grocery, liquor and home improvement sectors because these acquisitions are important at both the local and at the national level.

In particular, the ACCC is interested in small acquisitions by the major supermarket chains who are increasing their participation in these sectors. While, this ownership trend can result in substantial economies of scale and scope, it can also mean that barriers to entry are becoming increasingly high for other chains or buying groups to replicate the strong market position of Wesfarmers and Woolworths. This is in addition to local barriers associated with, for example, access to sites.

The ACCC is also concerned that, with significant market power in groceries, Wesfarmers and Woolworths may move to a similar position in liquor and home improvement through frequent small acquisitions of existing outlets or greenfield land sites.

There is no provision in our legislation to cap market shares or to take account of previous acquisitions when reviewing the competitive effect of the next transaction. Instead, we can only consider the competitive effect of each transaction. This means the ACCC's focus will in many cases primarily be limited to analysis of the local market effects given that the acquisition of one store is unlikely to result in a substantial reduction in competition at the national or regional level.

By opposing those acquisitions which substantially lessen competition in a local market we hope to not only assist local communities, by protecting competition, but also ensure better national market structures than would otherwise emerge.

Recently, we have looked at a number of acquisitions in local markets involving acquisitions by Wesfarmers and Woolworths. In five of these reviews we released a 'statement of issues' which outlines the ACCC's preliminary view that the acquisition raises competition concerns warranting further investigation.

For example, earlier this year the ACCC considered a proposed acquisition by Woolworths of the Black Stallion Hotel and associated off licence bottleshop in Rocherlea, which is about 8 km north of the Launceston CBD in Tasmania.

We looked at this matter very closely and conducted a public review calling for submissions from interested parties. In the 'statement of issues' we identified a number of competition concerns including that:

- Woolworths would control three of the four off-premises liquor stores in the retail market

- one of the three banner groups that operated in the retail market would be removed, and
- there would be an associated reduction in the scope of consumers to purchase their preferred liquor products at a discount or on promotion.

Days prior to making a final decision, Woolworths withdrew its request for an informal merger review and the ACCC discontinued its review without making a final decision.

More recently, the ACCC is currently conducting a review of a proposed acquisition by Woolworths of a supermarket site at the Glenmore Ridge Village Centre. While most mergers reviewed by the ACCC involve the acquisition of a pre-existing business, this matter involves the proposed acquisition of a block of undeveloped land that is capable of being developed into a supermarket by Woolworths or another developer. The site is located approximately 53km west of the Sydney CBD.

Woolworths proposes to acquire the Glenmore Ridge site from Stockland Corporation, who currently owns it. Woolworths already operates the only other supermarket in Glenmore Park, with an Aldi due to open there in 2014.

We are still conducting a preliminary review of this matter, however we have released a "statement of issues" seeking further information on certain competition issues which have arisen from our review to date. Our preliminary view is that the proposed acquisition is likely to result in a substantial lessening of competition in the local Glenmore Park market as it is likely to prevent or hinder competition that may otherwise have been brought to the local market by an alternative supermarket operator. This competition is unlikely to be otherwise introduced into the local market because of the lack of other available suitable sites for supermarket development.

The ACCC is now considering submissions from the market and will make a final decision on this matter very soon.

The ACCC has also recently looked at a proposed acquisition in the local market for the retail supply of hardware and home improvement products in the Ballarat area in Victoria. Woolworths, in a joint venture with Lowe's Companies Inc, proposed to acquire three hardware and home improvement stores from G Gay & Co in Ballarat. The Joint Venture also has plans to open a Masters store in the Ballarat area in 2013.

The ACCC announced last week that it will oppose the proposed acquisition. We are concerned about the removal of a key independent competitor from the market to the detriment of competition and local consumers.

Our review found G Gay & Co is a vigorous and effective competitor in terms of price, product range and service and is likely to provide a strong competitive constraint on Masters in the Ballarat area.

The ACCC concluded that the proposed acquisition is likely to result in a substantial lessening of competition through the removal of what will be one of Woolworths' two closest competitors in the Ballarat area. The other remaining key competitor being the Wesfarmers owned Bunnings.

While there has been an informal arrangement in place between the ACCC and Wesfarmers and Woolworths regarding the supermarket transactions they would notify to the ACCC, there is no legal requirement for them to do this.

As a result of an increased focus on these sectors, we have now increased our engagement with Woolworths and Wesfarmers in order to improve the informal process for the notification of these types of acquisitions to ensure that those warranting review are identified and assessed by the ACCC.

We have proposed that, in return for advanced notice of a wider range of acquisitions, and for particular information being provided upfront with each transaction, we would establish a dedicated team to assess these transactions within specified timeframes. This way Wesfarmers and Woolworths would know quickly whether we have significant concerns or not with a particular acquisition.

We are continuing our discussions with Woolworths and Wesfarmers and these discussions need to be finalised soon. If agreement cannot be reached, our review of those local acquisitions we become aware of will continue under current processes.

4. Food labelling

Country of Origin

Consumers increasingly want to know where the food they buy comes from. It is important that these consumers can confidently use and understand the claims on labels, packaging and advertising about where products have been made or grown.

Some people will be willing to pay a premium for an Australian product, others will not. The key point is that consumers must know what they are buying.

The ACCC does not believe there is an essential problem with the current classifications. The problem is people's understanding of what they mean.

The ACCC is, therefore, today releasing consumer friendly advice which decodes the various origin claims.

'Product of/grown in' and 'made in' are the most common types of claims consumers are likely to come across as they walk down the aisle.

'Product of/Grown in' means that each significant ingredient or part of the product originated in the country claimed and almost all of any production processes also occurred in that country. 'Grown in' is mostly used for fresh food and 'Product of' is used for processed food.

'Made in' means that the product was made in the country claimed and at least 50 per cent of the cost to produce the product was incurred in that country.

Although they are made in Australia, these products could contain ingredients from other countries. Some companies identify imported ingredients in their products through claims such as 'Made in Australia from local and imported ingredients'.

If 'Made in Australia' appears on a jar of jam, this means the jam was made in Australia and at least half of the cost of making the jam was incurred in Australia. It doesn't necessarily mean that the ingredients for the jam were grown or sourced in Australia.
A feature of this type of claim is that it, for example, allows a 'made in' statement for those food products with seasonal variations impacting on the availability of local ingredients.

There is nothing at all wrong with having a classification 'Made in Australia' which requires at least 50 per cent of the cost to produce the product being incurred in Australia. The classification is, in effect, telling you where the product was made, and some will want to know this.

The problem arises, it seems to me, if the only label people are looking for is 'Made in Australia' when what they want is a product fully from Australian sources. When they realise the product can be made from some overseas ingredients they question the validity of the origin claims. They should not. We need a classification system that deals with where a product is made. The problem is they should have been looking for a 'Product of Australia' label.

We and others need to educate consumers as to what the various labels mean which is the purpose of today's release.

Some foods also include claims on their labels such as 'Proudly Australian owned' or '100% Australian owned'. Let me be clear on this point. These statements are about the ownership of the company; they don't indicate where the product was made or where its ingredients came from.

Olive oil

Extra virgin, virgin, pure and light; Australian consumers have access to many different types of olive oils. However, with labels and prices varying significantly between and within brands it can be confusing to know which olive oil is best.

The ACCC today is also launching a buying guide for consumers which provides information about the different grades of olive oil products, how they differ as well as some storage tips. The guide is about providing consumers with information to help them make informed purchasing decisions.

The ACCC's advice comes on the back of some enforcement action earlier this year. In May the Big Olive Company Pty Ltd paid two infringement notices totalling $13,200 for labelling products as 'extra virgin olive oil' that the ACCC considers were not. As we said at the time consumers should be able to trust that what's on the label is what's in the bottle.

The key point from our olive oil guidance is that if you want olive oil that is mechanically extracted from fruit with no chemicals used you need to buy extra virgin and virgin olive oil. Other oils are refined using heat or chemicals, and may have label terms such as 'light' or 'pure'.

CONCLUSION

As I said earlier, the food and grocery sector is in the middle of many competition and consumer issues. I look forward to engaging further with you.