



**Australian Competition and
Consumer Commission**

Promoting Competition and Fair Trading

**Master Grocers Association of Victoria
Melbourne**

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Meeting the competitive challenges of the grocery sector

Graeme Samuel, Chairman

1. Introduction

Firstly I would like to thank Jennifer Flanagan for inviting me to speak tonight.

Many of you here may have previously heard some of my thoughts and comments on a number of subjects; however, I do welcome this opportunity to reinforce a couple of key messages.

The Trade Practices Act 1974 (the Act) continues to create a lot of buzz amongst the business community. There continues to be comment and speculation surrounding the effectiveness of the Act to promote competition and ensure there is fair trading in the various markets.

Looking around the room I realise that the membership of this group is representative of most of the independent food and liquor retailers in Victoria, many being small and micro businesses. But there is a common goal amongst attendees – providing an opportunity for members to continue operating their businesses in the most efficient manner possible in a fair trading environment.

Small businesses are often called the lifeblood of the economy. They are often the innovators and instigators of smart, new and efficient practices. Small businesses provide competition and keep big business “on edge” by their quick response to market dynamics.

However there continues to be a challenge for small business. Increased compliance costs are something that I know worries the business community. Unfair trading can harm innovative businesses and anti-competitive conduct can drive some businesses out of the market.

I would like to address a number of points which I believe are important for small businesses.

First, I will discuss the importance of competition and consumer law.

Then I would like to outline the rationale for utilising the media to spread the message about competition policy and the Trade Practices Act.

Thirdly I will cover the more general subject of how small business is treated under the Act.

Finally I will discuss some of the issues that have come out of our petrol and grocery report into shopper dockets and acquisitions of independent grocery stores, and explain some of the reasons behind our decisions.

2. Competition and consumer law

Let me now deal with some issues of principle that go to the heart of the Commission's rationale.

The Commission's essential role is to promote competition and facilitate the provision of consumer protection in the market place for the benefit of all Australians.

Competition law is not about preserving specific competitors or protecting certain sectors of business from the rigours of competition.

There are clear benefits that result from tough but fair competition.

The difficult task is to distinguish between vigorous but lawful conduct that is likely to lead to significant benefits for consumers, and unlawful anti-competitive behaviour which may disadvantage consumers.

A strong Trade Practices Act generates advantages for small businesses. It contributes to a strong and vibrant industry sector. It inhibits unethical practices by competitors. And it can promote confidence in consumers that they are dealing with a business or industry that adheres to high standards.

Small businesses are often the suppliers, the customers and the competitors of big business and, as such, they have a right to be treated in a fair, competitive and ethical manner.

The Commission has an outstanding reputation as a vigorous enforcer of the Act.

And in this, I want to reassure you that the Commission will continue to pursue unlawful practices that harm competition, competitors, small businesses and consumers.

3. The Commission and the Media

There has been some speculation about where the Commission is heading with its enforcement action. Let me say to you that our fundamental enforcement priority is to achieve very quick results that avoids consumers and businesses, as the case may be, being harmed in the longer term, and brings about restitution to consumers where we can do it as fast as possible.

The Commission is made up of seven members, but we are currently two short. All the decisions of the Commission are made by the Commission as a whole – they're not made solely by the Chairman, but by the whole Commission. You can't simply talk to one Commissioner about a matter such as a merger and think that your merger can get through. Yes, sometimes it's useful to speak to the Chairman, but that's more as a matter of courtesy than anything else. You will find that it's far more important to deal with our staff – they are the ones that provide rigorous analysis to the Commission to enable us to make our decisions.

To ensure compliance with the law, the Commission works to achieve a high public profile. We bring matters of competition and consumer law to the attention of the Australian public and to the business community.

There is a clear public benefit generated by the dissemination of information about Commission activities and initiatives.

All Commissioners, including myself, use the media and comment in the public forum to keep consumers informed of their rights and businesses informed of their responsibilities under the Act.

That said, I also want to reassure those dealing with the Commission that we will respect the appropriate requirements of confidentiality in those dealings. We do not allow the media's thirst for information to undermine community respect for the integrity of our processes.

The Commission is using the media to bring about behavioural change on the part of business. In doing so, the Commission seeks to ensure that business understands its responsibilities and we hope to reinforce the desire of business to compete hard and to behave in a lawful manner.

For example, last year the Commission announced that allegations of misleading and deceptive behaviour in the property industry were a major consumer protection priority. We had become concerned about aspects of wealth creation through promotion and particularly 'dummy' bidding at auctions. As a result of publicity, and some well-honed court cases, we have seen a marked change in behaviour by the property industry. Consumers are watchful of dummy bids, and advertising in the industry is more circumspect.

Change in behaviour by industry has benefits for consumers and the industry itself whose reputation can only be enhanced by fair and ethical behaviour.

A good reputation is highly prized by all businesses and publicity attending an adverse judgment of say, pricing fixing or unconscionable conduct, can lower a firm's

standing and reduce sales. This is of concern to the companies involved, and, *sometimes*, a matter of complaint.

Of course, there is an important balance to be struck.

The Commission is circumspect where rights and reputations might be improperly or adversely affected. Announcements of the institution of legal proceedings will be factual, moderately worded and balanced. They will not be the subject of further comment or backgrounding.

The Commission does not discuss cases whilst we investigate or bring a case to court. Such restraint would be enhanced if those who are the subject of proceedings demonstrated a similar commitment to factual accuracy and moderate comment.

The Commission is not cavalier in its treatment of individuals or corporations about whom we allege wrongdoing – not in public, not in private, not by statement, not by innuendo, not by background briefing.

It is my intention that our regular contact with the media should and will continue. It forms part of our broader commitment to achieving compliance with the Act and providing the public with accurate and timely information about enforcement and regulatory decisions.

There is another set of important reasons for the Commission to speak publicly. This is the important issue of accountability and transparency, not just to parliament and ministers, but also to the Australian public.

The community has a clear right to be informed of, and to assess and judge, the work and decisions of the Commission and thus it is proper that the Commission accounts for its actions.

4. Small businesses and the Trade Practices Act

Let me now turn to some specific issues pertinent to small business under the Act.

Unconscionable Conduct

As I have mentioned, a key focus of the Act is the promotion of fair trading.

The most important, for small businesses, of these fair trading provisions in the Act are the unconscionable conduct provisions.

These provisions were introduced to redress the imbalance of bargaining power between small and large business. These provisions protect small businesses who deal with larger, more powerful enterprises. But bargaining power is not solely dependent on the size of the participants. Some small businesses do have a superior bargaining power when they deal with other small businesses.

The provisions, and in particular s.51AC, are still relatively new and are the subject of a number of cases currently before the courts. They have been successful in protecting some retail tenants, primary producers and franchisees.

Although the unconscionable conduct provisions do not have the backing of the pecuniary penalties which are attached to breaches of the misuse of market power provisions, they still remain an effective tool.

Small businesses are not looking to penalise other businesses. Instead, what they seek is an opportunity to run their own business in a fair and competitive environment. They just want a fair go.

In our submission to the Senate Inquiry into Small Business Review, the Commission has not called for widespread changes to the unconscionable conduct provisions of the Act.

In a number of submissions to that committee organisations have called for a number of issues to be addressed, including:

- late payments;
- access to justice for small businesses;

- big businesses misusing a market power to the detriment of small businesses;
- termination of contracts without just cause or due process; and
- standard form contracts offered on a take it or leave it basis.

On the second of these points, the Commission welcomes the legislative change which allowed state jurisdictions to draw down the unconscionable conduct provisions of the Act. New South Wales, the ACT, Queensland and Victoria have already done this.

By doing this, small businesses will have easier access to justice, often in a less expensive and quicker environment such as a tribunal. We will note with interest the outcomes in this area.

In its submission the Commission recommended that the imposition or exploitation of an unfettered unilateral variation clause, by businesses in a superior bargaining position, should be a factor that a court may consider.

Generally the Commission's view is that the unconscionable conduct provisions of the Act are currently a flexible mechanism which does address examples of unconscionable conduct.

Misuse of Market Power

There has been a lot of discussion surrounding recent court decisions involving section 46, the misuse of market power provisions of the Act.

Many of you are aware that this was covered as part of the Dawson Review and is also being examined by the Senate Inquiry into Small Business. The Senate Committee's report into the effectiveness of the Trade Practices Act on Small Business is expected to be tabled in Parliament on 1 March 2004.

The misuse of market power provision plays a crucial role in the policy framework and objectives of the anti competitive conduct provisions of the Act.

Section 46 prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into that or any other market, or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46 is a necessary complement to other prohibitions against cartel arrangements and vertical restrictions.

Section 46 is an essential pillar of the Act. It is about protecting the process of normal competition, dealing with a situation where a business with substantial market power uses that power to damage a competitor.

It is important not to confuse the protection of competition with the protection of individual competitors.

Following recent court decisions on section 46, the Commission believes that there is a need to give guidance to the courts and certainty to the business community, and to bring the section in to line with what Parliament intended.

Further guidance could be provided to afford clarity for businesses and the courts on why:

- the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control;
- 'substantial market power' does not mean a business is absolutely free from constraint;
- more than one business can have a substantial degree of power in a market; and
- evidence of a business's behaviour in the market is relevant to determining substantial market power.

There should also be clarification of the concept of 'taking advantage' in regard to market power of section 46 as it has proved difficult to understand and has been creating uncertainty.

The Commission believes that in predatory pricing cases a finding of recoupment of losses should not be required to establish a breach of the Act. The latter amendment would be consistent with Parliament's original, stated intent.

These issues will be debated in more detail as part of the inquiry and we welcome the opportunity to comment in more detail at that time.

5. Assessment of petrol and grocery sectors

A further issue that will be of interest to you is the Commission's recently released report into the petrol grocery sectors.

Particularly, the Commission studied the impact of the arrangements made by Woolworths and Caltex and Coles and Shell to make the petrol discounts available through shopper docket schemes and also acquisitions in the supermarket area, particularly by Coles.

The Commission found that there are substantial benefits to consumers from the shopper docket discounts. We believe the offers are pro-competitive because they drive competition between supermarkets and petrol retailers. In addition to the effect on price, retailers must become more innovative in non-price factors, like additional services, in order to gain and maintain market share.

Let me make this point clear: it is essential that the Commission's primary focus remains on the interests of consumers – that is to say, the community at large – and is not diverted to protect certain sectors of business from healthy competition. Protecting certain businesses or any particular sector of the Australian community from fair, vigorous and lawful competition for whatever reason brings with it corresponding costs to the Australian public. This is not the Commission's mandate.

Specifically there were claims that independent retailers would go out of business because of the shopper docket schemes. Concerns were raised that, with fewer independents, the shopper docket discounts would entrench the dominance of the majors with long term effects on competition and prices.

The Commission examined both the petrol and grocery sectors and how there had been considerable change since the mid 1970s to today. We concluded that changes in demand and supply in both the petrol and grocery sectors have resulted in significant industry rationalisation and that this can be expected to continue. In the Australian market, the Commission found that there were a number of factors that had seen the number of retail petrol outlets fall from 20,000 in 1970 to about 8,000 in 2003. This has also happened overseas.

The new fuel standards, the trend to larger sites offering more pumps and other services at prime locations such as highways or major intersections and an anticipated shortfall of petrol in the Asia-Pacific region are expected to be continuing influences on the petrol market and as a consequence on site numbers.

The Commission considered that, in view of other developments affecting competitiveness in petrol and grocery retailing, the shopper docket discounts would be only a marginal determinant of whether independent retailers remain in these sectors. The Commission also noted the United Kingdom experience where major supermarkets have been involved in petrol retailing for more than ten years and the discounting of petrol prices is still occurring.

From the review it has become obvious that there have been a lot of changes to both sectors over the past couple of years. This is affecting the way that independent businesses operate, but the Commission considers that the shopper docket offers encourage competition between both supermarket and petrol retailers.

As consumer demands change, businesses are forced to become more innovative. The Commission believes those businesses that are able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, and other forms of vigorous competition will thrive. It is interesting to note that smaller

businesses are often more flexible and able to take up new ideas and think up new ways to get customers through their doors than their bigger rivals. This is evidenced by the number of shopper docket notifications – more than 100 – that the Commission has received since Woolworths began its shopper docket offer in 1996.

While petrol pricing is a major issue for most Australians, the ability to obtain a discount is a great incentive which significantly influences consumers' grocery purchasing decisions. But these incentives are not the sole domain of the major chains. In fact, the Commission has received a number of shopper docket offers similar to those offered by both Coles and Woolworths by various independent supermarkets and petrol stations. Many of you would be aware of the innovative offers currently being advertised by IGA stores around the country inviting customers to take advantage of cheaper groceries by using their dockets from any petrol outlet.

Acquisitions by the majors - creeping acquisitions

The process of acquisitions by the major grocery chains of independent operators is often referred to as a process of “creeping acquisitions”.

While I do not intend to use this opportunity to outline in details the Commission's position in relation to the recent acquisitions of independent grocery outlets by Coles, the Report clearly articulates the reasons for the decision, and I would like to reiterate the context in which the decision was made.

Firstly, the legal context. The purpose of competition law and policy generally is to promote and protect competition in the interests of consumers, and as I have already said tonight, competition law does not aim to preserve competitors or protect certain sectors of business from the rigours of competition.

The role of the Commission, as set out in Section 2 of the Act, is fundamentally to enhance the interests of Australian consumers by promoting fair, vigorous and lawful competition, *whether it be between big, medium and/or small businesses*. The Commission will enforce the Act in relation to a series of acquisitions which are likely to substantially lessen competition.

Secondly, the economic context. The Commission is conscious of the potential competition problems that continued acquisitions (and the subsequent increased concentration) may result in – increased likelihood of collusion, loss of volume for independent wholesalers, reduced negotiating power for suppliers, to name a few.

However, it should be stated that a concentrated market does not necessarily mean it is anti-competitive. Market share is just one indicator of the competitive dynamic of any market.

Growth from acquisitions represents only one part of the growth of supermarket chains, and not only Coles and Woolworths but also the independents, Metcash and FAL, among others, have experienced strong recent growth both of store numbers and of sales within existing stores.

This suggests to me that the grocery industry remains a dynamic and competitive one that is responding to an ever more demanding consumer.

The growing prominence of generic products, changes to the regulation of shop trading hours in most states and territories, varied shop formats and product lines tailored to “time poor” customers, diversified product offerings (flowers, dry-cleaning, photo processing), and the convergence of petrol and grocery all impact on the operation of small/independent operators and the major chains alike.

Creeping acquisitions is just one factor determining the structure of the grocery sector in Australia. The Commission will continue to assess purchases of independent supermarkets by the major chains with a view to ensuring competition is not substantially lessened.

6. Conclusion

Tonight I have covered a number of areas where there continues to be much debate and comment. I believe that there is a need for greater clarity to assist businesses, both big and small in complying with the Act. To assist in this process the

Commission is developing clear guidelines on unconscionable conduct and the use of voluntary codes of conduct.

Ultimately our main priority will continue to be compliance with the Act in the interests of consumers – this is achieved through a variety of means; enforcement, education and developing better business practices.