Address to

Wine Grape Growers

"Levelling The Playing Field"

Presented by

John Martin
Commissioner
Australian Competition & Consumer Commission

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1. INTRODUCTION

I would like to thank Mike Stone and Wine Grape Growers' Australia for inviting me to speak today on behalf of the ACCC today at your annual conference in Mildura.

A major part of my brief is to communicate with and respond to business groups in rural and regional Australian and to assist in their dealings with matters connected to the Trade Practices Act (the TPA). As many in your industry know, ACCC Chairman Graeme Samuel has also taken a direct interest in matters affecting growers and the supply chain.

It had been requested that I speak on the subject of “creating a level playing field”. I thought it was more appropriate to address issues of “levelling the playing field”. Drawing from recent remarks of Graeme Samuel, I will try to explain the distinction, reflecting the balance the ACCC must try to achieve in protecting competition and fair trading but not necessarily protecting all competitors in a market.

The wine and grape industry is a vital sector of the Australian economy, with total sales closing in on $4.5 billion per year (including almost $2.5bil in exports), and employing over 30,000 people – the majority in rural and regional Australia. Over half of these people work in grape growing, predominantly in small businesses.

Winegrape growers are the backbone of many regional economies within Australia, particularly in Riverland SA, the Riverina area of New South Wales and here in the Murray Valley. Without the wine grape industry, these regions would not be the vibrant regional centres that they are today.

There is a unique challenge in getting the message across that the TPA and ACCC play an important part in the life of rural people. Often, there is a perception that the TPA is not relevant to growers, as they do not deal directly with consumers. However, the Trade Practices Act seeks to ensure fair dealing for all participants in today’s deregulated horticulture industry including those in the wine grape industry. The

competition provisions ensure that winemakers compete fairly with each other, and the unconscionable conduct provisions seek to stop them illegally taking advantage of their superior bargaining position in relation to growers.

My address today focuses on areas where the activities of the ACCC are relevant to the challenges and opportunities of the wine grape industry, including:

- What the ACCC can and can't do
- ACCC response to grower complaints
- Protections provided by Section 46 and Unconscionable Conduct provisions
- Codes of conduct and industry self-regulation
- Collective negotiations

2. WHAT THE ACCC CAN AND CAN'T DO

The purpose of competition policy must be to benefit consumers – not competitors. The question to be asked must always be what is in the long-term interest of consumers.

The difficult task for governments and regulators is to strike the balance – to distinguish between vigorous, lawful competitive behaviour that is likely to lead to significant and sustained benefits for consumers and unlawful inherently anti-competitive behaviour that is likely to disadvantage consumers.

Now that is the theory and it has been most recently endorsed by both the Dawson Committee Review into the Competition Provisions of the Trade Practices Act and the Senate Committee considering the effectiveness of the Act in relation to small business.

But while the theory is easy to state, it is not so clear that the principles and objectives are either well understood or applied. In practice the distinction between these objectives is often confused and blurred.

It may or may not be the case that to protect and nurture competition in a market, it is necessary to take steps to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by another competitor. The restrictive practices provisions of the TPA are designed to permit that intervention by competition regulators to take place.

What is not often clear however, given the claims and counter-claims that are made by small and big business respectively in relation to these matters, is whether the primary case has been made for regulatory intervention. It is rare to find any rigorous independent analysis of the relevant market or markets that can clearly indicate that a course of behaviour by one or more competitors in these markets will lead to a substantially anti-competitive (and thus anti-consumer) impact.

If such an analysis leads to the conclusion that there is likely to be a substantial lessening of competition in the relevant market, then of course the competition regulator should intervene. But if the analysis merely leads to the conclusion that some competitors in the market might suffer damage or indeed be eliminated, but that competition in the market will still be vigorous with attendant consumer benefits, then there is a dubious case for intervention by the competition regulator.

The point is, if we intervene too soon and without transparent, open and independent analysis, we may be acting to protect competitors, at the expense of vigorous, lawful competitive behaviour, and as a consequence, disadvantage the consumer.

Repeating the words of our Chairman Graeme Samuel, “it is not the job of the Trade Practices Act or the Australian Competition and Consumer Commission to protect competitors – but to protect competition”.

This is not to say that small business has no protection under competition policy. For competition policy is about encouraging lawful, vigorous, competitive behaviour to

benefit consumers, that is to say the public interest. Small businesses that are subjected to anti-competitive or oppressive and unconscionable business behaviour that disadvantages small businesses are entitled to protection.

The Small Business, Rural and Regional Program

Since the 1998 government decision to strengthen the protection offered to small businesses under the TPA, the ACCC has upgraded the level and style of its dealing with small businesses, and implemented a strategy of small business outreach and education.

In the ACCC's experience, education and information provision are key elements in ensuring compliance with the TPA. This is particularly so when the subject matter is as complex as unconscionable behaviour or the anticompetitive provisions.

From our point of view, you are mostly small business people. As such, you are granted a range of protections against unfair and anticompetitive behaviour, alongside a number of legal obligations which apply to all businesses.

All businesses, including wine grape growers should be familiar with at least the basics of these protections and obligations, and operate their businesses in accordance. These requirements are relevant whether growers are acting individually or collectively to establish transparency and fairness of terms and conditions in their dealings down the supply chain.

To help achieve this, the ACCC established a Small Business, Rural and Regional Program. Regional Outreach Managers are located in each State and part of their role is to organise regular seminars and local visits to provide trade practices information and to discuss any areas of concern.

As well as visits, we have a range of publications to assist growers to understand their rights and obligations under the TPA. We also have a series of videos that are designed to assist small businesses generally to understand the various trade practices issues affecting them.

The topics covered so far include franchising, advertising and selling, unconscionable conduct and 'Growing Good Business Relationships' – a video with a specific focus on TPA and business issues which arise in the fresh produce supply chain.

I will try to illustrate briefly how the Trade Practices Act and the ACCC operates to protect the interests of small business firstly, by looking at specific issues of grower complaints and then examining broader protections offered by Section 46 of the TPA and Section 51AC relating to unconscionable conduct.

3. RESPONDING TO GROWER COMPLAINTS

Competition between primary producers in many rural industries was traditionally regulated by a statutory marketing authority or some other form of arrangement exempt from the TPA. In some states the wine industry is still partially regulated, especially over statutory payment timeframes for the purchase of grapes and contract terms.

However, the ACCC still has a role to play in the wine and wine grape industry. Through our Small Business, Rural and Regional program we have received complaints from primary producers about the prices they receive for their produce and the selling arrangements they have with their buyers. The ACCC has recently investigated complaints in this area, especially regarding the contracts between the parties.

Most of the complaints received by the ACCC are from growers who allege that the buyer of their produce has behaved unconscionably or deceived them.

Growers have alleged that the buyer has intentionally set quality standards that are unobtainable and unrealistic, thereby giving them a reason to pay less for produce. Others have alleged that some aspects of the way the buyer receives or handles the fruit causes a deterioration in quality after delivery and therefore allows the buyer to claim a reduction in price.

On other occasions, growers have said that the price they were paid was less than what they were entitled to under their contract, where the contract refers to an average price for the region.

It has also been claimed that buyers have insisted on contract amendments under an implied threat that if growers didn't accept they would receive lower prices or no further contracts once the current one expired.

Similarly, we have also received complaints from winemakers about low prices being offered for their product by large buyers, and from retailers about the level of competition in the market.

ACCC Market Investigations

Our market enquiries found that in many instances, growers had not effectively utilised the review and mediation provisions of their contractual agreement before lodging a complaint with the ACCC. Some growers had not read, or not fully understood how the contract worked or their rights under the contract. Further, many growers had not raised their complaint directly with the buying company or, if they had, one or other of the parties had dealt poorly with the discussion and there was no real outcome.

The ACCC has also found that complaints over the fairness of price and quality assessments are not always completely accurate; often, other factors were present but not taken into account.

We are aware that growers typically compare the price they receive for their fruit with the price their neighbour receives. Not surprisingly, where there is an apparent price differential for what appears to be identical quality fruit, growers perceive that they may not being treated fairly or equitably.

Quite often it is the perceptions as to what prices **should be** that can prejudice fair and reasonable negotiations. This makes it imperative that all parties follow transparent and consistent procedures, including providing access to mediation and independent dispute resolution.

Certain questionable behaviour has warranted substantive investigation and that has occurred. However, the level of evidence has not justified a successful action. In the matters which the ACCC has become informally involved, there has generally been willingness by industry participants to respond to concerns and adjust arrangements relating to ongoing or new contracts in ways that have at least partly alleviated concerns of both growers and the ACCC.

We shall continue to investigate matters where grower complaints have substance and show a possible breach of the TPA.

Lessons of the Central Markets

One area of complaint the ACCC receives from growers is concern at the lack of transparency existing in relation to the pricing of their produce. In particular, growers raise concerns that some wholesalers and retailers fail to provide adequate disclosure in relation to the price obtained for their goods in the marketplace.

This can make it difficult for growers to assess their position in the market, which in turn presents difficulties when pricing their produce. This is particularly evident where growers attempt to gauge the competitiveness of their pricing against others selling similar product. Large differences are often seen between the prices offered to growers selling similar produce, often leading to confusion and allegations of unfair or unconscionable conduct.

It is likely that the majority of such price differences can be attributed to variances in the transport and distribution costs associated with supplying goods to consumers. Unfortunately, the lack of pricing transparency that still exists in many areas of the market means that growers are not aware of these differing costs, and therefore may feel that they are receiving lower prices than they should.

The ACCC also receives complaints about misleading and deceptive conduct. Under section 52 of the TPA, companies are prohibited from engaging in any conduct that is misleading, or likely to mislead.

Common examples of when wholesalers may engage in misleading or deceptive conduct include:

- where they create the impression that someone's produce is of a lower quality than it actually is; or
- where they indicate that they can achieve a certain price when they have no basis for doing so.

Likewise, growers may also engage in misleading and deceptive conduct where representations are made to buyers concerning the quality of their goods, where the actual quality does not match the description given.

In these and other similar circumstances, both the affected party and the ACCC may take action for breaches of the TPA. However, it can be hard to obtain the necessary evidence required to prosecute TPA breaches, especially where there is a lack of information and documentation available.

After ongoing negotiations between growers and wholesalers of fresh produce failed to result in agreement on terms of trade, the Government announced its intention to establish a mandatory code of conduct for this sector.

4. MISUSE OF MARKET POWER

There has been a lot of discussion about how the misuses of market power provisions of the Trade Practices Act protect small business.

Following some recent High Court decisions the Commission has expressed the view that there is a need to clarify the interpretation of the section to bring it back to what was intended by Parliament when it was first enacted and then subsequently amended in 1986.

Effective misuse of market power provisions are an important part of any competition law. They deal with situations where a firm has substantial market power and uses that power to damage its competitors or to prevent new firms from competing with it. These provisions are an important adjunct to the other main pillars of an effective

competition law – the restrictions on the accumulation of market power through mergers and acquisitions and anti-competitive agreements between competitors.

Effective misuse of market power provisions are important to small business because smaller businesses could be the potential targets of a misuse of market power by a larger business. In this situation the Commission will act to protect the small businesses involved. We do this not to protect a particular business merely because it is a small business, but to protect competition where small businesses are being targeted for anti-competitive reasons by a more powerful firm.

So, while the Commission believes it would be helpful for the misuse of market power provisions in the Trade Practices Act to be clarified, we still stand ready to act against any business that seeks to abuse its market power. Contrary to some recent claims, the Commission has not turned its back on this section of the Act even though, as the law currently stands, it has placed some high hurdles in our way before we can take action under this section.

Small business needs to be careful, however, not to place undue reliance on the misuse of market power provisions.

Firstly, it needs to be understood that the misuse of market power provisions require both conduct which is damaging, or potentially so, to competitors, and for this conduct to be intended to, or to have the purpose of, damaging specific competitors. It is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business. Normal, even aggressive competition is not on its own a misuse of market power. The conduct of the larger business needs to be targeted or intended to damage particular competitors.

This is where the Commission requires the assistance of small business. The Commission will investigate properly alleged instances of abuse of market power and use its statutory powers to do so if necessary. However, it needs small business to draw to its attention instances of market behaviour by larger businesses which is both targeted at a particular business and is detrimental or potentially detrimental in its impact.

The second reason why small business should not place undue reliance on the misuse of market power provisions is that they are concerned with a particular form of market conduct - that is, so called horizontal behaviour. This is where a business with substantial market power is seeking to damage one or more of its competitors.

The abuse of market power provisions are not relevant in so called vertical behaviour - that is, where a small business is a customer of, or supplier to, a larger more powerful business. There are other provisions in the Trade Practices Act concerning unconscionable conduct which are relevant to these situations and which I will now discuss.

5. UNCONSCIONABLE CONDUCT

In deciding whether a business has acted unconscionably, courts may consider various factors, including the relative bargaining power of each party, the use of undue influence or pressure, whether the stronger party imposed terms that were not necessary to protect their legitimate commercial interests, and the requirements of any relevant industry code. The courts may also look at whether the stronger party acted in good faith in its dealings with the weaker party.

The main area of complaint in this respect is that smaller operators are at a significant disadvantage when negotiating with larger more powerful wholesalers, processors or retailers. Consequently, those dealing with growers should be aware of the potential for some behaviour to amount to unconscionable conduct under the TPA. It is also important to note that unconscionable conduct will depend on the circumstances in each case; an imbalance of bargaining power is not of itself evidence of unconscionable conduct.

One leading case taken by the ACCC under s.51AC made it clear to franchisors that they cannot hold their franchisees to ransom with unreasonable terms and conditions.

The franchisor in this case withheld essential supplies unless the franchisees bowed to a range of unreasonable conditions, including making them pay for advertising that

did not even include their stores details, and forcing them to buy many years worth of product at a time.

At one point, the franchisor demanded the surrender of diaries containing details of current customers, while setting up his own businesses which competed directly with his franchisees.

The franchisor demanded unreasonable conditions, such as refusing to consider meetings unless the request was received by mail, and refusing joint meetings, when the franchisees tried to discuss their concerns with him.

The court declared that the conduct of the franchisor was unconscionable, in breach of the Act, and that the managing director of the franchise was involved in the contraventions.

The conduct of this franchisor beggared belief and the franchisees in this case had no way forward in running their businesses.

The unconscionable conduct provisions seek to protect all parties from unfair dealing such as this, but particularly where one of the parties is especially vulnerable. Businesses should not take unfair advantage of a person in a vulnerable position by entering into commercial arrangements without ensuring that the person has full knowledge of its terms and effects.

The cases that the ACCC has pursued with regard to unconscionable conduct all have an unscrupulous factor. It is more than tough negotiating. For a matter to be regarded as unconscionable by the courts a business must have crossed the line and engaged in conduct that is not tolerated in a normal commercial relationship.

It is important to recognise that the law does not exist to inhibit businesses from advancing their own legitimate commercial interests. The law will not apply to situations where a business has merely driven a hard bargain, nor does it require one business to put the interests of another party ahead of its own.

Most matters raised with the Commission under unconscionable conduct have come after other avenues of resolution have been explored. Where the ACCC has considered there are TPA issues, it examines both sides of the argument before considering enforcement action. While there has been little in the way of direct litigation, several systemic grower issues related to contracts with processors have resulted in administrative responses following ACCC intervention.

6. INDUSTRY CODES OF CONDUCT

The ACCC believes that effective industry codes have the potential to deliver real benefits to all the participants in an industry with the lowest possible compliance cost. In turn, this benefits both consumers and the industry itself.

Codes also present an opportunity to deal with situations where it is not deemed appropriate to legislate, but where scope exists to introduce standards. When approached for assistance, the ACCC assists industry groups in ensuring the successful development of their codes.

There has been an ongoing debate over the role and effectiveness of industry codes of conduct, and, in particular, the Retail Grocery Industry Code of Conduct, as another means of preventing and resolving disputes in the wine grape industry. As you may be aware there was a recent decision authorising the Retail Grocery Industry Code Ombudsman Bob Gaussen to mediate disputes within the wine industry.

The RGIC has been in operation for over three years as a voluntary industry code designed to promote fairness and transparency in the retail grocery sector. The code sets out aspirations for produce standards and specifications; contracts; labelling, packaging and preparation; acquisitions; and dispute resolution.

The Code aims to provide clarity for all supply chain participants from growers, processors, wholesalers and retailers in their contractual arrangements and puts in place an equitable procedure for dispute resolution. As this Code is voluntary, industry participants are free to decide whether to support the Code. This voluntary framework also allows industry bodies to develop their own codes, should they choose to.

As noted earlier in the paper, the Government is now aiming to introduce a mandatory Horticultural Code of Conduct.

Wine Industry Code Initiatives

The ACCC has also followed with interest recent developments of some wine industry bodies aimed at assisting winemakers and grape growers achieve greater transparency and fairness in their commercial dealings.

The recently released publication "*Winegrape Assessment in the Vineyard and at the Winery"*, jointly produced by the Winemakers Federation of Australia and the (now dissolved) Winegrape Growers Council of Australia outlines one such code, laying out a framework and guidelines for the evaluation of fruit prior to, and during harvest.

I also understand that the Wine Industry Relations Committee has recently completed work in relation to quality assessment, which will soon be followed up with guidelines for grape purchasing agreements and contractual relationships, and the establishment of dispute resolution mechanisms.

The ACCC will continue to work with industry to encourage fairness and transparency in contractual negotiations and agreements between participants, whether under the framework of the TPA, through a voluntary industry code or a combination of both. The ACCC encourages any efforts by industry to develop effective codes of conduct, and is always willing to assist where appropriate.

7. COLLECTIVE BARGAINING AND THE TPA

When negotiating with larger or more powerful companies, small businesses often feel that they have little or no bargaining power and that they are sometimes forced to accept unfavourable terms and conditions, including unfavourable prices.

Collective bargaining involves an arrangement where multiple competitors in an industry come together, either directly or through the appointment of a representative,

to negotiate the terms and conditions of supply with another, usually larger, business. This can also involve collective boycotts, where competitors collectively agree not to supply or acquire goods or services from another business.

In some industries, collective bargaining may be an effective strategy to redress this imbalance in bargaining power and achieve more favourable commercial outcomes in their dealings with big business.

Many growers have suggested that they could get better terms for their produce if they bargained as a group. However, by acting collectively, those involved are clearly not competing with each other. Such action could therefore be seen as anti-competitive and a potential breach of the Trade Practices Act.

Section 45 of the Act prohibits anti-competitive agreements, including –

- price fixing, which is agreeing with your competitors to sell produce at a fixed price;
- market sharing which involves agreeing with your competitors about what products you will sell, where you will sell them or who you will sell them to; and
- boycotts which involve getting together with other businesses to decide which person or business you will not sell to or not buy from.

The ACCC recognises that not all anticompetitive arrangements are undesirable; in some cases, conduct that would usually breach the Act can sometimes actually enhance competition. In addition, some markets require a degree of this behaviour to operate efficiently and provide an effective service for consumers.

The ACCC is therefore able to grant immunity from possible breaches of the Act that may result from collective bargaining and collective boycotts through a process known as ‘authorisation’.

Before granting authorisation, the ACCC is required by law to be satisfied that the conduct being authorised is in the public interest. This assessment is made on a case

by case basis. In deciding whether an authorisation is in the public interest, the ACCC must determine both the public benefit and anticompetitive detriment that would result from the proposed conduct.

In general, the ACCC must be satisfied that the benefit to the public of the conduct in question would outweigh the possible detriment. The onus to prove that the proposed authorisation will give a net benefit is placed upon the applicant.

The term 'public benefit' is not defined in the Act; it is a continuously evolving concept. In previous cases, a wide variety of factors have been recognised as having public benefit, such as:

- increased business efficiency
- expansion of employment or prevention of unemployment
- promotion of industry cost savings resulting in contained or lower prices
- promotion of competition in industry
- assistance to efficient small business
- improvement in the quality and safety of goods and services and expansion of consumer choice

Once in place, authorisations are periodically reviewed to ensure that the public benefit still outweighs any detriment as a result of the authorisation. Material changes in the structure of the industry, needs of consumers and legal position of the ACCC may result in an authorisation no longer providing a net benefit, and therefore the need to revoke that authorisation.

Generally, the ACCC has found that such arrangements are likely to have little impact on competition. In the majority of cases where small businesses are seeking to collectively bargain with a larger business, the ACCC finds these arrangements to be in the public interest because they even up the bargaining power of the respective parties, and is therefore allow them to proceed.

Examples of this in recent years include authorisation for chicken growers to collectively bargain with big chicken processors, TAB agents with the TAB, small private hospitals with health funds and newsagents with newspaper publishers.

A New Simpler Notification System

The process of authorisation under the TPA has sometimes been criticised by small businesses as complex, cumbersome and costly.

In June this year, the Government introduced legislation introducing a notification scheme for collective bargaining, with provision for collective boycott arrangements. This legislation aims to give small businesses a quicker and easier way to obtain immunity from the TPA.

The law, when introduced, will still require the ACCC to be satisfied that the arrangements are in the public interest. Seriously anti-competitive arrangements will not receive immunity under the notification process without significant benefits being demonstrated that outweigh the detriment. In particular, the ACCC will require strong justification before granting immunity to any arrangements which involve collective boycott activity.

By lodging a notification under the new collective bargaining rules, small businesses will be given the same immunity from the Act to collectively bargain as the authorisation currently grants. However, immunity can be obtained sooner and more cheaply, being automatically granted after 14 days. This immunity remains in place unless, and until, the ACCC is satisfied that it is not in the public interest. It also places the onus onto the ACCC to form a view that immunity is not justified, reversing the current process which requires applicants to prove their case.

The ACCC will be releasing public guidelines to further assist small business with this new process and we will also be conducting information and education sessions for interested parties.

The ACCC has been active talking to a range of grape growers and winemakers about the foreshadowed changes to the notification and collective bargaining process, and what this might mean for their industry. From the ACCC's perspective, we appreciate opportunities to inform industry about the collective bargaining process. However we

are not an advocate for one part of the industry over another and will continue to engage with all participants in the industry.

Further information on the proposed collective bargaining notification process is set out in an issues paper available on the ACCC's website.

8. CONCLUSION

The ACCC shall continue to vigorously enforce the Trade Practices Act. I can assure you that we will continue to pursue unlawful practices that harm competition, competitors, small businesses and consumers.

At the same time we recognise a majority of the transactions that occur are ethical and efficient. In order to further enhance this, the TPA provides a framework that benefits all businesses.

Compliance with the Act is beneficial to all parties. The protection available to growers promotes fair dealing and encourages competition, participation and further investment in the sector - ensuring a strong future for the Australian wine and wine grape industries.