

Australian Food And Grocery Council

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The Grocery Industry and the Trade Practices Act

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Good afternoon Ladies and Gentlemen,

It is a pleasure to be here today. I propose first to discuss, in general, the role of the ACCC in enforcing competition and consumer protection laws. I will outline the ACCC's views on merger regulation, and the impact of global mergers and increasing international economic dependence on Australian Competition Policy. I will devote some time to country of origin issues. I will also outline the ACCC's pricing functions, with a focus on the ACCC's oversighting pricing behaviour pursuant to the introduction of the GST in July 2000. Lastly, I will briefly discuss the ACCC's role in relation to the Joint Parliamentary Committee inquiring into the Retail Sector.

ROLE AND POWERS OF THE ACCC

The stated aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and consumer protection.

In particular it focuses on:

- unfair prices
- the abuse of market power; and
- the violation of consumer rights

for the whole of Australia.

The role of the ACCC is to apply the Trade Practices Act properly, without fear or favour to anyone, no matter how powerful economically or politically, for the benefit of consumers of all kinds everywhere in Australia, including household consumers; small, medium and big

business; farmers; local, state and federal governments; and all people everywhere, in capital cities, country towns and farms. All have an interest in being supplied competitively and efficiently at low prices with good service; and where they sell, to sell to buyers who have to compete for their output.

In general, the ACCC is not involved in advocating changes in the law, even where laws are anti-competitive, for example, laws that restrict entry into a profession; laws that restrict shopping hours; or laws that confer monopoly power. The ACCC is therefore not involved in the numerous reviews of laws carried out under the National Competition Policy.

Applying the law

The ACCC is committed to vigorous enforcement of the law. The goals of the ACCC in taking enforcement action are:

- to stop unlawful conduct;
- to seek compensation for those damaged by unlawful behaviour;
- to secure compliance with the law;
- to seek deterrence and, if appropriate, punishment.

Although the ACCC is committed to the vigorous enforcement of the Trade Practices Act, it is equally committed to following lawful processes. It is always careful to stay within the law in its own behaviour. There are important safeguards for business in the Act. Essentially the ACCC must prove its case in court, usually against well heeled highly defended litigants.

No one likes having the law applied to them. The usual fear and loathing apply to the regulator. When the ACCC applies the law to someone a frequent response is:

- the behaviour did not occur;
- if it occurred, it was not unlawful;
- if it was unlawful, it was justified in the circumstances;
- the business is being unfairly picked upon;
- others in the industry or in other industries are breaking the law more than this business and should be the target of the ACCC rather than this business;
- the ACCC should exercise its discretion not to apply the law;
- if the law must be applied there should be absolute minimal resolution, e.g. by means of a warning or exchange of letters between the ACCC and the offending party.

The ACCC's view is ultimately that the Trade Practices Act is an important one and it should be upheld. There should be no special favours to any groups. In short, the law should be applied without fear or favour in the way Parliament clearly intended.

MERGERS

The ACCC tries, through merger law, to stop unjustified increases in the concentration of market power. Thus in the Coles/Myer/Foodland case it opposed Coles/Myer's attempt to acquire 75 per cent of the Western Australian wholesale grocery market and thus (a) to increase its buying power in relation to suppliers; (b) to increase its competitive power versus the small retailers it would have both supplied and competed against in retailing; and (c) to reduce retail competition.

Merger law is especially important given the absence of a divestiture law in Australia that enables existing firms to be broken up. Mergers have a profound effect in shaping the competitive structure of the economy in years ahead. Essentially a balance must be struck between allowing through with as little difficulty as possible good mergers that increase efficiency and do not harm competition, and opposing undesirable and unhealthy mergers.

Current mergers which are of interest to the ACCC are those involving Cable & Wireless OPTUS and AAPT, British American Tobacco PLC and Rothmans International BV, and Coca Cola and Schweppes.

A global merger wave is occurring. The US authorities are dealing with three times as many mergers as normal at present. Australia is not exempt. The Asian crisis has probably put somewhat more merger pressure on some Australian firms. Some attempts are being made internationally to get better coordination between countries dealing with mergers occurring in many countries simultaneously.

Merger law is not getting in the way of firms that need to achieve the scale necessary to take part in world markets. The ACCC has opposed no mergers where there is significant import competition and this is the area where the claim that large size is necessary to take part in world markets is most relevant. However, even apart from that, the ACCC opposes relatively few mergers. Our total rate of opposition to mergers is around five per cent a year, and some of them are eventually overcome by undertakings given to the ACCC. In the small Australian economy, unlike the USA, our law permits anticompetitive mergers where, as part of the authorisation process, they can be shown to bring a sufficient benefit to the public, e.g. lower prices. Over half of authorisation applications are successful.

The real agenda for future merger policy is in the deregulating areas where there will be a very high rate of merger activity. Much such activity is justified. It is unlikely that the structure of an industry will be right, fixed and immutable at the beginning of a process of

deregulation. However, from time to time, mergers can undo the procompetitive effects of deregulation. For example, if Victoria's electricity industry which was broken up into many parts was allowed to remerge tomorrow, if for example the five generator companies could remerge tomorrow, or take over the distributors, this could undo many of the procompetitive effects of Victorian deregulation.

GLOBALISATION

As I have already mentioned, a global merger wave is occurring. There has been a dramatic increase in the degree of economic interdependence between the different countries of the world as indicated by, amongst other measures, a 16-fold increase in today's volume of world merchandise in trade from its 1950 level. In comparison the value of world output increased by a factor of 5.5¹.

Causes of globalisation

A number of factors have given rise to the increased degree of economic interdependence. These include:

- continuous economic growth. This increases the demand for imports and for foreign investment to fund some of the expansion of the economy. In fact, the statistics indicated earlier suggest that imports will rise more than proportionally as income rises.
- improvements in technology, especially in the areas of communications and information technology. The degree of increase in interdependence in financial markets has been especially facilitated by these changes.
- reductions in transport costs.
- liberalisation, both international and local.

¹ *Open markets matter: the benefits of trade and investment liberalisation*, OECD 1998.

Policy making in all areas has been much affected. Competition policy is no exception. I will now turn to some issues concerning Australian Competition Policy and its relationship to international competitiveness.

It is sometimes suggested that Australia's merger policy may impede the achievement of economies of scale necessary for international competitiveness. Few if any specific cases are cited in this regard. One reason is that few such mergers are likely to be found anti-competitive. Typically firms seeking to compete in international markets are subject to import competition in the Australian market. The ACCC has not objected to any mergers in the last four years where there has been import competition. Moreover, even if the merger is anti-competitive, Australia's distinctive authorisation process allows mergers to occur if the parties can demonstrate to the satisfaction of the ACCC and on appeal the Tribunal that the public benefit exceeds any detriment to competition. However, assertions that mergers will contribute to international competitiveness are not automatically accepted. Arguments about national champions have been discredited in recent years. Porter's view that competitiveness in a domestic market is the key to success in international markets also deserves consideration. Firms proposing anti-competitive mergers must positively demonstrate the value of their merger. A recent example of failed argument concerns CSR proposed joint venture with MacKay Refined Sugar.

One should not view merger policy negatively. It makes a positive contribution to Australia's international competitiveness by ensuring competitive and efficient supply conditions in many industries and hence leads to lower input costs for exporters and import competing businesses.

Country of origin labelling

The issue of what can reasonably be described as 'Made in Australia' has been a matter of lively debate involving a considerable range of opinions as to what should constitute

an appropriate definition.

The Trade Practices Act contains two provisions of relevance to country of origin claims made by businesses.

Section 52, a very general prohibition, states that:

52. (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 53(eb), a specific prohibition, states that:

53. A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services.

(eb) make a false or misleading representation concerning the place of origin of goods.

The provisions cover all forms of representation — including labelling, media advertising, signs, brochures, direct mail and **oral** statements made by employees or chief executives.

In August 1998 amendments were made to the Trade Practices Act's Part V consumer protection provisions which set out in some detail what characteristics goods must have to ensure that a claim about their country of origin does not constitute a breach of the

Trade Practices Act.

There are three general classes of country of origin representation recognised by Division 1AA.

General country of origin claims

This provision is not specific about the terms used to indicate origin. It covers, for example, 'Made in Australia', 'Made in China', 'Australian Made', 'Manufactured in Australia' and 'Processed in Australia'. It may also cover many other terms such as 'Assembled in Australia', 'Built in Australia' etc.

Product of/produce of claims

This provision applies to representations that goods are the produce of a particular country. It also applies to variations of the term 'produce of', such as 'product of' and 'produced in'.

Use of a prescribed logo

This provides for the use of a logo, or logos, to indicate the country of origin of goods. It allows industry sectors, consumers or other interested parties to develop distinctive marketing schemes that give consumers additional information about the source of contents.

Generally speaking, goods must pass two tests to qualify for the general country of origin defence. They must be substantially transformed in the country that is the subject of the

representation **and** 50% or more of the cost of production or manufacture of the goods must be incurred in relation to processes that occurred in that country.

If goods pass **both** of these tests for a particular country, the manufacturer (or distributor or retailer) may make a claim that the goods are made in that country with the full confidence that this claim will not attract liability for action under the country of origin provisions of the Act.

Four basic safeguards will help reduce the risk of representations breaching the Act.

- Each person in the organisation with responsibility for labelling, advertising, sales and marketing should be aware of the need to comply with the Act and what obligations this entails. Trade practices compliance training will help equip employees to meet their obligations.
- All promotional material (labelling, advertising, etc.) should be checked against the requirements of the Act and signed off at the corporate lawyer level.
- Every business that sells goods with labels or advertises goods should have clear procedures for signing off on representational materials. Assigning responsibility will reduce the risk of running problem advertisements or labels and also provide an audit trail if corrective action is ever needed.
- Effective complaints handling procedures should be implemented at shop front level. There should also be an effective referral mechanism from shop front to head office so that management will have a feel for the manner in which its advertising and labelling is received by consumers.

It is also important to regularly review existing promotional material. This is absolutely essential where any representation of country of origin is made, now that the law has been

amended.

PRICING FUNCTIONS

Prices Surveillance Act

In addition to applying the Trade Practices Act, the ACCC is also responsible for administering the Prices Surveillance Act. The Prices Surveillance Act enables the ACCC to examine the prices of selected goods and services in the Australian economy, if they have been declared by the Government. Few products are declared at this time.

The ACCC's task is to promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective. It has three pricing functions.

- To vet the proposed price rises of any business organisations placed under prices surveillance. The Minister determines which organisations, goods or services are selected.
- To hold inquiries into pricing practices and related matters. The Minister determines the subject of an inquiry and the ACCC submits its findings to the Minister.

- To monitor the prices, costs and profits of an industry or business. The Minister determines which industries or businesses are monitored and how often the ACCC should submit a report to both the Minister and the monitored organisations.

The GST

Legislation amending the *Trade Practices Act 1974* is now before the Parliament that will give powers to the ACCC to oversight pricing behaviour in relation to the introduction of the GST in July 2000.

The legislation (*A New Tax System (Trade Practices Amendment) Bill*) inserts a new Part VB to provide the ACCC with power to prevent consumer exploitation and excessive profit taking in the transition to the new tax system. Succinctly, the legislation:

- prohibits price exploitation;
- requires the Commission to issue guidelines as to where prices contravene the prohibition, which in effect will set the basic parameters on what we consider to be price exploitation;
- monitor price movements and report to the government on the impact of the GST.

The Bill provides a transitional regime that will apply from 1 July 1999, or when the Bill commences (whichever is the later) until two years after the implementation of the GST. In the period prior to the introduction of the GST the Commission's powers will apply to goods

on which wholesale sales tax is to be reduced, which is expected to be from 1 July, 1999.

The Bill prohibits price exploitation. This may occur where a corporation supplies a good or service at a price that is unreasonably high, taking into account the various tax changes, and where an unreasonably high price is not attributable to the supplier's costs, supply and demand conditions, or any other relevant matter.

Power and Penalties

The Government has stated its intention that the benefits of tax reform will flow through to the consumer.

To fulfil its responsibilities, the ACCC focus is to promote compliance and good business practice in relation to the GST. In this context the ACCC aims to facilitate the delivery of the benefits of the reform to consumers, without disadvantaging business. To achieve this, the Commission will:

- encourage compliance with the Act;
- work with industry to ensure the benchmarks established are clearly understandable, realistic and attainable; however, the Government is committed to ensuring consumers receive the benefits of change;
- make education and compliance programs a major part of our role;
- not hesitate to use enforcement action where there are blatant breaches.

With the last point in mind, the Bill gives the ACCC a ‘big stick’. There is a provision for penalties of up to \$10 Million for corporations and up to \$500,000 for individuals who breach these provisions. Actions to have these penalties imposed will be taken by the ACCC in the Federal Court.

The legislation generally uses the basic remedies already available in the Trade Practices Act. The ACCC will be able to seek injunctions to restrain conduct that is, or may be, in breach of the prohibition on price exploitation and, as an alternative to court action, will be able to accept court enforceable undertakings in line with its existing powers in section 87B of the Trade Practices Act.

In addition the ACCC will have the power to issue a notice to a corporation that it considers has breached the prohibition on price exploitation. This notice will constitute prima facie evidence that the corporation made a supply at a price that was unreasonably high, and that the price was not attributable to other factors such as supplier’s costs and supply and demand conditions.

The ACCC will also be able to issue a notice to a corporation if it considers this will aid the prevention of price exploitation. In these notices the ACCC may specify a maximum price that, in its opinion, may be charged for supplies of a specific kind, made in specified circumstances, and during a specified period.

The ACCC may publish these notices in newspapers, and must also include them in its

reporting to the Minister on the operation of the new Part VB.

Strategy

A critical period for the ACCC is between now and 1 July this year when the first tax changes are expected to occur.

The primary focus for the ACCC is promoting compliance. Helping business to comply with the provisions of the Trade Practices Act is a key role of the ACCC.

One measure that is being considered is to seek from individual businesses with annual turnovers exceeding \$100 Million voluntary commitments of compliance with the Guidelines.

The ACCC will undertake extensive price monitoring. Some of this has started already.

The ACCC will also be approaching a lot of its work more on the basis that there may be uncertainty, companies are not deliberately out to “rip off” consumers and the ACCC will help as necessary. Where a problem exists, the legislative mechanism allows the staged approach of warnings before any action is taken.

Additionally, the ACCC plans a widespread information program to educate businesses of

their rights and responsibilities under the new tax system.

Guidelines

In April of this year, the ACCC issued preliminary draft Pricing Guidelines for consultation with all interested parties. The Guidelines are being developed now to provide business with the opportunity to have their views taken into account

The Guidelines are not a legal instrument. However the Commission is required to take them into consideration in any action it brings for price exploitation. Their purpose is to provide direction to business on what may be considered price exploitation.

The Guidelines have been drafted to be as general and simple as possible, given their broad application across all sectors of the economy to businesses of all sizes and kinds where the Commission considers there is a demonstrated need. Additional Guidelines may be developed in relation to issues affecting particular industries or sectors, such as Financial Services and Insurance.

The ACCC's focus in the transition period will be on changes in prices resulting from the tax changes, not on the level of prices. The ACCC's interest is in the response of business to the tax changes. It is not intended that the ACCC assess how reasonable or otherwise the existing level of prices may have been.

The ACCC will expect suppliers to adjust their prices in response to the New Tax System changes. A basic principle is that prices should reflect the net effect of the tax changes, including the GST, and pass through the benefits to consumers.

The draft guideline proposes that the ACCC will use two tests to assess price changes resulting from the tax changes:

The pass through test

The net profit margin implied by prices and costs incurred in the supply of a particular good or service should not increase as a result of the New Tax System changes alone. The net profit margin will be assessed as a percentage of costs or of sales exclusive of indirect taxes.

Businesses should not anticipate the effects of the New Tax System changes by increasing current prices. In general, suppliers should not change prices in advance of the introduction of the GST solely on the basis of expectations about it.

The competitive market test

The Commission recognises that other factors may influence the extent of pass through in addition to the New Tax System changes. These may involve:

- changes in administrative costs associated with implementing the tax changes; and

- changes in production and sales volumes

The ACCC will consider whether any change in margin is consistent with what would be expected to occur in a competitive market. In this respect, the ACCC will assess whether a supplier or suppliers together are likely to possess a high degree of market power which may allow them to take inappropriate advantage of the New Tax System changes.

If margins are observed to change prior to the introduction of the GST the ACCC will closely examine subsequent pricing responses at the time of the GST introduction and afterwards. The ACCC would expect to see the effects of demand anticipation on margins to be neutral over the transition period.

Responses to the draft Guidelines

The ACCC has received about 30 responses to the draft Guidelines. The main themes of industry comment have been:

- the business community generally supports the introduction of the GST and the need to ensure that price exploitation is discouraged;
- business recognises that competitive markets will, on the whole, ensure that consumers receive the benefits of tax changes
- business generally supports the ACCC's approach of monitoring changes in prices rather than levels of price
- there is some discussion on the approach to profit being taken in the guidelines, and the

Commission is considering a number of options proposed; and

- a number of industries are seeking industry specific guidelines and again we will consider the options.

The ACCC will continue to consult with industry on the Guidelines, but it is important to recognise that there is a very tight timeframe to finalise them if business is to have some certainty on the ACCC's approach to its responsibilities.

Monitoring

In monitoring prices in the transition period, the ACCC may take into account any publicly available econometric modelling and any other modelling or pricing information that the ACCC itself undertakes or commissions. Price changes that vary significantly from an industry's expected average price movements may be an indicator for closer scrutiny by the ACCC.

Displaying prices

Where prices are displayed, they should be GST inclusive. This is in line with the intent of the Government.

Suppliers are encouraged to provide information to consumers to explain the basis for any price changes made in response to the New Tax System changes. This may include display

of the pre-GST prices as well as the GST inclusive price, where appropriate.

Conclusion on GST

It is in everyone's interest to ensure against price exploitation, real or perceived, and to ensure that the community is well educated and that there are realistic expectations as to what happens when the GST is introduced. There will be a general process of consulting business to seek its assistance in this task.

Whilst it is the role of the Australian Taxation Office to implement the new tax it will be up to the ACCC to make it work in the market place and ensure sure there is no exploitation.

The Commissions GST role is an evolving one. The legislation is still in the Parliament and may change between now and when they become law.

The ACCC will continue to work with industry and consumers to encourage compliance with the proposed new legislation.

PARLIAMENTARY INQUIRY INTO THE RETAILING SECTOR

Finally, I will turn to a matter of particular interest today. As you would all be aware, the government has established a Joint Parliamentary Committee inquiring into the Retailing

Sector.

The Parliament established the Committee to basically inquire into :

The degree of industry concentration within the retailing sector in Australia, with particular reference to the impact of that industry concentration on the ability of small independent retailers to compete fairly in the retail sector.

The Committee agreed that it would give a wide interpretation to its terms of reference. It will include in its inquiry an examination of the purchasing practices of the major retailers, especially those relating to purchases from primary producers. It will also include the impact of concentration in the retailing sector on rural and regional communities and on consumers.

The Committee is scheduled to report on August 30 this year.

It should be noted that the ACCC itself is not carrying out the Inquiry. The ACCC has made a submission to the Inquiry. We consider that we are in a good position to make such a submission given our considerable expertise in competition issues and experience in dealing in these issues with the retail sector.

We have addressed the terms of reference in some detail in our submission. Copies of our submission are available from the Secretary of the Committee.

Conclusion

To conclude, the ACCC has a role to defend:

- consumers
- small business
- rural Australia, and

- others

from

- unfair prices
- the abuse of market power
- the violation of consumer rights

Clearly the ACCC will continue to keep a close eye on the competition issues arising from the grocery sector, including those that impact directly upon producers. Like yourselves, we will await the outcome of the Committee's Inquiry into the Retail Sector with interest.

Thank you.