Australasian Convenience and Petroleum Marketers Association

Annual Conference Breakfast

Keynote address

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Rod Sims, Chairman

I am delighted to be here this morning for two reasons. First, this is an opportunity to speak directly to the people who make this industry tick. Second, I was in effect born into a service station in Lorne, which my father owned, and which we lived behind. I spent a lot of time amongst the fumes and the grease. This was, of course, in the 1950s, a different era.

I think back then we sold petrol under the logo of a flying red horse, the then symbol of Mobilgas.

Competition in petrol retailing can be looked at in a number of ways. Some consider national market shares: The market share of major players and independent chains, by volume of retail sales in 2010-11 was BP, Caltex & Shell combined 39 percent; Woolworths & Coles combined 45 percent and the Independent chains 17 percent.

Many see competition as local. How many competitors are there within a certain radius in a city, or a country town?

The Australian Competition and Consumer Commission (ACCC) typically receives 1000 complaints and enquiries per year relating to petrol. The great majority are simply complaining that petrol prices are too high. International petrol prices have more than doubled in the past 10 years, and so they have doubled in Australia as well.

We also get a number of complaints that prices are much higher in rural areas than in the cities, typically 4 cents per litre[1] higher. Some calculate that this difference is higher than the cost of transport from the city to country areas, and they are usually right. But prices will also reflect lower petrol country or convenience store sales and so economies of scale, and also less competition in country areas.

There have even been times when higher prices reflect price fixing. There have, for example, been important Victorian price fixing cases run by the ACCC in Ballarat in 2002 and in Geelong in 2003. These can be complex cases and sometimes we prove price fixing to the satisfaction of the court, and sometimes we do not. As you know the ACCC's powers came from our Act, and our ability to convince a court that it has been breached.

You are today all facing many pressures on your businesses. Higher costs, more cautious consumers and a constantly changing industry structure and landscape. In many ways it is a difficult business environment for you.

[1] In 2010-11, the annual average retail petrol price for Australia's five largest cities was around 132 cents per litre (cpl), which was round 4 cpl lower than the average price for monitored regional locations.

Today, I will address four topics which go to some of these industry structure and landscape issues.

1. Firstly, I will address some recent supermarket competition and market capacity issues

2. Secondly, I will talk about where the ACCC stands when it comes to misuse of market power and unconscionable conduct. This will include a short update on some key assessments under way.

3. Thirdly, I will outline the ACCC's approach to merger assessments in the grocery, liquor and home improvement sectors, and

4. Finally, I will provide you with an update on petrol price boards and moves to put in place a nationally consistent standard.

1. SUPERMARKET COMPETITION AND MARKET CAPACITY

First I would like to take the opportunity to respond to a recent report from Master Grocers Australia (MGA), *Let's have fair competition*, August 2012.

The report made several recommendations addressing what the MGA sees as anti-competitive practices in the grocery and packaged liquor markets. In particular, the MGA called on the ACCC to determine 'whether the major chains are cross-subsidising a substantial number of loss-making supermarkets for anti-competitive purposes and determine whether this is misuse of market power.' The report also raised several issues relating to 'store saturation' and 'over-sized store' strategies.

The ACCC is currently considering the issues and recommendations raised in this report and whether there are any competition issues that the ACCC should consider further under the *Competition and Consumer Act 2010 (the Act)*.

However, by way of background, in order to meet the tests of conduct being against the law and anti-competitive, it has to be behaviour which is deliberately meant to damage competition. 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 close to being met.

I also note the report contains several other recommendations relating to planning laws for local government authorities that are outside the scope of the ACCC’s activities. However, I welcome discussion on these important issues and, as I said, we are considering these issues in the context of the Act.

2. MISUSE OF MARKET POWER AND UNCONSCIONABLE CONDUCT

I will continue on the topic of market power, but will now take a different tack. In the early stages of my Chairmanship I have been discussing 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 21 and 22 of the Australian Consumer Law). Both involve:

- unilateral conduct, or conduct by someone acting alone
- some imprecise definitions of what behaviour is meant to be covered.

Misuse of market power

Section 46 presents the ACCC with a notable perception gap. On one side we have high public expectations as to what we can do in markets where, say, one or two firms are dominant.

At many events I attend people tell me that such-and-such a big firm is engaging in predatory pricing, or that it is using its weight to force someone else out of business, and that the ACCC should be doing something about it. That is one perspective.

On the other hand, section 46 sets very high hurdles. And that is as it should be – because the implications of the section, for business and the economy, are considerable.

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, which is not as easy as you think
- 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.

Further, over the years only a handful of cases under section 46 have succeeded in court. Indeed, section 46 cases are almost always hard fought, as major companies are necessarily involved, and they are usually defending what they may see as a key part of their business strategy.

The guidance to be derived from case law is relatively modest. So, the ACCC finds itself in the middle, with high public expectations on one side and high legal standards and relatively few cases on the other.

However, the law has evolved in recent years, providing the ACCC with a clearer view of what is intended by section 46 and misuse of market power to gain advantage.

At the moment, we are awaiting the outcome of a Federal Court case, where the respondents are Cement Australia, Pozzolanic Enterprises and others, which alleges contravention of section 46 over an ingredient in ready-mix concrete.

We also currently have a number of investigations on foot which may or may not go the distance, but they tick a number of boxes.

A final point I would like to make is that, in my view, through the cases we run we need to gain an understanding of the scope and limitations of section 46 as it currently stands. I am not, therefore, making a case for further amendments or additions to section 46 at this stage.

Unconscionable conduct

Unconscionable conduct, like misuse of market power, is also a provision that demonstrates the difficult task of deciding the line between the cut and thrust of participation in the market and what behaviour should be prohibited.

This again sits in an environment where there are expectations placed on the regulator by those affected by the conduct and their representatives.

There is no clear definition in the Act of what constitutes 'unconscionable conduct'.

What we do know, however, is that 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.

I am well aware of the complexities – conduct that might be 'irreconcilable with what is right or reasonable' to one party, may be simply the rough and tumble of a robust commercial negotiation for another.

In addition, unconscionable conduct matters are often difficult to investigate, and involve a web of allegations and counter-allegations. Witnesses are, by nature, often vulnerable, disadvantaged and can be confused.

It is sometimes difficult to elicit the real story of what has happened. Having said that, these are precisely the types of consumers the ACCC should engage with.

In business-to-business transactions, however, the issues become even more interesting.

Unconscionable conduct allegations may involve a breakdown of a longstanding relationship between franchisor and franchisees, or between landlord and small business tenant – where contractual issues might be at the heart of the dispute, and rights and wrongs have been committed by both parties. In these circumstances it can be difficult to ascertain where the truth lies when unconscionable conduct is alleged.

However, despite these complexities, I view the unconscionable conduct provision as an important component of our Act, with important application in business-to-business dealings which I am keen to explore further.

I am also interested in exploring the relationship, if any, between the unconscionable conduct provisions and section 46. While the unconscionable conduct provisions are in the ACL, and section 46 falls within the competition provisions, both, in effect, involve potentially unilateral and egregious conduct.

For example, could the taking advantage of market power for the purpose of substantially damaging a competitor also amount to conduct that is unconscionable in all the circumstances?

Enforcement activity update

As a result of history and sheer geography, Australia has many highly concentrated sectors. These sectors, including the petrol and supermarket sectors, need to be watched carefully to ensure the obvious market power is not misused to prevent or damage competition.

While there are many issues under examination which, of course, must remain confidential, the ACCC is directing enforcement resources to this area.

The ACCC has announced active examinations of three areas:

- We are investigating the sharing of information about prices in the fuel retailing sector
- We are examining the longer term competition implications of the large shopper docket discounts provided between the fuel and supermarket sectors in particular.
- We are focusing on issues relating to the treatment of suppliers by the major supermarket chains which include misuse of market power competition issues as well as allegations of unconscionable conduct, business-to-business, which we are keen to pursue generally.

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. The ACCC understands these issues are of immense interest to the public and your industry.

3. ACCC'S APPROACH TO MERGER ASSESSMENTS IN THE GROCERY, LIQUOR AND HOME IMPROVEMENT SECTORS

On the mergers front, the ACCC has been paying close attention to incremental acquisitions in the grocery, liquor and home improvement sectors.

Section 50 of the Act 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.

To give you some context, since 2005 the ACCC has reviewed more than 70 transactions in the grocery sector which involved the sale of approximately 260 retail grocery stores. In the same time frame, the ACCC has reviewed around 80 transactions involving liquor licences. While most are approved a number of transactions have been blocked.

Most recently it has been the ACCC’s reviews of 'small' retail acquisitions—in some cases involving single stores—that have raised scrutiny. Questions have been raised as to why the ACCC is devoting time and resources to acquisitions which, some argue, have little overall effect in the Australian economy. While these acquisitions may seem small relative to a global merger of, say, two mining companies, they are important at both the local and at the national level.

We accept that the onus is on the ACCC as the regulator to make our processes as efficient as possible in our review of all transactions. However, our main

responsibility is to get the decisions right. That said, the ACCC is taking steps to see if we can streamline our review process.

The ACCC is seeking to agree a protocol with the MSCs that will enable decisions to be reached earlier in exchange for much wider notification of transactions and the provision of agreed up front information.

We are having discussions with Woolworths and Wesfarmers and it is not yet clear whether an agreement can be reached. If it cannot at least it demonstrates a willingness on the ACCC's part to explore ways to expedite certain types of reviews.

4. PETROL PRICE BOARDS AND MOVES TO PUT IN PLACE A NATIONAL CONSISTENT STANDARD

Concerns have been raised that the prominent display of discounted petrol prices on fuel price boards may be misleading consumers.

The ACCC can also see that this is an issue for consumers and we recommended that consideration be given to a national approach to fuel price boards under the Australian Consumer Law.

The Policy and Research Advisory Committee (PRAC), which is comprised of all of the Commonwealth, State and Territory consumer law enforcement and policy agencies, will look at the possible development of a fuel price board information standard. The ACCC is actively working within the PRAC process chaired by Treasury.

You may also have seen that NSW revisited its laws on what information must be contained on a petrol price board and announced a new standard, which will apply from next year. A feature of the proposed NSW standard is the requirement to display undiscounted prices, and no other price per litre, on price boards.

That approach is likely to be considered in some detail by PRAC in the coming months, before it reports to a future consumer affairs ministerial council. Ministers will then have the chance to decide whether a national fuel price board information standard should be progressed.

Many of you might have questions about the impact of a national standard *if* one was made. However we're some way from that point and these issues will be scrutinised in any regulatory impact process, at which time stakeholders would be able to have their say on any proposal.

CONCLUSION

Issues relating to petrol are of considerable community interest, and rightly so. From the ACCC's perspective the petrol and supermarket sectors need careful scrutiny.

This needs to occur as the industry constantly changes. Thank you for your time today.