The role of the ACCC and the Trade Practices Act in the farm sector

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I am delighted to have this opportunity to speak to you today about the work of the Australian Competition and Consumer Commission and how this impacts on the grains sector.

I hope I can offer you some insights into how we do what we do at the ACCC, how we can work with you, and also touch upon some major issues currently before us.

ACCC and grain grower issues

The ACCC is concerned to ensure that all businesses are aware of their rights and obligations under the Trade Practices Act.

These rights include competing in a market that is, as far as possible, freely contested. Businesses also have the right not to be subjected to any conduct that is unconscionable or misleading.

These rights, however, have corresponding obligations. It is important that businesses themselves do not mislead or deceive, or engage in any anticompetitive conduct.

These issues will become increasingly relevant in the supply chain for grain products.

Although the wheat sector is currently regulated, other grain products are moving towards a more competitive market.

These changes mean that growers may have to re-examine their relationships with other supply chain participants.

Growers will increasingly find themselves in a position where they must negotiate their own terms of trade with merchants, processors, and even storage or transport service providers.

This opens up great opportunities for growers, but it is also not without some risks. The bargaining power of an individual grower, for example, is unlikely to ever match that of a food processor or transport company.

A way to redress this imbalance is through collective negotiations, which, if done correctly, can facilitate a fair bargaining environment in which small business growers have the ability to negotiate with larger wholesalers, processors and retailers.

I'll come back to this later and talk about some of the exciting changes now underway in the area of collective negotiations. I also want to talk about some of the recent developments in the grains industry, and in particular the recent spate of mergers and alliances, our role in enforcing compliance with the Trade Practices Act, and some of the things we do to help business get this right.

On this last point I would draw your attention to a very helpful publication for this audience which is the Commission's popular guide for rural producers - Rural Industry and the Trade Practices Act.

The guide, which was updated and reissued in August 2002, has been produced by the ACCC for owners, managers and advisers of small businesses and primary producers in regional areas.

It describes how the Act and the actions of the ACCC affect Australians in rural communities by outlining how our enforcement process operates, and illustrates this with case studies where court action has been taken for breaches of the Act.

It is brief and to the point, and answers the most frequently asked question. There are details on how to follow up when seeking or providing more information. The guide also lists other related publications that may be of use to those operating in rural industries.

Enforcement

Now, you may get the impression from all the public and media talk of court cases and ACCC enforcement actions that the ACCC is keen on litigation and likes nothing better than to haul an errant business off "to the judge".

In fact, our philosophy is that it is eminently more sensible to have business comply with the Trade Practices Act in the first place, instead of have them act in a way that does damage to both consumers and the business, and then have to try to undo the damage later.

In the financial year just completed, the Commission received 48,724 complaints and enquiries relating to the TPA. Of these, 23,125, or just under 50% (47% actually) were resolved during the initial contact. Just 220 or less than half of one per cent were escalated to serious investigation and only 22, or .04% proceeded to litigation.

So you can see the overwhelming focus of our work is actually on education, advice and persuasion rather than litigation. Litigation is very important as a signal that we're serious about compliance with the law – but it's the small pointy end of a large overall enforcement pyramid.

We also work with industry sectors on voluntary self-regulation schemes, such as the National Agricultural Commodity Marketing Association Ltd (NACMA) code which has as its aim, "the development of fair, transparent and efficient commodity markets in Australia".

Voluntary industry codes are, of course, no substitute for compliance with the Act - the Commission will still enforce the Act without fear or favour. However, industry

stakeholders in compliance with effective Voluntary Industry Codes of Practice, as outlined in the ACCC's Guidelines, are less likely to breach the Act in our experience.

When enforcement is required, our policy, at all times, is to achieve very quick results which avoids or minimises harm in the longer term, and, in appropriate cases, brings about restitution to consumers when possible.

Companies faced with substantiated Commission allegations have two choices. One is to deny the complaint and tell the Commission it is willing to go to court.

The other way is to actually recognise that there is a problem, sit down with the Commission and try to sort problems out quickly. Any company that takes that approach I can assure you, will find us very receptive

But as you well know, the Commission will not shy away from going to the highest courts of the land if this is what is needed to protect competitors or consumers.

I have to say, however, that going to the Courts is not something that seems to happen often in the grains sector.

The majority of investigations by our enforcement staff in the grains industry relate to alleged breaches of Part IV of the Trade Practices Act - restrictions on trade and unconscionable conduct.

The most recent example of this was Project Broadacre which followed a complaint to the ACCC by the Grain Growers Association.

Their complaint was that AWB Limited and Pacific National had made an arrangement which could substantially lessen competition in the markets for bulk freight transport of grain and grain storage and handling. We closed that investigation, after finding no breach of the Act.

Industry contraction/rationalisation

However, the Commission has been very busy in the grains sector in recent months dealing with a raft of merger and joint venture proposals.

As I'm sure this audience is well aware, the Australian grains industry has been undergoing significant rationalisation in the past decade or so, particularly with the relaxation of some restrictive marketing arrangements and the replacement of state-owned grains storage and handling and marketing bodies with privatised companies.

At the same time there has been an increasing trend for alliances or joint venture arrangements between major parties, as well as increasing vertical integration between trading, storage and handling and downstream processing operations.

While there are any number of smaller niche based grain marketers and traders operating in Australia, there are only a small number of significant, generally regionally-based integrated grain storage/handlers and marketers.

Obviously, where markets are highly concentrated and significant parties within those markets seek to merge or combine their interests, the Commission will generally examine the matter closely to ensure that anti-competitive consequences do not arise.

At the same time, the Australian grains industry is under pressure to deliver efficiency gains and improve the coordination of the supply and movement of grain. To a large extent this is a result of cost pressures and competition arising from increasing global competition. These pressures are contributing to an increasing number of formal and informal collaborations between market participants, a few examples of which I will come to shortly.

The ACCC expects this trend to continue and we expect to continue to consider a range of developments in the industry in future, including formal and informal collaborative and joint venture arrangements.

As with all industries, we will continue to assess each merger or arrangement on a case by case basis to see whether it raises concerns of anti-competitive structures or practices in the industry.

The Commission has traditionally assessed joint ventures within the same analytical framework as it would consider a merger. As with mergers, collaborative arrangements can often be efficiency enhancing and will generally not raise any particular competition concerns. Where this is not the case and the arrangement leads to enhanced market power and concerns of a substantial lessening of competition, efficiency benefits can be considered under the authorisation and notification provisions of the Act.

So that's the big picture, if you like, of mergers and alliances in the grains industry, but how is it taking place in practice? Well there are currently four such matters being considered by the Commission's Mergers Branch at the moment, these are:

1. Proposed merger between ABB Grain Ltd, AusBulk Ltd and United Grower Holdings Ltd.
ABB Grain holds the single desk rights for the export of barley from South Australia. AusBulk owns and operates the vast majority of grains storage and handling facilities in South Australia (as well as having an interest in a small number in Victoria and southern NSW). AusBulk also owns AusMalt, which is Australia's largest maltster and is the only maltster operating in South Australia. AusBulk also acts as a trader for a variety of grains.

This merger proposal therefore involves some quite far reaching implications for the grains sector, in particular the extent to which it would allow a single entity to control various aspects of the supply chain, and impact on competing sectors of the market.

Given the extent of vertical integration the Commission was required to examine closely concerns about the potential for the merged entity to deny or hinder access to storage and handling facilities or to disadvantage competitors in downstream trading and malt markets.

In addition, the matter warranted close attention in view of the current legislative restrictions on the export of barley from South Australia, which provide ABB with a

monopoly over bulk exports of barley and market power in trading in barley in South Australia.

A particular focus has been the assessment of the likely impact on malt barley trading and the prices growers receive for their malt barley grain since the merger parties are the only significant purchasers of malt barley in SA.

Our concerns here are reinforced by the possible incentives the merged entity would have to favour its downstream interests in AusMalt, the only significant domestic purchaser of malt barley in SA.

As a general rule the Commission will examine closely any mergers or joint ventures involving parties which hold single desk rights.

2. Logistics joint venture between Australian Wheat Board and GrainCorp Ltd. This involves a 50/50 joint venture between Australia's largest grain trader, AWB, which holds the single desk rights for the export of wheat for Australia, and one of Australia's other main grain traders, GrainCorp. Both GrainCorp and AWB also own and operate grain storage and handling facilities and have interests in port facilities on the east coast of Australia. In addition, GrainCorp enjoys the single desk rights for the export of barley, canola and sorghum in NSW until October 2005.

The joint venture company is to provide logistics services to GrainCorp and AWB in Queensland, NSW and Victoria for grain bound for export. It will not service domestic grain.

The aim is for the company to manage the freight task for export grains from up-country to ports. It will negotiate the rail rates (or road rates if applicable), select the rail provider, negotiate the storage and handling services, undertake logistics planning and co-ordination of grain allocation and cargo aggregation for export grains.

Another aspect to the joint venture proposal is a 20 year non-exclusive access arrangement which will afford AWB long term rights of non-exclusive access to GrainCorp's up-country and port facilities on certain conditions, including for AWB to obtain most favoured terms for export bound grain, subject to it meeting certain conditions. Effectively, this provides AWB with security of access to capacity at GrainCorp port terminals but the rate and terms will depend on the volume of grain throughput.

GrainCorp remains free to offer storage and handling services to other parties and AWB is not obliged to use GrainCorp's storage facilities.

The Commission will be examining the matter to assess its implications on various markets related to storage and handling, trading in general and in terms of trading of grains for domestic use, as well as any impact on freight markets. The parties maintain they will continue to actively compete in storage and handling and for the acquisition of grain (other than, of course, export wheat, for which AWB has the legislated monopoly).

3. AWB/Co-operative Bulk Handling Ltd joint venture.
This involves a proposed alliance between CBH and AWB. CBH is the dominant provider of grains storage and handling facilities in Western Australia. It is also a grain trader and holds the single desk rights for the bulk export of barley, canola and lupins from WA.

The parties aim to establish a 50/50 joint venture company confined to up-country storage and handling, the transport of grain to port and port storage and handling. The parties will continue to compete in purchasing grain from growers and the export and domestic marketing of wheat and other grains.

This joint venture too, is aimed at reducing supply chain costs and delivering efficiencies for growers. It raises similar issues to the AWB/Graincorp joint venture above.

4. GrainCorp's divestiture of its 50% interest in Australian Bulk Alliance
The Commission is oversighting a divestiture by GrainCorp Ltd of certain assets in line with the undertaking given to the ACCC last year when GrainCorp acquired Grainco Australia Ltd.

In May 2003, the ACCC announced that it would not oppose the GrainCorp and Grainco merger, partly predicated on the expectation that Grainco would not retain its interest in ABA. ABA is a joint venture between Grainco and AusBulk Ltd which owns a number of grain storage and handling facilities in Victoria and NSW, and a 50 per cent interest in the Melbourne Port Terminal (with the other 50 per cent interest held by AWB Ltd).

In the event that Grainco had not sold its interest in ABA prior to the completion of the merger, the ACCC accepted undertakings offered by GrainCorp that it would dispose of Grainco's interest in these assets in a specified time period following the completion of the merger. The divestiture is aimed at ensuring the maintenance of competition in the provision of up-country grain storage and handling facilities, and in port terminals.

The Commission is monitoring the divestiture process to ensure the divestiture proceeds and that the acquisition of the assets by a third party will not have any anti-competitive effects on relevant markets.

Collective Negotiations
On matters other than mergers, legislation arising from the recommendations of the Dawson Review of the Trade Practices Act passed through the lower house of Federal Parliament last Thursday and will now be considered by the Senate.

Of principle interest to this audience will be the new arrangements to simplify the process under which small businesses, such as groups of growers for example, can come together and collectively negotiate.

Normally, where groups of competing businesses come together to collectively negotiate terms and conditions and, in particular, prices, this is likely to raise concerns under the Trade Practices Act.

Indeed, in recent months we have had great success in prosecuting a number of companies and their executives for illegal cartel arrangements to fix prices, including a record total of $35 million in total penalties for companies and executives involved in a power transformer and transformer distribution cartel.

Those involved in this cartel were prosecuted under s.76 of the Trade Practices Act, under which business currently faces maximum penalties of $10 million for each breach and executives $500,000 for cartel behaviour.

These maximum penalties may seem high, but compared to the rewards on offer for participating in cartels were not seen as a sufficiently strong deterrent.

The legislation now going through federal parliament arising out of Dawson therefore increases these penalties so companies will now face potential penalties of $10 million, 3 times the value of the benefit of the anti-competitive conduct, or where that value cannot be determined, 10 per cent of the annual turnover of the body corporate and all its related bodies – whichever is greater.

However, the federal government and the ACCC both recognise that there are often valid and economically sensible reasons for allowing groups of competing businesses to come together to collectively negotiate terms and conditions and, in particular, prices.

The most pertinent example of this for this audience is when groups of growers, or other small businesses want to come together to collectively bargain with a much bigger company, as a way of evening up the respective bargaining power of the two parties.

By acting collectively, it's self-evident that those involved are not competing with each other. Such action could therefore be seen as anti-competitive and a potential breach of the Trade Practices Act.

However, the ACCC is able to grant immunity from any possible breaches of the ACT for collective bargaining and collective boycotts, to name just two, through a process known as 'authorisation'.

Before granting authorisation for such conduct, the Commission is required, by law, to be satisfied that the action we are authorising is in the public interest. This assessment is made on a case by case basis.

Generally, when it comes to small businesses seeking to collectively bargain with a larger business, the ACCC finds that such arrangements are likely to have little impact on competition.

In the overwhelming majority of cases, the ACCC finds these arrangements to be in the public interest because they even up the bargaining power of the respective parties and we 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.

While each case raises its own issues, there are common features to many collective bargaining arrangements.

To make this process easier, last month we released an ACCC Issues Paper on collective bargaining and collective boycotts to provide an insight into what the ACCC considers when businesses request authorisation to engage in such activities, including when we are likely to look favourably on such requests.

The legislation now going through Parliament further strengthens this process with the introduction of a formal notification system for collective negotiations that includes tight time constraints, minimal cost and provision for collective boycott arrangements.

These amendments to the Trade Practices Act also involve other initiatives beneficial to growers and other small businesses including an outlawing in particular circumstances of the inappropriate use of unilateral variation clauses in contracts.

By lodging a notification under the new legislation, growers and other small businesses will be afforded the same immunity from the Act to collectively bargain as the current authorisation process allows. However, such immunity will be automatically conferred after 14 days and will remain in place unless, and until, the ACCC is satisfied that it is not in the public interest. Essentially, the onus will fall onto the ACCC to demonstrate that immunity is not justified, reversing the current process which requires applicants to prove their case.

The notification process will be available in respect of collective negotiation including associated collective boycotts.

I should stress that the law still requires 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. In particular, the ACCC will require strong justification before granting immunity to any arrangements which involve collective boycott activity.

Copies of the issues paper are available from the ACCC website. In addition, in conjunction with the passage of the Bill enacting the collective bargaining notification process, the ACCC will be issuing public guidelines to assist small businesses in lodging collective bargaining negotiations.

Conclusion

As you can see from this brief summary, Trade Practices law as it applies to small business and in particular those in the grains sector is going through a fairly dynamic time at the moment.

This process is far from complete and with the continuing deregulation of the grains sector, changes to the Trade Practices Act and development of voluntary industry code there will obviously a lot for us to discuss in coming months.

As I said earlier, we would much rather businesses complied with the Act in the first place than have to try to undo the damage later.

So, use our guide, look at the information on our website, write or phone us if you have any queries or want copies of any of our publications and please contact us if you have any concerns. We will especially want to meet with relevant groups to talk about and explain the new collective bargaining arrangements in more detail (providing of course that they pass the Senate); in particular, we'll want to liaise with groups before they create a notification - the more effective their application, the more likely we'll be able to deal with it in a timely fashion.

Thank you.