Presentation to

2005 National Potato Conference

"Umpiring the Market Game
The ACCC at Work"

Presented by

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Table of Contents

1. Introduction
2. TPA & Small Business
    - Misuse of Market Power
    - Unconscionable Conduct
3. Collective Bargaining
4. Codes of Conduct
5. Supermarket Developments
6. Country of Origin Food & Labelling
7. Outreach & Educational Initiatives
8. Conclusion

1. *INTRODUCTION*

I welcome the opportunity to speak to representatives of the potato growing industry.

A major part of my brief is to communicate with and respond to business groups in rural and regional Australia and to assist in their dealings with matters connected to the Trade Practices Act (TPA) which the ACCC administers.

The TPA provides a broad framework of rules within which Australian business must operate, and as such is the cornerstone of the competition environment and fair trading rules throughout the country.

The broad objective of the TPA is to enhance the welfare of all Australians through the promotion of competition and fair trading, as well as to provide for consumer protection.

Competition policy is about protecting the competitive process - not preserving specific competitors or protecting certain sectors from the rigours of competition. It is about encouraging vigorous, competitive behaviour which benefits consumers and the public at large.

A strong TPA promotes a well-functioning market. It promotes confidence in consumers that they are dealing with a business or industry that adheres to high standards, and it inhibits unethical practices by competitors.

The ACCC is responsible for administering the TPA independently, rigorously and transparently. In my address I would like to cover some issues that are of significance to small business and to potato growers:

- The market power and unconscionable conduct provisions of the TPA
- A new provision to assist collective negotiations
- Codes of Conduct and in particular the proposed Horticulture Code of Conduct
- Supermarket developments
- Country of origin food and labelling
- The Commissions outreach and education initiatives

2. *TPA & SMALL BUSINESS*

Small business is an integral part of the economy. It contributes almost one-third of our Gross Domestic Product and employs over half of the workforce. Small business is an integral part of vigorous competition and the interests of competitive small business are consistent with those of consumers.

Businesses that thrive are those able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, keen pricing, quality service standards and other forms of vigorous competition. Small business is often able to respond to the competitive environment more quickly and with more flexibility than its larger

competitors. Small businesses can be vulnerable to anti-competitive, misleading or unconscionable conduct and the TPA provides important safeguards against this. However the TPA and the ACCC are not panaceas and cannot artificially protect businesses unable to meet the challenge of hard and fair competition.

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

Misuse of Market Power

There has been a lot of discussion about how the misuse of market power provisions of the TPA protects small business.

Following some recent High Court decisions the ACCC 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 ACCC 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.

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

Firstly, 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 ACCC requires the assistance of small business. The ACCC 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 TPA which are relevant to these situations to which I will now turn.

In 2004 a Senate inquiry into the effectiveness of the TPA to protect small business examined a range of issues including s46, unconscionable conduct and proposals to improve access of small business to collective bargaining. The Government has indicated its intention to make some changes to s46 but did not accept recommendations made by in the majority report of the Senate Committee.

Unconscionable Conduct

The ACCC has put significant effort into tackling unconscionable conduct against both consumers and small business.

It's important to distinguish between unconscionable conduct – which is illegal, and conduct which simply represents hard bargaining which is legal.

For conduct to be regarded as unconscionable, courts have found that given there is an imbalance of power serious misconduct or some action clearly unfair or unreasonable by the larger party must be demonstrated. This might include an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour, actions showing no regard for conscience, or are irreconcilable with what is right or reasonable.

Conduct found to be unconscionable includes:

- blatant disregard of industry codes of conduct or other law
- placing unreasonable conditions on a franchisee.
- threatening to withhold essential franchising supplies or placing unreasonable conditions on supply of essential franchising goods to franchisees.
- attempting to terminate a commercial agreement for contrived reasons
- failing to honour important terms of a retail lease
- failing to adequately disclose key changes to a contract.
- granting an 'exclusive' dealership to one business, while at the same time negotiating with another business.
- unreasonably refusing to supply a business
- conduct that is unfair, unreasonable, harsh or oppressive, intimidating, bullying or thuggish, or wanting in good faith
- terminating a contract in a capricious and unreasonable manner.

As mentioned a Senate Inquiry into small business and the TPA reviewed the effectiveness of the unconscionable conduct provisions of the TPA

Whilst the unconscionable conduct provisions were found to have had a positive effect, some shortcomings were identified. As a result of that inquiry the government subsequently signalled its intention to introduce a number of reforms.

These include an outlawing of the inappropriate use of unilateral variation clauses in contracts widened the coverage in terms of small business and confirmed proposal that will improve access to collective bargaining.

3. COLLECTIVE BARGAINING

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 TPA. However, the ACCC is able to grant immunity through an 'authorisation' process, but only where we are satisfied that this is in the public interest. This assessment is made on a case by case basis.

Generally, in relation to small businesses collectively bargaining with a larger business, the ACCC finds these arrangements to be in the public interest and allows them to proceed. In recent years, ACCC authorisation has enabled collective bargaining by chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers, TAB agents, hotels, newsagents and small private hospitals amongst others.

The Commonwealth Government has decided to make this process easier for small business by introducing a notification system for collective negotiations with tight time constraints, minimal cost and provision for collective boycott arrangements.

By lodging a notification allowed under the new legislation, the onus of proof is reversed. Small business will, after 14 days, be afforded the same immunity from the TPA to collectively bargain, unless, and until, the ACCC is satisfied that it is not in the public interest.

It will thus be up to the ACCC to demonstrate that immunity is not justified, rather than, as is currently the case, on the applicants to demonstrate that it is.

The key features of the new process include:

- Immunity will only be available to collective bargaining arrangements in the public interest
- Validity will be determined by whether a collective bargaining notification form has been completed correctly and is accompanied by the correct lodgement fee (a decision is yet to be made on the cost but it is likely to be $1000 per notification)
- Collective bargaining notifications must be specific to a particular bargaining group. Targets are not required to engage in collective bargaining arrangements
- A three year time limit, and
- A $3 million financial limit.

The ACCC will be working closely with the Office of Small Business in providing guidance to small businesses throughout Australia in understanding and applying for the new notification arrangements.

4. *CODES OF CONDUCT*

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 (RGIC), as another means of preventing and resolving disputes between growers further down the supply chain.

The RGIC has been in operation for over four 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.

The issue of the perceived discrepancy between the prices paid to growers and the prices received by retailers has been the subject of public debate and of relevance to consumer interests.

A report commissioned by the Department of Agriculture, Fisheries and Forestry; "Price Determination in the Australian Food Industry" noted that such price differences are attributable to transport and distribution costs associated with supplying fruit and vegetables to consumers. While this may account in part for the pricing discrepancy, the report also noted that there was still a problem of "limited transparency of market prices and costs through the wholesale market sector". Therefore, it is highly possible that in some instances, growers are being misled with regard to the prices received for their produce.

Horticulture Code of Conduct

Following a high level of complaints and discussions between various interested parties the Australian Government has publicly committed itself to prescribe a mandatory industry code of conduct for the wholesale horticulture industry under s.51AE of the TPA.

The Department of Agriculture, Fisheries and Forestry (DAFF) is managing the development and implementation of the mandatory code. The Centre for International Economics (CIE) and Allens Arthur Robinson (AAR) were retained by DAFF to assist with this task. CIE in

conjunction with AAR have produced a draft code (the Code) and a Regulatory Impact Statement (R.I.S) and released these documents for public consultation.

Objectives of the Code
The Code addresses the following systemic issues identified by CIE in the wholesale market:

- under-supply of important information,
- lack of clear terms of trade arrangements;
- cost and price averaging
- claims about the quality of produce
- problems with the delivery of unsolicited, unwanted and oftentimes
- poor quality produce;
- inconsistencies about the treatment of high quality produce and
- volatility in the returns for quality; and
- development of alternative pathways to market

It is understood the consultants plan to complete the process of providing their advice to the government and finalising the RIS and draft Code during September 2005.

5. SUPERMARKET DEVELOPMENTS

Concern has been expressed by some suppliers about the market power of the major retail chains and their capacity to increase that market power by acquisition of independent retail grocery outlets.

The ACCC under s.50 of the TPA has power to oppose an acquisition if it will result in a substantial lessening of competition.

To illustrate how the TPA can restrain increased market share going to either of the two major super-market chains, I cite examples of the disposal of Franklins stores in 2001 and the recent indication of ACCC concern in relation to Woolworths acquisition of 22 Action stores in Western Australia and Queensland.

Franklins Disposal
The disposal of 270 Franklin stores resulted in the sale of around 200 of the stores to independents through Metcash and to Pick 'n Pay and Action stores. Woolworths was allowed to buy 67 of the stores.

The sale of stores to all independent retailers, other than FAL and Pick 'n Pay, were conducted through the Joint Independent Divestiture Alliance (JIDA) between Metcash and Dairy Farm. The JIDA process was the process for the sale of JIDA stores as set out in an agreement between Franklins and Metcash. JIDA stores were directly offered for sale to independent operators, not being Coles or Woolworths.

While not required, the Commission did assess the ability of the two independent operators, FAL and Pick 'n Pay, to finance their respective acquisitions. Although an in depth analysis was not conducted, the Commission spoke with all parties to ensure the operators' bona fides.

This was seen to be important due to the large number of stores being acquired and their role in the managed sell down.

Acquisition of Action Stores by Woolworths
In the past few months the ACCC has been looking very closely at the proposed acquisition of 22 Action supermarkets in WA and Queensland by Woolworths. This was part of a larger acquisition of FAL stores in Australia and New Zealand by Metcash and Woolworths. The Commission had earlier agreed to Metcash acquiring 60 Action stores but has had the Woolworths acquisition of the 22 Action stores under review. The Commission recently published a *Statement of Issues* identifying preliminary competition concerns with 8 stores. The ACCC is continuing its investigation of these 8 stores and it is possible that the ACCC will oppose the acquisition of some or all of them by Woolworths. An outcome is expected in late October.

Initially, the ACCC was also concerned that the Woolworths' acquisitions also raised competition concerns in markets for the supply of perishable goods – including fruit and vegetables – to supermarkets and wholesalers. However, the evidence received during market inquiries did not substantiate these concerns.

In addition, recently, the major supermarket chains committed to a Charter promoting fair competition between potential buyers of independent supermarkets. Under the Charter, Woolworths and Coles, as well as Franklins and Metcash, will not be able to limit the ability of independent supermarket owners to seek alternative purchasers for their stores.

The Charter is important, as it ensures that independent supermarket owners will always have the option of seeking a bid for their store from another independent buyer.

6. COUNTRY OF ORIGIN FOOD & LABELLING
I note that the issue of *country of origin labelling of food* has received wide media coverage in July and August of this year partly as a result of McDonald's decision to no longer exclusively source potatoes from Tasmanian growers and extending contracts of supply to include New Zealand potatoes. This event coupled with concerns from the WA fruit and vegetable industry[1] prompted the Fair Dinkum Campaign, which saw a number of potato farmers from Tasmania drive a convoy of tractors from Tasmania, through Victoria and New South Wales to Canberra to protest for stronger country of origin labelling laws.

Core to this issue was the fruit and vegetable industry groups raising concerns that the TPA doesn't go far enough in terms of country of origin labelling.

While the *TPA* does not require that goods are labelled with their country of origin, it does, prohibit misleading and deceptive conduct, or conduct that is likely to mislead or deceive. More specifically, the TPA prohibits corporations from making false or misleading representations concerning the place of origin, including the country of origin, of goods of any type, including food and food commodities. There are other relevant sections under which place-of-origin claims may offend in relation to representations concerning the

[1] The fresh fruit and vegetable industry in WA believes Woolworths is increasingly purchasing imported fruit and vegetables and neglecting local producers. The WA fruit and vegetable industry leads the campaign against Woolworths proposed acquisition of FAL as they believe it would see a rapid decline in the industry.

particular history or style of goods and the nature, manufacturing process or the characteristics of particular goods.

The TPA also sets out what is known as "defences" meaning that where certain tests are met, claims about the origin of goods do not breach these sections.

The Commission has pursued a number of past complaints with regard to origin labelling involving food-related matters. The Commission has released a trade practices compliance guide titled *Food and beverage Industry – Country of origin guidelines to the Trade Practices Act* to assist industry in understanding the Commission's compliance position.

The Food & Grocery Council (AFGC) has argued that the TPA is sufficient to regulate the administering of origin labelling in food and the proposal in the new Food Standards Code is costly and unworkable and contrary to minimum effective regulation

I note that following earlier rounds of consultation and submission the key regulatory body FSANZ has proposed a new standard which will seek to tighten the current requirements for country of origin labelling -

- in a manner that is consistent with trade practices law
- that is consistent with international obligations
- applicable regardless of whether it is Australian or New Zealand or imported' from another country.

If agreed to by governments, specific requirements for packaged food would set out:

- a need to declare the country of origin in a manner that is clear and not misleading – e.g. prominent text on contrasting background;
- specific requirements for 'made in', 'manufactured' or 'packaged for retail sale'; and
- specific requirements for food made up from local and imported ingredients.

New specific requirements would apply for unpackaged fish, fruit, vegetables and nuts, whether fresh or processed.

Labels on or in association with unpackaged foods would be subject to the same legibility requirements as packaged foods. Where a sign is displayed adjacent to produce, it should be at least 9mm and comply with legibility requirements. Stickers on produce would need to be clear and unambiguous about the country of origin. A logo or manufacturer's address alone would not be sufficient.

FSANZ conducted a third round of public consultation on the revised draft standard during August. The FSANZ Board will review a summary of responses late in September, prior to a discussion of the matter by the Ministerial Council in October 2005.

7. *OUTREACH & EDUCATIONAL INITIATIVES*

The ACCC has long recognised that small business does not have the same sort of resources as big business to educate staff about the requirements of the TPA and ensure compliance. For some time now we have had a dedicated Small Business Rural & Regional section within the ACCC to focus on this sector.

The ACCC has a small team of outreach representatives throughout regional Australia and we have adopted innovative and user friendly ways of getting messages out.

Small Business Guide to Unconscionable Conduct

An ACCC Small Business Guide to Unconscionable Conduct was launched by the Chairman this year.

The key aim of the guide is to help small businesses understand the difference between hard dealing and unconscionable conduct, so that they can recognise when someone is not 'playing by the rules'

The guide contains plain English definitions of unconscionable conduct law, and how it might apply to common business situations.

The unconscionable conduct provisions do not try to stop competition amongst businesses, particularly when negotiating with others. They will not apply when one party is merely driving a hard bargain, nor do they require a business to put the interests of another party ahead of its own.

To help alleviate this, the guide contains:

- concrete examples illustrating the difference between these two types of conduct and highlighting situations where it is unlikely that any unconscionable conduct has occurred;
- advice on high risk situations for small businesses in dealing with larger businesses;
- advice on how to avoid becoming subject to unconscionable conduct; and
- advice on how to deal fairly with customers.

The release of this guide adds to our existing small business information about the TPA and its application to small businesses. (Note: *Copies of the Guide will be available at the meeting).* What is in the Guide?

1. What is unconscionable?

2. Dealing with other businesses

   -High risk situations

   -How to avoid being subject to unconscionable conduct

3. Dealing with customers

Small Business Complaints Form

The ACCC ***Small Business Complaints Form*** has been developed as a result of the ACCC's continuing focus on small business industry sector and has been designed to provide small business operators with an additional avenue of advising the ACCC of your circumstances and seeking our advice. This form is now available on the ACCC website.

In its recent Strategy paper the Small Business section identified three different types of complaints received by the ACCC from small businesses, franchisees and franchisors. They are:

- Scams and exploitation
- Poor business selection and relationship management
- Structural dissonance

The Strategy Paper highlighted the importance of educational initiatives in curtailing these types of complaints. And it was decided that a targeted educational campaign that focuses on the key issues may assist potential small business owners, franchisees and franchisors in making better informed decisions about business ventures and prevent and/or assist in resolving disputes.

News for Business publications

With this in mind, the SB, R&R section has developed three publications using the recognised *News for business* format:

- *News for business: don't blow your nest egg*
- *News for business: checklist for entering into a small business*
- *News for business: franchising*

The *News for business: don't blow your nest egg* publication will contain a scam checklist that will help consumers identify and recognise the tell tail signs of a business scam.

The *News for business: checklist for entering into a small business* publication will contain a checklist of issues that potential small business owners should consider when entering into a new business.

The *News for business: franchising* series will be an ongoing project that aims to produce a number of articles over a twelve month period. The issues surrounding structural dissonance are wide ranging in the franchising sector and the quantity of information needed to address the issues would be difficult to digest in one complete publication. Therefore, a series of smaller publications addressing specific problems, which have been identified in a variety of franchise systems, is likely to be a more effective and informative approach.

On release, the publications will be posted on the *Publications* section of the ACCC website and *related topics* links will be created from relevant small business pages. The publications will also be circulated to Small Business Advisory Group and Franchise Consultative Committee members for distribution to members in their organisation, Regional Outreach staff will distribute hard copies at up coming small business and franchising events and copies will be distributed via the ACCC's supporter network.

Furthermore, news of each publication release will be promoted in regular ACCC publications such as *Briefing* and *Infolink*.

The Small Business, Rural and Regional section will work closely with the federal Office of Small Business by seeking their contribution/input to the long term objectives of this project.

CONCLUSION

To sum up, it is not the role of competition policy to favour one sector over another - competition policy is not about preserving competitors, it is about promoting competition.

The benchmark test for competition regulators is whether a course of conduct is likely to lead to a substantial lessening of competition in a specific market for goods or services.

One of the difficulties is that there is not a wide understanding of the difference between protecting competitors and promotion of competition.

However small businesses including growers operating in rural Australia do have significant rights under the TPA to enable them to compete in our market economy. The ACCC will seek to ensure that information and support in relation to those rights, as well as associated responsibilities, is freely available so that competitive small businesses can continue to grow and prosper.