



Presentation to

The Victorian Farmers Federation

Horticulture Group AGM

“Dealing with Anti-Competitive Behaviour and Collective Bargaining”

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## **1. INTRODUCTION**

Given my special role in the Commission with responsibilities for rural and regional matters, I greatly appreciate this opportunity to speak to the VFF Horticulture Group.

Growers, and indeed all members of the fresh food supply chain, have increasingly been forced to make changes to the way they run their businesses. Pressures dictated by rapid changes in electronic technology, logistic systems and financial/commercial practices, have led to ever increasing demands for transparency and due diligence.

This has occurred against the backdrop of deregulation of agriculture production and marketing arrangement, more open competition in the food supply chain and, in some instances, aggregation of market power.

The relevant provisions of the Trade Practices Act (TPA) and the related role of the ACCC are important factors in this process.

The ultimate objectives of the Commission are to protect fair and informed markets, the competitive process and the long term interests of consumers. The challenge for the ACCC is how, in this deregulated environment, to facilitate fair competition in the marketplace and avoid abuse of inequalities in bargaining power between participants in the supply chain.

I am conscious that these matters are of concern to horticulture producers. Some matters have been the subject of ACCC investigation following complaints and there has been an ongoing debate over the role of industry codes of conduct and, in particular, the Retail Grocery Industry Code of Conduct

It is timely to be speaking today when both the Government and the Opposition have recently made major announcements on relevant issues.

While the ACCC does not have a direct role in policy development and changes to the law, we are well placed to provide insights into the administration of the TPA.

I would like in particular to comment on the collective negotiation elements of the Trade Practices Act (TPA) reform legislation now going through Parliament, proposed unconscionable conduct provision amendments and the even more recent announcement by the Minister for Small business of the Governments response to the review of the Retail Grocery Industry Code of Conduct.

## **2. GROWER COMPLAINTS**

The ACCC has received a significant number of complaints from growers who are concerned at the lack of transparency existing in relation to the pricing of their produce. In particular, growers are concerned that some processors, wholesalers and retailers fail to provide adequate disclosure in relation to the price obtained for their goods in the marketplace. If backed by credible evidence, such conduct is potentially misleading and deceptive to growers. As such, the ACCC is concerned about commercial representations made to growers.

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

A recent report commissioned by the Department of Agriculture, Fisheries and Forestry; “*Price Determination in the Australian Food Industry*” notes 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.

### **Misrepresentation**

Under section 52 of the TPA, it is stated that “a corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive.”

It is important to note that, under section 52, the Commission does not have to prove that a party intended to mislead or deceive. It is sufficient if a person simply was misled or deceived. In addition, the Commission does not have to show that someone was, in fact, misled: it is enough if the conduct simply had the potential to do so. Moreover, businesses should be aware that breaches of section 52 can also occur by way of silence.

Some industry-specific examples of when wholesalers may engage in misleading or deceptive conduct include:

- where a wholesaler creates the impression that they are a buyer for a particular business when they are not;
- where they create the impression that they can sell someone’s produce when they cannot;
- where they create the impression that someone’s produce is of a lower quality than it actually is;
- where they misrepresent the state of the market, for example, by stating an incorrect market price for produce;
- where the wholesaler quotes a fee for service that does not include all fees, commissions, and government charges; or
- where they indicate that they can achieve a certain price when they have no basis for doing so.

Conversely, farmers may also engage in misleading and deceptive conduct where representations are made to buyers as to the quality of their goods, which don’t match the quality of the goods provided.

In these and other similar circumstances, the ACCC has the power to prosecute for breaches of the TPA.

### **Areas for Grower Improvement**

It is recognised there is scope among some farmers to improve the management of the distribution of their produce by updating their use of technology, by establishing business-like record keeping, good working relationships with those they supply and by paying attention to market demands.

This criticism was recognised by the recent report commissioned by DAFF. The report acknowledges that growers who have “inferior quality [produce], few or no market relationships, or do not have their own source of market intelligence, are exposed to manipulation by the trade .” It is suggested that this is the source of most complaints about the fairness of market practices. Therefore, there is an onus on growers to take the initiative to protect their own competitive interests.

However, the report also states that market pricing is “open to manipulation by the intermediary [ie the wholesaler] ... due to the lack of total market visibility.”

### **Avoidance of problems**

The ACCC has made a significant effort with small business generally and, in particular, with Rural and Regional business in providing outreach and information programs to provide understanding and utilising protections and responsibilities associated with the TPA.

The Commission has published the “*Fresh Fruit and Vegetables and the Trade Practices Act*” publication to assist wholesalers and growers to understand their rights and obligations under the TPA and has produced a number of educative seminars targeted at rural and regional businesses in the form of the Competing Fairly Forums.

The ACCC produced a Competing Fairly Forum video last year titled “Growing Good Business Relationships” which deals specifically with the issue of developing and maintaining transparency in commercial dealings between growers, processors, wholesalers, and retailers. The forum features panel members Graeme Samuel, Chairman of the ACCC; the Retail Grocery Industry Ombudsman, Bob Gaussen; John Rogers, a stone fruit farmer and member of the NSW Farmers Association; Stan Moore from the Australian Retailers Association; and President of the Australian Chamber of Fruit and Vegetable Industries, Bill Chalk.

Problems with clarity in commercial dealings and misunderstandings between wholesalers and growers as to the terms of their supply agreements can be the catalyst for breaches of the TPA. In a March address to wholesalers, I indicated if, as an industry, they accepted the need to take positive steps to promote transparency and fair practices in their commercial dealings with fruit and vegetable growers, this would considerably diminish any possibility of enforcement proceedings for breaches of the TPA.

### **Enforcement issues**

The Commission has examined complaints from groups involved in the fruit and vegetable supply chain. Such complaints have raised trade practices concerns in respect of misrepresentations made in relation to the pricing and handling of fruit and vegetables, unconscionable conduct between businesses and collusion. In these

circumstances, the ACCC has an enforcement role to play. This is the “pointy end” of compliance in trade practices law.

ACCC enforcement is predominantly driven by the level of complaints that the Commission receives and there have been a number of complaints made in relation to the fruit and vegetable industries.

However, it is very hard to obtain the necessary evidence required to prosecute TPA breaches. This is due, in large part, to the lack of transparency within the industry.

The Commission has also received a variety of complaints in relation to growers’ inability to negotiate fairly with their wholesalers, processors, and in some cases supermarket retailers. The main area of complaint is that smaller operators are at a significant disadvantage when negotiating with larger more powerful wholesalers, processors or retailers.

Consequently, those dealing with growers should be aware of the potential for some conduct to amount to unconscionable conduct in a business transaction, as defined by section 51AC of TPA. Unconscionable conduct will depend on the circumstances in each case.

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

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

### **3. TRANSPARENCY OF TERMS & CONDITIONS**

Due to the possibility of price manipulation in the fruit and vegetable market, the ACCC has strongly advocated improved transparency in commercial dealings between all participants in the supply chain and contends that the most important mechanism available to growers and wholesalers alike is to ensure certainty of terms in commercial dealings.

The ACCC has consulted widely with industry to understand the issues faced by participants in the supply chain. We have been in regular consultation with peak industry bodies, such as the Australian Fruit and Vegetable Chamber and individual state chambers, the national and state Farmers’ Associations, the Australian Retailers’ Association and many others in an effort to become more informed of the industry barriers to achieving transparency and fair dealing in the marketplace.

Based on these consultations, the ACCC is aware that problems with clarity in commercial dealings and misunderstandings between wholesalers and growers can occur when, for example, the agreement is based solely on a 'handshake'. Often, this occurs in circumstances where buyers and sellers are far away from each other and where the terms of the agreement are vague. Handshakes are fine but more is needed in a contemporary, competitive business environment.

Growers have complained that they often have no way of knowing what prices the wholesaler receives when the growers' produce is sold. Many growers are simply informed by the wholesaler of the net price to be paid to the grower. Sometimes, when queried, the wholesaler refuses to discuss the sale prices. The Commission has also received complaints that there is, generally, an unwillingness by the wholesaler to disclose arrangements between the wholesaler and the buyer.

### **Documentation**

To facilitate greater transparency, wholesalers and growers should ensure that the terms upon which they agree to deal are clear and, preferably, are in writing. Such common sense measures reduce the propensity for disputes to arise between the parties in the first place and, where disputes do occur, these measures also provide a degree of protection to both parties.

The DAFF report recognises problems of insufficient transparency in the fresh fruit and vegetable markets and recommends the promotion of "standard written agreements" in the supplier-wholesaler relationship. Some examples of the information that might be included in written agreements include:

- the basis on which the wholesaler is acting (that is, whether they are buying produce outright or selling on commission);
- how the price to be paid for the good is set;
- the specifications of the produce (for example, quality, quantity, size, grade, packaging etc);
- any variables that are likely to influence the sale or the final price; and
- the options available if the sale does not proceed or if the produce has to be returned.

At present, some growers still do not operate under a written agreement. This may not present a problem if there is a long term relationship, an implicit "agreement as to terms and conditions" and good communication channels between the grower and the buyer. However, this is generally not the case for new and smaller growers.

Wholesalers should, when dealing with growers, establish a price, or a mechanism for setting the price. If the produce is subsequently rejected or returned, a wholesaler may have a contractual right to seek a renegotiated price with the grower. The wholesaler should provide notification to the grower as soon as practicable and provide reasons for the rejection or regrading of the produce. Clearly, there can be complex factors relating to quality, grading, diversity of buyers, weather, and timing that impinge on how a net price is derived but this is no reason for avoiding the issue of transparency and adequate disclosure as to details of a transaction.

It has also been suggested that disclosure needs to be restricted because of the need for confidentiality in the wholesaler's dealings with buyers. However, under modern

business practices, it is difficult to understand why the grower should be denied disclosure as part of the arrangement between the wholesaler and buyers.

Clear agreement on these issues would provide both parties with certainty and confidence that could only assist in the successful conduct of their businesses.

The Commission would regard, most seriously, a situation where a grower takes the prudent step of seeking clarification of terms or asking for a written agreement but is met with a wholesaler response which ignores, or tries, to frustrate the grower's request, or even worse, intimidates or refuses to do business with them at all.

#### **4. RETAIL GROCERY INDUSTRY CODE**

The Government has just released its response to the Review of the Retail Grocery Industry Code (RGIC). The RGIC which has been in operation for over three years is a voluntary industry code to promote fairness and open communications in the retail grocery sector. The code sets out requirements for: produce standards and specifications; contracts; labelling, packaging and preparation; acquisitions; and dispute resolution.

The review comprised a report undertaken by Mr Neill Buck, an independent consultant, and subsequent consultation with stakeholders, industry groups and participants in the retail grocery supply chain. While not accepting Mr Buck's recommendation for converting the RGIC to a mandatory Code the Government, generally supported other recommendations and has indicated it will

- work with industry to develop a widespread Code education and promotional campaign to raise awareness of the Code within the industry; encourage industry participants to use the services of the Ombudsman to resolve disputes; and encourage transparency in contractual negotiations and agreements between industry participants;
- work closely with the Retail Grocery Industry Code Administration Committee to encourage increased grower representation on the Committee and improve their internal dispute resolution procedures; and
- continue to fund the existing dispute resolution scheme currently available under the Code provided by the Retail Grocery Industry Ombudsman.

While noting the disappointment expressed by many grower groups concerning the decision to retain the existing voluntary Code, this is a policy decision for Government. However, given the shortcomings in transparent processes, particularly at the wholesale level that part of the response involving new procedures to help provide clarity for growers and wholesalers in their contractual arrangements and provide a fair internal disputes procedure for participants, is an important breakthrough.

The ACCC has interpreted it as a positive step forward in the Retail Grocery Industry Code process. We made it clear that the ACCC would only support the initiative if it promoted transparency in dealings between growers and the central markets and enabled grower access to an efficient and effective dispute resolution mechanism which sits within the current RGIO scheme. Indeed, the initiatives by the ACFVI are



in response to the pressures from grower representatives (supported by the ACCC and other stakeholders) to act on central market and related supply chain failures in respect of documentation, transparency and fair dealing.

The ACFVI have now released details of the proposals and I have set this out in the Appendix to my paper.

Grower representatives are urged to carefully examine the proposals and work constructively in their implementation. This will ensure the NCFVI is held accountable in delivering what has been promised. For its part, the ACCC will be monitoring progress of the initiatives.

## **5. NEW PROVISIONS FOR COLLECTIVE NEGOTIATIONS AND UNCONSCIONABLE CONDUCT**

The Government has decided to introduce a notification system for collective negotiations with tight time constraints, minimal cost and provision for collective boycott arrangements. This reflects Government's recognition that some forms of collective negotiation must be encouraged to facilitate a fair bargaining environment in which small business growers have the ability to negotiate with larger wholesalers, processors and retailers.

This is part of amendments to the TPA introduced into the Parliament in June. In addition the Government has signalled its intention to introduce further amendments to the TPA following a Senate References Committee inquiry report on Small Business and the TPA. An initiative beneficial to growers and other small businesses will be the outlawing in particular circumstances of the inappropriate use of unilateral variation clauses in contracts.

An ACCC Issues Paper on collective bargaining and collective boycotts issued last Wednesday provides an insight to what the ACCC considers when businesses request to engage in such activities, including when it is likely to look favourably on such requests.

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. However, the ACCC is able to grant immunity from most of the competition provisions of the Act, including those relating to collective bargaining and collective boycotts through an 'authorisation' process. Before doing so, the ACCC must be satisfied that granting such immunity is in the public interest. This assessment is made on a case by case basis.

Generally, particularly in relation to small businesses collectively bargaining with a larger business, the ACCC finds that such arrangements are likely to be fairly benign in terms of their effect on competition. In the overwhelming majority of cases, 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.

While each case raises its own issues, there are features in common to many collective bargaining arrangements. The ACCC paper provides a useful guide for businesses wishing to seek immunity in respect of collective bargaining and boycott activity to the way in which the ACCC considers these issues.

By lodging a notification allowed under the new collective negotiation, 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, rather than, as is the case under the authorisation process, on applicants to demonstrate that it is.

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

The ACCC will still need 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 will be 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 notifications.

## **6. THE WAY FORWARD**

I would like to leave with Victorian horticulture growers a catch cry that Robert Gottlieb (business commentator at *The Australian* newspaper) has recently articulated about keeping up with technology and contemporary business practices. Like every part of the retail food supply chain, growers are under pressure and your competitive response must be to keep up.

An important part of this response should be to work collectively and strategically through your sectoral groups to respond to the RGIC initiatives, the changes to collective negotiations arrangements and the proposed strengthening of the unconscionable conduct provisions.

None of these initiatives are a panacea and the challenges involved should not be under-estimated. However, they each add to the tools available to growers to assist in effectively planning and managing their businesses.

The ACCC looks forward to working with the horticulture sector as it responds to these challenges.