



**Presentation to Dairy Farmers in Colac, Victoria**

**“Fire In The Belly Program”**

**No 8 District Council of the United Dairy farmers of Victoria,  
Colac Region**

*“Competition and Consumer Issues for Dairy Farmers”*

*Presented by*

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*Australian Competition and Consumer Commission*

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## 1. INTRODUCTION

I welcome the opportunity to be here today, and I would especially like to thank Delwyn Seebeck for the invitation to speak to you. This program provides a terrific opportunity to hear from various speakers about issues affecting the dairy farming industry but it also enables that vital flow of information and ideas which can assist your farming business.

The Australian Competition and Consumer Commission, the ACCC, encourages small businesses to think of the Trade Practices Act (TPA) as an important management tool, and compliance with the Act as part of good business practice that leads to success and profitability.

Dairy farmers, and indeed all members of the food supply chain, have increasingly been forced to make changes to the way they run their businesses. Pressures dictated by rapid changes in electronic and other 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 TPA and the related role of the ACCC are important factors in dealing with 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 dairy farmers. 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.

Today I would like to give you an overview of the ACCC, the TPA and small business, and contemporary competition and consumer issues that have emerged in the dairy industry and may impact on farmers like yourselves.

I would like to comment on the collective negotiation elements of the 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. ROLE OF THE ACCC**

The ACCC is the federal government body responsible for administering the provisions of the Trade Practices Act. The Act contains a number of provisions ranging from consumer protection to preventing anti-competitive conduct. By doing so, the Act aims to encourage competition

and efficiency in business and greater choice for consumers in price, quality and services.

- **Distinction between the ACCC & NCC**

I think it useful that I distinguish the role of the ACCC as the competition regulator and the National Competition Council as the competition instigator. The NCC was established by all Australian Governments in November 1995 to act as a policy advisor to oversee their implementation of National Competition Policy.

The Council does not set the reform agendas or implements the reform. This is the responsibility of each state, territory and the Australian Government. The NCC's role is to ensure that governments are implementing competitive reform throughout the country.

The ACCC core function is the enforcement of competition, fair trading and consumer protection laws. Generally, the ACCC pursues allegations where there is a public interest in doing so. The ACCC is also willing to work with your industry to help you understand your rights and obligations under the Act.

However, in order to effectively carry out its role, the ACCC must remain independent and objective. We do not play a role in changing or amending laws, or lobbying government on behalf of industry and business organisations.

- **Rights and Obligations under the TPA**

All businesses have a right to operate in a competitive and fair dealing environment. Like all businesses you, as farmers and small businesses

yourselves, have various rights and obligations under the Act. These will be discussed in more detail later.

The ACCC administers the Act essentially in two ways:

- By preventing or halting anti-competitive conduct so that all businesses – big, medium and small – have the opportunity to survive and thrive, and to conduct their business in a manner consistent with the interests of the Australian public, the Australian consumer.
- By protecting consumers against misleading and deceptive conduct.

The ACCC is independent in its administration of the Act. This is done through the independent appointment of Commissioners like myself, to oversee the working of the ACCC.

This means that as a Commission, the ACCC can promote and enforce the Act in an unbiased manner. We may take action against any corporation or business including government acting as a business, which we believe has broken the law and has acted in anti-competitive or unfair manner against the interests of consumers or other businesses.

As the watchdog we are ready to “bite hard” when there are serious breaches of the law. However, our central objective is compliance with the law and hence avoidance of problems – prevention is the best cure. The ACCC puts considerable effort into assisting business to improve compliance. We do this through our publications, the media, our internet site, and of course through forums such as this. Opportunities like today

enable us to talk to business people face to face in order to make them aware of their rights and obligations under the Act.

But when there are serious breaches of the law, court action is required. Our policy is to achieve very quick results that avoid or minimise harm to consumers and businesses. In some cases we will look at bringing about restitution, but generally court action aims to restore competition and fair trading to the marketplace. In the last financial year the ACCC had approximately 53 000 complaints and inquiries of which approximately 26,000 were resolved during the initial contact (by a quick telephone call or letter). Only 29 of these matters proceeded to litigation.

### **3. SMALL BUSINESS AND THE TRADE PRACTICES ACT**

Most dairy farmers like most farming businesses, are small businesses. It is not the ACCC's role to protect any one sector of the economy, or any particular business, big or small. However, the ACCC places priority on enabling small businesses to understand the benefits provided by the Act. This means that small business can be better placed to respond effectively if they become the target of anti-competitive conduct or unconscionable conduct by larger companies.

The ACCC has appointed Small Business Managers and Regional Outreach Managers in each State and Territory to help small businesses in rural areas understand and deal with TPA matters. Their main role is to liaise with rural communities, respond to concerns and provide information and education about the ACCC and the Trade Practices Act.

It is important that small businesses, like all businesses, are aware of their obligations and rights under the Act. Conduct prohibited under the Act includes:

- restrictive practices such as:
    - price fixing,
    - market sharing arrangements,
    - secondary boycotts, and
    - exclusive dealing.
  - anti-competitive mergers and acquisitions
  - unfair trade practices such as misleading and deceptive conduct
  - unconscionable conduct
- 
- **Anti-competitive practices**

Price fixing agreements are prohibited outright by the Act and treated as a serious offence. Price fixing not only harms consumers by artificially increasing prices, but it can give businesses engaging in the conduct an unfair competitive advantage. An agreement between competitors on the price they intend to charge is illegal regardless of whether it is in writing or a spoken agreement. In fact, it may simply be a ‘nod and wink’ understanding that can take place anywhere – in the pub, on the golf course, association meeting or social occasion.

For example, the ACCC has exposed an international cartel between three pharmaceutical companies that fixed the price for animal vitamins A and E, primarily used in animal feeds. These arrangements involved meetings and telephone conversations between the companies on a regular basis over a four year period. The ACCC took court action against this cartel



and fines of \$26 million were imposed on the parties involved, highlighting the serious nature of this offence.

- **Misleading & Deceptive Conduct**

It is also important that small businesses refrain from unfair practices such as conduct that is misleading or deceptive, or that is likely to mislead or deceive consumers including other small businesses.

Generally, sellers, whatever their size, are required to tell the truth and must not give an untruthful impression when advertising or talking about goods and services to customers. Farmers are significant consumers in terms of their inputs and capital equipment so this part of the TPA provides important protections.

An example of this occurred in 2003 when the ACCC took action against Telstra in the Federal Court over certain \$0 mobile phone representations made in advertisements. The ACCC alleged that the advertisements were misleading because customers who signed up to the \$0 'phone option' had to pay more for the overall package than customers who signed up to other monthly member plans. Those who signed up to the \$0 option did not receive call credits available on monthly member plans and were subject to higher termination charges. The court found that the use of \$0 by Telstra was misleading in this respect.

Misleading advertising such as this not only provides businesses with an unfair competitive advantage but also harms consumers. It is important to remember that silence or leaving relevant information out can also

amount to misleading and deceptive conduct therefore it is a very broad prohibition that catches various types of conduct.

- **Unconscionable Conduct**

Small businesses are protected from unconscionable conduct that is, harsh and oppressive conduct by a party who is taking advantage of its stronger position in a business relationship. A number of factors are relevant to determine whether a party has engaged in this type of conduct and these will be discussed in detail later.

- **Farmer complaints**

The ACCC has received a significant number of complaints from farmers who are concerned at the lack of transparency existing in relation to the pricing of their produce. In particular, farmers 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 may be 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.

For growers dealing with processors issues usually with the way contractual terms and condition are established, changed or implemented.

#### **4. COMPETITION & CONSUMER ISSUES IN THE DAIRY INDUSTRY**

- **Collective Bargaining**

Many small businesses believe that the only way in which they can survive and be competitive is by getting together and bargaining as a group with a larger supplier or customer. Although this is important, particularly in light of the structural changes that have taken place in the dairy industry, collective bargaining is not the only way that farmers will remain competitive. The demand for dairy products appears to be strong and increasing and there are many ways for dairy farmers to remain competitive. This is seen amongst those dairy farmers who seek to add value to their products, especially those who have emerged as niche and specialty producers.

Small businesses that wish to negotiate collectively on the price charged or paid for goods and services must obtain special permission from the ACCC to do so. Otherwise this conduct is generally likely to raise

concerns under the price fixing provisions of the Act mentioned earlier. To obtain permission to engage in collectively bargaining, businesses must go through the process of authorisation.

- **Authorisation**

Businesses can apply to the ACCC for the authorisation of collective bargaining conduct and the ACCC will consider applications on a case by case basis. Authorisation protects businesses that are otherwise competitors from being liable for conduct that may otherwise breach the Act. Before authorising such conduct, the ACCC carries out an open and transparent public consultation process that involves consulting with interested parties and those likely to be affected by the conduct. At the same time, a thorough analysis of the conduct and its effects is undertaken. If the ACCC is satisfied that authorising the conduct would be in the public interest and would outweigh any competitive detriment, the conduct will be permitted.

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.

The importance of authorisation for small business was highlighted in the circumstances surrounding dairy farmers following the deregulation of the industry.

- **Authorisation and the Dairy Industry**

As you would appreciate, the decision by Australian governments to deregulate the dairy industry meant that individual farmers and processors are now expected to negotiate supply terms and conditions in a more competitive and commercial environment. The ACCC has recognised that there is a need to provide farmers with an opportunity to develop skills and experience so that they can successfully operate in this new environment. For example, the ACCC granted authorisation for Premium Milk Supply to collectively bargain farm-gate prices and milk standards with Pauls Limited on behalf of South East Queensland dairy farmers. More extensively, the Australian Dairy Farmers' Federation (ADFF) authorisation provides a broader example of the ability for farmers to address the imbalance in bargaining power between small and big businesses.

## **5. THE ADFF AUTHORISATION**

In 2001 the ADFF lodged an application for authorisation with the ACCC to collectively negotiate pricing and supply arrangements with dairy processing companies on behalf of dairy farmers. The ADFF also sought authorisation for it to have discussions with supermarkets regarding the consequences of tender processes upon dairy farmers. The ADFF argued that dairy farmers were placed in an inequitable position for they were not able to collectively negotiate in a marketplace that was controlled by a few large dairy processing companies.

After much public consultation and analysis, the ACCC decided that to authorise the ADFP to collectively negotiate – on an “Australia wide” basis - on the proposed terms was likely to have an adverse effect on competition. It was felt that a national collective bargaining group would distort milk supply markets and lead to higher prices for consumers.

Based on these concerns, the ACCC granted authorisation subject to a number of conditions designed to safeguard competition in the industry. Soon after, Australian dairy processing company National Foods applied to the Australian Competition Tribunal for review of the ACCC’s determination. The Tribunal can review a decision made by the ACCC to authorise, or deny, an application for authorisation, or to revoke a notification. The Tribunal can then support, vary, or set aside the ACCC’s decision. ADFP and others expressed concern that the regions adopted in the determination were inflexible and commercially irrelevant.

The Tribunal worked together with the parties to alter the conditions of the authorisation. The ACCC authorised collective bargaining by groups of dairy farmers that have a ‘shared community interest’. The definition of a shared community interest covers those dairy farmers that:

- operate under similar farming and climatic conditions; or
- operate within a distance in which milk can be economically delivered to a processor’s plant; or
- supply a speciality raw milk product.

The ACCC also considered that it would be inappropriate for the ADFP to involve itself in specific negotiations between processors and supermarkets or seek to pressure a supermarket to accept a particular tender.

The authorisation was granted for a period of five years until 1 July 2005 but there is the opportunity for it to be extended further.

## **6. NEW PROVISIONS FOR COLLECTIVE BARGAINING**

Authorisation has played an important role in the dairy industry although it has sometimes been criticised by small businesses as complex, time consuming, and costly. In June this year, the Government introduced amending legislation covering a collective bargaining notification scheme with provision for collective boycott arrangements. This legislation aims to afford small businesses a quicker and easier way to obtain immunity from the TPA and it reflects Government's recognition that some forms of collective negotiation should be encouraged to make a fair bargaining environment possible in which small business is able to negotiate with larger wholesalers, processors and retailers.

By lodging a notification allowed under the new collective negotiation, small businesses will be given the same immunity from the Act to collectively bargain as the current authorisation process allows. However, such immunity can be obtained sooner and more cheaply. Immunity will be automatically granted after 14 days and will remain in place unless, and until, the ACCC is satisfied that it is not in the public interest. It will be up to the ACCC to show that immunity is not acceptable, rather than for the applicant to show that immunity is acceptable, as is the case under the current process.

Further information on the proposed collective bargaining notification process is set out in an issues paper available on the ACCC's website.

Once the bill is passed by Parliament, the ACCC will be releasing public guidelines to further assist small business with this new process and we will also be conducting information and education sessions for interested parties.

## **7. UNCONSCIONABLE CONDUCT PROVISIONS**

The fair trading provisions in the TPA, in particular section 51AC, are aimed to provide protection for small business against exploitative business conduct by more powerful business. Section 51AC prohibits the stronger party from exploiting its bargaining advantage to impose contractual terms, or engage in conduct, that would be unconscionable in the context of the particular commercial relationship between the parties.

When deciding a case involving section 51AC, the court may take into account a range of circumstances in determining whether a business has been subjected to unconscionable conduct. It may consider:

- The parties' relative commercial strengths;
- Whether undue influence was used;
- Whether the contract exceeded what was reasonably necessary for the legitimate interest of the larger business;
- The requirements of any applicable industry code; and
- Whether there was evidence of disclosure, good faith and a willingness to negotiate.

The ACCC has been successful in a number of cases in protecting small business from unfair, unconscionable conduct when dealing with larger, more powerful enterprises. The matters litigated and overall complaints



have been concentrated in supply chain, retail tenancy, franchise and finance disputes.

For example, in the *Avanti* Case, the Federal Court found that a lessor had engaged in unconscionable conduct against a group of farmers leasing land in South Australia. The original lease agreement had no limit on the water available from a bore on the land however subsequent lease agreements placed limits on the water available. The lessor claimed that the lease agreement had not been changed and threatened to terminate the lease unless the farmers signed new leases. The lessor also transferred water elsewhere without notice which caused the farmers to have to pay excess water charges.

In its decision, the court recognised that many of the farmers lacked formal education, English language skills, or commercial experience and the lessor was ordered to pay the farmers for any excess water charges.

Unconscionable conduct provisions recognises that small businesses are not looking to penalise. What they seek is an opportunity to run their business in a fair and competitive environment. They want the game played under a reasonable set of “rules” that can be enforced if a larger player goes outside them.

Importantly, state jurisdictions now have the capacity to draw down the unconscionable conduct provisions. By doing this, small business will have easier access to justice, often in a less expensive and quicker environment such as a tribunal.

Generally, the ACCC’s view is that the unconscionable conduct provisions of the Act are working in a constructive manner. The Commission has recommended rescinding the \$3 million transactional

threshold which is regarded as arbitrary and unnecessary and introducing an additional factor that Courts can take into account, the use of unfettered unilateral variation clauses in contracts.

Following the recent Senate Inquiry into the “*Small Business and the TPA*”, the Government has now signalled its intention to introduce reforms in relation to unilateral variation clauses and to increase the transactional threshold to \$10 million.

## **8. RETAIL GROCERY CODE OF CONDUCT**

The Baird Committee Report *Fair Market or Market Failure?: A review of Australia’s Retailing Sector* (August 1999) largely arose from about the perceived concentration of the retail grocery chains.<sup>1</sup>

The outcomes from that report included the development of the voluntary Retail Grocery Industry Code of Conduct<sup>2</sup> that deals with vertical relationships in the grocery chain. In addition, the Commonwealth has funded a retail grocery industry ombudsman to assist in dispute resolution within the industry.

The Commission encourages the business sector to look to enhancing standards of conduct in business to business dealings.

The Government has just released its response to a Review of the Retail Grocery Industry Code which has been in operation for over three years is

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<sup>1</sup> *Fair Market or Market Failure?: A review of Australia’s Retailing Sector*, The Baird Committee Report August 1999 p 1.

<sup>2</sup> Implemented September 2000.

a voluntary industry code to promote fairness and open communications in the retail grocery sector.

The code brings together grocery retailers, grocery suppliers together with primary producers and processors and other stake holders. It sets out requirements for: produce standards and specifications; contracts; labelling, packaging and preparation; acquisitions; and dispute resolution.

The review of the Code 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.

## **9. THE WAY FORWARD**

The Trade Practices Act provides a framework in which businesses can operate in a competitive and transparent environment.

In the past, many farmers were able to regard the “farm gate” as the end of their responsibilities.

However, since deregulation there is even more of a need for farmers to understand and implement their rights and responsibilities under the TPA. Doing so is a vital part of sound business management and an enhanced competitive advantage.