



Presentation to

Australian Chamber of Fruit & Vegetable Industries
Annual Conference

“Growing Good Business Relationships”

Presented by

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Table of Contents

1. Introduction
2. Avoidance of Problems
3. Grower Complaints
 - Misrepresentation
 - Criticism of Growers
4. Transparency of Terms & Conditions
 - Documentation
5. The Role of Codes
 - Retail Grocery Industry Code (RGIC)
 - RGIC Ombudsman
 - Mango Industry Code Development
6. Collective Negotiations
7. Enforcement Issues
8. The Way Forward

1. INTRODUCTION

I appreciate the opportunity to speak to the Australian Chamber of Fruit and Vegetable Industries today.

In recent years, wholesalers, and indeed all members of the fresh food supply chain, have made some significant changes to the way they run their businesses. This has been dictated to by the rapid changes to electronic technology, logistic systems and financial/commercial practices, which have led to ever increased demands for transparency and due diligence.

Some changes have been driven by developments in the provisions of the Trade Practices Act (TPA) and the related role of the ACCC, coupled with the deregulation of the fresh food supply chain and the move toward open competition.

The ACCC aims to ensure that this deregulated environment facilitates fair competition in the marketplace, and that inequalities in bargaining power which exist between members of the supply chain are not abused by parties with considerable market power. The ultimate objectives of the Commission are to protect fair and informed markets, the competitive process, and the long term interests of consumers.

2. AVOIDANCE OF PROBLEMS

To this end, 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.

Of particular relevance to the Australian Chamber of Fruit and Vegetable Industries, 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, wholesalers, and retailers. The forum features panel members Graeme Samuel, Chairman of the ACCC; the Retail Grocery Industry Ombudsman, Bob Gausson; John Rogers, a stone fruit farmer and member of the NSW Farmers Association; Stan Moore from the Australian Retailers Association; and a man who is known to all of you, President of the Australian Chamber of Fruit and Vegetable Industries, Bill Chalk. I will show you part of this video shortly.

First I would like to pick up and expand on the major theme featured in the CFF, the “Growing Good Business” video: the importance of transparency in commercial dealings between fruit and vegetable growers and wholesalers. 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. If wholesalers accept 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.

However, the existing status quo within the industry is marred by a distinct lack of transparency in business dealings. In encouraging wholesalers to consider the ramifications of this I will address issues of breaches of the TPA that may potentially arise in the fruit and vegetable supply chain, specifically, misleading and deceptive conduct, and unconscionable conduct in business transactions. I will consider the relevant role of voluntary industry codes and collective negotiation arrangements.

3. 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.

Criticism of Growers

I should note that the ACCC is also aware of a degree of criticism which has been levelled at growers by wholesalers relating to a perception that growers need to implement more efficient management practices to ensure that the supply of their produce meets consumer demand.

This criticism has been 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, the ACCC acknowledges that there is an onus on growers to take the initiative to protect their own competitive interests. Growers are not entitled to any special protection.

The ACCC further acknowledges that historically, there has been a problem amongst some farmers with poor farm management. These farmers can improve the management of the distribution of their produce by updating their use of technology (for example by bar-coding produce), by establishing business-like record keeping, good working relationships with wholesalers, and by paying attention to market demands. 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.”

4. TRANSPARENCY OF TERMS & CONDITIONS

Due to this possibility of price manipulation in the fruit and vegetable market, the ACCC strongly advocates 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 been consulting 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.

5. CODES OF CONDUCT

One way businesses can achieve more effective relationships within their industry is by the adoption of a voluntary code of practice. While the ACCC strongly encourages such initiatives, the DAFF report also acknowledges that fresh food industries themselves are seeking greater meaning for codes of conduct especially the Retail Grocery Industry Code of Conduct.

Retail Grocery Industry Code

As many of you will be aware, the Retail Grocery Code has been in operation for over three years. It 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.

While the code has been effective in facilitating genuine mediation between disputing parties, the Retail Grocery Industry Ombudsman has also identified shortcomings under the Code such as his lack of power to require parties to mediate, and lack of protection for complainants from victimisation. The strength of the code is also heavily reliant on the goodwill of all industry participants. The Retail Grocery Code is currently under review.

RGIO

The Retail Grocery Industry Ombudsman helps parties to mediate disputes and to reach sensible commercial solutions to TPA problems. The Ombudsman provides a

cheap and quick way to resolve disputes between wholesalers and growers, as an alternative to litigation. The Retail Grocery Code has gained additional impact and credibility as a result of the Ombudsman's effort to mediate disputes and suggest sectoral responses to systemic problems adversely impacting on smaller growers.

The ACCC encourages parties to use the Ombudsman where appropriate, but will always take action for serious breaches of the Trade Practices Act.

Mango Industry Code Developments

The development of a Mango Code was a serious attempt to address issues of transparency and sound marketing practices within the industry. It has also served to highlight some of the concerns that are associated with codes being too industry specific and proscriptive. Consequently, the Code has encountered a degree of opposition by some parties.

While the Mango Code highlighted some of common needs and concerns for growers across the fruit and vegetable industries, it is also apparent that the Code did not necessarily identify the common solutions.

Despite these concerns, the Commission contends that the development of the Mango Code has played a useful role and has facilitated an understanding of the key issues for growers more broadly. That is not to say there is a justification for "multiple codes" relating to different horticultural products.

6. COLLECTIVE NEGOTIATIONS

It should be noted that Government is aware of problems faced by small businesses, and is currently examining the issue of collective negotiations. Some growers have suggested that they could get better terms for their produce if they get together and bargain as a group. Businesses cannot collectively bargain unless they get special permission from the ACCC, known as authorisation, which must be applied for. As collective negotiation is strictly not allowed under the TPA due to the fact that it is inherently anti-competitive, in order to grant the authorisation, the Commission must be satisfied that there is a clear public benefit arising from the particular conduct that outweighs any anti-competitive detriment.

However, the process of authorisation under the TPA has sometimes been criticised by small businesses as complex, cumbersome and costly. The Commission agrees there is room for improving the processes involved.

Accordingly, there has been a positive response to the government decision to introduce a notification system for collective negotiations with tight time constraints, minimal cost and consideration of collective boycott arrangements. Recently, the Senate Economics Reference Committee's report on the effectiveness of the TPA in protecting small business, also supported the recommendation for a notification process rather than an authorisation process for proposed collective bargaining 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.

It should be noted that the ACCC is aware that collective negotiations will not fix all problems and will not necessarily be relevant to all industries. The use of boycotts may not be conducive to positive long term relationships, and could therefore be a "two-edged sword" for smaller parties. Therefore, collective negotiations should only be used as a tool for small business where appropriate.

7. ENFORCEMENT ISSUES

The Commission has examined complaints from all 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 with their wholesalers or processors fairly, and in relation to the inability of wholesalers to negotiate with supermarket retailers fairly. 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, wholesalers 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.

8. THE WAY FORWARD

I will conclude by playing you a brief extract from the CFF video "Growing Good Business Relationships", which illustrates some of the matters I have raised.

I would like to leave with the fruit and vegetable wholesale industry a message that is similar to one which Robert Gottlieberson (business commentator at *The Australian* newspaper) has made recently about keeping up with technology and contemporary business practices. The retail food supply chain requirements become more demanding by the day. The wholesale sector is under pressure and your competitive response must be to keep up with those demands.

An important part of this response should be to set a benchmark for appropriate transparency and dispute resolution processes consistent with good business practice.

If you don't do this as an industry, your lesser performers will bring the sector into disrepute and governments and regulators may be forced to take the matter out of your hands.

The ACCC looks forward to a good working relationship with your sector to assist in building trade practices compliance and its competitiveness as an integral element of the fresh food supply chain.