Conclusion

There is a community acceptance that despite the common law and all the other provisions of the TPA, a 'safety net' is needed for situations where the 'un-level playing field' between small businesses and larger more sophisticated firms is subject to unreasonable abuse.

I suggest a few reasons why the retail leasing industry should be supportive of a balanced approach to this issue.

- Although ensuring compliance with regulations such as s. 51AC can incur administrative costs, it is good business practice for larger companies to achieve this, and play their part as good corporate citizens in ensuring the market operates as effectively and fairly as possible.
- Small businesses are responsible for a significant proportion of economic activity, and comprise a large portion of the customer base of retail tenancy lessors. Presumably a confident and thriving small business sector is good news for the industry and the wider economy.
- A larger business that consistently gets away with acting unconscionably towards its small business tenants could be gaining an unfair competitive advantage over large competitors acting fairly in their business transactions.
- When such behaviour occurs in an industry it is often to the detriment of the industry as a whole unless the misbehaviour is addressed quickly.

It is recognised that protections for small business are not panaceas and that the powers available to the ACCC and other jurisdictions need to be applied with commonsense and consistency. Unsubstantiated or vexatious claims are quickly weeded out by ACCC processes.

There has generaly been a positive response by larger businesses to comply with the new s. 51AC provision. For example, many leading franchisors identify a marked cleaning up of adverse behaviour by fringe elements in that sector which has had to embrace not only the new provision but also the application of a mandatory code of conduct.

With retail tenancy disputes primarily handled in state/territory jurisdictions there is a tendency for regulatory intervention to become inconsistent. A 'good practice' national self regulatory code could provide greater consistency and certainty for both landlords and terants and take some of the heat off individual jurisdicions.

Getting a fair deal in the mango industry

This is an edited text of a speech by Commissioner John Martin presented to the NT Mango Industry Association Code of Practice Forum at Parliament House, Darwin on 14 April 2003.

In September 1997 the federal government released its response to the report of the major parliamentary inquiry by the Reid Committee into fair trading business issues.

The government response was a reform package, 'New deal: fair deal', which put in place a series of initiatives connected to the Trade Practices Act and the role of the ACCC aimed at giving small business a fair go. This centred on a new commercial unconscionable conduct provision of the TPA which defines a range of criteria where the conditions imposed by a larger business on smaller entities are beyond its legitimate economic interest.

As ACCC Commissioner responsible for small business and the ACCC's implementation of the small business program, it is important to discuss the issues related to fair economic dealing in the supply and marketing of mangoes for Northern Territory growers.

The ACCC has been communicating with and subsequently investigating matters related to the mango industry supply chain following serious complaints from growers in 2001. Our actions have not taken the traditional enforcement course. The issues have been complicated and in some cases delicate. The Commission has collaborated with various stakeholders to explore solutions and best practices. At the same time the Commission remained ready to take enforcement action if a clear breach of the TPA could be established.

The ACCC does not discuss matters relating to investigations. In this instance I will speak in broad terms about the issues that were presented at that time as there has already been considerable public comment by some of those involved. I hope what I say will help identify some of the issues which have been causing problems. In many ways, unless the issues are on the table, there is little likelihood of us moving forward. Here is an outline of the dialogue and actions that have occurred in the parallel investigation and education processes.

The complaints and allegations

I stress that what I will initially speak about does relate to complaints, allegations and some discernible responses to them. My comments do not suggest that any of the allegations have been proven.

I first met with the Northern Territory mango growers back in July 2001. Attending that meeting with myself and Fiona Macrae of our Darwin office were some leading figures from the NT mango growers industry: Peter Delis, Peter Cavanagh, Bill Gilbert, Laurence Ah Toy and Ian Baker.

From complaints received at the meeting we established that following deregulation the role of the merchant/agent had become a source of conflict. The mango group complained that individuals approached them from Sydney claiming to be merchants and therefore purchasing the mangoes from the grower.

After the fruit arrived in Sydney the merchants would allegedly sell the product and then claim that they were acting as agents for the grower. These merchant/agents also claimed that they had sufficient cold storage and consequently the produce would be kept in good order. The group stated that often this was not true and as a result of improper handling the fruit would deteriorate and the price would be significantly reduced.

It was also apparent that the majority of growers were working with agents and merchants under very loose arrangements. A major factor had been that if they asked for a written agreement the merchant/agents would refuse to do business with them. The fact that this had not rung 'alarm bells' demonstrated that growers needed to have a hard look at their business practices.

There was significant financial hardship to the growers and associated industries such as the freight companies. The prices received by the growers meant that they were often unable to meet the freight, picking and packaging costs.

Initial action

Further meetings were set up with the peak bodies and individuals to ascertain the extent of the problem, identify solutions and to commence a process of informing growers how to better protect their interests.

The quickly established areas of concern were lack of transparency, lack of disclosure and allegations of false claims.

Growers had no independent way of knowing what price the merchant/agent received when the growers' produce was sold. Growers complained of simply being rung or mailed by the agent/merchant and informed of the sell price. When queried, the merchant/agent allegedly refused to discuss the sell price.

Further, growers were provided limited details of the sale transactions. For example, who purchased the product and what the purchase price was.

The growers also stated that mangoes were trucked to the markets and then a separate company unloaded the mangoes at the agent's stands. In some cases we are told that an agent would ring growers and state that they did not receive the mangoes. When the growers showed evidence that the mangoes were delivered the agent then claimed they were not at the stand at that time and they did not accept responsibility. We are told that one particular mango grower lost 14 000 trays.

Agents allegedly made statements to the effect that they were agents for one of the retail chains but failed to provide any evidence of this. Again we're told that agents made statements to the effect that they were purchasing the goods, hence merchants, only to change their stance and maintain they are agents once the product was in the market place.

There was allegedly no disclosure by the merchant/agent as to any arrangements between the merchant/agent and the retailer. Growers were also unable to ascertain if the market price was the sell price from merchant/agent to retailer. Or, whether the sell price was the price an agent/merchant paid to another agent/merchant and not the supposed retailer.

The Commission consistently received complaints by growers that agents represented that they had contracts with the retail chains which provided for the purchase of mangoes by the chains at a set price. When the grower received payment it was significantly less that the price stated and when the grower challenged that, the blame would be shifted back to retail chains.

Information and education

The Commission's Fiona Macrae travelled to Katherine, Bees Creek and Berry Springs to conduct education seminars. These focused on simple 'how to' guides by which the growers could protect their product.

Due to the level of complaints received, the Commission sought details from the Office of Small Business and the Retail Grocery Industry Code Administration as to means by which growers could verify if an agent was an agent of the major chains. This material was subsequently passed on to the Northern Territory Mango Growers Association.

The Commission decided it would embark upon a two-pronged intermediation and education campaign.

As a first initiative the Retail Grocery Industry (RGI) Ombudsman was invited to visit the Northern Territory to advise growers of his role regarding complaints.

A second initiative was the brochure, *News for Business—fresh fruit and vegetables and the Trade Practices Act*, developed by the Commission. Because the ACCC publication was an initiative that emanated from the Northern Territory it is appropriate that use this forum to formally launch the brochure.

Finally in 2002 and just before the season commenced, Ms Macrae again attended your association meeting to deliver a seminar to assist the industry to prevent problems occurring. Important points to be aware of include:

- It is critical that a grower be specific about what an agent is authorised to do.
- Growers dealing with a wholesale merchant should establish a price or a mechanism for setting the price. If the produce is subsequently rejected or returned, a merchant may have a contractual right to renegotiate with the grower. The merchant should provide notification to the grower as soon as practical and provide reasons for the rejection or re-grading of the produce.
    - It is important for growers to clarify the terms and conditions that apply to their contract with the wholesale merchant.
    - It is important that all involved keep good documentation, including notes of conversations, so that if there is a dispute, there is a good basis for piecing together exactly what happened.

Industry codes of practice

One way businesses can achieve more effective relationships within their industry is by adopting a voluntary code of practice. Section 51AC specifically refers to these codes, and the ACCC encourages such initiatives.

For example the ACCC continues to work with the film industry on the Code of Conduct for Film Distribution and Exhibition, which sets out a framework for negotiation between film distributors and exhibitors.

Private hospitals and health funds have also adopted a voluntary code. The main aim of the code is to minimise disputes between hospitals and health funds. It provides for an independent dispute resolution process with final reference to the Private Health Insurance Ombudsman, and it is hoped that the code will lead to improved negotiation processes between hospitals and funds.

The Retail Grocery Industry Code of Conduct was introduced on 13 September 2000. It is a voluntary code; membership comprises many major grocery producers, wholesalers and retailers. The RGI code sets out requirements for produce standards; contracts; labelling and packaging; acquisitions and dispute resolution.

While there were some teething problems with the code, the energy and wisdom of code ombudsman, Bob Gausen and his partners at Mediate Today, has seen much more propensity for genuine mediation in grower-related supply chain matters. In several matters there has been agreement to fair and reasonable solutions. At the same time the ombudsman has identified shortcomings under the code such as his lack of power to require parties to mediate and lack of protection for complainants from victimisation.

This week's forum provides the opportunity for the mango industry and its customers to test whether some form of voluntary code can assist in the application of transparency and sound marketing practices.

Conclusion

The mango industry Australia-wide is worth hundreds of millions of dollars per year and given that the industry is expected to continue to expand its export penetration, it is essential that domestic marketing processes are carried out in a best practice fashion.

The processes that have culminated in the conduct of this forum reflect the sort of reponses that was sought when the federal government introduced its 'New deal: fair deal' over five years ago. There are no magic wands or panaceas for the supply chain

difficultly faced by primary producers. However, the powers of the TPA and the role of the ACCC are important adjuncts to achieving fair and competitive market outcomes.

Advertising the price of motor vehicles

The following is an edited version of an ACCC in-house presentation by Sherif Seid, discussing the effect of recent court judgments in the Dell and Signature cases on advertising full cash price.

Advertising price generally plays an important role in the motor vehicle industry. It can give a trader a competitive advantage over its competitors and plays a fundamental role in attracting consumers. The Commission, however, receives a large number of complaints from consumers about the practices of the motor vehicle industry in advertising prices.

Under the TPA companies do not have to state the prices of motor vehicles in their advertisements; but if they do, the statement must be accurate.

Outline

The contentious issues in price advertising, the nature of the problem and the Commission's response to it can broadly be divided into five sections:

- relevant section of the TPA governing the issue
- advertising practices by both manufacturers/ importers and retailers
- relevant court decision
- undertakings and consent orders related to price advertising
- the Commission's current position on key aspects of price advertising.

Relevant law

The sections of the TPA that are most relevant to motor vehicle advertising practices are:

- section 52: misleading and deceptive conduct
- section 53(e): false or misleading representations with respect to price
- section 53C: cash price to be specified where reference is made to part of the consideration
- section 56: bait advertising

Misleading and deceptive conduct (s. 52)

Section 52 requires that representations about price should not be misleading and deceptive or be likely to mislead or deceive. A number of factors will affect the impression conveyed, including the advertising medium used, the express representation and the size and prominence of small print.

Section 52 also requires that the representation disclose the mandatory charges imposed by the dealer, but does not appear to require that these charges be specified.

False or misleading representation with respect to price (s. 53(e))

Section 53(e) prohibits false or misleading representation about the price of goods or services. This means that the quoted price of a motor vehicle must accurately reflect the cost for the consumer.

Cash price (s. 53C)

Section 53C requires the cash price of goods or services to be stated in certain circumstances. It is the Commission's view that, to prevent the consumer from mistaking one individual element of the price for the total price, all of the elements should be disclosed as one total figure.

Bait advertising (s. 56)

Section 56 prohibits companies from advertising goods or services at a specific price if there is a reasonable ground that they may not be able to offer or supply those goods or services.

The practice of advertising motor vehicles

A consistent pattern of advertising by most of the major car manufacturers, importers or dealers across the country is a headline price with an asterisk and fine print stating that dealer delivery and administration charges are extra. Most of them do not state the amount of these extra charges. Nor do they state whether the dealer delivery charge is compulsory.

Another form of advertising is the listing of various features of the vehicle and then the line: '**1 only! All this from $...***'. This wording could be seen as contradictory and misleading. If there is only one vehicle for sale, then the actual price of that vehicle should be displayed, rather than the 'from' price.

In television advertisements, the consumer is sometimes not given sufficient time to study the