



Transcript of Interview between Matt Kirkegaard and ACCC Chair Rod Sims, published May 15 2015.

MK: I thought we'd have a chat with the ACCC and find out a little bit more about what the ACCC's job is, what brewers can do, and what they shouldn't do, and put on the label to avoid coming under ACCC scrutiny.

RS: The ACCC's role covers a number of things, so under consumer law our role is essentially to stop misleading and deceptive advertising. It's not about controlling the price of good, it's just making sure that consumers aren't misled. It's a very powerful bit of law, it can be applied in a number of ways, but sometimes people say, "Consumers are getting ripped off, someone's charging a price for a good that's way above the cost of production," that's not against the law. But misleading consumers is. So that's the consumer part of what we do.

We're the National Product Safety Regulator, so if someone's selling an unsafe good to consumers, we have a power to assist with voluntary recalls, advise the Minister of a mandatory recall, basically a recall role.

We're also the competition regulator, that's where we deal with people who are colluding to fix prices, what are known generally as cartels. We approve mergers and we basically deal with issues where there's a substantial lessening of competition. That's our competition role.

And we also have a bit of a role as an infrastructure regulator, particularly in relation to telecommunications, the NBN and things like that, but I won't go into that detail. So we have a fairly broad remit, but on consumer matters, it's basically, "Don't mislead or deceive consumers."

MK: And it was on that point that, last year in April, the ACCC after negotiations with CUB, you accepted a court-enforceable undertaking from Carlton United Breweries in relation to your concerns that a brewery had misrepresented what Byron Bay Pale Lager was, that it was brewed by a small brewery in Byron.

Can you tell us a little bit about the process that goes into a court-enforceable undertaking? Because it's not a court decision, is it?

RS: No, it's not a court decision, it's an undertaking that's enforceable by the court. The ACCC enters into an agreement with the company, and if the company doesn't comply with that agreement, then we can take them to court and get the court to make sure that they do. Very, very rarely is that ever needed. We've got the power to enter into these undertakings under our act, they are enforceable by the court, so it's as if they've got the blessing of the law, and indeed they do, but we've got to go to a court to get that. But they are binding undertakings.

MK: Can you tell me a little bit about the circumstances that led you to choose Byron Bay Pale Lager? Because subsequent to that decision, the ACCC has been communicating with a number of breweries and looking at their labelling. That had been a situation that had been going on for some time before the Byron Bay case; what was it about the Byron Bay case that brought it to your attention? Or gave you the impetus to pursue some outcomes with that case?

RS: Very good question. Just to step back, we've had an interest for a year or two prior to that in what are called "credence claims", where how a good is made, or where it's from, has been of particular interest. Sometimes people will say a good is made in Australia when it's not; it's made in King Island when it's not. So giving it some appeal that it doesn't have because it's not Australian made, or it's not a cheese product or a meat product from King Island, which has a premium brand rating.

Also how something is made. The classic one there is free range eggs. 40% of the eggs sold in Australia are free range, we allege on a number of occasions the birds hardly, if ever, get out of the barns, so they can't be free range. Now the reason we take these things on is for two important reasons: one is consumers are paying for something that they're not getting, and two is that people who are competing legitimately are losing out.



If you go back to the free-range example, you want to make sure that those who are genuinely using free range, where the hens can go outside each day, and do go outside each day, that they're not losing out to people who are saying their eggs are free range, when in fact they can't leave the barn. That's just inappropriate competition, it damages innovation, it means that small companies who try and differentiate themselves can't do it.

With that background, we saw the Byron Bay beer, it was – we thought – a fairly concerning example because all you had on the beer, whether you look at the front or back of the label, was “Byron Bay Beer”. You had pictures of Byron Bay on a map, so every representation was that this was a small company, and that the beer was brewed in Byron Bay. When we found out that it was, in fact, owned by CUB and the beer was brewed in Warnervale in Sydney, at the main brewery, we felt that, not only were consumers being misled because they may have wanted a niche product produced by a small company, but also other craft beer makers who are trying to compete against Byron Bay beer, that they won't lose out because somebody's misrepresenting what they are. So that's the reason we took the action.

MK: And I notice that, since you took that action, you've been communicating with a number of breweries. Has that been to raise issues that you might have with their particular labels? Or just to advise them of the decision generally and work with them to make sure that they're telling a clear story about their brand?

RS: Pretty much. What we do when we take these sort of actions is we usually do them to send a wider message. So it's not just a one-off, we don't take that many cases, we don't enter into that many undertakings. But when we do take someone to court, or we enter into a court-enforceable undertaking, we then try and make sure that that is widely known. After the Byron Bay undertaking, we wrote to a large number of players in the beer market seeking to make sure they understood what had happened, and what that meant for them.

We've now been engaging with many brewers, some large, some not-so-large, and fundamentally we've been trying to get two things: one is to get them to say when it's in fact a big company that's making the product. So on the lager, for example, to acknowledge that the Lion Group is now saying when it's one of their beers that they'll say on the back of the label that this particular beer is part of the “Lion Group”, and that's great. And also, we're making sure that, when you've got a small company, if they start to brew the beer under contract, that they make that clear as well on the back of the label.

Those are the two main things we're doing, we've had about 12 different organisations that have changed their behaviour, and we're still in discussion with others. So it's been very successful, we've been – so far – pleased with the response from industry. We're still talking with a number of other players who would like to get on board, so it's been successful so far but there's a bit more to do.

MK: I've noticed that, particularly at the moment when you go to bottle shops, there's obviously a transition phase going through where some of the old and some of the new labels, so it's obviously coming to fruition now. One of the examples is the Coles-owned beer brand, Steam Rail, which has been contract brewed and has recently started to bear the label, “Part of the Liquorland Group”. That was one of the ones that, in my view, was a fairly clear-cut case, because they created this Australian Beer Connoisseurs, that was the label that they put on. And looking at the amount of traffic that came through the Australian Brews News website, where people were Googling, “Who is ‘Australian Beer Connoisseurs?’”, there's obviously a lot of consumer interest in this very crafty looking beer, and who is the ownership behind it.

Having Liquorland's name on it, for example, isn't the name that people are really interested in Coles? Because even Liquorland is one step removed from Coles and sounds like it's a smaller company or a smaller entity if not everyone knows that Coles is the owning entity?



RS: We've had a lot of discussions with Coles, we're certainly, we think, making good progress with them. We're pleased with those discussions. There may be more to come, but we are trying to work with the industry as much as we can. For example, on some occasions we've allowed them to take time to go over the new labelling, and other times we've engaged with them and seen how best to deal with the issue. Let's just see where we get to on the Coles matter, I don't want to pre-empt that.

It is an interesting question, how many people are aware of Liquorland? I would have thought that many people did know that was a major organisation because they've got quite a lot of bottle shops. That's a good point, but as I say, I would have thought many people would know who owns Liquorland. Or at least know that they're a very large organisation.

MK: They do, and I guess that's where the question of scale comes in, when you've got a group such as Coles which owns First Choice, which is the big box store, they've got Liquorland, and then they've also got Vintage Cellars, so they've got three different offerings in the market. I don't think people are fully aware, certainly the feedback that I get, that they know there is an entity behind them but they're not necessarily sure which one.

Another example that's been raised with us here as Brews News recently, is, for example, Coca Cola's entry into brewing through the Australian Beer Company, which is a joint venture with the Casella wine producers, and then they've created the Australian Beer Company, which in turn has a brand called Yenda. That's one where, I think, the feedback from people when they find out the Australian Beer Company is the partnership that is producing the beer, but there is a sense that I get from consumers is that they want to know the ultimate. Coke is the name that they're interested in seeing in deciding what price or value they put on the beer.

Is that something that the ACCC can work with? Or are you hamstrung by corporate rules where Coke isn't the ultimate owner of a brand such as Yenda.

RS: We could certainly work on the issue. We're not hamstrung in any precise way, because the rule is, what would a reasonable consumer think? That's the guiding light, and that guides us in terms of how we go about these issues. All I can say is we're working through a number of these issues. We understand how important they are, and in a sense the, as you implied, the more some of these bigger companies seek to disguise who they are, the more important it is that we deal with that. Because they're only doing it for one reason, and that is to sell more beer without giving the consumers all the information. They obviously have the view that if the consumers knew all the things that you've just mentioned, they might not sell as much beer.

The more companies want to pursue this behaviour, the more important it is that we deal with it. So all I can say is all this is a work in progress. As I say, we've got changes with 12 companies, and we're very pleased about that, but there's certainly more to do.

MK: You've actually pre-empted a question I wanted to ask. I happened upon a quote that seemed to sum up a lot of what you just said, and it's from an American case. It was listed in an American textbook called "The Law of Unfair Competition" that was published around about 1906, but it quotes the case law that says, "The law is not made for the protection of experts, but for the public; that vast multitude which includes the ignorant, the unthinking, and the credulous, who, when making purchases, do not stop to analyse but are governed by appearance and general impressions."

Is that a pretty good rule of thumb for consumer law should be trying to do?

RS: Yes it is, and I'll go back to my own words. I'm not disagreeing with what you've just said there, it is about what would a typical consumer believe? You get those usual statements where somebody says, "I'm making the best beer in the world." Now we know, I think most people would think that consumers would not treat that comment very



seriously, so someone might assert it, but that would be what's defined in our trade as being "puffery", it would be an exaggeration and nobody's going to take it too seriously.

But where you say something that people would have a reason to believe, or you omit something that people, by not seeing it, would therefore also be misled, then that's when we act. It's not in any way trying to say you're dealing with consumers who don't know much, it's more, would a typical consumer be misled by this? That's the test we apply. And then we also ask ourselves, how much does it matter?

Because we have to prioritise what we do. If we judge it matters to consumers, and for us it matters also if we think there's competition detriment. And certainly, in the case of craft beer, we well know that there's a lot of small players out there making and selling craft beer, they are small companies, they are making the beer in a small brewery, and it's unfair if they're competing against people who are portraying themselves as the same thing. That's just unfair competition, so I don't have any problem with that terms. But here it's all through the lens of, what would a reasonable consumer believe?

MK: We also see these days a lot of place names springing up on beer bottles. Byron Bay was one example, but we're seeing Sydney suburbs cropping up, we're seeing Victorian suburbs cropping up. Surely the only reason to name a product after a place is to create an emotional link between the product and the place. So we're seeing Sydney Suburb X with the label saying a post office box in that suburb, even though the brewery isn't there, and then they'll often have a fairly blurry statement about a beer being brewed in honour of that place.

Is that something that you'll look into as well?

RS: It is. We do need to be careful how far we go here. If someone says, this is brewed in a particular suburb. Sorry, let me start that again. If the label on the beer is a particular suburb, Brighton Beer, for example, a suburb of Melbourne, provided over the back of the label it's sufficiently clear that it's not made in Brighton if, indeed, it isn't made in Brighton, then that's fine. We're not seeking to do more than that. As long as someone who wants to have a decent look at the label can find out what they need to know, we're not going to stop them calling it Brighton Beer simply because they're not making it in Brighton. We haven't gone that far.

Let me hasten to say, we had in other circumstances. For example, someone called their honey, "Victoria Honey." In fact, it was made in Turkey.

MK: And it wasn't even honey, from memory of that case.

RS: Well that was the one that wasn't even honey, yeah. That was a [inaudible] example. But that was one that we thought by calling it Victoria Honey does suggest it's Australian, whereas calling it Brighton Beer, well, I guess if people want to find out that it's actually made in Sydney, they can look on the back of the label.

This is very much a matter of judgement. We're trying to change behaviour, we're trying to get clarity. I guess we're stopping short of complete purity, but we do want consumers – and as I say, this is an exercise that's continuing, we're going to keep at it – we do want consumers to know who's brewing the beer. The two things are, are you part of a larger group? And are you brewing it, or are you contracting it out to a larger group?

MK: From what I've heard you say, then, say you've got Brighton Beer and you've got a Brighton PO Box because that's where your business address is, but the beer is brewed outside of Brighton, from the sounds of it, the label should somewhere have a fairly clear statement that this beer is not brewed in Brighton? Is that what I'm hearing?

RS: Largely, yes. If the beer was brewed, in fact, in Moorabbin, a neighbouring suburb, perhaps we wouldn't mind. If it was brewed in Sydney by Carlton United, then we most certainly would mind. It is a bit of a matter of judgement. We're really trying to make sure that the people are getting what they're paying for, and that there's no competitive harm here. But yes, if they were really saying this is Brighton Beer and it's really made not anywhere near Brighton,



and by the way it's actually made by a big company, that's when we'd take action. It does matter how important it is. As I say, if it's in fact made in Moorabbin, I'm not sure it matters so much, provided it's truly the small company it's trying to portray itself as.

MK: It sounds like it's, with so many shades of grey – and I don't want to make any allusions along that line – with so many shades of meaning, it sounds like it could be a very hard law to police. My observation is your approach is to work with breweries to try and correct them and try and give them guidance, rather than come in and be the Storm Troopers or the Sheriff riding into town arresting people. Is that a fair assessment of your approach?

RS: Largely it is, but not completely. Had we not got the undertaking from Carlton United in the case of Byron Bay beer, then we would have taken them to court. If we find something that we think is egregious, really bad, very misleading, then we won't hesitate to take court action if we don't get the cooperation we think we need.

But yes, you're right. How far you go, how much change you're seeking to achieve, that is a matter of judgement. I think most people in the ACCC's position, you do exercise judgement. If I can make the comparison, even the police force exercises judgement about what it deals with and what it doesn't. If there's a crime of murder, of course that will be a top priority for them. If somebody breaks into your house and steals \$10, it's still theft, but they may not have the resources to put many people to check into chasing the thief.

These things are matters of judgement and resources, but we have made a big commitment to try and make a difference in this craft beer area, and I think we've had success so far, and we'll certainly have more success because we'll stay with it.

MK: What's the role of the industry's body? For example, the Craft Beer Industry Association, which I believe you've had dealings with, or have been working with them as well? Do you think that they should be providing clear direction as an industry group around these areas?

RS: Absolutely, we always work with industry groups. We spend an awful lot of time with industry groups, generally. One of my Deputy Chairs, Michael Schafer, is out talking to industry groups just about all the time, I think. That's not quite true, but he's out there with a lot of industry groups, so we work through industry groups as much as we can. We try and make sure they understand what we're trying to achieve, and yes, we seek to get as much help from them as we can. How much help they provide is up to them, and I won't make any comment in this case, but we like to get as much help from them as we possibly can.

We certainly make clear what it is we're trying to do, and why we're doing it, so they can communicate very clearly with their members.

MK: The one last issue I want to touch on very, very briefly, you mentioned a lessening of competition role that the ACCC has. You've had a very well-publicised investigation afoot into tap contracts, are you able to bring us up to date as to where that investigation currently is?

RS: A little bit, I can. That's an investigation that's still continuing. These things do take time, and I know it's frustrating for people. At the end of the day, on these issues we have to find out what's actually going on, we have to make a competition assessment, and if we're going to take it forward, we need to put evidence in front of a court, so there's a lot of work to be done.

We've been in contact with a lot of licences premises trying to find out what their contracts are, we've been in touch with the main companies to get their perspective on things. So it does take time to get in touch with people, get information back, analyse that information and find out you need more information. These things do take time. But it is an active investigation, and it's still continuing. I can't say more than that, and I'm afraid I can't put a time when we'll get out the other end of it, either. But it's certainly a priority for us.



MK: What sort of powers does the ACCC have to compel publicans to reveal their contracts? Are they able to claim that they're commercial and confident? Or do you have the power to ask? Or when the ACCC asks, people help?

RS: Both are true. We have the power to compel information. Often when we approach somebody, they'll say, "Yes, I do have that information, but I can't give it to you voluntarily because it's subject to confidentiality, but if you ask me for it under your compulsory powers, I have to give it."

Yes, we have compulsory information powers that allows us to get information we need, such as those tap contracts, and often people will cooperate with us where they can, knowing that it's much better to do that than get one of these notices to provide information. But as you just said, sometimes you have to use those notices to overcome confidentiality concerns.

That is our key power. In a sense, the main power that the ACCC has that allows us to do what we do. It's hugely important to us.

MK: Just before we let you go, if any brewers have any questions about their labelling, can they seek guidance from the ACCC? And if so, how would they contact the Commission to get that guidance?

RS: They can do that... All they really need to do is get on our website and that will get directed to the relevant area. So they most certainly can get in touch with us, we'd be delighted to deal with them.