



6 January 2017

Senator Jane Hume
Chair
Senate Economics Legislation Committee
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Parliament House
Canberra ACT 2600

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Dear Senator Hume,

Re: Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Australian Dairy Farmers (ADF) appreciates the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

ADF is the national advocacy body representing dairy farmer organisations across the six dairying states. Our mission is to improve the profitability and sustainability of dairy farmers in Australia.

Brief Industry Background

Australian dairy is a \$13.7 billion farm, manufacturing and export industry. Australia's 6,100 dairy farmers produce approximately 9.5 billion litres of milk a year.

More than 100,000 Australians rely on dairy for their livelihoods, including vets, scientists, mechanics, financial advisers and feed suppliers, while 38,000 Australians are directly employed on farms and in dairy processing.

Approximately 98% of Australian dairy farms are family-owned businesses.

Our quality and safety processes are among the best in the world and Australian dairy makes a vital contribution to the national economy.

With a farm gate value alone of \$4.3 billion, dairy enriches regional Australian communities across Australia.

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

ADF has long advocated for legislative and policy change to assist in addressing the unequal distribution of market power along the value chain and to provide some balance to the concentration of market power in Australia's two major retailers.

ADF congratulates the federal government on working to provide more transparency and fairness in the market through legislation such as the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

This legislation will help to ensure that farmers, processors and consumers are not adversely impacted by the actions of those who hold significant market power in Australia.

For a significant period of time the clear intent of the major retailers' strategy has been to extract as much value as possible from the supply chain with consequent pressure on those at the start of the chain, namely farmers.

The major retailers are also seeking to increase their own market share to the detriment of competitors and to increase the share of private label home brand products in store. In Queensland, where almost 100 per cent of production goes to fresh drinking milk, almost 30% of dairy farmers have left the industry since the supermarkets aggressive discounting tactic began in January 2011.

Effects Test

Given this, it is important that the ACCC has the ability to examine the impact of supermarket pricing strategies in the longer term, with particular emphasis on the impact on consumer choice, farmer viability, the supply chain and future prices. It should also be noted that ADF is of the firm opinion that the ACCC must take a longer term view of market issues than it currently does on all issues and in all its investigations; including those related to the proposed Food and Grocery Code.

It is for these reasons that ADF, and other dairy industry stakeholders, have advocated for an Effects Test for so long.

The importance of the Effects Test has been recognised and endorsed by the ACCC Chairman Rod Sims, who has stated that inclusion of such a test in the Competition and Consumer Act would assist the ACCC in its objective to maintain strong competition by curbing abuse of market power and discovering the true impact for consumers, farmers and others of strategies undertaken by those with significant market power.

ADF notes that:

- In any policy and law, a key principle is consistency. The proposed amendment provides an opportunity to make section 46 consistent with section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) which apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition and section 50 (mergers) which applies if the effect or likely effect of the conduct is to substantially lessen competition.
- An Effects Test is in line with competition policy around the world – the vast majority of developed nations have an Effects Test. For example, almost all OECD nations, except for Australia and New Zealand, have an Effects Test or an equivalent policy or legislative instrument.
- The proposed change to section 46 would move Australian law closer to international best practice, which prohibits unilateral conduct by a dominant firm that has a harmful effect on competition.
- As mentioned above ADF notes the support of competition experts for the proposed changes to Section 46, including the Harper Panel, the ACCC, former Chairmen of the ACCC and small businesses and suppliers across Australia.
- It is also worth noting that the bill includes the key term '*substantially lessening competition*', this serves to provide the ACCC with flexibility in their assessment of any issues.

Predatory Pricing

ADF notes the proposed changes relating to Predatory Pricing, namely that:

- The current provisions expressly prohibiting predatory pricing and other forms of conduct are replaced by a general provision focusing on damage to the competitive process.

ADF has long advocated for an investigation of Coles for a potential breach of section 46, of the Competition and Consumer Act 2010 in relation to predatory pricing.

ADF has concerns that the removal of this express provision may lead to the potential for difficulty in enforcing or proving predatory pricing, leading to little change in outcomes of supermarket actions.

ADF requests that the removal of this express provision be closely monitored and reviewed no later than three years after the passage of the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

If it proves that an express provision is needed to provide clarity and certainty, then ADF urges it should be reinstated.

Conclusion

As mentioned above, ADF congratulates the federal government on working to provide more transparency and fairness in the market through legislation such as the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

It should also be noted that ADF also appreciates the work of the federal government in extending unfair contract protections to small businesses such as dairy farms from 12 November 2016 through the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.

The unfair contracts legislation has assisted in providing the impetus for dairy farmers and dairy processors to work together to develop a voluntary Code of Conduct for Contractual Arrangements.

The Code, along with other government initiatives such as the Small Business and Family Enterprise Ombudsman, will play a significant part in helping dairy farmers level the playing field, help ensure an unfair share of the risk in the value chain is not taken by farmers, provide further transparency and balance the significant market power of the major retailers.

The dairy industry is a resilient industry with a long, sustainable future ahead. We are an industry that is mindful that our sustainability depends greatly on working together on solutions and cooperation across the value chain and the continued support of the Australian public, which we are always thankful for.

If you require any further information or wish to discuss these matters, please do not hesitate to contact me on (03) 8621 4200.

Yours sincerely,

John McQueen
Interim ADF Chief Executive Officer