

Government Senators' Additional Comments

1.1 It is clear that the price reductions in private label milk announced by Coles on 26 January 2011, and followed by other supermarkets, have caused significant concern and anxiety within elements of the dairy industry in Australia—particularly in the regions which are more focused on drinking milk production, such as Queensland, New South Wales and Western Australia.

1.2 Government Senators on the committee broadly support the approach and a number of the recommendations of the majority report. We believe recommendations 1–3 of the report are sensible initiatives for both industry and government to adopt in a complex, deregulated industry. We also support recommendation 4 of the majority report which encourages the Australian Competition and Consumer Commission (ACCC) to publicly release greater information about its investigations and current enforcement activities.

1.3 Government Senators also agree with the majority report's observation that the benefits gained by consumers due to the lower price of a staple good have not received enough attention, particularly as in recent years concern about food prices has been focused on them being too high, rather than too low. As the Parliamentary Secretary to the Treasurer, the Hon. David Bradbury MP, stated in April this year:

In my living memory, the debate around competition in the supermarket sector has always been characterised by concerns about prices being too high. It is, in my view, ironic that we are now having a public debate about prices being too low.

While I understand that people are concerned about significant market concentration in the sector, it should be noted that recent developments in the supermarket sector demonstrate that aggressive competition can occur and is occurring.¹

1.4 In this context, however, Government Senators are concerned with recommendations 5 and 6 of the majority report. In 2008, the ACCC conducted a broad-ranging public inquiry into the competitiveness of retail prices for standard groceries. This included an examination of the drinking milk industry. The report found that the grocery sector was 'workably competitive', although one of the findings was that the level of price competition was restricted by the limited incentives for Coles and Woolworths to compete.² The more frenzied price competition that has been occurring recently between the two major supermarket chains, such as the price

1 The Hon. David Bradbury MP, Parliamentary Secretary to the Treasurer, 'The critical role of competition policy', *Address to Regulatory Reform Conference*, 12 April 2011.

2 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. xiv.

discounts for private label milk, appears to be an improvement on the situation in 2008 in this regard, and of clear benefit to consumers.

1.5 With specific reference to the drinking milk industry, ultimately Coles cannot put the sustainability of the supply chain at risk. With strong consumer preferences for fresh drinking milk throughout Australia, Coles has to ensure that it is able to be supplied with that product. In other words, those down the supply chain also have power in the sense that retailers depend on the supply of fresh drinking milk to satisfy consumer demands. As noted by the Chairman of the ACCC:

... [it] works both ways: the processor has the need for the milk, just as the people who produce the milk have the need to sell it.³

1.6 Additionally, dairy farmers do not appear worse off from the growth in private label milk that has occurred over time. While there may be some short-term uncertainty due to changes in private label milk contractual arrangements between the major supermarkets and the processors, this appears to be a separate issue. The ACCC's 2008 report concluded that the lower price of private label milk over time has appeared to shift margin away from processors (with benefits for both the major supermarkets and consumers), while not resulting in a reduced farm gate price.⁴

1.7 The processors have provided evidence to the committee about the slim or negative margin they receive on private label milk. In a free market, it is up to the processors—who after all supply both the private label and branded products to the supermarkets—to decide on what terms they are willing to continue to do this. Provided they do not contravene competition laws in doing so, or are not being subjected to clear anti-competitive conduct themselves, it is not apparent why their concerns should be anything else than a matter for them to address in the marketplace.

Competition law

1.8 As noted earlier, Government Senators are particularly concerned about recommendation 5 of the majority report regarding a review the *Competition and Consumer Act 2010* (CCA), formerly the *Trade Practices Act 1974*. The object of Australia's competition law is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.⁵ The ACCC, the independent statutory authority charged with enforcing the CCA, undertook an investigation of Coles' actions and concluded that there 'is no evidence'

3 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 32.

4 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 384.

5 *Competition and Consumer Act 2010*, s. 2.

that Coles has acted in breach of the CCA.⁶ The ACCC issued a statement outlining its findings:

"It is important to note that anti-competitive purpose is the key factor here. Price cutting, or underselling competitors, does not necessarily constitute predatory pricing. Businesses often legitimately reduce their prices, and this is good for consumers and for competition in markets", Mr Samuel said.

ACCC enquiries have revealed evidence that Coles' purpose in reducing the price of its house brand milk was to increase its market share by taking sales from its supermarket competitors including Woolworths. This is consistent with what the ACCC would expect to find in a competitive market.

After Coles price reductions, Woolworths and other supermarket retailers have also reduced prices for house brand milk.

The ACCC's enquiries show that there is a significant variation between respective costs of supply and operating margins among supermarket operators.

"As to the relationship between dairy farmers and milk processors, it is the case that some processors pay some farmers a lower farm gate price for milk sold as supermarket house brand milk. However on the evidence we've gathered over the last 6 months it seems most milk processors pay the same farm gate price to dairy farmers irrespective of whether it is intended to be sold as branded or house brand milk" ... Mr Samuel said.⁷

1.9 Government Senators are concerned that this proposed review is based on arguments from stakeholders who seem to support undoing certain competition law reforms. Further, undertaking a review of a law which applies economy-wide based on perceived issues in one sector (dairy) is far from an ideal approach. Indeed, an attempt to amend Australia's competition laws based on alleged anti-competitive conduct in one industry could significantly harm the Australian economy.

1.10 It is also not clear how the amendments to the competition law that were suggested during this inquiry could meaningfully assist participants in the dairy industry. Key witnesses put compelling arguments against reinstating an anti-competitive price discrimination provision in the CCA. Other suggestions were also countered. At the 6 October 2011 hearing the ACCC chairman, Mr Rod Sims, remarked with respect to the Coles discounts that, even under a section 46 test which allowed for the anti-competitive 'effects' of an action to be used to prove a misuse of market power (generally considered to be a lower threshold than the current test which

6 Australian Competition and Consumer Commission, 'ACCC: Coles discounting of house brand milk is not predatory pricing', *Media release*, NR 129/11, 22 July 2011.

7 Australian Competition and Consumer Commission, 'ACCC: Coles discounting of house brand milk is not predatory pricing', *Media release*, NR 129/11, 22 July 2011.

requires one of three prescribed anti-competitive *purposes* to be proven), he was still 'not sure it would have got up'.⁸

1.11 As acknowledged by the majority report, in 2007 and 2008 a number of amendments were made to section 46 of the CCA which are yet to be tested in the courts. Mr Sims has indicated that he is 'very keen' to find cases that would test these amendments.⁹ Government Senators are of the view that it would be premature to review the competition provisions of the CCA and consider amendments to them until they are tested, or it is otherwise clear that they are not functioning as intended.

Collective bargaining

1.12 The majority report recommended that the Government review the effectiveness of collective bargaining laws and arrangements for agricultural industries.

1.13 There does not appear to be clear evidence which leads to this recommendation. Government Senators note the evidence from officials of the Department of Agriculture, Fisheries and Forestry and the ACCC on collective bargaining in the dairy industry—while recognising the current provisions have been used, they acknowledged that more use of the provisions could be made.¹⁰

1.14 Government Senators also note the following comments from the ACCC:

It is a bit hard to get a terribly accurate read on just how well dairy farmers overall are informed about collective bargaining and think of it as a viable option for them; there is conflicting evidence, if you like. But certainly from our point of view ... we see that as one of the answers to the situation that dairy farmers perhaps find themselves in dealing with processors, particularly when they have only got one to deal with.¹¹

1.15 Rather than indicating that the collective bargaining laws need review, it may be the case that the dairy industry needs to become more aware on how to utilise the current law to its full potential.

8 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 35.

9 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 39.

10 Mr Simon Murnane, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 10 March 2011, p. 24; Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, pp. 39–40.

11 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 32.

Recommendation 1

1.16 Government Senators recommend that the government takes steps to promote awareness of options for agricultural industries to develop more effective collective bargaining arrangements.

Other issues

1.17 It is apparent that much of the evidence put forward in the inquiry was influenced by so-called 'processor arguments', which contend that because processors offset low returns or losses from private label milk with higher returns from their branded products, shifts in sales from branded to private label would affect the profitability of the processors and, therefore, ultimately the incomes farmers would receive (as well as other outcomes, such as lower levels of product innovation).

1.18 As acknowledged in the majority report, it should not be a matter for public policy to protect brands that consumers no longer value. Processors are the best placed to adapt to changing market circumstances and in any event will still need a supply of milk from farmers. Farmers' incomes are dictated by separate market forces to those that determine retail prices; in most areas (although not all) they are largely influenced by international prices. In the dairying areas where the costs of production are higher, such as in Queensland, a premium is paid above international prices to reflect the cost of freighting milk from other states that would otherwise need to be paid if milk could not be sourced from Queensland.

1.19 While developments in the dairy industry and the grocery sector more generally need to be closely monitored, it is not clear that the market has failed and government action is warranted, particularly when there are such clear benefits to a large number of consumers.

Senator Mark Bishop
Deputy Chair

Senator Doug Cameron
Senator for New South Wales

