

## Chapter 2

### Selling practices at saleyards

2.1 This chapter focuses on selling practices at livestock saleyards. It considers the events at Barnawartha which, for many producers, served as a significant example of the potential for the misuse of market power in the red meat industry. The chapter also examines the perception that there is a culture of collusion at saleyards, and what may amount to concerted practices.

#### Issues arising from events at Barnawartha

2.2 A number of submitters drew on the events at Barnawartha to highlight serious concerns with the selling system at saleyards. They suggested that the processors 'boycotted' the prime cattle sale in an effort to change the selling practice from pre-sale weighing to post-sale weighing.<sup>1</sup> The Alpine Shire, where the Barnawartha saleyards is located, argued that the 'boycott' demonstrated the power of buyers 'potentially colluding to gain a direct benefit'.<sup>2</sup> For producers, the events were seen as 'a timely reminder that the buyers and the processors have excessive market power in our industry'.<sup>3</sup>

2.3 The Barnawartha saleyards, trading as the Northern Victoria Livestock Exchange (NVLX) are located on the southern outskirts of Wodonga, Victoria.

2.4 According to evidence before the committee, the events unfolded as follows:

- On 30 January 2015, Regional Infrastructure Pty Ltd (RIPL), the manager and operator of the Northern Victoria Livestock Exchange (NVLX) Wodonga facility, sent correspondence to NVLX buyers stating that it would operate on a pre-weigh basis.<sup>4</sup>
- On 12 February 2015, Teys Australia informed Regional Infrastructure Pty Ltd (RIPL) that it would not attend NVLX sales if operations were conducted on a pre-weigh basis.<sup>5</sup>

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1 Mr Norman Sharp, *Submission 27* and Ms Loretta Carroll, *Submission 63*, p. 1.

2 Alpine Shire, *Submission 33*.

3 Mrs Maureen Cottam, *Submission 25*, p. 1. See also Mr David and Ms Anne Wortmann, *Submission 76*.

4 Regional Infrastructure Pty Limited, Answer to question on notice from 17 November 2015 hearing, received 15 December 2015.

5 According to RIPL, Teys Australia had notified the Australian Livestock and Property Agents Association (ALPA) in June 2014 that Teys would not have a buyer attend the new NVLX site if it were to conduct sales on a pre-weigh basis. ALPA then notified Regional Infrastructure Pty Ltd (RIPL) and a number of livestock selling agents of this communication. Regional Infrastructure Pty Limited, Answer to question on notice from 17 November 2015 hearing, received 15 December 2015.

- On 17 February 2015, up to ten commission buyers (nominally accounting for 45 per cent of normal purchases on a sale day) failed to attend the sale, without warning.<sup>6</sup> The same day, the agents agreed to a post-weigh system of selling without 'consultation with producers who pay all the sale yard fees'.<sup>7</sup>
- On 2 March 2015, a public meeting was held at the Barnawartha Public Hall. The meeting was attended by over 250 farmers and ultimately led to demands for a parliamentary inquiry.<sup>8</sup>

2.5 One of the country's largest processors, JBS Australia, advised the committee that it did not participate in any alleged boycott at Barnawartha, and had no communications with other processors in regard to its attendance at the saleyard.<sup>9</sup> According to RIPL, JBS had informed NVLX management on 17 February 2015 that their Dinmore plant had broken down and that it would not be attending the sale that day.<sup>10</sup>

2.6 Mr Bradley Teys from Teys Australia explained the timeline of his company's decision not to attend the sale:

The decision we heard was that it was going to be post sale and then when the sale started a week or two before we heard it was going to be presale weighing, so that is when the decision was made.<sup>11</sup>

2.7 When asked about the Barnawartha matter, Mr David Larkin from the Australian Meat Industry Council (AMIC), the peak industry council representing the meat processing sector, informed the committee that:

It is our understanding that a number of players, over several months and a couple of years, indicated to the livestock sale yard operator that if they changed that method of selling, they would not commercially participate. So I do not believe that there was any collusion or any decision made on that particular day other than the fact that a sale yard operator potentially tried to force a change of which commercial operators had indicated, in public and in writing, their view on that change.<sup>12</sup>

2.8 However, along with the suggestion of an organised boycott, the events at Barnawartha brought to the fore broader concerns regarding market competition and

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6 Victorian Farmers Federation – Wangaratta Branch, *Submission 45*, p. 4.

7 Ms Loretta Carroll, *Submission 63*, p. 1. See also, Victorian Farmers Federation – Ovens Valley Branch, *Submission 62*, p. 1.

8 Victorian Farmers Federation – Wangaratta Branch, *Submission 45*, Appendix 1 and 2 provide a summary of the ideas, comments and a summary transcript of the meeting which was moderated by the VFF and NSW Farmers.

9 JBS Australia, *Submission 50*, p. 18.

10 Regional Infrastructure Pty Limited, Answer to question on notice from 17 November 2015 hearing, received 15 December 2015.

11 Mr Bradley Teys, Teys Australia, *Committee Hansard*, 27 August 2015, p. 3.

12 Mr David Larkin, Australian Meat Industry Council, *Committee Hansard*, 17 November 2015, p. 2.

the reporting of livestock sales. With consolidation and rationalisation of the processing sector, fewer buyers are attending cattle markets. Under such circumstances, and particularly in relation to smaller saleyards, the non-attendance of processors at markets can have a significant impact on the market price.<sup>13</sup> This factor was explained by the Australian Livestock and Property Agents Association (ALPAA):

We believe that the misuse of market power could be as simple as some buyers (not only processors) attending some saleyards and not attending others, leaving it to their competitors to operate without their competition. This may well be seen as collusive behaviour; however it could simply be coincidental and have happened without either buyer talking to another buyer about their attendance or non-attendance.<sup>14</sup>

2.9 However, the statements by processors that there was no intentionally organised boycott were questioned by many producers and producer groups. The NSW Farmers' Association noted its scepticism and pointed to a number of factors: including the number of processors who did not attend the sale, the timing of the incident and its connection with the takeover of Primo.<sup>15</sup>

2.10 In terms of the immediate impact of the Barnawartha events, producers who sent their livestock to the saleyard on 17 February 2015 provided evidence to the committee. Their contention was that the change from what was 'accepted practice' regarding weighing saw \$50 to \$100 taken from beef producers on every grown beast sold, with a price drop of between 20 to 30 cents per kilogram for cattle on the day.<sup>16</sup>

2.11 Given the significant transportation costs involved in trucking livestock to the saleyard, coupled with the adverse impact of any additional transport and handling on their stock, some producers were unable to withdraw cattle from the sale on that day. They had no alternative but to accept a price below previous markets. One affected producer, Mr Mark Wortmann expressed the view that the situation highlighted the fact that:

...the farmer has very little influence on the system that he is forced to sell his cattle under and is left at the mercy of the buyers and the operators of the selling facility.<sup>17</sup>

2.12 Mr Laurie Horne was offended by the behaviour of buyers at Barnawartha:

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13 Ms Loretta Carroll, *Submission 63*, p. 2 and Mr Derek Schoen, NSW Farmers' Association, *Committee Hansard*, 2 September 2015, p. 3.

14 Australian Livestock and Property Agents Association, *Submission 79*, p. 4.

15 Mr Derek Schoen, New South Wales Farmers' Association, *Committee Hansard*, 2 September 2015, p. 4.

16 Merebene Pastoral Co. Pty. Ltd, *Submission 6*; Mr Norman Sharp, *Submission 27* and Victorian Farmers Federation – Ovens Valley Branch, *Submission 62*, p. 1.

17 Mr Mark Wortmann, *Submission 14*.

I could not believe that some processors could treat producers with so little respect...Can you imagine a year's product sold at a dramatic discount because of the buyers' wish to have their own way?<sup>18</sup>

2.13 The Barnawartha matter highlighted the intricate three-way relationship between producers, stock agents and buyers and the 'wider complicated web that is the ownership, management and operation of saleyards'.<sup>19</sup> Mr Vin O'Neill argued that, whereas agents serve as the intermediary between the buyer and seller, in the Barnawartha case, they opted to side with the buyers to 'protect their financial position as agents of supply to the large retail operators'.<sup>20</sup>

### **Livestock agents and buyers**

2.14 The Barnawartha matter raised serious concerns regarding the selling systems at saleyards. This section considers the selling system with particular focus on the role of commission buyers.

2.15 The 'middlemen' in most cattle transactions are either:

- stock agents such as TopX, Grant Daniel Long (GDL), Landmark, Elders, Brodie and Co. When a sale is transacted, they receive commission from the seller, based on a percentage of the sale prices; or
- commission buyers who buy on a commission or per head basis, remunerated by the buyer; or
- meatworks buyers who buy cattle on property, over the phone, via email or out of the saleyard. Their remuneration is paid for by the meatworks.<sup>21</sup>

2.16 Livestock agents typically sell livestock on behalf of the producer/vendor on a commission basis. Livestock agents are licenced under state government regulations with requirements varying between jurisdictions.<sup>22</sup>

2.17 While buyers are usually engaged directly by a meat processor or retailer on a salaried basis or engaged as a commission buyer, according to the department, there is no public information describing the operations of livestock buyers.<sup>23</sup> However, according to Mr Wayne Osborne, Chief Executive Officer of NVLX, buyers are included in state and national codes of practice for saleyards.<sup>24</sup>

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18 Mr Laurie Horne, private capacity, *Committee Hansard*, 17 November 2015, p. 40.

19 Mrs Suzanne Ryder, *Submission 43*, p. [1].

20 Mr Vin O'Neill, *Submission 32*.

21 Mr Rob Atkinson, *Submission 22*, p. [1].

22 Department of Agriculture, *Submission 74*, p. 13.

23 Department of Agriculture, *Submission 74*, p. 13.

24 Mr Wayne Osborne, Victorian Livestock Exchange Pty Ltd, *Committee Hansard*, 2 September 2015, p. 17.

2.18 Some producers argued that while livestock agents work for the vendor – the seller – in reality, they may capitulate to pressure from buyers to change the rules in a selling system. According to Mr John Buxton, this was the case at Barnawartha and other selling systems in Victoria where the 'code of practice was overturned in the face of pressure from meat buyers'.<sup>25</sup>

2.19 Evidence to the committee also went to instances whereby livestock agents have operated on both sides of the transaction by representing both vendor and buyer.<sup>26</sup> The committee was also informed of practices where individual buyers may be buying for more than one meat company, sometimes multiple companies and at the same sale.<sup>27</sup> A number of submitters noted that, where such practices arise, the auction system may be compromised and the true value of stock is not realised.<sup>28</sup>

### ***Commission buyers***

2.20 Mr Andrew Madigan, CEO of ALPAA, explained how commission buyers operate:

Some commissioned buyers will turn up with only one order. Some commissioned buyers will turn up with four orders. Some commissioned buyers will turn up with a number of orders that are totally different, so they do not create a lack of competition. For example, a commissioned buyer might have an order to buy cows for a processor and he might also have an order to buy feeder steers, so the two are not opposing one another. But it is when a commissioned buyer turns up with three orders to buy feeder steers that there is a problem.<sup>29</sup>

2.21 However, evidence to the committee indicated that it was not uncommon for commission buyers to buy for multiple clients including up to ten different processor identities, which is likely to have a repressive effect on prices for reasons including limited or even no competition.<sup>30</sup> As a case in point, Mr Stuart Morant suggested that in Wodonga in late 2014, three commission buyers were purchasing for 14 different companies, 'resulting in prices being driven down'.<sup>31</sup> In this regard, the Victorian Farmers Federation – Wangaratta Branch observed that it was not aware of any other auction system whereby one bidder represented more than one client for the same commodity.<sup>32</sup>

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25 Mr John Buxton, *Submission 5*, p. [2].

26 Mr John Buxton, *Submission 5*, p. [2].

27 Mr Mark Wortmann, *Submission 14*; Mr Frank Griffiths, *Submission 21*;

28 Mr Mark Wortmann, *Submission 14* and Mr Shane and Mrs Maree Kennedy, *Submission 20*

29 Mr Andrew Madigan, Australian Livestock and Property Agents Association, *Committee Hansard*, 27 August 2015, p. 38.

30 Merebene Pastoral Co. Pty. Ltd, *Submission 6*; Mr Murray and Mrs Debbie Jones, *Submission 17*; Mr Norman Sharp, *Submission 27*; Victorian Farmers Federation – Wangaratta Branch, *Submission 45*, p. 6 and Mr Julian Carroll, *Submission 48*, p. 4.

31 Mr Stuart Morant, *Submission 28*.

32 Victorian Farmers Federation – Wangaratta Branch, *Submission 45*, p. 6.

2.22 Mr Derek Schoen, President of the NSW Farmers' Association explained the issue with commission buyers:

If a commission buyer takes over the role of all the processor buyers then it takes out that competition because, of course, they have a duty to the person that is hiring them to get the stock at the cheapest possible price and they will do whatever they can to achieve that.<sup>33</sup>

2.23 The committee was also informed that stock agents do nothing to report or stop buyer collusion at the fat market because they fear the buyers will boycott their run of cattle. Therefore, stock agents may comply with the commission buyers wishes as to how the cattle are booked out and to how many different processors.<sup>34</sup>

2.24 Submitters to the inquiry suggested that in some instances, buyers will decide between themselves prior to the sale as to who will bid for what pen in order that they don't compete with each other.<sup>35</sup> As a case in point, Mr David Evans indicated that during periods of oversupply, lots of cattle may attract only one bid with different commission buyers purchasing in turn. He suggested that this practice created a clear impression that they were taking it in turns to purchase and leaving the vendor with a choice of 'take it or leave it'.<sup>36</sup>

2.25 In light of these concerns, some submitters suggested that commission buyers should buy for one customer only and let other buyers participate in sales. However, others made the point that limiting buyers to one customer might exclude smaller buyers from the market such as local butchers or small-scale farmers and others who don't have the time to attend a sale to purchase a few head of cattle. Mr David Evans suggested that even excluding a single commission buyer from acting for more than one major client processor might operate to the disadvantage of competition.<sup>37</sup>

2.26 However, others argued for the need to place a limitation on the number of processors each buyer is permitted to represent.<sup>38</sup> Mr James Neary suggested that in order to ensure more competition at auction, the larger buyers/processors who buy 20 or more animals should have only one buyer.<sup>39</sup>

2.27 The NSW Farmers' Association supported a nominal limit of five per cent of stock that a single buyer may be able to purchase on behalf of a number of players. Such a limit would be set within a mandatory code of conduct which could be

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33 Mr Derek Schoen, NSW Farmers' Association, *Committee Hansard*, 2 September 2015, p. 3.

34 Mr Stuart Morant, *Submission 28*.

35 Mr David Blum, *Submission 26*.

36 Mr David Evans, *Submission 15*, p. [2].

37 Mr David Evans, *Submission 15*, p. [2].

38 Merebene Pastoral Co. Pty. Ltd, *Submission 6*; Mr Rex and Mrs Trish Forrest, *Submission 44*, p. 2 and Mr David and Ms Anne Wortmann, *Submission 76*.

39 Mr James Neary, *Submission 34*.

negotiated between all respective stakeholders.<sup>40</sup> This recommendation was supported by others, including the Indigo Shire Council.<sup>41</sup>

### **Culture of collusion**

2.28 The committee was informed of a number of buyer practices utilised to influence the purchasing price and limit market competitiveness. It became evident to the committee that there is a widespread belief amongst producers that collusive practices occur routinely and have the effect of suppressing price.<sup>42</sup> In fact, the information provided by submitters and witnesses built up a picture of practices and conduct specifically directed at influencing market price.<sup>43</sup> The evidence of Mr Vin O'Neill was typical in this regard:

Within the auction system I'm sure there is some level of buyer collusion taking place, though it is more likely to be in a falling market than in a rising market. The problem is, it's very difficult to prove and from what I'm hearing from within the industry, it's mostly the larger company's buyers working together that are accused of this type of collusion. Within an open bidding system such as in a saleyard situation there is always a danger of buyer collusion taking place within it, though it's fair to say, any auction in any industry is exposed to the dangers of buyer collusion.<sup>44</sup>

2.29 The Australian Competition and Consumer Commission (ACCC) noted that in order to prove collusion, what would have to be demonstrated is that a particular contract between a buyer and an agent led to a substantial lessening of competition as Mr Marcus Bezzi, ACCC Executive General Manager of Competition Enforcement explained:

We would need to be able to prove that there was a substantial lessening of competition in the market – not just in a particular sale, but in the market.<sup>45</sup>

2.30 Notwithstanding the fact that collusive practices are difficult to prove, it was made clear to the committee that producers were reluctant to provide evidence to the inquiry for fear of compromising their relationship with processors and thereby jeopardising their livelihoods.<sup>46</sup> This concern was highlighted in the evidence of Councillor Bernard Gaffney, Mayor of the Indigo Shire Council. In detailing his

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40 Mr John Dunn, NSW Farmers' Association, *Committee Hansard*, 2 September 2015, p. 5.

41 Councillor Bernard Gaffney, Indigo Shire Council, *Committee Hansard*, 2 September 2015, p. 12.

42 Victorian Farmers Federation – Wangaratta Branch, *Submission 45*, p. 7.

43 The committee's experience corroborates with the ACCC's investigation, which was unsuccessful in obtaining evidence of collusion.

44 Mr Vin O'Neill, *Submission 32*, p. 1.

45 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 10.

46 As a case in point, Livestock SA acknowledged the evidence of Mr Tom Hunt who detailed a complaint about fat scores in his submission (*Submission 3*) despite the 'threat to his own business'. Livestock SA, *Submission 81*.

experience when in charge of the Victorian Police Criminal Investigation Branch (CIB) livestock squad in the late 1980s, Mayor Gaffney stated that:

I went to sales right across Victoria. It was obvious that there was collusion and farmers, beef producers, would complain about collusion. But, when it came to making a statement, they were very concerned about their livelihood and that they would be blackballed by the buyers.<sup>47</sup>

2.31 These concerns were corroborated in producer feedback to the Cattle Council of Australia which indicated that, while uncompetitive practices are still occurring, producers are reluctant to report them for fear of commercial retribution. This factor alone demonstrates the significant market power yielded post the farm-gate.<sup>48</sup>

2.32 The Livestock Saleyards Association of Victoria (LSAV) informed the committee that its members had occasionally reported issues related to buyer competition at their sales. It noted that these issues arose particularly in relation to smaller, less-frequented selling centres which are generally attended by fewer buyers. LSAV continued:

These issues include suspicion of collusion, the use of contract buyers purchasing on behalf of multiple end users and the number of buyers who actually attend each sale. It is difficult to provide any concrete evidence that collusion does occur but suffice to say that interest is raised when small numbers of buyers attend sales.<sup>49</sup>

2.33 Mr Rob Atkinson made the point that if collusion exists, it is because:

- some buyers mix in the same circles and know each other well – creating an impression that buyer collusion could be a factor;
- some agents or buyers will operate on behalf of multiple clients or processors which decreases competition; and furthermore
- as the number of buyers decreases, it will be easier to manipulate the system.<sup>50</sup>

2.34 The NSW Farmers' Association explained that saleyard integrity had been called into question over a variety of practices in relation to price at saleyards. It suggested that there were common examples of poor practice which undermine the integrity of the sale process.<sup>51</sup>

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47 Councillor Bernard Gaffney, Indigo Shire Council, *Committee Hansard*, 2 September 2015, p. 13.

48 Cattle Council of Australia, *Submission 83*, p. 3.

49 Livestock Saleyards Association of Victoria, *Submission 30*.

50 Mr Rob Atkinson, *Submission 22*, p. [2].

51 NSW Farmers' Association, *Submission 92*, p. 13.

2.35 The point was made to the committee that while proving collusion is one thing, the fact remains that it is open to occur.<sup>52</sup> Witnesses repeatedly emphasised the underlying problem as a lack of transparency throughout the supply chain and market tension at the saleyards. Without such transparency, the spectre of collusion, for which there is anecdotal evidence spanning a 25 year period, will remain.<sup>53</sup>

### **ACCC investigation into Barnawartha events**

2.36 In December 2015, the ACCC released the findings of its inquiry into the allegations of boycotting at Barnawartha. In a media release, the ACCC stated that:

The investigation found that there was uncertainty before the sale about whether the Barnawartha saleyard would use a pre or post weigh selling method. It was also clear that certain processors strongly opposed the pre-weigh method.<sup>54</sup>

2.37 The evidence obtained by the ACCC did not demonstrate that the processors had reached an agreement not to attend the sale. ACCC Chairman, Mr Rod Sims noted that:

Although it was clear that processors communicated about the sale, the evidence did not demonstrate that any of the processors entered an arrangement or reached an understanding not to attend the sale, which is required to establish a breach of the Act.<sup>55</sup>

2.38 However, the ACCC did identify some 'competition concerns in its investigation'.<sup>56</sup> It was confirmed that representatives of some of the competing nine processors communicated with each other on a regular basis. On this matter, Mr Sims made the following observation:

There is a fine line between social discussions about industry issues on the one hand, and exchanging information in circumstances that may constitute an understanding between competitors on the other.<sup>57</sup>

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52 Mr Gregory Mirabella, Victorian Farmers Federation – Wangaratta Branch, *Committee Hansard*, 2 September 2015, p. 23.

53 Mr Derek Schoen, NSW Farmers' Association, *Committee Hansard*, 2 September 2015, p. 3 and Councillor Bernard Gaffney, Indigo Shire Council, *Committee Hansard*, 2 September 2015, p. 13.

54 Australian Competition and Consumer Commission, 'Alleged Barnawartha boycott concerns investigated', *Media release*, 9 December 2015, [www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated](http://www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated) (accessed 9 December 2015).

55 Australian Competition and Consumer Commission, 'Alleged Barnawartha boycott concerns investigated', *Media release*, 9 December 2015. [www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated](http://www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated) (accessed 9 December 2015).

56 Australian Competition and Consumer Commission, 'Alleged Barnawartha boycott concerns investigated', *Media release*, 9 December 2015, [www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated](http://www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated) (accessed 9 December 2015).

57 Australian Competition and Consumer Commission, 'Alleged Barnawartha boycott concerns investigated', *Media release*, 9 December 2015. [www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated](http://www.accc.gov.au/media-release/alleged-barnawartha-boycott-concerns-investigated) (accessed 9 December 2015).

2.39 At the committee's hearing on 5 April 2016, Ms Sims noted that the ACCC did not have adequate proof of collusion under the standard required by the *Competition and Consumer Act 2010* Act (CCA Act). That is, the evidence obtained did not establish that there was some 'meeting of the minds'.<sup>58</sup>

### **Defining collusion under Australian law**

2.40 The CCA Act prohibits collusive behaviour, defining such conduct as both civil and criminal offences. The ACCC holds the statutory authority to investigate and penalise alleged conduct in breach of the CCA Act. Section 44ZZRA provides a simplified outline of collusion or 'cartel conduct'. The section states that:

A cartel provision is a provision relating to:

- (a) price-fixing; or
- (b) restricting outputs in the production and supply chain; or
- (c) allocating customers, suppliers or territories; or
- (d) bid-rigging;

by parties that are, or would otherwise be, in competition with each other.

2.41 The ACCC advised the committee that there are two types of collusive activity. 'Hard-core cartel activity' involves collusion such as price-fixing, agreements to limit supply and bid-rigging. These forms of collusion are criminal offences and can result in up to 10 years imprisonment.

2.42 In contrast, 'soft cartel activity' involves a wide range and spectrum of collusive conduct, such as concerted practices in which parties act consciously in an identical or similar way.<sup>59</sup> Soft cartel activity is not necessarily illegal, depending on the type of conduct involved. The ACCC noted that while acts of soft collusion, such as concerted practices, do not require reciprocity between colluding parties, hard-core cartel activity or collusion does require such an understanding.<sup>60</sup>

2.43 Section 46 of the CCA Act is also relevant in considering collusion under the law. It prohibits the misuse of market power by corporations for the purposes of eliminating or substantially damaging a competitor, preventing others entering the market, or deterring or preventing others from engaging in competitive conduct.<sup>61</sup>

2.44 Section 44ZZRF of the CCA Act makes it a criminal offence for a corporation to make a contract, agreement, or come to an understanding, which contains a cartel

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58 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 4.

59 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, pp 22–23.

60 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, pp 22–23.

61 *Competition and Consumer Act 2010*, section 46.

provision. It is also an indictable offence.<sup>62</sup> Section 44ZZRJ applies a civil penalty to the same conduct. Penalties for criminal offences or civil breaches for corporations will be the greater of:

- (a) \$10,000,000;
- (b) Three times the total value of the benefits obtained by one or more persons which are reasonably attributable to the commission of the offence or breach; and
- (c) If a court cannot determine the value of the benefits stated above – 10% of the corporation's annual turnover during the 12 month period ending at the end of the month when the corporation committed, or began committing, the offence.<sup>63</sup>

2.45 Individuals found to be guilty of cartel conduct could face potential criminal or civil penalties such as up to 10 years of imprisonment, fines of up to \$360,000 per criminal charge, and a pecuniary penalty of up to \$500,000 per civil contravention.

2.46 The ACCC informed the committee that for a contravention of the CCA Act to occur, an agreement between buyers, perhaps involving the agent, to essentially rig the bidding at an auction must be proven.<sup>64</sup>

#### ***Government response to Harper Review***

2.47 In late 2013, the Australian Government announced a review of competition policy. The Competition Policy Review (or Harper Review) final report which was released in March 2015, contained 56 recommendations for reform in competition policy.

2.48 In November 2015, the Australian Government released its response to the Harper Review, committing to reforming and updating the competition provisions in the CCA Act, including the introduction of a prohibition on concerted practices and simplifying cartel laws.<sup>65</sup>

2.49 In response to Harper Review Recommendation 30 concerning the misuse of market power, the Australian Government stated its intention to consult on options to reform the provision. The Harper Review had recommended a reframing of section 46 to simplify the provision by introducing an 'effects test'.<sup>66</sup>

2.50 Then on 16 March 2016, the Australian Government announced that it would amend section 46 of the CCA Act in line with the Harper Review recommendation to

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62 *Competition and Consumer Act 2010*, section 44ZZRF(4).

63 *Competition and Consumer Act 2010*, section 44ZZRF(3).

64 Ms Gabrielle Ford, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, p. 22.

65 Australian Government the Treasury, *Australian Government response to the Competition Policy Review*, November 2015, p. 2.

66 Australian Government the Treasury, *Australian Government response to the Competition Policy Review*, November 2015, p. 25.

introduce changes which will penalise businesses with market power if the 'effect' or 'likely effect' of their actions is, or would be, to substantially lessen competition. The Prime Minister, the Hon. Malcolm Turnbull MP, explained that under a new section 46(1):

[A] corporation that has substantial degree of power in a market shall not engage in conduct if the conduct has the purpose or would have or be likely to have the effect, the effects test, of substantially lessening competition in that or any other market.<sup>67</sup>

2.51 Mr Bezzi noted the ACCC's support for the Harper Review recommendation which the government will now implement:

We certainly strongly support the view of the Harper committee to get rid of the take advantage element of section 46 and bring the provision into line with sections 45, 47 and 50, which focus on conduct for the purpose or with the effect of substantially lessening competition. We think that that would be a significant improvement in the law.<sup>68</sup>

2.52 In terms of impact, Mr Bezzi noted that it would require 'people who have a substantial degree of market power to think a little bit more carefully about whether what they are doing could have an anti-competitive effect or might be for an anti-competitive purpose'. He noted in this regard that they might be deterred.<sup>69</sup>

### **Concerted practices**

2.53 While the ACCC did not obtain evidence of collusion as defined under the CCA Act in relation to the Barnawartha events, Mr Sims highlighted the ACCC's concerns regarding the behaviour of processors. To this end, the ACCC did find that there were 'signals sent to the market about attitudes to pre-sale weighing'. According to Mr Bezzi:

Those signals probably gave comfort to some of the smaller processors that the bigger processors were not going to turn up.<sup>70</sup>

2.54 The ACCC informed the committee that such behaviour was much closer to that of a 'concerted practice' rather than collusive behaviour as defined by the CCA Act. Mr Bezzi explained:

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67 Prime Minister of Australia, Joint Press Conference with the Treasurer and Minister for Small Business and Assistant Treasurer, 16 March 2016, [www.pm.gov.au/media/2016-03-16/joint-press-conference-treasurer-and-minister-small-business-and-assistant](http://www.pm.gov.au/media/2016-03-16/joint-press-conference-treasurer-and-minister-small-business-and-assistant) (accessed 21 March 2016).

68 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, p. 26.

69 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, p. 26.

70 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 4.

A concerted practice is, essentially, where competitors share confidential information, with each other, without any expectation that the other party will do anything reciprocal.<sup>71</sup>

2.55 What distinguishes collusion from a concerted practice is the matter of the understanding between the parties. Collusion occurs when there is an understanding and expectation generated by the sharing of information. According to the ACCC, the Barnawartha matter did not amount to collusion because it involved the sharing of information about sensitive matters between the parties but without 'mutuality' or an understanding and expectation generated that such information would be acted upon.<sup>72</sup> Mr Sims explained a concerted practice:

The classic one is...in any market where people are exchanging information about how they are going to price. They are not asking you what you are going to do but they are, equally, letting each other know how they are going to price.<sup>73</sup>

2.56 Mr Sims informed the committee that in most other jurisdictions, there are laws regarding concerted practices whereby signals are sent which amount to a substantial lessening of competition.<sup>74</sup> Such laws are applicable to circumstances which are close to collusion but where information is given, usually privately but also potentially publicly, which has the purpose or effect of substantially lessening competition, but without the element of 'mutuality'.<sup>75</sup> However, in Australia, there are no laws regarding such practices applicable to the cattle and beef industry.

### ***Defining a concerted practice***

2.57 The Harper Review recommended that the price signalling provisions in the CCA Act should be removed and replaced, by extending section 45 governing contracts, arrangements and understandings that affect competition to also cover concerted practices that have the purpose, effect or likely effect of substantially lessening competition.<sup>76</sup> It provided the following explanation of 'concerted':

The word 'concerted' means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is

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71 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 5.

72 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 5.

73 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 5.

74 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, pp 4–5.

75 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 7.

76 Professor Ian Harper, et al, *Competition Policy Review: Final Report*, March 2015, p. 9 and Recommendation 29 – Price signalling, p. 60, [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf) (accessed 7 March 2016).

jointly arranged or carried out or co-ordinated between the participants. The expression 'concerted practice with one or more other persons' conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (e.g., suppliers selling products at the same price).<sup>77</sup>

2.58 The Harper Review made it clear that such conduct would only be prohibited if it can be shown that the concerted practice has the 'purpose, effect or likely effect of substantially lessening competition'. Further:

It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.<sup>78</sup>

2.59 The CCA Act currently contains price signalling provisions which, by regulation, only apply to the banking sector. The provisions prohibit the private disclosure of pricing information to a competitor on a per se basis and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in the market. The Harper Review recommended the repeal of these provisions, while proposing the introduction of a prohibition on engaging in a concerted practice if it has, or is likely to have, the effect of substantially lessening competition.<sup>79</sup>

2.60 In its response to the Harper Review, the Australian Government noted its support for the recommendation (number 29) and committed to developing exposure draft legislation to repeal the price signalling provisions of the CCA Act and to extend section 45 of the CCA Act to capture concerted practices that substantially lessen competition.<sup>80</sup>

### **Competition in the marketplace**

2.61 It should be noted that a number of stakeholders who gave evidence to the committee (including processors and Meat and Livestock Australia (MLA)) did not share the view that collusion-type practices occur, while Teys Australia emphatically rejected the claim. Teys argued that:

There is no established basis for attributing volatile livestock prices to industry consolidation or collusion among Australian producers, processors or retailers.<sup>81</sup>

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77 Professor Ian Harper, et al, *Competition Policy Review: Final Report*, March 2015, p. 60.

78 Professor Ian Harper, et al, *Competition Policy Review: Final Report*, March 2015, p. 370.

79 Professor Ian Harper, et al, *Competition Policy Review: Final Report*, March 2015, p. 369.

80 Australian Government the Treasury, *Government response to the Competition Policy Review*, November 2015, p. 24, [www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt\\_response\\_CPR.ashx](http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx) (accessed 4 May 2016).

81 Teys Australia, *Submission 55*, p. 18.

2.62 Mr Peter Hall from the Cattle Council of Australia agreed with Teys Australia, stating that:

Sales are supply and demand situations. That is very often what creates the impression that there is collusion there when it is not the case. It is just the supply and demand situation creating that atmosphere on the day.<sup>82</sup>

2.63 However, the point was made that any reduction in the number of individual buyers reduces competition and has a negative impact on the return to the producer.<sup>83</sup> The NSW Farmers' Association explained that with the consolidation of the processing and retailing sectors, and fewer sale options available to producers, saleyard integrity had become a critical issue, as producers are increasingly dependent upon the saleyard method of sale to realise value.<sup>84</sup>

2.64 As noted by the Australian Livestock and Property Agents (ALPA), misuse of market power could be as simple as some buyers (not only processors) attending some saleyards and not others, leaving their competitors to operate without their competition. ALPA continued:

[T]hrough market consolidation in any industry there is a real possibility for misuse of market power. This can happen with or without buyer collusion. Misuse of market power has been proven in the dairy industry to have an adverse impact on producer returns and we don't see any difference in the red meat industry.<sup>85</sup>

2.65 Producers argued that this has been brought about by a power imbalance between producers and buyers whereby the producer is the 'price taker' and the buyer the 'price maker'.<sup>86</sup> This power imbalance has resulted not only in the potential to use market power at saleyards but also in relation to grading, weighing, trimming, the use of by-products and with regard to discounting practices.<sup>87</sup>

2.66 The outcome for producers is that there is no mechanism of price discovery. While the choice of where to sell livestock is ever-diminishing for many producers, in light of ongoing consolidation of the processing sector, concerns were raised that producers will consistently achieve a low price.<sup>88</sup> Ultimately, therefore, the system lacks competition and fairness.<sup>89</sup>

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82 Mr Peter Hall, Cattle Council of Australia, *Committee Hansard*, 17 November 2015, p. 35.

83 Mr Greg Chappell, *Submission 89*, p. 1.

84 NSW Farmers' Association, *Submission 92*, p. 13.

85 Australian Livestock and Property Agents Association, *Submission 79*, p. 4.

86 Ms Jane Carney, *Submission 66*

87 Cattle Council of Australia, *Submission 83*, p. 13.

88 Mr Shahriar Mofakhami, Victorian Farmers Federation, *Committee Hansard*, 2 September 2015, p. 24.

89 Ms Jane Carney, *Submission 66*.

## **ACCC market study on the cattle and beef industry**

2.67 In light of the ACCC's concerns in relation to the Barnawartha investigation and the cattle and beef industry more broadly, the ACCC has announced that it has initiated a market study focused on the cattle and beef industry. The key areas of focus for the ACCC in relation to the market study are expected to include competition issues and in particular, competition between buyers: including buying agents working for more than one buyer, transparency issues and market power in the supply chain.<sup>90</sup>

2.68 The ACCC made clear that the conduct of buyers and agents was one of the key issues for consideration in its market survey, particularly given that this issue has not been dealt with in any of the case law to date.<sup>91</sup>

2.69 Other issues to be covered by the study include:

- competition between buyers of cattle, and suppliers of processed meat to downstream customers;
- the implications of saleyard attendees bidding on behalf of multiple buyers;
- impediments to greater efficiency, such as bottlenecks or market power at certain points along the supply chain;
- differences in bargaining strength, and the allocation of commercial risk between cattle producers and buyers;
- the transparency of carcass pricing and grading methods;
- seeking information on the share of profits among the cattle and beef production, processing and retailing sectors; and
- barriers to entry and expansion in cattle processing markets.<sup>92</sup>

2.70 A final report on the study is expected to be released in late November 2016.

### ***Provision of evidence to the ACCC market study***

2.71 The ACCC informed the committee that it was mindful of the need to protect the commercial interests of those who want to provide evidence to its market study. Given these concerns, the ACCC announced that it would accept anonymous and confidential submissions.<sup>93</sup>

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90 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 2.

91 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 10.

92 Australian Competition and Consumer Commission, *ACCC releases issues paper for cattle and beef market study*, 7 April 2016, [www.accc.gov.au/media-release/accc-releases-issues-paper-for-cattle-and-beef-market-study](http://www.accc.gov.au/media-release/accc-releases-issues-paper-for-cattle-and-beef-market-study) (accessed 11 April 2016).

93 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 3. Further information about the market study and how to make a submission is at [www.accc.gov.au/about-us/information-for/agriculture/cattle-and-beef-market-study](http://www.accc.gov.au/about-us/information-for/agriculture/cattle-and-beef-market-study).

2.72 It should also be noted that the ACCC also runs a cartel immunity hotline for members of the public who wish to report instances of collusion. Mr Bezzi explained:

We take allegations of collusion around price-fixing, bid rigging, market sharing or agreements concerning supply very seriously. They carry penalties of up to 10 years imprisonment. So they are very serious offences. Anyone who is aware or has evidence relating to collusion, we really ask them to bring that evidence to us and to our team. If you are actually involved in collusion, under our immunity policy we have a capacity to grant immunity on a conditional basis to the first person who reports the collusion to us. We encourage people to contact our cartel immunity hotline if they feel they may be in that situation. Or they can e-mail [cartelimmunity@acc.gov.au](mailto:cartelimmunity@acc.gov.au).<sup>94</sup>

### ACCC oversight

2.73 Many producers advocated for significant regulatory and industry change to prevent collusive practices and any misuse of market power. The majority of these suggestions were aimed at strengthening legislative protections against anti-competitive behaviour. Many also highlighted the need for reform to the industry to improve transparency and fairness.

2.74 A number of submitters recommended reform to both the ACCC and the CCA Act. The recent introduction of an 'effects' test and appointment of a Commissioner with specific responsibilities for agriculture was supported in evidence to the committee as a first step.<sup>95</sup>

2.75 The Sheepmeat Council of Australia advocated a series of additional measures to address the power imbalance between producers and processors, including:

- an increased role for the ACCC in regulating the red meat processing industry, including oversight of mergers and improved investigatory powers regarding incidents of uncompetitive market behaviour; and
- greater emphasis on providing a competitive market and transparency in order to protect the interests of producers.<sup>96</sup>

2.76 The NSW Farmers' Association suggested a range of measures designed to counter collusive practices starting with an ACCC investigation into the impact of commission buyers' agreements on competition. The NSW Farmers' Association also recommended that a commitment be sought from commission buyers and major buyers by way of a section 87B undertaking accepted by the ACCC not to enter into agreements that provide for multiple representations which would result in the acquisition of over five per cent of livestock at a saleyard in a day.

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94 Mr Marcus Bezzi, Australian Competition and Consumer Commission, *Committee Hansard*, 17 November 2015, p. 18.

95 Pastoralists & Graziers Association of Western Australia (Inc), *Submission 82*, pp 1–2; Sheepmeat Council of Australia, *Submission 59*, pp 8–10.

96 Sheepmeat Council of Australia, *Submission 59*, pp 8–10.

## **Mandatory code of conduct**

2.77 The NSW Farmers' Association advocated for the introduction of a mandatory code of conduct.<sup>97</sup> It suggested that such a code provide for:

- transparency as to the stock available at a saleyard, the stock purchased and price outcomes;
- a requirement that in yards where over a certain number of head are traded at one time, commission buyers must not represent multiple buyers that would result in the acquisition of over five per cent head of livestock in any given day;
- consistent maximum curfew periods and weighing without unnecessary delay; and
- a requirement that buyers' agents disclose the buyers that they represent at a saleyard before the fall of the hammer.<sup>98</sup>

2.78 Mr John Dunn, Policy Director with NSW Farmers' Association argued that:

All these things we are talking about—whether it is curfew times, pre or post-sale weighing, or commissioned buyers acting on behalf of multiple people—go to the integrity of that system, that economic transaction. The only way we can sort that out is through a mandatory code of conduct.<sup>99</sup>

2.79 The PGA WA also supported the establishment of an industry code, which would establish methods of compensation for producers in situations regarding collusion or misuse of power. However, it differed from the NSW Farmers' proposal to the extent that it recommended that the scheme be voluntary.<sup>100</sup> As an alternative, the Indigo Shire Council suggested that a system involving registration for buyers may be a solution.<sup>101</sup>

2.80 The ACCC noted that cost-benefit should be considered when introducing rules for markets and that a cost-benefit analysis is usually easily met when considered in relation to transparency. The ACCC suggested that when people have to declare on whose behalf they are buying, such a mechanism would pass any such cost-benefit test.<sup>102</sup>

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97 New South Wales Farmers' Association, *Submission 92*, p. 14.

98 New South Wales Farmers' Association, *Submission 92*, p. 14.

99 Mr John Dunn, NSW Farmers' Association, *Committee Hansard*, 2 September 2015, p. 5.

100 Pastoralists & Graziers Association of Western Australia (Inc), *Submission 82*, p. 2.

101 Indigo Shire Council, *Submission 94*.

102 Mr Rod Sims, Australian Competition and Consumer Commission, *Committee Hansard*, 5 April 2016, p. 11.