

**GOVERNMENT RESPONSE TO THE SENATE ECONOMICS REFERENCES
COMMITTEE'S 2010 REPORT *MILKING IT FOR ALL IT'S WORTH –
COMPETITION AND PRICING IN THE AUSTRALIAN DAIRY INDUSTRY.***

The Senate Economics References Committee's (the Committee) 2010 inquiry, *Milking it for all it's worth – competition and pricing in the Australian dairy industry*, was the first of two inquiries in relation to Australia's dairy industry completed by the Committee since 2010. In November 2011, the Committee released its report into *The impacts of supermarket price decisions on the dairy industry*. The Government would like to thank the Committee for the time and effort it has put into both inquiries.

This Government response deals explicitly with the recommendations outlined in the Committee's 2010 final report from the *Milking it for all it's worth – competition and pricing in the Australian dairy industry* inquiry. The issues raised in the 2010 inquiry have largely been re-examined in the 2011 inquiry. The Government has tabled a separate response to the Committee's 2011 inquiry: *The impacts of supermarket price decisions on the dairy industry*.

Response to recommendations

Recommendation 1:

The Committee recommends that the Government requests that the National Competition Tribunal reviews the effectiveness of section 46 of the Trade Practices Act in preventing price discrimination and consider reinstating anti-price discrimination provisions, particularly to protect those parties participating in industries dominated by multinational corporations.

The Government notes the recommendation

The Government's response to **Recommendation Five** made by the Senate Economics References Committee in its 2011 inquiry into *The impacts of supermarket price decisions on the dairy industry* (2011 Dairy Inquiry) provides a detailed response to this recommendation.

Recommendation 2:

The Committee recommends that contracts with farmers should offer a clear, consistent formula for milk pricing with unambiguous conditions.

The Government agrees in principle to the recommendation

The Government's response to **Recommendation Two** made in the 2011 Dairy Inquiry provides a detailed response to this recommendation.

Recommendation 3:

The Committee recommends that the Government requests the Australian Competition and Consumer Commission to use its information-gathering powers, and draw on its work for its recent report on grocery pricing, to provide more accurate estimates of the proportions of the retail price of milk that reflect (i) the costs and (ii) the profits, of farmers, processors and retailers and requests that the results of that review be published by 30 September 2010.

The Government notes the recommendation

The Government notes that during the 2011 Dairy Inquiry, a significant amount of information relating to the dairy supply chain was presented to the Committee for its consideration. As outlined in the response to **Additional Recommendation Four** in the 2011 Dairy Inquiry, the Government is of the view that at this point in time, another Australian Competition and Consumer Commission (ACCC) inquiry into the supermarkets would not necessarily be beneficial.

However, the Government will work with the dairy industry to provide clear information on industry cost structures including input costs and farm-gate prices in each of the dairy regions across Australia.

Recommendation 4:

The Committee recommends that the Government requests the ACCC to undertake monitoring of the pricing practices within the dairy chain with a view to establishing whether predatory pricing or misuse of market power is occurring.

The Government notes the recommendation

The Government notes its response to **Recommendation Five** and **Additional Recommendation Four** in the 2011 Dairy Inquiry.

The Government considers it unacceptable for businesses to engage in any conduct in breach of our competition or consumer laws. The ACCC, as the independent regulator responsible for the investigation and enforcement of these laws, is actively monitoring issues in the supermarket sector and is equipped to take action should evidence arise of a breach in the *Competition and Consumer Act 2010* (the Act).

The Government notes the ACCC's media release of 22 July 2011, in which it states that it considers there is no evidence that Coles has acted in breach of the the Act (formerly the *Trade Practices Act 1974*) in relation to milk discounting and that it will continue to monitor conduct within the dairy industry and grocery sector for signs of anti-competitive behaviour.

The Government is confident that the ACCC will take appropriate action in relation to these issues should evidence emerge in future.

Recommendation 5:

The Committee recommends that the Productivity Commission reviews and evaluates the effectiveness of the national competition policy and requests that it publish its report by 30 April 2011.

The Government notes the recommendation

In 2005, the Productivity Commission (Commission) concluded a major inquiry into the impact of the National Competition Policy (NCP) and related reforms, with the release of its inquiry report *Review of National Competition Policy Reforms*. The inquiry covered both the broad economic effects of the NCP and changes to specific industries.

The Commission found that implementation of NCP has delivered substantial benefits to the Australian community, which overall have outweighed the costs. In terms of deregulation and competition, the Commission concluded that the deregulation of the dairy industry, while entailing some transitional costs, has significantly benefited consumers in the form of lower drinking milk prices on average and an expansion in the range of dairy products available. It also noted that while some dairy farmers chose to exit the industry, deregulation has encouraged farmers to adopt innovative practices and technologies to increase production and profitability.

Recommendation 6:

The Committee recommends a moratorium on further takeovers and mergers in the milk processing industry until the Productivity Commission has published its report on the effectiveness of the national competition policy.

The Government notes the recommendation

The Government is committed to providing a robust and effective competition and consumer law, backed by appropriate and proportionate sanctions that can be effectively enforced by the ACCC as the independent regulator.

In relation to mergers and acquisitions, the Government's Competition and Consumer Legislation Amendment Bill 2011, which has recently passed the Parliament, clarifies the operation of the merger and acquisition laws in relation to 'creeping acquisitions'.

The Government considers that the existing framework provided by section 50 of the Act, which prohibits mergers or acquisitions that would substantially lessen competition, works well and is consistent with international practice.

The existing framework for mergers and acquisitions will continue to apply to this sector. To impose a moratorium on mergers or acquisitions not otherwise prohibited by the Act would

not have a meaningful effect on competition, may prohibit mergers or acquisitions which might be beneficial to competition and may be unnecessary and counterproductive for the industry.

As indicated in the Government's response to **Recommendation Five** in the 2011 Dairy Inquiry, the Government believes that the competition provisions of the Act should not be reviewed until the ACCC has had the opportunity to further test the law in the courts.

Recommendation 7:

The Committee recommends that the Trade Practices Act be amended to reinstate specific anti-price discrimination provisions and inhibit firms achieving market power through takeovers or abusing market power and that 'market power' be expressly defined so that it is less than market dominance and does not require a firm to have unfettered power to set prices. A specific market share, such as, for example, one third (based on international practice), could be presumed to confer market power unless there is strong evidence to the contrary.

The Government notes the recommendation

The Government is committed to providing a robust and effective competition and consumer law, backed by appropriate and proportionate sanctions that can be effectively enforced by the ACCC as the independent regulator.

In particular, since coming into office, the Government has legislated to clarify the misuse of market power prohibitions. The Government notes the CEO of the ACCC, Mr Brian Cassidy's recent comments that 'some judicial interpretation and rulings on the substantially changed section 46 is needed before it is possible to say whether the changes have been effective or something else needs to be done'¹.

The Government believes that a review of this provision of the Act should not be considered until the ACCC has had the opportunity to further test the amended law in the courts.

The Government notes its response to **Additional Recommendation One** made in the 2011 Dairy Inquiry which relates specifically to anti-competitive price discrimination.

In addition, as indicated in the Government's response to **Recommendation Five** in the 2011 Dairy Inquiry, the Government believes that the competition provisions of the Act should not be reviewed until the ACCC has had the opportunity to further test the law in the courts.

¹ Cassidy, B. Senate Hansard, Economics References Committee - Impacts of supermarket price decisions on the dairy industry - Thursday 6 October 2011.

Recommendation 8:

The Committee recommends that the ACCC conducts further study into the implications of increasing shares of the grocery market being taken by the generic products of the major supermarket chains. The Committee recommends that the terms of reference of any such inquiry include not just the current and future impact on prices paid by consumers but also the needs of Australia in terms of food security and economic and environmental sustainability, as well as the economic viability of farmers and processors. The Committee requests that the findings of these reviews be reported by 30 April 2011.

The Government notes the recommendation

The Government notes its response to **Additional Recommendation Four** made in the 2011 Dairy Inquiry.

The Government supports the issue of working towards food security and the future sustainability of the dairy industry. It notes that the development of the National Food Plan will provide a strategic and integrated approach to food policy development and implementation and will be developed through a green and white paper process. This will help ensure a long-term and whole-of-government focus, and a considered and consultative approach to food policy. In developing the National Food Plan, the Government is working closely with the Standing Council on Primary Industries to help ensure the strong commitment to the national strategy by all states and territories.

The Government also notes recent comments by the ACCC Chairman, Mr Rod Sims, in relation to the sale of private label products by supermarkets, and in particular that 'This vertical integration in the supply chain needs close scrutiny to ensure the supermarkets do not misuse their market power under Section 46.'² Given that the ACCC has indicated it is actively monitoring these matters, the Government does not consider it is necessary at this time to direct the ACCC, under the prices surveillance provisions of the Act (Part VIIA), to inquire into the implications of increasing shares of the grocery market being held by generic products.

² Sims, R. Some perspectives on competition and regulation Melbourne Press Club (10 October 2011).

Recommendation 9:

The Committee recommends the Productivity Commission considers, in its review of national competition policy, the appropriateness of separating the functions and powers of the ACCC with the effect that separate agencies are responsible for the approval of mergers and the assessment of whether concentration is subsequently excessive.

The Government notes the recommendation

Noting the Government's response to **Recommendation Five**, the Government considers that the ACCC, as the expert, independent competition regulator, is the agency best placed to consider all aspects of the competitive effects particular of mergers and acquisitions.

Recommendation 10:

The Committee recommends that the topic of competition and pricing in the dairy industry be again referred to the Senate Economics References Committee in May 2012 to assess whether progress has been made or whether tougher and more interventionist measures need to be adopted.

The Government notes the recommendation

The Government notes that since the release of this report, the Committee has further investigated the issues of competition and pricing in the dairy industry in its inquiry into *The impacts of supermarket price decisions on the dairy industry*, with the final report released in November 2011.

The Committee made a range of recommendations in its final report to this inquiry and the Government has tabled a separate response addressing each of those recommendations.

Recommendation 11:

The Committee recommends that the Federal Government commissions an independent report into the main impediments to the establishment of new processors owned by farmer cooperatives and how these impediments could best be overcome and requests that the report be tabled by 30 April 2011.

The Government notes the recommendation

The Government believes that the establishment of new processors and their corporate structure is a matter for industry and outside the scope of Government intervention. The Government believes that the establishment (or otherwise) of cooperatives is a business decision best left to industry members. The Government notes previous decisions of

cooperative shareholders (such as Australian Co-operative Foods Limited in 2008) to sell the enterprise to corporate entities.

Recommendation 12:

The Committee recommends that the Government reviews the collective bargaining provisions of the Trade Practices Act with a view to strengthening that framework to create a more equitable balance of power between the negotiating parties and requests that it report by 30 April 2011.

The Government notes the recommendation

The Government's response to **Recommendation Six** made in the 2011 Dairy Inquiry provides a detailed response to this recommendation.

Recommendation 13:

In reviewing the collective bargaining provisions the Committee requests that the Government considers the effectiveness of any existing alternative dispute resolution mechanisms and investigates:

- allowing collective bargaining groups to merge to address imbalances in bargaining power;
- the introduction of a requirement that the ACCC facilitate the timely appointment of a mediator should a party to a negotiation require such assistance; and
- the introduction of a requirement that cooling off periods be mandatory in contracts between dairy farmers and processors.

The Government notes the recommendation

The Government's response to **Recommendation Six** made in the 2011 Dairy Inquiry provides a detailed response to this recommendation.

Recommendation 14:

The Committee recommends that the Government addresses the issues of food security and the future sustainability of the dairy industry at a federal level. The Committee suggests to the Government that this review be facilitated through the Primary Industries Ministerial Council to ensure it receives the commitment and attention required. The Committee recommends that any review include the role of the ACCC and federal, state and territory agricultural departments in ensuring Australia's food security.

The Government agrees in principle to the recommendation

The Government supports initiatives to maintain and improve food security and the sustainability of Australian food production, including of the dairy industry.

As a demonstration of this support, the Government is developing a National Food Plan. The National Food Plan will be a strategic and integrated approach to food policy development and implementation and will be developed through a green and white paper process. This will help ensure a long-term and whole-of-government focus, and a considered and consultative approach to food policy. In developing the National Food Plan, the Government is working closely with the Standing Council on Primary Industries to help ensure the strong commitment to the national strategy by all states and territories.

The Food Processing Industry Strategy Group, established by the Minister for Innovation, Industry, Science and Research early in 2011 to develop a strategic plan for the processed food manufacturing sector, is also analysing the strengths and weaknesses of the industry, as well as long term opportunities to enhance its long-term competitiveness and sustainability.

As indicated in the Government's response to **Recommendation Three** in the 2011 Dairy Inquiry, the future sustainability of the dairy industry across Australia depends to a large extent on its ability to remain competitive in a global dairy market. Research and development also contributes to its competitiveness and sustainability. The Government works with the dairy industry through the provision of matched funding to undertake research, development and extension activities.

Recommendation 15:

In the light of the Tasmanian experience the Committee recommends that where industry bodies are encouraging increased production, all agencies involved in those bodies have regard to issues of long term sustainability in the context of long term trends. They should identify the source of increased demand, adopt cautious language and indicate the degree of uncertainty around any projections.

The Government notes the recommendation

The Government encourages all organisations preparing information for the use of rural industries to be mindful of the need to adopt cautious language and to indicate the degree of uncertainty around any projections.

For example, the Department of Agriculture, Fisheries and Forestry ABARES outlines its key assumptions and, where appropriate, identifies risk factors when presenting its forecasts. ABARES is particularly mindful of presenting its forecasts and explaining key factors underlying these forecasts in a cautious manner.

Recommendation 16:

The Committee recommends that the Australia and New Zealand Food Regulation Ministerial Council acts to ensure that labelling on dairy products adequately and accurately informs consumers about the provenance, manufacturer and contents of the product.

The Government notes the recommendation

Most packaged dairy products for retail sale are required to be labelled under the *Australia New Zealand Food Standards Code* with information which includes, in general: the name and address of the supplier; any applicable advisory and warning statements; a mandatory declaration of certain substances (such as allergens); an ingredients list; date marking; directions for use and storage where required for health or safety reasons; a nutrition information panel; and a statement concerning the country of origin.

The Government also notes that the Australian Consumer Law, applicable in all Australian jurisdictions, prohibits misleading and deceptive conduct and false or misleading representations throughout the economy – including in relation to dairy product labelling.

The Government will refer this recommendation to the Legislative and Governance Forum on Food Regulation for consideration.