Minority Report by Nick Xenophon
Independent Senator for South Australia

1.1 Australia's food processing sector is vital to our economy and food security. It is extremely concerning that successive governments have not seen fit to provide the industry with the support it needs, especially in relation to ensuring that Australia has world's best competition and consumer laws that adequately safeguard the competition and competitive diversity provided by food processors, small businesses and farmers.

1.2 As a result, food processors in Australia are now battling against a multitude of challenges, including the Coles and Woolworths duopoly, excessive levels of regulation, high production costs and the constant threat from imported products which can be passed off as Australian because of weak and misleading labelling laws. The Federal Government must act as a matter of urgency to ensure our food processing sector has a sustainable future.

1.3 The Committee's majority report has identified many of the major challenges facing the food processing sector, and with it the impacts on our primary producers. The issues in this report raise the bigger question of whether the Government and Opposition will adopt effective policies which will not only ensure the survival of the industry, but will also promote its future growth.

1.4 It is also important to acknowledge that the food processing sector – with its some 194,300 jobs across 10,000 businesses – is currently facing significant 'unknowns' in its future. Both the introduction of a carbon price and the Murray Darling Basin Plan will affect the industry, but it is currently impossible to quantify the extent of these effects.

1.5 I endorse the Committee's recommendation that the Government should monitor the implementation of a carbon price, although this should also include the Basin Plan. In particular the impact of the Basin Plan on South Australia given the vulnerability of SA food processors and producers being at the 'tail end' of the river system, combined with the early adoption of water efficiency measures in SA and the distortion in the water market that will be created by the overwhelming majority of $5.8 billion in water efficiency funds going to the eastern states.

Recommendation 1

1.6 The Federal Government monitor the effect of the Basin Plan on food production and processing as a matter of priority, and in particular South Australia.

1.7 I note the Federal Government's intention to create a National Food Plan. I support this intention, but any plan must be comprehensive, detailed and focus on action rather than ongoing monitoring. The Plan should cover all aspects of the food production and processing industries, and focus on consumer as well as industry outcomes. I endorse the comments of the Public Health Association of Australia in relation to this[1].

1.8 It is also vital that the National Food Plan addresses the multi-jurisdictional and complex regulations placed on the food processing industry. It is clear that this piecemeal approach to regulation is placing undue burden on an already struggling sector.

Recommendation 2

1.9 The Federal Government take into account all areas of the food production and processing industries when forming the National Food Plan, and ensure that the Plan focussed on action-based outcomes.

1.10 The lack of higher education interest and opportunities in relation to the food processing sector needs urgent attention. I note the important work of the Primary Industry Centre for Science Education (PICSE) in these areas. It is a significant failing of State and Federal governments that PICSE continues to struggle for funding and, due to a lack of long-term funding guarantees, is forced to exist from year to year. More secure funding would undoubtedly lead to even better outcomes from this organisation, and in turn the food processing sector.

1.11 It is unacceptable that processors are forced to access expert knowledge about new technologies and procedures outside Australia, as stated by Mr Elder of Simplot.[2] This points to a serious failure in both education and research and development in Australian agriculture and food processing.

1.12 I acknowledge the Committee's recommendation in relation to higher education, and I encourage State and Federal governments to address the funding problems for such organisations.

1.13 It is also important to note the challenges facing the industry in relation to labour costs, and I endorse the Committee's comments in relation to this. Not only are food processors – particularly small businesses with 20 full-time equivalent employees or less – competing against higher wages in more lucrative industries, such as mining, but the substantial increase in penalty rates under the Fair Work awards has created additional pressure.

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1 Adjunct Professor Michael Moore, Chief Executive Officer, Public Health Association of Australia, *Committee Hansard*, 10 February 2012, p. 31

2 Mr Callum Elder, Simplot, *Committee Hansard*, 12 April 2012, p.21

1.14 I note the broad concerns raised by the industry in relation to transport infrastructure and the associated high costs of transporting goods[3]. Similar concerns were discussed in the Rural and Regional Affairs and Transport References Committee inquiry into operational issues in export grain networks. That inquiry received evidence of extremely high costs and market concentration in rail networks, and also of the difficulties caused by lack of infrastructure investment by State and Federal governments.

1.15 In my Additional Comments to that report, I made several recommendations for further reviews and assessments to be undertaken into freight and rail transport costs in Australia[4]. The evidence received by this committee shows the problems extend far further than the grain industry, and as such these recommendations should be acted on as a matter of urgency.

Recommendation 3

1.16 The Federal Government, as a matter of urgency, appoint an appropriate body to review the condition of lines for rail freight transport in Australia, with particular attention to a cost/benefit analysis of rail versus road transport and the benefits of implementing an auction-based system similar to the one currently operating in the US.

1.17 I strongly support the majority recommendation of the Committee regarding an independent review of the *Competition and Consumer Act 2010*, particularly the need for closer monitoring and effective action in relation to creeping acquisitions, especially by Coles and Woolworths. The fact that Coles and Woolworths have been able to expand their market share from 40 percent to over 80 percent in thirty years without triggering any regulatory interference or action shows significant gaps in both government policy and the current regulatory system. Creeping acquisitions can substantially lessen competition over time and it is essential that the anti-competitive effect of such acquisitions are acknowledged and that the *Competition and Consumer Act 2010* adequately prohibits anti-competitive creeping acquisitions.

1.18 A review of the provisions within the *Competition and Consumer Act 20*10 insofar as they relate to collective bargaining is also warranted. Growers groups provided evidence to the Committee that the major retailers are either reluctant to negotiate with collectives or refuse to do so. The imbalance of power between suppliers and retailers could lead to circumstances where, due to their market share, major retailers may smply refuse to collective bargain or enter into discussions in good faith with smaller suppliers about prices, terms and conditions. There is a danger

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3 Mr Gary Burridge, Chairman, Australian Meat Industry Council and Mr Roger Fletcher, Chair, Sheepmeat, Committee Hansard, 10 February 2012, p. 27.

4 Senator Nick Xenophon, Additional Comments, *Rural and Regional Affairs and Transport References Committee report into operational issues in export grain networks*, 16 April 2012, p.105

that such practices can lead to the closure of smaller suppliers.[5] Persistently low orange prices were behind the decision of orange grower Bill Rudiger to bulldoze part of his orchard in March 2012.[6] If we truly values Australia's food industries we must act now.

1.19 Further, if the Federal Government still needs convincing of the devastating impact of persistently low farm gate prices then I refer them to the evidence of dairy farmers in the Inquiry into the impacts of supermarket prices on the dairy industry.

1.20 As the abovementioned inquiry was started due to the private label price war on milk, I believe particular attention needs to be paid to the growing dominance of private labels in our major retailers. Suppliers are being put in a difficult position when they are asked to manufacture a private label product which will be in direct competition with their own branded product. Furthermore, as evidence before the Committee suggests, "*retailers can capitalise on the leading brands' innovation without the risk and expense of developing the intellectual property*".[7] Together with the lack of funding for the industry for research and development, I believe the growth of the private label poses one of the most significant threats to Australia's food processing industry as it seriously jeopardises new product innovation and over time reduces product choices to the detriment of consumers.

1.21 I am concerned by the Department of Treasury's belief that "*ultimately the market will decide*" the extent of private label market domination.[8] This position seems dangerously naïve and fundamentally flawed as it ignores the evidence of producers and manufacturers that private labels dampen competition and will lead to a reduction in product innovation and diversity. Given Treasury also identified a number of other factors that impact the relationship between suppliers and retailers[9], I am concerned about that Department's lack of sense of urgency and policy foresight to address this major power imbalance to date.

1.22 The loss of product choice and innovation over time represents a serious and growing market failure and it would be expected that, at the very least, the Department of Treasury would undertake meaningful independent research regarding how consumers could be worse off with less product choice and innovation. Such independent research should be undertaken as soon as possible as a failure to recognise and respond in an adequate and timely manner to a market failure seriously distorts market competition to the considerable detriment of consumers.

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5 Citrus Growers of South Australia Inc, *Submission 45*, p. 2.

6 Laura Pool and William Rollo, "Producer bulldozes orange trees", ABC Rural, http://www.abc.net.au/rural/sa/content/2012/03/s3456935.htm, accessed 6 August 2012.

7 Ms Catherine Barnett, Chief Executive Officer, Food South Australia Inc., *Committee Hansard*, 10 February 2012, p. 17.

8 Treasury, Submission 18, p. 6.

9 Department of the Treasury, *Submission 18*, p. 5

1.23 Perhaps the greatest example of the growing disparity of bargaining power that exists between suppliers and retailers is in the trading terms. Woolworths believes its negotiations to be 'tough but fair'[10]. However where the market is dominated by two main retailers it is unrealistic to take the view that retailers are not receiving a disproportionately greater benefit from the trading terms than the suppliers. In a country where suppliers have relatively few buyers domestically, and are faced with prohibitive export costs, the major supermarket chains can impose 'take it or leave it' position during trading terms negotiations.

1.24 The Committee heard disturbing evidence in camera of what appeared to be unfair and unconscionable practices by major retailers to particular food processors. The fact that these food processors were not prepared to give evidence in public is in itself disturbing (indeed it merely confirms the experience of the producers of ABC's 'Lateline' program of 21 March 2012, where it was revealed that over 100 calls were made to producers and processors and only one was prepared to speak, as long as their identity and product were not revealed). This climate of fear seems to be a function of the growing market power of Coles and Woolworths, combined with inadequate competition and consumer laws.

1.25 There needs to be an urgent review of laws against unfair contract terms. Such laws are currently limited to traditional consumer contracts and do not cover contracts involving small business and farmers. This is a significant gap in laws against unfair contract terms. In relation to the food processing sector potentially unfair contract terms include the imposition of additional fees and charges above what was originally agreed to by the supplier, as well as the refusal of retailers to accept legitimate price increases. Suppliers need better protection from unfair contract terms such as these in order for them to continue operating in the market.

1.26 According to industry the unconscionable conduct provisions within the Australian Consumer Law also need strengthening as currently it is almost impossible to prove a retailer has acted unconscionably. [11] Associate Professor Frank Zumbo, a leading commentator on competition and consumer law issues, has also proposed that a statutory definition of unconscionable conduct be included in Australian Consumer Law and that Australia needs effective laws to deal with unfair terms in contracts involving small businesses.[12]

Recommendation 4

1.27 Amend the Australian Consumer Law to deal effectively with unfair contract terms in contracts involving small businesses and farmers, with further consideration be given to including a broad statutory definition of unconscionable conduct in the Australian Consumer Law.

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10 Mr Ian Dunn, Woolworths Ltd, *Committee Hansard*, 15 May 2012, p. 28.

11 Ms Kate Carnell, *Committee Hansard*, 13 December 2011, p. 28.

12 A/Prof Frank Zumbo, *Promoting a more diverse and competitive Australian supermarket sector* (2012) 20 AJCCL 25

1.28 Suppliers could be benefit from a mandatory code of conduct which applied to grocery retailers. A mandatory code would set standards on acceptable approaches to negotiation, which together with a Supermarket Ombudsman or the proposed Federal Small Business Commissioner, could provide the platform from which to assist small businesses to resolve disputes. [13] I am concerned by Treasury's belief that it is better to leave an industry to self regulate. [14] In a trading environment dominated by two major retailers and increasingly characterised by potentially anti-competitive pricing strategies, suppliers need more empowerment than ever if they are to continue to trade profitably.

1.29 Evidence presented to the Committee demonstrates voluntary codes are not taken seriously and that a mandatory code would be *"an efficient mechanism by which there is the transparency…that gives food manufacturers a fair go"*.[15] A mandatory code of conduct needs to be backed by financial penalties in the same way that the South Australian Government has recently provided a legal framework in the *Small Business Commissioner Act 2011* for the imposition of financial penalties for breaches of mandatory codes of conduct under the South Australian *Fair Trading Act 1987*.[16]

Recommendation 5

1.30 The Federal Government implement a mandatory Supermarket Fair Trading Code of Conduct, to be overseen by a Supermarket Ombudsman or the proposed Federal Small Business Commissioner and backed by financial penalties under the Competition and Consumer Act for breaches of the Code.

1.31 Whilst I acknowledge the Committee's comments in relation to the reluctance of suppliers to come forward with complaints about the market power of the major retailers, particularly in regards to negotiating terms of trade, I believe more can be done to encourage and facilitate the complaint making process. The difficulty for suppliers lies in the fact that their concerns must be communicated to the retailers by the ACCC during the process of the ACCC investigation. The ACCC must improve their complaint handling processes can be maintained and guaranteed. Furthermore, if a supplier that comes forward subsequently faces detriment there ought to be a reverse onus of proof provision which would impose penalties on a retailer unless it can be shown that the adverse action was not in any way related to the complaint.

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13 Australian Food and Grocery Council, *Submission 12*, pp. 4–5, pp. 12–14.

14 Mr Bruce Paine, Treasury, *Committee Hansard*, 13 December 2011, p. 33.

15 Ms Catherine Barnett, Food South Australia Inc., *Committee Hansard*, 10 February 2012, p. 19.

16 A/Prof Frank Zumbo "The rise and rise of small business commissioners" (2012) 20 AJCCL 93

Recommendation 6

1.32 Amend the Australian Consumer Law to provide greater protection for suppliers who have suffered detriment after making a complaint to the ACCC and by placing the onus on the party complained of to prove that the adverse action was not in any way related to the complaint.

1.33 There are also issues of the effectiveness of existing laws. It is interesting to note that the predatory pricing provisions in the 'Birdsville Amendment' (section 46(1AA) of the *Trade Practices Legislation Amendment Act (No 1) 2007*) have yet to be tested by a prosecution even though it has been in force for some five years. At the very least, the ACCC should issue guidelines as to its approach to the Birdsville Amendment.

1.34 However, improvements to the ACCC's processes should not be limited to their handling of complaints. As evidenced by their inaction in terms of the duopoly's market power which was largely obtained through creeping acquisitions, I believe the ACCC needs to take a more proactive approach to market supervision and investigation.

1.35 The current legislative framework does not give adequate powers to the ACCC to deal with abuses of market power. The risk of such abuse seems inevitable with an increase in market share unless there is an effective regulatory approach. The United Kingdom and the United States have general divestiture powers which deal with market power by forcing businesses to 'break up' once they become so large they become anti-competitive.

1.36 Divesting the major retailers of some of their market power would help to create a level playing field for suppliers and encourage more effective competition. Associate Professor Frank Zumbo has proposed that Australian competition laws be amended to introduce a general divestiture power[17]. Having such a power in the *Competition and Consumer Act* would bring our laws into line with the United States and the United Kingdom.

Recommendation 7

1.37 Amend the *Competition and Consumer Act 2010* to provide for a general divestiture power whereby the ACCC and other affected parties could, in appropriate cases, apply to the Courts for the breakup of monopolies or dominant companies that engage in conduct that undermines competition.

1.38 It is entirely appropriate that the Australian Consumer Law now heavily favours the interests of consumers by encouraging competition in the market place. However if urgent action is not taken to address the imbalance of power of major

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[17] A/Prof Frank Zumbo *Don't bank on bank competition: The case for effective laws against anti-competitive mergers and creeping acquisitions*, (2010) 18 TPLJ 26

retailers over suppliers, consumers could eventually be paying more for their groceries if suppliers hit the wall and go out of business. Ultimately that will lead to less choice and less competition.

1.39 I fully support the Committee's recommendations regarding future regulatory options, especially those that relate to the structural separation of supermarkets' private label businesses and the capping the level of market share achievable by retailers. This requires legislative reform to implement the Committee's recommendations.

1.40 I support the Committee's recommendations regarding changes to Australia's food labelling laws, particularly the Committee's recommendation that the Federal Government implement recommendations 40 and 41 of the Blewett Review (even though the reforms should go further, both in terms of transparency and clarity).

1.41 I believe the Federal Government's response to the Blewett Review was a win for multinational, foreign owned companies who can export their products to Australia where unsuspecting consumers purchase them, believing they are supporting Australian producers. The Australian Food and Grocery Council bears considerable responsibility for this given the number of multinational food processing companies it represents. Given the evidence presented to the Committee about the impact of our inadequate labelling laws, the Federal Government has more than sufficient reasons to implement the Blewett Review's recommendation as a matter of urgency.

1.42 There are serious concerns about our current labelling regime and the extent to which it allows foreign imports to be classified as 'Made in Australia'. Currently the test for a product to achieve this classification it must either be 'substantially transformed' in Australia or 50 percent of the total cost of producing or manufacturing the good is attributable to processes that took place in Australia.

1.43 The Australia-New Zealand Closer Economic Relations Agreement is also failing Australian producers. One of the most poignant examples of the extent of this failure came from Mr David McKinna, who pointed out that seafood caught in the Atlantic by a Korean vessel can be processed in China, imported into New Zealand to be repacked and labelled at 'Product of New Zealand'. It can then imported into Australia where the seafood is crumbed and frozen can be sold as a 'Product of Australia'.[18]

1.44 The Committee has recommended that claims of misleading or deceptive conduct arising from imports under Australia's free trade agreements should be investigated, however I believe specific attention should be paid to imports under the Australian-New Zealand Closer Economic Relations Agreement.

1.45 I acknowledge the Committee's discussion about education campaigns to help further public understanding of Australia's labelling laws, however I believe such

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18 Dr David McKinna, *Submission 32*, p. 17.

campaigns would be ineffectual due to the difficulty involved with clearly explaining our current labelling laws. The Federal Government's attention should be focused on reform of the laws as this will be the most effective way to protect and promote Australian producers.

1.46 The Federal Government must also look at reforming current labelling regulations pertaining to health-related claims, such as 'fresh' and 'light'. It was recently revealed that Coles were advertising their 'CuisineRoyale' bread as 'Australian' and 'baked today, sold today', when in actual fact the bread was made from dough that had been imported from Ireland.[19]

1.47 The submission by the Australian Olive Association highlighted how imported chemically refined olive oils can be labelled as 'light' and 'extra light' and are sold in direct competition with Australian made 'extra virgin' olive oil.[20] Consumers believe they are purchasing a healthier option by choosing a 'light' olive oil, however 'light' does not mean 'low fat'. Thus Australian olive oil producers are forced to compete with cheap and misleading imports.

1.48 Given the Australian Olive Association's evidence that tests performed on olive oils available in Australia revealed some imported olive oils are in fact 'lamp oil' and therefore not fit for human consumption,[21] it is imperative that the Federal Government move to strengthen are food labelling and biosecurity laws. The Federal Government should act on the Blewett Review's recommendation to establish definitions for nutrition and health related terms such as 'light' and 'fresh'. In the absence of any such action I intend to introduce legislation to address the current ambiguity of our labelling laws.

Recommendation 8

1.49 The Federal Government establish definitions for health related terms such as 'light' and 'fresh' be established.

Recommendation 9

1.50 There needs to be an urgent overhaul of Australia's country of origin food labelling laws to provide truthful and useful information to consumers.

1.51 As signalled by the Committee, a review of the new biosecurity legislation is necessary to determine whether it adequately addresses the different standards that apply to imported goods versus domestic products. Our current legislation has failed Australian producers and consumers, evidenced by the inconsistencies surrounding the

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19 Pia Ackerman, 'Coles accused of Irish-made bread con', *The Australian*, 5 July 2012, http://www.theaustralian.com.au/news/nation/coles-accused-of-irish-made-bread-con/story-e6frg6nf-1226417762206 (accessed 13 August 2012).

20 Australian Olive Association, *Submission 68*, pp. 1-2.

21 Australian Olive Association, Submission 68, p. 3.

import and use of the pesticide carbendazim. Australian citrus growers were banned from using the pesticide carbendazim over two years ago, but the Federal Government is still allowing Brazilian orange juice concentrate containing carbendazim to be imported following a backflip on its previous commitment to halt its importation.

1.52 I have previously raised concerns about the difficulties Australian producers face from imported New Zealand goods, and in particular New Zealand apples that carried the risk of fire blight.[22] Australia was opening our doors to imports that could jeopordise an entire Australian industry because many apple growers felt trade agreements took precedence over appropriate biosecurity arrangements.

1.53 Another issue deserving Federal Government attention is the current costs associated with biosecurity arrangements, particularly the impact of cost recovery arrangements for AQIS certification charges. The removal of the 40 percent rebate on certification charges will have a significant financial impact across the food processing sector, including in the meat and horticultural industries. Summerfruit Australia expressed concerns that now the full cost of recovery is being charged which is not reflective of the actual service being provided.[23]

1.54 I have previously raised concerns about the removal of this rebate and the impact it could have on small to medium sized enterprises.[24] As Australian producers may need to more aggressively pursue export markets in order to minimise their trade exposure to the major retailers, it is important that the Federal Government does not impose additional barriers to export. I support the Committee's recommendation in relation to developing an affordable cost environment for Australian producers and exporters, and believe consideration should be given to reinstating the rebate on AQIS certification charges.

1.55 The historical lack of innovation in Australia's food processing sector has resulted in it becoming one of Australia's least profitable sectors.[25] I agree with the Committee's view that the Federal Government must examine the current taxation and regulatory settings and ensure it encourages innovation in the food processing sector. More needs to be done to improve the accessibility of opportunities to engage in innovation for those involved in the food industry.

1.56 As referred to in paragraph previously, South Australian producers may be at an even greater disadvantage due to their inability to obtain funding through the Federal Government's 'Water for the Future' program. Irrigators are already too

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22 Inquiry into Australia's Bio-security and Quarantine Arrangements, Additional Comments by Senator Nick Xenophon, p. 1.

23 Summerfruit Australia Limited, *Submission 13*, p.8.

24 Inquiry into Australia's Bio-security and Quarantine Arrangements, Additional Comments by Senator Nick Xenophon, p. 2.

25 M. Cole and G. Ball, 'Global trends and opportunities in food and nutritional sciences, JR Vickery Address, 2010, 43rd Annual AIFST Convention, *Food Australia*, October 2010, pp. 461–462.

efficient to access funds through the 'Sustainable Rural Water Use and Infrastructure Program', which is in place to enable irrigators to increase their productivity. Worthwhile research and development opportunities, such as trialling new irrigation techniques by improving infrastructure,[26] have been denied funding as the Program does not fund research and development projects.[27]

1.57 The Federal Government must act to ensure the continuation of funding for research and development for industries involved in Australia's food supply chain. It must look beyond the current funding arrangements and programs delivered by the Cooperative Research Centres and ensure that Government money being directed through other programs, such as the Sustainable Rural Water Use and Infrastructure Program can be made available for research and development purposes.

1.58 Evidence before the Committee suggests that the current economic climate is presenting a barrier to companies investing in their own research and development. Low consumer confidence, increasing input costs and the high Australian dollar are making it more and more difficult for businesses to stay afloat and leaving little opportunity for funds to be directed towards research and development.[28] I believe that these issues need to be addressed and I propose that an inquiry be established to investigate the impact of the high Australian dollar on the Australian economy, particularly the manufacturing sector.

1.59 I am concerned by the potentially contradictory views of the Committee in respect of intellectual property and the growth of private labels. The majority report characterised the growth of private labels as an opportunity for food processors, yet when private labels are put in the context of intellectual property the Committee viewed them as a threat to investment in innovation. I am inclined to view private labels in the latter sense and believe more needs to be done to protect existing intellectual property rights of processors and foster future innovation in Australian products.

1.60 More must be done to protect the intellectual property rights of Australian producers who export overseas. Unfortunately some Australian producers are all too familiar with the integrity and quality of their brand being jeopardised in overseas markets. Australia's wine industry has persistently been targeted by counterfeiters in China, with well known brands such as Penfolds and Jacobs Creek being promoted in Chinese wine fairs, sold in Chinese liquor stores and exported to other markets

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26 Rural and Regional Affairs and Transport References Committee, Management of the Murray-Darling Basin system, Mr Chris Byrne, *Committee Hansard*, 3 April 2012, p. 45.

27 Department of the Environment, Water, Heritage and the Arts, 'Guidelines for the private irrigation infrastructure program for South Australian, November 2009, p. 7.

28 Mr Duncan Makeig, Group Sustainability Director and General Counsel, Lion Pty Ltd, *Committee Hansard*, 10 February 2012, p. 50.

overseas.[29] As China is Australia's fastest growing export market for wine, the Australian Government must ensure our brands are not irreparably damaged by poor quality and potentially hazardous imitations.

1.61 Australia's export capabilities are also being hampered by the high Australian dollar which is making imports cheaper and our exports more expensive. The Committee heard that processors in Western Australia who were highly exposed to changes in the export market have been forced to close recently.[30] Our market is also being exposed to higher levels of cheap imports, often from overseas industries whose food processors are supported by higher levels of government subsidies or protected by tariffs imposed on imports. I support the Committee's recommendation that the Federal Government lobbies for the reduction in tariff and non-tariff barriers to trade in Australian export destinations.

1.62 Cheap imports also pose a significant threat to our producers due to Australia's lax anti-dumping laws. Currently Australian producers and processors must prove that the products have been dumped and that they have suffered a material injury as a result. The Committee heard how pork products were dumped in Australia in 2006 but that proving the dumped products caused a 'material injury' to the pork industry was too complex and expensive for Australian producers. As a result no action was taken.[31] This demonstrates a significant failure on the part of the Government to protect Australian producers.

1.63 I acknowledge that the Federal Government's proposed anti-dumping reforms go some of the way to protecting Australian producers and processors, however I believe these reforms need to go much further. I agree with Australian Pork Limited who believes reversing the onus of proof *"would make a huge difference in being able to technically determine whether dumping was taking place"*[32] and I will continue to push for the onus of proof to be reversed in Australia's anti-dumping legislation.

Recommendation 10

1.64 Amend the *Customs Act 1901* to reverse the onus of proof so as to require an importer to prove the imported goods have not been dumped or subsidized for export.

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29 Jeni Port, 'Chinese fake it with counterfeit Australian wines', *The Sydney Morning Herald*, http://www.smh.com.au/executive-style/top-drop/chinese-fake-it-with-counterfeits-of-australian-wines-20100823-13im7.html and Meredith Booth, 'Fake SA wine market in China', *The Advertiser*, http://www.adelaidenow.com.au/news/south-australia/fake-sa-wine-marketed-in-china/story-e6frea83-1226398023478 (accessed 9 August 2012).

30 Mr Stuart Clarke, Director, Food Industry Development, Department of Agriculture and Food, Western Australia, *Committee Hansard*, 18 April 2012, p. 5.

31 Mr Andrew Spencer, *Committee Hansard*, 13 December 2011, pp .6–7.

32 Ibid.

1.65 For Coles to challenge Australian producers to be more proactive in their approach to accessing export markets is blatantly disrespectful and offensive to producers whose profit margins are already being squeezed by the major retailers.[33] If our producers really are able to take advantage of the opportunities presented by the growing middle class in Asia then we must act now to ensure our producers and processors are able to compete in our domestic market.

1.66 Current industry views indicate that DFAT and AQIS are not doing enough to assist Australian producers access overseas markets.[34] Reducing the regulatory compliance costs for exporters will go some of the way to assisting exporters, however I believe Government departments must be more proactive in their approach in establishing and improving relationships with export partners.

1.67 I believe Australia needs to reconsider its approach to free trade agreements (FTAs) by ensuring that we enter into agreements that serve our own best interests. In fact, the Australian Food and Grocery Council described our current approach to FTAs as "dumb" and believes the Federal Government must refocus the purpose of FTAs to achieve greater benefits to smaller producers.[35]

1.68 I am encouraged by the discussions that took place during this inquiry and by the Committee's recommendations. However this is not the time for complacency. The Federal Government must move to make a fairer operating environment for Australian food processors and priority consideration needs to be given to the divestiture of the grocery retail market. Australia's current regulatory regime has made it too easy for the Coles and Woolworths duopoly to profit at the expense of producers and consumers. To that extent producers must be protected by effective laws against unfair contract terms and unconscionable conduct. Similarly, the *Competition and Consumer Act* needs to be strengthened to effectively deal with anti-competitive conduct and to ensure that a general divestiture power is available to break up monopolies and dominant companies that act to the detriment of competition and consumers. Australia's future food security should not be put at risk by inadequate biosecurity laws and disadvantageous FTAs.

Senator Nick Xenophon

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33 Mr John Durkan, Merchandise Director, Coles Group Ltd, *Committee Hansard*, 15 May 2012, p. 1.

34 Mr John Millington, Company Spokesman, Luv-a-Duck, *Committee Hansard*, 17 April 2012, p. 40.

35 Australian Food and Grocery Council, *Submission 12*, pp. 18 and 20.