SUBMISSION TO THE AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION

INQUIRY ON THE REGULATION OF AUSTRALIAN AGRICULTURE

By

THE
AUSTRALIAN MEAT PRODUCERS GROUP
('AMPG')

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THE AUSTRALIAN MEAT PRODUCERS GROUP

The Australian Meat Producers Group ('AMPG') is a think tank made up of leading beef industry figures established following the large beef industry forums held in Armidale and Rockhampton in 2010 to advise on restructure and reform options for the Australian red meat industry organisations.

The Australian beef and dairy cattle industries are facing major challenges around the increasing concentration of power in the processing and retail industries, together with rising farm debt and the declining producers' share of the retail dollar.

Consequently, a number of cattle producers around Australia, including members of the AMPG think tank, have banded together to assist those cattle producers worried about the increasing market concentration of the retail and processing industries, as well as their declining share of the retail dollar and the effectiveness of their current representation.

The following submission focuses upon the issues facing beef producers in relation to the regulation of agriculture and competition law under consideration in the Productivity Commission's Inquiry on the Regulation of Australian Agriculture.

AMPG Cattle Producers and their representatives directly contributing to this submission include:

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1. INTRODUCTION

The Australian Meat Producers Group ('AMPG') welcomes the opportunity to provide a submission to the Productivity Commission's ('Commission') Inquiry on the Regulation of Australian Agriculture ('Inquiry') and provide comment on the Commission's draft report published on 21 July 2016 ('Draft Report').

This submission reviews related issues raised in the Commission's Draft Report for the Inquiry on the Regulation of Australian Agriculture, and examines the need for changes to Australia's competition laws from the perspective of Australian beef producers in the context of unnecessary supply chain regulatory burdens, Australia's farm export competitiveness, and comparing the Australian approaches to the approaches in other countries, including the United States, Canada, and the European Union, with whom Australia competes in a global market, particularly:

- the degree of concentration of retail and processing market power in those industries;
- the producers' share of the retail dollar and price transparency laws;
- the uncompetitive Australian government influenced charges and costs on those industries; and
- the relative weakness of Australian rural advocacy groups.

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2. EXECUTIVE SUMMARY

A. OVERVIEW

Australian agricultural producers are faced with increased concentration in the processing industry and the domestic retail market. While, as stated in the Commission's Draft Report, there is a co-dependence among producers, processors, and retailers on the productivity and profitability of suppliers throughout the supply chain,[1] the increased concentration of the processing industry coupled with increased concentration in the domestic retail market has resulted in unequal bargaining power along the supply chain with Australian producers receiving less of the retail dollar for their products than producers and retailers compared to American producers.

The extent of unequal bargaining power can potentially lead to unconscionable conduct by retailers or processors.[2] These issues have recently been illustrated in Australian dairy industry and the actions of Murray Goulburn in retrospectively cutting milk prices for farmers and the apparent use of $1/litre milk by Coles and Woolworths as a loss-leader, which has raised allegations that dairy processors and retailers have acted unconscionably in relation to dairy producers. This situation has led to the ACCC inquiry into the Australian dairy industry recently announced by Deputy Prime Minister and Minister for Agriculture Barnaby Joyce.[3]

It is vital to the interests of Australian producers and consumers that the remaining sectors of the agricultural industry do not end up in the fairly dire situation that the Australian dairy industry now finds itself. There are, of course, international circumstances and factors that

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[1] Based upon *Productivity Commission, Regulation of Australian Agriculture, Draft Report ('Draft Report')*, 431.
[2] See for example 2009 European Commission Paper at page 7 below.
[3] Barnaby Joyce MP, Media Release*: ACCC to undertake full examination of the dairy industry*, 25 August 2016, <*http://minister.agriculture.gov.au/joyce/Pages/Media-Releases/ACCC-dairy-industry.aspx*

may, and often will, affect Australian agricultural industries; however, these international factors are only one force upon Australian agriculture, and domestic regulations are the most significant force upon the profitability of Australian agriculture.

B. CONCLUSIONS

A truly competitive market with market and price transparency will lead to greater efficiencies throughout the supply chain. In order to ensure a competitive agricultural market, the amendments to section 46 of the *Competition and Consumer Act 2010* (Cth) ('*Competition and Consumer Act*') contained in the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, as recommended by the Australian Government Competition Policy Review chaired by Professor Ian Harper ('Harper Panel'), need to be enacted as law.

One challenge to competition throughout the supply chain is the unequal bargaining power between producers on the one hand and the increasingly concentrated retail industry and processing industry on the other. This unequal bargaining power permits large retailers, and to an extent large processors, to unilaterally set prices to producers, even if the price is below the cost of production – as the case with milk during the price wars between Woolworths and Coles, which poses a risk for the long term existence of Australian agricultural producers and therefore Australian food security.

The introduction of a mandatory price reporting system similar to the mandatory price reporting regimes in the United States for both beef and dairy would provide market transparency and go some way to ameliorate the unequal bargaining power between producers. The Senate's Rural and Regional Affairs and Transport Committee's ('RRAT Committee') September 2014 report on *Industry Structures and Systems Governing Levies on Grass-fed Cattle* ('Grass-fed Cattle Levy Report')[4] dealt with this issue and recommended as Recommendation 7 of the RRAT Committee's Grass-fed Cattle Levy Report that a mandatory price reporting regime as in the United States, as well as legislation akin to the *Packers and Stockyards Act 1921* (U.S.) be considered and implemented.[5]

Almost 70% of Australia's beef production is exported,[6] and the majority of Australia's solid dairy product is exported. Australia has higher labour costs than their South American and U.S. counterparts and Australia's beef processing costs are significantly higher than U.S. and South American processing costs. It is axiomatic in these circumstances that Australia's beef and dairy product exporters cannot compete with overseas competitors in a globally competitive economy if Australia's livestock producers are burdened with higher government influenced costs and charges then their overseas competitors.

The relative weakness of producer advocacy groups compared to processor and retail advocacy groups further exacerbates the unequal bargaining power issue, and could be addressed by implementing Recommendation 1 of the RRAT Committee's Grass-fed Cattle Levy Report to establish a producer-owned body by legislation that would have the authority

[4] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014.
[5] Ibid, xiv and 86.
[6] ABC Online, 'Why is finding out who is taking the profit in the cattle supply chain so difficult?', 3 November 2014, <http://www.abc.net.au/news/2014-10-21/nsw-producer-share-of-retail-price-21-10-14/5822044>.

to receive and utilise part of the cattle transaction levy funds for membership liaison and policy development on behalf of levy payers in a similar way that effective overseas rural advocacy groups operate.[7]

The empirical evidence from the overseas models and examples reviewed in this submission is that strong and effective competition and price transparency laws coupled with strong rural advocacy group models has resulted in beef producers in those countries receiving a larger share of the retail dollar than that received by Australian beef producers.

C. SUBMISSIONS

For the reasons set out below, and consistent with the regulation and policy in the U.S. and the EU, AMPG submits that four actions should be taken to help protect and ensure competition vertically throughout the supply chain, namely, that the Commission should:

1. endorse the amendments contained in the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* and recommended by the Australian Government Competition Policy Review in relation to section 46 of the *Competition and Consumer Act*, including the implementation of an 'effects' test;
2. support the introduction of a mandatory price reporting system similar to the livestock mandatory price reporting regimes in the United States, and also proposed by the European Commission, for both beef cattle, as well as other agricultural industries;
3. support and advocate for the reduction of the undue burden flowing from government influenced costs and charges that disadvantage Australian producers and processors on the global market; and
4. support Australian agricultural producers' endeavours to form stronger, industry specific, properly-funded advocacy groups as recommended in the RRAT Committee's Grass-fed Cattle Levy Report.

3. CONCENTRATION OF PROCESSING AND RETAIL MARKET POWER

A. OVERVEIW

The impact of increasing concentration of processing and retail market power on the economies of the developed world have been the subject of considerable economic scrutiny in recent years.

B. EUROPEAN UNION

The impact of the revolution in retailing and the growth in international retail chains with giant corporations controlling significant proportions of domestic retail sales since the 1980's has been of particular concern in the European Union, including being the subject of a number of studies and papers by the European Commission whose main roles include, to:

- review and propose legislation and set objectives and priorities for action;
- enforce European law;
- represent the EU outside Europe; and
- manage and implement EU policies.[8]

[7] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014, xiii and 83.
[8] European Commission, About the European Commission, <http://ec.europa.eu/about/index_en.htm>.

As far back as June 2000 a study conducted by a number of UK university economists for the European Commission into *Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union* ('2000 European Commission Study') noted that the top 10 grocers in Europe accounted for 27.8% of the market in 1992 and 36.2% by 1997.[9] The 2000 European Commission Study stated that "there may be cause for concern that increasing concentration [of market power] may facilitate the ability of [European] retailers to exercise market power, as both buyers and sellers."[10] The study noted unless there was equivalent bargaining power along each sector of the supply chain, the selling power that flowed from high percentage share of the retail market translated into significant buyer power which allowed the retailer to "squeeze" prices paid to suppliers.[11]

The authors of the 2000 European Commission Study also noted that relative imbalance between retailer and supplier power allowed the retailer to engage in anti-competitive behaviour such as a combination *ex post* loyalty rebates, product promotion fees, prominent shelf-placement fees, and threats to delist the supplier.[12] The 2000 European Commission Study also found that the highest concentrations of European market retail power in 2000 occurred in the food supply chain, and warned the European regulators about the dangers of accepting short-term consumer benefits from "squeezed" supplier prices and ignoring the danger of potential detrimental effects on long-term productivity and innovation further down the supply chain.[13]

The 2009 European Commission paper into *The functioning of the food supply chain and its effect on food prices in the European Union* ('2009 European Commission Paper') examined the effect of concentration and consolidation and relative bargaining power along the supply chain concluding that excessive concentration may result in anti-competitive developments,[14] and that "problems in the functioning of the food supply chain, in terms of competition and regulation, may have played an important role" in the "sharp fluctuations in agricultural commodity and food prices . . . [and] the rapid increase in food prices."[15]

As a consequence of the 2009 European Commission Paper, the European Union determined that three main actions needed to be instigated to improve the functioning of the food chain. Namely, to:

- review unjustified regulations in cases where national regulations continue to disadvantage the market;
- enforce all European competition and consumer protection regulations, and
- gather and provide better market price information to consumers, public authorities, and market operators by setting up permanent monitoring of food prices along the supply chain.[16]

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[9] Paul Dobson, Roger Clarke, Stephen Davies, and Michael Waterson, *Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union*, June 2000, 1.
[10] Ibid, 2.
[11] Ibid, 32.
[12] Ibid.
[13] Ibid, 4.
[14] European Commission, Directorate-General for Economic and Financial Affairs, *The functioning of the food supply chain and its effect on food prices in the European Union*, Occasional Papers 47, May 2009, 25.
[15] Ibid, 33.
[16] Ibid, 34.

Currently the top four retailers in the United Kingdom control about 71.7% of the grocery retail market share.[17] Similarly, other European countries have high concentration in the grocery retail market, with Austria's top three supermarkets controlling 82% of the market share, Denmark's top five supermarkets controlling 80% of the market share, Finland's top three supermarkets controlling 88% of the market share, France's top five supermarkets controlling 65% of the market share, Germany's top four supermarkets controlling 85% of the market share, and Portugal's top three supermarkets controlling 90% of the market share.[18]

C. EFFECTS OF RETAIL CONCENTRATION OF MARKET POWER ON THE AUSTRALIAN SUPPLY CHAIN

In Australia, Woolworths and Coles controlled 73.1% of the retail grocery market in June 2014,[19] and they also control about 57.3% of the Australian retail beef market.[20]

Australian beef and dairy producers face a "double-whammy" or two-pronged challenge flowing from the increased concentration in the retail industry and the processing industry.

As stated in the Commission's Draft Report, there is a co-dependence among producers, processors, and retailers on the productivity and profitability of suppliers throughout the supply chain.[21] However, Australian beef and dairy producers are fragmented and the increased concentration of the processing industry coupled with increased concentration in the domestic retail market has resulted in unequal bargaining power along the supply chain.

Market Power in the Australian Food System

The independent, not-for-profit strategic research institute, Future Directions International ('Future Directions') published a strategic analysis paper on *Market Power in the Australian Food System* in 2014 (the 'Future Directions Paper').[22] In the paper, the authors point to the particular challenge facing Australian farmers and suppliers given the escalation in market share for Coles and Woolworths in the retail industry, and the concern "that the current imbalance in market power, favouring major supermarkets, is detrimental to Australia's agricultural industry."[23]

The Future Directions Paper notes that:

- the market power of Woolworths and Coles gives them the ability to largely determine prices for products without negotiation;

[17] BBC News, 'Aldi and Lidl double market share in three years', 17 November 2015, <http://www.bbc.com/news/business-34842198>.
[18] Consumers International, *The relationship between supermarkets and suppliers: What are the implications for consumers?*: *Summary of the main report*, 5 October 2012, 2.
[19] Future Directions International, Bariacto, Natazsa and Di Nunzio, Jack, Strategic Analysis Paper: *Market Power in the Australian Food System* (17 July 2014), 2.
[20] Beef Central, 'Butchers winning ground in retail beef share stakes', 5 February 2015, <http://www.beefcentral.com/trade/domestic/butchers-winning-ground-in-retail-beef-share-stakes/>.
[21] Based upon *Productivity Commission, Regulation of Australian Agriculture, Draft Report ('Draft Report')*, 431.
[22] Future Directions International, Bariacto, Natazsa and Di Nunzio, Jack, Strategic Analysis Paper: *Market Power in the Australian Food System* (17 July 2014).
[23] Ibid, 1.

- while Woolworths and Coles have been able to provide better access to affordable products for the Australian consumer, this has been accomplished by risking the financial viability of many Australian farmers.[24]

The Future Directions Paper notes that "[a]t the height of the 'price war' [between Woolworths and Coles], on average, farmers received between 20 to 30 cents for every litre of milk supplied to the supermarket giants, well below the cost of production for many dairy farmers,"[25] which led to 30 Queensland dairy farmers to "sell up" their farms in 2011 alone.[26]

In light of the above issues facing Australian agricultural producers from the increased concentration of market power in the retail industry duopoly of Woolworths and Coles, and the risk it poses to the financial viability of many Australian farmers could undermine Australia's food security.

Further the Future Directions Paper also notes that in order to compete with this duopoly without intervention, Australian food producers would be forced to become more centralised in an attempt to equalise the bargaining power of producers compared to retailers, and warns that "the more centralised agricultural production becomes in Australia, the more vulnerable our food system is to environmental shocks."[27]

As things currently stand, small businesses and local farmers are struggling to co-exist with the supermarket giants in light of the imbalance in market power and bargaining power.[28]

D. CONCENTRATION IN THE BEEF PROCESSING INDUSTRY

In August 2016, SG Heilbron Economic and Policy Consulting ('SG Heilbron') published a report on *The nature of competition in the beef processing industry* commissioned by the Australian Meat Processor Corporation ('2016 Heilbron Processor Competition Report') which has been submitted the ACCC *Market Study into the Cattle and Beef Industry*.[29] The 2016 Heilbron Processor Competition Report states that "concentration does not mean lack of competition and the level of concentration in the USA is far higher than here."[30]

SG Heilbron is also correct that the Australian beef processing industry is not as concentrated as the beef processing industry in the United States where the top four processors have 85% of the market share, and importantly the Australian beef processing industry with the top five largest processors having about 57% of the market share,[31] is less concentrated than the Australian dairy processing industry whose top four largest processors have 72.6% of the market share.[32]

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[24] Ibid, 2.
[25] Ibid, 4.
[26] Ibid.
[27] Ibid, 6.
[28] Ibid, 9.
[29] SG Heilbron Economic & Policy Consulting for Australian Meat Processor Corporation, *Report on the Nature of Competition in the Beef Processing Industry*, August 2016.
[30] Ibid, 4.
[31] Ibid, 22.
[32] IBIS World, Industry Report C1131, *Milk and Cream Processing in Australia*, October 2013, 23.

It is also true that currently the Australian beef processing industry is competitive for the most part, but there can still be an imbalance of bargaining power through the supply chain. For example, recently, when due to the supply of cattle going to slaughter abattoirs were operating at over-capacity, producers were generally required to book forward over four months with no price locked-in, and the processors were able to set their grid prices. Currently, however, abattoirs are operating under-capacity which results in the reverse circumstances with processing costs increasing and efficiencies decreasing.

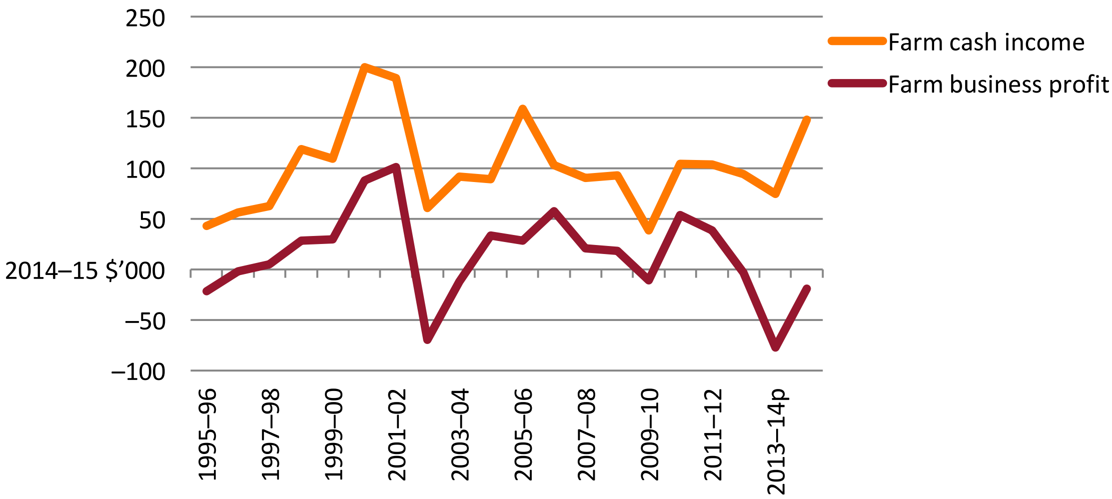
However, in Australia, a big issue that producers are dealing with is the "double-whammy", cumulative effect, flowing from high concentration of the beef processing industry and the very high concentration in the retail industry. A transparent marketplace through a mandatory price reporting system like in the United States ensures, in part, a level playing field between producers and processors in relation to bargaining power and market knowledge.

4. BEEF PRODUCER SHARE OF THE RETAIL DOLLAR

The 2016 Heilbron Processor Competition Report cites the Meat and Livestock Australia reports: *The Northern Beef Report – 2013, Northern Beef Situation Analysis – April 2014*, and *Southern beef situation analysis – 2014*, and states that "prices for livestock are not the main driver of producer profitability,"[33] and that "[p]rice received varies in only a minor way thus it is not a key driver of any difference in profit."[34] SG Heilbron instead argues that the "ability to contain costs is the main cause of low profits."[35] However, this underplays the fact that prices received for livestock are literally half the equation of producer profitability where profits = revenue (prices paid for livestock) – expenses (costs).

The graph below, at Figure 1, in relation to beef producing farms in northern Australia shows the close correlation between farm income and farm profitability.

Figure 1:[36]



Source: ABARES Australian Agricultural and Grazing Industries Survey

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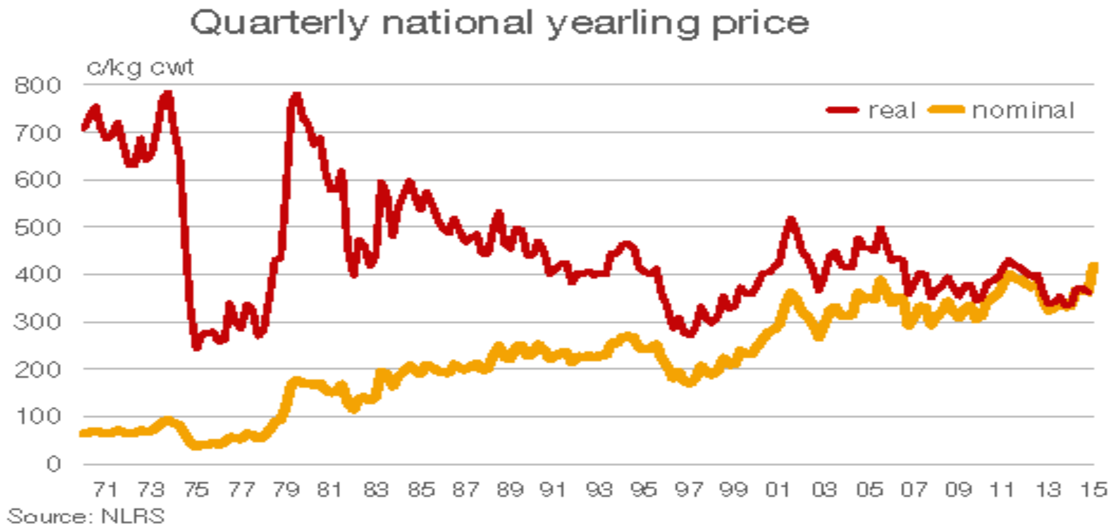
[33] SG Heilbron Economic & Policy Consulting for Australian Meat Processor Corporation, *Report on the Nature of Competition in the Beef Processing Industry*, August 2016, 10.
[34] Ibid.
[35] Ibid, 14.
[36] Peter Martin, *Australian beef: financial performance of beef cattle producing farms, 2012-2013 to 2014-15,* ABARES research report prepared for Meat and Livestock Australia, 2015, 19.

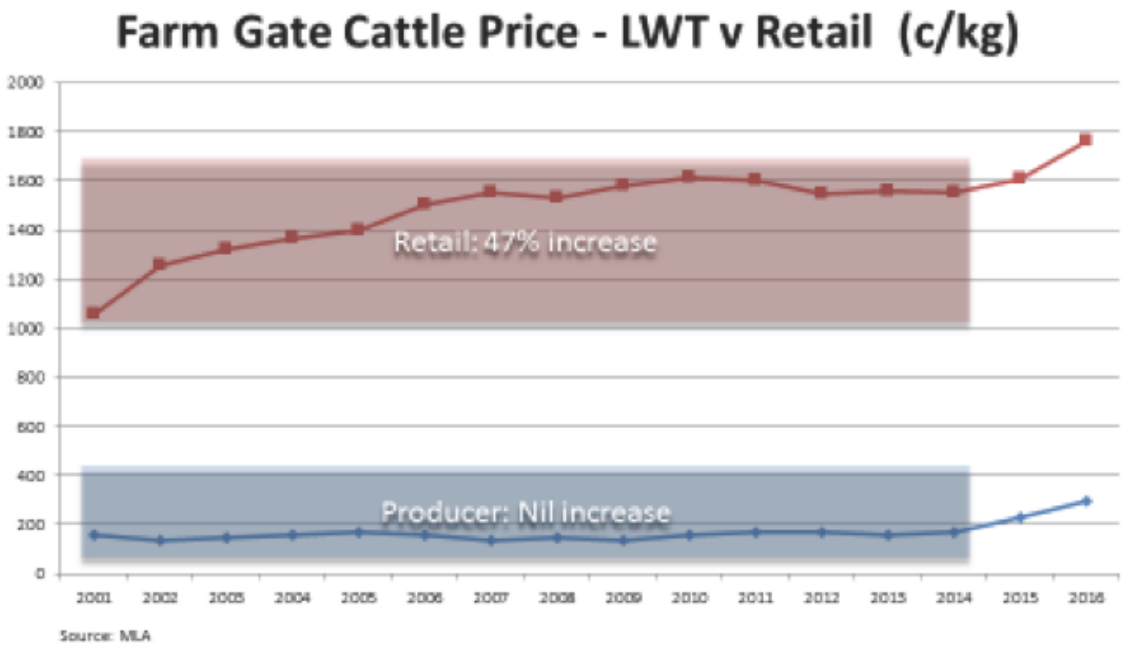
The graph published by Meat and Livestock Australia in March 2105 set out below at Figure 2 shows the history of Australian Cattle prices in real and nominal terms since 1970 discloses the huge variations in long term real cattle prices received by producers.

Figure 2:[37]



The graph set out below at Figure 3 compares farm gate prices to retail carcass prices between 2001 and 2014.

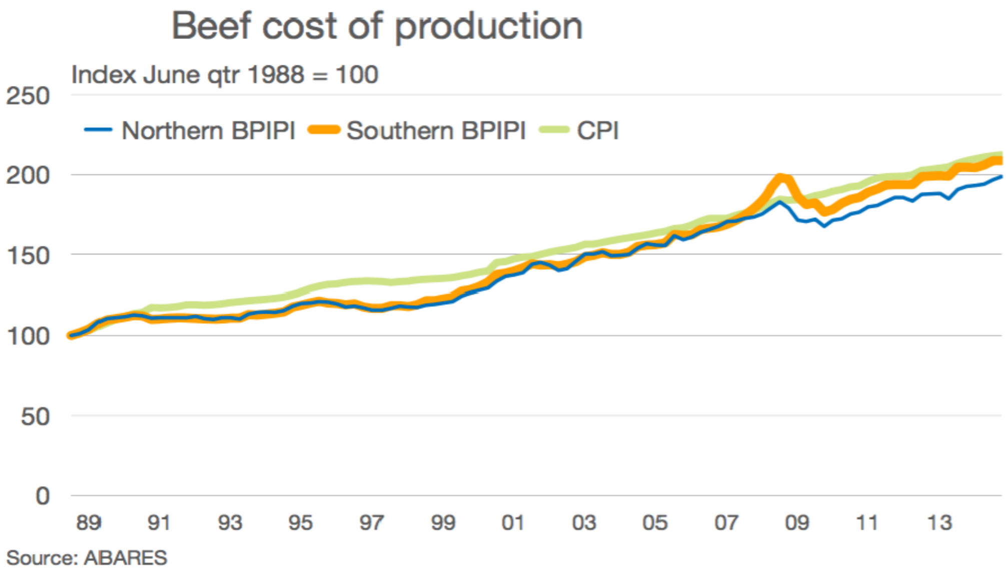
Figure 3:[38]



[37] MLA, *The history of Australian cattle prices since 1970*, MLA Market Information – March 2015,1.
[38] Australian Beef Association, AMPG Conference Presentation, 'Quality of beef from Gate to Plate? Who gets what share of retail dollar?', which cites MLA.

The graph published by Meat and Livestock Australia at Figure 4 shows the increase in costs of beef production from 1989, while (as shown in Figure 3 above) cattle prices remained flat.

Figure 4:[39]



The price which cattle producers receive and the producers' share of the retail dollar are clearly significant determiners of Australian cattle producer profitability.

Partly as a result of the unequal bargaining power between producers on the one hand and the increasingly concentrated processing and retail industries on the other, Australian cattle producers receive a lower amount of the retail dollar compared to U.S. cattle producers, and the producers' share of the retail dollar has often been used as a shorthand benchmark for producer profitability.[40] In 2013-2014, Australian beef cattle producers received 36% of the retail dollar compared to U.S. beef cattle producers who received 55% of the retail dollar.[41] Albeit that Australian beef cattle producers have enjoyed a rise in share of retail dollar since 2015, and according to Meat and Livestock Australia was at 43% in the first quarter of 2016.[42]

Canadian producers, according to Canfax Research Service, received 31% of the retail dollar in January 2010,[43] with this figure going back up. In 2010, according to Meat and Livestock Australia the Australian beef producers' share of the retail dollar was 30% on a 57% yield,

[39] MLA, *The history of Australian cattle prices since 1970*, MLA Market Information – March 2015, 5.
[40] This section relies upon, in part, Hunt Blog Newsletter: *Cattle Producers Need a Strong Representative Body to Counteract Supermarket and Processor Power: Part 1 – Identifying the Problems*, 20 April 2016.
[41] Australian Government Department of Agriculture, *Submission on Market Consolidation and the Red Meat Processing Sector*, 9 July 2015, 28 and 55.
[42] Meat and Livestock Australia, *Retail prices continue upward trend in 2016*, 17 May 2016, <http://www.mla.com.au/Prices-markets/Market-news/Retail-prices-continue-upward-trend-in-2016-17052016>.
[43] Canfax Research Services, *Interpreting the Farmers Share of the Retail Dollar*, April 2010.

and 24% on a 72% yield.[44] By comparison, U.S. beef producers received a low of 42% of the retail dollar in 2010.[45]

The Australian Beef Association estimates that the Australian beef producers' share of the retail dollar is much lower, due in part to Meat and Livestock Australia estimating that 57% of any carcass was saleable meat, whereas the Australian Beef Association commissioned an independent audit of carcass yield undertaken by the University of Tasmania which resulted in a 72% of the carcass being saleable meat.[46] Using a slightly more conservative figure of 70% carcass yield, the Australian Beef Association estimates that in 2014 Australian beef producers received about 25% of the retail dollar.[47]

We note, however, that U.S. producers have obtained a higher share of the retail dollar in a country which has higher concentration in the processing industry than in Australia, while in some U.S. states (such as Florida) there is a higher concentration in the retail industry than in Australia as well.

One potential explanation for the higher share of the retail dollar received by producers in the United States compared to Australia and Canada in these circumstances is U.S. beef producers' access to twice daily mandatory price information reporting under the United States' *Livestock Mandatory Reporting Act 1999*. Australian producers, on the other hand, do not have access to the same price transparency, and therefore are operating on a less than transparent market, which further accentuates the unequal bargaining position of Australian producers compared to the highly concentrated processing and retailer industries.

Similarly, Canadian beef producers do not have access to a Canadian equivalent of the U.S. mandatory price reporting system, and this could partially explain why they enjoy a lower share of the retail dollar compared to U.S. beef producers, in spite of the relative strength of Canadian beef industry advocacy groups.

It is worth noting in the context of the ongoing debate about Australian producers' share of the retail dollar that Australia does not have a mandatory price reporting system like in the United States. One benefit of such a system is that it permits the producers' share of the retail dollar to be clearly and easily calculated.

5. PRICE TRANSPARENCY IN AUSTRALIA AND REPORTING PROPOSALS

Australia's current cattle price indices are derived from saleyard prices, however, currently less than 30% of cattle slaughtered in Australia each year are sold through saleyards. Indeed, the largest processors are buying over 80% of their cattle through direct consignment from producers.[48]

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[44] Beef Central, 'Producers' share of retail dollar slides, but is it a relevant indicator?', 11 December 2013, < http://www.beefcentral.com/news/producers-share-of-retail-dollar-slides-but-is-it-a-relevant-indicator/>.

[45] Australian Government Department of Agriculture, *Submission on Market Consolidation and the Red Meat Processing Sector*, 9 July 2015, 29.

[46] Australian Beef Association, 'Producer's Share of Retail Dollar', 19 April 2013, <http://austbeef.com.au/2013/04/19/producers-share-of-retail-dollar/>.

[47] Australian Beef Association, 'More on Producer's Share of Retail Dollar', 17 May 2014, <http://austbeef.com.au/2014/05/17/more-on-producers-share-of-retail-dollar/>.

[48] This section relies upon, in part, Hunt Blog Newsletter: *Grass Fed Cattle Levy Senate Inquiry Recommendations and Price Transparency in the Australian Beef Industry*, 7 December 2015.

The issue around price transparency in Australia's cattle industry was taken up in the RRAT Committee's Grass-fed Cattle Levy Report.[49] Recommendation 7 of the RRAT Committee's Grass-fed Cattle Levy Report was that "the Department of Agriculture, in consultation with the cattle industry, conduct an analysis of the benefits, costs, and consequences of introducing legislation akin to the *Packers and Stockyards Act 1921* and *Livestock Mandatory Reporting Act 1999*."[50]

A. U.S. MANDATORY PRICE REPORTING

An increase in processor concentration caused the U.S. Congress to pass the *Livestock Mandatory Reporting Act 1999* ('*LMRA*'). The purpose of the *LMRA* "is to establish a program of information regarding the marketing of [livestock] that:

1. provides information that can be readily understood by producers, packers, and other market participants, including information with respect to the pricing, contracting for purchase, and supply and demand conditions for livestock, livestock production, and livestock products;
2. improves the price and supply reporting services of the [U.S.] Department of Agriculture ('USDA'); and
3. encourages competition in the marketplace for livestock and livestock products."[51]

Once the packers inform the USDA of the prices they pay livestock producers for cattle, hogs and lambs as well as the prices they receive for wholesale meat cuts, the USDA then publishes reports that detail the dealings between livestock producers and meat packers to highlight to producers exactly where the money flowing through the industry's supply chain is going.

The *LMRA* was reauthorised by the U.S. Congress in September of 2015 as the *Mandatory Livestock Reporting Act of 2015* under a process in the United States whereby existing legislation is subject to review after five years.

The benefits of the *LMRA* are regular and transparent price reporting. In the United States, processors (called 'packers' in the United States legislation) are required to report on a twice daily basis prices both for live cattle and for boxed beef sales, adding to the market's knowledge on price discovery.

B. APPLICABILITY OF U.S. MANDATORY LIVESTOCK AND BEEF PRICE REPORTING LEGISLATION TO THE AUSTRALIAN BEEF INDUSTRY

Australia's two largest beef processors, Swifts and Teys/Cargill, are subject to the *LMRA* in their U.S. operations and presumably would not object to complying with similar legislation in Australia. At least one other Australian-owned major beef processor has also publically indicated that it would have no objection to mandatory beef and livestock price reporting in Australia.

[49] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014.
[50] Ibid, xiv and 86.
[51] 7 U.S.C. §1635.

On the other hand, MLA CEO Richard Norton raised a number of potential issues regarding the introduction of livestock and beef price transparency legislation in Australia when he spoke to 300 cattle producers at the producer forum in Biloela, Central Queensland on 13 October 2015.

Mr Norton argued that the American system of livestock mandatory price reporting may be difficult to implement in Australia due to the fact that the U.S. beef market is heavily domestically-focused, being about 85% dependent on its domestic market while Australia exports about 70% of its beef product. This comment however does not seem to be relevant for the purpose of the discussion on introducing livestock mandatory price reporting in Australia. From a producer's perspective, cattle prices paid by processors are cattle prices irrespective of whether the product from those cattle is sold onto the domestic or export market, and beef prices are beef prices irrespective of whether the processor sells the beef on the domestic market or the export market.

Mr Norton has also pointed to the fact that the requirement for U.S. processors to report on export beef prices is voluntary but this reporting deficiency does not fundamentally undermine U.S. mandatory reporting price indices because the U.S. exports only about 15% of their beef production and all domestic livestock and beef sale prices are subject to mandatory reporting. Conversely there is no mandatory or voluntary reporting of Australian beef prices and Australian livestock price reporting is limited to price information collated from a limited number of saleyards and less than 30% of cattle slaughtered in Australia each year are purchased through saleyards.

SG Heilbron states that "[p]rice transparency . . . does not offer a solution for unequal power relationships in the chain."[52] However, the producer's ability to know the average price for livestock permits the parties who do not have equal bargaining power to have a fair starting point for negotiations, and the effect of price transparency can be demonstrated by the U.S. producer's share of the retail dollar as compared to the Australian producer's share of the retail dollar as dealt with in section 4 below.

Further, the fundamental issue here is one of free markets and the more transparent the market the freer the market. If a producer knows that the average price received for cattle is $5.50 per kg cwt and a processor offers $4.50 per kg cwt, then that producer is likely to go to the processor's competitor to see what it will offer and the free market will take care of the market price. SG Heilbron is correct in stating that the Australian beef processing industry is not as concentrated as in America, nor is it as concentrated as the Australian retail industry, but nonetheless a mandatory price reporting system will ensure that the unequal bargaining power between producers and processors is ameliorated, at least to some extent, while ensuring a freer and more transparent market place.

C. FUNDING FOR AUSTRALIAN MANDATORY LIVESTOCK PRICE REPORTING

The costs of the price reporting mechanisms in the United States run into the millions of dollars, but these costs are picked up entirely by the U.S. government. Based on the trend in the regulation of the Australian cattle industry and the additional government-imposed costs

[52] SG Heilbron Economic & Policy Consulting for Australian Meat Processor Corporation, *Report on the Nature of Competition in the Beef Processing Industry*, August 2016, 21.

which have been placed on producers since 2001, it may not be likely that the Australian Federal Government will pick up the costs of such a system if it is implemented in this country. However, it would be in the interests of Australia to help Australian agriculture compete on the global market for the Australian Federal Government to fund any costs associated with a mandatory livestock price reporting system in Australia.

Cost Benefit of Mandatory Price Reporting

Even if an Australian livestock mandatory price reporting system is implemented for the Australian cattle industry on a 'user pays' basis, it would most likely result in a net benefit to the sector in Australia.

A cost-benefit analysis conducted by the USDA to assess the effects of mandatory market information reporting on the operation of U.S. agricultural markets found that the mandatory reporting system resulted in "welfare gains to livestock sellers, meatpackers, and – ultimately – consumers, all of whom benefit from having more information on prices."[53]

Further, the costs of operating a mandatory price reporting system in Australia would be substantially less than the cost of the American system. The Congressional Budget Office has estimated that the cost of the *Mandatory Livestock Reporting Act of 2015* over the 2016-2020 period will be US$36 million, or an average of US$9 million for each year. At current exchange rates, this is equivalent to approximately AU$12.63 million per year. The value of U.S. cattle and calf production was US$48.5 billion in 2013, compared to US$7.4 billion in the same year in Australia. On a proportionate basis, the cost per year of implementing such a system in Australia would be only around AU$1.93 million, which would more realistically be rounded up to $2.5 million to account for the reduced economies of scale of the smaller Australian market.

Ongoing costs in Australia could be further reduced by reducing the mandatory price reporting requirement from twice per day to only once per day or once per week. The monies saved by Meat and Livestock Australia by abolishing the existing sale yard reporting mechanisms could be applied by Meat and Livestock Australia to the publishing of the market information collated by the Department of Agriculture under the mandatory price reporting legislation.

A 2015 report published by Meat and Livestock Australia and prepared by agInfo Pty Ltd on *Assessment of price transparency in the beef supply chain* in relation to Milestone 4: The likely benefits of improved beef price transparency ('2015 Price Transparency Report') concluded that:

> The benefit of full cattle and beef price transparency is to assist Australian cattle and beef markets to work more efficiently in matching beef and co-product production to consumer or export customer requirements. It can speed up the process of price discovery and smooth out price peaks and troughs. This assertion of the study team needs to be tested as we gather data. Price transparency allows the implementation of derivative mechanisms such as futures and options which alleviate price volatility.

[53] Kenneth H. Matthews, Jr., Wade Brorsen, William F. Hahn, Carlos Arnade, and Erik Dohlman, *Mandatory Price Reporting, Market Efficiency, and Price Discovery in Livestock Markets,* USDA Economic Research Service LDPM-254-01, September 2015, 28.

> It achieves this by assisting cattle producers, processors, wholesalers, exporters, retailers and foodservice operators to more quickly direct production or purchases towards areas of greatest demand, to better meet latest market specifications and to produce at times when demand is highest.[54]

Competitive Advantage of Price Transparency

Other stakeholders have also expressed concerns that a price transparency mechanism could put the Australian beef industry at risk of losing its competitive advantage by giving away commercially confidential information about how much product the country is producing and at what cost. This does not seem to be a major issue that would hinder the effectiveness of a price transparency initiative as information on the export price of Australian beef is currently freely obtainable by prospective overseas buyers and the market price information would not include information with respect to the cost of production from individual processors. Further, the Department of Agriculture would be the recipient of all price reporting from individual processors which would then be collated by the Department into a whole of industry report that would ensure commercial in confidence of particular abattoir pricing information.

Any concern about competitive advantage of Australian agriculture on a global market is more directly dealt with in relation to undue burden from government influenced charges and costs.

6. UNCOMPETITIVE AUSTRALIAN GOVERNMENT INFLUENCED CHARGES AND COSTS

Compounding the problems created by the concentration of power in the processing and retail sectors is the fact that the Australian red meat industry continues to be burdened with increasingly uncompetitive government issued costs and charges compared to their foreign competitors.[55]

A. 2001 HEILBRON UNCOMPETITIVE COST AND CHARGES REPORT

The 2001 *Study on the Impact of Government on Industry Competitiveness* by SG Heilbron ('2001 Heilbron Uncompetitive Costs Report') on the impact of uncompetitive government influenced costs and charges on the Australian red meat industry, which was commissioned by Meat and Livestock Australia, found that in 2001:

- Australian beef and sheep producers paid around one-third of their revenue in (excluding wool) government influenced costs and charges;[56]
- New Zealand beef and sheep producers paid one-sixth of their revenue (excluding wool) in government influenced costs and charges;[57]

[54] agInfo Pty Ltd, *Assessment of price transparency in the beef supply chain*, 13 April 2015, 31-32.
[55] This section relies upon, in part, the Hunt Blog Newsletter: *Cattle Producers Need a Strong Representative Body to Counteract Supermarket and Processor Power: Part 1 – Identifying the Problems*, 20 April 2016.
[56] SG Heilbron Economic and Policy Consulting for Meat and Livestock Australia, *Study on the impact of Government on Industry Competitiveness*, February 2001, 39.
[57] Ibid.

- American sheep producers paid one-eighth of their revenue (with little wool being produced) in government influenced costs and charges;[58]
- Australian beef producers paid around 12% of total farm revenue in government influenced costs and charges, while U.S. beef producers paid only 9% of total farm revenue in government influenced costs and charges;[59] and
- Australian meat processors paid twice as much as U.S. meat processors in government influenced costs and charges.[60]

B. CONTINUING INCREASE OF BEEF RELATED AUSTRALIAN GOVERNMENT INFLUENCED CHARGES AND COSTS

Since the 2001 Heilbron Uncompetitive Costs Report was published, total government charges in Australia have increased by an immense $14.26 per head, with this increase consisting of the cost of the National Livestock Identification System (NLIS), increased MLA and AMPC levies, and the 100% AQIS fee recovery. This $14.26 per head cost translates into an additional burden of more than $100 million per year on the Australian red meat industry.

Australia's overseas competitors in the red meat industry, including the United States, New Zealand and Brazil, have not suffered similar increases in their government influenced costs and charges since 2001.

C. 2016 HEILBRON BEEF PROCESSOR COMPETITION REPORT AND AUSTRALIAN BEEF PROCESSING COSTS

Additionally, Australian beef processing costs are $220 per head higher than costs in Argentina, and $150 per head higher than the U.S.[61] These extra costs put the Australian beef industry at a further disadvantage of more than $1 billion per year on the processing costs of the 8 million cattle slaughtered in Australia each year compared to their Argentinian and U.S. counterparts.

According to Meat and Livestock Australia, on average, a beast is traded 1.7 times during its lifetime which means that when the $5 levy on each sale transaction is applied the total transaction levies paid on each mature beast slaughtered is $8.70. When the 60-day pre-slaughter notional transaction levy is applied the figure becomes close to a transaction levy of $9.80 for every beast slaughtered. When the Australian Meat Processor Corporation cattle slaughter levy which amounts to $1.51 per head for an average 252 kg beast is added, it can be seen that total transaction and slaughter levies amount to about $11.31 a head, around $3.05 per head or 27% of which is being paid by processors and around $8.25 per head or 73% of which is being paid by producers.

In contrast, American cattle producers pay a $1 checkoff transaction levy for each beast sold.

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58 Ibid.
59 Ibid, 43.
60 Ibid, 45.
61 SG Heilbron Economic & Policy Consulting for Australian Meat Processor Corporation, *Report on the Nature of Competition in the Beef Processing Industry*, August 2016, 17.

7. STRENGTH OF PRODUCER ADVOCACY GROUPS

As a further aspect of levelling the competitive playing field, it is vital that producers have access to strong farm sector representation to counteract imbalances in bargaining power between producers on the one hand and increasing retail and processor industries on the other.[62]

A. AUSTRALIAN FARM INSTITUTE REPORT

The Australian Farm Institute's ('AFI') report, *Opportunities to Improve the Effectiveness of Australian Farmers' Advocacy Groups – A Comparative Approach* published in March 2014 found that, compared to the farming sectors of Canada, New Zealand, France, and the United States, "the Australian farm sector is the least 'organised', and has very few examples of successful collective action – either in pursuit of policy or commercial objectives."[63] The AFI report also notes the considerable difficulties facing farmer representation and advocacy organisations in Australia, "exemplified by declining membership, fragmentation, and perceived ineffectiveness."[64]

The AFI report found that the factors contributing to the difficulties facing rural advocacy groups in Australia include:

- the centralisation of major issues affecting agriculture towards the Australian Government and away from state governments;
- reduced national economic importance of agriculture;
- deregulation of the agricultural sector;
- increased scrutiny being imposed on agriculture by environmental and animal welfare organisations; and
- the digital revolution.[65]

The AFI report, in comparing the relative weakness of Australian rural industry advocacy groups compared to their counterparts in Canada, New Zealand, France, and the United States, put forward a number of suggestions to strengthen the effectiveness and long-term sustainability of Australian farm advocacy bodies, including that:

- agricultural advocacy groups need to deliver a range of services and benefits which can act as an attraction to encourage membership;
- providing attractive opportunities for local engagement is a powerful way to gain and retain members;
- direct-membership models of national agricultural advocacy organisations are highly unlikely to be successful unless they offer a wide array of commercially attractive products and services for members;

[62] This section relies upon the Hunt Blog Newsletters: *The Need to Strengthen Australian Rural Industry Advocacy*, 16 October 2014; *Cattle Producers Need a Strong Representative Body to Counteract Supermarket and Processor Power: Part 1 – Identifying the Problems*, 20 April 2016; and *Cattle Producers Need a Strong Representative Body to Counteract Supermarket and Processor Power: Part 2 – Conclusions and Solutions*, 26 April 2016.
[63] Australian Farm Institute, *Opportunities to Improve the Effectiveness of Australian Farmers' Advocacy Groups – A Comparative Approach*, March 2014, iii.
[64] Ibid, 1.
[65] Ibid.

- legitimacy is derived from the relationship between the organisations and its members – relies on continuing engagement of members; and
- an organisation providing a range of services and products to members in addition to advocacy services will be less prone to lose membership as a consequence of disagreements over policy.[66]

B. NEWGATE REVIEW

In November 2013, Newgate Communications was engaged by the National Farmers Federation ('NFF') and its 29 member organisations to undertake a review into farm sector representation in Australia. In August 2014, Newgate Communications published *The Newgate Review of the Future of Australian Farm Sector Representation* (the 'Newgate Review').

The aims of the review were to:

- "Establish the most effective way in which to advocate and develop policy and drive activism within the agriculture sector;
- Create an environment which supports the ability of farmers to operate profitably; and
- Strengthen the voice of the farm sector to increase its regional influence."[67]

The desired outcomes of this review were to determine "if there is support for the idea of changing the representation model and, if so, what form that change would take."[68]

The report summarises the challenges faced by the Australian farm sector in 2013 as follows:

- "Effective representation of the farm sector is impeded by structural issues, *changing membership*, revenue and *restricted resources*;
- Well-funded and effectively-coordinated bodies for the *minerals, energy, services* and *animal welfare sectors* have claimed a greater share of political influence at the expense of the farm sector;
- These challenges exist at a time when *effective representation is needed to counter anti-farm activism*, and provide stronger voice in policy debates on issues like foreign ownership, farm investment and trade policy;
- If the sector *fails to adapt* to the new environments its influence, relevance and therefore membership and funding will continue to decrease, until inevitably its capacity for effective representation is lost; and
- The sector is *ready to consider revolutionary change* in order to secure the future of farm sector representation in Australia."[69]

The Newgate Review suggests a "Unified Model" for the agricultural sector that would reduce duplication and adapt to changes in the modern agricultural environment. The "Unified Model" proposed in the Newgate Review would merge current territory and state farm organisations into a single body,[70] with "[s]ector wide resources [would also be] pooled

[66] Ibid, x.
[67] Newgate Communications, *The Newgate Review of the Future of Australian Farm Sector Representation*, August 2014, ii.
[68] Ibid, 1.
[69] Ibid. (emphasis added)
[70] Ibid, 31.

to establish a national executive to service the farm sector with 'best in class' resources, whilst removing sector wide duplication."[71]

The Newgate Review suggests two types of commodity bodies: independent commodity groups which would be peak bodies funded via industry levies (such as Cotton Australia or Australian Pork Limited) who would remain independent with some interaction with the unified body;[72] and integrated commodity groups which are currently funded by SFO membership, and would operate within the unified body.[73] The "integrated" bodies would be housed within the unified body, enabling them to draw on the resources at the national and state level to conduct activity on behalf of the commodity.[74]

Within the proposed new unified representative body:

- "The focus is upon the national level where the agreed critical issues are potentially resolved;
- Resources are re-deployed to support greater local engagement with farmers at the local level;
- Needs of states and commodity sectors are supported by dedicated experts in policy advocacy and campaigning; and
- Skills and expertise are pooled (research, campaigning, member servicing, commercial services, shared admin services)."[75]

C. THE U.S. NATIONAL CATTLEMEN'S BEEF ASSOCIATION

The National Cattlemen's Beef Association ('NCBA') in the United States is a consumer-focused, producer-directed marketing organisation and trade association that is regarded as being highly representative of cattle producers and feeders.

The NCBA aims "to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests."[76] The NCBA lobbies Congress to achieve its aims, and funds full-time lobbyists.

The funds from the Checkoff levy (a $1 transaction levy on cattle in America), is split between the Federation of State Beef Councils (the 'Federation'), the State Beef Councils, and the Cattlemen's Beef Board ('CBB'). These organisations have what may be described as a "symbiotic" relationship with the NCBA and its State affiliates, especially given their memberships come from the NCBA and its State affiliates, and that the Federation is itself a division of the NCBA.

The Federation is the division of NCBA that oversees beef and beef production promotion, research, information, and related activities funded by the beef Checkoff levy, up to 50 cents on the dollar of which is permitted to be retained by individual State Beef Councils and contributed to the Federation.

[71] Ibid, 31-32.
[72] Ibid, 32-33.
[73] Ibid.
[74] Ibid, 33.
[75] Ibid, 46.
[76] National Cattlemen's Beef Association, <www.beefusa.org/theassociation.aspx>.

In order to keep the Checkoff levy funds from being used for the more political actions of the NCBA, structurally there is what amounts to a financial "Chinese Wall" inside the NCBA whereby the Checkoff levy funds are in a separate bank account that is controlled by the Federation Directors and Executive Committee inside the NCBA to ensure that the Checkoff levy funds are not used for the lobbying activities of the NCBA.

Such a financial "Chinese Wall" could easily be constructed in an Australian grass fed cattle representative body, and the implementation of a levy-funded cattle producer group would help level the competitive playing field between producers on the one hand and the increasingly concentrated processor and retail industries on the other.

D. CANADA

The Canadian Cattlemen's Association operates on the second largest budget out of all national agricultural advocacy groups in Canada, and one of its primary functions is engaging with government and lobbying the government. About 80% of the Canadian Cattlemen's Association's funds come from the levy-funded member groups – the eight provincial member cattle associations.

A primary difference between the Canadian levy system and the Australian levy system is that, while the levy is $3, only $1 is mandatory and goes to Canada Beef Inc. and the Beef Cattle Research Council for market research, development, and promotion. The remaining $2 of the levy can be requested back by the levy payer as a refund on an opt-out basis, but otherwise stays with the provincial cattle association who then pays some of it to the Canadian Cattlemen's Association.

A further difference between the Canadian levy system and the Australian levy system is that the Canadian levy goes to beef industry-specific groups for market research, development, and promotion. This situation stands in stark contrast to Meat and Livestock Australia who receives the levy funds, and is to promote simultaneously the conflicting interests of beef and lamb to the Australian public.

E. STRENGTHENING AUSTRALIA'S BEEF PRODUCER ADVOCACY BODY

Recommendation 1 in the RRAT Committee's Grass-fed Cattle Levy Report recommends the establishment of a producer-owned body by legislation that would have the authority to receive and disperse the research and development, as well as marketing component, of the cattle transaction levy funds.[77]

A host of successful representative advocacy bodies in Australia and overseas all fund part of their operations from a mixture of levy funds (such as Australia Pork Limited, Australian Wool Innovation, the Australian Egg Board, and the Canadian Cattlemen's Association), membership fees (such as the U.S. National Cattlemen's Beef Association ['NCBA']), and derive income from services supplied to their members (such as the American Farm Bureau Federation ['AFBF']. It is common ground in Australia that organisations can use levy funds for policy development and there are a number of examples of levy funded bodies that either by charter or in practice utilise statutory levies to fund advocacy as well.

[77] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014, xiii and 83.

A well-funded, unified advocacy group would allow cattle producers to effectively lobby the federal government to implement the policy changes needed for the long term success of the Australian cattle producers, and further levels the competitive playing field between producers on the one hand who have well-funded and powerful advocacy groups, and retailers who also have well-funded and powerful advocacy groups.

Arguments against the use of levy funds by representative bodies for advocacy have to be understood in the context that:

- Australian political parties are allowed to overcome the financial effect of falling membership and fund their political campaigns from Consolidated Revenue;
- the current red meat Peak Councils can utilise interest earned from levy reserve funds and levy "service fees" for policy development and advocacy; and
- other Australian and overseas rural representative bodies can receive and utilise levy funds to fund policy development, advocacy, and service delivery.

Further, policy advocacy could be funded out of membership fees and income earned from providing members services similar to the models of the NCBA and AFBF.

It follows that there is no fundamental logical impediment to the proposed new cattle producer representative body also receiving and utilising cattle transaction levy funds for policy development, advocacy, and service delivery.

The only logical restrictions that need to be placed on levy expenditure for rural representative advocacy is to preclude the use of levy funds to fund political parties and political candidates, and perhaps to prohibit the use of levies to fund litigation against the Government, which often are inserted in Statutory Funding Agreements.

In any event, any qualms about a representative body using levy funds for advocacy or lobbying can be resolved by the representative body quarantining income received from interest received from the RMAC reserves and income earned from the provision of membership services for advocacy and lobbying with all levy funding being spent on policy development and R&D.

8. THE NEED FOR COMPETITION LAW REFORM

The Australian Government has recently introduced an exposure draft and accompanying explanatory materials for the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* which seeks to amend the *Competition and Consumer Act*, including by introducing the changes recommended by the Harper Panel in respect of section 46 of the *Competition and Consumer Act*.

A. PURPOSE OF COMPETITION LAW

It is in protecting the competitive process itself that the *Competition and Consumer Act*, like other competition laws such as the Sherman Act in the United States, seeks to protect the interests of consumers. As the High Court has stated in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* [1989] HCA 6, "the object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end."[78] Similarly, it was for the general welfare that Theodore Roosevelt in his 1901 State of the Union speech stated that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled."[79]

While consumers do benefit in the short term by lower prices, consumers would not benefit nor would the competitive process benefit from producers being forced to operate at a loss (which is unsustainable) by the unrealistic prices that retailers and some processors are willing to pay for the products, whether it be beef or dairy.

The purpose of competition law in the United States was not only to protect the interests of consumers but also to protect farmers, producers, and small suppliers from unfair market conditions which stifle competition flowing from highly concentrated market power and unequal bargaining positions. Professor John B. Kirkwood points this out in his article, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, where he states, "*[t]he most basic purpose of antitrust law is to protect consumers from [anticompetitive] behaviour. A closely related goal is to protect small suppliers like farmers and ranchers from price fixing by large buyers*."[80] Professor Kirkwood shows that, "[The U.S.] Congress also intended to stop buyers from engaging in similar anticompetitive behaviour in order to exploit small sellers like farmers and ranchers."[81]

As discussed in section 3 above, the European Commission also recognises that competition policy needs to extend along the supply chain to protect food producers and the long-term interests of consumers.

Similarly, the Australian competition law may be viewed as not only being for the benefit of consumers, but also for the benefit of the competitive process and in support of small sellers like farmers and rangers from being subject to the anticompetitive behaviour of buyers in concentrated industries like retail and processing.

B. CHANGES TO MISUSE OF MARKET POWER PROVISION

Background to the Draft Amendments to the Competition and Consumer Act

The Commission in its Draft Report has included Draft Finding 11.2 which states in part: "Existing competition regulation and oversight is adequate for managing the risk of supermarkets abusing market power in their dealings with farm businesses and wholesale merchants."[82] AMPG supports the Australian Government's *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* insofar as it amends the current section 46 of the *Competition and Consumer Act* in accordance with the recommendations of the Harper Panel.

In light of the recent inquiry into the Australian dairy industry conducted by the ACCC, and especially its relationship to the $1 per litre milk specials at the major supermarket retailers

[78] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* [1989] HCA 6, [24] (Mason CJ and Wilson J).
[79] Theodore Roosevelt, *State of the Union 1901 Speech*, < http://www.theodore-roosevelt.com/images/research/speeches/sotu1.pdf>.
[80] John B. Kirkwood, 'The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct' (2013) 81(5) Fordham Law Review 2425, 2426. (emphasis added)
[81] Ibid, 2434.
[82] *Productivity Commission, Draft Report,* 438.

Coles and Woolworths which Deputy Prime Minister and Minister for Agriculture Barnaby Joyce has called on Coles and Woolworths to abandon,[83] the statement that the "[e]xisting competition regulation and oversight is adequate for managing the risk of supermarkets abusing market power in their dealings with farm businesses and wholesale merchants"[84] does not appear to ring true.

Outline of the Proposed Changes to the Competition and Consumer Act

The recommendations of the Harper Panel that "section 46 of the *Competition and Consumer Act* should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market";[85] will strengthen the competition law around the misuse of market power, while brining section 46 into line with sections 45, 47, and 50 of the *Competition and Consumer Act*, all of which contain an 'effects' test.

The changes to section 46 will not provide a 'silver bullet' in ensuring a truly free and competitive market, but the changes are a step in the right direction.

In relation to the 'effects' test in particular, this change appears to go hand in hand with the shift from section 46 of the *Competition and Consumer Act* as it currently stands which appears to be concerned with harm to individual competitors, compared to the Harper Panel's proposal which seeks to protect the competitive process rather than individual competitors.

This shift from protecting individual competitors from harm to protecting the competitive process is an important move in properly aligning the aims of the *Competition and Consumer Act* with concern of section 46. As the Harper Panel's report states: "Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself – that is, the competitive process."[86]

9. CONCLUSIONS

In light of the two-pronged issue of increasing concentration of the processing industry and increasing concentration of the retail industry producers often find themselves in an unequal bargaining position when compared to processors and retailers. This issue is clearly illustrated by the current calamitous situation of the Australian dairy industry. A situation that has led to the Australian Government calling the recent ACCC inquiry into the Australian dairy industry, with the aim to ensure, as Deputy Prime Minister and Minister for Agriculture Barnaby Joyce states, that dairy farmers receive "fair returns at the farm gate, as well as transparency in milk price arrangements and supply contracts," and Minister Joyce also suggested the establishment of a commodity milk price index.[87]

[83] ABC Online, 'Agriculture Minister Barnaby Joyce announces ACCC investigation into Australian dairy industry', 26 August 2016, < http://www.abc.net.au/news/2016-08-25/dairy-symposium-discusses-crisis/7783944>.
[84] Ibid.
[85] *The Australian Government Competition Policy Review*, March 2015, 62.
[86] Ibid, 339, which is also a position put forward by the European Commission.
[87] Barnaby Joyce MP, Media Release: *ACCC to undertake full examination of the dairy industry*, 25 August 2016, < http://minister.agriculture.gov.au/joyce/Pages/Media-Releases/ACCC-dairy-industry.aspx>.

A truly competitive market with price and market transparency will lead to greater efficiencies throughout the supply chain. In order to ensure a competitive agricultural market, the amendments to section 46 of the *Competition and Consumer Act* contained in the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, as recommended by the Harper Panel, need to be enacted as law.

One challenge to competition throughout the supply chain is the unequal bargaining power between producers on the one hand and increasingly concentrated retail industry and processing industry on the other. This unequal bargaining power permits large retailers, and to an extent large processors, to unilaterally set prices to producers, even if the price is below the cost of production – as the case with milk during the price wars between Woolworths and Coles, and was also done during periods when cattle were required to be sold to processors on four month forward contracts without a set price due to abattoirs being over-capacity compared to the cattle supply, which poses a risk for the long term existence of Australian agricultural producers and therefore Australian food security.

The introduction of a mandatory price reporting system similar to the mandatory price reporting regimes in the United States for both beef and dairy would provide market transparency and go some way to ameliorate the unequal bargaining power between producers. The RRAT Committee's Grass-fed Cattle Levy Report,[88] dealt with this issue and recommended as Recommendation 7 of the RRAT Committee's Grass-fed Cattle Levy Report that a mandatory price reporting regime as in the United States, as well as legislation akin to the *Packers and Stockyards Act 1921* (U.S.) be considered and implemented.[89]

Almost 70% of Australia's beef production is exported,[90] and the majority of Australia's solid dairy product is exported. Australia has higher labour costs than their South American and U.S. counterparts and Australia's beef processing costs are significantly higher than U.S. and South American processing costs. It is axiomatic in these circumstances that Australia's beef and dairy product exporters cannot compete with overseas competitors in a globally competitive economy if Australia's livestock producers are burdened with higher government influenced costs and charges then their overseas competitors.

The relative weakness of producer advocacy groups compared to processor and retail advocacy groups further exacerbates the unequal bargaining power issue, and could be addressed by implementing Recommendation 1 of the RRAT Committee's Grass-fed Cattle Levy Report to establish a producer-owned body by legislation that would have the authority to receive and utilise part of the cattle transaction levy funds for membership liaison and policy development on behalf of levy payers in a similar way that effective overseas rural advocacy groups operate.[91]

The empirical evidence from the overseas models and examples reviewed in this submission is that strong and effective competition and price transparency laws coupled with rural

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[88] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014.
[89] Ibid, xiv and 86.
[90] ABC Online, 'Why is finding out who is taking the profit in the cattle supply chain so difficult?', 3 November 2014, <http://www.abc.net.au/news/2014-10-21/nsw-producer-share-of-retail-price-21-10-14/5822044>.
[91] Australian Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on Industry Structures and Systems Governing Levies on Grass-fed Cattle*, September 2014, xiii and 83.

advocacy group models has resulted in beef producers in those countries receiving a larger share of the retail dollar than that received by Australian beef producers.

10. SUBMISSIONS

For the reasons outlined above, the AMPG submits that in seeking to level the competitive playing field between producers and increasingly concentrated processing and retail industries, and consistent with the regulation and policy in the U.S. and EU, four actions should be taken to help protect and ensure competition vertically throughout the supply chain, the Commission should:

5. endorse the amendments contained in the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* and recommended by the Australian Government Competition Policy Review in relation to section 46 of the *Competition and Consumer Act*, including the implementation of an 'effects' test;
6. support the introduction of a mandatory price reporting system similar to the livestock mandatory price reporting regimes in the United States, and also proposed by the European Commission, for both beef cattle, as well as other agricultural industries;
7. support and advocate for the reduction of the undue burden flowing from government influenced costs and charges that disadvantage Australian producers and processors on the global market; and
8. support Australian agricultural producers' endeavours to form stronger, industry specific, properly-funded advocacy groups as recommended in the RRAT Committee's Grass-fed Cattle Levy Report.

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