SUBMISSION TO THE PRODUCTIVITY COMMISSION ON THE REGULATION OF AGRICULTURE

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- Confidentiality request: I **do not** request that the details of this submission be kept confidential.

Introduction

The Ovens Valley Branch of the VFF has 32 members based in the Alpine Shire and parts of the Rural City of Wangaratta located in the communities of Beechworth, Bowmans Forest, Bright, Everton, Myrtleford, Mudgegonga, Porepunkah, Whorouly, Rosewhite and Stanley. Membership of the Ovens Valley Branch are predominantly beef production with 7 members who are dairy farmers and a number of mixed sheep and beef producers.

Our Branch wish to highlight our concerns with section 11 of the Productivity Commission's Draft Report (PC Draft Report), relating to Competition Regulation where it discusses changes to Section 46 of the Competition and Consumer Act (CCA). The PC Draft Report states that "*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*." (Product Commission Draft Report Overview P40)

The PC Draft Report further states that "*The introduction of an 'effects' test to section 46 is unlikely to shield farm businesses from intense competition in retail grocery markets. Shielding farm businesses from competition would also not be in the interest of consumers*" (Competition Draft Report p 431). The Competition Law's main objective is to protect the competitive process and ensure healthy and robust competition, to protect the long term interest of consumers. When there is consolidation of industry and concentration of market power in retail sectors of the supply chain, this can negatively affect and disadvantage farmers and small businesses who supply the concentrated sectors of the supply chain because these suppliers are not in a fair bargaining position and the competitive process breaks down. This break down in the competitive process of which undermines the existence of Australian farms is not in the long-term interest of consumers.

The simple fact that few cases have been successfully brought under the current misuse of market power law and in fact only seven cases have been considered by the full Federal Court of the High Court over the past 15 years demonstrates the ineffectiveness of the law. (Options to strengthen the misuse of market power law, Discussion Paper December 2015, p3) Clearly the burden of proof is too high restricting the success rate of potential claims. Our Branch is very concerned that the Productivity Commission would endeavour to reverse the Harper

Panel recommendations. A reversal of the Harper Panel's recommendations and failure to introduce the 'effects' test would disadvantage small business, and in particular farmers, who do not have equal bargaining power compared to, and are therefore dependent upon the prices set by, supermarkets and other organisations above them in the supply chain who, especially in highly concentrated markets, are free to set the prices they are willing to pay for goods without a truly competitive process or significant negotiation. The general view that the competition law has been ineffective also inhibits farmers' from initiating legal action if they feel there has been a misuse of market power.

The Ovens Valley Branch believe the competition law has let our farmers down. We strongly encourage the Productivity Commission to accept the changes recommended by the Harper Panel and to support the changes to this law to allow for appropriate legal protection for farmers and small business across Australia.

We also highlight the importance of the farming sector with livestock and meat valued at $27 billion (7121-0 Agricultural Commodities, Australia, 2014-15, 23 March 2016) and note that beef farmers manage more than 75 per cent of the total area of agricultural land in Australia. (The Australian Beef, financial performance of beef cattle producing farmer, 2011-12 to 1013-14, Research by the Australian Bureau of Agricultural and Resources Economics and Sciences Research Report 14.7 August 2014, p1). If farmers are being disadvantaged by unabated collusive behaviour and misuse of market power, which we believe has been occurring for many years, the impact on regional communities and on the social, economic and the natural environment across Australia is massive.

As rationalisation continues to occur in our industry, with fewer buyers attending the public cattle markets, there is opportunity for operators to manipulate the market price. This is of particular importance in Australia as we do not have any form of mandatory price reporting mechanism along the market and retail chains so we are left with the Eastern Young Cattle Indicator (EYCI) to determine the average livestock price across Australia. However, the EYCI is calculated from saleyard prices, which is not the method for the majority of cattle sales to abattoirs in Australia. Since there is no mandatory price reporting mechanism in Australia along the market and retail chains, the EYCI is by default used as a price barometer index, and if there is price manipulation at a public cattle sales it can have a significant flow-on effect across the Australian cattle industry.

Misuse of market power

One of the most significant and open examples of market power and collusion affecting beef farmers was demonstrated on 17th February 2015 when 9 processes chose to boycott the Northern Victoria Livestock Exchange (NVLX) at north Barnawartha. It would appear the processors did collectively choose to boycott the very first prime cattle sale, in an effort to change the pre-weigh system to post-weigh. Prices on the day dropped up to 30 cents per kg and these actions followed with an ultimatum that saw agents cave into processor demands and NVLX moved to a post-weigh system that very same afternoon. There was no consultation with producers who pay all the sale yard fees - yet again underscoring the unequal bargaining position in which farmers find themselves.

The ACCC responded to requests from concerned farmers and farmer organisations and investigated the Barnawartha 'boycott' as did the Government calling for a Senate Inquiry into the Effect of market consolidation on the red meat processing sector.

Although the ACCC used statutory powers to gather documents from the buyers involved, after many months of investigations they produced little for their efforts due largely to the difficulty with section 46 of the CCA and the 'take advantage' test.

The Chairman of the ACCC, Mr Rod Sims, said, "*Although it was clear that processors communicated about the sale, the evidence did not demonstrate that any of (them) entered an arrangement or reached an understanding not to attend the sale, which is required to establish a breach of the (Competition and Consumer) Act,"*

When our Branch questioned the ACCC on their decision they claimed the threshold for evidence is extremely high and virtually impossible to attain.

The ACCC have since clearly articulated their concerns with the current regulation at a public hearing on 5th April 2016 in Canberra for the Rural and Regional Affairs and Transport References Committee where the Committee heard evidence from the ACCC for its inquiry into the effect of market consolidation on the red-meat-marketing sector. Mr Rod Sims and Mr Marcus Bezzi, Executive General Manager, Competition Enforcement, presented evidence in regard to the Barnawartha 'Boycott'. They also announced to the Committee that due to their investigations and concerns with what communications had been taking place amongst the livestock buyers, that they would be conducting a market study into the cattle and beef industry.

When Mr Bezzi was questioned in regard to whether there had been a collective boycott his response was, "*We found that there were signals sent to the market about attitudes to pre-sale weighing. Those signals probably gave comfort to some of the smaller processors that the bigger processors were not going to turn up. … That is not enough to establish a breach."* (Australian Competition and Consumer Commission, Committee Hansard, 5 April 2016, p. 4)

When questioned by Senator McKenzie in regard to the behaviour clearly looking like a collective boycott, Mr Sims answered "*Sure. We have explained before the laws on collusion and that your need to establish that there has been some form of meeting of minds. I want to point out that one of the recommendations from the Harper committee, which is very relevant here. It is a deficiency in our laws and one that is not much commented on – that is the law in relation to concerted practices*." Mr Sims went on to say that "*In most other jurisdictions, there are laws in relation to concerted practices where, if you like signals are sent in various ways. They have to amount to a substantial lessening of competition*." (Ibid p4)

Mr Sims goes on to say that our laws are quite limited and highlighted the need for 'facilitating practices' "*we have a variation of it that applies just to banking and, frankly, it is rather silly to have a law that applies to just one sector*." (Ibid p5) Importantly Mr Sims notes that this law is usually applied overseas.

Mr Bezzi than went on to explain that "A concerted practice is essentially, where competitors share confidential information, with each other, without any expectation that the other party will do anything reciprocal." As opposed to collusion where there is proof that the parties came to an understanding. "*But if there is no understanding, if there is just a sharing of highly sensitive confidential information, which then has an impact on competition, in the UK, in Europe, in the United States, the competition agencies can take action. Here, we cannot*." (Ibid p5)

Further when asked did this type of behaviour occur between the buyers at Barnawartha, Mr Sims answered "…*had the Harper concerted practices laws been in place we would have had a very close look under that heading.*" Further explaining that in regard to concerted practices there only needs to be evidence of people exchanging information about how they are going to price. Mr Bezzi went on to say, "…*if you had buyers have a cup of coffee in the morning, beforehand, and say, 'these are the lots I'm going to bid on, today.' Mr Sims goes on to explain, "And the other might say, 'I'm going to do this*."(Ibid p5)

Although this sounds like collusion to us with buyers openly discussing what prices they are going to pay and what lots they are going to bid on the law says differently and clearly there is a very real need to adjust the law if we wish to protect farming businesses.

The key recommendations that are being discussed in this submission from the Harper review are detailed below:

Key competition *law* recommendations

In terms of the competition laws, key recommendations *include*:

- that **section 46 (misuse of market power)** should prohibit conduct by firms with substantial market power that has the purpose, effect, or likely effect of substantially lessening competition (SLC) (no defence, but list of factors court must considered when assessing SLC - including whether conduct might enhance efficiency, innovation, etc.);
- that **price signalling provisions be removed** and replaced by extending section 45 to cover **concerted practices** having the purpose, effect, or likely effect of SLC;

Price signalling	Repeal Division 1A; extend s 45 to capture **concerted practices**	Rec 29
Misuse of market power	Replace taking advantage and purpose elements with purpose, effect, or likely effect of SLC test; no defence but factors court should consider when assessing whether this element satisfied (including efficiency, quality and price issues)	Rec 30

Competition Policy Review Final Report 31 March 2015

Conclusion

Our Branch support recommendations 29 and 30 of the Harper Review, both of which are key elements of the competition law that will assist in restricting anti-competitive behaviour and protect small businesses and the interests of consumers. Our Branch is very concerned after the amount of work undertaken with regard to the Harper Review that the Productivity Commission would seek to undermine that work and undermine the recommendations. We need to develop initiatives that support our farmers and assist in delivering sustainable outcomes with at least some level of protection against anti-competitive behaviour from larger corporations. We agree with the Harper Panel that section 45 of the act should be extended to prohibit "concerted practices" having the purpose or effect of lessening competition and question why this law only applies to the banking industry in Australia when clearly there is a need to be inclusive for all industry as is the case in England, America and Europe.

Potentially, farmers have been affected by the collusive behaviour of the large multinationals for many years. ABARES clearly indicates poor profitability within the industry over a considerable time and the ACCC confirm their concerns in regard to their investigations proving frequent communication has been occurring between the buyers. Furthermore, the ACCC have been outspoken on their frustration with the current regulation limiting their effectiveness in managing complaints from the farming community. Mr Sims says "…*I think it really is as straightforward as saying that the missing law is on concerted practices. Collusion is really the main thing people are concerned about, where sellers in a market – or buyers, for that matter, in this case – are colluding, and that is really a cornerstone of trade practices law. But overseas they have recognised for a long time that there are circumstances where you can get close to that, where you are giving information particularly privately, but also potentially publicly, where that has the purpose or effect of substantially lessening competition….we would have to say we are missing this key element of law which would have dealt with this issue. I can urge again that we are hopeful the parliament will endorse the government's recommendation to bring in the particular law*." (Australian Competition and Consumer Commission, Committee Hansard, 5 April 2016, P7)

The farming community for many years has had little control over pricing, predominately we have been price takers allowing the large organisations to control product pricing. The Australian farmer has had little support in managing his or her unequal bargaining position as a result of collusion and misuse of market power across our country, the legacy can be seen and felt throughout our small communities as can the effects of collusion – rationalisation and poor government representation which turn a blind eye to corrupt buying systems. The flow-on effect has been significant and over the past 20 years our regional communities and small towns have been disadvantaged and shrinking, creating fragmented communities and forcing farmers and local town folk to leave their much loved homes to relocate to larger centres. Sadly, this has come at huge social and economic cost to hardworking Australian farmers, small business and Australia as a whole as it threatens to undermine the continuing existence of Australian farmers.