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To Whom It May Concern,

Australian Dairy Farmers (ADF) appreciates the opportunity to provide a submission in response to the draft report of the independent Competition Policy Review Panel (the Panel).

ADF appreciates the consultation and hard work that has been undertaken by the Panel and commends the Government for undertaking this comprehensive and necessary Review.

Rather than addressing all questions raised in the draft report of the Panel, ADF will once again concentrate on issues that are relevant to dairy farmers and the complex issues they face in both domestic and international markets as we did in our original submission to the Review.

It is also worthwhile reiterating once again that ADF also has been heavily involved in working with the National Farmers' Federation (NFF) on their submissions and strongly endorses the initial NFF submission and work from Minter Ellison that is attached to it.

Competition issues do not affect the dairy industry alone but are being experienced across agricultural commodities and the issues and priorities discussed in this submission reflect, and are in alignment, with NFF priorities.

The inequality of market and or bargaining power means that farmers are largely price-takers in the market and susceptible to at times questionable business practices of large corporate businesses with significant market power. It also needs to be acknowledged that these same practices will have implications for consumer choice and costs in the longer term if left unchallenged.

ADF seeks recognition of the competitive disadvantage faced by farmers which places them in a uniquely vulnerable position.

This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods. Further, the protection offered to consumers in similar circumstances should be considered for small businesses in similarly vulnerable positions.

The Review Panel must also ensure it is in alignment and working closely with the Minister for Agriculture and the Agricultural Competitiveness Green paper processes.

Yours sincerely,

Natalie Collard
Chief Executive Officer

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Introduction

Australian Dairy Farmers (ADF) is a not-for-profit organisation that represents the interests of dairy farmers nationally. We are the collective voice to Government and the community on national issues affecting dairy farmers.

The ADF has a long history of successfully lobbying for the rights of dairy farmers on many fronts.

Australian dairy is a \$13 billion farm, manufacturing and export industry, with an extremely positive future. Dairy's value to the Australian economy, jobs on farms, in manufacturing and service sectors, the towns and communities it supports, as well as the ongoing health and wellbeing of Australian families, are a compelling basis for Government attention and policy support.

Australia's 6,400 dairy farmers produce around 9.2 billion litres of milk a year, with the potential to grow substantially over the next decade to meet growing international demand, particularly in South East Asia, China and the Middle East.

The industry directly employs 43,000 Australians on farms and in dairy processing, while more than 100,000 are employed in dairy service sectors.

Whole supply chain approach

The Australian dairy industry needs to be viewed as an integrated supply chain. Milk is a perishable product, which must be processed before it can be sold commercially. As a result, dairy production is integrated across the supply chain: dairy farmers cannot operate without domestic processing capacity, nor can processors survive without domestic farm milk supply.

Significant regional differences continue to characterise the Australian dairy industry – based on market and product mix, farmer confidence as well as current and future growth prospects.

Like the national economy, the dairy industry continues to be characterised by “two speeds” – growth and consolidation in exporting regions, contrasted with faltering confidence and contraction in domestic milk regions.

For most farmers in south-eastern Australia, international conditions determine prices and industry confidence. In Queensland, Central and Northern New South Wales, and Western Australia, however, the industry is geared toward domestic fresh milk supply.

Ongoing intensity in retail competition, unsustainable pricing of milk at \$1 per litre, disruptions caused by changes in private label supply contracts and uncertainty surrounding processor milk requirements have undermined farmer confidence and supply stability.

The use of fresh milk as a discount marketing agent by the major supermarkets, while at the same time seeking to increase the market share of their own private label brands, has seen a substantial negative impact on the margins and profitability of the domestic fresh milk supply chain. The impacts have directly affected small retailers, milk processors and farmers.

These issues affect the food system within regions, and, ultimately, the sustainability of a local fresh milk supply at a regional level. Analysis at the national level fails to show this nuanced picture, particularly the de-linking of pricing in the ‘drinking milk’ states from international prices which is becoming apparent and is cause for concern.

Prices in Southern states are set in global markets due to the large amount of product exported (over 40% of production is exported).

The domestic market is a mature market and any substantial growth in the Australian dairy industry is going to come through the export market.

Dairy ranks fourth in agricultural exports—valued at almost \$3 billion—with a 5% increase in export volumes last year alone.

Key Points

Competition Law

- Effects Test and other changes to the Competition and Consumer Act as recommended at pages 7-9.
- A Mandatory Code of Conduct and Supermarket Ombudsman with teeth to balance the excessive market power of the major retailers.

Collective Bargaining

- Further improvements to Collective Bargaining and boycott regimes than those outlined in the Review draft paper as discussed on pages 13-14 of this submission.
- ADF also notes, and welcomes, the comments in the Agricultural Competitiveness Green Paper regarding Collective Bargaining in which the Government states it is committed “to ensuring competition laws in Australia enable a competitive marketplace – for example by preventing the misuse of market power and allowing for appropriate collective bargaining by farmers.”

Unfair Contract Protection

- ADF notes, and welcomes, the Coalition Government’s commitment to extend unfair contract protections to small business.

Competition Policy for Global Industries

- ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (over 40% of dairy production is exported).
- There is a need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB, ACCC and the ACT.
- The timeframes involved in various competitive regulatory processes should not have the unintended effect of advantaging one bid ahead of any other in acquisitions.
- The number one priority from the ADF National Dairy Farmers Summit was to “develop an industry strategy for innovation, investment and growth,” a key aspect of this will be growing the industry through exports.

Response to draft recommendations relating to Competition Law

Draft Recommendation 25 — Misuse of market power

The Panel considers that the primary prohibition in section 46 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.

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

Key Points

- ADF welcomes the Panel's recommendation for an Effects Test, however has concerns that the inclusion of the purpose element and defence as outlined above may make the Effects test unworkable in reality.
- ADF requests that the proposed inclusion of the purpose and defence as outlined be carefully scrutinised to ensure it does not make the recommended Effects Test unworkable.
- ADF recommends further changes to the Competition and Consumer Act as outlined at pages 7-9

Background

The considerable amount of work, investment, planning and risk required to produce, transport, process, distribute and deliver a perishable product, fresh milk, on a daily basis is not reflected in the current discount price of milk by major retailers at \$1 per litre and is distorting the market.

If left unchecked, the actions of the major retailers in squeezing the supply chain ultimately will lead to a substantial lessening of competition in the market place, a significant impact on the viability of branded dairy products, less product variety on supermarket shelves, less choice for customers and in the long term, higher prices for consumers.

The supermarket duopoly in Australia benefits from unprecedented market share, including for their own private label brands, and market power. The unique nature of milk provides retailers with an effective means to grow their market share and power, however the consequences for the sustainability of the domestic fresh milk supply chain is significant.

The United Kingdom situation

The United Kingdom has already experienced this sort of discounting and the ensuing impacts on farmers and processors. This led them to develop measures to bring about more fairness and transparency in the market.

ADF believes these measures, particularly the UK Groceries Supply Code of Practice (the Groceries Code) provide a good starting point for the basis of Australian legislation establishing a mandatory code of practice and an ombudsman or commissioner.

The United Kingdom Competition Commission (CC) has found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.

The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and published its final report on 30 April 2008. In the report the CC considered that a package of remedies consisting of the following key elements would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition:

- (a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
- (b) the establishment of a GSCOP Ombudsman (or Adjudicator) to monitor and enforce compliance with the GSCOP.

A major issue the report raised was that some practices by big supermarkets were still having an anti-competitive effect, harming the long term interests of consumers. The new UK Code of Practice (the Groceries Code) was designed to improve the relationship between big retailers and their suppliers by preventing certain practices from occurring.

The Groceries Code came into force on 4 February 2010 and applied to all retailers with an annual turnover of more than £1 billion in groceries in the UK (there are ten such retailers in the UK). It must be incorporated into contracts with suppliers.

It is also worthwhile noting that, whether in relation to the proposed voluntary prescribed proposed Australian Grocery Code or any other subsequent arrangement, the Australian common law concept of 'good faith' is an important provision that covers honesty, cooperation, reasonableness and fairness in contractual dealings between suppliers and retailers. Such a 'good faith' clause has been inserted in the mandatory UK Groceries Supply Code against the background of past retailer behaviour in relation to the exercise of superior bargaining power

ADF Recommendations – Excessive Market Power of the Major Retailers

ADF's recommendations to the Competition Policy Review in relation to the excessive market power of the major retailers can be summarised as:

1. An Effects Test
2. Investigate Predatory Pricing
3. Definition of Unconscionable Conduct
4. Statutory Duty of Good Faith
5. Unfair Contract Terms
6. ACCC Divestiture Powers
7. ACCC Monitoring Powers

It should be noted that ADF supports the work done by the National Farmers' Federation (NFF) in this area and endorses their initial submission to the Review and the attached work by Minter Ellison lawyers.

1. Reintroduce an Effects Test into the Competition and Consumer Act

The clear intent of the major retailers' strategy is to extract as much value as possible from the supply chain with consequent pressure on those at the start of the chain, namely farmers. They are also seeking to increase their own market share to the detriment of competitors and to increase the share of home brand products in store.

Given this it is important that the ACCC has the ability to examine the impact of such strategies in the longer term, with particular emphasis on the impact on consumer choice, farmer viability, the supply chain and future prices. It should also be noted that ADF is of the firm opinion that the ACCC must take a longer term view of market issues than it currently does on all issues and in all its investigations.

It must not only look at the impact of issues on the current market but examine potential future impacts – this is particularly the case for misuse of market power issues. The former Section 49 of the Competition and Consumer Act included an 'effects' test relating to price discrimination – does the conduct in question have the effect or the likely effect of bringing about a substantial lessening of competition?

ADF believes it is well worth reinstating this under section 46 to assist the ACCC in taking a longer term view of issues and discovering the true impact for consumers, farmers and others of strategies undertaken by those with significant market power.

ADF welcomes the Panel's recommendation for an Effects Test, however has concerns that the inclusion of the purpose element and defence as outlined above on page 6 may be potentially limiting and restrict the scope of the actual benefits of an Effects Test.

ADF requests that the proposed inclusion of the purpose and defence as outlined be carefully scrutinised to ensure it does not make the recommended Effects Test unworkable in reality and tie the hands of the ACCC.

2. Investigate Predatory Pricing

That the relevant Federal Minister give direction to the ACCC to undertake an immediate investigation of Coles for a potential breach of section 46, of the Competition and Consumer Act 2010 in relation to predatory pricing, particularly in regional and remote areas.

In regional and remote areas of Australia such as Darwin, Kununurra and Broome milk cannot be sold at \$1 per litre on an ongoing basis without making a loss. ADF believes it is impossible to buy, transport, store and sell milk in these areas for \$1 per litre without selling below cost. In these same regional market areas processor proprietary brands have lost significant market share to discounted supermarket home brand milk.

3. Definition of Unconscionable Conduct

Greater certainty in the form of a legislative definition could assist farmers' access relief from unconscionable conduct. The exact meaning of 'unconscionable conduct' is not defined in the Act. The Act lists several factors that the court considers when deciding if a party has acted unconscionably. However, the court is able to consider any other matters it believes are relevant.

Associate Professor Zumbo in his submission to the 2010 inquiry into Competition and Pricing in the Australian Dairy Industry recommended inserting a definition of the word 'unconscionable' into Section 51AC of the Act. Section 51AC of the Act was introduced in 1998 to address the problem of small businesses facing power imbalances while dealing with larger commercial entities.

Associate Professor Zumbo believes this would be an 'obvious way to provide clear statutory guidance as to what is meant by the term as used in Section 51' and 'would send a clear parliamentary signal to the Courts that the concept is not only broader than the equitable concept,

but that s51AC is intended to promote ethical business conduct.’ This is particularly important in a country where two dominant players have almost 80% of the market.

Such a definition would not interfere with the driving of a ‘hard’ bargain, but rather would provide clear statutory guidance as to what is considered unethical, set out a non-exhaustive benchmark for assessing conduct to determine whether or not it goes beyond what is reasonably necessary to protect the legitimate interests of the parties involved.

ADF believes that Coles’ recent actions are certainly unconscionable, particularly when the intent of the actions is taken as a whole. Coles clearly means to damage other competitors and also put pressure on the dairy (and other commodity sectors) value chain, while at the same time benefitting its own private label brands.

ADF is of the view that anything that provides clarity for the courts and reduces the limitations of the current Act is worth pursuing. A possible definition as outlined by Associate Professor Zumbo is below:

‘Unconscionable conduct includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.’

4. Statutory Duty of Good Faith

It is important in any commercial relationship that acceptable and ethical business be promoted and undertaken. It is ADF’s belief that enacting a statutory duty of good faith in the Competition and Consumer Act will assist in ensuring this takes place.

ADF understands that recent case law has provided a framework upon which a statutory duty of good faith could be based.

- (1) Acting arbitrarily, capriciously, unreasonable or recklessly;
- (2) Acting in a manner that is oppressive or unfair in its result by, for example, seeking to prevent the performance of the contract or to withhold its benefits;
- (3) Failing to have reasonable regards to the other party’s interests; and
- (4) Failing to act ‘reasonably’ in general.

In situations where a company with significant market power and vast resources uses its ‘muscle’ to damage an industry then it cannot be said to be acting in good faith. ADF believes the enacting of a statutory duty of good faith will assist in controlling such behaviour. ADF recommends that a statutory duty of good faith be enacted as part of the Act as soon as possible to provide an appropriate and accepted benchmark of standards of ethical conduct within the Australian dairy industry.

As mentioned above this concept has been included in the United Kingdom mandatory Grocery Code.

5. Unfair Contract Terms

The dairy industry seeks recognition of the competitive disadvantage faced by farmers (who are essentially small businesses) which places them in a uniquely vulnerable position. This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods.

The dairy industry acknowledges the recent release by the Minister for Small Business of a consultation paper on extending unfair contract term protections from consumers to small businesses and endorses this work.

It is essential that the protection offered to consumers in similar circumstances should be considered for small businesses in similarly vulnerable positions. Two further issues that warrant examination are briefly outlined below.

Dairy farmers generally supply one processor and in the northern markets (Queensland and NSW) have a contract in place with that processor. The contract specifies the minimum amount of milk the farmer will supply, with financial penalties for the under-supply of milk. When farmers produce more milk than specified in the contract they are prohibited from supplying over volume contracted amounts to a third party which may provide a higher price to the farmer – to other processors, other farmers or retailers.

This inability to supply a third party puts a cap on the future growth of dairy farming businesses which may affect the future viability and scale of their business.

The lack of the ability to have dual supply or sell their milk elsewhere limits farmers' ability to invest and grow and acts as a restraint on trade. This situation also makes it very difficult for small dairy processors to access milk to start or grow their business, which again has implications for market competition and consumer choice. This is particularly concerning given that the markets where this is taking place are experiencing a growing under-supply of milk, with more farmers continuing to exit the industry. The above issue warrants further investigation by the Competition Policy Review.

In Queensland there is an issue that relates to contract timing and the alignment of these contracts. One processor contracts on a calendar year basis whilst the other contracts on a financial year basis.

As Queensland is a small market with only two major processors operating it is a particularly difficult issue.

Dairy farmers who wish to switch processors may face a significant period with no contract. They may also miss out on some incentive payments. ADF and QDO are in the process of further examining this issue.

6. ACCC Divestiture Powers

As discussed in the National Farmers' Federation submission, the clear potential reform in this area is for the ACCC to be vested with similar divestiture powers to the Competition Commission in the United Kingdom.

This would provide the ACCC with a much simpler process of divestiture. Appeals against divestiture orders may be made to the Federal Court, to ensure there is judicial oversight of divestiture powers, while reversing the onus of proof from the ACCC to the company in question.

7. ACCC Monitoring Powers

ADF has recommended, since January 2011 that the relevant Federal Minister give direction to the ACCC to:

- Use its price monitoring powers under section 95ZF of the Competition and Consumer Act 2010 to monitor prices, costs and profits relating to the supply of drinking milk.

It is appropriate that consideration be given to mandatory price monitoring or regular price surveillance across 'at risk' industries. The 'at risk' industries could include certain primary production industries most vulnerable to anti-competitive behaviour, such as perishable goods. The ACCC could conduct 'own motion' price monitoring under Part VIIA of the CCA.

16.4 – Codes of Conduct - The Panel's view

Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour, and are generally applied to relationships between businesses within a particular industry.

The Panel has heard of codes that are perceived to be lacking in meaningful enforcement sanctions and the capacity for public enforcement.

The introduction of civil penalties and infringement notices for breaches of codes strengthens the CCA enforcement options.

Having these options available for CCA codes is a significant development. Any new CCA codes could consider whether they should apply penalties for non-compliance.

Key Points

- ADF urges the Panel to consider a Mandatory Code of Conduct and Supermarket Ombudsman with teeth to balance the excessive market power of the major retailers.
- ADF notes the proposed retailer and AFGC Grocery Code of Conduct and is of the view that it has a number of significant flaws and gaps.

Mandatory Code of Conduct

Given the sheer size of the supermarket duopoly and the disproportionate power they wield in the Australian market place the majority of Australian suppliers, particularly of fresh food produce and drinking milk, must have some sort of ongoing commercial relationship with them. It is important therefore that there is full transparency along the supply chain and that processors and farmers have access to timely and cost effective dispute resolution processes in their dealings with major supermarkets.

The only effective way to ensure this is to establish a Mandatory Code of Conduct covering the whole supply chain to balance the market power of the major retailers and appoint an Ombudsman with teeth to ensure compliance.

As mentioned above, ADF and Queensland Dairyfarmers' Organisation (QDO) have developed a draft Mandatory Code of Conduct. The draft Code has been provided previously to the Review.

The draft ADF and QDO Code is intended to address, among other issues, market power issues and therefore only applies to retailers that account for at least 20% of the sales of one or more dairy items in Australia from supermarkets. The draft Code is currently called the Dairy Industry Code of Conduct but has been drafted to allow it to easily be adapted to cover all supermarket suppliers.

Given the market power of the major retailers and the reluctance of suppliers to take action or give evidence against them an important aspect of the draft code is the ability of industry organisations, federations or associations to make complaints on behalf of their members.

It is worth noting that a lack of complaints against the major retailers does not mean there is an absence of market failure but instead represents evidence of significant market failure as smaller suppliers are extremely reluctant to take action or give evidence.

The draft ADF and QDO Code also includes an Ombudsman with the power to obtain information, documents and evidence, i.e. the Ombudsman can require a person to produce documents or appear before the Ombudsman, issue written public warnings to the public regarding the conduct of a supermarket and apply substantial financial penalties for those who transgress.

ADF and QDO are happy to discuss the draft Code and once again urge the Competition Policy Review Secretariat and Members to closely examine the draft document and its recommendations.

Retailer and AFGC Grocery Code of Conduct

ADF recognises that the proposed Code is a step forward and considers this to be a positive result of the significant media and political pressure generated by ADF, QDO and other industry organisations.

However, while the Code is admittedly a step in the right direction, ADF believes that it lacks scope and is not sufficiently comprehensive. There are significant gaps in the Code including but not limited to the need for an Ombudsman, penalties and making the Code mandatory.

The Code should apply to all retailers and it must be mandatory to ensure complete coverage across the industry and it must remove the ability of retailers to opt out of the Code; giving it the authority necessary to effect real changes.

Considering the market power of the major retailers and the reluctance of suppliers to take action or give evidence against them, an important aspect of the Code will be the ability of industry organisations, federations or associations to make complaints on behalf of their members. Appointment of an Ombudsman will be instrumental in facilitating correct compliance with the Code and improving the balance in the commercial relationship between retailers and suppliers.

An Ombudsman provides the added benefit of absolute focus on issues pertaining to the food and grocery space, allowing proactive monitoring of the Code, as has been the case in the UK, where the adjudicator does not have to wait for a unilateral complaint or failure of other mediation process in order to take necessary actions. Appointment of an Ombudsman encourages speedy resolution of disputes rather than escalation.

ADF recommends that the Ombudsman have the capacity to obtain information, documents and evidence, issue written public warnings regarding the conduct of a supermarket and apply substantial financial penalties for those who transgress.

The appointment of an independent arbiter by one of the major retailers to oversee an internal supplier charter and help resolve disputes is tacit acknowledgement of the need for an independent Ombudsman.

In order for the Ombudsman to enforce compliance with the Code, the Ombudsman must have the power to instigate significant financial penalties against those who transgress, as in the case of the UK Grocery Code, which allows maximum penalties of 1 percent of the retailer's turnover.

The proposed Food and Grocery Code does not provide for any penalties and this is a glaring omission.

ADF believes that the absence of penalties and an Ombudsman to impose financial penalties severely undermines the authority of the Code's provisions.

Other key failings of the proposed Code include:

- many opt-out trading terms (clauses), which imply a greater emphasis on commercial flexibility than ensuring fair trading;
- the proposed Code primarily focuses on terms of trade through supply agreements, which ADF understands limits the capacity of the Competition and Consumer Act to monitor complaints and address abuses remains a major concern for many suppliers;
- the proposed Code relates to the direct relationship between supplier and retailer and therefore has very limited bearing on other relationships and efficiencies in the whole supply chain;

Draft Recommendation 50 — Collective bargaining

The Competition and Consumer Act should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC's notification register).

The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.

Key Points

- ADF supports the Review Panel's draft recommendation in relation to collective bargaining.
- ADF appreciates the Review Panel's focus on collective bargaining and strongly encourages the Review Panel to re-examine this aspect of their work and go further by considering the issues outlined below.
- ADF appreciates the efforts of the ACCC in relation to collective bargaining.

It is worth noting that this is an issue for the whole of agriculture.

The NFF noted in its first submission to the Review that, in simple terms, the farm sector has specific and unique characteristics that mean the impacts of ineffective competition legislation can have a more detrimental bearing than other businesses in the economy.

The inequality of market and or bargaining power means that farmers are largely price-takers in the market and susceptible to at times questionable business practices. Farmers may be forced to accept standard form contracts on a "take it or leave it" basis or to operate under arrangements without the benefit of contractual security.

They may be influenced to act in certain ways based on predictions or promises which later do not come to fruition.

The agricultural sector seeks recognition of the competitive disadvantage faced by producers (who are often small to medium sized businesses) which places them in a uniquely vulnerable position. This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods.

Further, the protection offered to consumers in similar circumstances should be considered for small businesses in similarly vulnerable positions.

As has been highlighted previously the above points are particularly pertinent to dairy farmers.

ADF would like to take this opportunity to acknowledge the ACCC's work in relation to collective bargaining under the constraints of the current legislation.

Collective Bargaining Changes

The dairy industry seeks to improve the collective bargaining and boycott regimes, in particular to influence the following outcomes:

- a) relaxation of the 'public interest' test for boycott approvals, to consider the unique nature of agricultural markets;
- b) increase the ability for peak bodies to commence and progress collective bargaining and boycott applications, on behalf of their members;
- c) examining policy options for expanding the 'shared community interest' provision in the current ADF authorization;
- d) broadening the scope of buyers in the market place able to negotiate with Collective Bargaining Groups so it is not just limited to processors, to include all buyers of milk e.g. brokers, wholesalers, retailers as well as other dairy farmers:

As part of the ADF and QDO draft Mandatory Code of Conduct a declared supermarket operator must not refuse to enter into a supply agreement with a supplier because that supplier is, or is not, a member of a collective bargaining group or because that supplier is entering into a supply agreement as a result of conduct or negotiations undertaken by a collective bargaining group.

A declared supermarket operator must not enter into any supply agreement with a supplier unless that supplier has been provided with a reasonable period within which to apply to join or take the benefit of conduct of a collective bargaining group.

Market Definition and Global Competition

The Panel's view

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

While the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets are global. The CCA has been framed to take account of all sources of competition that affect markets in Australia. However, the current definition of 'competition' in the CCA could be strengthened so that there can be no doubt that it includes competition from potential imports of goods and services, not just actual imports.

In many markets in Australia, achievement of efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

If the achievement of efficient scale through a merger will also result in a substantial lessening of competition in Australia, conflicting interests arise: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers due to the reduction in competition.

The Panel considers that such issues can be addressed under the existing CCA framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

As noted elsewhere in this Draft Report, the Panel recommends some procedural changes to the merger approval process and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC.

Competition Policy for Global Industries such as the dairy industry

Key Points

- ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (approximately 40% of dairy production is exported).
- An environment must be created without regulatory constraints in which the dairy industry can grow and expand, through consolidation of processors and investment, to compete on the global market and at a global scale.
- Existing competition laws do not take into account this global market and need for scale but rather have a narrow regional focus. There must be allowance for a global perspective and

the realisation that for export-focussed industries prices are set globally, not on a region by region basis.

- There is a need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB, the ACCC and the ACT. The timeframes involved in various competitive regulatory processes should not have the unintended effect of advantaging one bid ahead of any other in acquisitions.
- The number one priority from the ADF National Dairy Farmers Summit held in 2014 was to “develop an industry strategy for innovation, investment and growth,” a key aspect of this will be growing the industry through exports.

Background

The milk price in southern Australia is ultimately set by global markets, even at a regional level. More processors competing for milk does not necessarily mean higher milk prices and in the long-term can be detrimental to the industry as much-needed investment in processing capacity is not pursued to allow processors to compete on price in the short-term.

ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (over 40% of dairy production is exported).

An environment must be created in which the dairy industry can grow and expand, through consolidation of processors (if necessary) and investment, to compete on the global market and at a global scale.

Existing competition laws do not take into account this global market and need for scale but rather have a narrow regional focus. There must be allowance for a global perspective and the realisation that for export-focussed industries prices are set globally, not on a region by region basis.

It is worth noting that the number one priority from the ADF National Dairy Farmers Summit was to “develop an industry strategy for innovation, investment and growth,” a key aspect of this will be growing the industry through exports.

A further issue that relates to creating a dairy industry that can compete on a global scale is the recent experience of the acquisition of Warrnambool Cheese and Butter (WCB) by the Canadian dairy products company Saputo.

With Bega, Murray Goulburn (MG) and Saputo all bidding for WCB, it was essential the regulatory approval processes they were respectively subject to were seen to be fair and equitable.

By this, ADF means that the timeframes involved in the various regulatory processes, in this case the Foreign Investment Review Board (FIRB) and Australian Competition Tribunal (ACT) should not have the unintended effect of advantaging one bid ahead of its rivals.

ADF made this point in its submissions to the Australian Competition Tribunal (ACT) during the acquisition process of Warrnambool Cheese & Butter and would again like to reiterate the need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB, the ACT and the Australian Competition and Consumer Commission (ACCC).

The timeframes involved in the various regulatory processes should not have the unintended effect of advantaging one bid ahead of any other. An even regulatory playing field is both desirable and necessary as competition for processing resources intensifies.