



Submission

Senate Inquiry

**Effect of market consolidation on the red meat processing
sector**

July 2015

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Introduction

The Cattle Council of Australia is the peak producer organisation representing Australia's beef cattle producers. The Cattle Council of Australia was established in July 1979, bringing together for the first time all farmer organisations whose members had beef cattle enterprises. The objective of the Council is to represent and progress the interests of Australian beef cattle producers.

Cattle Council's founding members are the following state farming organisations:

- NSW Farmers
- Victorian Farmers' Federation
- Tasmanian Farmers' and Graziers' Association
- AgForce Queensland
- Pastoralists' and Graziers' Association of WA
- Livestock South Australia
- WA Farmers

In January 2015, Cattle Council adopted a new constitution which for the first time also allowed producers to join Cattle Council directly. This direct membership base has representation on the Cattle Council board in addition to nominees from our founding members.

Our members are becoming increasingly concerned with the disproportionate power processors have in the market place with many arguing this is due to a lack of competition caused by increasing consolidation.

In preparing this submission Cattle Council undertook a number of steps:

- We have commissioned advice from top tier international law firm Baker and McKenzie that informs producers how they can protect themselves from uncompetitive practices, which has also illustrated key areas for competition law reform.
- We have compiled all existing policies relevant to the submission. The importance of this step is that it demonstrates these concerns are not new and that improvement has been sought for a significant amount of time.
- We established a facility on our website that enabled to producers to submit instances where they felt they had been subject to unfair and uncompetitive practices. The information received through this facility has demonstrated two things:
 - That uncompetitive practices are occurring and that something must be done; and
 - That producers are reluctant to report instances for fear of commercial retribution – a demonstration of the significant market power yielded post farm-gate.

As an industry we believe that market forces should be allowed to occur as they are integral to the commercial realities of doing business. Some may argue that the last few years, given serious drought conditions and record cattle turn off, that the perception of disproportionate market power is simply a symptom of market cycles.

For policy makers there are limits to how market forces can be controlled. Many of the issues attributed to consolidation such as high transport costs, inadequate infrastructure, red and green tape and labour costs are all perennial issues that governments have grappled with for many years. While these issues must be addressed, they do not present solutions in the short-term.

After years of drought, record turn off and low prices the tide seems to be turning for producers as cattle prices begin to hit Australian records. But the key point to note here is that these prices are being driven by global demand, not increased competition immediately post farm gate. It is worth noting that two strong buyers are all that is needed to provide significant post-farm-gate competition; collusion, should it be found to exist, can extinguish this to the detriment of the seller(s). Acquisitions over time, a

lack of transparency in the supply chain and common practices such as multiple buyers being represented by single agents has demonstrated a prevailing need for processes and protections to be in place regardless of market conditions.

These measures must protect the producer from unfair and uncompetitive practices and ensure that a fair return is received for their product.

This submission argues that there are key areas of reform that will ensure producers are receiving fair returns for their product. The key areas that need to be addressed are:

- Incentivising new entrants;
- Reforming beef industry language;
- Developing greater transparency through the supply chain;
- Realigning the political power afforded the processing sector within the industry structure;
- Strengthening foreign investment policy to give greater consideration to the market needs of producers; and
- Strengthening competition law frameworks including introducing an industry code.

We believe these measures are achievable in the short-term and this submission will outline how and why. However, it will be necessary to have the Senate Committee's support for these measures to be implemented by the Australian Government, ensuring a fair return for producers regardless of market conditions.

Recommendations

- 1. The Australian and state Governments provide consortiums that wish to establish a processing facility, opportunities for accessing grants or low interest loans.**
- 2. That the Australian Red Meat Industry adopts the improved AUSMEAT language once developed.**
- 3. That the Australian Government recognises industry's desire to improve beef language, and assist in communicating any language changes with trade partners.**
- 4. That a voluntary prescribed industry code be established. The code would establish an industry standard practice for demonstrating price transparency through the supply chain.**
- 5. That the Red Meat Industry Memorandum of Understanding be revised to provide a more equitable situation for peak industry bodies that represent producers.**
- 6. Should a foreign entity apply to purchase, or takeover, a business that has a primary purpose of transporting, processing or retailing agricultural goods, then the impact of competition for agricultural producers must form an element of the national interest test for the purpose of foreign investment review.**
- 7. That industry and government partner to actively inform producers of their rights under current competition laws.**
- 8. That the Australian Government adopt the recommendation of the Harper Review establishing a prohibition on concerted practices that have the purpose or likely effect of substantially lessening competition.**
- 9. That the Australian Government supports the implementation of the 'effects test' for determining a misuse of market power.**
- 10. That the ACCC's Agriculture Commissioner prioritises merger analysis as an area requiring agricultural expertise.**
- 11. That a voluntary prescribed industry code be established, that provides an avenue for producers to seek recourse for instances of uncompetitive or unfair conduct.**

Background

The primary means by which cattle are sold by producers are as follows:

- by public auction at saleyards, where price is determined by the market based on live- weight cents per kilogram;
- 'over the hook', where cattle are delivered directly from producer to the processor pursuant to a supply agreement, including forward contracts. Price will generally be determined according to a processor 'price grid', with penalties and other discounts imposed on the basis of the quality of beef produced (which can be seriously impacted by the processor during the time, sometimes days between delivery and final grading of the carcass which ultimately determines price paid); and
- less commonly, 'from the paddock' sales from a producer directly to a buyer or agent, where prices may be determined per head or by weight and are frequently purchased on the basis of forward contracts to secure supply.¹

The prices available to producers through over the hook and paddock sales may differ depending upon the time between sale and processing and the extent to which agents are involved but are generally benchmarked on traditional saleyard sales.²

The options for marketing beef products include:

- domestic markets which are primarily the supermarket, butcher and food service sectors;
- export markets, including major markets such as the United States and Japan to which producers and processors may be accredited to supply;
- live export markets including major markets for which there is substantial demand and limited domestic production such as Indonesia and the Middle East; and
- niche markets which are generally higher value added domestic or export markets including for branded or high specification beef products. Niche markets are necessarily small compared to commodity markets but deliver higher returns and are growing faster than commodity markets.³

Across the supply chain, value is primarily added in the three broad stages of production, processing and retailing which are addressed below. Buying and selling agents, cattle breeders, intermediate producers (backgrounders) and finishers, wholesalers, exporters and importers also participate at various stages of the supply chain.⁴

New Market Entrants

Compared to the production sector, Australia's cattle processing sector is relatively consolidated with a small number of very large processors having over 50% of processing capacity and throughput. There are also a significant number of small processors.⁵

A number of processors, including major processors, are vertically integrated and acquire cattle 'over the hook' as an input to their own wholesaling and retailing operations. Processors also provide consignment /service kill services to third parties that have significant supply requirements, such as Australian supermarket operators, or producers that seek direct access to wholesale and retail markets.⁶

¹ *Competition Law and the Cattle Supply: Guidance for Market Participants*, Baker and McKenzie, www.cattlecouncil.com.au/media/submissions

² *ibid*

³ *ibid*

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

There may also be an argument put forward that consolidation within the processing sector is an organic process caused by Australia being participants in the global market as well as an indication of the tight margins processors operate within. Many processors would argue that they face higher overheads than their international competitors and therefore must seek efficiencies.

This certainly narrows market options for producers to sell their cattle and demonstrates that diversity in the market has diminished over time. As mentioned above, there are limited options for policy makers to control market forces. Market intervention is also a risky option given the potential to distort. Cattle Council does not propose placing restrictions on the market to prevent further consolidation per se. Instead we are proposing that incentives be put in place to encourage new entrants into the market.

This could take the form of Government assistance for producers and other investors to establish processing facilities. There are already operations in place that demonstrate the concept is feasible. You would assume that such an entity would base significant proportion of its operations on custom kills. This would encourage brand development and advance Australian beef's reputation as a premium product. This assistance could also apply beyond cooperative based businesses.

We note the recent announcement by the Australian Government under the Agricultural Competiveness Whitepaper to establish a \$13.8 million two-year pilot training programme commencing in early 2016 to be delivered through the Rural Industries Research and Development Corporation. In addition, The Australian Government are making specialist advisors available to assist farmers in establishing these new business arrangements. The Government will deliver information about innovative business models (including cooperatives) and contract negotiations. Training and materials will help give farmers the knowledge they need to improve business practices and restore the balance between farmers and processors and retailers.⁷

The Australian Government could also consider incentivising decentralisation. The cattle production areas have moved with development over the last 50-60 years, regional centres have grown to a size to support processing, processing plants which were once well located near people and water are now poorly located and are costing community and Government unnecessarily in safety, infrastructure repair, animal welfare etc. The flow on benefits to regional communities would be immense.

Infrastructure improvements such as refrigerated shipping facilities at ports, improved road access and streamlined processes for greenfields development may also make the construction of new plants in broader range of locations more feasible.

However, we acknowledge that these proposals are long-term and more complex than acknowledged in these paragraphs. Nonetheless, they must continue to be at the forefront of the Australian Government's agenda no matter how perennial the issue.

In the meantime there are a number of short-term solutions available, and these will be the focus of the remainder of the submission. These short term solutions present opportunities for producers to be treated more fairly.

Recommendations

- 1. The Australian and state Governments provide consortiums that wish to establish a processing facility, opportunities for accessing grants or low interest loans.**

⁷ <http://agwhitepaper.agriculture.gov.au/white-paper/factsheets>

Beef Language Reform

Cattle Council has initiated a process for beef language reform. The current AUSMEAT language was designed some 20 years ago for primary use as a trade language. The current beef language requires immediate and continual development. Producers are currently receiving discounts based on company specifications that have no relevance to consumer requirements resulting in high eating quality products not receiving their full market value, as determined by consumers. This is distorting key market indicators that need to be corrected to ensure that the whole beef supply chain is driven in a productive and progressive direction.⁸

For example, the use of dentition in the ciphers is creating significant disadvantage for the Australian beef industry. The inclusion of dentition within the beef language is not based on current scientific evidence, as it is an unreliable indicator of age and eating quality. Its continual use is hindering the primary focus of industry, to produce high eating quality products demanded by consumers.⁹

One of the challenges to language reform is that the AUSMEAT language is internationally recognised. Of particular note is recognition of the AUSMEAT Language under trade agreements such as the Australia-Chile Free Trade Agreement. However, this is not an insurmountable challenge and should not prevent the language from evolving. However, key to change will be Australian Government recognition of industry's desire improve the language, and its support in communicating this with trade partners.

Cattle Council is seeking a progressive and dynamic beef language to be used consistently post farm gate for both domestic and international markets. This reformed beef language will improve the systems accountability and transparency, and be based on objective measurements supported by current scientific evidence. The language should send clear market signals to economically reward members of the supply chain that deliver products that meet the expectations and wants of consumers.

Recommendations

- 2. That the Australian Red Meat industry adopt the improved AUSMEAT language once developed.**
- 3. That the Australian Government recognises industry's desire to improve beef language, and assist in communicating any language changes with trade partners.**

Price Transparency

Producers have long held concerns about transparency in the supply chain. The primary price transparency gap along the beef supply chain is at the wholesale/export stage, with no data currently available. This is also the beef price stage closest to, and of most relevance to, the value of cattle sold by producers.

Of grave concern, given the current inadequacies of the beef language and the broad nature of cyphers, is that product is being undervalued for export. This raises concern around taxation and GDP issues for the Australian Government. Cattle Council acknowledges that these are serious accusations and they are based purely on anecdote and suspicion. Nonetheless, we challenge processors and exporters to demonstrate these practices are not occurring.

Transparency concerns also arise in direct producer to processor cattle sales over-the-hook (OTH) or in the paddock. Producers' perception of OTH grids is that they vary greatly, they are inconsistent and there appears to be no standard format. It is becoming increasingly difficult for producers to compare or interpret OTH grids. It has been identified that there is a need for processors to do more to communicate

⁸ *Submission: The Australian Beef Language Whitepaper* Cattle Council of Australia

⁹ *ibid*

meaningful information in grids and then to provide timely and business like feedback. There is suspicion from producers that in a falling market and oversupply situation as was the case in the second half of 2014 that it was more about non transparent and arbitrary grid penalties being applied.¹⁰

Another example of producer suspicion is in regards to standard carcass trim. Standard carcass trim guidelines provide clear definitions on the limits and boundaries of objects that can be removed from the carcass prior to the Hot Standard Carcass Weight (HSCW) being determined. This concern is being highlighted by information received by producers on their carcass feedback that is difficult to explain. Producers are receiving variations between P8 and rib fat measurements that are not consistent with current understanding of the correlation between these two measurements. There is also distrust caused by the differences in dressing percentage, at different times and between plants, in cattle that have been consigned from the same mob and at the same time.¹¹

Greater consistency in the application of objective measurements would go some way to alleviating distrust. Uniform plant equipment, a reformed beef language and greater consistency across grids provided to producers would be the first necessary steps.

To ensure that Standard Carcass Trim is being effectively applied there is a need for greater transparency and accountability throughout the beef supply chain. Technological advancements create the possibility that the results for cattle assessments could be far more readily available to producers and this development could increase the transparency and accountability of the beef supply chain. In addition, currently there are no effective mechanisms available for producers to contest their cattle grades. Such a process is not possible due to the time delay between the assessment, the meat being identifiable and producers' receiving their grading.

Increasing the accountability and transparency of the beef supply chain is essential to ensuring that producers receive the correct market signals. The whole of the beef sector needs to examine methods to improve the transparency and accountability, to ensure that activities which detrimentally impact upon members are identified and effective corrective actions are taken.

Cattle Council have requested that MLA analyse possible options for increasing price transparency in the beef supply chain, including the benefits and costs of introducing mandatory price reporting arrangements in Australia, similar to those operating in the United States.

The project aims to assess whether there is a lack of price transparency in the beef supply chain and, if so, identify points in the supply chain where greater price transparency is needed to provide clear price signals to producers to inform their production and marketing decision making and improve farm gate returns.

The project is currently underway and will report before the end of 2015. However, so far findings have indicated that while there is a fair degree of transparency in cattle prices and transactions in Australia, there is poor beef price transparency in wholesale markets and retail markets. Beef price transparency, as it applies to wholesale, retail and export markets, is assessed to be unacceptably low from a cattle producer's perspective.

Recommendations

- 4. That a voluntary prescribed industry code be established. The code would establish an industry standard practice for demonstrating price transparency through the supply chain.**

¹⁰ *ibid*

¹¹ *ibid*

Industry Structures

From a political perspective, Cattle Council as a producer representative body is frustrated with undue influence afforded the processing sector within the current industry structure.

The principal example of this is the Memorandum of Understanding (MoU) dated 27 April 1998 which underpins the 1997 reforms. It is a non-binding agreement involving the following prescribed bodies: Cattle Council of Australia, Sheepmeat Council of Australia (SCA), Australian Lot Feeders' Association (ALFA), Goat Industry Council of Australia, Australian Livestock Exporters' Council and the Australian Meat Industry Council (AMIC). These organisations are formally acknowledged by the Australian Government as the appropriate body to speak on behalf of their sectors as they are perceived to be representative.

The MoU incorporates agreed roles and responsibilities, funding, planning and service delivery arrangements, the Meat Industry Strategic Plan, use of industry reserves and research and development. Schedules to the agreement cover the Red Meat Advisory Council, AUS-MEAT Ltd, SAFEMEAT, funding flows and crisis and issues management.

Cattle Council questions whether AMIC is the appropriate body to have responsibility for these obligations. At the time the MoU was signed, the Australian Meat Council and the National Meat Association of Australia (since amalgamated to form AMIC) represented the majority of processors, manufacturers and exporters in Australia. However, Cattle Council understands that internal politics within AMIC has led to two major processing companies withdrawing their membership of this organisation. Given these two companies are two of the biggest, if not the biggest processors of cattle in Australia, this raises questions about AMIC's representative nature for the purposes of the MoU.

In making this point, Cattle Council is not seeking to benefit from the misfortunes of another peak industry body – we all have our challenges. However, this revelation becomes particularly concerning when considering some of the unique responsibilities AMIC under the MoU. These include:

- Two representatives and two votes on the Red Meat Advisory Council while all other peak councils have one;
- Four representatives on the Australian Meat Industry Language and Standards Committee while CCA, SCA and ALFA only have one each; and
- The sole ability to nominate the chair of SAFEMEAT.

In many of these forums, the inequitable power afforded AMIC has meant the processing sector can be a particular hindrance when seeking to implement reform for the benefit of producers such as the Beef language reform discussed previously.

We note that in its response to the Senate Inquiry into the Industry structures and systems levies on grassfed cattle, the Australian Government stated: "Revision of the Red Meat Memorandum of Understanding is also necessary to more clearly define the roles and responsibilities of each entity around consultation requirements and agreement on forward work plans and levy expenditure."¹²

Recommendations

- 5. That the Red Meat Industry Memorandum of Understanding be revised to provide a more equitable situation for peak industry bodies that represent producers.**

¹² *Australian Government Response to the Senate Rural and Regional Affairs and Transport References Committee report: Inquiry on industry structures and systems governing levies on grassfed cattle* <http://www.agriculture.gov.au/about/obligations/government-responses/gov-response-srratrc-rep-industry-levies-grass-fed-cattle>

Foreign Investment Policy

The Australian beef industry has had a long history of foreign investment. Australian cattle properties have previously received foreign investment from England, the United States of America, China, Japan and Brazil, amongst others. As an industry that exports over 65% of our product to over one hundred markets around the world, foreign investment only strengthens relationships between Australia and these markets.

The key concern of our members is ensuring that adequate competition exists for their product. There have been concerns expressed, publicly and privately, about acquisitions within the processing sector and the impact this can have on competition. We acknowledge that the Treasurer recently saw fit to impose conditions on JBS Australia's acquisition of the Primo group. However, the Cattle Council also acknowledges that foreign investment also represents real opportunity to increase competition within the sector.

The Cattle Council supports a case-by case assessment of foreign investments against the national interest test with powers vested in the Treasurer. We also believe there should be increased emphasis on the impact of competition on primary production when considering the national interest test. Should a foreign entity apply to purchase, or takeover, a business that has a primary purpose of transporting, processing or retailing agricultural goods, then the impact of competition for agricultural producers must form an element of the national interest test.

Recommendations

- 6. Should a foreign entity apply to purchase, or takeover, a business that has a primary purpose of transporting, processing or retailing agricultural goods, then the impact of competition for agricultural producers must form an element of the national interest test for the purpose of foreign investment review.**

Current Competition Laws

Competition laws are complex involving legal and economic concepts that are designed to be flexible enough to be applied to the broadest range of industries. The result is that the intent and operation of competition laws are not always clearly understood by producers.¹³

Cattle Council welcomes the recent announcement contained in the Australian Government's Agricultural Competitiveness Whitepaper that an Agriculture Commissioner will be installed at the Australian Competition and Consumer Commission (ACCC) as well as increased funding to enable the observation of market practices.

However, this process will only be effective to the extent that market participants are able to engage with the competition laws and provide relevant information in support of any concerns they have to the ACCC for further investigation. There is further work to be done.

Cartel conduct

One of the common views expressed to Cattle Council through its website facility was that they believed cartel conduct was occurring during the sale of cattle. This included accusations that agreements were made by cattle buyers to only bid on alternating pens at saleyards. They also expressed concern about agents representing multiple buyers during the sale process and the negative effect this also had on competition.

¹³ Above n1

Under current competition law, cartel conduct relates to formal or informal agreements between competitors to act together instead of competing with one another. A 'cartel provision' is a provision of a contract, arrangement or understanding between competitors that has:

- the purpose or likely effect of fixing prices;
- the purpose of restricting outputs;
- the purpose of allocating customers, suppliers or territories; and/or
- the purpose of rigging bids or tenders.¹⁴

Cartel conduct is the most serious of the competition laws. To prove cartel conduct it is only necessary to satisfy the elements of the provision for a contravention to be established. This means that in order to substantiate any concerns regarding potential cartel conduct, market participants would require direct or indirect evidence of communications between parties that are potential competitors. This would include being a party to, or informed of:¹⁵

- communications between competitors regarding prices, outputs, markets or bids;
- the nature and scope of any understanding arrived at; and
- instances in which the understanding was given effect to through conduct in the market.

While mere suspicion of cartel conduct is generally insufficient, there may be circumstances where observable market conduct can indicate the presence of cartel conduct. These include:

- where market conduct would have been unlikely to arise in the absence of communications between competitors; or
- where patterns of market conduct can be identified which are inconsistent with normal market operation.

It is also possible that competition issues could arise from the common representation of market participants by agents. This is because of there is a risk that agents could facilitate communications regarding selling or buying strategies between competitors. Even in the absence of cartel conduct, such arrangements have the potential to raise competition concerns where common representation has the effect of further reducing the number of competitors contesting the market.

The Australian Government's Harper Review into competition laws did recommend amendments to the cartel prohibitions to provide for a simplification of the existing regime and greater clarity in relation to aspects of the regime. These include the jurisdictional reach of the law, the meaning of 'potential' competitors and exceptions relating to the joint ventures and supply agreements. Beyond these refinements, it could be expected that there will not be substantive reforms to the cartel prohibitions in the short to medium term.

However, the Harper Review also concluded that the current prohibition on price signalling in prescribed markets (currently only the banking sector) should be repealed and replaced with a prohibition on concerted practices that have the purpose or likely effect of substantially lessening competition.

Such a provision would address conduct by actual or likely competitors that is jointly arranged, carried out or co-ordinated but falls short of the 'understanding' that must be identified under the cartel prohibition. Nonetheless, Cattle Council would support the recommendations of the Harper Review.

Misuse of market power

As highlighted in previous sections, producers have expressed concerns over the level of control and transparency they have over the value they receive for their products. Competition law prohibits

¹⁴ *ibid*

¹⁵ *ibid*

corporations with 'a substantial degree of power in a market' from 'taking advantage' of that power in that or any other market for particular prohibited purposes. These purposes are eliminating or damaging a competitor, preventing market entry, or deterring or preventing a person from engaging in competitive conduct in that or any other market.

There is no specified market share threshold that establishes market power. The courts have defined market power as the ability to act free from the constraints of competition, in particular, in relation to price. The CCA contains a non-exhaustive list of factors that a court may consider in determining whether a corporation has taken advantage of its market power.

Establishing a prohibited purpose is essential in determining whether or not a corporation has misused its market power. The prohibited purpose need not be the only motivating purpose to constitute a breach but it must be a substantial purpose.

For producers concerns to be the subject of a misuse of market power allegation, it would be necessary to gather evidence to demonstrate that the market participant engaging in such practices has:

- a substantial degree of market power. This would include details of market shares in the relevant market and the extent to which there are effective competitive constraints imposed on the market participant through, for example, alternative suppliers and new entry or expansion;
- used any substantial market power to engage in the conduct and, relevantly, could not have engaged in the conduct without having substantial market power; and
- engaged in the practice for a specified purpose of undermining the competitive process.¹⁶

Given the relatively high level of concentration in the cattle processing and retailing sectors, it is possible that some market participants could have a substantial degree of market power in particular regions. It is also possible that grading, weighing, trimming, the use of by-products or discounting practices could be applied in a way that requires substantial market power.¹⁷

However, in most cases, these practices will not be engaged in for the purpose of undermining the competitive process. Instead, it is more likely that practices that seek to transfer value from one level in the supply chain to another are simply a use of market power, which is not captured by the prohibition on misuse of market power.¹⁸

The Harper Report proposed that the misuse of market power prohibition be broadened to address conduct that had the purpose or effect of substantially lessening competition and removing the 'taking advantage' element of the prohibition. Treasury is currently consulting on this proposal with the expectation that legislative reform will be progressed in 2016.¹⁹

It may be the case that the behaviour producers are concerned about is actually considered unconscionable conduct, rather than a misuse of market power.

Unconscionable conduct is conduct that is considered to be against good conscience as judged by the norms of society. This requires conduct that is more than just unfair and will generally relate to only the most serious cases of the use of market power or bargaining position.²⁰

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *ibid*

Relevant evidence that market participants should look to in seeking to explore whether market conduct may be unconscionable includes:

- the relative bargaining strength of the parties;
- whether any market practices of the stronger party were necessary to protect their interests;
- the willingness of the stronger party to negotiate;
- the extent to which the parties acted in good faith; and
- the requirements of applicable industry codes.²¹

Access to Services

Producers have also identified they are concerned about a decreasing ability to engage custom kill services.

While there is no general obligation on market participants to provide services to one another, it is possible that concerns of this nature could be framed in terms of a misuse of market power. To determine whether conduct of this nature may constitute a misuse of market power, evidence would be required to establish that the market participant limiting or refusing to supply services has:

- a substantial degree of market power in the provision of those services. This would include details of market shares in the relevant market and the extent to which there are effective competitive constraints imposed on the market participant through, for example, alternative suppliers and new entry or expansion;
- used any substantial market power to engage in the conduct and relevantly, could not have engaged in the conduct without substantial market power; and
- engaged in the practice for the purpose of undermining upstream or downstream competition.²²

As flagged above, it may be possible to establish that some vertically integrated market participants have a substantial degree of market power and that they would require market power in order to refuse to provide services. This bigger challenge is likely to be establishing that the conduct has been engaged in for the purpose of undermining the competitive process.²³

Market participants may have legitimate reasons for limiting or refusing to supply services to third parties including insufficient capacity to meet their own requirements. Third parties impacted by these decisions would need to establish more than just suspicion in relation to purpose in order to provide the ACCC with a basis to commence an investigation.²⁴

Mergers

Current Competition Law prohibits the acquisition of shares or assets if that acquisition would have the effect, or likely effect, of substantially lessening competition in any market for goods or services in Australia.

During the recent the JBS USA Holdings Inc acquisition of Australian Consolidated Food Investments Pty Ltd (Primo Smallgoods), the ACCC granted informal merger clearance on the basis that, amongst other factors, there would be an ongoing effective competitive constraint imposed by alternative cattle processors that remained in each market.

In determining this outcome, “the ACCC considered the effects of the proposed acquisition in a regional market for the acquisition of fat cattle in northern NSW and southern Queensland. The merger parties

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ *ibid*

were active in many other markets, but this was the only market in which their activities overlapped enough to raise potential competition concerns.”²⁵

The Cattle Council questions whether this is an accurate assessment given that anecdotal evidence suggests cattle were being sought by the Primo as far north as Charters Towers in Queensland. The ACCC acknowledged that this was the case in its assessment by stating it “noted information that fat cattle buyers in the relevant market would sometimes acquire cattle from other geographic areas (such as northern or central Queensland). However, these purchases were a small proportion of their total purchases. In considering the geographic dimension of the relevant market, the ACCC took account of market feedback suggesting cattle normally travel distances of up to around 600 kilometres from farm to abattoir.”²⁶

While Cattle Council notes that the ACCC acknowledged purchasing power extended beyond the 600km radius but were small in proportion to total purchases, it would be a fair statement to say that this assessment fails to recognise the geographic breadth over which cattle purchases are made and the importance these “long distance purchases” can have in a market of reduced competition.

This demonstrates the need for agricultural expertise within the ACCC, and presents merger analysis as an area of competition law that the newly appointed Agriculture Commissioner can play a crucial role.

Industry Codes

Competition Laws allow for establishing industry codes where the scope of existing competition laws do not adequately address the specifics of a particular industry. An industry code would provide the ability to target specific conduct that has arisen in the context of unequal bargaining power between market participants and has detrimental impacts on the efficient operation of the cattle supply chain.²⁷

Industry codes involve a set of principles, guidance or obligations that set out minimum standards of conduct in an industry in the context of an identifiable problem. In this sense, industry codes assist in preventing instances of market failure as well as providing a mechanism to address any market failure that may have occurred.

Industry codes may be established on the following bases:

- a self-regulatory voluntary code;
- a voluntary prescribed code;
- a mandatory prescribed code.

A voluntary industry code is the most common form of industry code used in Australia. It involves an industry agreeing some of the key terms upon which market participants will interact and provide for self-regulating industry body to administer the code. This usually involves the operation of dispute resolution procedures.²⁸

The benefits of voluntary industry codes are that they involve lower compliance costs and are highly flexible, ranging from providing guidance in relation to operational matters to imposing specific obligations for market participants with consequences for non-compliance. Examples relevant to the cattle supply chain include the Australian Code of Practice for the Selling of Livestock.²⁹

²⁵ *JBS USA Holdings Inc – proposed acquisition of Australian Consolidated Food Investments Pty Ltd (Primo Smallgoods)* Australian Competition and Consumer Commission Public Register <http://registers.accc.gov.au>

²⁶ *ibid*

²⁷ Above n1

²⁸ *ibid*

²⁹ *ibid*

A voluntary industry code prescribed under the Competition Law framework will be considered by the Government where industry consultation demonstrates a compelling case for regulatory intervention to address market failure. The Government will also assess whether alternative options may be available, such as a self-regulatory code or industry specific legislation, and whether the costs of operating the code will be outweighed by the benefits.³⁰

Voluntary prescribed codes will only be binding upon market participants that agree to comply with the code. Examples relevant to the cattle supply chain include the Food and Grocery Code of Conduct which has been agreed to by some participants in the grocery sector.³¹

Mandatory industry codes prescribed under Competition Law will be considered by the Government where an industry code is considered the most appropriate response to instances of market failure and market participants have proven unable to resolve industry issues on a self-regulatory or voluntary basis.

The benefit of a code of conduct would ultimately be determined by its scope. Where an industry code dealt with operational matters and higher level obligations, the cattle supply chain could benefit from greater transparency in relation to interactions between market participants. This could also contribute to greater confidence and potentially investment across the supply chain.³²

Where appropriate, a code could also include detailed obligations to address any instances of market failure that are capable of being demonstrated. This could include specific unilateral conduct which impacts upon returns to market participants and/or access to services that facilitate greater competition across the supply chain.³³

Finally, an industry code would also provide a forum in which any concerns arising in relation to the cattle supply chain could be considered and, if substantiated, acted upon in a timely way. Given the protracted process of legislative reform and testing specific conduct through competition enforcement, the ability to resolve any issues in a shorter timeframe is likely to be attractive to market participants and assist the entire cattle supply chain in focusing on opportunities for growth.³⁴

Recommendations

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ *ibid*

³⁴ *ibid*

- 7. That industry and government partner to actively inform producers of their rights under current competition laws.**
- 8. That the Australian Government adopt the recommendation of the Harper Review establishing a prohibition on concerted practices that have the purpose or likely effect of substantially lessening competition.**
- 9. That the Australian Government supports the implementation of the 'effects test' for determining a misuse of market power.**
- 10. That the ACCC's Agriculture Commissioner prioritises merger analysis as an area requiring agricultural expertise.**
- 11. That a voluntary prescribed industry code be established, that provides an avenue for producers to seek recourse for instances of uncompetitive or unfair conduct.**