

CATTLE COUNCIL OF AUSTRALIA

OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

I. INTRODUCTION

The Cattle Council of Australia (CCA) is the peak industry council for the grassfed beef industry. The Council's membership consists of State Farming Organisations and also individual producers that have chosen to become direct members. The objective of CCA is to represent and progress the interest of Australian beef cattle producers.

The Cattle Council greatly appreciates the opportunity to provide further comment on the options available to the Australian Government to amend the misuse of market power prohibition contained within the current competition law framework.

Cattle Council supports effective competition law and considers that the Harper Review's proposed amendments to the misuse of market power as the most desirable. CCA is supportive of the Review's amendments as they seek to protect the competitive process, which is critical to delivering efficient markets and, sustainable and profitable industries in Australia. The role of the competition law framework must be to offer an environment in which competition between businesses can occur to drive efficiency and innovation, for the benefit of consumers. The revised provision would enable businesses to strive for competitive advantage through innovation and efficiency, whilst ensuring that firms do not engage in prohibited anti-competitive practices.

The reframing of the prohibition on the misuse of market power is of large importance to the beef industry due to the concentration of power within the industry's value chain. The current provision has been ineffective in exploring when anti-competitive conduct may have been undertaken. This failing has eroded beef producers confidence in the competition law framework as a whole. The amendments proposed to section 46 within the Harper Review offer the correct balance, between regulating conduct and refocusing the provision on the conduct that has a negative impact on the competitive process.

II. CATTLE COUNCILS POSITION ON SECTION 46

Cattle Council supports the reforms advocated for within the Harper Review, as it presents the best protections to the competitive process, the primary goal of competition law. Recommendation 30 within the Review advocated for the primary prohibition to be reframed to prohibit a corporation that has a substantial degree of market power from engaging in conduct if the proposed conduct has the purpose, effect or likely effect of substantially lessening competition.

Cattle Council is supportive of this recommendation being incorporated as it offers the best protection to the competitive process and uniformity to competition law, both in focus on the competitive process and the tests applied. The amendment would enable suspected anti-competitive conduct to be examined effectively and this would instil greater confidence from complainants that their case had been tested appropriately.

1. Effects Test

Cattle Council is supportive of the inclusion of the ‘effects’ test into the amended provision as it offers the superior option, both in the practical application and also in protecting the competitive process.

The proposed ‘effects’ test is superior to the current ‘purpose’ test incorporated into the prohibition, as it enables the court to assess whether the conduct is harmful to the competitive process. This expansion is necessary as the current wording only allows the court to examine conduct that has a proscribed anti-competitive purpose. The limited scope of the current provisions allows for conduct that is having an anti-competitive impact on the marketplace to go unchecked. Conduct that has an anti-competitive effect needs to be within the scope of competition law to ensure that the competitive process is adequately protected.

Cattle Council recognises that this amendment has created concern from a range of stakeholders. CCA is supportive of this amendment as it strikes a good balance between protecting the competitive process whilst ensuring that competitive behaviour and innovation are not stifled. The practical impact of the amendment will be subtle and would not lead to a large number of cases being brought before the courts. The limited practical impact is because the proposed changes do not seek to prohibit firms utilising their market power and in the majority of cases it will still be permissible. Additionally, the ‘substantially lessening of competition’ test remains a relatively high threshold, as it requires a lasting impact.

2. Take Advantage Test

The ‘take advantage’ test has not been effective in identifying anti-competitive conduct and as a result Cattle Council believes that the competition law framework would be improved by its removal. The courts have also struggled with successfully applying the test to activities that are lawful and unlawful business conduct. This is because the test allows a firm with substantial market power to be allowed to engage in conduct, if firms without such power can also engage in the conduct. The problem with this limb of the test is that it fails to recognise that when firms with market power engage in such conduct, the impact on the competitive process is far more distortive than if engaged in by a smaller firm. Owing to these problems with the ‘take advantage’ test, Cattle Council is supportive of its removal.

3. Mandatory Factors

Cattle Council is supportive of the inclusion of mandatory factors for the court to consider, reducing uncertainty that these amendments may create. As discussed above, the proposed amendments have created concern from a variety of stakeholders and the inclusion of mandatory factors would help illustrate the conduct that may be encapsulated within the new prohibition.

The mandatory factors would also assist the court in applying the new prohibition and mitigate concerns that the revised provision will capture pro-competitive conduct. Recommendation 30 within the Harper Review identified important mandatory factors for consideration by the court. The Review suggested that the court must consider the extent to which conduct will increase competition and the extent that it will lessen competition. The consideration of these factors will ensure that the Section 46 will only capture conduct by firms that is anti-competitive.

Additionally, to reduce uncertain the ACCC should issue advice about the amended prohibitions applicability to certain conduct. All of these steps will help businesses to understand the scope of the changes and ensure that their conduct aligns with the revised prohibition.