

# OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

## Introduction

I am a beef and fat lamb producer in the North East of Victoria, I am Secretary of the Ovens Valley Branch of the VFF and involved in the local Landcare Group, CFA and am Chair of the Into Our Hands Community Foundation. I rely only on the farm business for income and have been disappointed that we have not seen, until very recently, any significant price increase within the beef industry over the past 15 - 20 years. The poor market conditions have had huge impacts on the beef industry as a whole driving many farmers off the land and undermining any chance of younger generations realising their farming dream. We have seen minimal industry reform or investigation into the real causes of the ongoing downturn. The low profitability has created a flow-on effect greatly impacting on rural communities.

## Misuse of market power through buyer collusion

One of the most significant open examples of market power and collusion in the meat industry was demonstrated on 17<sup>th</sup> February 2015 when 9 processors 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 20 – 30 cent 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 - farmers were astonished at this behaviour.

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.

I sent a letter to the ACCC (see Appendix A) seeking an investigation, as did other farmers and the Victorian Farmers Federation. The ACCC responded to our requests and investigated the 'boycott' and after many months produced little for their efforts, due largely to the difficulty with Section 46 of the Misuse of Market Power and the 'take advantage' test.

Although the ACCC used statutory powers to gather documents from the buyers involved, the Chairman 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,"*

The farming community were disappointed with this decision and when I made contact with the ACCC they claimed the threshold for evidence is extremely high and virtually impossible to attain. I received an email stating the following:

*Thank you for your phone call this morning.*

*As discussed, the ACCC has now concluded its investigation into allegations that nine meat processors boycotted the Barnawartha saleyard on 17 February 2015.*

*In this case, the ACCC needed to establish that two or more of the processors made a commitment not to attend the Barnawartha saleyard on 17 February 2015 in breach of the Competition and Consumer Act 2010 (the Act).*

*As part of the investigation, the ACCC exercised its statutory powers to gather information, data and documents from the processors. The ACCC also used its powers to conduct compulsory examinations of key individuals.*

*The evidence obtained through the investigation did not demonstrate that the processors made a commitment not to attend the sale. Although the evidence did not demonstrate a breach of the Act, **it did highlight some areas of concern.** The ACCC's new Agricultural Enforcement and Engagement Unit will continue to monitor these issues.*

I consider these comments suggest the ACCC's has grave concerns with the current regulation due to the incredibly high threshold for evidence which virtually makes their role ineffective. I therefore seek the support of government to change the current regulation as indicated in the Harper Review in regard to Section 46:

#### **"THE HARPER REVIEW'S FINDINGS**

*Following extensive public consultation, the Harper Panel considered that section 46 is deficient in its current form, both holistically and with respect to the 'take advantage' and 'purpose' limbs individually. The Panel was of the view that the current misuse of market power provision is not reliably enforceable and permits conduct that undermines the competitive process. This led the Panel to make the following recommendation.*

#### **Recommendation 30 — Misuse of market power**

*The primary prohibition in section 46 of the CCA 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.*

*To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:*

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and*
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition*

*in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.*

*Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.*

*Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.*

*The main elements of the recommendation are:*

- 1. remove the 'take advantage' test;*
- 2. move from a 'purpose' to 'purpose, effect or likely effect' test;*
- 3. move from a focus on 'damage to a competitor' to a focus on the competitive process ('substantially lessening competition');*
- 4. introduce mandatory factors that courts must take into account; and*
- 5. additional measures to reduce uncertainty.*

*This section summarises the Panel's considerations (reproduced in full at Attachment A).*

### **Remove the 'take advantage' test**

*The Harper Panel considered the 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct."*

### **Conclusion**

I cannot emphasise enough the importance of accepting the above recommendation. The farming community for many years has had little control over pricing, you could say we have been price takers allowing large organisations to control product pricing. The Australian farmer has had little support in managing collusion across our country and when travelling through remote Australia and small country towns, you can see the legacy of such collusion and poor government representation - turning a blind eye to corrupt buying systems, partly brought on through rationalisation with little buyer competition or regulation. As a result our regional communities and small towns have been crippled creating fragmented communities and forcing farmers and local town folk to leave their much loved homes to relocate to larger centres at a huge social cost to hardworking Australian farmers and Australia as a whole.