

12 February 2016

Manager
Competition Policy Unit
Treasury

Dear Manager,

On behalf of the National Farmers' Federation (NFF), I welcome the opportunity to provide a submission to the 'Options to strengthen the misuse of market power law – Discussion Paper'.

The NFF is the peak national body representing farmers and the agriculture sector across Australia. The NFF's membership comprises all Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

Reforming misuse of market power provisions should be about protecting the competitive process, rather than protecting individual competitors. A truly competitive market, where companies succeed and fail as a result of merit, not as a consequence of dominant companies misusing market power, will best foster innovation and growth. Such innovation and growth will ultimately best serve the interests of the community.

In order to best protect the competitive process, the NFF retains support for amending the Australian Competition Law. Specifically, the NFF recommends amending Section 46 (here within s46) of the *Competition and Consumer Act 2010* (CCA). The NFF supports replacing the existing purpose test with an 'effects test'. This would shift the onus of consideration from what a company's purpose of conduct was, to what effect that conduct had on any given marketplace.

As discussed below, the NFF position aligns closely with the recommendations of the 'Harper Review' of Competition Policy. The NFF supports the amendment legislation directing the courts to have consideration for the impact on competition in the market place, and the issuing of authorisation by the Australian Competition and Consumer Commission (ACCC) in particular instances.

Hence, the NFF supports option F presented in the Discussion Paper.

The nature of the Australian agriculture sector

The NFF acutely recognises that efficient and effective markets must be allowed to operate without unnecessary constraints or limits on competition. Within the NFF's membership there is clear support for a competitive and dynamic market place that fosters competitive behaviour. In accordance with this, the NFF is of the view that a balance must be developed to ensure a clear distinction is made between an environment that fosters healthy and constructive competition, and the misuse of market power.

To this end, the nature of the farming sector makes achieving this competitive environment all the more important. The farming sector is fragmented, made up largely of small to medium sized businesses in remote areas with limited access to market information and opportunities for collective organisation. Fluctuations in input costs, the impact of climatic variations,

limitations in infrastructure and the perishable nature of produce leave some farmers in an economically vulnerable position operating under extremely tight margins.

These market factors result in imbalances between participants in the supply chain. Where anti-competitive behaviours leveraged off this imbalance occurs, it may be subtle and difficult to clearly distinguish from legitimate business conduct. However, due to the nature of the markets, the conduct still has a substantial impact on competition.

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 need for an 'effects test'

The NFF supports provisions that prohibit a firm with substantial market power from taking advantage of that power if the effect is to cause harm to the competitive process. Competition legislation in essence must be focussed on the effect of conduct on competition, not necessarily the purpose of the conduct. The rationale for this is that it is the anti-competitive effect of conduct that is the negative impact and is detrimental to community or individuals benefit.

In reality there continues to be difficulties in demonstrating the *purpose* of commercial conduct. There is largely due to the fact that it involves a subjective enquiry. Alternatively, demonstrating the *effect* of anti-competitive behaviour is less difficult because it involves or is based on a less subjective approach and a more objective examination.

The NFF supports the recommendation made by the Harper Review Panel to adopt a hybrid test within the CCA's prohibition against the misuse of market power by a corporation with a significant degree of market power. Under this proposal the element of the offence would be based on either the purpose of the corporation, or alternatively the effect or likely effect of their conduct. However, the recommended amendment aligns with the Harper Review Panel's philosophy that the intent of competition policy is to protect competitive process, rather than competitors. The proposed 'effects test' maintains a focus on whether competition in the market is substantially lessened, not whether a competitor has been damaged.

In endorsing this proposal, the NFF has had the opportunity to consider the ACCC's calls for reform of s46 in its submissions to the Harper Review. As a result, the NFF agrees that the consideration of the move to an effects based test for misuse of market power should not be judged solely on the basis of the theoretical approach of s46. Rather, as the ACCC submitted, the public policy concern it holds with regard to its reasoning for an effects based test, is its experience of investigating serious unilateral behaviour by dominant firms that have anti-competitive effects. It stated that the available evidence uncovered during these investigations would not establish a proscribed purpose. Likewise, the NFF notes the ACCC's concern over the disembodied manner of interpretation that the theory surrounding s46 has developed. For instance, the requirement for courts to consider 'complex "counterfactual" analyses' in a manner that is uncoupled from the use of the market power held by the defendant and the purpose for which this power is used. The ACCC suggests that this divorces the investigation

by courts from the 'economic rationale' that lies behind the conduct of the firm, reducing the capacity of s46 to deal with anti-competitive conduct.

In considering the balancing factors of the proposed reform to misuse of market power, the NFF observes that the High Court has previously indicated that the intent of prohibiting taking advantage of market power for the purposes of damaging a competitor was to prevent damaging effects on competition. On this basis, it can be seen that the proposal maintains the intent of the provision, while at the same time reviving the law's capacity to deal with a fuller range of behaviours that damage competition.

Additionally, the NFF is of the view that the proposed test will bring Australian law closer to the international formulations utilised to prohibit abuse of market power which specifically prohibit conduct with an anticompetitive effect. In supporting this convergence, the Queensland Law Society's submission to the Harper Review adverted to the argument regarding "increased burden" on firms with a substantial degree of market power. However, in response to this concern the society drew attention to the fact that Australian law already prohibits certain types of conduct of firms with substantial market power based on the effect it has on competition regardless of intent, citing s45. They further argue that it is an open policy option to require this vigilance from firms with substantial market power in order to protect competitive markets from the 'dangers of a monopolist'.

Section 46 (6A)

Section 46 (6A) outlines factors that the court can consider when determining for the purposes of s46, whether by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market. The NFF recommends Treasury examines the extent to which any amendments to the factors contained in section 46(6A) may enable s46 to better protect and enhance the competitive process. In the NFF's view, this should not act as a substitute for adopting the broader s46 reforms recommended in this submission, but rather act as an additional avenue of available investigation with regards to strengthening competition protections.

Options not considered in the Discussion Paper

The NFF maintains its support for the implementation of the Harper Review recommendation in full. However the NFF would consider support for an option not proposed in the Discussion Paper. This option would involve amending Option E to include the 'take advantage of' provision. The option would retain the other elements proposed, including the addition of a 'purpose of substantially lessening competition' test, including mandatory factors for the courts' consideration, making authorisation available, and directing the ACCC to issue guidelines regarding its approach to the amended provision



Should you seek any further information on this submission, please do not hesitate to contact Mr Tony Mahar, Deputy Chief Executive, at tmahar@nff.org.au or on 02 6269 5666.

Kind regards,

A handwritten signature in black ink that reads "Tony Mahar".

Tony Mahar
DEPUTY CHIEF EXECUTIVE