# Review of the Trade Practices Act

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Submission to the Government review

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# 1 Executive Summary

Australian farmers commonly sell their products into markets with a concentration of buyers. While individual farmers have little or no bargaining power against major players, the market power of buyers can be offset if farmers are permitted to collectively negotiate.

Farmers must be able to come together and negotiate collectively to achieve better bargaining opportunities for their products. The NFF therefore seeks as a priority that the notification process be extended to include small businesses who wish to collectively negotiate with larger businesses.

The NFF also seeks a simpler and cheaper application process for authorisations and a shorter review process. NFF believes that authorisations that pass the public benefit test should be issued for an indefinite period of time providing certainty for farmers to go about their business.

Section 46 of the TPA deals with the misuse of market power. NFF believes that section 46 should provide a powerful deterrent against the abuse of market, to protect farmers and small business. However, the NFF does not believe that reversing the onus of proof under section 46 or introducing an effects test into section 46 will provide additional protection. The NFF is concerned that farmers could unintentionally find themselves in breach of section 46 simply by going about their business in a competitive manner. The NFF believes that the existing purpose test retains the emphasis on intention, which preserves competition and ensures that anti-competitive behaviour can be determined only by the *misuse* of market power and not simply by its *use*.

The NFF therefore suggests that consideration be given to strengthening section 46 to enable purpose to be inferred from the effect of the conduct of the corporation.

The NFF believes that the Review should examine the current rules in the TPA allowing courts to issue interim injunctions. Specific consideration should be given to increasing the timeliness of injunctions and increasing their duration.

The NFF supports amendments to the TPA to allow for criminal sanctions for 'hard core' collusion by big business but only supports divestiture as a last resort measure for addressing misuse of market power, when other remedies have proven unsuccessful.

The NFF sees no reason to change the current rules in relation to mergers therefore believes that the rules in the TPA restricting mergers and acquisitions should remain unchanged.

The NFF believes that the manner in which the ACCC administers the TPA should be open and transparent and suggests consideration be given to establishing a Joint Parliamentary Committee to focus on this outcome.

# 2 Introduction

The National Farmers' Federation (NFF) welcomes the opportunity to make a submission to the review of the Trade Practices Act, which is the major piece of legislation governing how farmers trade in the domestic market.

The NFF is the peak body representing Australian farmers at a national level. Farming is a very important part of the Australian economy, directly producing 21% of our exports and 320,000 jobs.

The markets that farmers sell into are often concentrated, so that buyers can exercise market power by driving prices down or placing onerous contract requirements on farmers. The *Trade Practices Act 1974* (TPA) and the Australian Competition and Consumer Commission (ACCC) restrain the ability of firms to abuse their market power.

It should be remembered that the TPA applies to trade or commerce between Australia and places outside Australia. Therefore, while many farmers are exporters, they are not outside the application of the TPA.

The NFF therefore considers that it is vital for the TPA and ACCC to operate effectively and efficiently.

Farmers have raised several concerns over the current operation of the TPA and ACCC. These concerns include that:

- It is too costly, time consuming and disruptive for farmers to obtain approval to collectively bargain with larger businesses;
- There can be difficulties in proving and preventing misuse of market power; and
- The ACCC's processes are not sufficiently transparent.

Farmers are also concerned about some proposals to change the TPA, particularly to:

- Water down the mergers test; or
- Place excessive restraints on trade.

The NFF is keen to ensure that these issues are addressed by the Review.

# 3 The Importance of Farming to Australia

Farming is a vital part of Australia's economy and society:

- While rural production makes up around 3 percent of Australia's GDP[1], it provides around 21 per cent ($34.0bn) of our goods and services exports[2].
- Many rural communities depend upon agriculture for their prosperity. Agriculture contributes more than 30 per cent of employment in 66 per cent of small non-coastal towns[3].
- Farmers are vital custodians of the land, with agricultural activities covering 60% of the Australian landmass[4].
- Agriculture is one of the largest employers in Australia, providing around 320,000 jobs – a level which has actually increased in the past five years, even with substantial improvements in productivity over this timeframe[5].
- Agricultural productivity increased by 3.3 per cent per year between 1988 and 2000, well above the average of 1.2 per cent and the second highest in the market sector (after communications)[6].
    - This fact in particular should dispel the myth that the agricultural sector is 'old economy'. Farmers have been adopting new technologies and improving practices with fervour.
- Agriculture also represents a significant input into many other industries, particularly the food processing industry, which had a turnover of $51.2 bn and a value added of $14.2 bn in 1999-2000. Food processing is the largest industry subdivision of total manufacturing, both by value added and by employment. It also provides over $11 bn of exports[7].

1. Source: ABS, *Agriculture (Cat no 7113.0)*, table 1.3
2. Source: ABARE, *Australian Commodities*, table 5
3. Agriculture contributes more than half of total employment in 28 per cent of small non-coastal towns. Source: ABARE, *Country Australia*, p38
4. Source: ABS, *Agriculture (Cat no 7113.0)*, table 5.1
5. Source: ABS, *Agriculture (Cat no 7113.0)*, table 1.4, which also shows non-owner employment increased by over 6,000 between 1996 and 2000.
6. Source: OECD, *Economic Surveys – Australia 2000-01*, p82
7. Source: ABS, *Manufacturing Industry, Australia, (Cat no 8221.0)*

# 4 Collective bargaining

## 4.1 Introduction

Farmers often sell their products into markets with a concentration of buyers (or sometimes with only one buyer). Concentrated markets with only a small number of major participants are a fact of life for most farm inputs and outputs.

While individual small businesses have little or no bargaining power against major players, the market power of buyers can be offset by sellers if the sellers are permitted to collectively negotiate (see below).

Under the current Trade Practices Act, certain actions that would otherwise be in breach of the Act can be allowed, either through authorisation or notification. Such actions include anti-competitive mergers, collective negotiations, boycotts, price fixing, exclusive dealing and third line forcing.

- A collective negotiation occurs when a group of businesses or individuals come together to negotiate price, terms and other contract details with another business or businesses. The Australian Dairy Farmers' Federation recently obtained authorisation to collectively negotiate on behalf of its members with milk processors (this authorisation is being reviewed – see section 4.3.2 below).
- A boycott is an agreement between competitors to limit dealings with a supplier or customer.
- Price fixing occurs when competitors agree on a price to sell or buy at.
- Exclusive dealing occurs when a restriction is placed on a company reducing its ability to deal with other company/companies. The ACCC recently approved an exclusive deal arrangement between Monsanto and Nufarm, with Nufarm to become the excusive distributor of Monsanto's Roundup products.
- Third line forcing is where a customer, as a condition of buying a product, is required to buy another product from another company, for example the purchase of a mobile phone requiring connection to a certain phone company.

Essentially, the ACCC will accept an authorisation or notification application if it determines that the public benefit from the arrangement outweighs the public cost.

### *4.1.1 Authorisation*

A business that wishes to obtain authorisation for collective bargaining must pay a fee with the application of $7,500. Additional related applications lodged within 14 days of the first application attract a fee of $1,500. This fee must be paid in full before the application can be lodged and cannot be waived, reduced or refunded.

The ACCC sends the application to interested parties, whose responses are examined and the ACCC releases a draft decision. After the draft decision is published, there may be a conference of interested parties, prior to the final determination being made by the ACCC. This determination may be reviewed by the Australian Competition Tribunal.

Farmers particularly apply for authorisation for collective bargaining, to enable small farms to negotiate on a fair basis with larger food processors.

### *4.1.2 Notification*

The TPA currently allows a much simpler process called notification for exclusive dealing and third line forcing only (see definitions above). With notification, the businesses are simply required to notify the ACCC that they wish to collectively negotiate, and the negotiation is automatically permitted if the ACCC does not object. The application fee is $2,000 for exclusive dealing and $1,000 for third line forcing, but this is reduced to $100 for an application by an individual or a proprietary company.

A decision to *allow* a notification is reviewable through the Administrative Decisions (Judicial Review) Act and is only reviewable in terms of process, not the merits of the case. A decision to *deny* a notification is reviewable through the Australian Competition Tribunal, which involves a full re-hearing of the case, based on the merits.

Farmers and farm organisations are not able to make use of notification because they generally do not sell products through exclusive deals.

### *4.1.3 Differences between authorisation and notification*

For authorisations, the onus is on the applicant to prove that the application should be approved. Conversely, for notification, the onus is on the ACCC to determine whether the application should be denied.

Notifications take effect from the date the application is lodged with the ACCC (or soon after), whereas authorisations do not take effect until granted by the ACCC.

### *4.1.4 Discussion & concerns*

Currently, collective bargaining by businesses is not permitted unless and until authorisation is given by the ACCC. Contrast this with a single business operating in many locations – the operations in different locations can collectively negotiate with their suppliers, with no need for any application to the ACCC. For example, independent supermarkets are unable to collectively negotiate with farmers or processors without authorisation, whereas a chain of supermarkets is able to collectively negotiate because of their common ownership structure (ie, they are part of the one company).

The costs and time taken by the current authorisation and possible review processes are a burden on farmers and can be prohibitive. The NFF therefore supports measures to reduce the costs and time involved in obtaining approval for collective bargaining.

## 4.2 Extending notification to collective bargaining

As noted above, notification is available for exclusive dealing and third line forcing. The NFF seeks that the notification process be extended to allow notifications for small businesses wishing to collectively negotiate with larger businesses.

This would greatly simplify the collective negotiation process, reduce costs for small business and help redress bargaining power imbalances that still exist. We understand that the ACCC has indicated its in principle support for this proposal.

### *4.2.1 Details of notification proposal*

Certain questions of detail would have to be examined under this proposal:

- What types of collective negotiation will be permitted to use notification? It would be inappropriate for all collective negotiations to use notification, as some would need to go through more rigorous assessments through the authorisation process, particularly when the public benefit test needs to be examined more closely. For example, there would have to be a more thorough test for applications by larger businesses (including food processors). In addition to legislative rules, businesses would benefit if the ACCC prepared guidelines to indicate who would be eligible for notification to increase market certainty.
- Content of the application: As noted above, the written applications for authorisation need to be comprehensive, and can be expensive to prepare. The NFF believes that applications under the notification proposal should be simpler, easier and cheaper.
- Public benefit test: the application process could also be simplified by requiring that the application show that a proposal does not have a public detriment, rather than requiring it to show that the arrangement has a public benefit.
- Costs: we would expect no increase in the current application fees for notifications.
- Application on behalf of other parties: currently, notifications cannot be made on behalf of anyone else. To reduce compliance and transactions costs, it would be appropriate to allow a third party to apply for a notification on behalf of a group (such as a farming organisation on behalf of its members).
- Notifications that apply to other parties: There are important concerns raised with authorisations that apply to other parties (see section 4.3.4 below). This issue would also need to be addressed for notifications that apply to other parties.

## 4.3 Authorisation

### *4.3.1 Improving the current authorisation process*

In addition to seeking changes to the notification process, the NFF also seeks changes to the authorisations process as not all collective bargaining situations will be covered by notification; there will still be a need for authorisation for some collective bargaining arrangements. As noted above (section 4.2.1 above) it would probably be inappropriate for larger business to be able to access the simpler notification process.

The NFF expects that most farmers would be able to use notification, and therefore seeks changes to the notification process as a priority. However, as some arrangements may not be eligible to use notification, it is essential that changes be made to the authorisation process particularly if changes to the notification process are limited.

The current authorisation process is rigorous and extensive. It requires the applicant to lodge a submission identifying in detail claims of public benefits arising from the arrangement and addressing any anti-competitive detriment. The submission is critical to the process and can be costly and time-consuming to research and prepare. In particular it requires a detailed explanation of how the arrangement satisfies the public benefit test.

In many cases the applicant will need to seek specific legal advice and assistance to address the detail required in the submission, substantially increasing the cost of the application.

Due to the level of detail required and the need to provide all relevant documentation, the application process can significantly delay the commencement of any arrangement that is being sought and consequently adversely impact on the farmers ability to compete.

The NFF firmly supports the ability for farmers to apply for authorisation to negotiate collectively on a voluntary basis, however we believe that this process should be simplified and the application fee reduced.

The NFF therefore seeks a simpler and cheaper application process for authorisations, which should result in a reduction in the time taken and costs imposed in preparing the application. Some possibilities include:

- Reducing the statutory time limit of 4 months (s90(10)) on the ACCC for making a determination of an authorisation application;
- Reducing the number of steps in the application process, particularly if the appeal process remains unchanged (see section 4.3.2 below);
- Simplifying the application process by requiring that an application show that a proposal does not have a public detriment, rather than requiring it to show that the arrangement has a public benefit;
- Restricting the ability of any party to request a pre-decision conference;
- Reducing the application fee for applications that are substantially similar to, or are continuations of, existing authorisations (see section 4.3.3 below); or
- Having an application fee based on the size of the market, using a sliding scale.

### *4.3.2 Reviews of authorisations*

Concern exists in relation to the review process for authorisations. The Australian Dairy Farmers' Federation (ADFF) was recently granted authorisation by the ACCC to enable dairy farmers to collectively bargain with dairy processors. However, a market participant has sought a review of this decision, with the review to be conducted by the Australian Competition Tribunal. The authorisation has therefore been suspended even though the authorisation process was thorough, and gave the review applicant several opportunities to comment. The review is unlikely to be decided within 12 months of the appeal being lodged and only if ADFF can afford to defend it.

It is clear that the process of applying for authorisation is rigorous and should not be open to easy review. We note that the Government has also recently announced that it will remove the right for review by the Australian Competition Tribunal for telecommunications access decisions.

An authorisation that is subject to a review cannot commence until the review process has been completed with the original decision of the ACCC being upheld. The review process can take 12 months or even longer to be completed.

This delay is detrimental to all market players, reducing certainty and overall market efficiency. It would, therefore, be better for there to be a simpler and shorter review process, recognising the significant consultation that occurred during the initial

consideration. The TPA already stipulates at s102(1A) that a review by the Competition Tribunal of a merger decision should be decided within 60 days; it would be reasonable for this time limit to apply to other review applications heard before the Tribunal.

The NFF therefore seeks that amendments to the TPA be pursued to expedite the review process for authorisations. In particular, the existing time period for merger appeals of 60 days should apply to reviews of authorisations.

### *4.3.3 Length of authorisation period*

A concern has been raised by NFF members that authorisations do not cover a long enough period. Currently, authorisations for farmers cover various periods including 3 and 5 years. Authorisations for other markets, such as for the wholesale payment system, can last up to 10 years. After the authorisation period ends, the businesses must reapply for a new authorisation with the resultant costs.

Short authorisation periods increase costs, as applications have to be made more often. A more significant problem is certainty: shorter authorisations may not provide enough certainty to enable growers to borrow money or undertake business investments.

The NFF therefore seeks that authorisations that pass the public benefit test should be issued for an indefinite period of time. A periodic review that is simple and low cost can be considered, with the review period being determined on a case by case basis and with the presumption that an authorisation would continue.

### *4.3.4 Authorisations by third parties that apply to farmers*

Currently, authorisations can be applied for by third parties. This enables a farming organisation to apply for an authorisation on behalf of its members, as occurred with the Australian Dairy Farmers' Federation's application for authorisation on behalf of dairy farmers. However, the NFF is concerned that a third party can apply for an authorisation and purport to act on behalf of farmers, when this may not be the case at all.

Recently, a number of Victorian chicken processors applied to the ACCC to enable their respective growers to collectively negotiate with the processors. The growers were not party to the application for authorisation and, in fact, many vigorously opposed the authorisation because it resulted in poor contract conditions. However, the way the application was framed meant that the authorisation *applied to* the growers. The Victorian Farmers' Federation (VFF) is challenging the authorisation in the Federal Court on the basis that the processors have abused the authorisation process for their own purposes. Irrespective of the outcome of the court case, the NFF strongly opposes the ability of businesses to abuse the authorisation process in this manner.

The NFF therefore seeks that the Review examines the process for authorisation to ensure that authorisations for collective negotiations that apply to other parties cannot be obtained where the majority of those other parties disagree with that authorisation.

# 5 Proving misuse of market power

## 5.1 Introduction

Section 46 of the TPA deals with misuse of market power. The key parts of this section are as follows:

> (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Importantly, section 46 places an emphasis on the *intention* of a company's behaviour through the purpose test in subsection 1. It does this by providing that a corporation "shall not take advantage of" its market power "for the purpose of" particular outcomes. The NFF believes that this emphasis on intention preserves competition and ensures that anti-competitive behaviour can be determined by the *misuse* of market power and not simply by its *use*.

It can be difficult to determine the "purpose" of a corporation. However, case law and legislation enable the courts to infer "purpose" of a corporation from:

- The conduct of a corporation, under section 46(7) "by inference from the conduct of the corporation or of any other person or from other relevant circumstances."
- Allegations that are not refuted by evidence[8].
- The actions or state of mind of a director, servant or agent of the company acting with actual or implied authority of the company (section 84).

In addition, a purpose does not have to be the sole or dominant purpose, but can be a 'substantial' purpose (s4F(1)(b)).

Various concerns have been raised about the current section 46:

- The ACCC argues that it is difficult to obtain a conviction for misuse of market power, as it is difficult to find so-called 'smoking gun' documents that prove misuse. They argue that businesses can deliberately avoid having such documents.
- There is uncertainty over what section 46 means and how it has been interpreted by the courts[9]. It is argued that this is unfair to all concerned, both small and large businesses.
- The requirement to prove purpose under section 46 is seen as an obstacle as it must be proven that a company misused its market power for a proscribed purpose, such as to eliminate a competitor or to prevent entry to a market.

8. Su vs Direct Flight International Pty Ltd and Anor (2000) ATPR 41-750
9. Warren Pengilley (2002), *Submission to Senate Legal and Constitutional References Committee's inquiry into section 46 of the Trade Practices Act 1974*, p2-3

There have been a number of section 46 cases in the past 18 months that indicate that proving purpose is now not necessarily a problem, particularly Universal Music Australia Pty Ltd[10], Boral[11] and Rural Press Ltd[12].

The NFF does accept that the current purpose test has a degree of uncertainty about it and suggests that the Review should consider strengthening the current provisions to provide greater certainty (see section5.4 below).

## 5.2 Onus of proof in Section 46

Currently, the onus is on the ACCC (or other plaintiff) to prove that the defendant is or was abusing its market power. There have been suggestions that this be reversed, so that the company would have to prove that it is *not* operating with the intent of abusing market power. The proposal is that this reversal would only be available for cases brought by the ACCC.

This would make it easier for the ACCC to obtain a conviction. However the proposal does raise a number of concerns:

- It would have the effect of rendering a business guilty until proven innocent
- It would require the accused business to produce a large range of documents to prove it was not abusing market power.
- It may create substantial uncertainty in the marketplace.
- Under the TPA, the ACCC has rights and powers over and above those of an ordinary citizen. Those rights and powers include the power to obtain information, documents and evidence.
- It is a fundamental premise of Australian law that a person seeking to prove a cause of action bears the onus of proof. That onus is only reversed in extreme circumstances.

Given the broad powers of the ACCC to obtain information, documents and evidence, the NFF considers that the ACCC should bear the onus of proving its allegations.

The NFF therefore believes that the TPA should not be amended to reverse the onus of proof under section 46.

## 5.3 Purpose test vs Effects test in Section 46

Currently the ACCC is able to take action under the TPA for misuse of market power where the *purpose* of a company's behaviour is considered damaging to a competitor; that is, the company *intended* the behaviour to be damaging. The ACCC would like to introduce an effects test in section 46 (as well as retaining the purpose test) so that they could take action where the *effect* of a company's behaviour was anti-competitive.

In support of this position, it is argued that:

- an effects test will strengthen the ACCC's powers to act on behalf of small business;

10. ACCC v Universal Music Australia Pty Limited (2001) FCA 1800
11. ACCC v Boral Ltd (2001) FCA 30
12. ACCC v Rural Press Limited (2001) FCA 116

- several other sections of the TPA use an effect test, including s45(1), s45(2), s45D, s50, and Part XIB; and
- other countries use an effects test for misuse of market power, particularly the US, EU and Canada.

However, the NFF has a number of concerns with the proposal to introduce an effects test. The Chairman of the ACCC, Professor Allan Fels has himself acknowledged several of these problems in his appearance before the Federal Parliament's Joint Committee on Retailing.

### *5.3.1 Normal competition can damage competitors*

In the marketplace in which farmers operate, a considerable number of actions by a company could be taken to have the effect of "substantially damaging" a competitor. Merely reducing price can be seen as damaging to a competitor. The High Court has stated: "competition by its very nature is deliberate and ruthless. Competitors jockey for sale, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other. This competition has never been a tort"[13]. Any business that goes bankrupt could argue that its competitors' conduct drove it out of business.

- For example, when Virgin Airlines entered the Australian market there was significant price discounting in air travel with the effect being that Ansett ceased operation. Under an effects test, the ACCC could say that Virgin was acting anti-competitively and in breach of the TPA when Ansett's demise could be due to a number of factors including bad management and uncontrolled costs.
- Some of these actions actually improve competition in the long run, for example cost reductions by one company leading to price reductions could hurt other companies in the market in the short run, but increase pressure for industry-wide cost reductions that improve competition in the long run.
- Previous reviews into the TPA have encountered this problem and therefore rejected an effects test.

An effects test would create a great deal of uncertainty, as acknowledged by Professor Fels: "It [an effects test] is also likely to create greater uncertainty for business"[14].

### *5.3.2 Small businesses can have market power*

An effects test would mean that a corporation that has substantial market power would not be able to take advantage of that market power if it has the effect of damaging a competitor.

- For example a small farmer has sought to build a niche market through producing and marketing biodynamic beef. Strict quality assurance measures and improved technology have enabled this farmer to have substantial market power. As the major supplier of organic beef in the State, the farmer is able to secure a contract with the majority of butchers in the State to supply organic beef. Due to this contract, the butchers no longer purchase beef from two other suppliers of organic beef and both of these farmers go out of business. An effects test would

13. Queensland Wire Industries Pty Ltd vs Broken Hill Pty Co Ltd (1989) 63 ALJR 181
14. Joint Committee on the Retailing Sector, transcript of 13 July 1999 at 1162

mean that this farmer could be in breach of section 46 when the farmer was simply using long term contracts to continue to expand and improve their product. Further, this farmer would need to constantly be mindful of actions that could affect other farmers. While the farmer could be confident about the reasons for engaging in a certain type of behaviour, the same confidence could not extend to the effect the behaviour would have on a competitor.

- Further, many farmers sell through or to co-operatives or trading organisations which would have substantial market power. A reduction in the ability to actively compete by these player could adversely impact on the returns to farmers.
- There have been already been Federal Court cases brought against smaller business for breach of section 46, specifically Lyons vs Bursill Sportsgear[15] and Williams vs Papersave[16] which both applied s46 to relatively smaller corporations.

### *5.3.3 It is difficult to predict the effect of actions*

It may be difficult for a business to predict the effect of its actions. For example, the conduct of a company could have the effect of preventing the entry, or causing the removal, of another business into a market, even though the company did not have this as a purpose when it was implementing its strategy. Other company activities could have had the effect of preventing entry of a second business, such as a downturn in the market. If that intervening event was not caused by the first company and was not foreseen at the time of implementing the company's strategy, it would be unfair for the ACCC to prosecute the company, because at the time of implementing its strategy, that effect was not contemplated. Professor Fels has said: "…section 46 in its present form, because it has a purpose test, is far less likely to catch unintended behaviour. In other words, a firm may innocently be competing and unknowingly breaching a section 46 effects test. So firms may unintendedly do anti-competitive things"[17].

### *5.3.4 Comparisons in Australian law and overseas*

Various sections of Part IV have an effects test, except for section 46. However, there is another important difference between s46 and these other sections: the other sections have a test that prohibits actions that have the *effect* of causing a substantial lessening of *competition*, whereas s46 talks about conduct with the *purpose* of substantial damage to a *competitor*. In essence, the change in s46 from effects to purpose is balanced by a change from competition to competitor. The High Court has implied that these two changes balance each other[18].

While a test of effect on competitors is proposed for s46, it has not been proposed for other sections in Part IV. Damage to a competitor would generally be easier to show than damage to competition[19], while some conduct that damages a competitor could actually improve competition, as noted above (section 5.3.1).

- While Part XIB of the TPA (specific to telecommunications) has an effects test, this rule is in place to address telecommunications-specific issues, is generally not

15. Mark Lyons Pty Ltd and Bursill Sportsgear Pty Ltd (1987) ATPR 40-809
16. John Neal Williams and Anor and Papersave Pty Ltd (1987) ATPR 40-871
17. Joint Committee on the Retailing Sector, transcript of 13 July 1999 at 1162
18. The High Court has suggested that the current s46 test (purpose of damaging a competitor) is similar to the other tests in Part IV (effect on competition) – Queensland Wire Industries Pty Ltd vs Broken Hill Pty Co Ltd (1989) 63 ALJR 181 at 24.
19. Productivity Commission (2001), *Telecommunications Competition Regulation Report*, p179.

relevant to other markets and appears unique to Australia[20]. The Government envisaged that these rules would only be transitional in nature and it was "intended that competition rules for telecommunications will eventually be aligned…with the general trade practices law"[21]. There is however an argument that the *process* applying to Part XIB is quicker and simpler and could be more widely applied in other sections of the TPA.

The Australian rules for misuse of market power are not comparable with those in the US, EU and Canada. In the US and EU, an effects test is not legislated and has only arisen through case law – in other words, policy makers have not explicitly made the decision to incorporate an effects test. Case law in the US indicates that intent (purpose) "may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct"[22]. In the US and Canada, the definition of market power is based on market dominance, which is distinctly stronger than the Australian test of substantial market power. In Europe the rules are aimed largely or wholly at trade between EU countries and therefore are not comparable with rules for trade within a country. New Zealand has a similar test to the current Australian TPA[23].

### *5.3.5 An effects test could be used anti-competitively*

Some businesses may take action under an effects test for tactical and anti-competitive reasons – in other words, in direct opposition to the intended reason for the legislative change. As noted above, it would simply be too easy to show an adverse effect on a competitor. While anyone can bring an action under section 46, not just the ACCC, this type of anti-competitive claim could be restricted if an effects test was limited to actions by the ACCC only. However, the NFF remains concerned that an effects test gives substantial additional powers to the ACCC thus increasing the risk of regulatory error[24]. Professor Fels has acknowledged this concern[25].

### *5.3.6 Problems with current law are not severe*

The ACCC already has extensive powers that can be used to determine purpose, including powers to seek internal files, examine witnesses and has the right of access to legal advice.

It is argued that the ACCC has been unable to find the necessary evidence of wrongful purpose in several recent court cases because the allegations of wrongdoing were without foundation, and hence there was no evidence to be found.

The ACCC has in fact had a number of successes in recent section 46 cases where the courts have been able to determine purpose, particularly ACCC v Universal Music Australia Pty Ltd[26], and ACCC v Rural Press Ltd[27].

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20. Productivity Commission (2001), *Telecommunications Competition Regulation Report*, p165.
21. Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum, p7.
22. US v United States Gypsum Co 438 US 422 at 436, n 13 (1978)
23. Productivity Commission (2001), *Telecommunications Competition Regulation Report*, p164.
24. This includes taking action when it is not warranted, not taking action when it is warranted, and deterring firms from pro-competitive behaviour – see Productivity Commission, *Telecommunications Competition Regulation Report 2001*, p156.
25. Joint Committee on the Retailing Sector, transcript of 13 July 1999 at 1162
26. ACCC v Universal Music Australia Pty Ltd (2002) FCA 192
27. ACCC v Rural Press Ltd (2001) FCA 116

### *5.3.7 Other concerns*

The current section 46 states that a business must 'take advantage' of market power for a proscribed purpose to be held in breach of the TPA. It has been argued that this 'take advantage' test is an important safeguard that would restrict the misapplication of an effects test elsewhere in s46, as 'take advantage' implies a hostile intent. However, the High Court has indicated[28] that it has "difficulty in seeing why an additional, unexpressed and ill-defined standard" should be added into s46, and therefore determined that "the phrase 'take advantage' in s.46(1) does not require a hostile intent inquiry". Thus, the 'take advantage' test would pose little restriction on the ability to use s46 inappropriately.

An effects test would place the onus of proof onto business to show that it had not contravened the Act rather than, as at present, requiring the ACCC to demonstrate wrongdoing. This is because it would be relatively easy for the ACCC to show the effect of certain conduct was substantially damaging to a competitor. Thus it would have similar problems to those indicated with reversing the onus of proof (see section 5.2 above: it could have the effect of rendering a business guilty until proven innocent – and it may be difficult to prove innocence, as an effects test does not allow a business to justify its actions).

Importantly, it must be remembered that section 46 of the TPA is about the *misuse* of market power not the *use* of market power. Moving to an effects test would enable action to be taken for the *use* of market power which the NFF believes could stifle competition and adversely affect a farmer's ability to compete. Professor Fels has stated "there are dangers in taking section 46 too far, because one always has the problem that it can deter genuinely procompetitive behaviour"[29].

### *5.3.8 Summary of concerns with an effects test*

Farmers have embraced technological advances in agriculture with enthusiasm and the uncertainty that an effects test would introduce into the market could reduce the incentive for farmers to continue to invest and explore more innovative ways of doing business.

The NFF believes that it is better to address concerns of market power through other processes, particularly through collective negotiation (see section 4 above).

The TPA is concerned with protecting competition and the NFF supports the promotion of open competition. However, an effects test may well be at the expense of competition. The NFF therefore does not support the proposals to introduce an effects test into the TPA.

## 5.4 Strengthening the current purpose test

The NFF believes that it would be preferable to strengthen the current purpose test than insert an effects test into the legislation. This could particularly occur through amending subsection 46(7), which allows the ACCC to infer an anti-competitive purpose from the conduct of the corporation or from the relevant circumstances.

The purpose test allows an examination of the factors that influence intention.

28. Queensland Wire Industries Pty Ltd vs Broken Hill Pty Co Ltd (1989) 63 ALJR 181
29. Joint Committee on the Retailing Sector, transcript of 13 July 1999 at 1162

The courts have recently inferred purpose from the effect of the action of a company. For example, in the Melway case[30] the High Court considered whether the conduct of Melway amounted to taking advantage of market power, and determined that Melway had acted for a proscribed purpose, inferring purpose from Melway's conduct (though it rejected the overall case).

Therefore, if subsection 46(7) were amended to enable purpose to be inferred from the conduct of the corporation **or the effect of the conduct of the corporation** or from other relevant circumstances, this would give greater breadth to determine a breach of section 46. It would also make more explicit the direction that the courts appear to be moving in enabling purpose to be inferred from the effect of the conduct. Importantly, it would ensure that purpose remains the primary test and that intention is the key indicator of anti-competitive behaviour. The NFF does not believe that by extending the purpose test to include purpose to be inferred from the effect of the conduct will result in the uncertainty that an effects test on its own would bring.

In the Melway case, although the court was able to infer purpose from the effect of the conduct of the corporation, it was not held that the corporation took advantage of its market power to for the purpose *of damaging a competitor*. It is essential that the purpose test and the requirement to show advantage was taken of market power remain.

While 46(7) currently does allow purpose to be inferred from other relevant circumstances, including the effect of the conduct of the corporation, including this wording in subsection 46(7) would make this more explicit.

The onus would still be on the ACCC (or any other litigant) to show that this conduct indicated a proscribed purpose.

The NFF therefore seeks that consideration be given to strengthening section 46 to enable purpose to be inferred from the effect of the conduct of the corporation.

30. Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) HCA 13 (15 March 2001)

# 6 Sanctions for misuse of market power

## 6.1 Current rules

Currently, the TPA provides a number of sanctions or remedies for breaches of Part IV, which include misuse of market power. These sanctions include:

- Monetary penalties of up to $10m for a company or $500,000 for an individual (section 76);
- Injunctions preventing or requiring certain conduct, particularly to remedy the misuse (s80);
- Divestiture (breakup) of a company, but only where that company has made an acquisition that substantially lessens competition (s81); and
- Damages payable to a person harmed by the breach (s82).

Concerns have been raised that these sanctions and remedies are not broad enough to:

- Cover all situations;
- Respond quickly enough to potential breaches; or
- Act as a sufficient deterrent against misuse of market power.

## 6.2 Interim injunctions and interim cease and desist orders

Court cases to examine potential breaches of the TPA can take many years, particularly if decisions are appealed. In the intervening time the impact of the potential breach can cause significant damage to competitors.

To address this concern, the TPA allows an interim injunction to be sought from the court, preventing the conduct that is potentially in breach of the TPA (under Section 80(2)).

Before an interim injunction can be granted, the court must be satisfied that there is a substantive case in respect to the allegation of a breach. The NFF understands that this can be a lengthy and costly process.

An interim injunction can be appealed and the length of the interim injunction is determined by the courts assessment of the applicant's case.

The ACCC argues that this power needs to be strengthened, particularly because:

- It is difficult to obtain the required documents to prove a prima facie case that misuse of market power is occurring;
- A faster response is required to deal with anti-competitive activity; and
- An interim injunction can be stopped by an appeal.

The ACCC therefore argues that it should be allowed to issue interim cease and desist orders to enable it to stop anti-competitive conduct more quickly. The ACCC would seek to have an order imposed without having to go to court (in other words, it could be applied administratively).

There are, however, important concerns with this proposal:

- Allowing the ACCC to unilaterally order a company to cease conduct, without first approaching the Court, could be unconstitutional[31].
- Increased powers for the ACCC raise concerns about regulatory error – that is, the possibility that the ACCC could make mistakes.
- The ACCC can currently respond quickly and effectively to contraventions of the TPA, and can obtain interim injunctions in less than 48 hours[32]. The NFF does note, however that the ACCC currently faces some difficulties in obtaining and presenting this information to the court in a timely fashion.

Due to the court process required, interim injunctions may not provide an adequate remedy to prevent substantial damage occurring to the affected business. The NFF acknowledges that the ability to issue interim cease and desist orders may resolve the problems associated with interim injunctions in extreme circumstances. However, the NFF believes that the regulator should not be able to intervene at its discretion.

The NFF submits that if interim cease and desist orders were to be introduced that there would need to be strict regulatory requirements as to when and how these orders could be utilised by the ACCC. There should also be transparency in relation to the utilisation of these orders. For example, will the ACCC be required to give notice to a corporation that it intends to issue interim cease and desist orders if the conduct does not cease?

The length of time that an interim cease and desist order will apply to must be limited to enable the existing process of applying for interim injunctions to remain and allow the final adjudication to rest with the courts.

Any consideration of the introduction of interim cease and desist orders must be assessed in light of the extreme nature of the order and the consequences it can have on the corporation claimed to be in breach of the Act. Importantly, it should be recognised that interim cease and desist orders would not replace the current interim injunction provisions, but provide an ability to prevent conduct only in extreme circumstances.

While the NFF does not believe that the current interim injunction provisions are fundamentally flawed we do acknowledge that there is a concern in relation to the adverse implications that can flow to a business as a result of a potential breach. The NFF therefore believes that a review of the current arrangements to enable prevention of conduct that is potentially in breach of the Act is warranted.

### *6.2.1 Damages for vexatious injunctions*

Currently a business that is subject to an interim injunction can sue for damages if the injunction is subsequently shown to be without merit, but only if the injunction was sought by another business – the ACCC cannot be sued (section 80(6)). However, if a company is damaged by a vexatious injunction, then it should be able to obtain damages, no matter who obtained the injunction.

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31. As an administrative body, the ACCC should not be able to exercise judicial functions, as argued by the Attorney-General's Department before the Senate Standing Committee on Legal and Constitutional Affairs inquiry *Mergers, monopolies and acquisitions 1991*.
32. House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance? Review of the ACCC Annual Report 1999-2000* p52-53.

The NFF believes that consideration should be given to whether the ACCC should remain exempt from a damages suit if it obtains an interim injunction that is subsequently shown to be without merit.

## 6.3 Sanctions for breaches of the Trade Practices Act

The ACCC has suggested that a wider range of penalties should be available, to ensure that there is adequate deterrence for breaches of the TPA.

### *6.3.1 Criminal sanctions*

Currently, criminal sanctions for breaches of the competition provisions of the TPA are specifically excluded under section 78. The ACCC has argued that criminal penalties should be available for the courts to use, but only as a remedy for the most 'hard-core' collusion.

The NFF supports the addition of criminal sanctions, noting that collusion can be of significant detriment to the efficiency of the economy. Two important issues that need to be addressed are what level of culpability is required before a criminal sanction can be applied; and what hard core means.

The OECD defines the similar concept of a hard-core cartel as being an anti-competitive agreement or arrangement by competitors to fix prices, restrict output, or share markets[33].

Arguments for criminal sanctions include[34]:

- The monetary benefits of cartel activity can be greater than the maximum fine ($10m);
- Fines are not an adequate deterrent, as some firms have re-offended after an initial fine;
- Jail penalties for cartels are available in the US, Canada, Japan and Korea (with the UK soon to introduce criminal sanctions); and
- Criminal penalties would put greater pressure on individual cartel members to inform on each other.

Some arguments have been made that criminal sanctions could be applied capriciously. However, it should be noted that criminal sanctions would have to be determined under the stricter rules of criminal law: ie trial by jury, prosecution run by the Director of Public Prosecutions (not the ACCC), and subject to the higher threshold of 'beyond reasonable doubt'. We understand the ACCC is proposing that criminal sanctions only apply to larger businesses; the NFF would support this restriction.

Therefore, the NFF supports amendments to the TPA to allow for criminal sanctions for 'hard core' collusion by big business.

### *6.3.2 Increased civil penalties*

On a similar basis, it would be appropriate for the Review to consider whether the current civil penalty regime is adequate to deter collusion: a penalty of $10m may not

33. OECD (2002), *Hard Core Cartels: Meeting of the OECD Council at Ministerial Level,*.
34. All points sourced from House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance? Review of the ACCC Annual Report 1999-2000* p54-55.

be sufficient in some situations. In particular, a link between the penalty and the gain to the company from the collusive activity may be appropriate.

The NFF therefore believes that consideration be given to whether the current penalty regime for collusion and other restrictive trade practices should be amended to ensure that this conduct is adequately deterred.

## 6.4 Divestiture (break-up)

When a company is found to be abusing its market power, a solution is to break the company up into smaller companies that would all have to compete against each other. Divestiture is currently available as a remedy only if a merger occurs that is unlawful. It is not available where a company is found to misuse market power (under section 46).

The ACCC supports divestiture where "flagrant or repeated anti-competitive conduct" occurs, and this power should only be given to a judicial body (not to the ACCC).

Such power should be limited to the most extreme contraventions of section 46 of the TPA. The NFF does not support proposals to allow divestiture to occur just because the ownership structure has the effect of substantially lessening competition. Divestiture should be a remedy for unlawful conduct, not just for an "unlawful" structure. The ACCC has argued that a divestiture test that is not based on unlawful conduct could be unconstitutional[35].

Therefore, the NFF supports divestiture as a last resort measure for addressing misuse of market power, when other remedies have proven unsuccessful.

35. ACCC, *Submission to Senate Legal and Constitutional References Committee's inquiry into section 46 of the Trade Practices Act 1974*, p10.

# 7 Mergers & acquisitions

The TPA currently has restrictions on the ability of companies to merge with one another or for one company to acquire another. The ACCC basically has the power to prevent a merger or acquisition if the transaction would 'substantially lessen competition'. There have been suggestions that the restrictions on mergers and acquisitions should be relaxed, particularly so that the ACCC can prevent a merger only where the merged firm would have 'market dominance'. The primary argument for a change is that excessive competition hinders dynamic efficiency, in particular because it discourages innovation.

The main arguments against a change are:

- The ACCC argues "there is substantial evidence that successful export performance is enhanced by domestic competition, which stimulates efficiency and innovation, rather than by domestic market power and monopoly."[36] A recent OECD study found that "enhancing competition in the product market seems to have a positive impact on the innovation performance of a country"[37]
- International harmonisation: soon, all the English speaking world will have the same test as Australia of 'substantial lessening of competition'.
- Collusion and cooperation are not assisted by a concentrated market: while this principle has not been tested in the Australian courts, it is generally accepted in the EU & US.
- The ACCC can authorise mergers that would otherwise breach the TPA if the public benefit test is met. This is the same test that applies to other actions that would otherwise breach the TPA, including collective negotiation as noted in section 4 above. The ACCC's authorisation decision is subject to appeal or review by courts and the Australian Competition Tribunal.

The NFF therefore believes that the rules in the TPA restricting mergers and acquisitions should remain unchanged.

36. ACCC, *Annual Report 1999-2000*, p39.
37. A Bassanini & E Ernst (2002), *Labour Market Institutions, Product Market Regulation, and Innovation: cross country evidence*, p2.

# 8 Other related issues

## 8.1 Administration of the Act

The NFF believes that the activities of the ACCC should be open and transparent.

Currently the Act allows for the ACCC to report to Parliament annually, and the Minister can refer matters to the ACCC. The ACCC is subject to Parliamentary oversight through the Senate Estimates process and the relevant standing committee.

However, the NFF believes that there is further scope to enable greater transparency in the activities of the ACCC. The NFF therefore suggests that consideration should be given to establishing a Joint Parliamentary Committee that will focus on ensuring that the manner in which the ACCC administers the TPA is open and transparent. The Chairman could be required to appear before this committee every 6 months. This will provide an avenue for business to raise their concerns about the way in which the ACCC operates rather than have these issues pursued through the media.

### *8.1.1 Mergers*

There is a proposal that the ACCC should be required to publish its reasons for accepting or rejecting merger applications after a decision has been made[38]. This will enable greater scrutiny of ACCC processes, will provide precedent for future applications and ensure consistency with past applications. However, there would be privacy/confidentiality concerns with the publication of some information.

## 8.2 Compulsory information disclosure

As noted above (section 4), farmers operate in concentrated markets with only a small number of major participants for most farm input and outputs. This is particularly the case in the retail grocery industry.

A Joint Select Committee of Federal Parliament was established in December 1998 to report on the impact of market concentration in the retail sector. In response to the Committee's recommendations, a voluntary industry Code of Conduct was developed along with the establishment of an Ombudsman to assist in resolving industry disputes.

The NFF acknowledges that the current Ombudsman has been actively involved in ensuring that farmers are aware of the dispute resolution mechanisms available to them, and has resolved a number of disputes through mediation. However, NFF continues to hold concerns about the effectiveness of the Code, particularly in relation to the reluctance of the Code Administration Committee to consider suggestions for improvements to the Code, even when those recommendations are made by the Ombudsman himself.

Farmers continue to raise areas of concern, including unfair negotiating practices, breaches of contracts and the flexible use of quality standards as grounds for product rejection. Further, where a producer has a commercial relationship with a supermarket that may constitute a large proportion of their business, they are reluctant to place the operation in jeopardy in an attempt to redress unfair treatment.

38. Willaims & Woodbridge (2001), *Antitrust Merger policy: Lessons from the Australian Experience*, Available at http://www.nber.org/books/ease12/williams-woodbridge9-22-01.pdf

Fair and equitable trading practices are not being promoted amongst all industry participants and the NFF believes that existing arrangements are inadequate to impose balanced negotiations between suppliers and major chains.

It is generally recognised in both international and Australian jurisdictions that in some markets, either because of 'natural' monopolies or as a result of dominance by a small number of suppliers, market power is able to be exercised to the disadvantage of consumers or suppliers. Appropriate mechanisms to ensure these markets remain efficient are necessary, with these generally being regulations to enforce some degree of market information transparency, and/or price controls.

Markets where one or both of these mechanisms are used in Australia include electricity, gas, telecommunications, and a range of other utilities where natural monopolies exist. In most, price control powers are available for use, although a critical first step in implementing these is obviously access to relevant market information.

US legislation dealing with competition and monopolies includes two specific Acts of particular relevance to the issue of buyer power in food markets. These Acts are the Perishable Agricultural Commodities Act (PACA) and the Packers and Stockyards Act (PSA) and provide the US Secretary of Agriculture with the power to enforce mandatory information disclosure on participants in certain concentrated markets.

In general, both pieces of legislation are designed to impose licensing requirements on participants in the marketing chain between the farmers and retail consumer. They also impose payment and security terms throughout the marketing chain and impose record retention and disclosure of market information requirements on market participants. The PACA is designed to promote fair trading in both the fresh and frozen fruit and vegetable industries, similar to what the Retail Industry Code of Conduct aims to achieve in Australia.

Supplementing the US legislation is a range of much more specific legislation that deals with the problems experienced by small scale suppliers to large corporations. The laws are largely preventative in nature and of particular relevance to the Australian market in that they require a reliance on free and open information flows to ensure that markets remain transparent and efficient.

Legislating to enforce appropriate market transparency, rather than imposing arbitrary market share limits, minimises the chance of potential efficiency losses in food distribution and marketing (see section 8.3 below). At the same time it ensures adequate information is available to the regulators to detect abuses of buyer power as they arise. It also acts as a deterrent to those large organisations tempted to use unfair practices. Importantly, it provides the opportunity for farmers to use the information collected to create comprehensive market information systems. These systems are essential to ensure farmers make appropriate resource allocation decisions and continue to enhance the efficiency of food production in Australia.

It is apparent from international experience that a requirement for mandatory information disclosure acts as a preventative measure in concentrated markets, reassuring suppliers and customers about the 'fairness' of the market, but also enabling dominant organisations in a market to reach market share levels that would otherwise be unacceptable.

In a small and open market such as Australia, there is a much greater likelihood that markets of all types will be more concentrated, and therefore mandatory information disclosure powers could apply more generally across the economy.

The NFF suggests that compulsory information disclosure could be an appropriate way to deal with power in the markets for our products and would provide a mechanism to protect the balance of power between small and larger businesses. Therefore, the NFF seeks that the Review examine the costs and benefits to requiring compulsory information disclosure as a means of addressing concerns over concentrated markets.

### *8.2.1 Details of information disclosure proposal*

Information on prices and quantities would need to be reported to a central authority that would then aggregate the information and publish it in a timely way. The aggregation would make the seller and buyer anonymous, similar to the operation of the stock market.

While the NFF accepts that there is a Retail Industry Code of Conduct in place, the NFF does not believe that attempting to insert mandatory compulsory information disclosure into the Code would be effective. Indeed, NFF believes that a legislative basis is necessary to ensure compliance with the requisite information disclosure. This will aim to prevent abuses of buyer power in concentrated markets.

The ACCC would need to investigate and define the market, a process that already occurs in response to proposed mergers and the prosecution of other powers the ACCC is able to exercise under the TPA.

The ACCC would need to assess whether the dominant participants in that defined market are likely to be able to exercise market power in relation to that market, or segments of that market.

The ACCC would also need to define the scope and frequency of disclosure of specific market information that it would require be disclosed under the proposed powers, and the mechanisms that would be implemented to 'sanitise' that disclosure to protect commercial interests.

A review mechanism would be necessary to reverse the requirement in the event that conditions changed in the defined market.

## 8.3 Limits to Market Share

It has been suggested that another approach to address market power more directly is to impose legislated limits on a company's market share.

However, market forces should be allowed to operate in an unrestricted environment to determine supply and demand as well as market segments. Enforcement of limited market share, whether imposed as a sanction for previous misuse of market power or otherwise, is not considered warranted. It is an extreme sanction that could disrupt markets and competition. It also raises the question of how to define a market, which has raised problems in the past.

Therefore, the NFF does not support the introduction of legislated limits on a company's market share.