

Australia's Food Processing Sector

Submission by the Treasury to the Senate Select
Committee on Australia's Food Processing Sector

4 October 2011

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Introduction

The Treasury is grateful for the opportunity to provide a submission to assist the Committee in its inquiry. The Submission mainly addresses the changing economic environment for the food processing market in Australia, as well as the role of competition law and policy, and the broader regulatory environment for Australia's food processing and manufacturing companies.

Key points

- Food and beverage manufacturing is a high value sector of the domestic economy, comprising 21 per cent of total manufacturing sales and service income in 2007-08. Australia is a net exporter of processed food, and continues to maintain this position despite a decline in net exports in recent years.
- Nevertheless, Australia's food processors are facing a structural adjustment challenge.
 - The continuing strength in Australia's terms of trade and high levels of activity in the mining sector have contributed to a strong exchange rate and input cost pressures. These factors have reduced the international competitiveness of some trade-exposed sectors, such as the food processing industry.
 - However, over the longer term, continuing growth of key economies in the Asia-Pacific region will generate increased opportunities for Australia's food processors.
- Competition plays a key role in ensuring that the food processing industry is resilient and flexible. Food processors will increasingly need to innovate, including by adapting to changing consumer preferences and taking advantage of opportunities in emerging markets.
- Consistent with international trends, the food processing industry in Australia tends to be concentrated, with two or more key players and a number of smaller competitors in major product types. All else being equal, market concentration is less likely to give rise to concern if there are no significant barriers to entry or expansion.
 - Governments can play a role to ensure that regulations do not unnecessarily create barriers to entry.
 - Competition law also plays a role by ensuring that anti-competitive behaviour, such as predatory pricing or mergers or acquisitions that substantially lessen competition, does not raise strategic barriers to entry.

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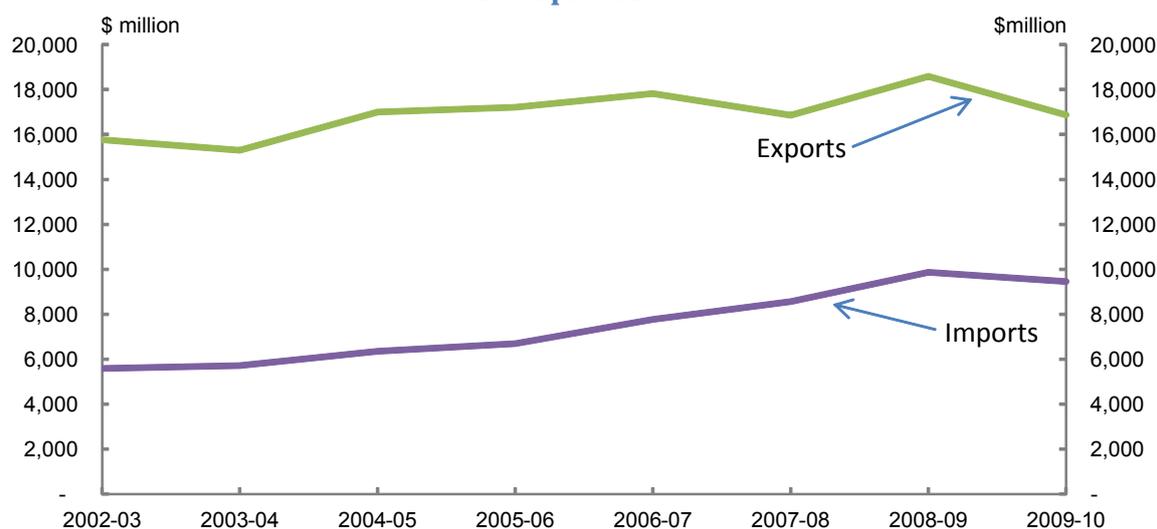
A. Food processing in Australia — a changing market

The Australian food industry is a high value sector of the domestic economy and encompasses a complex series of supply chains. According to *Australian Food Statistics 2009-10*, Australia maintains a significant food processing sector which has recently experienced growth following recovery from the Global Financial Crisis. Value added in food, beverage and tobacco manufacturing increased by 6.2 per cent in 2009-10 to \$21.7 billion.¹

Food and beverage manufacturing is the largest sector of the Australian manufacturing industry. In 2007-08 it accounted for 21 per cent of employment in the Australian manufacturing sector, and approximately \$84 billion in sales and service income.²

In terms of international trade, Australia has traditionally been a net exporter of food products, with significant exports by global standards in substantially and elaborately transformed food products (hereafter referred to as 'processed' food).³ As illustrated in Chart 1 below, in 2009-10 Australia had an export surplus of \$7.4 billion over processed food imports.

CHART 1
Australian exports and imports — substantially & elaborately transformed food products



Source: Australian Food Statistics, 2009-10

The meat, wine, beer, malt and spirits, and dairy industries have been major contributors to the overall growth in Australia's processed food export earnings since the mid 1990s. In contrast, export earnings from processed seafood and processed fruit and vegetables have declined, and expenditure on imports of these products has increased.⁴

As illustrated above, the value of Australia's processed food exports declined to \$16.8 billion in 2009-10, \$1.7 billion lower than in 2008-09. The appreciation of the Australian dollar was a key factor that would have accounted for much of this decline.⁵ However, growth in the value of processed food imports also appears to have flattened.

1 Department of Agriculture, Fisheries and Forestry, 2010, *Australian Food Statistics 2009-10*, http://www.daff.gov.au/agriculture-food/food/publications/australian_food_statistics_2009.

2 Australian Bureau of Statistics, 2010, *Year Book Australia, 2009-10*. <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1301.0>

3 Australia's food exports and imports can be categorised into three main categories — 'minimally transformed' (such as grains, oilseeds and live animals), 'substantially transformed' (such as meat, dairy products, sugar, beverages and malt) and 'elaborately transformed' (such as biscuits and confectionary).

4 *Australian Food Statistics 2009-10*.

Australia’s food processing sector has long been an attractive destination for overseas investors, and most key market segments have high levels of foreign investment. While there has been a decline in recent years in the number and value of foreign investment proposals (see Table 1 below), large proposals in the food processing sector continue to attract media coverage.

Table 1: Proposed foreign investment in food, beverage and tobacco manufacturing

	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Number of proposals	16	9	12	10	13	14	22	10	5	8
Proposed investment (\$b)	4.3	1.6	5.3	2.3	6.8	5.3	6.3	7.2	3.5	2.8

Source: Foreign Investment Review Board Annual Reports.

The macroeconomic context

As discussed above, conditions for Australian food processors are affected by broader macroeconomic factors. The rise in Australia’s terms of trade has supported growth in national income and lifted our purchasing power. It is also having a profound effect on the shape of Australian industry.

Mining-related sectors are growing strongly and drawing resources — such as land, skilled labour and other production inputs— from other parts of the economy. Despite strong growth of the mining and mining-related industries, around three quarters of the economy’s output is not being boosted directly from the mining boom.

High export prices and high levels of activity in the mining-related sectors have been accompanied by a strong exchange rate. This has affected the international competitiveness of some trade-exposed export and import-competing sectors, such as key parts of the food processing industry.

Since Australia’s mining boom is tied to the pace of Asia’s industrialisation and urbanisation, the exchange rate can be expected to remain high relative to history. One advantage of a stronger Australian currency is that it reduces the relative cost of imported inputs to food processing, including fuel and capital equipment. However, for many exporters, these cost savings are likely to only partially offset the impact of the high exchange rate.

Trends in the food processing industry

While the mining boom and the high dollar are impacting on the competitiveness of Australian food processors, other broader trends are emerging.

As noted above, changes in the international landscape present challenges for Australia’s food processing industry, as higher input costs are likely to affect the manufacture of some products, amid increased competition from low-cost producers overseas.

However, emerging markets also present opportunities for growth. By 2020, the Asia Pacific region could have more people in their middle class than the rest of the world combined. China could have a middle class market that surpasses the United States in dollar terms. The continued rise of middle class incomes in Asia presents Australia’s food export industries with increased opportunities, as the demand for value-added products will rise.

Innovation will also increasingly play a role in ensuring that the food processing sector in Australia is competitive in global markets. To compete effectively, food processors are adapting to new and changing consumer preferences, such as increasing consumer demand for organic goods and consumer trends in healthy eating.⁶

5 *Ibid.*

According to IBISWorld, Australian supermarket chains are increasingly importing food items from international suppliers, to expand their product range into more specialty products, such as Asian ingredients.⁷ This trend reflects a shift towards a more globalised food market, and competition between supermarket chains to meet the changing preferences of Australian consumers.

The Australian Food and Grocery Council has also noted that opportunities for food processors will arise from growing demand for safe, quality and convenient food.⁸ Food processors will need to innovate: for example, advances in genomics, food and nutritional sciences may offer possibilities for innovation to improve public health aspects of food and also to meet changing consumer trends.⁹

While these challenges and opportunities will necessarily involve some adjustment costs, a challenge for governments is to facilitate as smooth a transition as possible. Good policies will help industry, workers and regions adjust, not just to the circumstances today, but also in the decades ahead.

In the face of increasing global economic integration, however, it is important to maintain open flows of trade and investment. Government actions to protect industries from exposure to the global market can impact adversely on other industries, taxpayers, and consumers. This can be manifested through higher domestic prices for consumers and businesses, higher taxes to finance such government action and through adverse impacts on Australia's overall productivity.

Conversely, open trade with other countries can benefit the Australian economy by facilitating the efficient production of goods and services, increasing competition, improving the allocation of capital and by providing Australian businesses with access to inputs at competitive prices. An open investment environment can also help to deliver improved competitiveness and productivity performance over time, through the introduction of new and improved technology, by allowing access to global supply chains and markets and by enhancing Australia's skill base.

Whether Australia benefits from global economic opportunities depends on the quality of our economic policies and whether businesses make the right decisions for the long-term, by facilitating change rather than opposing global market forces and supporting productivity growth and labour force participation.

In summary, in the emerging global environment there will be a premium on having a flexible, adaptable and innovative Australian food processing industry, and an adaptive, responsive economy.

6 *Ibid* p. 18.

7 IBISWorld, 2011, *Supermarkets and Other Grocery Stores in Australia*, May 2011, p. 22.

8 Australian Food and Grocery Council, 2010, *State of the Industry 2010*, p. 49.

9 *Ibid*.

B. Competition in the food processing industry

The role of competition

Policy settings that encourage flexible, resilient and competitive markets will support the process of transformation in Australian industry, spurring growth, increased productivity and higher living standards.

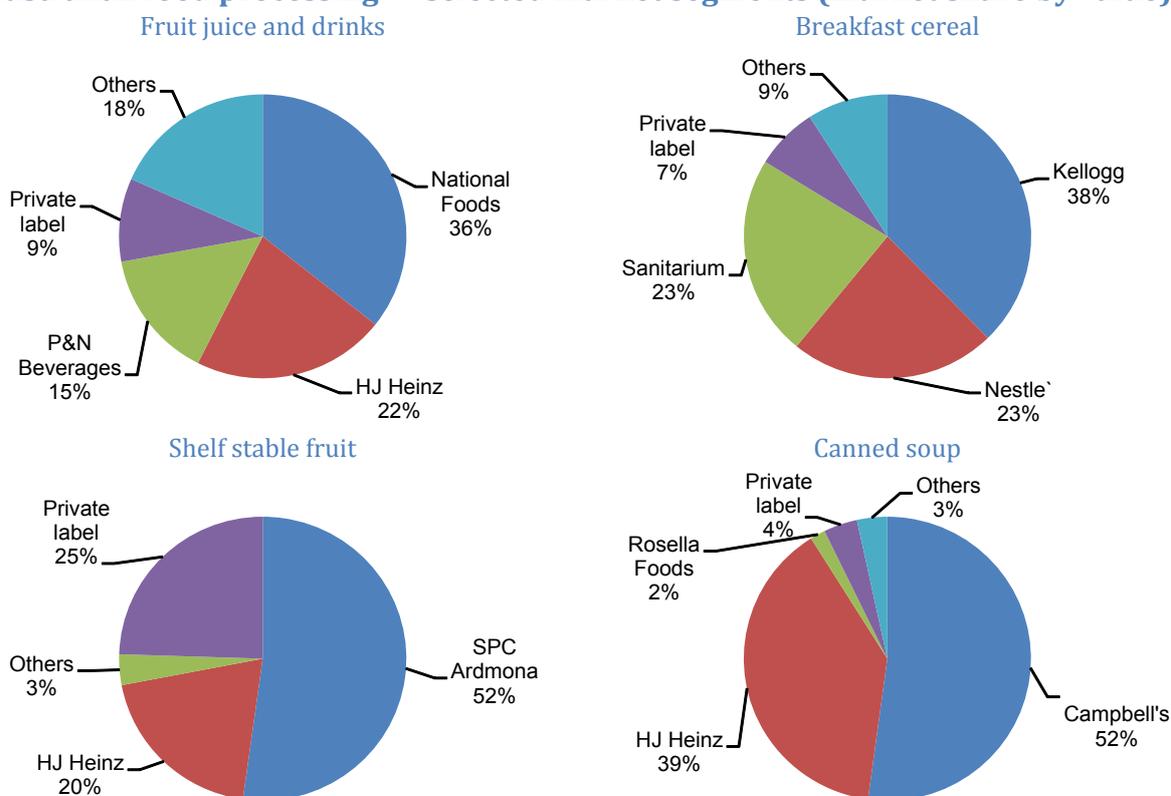
Competitive markets generally maximise efficiency and lead to more productive outcomes for businesses, as well as benefits for consumers through greater choice and competitive pricing. To this end, governments can play an important role in ensuring that regulations do not unduly impede competition or prevent new businesses from entering a market. The effects on competition of planning, zoning and development regulation, for example, are discussed further in Part D of this submission.

Market structure and competition

Consistent with international trends, the food processing industry in Australia tends to be concentrated, with two or three key players in each product type and a number of smaller competitors. For example, Chart 2 illustrates that two or three firms have a high market share in four key market segments.

CHART 2

Australian food processing — selected market segments (market share by value)



Source: Retail World Annual Report 2010, Retail Media.

High market concentration, however, does not necessarily indicate that incumbent firms have market power. When assessing the level of competition in a market, it is also important to assess other factors, such as the presence of barriers to entry or expansion, competition from imports, the level of countervailing power held by buyers, the nature of key competitors, and the availability of substitute products or services.

Barriers to entry and expansion can be broadly categorised as:

- **intrinsic barriers** – which relate to the ‘natural’ costs of setting up or expanding a commercial operation (for example, firms that have recovered sunk costs may enjoy lower unit costs);
- **strategic barriers** – which are impediments that arise because of actions taken by (or available to) incumbents either to discourage new competitors from entering the market, or to drive them out if they choose to enter (for example, firms may develop a strong brand and work on building consumer loyalty); and
- **regulatory barriers** – which are regulations or legislation that make entry more difficult or costly than it would otherwise be (for example, planning and zoning, food safety and quarantine restrictions, and food labelling requirements may give rise to barriers for new entrants – some of these issues are discussed further in Part D of this submission).

The role of competition from imports has been discussed above. International supermarket chains such as ALDI and Costco are also emerging as a new source of competition for the major supermarket chains in Australia. Further retail competition is likely to put more downward pressure on prices, foster innovation and increase consumer choice.

The food supply chain in Australia (from production to retail) also varies significantly for different categories of food.¹⁰ In 2008, the Australian Competition and Consumer Commission (ACCC) released the report of its *Inquiry into the competitiveness of retail prices for standard groceries* (Grocery Report), which focused on the grocery market in Australia. In its report, the ACCC examined the supply chain of grocery products including fruit and vegetables, meat, dairy and dry and packaged groceries. As outlined in the Grocery Report, food and grocery processors engage with supermarket chains to achieve broad distribution of their products through supermarkets by increasing their product range or establishing direct supply contracts with market entrants such as ALDI.¹¹ As the ACCC highlighted, competition between brands for limited shelf space helps to constrain prices at which suppliers can sell their products.

There are a number of factors that impact on the relationships between food manufacturers and retailers, including, but not limited to:

- shelf space allocations are an important point of negotiation between retailers and manufacturers and wholesalers;
- in some instances, food retailers are also seeking to import branded products through lower cost international supply channels (so-called ‘parallel importation’);
- increased market penetration of retailers’ ‘private label’ products; and
- the entrance of new players in the retail grocery sector (particularly multinational retailers such as ALDI and Costco).

10 ACCC, 2008, *Inquiry into the competitiveness of retail prices for standard groceries*, p. 381.

11 *Ibid.*

Private label products

At the retail end of the food supply chain, the range of products available in supermarkets has evolved significantly in recent years, partly due to the introduction and growth of private label products.¹² In recent years, major supermarket chains in Australia have focused on developing their private label brands to compete directly with the branded products of food processors.¹³ New entrants such as ALDI and Costco, both with private label brands, are in part also motivating the major supermarket chains to turn to private label brands as a competitive response. The ACCC has noted that private label products offer consumers additional choice and place competitive pressure on prices.¹⁴

Private label brands are growing in the Australian retail market and have successfully expanded into less traditional categories such as shelf stable fruit. However, private label brands still have substantially less market share in Australia (around 14 percent) compared to international retail markets such as the United Kingdom (around 43 per cent) and Switzerland (46 per cent).¹⁵

Concerns have been raised about the impact of private label products on competition in the retail grocery market and on the viability of branded products. The ACCC noted in its Grocery Report that the introduction and growth of private label products has the potential to enhance the buying power of major retail chains and decrease the competitiveness within vertical supply chains. However, private label products may also increase competition by potentially motivating suppliers of branded products to act more competitively (for example, to increase the quality of their products or employ greater product innovation).

While generally increased use of private label brands is likely to put downward pressure on prices, which benefits consumers, there may also be other effects such as a crowding out of shelf space which impacts on producers of branded products. As the ACCC Grocery Report highlighted, concerns have been raised that the growth of private label products is lessening consumer choice by narrowing the range of branded products available. However, these outcomes are ultimately driven by consumer demand and brand preferences. Domestic food processors may also benefit where they are awarded contracts for the production of private label products.

12 IBISWorld, 2011, *Supermarkets and Other Grocery Stores in Australia*, May 2011, p. 18.

13 ACCC, 2008, *Inquiry into the competitiveness of retail prices for standard groceries*, p. 360.

14 *Ibid* p. 377.

15 Nielsen, 2011, *The Rise of the Value-Conscious Shopper: A Nielsen Global Private Label Report*, March 2011, p.3.

C. Role of competition law

This part of Treasury's submission seeks to outline the purpose and current state of the legislative provisions that make up Australia's competition law, the *Competition and Consumer Act 2010* (CCA). The objective of the CCA is to:

*'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*¹⁶

Competition laws are intended to protect the competitive process in our markets, which will generally deliver greater efficiency and productivity, and better outcomes for consumers. These laws are designed to safeguard against particular types of conduct which would in all cases be anti-competitive. In some cases, however, conduct may be authorised where it may nonetheless produce a net public benefit.

Competition laws are principally concerned with protecting the competitive process, not individual competitors. They are not designed to protect competitors from rigorous competitive behaviour, nor to force businesses to compete.

As noted above, there are various factors which can indicate the extent and nature of competition in a market, including:

- barriers to entry to the market;
- level of concentration in a market;
- degree of countervailing power in a market;
- availability of substitutes;
- dynamic characteristics of the market including growth, innovation and product differentiation; and
- the nature and extent of vertical integration in a market.¹⁷

While none of these factors by themselves unambiguously suggest a lack of competition, the presence of one or more can be grounds for closer investigation.

Part IV of the *Competition and Consumer Act 2010* — competition law prohibitions

Competition law, as applied in Australia and embodied in Part IV of the CCA, is principally concerned with safeguarding against the effects of anti-competitive conduct across all sectors of the economy. Part IV of the CCA contains the substantive competition provisions of the CCA, which is intended to prevent anti-competitive conduct and foster competition through a host of targeted prohibitions.

Effective competition can be reduced by firms behaving, either independently or with other firms, in ways that reduce rivalry in the market, or prevent or deter the entry of new firms. Accordingly, the

¹⁶ Section 2, *Competition and Consumer Act 2010*.

¹⁷ These indicative factors reflect those in subsection 50(3) of the CCA, which provides a non-exhaustive list of matters that may be taken into account in considering whether a proposed merger substantially lessens competition.

competition provisions in Part IV of the CCA seek to restrain conduct that substantially lessens competition, but to otherwise leave firms free to act as they see fit.

Two key provisions in Part IV of the CCA may be of particular interest to the Committee: the misuse of market power prohibition (section 46) and the prohibition on mergers that substantially lessen competition in a market (section 50). These provisions are outlined further below.

The remaining competition provisions in Part IV are summarised in **Attachment A** to this submission.

Misuse of market power (section 46)

Section 46 regulates unilateral anti-competitive conduct. Section 46 endeavours to distinguish between vigorous competitive activities (which are desirable) and economically inefficient, monopolistic practices that may enable a firm to entrench its market position to the detriment of the competitive process (and hence, which are undesirable).

There are three elements that must be proven in order to establish a breach of the misuse of market power prohibition in subsection 46(1), that:

- the respondent has a substantial degree of power in a market (which has essentially been interpreted as a freedom from competitive constraint);
- the respondent took advantage of that power (acted in a manner that it would not have acted were it subject to competitive pressures); and
- the conduct had the purpose of:
 - eliminating or substantially damaging a competitor;
 - preventing entry to a market; or
 - preventing or deterring a person from engaging in competitive conduct in that or any other market.

Only firms with a 'substantial degree of market power' are prohibited from taking advantage of that power for a proscribed anti-competitive purpose. This is because firms that lack substantial market power are rarely, if ever, able to unilaterally harm competition in an enduring way.

The object of subsection 46(1) in distinguishing between a misuse of market power and aggressive competitive behaviour was described by the High Court in an oft-cited passage:

*'The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition section 46 is designed to foster.'*¹⁸

Further details regarding the operation of the section 46 prohibition were provided by Treasury in its submission to the Senate Economics Committee inquiry into the impacts of supermarket price decisions on the dairy industry.¹⁹

¹⁸ *Queensland Wire Industries Pty. Ltd. v The Broken Hill Proprietary Company Limited & Anor* (1989) Australian Trade Practices Reports 40-925, at 50,010.

¹⁹ The Treasury, Submission No. 111 available at http://www.aph.gov.au/senate/committee/economics_ctte/dairy_industry_supermarket_2011/submissions.htm.

Mergers and acquisitions (section 50)

The purpose of the mergers and acquisitions prohibition in section 50 was articulated in the *National Competition Policy Review* (Hilmer Report) in 1993, which formed the basis of Australia's National Competition Policy.

'The role of a merger provision is to distinguish between welfare enhancing and welfare reducing mergers and acquisitions ... Mergers between firms can be an effective way of developing competitive advantage, optimising the benefits of complementary strengths and taking advantage of economies of scale and scope. Mergers can also operate as an important discipline upon poorly performing management. Merger activity can thus improve efficiency to the benefit of consumers and the community generally'.²⁰

Subsection 50(1) of the CCA prohibits a corporation from 'directly or indirectly acquiring shares in the capital of a body corporate or acquiring any assets of a person if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.' The use of the substantially lessening competition (SLC) test is consistent with international practice as the same test is used in many other Organisation for Economic Cooperation and Development (OECD) countries including the United States, Canada, United Kingdom and New Zealand.

Subsection 50(3) of the CCA then provides a non-exhaustive list of factors that may be taken into account when considering the impact of a merger or acquisition on a market, including the height of barriers to entry and the actual and potential level of import competition in the market.

A market is defined by subsection 50(6) of the CCA which states a 'market means a substantial market for goods or services in Australia or a State or a Territory or a region of Australia'.

The Government has introduced amendments to section 50 under the Competition and Consumer Legislation Amendment Bill 2011, which is currently before the Parliament. The Bill intends to clarify the law in relation to mergers and acquisitions by amending subsection 50(1) of the CCA and allowing the impacts of a merger or acquisition to be considered within the context of any market instead of a market and removing the requirement that the market being considered be a substantial market in subsection 50(6) of the CCA.

In addition to the prohibition itself in section 50, the CCA provides a framework within which the competition concerns posed by mergers and acquisitions in Australia can be considered and addressed. Under the CCA, prospective acquirers have three avenues available to have a proposed acquisition examined:

- assessment of the proposed acquisition on an informal basis by the ACCC;
- an application for formal clearance of a proposed acquisition by the ACCC; or
- assessment by the Australian Competition Tribunal of an application for authorisation of an acquisition, using a net public benefit test.

As parties are not required by the CCA to notify the ACCC of a proposed acquisition, they have the option of proceeding with the transaction without seeking regulatory consideration. This does not prevent the ACCC from subsequently investigating the transaction, including making public inquiries, using its formal information-gathering powers and taking enforcement action under section 50.

The ACCC publishes *Merger Guidelines*, which outline the analytical and evaluative framework the ACCC applies when reviewing mergers and acquisitions under the CCA, and public competition assessments on its website (www.accc.gov.au) to provide certainty to all parties.

²⁰ *National Competition Policy Review*, August 1993, page 80.

Parties can also seek authorisation directly from the Australian Competition Tribunal, which can authorise mergers and acquisitions which would result in such a benefit to the public that the merger should be allowed to occur. In determining what amounts to a public benefit, the Tribunal must have specific regard to matters of international competitiveness, as required by section 95AZH of the CCA.

The Tribunal must take into account all relevant matters that relate to the international competitiveness of any Australian industry, and must consider as benefits to the public: a significant increase in the real value of exports; or, a significant substitution of domestic products for imported goods.

Further details regarding the operation of the section 50 prohibition were provided by Treasury in its submission to the Senate Economics Committee inquiry into the Trade Practices Amendment (Material Lessening of Competition - Richmond Amendment) Bill 2009.²¹

²¹ The Treasury, Submission No. 15 available at:
http://www.aph.gov.au/senate/committee/economics_ctte/richmond_amendment_09/submissions.htm

D. The broader regulatory environment for the food processing industry

In addition to competition law, Australia's food processing and manufacturing companies are subject to regulation in other areas, including food labelling, planning and zoning, and taxation. This part of Treasury's submission outlines the current state of the broader regulatory environment, as well as Government initiatives to support competition and promote the productivity and sustainability of Australia's food processing industry.

Food labelling

Food labelling requirements can generate significant compliance costs for businesses, and may constitute a barrier to entry or expansion for firms in the food processing industry. These costs need to be carefully balanced against the various public policy objectives of food labelling, such as for health or safety reasons, or to assist consumers to make informed purchasing decisions.

On 28 January 2011, the Government received the final report on the Review of Food Labelling Law and Policy (Review). The Review was conducted by an independent expert Panel chaired by Dr Neal Blewett AC. The Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) commissioned the Review at the request of the Council of Australian Governments (COAG). The Review made a total of 61 recommendations and discusses a range of food labelling issues, including public health claims, front-of-pack labelling, new technologies, alcohol labelling and country of origin labelling.

The Commonwealth, State and Territory governments and the New Zealand Government are working together to coordinate a process for the development of a whole-of-government response to the Review's recommendations. As part of this process, targeted engagement with stakeholders is being undertaken on particular recommendations.

The Ministerial Council has suggested that a realistic timeframe to consider a response to the Review is at its meeting in December 2011.

Planning and zoning

As discussed above, the nature of competition in the retail grocery sector can impact on the food processing sector; for example, by altering the respective market power of supermarket chains and food processors. Planning and zoning requirements have been identified as an issue relevant to competition in the retail sector, and key developments in this area are summarised below.

At the COAG meeting of 7 December 2009, it was agreed that planning laws should not unjustifiably restrict competition. It was also agreed that the Productivity Commission would report on the States and Territories' planning and zoning systems to identify practices that support or unjustifiably restrict competition.

In April 2010, the Government requested that the Productivity Commission examine and report on the operations of the State and Territories' planning and zoning systems, particularly as they impact on business compliance costs; competition; and the overall efficiency and effectiveness of the functioning of cities.

On 16 May 2011, the Productivity Commission's report *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* was released. The Productivity Commission found that planning guidelines on where retailers can locate are very complicated, often prescriptive and exclusionary. In effect, they make it difficult for some businesses to find suitable land and enter the market, and prevent the market from allocating land to its most valued uses. The Commission identified a number of restrictions on competition, including:

- highly prescriptive zoning;
- local planning restrictions on retailers;
- adverse impact tests on existing businesses or activity centres;
- lack of 'as of right' developments; and
- business gaming of planning systems and appeal processes.²²

The report also identifies best practice approaches to support competition in land use markets. The leading practices identified by the Commission fall into broad groups, including:

- early resolution of land use and coordination issues;
- rational and transparent allocation rules for infrastructure costs; and
- improving development assessment and rezoning criteria and processes.

The approaches generally correspond to the constraints that unjustifiably restrict entry into markets. The Commission advocated that the States and Territories implement the leading practices identified in the report. The impact of planning and zoning restrictions is being considered further in the Productivity Commission's current inquiry into the *Economic Structure and Performance of the Australian Retail Industry*.

National Food Plan & Food Processing Industry Strategy Group

At the 2010 federal election the Government committed to develop a national food plan and subsequently announced that it was providing \$1.5 million over four years to support the creation of the Plan. The Government envisages that the Plan will outline the Australian Government's vision for the food industry and consumers, to guide Australian Government actions and provide certainty for other stakeholders. A national food plan, when finalised, would seek to better explain and better integrate Australia's approach to food policy, from production through to consumption, and be consistent with the Government's market-based policy approach.

On 23 June 2011, the Government publicly released an issues paper to inform the development of a national food plan, seeking feedback from stakeholders on what the plan should cover and aim to achieve. Submissions closed on 2 September 2011.

The Government has also established strong collaborative arrangements between Departments to ensure a coordinated approach to consultation and development of the national food plan and is using existing mechanisms to engage with State and Territory governments. Further sources of advice are being drawn upon, including a National Food Policy Working Group and a Food Processing Industry Strategy Group.

²² Productivity Commission, 2011, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*.

- On 1 December 2010, the Government established a Food Policy Working Group through the Department of Agriculture, Fisheries and Forestry. This group was established as a forum for active communication between the food industry and government to foster a common understanding of the industry's priorities, challenges and future outlook across the supply chain.
- On 24 January 2011, the Government established a Food Processing Industry Strategy Group through the Department of Industry, Innovation, Science and Research. The group consists of representatives from industry, academia, and trade unions and is focused on capability building and investment in the Australian food processing and manufacturing industry.

Carbon pricing mechanism

Treasury understands that several food and grocery manufacturers and the Australian Food and Grocery Council have co-signed a joint letter to the Prime Minister raising concerns about the proposed carbon pricing mechanism.

On 10 July 2011, the Government released its Clean Energy Plan, which includes a Carbon Pricing Mechanism. Treasury has conducted modelling on the effects of a carbon price on the Australian economy, including the food processing sector. The Deputy Prime Minister and Treasurer and the Minister for Climate Change and Energy Efficiency released *Strong growth, low pollution: modelling a carbon price* on 10 July 2011.²³

A key conclusion of the Treasury modelling is that, at a broad sectoral level, structural changes due to carbon pricing will be much smaller than other impacts, such as ongoing changes in the terms of trade or consumer tastes. While some emission intensive parts of the economy will undergo structural change, the modelling finds that the bulk of the economy will be largely unaffected.

Further, the modelling also finds that pricing of fugitive emissions in coal and gas production will slow output and export growth in these sectors. This will tend to lower Australia's exchange rate, making other trade-exposed industries, such as food processing, more competitive. Slower productivity growth in carbon-intensive sectors will also slow wages growth and costs of production in other parts of the economy.

Overall, the modelling finds that less emission-intensive industries, such as food manufacturing, are more competitive and grow faster with domestic carbon pricing than in the global action scenarios.²⁴

Tax Forum 2011

The Committee has also been asked to consider taxation as part of the regulatory environment for the food processing sector.

The Government has put in place a series of major reforms to build a stronger, fairer and simpler tax system, reducing company tax and introducing simpler and more generous depreciation arrangements for small business. The Tax Forum, being held on 4 and 5 October 2011, will help to build on that strong record of tax reform.

The forum is bringing together around 180 representatives from the community, business, unions, and government, as well as academics and other tax experts, to discuss priorities and directions for further tax reform, will cover the broad sweep of topics addressed in the *Australia's Future Tax System* review.

²³ The report can be accessed at <http://www.treasury.gov.au/carbonpricemodelling/content/report.asp>

²⁴ The global action scenarios project how the world could evolve, given global action to reduce the impacts of dangerous climate change. They incorporate world action to stabilise greenhouse gas concentration levels at around either 550 or 450 parts per million (ppm) respectively by around 2100.

A discussion paper has been released that outlines a range of ideas that may be discussed at the Tax Forum. The discussion paper is available at the Tax Forum website at <http://www.futuretax.gov.au>.

The discussion paper includes a section on each of the six sessions that will be held at the forum: personal tax; transfer payments; business tax; state taxes; environmental and social taxes; and tax system governance.

As part of the discussion at the forum, participants will need to consider the Government's commitment to fiscal discipline. To this end, participants have been invited to provide a statement that outlines their proposals for reform and how those proposals would be funded.

Following the Tax Forum, the Government will facilitate a debate on tax reform in the Australian Parliament.

ATTACHMENT A: *Competition and Consumer Act 2010* — summary of anti-competitive conduct provisions

This attachment summarises the classes of anti-competitive conduct that are prohibited under Part IV of the *Competition and Consumer Act 2010* (the CCA).

Cartel conduct (sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK)

- The cartel provisions prohibit a contract, arrangement or understanding which has the effect of creating a cartel between parties who would otherwise be competing against each other. A cartel is a formal (explicit) agreement among competing firms to coordinate conduct.
- The CCA definition of ‘cartel provision’ provides for four varieties of cartel conduct: price fixing; output restrictions; allocating customers, suppliers or territories; and bid rigging.
- There are both criminal and civil penalties available for cartel conduct.

Horizontal restraints (section 45)

- Section 45 prohibits contracts, arrangements or understandings that restrict dealings or substantially lessen competition. By colluding with one another, competitors who do not individually have market power are able to distort the competitive process. For example, competitors reaching agreement about the price to be charged for goods and services or who will supply particular segments of the market.

Misuse of market power (section 46)

- Section 46 prevents corporations with a substantial degree of market power from taking advantage of that power for the purposes of eliminating or substantially damaging a competitor, preventing the entry of a person into that or any other market or deterring or preventing a person from engaging in competitive conduct in that or any other market.
 - A business has substantial market power when its activities are not significantly constrained by competitors, suppliers or customers. Subsection 46(3C) specifies that a business may have market power even though it does not have substantial control of the market and does not have absolute freedom from constraint by the conduct of competitors, suppliers or customers.

Predatory pricing (subsection 46(1AA))

- Subsection 46(1AA) prohibits businesses with a substantial market share (having regard to the number and size of its competitors in the market) from selling goods or services for a sustained period at a price below their relevant cost of supply, for an anti-competitive purpose.

Exclusive dealing (section 47)

- Section 47 prohibits vertical restraints referred to as ‘exclusive dealing’. Vertical restraints involve dealings between firms operating at different stages of the production process. Vertical restraints can be entered into for a variety of purposes, many of which will not be anti-competitive but are in fact designed to promote the competitiveness of the firm.
- The CCA prohibits per se third line forcing, which is a specific form of exclusive dealing that involves the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.

- All other forms of exclusive dealing conduct are prohibited if the conduct has the purpose, effect, or likely effect of substantially lessening competition.

Resale price maintenance (section 48)

- Section 48 of the CCA prohibits resale price maintenance, which is conduct by a supplier which is designed to dictate the minimum price for the resale of its goods or services by any party which acquires those goods or services. It is also illegal for a supplier to cut off, or threaten to cut off, supply to a reseller (wholesale or retail) because they have been discounting goods or advertising discounts below prices set by the supplier. It is not a contravention to state a recommended resale price so long as it is just that—recommended.
- Resale price maintenance is prohibited on a per se basis, as the prohibition refers exclusively to the conduct of the supplier of goods. The purpose or effect of that conduct is irrelevant in determining whether section 48 has been breached, as is the degree of market power held by the supplier.

Mergers and acquisitions (section 50)

- Section 50 prohibits mergers or acquisitions that would result in a substantial lessening of competition.
 - The ACCC has primary responsibility of review in regard to mergers in the Australian market. When undertaking a review the ACCC assesses each merger on its merits according to the specific nature of the transaction, the industry and the particular competitive impact likely to result in each case.
- Parties can proceed with a merger without seeking any regulatory consideration from the ACCC, however, this may put merger parties at risk of the ACCC or other interested parties taking legal action under section 50. To avoid this, there are three avenues available for firms to have their proposed acquisition or merger considered.
 - Formal ACCC clearance: enables an acquirer to apply to the ACCC for clearance of a proposed acquisition which, if granted, provides protection to the acquirer from legal action under section 50. It is rarely used in practice.
 - Informal ACCC clearance: parties may wish to seek the ACCC's informal advice on the effects of the proposed merger and, by implication, whether the ACCC is likely to challenge the merger should it proceed. It does not provide protection from legal action under section 50. In practice, informal clearance is the primary method used by firms.
 - Australian Competition Tribunal authorisation: a firm can also make an application to the Tribunal under section 95AT of the CCA. If authorisation is granted, neither the ACCC nor any other party may take action under section 50 in respect of the acquisition. It is rarely used in practice.