SENATE SELECT COMMITTEE ON AUSTRALIA'S FOOD PROCESSING SECTOR
Inquiry into Australia's food processing sector
Public Hearing Tuesday, 15 May 2012
Questions on Notice – ACCC

1.

Several Senate committees over the past decade have examined the issue of competition law and the particular problem of concentrated ownership of Australia's retail grocery sector. The ACCC has also examined the issue in some detail. In August 2008, it released a report into the competitiveness of retail prices for standard groceries. It recommended:

- several changes to the Horticulture Code;
- a mandatory, nationally-consistent unit pricing regime be introduced for standard grocery items both on in-store price labels and in print advertising, for significant supermarket stores;
- that all appropriate levels of government consider ways in which zoning and planning laws, and decisions in respect of individual planning applications where additional retail space for the purpose of operating a supermarket is contemplated, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area; and
- a general creeping acquisitions law.

What was the government's response on each of these four issues? To what extent has the policy response addressed the issue? What more needs to be done on these issues?

ANSWER

Question referred to Treasury.

2(a)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Collective bargaining and boycotts

1. Could farmers and/or food processing companies organise to effectively boycott the major retailers?
2. How can collective bargaining be authorised under the *Competition and Consumer Act 2010?*

3. In what circumstances could this type of action be in breach of the *Competition and Consumer Act 2010*?

4. Is it the case that strong collective bargaining will only work if there are alternative selling options available to farmers and food producers?

5. Will collective bargaining arrangements only work if participants can be sure there will be no suppliers that will break ranks and sell to the retailers on separately agreed terms?

ANSWER

1. The *Competition and Consumer Act 2010* (CCA) prohibits agreements among competitors not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating. Concerns may arise where competing farmers and/or food processing companies agree to collectively boycott a retailer unless that retailer accepted the terms and conditions offered by the group. Under the CCA, parties are able to seek protection from legal action, on public benefit grounds, to engage in a collective boycott arrangement by lodging an application for authorisation or, in certain cases, a notification with the ACCC.

2. Under the CCA there are two broad ways that parties can obtain protection from legal action for a collective bargaining arrangement – authorisation or notification. In broad terms the ACCC may grant authorisation or allow a notification for a collective bargaining arrangement if it is satisfied that the likely benefit to the public would outweigh the likely detriment to the public. The ACCC's public benefit/detriment assessment is guided by submissions by interested parties, including the target of the collective negotiations.

3. The CCA generally requires competitors to act independently of each other when deciding which firms they deal with and setting prices and other terms and conditions of doing business. Collective bargaining and collective boycotts involve agreements between competitors and are at risk of breaching the competition and cartel provisions in the CCA.

4. In the ACCC's experience, collective bargaining arrangements are more likely to be successful where both sides of the negotiation process see benefits for themselves in participating. An ACCC authorisation or notification enables the parties to engage in collective negotiations by providing protection from legal action under the CCA to engage in the collective arrangements. Whether or not the negotiations are successful will depend on the specific circumstances including whether there are alternative selling options available.

5. As noted, collective bargaining arrangements are more likely to be successful where both sides of the negotiation process see benefits in participating. Whether or not the ability for individual participants to opt out of the collective arrangements and negotiate on their own undermines the success of the collective negotiations will depend on the specific circumstances.

2(b)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Divestiture laws

There is currently no law to break up the market ownership of a corporation in Australia. Divestiture has been flagged as a possible option to promote competition in the retail grocery sector.

1. Could divestiture or anti-trust laws be used in Australia, similar to how they are used in the US? Why, why not?

2. The committee is aware that NARGA had in the past a campaign to cap the market share of corporations. What is the ACCC's view on this idea?

ANSWER

1. Australia's competition law, the *Competition and Consumer Act 2010* (the CCA) provides for divestiture in a narrow range of circumstances, following mergers that substantially lessen competition. While America's competition law provides scope for divesture orders to be made this is only where there has been a breach of competition law, The ACCC notes the findings of the 'Dawson Review' of competition law (2003) which found that expanding the availability of divestiture orders in Australia would be inappropriate. It is also the case that the divestiture laws in the US have been very rarely used.

   The ACCC recognises the importance of addressing barriers to entry in concentrated markets. Its 2008 Grocery Report indicated the value of a review of planning laws by all levels of Government to enhance competition. Further, it flagged an ACCC review of restrictive provisions in supermarket leases. Since that time, the ACCC has obtained court enforceable undertakings from grocery chains not to enter into restrictive leases in shopping centres in the future (to prevent a rival's entry) and to phase out existing restrictions within five years.

2. The ACCC is aware of the NARGA 2010 campaign to cap the market share of the major chains in the grocery sector at 80 per cent. This and other similar 'market cap' initiatives have been based on the assumption that such restrictions currently apply in the United States.

   However, the ACCC understands that there is currently no law in the United States preventing companies from expanding beyond a certain size (i.e. beyond 20 or 30 per cent).

The concept of imposing a market share cap was considered and rejected by Parliaments in both Australia and the United States last century.

In its 1999 report, the Joint Select Committee in the Retailing Sector noted that in 1968 the United States Congress rejected a White House task force recommendation for a market cap due to 'recognition of the need for scale efficiencies to be internationally competitive, and various practical issues, which could not be resolved'.

The Joint Select Committee on the Retailing Sector concluded that a 'market cap would be extremely interventionist, unworkable and detrimental to consumers'.

The ACCC believes that the introduction of a 'market cap' would not accord with the broad aims of the CCA.

2(c)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Merger laws

Section 50 of the Competition and Consumer Act 2010 prohibits acquisitions that would result in the substantial lessening of competition.

1. Do you believe the 'substantial lessening of competition' test in section 50 is adequate?
2. Can you explain the creeping acquisitions amendment passed into law in December 2011?
3. How significant do you believe this amendment will be?

ANSWER

1. Yes
2. Parliament passed the Competition and Consumer Legislation Amendment Bill 2011 which contained two amendments to section 50 of the CCA (which came into effect on 6 February 2012). The amendments:
   - removed the requirement that a market be a "substantial market"
   - reworded the "substantial lessening of competition" test to apply to "any market" rather than "a market".

The amendments were intended to shore up the ability of the ACCC to consider a series of one-off acquisitions in small geographic markets.

3. At the time the amendments were introduced to Parliament the Government indicated that the intention of the amendments was to clarify the operation of section 50 of the CCA. The amendments are yet to be tested before the court.

2(d)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Small Business Commissioner

In March this year, the government announced that it will appoint a Small Business Commissioner. The role of the Commissioner is to advocate, advise and provide information to small businesses. The Commissioner will report directly to the Minister, who will liaise directly with his Cabinet colleagues about issues important to small businesses. The Commissioner will also be able to take up individual cases with relevant Government agencies.

1. What is the ACCC's view on how the role of the Small Business Commissioner will overlap with the Commission's role?

2. Will the ACCC be able to refer a small business with a grievance against one of the big retailers to the Small Business Commissioner?

3. Will the Small Business Commissioner be able to refer matters to the ACCC?

ANSWER

1. The ACCC's role includes educating small businesses about their rights and obligations under the *Competition and Consumer Act 2010* (CCA), including the Australian Consumer Law (ACL) and mandatory industry codes of conduct, and enforcing the CCA where necessary. The ACCC does not have jurisdiction over commercial disputes that do not involve potential contraventions of the Act.

   The ACCC anticipates that the work of the National Small Business Commissioner will complement and, where appropriate, feed into the work undertaken by the ACCC.

   Although the role of the National Small Business Commissioner is still not entirely clear, it is likely that the majority of small business related disputes will be best considered at first instance by the National Small Business Commissioner, who may in turn refer matters to

state or territory Small Business Commissioners (where they exist). Where a matter involves a serious contravention of the CCA the ACCC would expect the National Small Business Commissioner to refer the matter to the ACCC (or one of the other State/Territory ACL regulators) for consideration. The ACCC will decide the appropriate action in accordance with our Compliance and Enforcement policy.

2. If a small business raises a dispute with a large retailer with the ACCC, the ACCC will determine whether the matter raises concerns under the CCA. If not, the matter may be referred to the National Small Business Commissioner or one of the state Small Business Commissioners for consideration, as appropriate.

3. The ACCC intends to develop a close working relationship with the National Small Business Commissioner to ensure that matters are referred appropriately and in a timely manner between the agencies. The ACCC is currently in discussions with existing state Small Business Commissioners about the possibility of developing a Memorandum of Understanding to guide the referral of matters between the ACCC and the various Small Business Commissioners. The National Small Business Commissioner will be invited to be a party to this Memorandum of Understanding.

2(e)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Supermarket Ombudsman

Another option is for a Supermarket Ombudsman to be established.

- As a concept, what is the ACCC's view on a Supermarket Ombudsman?
- Would the ACCC support a supermarket ombudsman on the basis that it could act as a 'mailbox' for the ACCC in its handling of complaints?
- Would a Supermarket Ombudsman need to be backed by a mandatory code of conduct?
- If a Supermarket Ombudsman was established, how would recriminations by supermarkets against complainants be avoided?

ANSWER

Question referred to Treasury.

2(f)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Unconscionable conduct provisions

Section 51AC of the Competition and Consumer Act 2010 prohibits a corporation in trade or commerce in connection with the supply or acquisition of goods or services from engaging in conduct that is in all the circumstances unconscionable.

In 2011, on the recommendation of the Senate Economics Legislation Committee, a statement of interpretative principles was inserted into the unconscionable conduct provisions of the Act. In addition, an amendment was made to ensure that the statutory concept of unconscionable conduct is consistently applied to both consumers and businesses.

- How effectively do you think the current section 51AC relating to unconscionable conduct is working?
- How effective do you think the recently inserted list of interpretive principles relating to section 51AC will be in bringing more unconscionable conduct cases before the courts?

ANSWER

Amendments taking effect from 1 January 2012 unified sections 21 and 22 of the Australian Consumer Law (formerly sections 51AB and 51AC of the *Trade Practices Act 1974)* into a new consolidated section of the Australian Consumer Law and inserted a list of interpretative principles

In relation to the former section 51AC the ACCC has in recent years had a number of successful cases before the courts.

The ACCC considers that the interpretative principles have clarified the application of the unconscionable conduct provisions for businesses seeking to comply with the ACL and for the ACCC in its role of educating consumers and businesses. It is possible that the increased clarity in the unconscionable conduct provisions, by clarifying rights and responsibilities of parties, may lessen the likelihood of disputes arising.

In terms of the ACCC's role in focussing on systemic or widespread unconscionable conduct concerns, the amendments will assist in assessing those concerns. As the amendments are relatively recent it may take some time for concerns to arise and matters to then be brought before the courts.

The 2010 expert panel report *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* recommended that the efficacy of changes to the statutory unconscionable conduct provisions should be assessed after three to five years of operation.

2(g)

In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Planning and zoning laws

In its 2008 review on supermarket prices, the ACCC recommended that all appropriate levels of government consider ways in which zoning and planning laws, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area. It recommended that particular regard should be had to whether the proposal will facilitate the entry of a supermarket operator not currently trading in the area.

- Can you tell the committee what changes there have been to zoning laws since the ACCC made its recommendation in 2008?
- What has been the effect of these changes?

ANSWER

Question referred to Treasury.