National Farmers' Federation

Submission in response to the Draft Report of the Competition Policy Review

November 2014

NFF Member Organisations

Australian Chicken Growers' Council Ltd

AGFORCE

ALPA

Animal Medicines Australia

Australian Livestock Exporters' Council ALEC

Australian Dairy Farmers

AUSTRALIAN Pork

Australian Veterinary Association

PURE Beechworth HONEY 100% Pure Australian Honey

CANEGROWERS

CATTLE COUNCIL OF AUSTRALIA

CORPORATE AGRICULTURAL GROUP

COTTON AUSTRALIA

dried fruits australia

Future Farmers Network

Goat Industry Council of Australia inc.

GrainCorp

Grain Growers Real benefits. Real results.

NSW FARMERS

NEW SOUTH WALES IRRIGATORS' COUNCIL

The Pastoralists' Association of West Darling

PET Primary Employers Tasmania

RICEGROWERS' ASSOCIATION OF AUSTRALIA INC

RIDLEY

Ruralco HOLDINGS LIMITED

SHEEPMEAT COUNCIL OF AUSTRALIA

TFGA Agriculture's Future Your Future Our Future

Victorian Farmers Federation

WAFARMERS

WOOLPRODUCERS AUSTRALIA

Policy enquiries arising from this submission should be directed to:

Mr Tony Mahar
General Manager, Policy
Ph. 02 6269 5666
Email tmahar@nff.org.au

NFF House, 14–16 Brisbane Ave, Barton ACT 2600
PO Box E10 Kingston ACT 2604
Ph. 02 6269 5666
Fax 02 6273 2331
Email nff@nff.org.au

Media enquiries should be directed to:
Ms Sophie Keatinge
Communications Officer
Ph. 02 6269 5666
Email. skeatinge@nff.org.au

www.nff.org.au

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The National Farmers' Federation (NFF) was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF. Following a restructure of the organisation in 2009, a broader cross section of the agricultural sector has been enabled to become members of the NFF, including the breadth and the length of the supply chain.

While our members address state-based 'grass roots' or commodity specific issues, the NFF's focus is representing the interests of agriculture and progressing our national and international priorities.

NFF has for 35 years consistently engaged in policy interaction with government regarding a range of issues of importance to the sector including trade, education, environment, innovation to name a few.

NFF is committed to advancing Australian agriculture by developing and advocating for policies that support the profitability and productivity of Australian farmers.

1. Introduction

The National Farmers' Federation (NFF) welcomes the opportunity to make a submission in response to the draft report of the Competition Policy Review.

In 1995, the Commonwealth, State and Territory governments' agreed to implement a wide-ranging National Competition Policy (NCP) built on the recommendations of the Hilmer Review. Twenty years on, the Harper Review of National Competition Policy provides a timely opportunity to consider:

- NCP implementation progress and impacts;
- economy-wide changes that influence the competition settings;
- areas of business and/ or government that have escaped NCP reform to date; and
- lessons from governments elsewhere around the world in the implementation of competition policy.

NFF's view is that the 20-year interim allows assessment of competition policy reforms that have directly affected the agriculture sector, such as the elimination of marketing boards as well as the separation of commodity pricing from governance issues.

The favourable impacts of micro-economic reforms outside the sector have assisted in increasing price transparency and lowereing the cost of farm inputs. NFF's view is that this experience allows the agriculture sector to approach and consider competition reforms more confidently.

In responding the draft report, NFF has focused on those recommendations in the draft report that are important for our sector. NFF's response is not exhaustive, rather a consolidated examination of the merits of the proposed recommendations presented in Part 2 of the report.

2. Response to draft recommendations relating to competition policy

2.1 Draft Recommendation 1 – Competition Principles

The Harper Review builds on the Competition Principles that were set at the inception of the National Competition Policy and supports the continued implementation of reforms on the basis that it is a work in progress to help align market competition rules with changes in the economy, e.g. in telecommunications and population demographics, and keep the focus on those areas ripe for change.

The six underpinning elements of Competition Policy identified in the 1995 Hilmer report are considered to be as true today as they were 20 years ago. They are:

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

These elements continue to provide the economic framework for the application of competition principles in that many of the Harper recommendations essentially target unfinished business and reinforce the justification for further competition reform.

Further, the NFF notes and supports the Panel view that the Competition policy reforms most likely to generate large net benefits are those that:

- benefit a sizeable part of the economy – with links to other sectors;
- remove a significant barrier to competition; and
- where government involvement demands greater contestability.

NFF supports the set of competition principles in the draft report that focus on making markets work efficiently, transparently and fairly in the long term interests of consumers. The principles should guide the Commonwealth, state, territory and local governments in implementing those aspects of competition policy for which they are responsible. They must provide for the range of businesses across the economy and recognise and be applicable to the various sectors in particular the farm and agribusiness sector where there are a number of unique and specific characteristics that impact on profitability and competitiveness.

NFF's view is that enhanced public understanding of the competition process would assist the implementation of competition reform. The use of "public interest test" or "consumer or community benefit" are of significant interest to the farming sector. In general these provisions and terminology are well intentioned, have merit and should be supported. However the definition and application of such terms to particular circumstances does not always adequately reflect the challenges faced by producers. In certain circumstances these provisions can be overly simplistic and fail to recognise the effects of market structures. For example lower prices for particular products may well be regarded as being in the community interest or satisfy some loose public interest test. However they are not always in the entire public interest in the longer term, nor do they always result in overall community benefit, as they can serve to be detrimental in the long term to industries vital to the nation such as agriculture.

NFF is of the view that while these measures are useful and have merit, there should also be additional consideration beyond just public interest tests, to include the impact on the supply chain.

The NFF supports the broad definition of consumer that is proposed by the Panel. This definition, which extends beyond retail consumers or households to businesses transacting with other businesses, is supported in international interpretations, such as that of the USA's Supreme Court which construed 'consumer welfare' to be a 'reference to a broad welfare concept such as aggregate welfare. Such a definition also distinguishes 'consumer welfare' from the concept of 'end-user welfare'; with the effect that an aggregate consumer welfare approach will seek to configure competition policy and law to ensure that markets work to the advantage of both small businesses and end users.

Based on this position, the NFF believe that this approach to the definition of consumer welfare should be reflected within the objectives of the Competition and Consumer Act 2010 (CCA) to ensure a broader understanding of the objectives of Australia's competition policy; and to provide suitable direction to courts in their interpretation of competition law

The proposed increased focus on competition principles applying to the operations of government (at all levels) is extremely important. There are key areas of market competition where government either sets the rules or competes with the private sector. While generally justified on public interest grounds (i.e. the goods/services would not be provided otherwise or at higher cost), the business case needs to be made; ownership and operation of key infrastructure – such as poles and wires and ports – is a case in point. Often there is a lack of clarity surrounding the benefits of ownership and/ or sale (such as with the NSW electricity network) and, as a general comment, the case needs to be made if the competition reform process is to be supported.

In accordance with this perspective of consumer welfare, the NFF further supports the object of this focus being places a greater focus on the protection of the competitive process within markets rather on than the protection of competitors. In lending this support, the NFF notes that many of the markets that farmers participate in are characterised by market inefficiencies caused by monopoly power in upstream markets for farm inputs and monopsony power in the downstream markets for farm produce and logistics associated with the transport of farm produce to market. The impact of these market inefficiencies on farming businesses has been depicted by the quote famously attributed to former President of the United States of America John F. Kennedy:

"The farmer is the only businessman in our economy who has to buy everything at retail, sell everything at wholesale, and pay the freight both ways."

Further to this approach, the NFF sees competition policy as facilitating this competitive process through preventing the obtaining unhealthy levels of market power through merger prohibition; restraining the misuse of market power; and facilitating countervailing market power for farmers through collective bargaining and policy supporting farmer owned co-operatives. The NFF, its members and the wider farm sector, have been maintaining a keen interest in the role of competition policy in the economy as part of the increased focus on the behaviour of dominant firms in the supermarket sector over the past few years, including recent litigation commenced by the ACCC. This interest is particularly focused on the on the misuse of market power and the use of unconscionable conduct by these dominant market participants.

As such the deliberations of the Panel on these issues remain part of the key focus for the farm sector.

In relation to services, especially in regional areas, the NFF notes the recommendation to place more emphasis on local government competition reform. On balance, NFF's view is that the local government sector has been lagging in reforms implementation, hiding behind regulation to justify service charges and facilitating duplication of services in some areas, such as environment management.

2.2 Draft Recommendation 2 – Human services

The NFF agrees with the Panel's assessment (p.26) that despite regional and remote communities in some cases lacking sufficient demand for human service provision, it is important the people in such communities continue to have access to timely and quality human services. This principle must underpin consideration of any changes to competition policy in this area and ensure the end outcome of reform sees no diminishing of base-level service provision for regional Australians.

It is important to note that beyond this basic service level requirement, the capability of human services in regional areas must also be able to cope with periods of increased demand. For instance, periods of drought commonly result in many people, particularly farmers, requiring heightened human services support. Competitive pressures from private sources will not lead to improved services in these situations due to a limited market. In light of this, appropriate government investment in the long-term resilience of human services is critical to ensure the infrastructure and systems are in place to deal with such periods and ensure positive outcomes for regional communities.

2.3 Draft Recommendation 3 – Road transport

The draft report notes that more than 70% of domestic freight is transported by road[1]. This supports the NFF's view that coastal trading regulation is putting undue pressure on the road and rail network and any unnecessary regulation should appropriately addressed. Any consequential easements in road use could see a reduction in road damage and an increase in road use safety for the general public.

The report also notes that safety regulation is one of the means through which governments regulate the Australian road transport industry[2]. One issue not raised in the report is the role of the Road Safety Remuneration Tribunal in increasing the regulatory burden on business and driving up costs.

The justification for higher costs and an increased regulatory burden is the need for a safer, fairer, road transport industry. In reality, the *Road Safety Remuneration Act 2012* increases rates of pay for transport workers (employees and contractors), makes end users (often small

[1] The Australian Government Competition Policy Review (2014), *Draft Report*, Canberra, page 134.
[2] The Australian Government Competition Policy Review (2014), *Draft Report*, Canberra, page 134.

businesses) responsible for conduct of others in the supply chain, whether or not they have any capacity to control outcomes, significantly increases the paperwork burden on small business and broadens the scope of the general protections in the *Fair Work Act 2009* so that it covers contractors as well as employees. It is hard to see how these measures will, in fact, deliver improved safety outcomes in the road transport industry.

In the NFF's view, the *Road Safety Remuneration Act 2012* does not meet the test of 'good regulation'. The costs of compliance far outweigh the benefits of sector-specific rules of this kind, and there is no evidence underpinning the laws that would support such a need for regulation.

In our submission to the Review of the Road Safety Remuneration System, the NFF argued that the *Road Safety Remuneration Act 2012* is fundamentally flawed. It protects major transport and logistic providers against commercial risk, and inappropriately transfers risk to consignors. In this respect, it does not do what it seeks to do; that is, to safeguard small contractors at risk of exploitation or unfair treatment. In our view, the regulatory framework is anti-competitive, inefficient and expensive.

The *Road Safety Remuneration Act 2012* and associated regulation should be repealed.

2.4 Draft Recommendation 5 - Coastal shipping

The NFF supports reform of coastal shipping regulation as a matter of priority.

Affordable shipping is an important issue for Australian agriculture and for the wider economy. All commercial produce is transported from the farm gate to market and approximately two-thirds of all Australian produce is exported. For many farmers, shipping is an essential link in the supply chain. Australian products must be able to move quickly from the farm gate into domestic and overseas markets at a price that delivers a reasonable return to the farmer.

Making shipping too expensive puts pressure on Australia's road and rail networks. Urgent reform of coastal shipping laws is required to ensure that Australia's infrastructure settings promote growth and prosperity for Australian businesses in the long term.
The NFF submission to the Review of Coastal Trading Regulation called for repeal of regulations that increase the cost of shipping. The NFF called on government to:

- repeal the *Coastal Trading Act* without disrupting current importation rules;
- repeal compulsory collective bargaining in connection with the Australian International Shipping Register;
- repeal Fair Work Regulations extending the *Fair Work Act* to temporary licensed ships and majority-Australian crewed ships; and
- make new regulations excluding ships engaged in the coasting trade from Fair Work Act coverage.

These measures will reduce shipping costs and increase competition and efficiency in the Australian market. They should be implemented without delay.

2.5 Draft Recommendation 10 - Planning and zoning

In NFF's view, the current planning system is not set up to consider how a planning decision could impact prices and consumer choice. That said, NFF's view is that planning regulation is not the most effective mechanism to encourage competition and should be last resort option, as planning compliance generally adds cost to doing business. Opportunities to promote competition in planning are somewhat limited to facilitating new entrants to a local market or focusing on long term interests of consumers.

Currently, most planning legislation is focused on key objectives for economic development, fairness and planning for present and long term interests of the community. Often the assessment criteria in the planning system is already overly complex, which adds cost to businesses in complying. Reducing unnecessary regulatory burden can lead to improved competitiveness.

To include specific consideration of 'new entrants' and 'long term interests of consumers' in planning decisions is likely to add unnecessary complexity to the planning process. One of the key challenges with current approaches to planning is that planning rules are often broadly written and can lead to inconsistent and subjective interpretation. This can add to the uncertainty and cost of dealing with planning. Further, NFF notes that local councils and local planning officers do not have the capabilities to make informed and consistent decision in relation to competition or consumer choice matters.

It should be noted that not all businesses require a planning permit to operate, therefore a focus on competition would only apply to those businesses captured by planning frameworks.

In an agricultural context, local planning zones often provide permit exemptions for a range of agricultural uses and structures. Permits may be required – either under local planning laws or environmental laws – for activities such as the removal of native vegetation or for a new intensive animal husbandry use such as a broiler farm. The planning permit application process can deter a farm from increasing their intensity or efficiency as a change in the operation of a business may trigger the need to obtain a planning permit.

Farmers are concerned with the cost, complexity, delay and uncertainty associated with the planning permit application process. A further issue is the impact of competing non-agricultural uses in farming zones that have third party notice and review rights, as this only leads to contention and further cost for farming businesses in obtaining a permit.

In many states, changes to planning requirements can be introduced with little scrutiny of their effectiveness and nor cost impost on public and private sectors. In NFF's view, there are opportunities to improve the competitiveness of businesses by reducing or streamlining planning permit requirements, and improving the scrutiny around how new planning requirements are introduced, through for example a regulatory impact statement.

2.6 Draft Recommendation 11 – Regulation Review

In the draft report the Panel makes the comment that "most price and supply restrictions in agricultural marketing have been removed. However, some unfinished business remains. For example, restrictions still apply in relation to rice in NSW and potatoes in Western Australia. These restrictions raise barriers to entry and impede consumer choice".

The draft report also states that "issues to do with rice marketing in NSW have not been raised at all during public consultations". There is a good reason for this. The report's claim about the single desk rice marketing arrangements impeding consumer choice are wrong.

There is in practice no restriction on companies other than SunRice milling and marketing rice to Australian consumers. Although buyers of rice in NSW need to be authorised by the Rice Marketing Board of NSW, this is little more than an administrative procedure.

Companies operating outside of NSW face no marketing regulation at all. Under the current arrangements, Australian rice can be freely marketed to Australian consumers. Furthermore, Australian rice companies are subject to intense competition from international suppliers, on whom there are no import restrictions, apart from the quarantine protocols to which importers must adhere for biosecurity reasons. This import competition provides domestic consumers with an enormous range of choice in a highly price competitive retail environment.

The fact that SunRice continues to be the dominant buyer and marketer of Australian rice into the Australian market is not a consequence of the current marketing arrangements. It stems from the fact that its grower suppliers continue to own the company and receive the benefit of its retail activity and strong brand recognition. It is this arrangement that ensures the majority of Australian growers continue to supply SunRice in preference to other potential buyers.

There are no price or supply restrictions applying to rice marketing in NSW. Australian consumers have enormous choice when selecting rice products at retail levels, a fact obvious in the rice isle in any supermarket in the country.

It is disappointing that the Panel has made this error of fact in its draft report and we request that it be rectified prior to the Panel's next published report.

The report also makes the recommendation that that where such marketing arrangements exist, the responsible jurisdiction should review them to ensure they are in the public interest.

In NSW, the marketing arrangements for rice are the subject of review every four years. This most recently occurred in late 2012 when the NSW Department of Trade and Investment's Strategic Policy and Economics Division found that the arrangement yields a net benefit to the rice industry and broader community, and should be extended until 30 June 2017.

It is important to note that it was this process that led, in 2005, to the removal of the marketing arrangements for domestic rice sales from NSW. At that time, the National Competition Council stated in their press release of October 18 2005 that 'the public interest in having a single desk for exports was adequately demonstrated, but domestic control was not shown to be necessary'.

The next review will take place in early 2017, where the rice industry will again be required to demonstrate the regulations are in the public interest.

2.7 Draft Recommendation 16 - Electricity, gas and water

Electricity

Electricity is a considerable input into farm businesses, particularly irrigation farms and intensive farms that require heating and cooling facilities. Many farming systems have highly inelastic demand and where reliability is uncertain, investment in back up generation capacity is required.

NFF cautions against unquestioned acceptance of the electricity reform model as a success, and thus application of this approach to other utilities. Reform has led to a vastly complex system that is difficult to understand and navigate.

Any consideration of deregulation of distribution and transmission infrastructure must carefully examine how deregulation will benefit consumers. The terms of sale are thus crucial. The Federal Government is currently providing incentives for State Governments to divest assets as part of its Asset Recycling Fund. The current design of that fund encourages network owner to inflate their regulatory asset base to receive greater incentive payments.

The draft recommendation proposes to transfer responsibility for reliability standards to a national framework. Unnecessarily high reliability standards encourage inefficient investment in networks, and drive up the cost of electricity. There has been significant investment in the network over the past 5 years, with these investments being a main driver of the escalating cost increases. Analysis conducted by NSW Irrigators Council shows that network charges make up between 55 and 65 per cent of an irrigator's electricity bill. A shift to a national framework is unlikely to result in any winding back of service level, where past investments have resulted in any "overshoot" of the proposed national standard.

However, it is important that reliability standards reflect consumer expectations – balancing the trade-off between service levels and willingness to pay. Improving the reliability of service continues to be important for some regional customers – including farmers. Any move to a national framework must facilitate effective consumer advocacy. NFF strongly supports an approach that requires greater consultation with customers on their reliability needs to ensure that adequate reliability is established and there is no wastage or investment in overcapacity. NFF's view is that more detailed examinations of these issues is required to better understand how national reliability standards marry with the current national regulation of network and transmission costs – and the likely benefits to competition and ultimately to consumers.

Water

NFF urges the Panel to reconsider the premise of this recommendation in relation to rural water reform. The recommendation is based on the notion that there is an absence of a national framework for managing water resources – and thus water reform has been slow and fractured. NFF contends that this is not the case for rural water management.

Our view is that the National Water Initiative provides governments with the overarching policy framework for water reform – and that State, Territory and the Commonwealth Governments have made solid progress in implementing the reform agenda. This policy framework emerged from reforms triggered by the initial waves of competition policy reform in the mid 1990s.

While recognising that more work needs to be done, the latest Triennial Assessment of the implementation of the National Water Initiative found that "solid progress on managing the nation's water resources during the past two decades has delivered tangible benefits to governments, communities and industries[3]".

Water reform is a complex balance of change to achieve social, economic and environmental goals. The current regulatory and operating environment is influenced by a range of factors. Differences in regulatory approaches recognises that water resources have different hydrological characteristics and different histories of development. The NWC's 2014 assessment acknowledged that "in implementing the NWI, the [National Water] Commission and its partner governments have adopted an adaptive and cooperative approach, recognising the need to learn and adjust when implementing change in complex and dynamic environments" [4].

In NFF's view, much of the rural water reform agenda that relates to economic regulation has been substantially implemented, particularly in those parts of the nation where water use is greatest. The latest triennial assessment concludes that the:

- Establishment of statutory-based entitlements, unbundling of water entitlements from land and the creation and operation of water markets have facilitated movement of water towards higher-value uses, particularly in times of scarcity. These changes, together with addressing overuse to preserve the productive base of the resource, have provided greater investment confidence, increased innovation and provided incentives to use water more efficiently [5].
- There has been a significant improvement in both the technically and economically efficient use of water and the sustainability of water use. While gains are still to be made in the areas of pricing and regulation, the economy has benefited from water reform[6].

NFF's view is that national consistency of water reform principles is important, but that complete harmonisation of regulation and the nationalisation of regulation is not desirable. The economic and environmental pressures on water resources varies vastly across the continent. Consideration needs to be given to the benefits associated with further rural water reform and the costs associated with implementing that change. Indeed one of the benefits of the approach of the NWI is that jurisdictions have the flexibility to implement cost-effective and risk-based reforms, particularly in smaller water sources with limited pressure for development. Given that under national pricing principles it is end users who ultimately pay, the case for further reform and the benefits that will arise from this need to be better articulated.

Beyond the current provisions of the Water Act 2007 which establishes the ACCC as a pricing regulator for rural water in the Murray-Darling Basin, NFF's view is that nationalisation of water pricing regulation in the rural water sector is unwarranted. While the principles of

[3] National Water Commission (2014) *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 11.
[4] National Water Commission (2014) *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 11.
[5] National Water Commission (2014) *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 82.
[6] National Water Commission (2014) *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 82.

independent economic regulation and transparent setting of prices is supported by NFF, a national takeover of water pricing would add cost and achieve very little additional reform. Indeed the latest NWC Triennial Assessment found that:

- Pricing of bulk [rural] water is consistent with lower-bound pricing practices across the country[7].
- All jurisdictions now have in place some form of economic regulation[8]

NFF's view is that it is important that Governments maintain an ongoing commitment to the principles of the National Water Initiative. Jurisdictions must be afforded the opportunity to sensibly implement the current reform agenda before any consideration is given to examining the benefits and costs of any next generation rural water reform agenda.

3. Response to draft recommendations relating to competition laws

3.1 Draft Recommendation 25 - Misuse of market power

The farming sector is fragmented, made up largely of small to medium sized businesses in remote areas with limited access to market information and opportunities for collective organisation. Further to this, fluctuations in input costs, the impact of climatic variations, limitations in infrastructure and the perishable nature of produce leave some farmers in an economically vulnerable position operating under extremely tight margins. In simple terms the farm sector has specific and unique characteristics that mean the impacts of ineffective competition legislation can have a more detrimental bearing than other businesses in the economy.

The NFF acutely recognises that efficient and effective markets must be allowed to operate without unnecessary constraints or limits on competition. There is clear support for a competitive and dynamic market place that fosters competitive behaviour. In accordance with this the NFF is of the view that a balance must be developed to ensure a clear distinction is made between an environment that fosters healthy and constructive competition and the misuse of market power. The NFF notes with interest that the draft report recognises that since 1976 the issue of an effects test has been considered and rejected through a series of inquiries and reviews.

Competition legislation must be designed and implemented in a way that does not un-necessarily separate small to medium sized agribusinesses from the normal and transparent business environment but should incorporate provisions that safeguard them from unconscionable, un-necessary and oppressive conduct or misuse of power by dominant stakeholders in the supply chain who hold a significant degree of market power.

The NFF view is that competition legislation in Australia must provide both a remedy to farmers who fall victim to unfair conduct in their individual dealings but must also provide a

[7] National Water Commission (2014), *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 45.
[8] National Water Commission (2014), *Australia's Water Blueprint: National Reform Assessment 2014*, NWC Canberra, page 49.

means to proactively address the issues of concern through the supply chain to ensure the farm sector can continue to be profitable through investment, innovation and certainty in business practices.

NFF retains support for an 'effects test' that could, if used to replace the existing purpose test, shift the onus of consideration from what a company's purpose in undertaking any conduct was, to what effect that conduct has had on any given marketplace. NFF supports provisions that prohibit a firm with substantial market power from taking advantage of that power if the effect is to cause harm to the competitive process. Competition legislation in essence must be focussed on the effect of conduct on competition, not necessarily the purpose of the conduct. The rationale for this is that it is the anti-competitive effect of conduct that is the negative impact and is detrimental to community or individuals benefit.

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

The NFF supports the Panel's recommendation to adopt a hybrid test within the CCA's prohibition against the misuse of market power by a corporation with a significant degree of market power. Under this proposal the element of the offence would be based on either the purpose of the corporation, or alternatively the effect or likely effect of their conduct. However in accordance with the Panel's philosophy that the intent of competition policy is to protect competitive processes rather than competitors, the object of the purpose, effect or likely effect under the proposal, is whether competition in the market is substantially lessened.

In endorsing this proposal, the NFF has had the opportunity to consider the ACCC's calls for reform of s 46 in its submissions to the Panel. As a result of this consideration, the NFF agrees that the consideration of the move to an effects based test for misuse of market power should not be judged solely on the basis of the theoretical approach of s 46. Rather, as the ACCC has submitted, the public policy concern it holds with regard to its reasoning for an effects based test is its experience of investigating serious unilateral behaviour by dominant firms that have anti-competitive effects, that based on available evidence uncovered during these investigations would not establish a proscribed purpose.

Likewise the NFF notes the ACCC concern over the disembodied manner of interpretation that the theory surrounding s 46 has developed the requirement for courts to consider 'complex "counterfactual" analyses' in a manner that is uncoupled from the use of the market power held by the defendant and the purpose for which this power is used. The ACCC suggests that this divorces the investigation by courts from the 'economic rationale' that lies behind the conduct of the firm reducing the capacity of section 46 to deal with anti-competitive conduct.

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

Additionally, the NFF is of the view that the proposed test will bring Australian law closer to the international formulations utilised to prohibit abuse of market power which specifically prohibit conduct with an anticompetitive effect. In supporting this convergence, the Queensland Law Society's submission adverted to the argument regarding "increased burden" on firms with a substantial degree of market power. However in response to this concern the society drew attention to the fact that Australian law already prohibits certain types of conduct of firms with substantial degree of market power based on the effect it has on competition regardless of intent, citing s 45. They further argue that it is an open policy option to require this vigilance from firms with substantial market power in order to protect competitive markets from the 'dangers of a monopolist'.

In considering the draft report's specific question with regard to making a defence to the proposed construction of s 46, the NFF recognises the predominant filter that protected pro-competitive behaviour will be removed if the Panel's recommendation is accepted. As such, despite noting the desirability of the policy choices proposed by the Panel in prohibiting the misuse of market power, the NFF is not opposed to the Panel's further recommendation that a defence should be made available to the duty with minor amendment as outlined below.

The defence presently proposed is based on the legitimate business purpose approach which has been adopted in North American jurisdictions, and would excuse conduct that had the purpose, effect or likely effect of substantially lessening competition in the market if the conduct:

- was a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market;
- the effect or likely effect of the conduct is to benefit the long term interests of the entire (including those in rural and regional areas) community.

The NFF reiterates concerns held in relation to basing a defence solely on the long term interests of consumers or some undefined consumer benefit test. This defence on its own is likely to be too broad and difficult to determine equitably across a range of complex issues. This defence should be one consideration but there must be consideration of the broader effects and long term impacts of the action. The objective of the review should be to deliver outcomes that ensure section 46 is simpler and easier to implement.

3.2 Draft Recommendation 30 – Mergers

While the Panel concluded the view that the merger provisions of the CCA are working effectively and chose not to recommend changes to the substantive law; the farming sector continues to hold some concerns about the impact of the oversight of mergers in the markets for agricultural inputs and produce.

The NFF notes that the draft report characterised the formation of Fonterra and calls for the development of similar scale agricultural exporter almost exclusively as that of the creation of a "national champion in Australian agriculture". The NFF believe this characterisation to be misleading and to take the focus away from the underlying competition rationale that was implemented in New Zealand during the formation of Fonterra through the merger of the two largest dairy farmer cooperatives. Key to the processes that enabled the development of

Fonterra included a philosophy that greater opportunities could be provided to farming cooperatives to expand through a merger where there is a resulting supply chain alignment with suppliers/customers. The NFF supports the view that to take advantage of the much talked about export opportunities available to Australian farmers and agribusinesses scale and capacity is important to improve efficiencies and lower costs and build lasting commercial relationships. The legislative approach to mergers should take this into consideration but equally ensure there is no negative impact on the supply chain from any imbalances in market power.

NFF is of the view that there is significant merit in a transparent and consultative approach between the ACCC and business representatives in relation to mergers with the objective of delivering more timely decisions in the informal review process.

NFF supports the view that there is value in removing any un-necessary restrictions and requirements that may deter the use of a combined approach to the two current formal merger exemption processes (i.e. the formal merger clearance process and the merger authorisation process).

The NFF is of the view that specific features of the improved formal approval process should be settled in consultation with business, competition law practitioners and the ACCC.
The NFF supports the general framework proposed in the draft report including the proposition that the ACCC be incorporated in the decision making and approval process and that it can be satisfied that any merger does not substantially lessen competition and/or if it is satisfied that the merger results in public benefits that outweigh any anti-competitive detriments.

3.3 Draft Recommendations 31 & 32 - Secondary boycotts enforcement and proceedings

The NFF agrees with the Panel's view that labour markets are not in all respects comparable to other product or service markets[9]. NFF supports the continued operation of secondary boycott prohibitions and the relevant employment exceptions in some limited circumstances.

In terms of making the provisions more relevant and accessible, the NFF supports additional measures to raise awareness about what secondary boycotts are and how they can be prevented, including the role the ACCC can play in investigating complaints. This would heighten the deterrent value of the provisions by making them more accessible to small businesses, who are less likely to have the resources to obtain legal advice in contemplation of complex Federal Court proceedings.

Noting the Panel's view[10] that expanding the environmental and consumer protection exception to cover false, misleading and deceptive conduct is outside the Terms of Reference of the review, the NFF supports calls by its member organisations for a new regulatory approach to prevent illegal activity which aims to significantly harm lawful business activities.

[9] The Australian Government Competition Policy Review (2014), *Draft Report*, Canberra, page 241.
[10] The Australian Government Competition Policy Review (2014), *Draft Report*, Canberra, page 244.

Activities, such as night farm raids and use of digital technology to spy on Australian farmers, distort markets by imposing additional and unreasonable burdens on chosen businesses within an industry. Increased risks of biosecurity breaches, defamation causing changes in consumer behaviour and sapping of public and private resources ultimately increases costs and hampers business growth. It poses a real threat to Australian export markets in connection with increasing biosecurity risks.

The NFF supports a narrowing of the exception so that it does not cover conduct that seeks to damage a persons' capacity to engage in trade or commerce where the conduct is not based on established facts or is based on material illegally obtained.

3.4 Draft Recommendation 33 - Restricting supply or acquisition

The NFF supports the Panel's recommendation that the limitation in sections 45E and 45EA "that the first person has been accustomed, or is under an obligation, to supply" be removed. Labour-related trading restrictions are anti-competitive, whether they involve new or pre-existing relationships.

The NFF agrees with the Panel that there is a conflict of purpose between sections 45E and 45EA (which seek to promote competition) and section 172 of the *Fair Work Act 2009* (to the extent that it permits enterprise agreements to contain trading restrictions).

Trading restrictions of the type considered in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (14 August 2012) are commonly known as 'job security terms'. Under the current law, these terms are permitted to be included in enterprise agreements made under the *Fair Work Act 2009* (section 172). Similar trading restrictions requiring the use of particular products or suppliers could also be validly included in an enterprise agreement if it could be shown to relate to the 'job security' of employees.

While the terms may be lawful under the *Fair Work Act 2009*, they clearly have the capacity to hamper competition and efficiency. The NFF supports the Panel's view that businesses should general be free to supply and acquire goods and services as they choose.

Notifying the ACCC about enterprise agreements containing trading restrictions

In NFF's view, this solution is unlikely to be workable in practice. In 2013-14, 6754 enterprise agreement applications were lodged in the Fair Work Commission[11]. Assessing each one of these to determine whether the enterprise agreement contains (or may contain) trading restrictions would be a labour intensive process, whether conducted centrally within the Commission or individually by imposing an additional reporting obligation at the time of application. If an enterprise agreement was considered to contain trading restrictions, referral to the ACCC would be likely to result in substantial delays in enterprise agreement approval while the issue was considered by the ACCC and communicated back to the Fair Work Commission and affected parties. As a matter of procedural fairness, bargaining representatives for the enterprise agreement (that is, the employer, employees and any relevant union or other representatives) would have to be consulted on the process. This would run counter to recent

[11] Fair Work Commission Annual Report 2013-14, page 58.

efforts by the Fair Work Commission to implement timeliness benchmarks in connection with enterprise agreement approvals[12].

Even putting aside the procedural steps involved, to what end would such a process be directed? What would the ACCC do, once it determined that an enterprise agreement may contain trading restrictions? If it proposed to investigate each such restriction, it would require detailed evidence about relationships between the parties and their supply chain, the likely effect of the restriction on those relationships, a weighing up of the evidence and an assessment of the merits of bringing proceedings under the *Competition and Consumer Act 2010*. In NFF's view, there would be considerable uncertainty in each case about the likely prospects of a successful prosecution, having regard to the approach taken by the full Federal Court in *Australian Industry Group v Fair Work Australia*.

Changing the law to resolve the conflict in relation to sections 45E and 45EA

The NFF considers that the conflict of purpose discussed above should be resolved and that the only means of doing so is through legislative amendment. The Panel has sought comment on potential amendments to the *Competition and Consumer Act 2010*. In the NFF's view, a simpler approach would be to amend the *Fair Work Act 2009* to prohibit trading restrictions in enterprise agreements. This could be done by extending the concept of 'unlawful term' in section 194 to include terms that restrict the capacity of a person to supply or acquire goods or services.

4. Response to draft recommendations relating to institutions and governance

4.1 Draft Recommendation 39 - Establishment of the Australian Council for Competition Policy

NFF supports the Panel recommendation to form a new national competition body, to be called the Australian Council of Competition Policy (ACCP), with the job of reviewing and driving competition policy from a national perspective.

In NFF's view, the case for this new intergovernmental body is overwhelming in that there are many examples of reform failing to be implemented due to a lack of focus and drive, resulting in significant variations in reform progress across jurisdictions. It will be important for a common view that translates state responsibility for competition reform to local government.

NFF notes that the restructure and creation of a new body has the potential to create a larger bureaucracy, with the attendant increase in running costs. This should be avoided, in line with the general government trend toward constraining unnecessary expenditure and red tape.

4.2 Draft Recommendation 40 - Role of the Australian Council for Competition Policy

NFF supports the ACCP function as the primary educator and advocate for competition reform and sees merit in separating out this function from the ACCC, leaving it with the primary

[12] Fair Work Commission Annual Report 2013-14, page 31.

responsibility of ruling on competition disputes, enforcement and responding to consumer complaints.

4.3 Draft Recommendation 41 - Market studies power

NFF's view is that the ACCP should have market study powers operating in a similar fashion to the Productivity Commission. An alternative approach might be to position the ACCP as an independent authority of the Productivity Commission, indirectly providing it with information gathering powers, should they be needed – as well as networks.

The Productivity Commission currently undertakes research/ completes references on behalf of the Commonwealth, but has particularly strong research and advocacy skills in the area of competition policy.

4.4 Draft Recommendation 42 - Market studies requests

The NFF supports the ACCP cross-jurisdictional role in accepting requests to undertake market studies. The market studies priority list, analysis and findings of ACCP should be made public – in similar fashion to Productivity Commission references from the Commonwealth.

4.5 Draft Recommendation 43 - Annual competition analysis

NFF's view is that the ACCP should complete an annual analysis with the Commonwealth, State and Territory Treasurers signing off on the specific priorities.

4.6 Draft Recommendation 44 - Competition payments

The NFF agrees with this recommendation.

4.7 Draft Recommendation 45 - ACCC functions

NFF supports the retention of competition regulatory (enforcement) tasks and consumer protection functions under the ACCC.

4.8 Draft Recommendation 46 - Access and pricing regulator functions

While in principle NFF supports the separation of access and pricing functions, NFF cautions against a hasty recasting of regulator roles in relation to energy and water. Indeed, NFF's view is that prior to further reform, a detailed case that clearly identifies the failures of the current arrangements should be made.

Energy market regulation is complex, involving both state and national regulators. Over-simplifying matters risks imposing another layer of regulation. In the first instance, as outlined in our response to the Government's energy Green Paper, the NFF supports a comprehensive review the regulator and price setting processes including closer examination of:

- the Australian Energy Regulator (AER) network price determination process; and
- the performance of networks in relation to global benchmarks and actual service delivered.

As noted in our response to Draft Recommendation 16, beyond the current provisions of the Water Act 2007 which establishes the ACCC as a pricing regulator for rural water in the Murray-Darling Basin, NFF's view is that nationalisation of water pricing regulation in the rural water sector is unwarranted.

While the principles of independent economic regulation and transparent setting of prices is supported by NFF, a national takeover of water pricing would add cost and achieve very little additional reform.

4.9 Draft Recommendation 47 - ACCC governance

NFF favours the second option in supporting the incorporation of a wider range of business, consumer and academic viewpoints to improve the governance of the ACCC – but with the main focus on business and consumer views. Academic views may best be expressed within the ACCP.

The credibility of the ACCC could also be strengthened with additional accountability to the Parliament through regular appearance before a broadly-based Parliamentary Committee that, ideally, would capture the cross jurisdictional nature of ACCC decisions. Additionally, the ACCC would also focus on reporting to the media on compliance and enforcement issues.

4.10 Draft Recommendation 48 – Media code of conduct

NFF agrees with this recommendation.

5. Response to draft recommendations relating to small business

5.1 Draft Recommendation 50 – Collective bargaining

NFF supports the Panel's draft recommendation in relation to collective bargaining – and changes to the current collective bargaining provisions are one of NFF's top priorities for competition reform.

While we support the draft recommendation, we encourage the Review Panel to go further by considering the following key issues.

The NFF noted in its first submission to the Review that, in simple terms, the farm sector has specific and unique characteristics that mean the impacts of ineffective competition legislation can have a more detrimental bearing than other businesses in the economy.

The inequality of market and or bargaining power means that farmers are largely price-takers in the market and susceptible to at times questionable business practices. Farmers may be forced to accept standard form contracts on a "take it or leave it" basis or to operate under arrangements without the benefit of contractual security. They may be influenced to act in certain ways based on predictions or promises which later do not come to fruition.

The agricultural sector seeks recognition of the competitive disadvantage faced by producers (who are often small to medium sized businesses) which places them in a uniquely vulnerable position. This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods. Further, the protection offered to consumers in similar circumstances should be considered for small businesses in similarly vulnerable positions.

This dynamic means that collective bargaining may be a particularly useful tool for farmers when compared to other small businesses if it can be made more accessible and the NFF's suggested improvements made.

NFF welcomes the Coalition Government's commitment to extend unfair contract protections to small business. The NFF also notes, and welcomes, the comments in the *Agricultural Competitiveness Green Paper* regarding Collective Bargaining in which the Government states it is committed *"to ensuring competition laws in Australia enable a competitive marketplace – for example by preventing the misuse of market power and allowing for appropriate collective bargaining by farmers."*[13]

In addition to the views put forward by the Panel in the draft, NFF's view is that the following reforms to the public detriments test, interim boycott approval and threshold increase are also required.

Public detriments test

Instead of relaxing the current test for collective boycotts (that is, the public benefit test) an available reform is to seek a reversal of the onus. That is, in considering whether a collective boycott application should be approved, the ACCC should focus on whether that boycott could cause any 'public detriment'. This would be a less onerous test while still complying with the overarching purposes of the CCA.

A public detriment test does not specifically seek to advance consumer interests (unlike a public benefit test), rather it is aimed at maintaining them. In favour of this proposal is the argument that the current collective boycott regime is inaccessible and largely discounted in the marketplace. Because of this, processors are able to arrange their affairs in the knowledge that producers will always be at a competitive disadvantage and permanently hamstrung in their negotiation position.

Interim boycott approval

Reforms allowing interim boycotts in certain/limited circumstances may assist producers' ability to progress negotiations. That said, a fundamental change to the 'public benefit' test is first necessary for this proposal to have any impact.

Threshold increase

The current threshold for primary products is $5 million. An increase in this amount would expand its accessibility.

In summary the agricultural sector seeks to improve the collective bargaining and boycott regimes through:

[13] Commonwealth of Australia (2014), *Agricultural Competitiveness Green Paper*, Canberra, page xxi.

- relaxing the 'public interest' test for boycott approvals, to consider the unique nature of agricultural markets;
- increasing the threshold for primary production bargaining from $5million;
- allowing for a more accessible notification process for primary producers; and
- increasing the ability for peak bodies to commence and progress collective bargaining and boycott applications, on behalf of their members.

5.2 Industry codes

There are over 130,000 farm business in Australia with the majority of these being small and medium sized enterprises. The agricultural supply chain contains many primary producers but significantly fewer retailers/wholesalers 'up' the supply chain. While many small and medium producers have strong relationships with their buyers, the current supply chain structure can result in unfair and negative outcomes for suppliers. This is the result of clear imbalances of power between stakeholders across the supply chain, lack of transparency in contractual terms and concerns over the capacity to remedy areas of concern.

The NFF supports the assertion that codes can be a valuable tool to influence or control commercial behaviour within a particular industry and that they, if implemented and monitored properly, can assist in providing a dispute resolution framework for those covered by the code. Notwithstanding this, the NFF is of the view that the development of a mandatory Code to monitor and improve relationships across the food supply chain should be pursued as it would have a specific and transparent capacity to regulate the conduct of participants in an industry towards other participants in the industry where required.

The NFF notes that the Parliament passed the Competition and Consumer Amendment (Industry Code Penalties) Act in September 2014 which amended the CCA to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. The NFF welcomes the implementation of the Act that provides for courts to impose penalties on businesses that breach prescribed industry codes which incorporate these new penalties. The new powers apply from 1 January 2015 and only apply to future arrangements.

NFF welcomes the initiative of Coles, Woolworths and Australian Food and Grocery Council to propose a Grocery Code of conduct (practice and dealing), prescribed under a regulation to the Competition and Consumer Act (2010). The proposed Code offers the hope of a more formal, open and transparent process through which the major retailers will negotiate supplier trading terms and enable them to work together to draft Supply Agreements.

However, NFF is of the view that the proposed Code has a number of significant shortcomings:

- It is a voluntary, opt-in Code with many opt-out trading terms (clauses), which may imply a greater emphasis on commercial flexibility than ensuring fair trading.
- While the problems articulated in Part A focused on the major supermarket retailers, such a Code would be expected to apply to all supermarket retailers that exceed an agreed market turnover/ product segment share given the desirability of universal fair dealing practice/conduct
- As the proposed Code primarily focuses on terms of trade through supply agreements, the current limited capacity of the CCA to monitor complaints and address abuses remains a major concern for many suppliers.

- The Code relates to the direct relationship between supplier and retailer and therefore has very limited bearing on other relationships and efficiencies in the whole supply chain.
- 'Prescribed' under CCA (2010), the Code provides for dispute remedies (excluding money penalties) but many suppliers question the independence of the dispute resolution process and even more may not have sufficient confidence to test it for fear of subsequent retribution. This situation points to the need for an independent supermarket commissioner or ombudsman.

The NFF does not believe the proposed Code is a sufficient solution to the problems identified, although it recognises the added formality and transparency in negotiating trading terms and documenting these in supply agreements as a worthwhile step forward and should go some way towards assisting in compliance.

Similarly, whether in relation to the proposed Grocery Code or any other subsequent arrangement, the Australian common law concept of 'good faith' is an important provision that covers honesty, cooperation, reasonableness and fairness in contractual dealings between suppliers and retailers. Such a 'good faith' clause has been inserted in the mandatory UK Groceries Supply Code against the background of past retailer behaviour in relation to the exercise of superior bargaining power.

6. Response to draft recommendations relating to retail markets

6.1 Draft Recommendation 52 — Pharmacy

In NFF's view, any consideration of reform to pharmacy competition policy must be based on the basic principle that people in rural and regional areas should have timely and affordable access to basic medical services, at a level comparable to those in metropolitan areas.

The current pharmacy regulations, particularly location and ownership rules, contribute to underpinning the provision of accessible and quality health services to regional Australians. The Pharmacy Guild of Australia notes that the removal of such regulations could see a marked reduction in the accessibility of health services in regional areas due to a clustering of pharmacies in urban centres and regional pharmacies facing struggling to recoup sustainable profits in the face of cost-price corporate pharmacy chains entering the market. Additionally, they note that such corporate operations may lack understanding of the unique nature of regional health complexities and be driven by shareholder not community outcomes and that this could subsequently result in reduced provision of quality health services to regional people[14].

The NFF urges the Review Panel and the Government to consider the implications of any proposed reform to pharmacy regulation, to ensure the ongoing provision of timely and affordable pharmacy services to rural and regional Australians.

[14] Pharmacy Guild of Australia (2014), *Key points relating to deregulation of pharmacy and potential impact on rural areas*, Canberra, page 1-4.