



National Farmers' Federation

Submission to the Australian Competition and Consumer Commission on Frameworks for Concerted Practices and Misuse of Market Power Guidelines

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NFF Member Organisations





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.

The NFF has for 36 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.

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

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental sustainability.

Social >

There are approximately 115,000 farm businesses in Australia, 99 percent of which are family owned and operated.

Each Australian farmer produces enough food each year to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 percent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2.4 percent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2013-14 was \$51 billion – a 6 percent increase from the previous financial year.

Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all economic activities supporting farm production through farm inputs, agriculture's contribution to GDP averages out at around 12 percent (over \$155 billion).

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 52 percent of Australia's land mass.

Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 percent of Australian farmers actively undertaking natural resource management.

The NFF was a founding partner of the Landcare movement, which in 2014, celebrated its 25th anniversary.

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1. Introduction

The National Farmers’ Federation (NFF) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission on how proposed amendments to the *Competition and Consumer Act 2010* would operate if adopted.

The NFF is broadly supportive of the contents exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016. The NFF believes the draft Bill would implement most of the recommendations of the Harper Competition Policy Review (Harper Review) in accordance with the Australian Government’s response to the Harper Review.

The NFF has consistently advocated for amendment of section 46 of the CCA to implement an ‘effects’ test. However, the effectiveness of the reforms will predominantly depend on how the ACCC plans to implement and enforce the proposed legislation and how the courts interpret and apply the law.

This submission addresses the draft frameworks for concerted practices and misuse of market power guidelines.

2. Concerted practices

The section in the concerted practices guidelines on ‘What is a concerted practice?’ tends to focus on instances where only a single round of interactions between competitors occurs. Whilst it would add complexity to the guidelines, the ACCC should provide greater clarity around repeated interactions between competitors in a particular market.

The guidelines contain the following example as conduct that is likely to be classified as a ‘concerted practice’:

*At an industry event, Bank A discloses to its main competitor, Bank B, Bank A’s intention to increase its loan interest rate by 25 basis points. **This disclosure is made prior to disclosure to the market.***

*Bank B does not provide its pricing information in return, but circulates Bank A’s pricing information internally and knows that there will be less competitive pressure on its loan product pricing. Bank B does not seek to undercut Bank A but moves its rate broadly in line with Bank A. **Bank A notes Bank B’s reaction and this practice continues over time.** [NFF emphasis]*

It is unclear whether prior disclosure to the market is a prerequisite for the ACCC to launch an investigation or enforcement action and whether different competitors may take turns at being ‘leader’ in such a situation. Greater clarity on these aspects would be beneficial.

The guidelines also contain another example which would be deemed unlikely to be a ‘concerted practice’:

*Airline A runs a promotion offering discounts on flights to a number of popular holiday destinations. Airline B monitors Airline A’s promotional offers in order to match Airline A’s prices as part of its own campaign. This is unlikely to amount to a concerted practice as Airline B is responding to Airline A’s **publicly advertised pricing information** without any coordination occurring between the two airlines.*

It is possible that publicly signalling information might also facilitate tacit collusion between competitors.

Therefore, this example raises the following questions:

- How important is the use of publicly advertised or disclosed pricing information in rendering the conduct as unlikely to be a concerted practice?
- Are there instances where the coordinated and systematic use of publicly disclosed information amongst competitors might still constitute a ‘concerted practice’?

It would be helpful if the ACCC would provide greater clarity on these issues and perhaps compare and contrast different examples to highlight the importance of particular factors.

Recommendation 1:

The ACCC should provide more guidance on the importance of information disclosures between competitors taking place prior to public disclosure as a necessary condition for identifying concerted practices. The NFF believes that public disclosures of information can potentially be used as a means of price signalling that enables tacit collusion.

3. Misuse of Market Power

The draft misuse of market power guidelines tend to focus on instances where the interests of consumers may be damaged through monopolistic or oligopolistic conduct, but they are silent on monopsonistic or oligopsonistic conduct. Such conduct may damage upstream producers by squeezing their margins and preventing the entry of alternative customers for those upstream producers. Ultimately, this may serve to reduce consumer choice.

The draft guidelines seem to make an implicit assumption that costs of production in a particular market are fixed and determined by technology. Thus, there is a tendency to ignore the ability of downstream producers (for example, dairy processors and food and grocery retailers) to use their market power to affect their input costs by squeezing margins of upstream producers.

It would be helpful to understand whether the ACCC could make use of the proposed misuse of market power provisions to tackle monopsonistic or oligopsonistic conduct that has the effect of damaging upstream producers and reducing avenues for competition in the downstream market.

The example of standardised or national pricing by large retail chains focuses on the effect of conduct by a dominant firm on competitors in the downstream market. It is possible that a standardised or national pricing policy in and of itself may not be deemed to damage competitors in the downstream (i.e. retail) market because a retailer or processor is supplying the downstream market profitably, even though this may damage competitors in some regions. However, this ignores the fact that the retailer or processor may be driving down the margins of the upstream producers and reducing their options to seek alternative buyers.

Recommendation 2:

The ACCC should explicitly address the issue of monopsonistic or oligopsonistic conduct in the draft framework for misuse of market power guidelines. The NFF believes that the proposed section 46 should apply symmetrically to dominant players on both sides of the market (buyers and sellers). In other words, the NFF believes that the ACCC should apply section 46 in cases of monopolistic/oligopolistic and monopsonistic/oligopsonistic conduct as both are deviations from ‘competitive conduct’ arising from a dominant position in the market.

Recommendation 3:

The ACCC should provide guidance on whether monopsonistic and oligopsonistic conduct are likely to be captured by the proposed misuse of market power provisions, and if so, what factors may be considered a breach of the proposed section 46.