



Statement of Reasons

In respect of a notification lodged by

Agility Logistics Pty Ltd

for

proposed collective bargaining conduct

Date: 14 December 2018

Notification number: CB10000459

Commissioners: Keogh
Rickard
Featherston

Summary

The ACCC has decided not to object to the notification lodged by Agility Logistics Pty Ltd (**Agility**) to enable it to collectively negotiate with various shipping lines (or their agents) on behalf of three carrot and onion exporters from Tasmania and any Tasmanian carrot and onion exporters that join this group in the future.

Agility proposes to collectively negotiate container shipment rates based on the combined volume of produce of the participating exporters as well as improved general trading terms and conditions. Collective bargaining is voluntary for both the members of the group and the target shipping lines (and their agents).

Onion exports from Tasmania have declined significantly in recent years. According to Agility, a major reason for the reduction is the cost of onions (of which freight is the most significant component). The collective bargaining proposal is an initiative of the Tasmanian Fruit and Vegetable Export Facilitation Group, which was formed with funding from the Australian and Tasmanian Governments and industry. Its principal objective is to explore and facilitate the development of export opportunities for Tasmanian fruit and vegetable growers.

The notification was lodged on 30 October 2018 and the legal protection it provides came into force on 13 November 2018. The ACCC has decided to allow the notification to remain in force until 29 October 2028, unless it is withdrawn or revoked.

The notification

1. On 30 October 2018, Agility lodged a collective bargaining notification¹ to enable it to collectively negotiate with various shipping lines (or their agents) on behalf of three independently owned and operated carrot and onion exporters from Tasmania and any future carrot and onion exporters that join this group.
2. The current members of the bargaining group are:
 - Premium Fresh Tasmania
 - Wynyon Pty Ltd and
 - Forth Farm Produce Pty Ltd (trading as Harvest Moon).

¹ Businesses can obtain protection from legal action under the *Competition and Consumer Act 2010 (Cth) (the Act)* for collective bargaining including associated collective boycotts by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining (which does not involve a collective boycott) will generally commence 14 days after the collective bargaining notification is lodged.

- 1.1. The notification identifies the following six shipping lines as the likely targets of the proposed collective bargaining conduct:
 - Orient Overseas Container Liner (OOCL)
 - ANL Container Line
 - Hamburg Sud
 - Mediterranean Shipping Company (MSC)
 - CMA-CGM and
 - Maersk.
3. More specifically, Agility, on behalf of current and future members of the group, proposes to collectively negotiate rates at which members can secure freight transport for their onions and carrots to overseas markets, as well as other general terms and conditions (the **Notified Conduct**). Following collective negotiations, it is expected that some or all of the carrot and onion exporters will enter into contracts with the relevant shipping lines.
4. Agility has requested a period of 10 years for the Notified Conduct.²
5. Agility is a global logistics company providing freight forwarding, transportation, warehousing and supply chain management. Agility has 500 offices in 100 countries, including Australia.
6. This is the first collective bargaining notification received from Agility or any of the group members.

Rationale for the Notified Conduct

7. Agility advises that the tonnage of onions exported from Australia over the past five years has dropped substantially. The most significant drops have occurred in exports to Europe, to which Tasmanian farmers have historically (and currently) been the major exporter from Australia. The main reason for this decline has been the cost of the goods (of which freight is the most significant component), which reduces the competitiveness of Tasmanian exports.
8. The proposal for collective bargaining by carrot and onion exporters is an initiative of the Tasmanian Fruit and Vegetable Export Facilitation Group, which was formed with funding from the Australian and Tasmanian Governments and industry. Its principal objective is to explore and facilitate the development of export opportunities for Tasmanian fruit and vegetable growers.
9. By combining individual tonnages of carrots and onions in negotiations with international shipping companies, Agility expects to be able to achieve improved freight rates for participating carrot and onion exporters.

² The ACCC may provide a written notice determining the expiry of the collective bargaining notice if the ACCC is satisfied that the standard three year period is not appropriate and another period (up to 10 years) is appropriate in all the circumstances. The ACCC must, in or with the notice, provide a written statement of its reasons for giving the notice.

Consultation

10. The ACCC invited submissions from a wide range of interested parties. Copies of all public submissions are available on the [ACCC's public register](#).

Interested parties

11. The ACCC received one submission in support and three submissions objecting to the Notified Conduct. A short submission from one of the shipping line targets, Orient Overseas Container Liner (**OOCL**), stated that it had no objections and saw the process as beneficial for all parties.
12. A public submission objecting to the Notified Conduct was received from Link Logistics International Pty Ltd (**Link Logistics**). Link Logistics is a freight forwarder and broker, based in Tasmania and operating in the fruit and seafood export market. It raised concerns relating to the ability for other vegetable exporters and freight forwarders to negotiate similar rates and conditions and the possible flow on effect to the industry more generally.
13. The ACCC notes that the Notified Conduct is confined to carrot and onion exporters and any proposal by Agility to engage in similar conduct for other exporters of other commodities from Tasmania would need to be notified separately (and assessed) by the ACCC.
14. The concerns raised in two confidential submissions objecting to the notified conduct are summarised below:
 - The Notified Conduct will result in a consolidation of freight volumes on a single shipping line which could ultimately limit the commercial rationale for shipping lines to continue to supply services to Tasmania, therefore limiting competition between shipping lines to and from Tasmania. This would be made worse if other fruit and vegetable growers were added to the bargaining group.
 - Once freight rates are adjusted for rebates received under the Tasmanian Freight Equalisation Scheme (**TFE Scheme**)³, Tasmanian exporters 'do not incur higher freight costs than mainland Australia fruit and vegetable growers'.
 - The Notified Conduct will not result in transaction cost savings due to each exporter's unique shipping and contracting requirements which require individualised contracts and shipping rates.
 - In any event, should the ACCC decide not to object to the notification at this time, the immunity afforded to the Notified Conduct should not extend beyond the standard three year term.

³ Established in 1976, the TFE Scheme is an Australian Government rebate scheme which provides financial assistance for cost incurred by shippers of eligible non-bulk goods moved by sea between Tasmania and mainland Australia. From 1 January 2016, the TFE Scheme was expanded to include northbound goods going to markets not previously covered by the Scheme and that are transhipped through a mainland port. On 16 March 2018 the Australian Government decided to maintain this expanded component of the scheme covering eligible northbound goods at the flat rate of \$700 per twenty-foot equivalent unit for goods transhipped through an Australian mainland port.

Response from Agility

15. In response to concerns raised, Agility submits:

- The notification only applies to current and future Tasmanian carrot and onion exporters that elect to participate in the collective bargaining group.
- The Notified Conduct is unlikely to result in the consolidation of carrot and onion shipping freight volumes on any one shipping line – it is expected that shipping contracts will be entered into with a number of shipping lines at any one time based on a combination of factors, including the freight rates offered and shipping paths.
- Shipping contracts are seasonal and are typically six months in duration.
- The collective bargaining group does not currently comprise the entire Tasmanian carrot and onion export industry, therefore there are other exporters that shipping lines can secure contracts with.
- Should other Tasmanian onion and carrot exporters elect to join the group in the future, onions and carrots comprise only a portion of perishable produce in Tasmania that require refrigerated shipping containers for export (for example, seafood, dairy, and other fruit and vegetables such as potatoes, beans, cherries and apples), and an even smaller portion of Tasmanian export commodities more broadly. Failure to secure onion and carrot freight for any one contracting period is unlikely to have a significant impact on the commercial viability of shipping lines' services to Tasmania.
- Under the Notified Conduct Agility will be a single point of contact for exporters and shipping lines. Based on aggregated freight volumes it is likely to be able to negotiate improved freight rate for exporters.
- The TFE Scheme provides some assistance to Tasmanian exporters but does not result in 'full equalisation'. For example, it only applies to northbound shipping and therefore does not take into account the cost (and loss in time) to reposition equipment and hold equipment, particularly refrigerated goods. In addition, the rebate provided under the Scheme is fixed and does not reflect CPI and changes in shipping rates throughout the year.

ACCC's assessment

16. The ACCC has considered the Notified Conduct in accordance with section 93AC of the *Competition and Consumer Act 2010 (Cth)* (**the Act**).
17. The protection from legal action provided by a collective bargaining notification that does not include a collective boycott commences 14 days after it is validly lodged unless the ACCC objects within this period.
18. Broadly, the ACCC will assess a collective bargaining notification to determine whether any benefit to the public that is likely to result outweighs any detriment to the public that is likely to result. If the ACCC is satisfied that the likely public benefit does not outweigh the public detriment, it may issue an objection notice.
19. In assessing the Notified Conduct, the ACCC has taken into account:
 - The likely future with and without the Notified Conduct. In particular, the ACCC considers that, absent the Notified Conduct, each exporter participating in the group is likely to continue to individually negotiate and contract with relevant shipping lines (or their agents) or through a freight forwarder.
 - The relevant areas of competition likely to be affected by the Notified Conduct. The ACCC considers that the primary area of competition is the supply of shipping services to Tasmania for refrigerated cargo. The supply of sea freight forwarding services may also be affected by the Notified Conduct.

Public Benefit

20. The ACCC considers that the Notified Conduct is likely to result in the following public benefits from improved efficiencies through:
 - **transaction cost savings** (such as negotiation and contracting costs) for the target shipping lines and the participating exporters, compared to a situation where there would be individual negotiations. One interested party submitted that collective bargaining will not achieve a reduction in freight costs as it is impractical in circumstances where exporters of carrots and onions have unique shipping and operational requirements which result in individualised shipping rates. The ACCC understands negotiations occur at least on an annual basis and considers there are likely to be transaction cost savings by providing for a single point of contact to negotiate with shipping lines.
 - **providing better input into contracts** with target shipping lines relative to a situation where there are individual negotiations, which may result in terms and conditions that better reflect the needs of members of the group. One interested party submitted that exporters of carrots and onions already have a high level of input into contract negotiations with shipping lines and have unique shipping and operational requirements which are reflected in customised contracts. The ACCC understands that negotiations vary between shipping lines and it may not be the case that all exporters obtain highly customised contracts. Accordingly, the ACCC considers the Notified Conduct will likely result in some public benefit by providing the group with better input into contracts, including in relation to more general trading terms and conditions.

21. Further, by aggregating their export volumes, members of the group are likely to be able to obtain improved freight rates compared to what they could access individually. This is likely to help participants to reduce their costs and compete more effectively in international markets. In turn, this would likely result in increased demand for carrot and onion exports as well the supply of shipping services from Tasmania. In addition, Agility advised that, in the case of carrots, outside the November to June harvest season, Tasmanian exporters purchase their produce for export from mainland suppliers. It submits that to this end, any increase in exports as result of reduced freight costs will also benefit mainland producers.

Public Detriment

22. The ACCC considers that the Notified Conduct is likely to result in minimal public detriment from a reduction in competition between carrot and onion exporters for the acquisition of shipping services or sea freight forwarding services from Tasmania for the reasons set out below.

- The limited scope of the Notified Conduct – the notification is limited to current and future Tasmanian carrot and onion exporters that elect to participate in the group, and does not seek to add other exporters of other produce. Should the other exporters wish to form a collective bargaining group this would need to be the subject of a separate notification process.
- Participation in the Notified Conduct is voluntary for the onion and carrot exporters and the targets (shipping lines) – members of the collective bargaining group each decide whether to enter the collectively negotiated contract with the relevant shipping line or seek to negotiate a better deal directly with a shipping line or using the services of a different freight forwarder. The shipping lines are under no obligation to participate in a collective negotiation with the group.
- The exporters currently represent approximately two thirds of Tasmanian-based carrot exporters and half of onion exporters. However, carrots and onions are just one portion of perishable produce currently exported from Tasmania, which includes seafood, dairy, meat, and other fruit and vegetables. Further, Tasmania exports several other non-perishable commodities including wood and paper products, zinc, aluminum and ores and concentrates. As at June 2017, Tasmania's largest export commodities (by value A\$) were processed metals and metal products, ores and concentrates, meat products, seafood products and dairy products.⁴ As such, it is unlikely that the viability of a shipping line providing services to Tasmanian exporters more broadly is dependent on obtaining contracts to ship carrots and onions.
- Further, it is unlikely that the combined volume of carrot and onion exports is so significant that it would allow the bargaining group to artificially depress freight rates below competitive levels. In this regard the ACCC notes that there are three other carrot and onion exporters in Tasmania who are not currently part of the group to whom shipping lines could seek to supply services if they are not awarded a contract to supply services to the group.

⁴ Export Statistics, Department of State Growth, viewed online at https://www.stategrowth.tas.gov.au/business/trade/exporters/export_statistics.

- In addition, Agility advises that, following negotiations, it expects that shipping contracts with a number of shipping lines will be entered into at any one time based on a combination of the freight rates offered, the Tasmanian ports they service and the destination ports to which they ship. In addition, Agility advises that shipping contracts are typically short in duration (6 months given seasonal and other fluctuations in freight rates). Accordingly, it is unlikely that any shipping line would be forced out of the market for the supply of shipping services in Tasmania if it was not awarded a contract to supply shipping services to the group.

Period for which the Notification will be in force

23. A collective bargaining notification (and therefore the protection it confers) will be in force for a period of three years from the date it is lodged unless the ACCC determines that another period is appropriate or the notification is withdrawn or revoked.
24. In this case, as part of the Notified Conduct, Agility requested the period of immunity to be extended by up to 10 years given the benefits and the ongoing process of negotiating freight rates.
25. Some interested parties submitted that should the ACCC decide not to object to the Notified Conduct, the standard three year immunity period, rather than a longer period, would be appropriate to allow the industry to review the impact of the notification.
26. The ACCC considers that it is appropriate for the notification to remain in force until 29 October 2028 for the following reasons:
 - The likely benefits of the Notified Conduct may be expected to continue for the duration of the Notified Conduct and therefore total benefits are likely to be greater with the extended notification period.
 - The extended notification period is unlikely to increase the minimal public detriment which is likely to result from the Notified Conduct.

Decision

27. The ACCC considers that the benefit to the public that is likely to result from the Notified Conduct will outweigh the detriment to the public that is likely to result.
28. Accordingly, the ACCC does not object to the notification at this time. As with any notification, in accordance with section 93AC, the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.
29. With respect to the period for which the notification will remain in force, for the reasons set out in paragraphs 20 to 22, in accordance with section 93AD(5), the ACCC is satisfied that:
 - a three year notification period is not appropriate in all the circumstances, and

- another period is appropriate in all the circumstances, being the period ending on 29 October 2028.⁵
30. Accordingly, the protection provided by notification CB10000459 commenced on 13 November 2018 and will continue until 29 October 2028, unless the notification is withdrawn or revoked.
31. This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the Act.

⁵ As required by s 93AD(5)(b) of the Act, this period will end no later than 10 years after the day that the notification was lodged.