Luke Donnellan MP

State Member for Narre Warren North

MINISTERIAL URGENT

Mr Tim Grimwade
General Manager – Adjudication Branch
ACCC
PO Box 1199
Dickson ACT 2602
By facsimile: (02) 6243 1199

5 May 2004

Dear Mr Grimwade

Re: Applications for Authorisation A90901, A90902, A90903, A90904 & A90905 and the VFF Application for Authorisation

I refer to the above applications for authorisation lodged by integrated Victorian chicken processors (hereafter referred to as 'the processor applications'). I also refer to the application for authorisation lodged by the Victorian Farmers Federation, on behalf of its chicken grower members, which I understand that the ACCC has recently received (hereafter referred to as 'the grower application').

From the outset, I wish to indicate my strong support for the grant of interim and final authorisation for the grower application. I strongly oppose to the grant of interim or final authorisation for the processor applications. Aside from the fact that the grower application has broad support from Victorian growers and will provide an effective framework for counteracting the market power of the relevant processors, I believe that the grant of authorisation to the processor applications would undermine the objects of the Trade Practices Act.

A. Technical Failings in the Processor Applications

In relation to the processor applications, I have reviewed the ACCC's opinion in relation to the effectiveness of those applications and make the following observations.

In relation to the Inghams, Biaida and Hazeldene applications it is clear that while those applications will authorise conduct to which those processors are party, they will not authorise conduct to which growers only are party. The ACCC notes that, at a minimum, growers would need to agree amongst themselves that they will collectively bargain with their relevant processor, and that such decision (and any other collective discussions between growers in the absence of their processor) will not be authorised by these applications. As a result of this, even if these processors were granted authorisation, growers could not lawfully enter into collective

negotiation under those authorisations. Consequently, these applications are completely ineffective and should not be granted.

In relation both the Bartter and La Ionica applications, the ACCC's view is that, due to the fact the applicants for these authorisations include 'consenting growers', these authorisations can potentially authorise conduct of both processors, consenting growers, and non-consenting growers. However, this is subject to the limitation that, for the conduct of non-consenting growers to be authorised, such conduct must be engaged in collectively with one or more consenting growers.

In relation to the La Ionica application, it is my understanding that the consenting grower (Tarwood) is owned and operated by La Ionica. It is ludicrous to expect non-consenting growers to engage in confidential discussions in the presence of a consenting grower that is owned and operated by their processor. Further Tarwood, as a related entity of La Ionica, does not require authorisation to engage in the conduct the subject to La Ionica's application. For these reasons, it is clear that Tarwood cannot practicably participate in any grower negotiations involving non-consenting growers. Consequently, this application is completely ineffective and should not be granted.

In relation to the Bartter application, I note that nine consenting growers are party to that application. As a result, the Bartter application does not suffer the same limitations of the other applications discussed above. However, I am concerned that the grant of interim authorisation to Bartter may:

- disadvantage non-consenting Bartter growers as they may be pressured into joining collective negotiations under the Bartter interim authorisation, as opposed to negotiating under their preferred grower application (if such grower application is also authorised); and as a consequence
- prejudice the effective operation of any grower application.

For these reasons, I believe that neither interim nor final authorisation should be granted for any of the processor applications.

B. Public Policy

Further and in addition to the technical failings in the processor applications, there are public policy factors that suggest these applications should not be authorised.

First and foremost, I believe that the processor applications represent an attempt by oligopsonist processors to institutionalise their market power to the detriment of growers. The processor applications relate almost entirely to grower conduct, and are only relevant to processors in that they eventually have to 'sit across the table' from a collective of growers. The vast majority of Victorian growers believe that the framework established by the processor applications to be disadvantageous to them. If processors were truly interested in seeing growers form a collective bargaining group, they should have either:

- negotiated with growers to reach a mutually acceptable form of application; or
- encouraged growers to seek their own authorisation.

The decision by processors to 'go it alone' and proceed with an application opposed by the majority of growers could only have been made if processors themselves

believe they possess the market power to force growers to deal within the framework established under their applications.

Granting the processor applications, despite significant opposition from the vast majority of Victorian chicken growers, could pave the way for other monopsonists or oligopsonists to exploit their market power by creating unfair bargaining frameworks sanctioned by the ACCC. For example, the grant of the processor applications could pave the way for Coles and Woolworths to seek to impose their own, disadvantageous, collective bargaining frameworks on farmers and other small suppliers. Similarly, major motor vehicle insurers could seek to further disadvantage smash repairers and other suppliers in the same manner – using the grant of authorisation to chicken processors as precedent.

C. The Grower Application

I would also like to take this opportunity to provide general comment on the grower application. As noted above, I strongly support this application as an appropriate mechanism to address the current market imbalance between processors and growers in relation to the acquisition of grower services.

I note that under A90750 growers and processors were unable to reach agreement on any new contracts. I believe this failure to be the result of processors refusing to negotiate in good faith with growers - and A90750 failed to confer upon growers any degree of countervailing power that would allow them to induce processors to bargain fairly. In particular, I see as crucial to the success of the grower application the boycott provisions proposed in the grower application – such boycott powers will help address this market imbalance.

More specifically, I support the grant of interim authorisation for the entirety of the grower application, including the relevant boycott provisions. In this respect I note that any boycott could not occur during the first seven months of any authorisation (interim or otherwise) and that this timeframe ought to be sufficient for the ACCC to consider the grower application and make its decision with respect to final authorisation. It would be disappointing if any grant of interim authorisation was 'neutered' by the ACCC (to limit potential anti-competitive conduct many months into the future) simply because the ACCC is unable to make its final determination within this timeframe. This is especially the case considering:

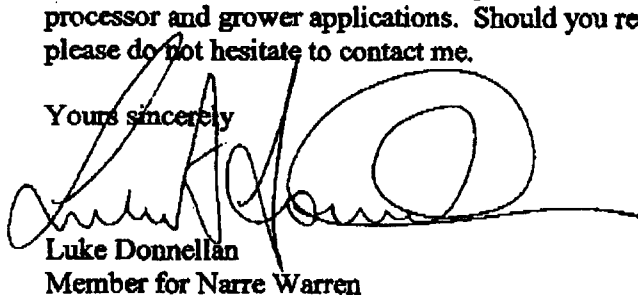
- the criticisms levelled at the ACCC during the Dawson Review of the Trade Practices Act that the authorisation process is too slow, cumbersome and unable to meet commercially realistic timeframes; and
- the comments made by the ACCC to the Full Federal Court that it could decide a new application for authorisation for the Victorian chicken growing industry in less than seven months (Jones v Australian Competition and Consumer Commission [2003] FCAFC 164).

The VFF has put to the ACCC a number of other reasons as to why the processor applications ought not be granted, and why their application for interim and final authorisation ought to be granted. I endorse those views.

D. Conclusion

I would appreciate if you would keep me informed of the progress of both the processor and grower applications. Should you require any additional information please do not hesitate to contact me.

Yours sincerely



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