Australian Competition & Consumer Commission

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7 June 2004

Dr Tim Ryan
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Dear Mr Ryan

Applications for authorisation lodged by Bartter Enterprises Pty Ltd, La Ionica Operations Pty, Baiada Poultry Pty Ltd, Inghams Enterprises Pty Ltd & Hazeldene Chicken Farm Pty Ltd

I refer to the above applications for authorisation, lodged with the Australian Competition and Consumer Commission (the Commission).

The Commission has received submissions on the applications from the following interested parties:

- The Victorian Farmers Federation;
- Mr Luke Donnellan MP, State Member for Narre Warren North;
- Mr Michael Crutchfield, Member for South Barwon;
- The Victorian State Government; and
- a number of individual chicken growers.

Copies of these submissions are enclosed for your information and have been placed on the Commission's Public Register.

If you wish to respond to any of these submissions, please do so in writing by **close of business Friday 18 June 2004**. Any response should be addressed to:

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

If you have any queries in relation to this matter, please contact Liam Stewart on (02) 6243 1275.

Yours sincerely

Gavin Jones
A/g Director
Adjudication Branch

Victorian Farmers Federation

Chicken Meat Group

26 May 2004

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The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear General Manager

Submission Opposing Authorisation Applications

Please find enclosed a submission prepared by the Victorian Farmers Federation opposing Authorisation Applications A90901, A90902, A90903, A90904 and A90905.

If you have any questions regarding the submission please contact Graeme Ford at the Victorian Farmers Federation.

Yours sincerely

John Clarke

John L Clarke
President, VFF Chicken Meat Group

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Victorian Farmers Federation

25 years - Fighting for Farmers

Submission
Opposing Authorisation of Applications A90901, A90902, A90903, A90904, A90905

May 2004

Introduction

The Victorian Farmers Federation Chicken Meat Group represents the interests of 183 (86%) farmers providing contract chicken growing services in Victoria. The VFF Chicken Meat Group has a number of concerns with the authorisation applications made by the 5 Victorian Integrated Chicken Meat Processors. We believe that there are a number of technical and practical problems with the applications. Also, the public benefits claimed in the application to flow from the granting of these particular authorisations will not be obtained, and in fact the granting of these applications will result in a public detriment.

This submission at first canvasses the broad issues relating to the applications and refutes claims made in the supporting documents. Secondly the specific public benefits and detriments as claimed in the supporting documentation to the applications are addressed.

Technical Issues

Legal opinion obtained by the VFF Chicken Meat Group on the structure and validity of these applications has highlighted a number of questions over certain elements of the applications. While we understand the Commission has also sought counsel on the validity of the applications, and that this advice has deemed all five applications as being valid, it is the belief of the VFF Chicken Meat Group that there is still some doubt as to whether the applications overcome the issues raised in the Jones decision.

In respect of the validity of the applications the following assessment has been provided to the VFF Chicken Meat Group by the law firm Nevett Ford.

> Aspects of some of the applications are contrived and artificial, which in our view are matters going to the question whether granting of the authorisation will be of benefit to the public.
>
> > (i)Baiada Poultry Pty Ltd seeks authorisation to give effect to agreements said to have been negotiated with growers detailed in Annexure A, in a form similar to the agreement in Annexure B. We have not seen Annexure A and are deprived of the opportunity to see Annexure B by reason of Baiada's request for confidentiality. From previous versions of the application we believe that Baiada suggests that it has negotiated new contracts with 83 growers. As we understand the position, in fact all that happened was that when the former Marven and Eatmore operations were merged, as a matter of practicality it was necessary to rationalise the differing productivity adjustments applying to the two groups of growers, productivity adjustments being an aspect of the regulated system involving adjustment to the common fee to allow for different batch rates and conditions.
> >
> > (ii)In the application by La Ionica Farming Operations Pty Ltd, Tarwood Pty Ltd (which we understand is effectively a company owned farm) seeks authorisation on its own behalf to make arrangements between growers and/or with La Ionica. It is not credible that Tarwood will be either joining in collective negotiations with other growers to negotiate a contract with La Ionica, or that it will be negotiating at all with La Ionica.
>
> In our view there are more fundamental problems with the applications. The point fundamental to the decision of the Full Federal Court in *Jones v Australian Competition and Consumer Commission* was that the applicant for authorisation must identify what it is that the applicant itself proposes to do which requires authorisation.
>
> Bartter Enterprises Pty Ltd seeks authorisation "to negotiate further contracts (whether with or without other growers including those identified in Annexure C) on a collective basis. The meaning of this is not very clear.

Baiada Poultry Pty Ltd seeks authorisation to negotiate agreements with growers, which agreements "will be negotiated with the growers on a collective basis".

Inghams Enterprises Pty Ltd seeks authorisation to negotiate the terms of an agreement with growers on a collective basis.

Hazeldene Chicken Farm Pty Ltd seeks authorisation in the same terms as Inghams.

La Ionica Farming Operations Pty Ltd seeks authorisation to negotiate further agreements with other growers acting on a collective basis.

Leaving aside the uncertainties of the wording of the relevant part of the Bartter application, Inghams, Baiada and Hazeldene seek authorisation to negotiate agreement with growers on a collective basis and La Ionica seeks to negotiate an agreement with growers acting on a collective basis (emphasis added). The wording appearing in the La Ionica application (as emphasised) appears to be what is meant by the relevant parts of all of the applications, and "collective" is intended to be descriptive of the growers conduct. It does not seem to make much sense to suggest that the processor as the other party in the negotiations will be acting collectively. We would suggest therefore that the only matter identified which could be the subject of authorisation is the growers acting collectively, thus raising the possibility that competition between them is affected. The applications take the matter no further and apparently rest on the assumption that the processors must therefore require authorisation. This is not articulated and we are not told why.

As identified by the ACCC in its memo as to the validity of the applications, the applications cannot result in the growers (other than those on whose behalf application is made) being authorised to act collectively.

It remains the case that the matter essentially requiring authorisation is the collective bargaining of contracts on the part of growers, and it is the growers who are the appropriate persons to apply for that authorisation. For this to be inverted to applications by processors is an uncomfortable and inappropriate gymnastic exercise, which in our view, in this case does not succeed.

While this advice may conflict with the Commissions own assessment, the merits of each argument could only be determined in another forum. However, the Commision's assessment does appear to support the view on the practical application of these authorisations.

Commission's Assessment

The Commission recognises the structural flaws in the applications that would result in the applications providing at best ineffectual authorisations. The inability of the applications to result in a functioning collective bargaining arrangement negates the potential for the claimed public benefits to be realised.

At least three of the applications fail to address the full range of collective behaviours necessary to allow effective operation of the authorisations. The applications submitted by Hazeldene, Inghams and Baiada are without the support of any consenting growers and cannot provide a functioning collective arrangement. The Commission notes that a necessary precondition to negotiations between grower group representatives and their respective processor is a preceding agreement between the growers themselves on the terms and conditions their representatives would seek to negotiate with the processors.

> "An agreement between processors and growers could not be made absent of an agreement between growers alone. That is, a processor would be unable to negotiate and reach an agreement regarding the terms and conditions of growers agreements with a group of growers acting collectively without those growers first having agreed amongst themselves, absent of the processor, to enter into collective negotiations."

The Commission states quite clearly that without a consenting grower being a party to the agreement between growers themselves, the collective behaviour of the growers would

possibly breach the Trade Practices Act. Neither the Hazeldene, Ingham, or Baiada applications were made with the consent of any grower, and growers for these processors have indicated that they will not consent to be a party in the future. While the La Ionica and Bartter application do have consenting growers that could bring protection to the initial agreements between growers, this situation will not occur.

Bartter is seeking to have authorised, agreements already reached between themselves and the 9 consenting growers who are not members of the VFF. If the consenting growers have already reached a collective agreement (which they are seeking to have authorised) why, in the immediate future, would they need to be a party to negotiations with the non-consenting growers to reach a further agreement?

As has been mentioned in the advice from Nevett Ford, it is not credible that the consenting grower to the La Ionica application will be a party to the collective arrangement between non-consenting growers. Tarwood Pty Ltd, the consenting grower, is a company owned farm of which Gavin Eckersley is the sole director. Gavin Eckersley is also a director of La Ionica farming enterprises and represents La Ionica in contract negotiations with growers. The question arises as to how Gavin Eckersley acting as grower through Tarwood Pty Ltd, can credibly claim to be a party to the negotiations between growers themselves, to arrive at terms and conditions to be taken to, and negotiated with, Gavin Eckersley acting as processor.

Given that no VFF member will consent to the relevant processor application, and that none of the consenting growers for Bartter or La Ionica will be a party to the necessary collective discussions between non-consenting growers, additional authorisations are required. However, if the growers themselves obtain authorisation (an application for grower authorisation has been made) the need for processors to gain protection for themselves from the Trade Practices Act is removed. In these circumstances it is difficult to see any public benefit in the processor applications being authorised. At best 9 growers, who have already negotiated agreements, will be covered.

Non-Consenting Growers

Putting aside the technical issue associated with the applications, the claimed public benefits of the proposed authorisations can only be obtained if growers make use of the authorisations. As outlined the majority of Victorian growers are members of the VFF Chicken Meat Group and these members have indicated that they will refuse to operate under the collective arrangements as proposed in the processor applications.

At a meeting attended by 72 growers on Thursday April 29th, the growers moved and unanimously supported the following resolution.

> *Members of the VFF Chicken Meat Group are opposed to the authorisation applications submitted by the 5 Victorian integrated chicken meat processors, and no Chicken Meat Group member will be party to the proposed collective negotiations if the processor applications are granted interim authorisation.*

Subsequent grower meetings held on Friday April 30th, and Monday May 3rd, with 29 growers in attendance gave unanimous support to the resolution.

The VFF believes strongly that this is not only the view of the 101 members who attended the meetings, but is the view of all 183 VFF members and the refusal to participate in an interim authorisation extends to a final determination. Another indication of grower opposition to the processor applications is the 169 growers who have so far provided written consent to be a party to the application made on behalf of members by the Victorian Farmers Federation.

Previous Authorisation

The fact that these particular applications would result in authorisations that fail to obtain the claimed public benefits is evidenced by the failure of negotiations between processors and growers under Authorisation A90750. Even if growers were to consent to operate under the framework proposed in the current applications, a framework essentially identical to that of A90750, the experience is that agreements will not be reached, or growers will be forced, due to their inherent poor bargaining position, to accept terms and conditions which will ultimately result in a public detriment (the reasoning behind this line of argument is outlined further on).

Collective Negotiations Under A90750

Growers attempted to negotiate agreements with processors under the framework provided by A90750 from August 2002 until the Federal Court set aside the authorisation. During this time members elected to the various Processor Negotiating Groups found it virtually impossible to make any progress in negotiating agreements. They found that processors actively sought to exclude growers from entering the collective negotiations, and delay the negotiation process.

The VFF Chicken Meat Group disputes the claims made in the supporting documents to the processor applications that negotiations under A90750 were in most cases at an advanced stage prior to the Federal Court decision. **Despite the endeavours of the growers, no PNG of VFF members successfully negotiated a contract under A90750.**

This not only occurred in Victoria but also in South Australia where a similar authorisation was in force. In fact the delaying, and in the words of a South Australian Parliamentarian, '*bullying tactics*' employed by processors, and allowed under a collective bargaining framework similar to that proposed, led to the South Australian Government re-regulating the industry.

It is claimed in the application that a key reason for authorisation is the pressure on government to legislate a more restrictive regime, and the capacity for legislation to be influenced by lobbying activities of vested interest groups. This appears to be a rather counterproductive argument to support the application when the South Australian industry was re-regulated due to the activities processors were allowed under a similar, if not identical authorisation.

The claimed public benefits rely on agreements being reached between processors and growers, the history of similar authorisations would indicate that under the proposed system this will be difficult to achieve. Another key public benefit claimed is that of savings in transaction costs. However, if negotiations are protracted, as they are likely to be, efficiencies obtained through dealing with growers collectively rather than individually, will be seriously eroded.

The only significant advancement in negotiations on the fundamental component of any agreement, the growing fee paid to growers, was obtained after the Federal Court decision, and just prior to the setting aside of A90750. At this time growers had reason to question the legal basis for them to accept birds from processors once the protection of A90750 was removed, and it was only then that processors provided some surety of growing fee payments.

Bargaining Power

The processor application refers to the *perceived imbalance in bargaining power* between growers and processors. According to the Commission's own assessment the imbalance in not perception, but reality. This is also the position of the VFF.

"The commission recognises that there is a combination of factors which result in chicken growers having very little bargaining power compared with the chicken processors"[1]

Furthermore it is the contention of the VFF that this imbalance in bargaining power does result in a public detriment; and that the collective bargaining framework proposed in the processor applications at best does nothing to counter the imbalance, and based on previous experience, actually enshrines the weak position of growers.

Before outlining the case of the effect an imbalance in bargaining power in this industry has on the public, the functioning of the growers services market, and the market concentration of the processing sector needs to be outlined.

Grower Services Market

The market for the acquisition of growing services in Victoria is typified by the absence of competition. It is claimed in the application that most growers are located in proximity to a number of buyers, with the exception of growers located around Bendigo. The VFF suggests that most of the growers in the Geelong area are also an exception. However, the proximity to a number of processors is not indicative of the level of competition between processors for grower services. In fact it is the history of the industry that processors do not compete for the services of efficient growers.

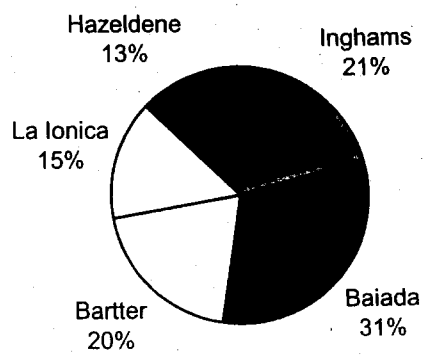
The Victorian market for growing services is typified by processor monopsonies based on geographic location, and processor specific facility requirements. At best the market can be categorised as two monopsony markets for growers in the Bendigo and Geelong areas, and an oligopsony market with the remaining growers having access to 3 processors. However, in the absence of any desire by processors to compete for another processor's growers, each processor effectively operates a monopsony market for their particular growers.

Market Concentration

The level of market concentration in the processing sector is relatively high with 72% of production being controlled by the 3 largest processors (figure 1).

Figure 1.

Processor Share of Victorian Production



[1] Australian Competition & Consumer Commission (2001) Determination. Application for Authorisation lodged by Marven Poultry Pty Ltd. P 53

From the information presented above, it seems clear that Victorian processors are monopsony or oligopsony acquirers of grower services. This can be confirmed through application of the test advocated by the UK Office of Fair Trading:

> (T)hree conditions appear necessary for the exercise of buyer power: first, that the buyers contribute to a substantial portion of purchases in the market; secondly, that there are barriers to entry into the buyer's market; and thirdly, that the supply curve is upward sloping. Under these circumstances it is straightforward to apply the principles of oligopoly theory to model situations of oligopsony where strategic interaction occurs between a few buyers competing in a market - see for example the seminal analysis of Stackelberg (1934) and Fellner (1949) ...[2]

In this case, it is clear that Victorian processors comprise a substantial portion of purchases in the market. The five processors account for all purchases in the market, with the three major processors accounting for almost three quarters of purchases. Second, it is similarly clear that there are major barriers to entry into the processing market. Entry into the market is subject to high economic costs and some level of economies of scale. Further, the level of vertical integration in the industry protects incumbents from competition. Therefore, the final determining factor of whether processors possess monopsony or oligopsony power is whether the supply of chicken growing services is subject to an upward sloping supply curve. It is the experience of the VFF that this is the case. This is confirmed by the OFT who state:

> (M)ost of the empirical analysis relating to monopsony power has been concerned with agricultural and labour markets where diminishing returns and competitive supply seem generally more plausible, and thus upward sloping supply curves are likely to apply.[3]

The VFF believes that this strongly supports its position that processors possess monopsony and/or oligopsony power in their dealings with growers.

Effect on Consumers

The United Kingdom's Office of Fair Trading outlines the effect of monopsony and oligopsony markets on consumers.

> A)ttention needs to be given to possible dynamic effects and here concern is often expressed about possible detrimental welfare effects arising from the damage to the long-term viability of producers resulting from the exercise of monopsony power. This can have an economic impact when, for example, buyer power reduces prices for suppliers, and thus their income, making it difficult for them to finance required investments, which might then be postponed or even foregone completely. Similarly, suppliers may be reluctant to undertake investments when they anticipate (post-contractual) opportunistic behaviour by powerful buyers seeking to exploit supplier commitments. In both cases, supplier efficiency may suffer which might ultimately feed through to higher prices for consumers than would otherwise be the case in the absence of such problems.[4]

The processor applications would result in authorisations that provide no level of bargaining power to growers which would provide some alleviation to the problems outlined above. In fact the VFF believes that the authorisations, if granted, will enshrine the market power of the processors through a Code of Conduct that allows processors to exert considerable influence over the decisions of the grower groups.

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[2] Dobson, P, Waterson, M and Chu, A, The Welfare Consequences of the Exercise of Buyer Power Prepared for the Office of Fair Trading, Research Paper 18, September 1998 at 13.

[3] Ibid at 14.

[4] Ibid at 16

Claimed Public Benefits

The processor application claims that authorisation would end the very severe short-term difficulties facing the industry. The VFF would add a rider to this statement in that only an **appropriate** authorisation will achieve the desired result. As already outlined the processor applications cannot result in authorisations providing any public benefit due to the flaws in the applications, and the refusal of growers to operate under the proposed structure in order that these flaws can be overcome. However, some of the claims relating to public benefit, as claimed, are specifically addressed below.

- *Improved bargaining position of growers to counter the perception of a power imbalance with growers.*

While the VFF does not dispute that improving the bargaining power of growers is a public benefit, the nature of the proposed authorisation will not result in growers being in a better position in relation to bargaining with processors. In fact it is more likely that the proposed structure will enshrine a set of rules imposed on the way in which growers bargain that further reduces grower bargaining power.

Also, in this application it is the improvement in *grower perception* of their bargaining power from which the claimed public benefit flows. It is quite clear the majority of growers are of the perception that this application will result in no improvement, and more likely a deterioration of their bargaining power. Therefore, the likelihood of growers pushing for restrictive legislation (a claimed negative public benefit) will increase rather than lessen. As already discussed, this has proven to be the case in the South Australian industry.

- *Reduced transaction costs for growers and processors.*

Again the VFF does not dispute that an appropriate authorisation could provide savings in transaction costs. However, previous experience has shown that an authorisation as proposed will lead to protracted negotiations due to the mismatch in imperative to reach agreement.

As the negotiations will usually result in an increase in the growing fee, postponing conclusion of the negotiations delays the introduction of any new fee the processors must pay. It also appears processors are reluctant to conclude negotiations in case they agree to terms and conditions that may be disadvantageous in comparison with agreements arrived at between other processors and their growers. Further, the longer negotiations continue, the more pressure growers, some with significant financial commitments, are under to agree to the offered terms and conditions. Processors on the other hand, providing growers continue to provide their services, suffer no apparent disadvantage from protracted negotiations. This will result in ongoing negotiations that significantly reduce, or completely negate, any savings obtained through conducting negotiations collectively.

Without any mechanism to provide some measure of equal incentive to both growers and processors to reach agreement, the transaction savings will be minimal or more likely negative.

- *Reduction in sources of conflict*

If growers are in no better bargaining position, and processors delay negotiations to place more pressure on growers to accept terms and conditions they would not otherwise accept, it is likely that the authorisations will increase sources of conflict.

- *A mechanism for dealing with disputes which leads to greater industrial harmony.*

Under the proposed framework the dispute resolution mechanism would see disputes drag on for more than 4 months, or at best in disputes on amounts payable 2 months. The current practice of processors is to withhold disputed payments from growers until a resolution to the dispute is arrived at. This places significant pressure on growers, most of who rely heavily on the regular payment cycle to meet commitments, to accept a settlement on terms less advantageous than they otherwise would. This process is not likely to result in greater industrial harmony.

- *A stronger Victorian industry*

The VFF believes that authorisations as proposed in the processor application will not create a stronger Victorian Industry. Grower confidence, and willingness to invest will diminish as the market power of the processors will be maintained, if not increased through an inappropriate code of practice, and a lack of any mechanisms to encourage bargaining in good faith.

- *A more rapid growth rate*

For the reasons outlined in this submission the VFF believes that growth of the industry will be impeded rather than promoted by the granting of the processor applications.

A number of other public benefits are claimed to flow from the authorisations but it is difficult to gauge how these benefits rely on the success of the applications in order to be achieved.

The application claims as evidence of the benefits to be obtained the contract terms and conditions as concluded or nearly concluded under the previous authorisation or proposed (supposedly in the current application). It is difficult to discuss the proposed terms and conditions as they not available to be examined. However, there is some experience of terms and conditions that were forced onto growers, and alluded to in the application as a more efficient matching and pricing of processor and grower capabilities.

One group of growers have been forced onto a performance system whose application has significantly disadvantaged growers. Growers operating under this scheme found themselves penalised for poor performance caused by low quality inputs provided by the processor. Growers fail to see the benefit of processors being able to pass the cost of their decisions and poor performance onto growers. These practices can only lead to public detriment through increased conflict and reduced grower confidence in the industry.

Summary

In summary, the VFF believes that the authorisation process is being used in a cynical manner by processors holding substantial market power through natural, and imposed monopsony markets, to further reinforce this power. The history of authorisations such as that proposed, is that they have failed to achieve sustainable outcomes in both the South Australia and Victoria chicken meat industries; and have been used as a tool by processors to further disadvantage growers.

It is hard to imagine another industry where an attempt by dominant purchasers to impose a system of their choosing, for the collective bargaining of suppliers would be considered. The very fact that processors believe that they can impose a framework of their choosing, and ignore the views of growers in the process, is evidence of the market power they possess.

The VFF opposes the granting of these authorisations, as they cannot deliver the claimed public benefits, and in fact will result in public detriment through reinforcing the market power held by the processors. Further, the applications are unable to provide collective

negotiations throughout the industry due to the flaws in the applications, and growers will not become a party to the applications to enable those flaws to be overcome.

The best outcome that can be achieved is in 9 growers being authorised to collectively bargain. However, any degree of public benefit obtained through these 9 growers obtaining authorisation will be offset by the problems that this will cause for the remaining Bartter growers. It will establish a situation where the processor may attempt to force the 20 VFF member growers to consent to the processor authorisation. An authorisation that as outlined above provides minimal, or no public benefit. Further, if the VFF application is successful it will result in both the VFF member growers, and the processor holding competing authorisations with each party refusing to deal under the other's authorisation. This can only lead to further instability and public detriment. It would seem that the very small public benefit that may be gained through authorising 9 growers to collectively bargain would be lost many times over through the additional problems that may result.

Finally, the Victorian Farmers Federation on behalf of growers has made a more appropriate application, an application with broad support. The application provides a collective bargaining framework more suited to the structure of the industry and will result in substantial public benefit. If the VFF application is successful, the derivative liability protection the processors claim they require will not be needed.

Luke Donnellan MP

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State Member for Narre Warren North

Mr Tim Grimwade
General Manager – Adjudication Branch
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FILE No: C2004/38
DOC: D04/20932 22138
MARS/PRISM:

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

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- 5 MAY 2004

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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

Luke Donnellan
Member for Narre Warren

M CRUTCHFIELD MLA

MICHAEL CRUTCHFIELD MLA

MEMBER FOR SOUTH BARWON

WORK FILE COPY

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FILE No: C2004/38
DOC: D04/21258-2240
MARS/PRISM:

5 May 2004

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
Dickson ACT 2602
Fax: (02) 6243 1211

MINISTERIAL URGENT

Dear Sir/Madam

Re: Victorian Chicken Industry – Applications for Authorisation by Processors and Growers

I wish to provide comment to the ACCC on the applications for authorisation lodged with it by a number of Victorian chicken processors, as well as the application for authorisation lodged by the Victorian Farmers Federation on behalf of Victorian chicken growers. I am the Victorian Member for South Barwon and my electorate has a number of chicken grower farms within it.

From discussions with growers in my electorate, I understand that the deregulation of their industry has left them in a state of considerable uncertainty and - given their relative size and importance in the chicken supply chain – at the mercy of chicken processors. There seems to be general industry acceptance that some form of collective bargaining is necessary (with both processors and growers seeking separate authorisations), although dispute remains as to the most appropriate form of such arrangements.

As a general proposition, I support the authorisation of collective bargaining by Victorian chicken growers with their respective processor. In this respect, I believe that the application by the VFF on behalf of its members should be granted by the ACCC. I believe that this application will result in a net public benefit and will provide a more level playing field for growers in their dealings with processors. I do not support the grant of authorisation to Victorian chicken processors and believe that the grant of such authorisation will not address the basic issues of market imbalance in the industry, and will not result in any public benefit.

As a threshold issue in relation to the processor applications, I understand that the ACCC is of the view that the majority of processor applications will fail to authorise all conduct necessarily involved in collective bargaining between growers and processors. As a result, even if these applications were granted, most Victorian growers would be prevented from entering into collective negotiations under those proposed arrangements. This raises significant doubt about the appropriateness of granting authorisation for the processor applications.

More specifically, I am concerned about the general structure of the processor applications. The framework for collective bargaining within these applications appears to be inadequate. In particular I note that during the operation of A90750, no grower represented by the VFF succeeded in negotiating a new contract with their processor. I believe that any framework for collective bargaining approved by the ACCC for the chicken growing industry needs to be significantly stronger than that proposed by the processor applications.

Accepting that there exists an imbalance of market power between growers and processors, a major deficiency in the processor applications is the lack of any real mechanism to provide incentive to processors to negotiate. Essentially under the processor applications, growers can attempt to collectively negotiate terms and conditions with their respective processor, but are unable to do anything if processors refuse to offer or accept reasonable terms. Traditionally, collective bargaining arrangements allow for the collective withdrawal of services – with the threat of such a collective withdrawal of services being the very thing providing the collective with a greater level of bargaining power.

In this respect, I note that the majority of Victorian chicken growers, acting through the Victorian Farmers Federation, have decided to lodge their own application for authorisation. I am supportive of this application, and in particular the mechanisms within it allowing the collective withdrawal of services.

I note that the particular boycott procedures contained in the grower application are subject to a number of safeguards, including the requirement that at least 6 months negotiation, and additional mediation, occurs before any boycott can be commenced. This proposal is reasonable, provides incentive to processors to treat growers fairly, and provides growers and processors every opportunity to reach agreement before any boycott could ultimately occur.

For these reasons, and the reasons put to the ACCC by the VFF, I believe that granting interim and final authorisation to the grower application is in the best interest of the industry and will result in a net public benefit. Further, I believe that neither interim nor final authorisation should be granted for the processor applications for the above reasons.

Should you require any further assistance, please do not hesitate to contact me.

Yours sincerely

MICHAEL CRUTCHFIELD MP

Minister for Agriculture

FILE No: C2004/642
DOC:
MARS/P D04/24607

Our Ref: SU500821

WORK FILE COPY

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25 MAY 2004

Mr Tim Grimwade
General Manager
Adjudication Branch
Australian Competition & Consumers Commission
PO Box 1199
DICKSON ACT 2602

MINISTERIAL URGENT

Dear Mr Grimwade

AUTHORISATION APPLICATIONS

Thank you for your recent letters seeking submissions on the authorisation applications lodged by the Victorian chicken meat processors and the Victorian Farmers Federation, Chicken Meat Group. I note that you also wrote to the Hon John Brumby MP, Treasurer of Victoria. The Treasurer has requested that I respond on his behalf.

As the authorisation applications are primarily a matter between the commercial parties seeking the authorisation, I do not propose to comment on specific details of the applications.

As has previously been indicated, the Victorian Government supports the principle of Australian Competition and Consumer Commission authorisation of collective negotiation arrangements in the State's chicken meat industry.

I look forward to the Commission bringing these parties closer together to resolve a way forward for this industry.

I would appreciate being kept informed of progress with authorisation applications for the Victorian chicken meat industry. Should your officers wish to discuss this matter further, please contact Ms Lucy Ripper, Senior Policy Analyst Animal Industries, Department of Primary Industries on (03) 9637 8487.

Yours sincerely

Bob Cameron

Bob Cameron, MP
Minister for Agriculture

AUST. COMPETITION & CONSUMER COMMISSION CANBERRA
27 MAY 2004

Victoria
The Place To Be

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
P.O. Box 119
Dickson A.C.T. 2602

Dear Mr Stuart
Thankyou for the opportunity to make comment on the authorisation application made in relation to the seeking of authorisation to enable chicken meat processors of Victoria to give effect to contracts already negotiated.

I am a Bartter Enterprises grower, so will speak to you of what I know and have experienced with this company.

Applicants proposed benefits to consumers to flow from collective bargaining arrangements.

I have deep concern that the proposed bargaining arrangements will have no real benefit to the consumer.

I say this because, since July 2003 we have had to work under the proposed new contract system. This was a situation that had to be accepted by growers, as the negotiation team representing growers, were not skilled negotiators but elected fellow growers. The team was subject to very forceful negotiation and already set contract ideas, resulting in what I felt was the processor having definite advantage to dictate all terms to growers. As a consequence of having to grow under these arrangements I have seen no real benefits to the consumer, ie the price has not fallen in the market place and as I see it the foundation has been layed to some serious long term problems for the industry.

If the A.C.C.C. decided to grant authorisation to processors in Victoria the consumer may benefit in the very short term from some sort of price war among processors, but this would pass very quickly. Bartter are poised in such a position at present that growers have to accept what they are paid. If other processors do not have themselves and their growers in a similar position they may crumble under such pressure. Leaving Bartter with a large share of the market and able to dictate price to consumers giving no long term benefit to the consumer.

There would also be no long-term benefit as I see it in quality of product to the consumer. In that the current price being paid to growers is averaging 48-50 cents per bird. Given that our key costs of gas, electricity, insurance and labour have increased the necessary money for capital maintenance is probably not being set aside to maintain and update capital in the next 5-10 years. This decrease in ability to reinvest in our businesses given the hi-tech nature of operating our industry gives rise to the very real chance of high bird losses and a poor quality product if the technology is not functioning at its absolute best. This would be of no benefit to the consumer, grower or processor.

The current system we have worked under since July 2003 has not allowed a proper system in which disputes about bird quality or payment can be settled. This has resulted in a soured relationship between Bartter and the majority of its growers. I feel that if this situation is allowed to continue growers would become desperate and take industrial action (ie strike) this would be of no benefit to the consumer, as prices would rise due to lack of product. Worse still it could lead to the importation of chicken meat. This would never do as the healthy clean green 'disease free' image of our industry would suffer. If disease were to enter Australia the whole Australian community would suffer.

Likely detriment to flow on to the public from the proposed authorised bargaining arrangements.

The idea of collective bargaining is not all bad, but it does need to be done under the guidelines of some form of legislation. Enabling the grower to perform to the best of his ability and produce a quality product that is going to be in demand by the consumer.

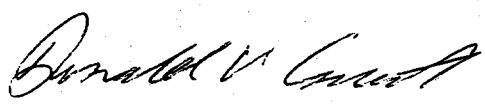
Growers are business people and as such need a fair price for the meat they produce. The grower has taken a huge financial risk in the development and maintenance of capital equipment and would not enter any form of negotiation for contracts unless it was going to be fair to all parties involved. The grower realises the importance of the interdependent relationship of grower, processor and consumer.

A fair contract system for the growing of chicken meat is very important to the Australian community, as this has become a basic food in our diet. Independence in the production of chicken meat needs to be maintained given the uncertainty of world situations (ie disease and terrorism).

Some form of legislation allowing collective bargaining between representatives of growers and processors is needed so all can have a fair say. The current situation is not suitable for any party. Grower insecurity prevents the development of capital equipment to produce a quality product and financial institutions have little enthusiasm for investment in our industry given the current situation.

I hope to see all growers and processors come to an amicable agreement regarding contracts. To see only one or two processors left in Victoria would be very detrimental to chicken growing and the consumer in that processors would set the price for chicken meat and the payment to growers.

Yours sincerely



Donald Grant
P.O. Box 66
Inverleigh
Victoria 3321

The General Manager
Adjudication Branch
A. A. A. C.
PO Box 1199
DICKSON ACT 2602

Dear Mr Grimwade,

Thank you for forwarding to me a copy of the five Victorian Chicken Meat processors application seeking interim authorisation.
I note that one of the applicants Baiada, to whom I am currently contracted to, have requested that annexure B and C be excluded from the public register
. I assume that my details have been provided to you (without my consent or knowledge) in the event that I may at some time participate in negotiating collectively under the sought authorisation.
Having no ability to determine what the contract and conditions contain I advise that I oppose the Processors request for Interim Authorisation.
The position forwarded to you by Baiada as to why they seek authorisation is incorrect.
Grower contracts have not been amended as claimed.
The two parties have agreed to a minimal fee increase structured within the confines of the existing legislated contracts.
If contracts have been amended as claimed, and again without consent or knowledge then those contracts have not been legally amended.
As I have previously outlined, I am opposed to the granting of this authorisation.
It is also somewhat difficult to envisage how the claimed public benefits will occur if as I suspect less than 5% of the states chicken growers intend to participate.
It is also interesting to note the Processors claim that growers were going to take strike action last September. This statement is incorrect.
We had been advised that we could not grow chickens legally at that point in time and we were not prepared to have growers legally exposed.

Yours sincerely,

Chris Jones.

P S. I received an additional copy as President of the VFF Chicken Meat Group. Could you please amend this, as I no longer hold that position?

FILE No:
DOC:
MARS/PRISM:

To
Australian Competition + Consumer Commission
P.O. Box 1199
Dickson ACT 2602

Your ref Leisa Stewart C2004/38

COPY

General Manager Adjudication Branch.

Dear Sir,

With regard To The "Authorisation application Lodged by five Victorian chicken processors, The subject of The above correspondence, We wish To advise The following:-

1 We do not support The processors Application
2 We do not intend To negotiate through a processor authorisation
3 We are prepared to support an authorisation Sought by The Chicken Meat Group of Victorian Farmers' Federation
4 We believe That The deregulation being pushed by The ACCC will eventually be detrimental To The chicken industry in The Short Term + detrimental To consumers in The long Term.
5 We refer you To our written submission and comments at The ACCC Melbourne hearing of The previous processor Application and ask That This be included in The current processor application hearing.

Yours faithfully

J.S. Scott for
J.S., J.C., T.S. & A.C. Scott
T/a

GALLUS LANE PTY. LTD.
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AUSTRALIAN COMPETITION & CONSUMER COMMISSION
CANBERRA
- 3 MAY 2004

C2004/38
D04/22402.

WORK FILE COPY

HILLCROFT CONTRACTORS

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4 May 2004

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Sir

Re Authorisation applications lodged by Bartter Enterprises Pty Ltd, La Ionica Operations Pty, Baiada Poultry Pty Ltd, Inghams Enterprises Pty Ltd & Hazeldene Chicken Farm Pty Ltd, I wish to make the following comments...

- There is no point in authorisation being granted to processors who do not have the consent of the growers.
- It seems little point in granting authorisation allowing processors and growers to collectively negotiate without allowing growers to legally discuss matters with the processor not present
- There is unlikely to be any "Public benefit" in granting Authorisation to the processors application, since the is only about 8 growers in the state that have been party to the application. Any other grower would be up for their own legal expenses.

Paul Mannes
Chicken Grower

D04/22404
C2004/38

WORK FILE COPY

Mike Shaw President
Inghams Growers Association
Ph 0359788536
Fax 0359788545

3rd May 2004
The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Sir

I am writing to you on behalf of the Inghams growers in relation to the recent applications for authorisation by the Victorian processors including Inghams Enterprises Pty Ltd.
The Ingham Growers Association is of the view that the ACCC should not grant the Authorisations sought on an interim basis, or a full authorisation, for the following reasons.
These applications have been made without consultation with, or the permission of growers. In fact they have been made with the in the face of direct opposition of the growers who are purported to be the beneficiaries of such an authorisation. If the growers are in need of such an authorisation then they are quite capable of applying for their own. The VFF is I understand in the process of making such an application.
In this climate it is difficult to see why any growers would be using the Processors Authorisation even if it were granted. Given the fact that growers will not use the authorisation it appears very unlikely that any nett public benefit could be obtained by its granting
I would also like to highlight grower's experience under the previous authorisation, which despite the efforts of growers in protracted negotiations did not result in suitable growing contacts being agreed. This has left growers in an unacceptable position with probably unenforceable contracts on batch to batch basis. The failure of the previous authorisation to deliver its stated outcomes was as a result of insufficient mechanisms to encourage the parties to conclude negotiations in a reasonable timeframe. As the current application is identical to the last it appears to have no better chance of success and would only assist processors in their endeavours to force growers into individual growing arrangements.
Thank you for the opportunity to comment.

Yours sincerely

Michael Shaw