



McCain Foods (Aust) Pty Ltd

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

9 May 2007

Dear Sir

Victorian Potato Growers Council (VPGC) application for authorisation A91048

We refer to the above application for authorisation, and the ACCC's letter of 24 April 2007 inviting comment from McCain Foods (Aust) Pty Ltd (**McCain**).

Executive Summary

For the reasons set out below, McCain:

- supports the VPGC's authorisation application insofar as it relates to collective negotiation with respect to contractual terms and conditions (**Negotiation Conduct**);
- does not, in the absence of further clarification of the proposed role sought to be played by the VPGC in dispute resolution (**Dispute Resolution Conduct**), support the application insofar as it relates to Dispute Resolution Conduct; and
- supports the application for interim authorisation of the Negotiation Conduct for the 2008 season (the negotiations for which are due to commence in the next couple of months).

1. Background

We understand from the VPGC's application and submission in support, and your letter, that the VPGC seeks authorisation for:

- the Negotiation Conduct, being agreements between current and future members of the VPGC to collectively negotiate the terms and conditions of contracts between

VPGC members (**potato growers**) and potato buyers, with or without the assistance of the VPGC; and

- the Dispute Resolution Conduct, being the participation by the VPGC in any "dispute resolution mechanism" for resolving disputes between potato growers and buyers.

McCain has previously been concerned about participating in any collective negotiation arrangements with two or more members of the VPGC collectively because of the risk of possibly being involved in a contravention of the TPA. McCain has encouraged the VPGC's members to seek ACCC authorisation in relation to such arrangements and, subject to the limited reservations set out below, McCain welcomes and supports the VPGC's authorisation application to the extent that it relates to the Negotiation Conduct.

We address each of the relevant types of conduct separately below, together with our comments on the VPGC's application for interim authorisation.

2. **Agreements to collectively negotiate**

McCain supports the VPGC's application for authorisation for current and future members of the VPGC to collectively negotiate terms and conditions (including price) of contracts with McCain, provided that any authorisation is expressed in terms that make it clear that it does not extend to cover conduct that might contravene the collective boycott provisions of the *Trade Practices Act (TPA)*. This is discussed in more detail below.

For the avoidance of doubt, McCain understands that notwithstanding any authorisation of the Negotiation Conduct, this would still result in separate contracts being entered into between McCain and each of the relevant growers.

2.1 *Public benefit*

In McCain's view, the Negotiation Conduct has the potential to result in some, albeit small, transaction cost savings. In the context of negotiations between McCain and potato growers in the Ballarat area, collective negotiation is (in the same manner as some other means of negotiation) likely to be an efficient and effective means by which to negotiate the terms and conditions of potato supply contracts, which typically take place on an annual basis.

However, McCain wishes to note that, contrary to the VPGC submission, it does not accept the proposition that there is necessarily an imbalance of power between McCain and individual potato growers, and it is not always the case that individual potato growers are in a weak bargaining position. The reasons for this include the facts that:

- McCain needs to secure supply to operate its processing plants and meet orders from its customers. McCain cannot take the risk that potato growers will withhold supply due to "inadequate" prices. The longer the price negotiations between potato growers and McCain continue, the more the situation favours the potato growers; and

- the range of potential suppliers to McCain is limited, as its suppliers are all located within a limited geographic supply area. In McCain's experience, growers are now increasingly specialising in areas of produce other than processing potatoes. While McCain has considerable sunk costs in its specialised potato processing factory (which is not readily capable of adapting to other crops), potato growers have the flexibility to produce and supply alternative crops, including fresh potatoes, crisping potatoes, irrigated lucerne, cereals and other vegetable crops.

2.2 *Public detriment – collective boycott conduct*

McCain is concerned to ensure that VPGC members do not, under the cover of any collective negotiation authorisation, engage in collective boycott conduct by, for example, collectively refusing to supply product to McCain in the absence of a price that is acceptable to two or more potato growers. Such an arrangement or understanding would be likely to result in significant commercial damage to McCain.

McCain notes that the ACCC has previously recognised the potential for collective boycott conduct to accompany a collective bargaining arrangement and detrimentally effect competition.

McCain therefore requests that any authorisation granted by the ACCC in relation to the Negotiation Conduct expressly state that it does not provide immunity in relation to conduct that may contravene the collective boycott provisions of the TPA.

3. **VPGC participation in "dispute resolution mechanisms"**

On the basis of the VPGC's current submission, McCain opposes the authorisation of the Dispute Resolution Conduct, because:

- (a) the authorisation application and submission in support do not:
 - (i) set out the precise nature of the conduct for which the VPGC seeks authorisation, or the circumstances in which it may arise; or
 - (ii) distinguish it from the Negotiation Conduct; and
- (b) it is unclear whether or not the VPGC's proposed conduct would even, by itself, give rise to any potential contraventions of the TPA.

McCain is not aware of the VPGC having had any role in facilitating or participating in any dispute resolution between potato growers and McCain in the past. Notwithstanding this, McCain does not, in principle, have any objection to the involvement of the VPGC in the resolution of disputes between McCain and potato growers. However, the nature of the VPGC's role, and the circumstances in which a "dispute resolution mechanism" would be triggered are not clear.

The submission in support of the VPGC's authorisation application suggests that a breakdown in commercial negotiations may be a "dispute" for these purposes. In McCain's submission, a breakdown in commercial negotiations is not a "dispute" that should be the subject of any independent dispute resolution mechanism. Rather (and as also suggested by the VPGC in its submission if agreement between a collective bargaining group and McCain cannot be achieved, the members of the collective bargaining group should consider their individual positions and negotiate individually with McCain.

The type of situation that McCain considers might properly be characterised as a relevant "dispute" might, for example, involve a disagreement between parties to a contract in relation to a matter arising under that contract (such as a disagreement about the discharge of an obligation under the contract). A dispute of this nature will almost always relate to an individual contract and so there will not normally be any reason for "collective" dispute resolution.

While McCain does not object to the VPGC being involved in, or facilitating, a dispute resolution process with individual growers in relation to a dispute arising under one of its contracts, McCain does not see how such participation would give rise to any conduct that may contravene the TPA and which would require authorisation.

To the extent that the authorisation application directly or indirectly seeks to facilitate the collective resolution of multiple or common disputes by growers, then McCain opposes this. This is due to the likelihood that any collective dispute resolution would almost certainly give rise to a risk that the growers, in deciding whether or not to collectively settle or pursue a dispute would engage in conduct that might contravene the collective boycott provisions of the TPA.

This concern exists regardless of whether or not the VPGC has any role in any collective dispute, and we note that joint conduct by the potato growers (in seeking to engage in collective dispute resolution) is not conduct that appears to be covered by the present authorisation application in any event.

4. Interim authorisation

McCain recognises that seeds must be planted in or around October 2007 for the 2008 season and commercial decisions must be made by growers in advance of that time.

Accordingly McCain supports the VPGC's application for interim authorisation of the Negotiation Conduct for the 2008 season.

5. General comments in relation to the VPGC submission

In addition to the above matters, McCain wishes to clarify or comment on a number of statements in the VPGC's submission. While these comments may not directly affect the

outcome of the ACCC's assessment of the authorisation application, McCain considers that it is important for the ACCC to possess a complete and accurate understanding of the background to the application and the relevant market dynamics.

- *Assertion that there are "increasingly shrinking local markets for fresh produce in Australia" due to increased imports and "closed loop" supply chains into supermarkets (see page 3 of the VPGC's submission).*

McCain makes no comment on the assertion with regard to the fresh potato market, however it does note that, while the demand for processing potatoes is diminishing, the market for frozen french fries is growing. This increased french fry demand is being met by import activity.

- *Other parties affected by the proposed arrangement (see page 8 of the VPGC's submission).*

In addition to the parties presently listed in the submission, the following parties would also be likely to be significantly affected:

- (i) the wholesale food distribution industry; and
- (ii) the quick service restaurant industry.

- *Assertion that McCain took \$3 off the supply price of potatoes and for the 2006 supply season (see pages 9-10 of the VPGC's submission).*

At no time did McCain take any amount off any previously agreed supply price. Rather, the acquisition price offered by McCain in 2006 was simply \$3 less than that for the 2005 supply season to enable McCain to respond to the competition threat caused by an increase in imports of frozen french fries into Australia. This offer was accepted by the potato growers.

- *Assertion that potato processors and packers fund discounts offered by Coles and Safeway supermarkets (see page 10 of the VPGC's submissions).*

Promotional retail pricing arises at the discretion of the retailers and/or the manufacturers to stimulate demand for specific products and as such has no relation to wholesale pricing. Further, as noted above, the more significant volume of processed potatoes are supplied to the wholesale and quick service industries.

- *Assertion that if Victorian potato growers and buyers are not able to achieve a realistic return on their investment, Australian consumers will have to pay more for imported products (see page 10 of the VPGC's submission).*

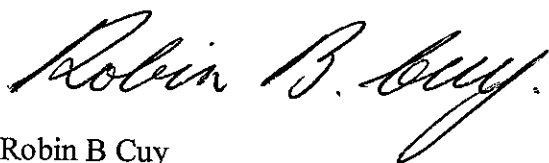
Insofar as this assertion relates to french fries, McCain does not agree with it. Rather, the cost of imports is comparable to (or cheaper than) Australian products, and is (and will continue to be) a constraint on wholesale pricing.

- *Assertion that Riverina Russet and Shepody potatoes are "private varieties" of potatoes (see appendix C of the VPGC's submission).*

Riverina Russet and Shepody potatoes are not private varieties. Further, while the Cabaret variety is a private variety, it is not a variety typically acquired by McCain.

Please contact Robin Cuy on (03) 5338 0650 if you would like to discuss this submission.

Yours sincerely

A handwritten signature in cursive script that reads "Robin B. Cuy".

Robin B Cuy
Company Secretary