



Australian
Competition &
Consumer
Commission

Assessment

Collective bargaining notifications

lodged by

citrus growers

Date: **23 August 2007**

Notification nos. CB00001 & CB00002

Public Register no. C2007/1525

Summary

The ACCC does not object to the collective bargaining notifications lodged by the Queensland citrus growers known as Abbotsleigh, Dermark and Bayntun who propose to collectively negotiate the price and quantity of their supply of citrus fruit to Woolworths Limited (Woolworths Supermarkets) and IGA Distribution Limited (IGA Fresh).

The small business collective bargaining notification process

Small business collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the Trade Practices Act (the Act).

Businesses can obtain protection from legal action under the Act for a small business collective bargaining arrangement by lodging a notification with the ACCC. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement.

The ACCC may object to a collective bargaining notification if it is satisfied that the proposed collective bargaining arrangement is not in the public interest (and in some cases, that the notified arrangement will substantially lessen competition).

The notification

On 31 July 2007 CB00001 and CB00002 were lodged by the Queensland citrus growers known as Abbotsleigh, Dermark and Bayntun (together known as the Participants) who propose to collectively negotiate the price and quantity of their supply of citrus fruit to Woolworths Supermarkets and IGA Fresh.

The collective bargaining notification process is transparent involving public registers and interested party consultation. The ACCC sought submissions from nine interested parties. Two submissions supporting the notification were received. In addition, Metcash, on behalf of IGA Fresh provided a response indicating that it has no competition concerns with the proposed arrangement.

ACCC's assessment

The ACCC considers that the proposed collective bargaining arrangement may enable the Participants to supply supermarkets directly and more efficiently than is possible individually.

The ACCC identified a number of features which mitigate against the potential for anti-competitive impact including the respective bargaining positions of the Participants and the counterparties. Additionally, the arrangement impacts a limited section of the industry, is voluntary and does not involve potential boycotts.

On the information available, the ACCC is not satisfied that the detriments likely to arise from the notified arrangement would outweigh the identified benefits. Accordingly, it does not object to the notifications.

Protection afforded by notifications CB00001 and CB00002 will commence on 28 August 2007 and will cease three years from the date of lodgement (31 July 2010). As with any notification, the ACCC may review these notifications at a later stage should concerns arise.

1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (known as the *target* or *counterparty*).
- 1.3. Arrangements will amount to collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which small business bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement. The immunity from a collective bargaining notification ceases three years from the date of lodgement.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that the proposed collective bargaining arrangement is not in the public interest (and in some cases where it believes the arrangement will substantially lessen competition).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object to a notification, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 28 day statutory period, legal protection from the notification does not commence.
- 1.9. The collective bargaining notification process is intended for small businesses and a \$3 million limit (or higher amount as set by regulations) applies to the value of annual contracts expected to be entered into between each member of the collective bargaining group and the counterparty.

2. Background

The proposed arrangement

- 2.1. Notifications CB00001 and CB00002 were lodged on 31 July 2007 by:
 - Nelson Enterprises Pty Ltd as trustee for the Cavan Street Trust, Campbells Citrus Consulting Pty Ltd, Nelson Enterprises Pty Ltd as trustee for the Michael McMahon Family Trust, and John Bernard Stephens and Sally-Anne Stephens as trustees for the J & S Stephens Family Trust (together known as Abbotsleigh)
 - Dermark Pty Ltd as trustee for the Sandy Trust (Dermark)
 - Bayntun & Co Pty Ltd (Bayntun)
- 2.2. Abbotsleigh, Dermark and Bayntun (together known as the Participants) are citrus fruit growers located in the central Burnett region of Queensland, specifically Gin Gin and Gayndah. The participants grow lemons, mandarins and grapefruit. Abbotsleigh (comprising Nelson Enterprise Pty Ltd and Campbells Citrus Consulting Pty Ltd) also run approximately 100 head of beef cattle and grow fodder crops for hay, while Bayntun runs approximately 350 head of beef cattle.
- 2.3. The Participants propose to collectively negotiate the price and quantity of their supply of lemons and mandarins to Woolworths Limited (Woolworths Supermarkets) (CB00001) and IGA Distribution Limited (IGA Fresh) (CB00002). The Participants do not currently supply Woolworths Supermarkets or IGA Fresh, but supply various citrus wholesalers and market agents in each state. The Participants intend to supply Woolworths Supermarkets and IGA Fresh nationally but this will be subject to negotiation.
- 2.4. The proposed collective bargaining arrangement will be the subject of a joint venture agreement which will operate under the business name 'Citrus Direct'. Any of the Participants may withdraw from the joint venture on giving 24 hours notice to the other parties. The joint venture agreement contains a dispute resolution provision requiring the delivery of dispute notices followed by mediation, if necessary.
- 2.5. Under the proposed arrangement, a representative of each of the Participants will form a committee which will meet each week and agree on the minimum price at which fruit will be sold to Woolworths Supermarkets and IGA Fresh. The committee will also agree on the price at which fruit will be offered to Woolworths Supermarkets and IGA Fresh.
- 2.6. Any Participant who wishes to supply fruit at a price below the agreed minimum price may do so individually.
- 2.7. The committee chairman will negotiate on behalf of the Participants with representatives of Woolworths Supermarkets and IGA Fresh with respect to the price of fruit to be supplied. The chairman may agree to sell fruit at any price above the agreed minimum

price. If an order is secured, the committee will determine which Participant(s) will contribute to filling the order. Each Participant is responsible for packaging and transporting their produce (at their own cost) to Woolworths Supermarkets and IGA Fresh.

- 2.8. In the event of a disagreement between the Participants in relation to an order to be filled, the disputed part of the order will be allocated between the Participants in proportion to the total produce they have available to fill that order.
- 2.9. There are no proposed dispute resolution procedures for the collective negotiation process between the Participants and targets. There are also no proposed dispute resolution procedures to deal with disputes which may arise in relation to the terms of contracts entered into with the targets because the Participants anticipate that such disputes will be governed by the standard terms of supply proposed by each supermarket.
- 2.10. The proposed commencement and duration of contracts to be negotiated with the target will be dependent upon the availability of fruit during the growing season.
- 2.11. The Participants advise that they expect the average annual value of the contracts they will each enter into with Woolworths Supermarkets to be \$250 000 and IGA Fresh to be \$100 000.

The citrus industry

- 2.12. The citrus industry is one of Australia's larger horticultural industries. According to the Australian Citrus Growers Inc, total citrus production averaged 680 000 tonnes between 2000/01 and 2004/05. The citrus industry is also Australia's largest fresh fruit exporting industry, with citrus exports of \$201 million in 2002/03 and \$153 million in 2003/04. The gross value of national production was more than \$508 million in 2002/03, of which Queensland produced approximately 22 per cent.¹
- 2.13. Information obtained by the Participants from their state industry body indicates that there are between 160 and 230 citrus growers in Queensland. They estimate that Queensland citrus production is 100 000 tonnes or 16 per cent of Australia's total production. The predominant citrus crop in Queensland is mandarins which are supplied interstate as well as exported to Asia. Other citrus crops grown in Queensland include navel and valencia oranges, lemons, limes and grapefruit.
- 2.14. Like many other horticultural sectors, the citrus industry is characterised by a large number of small growers and a small number of large buyers. In the fresh fruit sector, the major buyers are packers, wholesalers and brokers, and retailers. At the retail level, the majority of fresh fruit is sold by the two major supermarket chains.

¹ The Senate Rural and Regional Affairs and Transport Legislation Committee, *The administration by the Department of Agriculture, Fisheries and Forestry of the citrus canker outbreak*, June 2006.

Horticulture Code

- 2.15. On 14 May 2007 the mandatory Horticulture Code came into effect. The Horticulture Code aims to provide clarity and transparency in trade between growers and wholesaler traders of horticulture produce by clarifying the responsibilities of each. It applies to all horticulture produce agreements entered into on or after the 15 December 2006. The Horticulture Code does not apply to traders who are processors, exporters or retailers.
- 2.16. Under the Horticulture Code, the parties to a dispute concerning a horticulture produce agreement may refer the dispute to the Horticulture Mediation Adviser. When a dispute is referred in this manner, it is mandatory for the parties to the dispute to attend the mediation and try to resolve the dispute.

ACCC consultation

- 2.17. The ACCC sought submissions from nine interested parties potentially affected by the notified arrangement including Woolworths Supermarkets, IGA Fresh, grower organisations, industry associations and government departments.
- 2.18. Three responses were received. No submissions opposed the notification while two submissions supported it. Metcash, on behalf of IGA Fresh, indicated that it has no competition concerns with the proposed arrangement.
- 2.19. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public registers' and 'Authorisations and notifications registers' links.

Important dates

DATE	ACTION
31 July 2007	Lodgement of collective bargaining notifications and supporting submission completed.
31 July 2007	Public consultation process commenced.
13 August 2007	Closing date for submissions from interested parties.
17 August 2007	Closing date for response from the Participants to issues raised in public consultation process.
22 August 2007	ACCC assessment of notified arrangement issued.

Public benefit test

- 2.20. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.
- 2.21. For notifications that involve collective boycott, conduct within the meaning of s. 45(2)(a)(i) or (b)(i) of the Act (exclusionary provisions), or a collective arrangement under which competitors will negotiate prices, the ACCC may object to a collective bargaining notification if it is satisfied:
- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 2.22. For notifications that do not involve collective boycotts (or other exclusionary provisions) or price fixing but involve conduct that may otherwise lessen competition within the meaning of s. 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to a collective bargaining notification if it is satisfied:
- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and
 - the conduct has not resulted or is not likely to result in a benefit to the public or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

3. ACCC assessment

Affected markets

- 3.1. In considering the benefits and detriments associated with collective bargaining arrangements, it often assists to identify the markets affected. Where a market starts and finishes will be influenced by the degree of substitutability of different products and across different geographic areas.
- 3.2. Whilst it may not be necessary to precisely define all of the relevant markets, in this instance the ACCC has identified the following areas of competition that it considers to be relevant to this collective bargaining notification.

Participants' submission

- 3.3. The Participants submit that the relevant market is the market for wholesale supply of citrus fruits within Australia. They advise that this market is seasonal, with supermarkets obtaining supply from Queensland growers during the Queensland growing season and otherwise from growers in southern Australia. The Participants submit that, as a group, they would supply less than five per cent of the total Australian supply.

Wholesale supply of citrus fruits²

- 3.4. The notified arrangement concerns an agreement between competing growers of lemons, mandarins and grapefruit which are supplied as fresh fruit.
- 3.5. The key inputs associated with growing citrus are labour, electricity, fuel, water and fertilisers. Citrus production is highly variable due to climate variability, pests, diseases, water availability and tree physiology (which affects fruit quality and yields). There are long lead times involved in switching production to a different variety or in establishing a new orchard. New plantings may not generate commercial quantities of fruit for eight to ten years.
- 3.6. The citrus industry uses a number of strategies to manage these risks including crop diversification (into different varieties of citrus as well as non-citrus crops such as winegrapes and mangoes), finding off-farm sources of income, use of long-term contracts (such as between growers and processors for the supply of juicing oranges), vertical arrangements (such as growers moving into packing and vice versa) and management practices (such as the use of contract labour).
- 3.7. Once citrus fruit is harvested it needs to be sorted, graded and, for fruit destined for fresh markets, packed and labelled, before being transported to buyers. These activities are referred to within the industry as packing. Packing services are provided in a variety of ways. Some citrus growers choose to pack their produce in their own packing sheds using a combination of family and hired labour. Other growers choose to send their produce to off-farm suppliers of packing services which may be provided by other growers with packing facilities or by specialised packers. Some specialised packers are operated by grower cooperatives while others may be independently owned and operated. Economies of scale may be a more important issue for packing than for citrus growing. This is because most packing processes, unlike some labour-intensive growing tasks such as picking, can be mechanised.
- 3.8. Large retail chains may deal directly with larger enterprises supplying packed fruit instead of buying fruit through wholesalers and brokers.
- 3.9. In retail outlets, citrus fruit competes with other fruit. Citrus fruit tends to face less competition in certain months of the year because other fruit is out of season. Apart from competition from other fruit there is also competition within citrus varieties. Consumer preferences have been moving towards consumption of sweeter fruit such as navels and mandarins. The demand for citrus fruit is also affected by the frequency of promotional activities.

² The information in this section is largely drawn from the Productivity Commission's report on *Citrus Growing and Processing*, 30 April 2002.

- 3.10. Citrus fruit is traded internationally, in both fresh and processed forms. Relative to its exports, Australia imports a small quantity of citrus fruit. The main citrus imports are oranges (mainly navels), lemons and limes.
- 3.11. The ACCC does not have sufficient information to precisely define the relevant markets. It would seem however, that there are some limitations on the substitutability between citrus and other fruit at the wholesale level. While there may also be limitations on the substitutability between different citrus fruit at the wholesale level, for the purposes of this matter, the ACCC will consider the competition for the supply of citrus at the wholesale level in Australia.

The future with or without test

- 3.12. The ACCC uses the ‘future-with-and-without-test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the proposed arrangement.
- 3.13. Given the Participants’ concerns that their proposed arrangements may raise concerns under the competition provisions of the Act, the ACCC considers that the proposed collective bargaining arrangement would be unlikely to occur in the absence of the legal protection afforded by the notifications. The benefits and detriments of the arrangements are therefore compared to the circumstances with individual negotiations.

Effect on competition

- 3.14. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.15. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 3.16. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- the current level of negotiations between individual members of the group and the proposed counterparties is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage or composition of the group
 - there is no boycott activity.

Current level of negotiations

- 3.17. The Productivity Commission released a report on citrus growing and processing in 2002 which noted concerns expressed by growers that they have little negotiating power and must accept the prices or contracts offered by large buyers on a 'take it or leave it' basis.³
- 3.18. Both Growcom and Queensland Citrus Growers Inc submitted that growers are price takers and have very little influence on the wholesale selling price of the goods that they produce.

Voluntary participation

- 3.19. Participation in the collective bargaining arrangement is voluntary. Any Participant who wishes to supply fruit at a price below the agreed minimum price may do so individually. Additionally, the Participants may withdraw from the joint venture on giving 24 hours notice to the other parties.

Coverage or composition of the group

- 3.20. The collective bargaining arrangement described in the notification does not extend beyond Abbotsleigh, Dermark and Bayntun. As noted earlier, the Participants submit that, as a group, they would supply less than five per cent of citrus sold in Australia. This estimate was supported by the Queensland Citrus Growers Inc.
- 3.21. The vast majority of citrus growers in Australia remain outside the group.

Boycott activity

- 3.22. The notified conduct does not provide for Abbotsleigh, Dermark or Bayntun to engage in collective boycott activity.

Public benefits

- 3.23. In considering collective bargaining arrangements previously, the ACCC has accepted a broad range of public benefits that might arise and in particular:
- providing small business with an opportunity for increased input into contracts;
 - transaction costs savings arising from one negotiation process;
 - increasing the availability of information leading to more informed decisions;
 - dynamic efficiencies such as facilitating new ways to compete.
- 3.24. In this case, the Participants submit that collectively they will have the opportunity to have access to a market from which they are otherwise excluded due to their inability to supply sufficient volumes of produce on a regular basis. They consider that the result will

³ Productivity Commission, *Citrus Growing and Processing Inquiry Report*, Report No. 20, 30 April 2002.

be potentially improved competition in the market for the wholesale supply of citrus fruits.

- 3.25. This is akin to the dynamic efficiencies that the ACCC has recognised in past matters. The ACCC considers that collective bargaining arrangements can result in benefits to the public by increasing the ability of the collective bargaining group to supply new areas or increase competition in an existing market.
- 3.26. In this case, the ACCC understands that the Participants do not produce a sufficient quantity of citrus fruit on an individual basis to be considered a viable source of direct supply for Woolworths Supermarkets or IGA Fresh. To the extent that the proposed collective bargaining arrangement enables the Participants to supply supermarkets directly and more efficiently than is currently possible, it gives rise to some public benefit.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.21.
- 4.2. Consistent with that test the ACCC will object where it is satisfied:
 - that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 4.3. Having regard to the claims by the applicant and the issues raised by interested parties, the ACCC is not satisfied that the detriments likely to arise from the notified arrangement would outweigh the identified benefits.
- 4.4. The ACCC identified a number of features which mitigate against the potential for anti-competitive impact including the respective bargaining positions of the Participants and the counterparties. Additionally, the arrangement impacts on a limited section of the industry, is voluntary and does not involve potential boycotts.
- 4.5. Importantly, the ACCC considers that the proposed collective bargaining arrangement may enable the Participants to supply supermarkets directly and more efficiently than is possible individually.
- 4.6. Accordingly, the ACCC does not object to notifications CB00001 and CB00002. Immunity from legal action provided by notifications CB00001 and CB00002 commences on 28 August 2007 and will expire three years after the date of lodgement (31 July 2010).
- 4.7. As with any notification, the ACCC may review these notifications at a later stage should concerns arise.