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Ms Marie Dalins  
Director – Adjudication Branch  
Australian Competition and Consumer Commission  
Level 35, The Tower  
360 Elizabeth Street  
MELBOURNE VIC 3000

**18 January 2012**

Dear Ms Dalins

**Victorian Farmers Federation Horticulture Group – Australian Processing  
Tomato Growers – Application for Authorisation A91270 (Authorisation  
Application)**

We refer to the ACCC's Draft Determination in respect of the Authorisation  
Application.

**Enclosed** is Cedenco's submission in response to the Draft Determination.

Yours sincerely

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## **CEDENCO AUSTRALIA PTY LTD – SUBMISSIONS IN RESPONSE TO DRAFT DETERMINATION**

### **1. BACKGROUND**

On 26 August 2011, the Australian Processing Tomato Growers (**APTG**), a branch of the Victorian Farmers Federation's Horticulture Group, lodged an application for authorisation (A91270) with the Australian Competition Consumer Commission (**the Commission**). The APTG is seeking authorisation for its current and future members to collectively bargain with tomato processors about the terms and conditions of contracts for the supply of field grown tomatoes for processing (**APTG collective bargaining application**).

Cedenco Australia Pty Ltd (**Cedenco**), a tomato processor based in Echuca, opposes the APTG collective bargaining application. Cedenco lodged written submissions on 3 October 2011 setting out its reasons for opposing the authorisation, and met with ACCC staff on 7 November 2011 to make further oral submissions.

The Commission released its Draft Determination in respect of APTG's collective bargaining application on 13 December 2011 (**Draft Determination**). The Draft Determination proposed to grant, for a period of five years, the authorisation sought by APTG. The Commission has invited submissions from interested parties on its Draft Determination.

### **2. OVERVIEW OF CEDENCO'S SUBMISSIONS**

#### **2.1 Summary of Cedenco's submissions on Draft Determination**

Cedenco submits that:

- The Commission was incorrect in its Draft Determination to propose to grant authorisation to the APTG's collective bargaining application for a period of five years.
- The Commission's final determination should be to refuse authorisation to the APTG's collective bargaining application.
- Alternatively, if the Commission does grant authorisation to the APTG's collective bargaining application, Cedenco submits that the authorisation should be limited:
  - to a term of no more than two years; and
  - in scope such that the collective bargaining activities of APTG do not extend to growers who operate a tomato processing business, or have an interest in a tomato processing business (as envisaged in the Draft Determination). In the event that the Goulburn Valley Food Action Committee's (**GVAFC**) proposal to establish a new tomato processing co-operative does proceed, and APTG members form part of that co-operative, Cedenco submits that such growers should not be authorised to participate in collective bargaining with Cedenco (or any other processor).

#### **2.2 Commission's rationale for proposing to grant authorisation is incorrect**

The Commission's key reasons in its Draft Determination for proposing to grant the authorisation were that the Commission considers that the proposed collective bargaining process is likely to:

- generate public benefits by facilitating greater grower input into the terms and conditions of contracts with processors, which will help parties identify greater

efficiencies.<sup>1</sup> In reaching this conclusion, the Commission appears to accept the contention that the level of negotiation between Cedenco and tomato growers is low, and that growers have limited input into the terms and conditions of their contracts;<sup>2</sup> and

- result in some public benefits from lower transaction costs.<sup>3</sup>

Cedenco submits that the Commission's conclusions on these issues are incorrect, and that the material provided to the Commission in respect of APTG's application does not support these conclusions. Therefore, the Commission should conclude in its final determination that there is no evidence that the proposed collective bargaining application will result in public benefits, and consequently that authorisation should not be granted to the APTG's collective bargaining application.

In fact, Cedenco considers that the material provided in its previous submissions demonstrates that the Commission's conclusions noted above are incorrect. Cedenco continues to rely on those submissions, but in this response to the Commission's Draft Determination, Cedenco will take the opportunity to reiterate, or clarify, some matters raised in earlier submissions.

These matters are discussed in more detail below, but in brief:

- The contention that growers currently have limited input into the terms and conditions of their contracts is simply incorrect as a matter of fact as:
  - Cedenco's contract negotiation process affords growers the opportunity to have significant and meaningful input into the terms of their contracts; and
  - this high level of input is reflected in the substance of the contracts, which are tailored to address the individual circumstances of growers.
- Cedenco submits that the Commission does not have an objective basis for concluding the proposed collective bargaining process will assist the parties in identifying greater efficiencies, such as more efficiently resolving common contractual issues.<sup>4</sup>
- Cedenco submits that the proposed collective bargaining process will not reduce transaction costs. As explained previously (and reiterated below), if a collective negotiation process is authorised, Cedenco will still need to undertake individual negotiations with growers to ensure that their contracts are appropriately tailored to the requirements and circumstances of the grower and Cedenco. The proposed collective bargaining process will simply create an additional administrative burden for Cedenco (and the growers).

### 2.3 Other matters

The issue of grower input into supply contracts and transactions costs are the subject of more detailed submissions below, but Cedenco also makes the following submissions:

- Cedenco reiterates that:
  - it is in a relatively weak bargaining position as compared to the growers; and

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<sup>1</sup> See paragraphs 4.54, 4.80 and 4.133

<sup>2</sup> For example, the statement in paragraph 4.135 of the Draft Determination.

<sup>3</sup> See paragraphs 4.73, 4.81 and 4.134.

<sup>4</sup> For example, see statement in paragraph 4.133 of the Draft Determination.

- technical and industry knowledge can be (and is) disseminated amongst growers without the proposed collective bargaining process (which appears to have been accepted by the Commission).

However, these issues were not material to the Commission's Draft Determination, and will not be addressed further in these submissions.

- Cedenco also reiterates that, despite the Commission's conclusions in its Draft Determination, it is concerned that the dynamics of the proposed collective bargaining process make it more likely that growers will "hold out" on Cedenco, particularly as growers have the ability to undertake alternative activities to tomato growing which makes this type of conduct credible. However, Cedenco will not make further submissions on this issue.

## 2.4 Limitations on authorisation if granted

If, in spite of Cedenco's submissions, the Commission does decide to grant authorisation to ATPG's collective bargaining application, Cedenco submits that:

- It would not be appropriate to grant authorisation for a term of five years, and that the term should be no longer than two years. Cedenco submits that, within this timeframe, it will be clear if the collective bargaining process:
  - does assist the parties in identifying efficiencies in the contract negotiation process; and
  - does reduce transaction costs.

If the collective bargaining process does facilitate these outcomes, then it will be possible for a further authorisation to be granted following the two year term.

- As stated above, if the Commission does grant authorisation to the proposed collective bargaining process then the scope of the authorisation should be limited to exclude growers that have an interest in tomato processing operations.

## SUBMISSIONS IN DETAIL

### 3. GROWER INPUT INTO THE TERMS AND CONDITIONS OF CONTRACTS

#### 3.1 Growers currently have a high level of input into their contracts

The Commission's conclusion that there will be a public benefit from increased grower input into the terms and conditions of their contracts with Cedenco flows from the contention that growers currently have limited input into the terms and conditions of their contracts.

This contention is simply incorrect. In fact, growers have a high degree of input into their contracts.

As has been explained previously, Cedenco undertakes individual negotiations with each grower about contracts for the upcoming season (mainly over the course of March and April), and this process allows for growers to have a high level of input into the terms and conditions of their contracts. Specifically:

- Cedenco will typically meet with each grower on his/her farm to discuss the supply contract for the upcoming season.
- Cedenco's meetings with the growers at their farms:
  - allows Cedenco to explain to growers its requirements and plans for the upcoming season;

- provides growers with the opportunity to explain their circumstances and requirements, and how they would like to have the terms and condition of their contracts tailored to reflect these circumstances; and
- provides Cedenco with a first hand understanding of the circumstances and requirements of the individual growers.

In 2011, Cedenco held initial meetings with all of its active growers (12) at their respective properties over the course of March and April to discuss proposed supply arrangements for the upcoming season, including proposed price, volumes and harvesting costs. By way of example, Cedenco had the following discussions with growers on 30 March 2011:

- Grower A – Grower A indicated that he was agreeable to the proposed price and volumes, but was concerned about the increase in harvesting costs. Grower A was not prepared to make a decision about committing to growing in the upcoming season until his current harvest was complete.
- Grower B – Grower B also indicated that he would not be prepared to commit to growing in the upcoming season until harvesting for the current season was completed. Grower B indicated that he may seek seasonal funding.
- Growers C and D - Growers C and D indicated that they were agreeable to the proposed terms and conditions for the upcoming season. They requested that Cedenco prepare a contract and that they would discuss further.

Following these initial meetings, Cedenco provided all of its growers with further information about the proposed supply arrangements, and had further telephone discussions with the growers. Cedenco also held at least one further meeting with each of the growers on their respective properties to discuss the proposed supply arrangements. In terms of the outcome of discussions with the growers noted above:

- Grower A – Grower A agreed to the proposed terms and Cedenco received a signed contract from Grower A on 31 May 2011.
- Grower B – Following a number of discussions, Cedenco declined Grower B's request for seasonal funding (although, there have been instances where Cedenco has provided assistance with seasonal funding). Grower B did not enter into a supply contract with Cedenco until near the end of October 2011.
- Growers C and D – Growers C and D requested changes to their proposed delivery schedule, and Cedenco had to follow up these growers to obtain signed contracts. Cedenco eventually received signed contracts from Growers C and D on 30 June 2011.

These examples of individual negotiations last year reflect that the negotiation process does allow growers the opportunity to have input into their contracts, and that the substance of negotiations tends to differ from grower to grower.

Quite apart from having a process that allows each grower to have input into their contracts, as explained previously, Cedenco tailors its contracts to suit the individual circumstances, requirements and requests of its growers. By way of example, Cedenco will take account of:

- the preferences and capabilities of growers as to the varieties of tomatoes that they wish to produce;
- when the different growers want their tomatoes to be ready for harvest;
- the distance of growers from Cedenco's plant (eg, not necessarily reflecting the full cost of transport in the price paid to growers whose farms are relatively distant from Cedenco's plant); and

- requests from growers for pre-payment, or to have the option of supplying tomatoes in excess of contracted volumes.

Some specific examples of how Cedenco's contracts have been tailored to suit the individual requirements and requests of growers include:

- paying premiums to growers who provide tomatoes to Cedenco early in the season;
- providing assistance with seasonal funding;
- allowing the grower to undertake harvesting; and
- in one instance, permitting a grower to have proprietary use of a Cedenco harvester for the length of the season.

Therefore, Cedenco submits that, in light of the above, it is simply incorrect to state that the level of negotiation between Cedenco and its growers is low, or that growers are not afforded the opportunity to have meaningful input into their contracts. In fact, growers do have a high level of input into the terms and conditions of their contracts, and this input is reflected in the substance of their contracts.

Also, as explained in previous submissions and noted elsewhere in this submission, the proposed collective bargaining process will not be an effective or appropriate means of ensuring that contracts reflect the individual circumstances or requirements of growers. That is, the committee representing the growers in the collective negotiation process will not be able to negotiate the terms and conditions of contracts in a manner that effectively addresses the circumstances of each individual grower.

This is reflected in the specific examples of grower negotiation set out above, where the nature of the requests differed as between each of the growers, reflecting their different circumstances. A collective bargaining process would not be an effective or appropriate means for resolving the diverse range of requests from individual growers. In fact, it is likely to be more difficult for Cedenco to take account of the individual requirements of growers in a collective bargaining process as other growers are likely to be concerned about what they may consider to be advantageous treatment of an individual grower.

To put it another way, the level of meaningful input that individual growers will have into the terms and conditions of their contracts will be less under a collective bargaining process (where the grower representatives will have a more limited knowledge of the circumstances of the grower they are representing than the grower himself/herself) than is the case under the current process of individual negotiation (which will, in any event, need to continue if there is an additional collective bargaining process).

### **3.2 Collective bargaining is not likely to result in efficiencies in negotiation of terms and conditions of contracts**

The Commission concludes in paragraph 4.80 of its Draft Determination that the proposed collective bargaining process (facilitating greater grower input into the terms and conditions of contracts) is likely to assist the parties in identifying greater efficiencies, such as more efficiently identifying and resolving common contractual issues.

As noted above, Cedenco submits that:

- the level of grower input into contracts is already high; and
- the collective bargaining process will not be an appropriate or effective mechanism for increasing the level of grower input into the terms of their individual contracts.

Cedenco further submits that the conclusion in paragraph 4.80 is inconsistent with the practical reality of negotiating supply contracts. Namely:

- Key terms and conditions, such as the quantity of tomatoes to be grown, what varieties of tomatoes will be grown, and when they will be ready for harvest are all negotiated individually, and must be negotiated individually to take account of the circumstances and preferences of the individual grower.
- These types of matters are not capable of being addressed through the proposed collective negotiation process, and Cedenco will need to continue to engage in individual negotiations with growers to settle the terms of contracts each season. That is, there is no possibility of the proposed collective negotiation process resulting in efficiencies in the resolution of these types of matters.
- While it is the case that Cedenco typically applies some standard terms and conditions to each of its grower contracts, the matters covered by these standard terms and conditions (eg, payment and delivery terms, force majeure provisions and the like) are generally not contentious. If any issues do arise with these standard terms they are resolved efficiently. In this regard, Cedenco notes the matters discussed at its meeting with ACCC staff on 7 November 2011.

Having regard to these facts, Cedenco submits that the Commission does not have an objective basis for its finding that the proposed collective bargaining process will lead to efficiencies in the negotiation process.

Cedenco submits that it is telling that the Draft Determination does not identify any specific contractual matters that are likely to be resolved more efficiently under the collective bargaining process. Rather, the Draft Determination simply states, in a general sense, that the collective bargaining process may assist in resolving contractual matters more efficiently.

#### *Price negotiations*

Paragraph 4.62 of the Draft Determination states that Cedenco acknowledges that price may be appropriately settled by collective bargaining, being base price subject to adjustments for:

- premium/demium based on the level of total soluble solids in the tomatoes;
- distance from the plant for freight costs;
- seedlings purchased by Cedenco; and
- harvesting.

While Cedenco acknowledges that there is generally a common approach taken to pricing, it considers that there are likely to be significant difficulties in settling the price (and formula for adjusting price) through a collective bargaining process.

For example, as explained at the meeting on 7 November 2011, while the price paid to growers that are situated further away from Cedenco's plant is subject to some adjustment to take account of higher freight costs (eg, these growers are paid a lower price than growers whose farms are more proximate), this adjustment does not reflect the full freight cost. That is, there is some "cross subsidy" for growers on farms that are more distant from Cedenco's plant.

Cedenco considers that there are a number of benefits that flow from this approach, such as assisting in maintaining:

- the number of active growers (as explained in previous submissions, the number of growers has declined in recent years, and if growers on more distant farms had to incur the full cost of transport then it is likely that they would exit the industry); and

- the geographical diversity of growers, which is important as growers in more northerly regions can often harvest fruit earlier in the season, and a broader spread of growers provides more of a “hedge” against adverse climatic or other growing conditions in a particular region.

However, individual growers will not necessarily agree that growers on more distant farms should receive the cross subsidy for transport. For example, growers on farms that are proximate to Cedenco’s plant may take the view that Cedenco should not be providing a cross subsidy to growers on more distant farms. Consequently, Cedenco considers that there will be difficulties in growers themselves reaching a common position on price as they will have divergent interests and incentives.

This example reflects that, in practice, it is likely to be difficult (and inefficient) to seek to negotiate a common position on price with grower representatives through a collective negotiation process.

Also, while not accepted by the Commission in its Draft Determination, Cedenco does reiterate that it is concerned that the dynamics of a collective negotiation process will make it more likely that growers will “hold out” on Cedenco by choosing not to supply fruit for a particular season (or delaying the decision until the latter part of the year). Growers are most likely to engage in this type of “hold out” in respect of price negotiations (or some other related benefit).

#### **4. COLLECTIVE BARGAINING PROCESS WILL INCREASE TRANSACTION COSTS**

The Commission concludes in its Draft Determination that it considers that a collective bargaining process will result in some public benefits from lower transaction costs. In reaching this conclusion the Commission notes that:

- absent the authorisation growers are likely to negotiate individually with processors, and that individual processors and growers would be responsible for the costs of these negotiations;<sup>5</sup>
- collective bargaining is likely to result in fewer negotiations with lower total transaction costs;<sup>6</sup>
- irrespective of whether all terms can be negotiated individually, there will be transaction cost savings from a core level of terms being negotiated collectively;<sup>7</sup> and
- the proposed collective bargaining process is voluntary, and Cedenco can continue with its current practice if it sees no benefit in collective bargaining.<sup>8</sup>

Cedenco submits that the Commission has not been provided with material that can objectively support these findings, and these findings are contradicted by information provided by Cedenco in its previous submissions. Namely:

- With or without the proposed collective bargaining process being authorised, it will be necessary for Cedenco to conduct individual negotiations with growers in much the same manner as they are currently conducted. These negotiations will need to be undertaken regardless of whether there is a collective bargaining process.

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<sup>5</sup> Paragraphs 4.66 and 4.67

<sup>6</sup> Paragraph 4.69.

<sup>7</sup> Paragraph 4.70

<sup>8</sup> Paragraphs 4.71 and 4.72



- The collective bargaining process will not result in fewer negotiations with lower total transactions costs. Rather, it will increase the number of negotiations that take place as it will be necessary for Cedenco to engage in individual negotiation with all of the growers in same manner as it currently does, and then also participate in the additional collective bargaining process. Similarly, individual growers will also need to continue to participate in individual negotiations with Cedenco, as well as providing input into the collective bargaining process.
- The Commission's Draft Determination notes that there are a "core level" of terms that can be negotiated collectively, but the Draft Determination does not identify these core level of terms. As explained above, there are some standard terms and conditions that Cedenco does apply to its contracts, but to the extent these require negotiation, this process is already undertaken efficiently and does not require an authorised collective bargaining process.
- While the collective bargaining process will, strictly speaking, be voluntary the practical reality is that Cedenco would have to participate in such a process in good faith, or it would risk damaging its relationship with growers across the industry.

For all of the above reasons, Cedenco submits that the Commission did not have an objective basis for concluding in its Draft Determination that the proposed collective bargaining process is likely to result in lower transaction costs, and the Commission should not maintain this position in its final determination.

## **5. EXCLUSION OF GROWERS WHO HAVE INTERESTS IN PROCESSORS**

Cedenco supports the conclusion of the Commission that, in the event that the collective bargaining process is authorised, growers that operate tomato processing business, or who have a legal or equitable interest in tomato processing operations, should be excluded from participating in the collective negotiation process.

Cedenco submits that it is also important that the Commission establishes measures to ensure that there is effective compliance with, and monitoring of, this limitation.

By way of example, Cedenco considers that the following types of measures should be in place to ensure compliance with an exclusion on the participation of growers who operate a tomato processing business, or have an interest in a tomato processor, in any collective bargaining process:

- All growers participating in a collective bargaining process would have to declare to the Commission that they have no interest in a tomato processor (either as an owner or operator), and provide this undertaking on an annual basis prior to March of each year.
- If a grower takes an interest in a processing operation subsequent to making such a declaration, the grower would be required to notify the Commission as soon as this occurs and be excluded from the collective negotiation process.
- All new growers seeking to participate in the collective bargaining process would need to declare that they have no interest in tomato processing operations.
- Given that growers with interest in processing operations could continue to participate in APTG activities apart from collective bargaining, ring-fencing measures would need to be put in place to ensure that these growers were not involved in (or aware of the details of) the collective bargaining process. For example:
  - participants in the collective bargaining process would need to undertake measures to ensure that correspondence and communications relating to the process was not shared with excluded growers; and

- participants in the collective bargaining process would need to undertake not to discuss or disclose any information relating to the collective bargaining process with (or to) excluded growers.

Finally, Cedenco submits that, if the GVFAFC's proposed tomato processing co-operative does proceed, and a number of growers participate, then this will be a material change to the circumstances in which the current application for authorisation is being assessed. Therefore, if the Commission does authorise the proposed collective bargaining process, it would need to reconsider that decision in the event that the GVFAFC's proposed co-operative were to proceed.