Determination

Application for revocation of A91197 and substitution with authorisation A91467

lodged by

the Tasmanian Farmers and Graziers Association

to

collectively negotiate the terms and conditions of growing contracts with vegetable processors in Tasmania

Date: 4 March 2015

Authorisation number: A91467

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker
Summary

The ACCC grants authorisation to vegetable grower members of the Tasmanian Farmers and Graziers Association to collectively negotiate the terms and conditions of growing contracts with vegetable processors in Tasmania. The ACCC grants authorisation until 26 March 2025.

The application for authorisation

1. On 4 November 2014 the Tasmanian Farmers and Graziers Association (TFGA) applied for the revocation of authorisation A91197, and the substitution of authorisation A91467 (re-authorisation). The TFGA is seeking re-authorisation to continue to collectively negotiate the terms and conditions of growing contracts with vegetable processors in Tasmania (the Conduct).

2. The Conduct was first authorised by the ACCC in 2004 and enables present and future TFGA vegetable grower members to collectively negotiate the terms and conditions of growing contracts with McCain Foods (Aust) Pty Ltd (McCain) and Simplot Australia Pty Ltd (Simplot), and any future vegetable processor in Tasmania. The TFGA does not contract with processors itself but rather assists its members in collective negotiations with processors.

3. Collective negotiations occur in groups on the basis of each commodity and the particular processor supplied. The TFGA advises it currently operates and manages the following commodity groups:
   - Simplot processed potato growers group
   - Simplot seed potato growers group
   - Simplot pea growers group
   - Simplot bean growers group
   - Simplot carrot growers group
   - Simplot brassica growers group
   - McCain processed potato growers group
   - McCain seed potato growers group.

4. Each of the negotiating commodity groups acts autonomously and negotiates with the processors separately. The TFGA’s role is to:
   - obtain and disseminate relevant information to each of the commodity groups to assist with price and contract deliberations
   - provide administrative assistance to the commodity groups with secretariat support and general lobbying on issues affecting members
   - join the commodity groups during meetings with the processors to discuss price and contract arrangements.

5. On 17 December the ACCC issued a draft determination proposing to grant authorisation to the Conduct for 10 years. A conference was not requested in relation to the draft determination.
Background

6. The total gross value of vegetable production in Tasmania in 2010–11 was $184 million.\(^1\) Tasmania accounts for 30% of Australian production of processed vegetables. The majority of farms in Tasmania are small, with 45% of farms producing less than $50,000 of produce per year.\(^2\) The potato industry makes up approximately 70% of the total value of vegetable production in Tasmania,\(^3\) of which 225,000 tonnes are supplied to processors and 27,000 tonnes supplied to the fresh market.\(^4\)

7. Simplot and McCain are the only vegetable processors currently operating in Tasmania. Simplot manufactures frozen, canned and baked food products and is wholly owned by its US parent company, JR Simplot. Simplot operates two vegetable processing facilities in Tasmania. McCain produces and distributes frozen food products including fruit and vegetables, potatoes, meals and snacks. McCain is a wholly owned subsidiary of Canadian company McCain Foods. McCain operates one vegetable processing facility in Tasmania. This facility now only processes potatoes after the closure of McCain’s Tasmanian processing facility for other vegetables in 2010.\(^5\)

8. The TFGA is Tasmania’s peak agricultural body and represents over 5000 Tasmanian producers of meat, wool, dairy and vegetables. The ACCC has authorised collective negotiation arrangements between vegetable grower members of the TFGA and vegetable processors since November 2004. The ACCC understands that some of the TFGA’s producer members negotiate year to year while others have longer term contracts.\(^6\)

Consultation

9. The ACCC invited submissions from five potentially interested parties seeking comment on the application for re-authorisation. Simplot does not oppose the re-authorisation and recognises that benefits have resulted from the previously authorised collective bargaining arrangements. McCain does not support the application as it does not believe that re-authorisation is likely to result in public benefits. Following the draft determination, the ACCC invited further submissions but did not receive any in response.

10. Further information in relation to the application for re-authorisation, including any public submissions received by the ACCC, may be obtained from the ACCC’s website www.accc.gov.au/authorisations.

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\(^2\) ABARES, *op cit.*


\(^4\) ABARES, *op cit.*


\(^6\) Tasmanian Farmers & Graziers Association (TFGA), Application for authorisation A91467,
ACCC assessment

11. The ACCC’s assessment of the Conduct is in accordance with the relevant net public benefits tests\(^7\) contained in the *Competition and Consumer Act 2010* (the CCA).

12. In its assessment of the application the ACCC has taken into account:

- the application, and views expressed by interested parties;\(^8\)
- other relevant information available to the ACCC, including information from consideration of previous matters;\(^9\)
- the likely future without the Conduct that is the subject of the authorisation.\(^10\) In particular, the ACCC considers that, absent the Conduct, it is likely that growers would negotiate the terms and conditions of growing contracts with processors on an individual basis;
- the relevant areas of competition likely to be affected by the Conduct, particularly competition between suppliers of vegetables to Tasmanian food processors, and competition between suppliers of vegetables to retailers and food service industries;
- the five year re-authorisation period requested; and
- that no collective boycott activity is proposed and participation in the Conduct is voluntary for both growers and processors.

Public benefits

13. The ACCC notes that Simplot acknowledges the collective bargaining has resulted in benefits and the ACCC considers that the Conduct is likely to continue to result in public benefits where collective bargaining takes place, in the form of:

- **Transaction cost savings:** An individual grower negotiating with a processor will incur transaction costs (such as legal and expert advice, and the time taken to negotiate). The processor will also incur transactions costs in negotiating with individual growers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits to be realised for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. It may in fact mean that no negotiation occurs at all and growers are effectively provided with a standard form contract prepared by a processor. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of legal and expert advisor costs for growers. By reducing the costs of negotiating for all parties, it is likely that more contractual issues will be able to be addressed, because each party can obtain the benefit from negotiating these issues at less cost to themselves, resulting in more comprehensive and efficient contracts of greater benefit to all parties.

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\(^7\) Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.
\(^8\) Please see the ACCC’s Public Register for more details, including a list of parties consulted.
\(^9\) See, for example, A91322 granted to the South East Potato Growers Association, and A91321 granted to the Victorian Potato Growers Council, on 12 December 2012.
\(^10\) For more discussion see paragraphs 5.20-5.23 of the ACCC’s Authorisation Guidelines.
• **Improved input into contracts:** The ACCC accepts that when negotiating with large suppliers, small businesses can be at a disadvantage, in terms of resources and experience of negotiating in complex commercial environments. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of TFGA members and processors, in relation to common issues. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with processors to achieve more efficient outcomes.

14. The ACCC also notes the voluntary nature of the conduct and that parties who do not anticipate a benefit from the conduct will presumably elect not to participate. To the extent this is likely to occur, it will reduce the total potential benefits which result from the Conduct. In this regard the ACCC notes that the authorisation tests require the ACCC to be satisfied of a likely net public benefit. The ACCC will take into account benefits or detriments that have a real chance of arising. It is not necessary to show that the benefits or detriments are certain to occur, or that it is more probable than not they will occur, however claims that are purely speculative in nature will not be given any weight. For this reason the ACCC considers it is not necessary that it be certain that bargaining will occur as a result of granting of authorisation.

**Public detriments**

15. The ACCC considers that any detriment resulting from the Conduct is likely to be limited by its voluntary nature and the absence of any boycott activity. The ACCC therefore considers that minimal detriment is likely to result from the Conduct.

16. The ACCC notes that any bargaining group is unlikely to be homogenous in composition and the application of a ‘one size fits all’ collectively negotiated contract could lead to inefficient outcomes, such as by rewarding inefficient growers within the bargaining group. However, collective bargaining will not necessarily result in a single outcome applied uniformly to all participants. It may, for example, result in a schedule of terms and conditions which rewards more efficient growers. Alternatively, because participation in the collective is voluntary, more efficient growers have the option of negotiating separately and seeking to agree terms and conditions that better reflect their circumstances.

**Balance of public benefit and detriment**

17. For the reasons outlined in this determination, on balance, the ACCC considers that the Conduct is likely to result in public benefit that would outweigh any public detriment, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

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11 *Re VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT 2 at 83.
Length of authorisation

18. The TFGA seeks authorisation for a further period of 5 years. The TFGA submits the period is appropriate to allow its members to negotiate longer term contracts where appropriate and to provide greater certainty regarding the negotiating environment for those growers to negotiate year to year.

19. Where arrangements have already been in place for a period of time the ACCC may consider it appropriate to grant authorisation for a longer period of time. Given that the Conduct is voluntary for both growers and processors and that the Conduct has been authorised since 2004, the ACCC considers granting re-authorisation for ten years is appropriate.

Determination

The application

20. The application for re-authorisation was made using a Form FC, under subsection 91C(1) of the CCA. Re-authorisation is sought to continue to make and give effect to agreements between the TFGA’s vegetable producer members in relation to the collective negotiation of the terms and conditions of growing contracts with vegetable processors in Tasmania.

21. Re-authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

The net public benefit test

22. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the Conduct.

Conduct authorised

23. The ACCC revokes authorisation A91197 and grants authorisation A91467 in substitution. Authorisation A91467 allows vegetable grower members of the TFGA to form negotiating groups to collectively bargain with vegetable processors in Tasmania for a period of ten years. Negotiating groups will continue to be based on the commodity they supply and the processor they provide growing services to. Participation in the Conduct is voluntary for both growers and processors.

24. Under section 88(10) of the CCA, the ACCC extends the authorisation to future parties to the Conduct.

25. The authorisation does not extend to:

- the commodity grower groups engaging in boycott activity, or
• collective negotiations being conducted by a common representative across more than one negotiating commodity group.

26. The ACCC grants authorisation until 26 March 2025.

**Date authorisation comes into effect**

27. This determination is made on 4 March 2015. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 26 March 2015.