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SUBMISSION TO THE COMPETITION POLICY REVIEW

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Executive Summary

The Australian Chicken Growers Council (ACGC) represents the interests of contract chicken and turkey meat growers in Australia. With the move away from state regulated authorisation for collective bargaining to the authorisation process provided by the Australian Competition and Consumer Commission ACGC believes that there is a need to make further changes to the conditions under which these authorisations are approved.

These changes include;

1) Where a group of growers has been granted authorisation to collectively bargain with the processor to whom they are contracted, the processor must be required to negotiate with that group. Also the processor should have no right to attempt to exclude any grower from joining the authorised negotiating group if they wish to do so.

2) Under the current arrangements there are no provisions for bringing a negotiation to finality unless this is done within a current contract. This could be achieved in two ways. The first is to grant the right to boycott under strictly controlled conditions and the second is to provide for compulsory arbitration with both parties agreeing to abide by the determination of the arbiter. If there is no such mechanism in place then negotiations can drag on for considerable periods of time sometimes measured in years rather than in months or weeks with significantly detrimental effects on the grower's income.

3) Appropriate changes to the unfair and unconscionable conduct provisions of the current Act might also be a way of helping correct the imbalance in bargaining power between a grower and his processor. Given the difficulties associated with changing to another processor which is often based on geographical location a grower can be faced with a "take it or leave it" proposition from a processor when negotiating fees and/or contracts. This is particularly a problem where a processor decides he will only deal with growers one-on-one. This, of course, becomes less of a problem if the mechanisms outlined in 1) and 2) above were part of the authorisation process

4) The supermarkets can introduce another layer of complexity into the issue as they can make arbitrary demands of processors which can flow back to the growers as it is in the case of Coles and Woolworths deciding that all their home brand chicken products should be grown under the RSPCA accredited farming scheme which will increase operational costs the industry and possibly reduce consumer choice.

General comments

1) These issues of bargaining imbalance and exploitation of suppliers by processors are dealt with as competition issues with a focus on outcomes for consumers.

2) In the context of authorisations, public benefit seems to be essentially consumer benefit, despite statements in a number of cases to the contrary.

3) Whether for the purposes of the boycott provisions there is any competition issue, given that by reason of the manner in which the chicken meat industry is structured, growers dealing with processors do not compete with each other, and in any event they are authorised to act collectively. An exclusionary provision is defined in the legislation as one made between competitors.

4) When does collective bargaining become a boycott of growers unable to reach agreement with the processor and stand firm on the final position that they will not supply except on their terms. Is probably has more force in the situation where contracts have expired but may still be applicable in the context of a contractual situation requiring periodically reviews. There must be a limit as to how long growers must continue to slide fee levels applicable to previous years. (this can be overcome if there is provision in a contract for compulsory arbitration).

5) The question must be raised whether the boycott issue could be resolved by the amendment recommended by the Dawson review in 2003 (but not adopted) to confine an exclusionary provision to one directed at a competitor of one or more of the parties to the exclusionary provision. This would appear to have the result than agreement by growers to refuse supplied to a processor would not be an exclusionary provision requiring authorisation. Presumably it would still be regarded as an agreement likely to lessen competition and the question would be whether it files within the conduct permitted under any applicable collective bargaining authorisation.

Australian Chicken Growers Council (ACGC) represents the interests of contract meat chicken and turkey growers nationally through six state organisations.

These are:

- New South Wales Farmers Association Poultry Meat Group
- Queensland Chicken Growers Association,
- South Australian Poultry Meat Group.
- Tasmanian Farmers and Graziers Association Chicken Meat Group,
- Victorian Farmers Federation Chicken Meat Group,
- West Australian Broiler Growers Association.

The Australian Chicken Growers Council welcomes the opportunity to provide a response to this review of Competition Policy

Some 700 contract growers grow about 80% of the chicken and turkey meat produced in Australia. The capital investment of the growers represents about 45% of the total capital invested in the industry. Shedding has become more technologically advanced and hence relatively more expensive over time to make sure that the growing facilities keep pace with advances in other areas of the industry eg improved genetics and to respond to increased climate variability in some localities. As would be expected the average size of farms has increased over time partly as a response to economies of scale and partly because getting approvals for new farms is both time consuming and costly.

Contract meat chicken and turkey growers clearly have a significant investment in fixed assets, which are essentially designed to grow poultry in. The industry is vertically integrated. The processors in some circumstances may own the breeding facilities but in all cases are the owner of the chickens or turkeys. The processor owns the feed it supplies and provides technical and veterinary advice to the farm. This is usually take the form of a detailed growers manual which the grower is required to follow as part of his contractual arrangements with the processor. The processor will also determine at what age/weight the birds will be processed at and arranges the pickup of these birds accordingly.

The grower supplies the shedding, energy (gas and electricity), labour and the necessary management that will allow the bird to reach its genetic potential both in terms of growth rate , feed conversion and meets the welfare requirements of the birds.
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The specialised non-portable nature of the assets, their location and the contractual arrangements essentially make the grower economically and often geographically captive.

During the 1970s all mainland states recognising the imbalance in bargaining power introduced legislation which essentially provided protection for collective bargaining with state committees made up of processors and growers, with at least one independent member as the chair, negotiating terms and conditions of contracts including a “growing fee” and dealing with any disputes that may arise.

With the competition reviews of the late 90s the existing legislation in a number of states was either modified, repealed or suspended and replaced by an authorisation under the then Trade Practices Act. More recently those states that still have legislation have decided to seek

authorisation in lieu of state legislation as the existing legislation was in reality delivering little more than could be achieved under an authorisation process by the ACCC although recognising there were some shortcomings in the process.

The authorisation essentially allows growers who are contracted to a particular processor to negotiate collectively with that processor although importantly nothing compels a processor to negotiate with the collective group which is a significant shortcoming compared to what was required under State legislation.

While this process can work reasonably well where there is good faith on both sides, it has still not addressed the inherent imbalance of bargaining power between processor and growers. Growers often have very little leverage in negotiations over fees and conditions as they simply cannot transfer their contracts in most cases. Generally processors do not encourage growers to transfer their contract to another processor unless it suits them to balance out production. In some regions growers have no option but to remain contracted to a particular processor because of geographical constraints given that is there is no other processor within a reasonable transport distance particularly for feed deliveries and birds being transported to a processing facility.

Therefore ACGC believes it will be very important for the future stability of the growing sector at least that the current review of the *Australian Consumer and Competition Act 2010* and Competition Policy in general should look at how imbalances in bargaining power in the value chain can be redressed whether they be with processors and their suppliers or further up the chain with supermarkets etc.

In terms of contractual arrangements between growers and processors ACGC believes there are a number of areas in the authorisation process that could be reviewed to improve the imbalances in bargaining power.

These include

1) The requirement for a processor to negotiate with the legally constituted negotiating group as authorized by the ACCC with regard to terms and conditions of contract including grow fees. A processor should not have the right to try and exclude any grower from the negotiating group.

2) The need for a mechanism which would allow such negotiations to be brought to finality.

3) A further review of the unconscionable conduct provisions of the Act to make them more applicable to the issues that may arise between a processor and a contracted grower.

In further expanding items 1) and 2) ACGC would like to draw attention to the experiences of the Victorian Farmers Federation Chicken Meat Group which represents contract meat chicken growers in Victoria.

In 2004 the Victorian Farmers Federation (VFF) on behalf of each of the grower groups applied for an authorisation for collective bargaining in relation to negotiating growing fees, fee adjustments and resolution of disputes. The growers main concern was that there was no incentive for processes to reach agreement with growers or even to engage in negotiation.

Growers had to continue to supply since the abandonment of the statutory regulated system (State Act was suspended in 1999) although there was uncertainty as to the status of existing growing contracts entered into under the statutory system. Only one processor had reached agreement with its growers on new contract terms. Increases in growing fees had for the most part been ad hoc and very few.

To address this concern the grower groups, through the VFF, also applied for an authorisation giving them the right to boycott, but subject to a number of conditions ensuring that this would only be utilised as a last resort and after notice. The Trade Practices Act of the day allowed the ACCC to grant authorisation for exclusionary conduct subject to similar public benefit test as applied to authorisations of agreements and arrangements listening competition. The ACCC had never granted an authorisation for exclusionary conduct, but on this occasion the ACCC recognised the validity of the growers position and authorised the boycott authorisation as well as the collective bargaining authorisation.

The processors sought a review of the boycott authorisation by the Australian Competition Tribunal. The tribunal concluded that there was evidence that the processors exercise market power to behave monopolistically and opportunistically. These conditions were likely to lead to outcomes inconsistent with those expected in workable competitive markets. It was likely that the processors would continue to exercise power against the growers despite authorisation for collective bargaining. Despite these conclusions the tribunal set aside the boycott authorisation on the basis that it was not confident the growers would necessarily use the boycott power only in ways that would lead to more efficient outcomes.

The consensus of those that specialise in competition law is that the ACCC would never grant another boycott authorisation, given the level of test applied by the Australian Competition Tribunal in the Victorian Farmers Federation case.

As identified in the Senate Economics References Committee report in 2010 even if a group of producers is authorised to collectively negotiate nothing compels a processor to engage in negotiations with the group. The processor can, if it chooses, elect to deal only on an individual basis. In addition in a situation of on going supply, with periodic renewals of contract or fee reviews, and very few of any options available to the producers, a processor has very little incentive to reach agreement with the group. The ability of the ACCC to authorise exclusionary conduct provided a possibility that groups of producers in these circumstances could be given a degree of countervailing bargaining power which would act as an incentive to processors to negotiate meaningfully and with a view to reaching agreement in the short term. In the Victorian Farmers Federation case, the authorisation to collectively bargain, coupled with the authorisation to boycott under stringent conditions was perceived by the growers to constitute a process to achieve an outcome, the boycott only being authorised when a bargaining process had been exhausted.

However the public benefit test, which is the hurdle to be cleared in all authorisations seems to be focused on the economic benefit of ultimate consumers. There would be a case for a wider view and the recognition of producers in this context are members of the public when considering public benefit, in contrast the Australian competition Tribunal's sanguine acceptance that the processors would continue to behave opportunistically towards growers.

A considerable part of the then Trade Practices Act was taken up with measures directed to preventing consumers from being exploited. Some sort of legislative intervention appeared to be necessary.

As observed above, following the Victorian Farmers Federation case it is unlikely that the ACCC will again grant authorisation for exclusionary conduct unless there are legislative changes.

The Senate Committee report in 2010 refers to submissions advocating arbitration as a means of ensuring an outcome. The suggestion may not be viewed enthusiastically by the competition regulators, who may perceive this to be tantamount to return to industry wide price-fixing arrangements under regulated systems, where often prices and fees were determined by committees consisting of producer and processor representatives plus one or two independents including an Independent chair who usually made the decision. ACGC believes that compulsory arbitration would be appropriate as the ultimate means of obtaining an outcome in these sorts of situations. It is difficult to identify what competition issues in fact exist and in what sense competition would be adversely affected by the availability of an arbitration mechanism in the situations is faced by meat chicken and turkey growers dealing with a processors.

There is also an obvious difference from the statutory regulated systems if collective bargaining and compulsory arbitration take place on an enterprise basis. The Senate committee in 2010 suggested that groups of producers should if necessary be represented in the collective bargaining process by persons with negotiating skills and experience in the industry, because often it is the case that the members of the group lack the necessary expertise and experience. However, usually it is a condition of authorisation of these groups that they should not be represented by persons who have been involved with negotiations on behalf of other groups, apparently on the basis that this might lead to industry wide prices and contract terms.
ACGC would suggest this ignores the reality of the modern world. Obviously the sort of information in question will be freely exchanged through industry and farmer organisations. It Is worth noting that the experience of the Victorian chicken meat industry since authorisation is that grower groups that have completed contract negotiations with their processor have followed quite different paths, and ended up with quite different results with respect to pricing and contract conditions. This effectively has been the case in all states where there has been a move to authorisation and there has been a collective outcome.

Contracts once they are entered into usually have provision for dispute resolution through mediation and often non –binding arbitration although some now do have provision for binding arbitration.

3) Unfair and Unconscionable Conduct Provisions

In sections 5.11 – 5.14 the Competition Policy review paper raises the issue of unfair and unconscionable conduct provisions in the Act as they apply to small business and their effectiveness. ACGC believes that is it is extremely difficult for an individual to take action against the other party to a contract without ultimately jeopardising the future contractual arrangement. The ACCC itself has often encountered reluctance from individuals to publically come forward when investigating supply chain relationships for fear of them losing their access to the supply chain.

Improved measures regarding unconscionable conduct provisions would certainly contribute to reducing the imbalance in negotiating power but not at the expense of and improved authorisation process including requirement for the processor to negotiate with the authorised

grown negotiating group and either compulsory arbitration or some form of boycott to finalise the negotiation.

A separate issue which also has a potential to impact on returns and viability relates to the power of supermarkets to make somewhat arbitrary decisions to require changes to farm production systems for a perceived benefit in the market place. This appears to happen without any real consideration of its impact on its suppliers or for that matter its customers in some instances.

Coles and Woolworths are now requiring that all unbranded product is sourced from farms that are accredited under the RSPCA Approved Farming Scheme. This means that the vast majority of meat chicken farms in Australia will need to be accredited as will the processing plants.

This effectively puts the control of animal welfare standards in the chicken meat industry in the hands of a third party commercial entity rather than where it belongs in the Federal and State regulatory arena.

Currently Codes and Standards for Animal Welfare are negotiated with all stakeholders are hopefully based on the known science rather than perception. It is important that this process continues.

There is a significant cost impost on the industry to meet these standards both in terms of capital costs and ongoing input costs. Ultimately these will have to be borne by some part/s of the value chain if they are not to be passed onto consumers which in the longer term is unlikely.

Reduced productivity will ultimately impact on the efficiency of the industry and require an increase in the farming footprint well beyond that need to meet just increasing demand.

Consumer choice is also being limited and with an increase in price points will there be a push to import cheaper product as has happened in the UK .

Australian Chicken Growers Council would be happy to expand on any of the issues raised in this submission with the Committee

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