

29 March 2019

Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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By email: competition.policy@mbie.govt.nz

To whom it may concern,

Submissions regarding MBIE review of s36 of the Commerce Act

1. The New Zealand Poultry Meat Producers Society Inc. (**NZPMPS**) is an incorporated society that represents the following chicken grower associations :
 - (a) The Waikato-Bay of Plenty Chicken Growers Association Incorporated;
 - (b) The Canterbury Poultry Meat Producers Association Incorporated;
 - (c) The Auckland Meat Chicken Growers Association Incorporated;
 - (d) The Taranaki Broiler Growers Association Incorporated;
 - (e) The New Zealand Tegal Growers Association Incorporated; and
 - (f) The Brinks Growers Association Incorporated.
2. The members of the associations listed in paragraph 1 supply chicken growing services to New Zealand's three major chicken processors (Tegal, Inghams and Brinks). Together the members of NZPMPS represent around 90 percent of chicken growers in New Zealand.
3. It is common practice in New Zealand and Australia for providers of chicken growing services to be represented by industry associations. The industry associations provide a range of services to members including the provision of technical knowledge, advice and expertise, assistance with regulatory matters and the representation of growers in relation to industry matters.

Submissions on authorisation process

4. The MBIE discussion paper (review of section 36 of the Commerce Act and other matters) (**Discussion Paper**) discusses proposed changes to section 36 of the Commerce Act (**Act**), particularly the change from a purpose based test to an effects based test for anti competitive conduct. The Discussion Paper asks whether authorisation should be available for unilateral anti competitive conduct under section 36 (such as is already available for mergers or agreements which are anti-competitive).
5. The NZPMPS wishes to use the opportunity presented by the review of section 36 of the Act and the question regarding authorisation to submit on two issues not directly covered in the Discussion Paper, but which peripherally relate to question 14:

- (a) First, the NZPMPs submit that MBIE should introduce a “class exemption” regime, similar to what has been introduced recently in Australia; and
- (b) Second, NZPMPs that the Commerce Commission should be granted the discretion to waive the authorisation application fee, in part or in whole, in appropriate circumstances (the Commerce Commission does not currently have this ability).

6. We have provided more detail on our submissions on these two issues below.

Class exemption regime

Summary of Australian Class Exemption Regime¹

- 7. From 6 November 2017, the Australian Competition and Consumer Commission (**ACCC**) has been able to make class exemptions for specific types of business conduct. Class exemptions are granted when the ACC is satisfied that all the circumstances are unlikely to substantially lessen competition or are likely to result in a net public benefit.
- 8. A class exemption issued by the ACCC specifies that one or more provisions of the Competition and Consumer Act 2010 Act do not apply. In effect it provides a ‘safe harbour’, allowing businesses to engage in conduct of the specified kind without the risk of breaching the relevant provisions that Act.
- 9. A class exemption removes the need for businesses to lodge individual applications for authorisation or notifications with the ACCC in order to engage in the specified conduct. Once an exemption is in place, businesses will be able to self-assess whether their proposed conduct falls within the terms of the class exemption such that they can proceed without authorisation or notification. If their conduct is outside the scope of the class exemption, they will not have the protection of the class exemption and will need to consider whether they should apply for authorisation or lodge a notification with the ACCC.
- 10. The ACCC may issue a class exemption if it is satisfied in all circumstances that conduct of the kind specified:
 - (a) would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
 - (b) would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from the conduct.
- 11. In its determination on a class exemption, the ACCC may specify limitations.
- 12. The ACCC will identify types of conduct for class exemptions. While businesses do not apply for a class exemption they may suggest options to the ACCC. The ACCC will consider such requests taking account of other organisational priorities. The ACCC will consult with a wide range of interested parties as it develops a particular class exemption. Interested parties will have an opportunity to make submissions during that process.
- 13. The ACCC will specify the time period for which a class exemption will be in force. The maximum period is 10 years. A class exemption may be varied or revoked and the ACCC would generally consult before doing so except, for example, in the case of a minor or technical variation.
- 14. There are no class exemptions yet in place in Australia. The ACC is currently developing a draft version of a class exemption for collective bargaining to be released for public consultation.

Application to New Zealand

- 15. Collective bargaining by chicken growers is an example of a type of business conduct that would be suitable for, and benefit from, the ability to fall within a class exemption. It is a common business

¹ Paragraphs 7 - 13 are summarised from the ACC website, see <https://www.accc.gov.au/business/exemptions/class-exemptions> for more detail on the Australian regime.

model for chicken growers (who are generally small businesses) to be members of industry associations to represent them and negotiate long term grower contracts on their behalf. Collective bargaining in this situation enables a more even playing field for contract negotiations for long term supply agreements, a reduction in administrative costs for the processor and each grower, and ultimately lower prices for consumers.

16. The Waikato-Bay of Plenty Chicken Growers Association was granted an authorisation in respect of collective bargaining in 2017 where the Commission found that while collective bargaining would lessen competition, this was outweighed by the benefits to the public. Other grower associations may need to apply for authorisations in the future. Many Australian chicken grower associations have applied for and been granted authorisations for collective bargaining by the ACCC.
17. The ability for the Commerce Commission to be able to grant class exemptions for matters like collective bargaining in agribusiness would be of considerable use in New Zealand. If the Commission can exempt conduct for which the Commerce Commission is likely to regularly receive and grants authorisation applications, it will save considerable time and expense for both the businesses concerned and the Commission.

Authorisation application fee waiver

Australian position

18. The fee for an authorisation application in Australia is \$7,500. Additionally the ACCC has the ability to waive the fee, in whole or in part, for applications for authorisation (except for applications for mergers). The ACCC may waive the lodgement fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.
19. In considering the request, the ACCC will take into account all relevant information, including factors such as the applicant's income, liabilities and assets, whether the payment of the fee will cause the applicant financial hardship and whether the applicant is a not-for-profit organisation.

New Zealand position

20. The current fee for applying for an authorisation in New Zealand is \$36,800. The Commerce Commission does not have the ability to waive any part of this fee. The fee applies regardless of the complexity of the application or the means of the applicant.
21. We believe that the purposes for which the authorisation process was originally included in the Commerce Act would be better served if there was an equivalent ability in New Zealand for the Commission to waive all or part of the authorisation application fee. At its current level, there is a risk that the New Zealand fee will deter the filing of applications and will have negative effect on pro-competitive business activities.
22. Thank you for the opportunity to make submissions on the Discussion Paper.

Yours faithfully,
New Zealand Poultry Meat Producers Association Inc



John Hartnell
Secretary/Treasurer