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Collective Bargaining Under Trade Practices Law

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Abstract

The Howard Government, supported by the Labor Opposition, legislated in 2007 to enable small businesses to engage in collective bargaining with large businesses under the Trade Practices Act. The object of the legislation is to facilitate greater equality in the bargaining power of the parties. Except where the small business sells goods/commodities rather than a service, a person who is 'employed' and the business that provides a 'service' are both effectively involved in the sale of labour or in the performance of work in the labour market. However, the legal concepts and procedures relating to collective bargaining in these two types of labour transactions are different. One, the 'employment' of persons, is placed in the category of workplace relations operating through labour law; the other, the 'sale of services', is viewed as a commercial transaction, dealt with through commercial law. This paper considers the question of whether there are sufficiently significant differences between these labour/service transactions as to justify the application of two separate sets of laws to deal with them — one to cover transactions between employers and employees, and the other to cover transactions between small and large businesses. A case study will be used to illustrate the involved and unsatisfactory approach of the commercial law route in determining what is in essence a labour transaction rather than a commodity transaction.

Introduction

Under the Trade Practices Legislation Amendment Act (no.1) 2006 (Cth) (Amendment Act), small businesses are encouraged to engage in collective bargaining with big business through procedures allowing immunity from s 45(2)[1] of the Trade Practices Act (TPA). This raises the question of whether the relevant provisions of the TPA, administered by the Australian Consumer and Competition Commission (ACCC) under commercial law principles, is an appropriate vehicle for authorising collective bargaining of small businesses. It is arguable that the Workplace Relations Act (WRA) or a specific chapter of this Act, or successor legislation, embodying the labour law concept of the Act, provides a more appropriate basis for certain types of small businesses to engage in collective bargaining.

Where one party sells goods/commodities to another, such a transaction properly constitutes a commercial relationship and commercial law should ap-

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ply to such transactions. However, it is now generally accepted that labour/service is not a commodity. A person who is 'employed' and a business that provides a 'service' are both effectively involved in the sale of labour or in the performance of work in the labour market. On this basis, there is a logical presumption that the transactions of self-employed persons operating as small business enterprises to provide/sell services to businesses, as well as those who are employed to provide/sell services to an employer, should both be regulated under labour law.

It is also useful to be reminded of the common law basis of these two forms of labour transactions. The common law treats all parties in such transactions as equals, but it will come to the aid of a party that has been treated unfairly or harshly (Owen and Riley 2007: 17). However, unequal economic power as such in a labour/service transaction is not considered unfair and will not provide entitlement to legal remedy. Moreover, action to correct an unbalanced power situation by *collective* action on the part of the weaker party is not acceptable under common law. Such action is considered to be in restraint of trade. The common law assumes that all persons, including legal persons in the form of large corporations, are equal in power for purpose of buying and selling goods and services. Hence, statute has to intervene to exclude the common law and allow collective action to operate legally.

Individual Bargaining

Although the issue under consideration concerns collective bargaining, the current difference between these two types of labour or 'work' transactions is rooted in legal concepts affecting individual bargaining. Hence a word first about individual bargaining.

From the economic or functional point of view, the different types of labour transactions are of little significance. One may be more cost-effective than the other depending organisational and technical factors, but in substance, *work* is performed in both types, adding to the income of the buyer and the seller. However, although I have characterised them as work relationships involving the sale of labour, the common law makes an important distinction between what is said to be a contract *of* service and a contract *for* service, with different implications and obligations for the parties in these two types of transactions.

A clear example of a contract of service is when a person is engaged to work for a firm under the direction of the latter, to start and to finish in at certain times, to perform this task or that, with this person or that — in a kind of master and servant relationship (Howe and Mitchell 1999) in which the servant is dependent on the master. In addition to the doctrine of vicarious liability attaching to the employer, various other obligations have developed over time — such as superannuation contribution, occupational health and safety, income tax deduction from pay, and, above a certain wage bill, payroll tax — imposed on the buyer of such a service. A person working in such a relationship would be considered as an *employee* of a firm and be covered by a contract of employment, and employment law would apply to the transaction.

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On the other hand, a person may work for a number of firms or persons, as and when called for. The question of when and where would be a matter of negotiation between the buyer and seller of the service. Such a person would be regarded as being self-employed or as a small business enterprise, and would legally be classified as an independent contractor involved in a contract *for* service. A plumber or electrician or gardener who is engaged by householders or enterprises to do a particular task for a fee and then to move on to another task, would fall into this category. Some may even have an assistant and many may even be incorporated. The transaction would be subject to commercial law, with obligations on both parties different from those covered by employment law.

The Courts have developed various common law tests or indicators to distinguish an employee from an independent contractor. The most important in the case of an employment relationship, is the degree of control of the buyer of the service but other tests may also be relevant (See Hollis v Vabu Pty Ltd, 2001, HCA 44). Tests include the extent to which the seller of the service is integrated into the firm, the extent to which the seller is tied to one buyer, the method of payment, the tax obligations of the seller, rights of the employer on how, when and where the work is to be done, whether the worker uses their own substantial amount of capital equipment and several others (Commonwealth of Australia, 2005, Table 2.1). These tests would form a composite basis for a judgment on whether the service seller was an independent contractor or an employee.

However, work practices change. These days, a large proportion of persons who are classed as independent contractors, are not clearly distinguishable from employees (Owens and Riley 2007). The dependency element of the worker's relationship to a particular employer, regarded as critical in an employment relationship, becomes tenuous in many such cases. Part-time and casual employment have become commonplace, so that an employee may be working with more than one employer, occasionally or continuously. On the other side, many with independent contractor status are engaged for much of their time and continuously, with one firm. The extent of direction of work, and the degree of integration with the workforce, may be considerable. New types of contracting have developed — people working from home for the firm (outworkers); drivers owning their own trucks; franchising arrangements; farmers growing a range of produce from grapes to poultry (Briggs, Buchanan and Watson 2006: 22–24). The specifications by the buyer of the kind and manner of work are in many cases considerable and rigid. Common statutory obligations — anti-discrimination, occupational health and safety — have been imposed on the buyers of these services. Moreover, it is arguable that those self-employed persons who use their own or hire expensive equipment — physical capital — to perform work, are from the economic point of view no different from skilled employees. Embodied in the latter's labour is human capital to varying degrees. Furthermore, the intervention of a third party in the transaction of services in the form of labour hire arrangements, adds a further complication to the question of who is the real employer of the worker.

The blurring of differences between employee and contractor, which in many cases can be manipulated by the buyer of the service to disguise the em-

ployee status, and the uncertainty of the status of workers, raise the question of whether it is time to abandon the distinction and to regard those involved in both types of transactions as 'workers' subject to labour law, unless the independent contractor falls clearly within a narrow definition (Stewart 2002). In entrenching and clarifying the status of independent contractors, the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (s 901 of WRA) attempts to provide protection against 'sham' arrangements. However, the Act does not define 'independent contractors', leaving it to a case by case determination by the Courts where the matter is disputed. On current case law, there is a question mark as to whether the grey areas I have referred to would be regarded as 'sham' arrangements.

State governments have legislated 'deeming' provisions on an *ad hoc* basis, effectively bypassing the common law, but *WorkChoices* has excluded state industrial laws from being applied to employers covered by federal law. However, outworkers in the Textile/Clothing/Footwear industry and owner-drivers in New South Wales and Victoria are excluded from this restriction and continue to be deemed employees. Some (Stewart 2002: 235–277) have suggested that 'employment status' should be defined by law to ensure a more comprehensive coverage of those who are effectively employees as distinct from being self-employed or truly in business as an entrepreneur. There are difficulties in arriving at a generally agreed definition and there is extensive literature on these matters (House of Representatives Standing Committee 2005). However, while there may be drafting difficulties, from the economic point of view, there is much sense in providing a clear distinction between a contract *for* service and a contract *of* service by a definition of employment or contractor that disposes of much of the present grey areas and minimises the uncertainty arising from resort to the Courts to determine particular cases.

Collective Bargaining

Individual bargaining, whether between employer and employee or between a small business and a large business, generally places the seller of labour/service in a weaker bargaining position. Hence, to establish a more level playing field and to provide countervailing power to the weaker party, statute has to step in. In respect of employment relations, there is acceptance that the purpose of labour law is to correct the imbalance between the power of employers and employees (Kahn-Freund 1972: 4–5). Historically, in Australia, both at the federal and state levels, the systems operating under labour law have been associated with collective mechanisms based on a dispute resolution process operating by conciliation and arbitration, with unions as part of the system.

The federal system has gone through many changes over the years, but the changes wrought through *WorkChoices* in 2005 have been the most radical since its origin (McCallum 2007: 436–454). Individual bargaining has been encouraged while union power and strike action, essential ingredients of effective collective bargaining, have been weakened. Although many sections of the Act remained to be clarified, its process and principles were simpler than those dealing with collective bargaining between small and big businesses. The cer-

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tification of collective enterprise agreements became a rubber-stamping process, no longer requiring the public interest test. The fact that a collective body, the union, is a monopolistic or anti-competitive force is not in itself an issue. Thus, while the Trade Practices Act frowns in principle on both areas of collective bargaining because it regards them as anti-competitive, the determination of employment conditions under labour law enjoys a *general* exemption from section 45A of the TPA. Collective bargaining between small and large businesses, on the other hand, can only secure immunity from this section of the Act by application in specific cases. Here because of concern about the consequential reduction in competition *between* the small businesses engaged in collective bargaining, any consideration for protection from section 45A is dealt with case by case. As will be seen, the differences in procedures and principles between the two areas of collective bargaining are such as to impose serious potential hurdles in the way of collective bargaining for small businesses (McCrystal 2007: 1–28).

Collective Bargaining Under the TPA/ACCC

The operation of the authorisation process to provide immunity from the TPA for collective bargaining of small businesses was reviewed in 2002–03 by the Dawson Committee (Commonwealth of Australia 2003) under its Terms of Reference 1(b) to determine whether they:

> provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration of power.

Under the existing provision, in order to obtain immunity from s 45A of the TPA,[2] small businesses seeking to engage in collective bargaining with larger businesses, were required to obtain authorisation from the ACCC. This process called for the small businesses concerned, the sellers of service or commodities,[3] to satisfy the ACCC, that the public benefit from such an anti-competitive behaviour outweighed the public detriment. The authorisation process was streamlined in 2006 to enable a final determination to be made within three months of the lodgment of an application for authorisation. However, as will be seen from the case study below, the principles involved in securing authorisation, impose a tortuous task on the parties and raises the question whether the TPA is an appropriate mechanism for dealing with this issue.

The Dawson Review resulted in the Act being amended (The Trade Practices Amendment Act (No.1) 2006) to provide an additional route to facilitate a faster and simpler procedure to engage in collective bargaining. This was through 'notification' rather than the existing authorisation process. The onus of proof on the applicants was also lifted. Significantly, the amended Act also allowed the ACCC to provide for the right to collective boycott[4] — the commercial law term for 'strike'. Collective bargaining without such a right does little to rectify the balance of power and does not constitute an effective countervailing power. However, as will be seen, the force of this provision has been greatly impaired by the conditions imposed on it by the ACCC.

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The 2007 *Guide to Collective Bargaining Notifiations* published in January by the ACCC, is a useful source on its procedures and principles in implementing the relevant recommendations of the *Review*. Briefly stated, in relation to the notification process, in addition to providing the names of the collectivity and the target, the notifier is required to provide material to show that on balance, collective bargaining will result in a net public benefit. The principles to be applied for satisfying this test are essentially the same as those under the authorisation process. To ensure that the employers concerned are 'small' for the purposes of this notification process, each member of the collective group is limited to an expected transaction of $3m per annum, although larger sums are allowed for specified business like farm machinery and petrol retailing. For transactions larger than the permitted amounts, the slower authorisation process would need to be used. The 'buyer' party or the target of the collective bargaining process and other interested parties would be invited by the ACCC to make submissions on the notification. The notifiers are presumed to have immunity within 28 days of lodging their notification in order to proceed with their collective bargaining intentions. Meanwhile, the ACCC will examine the supporting submission and may consult the parties on it. The protection will be removed if the ACCC is not satisfied that the collective bargaining as sought is in the public interest, that is, if it would result in a net public detriment. The ACCC may call a conference in this connection before making a final determination. A negative final determination may be taken for review by the Australian Competition Tribunal. The agreement has a maximum term of three years.

While the transparent procedural provisions as such are beyond reproach, there are a number of hurdles in the way of the notifiers of collective bargaining that are not encountered by employees under the WRA 2005.

First, the notifiers face the initial difficulty of establishing at the time of lodgment of their application that there is a 'reasonable expectation' of a collective agreement being reached with the target (s 93AB (5)). Although this requirement may be intended to ensure *bona fide* notifications, it gives the target an opportunity of effectively scuttling the collective bargaining process even before it has commenced.

Second, because the ACCC will remove the exemption from s 45A if it is not satisfied that there is net public benefit in collective bargaining, there is an element of uncertainty as to whether collective negotiations will be protected. As will be seen presently, given the principles for establishing net public benefit, doubts and uncertainty would be a reasonably expectation.

Third, the ACCC recognises (2004: 27) that, in some circumstances, there may be merit for small businesses to have the capacity for a collective boycott:

> The right to collective bargaining, absent the ability to collectively boycott, may be a blunt bargaining instrument … .(i.e. absent of the ability to collectively boycott there is less chance of striking a mutually beneficial agreement which will deliver the anticipated public benefits)

It is reasonable to infer from the provisions of the Act that collective bargaining is expected to be voluntary (2007a: 21). There is no suggestion that 'good faith'

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bargaining is obligatory. The exercise of collective boycott would be one way of bringing the target to the bargaining table. However, to do so requires justification from the collectivity that the boycott will on balance, add to public benefit:

> Collective boycotts are more likely to be appropriate when there is a significant disparity in bargaining power between the collective bargaining group and the target, that is, the bargaining power of the target means it is less willing to participate in collective bargaining arrangements. The case for collective boycott would be contingent on it being clear that a failure to collectively negotiate would result in inefficiencies. (2007a: 33)

A further and stronger qualification on the right to collective boycott:

> Given that the ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements, it is unlikely to allow protection from legal action to such contract in most cases. (2007a: 33)

The ACCC also notes that the extent of anti-competitive effects depend on the length of time of the boycott, whether there is a mediation period before a collective boycott is applied, and whether there is adequate notice of intention to apply the boycott. As might be expected, the approach of the ACCC is steeped in the concept of competition. This is understandable given its charter. Thus, on the ACCC approach, anything that adds to bargaining power increases 'anti-competitive' effects and, therefore, inefficiency. Such an assumption is justified in a perfectly competitive market among both buyers and sellers, but may not be sustainable where competition is imperfect, and especially where the buyers of the service have monopsonistic or oligopsonistic power. In short, the anti-competitive effect should be assessed in relation to the market as a whole and not on the basis of the market power position of one side considered in isolation from the other.

It is clear that, because of the required public benefit test, the concept of countervailing power for collective bargaining on the part of small businesses, does not apply in the same way as for collective bargaining in the (employment) labour market. In the latter, it is inherent in the case for collective bargaining.

The Dawson Review puts the role of countervailing power a little differently:

> Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to apply for authorisation to enable small business to negotiate more effectively with big business. (Commonwealth of Australia 2003: 115)

What is 'excessive' power? One that succeeds in securing substantial benefits to the collectivity? Is this a form of disguised arbitration on the appropriate fee?

Fourth, the assessment of the extent and outcome of anti-competitiveness as applied by the ACCC is problematic. Obviously, if the sellers of services are in competition with each other, collective action on their part will remove

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or reduce competition *among* them. They would then have to show that there are positive gains to the public. It is fair to assume that the object of collective bargaining on the part of the sellers is to obtain more favourable terms from the buyer than would be settled by individual bargaining. This would add to the costs of the buyer unless, as a direct result of collective bargaining, the buyer operates more efficiently to offset the added cost so that the consumer will not be adversely affected, assuming that the added cost can be passed on to the consumer. This would depend, among other things, on whether there is room for greater efficiency; whether the target is in competition with other firms for the services of the small businesses as well as the nature of such competition; also whether the other buyers of these services are also likely become targets of collective bargaining notifications/applications. Alternatively, would it simply be a transfer of income from the buyer to the sellers of the service, without any effect on the consumer? Could all these outcomes be anticipated by the ACCC or would they be largely conjectural? If any part of the additional cost were ultimately passed on to the consumer, the collective bargaining under consideration may not be considered by the ACCC as adding to the public benefit. The ACCC goes even further. It says that the

> ACCC considers that collective bargaining arrangements should produce benefits both for the business involved in the collective bargaining group and the target. (ACCC 2007a: 33)

This may well be a tall order in most cases.

However, on the positive side, the ACCC points to sources of public benefit. Collective instead of individual bargaining could be expected to lower transaction costs for the sellers insofar as representation, evidentiary material etc. can be presented jointly by the sellers. To be consistent to its principles, this should be regarded as a public benefit only if the savings are in some way passed on to the consumer. The ACCC implies this when it says that cost savings should accrue 'broadly' or be 'of value to the community generally' (2007a: 29). Quantification of this benefit is difficult; and unless the number of applicants is very large, is it likely to offset the cost of the anti-competitive elements?

The ACCC also refers to improvement in information as a positive element in applications where there is information asymmetry, i.e. where one side is better informed about market conditions than the other is. Where collective bargaining 'facilitates informed decision making' (2007a: 30), it can constitute a public benefit. However, given that in most cases, the collective group belongs to a trade association that could be expected to study the market and provide its members with intelligence to bargain effectively, it is unlikely that this would be a significant factor in the assessment of the public benefit.

The ACCC nominates a further consideration favourable to an application: whether the collective bargaining would facilitate 'market dynamics'. This is elaborated as:

> When a collective bargaining arrangement increases the ability of the collective bargaining group to supply new areas or to increase compe-

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> tition in their existing market, the ACCC is likely to accept that this results in an increase in a public benefit. (ACCC 2007a: 31)

Again, apart from rare cases, this is not a likely outcome of collective bargaining.

In reference to 'fairness', an important element in the employment labour market, the ACCC says that in the absence of evidence of 'extreme unconscionable conduct in past negotiations', it is difficult for it to accept claims of increased fairness arising from collective bargaining. Such conduct is not easily established and the legal costs involved could be beyond the means of the small businesses involved.

The ACCC admits the difficulty of measuring public benefits 'in precise qualitative terms'. Yet, it

> requires strong and credible evidence that claimed benefits are likely to flow. General statements about possible or likely benefits will not be given much weight unless supported by factual material. (ACCC 2004: 9)

It is difficult to escape the conclusion that, overall, the problems of identifying and quantifying net public benefit carries the hazard of guess-work, fudging and performing token exercises to determine whether collective bargaining should be allowed. These difficulties underline the conceptual difference between commercial law and labour law in their rationales for collective bargaining. This is so even allowing for the changes in the legislation made by *WorkChoices*.

Fifth, trade unions have been a critical in the development and outcomes of collective bargaining in the labour market. Moreover, under the Workplace Relations Act, discrimination against a union or union member is unlawful. On the other hand, while an industry association can lodge a notification/application and represent small business notifiers/applicants, a notification of collective bargaining is invalid if given by a trade union, an officer of a trade union or a person acting on the direction of a trade union (McCrystal 2007b: 211). It is not clear whether a trade union can represent small businesses in the collective bargaining process although it would seem unlikely if it is in the first instance unable to feature in a collective bargaining notification.

Sixth, it has been argued (McCrystal 2007a: 17) that there are potential risks of common law actions based on economic torts and restraint of trade as well as actions under secondary boycott provision of the TPA.

All told, collective bargaining under the TPA/ACCC processes and principles is likely to make heavy weather. It is likely be expensive for the parties and frustrating to one side or the other. This may be illustrated by reference to the case of the chicken growing industry in Victoria to which the ACCC (ACCC 2007a: 34) refers to as an example of a successfully authorised case.

A Case Study: The Victorian Chicken Growing Industry [5]

The main actors in the Victorian chicken broiler industry are the growers — some 220 — and five processors of chickens. The nature of competition is determined by the industry's structural, technical and economic features, giv-

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ing rise to economies of scale and vertical integration in chicken meat processing. The following summarise the main features of the industry.

- The growers supply labour, management and capital in the form of land, sheds, power and equipment connected with the growing of chickens. The capital outlay for the larger of them is as much as $5m.
- Groups of growers are tied by a 3-year rolling contract to a particular processor. This arrangement provides substantial continuity and stability favoured by both parties. There is hardly any mobility of growers between processors. The evidence suggests that processors do not poach on each other's growers but there are occasions when a processor would 'borrow' growers tied to other processors to supplement their stock of broilers.
- Entry by growers depends on securing a contract with a processor in advance of establishing the required infrastructure of a farm. Grower entry is also limited by the strict regulations imposed by local authorities on the setting up of farms.
- The processors have substantial control of the growing process — they supply the day-old chicks of a particular genetic stock, feed and medication, and impose detailed technical requirements on their particular group of growers on how the chickens should be raised to maturity. They also provide transportation of chicks, materials and the grown chickens.
- There are effectively three markets in Victoria — Bendigo, Geelong and the Mornington Peninsula near Melbourne. The grower-groups in Bendigo and Geelong are each tied to one processor. The grower-groups in Melbourne area, supply three processors, one of whom takes half the output in the area. Less than 10 per cent of chickens are imported from other States while overseas imports are negligible.
- Market concentration on the demand side is also reflected in the fact that the two largest processors take up about half the market share of the Victorian chicken output and use the services of more than 70 per cent of growers. The three largest processors have access to supply from other States, thus increasing their bargaining power in relation to their Victorian growers. Further, two processors supply chicks of the required genetic stock to the other processors. Thus, processors are interlinked by the supply of chicks and, in some cases, also by the supply of feed.
- The growing fee represents 6–8 per cent of the retail price of chicken meat. The effect of changes in the growing fee on the retail price of chicken meat is therefore likely to be relatively small.
- The retail market for chicken meat is highly concentrated. Nearly 70 per cent of the Victorian retail market is taken up by two retailers, which can be expected to have market power on the price of chicken meat.

These basic features of the chicken growing industry in Victoria raise two questions.

First, are the growers independent contractors as the ACCC determined, or are they more appropriately classified together with outworkers, owner-drivers,

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and *dependent* contractors, as being akin to employees, the large capital contributed by them and their employment of helpers notwithstanding? As argued earlier, ownership of physical capital is analogous to human capital embodied in a skilled person. Based on the various characteristics of the grower-processor relationship shown above, the ACCC's determination is questionable. On any reasonable interpretation of the common law, the high degree of dependence of the grower on the processor, the detailed specification by the processor of the work of the grower, and the continuity of the relationship of each group of growers with a particular processor, make it difficult to characterise growers as independent contractors.

The second question relates to the nature of competition in this industry. It is now well established by case law that in determining whether competition exists, the first task is to identify the 'relevant market' (Dean, J. in *G & M Stephens Cartage Contractors Pty Ltd.* (1997) ATPR 40-042 at 17,460). This involves identifying the nature of the relevant *service* market and the *geographical* extent of that market *(Howard Smith Industries Pty. Ltd. and Adelaide Steamship Industries Pty. Ltd.*(1997) ATPR 40-023 at 17,336). In this case, the relevant service market is the growing of chickens, while three of the relevant geographical markets are the specific locations in Bendigo, Geelong and a particular area near Melbourne.

In each of the first two markets, the growers face a single buyer for their services, and both groups of growers are locked into dealing only with their respective single buyers by virtue of the location of the buyers' plant, the growers' location, and the specificity of the growers' plant and equipment. Entry is restricted on the side of both supply and demand — in the former, by the buyer's control on the engagement of growers and on the side of demand, by the difficulties of entry by another processor in those markets. Further, the growers are unable to move to another processor or to exit to another activity. Under these conditions, it is clear that the processors as monopsonists have 'undue market power in the sense that the processors can — they have the 'discretion' (Brunt 2003: 194) — to manipulate the price at which the services of the growers can be obtained (*Queensland Co-operative Milling Association and Defiance Holdings Ltd.* (1976) ATPR 40-012 at 17,246). The growers, on the other hand, must not only run their business strictly in accordance with the specifications of their buyer, but are, singly, unable to dictate the size of their growing fee and must take what is dictated by their processor short of a fee level which force growers to exit the market.

As far as the Melbourne market is concerned, there are three processors. Each group of growers is tied to one processor, again because of their location relative to that of the processors, and the specificity of their plant and equipment. Here again entry is restricted on the side of both supply and demand. Although in terms of the broader market this can be regarded as oligopsonistic, there is a strong monopsonistic element in terms of the narrower market in which each processor effectively operates. Moreover, although there are three processors, one of them takes up half the output of chickens in the area, they are linked by the supply of chicks and the supply of feed, and do not poach on each other's

growers, whose movement between processors is rare. These factors interlink the interests of the processors and limit any constraints on their market power.

Regulating the Industry in Victoria

It is useful at this point to give a brief account of the history of the industry in Victoria. In 1974, frequent conflicts between the growers and the processors over the growing fee arising from the nature of the industry and the undue market power favouring the processors, led to Victorian government to regulate the industry through a tri-partite statutory body, the Victorian Broiler Industry Negotiating Committee (VBINC). This body fixed the growing fee from time to time, on a formula incorporating cost elements, an imputed profit margin based on the Government Bond rate plus a risk factor of 1.5 per cent and incentives for productivity improvements. The success of the procedures and principles adopted by VBINC are reflected in the continuing growth of productivity and a fall in the real growing fee by 27 per cent per kilogram between 1976 and 1999, the Victorian fee being well below the national average. Additionally, the procedures kept transaction costs down and the built-in mediation processes were effective in avoiding the need for any boycotts/strikes.

The Competition Policy Reform Act emanating from the recommendations of the Hilmer Report in 1993, obliged governments to review arrangements that restricted competition. In the circumstances, the Victorian (Kennett) Government responded to its obligations under the Competition Principles Agreement to review the Broiler Chicken Industry Act and the Regulations relating to it.

A consultant was commissioned to do the Review. It recommended deregulation of the industry based on a comparison of the existing regulated system with a counterfactual unregulated system. However, in the face of the structure of the industry, its assumptions of the counterfactual were wrong. It assumed that there was one market, not three. It virtually ignored the monopsonistic power of the processor, maintaining that an unbalanced market power was 'not uncommon' in commercial relationships, arguing that there is no evidence that the processor's bargaining power would be enhanced under deregulation; and asserting that collusive behaviour by processors 'may have been possible but unlikely'. It concluded that the fees operating under competitive conditions would be lower. The Victorian government accepted the findings of the Review and allowed VBINC to come to an end.[6]

Enter the ACCC

The next phase of the history of the industry involved applications to the ACCC for authorisation for enterprise-based collective bargaining with the right to collective boycott.[7] The growers, anticipating that the Commission would not accede to collective bargaining on an industry-wide basis, such as had been covered under VBINC, applied for authorisation of a system of processor-based collective bargaining. In essence, five grower groups would bargain with the respective processors for whom they were growing chickens. There would be 'uniform contractual cycles' for growers, each lasting five years. The elements of

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the built-in productivity concept of the regulated system outlined earlier would continue to apply but would be subject to periodic negotiations. As part of the process, should contract negotiations break down, the growers concerned would have the right to boycott their processor by refusing to accept chicks for growing. Such boycott could only be exercised after negotiations for a period of six months and, should mediation prove unsuccessful, 28 days thereafter.

The growers supported their application by relying essentially on the case for countervailing bargaining power in favour of the growers in an oligopsonistic/monopsonistic industry, the minimisation of transaction costs and the continuing improvement in productivity that could be expected to accrue under such a system. The ACCC issued its final Determination on 2 March 2005, substantially granting the terms sought by the growers.

Unlike the consultant, the ACCC based its analysis on a comparison of two counterfactual systems — an unregulated system and an enterprise/processor-based system. It did not examine in any rigorous way the VBINC system. If it had, it may well have come to the conclusion that the VBINC arrangement could well have been optimal in terms of the public benefit. Despite its clear appreciation of the nature of the industry, the ACCC based its determination on the assumption that the industry would eventually move to a deregulated system of individual bargaining. How this could happen without disadvantage to the growers, given the great advantages of scale and vertical integration, and the monopsonistic forces on the side of demand, was ignored. As reflected in its 2007 Guide referred to above, in deciding on the effect of collective bargaining on competition, the ACCC focused competition only on the supply side — the growers' side — rather than in each market. Instead of following the procedure established by case law noted above in determining the relevant *market* and its competitive characteristics, it looked at supply in isolation from demand to decide on whether there was more or less competition. Thus, by its curious logic, any increase in the bargaining power of growers is seen to have a detrimental effect on competition and, consequently, to damage public benefit. It follows from this that competition is greatest and public benefit is maximised in a deregulated system where processors bargain with *individual* growers, and, further, that the 'detrimental effects' of reduced competition are greater under industry-wide collective bargaining than under its authorised system of segmented collective bargaining. Hence, before granting authorisation, to maximise the public benefit, the ACCC considers factors that would offset the detrimental effects of its view of reduced competition.

The ACCC said all this while admitting that the ability of the growers to exploit any increase in bargaining power under the authorised arrangement is limited because of the various factors leading to a very limited ability of growers to move from one processor to another. Further, it would not authorise a 'common representation' that is, the same negotiator for the different groups, because this would 'significantly' increase the anti-competitive effect of processor-based collective bargaining. It also imposed on the growers the onus of showing that the processors were earning 'supra-competitive' profits — an onus that could not be discharged by the growers because the processors were pri-

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vate companies. Should the ACCC not satisfy itself on this matter by examining the books of the processors?

Although in the end the ACCC granted the application for authorisation for the conduct of processor-based collective bargaining, with qualifications and largely on the grounds that the reduction in transaction costs would offset any public detriment from 'reduced competition', the above analysis of the tortuous reasoning is intended to show the difficulty and arbitrariness inherent in the task of applying the criteria of competitiveness in establishing the net public benefit of collective bargaining in such an industry. Following the recommendation of the Dawson Report on the right of collective boycott in collective bargaining between small and big business, the ACCC included this right in its determination. It maintained that while this right 'could significantly increase the anti-competitive effects of the proposed collective bargaining arrangements', certain public benefits would accrue from it to offset the 'anti-competitive detriments'. How this would come about was asserted rather than substantiated. It will be noted that instead of applying the concept of 'countervailing power' without qualification, an accepted principle of labour law, the ACCC resorts to considering the addition and reduction of competitive detriments on an undisclosed calculus.

However, in its concern to minimise the 'anti-competitive detriments' of the right to boycott, the ACCC imposed procedures that would in effect water down this right. Thus, although conceding that the growers would resort to boycott as a last resort, it required the growers intending to apply this right to give their respective processor 21 days notice of this intention (ACCC 2005: para 12.25) to allow adequate time for mediation. This was in addition to the requirement of six months of negotiations for a new contract, and that any batch of chicken being grown at the time a boycott becomes available, must be completed before the boycott is applied. Further, a boycott should not occur at the same time in more than one grower group. In substance, these restrictions aim at avoiding an industry-wide boycott (ACCC 2005: paras 12.9, 12.22).

Underlying these restrictions on the boycott powers of the growers is the ACCC's concern to minimise the risk and extent of interruption to the supply of chickens in the interest of the consumer. This is understandable but not justifiable since the inconvenience and any rise in price to the consumer because of chicken meat shortage would be transitory. Further, it is inconsistent with the ACCC's recognition of the greater bargaining power of the processors and the ability of the main processors to draw from their operations in other states during a boycott in Victoria.

However, even the limited boycott provision allowed by the Commission was overturned on appeal by the processors to the Australian Competition Tribunal. (Re. VFF Meat Growers Boycott Authorisation [2006] ACompT 21 April 2006) Although admitting that the processors have significant market power, the Tribunal rejected the boycott provision because the likely cost of boycotts would be unduly high whereas, with the growth of demand over time, the processors' market power is thought likely to weaken.

Given the structure of the industry, both grounds are highly speculative and are in substance contradicted by the admission that there 'is no empirical

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evidence of the effect of collective boycotts' (para 438) and that it is 'highly uncertain' (para 451) how the growers would exercise their boycott power. The Tribunal gave no weight to the very limited degree of collective boycott allowed by the ACCC in speculating on the cost of the boycott. It would have been more appropriate in the circumstances, given its admission of the existence of significant market power, to allow the boycott provision and to see how it works over time. Should the concerns of the Tribunal be realised, it would then be open to the processors to bring the matter back to the Tribunal. It is surprising that the Tribunal did not impose the onus of establishing the likely cost of the boycotts on the appellants.

A further puzzling aspect of the Tribunal's reasoning is reflected in its statement that 'In the thirty two years of the life of the Act, the ACCC and its predecessor have never before authorised a collective boycott' (para 442). This is obviously true, but the Dawson Committee had only recently considered the situation and had issued a recommendation that there should be a right to collective boycott. The Tribunal's remark is in effect a denial of the Dawson Committee's recommendation.

It is arguable that, by its reasoning, the Tribunal has unwittingly made a strong case for a regulated system. If a collective boycott is not allowed and a situation of bilateral monopoly is found by the Tribunal to exist (para 451), surely the public (consumer) interest is best protected by something like the VBINC. However, although sensible for the industry and the consumers, millions of dollars are likely to be lost to the State from going against the National Competition Council. This appears to be a continuing deterrent to such action.

Concluding Observations

The ACCC, operating under the TPA, is concerned with promoting competition and efficiency. Anti-competitive elements and combinations are anathema to its thinking. Its concern is the welfare of the consumer rather than that of the sellers of service. In giving more power to the sellers of service or, as it sees it, adding to anti-competitive effects, it faces a conflict between support for the weaker party and maintaining its primary concern for the interest of the consumer. Collective bargaining of services does not sit comfortably in the TPA.

In the case of enterprise collective bargaining under labour law, the concern for competition and the consumer is not a primary issue except when industrial action has serious impact on the economy, especially in post-*WorkChoices* circumstances, where the public interest test in certifying collective agreements is no longer required. Here the concept of countervailing power as a means to protect the weaker party in the labour market is the primary rationale for collective bargaining and the statute on which it is based. Although *WorkChoices* reduced the force of this object, it is still inherent in the way enterprise collective bargaining is allowed to operate in the labour market.

However, the two areas of law are on more common ground as far as multiple employer collective bargaining is concerned. *WorkChoices* offered no protection to industrial action in such collective bargaining while pattern bargaining is illegal. There is here an implicit but unjustified public benefit concern,

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because there is strong argument in favour of both forms of bargaining being allowed in the interest of diversification (Briggs, Buchanan and Watson 2006: 11–15) and long term public benefit.

The conclusion to be drawn from these considerations is that the application of the ACCC's collective bargaining principles in what is, by any reasonable test, the sale of services very similar to sale of labour by employees to employers, is difficult to administer and to justify. The difficulties involved in such application are clearly shown by the case of the chicken growing industry in Victoria. Although procedural changes have taken place, the *Guide to Collective Bargaining* (ACCC 2007a) published by the ACCC does not suggest that in substance, much has changed. More recent cases underline this conclusion.

Two applications by the Australian Medical Association of Victoria were rejected on the grounds that the public detriment outweighed the public benefit. In the matter of the proposed collective bargain by a group of doctors with the Latrobe Regional Hospital (ACCC 2007b), the ACCC expressed concern that 'the coverage and composition of the group would lead to potentially anti-competitive outcomes' resulting in a potential price rise, and forcing the hospital to operate with fewer medical practitioners (ACCC 2007b: 28). The other AMA application, on behalf of 26 Visiting Medical Officers at the Werribee Mercy Hospital, was also rejected because the ACCC was 'concerned that the coverage and composition of the group in this instance is likely to lead to sufficient increases in doctor bargaining power to lead to potentially anti-competitive outcomes' (ACCC 2007c: 1). On the other hand, an application by the Wangaratta Anaesthetic Group for authorisation to bargain collectively with BUPA Australia Health Pty Ltd (CB0006) was allowed because the ACCC considered that 'the potential anti-competitive impact would be limited, in particular by the voluntary nature of the proposed arrangement' (ACCC 2007d: 18). Whereas in the two previous cases there were objections from the Victorian Department of Human Services, in this case there was no opposition to the application. Another application, based on voluntary collective bargaining and with no objection from any source, obtained approval from the ACCC. This was in the matter of four removalists bargaining collectively with Pacific National (CB0007). The ACCC concluded that the potential for anti-competitive effect was limited by the 'small size of the collective bargaining group, the voluntary nature of the arrangement and the arrangement does not involve potential boycotts' (ACCC 2008: 10). It should be noted that the other cases did not seek the right to collective boycott.

It appears, then, that *voluntary* collective bargaining may receive favourable response from the ACCC but authorisation is less likely where the application is opposed by the employer or interveners. Further any countervailing power, the essence of collective bargaining, is subject to the hazard of being 'sufficient' to be 'potentially anti-competitive' and is thus likely to be fatal to an application for collective bargaining. Moreover, the limitations on boycott, as discussed above, make the right to collective bargaining even less meaningful. The notions and considerations and the high element of subjectivity underlying their application under trade practices law, are not evident in the industrial jurisdic-

tions as criteria for allowing collective bargaining. This is highlighted by the ability of nurses to engage in collective bargaining with hospital and health authorities without the questions of public benefit and detriment being raised.

If the true object of legislature is to provide countervailing power to small businesses supplying services, the logical course to adopt in favour of those who are clearly not independent contractors, is to move the jurisdiction of such collective bargaining to industrial tribunals or to a body other than one based on the TPA. This would place these sellers of services on substantially the same basis as employees, owner-truck drivers and TCF outdoor workers. In addition, there should be provision for a procedure to deal with objections to such a course from target employers on evidence that the small businesses concerned are 'pure' contractors to be properly dealt with under the TPA.

Notes

1. This section prohibits price fixing.
2. The relevant words.
3. This paper is only concerned with the sellers of services.
4. s 88(7) of the TPA allows protection from s 45DB relating to boycotts affecting trade or commerce.
5. A detailed account of this case is to be found in 'Oligopsony, Monopsony and Collective Bargaining in the Victorian Broiler Chicken Industry: The Dominance of Doctrine over Performance?' in Shlomowitz, R. (ed) 2008 *Flinders Essays in Economics and Economic History*. *A Tribute to Keith Hancock, Matodey Polasek and Robert Wallace,* Adelaide, Wakefield Press.
6. A similar arrangement to VBINC prevailed in NSW. After suffering penalties running into many millions of dollars for maintaining the regulatory system in the face of the National Competition Council's objection, the NSW government finally succumbed to reducing the regulatory arrangement by amending the Poultry Meat Industry Act 1986 in June 2005. In effect, the industry-wide regulatory arrangement no longer exists and groups of growers can now as a group deal with their particular processor. It is not clear that there is even collective boycott right.
7. There were two sets of applications and two determinations of the ACCC but for purposes of brevity, we consider them together.

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