

Chapter 2

Issues

2.1 This chapter discusses allegations made by Cuthbertson Brothers Pty Ltd (Cuthbertsons) in relation to its commercial dealings with Swift Australia Pty Ltd (Swift).

Background

2.2 Cuthbertsons, which was established in 1840, is one of the major purchasers of sheep and lamb skins in Tasmania. It processes the skins at its processing plant in Launceston. Following processing, the skins are exported to China where they are further processed. The company has supplied skins and hides to footwear manufacturers throughout the world for over 150 years.

2.3 For many years, Cuthbertsons has purchased skins from the Longford and Devonport abattoirs. In 2008 Swift acquired these abattoirs. Swift is a subsidiary of one of the largest meat sellers in the world, and is the largest meat processor in Australia. Until February 2009, Cuthbertsons purchased some 80 per cent of the sheep and lamb skins produced in Tasmania.¹

2.4 For many years, including prior to Swift's acquisition of the Longford and Devonport abattoirs, skins have been sold at the abattoirs by way of auction. The auction process involves potential buyers attending the abattoirs to inspect the skins and tendering for these skins.

The potential buyers...tender their prices through an open process with the highest bidder generally securing the sheep and lamb skins. This money is then paid directly to the primary producer or the agent that represents them.²

2.5 An open tendering process operated. This process was described by Cuthbertsons in the following terms:

After inspecting the sheep and determining an appropriate price to offer for the skins the buyer writes his tendered price, i.e. the price that he [is] prepared to pay per skins for particular sheep in designated pens on an abattoir form. That form is then delivered to the Swift's abattoir administration. There are obviously other buyers in the market and the abattoir obtains prices from other buyers in the same manner. In other

1 *Submission 94*, Cuthbertson Brothers, section 3.

2 *Submission 94*, Cuthbertson Brothers, section 3.

words Swift is aware of the prices being offered by all of the prospective skin buyers.³

2.6 As noted above, until recently, Cuthbertsons was the largest buyer of skins at the Longford and Devonport abattoirs. In late December 2008, Cuthbertsons became less successful in acquiring skins.

2.7 Cuthbertsons stated that from about December 2008, Swift changed its operating practices at the Longford abattoir to one where Swift organises a tender for the sale of skins to interested buyers. Cuthbertsons argued that the process is not a competitive tender process.⁴

2.8 Cuthbertsons claimed that Swift, with the assistance of a Victorian skins merchant, Knox International Trading Co, operates the tender process for the skins such that following collection of the tenders, the highest bid made by Cuthbertson (or other external tenderers) may be subject to a further, often marginally higher, tender bid being made by Swift – or Knox on behalf of Swift – thereby unfairly disadvantaging Cuthbertsons and other arms-length tenderers.

2.9 The process was explained in the following terms:

Swift has now entered the skin buying market. Swift retains a skin buyer and processor a Mr. John Knox, in Melbourne who buys skins for Swift. Neither Mr. Knox nor any representative of Mr. Knox attend at the abattoirs and price the skins in the manner used by Cuthbertson Bros or by other potential buyers. What happens is reasonably straightforward. Swift's abattoir administration provide all of the quoted prices from the other buyers to Mr. Knox who then on behalf of Swift offers a higher price to the farmers. The higher price can vary between 5 cents to 10 cents per skin. Through this means, Swift is able to purchase all of the skins with the knowledge that their prices exceed that offered by Cuthbertson Bros. or other potential buyers. This process is fundamentally unfair. Cuthbertson Bros. and other buyers are being outquoted by 5 to 10 cents per skin and cannot consequently purchase the skins.

As a result of the abattoir which is owned by Swift receiving quotes from prospective buyers for the sheep and lamb skins, Swift is in the unique position of knowing what price is being offered for skins and being able to outbid Cuthbertson Bros and other buyers.

The overall effect has been that Cuthbertson Bros. is literally being priced out of the market and is suffering significant damage.⁵

3 *Submission 94, Cuthbertson Brothers, section 5.*

4 Mr Jones, Manager, Cuthbertsons/Mr Dickinson, Managing Director, Cuthbertsons, *Committee Hansard*, 1 April 2009, pp 2-4.

5 *Submission 94, Cuthbertson Brothers, section 5. See also Mr Jones/Mr Dickinson, Committee Hansard*, 1 April 2009, pp 2-4.

2.10 On 9 February 2009, Cuthbertsons stated that company employees were refused entry to tender for sheep and lamb skins at the Longford abattoir making it impossible for them to price the product. The company stated that it has also been threatened with refusal of entry at Swift Devonport.⁶

Possible contraventions of the *Trade Practices Act*

2.11 Cuthbertsons have made two related allegations concerning possible contraventions of the *Trade Practices Act 1974*.

2.12 Firstly, that Swift engaged in false or misleading conduct in the operation of the tender system for selling sheep skins; and secondly, that Swift's dealings at its Longford abattoir constitute a misuse of market power.

2.13 In a letter dated 16 February 2009, Cuthbertsons raised these allegations with the ACCC and requested that the Commission investigate these matters.⁷

2.14 Given its concerns about the allegations raised, the committee drew the ACCC's attention to the evidence it received from Cuthbertsons at the public hearing on 1 April 2009 to assist with the Commission's investigation.

2.15 Cuthbertsons argued that by divulging to their own agent prices being offered by competitors, Swift has obtained an unfair advantage in the market place – 'hence, Swift through its market power is eliminating or substantially damaging its competitors by misleading and deceptive conduct'.⁸

2.16 Cuthbertsons claimed that Swift 'continues a pattern of acting in a manner which is an abuse of their market power as well as being deceptive and misleading'. Cuthbertsons alleged that Swift:

- approached Cuthbertsons' main customer, Dynasty, offering to sell sheep and lamb skins directly despite claiming to participate in negotiations with the Tasmanian Farmers and Graziers Association;
- moved to significantly undercut the price for salting and shipping skins to Melbourne; and
- inferred to some members of the farming community, that if Cuthbertsons price their skins, Swift may not be in a position to process their lambs.⁹

2.17 A legal opinion obtained by Cuthbertsons in this matter concluded that:

6 *Submission 94*, Cuthbertson Brothers, section 3.

7 *Submission 94*, Cuthbertson Brothers, section 5.

8 *Submission 94*, Cuthbertson Brothers, section 3.

9 *Submission 94*, Cuthbertson Brothers, section 3.

...there is a very good argument that Swift's conduct in connection with the tender of skins at its Longford and Devonport abattoirs contravenes each of sections 52 and 51AC of the TPA. Cuthbertson's interests are affected by that conduct and it would have standing to seek injunctive relief against Swift under section 80 of the TPA.¹⁰

2.18 In relation to the ACCC's investigation, the Commission advised the committee that on the issue of a potential misuse of market power, 'the ACCC believes that based on current evidence, that a misuse of market power allegation is not likely to be sustainable on current evidence'.¹¹

2.19 In respect of the alleged false or misleading conduct, the ACCC advised the committee that it sought Swift's substantive response to the issues raised, as well as detailed information and documents relating to all tenders submitted by all parties since December 2008 – 'the ACCC has received that information and is presently assessing it, together with further information from a range of sources'.¹²

Effect of the company collapse

2.20 The committee was advised by John Barker and Associates, on behalf of Cuthbertsons, that the company is 'loosing substantial money and may have no other recourse than to close business at the end of June'.¹³

2.21 Evidence to the committee indicated that the collapse of Cuthbertsons would potentially have a number of adverse consequences on the community and the local economy. Cuthbertsons stated that 'a great Tasmanian company, with a proud history of working with the Tasmanian farming community for generations will be lost'.¹⁴ The company also noted:

This has placed Cuthbertson's operations under a cloud and the livelihood of 20 long term employees. This lock out is threatening financial returns to drought-affected farmers and exports of iconic Tasmanian ugg boots to lucrative US markets.¹⁵

2.22 Cuthbertsons noted that as the purchaser of some 80 per cent of sheep and lambskins in Tasmania, the withdrawal of the company from the market would mean

10 Memorandum of Advice in the Matter of Cuthbertson Brothers Pty Ltd and Swift Australia Pty Ltd – MH O'Bryan, dated 2 April 2009, cited in Mr John Barker, John Barker and Associates, Correspondence, dated 6 April 2009, p. 9. Section 52 of the TPA relates to misleading and deceptive conduct; section 51AC of the TPA relates to unconscionable conduct.

11 ACCC, Correspondence, dated 15 May 2009.

12 ACCC, Correspondence, dated 15 May 2009.

13 John Barker and Associates, Correspondence, dated 17 May 2009.

14 *Submission 94*, Cuthbertson Brothers, section 3.

15 *Submission 94*, Cuthbertson Brothers, section 3.

that producers would be likely to receive significantly less for their product (by an estimated \$3 to \$4 per skin) due to a reduction in competition.

If we close it, the consequences for the farming community are pretty dire. You will have virtually no-one quoting on the skins except Swift.¹⁶

2.23 Cuthbertsons further noted that competition is likely to be reduced.

Swift have also refused a major exporter from using their Longford facility, costing Tasmanian producers a further \$7 to \$10 per animal.

If this is allowed to continue, it is likely farmers' agents will be the next to be pushed out by Swift.

Once all competitive forces are removed from the market, Swift will seek to deal directly with producers and move from being a price taker to a price maker. They will control the market for export quality lamb products from Tasmania.¹⁷

2.24 Employment losses are also likely to occur. The company currently employs 20 people in Hobart, Launceston and Devonport.¹⁸

2.25 The demise of the company would also have consequences for the Tasmanian brand identification.

It is very similar to the King Island brand. Both are very good brands. John Verrall spent 15 years developing the Australian lamb market around the world as authentic Tasmanian. In the stroke of a pen, they pushed him out.¹⁹

2.26 The collapse of the company would also have an economic impact on Tasmania. Cuthbertsons estimated the cost to the Tasmanian economy at approximately \$10 million per year.

We have estimated that the loss in Longford alone in the lamb and sheepskin market will be \$10 million to the primary producer alone, without the meat. The Australian Lamb Co. are going to pay somewhere between \$10 and \$13 to process these lambs in Victoria. That comes off the farmer.²⁰

Committee view

2.27 The committee views with great concern the recent dispute involving Cuthbertsons and Swift. The committee believes that the matter raises serious questions in relation to market dominance within the industry. The gravity of the

16 Mr Dickinson, *Committee Hansard*, 1 April 2009, p. 12.

17 *Submission 94*, Cuthbertson Brothers, section 3.

18 Mr Dickinson, *Committee Hansard*, 1 April 2009, p. 12.

19 Mr Dickinson, *Committee Hansard*, 1 April 2009, p. 17.

20 Mr Dickinson, *Committee Hansard*, 1 April 2009, p. 17.

situation is apparent given the ACCC's current investigation of possible contraventions of the Trade Practices Act.

2.28 The committee considers that the evidence presented during the inquiry raises doubts about the efficacy and fairness of the tender process administered by Swift. The committee is disappointed that Swift declined to appear before the committee to respond to the allegations raised.

2.29 The committee believes that a possible collapse of Cuthbertsons would have dire consequences in terms of the loss of an iconic Tasmanian company, and the resultant economic impact on the local community in terms of employment and a broader impact on the Tasmanian economy.

2.30 The committee urges further negotiations between Cuthbertsons and Swift to resolve this matter. The committee further urges Swift to deal fairly with Cuthbertsons and other companies in the operation of its Tasmanian abattoirs.

2.31 Members of the committee retain an interest in this matter and will report to the Senate further on this issue should the need arise.

Senator the Hon Bill Heffernan
Chair