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## Timothy J. Ryan & Associates Pty. Ltd.

19 December 2003

Mr T. Grimwade  
General Manager Adjudication Branch  
Australian Competition and Consumer Commission  
PO Box 1199  
Dickson ACT 2602

Dear Sir

### **Applications for Authorisation - Bartter and Related Applications**

#### **The Application**

Enclosed is an application for authorisation pursuant to s.88(1) of the Trade Practices Act (Form B) made by Bartter Enterprises Pty Ltd ("**Bartter**"), a processor of chicken meat in Victoria. The application is made by Bartter on its own behalf and on behalf of certain growers contracted to Bartter for the growing of chickens, which growers have consented in writing to the application being made.

Bartter seeks authorisation from the Australian Competition and Consumer Commission ("**ACCC**") to give effect to ten contracts entered into by it and nine growers in July 2001 for the growing of chickens. Bartter seeks authorisation on its own behalf in respect of its own conduct in negotiating, entering into and giving effect to the growing contracts with the growers on a collective basis. In so far as Bartter makes the application on behalf of the consenting growers, it is made in respect of the growers' conduct in negotiating, entering into and giving effect to the growing contracts with Bartter on a collective basis.

Bartter also seeks ACCC authorisation on its own behalf in respect of its own conduct in the negotiation of further growing contracts with other growers.

The grounds on which the application is made (and on which the related applications are made) are set out in detail in the document identified as "Annexure D" and described as "Application to the ACCC for Authorization to enable certain conduct to be undertaken in relation to contract chicken growing in Victoria".

As Annexure D is common to the application and each related application, it is only reproduced once. It can be found as an attachment to the Bartter Application.

## **Related Applications**

Related applications by the following additional Victorian chicken meat processors are also enclosed:

1. **La Ionica Farming Operations Pty Ltd ("La Ionica")**

La Ionica seeks authorisation on its own behalf in respect of its own conduct in negotiating, entering into and giving effect to growing contracts with growers on a collective basis. La Ionica also makes the application on behalf of Tarwood Pty Ltd ("**Tarwood**") a grower contracted to La Ionica that has consented in writing to the application being made on its behalf. In so far as the application is made on behalf of Tarwood it is made in respect of Tarwood's conduct in negotiating, entering into and giving effect to a growing contract with La Ionica and other growers on a collective basis..

2. **Baiada Poultry Pty Ltd ("**Baiada**").**

Baiada seeks authorisation to give effect to contracts entered into by it and 83 growers in April 2003 for the growing of chickens. Baiada seeks authorisation on its own behalf in respect of its own conduct in negotiating, entering into and giving effect to the growing contracts with the 83 growers on a collective basis.

Baiada also seeks authorisation on its own behalf in respect of its own conduct in the negotiation of further growing contracts with other growers.

3. **Inghams Enterprises Pty Ltd ("**Inghams**")**; and

4. **Hazeldene Chicken Farm Pty Ltd ("**Hazeldene**")**

Inghams and Hazeldene seek authorisation on their own behalf in respect of their own conduct in engaging in negotiations with growers of chickens on a collective basis with a view to arriving at an agreement with those growers for the growing of chickens and ultimately entering into such an agreement.

The five processors named as applicants are the only fully integrated processors of chicken meat in Victoria. Integrated processors are companies that supply all the day old chicks and feed to contract growers or company owned farms, collect the grown chickens, then process or provide birds to non integrated processors and distribute and market the meat products. Through their agreements with growers the integrated processors produce most of the chickens grown in Victoria. These matters and other relevant features of the market in Victoria are dealt with in detail in Annexure D to the applications.

In the circumstances briefly outlined above and developed in detail in Annexure D, the processors consider the four applications listed above to be "related" to the primary application made by Bartter for the purposes of regulation 28(6) of the Trade Practices Regulations. They therefore apply on that basis and request that the ACCC apply a concessional fee in respect of those applications.

A cheque for \$13,500 is enclosed<sup>1</sup>, representing the fee payable in respect of these applications on this basis.

### **Interim Authorisation**

The applicants request that the ACCC grant interim authorisation pursuant to s.91(2)(d) of the Act in respect of each of the Bartter and the related applications, pending full consideration of them.

The existing contracts that are the subject of the applications were negotiated while Authorization A90750 was in force. Similarly, the negotiations that are contemplated by the description of the conduct that is the subject of the applications is, in most cases, the continuation of a process commenced but not completed while that Authorisation was in force.

The consequences of the applicants being unable to give effect to the existing contracts – and continue their negotiations with a view to further contracts - under an interim authorisation and pending full consideration and a final determination are dealt with in detail in Annexure D at p16.

### **Confidentiality of Information Contained in Annexures to the Applications**

The applicants also request that those annexures to their applications marked in red with the words "restriction of publication claimed" be excluded from the public register.

Those annexures for which confidentiality is claimed in respect of each application are:

1. Grower contract or contract outlines for each applicant processor except Inghams (in each case contained in Annexure B to the application).

Each grower contract or outline contains commercially sensitive information that the applicant believes should not be made available to that applicant's processor competitors or to growers outside the relevant grower group.

For example, each grower contract or outline contains terms relating to the price to be paid per bird, and how that fee is to be calculated. Certain contracts also contain development clauses, relating to specific works the processor requires its growers to complete on their farms, and terms relevant to calculating placement density – how many birds the grower will receive from the processor for growing. Such contractual terms constitute commercially sensitive information.

2. Grower details, except where the growers have consented in writing to the application being made on their behalf.

In order to assist the ACCC the applicant processors have provided the details of each of their contract growers. This includes the details of those growers that have consented to the application being made on their behalf (being the information contained in Annexure A to each application other than the Baiada application). and the details of those who have not consented to the application being made on their behalf but who are engaged in or likely to engage in the relevant conduct (being the information contained in Annexure C of each application and Annexure A of the Baiada application).

The grower details appearing in Annexure A of the Baiada application have been provided because contracts have already been entered with these growers. The grower details appearing in Annexure C to every other application are provided because these growers are either presently negotiating (or are likely to negotiate) growing contracts with the relevant applicant processor in the future

As these growers have not consented to the application being made on their behalf, the applicant processors are concerned that publication of their details would create the assumption that they are a party to or in some way endorse the making of the application for authorisation.

Further, the applicants submit that the details of those growers with whom they might contract in the future (or with whom they are currently negotiating) is commercially sensitive information.

The applicants therefore request that the appropriately marked documents be excluded from the public register. In the event that the ACCC refuses to exclude any of the said documents from the public register, the applicants require return of the document.

Please do not hesitate to contact the writer if you require any further information.

Yours faithfully



Dr Timothy J. Ryan

Principal Consultant

Enc: Bartter Application  
Four related Applications (La Ionica, Baiada, Inghams, Hazeldene)  
Cheque for \$13,500 (fees)

# **ANNEXURE D**

## **APPLICATION TO ACCC**

**FOR AUTHORIZATION  
TO ENABLE CERTAIN CONDUCT TO BE  
UNDERTAKEN IN RELATION TO  
CONTRACT CHICKEN GROWING IN  
VICTORIA**

**By**

***VICTORIAN CHICKEN MEAT  
PROCESSORS AND  
CERTAIN GROWERS***

**DECEMBER 2003**

## CONTACT DETAILS

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**APPLICATION TO ACCC FOR AUTHORIZATION OF  
CERTAIN CONDUCT IN THE VICTORIAN CHICKEN  
GROWING INDUSTRY**

**PARTIES**

1. Bartter Enterprises Pty Ltd ACN 000 451 374 ("**Bartter**") on its own behalf and on behalf of the ten chicken growers listed in Annexure A to the Bartter application that have provided letters of consent to the application being made on their behalf (and copies of which consents are contained in Annexure A). The growers listed in Annexure A are growing chickens for Bartter under a contract collectively negotiated in July 2001 under Authorization A 90750, a copy of which is Annexure B to the Bartter application ("**the Bartter agreement**").

Related applications are from:

2. La Ionica Farming Operations Pty Ltd ACN 078 145 909 ("**La Ionica**") on its own behalf and on behalf of Tarwood Pty Ltd ("**Tarwood Farms**") a grower that has provided the letter contained in Annexure A to the La Ionica application consenting to the application being made on its behalf. Tarwood Farms operates a "processor interest farm" which will be bound by the contract agreed by the La Ionica growers that collectively negotiate<sup>1</sup>.
3. Baiada Poultry Pty Ltd ABN 96 002 925 948 ("**Baida**")
4. Inghams Enterprises Pty Ltd ACN 008 847 335 ("**Inghams**")
5. Hazeldene Chicken Farm Pty Ltd ACN 004 381 346 ("**Hazeldene**")

Bartter, la Ionica, Baiada, Inghams and Hazeldene are the five fully integrated processors operating in Victoria. Integrated processors are firms that supply all the day old chicks and feed to contract growers or company owned farms, collect the grown chickens, then process or provide birds to non integrated processors and distribute and market the meat products.

The growers are growers who (together with other growers) grow or propose to grow chicken meat under contract to a Processor.

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<sup>1</sup> Processor interest farm is a farm in which the Processor or its employees have some but not full ownership interest.

## AUTHORIZATION REQUESTED

### **Authorization and interim Authorization sought**

The Applicants are seeking **Authorization and Interim Authorization** to enable all relevant Parties to give effect to contracts already negotiated under Authorization A90750 and to allow proposed or future contracts to be collectively negotiated between Grower representatives and their Processor.

Application is made under subsection 88(1) of the Trade Practices Act 1974 (TPA):

to give effect to a provision of a contract, arrangement or understanding which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and/or

to give effect to provisions in a contract arrangement or understanding that has the purpose, has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

The Applicants seek authorization of or for their own conduct in the process of negotiating contractual terms with growers on a collective basis (and in particular negotiating with growers the fee to be paid under that contract on a collective basis), with a view to arriving at a contract.

Such negotiations occur between a representative or representatives of the growers and the processor, and the result of those negotiations are voted upon by growers. In this way the Applicants are directly involved in the process of collective negotiations, because the agreement being negotiated and the contract that will result is a contract that might be deemed to have the effect of substantially lessening competition in the market in which growers are the suppliers of chickens and processors are the acquirers.

Indeed, there would be no purpose in the growers colluding in relation to the negotiation of contractual terms (including fees) unless the Processor was willing to enter into and did in fact participate in such negotiations.

The Applicants believe that if they engage in such conduct they may expose themselves to direct liability for a contravention of s 45 the Trade Practices Act. The Applicants refer to the ACCC's Determination A 90800 in respect of an application by Inghams and other processors in New South Wales for authorization under s 88 of the Act in respect of similar conduct, and in particular the Commission's comments at paragraph 9.8 of that Determination:

*"Following the reasoning outlined in the judgment [in Jones], the Commission considers that while the processors cannot lodge an application "on behalf of" the growers, **the processors do have standing to seek authorisation**. By virtue of being engaged in the proposed arrangements **either directly or** by being "knowingly concerned" in any possible contravention of section 45 of the TPA by growers (and thus being derivatively liable due to the operation of*

## AUTHORIZATION APPLICATION TO ACCC

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*section 75B), the processors have standing as parties to seek an authorisation to protect themselves." (emphasis added)*

While the Applicants note that the Appeal Court's decision in Jones may not support them having standing in their own right on the basis of the potential for derivative liability, the Appeal Court's judgment does not disturb – and indeed appears to support – the first part of this statement as to the standing of the processors **in their own right and in respect of their own conduct**.

More particularly in so far as each processor is concerned:

### **Bartter**

Bartter seeks authorization to give effect to ten growing contracts entered into by it with nine growers in July 2001 (while Authorization A97050 was still in force) for the growing of chickens. Each contract is identical except for the name of the grower. A copy of the contract is Annexure B to the Bartter application. Bartter negotiated the terms of the contract with the nine growers collectively, the growers electing a single grower to negotiate on their behalf the terms of the agreements. Bartter negotiated with the growers (by their representative) a common fee to be paid to all of the growers, and the manner by which such a fee was to be calculated.

Bartter makes this application on its own behalf in respect of its own conduct in participating in negotiations. Bartter also makes the application on behalf of the growers who have consented in writing to it doing so. In so far as the application is made on behalf of the consenting growers, it is made in respect of the growers conduct in negotiating with Bartter for the contract on a collective basis.

Bartter also seeks authorization to negotiate further contracts in the same terms as are contained in Annexure B to the Bartter application with other growers who will also act collectively in those negotiations. To the extent that those growers are known at this time, they are identified in Annexure C to the Bartter Application. The growers will be represented by one or more of their number for the purposes of the negotiation. The result will be that the growers will each be bound by a contract of similar terms, including the terms as to the common fee to be paid to growers and the basis upon which that fee is calculated.

### **La Ionica**

La Ionica makes this application on its own behalf in respect of its own conduct in participating in negotiations with growers of chickens (including Tarwood Farms) with a view to arriving at an agreement with those growers for the growing of chickens, and ultimately entering into such an agreement.

La Ionica also makes the application on behalf of the grower Tarwood Farms who has consented in writing to La Ionica making the application on its behalf. In so far as the application is made on behalf of Tarwood, it is made in respect of Tarwood's conduct in negotiating with La Ionica for the contract on a collective basis with other growers.

The conduct for which La Ionica and Tarwood seek authorisation is engaging in negotiations with a view to arriving at an agreement for the growing of chickens, and ultimately entering into such an agreement.

## **AUTHORIZATION APPLICATION TO ACCC**

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La Ionica also seeks authorization to negotiate further contracts in the same terms as are contained in Annexure B to the La Ionica application with other growers who will also act collectively in those negotiations. To the extent that those growers are known at this time, they are identified in Annexure C to the La Ionica Application. The growers will be represented by one or more of their number for the purposes of the negotiation. The result will be that the growers will each be bound by a contract of similar terms, including the terms as to the common fee to be paid to growers and the basis upon which that fee is calculated.

### **Baiada**

Baiada seeks authorization on its own behalf to give effect to contracts for the growing of chickens that were entered into by it with 83 growers in April 2003 (while Authorization A97050 was still in force). Each contract is either in the form of an amended Marven or Eatmore contract, with the 2003 amendments that were negotiated by the former Marven and Eatmore growers with Baiada appended to it. The contracts within each of these sub-groups are substantially the same, but will have different ending dates. An example of each such contract is contained in Annexure B to the Baiada application. Baiada negotiated the terms of each of these amended forms of contract with the growers collectively, the growers having elected representatives to negotiate the terms of the agreements on their behalf. Baiada negotiated with the growers (by their representatives) a common fee to be paid to all of the growers, and the manner by which such a fee was to be calculated.

Baiada also makes this application on its own behalf in respect of its own conduct in engaging in further negotiations with another group of growers of chickens ("the free range growers") with a view to arriving at an agreement with those growers for the growing of chickens and ultimately entering into a growing contract. The free range growers will negotiate collectively with Baiada through representatives elected by them. The growing contract will be in a form similar to the draft Free Range Contract that is contained in Annexure B. It will provide for a common fee to be paid to all of the growers, and the manner by which such a fee is to be calculated. To the extent that those growers are known at this time, they are identified in Annexure C to the Baiada Application.

### **Inghams**

Inghams seeks authorization on its own behalf and in respect of its own conduct in engaging in negotiations with growers of chickens with a view to arriving at an agreement with those growers for the growing of chickens and ultimately entering into such an agreement. The agreement will be in identical terms for each grower and will provide for a common fee to be paid to growers for the growing of chickens and the basis on which that fee is to be calculated. An example of the form of proposal appears in Annexure B to the Inghams Application.

Inghams has identified in Annexure C to the Inghams application the names of growers that may wish to collectively negotiate a like agreement with it as a processor. It has also nominated other growers unknown at this time who in the future may also want to collectively negotiate a like agreement.

The growers will be represented by one or more of their number collectively.

**Hazeldene**

Hazeldene seeks authorization on its own behalf and in respect of its own conduct in engaging in negotiations with growers of chickens with a view to arriving at an agreement with those growers for the growing of chickens and ultimately entering into such an agreement. To the extent that those growers are known at this time, they are identified in Annexure C to the Hazeldene Application.

An example of the form of proposed agreement is Annexure B to the Hazeldene application. The agreement will be in substantially the same terms for each grower and will provide for a common fee to be paid to growers for the growing of chickens and the basis on which that fee is to be calculated. The growers will act collectively and will be represented by one or more of their number in those negotiations.

**All contracts of a similar form**

All chicken growing agreements that are or will be entered into by the processor applicants will be in a similar form and cover the matters set out in the Guidelines for Contracts in Appendix A to this Annexure D. Processors have agreed to structure contracts using the framework set out in the Code of Conduct but particular contracts may vary with mutual agreement. Contracts for individual companies may be confidential due to the inclusion of particular fees, fee adjustment mechanisms, performance benchmarks, incentive payment and other details that are commercially sensitive.

Individual Growers will retain the right to opt out of collective negotiations and to negotiate specific contracts with Processors under the requested Authorization.

**Authorization period**

Authorization is sought for each application for 5 years. Five years is a commonly accepted time period in the Industry for contracts given the size and nature of the investment by growers. **Interim Authorization** for each application is sought immediately.

## INDUSTRY AND MARKETS OF RELEVANCE

There are two markets of relevance for this application, the Victorian market for chicken meat and the market for chicken growing services. They are connected through the integrated Processors.

### **Chicken Meat: Victorian Industry**

Approximately 2.3 million birds per week are grown and processed in Victoria, producing about 210,000 tonnes of chicken meat annually or 30 per cent of Australian production. The Industry is continuing to become nationally integrated with three of the integrated Processors operating in Victoria having processing and distribution facilities in most States. That distribution network has lowered the barriers to entry of interstate product, which with current technology may be shipped safely and economically anywhere in Eastern Australia within 24 hours and has added to the competitive pressures across the Australian market. Most Victorian production however is still consumed in Victoria, with around 7 per cent sent interstate and perhaps 2-3 per cent exported, mainly on an opportunistic basis.

#### *Very competitive market*

The Victorian market is highly competitive at the production, wholesale and retail levels. Product pricing is a major weapon employed by companies to gain and hold markets against other processors and competing products to other value adding processors and into the consumer and food service sectors. The retail sector (particularly supermarkets) and the food service industry (firms such as MacDonalds, KFC, Red Rooster) are the major market outlets. Only about 10 per cent of production is sold under a contract with a set period and specifications and only a few contracts have fixed prices. Accordingly strong attention is focussed on price and production costs that are always under pressure. Any gains by processors in production costs are quickly competed away along the marketing chain.

Consumers have benefited from this competition with the real retail price of chicken meat falling on average by 4.7 per cent annually over a 15 year period<sup>2</sup>. This price decline easily outperforms the decline in other meat prices over that period. Chicken meat prices have continued under pressure since that study with the Industry just emerging from a severe price war. Also processors have been squeezed by a drought that pushed up feed costs. Feed accounts for approximately 60 per cent of live bird costs.

#### *Globally industry is vertically integrated*

The critical significance of costs, the challenges of dealing with live birds and the need to supply significant volumes of consistent product to markets within designated time periods necessitates very tight control of all operations. These pressures have led the Industry globally to vertically integrate.

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<sup>2</sup> Instate Pty Ltd & Heilbron, S.G. (1997) *The Australian Chicken Meat Industry: International Benchmarking Study*, commissioned by the Australian Chicken Meat Federation, May.

### **The Companies**

The integrated firms, Bartter, Inghams, Baiada, La Ionica & Hazeldene provide all day the old chicks for commercial operations in Victoria and except for La Ionica also operate breeder farms and hatcheries and in the case of Inghams a feedmill.

Inghams, Bartters and Baiada are companies that operate nationally. Inghams grows and processes in all States and Bartter in all States except Tasmania. Bartter closed its South Australian growing operations last year and now supplies product to its Adelaide facility from Victoria. Both Inghams and Bartter transfer some product to and from other States for further processing. Other companies transport product for interstate, specialized production lines.

Baiada expanded from New South Wales two years ago buying out Marven Poultry in July 2001 and Eatmore Poultry in July 2002. It supplies product to South Australia, New South Wales and Queensland. La Ionica, one of the smaller integrated Processors markets a significant proportion of its product into New South Wales. Hazeldene another smaller integrated Processor located at Bendigo routinely moves product to Melbourne and South Australia.

### *Market shares*

The integrated firms process most of the chickens grown in Victoria themselves. Inghams has its processing plant at Somerville, Bartter west of Geelong, Baiada at Laverton (its Lilydale plant is used only for further processing), La Ionica at Thomastown and Hazeldene at Bendigo. The approximate market shares of the integrated processors and the number of their contract farms are set out in Table 1.

Other (non-integrated) processors such as Limnos, Crystal, and Cammorotto process live birds provided by the integrated processors (Baiada is the major supplier of live birds) or debone and further value add to product from other processors before selling onto the parties selling to consumers. The mix of processors ensures a very competitive market at the wholesale and the retail levels.

**Table 1: Production share estimates of suppliers of chickens and contract farms in Victoria.**

<b>Company</b>	<b>Production share (%)</b>	<b>Contract farms</b>
Inghams Enterprises Pty Ltd	21	45
Bartter Enterprises Pty Ltd	20	31
Baiada Poultry Pty Ltd	32	110+
Hazeldene Chicken Farm Pty Ltd	13	11
La Ionica Farming Operations P/L	15	23
<b>Total</b>	<b>100<sup>(a)</sup></b>	<b>220+</b>

(a) May not add to 100 due to rounding errors.

### **Chicken growing services**

Chicken growing services are an input into the production of chicken meat. The demand for chicken growing services therefore is a derived demand heavily influenced by chicken meat demand considerations, by technology along the production chain and the costs of all inputs.

If live bird costs to a particular plant are high, product will be substituted into the market from other lower cost plants located elsewhere within the State or interstate. There will be a consequent decrease in quantities demanded for all inputs including growing services at the high cost site.

#### *Contract farms are the norm*

Growing services around the world are typically outsourced as a way of conserving capital and of ensuring growing efficiency. The industry also is heavily involved in using contracts in other sectors, for breeders, cartage of chicks, live bird pick-up and delivery of product.

The processor provides the key inputs: chicks, feed and technical advice.

The grower provides chicken housing facilities (shedding), labour, some other variable inputs and management. The grower services are capital intensive with upwards of \$1 million or more for a modern, large facility. The facilities are specific to the chicken industry. The standard of the shedding (technology) has a direct impact on live bird costs. The technology impacts on costs to the processors through factors such as feed (through feed conversion ratios), rate and evenness of growth (timing of finish and homogeneity of product) and quality of product (damage to breast meat). Growers receive a fee per bird in return for their services.

The Victorian fee has recently moved from the regulated fee of 50.275 cents per bird established in late 2000 to between 53 and 55 cents. The 1997 Instate Australian benchmarking study found that growing fees averaged 15 per cent of live bird costs.<sup>3</sup>

#### *Economic interests of parties are not directly aligned*

There is a misalignment of expenditure and returns between the contracting parties. The live bird costs to processors are heavily influenced by the grower's investment in and maintenance of growing facilities, effort and bird husbandry skills, yet these factors are costs to the grower. Contracts therefore contain performance criteria to better align the economic interests of the parties and inefficiency definitions to protect processors from poor growing standards. Processors also are only willing to provide contracts if the growers meet company shedding standards.

#### *Majority of Growers have choice of Processor*

Growing farms tend to be located relatively close to the processing plant and associated feed mills to minimize transportation costs and ensure quality of finished birds. Inghams, Baiada and La Ionica all have farms on the Mornington Peninsula and in East Gippsland. Baiada has farms also to the north and west of Melbourne and into the Strathbogie Ranges, Bartter in the surrounds of Geelong and to the west of Melbourne. Hazeledene has farms in the Bendigo area.

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<sup>3</sup> Instate, op cit., p22.



Both the KPMG NCP Review<sup>4</sup> and the ACCC in its 2001 Determination (A 90750) concluded that Growers are located in close proximity to a number of buyers (at least four in most cases) of their services, with the possible exception of Growers around Bendigo.

*Efficient farms are sought after*

There is no history of efficient farms **not** having their contracts renewed or being left without a Processor to supply. The history of the Industry in fact shows that it is Processors who leave the Industry for financial reasons rather than Growers.

With the current planning criteria in effect through the Victorian Broiler Code, it is very difficult if not impossible to obtain a permit for a chicken farm in some areas or even an extension to an existing farm. Existing Growers therefore with permits are sought after by Processors.

**Regulation of contract conditions**

The growing of chickens in Victoria was subject to legislation over many years through the Broiler Industry Act 1978 and the Broiler Chicken Regulations 1992. The Regulations prescribed the terms and conditions of the contracts and the contracts had to be in a form set out in the Schedule to the Regulations. The Act established the Victorian Broiler Industry Negotiating Committee (VBINC) which among other functions periodically set a State wide common growing fee.

A Review of the Act under National Competition Policy guidelines was finalized in November 1999 and concluded that the Act and Regulations should be repealed<sup>5</sup>. A period of consultations with the responsible Minister took place. Processors suggested that Authorization to enable collective negotiations by growers be sought from the ACCC. The VFF Chicken Meat Group (VFF) that represents a number but not all growers opposed Authorization.

Following legal advice that continued operations of VBINC may put Members in breach of the TPA, VBINC no longer met beyond 2000.

*ACCC Authorization A90750*

On September 2000 Marven Poultry Pty Ltd for itself and on behalf of five other chicken meat processing companies operating in Victoria and current and future contract growers to those processors lodged an application for Authorization (A90750) with the ACCC. The application included a Code of Conduct. On 14<sup>th</sup> December 2000 a Draft Determination was released by the ACCC in which interim authorization was granted with respect to the proposed arrangements.

A final Determination was made by ACCC on 28<sup>th</sup> June 2001 granting authorization for 5 years subject to certain conditions.

*VFF Grower appeals*

In July 2001 the VFF lodged an application for judicial review of the Commission's decision with the Federal Court. The application was dismissed on all grounds on 27<sup>th</sup> August 2002.

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<sup>4</sup> KPMG (1999), NCP Review of the Broiler Chicken Industry Act 1978, Final Report, DNRE, Nov.

<sup>5</sup> KPMG op cit.

## AUTHORIZATION APPLICATION TO ACCC

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The VFF appealed to the Full Court of the Federal Court on the grounds that there was no statutory basis to grant the Authorization. The Full Court upheld the appeal in a judgment that was delivered on 5 August 2003 and set aside the Determination effective from 4<sup>th</sup> September 2003 (the "**Jones Decision**").

The decision turned on the right of Marven and the other processors to seek an authorization in relation to the conduct of the growers. The Court found that Marven was not entitled to make the application for authorization in the terms that it did. No question arose as to whether the conduct that was authorized was in fact able to be authorized, and the Court was therefore not called on to consider or decide that issue.

### **Collective negotiations no longer protected from TPA**

In a letter of 12<sup>th</sup> August 2003, the ACCC advised interested parties that effective 4<sup>th</sup> September 2003, any contracts entered into under the authorized arrangements and any collective negotiations entered into after that date would no longer be immune from the operation of the Trade Practices Act (TPA).

## **INDUSTRY ACTIVITY SINCE 2000**

The Victorian Government did not repeal the Act because existing contracts relied on the Act and the Regulations. The Regulations though were due to expire in October 2002. The VBINC contracts which are for 3 year periods with growing fees being set periodically (6 months) roll over automatically unless notice of termination is given. The last set VBINC fee of 50.725 cents per bird remained in effect because to vary that fee either growers had to negotiate individually or collectively under Authorization. There is not a common ending date, therefore contracts with various growers finish at different dates.

One group of growers with Bartter took immediate advantage of Authorization and collectively agreed a contract in July 2001. A few growers with some processors negotiated individual contracts. The majority of growers let their contracts run whilst waiting the outcome of appeals and VFF representation to the Government.

It was really only from August 2002 onwards with the pending October expiry of the Regulations that many parties started to focus on the processes afforded by Authorization. A number of negotiations were initiated from late 2002 onwards. A group of Baiada Growers for example agreed some changed contract conditions and a fee increase on a collective basis with Baiada in May 2003 (effective though from April 2003). The Jones Decision has now impacted on all collective agreements that have been concluded, that were underway or that were proposed.

### **Impact of the Jones decision**

The Jones Decision has thrown the Industry into a state of legal uncertainty with immediate negative economic impacts. The impacts include:

- unknown but potentially large adverse consequences arising from possible contravention of the TPA through continuation of arrangements negotiated in good faith,
- consequences from the delay in concluding contracts that will result in growers foregoing higher fees and improved performance incentives and
- Processors foregoing benefits from improved contracts.

These impacts will result in lower incomes for Growers, higher costs for Processors and an inability to properly manage the development of businesses by both Growers and Processors. The Industry will be hampered by a lack of certainty in a fundamental area of its commerce.

### **Growers strike**

At a meeting on Monday 1<sup>st</sup> September 2003 Growers voted in favour of returning to the VBINC system. To pursue their claim with the Government, they decided to refuse to accept birds as of 5<sup>th</sup> September claiming that with the Jones Decision and the lapsing of the Regulations, their contracts were ineffective.

Following discussions with Processors and Government, Growers withdrew their strike action.

**State of collective negotiations by Processor and Grower groups**

*Bartter*

In July 2001, a group of 9 contract growers (10 farms) accounting for 40 per cent of growing capacity collectively agreed a contract with Bartter. These growers are consenting applicants to this Authorization.

A **confidential** copy of the contract is contained in Annexure B to the Bartter application. The agreement contains a common fee varied by efficiency incentive payments that reward growers on performance against benchmarks. These incentive clauses result in additional fees to individual growers who achieve the benchmarks and total payout is not constrained as previously by total monies in a pool. The former system had a set pool of money (number of birds in the pool times common growing fee) and payment of per bird fees to growers was constrained by upper and lower boundaries (the pool spread). The result was that less efficient growers cross subsidized the more efficient growers. There have been two common fee increases to this group since the contract was agreed, one in July 2002 another in July 2003.

In November 2002, the remaining 21 Bartter growers (who are members of the VFF) commenced collective negotiations. The contract under consideration is not materially different to the agreed Bartter contract and also has a common fee that will be varied to individual growers depending on performance. The parties were within 2 to 3 days of agreement when the Jones Decision was announced. These growers are still on the old contract and they are foregoing an increased fee as well as the benefits of the improved performance provisions. Bartter is also at a disadvantage because it is foregoing benefits that it would obtain under the improved contracts.

All Bartter growers are caught in an uncertain situation. In the absence of authorization, they and Bartter now have to proceed on an individual basis or some alternative basis not yet determined either of which will incur costs.

*La Ionica*

La Ionica is the smallest of the integrated processors in Victoria having 22 contract farms of which three (including Tarwood) are processor interest farms. A Processor Negotiation Group (PNG), excluding the three processor interest farms was formed in October 2002. The PNG negotiates and agrees the fees and conditions under which all 22 contract farms including Tarwood will grow chickens.

An interim fee for placement from 14<sup>th</sup> January 2002 was agreed along with an agreement to backdate any increase in fees subsequently agreed to that date. Negotiations on new contract terms and conditions continued and were estimated to be about 70 per cent complete at the time of the Jones Decision with however agreement on the fee increase estimated to be about a week away. All negotiations including the probable fee increase were left in a state of uncertainty due to the Jones Decision.

Subsequent to the Growers threatened strike action, a fee increase only was agreed on an individual basis with each Grower and backdated to January 2002. The fee is effective until the end of 2003. The development of the contract is still in limbo. An outline of the agreement (**confidential**) is contained in Annexure B to the La Ionica application.

## AUTHORIZATION APPLICATION TO ACCC

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### *Baiada*

Baiada has the largest number of contract growers in Victoria. Baiada bought out Marven and Eatmore and took over their growers and contracts. The contracts are not materially different from each other being variations on the former VBINC contracts, but will vary to some extent depending on the origins of the grower (former Eatmore or Marven grower) and have different ending dates.

There are 3 groups of growers within Baiada. The largest group of 83 growers formed a PNG and reached a negotiated agreement with Baiada effective April 2003. The negotiations were on a new common fee and performance parameters that were incorporated (annexed) into the existing contracts. A **confidential** example of each of an Eatmore and a Marven contract along with the PNG Agreed Resolutions Annexure (**confidential**) dated 16<sup>th</sup> May 2003 are contained in Annexure B to the Baiada application. These are described as the Baiada PNG agreement.

The second group comprises 17 growers who specialize in the growing of free range chickens. Negotiations were in progress among other matters to set a common fee, initiate pools and agree performance criteria. Agreement was near but is now affected by the Jones Decision. A **confidential** draft of the Freerange Annexure to the contracts is also attached to Annexure B to the Baiada application. This is known as the Free Range Agreement.

The third group consists of growers who are on individual contracts and are not associated with this application.

### *Inghams*

Inghams had agreed with its 44 collective growers a higher fee from July 2001, but the former VBINC contracts remained in effect until their term expired. The parties were in negotiations on a new contract and agreement was very near when the Jones Decision was made. The proposed arrangements included new terms and conditions, a common fee and a new fee review determination formula.

Subsequent to the Growers threatened strike, Inghams concluded individual agreements with growers in relation to a fee to apply from 1<sup>st</sup> July 2003 until July 2004 at which time it will be reviewed. The previous contract conditions remain with chickens being placed on a batch to batch basis. That is growers have no contract term beyond the batch period (approx 8 weeks). A draft of the proposed contract is contained in Annexure B to the Inghams application (the Inghams agreement).

### *Hazeldene*

Hazeldene was in the process of negotiating a collective agreement with its growers and recently agreed a fee increase (backdated) from the former VBINC levels. Among the items being negotiated are on-farm assessment of facilities and a need to bring facilities up to a standard. A **confidential** outline of proposed contract items is contained in Annexure B to the Hazeldene application (the Hazeldene agreement).

The negotiations are in a state of uncertainty for both Hazeldene and growers following the Jones Decision. (About 50 per cent of Hazeldene's production is from company farms).

### **Authorization has worked**

A major rationale advanced for legislation and regulation is a perception of an imbalance of bargaining power between Processors and Growers. Experience post VBINC under Authorization has delivered outcomes that do not prima facie indicate that such perceptions are an issue.

- Fees have increased from the VBINC 50.275 cents to between 53 and 55 cents, the highest in Australia.
- New improved performance criteria have been agreed that have further increased the income of the better performing growers.
- Individual agreements have been concluded which have attracted new farms and investment into the Industry.
- Collective agreements have brought in new investment as evidenced by Barter grower activities and have allayed concerns expressed previously that the Financiers would not be prepared to lend if the VBINC system were dismantled.
- The value of farms has risen from around \$15 per bird in VBINC days to around \$20 per bird at present.

## **COLLECTIVE NEGOTIATIONS: A WAY FORWARD**

### **Concerns of Interested Parties**

Growers are concerned about a perceived imbalance of bargaining power between themselves and Processors and are not in favour of deregulation. Processors recognize Grower concerns and have reservations about the practicality of individually negotiating contract terms and conditions with every Grower. The Government is also concerned that Parties are able to negotiate on an equitable basis.

### **Processor-Grower group Negotiations**

The Applicants believe that Growers should be able to continue to negotiate collectively, if they elect to do so, with their respective Processor. The system of collective negotiations has been shown to work on a practical basis. It is a cost effective system compared to parties individually negotiating. The contracts that have been negotiated and that are in the process of being negotiated demonstrate that more relevant contracts can be developed than under the regulated central system. The contracts better reflect the situation facing each Processor and PNG, allow improved efficiency incentives and should lead to an improved allocation of resources and benefits for both parties. As considered in the section on the Industry and markets, the strong competition among processors should ensure that benefits from lower costs are competed away along the marketing chain and benefit consumer in the form of lower prices and increased supply.

### **Code of Conduct**

To provide more assurance to parties that relevant interests are being safeguarded, the Applicants agree to continue to use the Code of Conduct that formed part of the Victorian Authorization (A 90750) as a framework within which PNGs are established and operate, negotiations conducted and the contents of agreements are structured.

## AUTHORIZATION APPLICATION TO ACCC

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The Code is the end product of many discussions and negotiations with Growers in a number of States and earlier versions are contained in previous ACCC Authorizations and applications. It also draws on arrangements in place under legislation in Queensland, legislation that has a similar effect as ACCC Authorization. Specific references to earlier antecedents of the Code are laid out in Appendix A.

The Code of Conduct consists of a Section on Grower Arrangements and a Section of Guidelines for Contract contents.

### *Grower Arrangements*

The Code sets out procedures for the

- Formation, functions, composition, appointment of representatives and meetings of the PNG;
- How matters agreed or not agreed by the PNG are to be dealt with including matters relating to individual growers;
- Dispute/mediation mechanisms; and
- Certain rights of Non-Participating Growers (NPGs).

It includes the provision required by the ACCC that a common adviser to growers should not be used across the Industry nor across PNGs with a single Processor.

### *Guidelines for Contracts*

The Code sets out items that are to be negotiated and included in collective contracts unless mutually agreed. The Guidelines cover:

- Terms of the Agreement;
- Inputs to be provided by Growers and responsibilities;
- Inputs to be provided by Processors and responsibilities;
- Terms of payment and factors to be considered in negotiating the fee;
- Guidelines for measuring efficiency and any adjustments based on those measurements;
- Agreement to negotiate on the apportionment of any Government compensation monies;
- Requirements that Dispute/Resolution procedures are to be negotiated and included in the contract;
- Force Majeure provisions;
- Rights of assignment; and
- Contract default and termination provisions.

## LIKELY CONSEQUENCES OF NON APPROVAL

### Interim authorization

#### *Short run major problems*

The Jones Decision has resulted in contracts and all fees that were negotiated and concluded or are in the process of being negotiated under Authorization A90750 being no longer protected from the operation of the TPA. The Victorian Government, even if it wanted to would not be able to introduce legislation providing exemption from the TPA before the Autumn Session of 2004. Even that timetable, based on recent experience in South Australia is optimistic.

The ACCC granted authorization (A 90750) on the basis that the state of collective negotiations provided net public benefits relative to the deregulation counterfactual. Growers and Processors however now are left without a valid mechanism to undertake collective negotiations and reset the growing fee on a periodic basis and are faced with a fully deregulated situation. This is occurring in an Industry characterized by substantial investment in fixed growing structures with no alternative uses, yet has very short term live bird (income generating) placements on farms (8 week batches (cycles)). There is also some uncertainty regarding the contracts still dependent on the previous VBINC arrangements. Therefore institutions must have increasing concerns over their financing arrangements because of the mismatch between the long term investment and the short term income generation period of the batches. This unease would be expected to increase the longer the industry remains in the current uncertain situation.

The Jones Decision has thrown the Industry into a state of legal uncertainty with immediate negative economic impacts noted earlier in this Annexure. The Industry will be hampered by a lack of certainty in a fundamental area of its commerce.

#### *Likely impact on growers*

The likely impacts on the Grower groups are:

- Bartter Non VFF group (9 growers)
  - 2 year old contracts are in a state of ambiguity;
  - additional expenses will be needed to rectify;
  - could result in having to negotiate individually with increased grower concerns and higher costs than collective negotiations;
- Bartter VFF group (21 growers)
  - new contract agreement (which was imminent) delayed;
  - immediately growers suffer foregone fee increases and performance payments and other contract benefits until contract concluded;
  - additional expenses will be needed to rectify;
  - could result in having to negotiate individually with increased grower concerns and higher costs than collective negotiations
  - heightened tension between growers and processor due to uncertainties of a lack of contract finalization;



- Baiada PNG (83 growers)
  - Contract changes effective April 2003 are in a state of ambiguity
  - additional expenses will be needed to rectify
  - could result in having to negotiate individually with increased grower concerns and higher costs than collective negotiations
  - heightened tension between growers and processor due to uncertainties;
- Baiada Free Range (17 growers)
  - new contract agreement delayed
  - foregone increased fee and performance payments and other contract benefits until contract concluded;
  - could result in having to negotiate individually with increased grower concerns and higher costs than collective negotiations;
  - heightened tension between growers and processor due to uncertainties of a lack of contract finalization;
- La Ionica (19 growers)
  - new contract agreement delayed
  - foregone performance payments and other contract benefits until contract concluded;
  - heightened tension between growers and processor due to uncertainties of a lack of contract finalization;
- Inghams (44 growers)
  - new contract agreement delayed
  - foregone performance payments and other contract benefits until contract concluded;
  - growers operating on a batch to batch arrangement that may give concern to financing entities over security of income;
  - heightened tension between growers and processor due to uncertainties of a lack of contract finalization;
- Hazeldene (11 growers)
  - new contract agreement delayed.
  - foregone performance payments and other contract benefits until contract concluded
  - heightened tension between growers and processor due to uncertainties of a lack of contract finalization;

*Impact on Processors and the Community*

Processors will experience losses in benefits foregone because improved contracts are delayed. Both processors and growers are worse off due to the uncertainty in the industry. These losses flow from lower productivity, (higher costs) and a decreased ability to better satisfy their customers and develop their businesses. Because of the highly competitive nature of the industry it is expected that additional benefits would be passed along to consumers in the form of lower prices and increased supply. The net benefit that society forgoes is the total of the productivity/cost savings (improved producer and consumer surpluses) less any transfers between the groups.

*Surety of contracts are needed*

There is a need to be able to continue collective negotiations. The Industry is in a volatile state as evidenced by the threatened strike action and pressure is being placed on the Government to legislate a more restrictive regime.

It is therefore imperative that Interim Authorization is granted immediately to provide a certainty of contracts and contract negotiations and ensure that the Industry is not subject to disruption prior to the final determination. Even if the Government were to introduce legislation as noted, there is a considerable time lag before it could be effected.

**Longer term**

*Legislative counterfactual*

In the longer term the consequences of not granting Authorization depend on what takes its place. There are two counterfactuals that cover the range of possible outcomes, legislation or full deregulation. The net benefits/costs to the community therefore depend on which counterfactual is utilized. If legislation, the net public impacts depend on the particular contents of that legislation and the restrictions that it imposes. For example, the shortcomings of the previous VBINC system are well known and documented in the NCP Review and in submissions to that Review.

Legislation that provides an exemption to the TPA and mimics an ACCC Authorization does not impose any obvious major detrimental effects compared to Authorization itself. The concerns with legislation however are that once it is commenced it is subject to the lobbying endeavours of any vested interest groups and continues to be open to similar lobbying whilst on the books.

*Deregulation counterfactual*

There are some industry characteristics that suggest that some form of collective negotiations is likely to be a superior outcome to full deregulation. The Government has not shown any intent to move back to a legislated system since the NCP review release in 1999 or whilst Authorization was in effect. Therefore the counterfactual position taken here is that of full deregulation.

**Adverse consequences**

Many growers simply do not have the experience and skills needed for the preparation of or the undertaking of individual negotiations with a Processor. They had no requirement to develop this business experience because the contract terms, conditions and fees were heavily regulated for many years through legislation and the operations of VBINC.

The intermediate and longer term adverse consequences from disallowing Authorization compared to a deregulated situation include:

- A perceived imbalance of bargaining power that most likely imposes psychic costs on growers.
- Individual growers will be faced with costs of search, information gathering, and negotiations (possibly expensive accountants/legal persons).
- These costs will involve direct monetary outlays, losses of time away from their direct business and psychic costs associated with worries about the progress of individual negotiations and possible pressures from financing institutions to get an agreement in place.
- Some growers may not fully understand the true costs of their operations and agree to sub optimal contracts that lead to problems (personal financial, health, safety or environmental) later.
- There may also be costs associated with dissatisfaction of individual outcomes relative to others in similar positions.
- Processors will be faced with costs of negotiating individually with growers.
- These costs will involve monetary outlays, time, (which could involve considerable opportunity costs due to owners/management time being taken up in negotiations rather than on improving and managing the rest of the business) as well as psychic costs.
- An increase in industrial action (withholding strikes) that may occur over fees or negotiations. The consequences of industrial action would be severe because of the nature of the operations with the flow of chicks from hatcheries irreversible in the short and intermediate run. It would have both adverse financial and animal welfare impacts.
- An increase in disputes because of a lack of a clear resolution process or lack of consistency in contracts of Growers in similar situations.
- The Industry may be constrained in meeting the various planning and environmental challenges to which it is increasingly subject, resulting in a higher than necessary cost to the community.
- There may be lower efficiencies in operations due to an inability to ensure standardization of business practices.

## **PUBLIC BENEFITS**

Authorization would end the very severe short term difficulties that the industry is now in following the Jones Decision and the longer term adverse consequences noted above. To these benefits would be added the positive outcomes from the ability to better tailor contracts to the circumstances facing particular Processors and their Growers net of all transfers from one party to another. It should be noted that the Industry is coming off a system of highly standardized contracts.

The benefits include:

- An improved bargaining position of growers to counter the perception of a power imbalance with processors. (While a change in bargaining power itself may not constitute a public benefit, perceptions of power imbalance appear to be a major rationale for urging restrictive legislation. Therefore addressing this issue removes a pressure for a legislative solution that may have negative public benefits.)
- Reduced transactional costs for growers associated with seeking information, preparing negotiating positions and undertaking negotiations.
- Reduced transactional costs for processors in negotiations.
- A reduction in sources of conflict that could give rise to industrial unrest.
- A mechanism for dealing with disputes which leads to greater industrial harmony and hence to a focus on productivity.
- A more rapid adjustment to safety, environmental, planning and other issues impacting on the Industry and hence increased community benefits because of the negotiation of collective agreements as opposed to numerous individual negotiations.
- Being able to more easily effect differential contracts with a group of growers will allow each Processor (supply chain) to differentiate itself from another Processor (supply chain) and increase competition.
- Increased consumer satisfaction due to an increased ability to adjust production to meet the needs of consumers.
  - Each processor will be able to specify the needs of their buyers (consumers) more clearly in contracts to groups of growers who are needed to produce chickens meeting those requirements.
- An increase in productivity because of a more efficient matching and pricing of processor and grower capabilities.
- Improved incentives for capable growers.
- A stronger Victorian Industry (and hence employment in regional areas) which is better equipped to withstand interstate competition, competition from overseas imports and competition from other products.
- A more rapid growth rate.

The genesis for benefits is already evident in the contract terms and conditions either concluded or nearly concluded under Authorization or proposed. Benefits are expected to flow through to the consumer because of the competitive nature of the Industry as identified in various NCP Reviews.

## **DETRIMENTAL EFFECTS**

The major detrimental effects are:

- a collectively negotiated contract by growers could be expected to achieve a higher fee outcome and
- possibly less flexible contracts than individually negotiated contracts.

It is argued that the benefits identified in the Public Benefits Section more than overcome any remaining inefficiencies and that there are real, tangible benefits to growers, other suppliers of inputs, processors, consumers and to the community as a whole.

## **APPENDIX A**

### **CODE OF CONDUCT**

#### **Overview of Code**

This Code is the Final Code as required in ACCC Authorization 90750. The Code consists of a Section on Grower Arrangements and a Section of Guidelines for Contract contents. It has been agreed by the five Processors who currently supply all the live chickens produced in Victoria and who are party to the Authorization Application and by the consenting Growers.

The Grower Arrangements Section sets out procedures for the establishment, operation, conduct of negotiations and dispute settlements processes between a Processor and its contracted Growers through a Processor Negotiation Group (PNG). The Code provide a framework and each PNG may decide on more detail as necessary or where agreement with other parties is needed, by mutual agreement. The Guidelines for Contracts Section contains items that are to be included, negotiated and set out in detail in the Growing Contracts. The item includes a dispute resolution process that is to be negotiated and agreed.

The Code sets out how growers who elect to negotiate individually with a Processor interact with those choosing collective negotiation. It contains a dispute resolution mechanism that is to be incorporated into the individual contracts, unless other procedures are agreed.

It is fundamental to the operation of the Code that all actions and negotiations are undertaken in good faith by all parties. Nothing in the Code is intended to remove the right of any party to have access to full legal redress.

#### **Origins of Code**

The Code is heavily based on Codes developed in association with growers in

- South Australia and contained in Authorization A90595 for Inghams and its SA growers (1997);
- Authorization A30183 for Steggles and its South Australian growers (1998); and
- Authorization A 90659 for Inghams and its Tasmanian growers (1999);
- Queensland where similar parts are contained in the Chicken Meat Industry Committee Act 1976 and form part of the basis for functions of the Committee;
- New South Wales where the Poultry Meat Industry Committee sub committee on Code and Minimum Contract Guidelines agreed a Code in April 2000; and
- South Australia in 2000 in discussions on deregulation of the SA legislation;

The Code also contains conditions set by the ACCC in the Determination for

- Authorization A90750 in Victoria.

Subsequent to that Determination, a Code not materially different was contained in applications for Authorizations in

- New South Wales (A 90800)<sup>6</sup> and
- South Australia (A90825) to enable growers to negotiate on a collective basis (granted January 2003).

## **GROWER ARRANGEMENTS**

Growers who elect to negotiate collectively with their Processor will be known as Participating Growers (PGs). The PGs will need to appoint from among themselves, growers who with Processor representatives will form a PNG to negotiate the Collective Agreement.

### **1. Formation of Processor Negotiation Groups (PNG)**

Collective negotiations will be conducted through Processor Negotiating Groups (PNGs).

- 1.1. A secret ballot will be held at the request of any Grower contracted to a Processor of all growers contracted to that Processor as soon as practicable to determine if they wish to negotiate collectively.
  - 1.1.a. All Growers contracted to the Processor are to be given 14 days notice in writing of the ballot. It is not a requirement that all Growers vote, but that all Growers be given an opportunity to vote in the ballot, if they so choose. Growers are free to meet on their own and with advisors in accordance with Section 10 prior to the ballot being held.
  - 1.1.b. The Processor is to play no part or exert any influence over any vote taken under clause 1.1 except as provided under clause 1.3.
  - 1.1.c. The Processor is free to attend the meeting at which the ballot is being held and to address the meeting if requested by a Grower.
  - 1.1.d. Once a vote under clause 1.1 is held growers are free to form any PNGs they wish. Should a group of Growers wish to form their own PNG independent of the remainder of the Grower group, they are under no obligation to accept other growers into this PNG.
  - 1.1.e. Where a Grower requests to join an existing PNG it may do so providing that a majority of existing Growers represented by the PNG agree.
  - 1.1.f. The Processor is to play no role in any decision by existing Growers represented by a PNG to allow new members to join. Where a contract between a Processor and a Participating Grower represented by a PNG has been signed, the Processor is under no obligation to offer the same contract to new members who join that Grower Group after the contract is signed. However, any negotiation of new contracts or extensions of

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<sup>6</sup> The NSW Determination (March 2002) stated that the ACCC intended to grant authorization, but because the Government proceeded with legislation authorization was ultimately not granted.

contracts previously signed with the Participating Growers is to include new members of the Grower Group.

- 1.2. A PNG will be formed if 40 (forty) per cent of contracted Growers vote to negotiate collectively.
- 1.3. With the agreement of the Processor, a PNG may be formed if the vote is less than 40 (forty) per cent or more than one PNG may also be formed.
- 1.4. All contracted Growers are eligible to be a Participating Grower in a PNG.
- 1.5. If a PNG is not formed then all negotiations will be on a one on one basis.
- 1.6. If the number of Participating Growers falls below the agreed percentage in 1.2 then all PNGs will lapse unless it is mutually agreed to continue.
- 1.7. A PNG must be reformed if a ballot of all Growers contracted to that Processor achieves the percentage agreed in Clause 1.2.

## **2. Functions of PNG**

Each PNG may agree its own functions, but they are to include the following:

- 2.1. To negotiate the terms and conditions of the Growing Contract to be utilized by Participating Growers (PGs) including the operation of pooling and other joint incentive arrangements to be used for PGs.
- 2.2. To negotiate the payments to be made to growers and the procedures for the regular review of such payments.
- 2.3. To negotiate changes to operational procedures desired by either the PGs or the Processor and where appropriate to negotiate financial consideration for such changes.
- 2.4. To act as a mediator for the resolution of disputes between all PGs or any individual PGs and the Processor.
- 2.5. To take back to meetings of PGs (or individuals where appropriate) for decision the outcomes of negotiations or resolutions.
- 2.6. To make determinations or to take action on any other matters that the PNG agrees.

## **3. Composition of the PNG**

The composition of each PNG may vary depending on the number of Growers and what they agree with their Processor.

- 3.1. Grower Representatives numbers are to be decided between the PGs and the Processor having regard to the size of the PG group but shall not normally be less than 2 or more than 4
- 3.2. Processor Representatives numbers are not to exceed the number of Grower Representatives.



**4. Appointment of Representatives/Advisors**

The following minimum conditions shall apply to each PNG in appointing representatives and filling casual vacancies.

- 4.1. The Processor will appoint Processor representatives.
- 4.2. PGs in a PNG will elect for an agreed term from among themselves their representatives. The term of appointment shall normally not be less than 1 (one) year or more than 3 (three) years. Retiring Grower Representatives are eligible for re-election.
- 4.3. PGs may appoint advisers (subject to clause 4.4) to assist them in preparations and ongoing negotiation matters. Such advisers may at the express wish of growers, negotiate directly with the processor contract terms and conditions on behalf of the growers they represent.
- 4.4. A common advisor is not to be used across the Industry nor is it envisaged that a common adviser would be used across PNGs with a single Processor (Growers should form the one PNG if they want a common adviser).

**5. Meetings of the Group**

The following guidelines shall apply to the meeting procedures of each PNG.

- 5.1. Meetings will be held as required.
- 5.2. Meetings are to be called if requested by the Processor or if more than 50 per cent of Growers on the PNG request one.
- 5.3. The PNG may appoint a Chairman, but the Chair has no casting vote.
- 5.4. A quorum is to consist of one Processor representative and at least two thirds of the Grower representatives.
- 5.5. Matters can only be agreed if the Processor representatives and a majority of the Grower representatives agree.
- 5.6. Costs incurred in carrying out any of the functions of the PNG are to be met equally by all PGs and the Processor unless otherwise agreed.

**6. Agreed Resolutions of the PNG – *Matters relating to all Growers***

- 6.1. An agreed resolution of the PNG will be notified to all PGs prior to a meeting called to consider the resolution.
- 6.2. The PNG including the Processor will be present.
- 6.3. The PNG resolution shall be put to all Growers in attendance at the meeting either by a show of hands or a secret ballot. A secret ballot may be requested by the Processor or by the majority of Grower representatives on the PNG. The resolution shall become binding on all PGs if carried by the majority at the meeting.
- 6.4. If a resolution is not approved as in 6.3, the meeting shall determine on a show of hands or on a secret ballot whether the matter be referred back to the PNG for further consideration or be determined in accordance with the Dispute resolution/Mediation procedures set out in the Growing Contract (see Clause 9 below for guidelines).

**7. Agreed Resolutions of the PNG: *Matters relating to an Individual Grower***

- 7.1. The agreed resolution of the PNG will be notified to the Grower.
- 7.2. The Grower will within fourteen (14) days notify the PNG as to whether the resolution is accepted or if the matter is to be resolved in accordance with the Dispute resolution/Mediation procedures set out in the Growing Contract (see Clause 9 below for guidelines).

**8. Matters not resolved by the PNG - *Matters relating to all Growers***

- 8.1. The matter in dispute will be notified to all PGs prior to a meeting eligible to be attended by the Processor and all PGs called to consider the matter.
- 8.2. The Processor and the Grower representatives on the PNG will outline their positions to the meeting, which will consider the issues.
- 8.3. The matter shall be put as a resolution to the meeting either by a show of hands or a secret ballot among the PGs in attendance. A secret ballot may be requested by the Processor or by the majority of Grower representatives on the PNG.
- 8.4. The resolution will become binding if accepted by the Processor and approved by a majority of PGs.
- 8.5. If the resolution is not approved as in 8.4, the matter will be resolved in accordance with the Dispute resolution/Mediation procedures set out in the Growing Contract (see Clause 9 below for guidelines).

**9. Disputes/Mediation**

The detail of dispute resolution/mediation procedures are to be set out in each Growing Contract. The guidelines emphasize agreement being reached through the offices of the PNG and if that's not possible then it is referred to mediation. Arbitration is only used as a last resort and then only in matters relating to monies payable unless agreed by both parties. All parties retain the right to full access to redress under the legal system.

- 9.1. The aggrieved party is to notify the matter in dispute in writing to the other party and to the PNG.
- 9.2. The PNG is to consider the matter and attempt conciliation.
- 9.3. If after ninety (90) days of the serving of the written notice, the matter is not resolved between the parties and both parties agree, the matter can go for mediation to an agreed external mediator.
- 9.4. If after 28 days (or such time as agreed by the parties), mediation is not successful, the matter may go if agreed by both parties for arbitration.
- 9.5. In the case of amounts payable only; if after 28 days of the serving of the written notice under 9.1, the matter is not resolved within the PNG or if mediation is agreed but not resolved within 28 days (or such time as agreed to by both parties), after appointment of a mediator, the matter is to be referred to arbitration.

9.6. The arbitrator is to be a person agreed to by both parties or if agreement is not forthcoming by an arbitrator appointed by the Institute of Arbitrators and Mediators Australia.

9.7. The costs of mediation or of arbitration to be borne by each party is to be determined by the mediator or arbitrator.

**10. Meetings of Growers**

10.1. The Grower representatives on the PNG may meet as and when required on their own, with PGs and with advisers.

10.2. In meetings held under clause 10.1, Grower representatives on the PNG, PGs and their advisers are free to discuss any and all matters relevant to contract negotiations. Any confidentiality agreement agreed between the Processor and a PNG or between the Processor and PGs is not to preclude discussion of proposed contract terms and conditions by PGs amongst themselves or with their advisers.

**11. Non Participating Growers (NPG)**

11.1. At the formation of a PNG or at the time the collective agreement with a PNG is due for renegotiation, a Grower may elect to opt out and become a Non Participating Grower (NPG).

11.2. A Grower may at other times, with the Processor's agreement, withdraw from the collectively negotiated contract by advising the PNG in writing.

11.3. An NPG may negotiate directly with the Processor on any matter.

11.4. In matters of dispute, unless otherwise mutually agreed, a NPG will have the same access to resolution procedures and time periods as set out in Section 9. The references however to the PNG are redundant and will not apply.

11.5. Dispute procedures are to be set out in the Contract.

11.6. An NPG will not be eligible to participate in ballots for election of representatives on the PNG, nor to attend meetings convened by the PNG.

11.7. An NPG at the end of the relevant contract period may elect to join the collective agreement by notifying the PNG in writing to that effect.

## **GUIDELINES FOR GROWING CONTRACT**

It is acknowledged that to encourage investment in the Industry a minimum term should be explicitly included. The Growing Contract shall be valid for a stated number of years, normally between 2 and 5 years and shall be similar to the existing contract. Each however shall be developed according to the needs and circumstances of Participating Growers and their Processor. An emphasis will be placed on ensuring that contracts are available which encourage improved productivity, production of quality product and meeting of performance criteria.

All Growing Contracts negotiated with a PNG will provide for:

### **12. Terms of the Agreement**

- 12.1. All negotiations are to be conducted in good faith by both parties.
- 12.2. Terms will state the minimum period of the contract and include the commencement, expiry date and arrangements for notification of and response to intentions to enter into negotiations in relation to a new contract.

### **13. Inputs to be provided by Growers and responsibilities**

- 13.1. A clear statement of the inputs to be provided, their ownership and the standards to be maintained by the Grower.
- 13.2. The responsibilities of the Grower regarding and including insurance coverage, record keeping, reporting and access to Processor representatives and sanitation measures.
- 13.3. The responsibility for all costs incurred is to be clearly stated.

### **14. Inputs to be provided by the Processor and responsibilities**

- 14.1. A clear statement of the requirements in relation to the rearing of birds is to be set out.
- 14.2. All inputs and services which are to be provided, ownership and responsibilities for costs are to be clearly stated.
- 14.3. Notice of delivery and collection times are to be stated.

**15. Terms of Payment**

- 15.1. The payment to be made for growing the chickens having due regard to Processor requirements and the Grower's investment and costs incurred in growing the chickens. The factors to be taken into consideration in negotiating the fee include but are not limited to:
  - 15.1.a. Performance and throughput criteria
  - 15.1.b. Processor requirements for the farm facility
  - 15.1.c. Investments in land, shedding and equipment
  - 15.1.d. Maintenance and running costs
  - 15.1.e. Labour costs
  - 15.1.f. Utility charges
  - 15.1.g. Statutory/regulatory costs
  - 15.1.h. Market conditions
- 15.2. Details of adjustments to payments to be made to any and all Growers.
- 15.3. An agreed period over which the payment will apply.
- 15.4. The payments are to be reviewed regularly at agreed intervals.

**16. Guidelines for measuring the efficiency of Growers and any adjustments based on those measurements.**

- 16.1. Factors include but are not limited to the following:
  - 16.1.a. Efficiency measures such as FCR (feed conversion ratios), mortality, growth rates
  - 16.1.b. Production costs per batch (particularly feed usage)
  - 16.1.c. Standards of quality:
    - 16.1.c.1. live bird quality (bruising, breast blisters, full feed crops)
    - 16.1.c.2. facilities
    - 16.1.c.3. biosecurity
    - 16.1.c.4. environmental
    - 16.1.c.5. occupational health and safety
    - 16.1.c.6. quality assurance (ISO systems, HACCP)

**17. Government compensation monies**

- 17.1. Agreement to negotiate to apportion between the parties any relevant Government compensation monies where such monies are received by the Processor and include a payment relating to the growing fee due to the Grower.

**18. Dispute resolution/Mediation procedures**

- 18.1. These are to be developed based on the Guidelines in the Code of Practice, Clause 9.
- 18.2. Contracts are to specify those elements of the contract which constitute an amount payable for the purposes of clause 9.5 of the Code of Conduct.

**19. Force Majeure Provisions**

**20. Rights of Assignment**

- 20.1. With proper written notice neither party should unreasonably withhold approval providing the contract terms are substantially the same.

**21. Termination of the Contract/Default Provisions**

- 21.1. The conditions under which the contract with a PG may be terminated.
- 21.2. The conditions under which a contract default by either party occurs should be set out.

**Definitions**

**PG** Participating Grower, that is one who elects to enter into a collective negotiation with the Processor in relation to a Growing Contract.

**PNG** Processor Negotiation Group, a Group consisting of Processor and Grower representatives who undertake negotiations on Growing Contract terms and conditions and who act as the initial conciliators in any Disputes.

**NPG** Non Participating Growers, Growers who have elected to enter individual contracts with the Processor.