

Draft Determination

Application for Authorisation

Lodged by

Tasmanian Farmers & Graziers Association

in respect of

Collective bargaining by various vegetable grower commodity groups
with the processors they supply.

Date: 23 September 2004

Commissioners:

Samuel
Sylvan
Martin
McNeill
Smith
Willett

Authorisation no. A90914

Public Register no. C2004/434

Executive summary

The Application

On 23 March 2004, the Tasmanian Farmers and Graziers Association (“the TFGA”) lodged application for authorisation A90914 (“the application”) with the Australian Competition and Consumer Commission (“the Commission”).

The authorisation process

A key objective of the Trade Practices Act 1974 (“the TPA”) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.

Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

The proposed arrangements

The TFGA seeks authorisation on behalf of its vegetable grower members for an agreement between those members to collectively bargain, through grower representatives on their various commodity group boards, terms and conditions of growing contracts with the processors to whom they supply, namely McCain Food (Aust) Pty Ltd and Simplot Australia Pty Ltd. It is proposed that such negotiation occur on a commodity-group by commodity-group basis.

Generally speaking, ‘collective bargaining’ describes arrangements where a number of businesses form a group to engage in collective negotiations on the terms of trade (including price) with a supplier or acquirer of goods or services. Absent authorisation, collective negotiation amongst competitors is likely to raise concerns under the competition provisions of the TPA.

Authorisation is also sought for the TFGA to join with grower representatives from the various commodity groups and assist them in negotiations with processors.

Authorisation has been sought for a period of 5 years.

Assessment of public benefit and anti-competitive detriment

The Commission considers the anti-competitive detriment generated by the proposed arrangement to be negligible. The Commission considers that, even absent of the proposed arrangements, the right to supply growing services to processors would be likely to be subject to somewhat standard terms and conditions. The Commission is of the view

that the difference between the level of competition amongst growers over contract terms and conditions with or without the proposed arrangements would be small.

To the extent that there is scope for individual growers to vary the terms of growing contracts, the proposed arrangements will not reduce their scope to do so. Processors will still enter into individual contracts with each grower, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.

In addition, the Commission notes that, even where growers are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.

The Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that improving the bargaining power of growers, thereby providing growers with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.

The Commission also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.

Consequently, following consideration of the arguments advanced by the TFGA and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment.

Draft determination

The Commission therefore proposes, subject to any pre-determination conference requested, to grant authorisation to application A90914 for a period of five years.

Interim authorisation

The TFGA also sought interim authorisation for the proposed arrangements. On 21 April 2004, the Commission granted interim authorisation.

Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

Table of contents

EXECUTIVE SUMMARY	I
1 INTRODUCTION	1
2 BACKGROUND TO INDUSTRY.....	3
PROCESSED VEGETABLE INDUSTRY IN TASMANIA	3
MAJOR DRIVERS OF PRICES FOR PROCESSED VEGETABLES	4
3 THE APPLICATION	5
THE APPLICANT.....	5
VEGETABLE PROCESSORS	6
THE PROPOSED ARRANGEMENTS	6
PREVIOUS ARRANGEMENTS	8
4 STATUTORY TEST	9
5 SUMMARY OF THE APPLICANT’S SUBMISSION.....	11
PUBLIC BENEFITS.....	11
ANTI-COMPETITIVE DETRIMENT	11
TERM OF AUTHORISATION	12
6 SUMMARY OF PROCESSOR SUBMISSIONS	13
SIMPLOT AUSTRALIA PTY LTD.....	13
MCCAIN FOODS (AUST) PTY LTD	15
7 SUMMARY OF OTHER SUBMISSIONS	18
SUBMISSIONS BY THE GROWER GROUPS	18
OTHER INTERESTED PARTIES	18
8 COMMISSION ASSESSMENT	20
RELEVANT MARKETS.....	20
THE FUTURE WITH AND WITHOUT TEST (THE COUNTERFACTUAL)	21
EFFECT ON COMPETITION	23
PUBLIC BENEFIT	30
9. BALANCE OF PUBLIC BENEFITS & ANTI-COMPETITIVE DETRIMENTS.....	34
10 DRAFT DETERMINATION.....	37
THE APPLICATION	37
STATUTORY TEST	37
DRAFT DETERMINATION	37
CONDUCT FOR WHICH THE COMMISSION PROPOSES TO GRANT AUTHORISATION	38
INTERIM AUTHORISATION	38
FURTHER SUBMISSIONS	39

1 Introduction

- 1.1. The Australian Competition and Consumer Commission (“the Commission”) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (“the TPA”). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The TPA requires that the Commission then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.7. This document is a draft determination in relation to application for authorisation A90914 lodged with the Commission by the Tasmanian Farmers and Graziers Association (“the TFGA” or “the Applicant”).
- 1.8. Once a draft determination is released, the Applicant or any interested party may request that the Commission hold a conference. A conference is generally called by a party dissatisfied with the Commission’s decision and provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.9. The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the Commission may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the public detriment.

- 1.10. The Commission also has the power to grant interim authorisation, at the time the application is lodged or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the Commission considers and evaluates the merits of the application.

2 Background to industry

Processed vegetable industry in Tasmania

- 2.1 The Tasmanian processed vegetable industry covers a wide range of crops. The major crops processed are potatoes, green peas, green beans, carrots, broccoli, other brassica, and onions. These vegetables are processed into frozen product for the Australian domestic market.¹
- 2.2 Most vegetables are grown under contract for processing with the two main processors, McCain Food (Aust) Pty Ltd (“McCain”) and Simplot Australia Pty Ltd (“Simplot”).
- 2.3 These crops have benefited from the development of interstate and overseas markets, which have made them amongst the most valuable agricultural commodities produced in Tasmania.
- 2.4 Tasmania has strong natural and climatic advantages for growing vegetables, especially heat-sensitive summer varieties. Tasmania has a highly developed potato industry based on suitable soils and climate and the presence of established and competitive processors.²
- 2.5 Similarly, Tasmania’s green vegetable growing sector benefits from its reliable climate, where water supply and excess heat, which can affect yield and quality, are not an issue and from a reliable skills base in growing.
- 2.6 The processed vegetable industry is conducted across the state, with a concentration in the north-west and Midlands, with green pea production also in the Coal River Valley. Given the number and variety of vegetables grown and processed growing and processing occur year round. Harvest schedules and timing vary for each crop, with farmers growing more than one vegetable likely to be growing vegetables all year round.
- 2.7 A recent report prepared for the Department of Agriculture, Fisheries and Forestry (AFFA) entitled *Price Determination in the Australia Food Industry: A report*³ noted that the prices paid to farmers/growers is limited by the strong market power of the processors. Further, the report noted that there is limited transparency of market prices and information beyond the farmgate due to tight concentration of the sector. The report also noted that there are high barriers to entry for growers in terms of skill, customer contracts and capital outlay for land and equipment.

Grower/processor contracts

- 2.8 Growers generally supply vegetables under supply contracts with processors. Growers are generally contracted for set periods of time, for example, for a

¹ <http://www.dpiwe.tas.gov.au/inter.nsf/WebPages/EGIL-5J36UV?open>

² <http://www.dpiwe.tas.gov.au/inter.nsf/WebPages/LBUN-5SU5RV?open#vegs>

³ Spencer, S 2004, *Price Determination in the Australia Food Industry: A report*, Australian Government Department of Agriculture, Fisheries and Forestry, Canberra.

season or consecutive seasons. It is generally the case that overall production is managed by the processor to maintain a supply profile that is in line with the needs of the business.⁴

- 2.9 Growing contracts usually provide for the area, timing, yield performance, product specifications, price and terms of supply. In many cases, the contracts will impose penalties for variation from these specifications to avoid wastage or poor yields.
- 2.10 It has been noted that prices paid to growers in recent times for the growing of vegetables has been relatively stagnant, particularly in light of perceived increases in the retail price of vegetables grown.⁵

Major drivers of prices for processed vegetables

- 2.11 The report prepared for AFFA, *Price Determination in the Australia Food Industry: A report*, noted the following with respect to processed vegetable prices:

- Returns to processors and producers from the processed tinned and frozen food products sector are strongly influenced by international trade – with a significant percentage of imports (on average, 20 per cent) affecting several major lines.
- Competition between companies is chiefly based on price, though companies have been striving to increase the diversity of their product range offering to remain attractive to retailers, to leverage brand position and increase capacity utilisation.
- These food segments have suffered due to their traditional product nature and companies have been forced to innovate in several areas to increase product appeal and relevance against increasing demands for convenience and fresh foods.
- Producers have been forced to operate for lengthy periods of time without price increases due to the competitive pressure on processors and manufacturers.
- At retail, locally produced processed food products are under pressure from a range of food innovations and marketing and promotional strategies in other sectors.
- The major push by grocery retailers for clean and fresh image, as well as policies of sourcing processed products globally (where prices are competitive with locally supplied products), has limited sales and margin growth for the processed food sector.⁶

⁴ Spencer S, *ibid* page 69.

⁵ *Ibid* page 69.

⁶ *Ibid* page 66.

3 The application

- 3.1 On 23 March 2004, the TFGA lodged application for authorisation A90914 with the Commission.
- 3.2 The application was made under section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of 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
 - (b) to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.⁷
- 3.3 The TFGA seeks authorisation on behalf of its vegetable grower members for an agreement between those members to collectively bargain, through grower representatives on their various commodity group boards, terms and conditions of growing contracts with the processors to whom they supply, namely McCain and Simplot. It is proposed that such negotiation occur on a commodity-group by commodity-group basis.
- 3.4 Authorisation is also sought for the TFGA to join with grower representatives from the various commodity groups and assist them in their negotiations with processors.
- 3.5 Authorisation has been sought for a period of 5 years.
- 3.6 At the time of lodging its application the TFGA also sought interim authorisation for the proposed arrangements. On 21 April 2004, the Commission granted interim authorisation as requested by the TFGA. Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the Commission's final determination comes into effect, or until the Commission decides to revoke interim authorisation.

The Applicant

- 3.7 The TFGA is a farmer representative organisation, whose vegetable grower members are farmers in the state of Tasmania. The TFGA estimates that approximately 98% of growers in Tasmania are members of the TFGA.
- 3.8 The TFGA comprises of 5 groups, which represent various areas of primary production. The Vegetable Group comprises of a number of dedicated grower representatives who form the TFGA Vegetable Council. The vegetable council consists of growers of potato, peas, beans, carrots, brassicas and seed potatoes.

⁷ The application has also been considered as an application under the Tasmanian *Competition Code*.

Vegetable processors

- 3.9 McCain is a privately owned company based in Canada. McCain commenced operations in Australia in 1968 and has invested in a number of plants around Australia.
- 3.10 In 1984 McCain purchased a vegetable processing plant in Smithton, Tasmania. The Smithton plant is a multi-purpose vegetable freezing plant, which also processes french fry and other frozen potato products.
- 3.11 The ultimate holding company of Simplot is JR Simplot Co based in Boise, Idaho in the United States. Simplot entered the Australian market by acquiring the Edgell operations from Pacific Dunlop in August 1995.
- 3.12 Simplot has invested significant funds in recent years in order to upgrade its processing facilities in Tasmania. In 2003, Simplot invested \$35 million in its Ulverstone plant which it submits is recognised as the most modern and efficient potato processing facility in the world. This plant employs approximately 320 people.
- 3.13 Simplot's Devonport plant, which produces frozen vegetables, was established in 1942. Simplot states that the Devonport plant is the largest frozen mixed vegetable plant in the southern hemisphere and employs 101 permanent staff and up to 220 seasonal employees.

The Proposed Arrangements

- 3.14 The TFGA seeks authorisation on behalf of its vegetable grower members for an arrangement between those members to collectively bargain, through grower representatives on their various commodity group boards, the terms and conditions of growing contracts with McCain and Simplot. For example, McCain potato growers will negotiate in one group through a McCain potato grower group negotiating committee, Simplot potato growers in another group through the Simplot potato grower group negotiating committee, McCain pea growers in another group through their negotiating committee, and so on.⁸
- 3.15 The TFGA also seeks authorisation for an agreement between TFGA vegetable grower members for the TFGA to assist them in their negotiations with McCain and Simplot.
- 3.16 The proposed arrangements apply to all vegetable crops grown in Tasmania under contract for supply to the vegetable processors McCain and Simplot. It is proposed that growers negotiate collectively in each of the following grower groups:

⁸ Some growers may be members of more than one negotiating group. For example, some growers may grow a single class of vegetable for both McCain and Simplot, or grow more than one class of vegetable for an individual or both processors.

- Simplot: processed potato growers, seed potato growers, pea growers, bean growers, carrot growers, and brassica growers; and
 - McCain: processed potato growers, seed potato growers, pea growers, bean growers, brassica growers.
- 3.17 Each of the eleven negotiating groups acts autonomously as an individual commodity group, each group has their own meetings, their own office bearers and will negotiate with the processor separately. Each group operates with the administrative support of the TFGA.
- 3.18 The proposed process for collective negotiations to commence can be triggered by the relevant commodity group or by the processor. Having decided that negotiations should commence, a meeting of the relevant negotiating group committee members with the processor is called.
- 3.19 The negotiating group committee consists of grower representatives who are elected at meetings of the commodity group. The committee members must be growers of the particular commodity being represented and be levy paying members of the TFGA for that commodity. The TFGA representative, who is attached to each of the committees, is the Vegetable Council Executive Officer. The TFGA does not act as the negotiator. Rather it provides information and administrative support for each of the commodity groups in negotiations.
- 3.20 While each of these groups acts autonomously, as an individual commodity group, it is envisaged that each will follow a similar negotiating process as outlined below.
- 3.21 It is envisaged that the initial meeting between the negotiating group committee and the processor would review the past season and consider the outlook for the season ahead. The processor could ask the committee to advise of their price expectations, or, the processor may take a more positive approach and advise of its expectations with respect to price and conditions. If the committee members feel that what is being offered is reasonable and in line with their understanding of grower expectations, they can recommend acceptance of the offer to growers. This recommendation would be made to members by way of a newsletter. The company can then contact growers to secure individual acceptance and settle contractual details.
- 3.22 If the committee feels that what is being offered is less than reasonable and/or unable to be recommended to growers, then a grower meeting would be called. At this meeting growers would be advised of the conditions surrounding the company position and provided with as much information as is able to be obtained by the negotiating committee and the TFGA. At the meeting, growers would be asked to provide a directive to the committee about the grower expectations regarding price and conditions. The committee representatives would then communicate these expectations to the processor.
- 3.23 It is envisaged that representatives from the processor attend the grower meeting to put their position if appropriate. The processor representatives

would then leave the meeting while the growers considered the information provided and advised the committee about the direction required to be taken.

- 3.24 While the commodity group/TFGA representation to processors will endeavour to reach an agreement on contract price and conditions and growers will look for a recommendation from the Committee to accept or reject what has been agreed, there may be times when agreement is not able to be reached, in which case, the Committee is likely to recommend that growers should consider their individual positions.
- 3.25 Neither the commodity group nor the TFGA will contract with the processors. Each grower will determine whether or not to agree to accept the terms and conditions of the individual contract offered by the respective processors as a result of the negotiations. The tonnages to be contracted and acceptance of the price and conditions, following discussions of the commodity groups, will remain a matter between each individual grower and the processor.
- 3.26 The role of the TFGA would be to obtain and disseminate relevant information to each of the commodity groups to assist with the price and contract deliberations. The TFGA will, as it currently does, also provide administrative assistance to the commodity groups with secretariat support covering such matters as newsletters, meeting arrangements, minute taking, letter writing, press releases and general lobbying on any issues affecting members. The TFGA representative would also join the members of the committee of the various commodity groups during meetings with processors on price and contract arrangements. The representative of the TFGA is required to be directly responsible to the Chairman of the relevant commodity group.

Previous arrangements

- 3.27 The Commission understands that the vegetable growing and processing industry in Tasmania has been operating under similar arrangements to those described above for some time and that it is to address concerns that these arrangements may raise concerns under the TPA that the current application for authorisation has been lodged.

4 Statutory test

- 4.1. Application A90914 was made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 4.2. In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that the TFGA must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the TPA.
- 4.3. Under section 90(6) of the TPA, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 4.4. Under section 90(7) of the TPA, the Commission may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 4.5. In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation.
- 4.6. If this is not the case, the Commission may refuse authorisation or, alternatively, in refusing authorisation, indicate to the Applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.
- 4.7. The Commission may also grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the anti-competitive detriment.

- 4.8. Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 4.9. Section 88(13) of the TPA provides that an application for authorisation for specific arrangements may be expressed to be made also in relation to other arrangements that will be in similar terms. The Commission may grant a single authorisation in relation to all such arrangements.
- 4.10. In this instance, as well as seeking authorisation for itself and its members, the TFGA has also expressed its application so as to apply in relation to future parties to the proposed arrangements (that is, future TFGA vegetable grower members) and in relation to other arrangements that will be in similar terms.

5 Summary of the Applicant's submission

- 5.1. The conduct for which authorisation is sought is described in section 3 of this draft determination.
- 5.2. The TFGA's submission supporting its application is summarised below. A copy of this submission is available on the Commission's Public Register.

Public benefits

- 5.3. In its submission, the TFGA identifies a number of public benefits which it argues will arise from collective negotiation by its vegetable grower members with processors. The Applicant submits that these public benefits are likely to outweigh any anti-competitive detriment associated with the arrangements.
- 5.4. The TFGA states that it is well known that growers, as individuals, are always in a weak bargaining position and it is clear that some security is given to the growers through the use of a collective bargaining process.
- 5.5. The TFGA considers the collective bargaining approach to be an organised and cost effective means to cover the issue of arranging contract prices and conditions for vegetable crops grown for processing in Tasmania.
- 5.6. The TFGA states that individual growers are seen to be in a weak bargaining position and could not be expected to have the skills required to deal with well resourced multi-national processors. It considers it would not be practical, or economical, for growers to individually employ negotiators each time they wished to settle a commodity contract. It submits that this is particularly the case for many farmers who are multi-commodity growers.
- 5.7. The TFGA believes that collective bargaining, although sometimes difficult between the negotiating parties, is intended to provide support and industry stability for growers. The TFGA considers that this enables Tasmanian growers to maintain pace with, and continue to adopt, relevant technology for industry advancement and progress.
- 5.8. The TFGA claims that the practice of open consultation with each of the commodity groups by their respective leaders ensures that a considered grower position is always adopted when the negotiating groups meet with their processor representatives.

Anti-competitive detriment

- 5.9. The TFGA considers that it is unlikely that the activity of the growers in collectively bargaining with the processors will have any significant effect on consumers.
- 5.10. The TFGA estimates the grower share of the retail value of the products the subject of the proposed arrangements to range from around 1% to 11% depending on the specific vegetable crop. The TFGA submits that this effectively means that any increase in the price paid to growers will only be small relative to the price paid by consumers. For example, the TFGA states

that the delivered factory price being paid to potato growers is currently around \$220/tonne. The TFGA notes that the same potatoes, when sold to consumers by a major quick serve restaurant chain in Sydney will have a value of around \$22,000/tonne and that the growers therefore receive only 1% of the retail value of the product. The TFGA estimates that over the past nine years, when potato growers received no increase in the price paid for their potatoes, the same quick serve restaurant appears to have increased its prices by around 70%.

Term of authorisation

- 5.11. The TFGA seeks authorisation for a period of five years.
- 5.12. The TFGA notes that most vegetables are grown over a single season. For example, peas planted in August are harvested the following January.
- 5.13. However, the TFGA claims that there has been a move to longer term contracts, which are seen by many growers as giving some degree of stability to the industry. For example, the current Simplot potato contract is for three years covering the seasons 2001/02, 2002/03 and 2003/04 and the previous McCain potato contract was for two years covering the seasons 2001/02 and 2002/03. The TFGA notes that these longer term contracts have price and conditions fixed for the contract period, but that the processors may adjust tonnages each year if necessary.

6 Summary of processor submissions

- 6.1 Both McCain and Simplot provided detailed submissions to the Commission in relation to the application and the Applicant's supporting submission.
- 6.2 A summary of these submissions is provided below. Copies of these submissions are available on the Commission's Public Register.

Simplot Australia Pty Ltd

- 6.3 Simplot states that the vegetable and potato processing industry in Australia is highly competitive and consumers have long benefited from aggressive competition in the market. Simplot believes the application formalises a system of management of relations between growers and processors which has been informally in place for years.
- 6.4 Simplot supports the application, albeit with some conditions discussed below, and agrees that the term of authorisation should be for a period of five years.
- 6.5 While acknowledging collective bargaining has been utilised in the past, Simplot states that it has suffered increased prices in the cost of potatoes and vegetables without necessarily being able to pass on these increases to the retail trade and the foodservice customers with whom it has longer term fixed price contracts. Simplot claims that potato processing price increases in particular have led to losses in operating profit.
- 6.6 Simplot states that during the course of the 2001 negotiations, a number of Tasmanian McDonalds stores were the target of a campaign by growers for an increase in the price paid to growers for potatoes. Simplot considers that this generated unhelpful media interest in complex pricing issues between growers and processors. Simplot states that these actions were unhelpful because processors were forced into paying an unsustainable price to growers without being in a position to recover that increase from customers, as the market could not sustain a price increase.
- 6.7 Simplot considers that there needs to be greater exchange of information with the TFGA and growers so that there is a real understanding of supply chain costs, capital investment risk, sustainable rates of return and competitive market forces.
- 6.8 Simplot maintains that comparisons of the sale price at retail or quick service restaurants with what the grower receives at the farm gate is unhelpful to any negotiation and seeks to avoid the scenario which arose in 2001 through better communication and understanding between processors and growers.
- 6.9 Simplot submits that it is reasonably satisfied with the collective negotiations conduct by the growers and facilitated by the TFGA in the past. However, there are a number of concerns which Simplot has in relation to the ongoing process under authorisation. These are:

- the role and authority of the TFGA is not well known and is not published;
 - it is unclear how the TFGA will determine if there is a consensus from growers on contract negotiations;
 - the composition, appointment and removal of the representatives of the negotiating group is unclear;
 - there currently exists no dispute resolution process; and
 - there is no code of conduct relating to the negotiations.
- 6.10 Simplot is of the view that any authorisation should be subject to the requirement that the TFGA publish its charter and that the parties agree to a code of conduct which includes dispute resolution provisions. Simplot notes that this matter has been raised with the TFGA in discussion and is yet to be progressed.

Industry and relevant markets

- 6.11 Simplot submits that the relevant areas of competition to which the application relates can be broken down into two markets.
- 6.12 The first is the Australian processed frozen potato market which services two relevant sub markets:
- the frozen packaged retail market where consumers purchase products from major supermarkets; and
 - the food service market which comprises quick service restaurants such as McDonalds, KFC etc, catering outlets, take away food shops, restaurants, hospitals and other catering institutions who are usually serviced by independent third party distributors such as Country Wide.
- 6.13 The second market relates to Australian processed frozen and canned vegetables, which also serves the two sub markets identified above.
- 6.14 Simplot considers the Australian markets for frozen potato and vegetable products to be highly competitive and that margins have been eroded over the years so that there is a strong focus on price and production costs.

Public benefits

- 6.15 Simplot submits that authorisation of collective bargaining between growers and processors would formalise the system of contract negotiation and lead to greater certainty for both parties. Simplot submits that formalisation of the system would lead to an improved bargaining position for growers to counter the perception of power imbalance with processors. Additionally, growers will be better informed in their contract negotiations.

- 6.16 Simplot believes authorisation would allow greater efficiencies in the finalisation of contracts with growers through a known and certain process. In addition, it submits that if dispute resolution processes were adopted, this would lead to greater industrial harmony allowing for continuity of supply of consumer products.
- 6.17 Simplot further contends that contract certainty, particularly in relation to price, will lead to growth in the industry as the parties co-operate to achieve efficiencies in better varieties, sharing of research and knowledge and methods of reducing supply chain costs.
- 6.18 Simplot submits that benefits will flow to consumers through improved competitiveness of the industry and the ability to deliver product of better quality and greater variety.

Anti-competitive detriment

- 6.19 Simplot submits the major concern with collective bargaining of contracts is that it may result in less flexible contract for individual growers, particularly those who out perform other growers.
- 6.20 However, Simplot considers the benefits of authorisation, with the conditions outlined above, far outweigh the likely detriments arising from the proposed arrangements.

McCain Foods (Aust) Pty Ltd

- 6.21 In its submission, McCain states that collective bargaining to reach agreed contract prices has been an accepted practice in the past and McCain does not object to the application. However, McCain considers it appropriate to comment on the proposed process for collective bargaining and what it considers to be the likely effects of collective bargaining by the TFGA, and some assertions made by it in its supporting submission.

Concerns

- 6.22 McCain submits that it supports continuation of collective bargaining and authorisation of such arrangements, but has serious concerns that growers may use collective boycotts (that is, threats to withhold supply) to achieve price increases. McCain requests that the Commission expressly limit any authorisation to the collective negotiation process proposed by the TFGA and exclude any collective boycott conduct from authorisation.
- 6.23 McCain considers the TFGA's submission suggests that collective bargaining is the only, or at least the most efficient, method to achieve fair industry arrangements for growers. McCain considers that even though collective bargaining has been an industry practice for many years, it is not the only method by which satisfactory industry pricing outcomes can be achieved.
- 6.24 McCain submits that growers have other options if they consider that they cannot obtain an 'adequate' price from a particular processor and hence wish

to cease supplying that processor. Firstly, growers may opt to supply another processor. Secondly, growers can, and regularly do, alter the composition and volume of crops grown from one season to another, based on the price/return they expect to receive from a particular crop.

- 6.25 McCain considers that the longer (price) negotiations between growers and processors continue, the more they favour the growers. McCain states that the processors need to secure supply to operate their processing plants and meet orders from their customers. Therefore, a processor cannot take the risk that growers will withhold supply due to inadequate prices. McCain states that given the high fixed costs involved in a processing business, it is the processor, rather than the grower, who is exposed to any disruptions in the supply relationship. McCain states that the majority of growers ‘contract out’ their harvesting, planting and transporting, and therefore their fixed costs are low.
- 6.26 McCain refutes the claim by the TFGA that it had ignored the sound basis of the arguments presented by the growers in cost studies for price increases. McCain states that in the past it has sometimes disagreed with the contents of the cost studies, mainly because they reflected historical performance rather than best practice.
- 6.27 McCain considers that growers incorrectly assume that cost increases must automatically result in grower price increases, rather than taking into account the prices that are achievable in the total supply chain. In McCain’s view, automatic price increases based on Consumer Price Index changes are flawed because the approach:
- ignores the prices that are achievable in the marketplace;
 - removes the growers’ incentives to improve productivity; and
 - generally removes any incentives for continuous improvement in the production process.
- 6.28 McCain states that the TFGA’s argument that there is no need for any price increases to be passed on to consumers assumes that the processors and retailers will absorb any price increase to growers.
- 6.29 In addition, McCain refutes the TFGA’s argument that Australian consumers would have to pay more for frozen vegetables and fries, if imported. McCain argues that this is not true for all types of vegetables.

Public benefits

- 6.30 McCain submits that there are some public benefits likely to arise as a result of the proposed arrangements. These are:
- assured, reliable supply of products;
 - little volatility in pricing; and

- certainty for growers, processors, and their communities to encourage ongoing investment.

Anti-competitive detriment

- 6.31 McCain submits there is some potential for public detriment to result from collective bargaining where:
- potential boycotts are used to drive unrealistic, unsustainable price rises; and
 - it supports inefficient and unsustainable growers, as collective bargaining set prices to support the growers at the average.
- 6.32 In summary, McCain notes that application by the TFGA seeks to formalise a system between growers and processors that has been in practice for many years. McCain supports the application.

7 Summary of other submissions

- 7.1. The Commission sought submissions from a wide range of interested parties in relation to the proposed arrangements.
- 7.2. Copies of all submissions received are available on the Commission's Public Register.

Submissions by the Grower Groups

- 7.3. The Commission did not receive substantive submissions from any of the TFGA's grower groups. However, a number of the grower groups did provide letters indicating their support for the application for authorisation and that they did not consider it necessary to provide further submissions in addition to the supporting submission provided by the TFGA.
- 7.4. The TFGA Vegetable Council provided a letter supporting and endorsing the application.
- 7.5. The following grower groups provided letters in support of the application:
 - McCain pea growers;
 - McCain seed potato growers;
 - McCain bean growers;
 - Simplot potato growers;
 - Simplot carrot growers;
 - Simplot seed growers;
 - Simplot bean growers;
 - Simplot brassica growers; and
 - Simplot pea growers.

Other interested parties

- 7.6. The **Tasmanian Department of Primary Industries, Water and Environment** ("the Department") supports the continuation of the collective bargaining process currently in place.
- 7.7. The Department states that, given the TFGA's submission, it would appear that an authorisation granted by the Commission for the TFGA's vegetable growers to collectively negotiate with McCain and Simplot would provide greater certainty to the current arrangements.
- 7.8. The Department supports the position that authorised collective negotiations would provide an opportunity for those growers who are not in a position to

effectively negotiate individually with either or both McCain and Simplot, to do so such that they can achieve a reasonable outcome in terms of price, and other conditions of their contracts.

- 7.9. The Department supports the need to ensure that growers are provided with the opportunity to opt out of any authorised collective negotiation process and hence be able to negotiate individually with either or both processors if they so desire.

8 Commission assessment

- 8.1. The Commission's evaluation is in accordance with the statutory test outlined in section 4 of this draft determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.

Relevant markets

- 8.2. The first step in assessing the public benefits and anti-competitive detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 8.3. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 8.4. In this matter, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 8.5. In considering this application, the Commission has identified two areas of competition, broadly being those associated with:
- the supply of vegetables to Tasmanian vegetable processors – that is, competition between growers in the supply of vegetables to McCain and Simplot; and
 - the supply of vegetables to retailers and food service industries – that is, competition between suppliers, including McCain and Simplot, to supply vegetables to retailers (i.e. supermarkets) and food service industries (i.e. fast food and take away outlets, restaurants, caterers, etc).
- 8.6. With respect to the market for the supply of vegetables by Tasmanian growers to McCain and Simplot (or any other processor which could potentially establish a processing facility in Tasmania), the Commission notes the following:
- As contended by McCain, there is some capacity for growers to alter the composition and volume of crops grown from one season to another and/or switch processors.
 - However, more generally, vegetable growing requires significant preparation and forward planning, resources and relevant capital equipment, with little scope to make significant changes to crops and planting schedules should farmers wish to exit the industry in favour of other farming activities.

- The growing fee paid to the farmer is a relatively small percentage of the end retail price of the product.

8.7. With respect to the supply of vegetables to retailers and food service industries, the Commission notes:

- Vegetables processed by McCain and Simplot are sold both in Tasmania and mainland states.
- The market for the supply of vegetables to retailers is highly competitive. Potential substitutes for processed vegetables supplied by McCain and Simplot may include imported processed vegetables, convenience and fresh vegetables.
- Competition between suppliers is heavily influenced by price with competitive pressures limiting the capacity for processors to pass on any increases in production costs.
- Processed vegetables are under pressure from a range of innovations and marketing strategies in other sectors, which, together with increased import competition, has limited sales and margin growth for the processed food sector.
- Purchasers, in particular large supermarket chains and retail fast food chains, have significant buying power when purchasing frozen vegetables and potatoes from McCain and Simplot.

8.8. The Commission notes that the markets for the supply of vegetables by Tasmanian growers to McCain and Simplot and for the supply of vegetables to retailers and food service industries could, as contended by Simplot, be further disaggregated into separate markets for potatoes and other vegetables. In this respect, the Commission notes that the features of these markets noted above apply irrespective of whether each is broadly defined to include all vegetables or more narrowly defined as separate markets for potatoes and other vegetables.

The future with and without test (the counterfactual)

8.9. The Commission uses the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.⁹

8.10. Under this test, the Commission compares the public benefit and anti-competitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to make a reasonable forecast about

⁹ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

- 8.11. In identifying the likely situation without authorisation the Commission is mindful of the evidence provided to it which suggests that negotiations between the TFGA and the processors, along similar lines to those for which authorisation is sought, have been on-going for some time.
- 8.12. However, given that such conduct would be likely to raise concerns under the TPA, it is unlikely, absent of authorisation, that growers will be able to continue to collectively negotiate contracts with processors in the future. Specifically, the TPA prohibits persons in competition with each other engaging a common representative to specifically negotiate provisions in contracts that may have an anti-competitive purpose or effect (e.g. a common fee). Consequently, the counterfactual which the Commission has applied in assessing the proposed arrangements is one where each grower would be required to individually negotiate the terms and conditions of their contract(s) with either McCain or Simplot (or both if appropriate).
- 8.13. As for what form individual negotiations might take, this is somewhat difficult to speculate given that collective negotiations, in one form or another, have apparently been occurring for some time.
- 8.14. Absent authorisation, the processors would have two options available to them in offering contracts to growers. Either they could negotiate individually with each grower, the terms and conditions of any contract arrangements, or, offer standard form contracts with limited scope for variation of terms and conditions.
- 8.15. The Commission has previously considered numerous applications for small primary producers to collective bargaining with the processors to whom they supply. In its past consideration of these applications the Commission has generally found that the most common situation in the absence of an authorisation to collectively bargain, or some form of industry regulation, is one where primary producers offering a common good or service in similar circumstances are offered essentially standard form contracts with little capacity to negotiate variations on those standard terms or conditions.
- 8.16. In particular, where imbalances in bargaining power are observed, the result is, generally speaking, the offering of standard form contracts on terms likely to be to the advantage of the party offering the contract. That is not to say that the other party will always be at a disadvantage as a result, but rather that, as with any commercial arrangement, the party offering the contract will seek to ensure the most favourable deal for itself. Such contracts are generally offered on a 'take it or leave it' basis, with limited, if any, any scope for the other party to have input into the terms of the contract.
- 8.17. In the current case, as noted, while there is some capacity for farmers to alter the composition and volume of crops grown from one season to another and/or switch processors, more generally, vegetable growing requires significant preparation and forward planning, resources and relevant capital equipment,

with little scope to make significant changes to crops and planting schedules should farmers wish to exit the industry in favour of other farming activities. These switching costs would limit the ability for growers to do anything other than continue to grow for one of either McCain or Simplot, at least in the short run, even where unfavourable terms and conditions were offered. While it is also true that McCain and Simplot are reliant on the growers, they are not reliant on any individual grower to nearly the same extent. That is to say, failure to negotiate a mutually satisfactory agreement with an individual grower would not place the processors business at the same commercial risk as it would the growers. Consequently, as noted by the AFFA report into price determination in the Australian food industry, processors have a strong degree of market power in negotiations with growers.

- 8.18. In addition, McCain and Simplot are large, well resourced businesses with significant commercial and negotiating expertise. In contrast, TFGA members are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of McCain and Simplot.
- 8.19. It could therefore be expected, in a situation where growers were required to negotiate contracts with processors individually, that the consequence of such an imbalance in bargaining positions would be the offering of standard form contracts by processors to each of their grower in a particular commodity group, with little input from the growers or scope to vary the terms and conditions of such contracts.

Effect on competition

- 8.20. As discussed in Section 4, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 8.21. In respect of the current arrangements the Commission considers that there are three main areas where they may potentially have an anti-competitive effect:
- lost efficiencies resulting from collusion;
 - reduced scope for new market entry; and
 - increased potential for collective activity beyond that authorised.

Lost efficiencies resulting from collusion

- 8.22. A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price to be paid to the group and other terms and condition of supply or acquisition.
- 8.23. Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.

- 8.24. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 8.25. In particular, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.
- 8.26. This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.¹⁰
- 8.27. Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 8.28. In its past consideration of collective bargaining arrangements the Commission has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or reduced competition on other terms of supply, where there is capacity for any such increase to be passed on in the form of higher prices, less choice or lower quality of products offered to consumers, this could constitute an anti-competitive detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 8.29. In this case, the processors submit that collective negotiations between the growers and the processors may lead to higher fees paid to growers and less flexible contracts than would be the case if the contracts were negotiated individually.
- 8.30. However, the Applicant contends that the proposed arrangements will not put upward pressure on growing fees, nor pressure on the retail prices, even when compared to a situation where each grower individually negotiates its own contract terms and conditions with processors.
- 8.31. The Commission has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following features are present:
- the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to collectively bargain, is low;
 - there is voluntary participation in the arrangements;
 - there are restrictions on the coverage, composition and representation of the bargaining group; and

¹⁰ Section 45A of the TPA

- there is no boycott activity.

8.32. With respect to these four features, as they relate to the proposed arrangement, the Commission notes the following.

Competition between growers absent of authorisation

8.33. The Commission notes that even businesses with a high degree of bargaining power are influenced by supply and demand forces in the manner in which they set their prices. In setting their prices (in this case growing fees), processors are likely to have regard to how much each grower is willing to accept. In this respect, growers do compete (at least to some extent) with each other.

8.34. This is not to say that such competition manifests itself in more overt forms such as bargaining or undercutting. At times it is hard to describe how this less overt form of competition exists. A simple way is to ask the question why processors do not set a lower growing fee. Surely processors would choose to save on processing costs where they could without reducing the number of growers willing to grow at a lower price. The answer is that the processors believe that by setting a lower growing fee, more growers will choose not to (or will not be able to) continue to grow. This is reflective of competition (albeit not necessarily high) between growers.

8.35. However, more generally, as discussed at paragraphs 8.14 to 8.19, absent authorisation, the level of competition between those parties seeking to collectively negotiate, with respect to those matters on which they are seeking to collectively negotiate, would be low. That is to say, the nature of the industry, and the relationship between processors and growers, is such that generally speaking, if individual negotiation was to occur, growers in each commodity group would most likely be offered standard form contracts with limited capacity for individual growers to vary the terms of the agreement. To the extent that there would be scope for individual growers to vary the terms of such contracts, the proposed arrangements will not reduce the scope to do so. Processors will still enter into individual contracts with each grower, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.

8.36. Consequently, the difference between the level of competition amongst growers with or without the proposed arrangements would be small. While the proposed arrangements may result in a different set of standard terms being offered than would be the case if negotiations were to occur individually, by virtue of the increased bargaining power of the growers, they are unlikely to reduce competition between growers on negotiating those terms as such competition, were growers to negotiate individually, would still be limited.

Voluntary participation

- 8.37. As noted, the proposed arrangements are voluntary. Neither the processors, nor individual growers, would be compelled to participate in the proposed arrangements. Each would remain free to individually negotiate either variations to the collectively agreed contract or to negotiate individual stand alone contracts. To the extent that growers could, absent of the proposed arrangements, compete to provide growing services to processors, the voluntary nature of the proposed arrangement provides for such ongoing competition. Growers who consider that they will be able to negotiate a more commercially attractive arrangement, most likely to be the most productive growers, either by variations to the collective agreement, or through negotiating individually, will remain free to do so. Consequently, incentives for growers to compete on price, to innovate, or to otherwise improve their quality of services, to the extent that they exist, will not be reduced by the proposed arrangements to the extent that they that they might otherwise be.
- 8.38. In this respect, the Commission notes that collectively negotiated contracts will only be agreed and implemented where both growers and their processor consider it in their commercial best interest to do so. That is to say, the arrangements will only be entered into where both parties to the proposed arrangement consider that they will generate sufficient efficiency gains to offset any inefficiencies which may result from any reduced flexibility in contracts entered into. The Commission notes that in this regard, both processors and growers are supportive of the proposed arrangements.

Coverage and composition of bargaining groups

- 8.39. The coverage, composition and representation of proposed bargaining groups is somewhat restricted. Each bargaining group will consist only of those growers in a particular commodity group growing for a particular processor. That is, McCain pea growers will only form a negotiating group with other McCain pea growers.
- 8.40. Where the size of bargaining groups is restricted, the anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group. Further, where bargaining groups are limited in scope (by for example, commodity supplied) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces anti-competitive effects associated with ‘one size fits all’ negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.

Boycott activity

- 8.41. It is not proposed that any collective boycott activity occur. While there are circumstances in which the ability to boycott may in itself generate a net public benefit, more generally, collective boycotts can significantly increase any anti-competitive effects of collective bargaining arrangements. Specifically, they could enable a collective bargaining unit to inflict significant commercial damage on those with whom they negotiate. In addition, collective boycotts may generate direct inefficiencies through the

disruption to the business or businesses of the target of the boycott and upstream and downstream suppliers. The Commission notes McCain's submission that the Commission expressly limit any authorisation granted so as to preclude boycott activity. As noted, authorisation has not been sought for collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

- 8.42. In light of the above four features, the Commission considers the anti-competitive detriment generated by lost efficiencies resulting from collusion as a consequence of the proposed arrangements is likely to be minimal.

Competitive pressures in downstream markets

- 8.43. The Commission notes that, even where growers are able to negotiate increases in prices paid to them as a result of bargaining collectively, the capacity for such increases in price to be passed on to consumers is limited.

- 8.44. As noted at paragraph 2.11:

- Returns to processors and producers from the processed tinned and frozen food products sector are strongly influenced by competition from imports.
- Competition between companies is chiefly based on price.
- These food segments have suffered against increasing demands for convenience and fresh foods.
- Producers have been forced to operate for lengthy periods of time without price increases due to the competitive pressure on processors and manufacturers.
- At the retail level, locally produced processed food products are under pressure from a range of food innovations and marketing and promotional strategies in other sectors.
- The major push by grocery retailers for clean and fresh image, as well as policies of sourcing processed products globally (where prices are competitive with locally supplied products), has limited sales and margin growth for the processed food sector.

- 8.45. These competitive pressures are such that the capacity for processors to pass through any increase in fees to growers negotiated is likely to be limited.

- 8.46. In addition, the fee paid to growers is less than 10%, and it is contended by the Applicant that in some cases as low as 1%, of the retail price of the commodities grown.

- 8.47. Consequently, any small increase in price that growers are able to negotiate is unlikely to materially impact on retail prices.

Reduced scope for new market entry

- 8.48. The capacity for new entrants to compete for the right to undertake the business of existing market participants subject to a collective agreement has implications for how competition in a market is affected. Collective negotiations between parties resulting in agreed prices and other terms and conditions and entry into long term, common, agreements may reduce the likelihood of entry into the relevant markets. For example, a group of farmers entering into a collectively bargained, long term agreement, with a processor would make it more difficult for other prospective farmers to enter the market, as the processor may have entered into long term agreements sufficient to satisfy all its production needs, as well as make it more difficult for another processor to enter the market due to the scarcity of farmers able to compete to supply it.
- 8.49. With respect to the proposed arrangements, the Commission notes that barriers to new growers entering the market, in terms of skill, customer contacts and capital outlay for land and equipment, are already high. More generally, the application for authorisation is expressed so as to apply not just to current TFGA members, but also to future TFGA members. Consequently, any new growers seeking to grow the relevant commodities for Simplot or McCain, or indeed any existing grower who is not currently a TFGA member, could, provided they became a TFGA member and the processor was, in the case of a contract already negotiated, agreeable to offering them a contract on the same terms, join the collectively agreed arrangement. In addition, as noted, any exiting grower, or potential new entrant is, again subject to agreement being reached with the processor, able to enter into separate arrangements to those collectively negotiated.
- 8.50. The Commission notes that the proposed arrangements may, to some extent, limit the capacity for new processors seeking to locate in Tasmania to enter the market. While existing growers individually entering into longer terms contracts would also restrict the capacity for new processors to enter the market, under the proposed arrangements it is possible that all growers of a particular commodity for a processor may enter into longer term contracts with common end dates. This would restrict a potential new entrants capacity to compete to attract existing growers at any point in time other than the common expiration date of those contracts.
- 8.51. However, more generally, the Commission has not been provided with any information to suggest that there is a significant prospect of an additional processor seeking to locate in Tasmania within the five year period for which authorisation is sought. In addition, irrespective of contracts entered into by existing growers, a significant number of additional growers would be required to enter the market in order to sustain an additional processor. As noted, nothing in the proposed arrangements prohibits new growers entering the market, particularly if it were in the context of an additional processor seeking to locate in Tasmania.
- 8.52. Finally, as noted, existing processors are subject to significant competitive pressures in the supply of processed vegetables to retailers and convenience outlets which would lessen the anti-competitive detriment generated by any

barriers to a new processor seeking to establish processing facilities in Tasmania.

Potential for collusive activity beyond that authorised

- 8.53. In considering collective bargaining arrangements in the past, the Commission has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct.
- 8.54. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The Commission has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring. Indeed, as noted, McCain has raised concerns in their submissions that the arrangements could facilitate the implementation of a boycott by the various growers.
- 8.55. The Commission notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA, as is generally the case in the Commission's consideration of applications for authorisation.
- 8.56. While the Commission understands that the TFGA, its members, and the processors, have been engaging in broadly similar conduct to that the subject of the current application for sometime, it is noted that the TFGA chose to approach the Commission, and subsequently lodge the current application for authorisation, in order to address any concerns that these arrangements may raise under the TPA. This suggests a commitment on the part of the TFGA and its members to compliance with the TPA.
- 8.57. More generally, in this instance, there is no evidence to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the TFGA and/or its members. Moreover, in the case of most growers, the arrangements the subject of the current application are the only type of business activity in which they are involved in any event.
- 8.58. With respect to collective boycotts, as noted, authorisation has not been sought for any such activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA. Based on its discussions with them, it is the Commission's understanding that neither the TFGA nor its members have any intention of engaging in boycott activity.

Conclusion on anti-competitive effect of the proposed arrangements

- 8.59. For the reasons outlined above, the Commission considers the anti-competitive detriment generated by the proposed arrangement to be negligible. The Commission considers that, even absent of the proposed arrangements, the right to supply growing services to processors would be likely to be subject to somewhat standard terms and conditions. The Commission is of the view that the difference between the level of competition amongst growers over contract

terms and conditions with or without the proposed arrangements would be small.

- 8.60. To the extent that, absent authorisation, there is scope for individual growers to vary the terms of growing contracts, the proposed arrangements will not reduce their scope to do so. Processors will still enter into individual contracts with each grower, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.
- 8.61. In addition, the Commission notes that, even where growers are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.

Public benefit

- 8.62. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.

Improved grower bargaining power and greater input into contract terms and conditions

- 8.63. Arguments based on improved bargaining power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve its bargaining position relative to another, generally larger, business through a collective arrangement.
- 8.64. The Commission does not generally focus on whether a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the Commission focuses on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 8.65. The Commission recognises that there are a combination of factors which, in some circumstances, result in smaller businesses having very little bargaining power compared with larger businesses, particularly in a monopsony or oligopsony market.
- 8.66. In respect of the proposed arrangements, the TFGA has submitted that growers, as individuals, are always in a weak bargaining position relative to large companies such as McCain and Simplot, and that growers could not be expected to have the skills required to deal with well resourced multi-national processors. The TFGA submits that it would not be practical or economical for growers to individually employ negotiators each time they wished to settle

a commodity contract. Simplot submits that growers bargaining power would be enhanced where they are able to negotiate collectively.

- 8.67. As noted at paragraphs 8.14 to 8.19, the Commission considers that individual growers are in a comparatively weak bargaining position given the difficulties they would face in switch to other farming activities in the event that they were unable to negotiate a satisfactory agreement with either of the processors, and their relative resources and commercial and negotiating expertise. As noted, it could be expected that the consequence of such a bargaining power imbalance would be the offering of standard form contracts on a 'take it or leave it' basis with limited scope for variation of terms and conditions to be negotiated or for effective input by growers into the contractual terms and conditions.
- 8.68. In the current circumstances, the Commission accepts that there is an imbalance in bargaining power between Tasmanian vegetable growers and processors, which would, if growers were required to negotiate individually, limit their capacity to have effective input into contract terms and conditions.
- 8.69. The Commission considers that the proposed collective bargaining arrangements would improve growers bargaining position in negotiations with processors and provide a greater opportunity for growers, with the assistance of their representatives and the TFGA, to have more effective input into contracts terms and conditions, which the Commission considers does generate a public benefit.

Transaction cost savings

- 8.70. The TFGA argues that it would not be practical or economical for growers to individually employ negotiators each time they wished to settle a commodity contract if required to negotiate individually.
- 8.71. In considering previous applications for authorisation, the Commission has noted that transaction costs are likely to be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquire or supplier must negotiate and implement agreements with every business with which it deals. Where these savings are likely to be passed on in the form of lower prices to consumers, the Commission has accepted that this would constitute a public benefit.
- 8.72. However, in instances where, absent of authorisation, standard form contracts, with limited capacity for individual negotiation as to variations in those standard terms, are likely to be employed, significant transaction cost savings are unlikely to result from collective negotiations. That is to say, even where contracts are negotiated individually, in such circumstances there is likely to be little additional negotiating cost involved in doing so compared to a situation where a collective agreement is entered into.
- 8.73. However, the Commission notes that beyond negotiating costs, there are other transaction costs involved with entering into contractual arrangements. For

example, processors and growers may chose to avail themselves of their own financial and or legal advice before entering into such contracts.

- 8.74. With respect to the proposed arrangements, the Commission notes that although it is proposed that contracts be negotiated collectively, it is still proposed that each grower individually decide whether to accept the terms and conditions negotiated and enter into an individual contract. However, the Commission considers that individual growers are less likely to consider it necessary to individually engage their own independent legal and/or financial advice in respect of a collectively negotiated contract than they would if offered individually contracts, even allowing for the fact that such individual contracts would most likely take a standard form.
- 8.75. Firstly, even where individual contracts offered did take a standard form, any discussion between individual growers as to the terms and conditions of those contracts may raise concerns under the TPA. That is to say, while each grower supplying a particular commodity to a processor would essentially be offered the same contract, each would have to seek its own independent advice in respect of that contract. Secondly, if a standard form, collectively negotiated agreement was offered, growers would be more confident as to the suitability of the terms and conditions of that contract and therefore be less likely to require additional financial and /or legal advice. Thirdly, where such advice was required, under the proposed arrangements, growers would be able to seek it collectively.
- 8.76. Consequently, the Commission considers that some, albeit, limited transaction cost savings are likely to result from the proposed arrangements compared to a situation where each grower was required to negotiate contracts individually. To the extent that such savings do arise, the Commission considers that the competitive pressures to which processors are faced are likely to ensure that at least some of these cost savings are passed on to consumers. However, given the above, the Commission does not consider the magnitude of any such savings is likely to be significant.

Contract certainty

- 8.77. Both processors submit that the proposed arrangements would improve contract certainty which would improve industry stability, assure reliable supply of product, reduce price volatility and provide certainty to encourage ongoing investment in and improve the competitiveness of the industry. The TFGA similarly submit that the proposed arrangements will provide support and industry stability for growers.
- 8.78. To the extent that the proposed arrangements did promote these outcomes the Commission would consider this to be a public benefit. However, most of these outcomes are/would be likely to be achieved as a result of growers and processors entering into longer term contracts, irrespective of whether such contracts were individually or collectively negotiated. That is to say, these outcomes would be equally achievable if growers and processors were to negotiate contracts individually.

- 8.79. In this respect, the Commission notes the general move within the industry towards longer term contracts. To the extent that this is the industries preference, the Commission would expect this trend to continue irrespective of whether future contracts were negotiated collectively or individually.
- 8.80. While the Commission accepts that longer terms contracts are likely to improve industry stability, assure reliable supply of product, reduce price volatility and provide certainty to encourage ongoing investment, which constitutes a public benefit, the Commission does not consider this public benefit attributable, for the most part, to the collective bargaining process for which authorisation is sought.
- 8.81. However, as noted, the proposed arrangements will provide growers with greater competitive parity in negotiations with processors and the opportunity for greater input into contract terms and conditions which should, in itself, provide growers with greater confidence and certainty regarding their future viability and capacity to continue to supply processors.

Conclusion on public benefits of the proposed arrangements

- 8.82. For the reasons outlined above, the Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that in these circumstances, improving the bargaining power of growers, thereby providing growers with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.
- 8.83. The Commission also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.

9. Balance of public benefits & anti-competitive detriments

- 9.1 The Commission considers the anti-competitive detriment generated by the proposed arrangement to be negligible. The Commission considers that, even absent of the proposed arrangements, the right to supply growing services to processors would be likely to be subject to somewhat standard terms and conditions. The Commission is of the view that the difference between the level of competition amongst growers over contract terms and conditions with or without the proposed arrangements would be small.
- 9.2 To the extent that, absent authorisation, there is scope for individual growers to vary the terms of growing contracts, the proposed arrangements will not reduce their scope to do so. Processors will still enter into individual contracts with each grower, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.
- 9.3 In addition, the Commission notes that, even where growers are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.
- 9.4 The Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that improving the bargaining power of growers, thereby providing growers with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.
- 9.5 The Commission also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.
- 9.6 Consequently, following consideration of the arguments advanced by the Applicant and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment.

Other issues – dispute resolution process

- 9.7 Simplot states that authorisation should be conditional on the parties agreeing to a code of conduct which includes dispute resolution provisions.
- 9.8 The Commission notes that the TFGA has not sought authorisation for any code of conduct to govern negotiations or for a dispute resolution process in respect of either disputes arising during the negotiating process (i.e. as to terms and conditions to be included in contracts) or in relation to contracts once signed. The TFGA has however outlined the broad framework within which it is proposed that negotiation will occur. The Commission notes that

this framework is consistent with that developed by the parties to negotiations over recent years. The Commission considers that the specific details of negotiations within the framework authorised is a matter best agreed by the parties to those negotiations.

- 9.9 With respect to dispute resolution provisions, the Commission notes that provision for a dispute resolution processes may increase the public benefits generated by proposed arrangements, for example, by introducing greater certainty into the process for resolving disputes and reducing the costs involved in doing so. Alternatively, too prescriptive a dispute resolution process may increase the anti-competitive detriment generated by proposed arrangements by acting as a disincentive to negotiation between the parties, for example, if parties seek to rely on a third party arbiter to set or interpret contract terms and conditions at the expense of genuine negotiation.
- 9.10 However, irrespective of the merits or otherwise of a code of conduct and/or prescribed dispute resolution process, the Commission's role through the authorisation process is limited to considering the public benefits and anti-competitive detriments of the specific arrangements for which authorisation is sought. As noted, in this instance the Commission is satisfied that the benefits to the public from the proposed arrangements will outweigh any anti-competitive detriment.
- 9.11 In addition, the Commission notes that if collective bargaining was authorised, it would be open to the parties to develop a dispute resolution process which could form a condition of any negotiated agreements, taking into account what each party hopes to achieve by such a process. In this respect, the Commission considers that the most effective form of dispute resolution process is likely to be one mutually agreed by the parties.

Term of authorisation

- 9.12 The Commission proposed to grant authorisation subject to a five-year time limit, as requested by the Applicants. The Commission notes that traditionally contracts have been entered into on a season by season basis. However, the TFGA contends that more recently there has been a trend towards longer term contracts. For example, it notes that the current Simplot potato contract is for three years.
- 9.13 Authorising the proposed arrangements for five years does not require that contracts entered into be for the duration of the authorisation. However, it does provide growers and processors with the flexibility to negotiate longer term contracts if they so wish.
- 9.14 In general, authorising arrangements for a limited time period allows the Commission, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.

- 9.15 It is open for the Applicant to reapply for authorisation at the expiration of an authorisation. In the event that an application for reauthorisation is received by the Commission, whether reauthorisation should be granted would be considered based on the circumstances at that time.
- 9.16 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstance since the authorisation was granted.

10 Draft determination

The Application

- 10.1. On 23 March 2004, the Applicant lodged an application for authorisation (A90914) with the Commission.
- 10.2. The application was made under section 88(1) of the TPA and under the *Competition Code* of Tasmania for an authorisation to:
 - (a) make a contract or arrangement, or arrive at an understanding, a provision of 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
 - (b) give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 10.3. The TFGA seeks authorisation on behalf of its vegetable grower members for those members to collectively bargain, through grower representatives on their various commodity group boards, terms and conditions of growing contracts with the processors to whom they supply, namely McCain Food (Aust) Pty Ltd and Simplot Australia Pty Ltd.
- 10.4. Authorisation is also sought for the TFGA to join with grower representatives from the various commodity groups and assist them in negotiations with processors.

Statutory test

- 10.5. For the reasons outlined in this draft determination, the Commission is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the Act:
 - (a) would be likely to result in a benefit to the public; and
 - (b) that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Draft determination

- 10.6. The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to application A90914 for a period of five years.

Conduct for which the Commission proposes to grant authorisation

- 10.7. The authorisation the Commission is proposing to grant is for current and future TFGA vegetable grower members to collectively bargain, through negotiating committees formed by grower representatives on their various commodity group boards, the terms and conditions of growing contracts with McCain Food (Aust) Pty Ltd and Simplot Australia Pty Ltd. Such negotiation will occur on a commodity group by commodity group basis in the following growers groups:
- McCain: processed potato growers, seed potato growers, pea growers, bean growers, brassica growers.
 - Simplot: processed potato growers, seed potato growers, pea growers, bean growers, carrot growers, brassica growers.
- 10.8. Negotiating group committees will consist of grower representative, being levy paying members of the TFGA for that commodity, elected at meetings of the commodity group.
- 10.9. Each negotiating group will act autonomously as an individual commodity group in its negotiations with processors.
- 10.10. The Commission also proposes to grant authorisation for the TFGA, through its Vegetable Council Executive Officer, to assist grower groups in their negotiations. The role of the TFGA will be to obtain and disseminate relevant information to each commodity group and to assist each group, including by attendance at negotiations with processors, with price and contract deliberations.
- 10.11. Neither the commodity group or the TFGA will contract with processors. Each grower will determine whether or not to agree to accept the terms and conditions of the individual contract offered by the respective processor as a result of negotiations. Tonnages to be contracted and acceptance of price and conditions, following discussions of the commodity group, will remain a matter between each individual grower and the processor.

Interim authorisation

- 10.12. At the time of lodging the application, the TFGA requested interim authorisation for the proposed arrangements. On 21 April 2004, the Commission granted interim authorisation.
- 10.13. Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

Further submissions

- 10.14. The Commission will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the TPA.