

Draft Determination

Application for Authorisation

lodged by

the Victorian Farmers Federation on behalf of its member
chicken meat growers

in relation to collective bargaining by chicken meat grower
groups with their nominated processors in Victoria.

Date: 17 November 2004

Commissioners: Samuel
 Sylvan
 Martin
 McNeill
 King
 Smith

Authorisation nos. A40093, A90931

Public Register nos. C2004/642, C2004/1364

Executive summary

The application

On 5 May 2004, the Victorian Farmers Federation (VFF), on behalf of its member Victorian chicken meat growers (the Applicant), lodged an application for authorisation (A40093) with the Australian Competition and Consumer Commission (ACCC). On 15 September 2004, the Applicant lodged a further related application (A90931).

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 ACCC 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 ACCC for what is known as an ‘authorisation’.

Broadly, the ACCC 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 ACCC 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 Applicant seeks authorisation to allow individual VFF member chicken meat growers to form into grower groups, based on the VFF Chicken Meat Group with whom they are affiliated, and to act collectively in:

- negotiating the terms and conditions, including growing fees, of their broiler chicken growing contracts
- negotiating any necessary future amendments or adjustments to their growing fee or their broiler chicken growing contracts and
- negotiating for the resolution of disputes which may arise between the grower group and their processor.

The Applicant also seeks authorisation for each VFF Chicken Meat Group to have immunity under the TPA to collectively refuse to receive day-old chickens from their respective processors (referred to as a ‘collective boycott’) where agreement as to a growing contract cannot be reached after a prescribed bargaining process.

Assessment of benefits and detriments

The ACCC considers that granting the VFF member chicken meat growers immunity from the TPA to collective bargain with, and to collectively boycott supply from, processors could generate significant anti-competitive effects.

However the ACCC considers that there are a number of industry specific factors and contract arrangement features which will serve to limit the effect on competition and any flow-on effect in the form of higher prices to consumers.

Collective bargaining

In relation to collective bargaining, the ACCC considers the following industry factors will limit the effect on competition of the proposed arrangements:

- the current level of competition between members of the grower groups, with respect to those terms and conditions on which they are seeking to collectively bargain, is low
- pressure from powerful downstream purchasers of processed chicken meat such as large retail chains (Coles, Woolworths) and fast food outlets (KFC and McDonalds) limit the processors' ability to pass on any fee increases and
- the growing fee only constitutes approximately 6-8% of the retail price of chicken meat and consequently any increase in the growing fee is unlikely to materially change the retail price of chicken meat.

In addition, the ACCC considers that the effect of industry features such as large wholesale buyers and limitations on a grower's capacity to alternate between processors combined with the following factors will serve to further mitigate the potential anti-competitive effects of collective bargaining:

- existence of efficiency incentives (i.e. pool payment system) within grower groups
- separation of growers into discrete grower groups
- limited effect on barriers to entry caused by the arrangements
- freedom of growers to negotiate individual contracts with processors and
- competition from non-VFF growers.

The ACCC also considers that because of the high level of industry integration and the nature of the contract system, processors will continue to maintain a high degree of control over the growers with or without the collective bargaining arrangements.

The ACCC also considers that the anti-competitive effect of the arrangements would be significantly lessened if the specific negotiation procedures proposed at annexure B of the application and the terms and conditions included in annexure C of the VFF's application were not fixed but were open for growers and processors to negotiate.

Collective boycotts

The ACCC considers that granting growers immunity from the TPA to collectively boycott processors could significantly increase the anti-competitive effects of the proposed collective bargaining arrangements.

In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers as submitted by the processors. The ACCC is also particularly

concerned with the potential for immediate impact associated with the possible need for destroying day-old chickens.

In considering the detriments that may arise from collective boycott activity, the ACCC notes certain features of the proposed arrangements and relevant markets that are likely to lessen any such detriment:

- the restraint which growers are likely to adopt in using boycotts as a last resort to avoid damage to their business and the poor relations that might arise with processors
- the ability to engage in collective boycott's only at the time of negotiating contracts and only following a seven month negotiating period
- the limited time for which a boycott activity might be sustained by growers to avoid damage to their business
- the ability, albeit limited, for processors to balance the reduction in production six weeks following boycott action through interstate production and
- the relative impact on the national market for the supply of chicken meat as a result of boycott activity being limited to one processor at any one time.

The ACCC considers that the combined effects of these arrangement features and industry factors serve to mitigate the potential anti-competitive effects of collective bargaining and collective boycotts.

The ACCC considers that some public benefits are likely to arise from the proposed arrangements, the most significant of which arises from allowing greater grower input into terms and conditions of supply resulting in the potential for increased efficiencies in addition to reduced transaction costs.

Further, the ACCC considers that the proposed conduct provides some public benefit insofar as it facilitates the transition from a regulated to a deregulated environment.

The ACCC accepts that the extent to which granting grower groups the right to collectively boycott assists in securing these public benefits, such a right also brings with it a public benefit.

Following the arguments advanced by the Applicant and interested parties and despite the mitigating factors referred to above, the ACCC is not satisfied that:

- the public benefits likely to result from the proposed collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements or
- the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

However, by imposing certain conditions on the proposed collective bargaining and boycott arrangements, the ACCC considers the balance of public benefits and detriments will be shifted. The ACCC, therefore, proposes to grant the authorisation on the following conditions:

1. Only the following aspects of the contract process, as outlined in annexure B of the application, will be mandatory:
 - There will be a six month bargaining period preceding each Contract Period.
 - The ‘Contract Period’ will be the term of the growing contract agreed between the grower group and the processor.
 - The six month bargaining period will automatically commence six calendar months before the expiry date of the contract.
 - If after the conclusion of the six month bargaining period agreement on growing contracts has not been reached, the grower group may invite the processor to participate in mediation with a suitably qualified and independent mediator.
 - If after twenty-eight days from the date the processor received their invitation from the grower group to participate in mediation, agreement on growing contracts has not be reached by the parties, the members of the grower group will have protection under the TPA to engage in a collective boycott of the supply of chickens from the processor.
 - The first six month bargaining period will commence from the date this determination comes into effect.

All other aspects of annexure B will be open to the parties to negotiate.

2. Grower groups will provide a notice in writing to their respective processor 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from that processor. Such a notice should include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. This notice may only be issued 7 days after the mediation period has commenced.
3. Collective bargaining groups may only comprise growers supplying or proposing to supply growing services to the same processor.
4. Collectively bargaining and boycott conduct will be limited to being between individual grower groups and their respective processor.
5. There will not be any common representation of growing groups.
6. Authorisation does not extend in any way to negotiations between processors.
7. All those matters described in annexure C to the VFF’s application will be open to negotiation between the parties and will not be mandatory.
8. The growing of any batch of chickens held by a Victorian chicken grower at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.

With the imposition of such conditions, the ACCC would be satisfied that the public benefits of the proposed collective bargaining arrangements would outweigh their potential anti-competitive detriments and the proposed collective boycott provisions

would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Draft determination

The ACCC therefore proposes, subject to any pre-determination conference request, to grant authorisation to applications A40093 and A90931, subject to certain conditions, for a period of five years.

Interim authorisation

The Applicant also sought interim authorisation for the proposed arrangements. On 9 June 2004, the ACCC granted interim authorisation to the arrangements on a limited basis.

While the proposed terms of the authorisation differ to the current interim authorisation, the ACCC does not propose to alter the interim authorisation and those arrangements continue to be protected from action under the TPA until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke or amend the interim authorisation.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
1 INTRODUCTION	1
2 INDUSTRY BACKGROUND	2
The national processed chicken meat industry.....	2
Chicken growing services	3
Related authorisations	3
Victorian industry	4
3 BACKGROUND TO THE APPLICATION	6
Regulation of the Victorian chicken meat industry.....	6
The Marven authorisation	6
Current contractual arrangements	8
The current processor applications.....	9
4 THE VFF APPLICATION	10
The proposed arrangements	10
The VFF and its members	11
The proposed contract negotiation process	11
Requirements for terms and conditions.....	13
Interim authorisation	14
5 STATUTORY PROVISIONS	15
The statutory test.....	15
Benefits and detriments.....	16
Other relevant provisions	17
6 THE APPLICANT'S SUPPORTING SUBMISSION	18
Market definition.....	18
Market factors: Barriers to entry, expansion and exit	19
Market factors: Market dynamics	19
Other relevant markets	20
Wholesale and retail markets	20
Sector returns	21
Public benefits from the proposed arrangements	21
Anti-competitive detriments from the proposed arrangements.....	22
7 INTERESTED PARTIES SUBMISSIONS	23
The processor submissions.....	23
Other interested party submissions	27

8	ACCC ASSESSMENT - RELEVANT MARKETS.....	29
	Market definition.....	29
	ACCC assessment of the relevant markets	31
	ACCC conclusion on the relevant markets	32
9	ACCC ASSESSMENT - FUTURE WITH-OR-WITHOUT	33
10	ACCC ASSESSMENT - EFFECT ON COMPETITION	36
	Collective bargaining	36
	Conclusion on collective bargaining.....	45
	Collective boycotts.....	46
11	ACCC ASSESSMENT - PUBLIC BENEFITS	51
	Transaction cost savings	53
	Increased competition	54
	Increased dynamic efficiency.....	55
	Return of monopsony gains	55
	Promote investment.....	56
	Prevent grower exploitation	56
	Facilitate the transition to deregulation.....	57
	Promote industry bodies and standards.....	58
	Retain industry experience.....	59
	Maintain biosecurity	60
12	BALANCE OF PUBLIC BENEFITS AND DETERIMENTS	61
	Collective bargaining	61
	Collective boycotts.....	62
	Conclusion on collective bargaining and collective boycotts	63
	Proposed conditions	64
13	DRAFT DETERMINATION	66
	The application.....	66
	Statutory test	67
	Conduct authorised	67

1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) 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 conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC 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 ACCC for what is known as an ‘authorisation’. Broadly, the ACCC 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.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC 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 ACCC will take into account any submissions received from interested parties.
- 1.4 This document is a draft determination in relation to applications for authorisation A40093 and A90931 lodged with the ACCC by the Victorian Farmers Federation (the VFF) on behalf of its member Victorian chicken meat growers (the Applicant).
- 1.5 Once a draft determination is released, the Applicant, or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC’s decision and provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.6 The ACCC 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 ACCC 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/or decrease the public detriment.
- 1.7 The ACCC 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 ACCC considers and evaluates the merits of the application.

2 Industry background

The national processed chicken meat industry

- 2.1 In 2002-03, the Australian processed chicken meat industry produced 723,000 tonnes (35kgs per person) of chicken meat with total retail sales in excess of \$2.8 billion. Exports accounted for a further 21,000 kg.¹ In terms of absolute size for livestock, the poultry industry is now second only to the beef industry.² The industry is heavily concentrated in outer metropolitan areas and in rural and regional Australia.
- 2.2 Production has increased significantly over the past thirty years with annual growth of approximately 3-4% over the past few years. Similar levels of growth are expected for the next 2-3 years.³ New South Wales is the largest producer of chicken meat followed by Victoria, Queensland and South Australia. Tasmania is the smallest producer.⁴
- 2.3 The ACCC has accepted in past considerations that chicken meat has tended to be sold within local state markets although it is gradually moving from this state orientation to a national market as advancements in technology allow processors to move product greater distances with greater safety and economy. However, because of strict quarantine conditions, the processed chicken meat industry has remained primarily contained within Australia's borders with only a small percentage of product either imported or exported.
- 2.4 The retailing sector and the fast food industry are the major market outlets for the industry with approximately 75% of chicken meat is sold through retail outlets with the remainder sold through the food service industry (fast foods, restaurants etc).⁵
- 2.5 The Australian processed chicken meat industry is dominated by two large, vertically integrated companies, Inghams Enterprises Pty Ltd (Inghams) and Bartter Enterprises Pty Ltd (Bartter), who own breeding farms, multiplication farms, hatcheries, feed mills, some growing farms and processing plants. Inghams and Bartter account for approximately 70% of chicken meat production in Australia.
- 2.6 The processed chicken meat industry is typically vertically integrated due to the importance of having control over costs and the timing of all operations in the supply chain. Integrated processors supply day-old chicks and feed to contract growers or company-owned farms, collect the grown chicks, distribute and market the meat.

¹ <http://www.abare.gov.au/australiancommodities/commods/pigpoultry.html>

² Ibid

³ Ibid

⁴ http://www.nswfarmers.org.au/policy/poultry/current_issues

⁵ Ibid

Chicken growing services

- 2.7 The Applicant submits that it is standard industry practice within Australia for the growing component of the chicken meat supply chain to be outsourced. The Applicant claims that growing services are outsourced as a way of conserving processor capital with grower investment making up 40% of the total capital invested in the industry. Growers provide specialised shedding and variable inputs such as labour, gas, electricity and litter, in addition to management expertise.
- 2.8 This system of outsourcing chicken growing services and then contracting with the growers has been an intrinsic part of the chicken meat industry for many years. The characteristics of this system are:
- Processor control of inputs and rearing specifications: The processors control the genetic material for breeding chickens. They supply contract growers with day-old chicks to be reared according to detailed specifications. The processor also provides other important inputs to the growing process including all feed and medications.
 - Growing of chickens under contract: The processors and growers enter into contracts. Under these contracts, growers are independent contractors, not employees of the processor. Contract growers never own the chicks they rear.
 - Growing fee is a small component of product costs: The Applicant submits that the cost of contract rearing contributes to approximately 6% of the retail price.
 - Capital investment: The contract growing of chickens is capital intensive. The average contract farm in Australia consists of three to four growing sheds, each with a floor area of 1200 square metres. The replacement cost of such sheds, with all internal equipment, is approximately \$200-300 per square metre. Chicken growing sheds are highly specialised and have virtually no alternative use. In addition, they are non-portable.
 - Contract terms: Growers are restricted to working for a single processor at any point in time. They may be engaged on a batch by batch basis, or on contracts.

Related authorisations

- 2.9 Each of the mainland Australian states has (in the past or currently) regulated the commercial relationship between chicken meat growers and processors. These regulations have generally established an industry committee of grower and processor representatives to negotiate standard contract terms for the supply of growing services chicken meat to processors.
- 2.10 As a result of legislative reviews carried out by these states in accordance with National Competition Policy (NCP) requirements, a number of states have moved away from regulated commercial relationships between processors and growers to partial, or fully, deregulated industry arrangements. These legislative changes have resulted in a number of applications submitted to the ACCC by industry

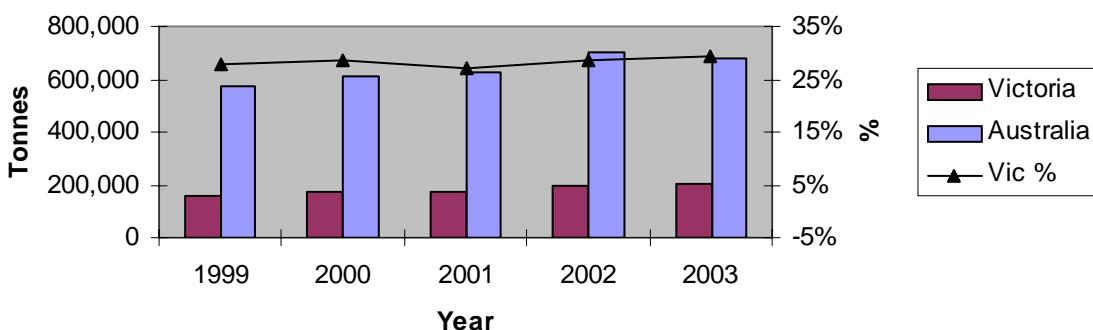
participants in recent years to allow them to collectively negotiate growing and supply contracts.

- 2.11 Authorisations granted by the ACCC in recent years to engage in similar collective bargaining arrangements to the current application include:
- 9 April 1997- (A90595) Inghams was granted authorisation for its South Australian growers to collectively bargain.
 - 20 May 1998- (A30183) Steggles Limited (now fully owned by Bartter) was granted authorisation for its South Australian growers to collectively bargain.
 - 19 May 2004- (A90888) Inghams' Tasmanian chicken growers were granted authorisation to continue collectively negotiating chicken growers contracts.
- 2.12 On 8 October 2002, an application for authorisation lodged by New South Wales chicken meat processors (A90800) was denied by the ACCC primarily because of changes in that state's legislation relating to its re-regulation of certain aspects of the chicken industry.

Victorian industry

- 2.13 In the period 1999 to 2003 national production of chicken meat rose by 19% to 681,487 tonnes, while Victorian production rose by 26% to 201,222 which equates to over 117 million chickens annually or about 31% of the total Australian production (Figure 1).

Victorian and National Chicken Meat Production (Figure 1)



Source: Australian Bureau of Statistics

- 2.14 The Applicant claims that the contract growers who supply growing services to the industry are predominantly family owned and operated businesses. The individual farm size of the average VFF member is around 100,000 birds but can range from 25,000 to 400,000 birds.
- 2.15 The Applicant claims that there has been a trend for consolidation in the processing sector with Inghams, Bartter and Baiada Poultry Pty Ltd (Baiada) now controlling

in excess of 70% of the Victorian poultry industry. The Applicant claims that it appears that this trend may continue with Baiada, indicating they intend further expansion.

- 2.16 Additionally, the Applicant submits that processors retain control over growing services by setting standards for growing facilities, regularly have their staff visit farms during the growing operation and (under the contract terms) by directing growers in the conduct of the growing operation. The Applicant submits that Victorian processors are structured as discussed below.
- 2.17 **Inghams** has processing facilities and growers in all Australian states; in Victoria, operates hatcheries, breeder farms and a feed mill in addition to its processing facility located on the Mornington Peninsula; has no company owned growing farms; contracts with 45 growers and accounts for 21% of Victorian production.
- 2.18 **Baiada** has processing facilities and contract growers in Victoria, New South Wales and South Australia; has recently expanded operations in South Australia; is a new entrant into the Victorian market which it entered by purchasing Marven Poultry in July 2001 and Eatmore Poultry in July 2002; operates hatcheries and breeder farms in addition to its main processing facility at Laverton; and contracts with 110 growers and accounts for approximately 32% of Victorian production.
- 2.19 **Bartter** has processing facilities and contract growers in all mainland states except South Australia; closed its grow out operations in South Australia in 2002 and now supplies product to its South Australian processing facility from Victoria; in Victoria, operates hatcheries, breeder farms and a feed mill, as well as its processing facility located in Geelong; contracts with 31 growers and accounts for approximately 20% of Victorian production.
- 2.20 **La Ionica** Farming Operations Pty Ltd (La Ionica) has processing facilities and contract growers in Victoria; operates one company growing farm as well as a processing facility located at Thomastown; has 23 contract growers and accounts for 15% of Victorian production.
- 2.21 **Hazeldene** Chicken Farm Pty Ltd (Hazeldene) has processing facilities, hatcheries, and breeder farms, located in and around Bendigo in central Victoria; and currently uses the services of 10 contract growers all of which are located in the Bendigo region and accounts for approximately 13% of Victorian production.

3 Background to the application

Regulation of the Victorian chicken meat industry

- 3.1 Chicken growing services in Victoria were first regulated by the state government in 1974. The original legislation was soon replaced by the *Victorian Broiler Chicken Industry Act 1978* (the Broiler Chicken Act) which, along with the Broiler Chicken Regulations 1992, regulated contract negotiations between Victorian chicken meat growers and Victorian chicken meat processors.
- 3.2 The Broiler Chicken Act established the Victorian Broiler Industry Negotiating Committee (the VBINC) which was responsible for, amongst other things, arbitrating on:
 - the standard, statewide, growing fee for broiler chickens and
 - resolving disputes between growers and processors.
- 3.3 In November 1999, a review of the Broiler Chicken Act and its regulations, conducted under NCP guidelines, concluded that the Broiler Chicken Act should be repealed. The review determined that retention of the legislation would not result in a net public benefit to the community (in accordance with the principles of legislative review under the NCP).
- 3.4 Whilst the Broiler Chicken Act was not (and has not yet been) repealed⁶, the Victorian state government has supported the NCP recommendation to deregulate the industry and, as a consequence, the VBINC has not met since 2000.⁷ The government was, however, concerned that some form of transitional process needed to be in place prior to full industry deregulation and so encouraged the parties to utilise the authorisation process available under the TPA.

The Marven authorisation

- 3.5 In September 2000, Marven Poultry Pty Ltd⁸ (Marven) for itself and on behalf of five other chicken meat processing companies operating in Victoria⁹ and current and future contract growers to those processors, lodged an application for authorisation with the ACCC. Broadly, the application sought to allow the contract growers of each of the processors to collectively negotiate standard growing agreements with their processor, including an agreement of a common fee, in accordance with a specified Code of Conduct.

⁶ The Victorian government did not repeal the legislation at the time of the initial NCP review as existing grower contracts relied on the legislation and the regulations for their enforceability.

⁷ Subsequent to 2000, VBINC passed some resolutions which provided security for on-going contracts.

⁸ Now fully owned by Baiada Poultry Pty Ltd

⁹ Inghams Enterprises Pty Ltd, Bartter Enterprises Pty Ltd, Eatmore Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd and La Ionica Farming Operations Pty Ltd.

- 3.6 On 28 June 2001, the ACCC issued its final determination which granted Marven and the five other Victorian chicken meat processors authorisation (the Marven authorisation) for a period of five years.
- 3.7 In giving its determination, the ACCC considered that, whilst there may have been some reduction in the scope for competition over, amongst other things, growing fees, the nature of the arrangements and the structure of the markets were likely to limit the extent of any anti-competitive detriments. In addition, the ACCC considered that a number of public benefits would flow from the arrangements including transaction cost savings and a smoother transition to deregulation.
- 3.8 In July 2001, the Victorian Farmers Federation (the VFF) Chicken Meat Group President, Mr Chris Jones, lodged an application with the Australian Federal Court for a review of the ACCC's decision to grant the Marven authorisation under the *Administrative Decisions (Judicial Review) Act 1997* (Cth).¹⁰ In short, the application alleged that there was no statutory foundation under subsection 88(1) of the TPA for the ACCC to have granted the authorisation that was in fact granted.
- 3.9 The review was initially dismissed by a single judge of the Federal Court, however, that decision was successfully appealed to the full bench of the Federal Court and on 5 August 2003 the Marven authorisation was set aside (effective from 4 September 2003) on the grounds that:
- the application was made by Marven for itself and on behalf of other processors
 - the authorisation sought was directed to permitting growers to engage in collective bargaining
 - in granting authorisation to the application, the ACCC had authorised grower conduct to which the processors were not a party and
 - sub-section 88(1) did not empower the ACCC to grant an authorisation to the growers where the application was not made by or on behalf of the growers.
- 3.10 Despite the VFF's application to the Federal Court some of its member chicken meat growers did begin the process of negotiating new growing agreements with their respective processors during the period that the Marven authorisation was in effect. One group of growers, who were contracted to Bartter agreed contracts in July 2001 and a further 83 Baiada growers negotiated some changes to their existing contracts, including a fee increase.
- 3.11 For the most part, however, new contracts were not finalised before the Marven authorisation was set aside by the Federal Court and consequently a majority of growers have continued to provide their services based on contracts negotiated under the VBINC contracts, or variations thereof.

¹⁰ *Jones v ACCC [2003] FCAFC 164;(2003) 200 ALR 234*

- 3.12 The Applicant claims that since the Marven authorisation was set aside in September 2003, the Victorian chicken meat industry has been in a state of legal and contractual uncertainty. The Applicant states that the contracts under which VFF member chicken meat growers currently trade are inoperable because those contracts formed under the VBINC have expired and those contracts negotiated when the Marven authorisation was in effect are no longer immune from the TPA.

Current contractual arrangements

- 3.13 Notwithstanding the uncertainty in the industry, both the growers and the processors agree that, apart from some minor exceptions, all Victorian chicken meat growers have continued to receive supply of day-old chickens from processors. However, growers and processors do have differing views about the current status and validity of their growing contracts.
- 3.14 The growers, and in particular those growers represented by the VFF, are of the view that during the period of the Marven authorisation no new contracts were finalised with processors.¹¹ In contrast, the processors are of the view that whilst a majority of contract negotiations initiated during the period of the Marven authorisation were not completed, several significant contract amendments and alterations were negotiated, including a fee increase in many instances.
- 3.15 Both parties do agree, however, that the terms and conditions under which all Victorian chicken meat growers provide their services vary from processor to processor and in many instances between individuals within the larger grower group. However, as mentioned, growers do continue to receive supply of day-old chickens from processors based on the understanding as discussed below.
- 3.16 **Inghams** growers remain on terms and conditions negotiated under the VBINC, however, they now receive chickens on a batch-by-batch basis. That is, there is no guarantee of a contract beyond the removal from the grower's farm of the last bird of the current batch.
- 3.17 **Baiada's** acquisition of Eatmore Poultry Pty Ltd (Eatmore) and Marven, has seen it assume all of those growers and those growing contracts. Whilst the Eatmore and Marven contracts contained some differences, they were essentially the same as those negotiated under the VBINC.
- 3.18 **Bartter** collectively negotiated contract terms and conditions during the period of the Marven authorisation with nine of its contract growers. Those growers are not included in the current application for authorisation by the VFF. The remaining 21 Bartter growers who did not finalise contracts with Bartter during the Marven authorisation are currently still working under VBINC negotiated contracts.

¹¹ With the exception of nine Bartter growers who are not members of the VFF.

- 3.19 **Hazeldene** receives approximately half of its growing services from VFF member growers with the remainder supplied by its own farms. Hazeldene's VFF member growers are still effectively supplying their services based on the VBINC contracts.
- 3.20 **La Ionica** has 22 contracted growers, three of which are processor owned. La Ionica's VFF member growers are still effectively supplying their services based on the VBINC contracts.

The current processor applications

- 3.21 In December 2003 the ACCC received five further applications for authorisation from Bartter (A90901), La Ionica (A90902), Hazeldene (A90903), Inghams (A90904) and Baiada (A90905) and some consenting growers (collectively known as 'the processor applications'). The processor applications seek to allow the processors and consenting growers to engage in similar conduct, to that previously authorised by the Marven authorisation.
- 3.22 The processor applications were made by the processors for their role in future collective negotiations with their contracted growers and, in some instances, the giving of effect to contracts already negotiated between individual processors and their growers acting collectively. Nine Bartter growers and one La Ionica grower consented to the applications being made on their behalf for their role in collective negotiations with their processor.
- 3.23 For the most part, however, the processor applications do not have the support of Victorian chicken meat growers. In particular, no Inghams, Hazeldene or Baiada growers consented to the application being made on their behalf.
- 3.24 On 9 June 2004, the ACCC granted interim authorisation to the processors request for interim authorisation as follows:

Processor	Interim Authorisation
Bartter Enterprises Pty Ltd	Granted in full
La Ionica Operations Pty	Granted in full
Baiada Poultry Pty Ltd	Granted to give effect to 83 existing contracts only
Hazeldene Chicken Farm Pty Ltd	Denied
Inghams Enterprises Pty Ltd	Denied

- 3.25 Specifically, interim authorisation was granted to the continued giving of effect to arrangements entered into under the Marven authorisation (the Bartter and Baiada contracts) and for the collective negotiation of new contracts by those growers who have consented to the processor application being made on their behalf (one La Ionica and ten consenting Bartter growers).
- 3.26 The draft determination in respect of the processor applications has been issued at the same time as the current VFF application.

4 The VFF Application

- 4.1 On 5 May 2004, the VFF, on behalf of its member Victorian chicken meat growers, lodged an application for authorisation (A40093) with the ACCC.
- 4.2 The application was made pursuant to 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 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.¹²
- 4.3 The Applicant also sought interim authorisation which was granted, to a limited extent, by the ACCC on 9 June 2004.
- 4.4 On 15 September 2004, the VFF lodged a further application (A90931) for authorisation pursuant to section 88(1) of the TPA:
 - (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA and
 - (a) to give effect to a provision of a contract, arrangement or understanding, where the provision is, or maybe, an exclusionary provision within the meaning of section 45 of the TPA.
- 4.5 A copy of both VFF applications and their submissions in support are on the public register maintained by the ACCC. The main issues are outlined below.

The proposed arrangements

- 4.6 The Applicant seeks to allow the members of each VFF Chicken Meat Group to act collectively in:
 - negotiating the terms and conditions, including growing fees, of broiler chicken growing contracts
 - negotiating any necessary future amendments or adjustments to the growing fee or the broiler chicken growing contracts and

¹² The application has also been considered as an application under the *Competition Code of Victoria*.

- negotiations for the resolution of disputes which may arise between the grower group and their processor.
- 4.7 The Applicant also seeks authorisation for each VFF Chicken Meat Group under the TPA to collectively refuse to receive day-old chickens from their respective processors (referred to as a ‘collective boycott’) where agreement as to a growing contract cannot be reached after a prescribed bargaining process.

The VFF and its members

- 4.8 The VFF submits that it is a company limited by guarantee arising out of a federation of primary production commodity groups which represents the interests of 23,000 farm members grouped together in 230 VFF branches based on the members’ main farming activity. The Chicken Meat Group is one of these commodity groups. Out of the 210 farmers providing chicken meat growing services in Victoria, 183 (86%) are members of the VFF Chicken Meat Group.
- 4.9 The members of the Chicken Meat Group are broiler chicken growers each of whom is contracted to one of the five companies¹³ in Victoria which process chicken meat on a fully integrated basis for distribution and wholesale. The growers receive a growing fee for their services.
- 4.10 Membership of the VFF Chicken Meat Group is structured under a constitution on a branch basis, each branch comprising growers contracted to one of the five processors and being referred to as a group, with the result that there is an Inghams Growers Group, a Bartter Growers Group, a Baiada Growers Group, a La Ionica Growers Group and a Hazeldene Growers Group (collectively known as ‘the grower groups’).
- 4.11 The present members of each grower group are named in annexure D of the application, a copy of which can be found on the ACCC’s website. The application is also made on behalf of persons who may become VFF Chicken Group members in the future from time to time, and whose identities are not presently known.

The proposed contract negotiation process

- 4.12 The Applicant proposes that each grower group and the processor to whom they supply their services follow a prescribed contract negotiation process which is described in its application. The Applicant submits that the proposed contract process is structured to produce a negotiated and agreed outcome within a finite period.

¹³ Bartter, La Ionica, Hazeldene, Inghams and Baiada.

4.13 The key aspects of the contract bargaining process proposed by the Applicant are as follows:

- A six month **bargaining period** will precede each **contract period**.
 - The ‘bargaining period’ means- the six months negotiation period immediately preceding the contract period.
 - The ‘contract period’ means- the five year period in which the contract is in effect.
- The first bargaining period will begin immediately following the VFF’s application is granted either interim or final authorisation by the ACCC.¹⁴
- During the six month bargaining period the grower groups collectively negotiate the following contractual terms with their processors:
 - i. The base growing fee including the:
 - base fee amount payable to growers which is anticipated to reflect specified categories of growers costs and the growers investment and investment return
 - the times during the contract term when the base fee will be reviewed and adjusted and
 - the formula or method to be used in calculating the base fee under all such contracts when the base fee is reviewed and adjusted during the contract term.
 - ii. A pool/comparative performance scheme which is to apply during the contract period and which determines the base fee payable to individual growers based on growing results.
 - iii. Facility standards and requirements to apply across the grower group.
 - iv. Other terms and conditions.
- There will be an annual review and adjustment period during which fees will be reassessed.
- All growers in a grower group will be entitled to a contract but will also be entitled to opt out of the collective negotiations at any time and negotiate on an individual basis with their processor if they so choose.
- If contract negotiations are not successful after the six month bargaining period, the parties will submit to mediation by a mutually agreed mediator. If the parties cannot agree on a mediator one will be appointed by the Retail Industry Grocery Ombudsman.
- The mediation period will last for 28 days and if agreement has not been reached the grower groups will be entitled to collectively boycott the supply of day-old chickens from their processor. That is, growers may, if they so elect, refuse to accept supply of new chickens. However, they will continue to grow chickens they have already taken delivery of.

¹⁴ The Applicants were granted interim authorisation on 9 June 2004.

- 4.14 Boycotts are only contemplated to be available after the 28 day mediation period, which in turn will only be available after the completion of the six month bargaining period in relation to a new contract period. Consequently, boycotts could only occur after a seven month negotiation period and only in respect of negotiations over new contracts.
- 4.15 Collective boycotts have not been applied for, and are not intended to apply, in relation to:
- disputes arising out of annual fee reviews (or the lack of a review) or
 - any contractual disputes in relation to contracts once entered into.
- 4.16 Under the proposed arrangements, the period of the contracts which are entered into by members of a grower group will be geared to a cycle which contemplates the commencement of the bargaining period from the date when authorisation is first granted and a five year contract term (subject to minor variation depending when in the bargaining period the contract is entered into), the cycle ending five years and six months from the date of authorisation.
- 4.17 It is intended that there will be successive five year contract periods thereafter, as the last six months of each contract period will be the bargaining period for the next contract period. The Applicant proposes that a grower entering the industry during the contract period will receive a contract for the balance of that contract period.
- 4.18 During the contract term there will be reviews of the growing fee negotiated collectively by the grower group with their processor. These reviews will occur at intervals and by the method initially agreed when the contract is entered into.
- 4.19 At the end of the five year period the process will be repeated with a bargaining period commencing six months before the end of the initial contract term so that the growing fee and all other contract terms and conditions can be renegotiated.

Requirements for terms and conditions

- 4.20 In addition to the prescribed contract negotiation process, the Applicant proposes that a number of specific provisions be included in the contracts. These include:
- Processors undertaking not, at any time during the contract period, entering into a contract with any other grower the terms and conditions of which enable the other grower to be treated more favourably with respect to batch rates and density levels than the agreement reached in relation to such matters with the grower groups.
 - Individual growers having the option to suspend their contracts and withdraw their growing services if an acceptable growing fee increase is not agreed within the six month designated review and adjustment period.

- A prescribed dispute resolution process that would include:
 - The initial notification by the aggrieved party of the matter in dispute.
 - A 14 day period during which the parties will endeavour to resolve the dispute.
 - If the matter is not resolved within 14 days, the matter will be referred to an appropriate dispute resolution body. If the parties cannot agree on one, one will be appointed by the Retail Industry Grocery Ombudsman.
 - If after a further 14 days the matter is not resolved by mediation the matter will be referred to a mutual agreed arbitrator. If the parties cannot agree, an arbitrator will be appointed by the Institute of Arbitrators and Mediators Australia.

Interim authorisation

- 4.21 On 9 June 2004, the ACCC granted the Applicant interim authorisation on a limited basis. In considering the Applicant's request for interim authorisation the ACCC considered it necessary to further examine the potential effect of collective boycotts and the proposed restrictions on processors being able to offer more favourable contract terms and conditions to non-VFF members.
- 4.22 In relation to the proposed boycott provisions, the ACCC considered that as it was not contemplated that they be used for at least seven months after the negotiating period began, it was not necessary to address the issue. Therefore, as the ACCC did not grant interim authorisation to allow collective boycotts, growers were not authorised to discuss or agree to withhold supply of their growing services from the processors.

5 Statutory provisions

- 5.1 Application A40093 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.
- 5.2 Application A90931 was also made under sub-section 88(1) to make and give effect to arrangements where a provision of the proposed arrangements might be an exclusionary provision within the meaning of section 45 of the TPA.

The statutory test

- 5.3 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 Applicant must satisfy for authorisation is outlined in subsection 90(6) of the TPA.
- 5.4 Under subsection 90(6) of the TPA, the ACCC 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.
- 5.5 In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements where a provision of the proposed arrangements might be an exclusionary provision within the meaning of section 45 of the TPA, the relevant test that the Applicant must satisfy for authorisation is outlined in subsection 90(8) of the TPA.
- 5.6 Under subsection 90(8) of the TPA, the ACCC may grant authorisation in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision if it is satisfied that the proposed contract, arrangement or understanding would result or would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.
- 5.7 While there is some variation in the language between the test in section 90(6) and the test in section 90(8), the ACCC has until recently adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.¹⁵

¹⁵ *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

- 5.8 This view has now been reconsidered by the Australian Competition Tribunal (the Tribunal) and it has found that the two tests are not precisely the same.¹⁶ In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(8) was not so limited.

Benefits and detriments

- 5.9 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation.
- 5.10 If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 5.11 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁷

- 5.12 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁸
- 5.13 The ACCC also applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 5.14 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

¹⁶ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

¹⁷ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶41-357 at 42677

¹⁸ *Ibid* at 42683.

Other relevant provisions

- 5.15 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.
- 5.16 In this instance, as well as seeking authorisation for its current VFF grower group members, the VFF has also expressed its application so as to apply in relation to future VFF grower group members who may become a party to the proposed arrangements.
- 5.17 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 5.18 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

6 The Applicant's supporting submission

- 6.1 The conduct for which authorisation is sought is described in section 4 of this draft determination.
- 6.2 The VFF's submission supporting its application is summarised below. A complete copy of this submission is available on the ACCC's public register and website.

Market definition

- 6.3 The Applicant submits that there are a number of markets relevant to the application for authorisation, most significant of which are the markets for:
 - contract chicken growing services and
 - processed chicken meat.
- 6.4 The Applicant states that it disagrees with past ACCC considerations in which it has formed the view that the Australian chicken growing industry is effectively a state-based industry. The Applicant claims that whilst it is clear growers operate within the broader market for chicken growing services in Victoria, those markets are separated into distinct geographic markets (regions) as opposed to one state market.
- 6.5 The Applicant states that, typically, processors prefer to have their contract grower farms located within 80 kilometres of their processing facility which has resulted in there being three distinct geographic markets for growing services in Victoria. The Applicant asserts that of these markets, two are regional monopsonies¹⁹ and one a regional oligopsony²⁰ which are located as follows:
 - **Bendigo region-** Hazeldene is the only processor and therefore growers operating in this area have no choice but to sell their services to Hazeldene. Consequently, Hazeldene has a monopsony for the acquisition of chicken growing services.
 - **Geelong Region-** Bartter is the only processor and therefore the majority of growers are restricted to supplying this Geelong based processor. Growers in the Geelong region are, therefore, effectively operating in a monopsony market. However, some growers located on the Melbourne side of Geelong supply Baiada as their locations place them within a reasonable distance of the Baiada processing facility in Laverton.

¹⁹ A market situation in which the product or service of several sellers is sought by only one buyer.

²⁰ A market condition in which purchasers are so few that the actions of any one of them can materially affect price and the costs that competitors must pay.

- **Melbourne Region-** The Melbourne regional market for growing services is a regional oligopsony with growers, theoretically, able to supply three processors, Inghams, La Ionica, and Baiada. The majority of growers are located east of Melbourne, with most being situated on the Mornington Peninsula. A small number of the eastern growers are located in South Gippsland, the East Dandenong's, Melbourne, South Werribee, Melton and Ridells Creek.
- 6.6 The Applicant claims that this segregation of growers into distinct geographic regions (and consequently oligopsony and monopsony markets) is expected to continue. This will, the Applicant claims, only serve to reinforce the existing oligopsony and monopsony structure.
- 6.7 The Applicant submits that from a processor perspective, the supply of chicken growing services is not restricted to Victoria or to any regional market therein. The Applicant claims that three of the five Victorian processors (Inghams, Bartter and Baiada) have access to contract chicken growing services in other states, including South Australia and New South Wales, where there is significant excess growing capacity

Market factors: Barriers to entry, expansion and exit

- 6.8 The Applicant submits that the chicken growing industry is characterised by high barriers to entry and expansion which include:
- the high cost of building a new facility which can be in excess of \$5 million
 - satisfying the shedding specification of particular processor generally locks the grower into supplying a single processor
 - regulatory barriers to entering the industry and
 - limited access to industry information for potential new entrants; growers looking to expand; and growers considering changing processor.
- 6.9 The Applicant claims there are also barriers to exit in that a grower cannot simply sell the operational component of the business if they elect to exit the industry as their family is often inextricably a part of that business and because in many cases growers have been in the industry for quite some time they may lack the skills necessary to find alternative employment.

Market factors: Market dynamics

- 6.10 The Applicant claims that there are a number of significant market factors that the ACCC should consider in making its determination including:
- the acquisition of chicken growing services in Victoria is typified by the absence of competition between the processors who acquire those services regardless of a grower's efficiency

- there is significant competition amongst growers as a result of the pool payment system which contributes to gains in production efficiency
- the features of the market for chicken growing services indicate significant differences in supply and demand elasticities and
- the potential for increases in efficiency in the market are stifled by the lack of competition between processors for growing services.

Other relevant markets

6.11 The Applicant submits that the chicken meat industry is highly integrated and that other markets in which the processors are involved include:

- **Genetic materials-** The genetic stock from which a majority of chickens grown in Australia are based come from two breeds, the Cobb and the Ross. Bartter has the right to import Ross. Inghams and a consortium which includes Baiada have rights relating to Cobb.
- **Hatcheries-** Inghams, Bartter, Baiada and Hazeldene own hatcheries in Victoria. La Ionica acquires their hatchery requirements from Baiada. Supplies from hatcheries are, however, not limited to Victoria.
- **Stock feed-** Inghams and Bartter own and operate their own feed mills.
- **Horizontal arrangements-** Processors have arrangements whereby they supply each other with services including their contract growers, eggs, day-old chickens, stockfeed and fully grown birds.

Wholesale and retail markets

- 6.12 The Applicant submits that the processors' wholesale operations transcend state boundaries. The Applicant claims that Victorian based processors export their production into other states. For example, La Ionica markets a significant proportion of its product into New South Wales, while Hazeldene sells product into the South Australian market.
- 6.13 The Applicant claims that demand for chicken meat is spread between a number of market channels. Supermarkets and major retailers, account for 75% of the retail trade in fresh poultry and 99.7% of the frozen poultry meat. Specialist chicken meat shops, butchers and delicatessens account for 24% of fresh meat sales.²¹
- 6.14 Further, the Applicant claims that there is a high degree of market concentration on the demand side. The Applicant submits that the two largest retailers account for 62% of the national retail grocery market, and 67% of the Victorian market.²² The Applicant suggests that it is this sector that is largely responsible for determining prices in the retail market, with processors unable to charge prices in other segments significantly higher than that paid by major retailers.

²¹ Australian Bureau of Statistics. Retail Industry, Commodity Sales

²² AC Nielsen 2003 Grocery Industry Report

Sector returns

6.15 The Applicant claims that since 1996 the growing fee has fallen by 6% in real terms (Melbourne CPI indexed) and by significantly more in terms of actual returns to growers and return on assets. The Applicant submits that this has occurred for a number of reasons including:

- improvements in the growth performance of the bird resulting in increased cooling required to cope with the extra heat generated by the larger birds and
- difficulty for growers to significantly reduce their costs because they have little control over most of inputs into the growing operation.

6.16 The Applicant claims that since all the processors are private companies it is difficult to obtain figures in relation to their financial performance and therefore the performance of the processing sector more generally. However, the Applicant claims that ABARE figures show that in the period 1994 to 2000, gross operating surpluses in the poultry processing sector rose by 78%.

Public benefits from the proposed arrangements

6.17 The Applicant submits that significant public benefits, both economic and non-economic, will flow from the proposed conduct. The Applicant submits that these will include:

- Transaction costs: Both growers and processors will save money and time as, amongst other things: negotiations for grower contracts will occur concurrently through a single grower group representative; there will be lower legal fees as a single contract will be constructed; and there will be an agreed dispute resolution process.
- Increased competition between processors for grower services: There will be increased competition between processors for the services of chicken growers through the introduction of a common end date for all contracts.
- Increased dynamic efficiency: Increasing competition between processors for the services of chicken growers and correcting the existing market imbalance will promote dynamic efficiency gains by providing growers with more confidence, greater certainty and increased resources to be innovative.
- Return of monopsony gains: The proposed contract system may result in some of those rents being returned to growers resulting in a wealth transfer between processors and growers.
- Recovery of deadweight losses: The authorisation would recover lost efficiencies and associated welfare (deadweight) losses.
- Promote investment: The proposed five year contract term and the return of monopsony rents will ensure growers have sufficient security of tenure and funds to construct new facilities, commit to upgrade existing facilities, and to recover costs incurred in adapting sheds if changing supply to a different processor.

- Prevention of grower exploitation.
- Industry stability.
- Capacity for growers to participate in industry bodies and to ensure standards.
- The retention of industry experience and knowledge.
- Maintaining biosecurity standards.

Anti-competitive detriments from the proposed arrangements

- 6.18 The Applicant submits that there will be limited anti-competitive detriment associated with the proposed arrangements, however, they acknowledge that there is some potential anti-competitive detriment associated with the proposed defined bargaining period and the right of individual processor groups to boycott their processor should they not be contracted at the end of that bargaining period.
- 6.19 The Applicant states that:
- the establishment of a clearly defined bargaining period will allow both parties to enter negotiations with equal incentive to arrive at an agreement by a specified time and
 - in order to ensure adherence to the defined bargaining period there must be some consequence and the only realistic means of achieving this is the growers have the right to collectively withdraw their services.
- 6.20 The Applicant submits that the proposed boycott provisions are intrinsically linked to the defined bargaining period and that the negotiating framework would be unenforceable without such a provision.
- 6.21 The Applicant argues that the commercial and practical realities of the industry mean that any intention to boycott would be communicated well in advance of it actually occurring and that a boycott would have as equally a harmful affect on the growers as it would on the processors.
- 6.22 The Applicant submits that if a boycott were to occur, growers would continue to have responsibility for birds already placed on farms and would continue to perform their obligations under the contract pertaining to those birds.

7 Interested party submissions

- 7.1 The ACCC sought submissions from a wide range of interested parties. A total of 11 submissions were received from nine parties.
- 7.2 The Victorian chicken meat processors provided three separate submissions. Two Victorian processors and two Victorian chicken growers supplied separate submissions on their own behalf. Submissions were also received from two Victorian state members of Parliament from the Chair of the South Australian Farmers Federation Chicken Meat Committee and from a confidential submission from a South Australian chicken grower.
- 7.3 The submissions received by the ACCC are summarised below. Copies of all submissions received are available on the ACCC's Public Register.

The processor submissions

- 7.4 Timothy Ryan & Associates Pty Ltd on behalf of five Victorian chicken meat processors²³ (the processors) lodged a submission dated 24 May 2004 in relation to the request for interim authorisation. The processors lodged a further submission dated 9 June 2004 in relation to the substantive request for authorisation and a final submission dated 27 August 2004 in response to a letter sent by the ACCC to Gavin Eckersley of La Ionica.
- 7.5 The first two submissions are summarised below, however, where information was supplied in the 24 May 2004 submission and is reiterated in the 9 June 2004 submission, it is not repeated in this draft determination. The third submission, for the most part, reiterates what was said in the first two submissions and is not summarised here. As mentioned, copies of all submissions are available on the ACCC website.

Submission of 24 May 2004

- 7.6 The processors state that fundamentally they are supportive of the growers' application as far as it relates to their seeking to collectively bargain. However, the processors do have concerns with a number of aspects of the application, including:
 - they would rather the application seek to permit all growers, both present and future, to negotiate collectively regardless of their affiliation with the VFF and
 - they would prefer the framework for negotiations to be the code of conduct which was originally authorised under the Marven authorisation.

²³ Bartter, Baiada, Inghams, La Ionica and Hazeldene

- 7.7 The processors claim they have a number of concerns with the framework proposed by the Applicant and a number of the proposed terms and conditions of the contracts including:
- common expiry dates and a contract period of a set five years
 - growers joining a group after the commencement of a contract period receiving the prevailing group terms and conditions
 - growers who elect to opt out and negotiate their own terms and conditions having their contract period end at the same time as the grower group
 - no restraint on having a common negotiator across all grower groups
 - the possibility of collective boycotts during the contract period and
 - compulsory arbitration should only relate to amounts payable.
- 7.8 The processors claim that the Applicant has not sustained its claim that a collective boycott exemption is in the public interest and that it provides a net public benefit. They claim that the Applicant's submission that collective boycott of supply is the only way that agreement on contracts and fee reviews can be concluded is incorrect for the following reasons:
- contracts were successfully negotiated under the Marven authorisation
 - VFF have sought to have the industry re-regulated and have actively opposed attempts to negotiate contracts and
 - contracts have been agreed elsewhere without the need for collective boycott.
- 7.9 The processors claim that collective boycotts would be highly disruptive and would impose considerable costs on the community. The processors refute the Applicant's claim that day-old chickens could be placed interstate in the event of a boycott as Victoria accounts for some 30 per cent of Australian production. They claim that it would result in an environmental disaster as millions of chickens would be killed or would die.
- 7.10 The processors claim that arguments regarding monopsony or oligopsony in the growing services market require careful consideration.
- 7.11 Processors claim, in relation to industry investment, that there is no shortage of people prepared to enter the industry, or of investment from existing growers, in other states. They claim that collective boycotts are not needed to maintain or attract investment and could in fact have the opposite effect if the industry became unstable through such boycotts.
- Submission of 9 June 2004***
- 7.12 The processors claim that, in many cases, the Applicant has failed to clarify the distinction between the public and private benefits that would flow from the authorised conduct and have provided no assessment of the size of any public benefits or its potential costs.

- 7.13 The processors submit that there are a number of further features of the wholesale market for chicken meat and the market for chicken growing services including:

Wholesale market

- Highly competitive with pricing the major weapon employed by purchases.
- Supermarket chains and food service industry the major buyers.
- Prices continually negotiated between processors and buyers.
- Retail price of chicken meat falling on average by 4.7% annually over 15 years.²⁴

Growing services

- Processors own the chickens and provide most other inputs, particularly feed.
- The technology (shedding/investment) and bird husbandry skills are provided by growers for which they receive a per bird growing fee.
- The technology or shedding is an important determinant of the range of outcomes that impact directly on non grower (processor) live bird costs and any particular grower is able to achieve through application of his bird husbandry skills.
- Processors have an economic interest in the standard and maintenance of shedding.
- Contractual terms are set and designed to ensure that an adequate standard of facilities is supplied and maintained and to encourage performance from growers.
- Contracts seek to align the economic interests of processors and growers to ensure efficient outcomes.

- 7.14 The processors submit the following comments in relation to the public benefits the Applicant claims will flow from the proposed authorisation:

- The processors agree that public benefits would flow from collective negotiations by growers, however, the realisation of those benefits is not conditional upon collective boycotts or other restrictions.
- It is not necessary to have common ending dates on contracts to promote competition for grower services as processors are always keen to obtain the services of superior growers and that it is in their economic interest to do so.
- Claims they earn supra competitive profits are highly questionable given the competitive market structure for chicken meat and the financial difficulties that a number of processing companies have faced over time.
- Permitting growers to negotiate collectively will address the perception of a power imbalance.
- Settling the current uncertainty in the industry by authorising growers to collective bargaining would provide a public benefit.

²⁴ Instate Pty Ltd & Heilbron, S.G. (1997) *The Australian Chicken Meat Industry: International Benchmarking Study*, by the Australian Chicken Meat Federation, May.

- The processors reject claims of victimisation of some growers made by the Applicant in its submission. They claim that whilst negotiations are agreed to be in good faith, this does not preclude them from being tough.
- 7.15 The processors agree with the Applicant that there will be little anti-competitive detriment arising from collective negotiations by growers provided they conduct those negotiations within their grower groups and in accordance with their contract process. The processors claim that two likely effects of collective negotiations would be a higher growing fee and a possible retardation of productivity uptakes.
- 7.16 The processors claim there are a number of significant areas of concern that it claims will potentially lead to anti-competitive detriments and costs to the public. These have been described previously but include: boycott provisions; restriction of authorisation to VFF members; exclusionary provisions against non VFF growers; common ending dates for contracts; and many of the proposed mandated terms and conditions to be negotiated.

Applicant's response to processor submissions

- 7.17 On 25 June 2004, the Applicant provided a response to the processors submissions.
- 7.18 The Applicant submits that the application does not seek to limit the number of grower groups negotiating with any one processor, the number of contracts negotiated, or the conditions under which a new grower entering the grower group during the contract period would be obliged to accept. In addition, the process does not seek to prescribe a contract period for the entire industry or the details of the contract.
- 7.19 The Applicant submits that grower groups would be free to negotiate whatever form of contracts they deemed necessary with their processors, within the limits of the negotiation process and after considering certain factors (density levels etc) and that new entrants would have flexibility in their negotiations with processors and would retain an opt out option.
- 7.20 The Applicant submits that the VFF will not, be controlling the negotiation process but that this process will continue to be conducted by the five branches and their elected representatives with their nominated processor.
- 7.21 The Applicant claims that there were major failings in the processor submissions including:
- there is not merely a perceived imbalance of power between the processors and the growers but a genuine imbalance and
 - competition does exist between growers but does not exist between processors for the acquisition of grower services.

Other interested party submissions

Grower submissions

- 7.22 The ACCC received two submissions from Victorian chicken meat growers. Both growers supported each aspect of the application, including the right for growers to collectively boycott the supply of growing services. Additionally they both support the Applicant's claims relating to the benefits to the public which will result from the arrangements
- 7.23 One of the growers, Mr Donald Grant, submits that contract negotiations of the kind proposed by the Applicant would, amongst other things:
- Provide growers with a fair price for their services and encourage experienced growers to remain in the industry.
 - Compel processors to negotiate to a predetermined timetable.
 - Reduce negotiation and dispute resolution costs for both parties.
 - Encourage competition among processors for grower services.
 - Encourage further investment in the industry by new and existing growers.
 - Provide community benefits in the form of fresher products and improved industry standards (Biosecurity).

Processor submissions

- 7.24 The ACCC has received two submissions from Victorian chicken meat processors. Essentially the processors reiterate the concerns relating to the proposed collective boycotts and common end dates for contracts which were detailed in the joint submission from processors.

Further submissions

- 7.25 Submissions were received from both the State Member for Narre Warren North, Mr Luke Donnellan MP and the Member for South Barwon, Mr Michael Crutchfield MLA. Both Mr Donnellan and Mr Crutchfield supported the VFF's application for authorisation and agreed that the proposed benefits could only flow if Victorian chicken meat growers were given the right to collectively boycott.
- 7.26 The ACCC also received submissions from the chair of the South Australian Farmers Federation Chicken Meat Committee, Ms Laura Fell.
- 7.27 Ms Fell states that the South Australian Farmers Federation Chicken Meat Committee fully supports the VFF's application for authorisation. Ms Fell submits that South Australian chicken meat growers have encountered many of the same problems as Victorian chicken growers in relation to collective negotiation frameworks imposed by processors.

- 7.28 Further oral submissions were provided by Inghams on 21 October 2004, the Victorian Chicken Meat Council (the Council) on 4 November 2004 and the Applicant on 5 November 2004. In each case the parties, for the most part, reiterated submissions already provided to the ACCC.
- 7.29 Inghams and the Council provided some additional information in relation to the potential effect of collective boycotts on both, processor production and, the supply of fresh chicken meat to the market place. The Council advised that it would endeavour to provide the ACCC with further evidence and information in support of its claims.
- 7.30 The VFF provided data in relation to the potential impact of a collective boycott on the national wholesale market for chicken meat. The VFF also stated that it would endeavour to provide further supporting evidence.

8 ACCC assessment - Relevant markets

Market definition

- 8.1 The first step in assessing the competitive effects and the public benefits and detriments of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 8.2 The ACCC may use market analysis to identify and measure the public benefit and detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC 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 the scope of the defined market.

Previous ACCC determinations

- 8.3 As noted, the ACCC has considered five previous applications for authorisation from the Australian chicken meat industry including: the application by Marven in Victoria; the Steggles application in South Australia; the original application by Inghams on behalf of Tasmanian chicken meat growers and their subsequent application for revocation and substitution and; the application by New South Wales processors.
- 8.4 In considering these applications the ACCC has generally concluded that the primary markets of relevance are the:
 - state based market for the provision of grower services to processors and
 - the market for the wholesale supply chicken meat.
- 8.5 The ACCC did, however, recognise in its recent determination for Inghams and their contract Tasmanian growers²⁵ that improvements in transport and technology methods were enabling processors to compete more effectively in interstate market for the wholesale sale of chicken meat.
- 8.6 The ACCC has in the past accepted a number of important and unique features of the chicken growing and wholesaling markets including:
 - competition between processors for the acquisition of grower services appears to be most vigorous when a new chicken grower enters the market and constructs a new facility or develops an existing facility

²⁵ Inghams Enterprises Pty Ltd application for revocation and substitution of A90659.

- in many instances, geographic and structural (shedding) requirements, essentially commit a grower to both a single processor and the delivery of a single service, that service being the growing of broiler chickens
- growers who elect to transfer their services to a different processor or to another product (turkeys or other poultry) will often incur significant costs for which, generally, they will not be directly compensated
- at the retail level, different brands of chickens appear to be highly substitutable
- wholesale buyers of chicken meat have significant negotiation and buying power and
- due to strict quarantine conditions, imports and exports of chicken meat are limited.

Submissions on the relevant markets

- 8.7 The Applicant submits that whilst it agrees with the ACCC's view in past determinations that the relevant markets are those for contract chicken growing services and the wholesale of processed chicken meat, it disagrees with the ACCC's view that those markets are necessarily state based.
- 8.8 The Applicant submits that the Victorian chicken growing market is divided into two regional monopsonies and a regional oligopsony. The Applicant claims that these regions are delineated by a grower's access to a processor's facility.
- 8.9 The Applicant states that as processors do not compete with each other for grower services and growers are essentially tied to a single processor once they have adapted their facilities to the requirements of that processor, the market is likely to be narrower still.
- 8.10 In relation to the wholesale market for the sale of chicken meat, the Applicant submits that because a number of the processors are national companies with facilities in nearly all mainland states, the market for the wholesaling of chicken meat is likely to be far broader than a state based market and is more likely to be a national market. Further, the Applicant submits that in its view the wholesale market for the sale of chicken meat is the only market in the chicken meat industry that is subject to some competition
- 8.11 The processors dispute the Applicant's submission that the market for growing services is a monopsony or oligopsony market. Instead the processors submit that due to, amongst other things: the absence of any collusive behaviour by processors; relatively low barriers to entry into the processing industry; a highly elastic long run supply curve; and the highly competitive nature of the market into which the processors sell their product, the market for grower services is a competitive state-wide market.

ACCC assessment of the relevant markets

- 8.12 The ACCC is of the view that whilst it is not necessary to definitively identify all of the relevant markets, it is important for the ACCC's assessment of the application to define general market parameters in order for it to assess the public benefits and detriments, particularly the anti-competitive effects, of the proposed arrangements.
- 8.13 The ACCC accepts submissions from both the VFF and the processors that due to the perishable nature of the product and strict Australian quarantine laws, the markets relevant to this draft determination are contained almost entirely within Australia's borders as there is negligible competition from imports and a very limited amount of export.

The market for chicken growing services

- 8.14 The ACCC considers that whilst the product market is generally accepted as being the market for the supply of chicken growing services, it is arguable that the market for those services in Victoria is, as the Applicant contends, a more limited regional market rather than a state based market as previously accepted.
- 8.15 The ACCC considers that the nature of the service provided by chicken growers (i.e. growing live chickens), limits the practical extent to which growers can provide those services and to whom they can provide them. For example, a processor's capacity to deliver a batch of live day-old chickens and collect those chickens once they are fully grown is limited by the transportability of the full grown chickens to a processing facility. As a consequence, processors are limited to acquiring growing services from chicken growers within a reasonable geographic area of their processing facility and conversely growers are limited in the number of processors to whom they can supply their services.
- 8.16 In addition, the ACCC considers that whilst processors can, to a certain extent, source chicken products for their processing facilities (to meet their wholesale commitments) from outside of their contracted chicken growers this is not a true substitute for chicken growing services in the locality of the processor facility.

The market for processed chicken meat

- 8.17 The ACCC considers that whilst a majority of chicken meat produced in Victoria is consumed in Victoria, the wholesale market for chicken meat in Australia has been moving from being a predominately state based market towards a national market. The ACCC considers a number features of the wholesale market for processed chicken meat are significant in this trend toward a national market, including:
- three processors (Baiada, Bartter and Inghams) having processing and distribution facilities in most states

- advancements in transport technology allows chicken meat to be shipped safely anywhere in the eastern Australia within 24 hours²⁶ and
- the major acquirers of processed chicken meat are large national supermarket and fast food chains who purchase on a national level.

ACCC conclusion on the relevant markets

8.18 For the reasons outlined above, the ACCC considers that the primary markets of relevance to the current application are:

- the three regional markets (Bendigo, Geelong and Melbourne) for chicken growing services in Victoria and
- the wholesale market for the supply of processed chicken meat in Australia.

²⁶ Inghams Enterprises Pty Ltd application for revocation and substitution of A90659

9 ACCC assessment - Future with-or-without

- 9.1 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and detriment generated by arrangements for which authorisation has been sought.
- 9.2 Under this test, the ACCC compares the public benefit and detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.

Submissions on the counterfactual

- 9.3 The Applicant submits that the appropriate counterfactual for the ACCC to consider is a complete deregulation of the Victorian chicken growing industry, a situation which the Applicant submits currently exists. In addition, the Applicant states that as its member growers would refuse to operate under any processor authorisation, it is unnecessary for the ACCC to consider a counterfactual which includes the collective bargaining process proposed in the processors applications.

Consideration of the counterfactual

- 9.4 The ACCC notes that collective bargaining of some description has been occurring in the Victorian chicken meat industry for many years under either the VBINC arrangements or under the Marven authorisation. However, given that such conduct would likely raise concerns under the TPA, it is unlikely, absent of the statutory protection provided by authorisation, that growers would be able to continue these collective bargaining arrangements in the future. Consequently, the counterfactual which the ACCC would normally apply in assessing the proposed arrangements is one where each grower would be required to independently negotiate the terms and conditions of their contracts with their individual processor.
- 9.5 However, in this instance, five Victorian chicken meat processors have also lodged applications with the ACCC seeking authorisation for conduct similar to that sought by the VFF, albeit under a different framework.
- 9.6 Specifically, the processors have sought authorisation for their role in future collective negotiations with their respective growers and in the case of two processor (Bartter's and La Ionica) applications, they are also made on behalf of (some) growers who have consented to the applications being made on their behalf. Those consenting growers are seeking authorisation for their role in future collective negotiations with their processors.
- 9.7 The ACCC has issued a draft determination in relation to the processor applications concurrent with this draft determination. The ACCC proposes, in the processors'

draft determination, to grant authorisation to only limited aspects of the applications.

- 9.8 In summary, the ACCC proposes to allow the continued giving effect to Bartter and Baiada contracts entered into under the Marven authorisation and for new collective bargaining arrangements with consenting Bartter growers.
- 9.9 The consequence of the ACCC's position on the processor's application does not significantly alter the counterfactual for the VFF's application. That is, even with the ability to undertake certain collective bargaining arrangements by Bartter growers, the majority of the industry, would operate under individually negotiated contracts.
- 9.10 As for what form any individual negotiations might take, this is somewhat difficult to speculate given that collective negotiations, in one form or another, have apparently been occurring for over 20 years.
- 9.11 Absent authorisation, the processors would have two options available to them in offering contracts to growers. Either they could negotiate the terms and conditions of any contract arrangements individually with each grower or offer each grower a standard form contract with limited scope for variation of terms and conditions.
- 9.12 The ACCC 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 ACCC 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.
- 9.13 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, scope for the other party to have input into the terms of the contract.
- 9.14 In the current instance, as noted, there is very little capacity for growers to provide a different service which is mainly due to the specificity of their assets and the associated cost of adapting them for an alternative use. In addition, whilst growers do have some capacity to change processors, there are significant switching costs associated with doing this, costs which are generally borne by the grower.

- 9.15 These switching costs would significantly limit the ability for growers to do anything other than continue to provide their service to their processor, at least in the short-term, even where unfavourable terms and conditions were offered. 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.
- 9.16 In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, VFF member growers 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 the processors.
- 9.17 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 growers, with little input from the growers, or scope for them to vary the terms and conditions of such contracts.

Conclusion on the counterfactual

- 9.18 For the reasons outlined above, the ACCC is of the view that, even with the ability to undertake certain collective bargaining arrangements by Bartter growers, the majority of Victorian chicken meat growers would still operate under individually negotiated contracts.

10 ACCC assessment - Effect on competition

- 10.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining and/or collective boycotts.
- 10.2 In general terms, collective bargaining agreements to negotiate terms and conditions (including fees) for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each of the contractors individually negotiate their own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 10.3 Collective boycotts, in the collective bargaining context, involve those parties to the collective bargaining arrangements doing something beyond merely collectively negotiating terms and conditions, but instead agreeing not to acquire goods or services from, or supply goods or services to, a business with whom they are negotiating, unless that business accepts the terms and conditions of acquisition or sale offered by the collective bargaining group. Collective boycotts can have a more significant effect on competition than collective bargaining alone.
- 10.4 As discussed in section 5, the ACCC must assess the extent to which the proposed arrangements give rise to any detriments. Specifically, in relation to the collective bargaining arrangements, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the proposed arrangements. In relation to the application to collectively boycott as part of those arrangements, the ACCC must be satisfied that the proposed arrangements would result, or would be likely to result, in such a benefit to the public that they should be allowed to be engaged in.

Collective bargaining

- 10.5 Whilst the Applicant submits that there will be minimal detriment from growers having immunity from the TPA to collectively bargain with processors, the ACCC considers that there are a number of potential anti-competitive effects which are relevant to the current application and require consideration including:
 - lost efficiencies from collective negotiations
 - reduced scope for new entry and
 - the restrictive nature of arrangements proposed in annexures B and C of the application

Lost efficiencies from collective negotiations

- 10.6 A major feature of most collectively negotiated arrangements is an agreement as to the price to be paid to members of the group and other terms and condition of supply or acquisition.
- 10.7 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.
- 10.8 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.
- 10.9 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.
- 10.10 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.²⁷
- 10.11 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.
- 10.12 In its past consideration of collective bargaining arrangements the ACCC 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.
- 10.13 In this case, the processors submit that collective negotiations between the growers and the processors may lead to higher fees paid to growers and a possible retardation of productivity uptakes than would otherwise be the case if the contracts were negotiated individually.
- 10.14 However, the Applicant contends that the proposed arrangements will have limited detriments.

²⁷ Section 45A of the TPA

- 10.15 The ACCC has previously accepted that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four 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
 - there is limited capacity for any price rises to be passed on to consumers.
- 10.16 With respect to these four features, as they relate to the proposed arrangement, the ACCC notes the following.
1. *Competition between growers absent of authorisation*
- 10.17 The ACCC 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.
- 10.18 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.
- 10.19 However, more generally, as discussed in paragraphs 9.10 to 9.17, 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 very 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 grower 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.

- 10.20 Consequently, the difference between the level of competition amongst growers with or without the proposed arrangements would be small.
- 10.21 The ACCC considers that the impact of the likely reduction in competition between growers is significantly mitigated by the industry's use of a comparative performance scheme and/or a pool payment system. The ACCC has in the past accepted that such schemes which rank growers based on their performance during a given period and remunerate them according to that ranking, provide significant incentive for growers to continue competing with one another for payments and to continue improving and modernising their businesses.

2. Voluntary participation

- 10.22 The proposed arrangements are voluntary and therefore growers who consider that they will be able to negotiate a more commercially attractive arrangement, most likely to be the most productive growers, 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 might otherwise be.
- 10.23 In this respect, the ACCC notes that, generally, 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.
- 10.24 The ACCC notes that whilst the arrangement propose to allow grower groups to collectively boycott processors, a right which may reduce the voluntary nature of the arrangements for processors (and therefore potentially increase the anti-competitive detriment of the arrangements), there are significant restrictions on when and under what circumstances these boycotts would be available, restrictions which would serve to mitigate their potential effects. The ACCC's full consideration of collective boycotts is provided later in this draft determination.

3. Coverage and composition of bargaining groups

- 10.25 The ACCC acknowledges that historically chicken growers in Victoria have been separated into discrete groups based on the processor to whom the grower is contracted and have negotiated contracts via some form of collective arrangement. The ACCC considers that the Applicant's proposal to continue the separation of bargaining units into these discrete groups would act to reduce the overall anti-competitive effect of the conduct compared to a situation where there was a single Victoria-wide bargaining group.
- 10.26 The ACCC considers that 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, processor specific) 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.

- 10.27 Additionally, the absence of any restriction on a new grower or an existing non-VFF member grower joining a grower group, aside from being a member of the VFF, further mitigates the potential anti-competitive effect of the proposed arrangements.
- 10.28 However, the ACCC considers that the involvement of any common representative (i.e. the VFF) in collective negotiations across two or more grower groups would be likely to significantly increase the anti-competitive effect of the arrangements.
- 10.29 The ACCC acknowledges that the Applicant has not proposed that the VFF act as a common negotiator for the grower groups although grower groups will be based on current VFF Chicken Group Branches.

4. Constraints on price rises

- 10.30 The ACCC considers that the effect of allowing Victorian chicken meat growers to collective bargaining under the arrangements proposed by the VFF may well be an increase in the growing fee paid to them by their processors. However, the ACCC is of the view that the passing on of any increase to consumers by processors of costs from higher growing fees is likely to be constrained at the wholesale market level by large buyers with significant purchasing power.
- 10.31 The ACCC considers that, to the extent that any increased costs were passed on by processors, they would only result in a minor increase in the retail price of chicken meat as the growing fee only constitutes approximately 6% of that price.
- 10.32 In light of the above features, the ACCC considers that the anti-competitive detriment generated by lost efficiencies resulting from collusion as a consequence of the proposed arrangements is likely to be minimal.

Reduced scope for new entry

- 10.33 The capacity for new entrants to compete for the rights to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected.
- 10.34 In this instance, the presence of collective arrangements may serve to increase the barriers to entry if parties were to enter long term contracts which satisfied their growing and processing needs. However, the potential anti-competitive effects of the arrangements would be mitigated by certain pre-existing barriers to entry into

the Victorian chicken meat industry and a number of features of the proposed arrangements.

Pre-existing barriers to entry

- 10.35 The Victorian chicken meat industry has a number of pre-existing barriers to entry that may limit the ability of new growers to enter the market regardless of the presence of any collective bargaining arrangements. These include:
- the capital investment requirements are substantial and tied to the industry, once committed
 - the extent of vertical integration in the industry
 - the limited ability of growers to vertically integrate either upwards or downwards
 - meeting the start-up requirements of the processors before entering into a growing agreement and
 - increased government regulation especially in relation to land available for growing chickens.
- 10.36 In addition, the ACCC notes that the number of growers in Victoria has declined steadily over the last decade as a result of industry rationalisation which suggests that there is, absent of the proposed arrangements, limited scope for new entry into the market in any event.
- 10.37 Entry into the market at the processor level also has barriers due to the relatively high start-up costs and the uncertainty of gaining either new growers and/or growers from other processors.

Potential increase in barriers to entry

- 10.38 Barriers to entry may be increased by the proposed collective bargaining arrangements if the grower groups entered into a collectively bargained, long term agreement, with their processor. This may have the dual effect of making it more difficult for other prospective growers to enter the market, as the processor may have entered into long term agreements sufficient to satisfy all its processing 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.
- 10.39 The ACCC notes that the Applicant proposes that all of its member chicken growers have a common five year contract period. Generally, however, contracts in the Victorian chicken meat industry have been for shorter periods and would be likely to remain so, absent of the mandatory five year contract period. The ACCC considers that having a shorter contract period would result in contracts being negotiated on a more regular basis which would have the effect of providing increased opportunities for new growers to enter the market.

Features lessening barriers to entry

- 10.40 In addition, the ACCC considers that there are certain features of the proposed arrangements which will serve to lessen any potential increase in the barriers to entry which may result from the authorisation. These include that participation in the arrangements will be voluntary which will allow any grower (including new entrants) freedom to negotiate rates of payment and other conditions different to those determined under collectively negotiated agreements and; that any grower can join the collective bargaining group provided they are a member of the VFF.
- 10.41 The ACCC considers that the formation of long term contracts between processors and their growers may slightly increase barriers to new growers entering the market. However, the ACCC considers that the existing barriers to entry into the industry are already high and would not be significantly increased by the proposed authorisation and that certain features of the proposed arrangements would serve to minimise the impact of the arrangements on those existing barriers.

Annexures B and C of the application

- 10.42 The ACCC considers that the prescriptive nature of the collective bargaining process proposed in annexure B of the VFF's application and the inclusion of mandatory contract terms and condition such as those described in annexure C would potentially increase the anti-competitive effect of the proposed arrangements, were they to be part of any authorisation.

Collective bargaining process

- 10.43 Annexure B of the Applicant's submission contains an outline of the proposed collective bargaining framework including the timeframes in which that process is expected to be conducted and a number of specific issues that are expected to be included in the discussions between grower groups and their processors.
- 10.44 The ACCC considers that the inclusion of a proposed collective bargaining framework as part of any application for such conduct is important to its consideration of the matter. However, the ACCC considers that, for the most part, details pertaining to those matters that are to be discussed during those negotiations should be mutually agreed by both negotiating parties. The ACCC considers that if matters for discussion are prescribed in an authorisation, the flexibility of the proposed arrangements and therefore their capacity to realise the claimed public benefits, may be diminished.
- 10.45 In this instance, the ACCC considers that the inclusion of timeframes for engaging in collective boycotts are, however, necessary to mitigate the potential anti-competitive effect of such collective boycotts were they to be authorised.

Term of contract

- 10.46 Further, as part of their proposed collective bargaining framework, the Applicant has proposed that the duration of all grower contracts be fixed at five years. This, the Applicant claims, would result in all VFF member chicken growing contracts expiring at the same time and, as a consequence, all contract re-negotiations across all grower groups occurring simultaneously.
- 10.47 Whilst the ACCC accepts that there may potentially be some pro-competitive effects from all VFF member chicken grower contracts expiring and being re-negotiated at the same time, the ACCC considers any benefit from common end dates would likely be countered by the potential anti-competitive effect of all, or a number of, grower groups failing to finalise contract negotiations during the prescribed bargaining period resulting in more than one grower group collectively boycotting at any given time.

General concerns - Mandatory terms and conditions

- 10.48 In addition to seeking to mandate the length of contracts, the Applicant has also sought (in Annexure C of the applications) to mandate the inclusion of certain other terms and conditions in growing contracts including:
- conditions relating to the termination of contracts by either party
 - the basis for the suspension of contracts by either party and
 - a prescribed dispute resolution process.
- 10.49 The ACCC considers that the mandatory inclusion of such prescriptive terms and conditions would be likely to generate greater anti-competitive detriment compared to a situation where growers and processors were free to negotiate such matters between themselves primarily because it places limitations on the ability of the parties to negotiate the most efficient contract.
- 10.50 For example, it may well be that, for circumstances unique to a particular processor or growing group that a four year contract provides greater efficiencies than the five years proposed by the Applicant. Under the proposed arrangements, however, it would not be possible for the growers and the processor to negotiate and agree to a term other than five years.
- 10.51 Similarly, where the growers and their processors, through negotiations, determined that a dispute resolution procedure different to that prescribed in the application would be more effective, the inflexibility of a prescribed dispute resolution procedure may give rise to inefficiencies.
- 10.52 It may also be argued that where processors do not agree with the prescribed terms and conditions, it may be less likely to participate in the proposed arrangements. This may lessen the likelihood of realising the claimed public

benefits or increase the prospects of boycott activity – both of which likely to reduce the net public benefit claimed by the Applicant.

- 10.53 Having said this, these concerns are unlikely to arise in relation to authorisations that provide a framework for proposed contracts that might arise but which otherwise allow the parties to negotiate a competitive outcome. For example, an authorisation that sets out the terms and conditions that may be negotiated (i.e. in the form of an indicative contract) and that mandated the inclusion of a dispute resolution procedure would still allow the parties to negotiate which terms and conditions would ultimately be included and the working details of the dispute resolution procedure.

Proposed restrictions on competitors

- 10.54 The ACCC is of the view that any proposed contract provision that seeks to restrict or impose conditions on the capacity of the target of the collective negotiations' to negotiate with competitors of the collective bargaining group is likely to have a significant anti-competitive effect.
- 10.55 Specifically, the ACCC has concerns with two proposed provisions in the VFF's application, the first of which appears at paragraph 5 of annexure B of the Applicant's submission which states that:

Each grower in the (grower) group who is offered a contract by the processor at any time during the Contract Period will be entitled to a contract at the commencing base fee and otherwise containing the terms and conditions as negotiated and agreed between the growers group and the processor for that contract period. However, a grower may elect to enter into a contract with the processor on other terms and conditions whether as to base fee or otherwise, but the term of any such contract shall expire at the end of the then current contract period.

and the second appears at paragraph 2.3 of annexure C of the Applicant's submission and states:

The terms and conditions of each contract between the Processor and a member of the Grower Group must include the following:

...In recognition of the costs and savings of collective bargaining the Processor will undertake not at any time during the Contract Period to enter into a contract with any other grower the terms and conditions of which enable the other grower to be treated more favourable with respect to batch rates and density levels than the agreements reached in relation to such matters with the Growers Group.

- 10.56 The ACCC considers that such provisions whilst not specifically seeking to restrict the growing fee that a competitor might negotiate with a processor, would have the effect of restricting the capacity of a processor and a grower to freely negotiate on any contract terms and conditions they wished.

10.57 Further, the ACCC considers that restrictions of the type proposed by the Applicant would have the effect of removing incentives for more efficient growers to do better than their growing group. That is to say, where a grower is of the view that they could be more efficient and innovative than their growing group, there would be no incentive for that grower to negotiate individually with their processors as they would not be able to get better terms and conditions than the growing group they would leave. Consequently, the grower's incentive to innovate or become more efficient would be reduced.

Conclusion on collective bargaining

10.58 The ACCC considers that the collective bargaining arrangements proposed in the application have the potential to result in some lessening of competition when compared to a situation where growers negotiate contracts individually with processors. In this instance, the potential anti-competitive effect of the arrangements is significantly increased by the proposed inclusion of certain mandatory processes and contract terms and conditions.

10.59 However, the ACCC considers that the effect of industry factors such as large wholesale buyers and limitations on a grower's capacity to alternate between processors combined with the:

- existence of efficiency incentives (pool payment system) within grower groups
- separation of growers into discrete grower groups
- limited effect on barriers to entry caused by the arrangements
- freedom of growers to negotiate individual contracts with processors and
- competition from non-VFF growers

serve to mitigate the potential anti-competitive effects of collective bargaining.

10.60 The ACCC also considers that by virtue of the high level of industry integration and the nature of the contract system processors will continue to maintain a high degree of control over the growers with or without the collective bargaining arrangements.

10.61 Finally, the ACCC considers that the anti-competitive effect of the arrangements would be significantly lessened if the specific negotiation procedures proposed at annexure B of the application and the terms and conditions included in annexure C of the VFF's application were not fixed but were open for growers and processors to negotiate.

10.62 Therefore, for the reasons outlined above, the ACCC considers that the proposed collective bargaining arrangements would not result in any significant anti-competitive detriment provided those matters outlined in annexures B and C of the VFF's application, subject to some exceptions, were not mandatory.

Collective boycotts

- 10.63 In addition to applying for immunity to collectively bargain with processors, the Applicant has sought immunity for each of the five discrete grower groups to boycott the supply of day-old chickens from processors if, after a prescribed negotiation process, contracts are not finalised. The ACCC considers that the inclusion of collective boycotts as part of any collective bargaining arrangements will significantly increase the potential anti-competitive effects of those arrangements.
- 10.64 A collective boycott essentially involves competitors agreeing not to acquire goods or services from a particular supplier or not supply goods or services to a particular business or person. In this instance, a collective boycott would involve individual chicken meat growers from a single grower group deciding, as a collective, to refuse to accept the supply of day-old chicks from their processor.
- 10.65 Where a group of businesses bargaining collectively also has the ability to engage in a collective boycott, this reduces the discretion of the other party to the collective bargaining arrangements over the extent to which they participate in negotiations. Specifically, the ability to engage in a collective boycott will reduce the discretion of the other party to the collective bargaining arrangements over the extent to which terms and conditions (including price) might deviate from those that might be expected to prevail absent of the collective arrangements. This is because the other party to the arrangements, faced with the threat of withdrawal of supply or acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining unit.
- 10.66 In addition to the effect a collective boycott can have on enhancing any anti-competitive effect flowing from collective bargaining, in many cases the direct inefficiencies caused by collective boycotts are also likely to be significant as collective boycotts have the potential to cause significant disruption to businesses, including the target of the boycott and downstream and upstream businesses and ultimately consumers
- 10.67 In the context of the commercial supply of goods and services, such a right could enable a collective bargaining unit to inflict significant commercial damage on those with whom they negotiate. As such, collective boycott activity can have significant economic consequences not only for the target of the collective boycott, but for other downstream and upstream businesses and the economy as a whole.
- 10.68 If used strategically, the right to collectively boycott could also give a collective bargaining unit a degree of bargaining power that goes well beyond that necessary to address any imbalance in market power issues. In some such cases it could simply reverse any imbalance in bargaining power.

Submissions on collective boycotts

- 10.69 The Applicant submits that the public benefits from the proposed arrangements will only flow if the growers have the capacity to collectively boycott processors. They state that the benefits would not flow because the processors will not have any reason to negotiate in good faith and will merely delay contract negotiations until such time as the offer which is most favourable to them is accepted by growers. The Applicant claims that these delays and the ultimate lack of any meaningful negotiations between the parties will result in contracts that produce none of the claimed public benefits.
- 10.70 The Applicant submits that this was the situation during the period of the Marven authorisation. They state that the processors continually delayed the negotiating process because growers lacked any mechanism to compel them to participate. The Applicant claims that this was the reason that no new contracts were negotiated during that period.²⁸
- 10.71 Processors submit that the Applicant's claim that negotiations cannot be concluded without collective boycotts is incorrect. Processors argue that negotiations have faltered primarily because the VFF and their members have been unwilling to engage in negotiations that did not include state government regulation. Instead, the processors claim, the Applicant has endeavoured to have the Victorian chicken growing industry re-regulated since the VIBNC was disbanded and have never genuinely tried to finalise contracts with processors.
- 10.72 Further, the processors submit that contract negotiations with growers have been shown to be capable of being concluded without the need for boycott provisions. They claim that this was demonstrated during the period of the Marven authorisation when 10 non-VFF member growers finalised contracts with Bartter and has been demonstrated in other states such as Tasmanian, South Australia, Queensland and, to some extent, New South Wales.
- 10.73 Importantly, the processors note the potential for disruption to supply and the prospect of damage to their business and ultimately consumers. The processors submit that there is not currently an excess supply of chicken meat with the daily demand for fresh chicken meat being met by daily supply. The processors submit that any agreement between growers to refuse to accept day-old chickens for growing will inevitably result in a reduction in available chicken meat.
- 10.74 The processors submit that, while they have the ability to transport processed chicken meat, there is not generally an excess of supply to accommodate any interruption to that supply. The processors further submit that the consequence of this is that the reductions in supply in the face of maintained demand will result in potentially significant increases in the price of chicken meat.

²⁸ With the exception of nine Bartter growers who are not members of the VFF.

- 10.75 The processors also claim that there will be an immediate impact on their business as a result of their inability to house the day-old chickens which growers have refused to accept. The processors advise they do not have the necessary storage or feed and may be forced to destroy up to 120,000 day-old chicks per day. In addition, the processor claim that as each chicken cost approximately 50 cents to 'produce', they would also incur significant financial losses.
- 10.76 Growers responded to the concerns raised by the processors submitting that:
- growers would, because of the potential impact on their own businesses and the impact on their relationships with their processors, only use boycotts as a last resort
 - boycotts could only be used at the time of negotiating contracts and only after a seven month negotiation process
 - any boycott conduct would be directed at the acceptance of day old chickens and growers would continue to grow and make available grown birds. Any impact on the supply of processed meat would not arise for at least six weeks following a boycott and
 - with any boycott being limited to only one Victorian processor at any one time, the actual impact on the supply of chicken meat would be limited.

ACCC consideration of collective boycotts

- 10.77 Given that the ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements, it requires strong justification before allowing any conduct which involves collective boycott activity to be afforded immunity from the TPA.
- 10.78 Justification for collective boycott conduct will, ordinarily, rely on the proposition that absent the ability to collective boycott, the collective bargaining arrangements will be unlikely to succeed in realising the claimed public benefits.
- 10.79 Most often, applicants are likely to claim that, absent collective boycotts, there is either little incentive for the target of the bargaining process to participate in the arrangements, or that even where they do participate, there is little incentive for the target to agree to terms or conditions that differ from those they would have obtained absent the collective bargaining process.
- 10.80 Generally speaking, the target of collective bargaining arrangements is less likely to participate in collective bargaining arrangements (i.e. arrangements without the threat of collective boycott) and to agree terms and conditions different to those they may have obtained absent the collective bargaining process where their bargaining power, relative to the bargaining power of participants of the collective, is greater.

- 10.81 As discussed earlier, the ACCC considers that, in the context of the current application, the processors hold significant bargaining power in comparison with chicken growers. Their bargaining power is derived from:
- the relative financial positions of processors and growers
 - the inability of chicken growers to supply their services to persons other than their processor particularly in the short term and
 - the degree of control employed by processors over the operations of growers.
- 10.82 The ACCC considers that the extent of the bargaining imbalance between processors and growers lends itself to the argument that absent the threat of collective boycott activity, the processors are less likely to participate in the collective bargaining arrangements or where they do, are less likely to agree to terms and conditions different from those they would have achieved absent the collective bargaining agreement.
- 10.83 This, in itself, does not justify the authorisation of collective boycott activity. The ACCC must still weigh the detriment associated with the proposed conduct and the public benefits claimed to have been secured by the use of collective boycotts. The ACCC's consideration of public benefits is detailed in the following section.
- 10.84 In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers as submitted by the processors. The ACCC is also particularly concerned with the potential for immediate impact associated with the possible need for destroying day-old chickens.
- 10.85 In considering the detriments that may arise from collective boycott activity, the ACCC notes certain features of the proposed arrangements and relevant markets that are likely to lessen any such detriment:
- the restraint which growers are likely to adopt in using boycotts as a last resort to avoid damage to their business and the poor relations that might arise with processors
 - the ability to engage in collective boycotts only at the time of negotiating contracts and only following a seven month negotiating period
 - the limited time for which a boycott activity might be sustained by growers to avoid damage to their business
 - the ability, albeit limited, for processors to offset the reduction in production six weeks following boycott action through interstate production and
 - the relative impact on the national market for the supply of chicken meat as a result of boycott activity being limited to one processor at any one time.

- 10.86 On balance, however, the ACCC maintains the view that the use of collective boycotts without further limitations would be likely to result in significant public detriments.
- 10.87 The ACCC considers that this detriment would, however, be further lessened if any grower group considering engaging in collective boycotts were required to provide processors with a notice of their intention to collectively boycott. The ACCC considers that a notice would allow processors to better prepare for such an occurrence by, for example: ceasing the incubation of eggs and consequently the hatching of day-old chicks; and finding alternative sources for their wholesaling needs to mitigate any impact on the supply of chicken meat in the short term.
- 10.88 The ACCC has been advised that eggs are placed in incubators for a period of 18 days followed by a three day hatching period. The ACCC considers, therefore, that a requirement of 21 days notice prior to grower groups engaging in any boycott activity would, to a large extent, allow processors to avoid the loss of day-old chickens as well as providing them with an opportunity to make alternative short term arrangements to supply their wholesaling requirements. These issues are discussed further in section 12 of this draft determination.

11 ACCC assessment- Public benefits

- 11.1 In order to grant authorisation to the proposed collective bargaining arrangements, the ACCC must be satisfied that those 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.
- 11.2 In addition, the ACCC must be satisfied, before it can grant authorisation to the proposed collective boycotts that those boycotts would result in such a benefit to the public that they should be allowed to be made and given effect to.
- 11.3 The Applicant submits that granting authorisation to VFF member chicken meat growers to collectively negotiate their chicken growing contracts with Victorian chicken meat processors along with granting them immunity to collective boycott, under certain circumstances, will result in a number of significant benefits to the public.

Increased grower input into contracts

- 11.4 An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve their bargaining position relative to another, generally larger, business through a collective arrangement.
- 11.5 The ACCC does not consider a mere change in bargaining power is, in itself, a public benefit. Rather, the ACCC 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.
- 11.6 The ACCC recognises that there is 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.
- 11.7 In respect of the proposed arrangements, the Applicant has submitted that its member growers, as individuals, are always in a weak bargaining position relative to the large, well resourced processors and that growers do not have the skills required to deal with multi-national processors experienced in the negotiation process.
- 11.8 As discussed at section 9 of this draft determination, the VFF submit, and the ACCC accepts, that individual growers are in a comparatively weak bargaining position in comparison to processors. As discussed in section 9, this imbalance in bargaining power arises from:

- the limited opportunity for growers to switch production from chicken growing given the significant capital investment and the specific nature of capital (in particular growing sheds)
 - the limited opportunity for growers to switch processors given the location of processors and the switching costs arising from the specific growing requirements of each processor
 - the direct control over growing operations by processors through the provision of day old chickens, growing specifications and the provision of other necessary inputs such as feed and veterinarian services
 - the reliance of growers on processors as their sole source of income and
 - the often limited bargaining expertise of growers in comparison to generally larger and more experienced processors.
- 11.9 The processors submit that this imbalance is offset to some extent by the interdependence of growers and processors. The ACCC agrees with this assertion to a certain extent, however, it considers the dependence is not so much on individual growers, but on growers as a whole. For this reason, in relation to individual growers, the ACCC considers that the bargaining position of the processor is very strong.
- 11.10 As noted in section 9, the ACCC considers that a consequence of such a bargaining power imbalance could 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, a view which is consistent with submissions made by both growers and processors.
- 11.11 In the current circumstances, the ACCC considers that if growers were required to negotiate individually, as a result of the imbalance of bargaining power, they would have a limited capacity to have effective input into contract terms and conditions.
- 11.12 It is generally accepted that competition between buyers and sellers on terms and conditions of supply, through the process of arbitrage, is likely to lead to an efficient outcome. Where either buyers or sellers are restricted in their ability to provide effective input in to those terms and conditions, the most efficient outcome may not be achieved. There can therefore exist a public benefit in collective bargaining arrangements that increase the effective input of the weaker party to the bargain.
- 11.13 In the context of chicken growing contracts, the ACCC considers the effective input of growers into fees, process and productivity issues are important in reaching the most efficient outcome.
- 11.14 The ACCC considers that the proposed collective bargaining arrangements would improve growers bargaining position in negotiations with processors and provide a greater opportunity for growers to have more effective input into contracts terms

and conditions. Further, the ACCC considers that granting Victorian chicken meat growers the right to collectively boycott would serve to further increase the likelihood of those growers having a real and meaningful input into their growing contracts and to the extent that this leads to efficiency gains, this outcome would give rise to public benefits.

Transaction cost savings

- 11.15 The Applicant submits that significant economic gains will be derived from the creation of an effective system of collective bargaining in the Victorian chicken growing industry. They state that in a deregulated environment each grower would need to negotiate individually with a processor to arrange new growing contracts which would result in indirect costs such as growers spending time away from their businesses and direct costs such as legal and accounting advice. The Applicant claims that processors would also have a reduction in their costs by conducting negotiations with the group rather than individually with growers.
- 11.16 The Applicant further argues that transaction costs will be saved in dispute resolution. They state that in the counterfactual environment where growers negotiate contracts on an individual basis, there are no easy, cost effective mechanisms for dispute resolution which will make it more likely that disputes will end in expensive arbitration or potentially litigation, a situation which will greatly increase transaction costs.
- 11.17 In considering previous applications for authorisation, the ACCC has noted that, as claimed by the Applicant, 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, such as legal and accounting fees, are likely to be passed on in the form of lower prices to consumers, the ACCC has accepted that this would constitute a public benefit.
- 11.18 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.
- 11.19 In this instance, however, the ACCC considers that there is scope for transaction costs savings to occur from the proposed collective bargaining arrangements, relative to a situation where growers would have to negotiate the terms and conditions of the their growing contracts individually.
- 11.20 The ACCC considers that there would be some savings in the form of reduced legal, accounting and financial fees which each grower would be likely to incur were they to be required to negotiate on an individual basis. The ACCC is of the

view that as Victorian chicken meat growers have not, in the past, been required to negotiate their own growing contracts they would be likely to incur expenses, regardless of whether they were offered a standard form contract or not, in an effort to understand the terms and conditions of the contract and then in their efforts to negotiate some better deal with their processor. The ACCC considers that because growers would have no mechanism to discuss their contracts with their growing group or the VFF as a common adviser, these costs would be borne by each individual grower, costs which would not occur with the proposed collective bargaining arrangements in place.

- 11.21 The ACCC also considers that there would be some savings in the form of reduced cost resulting from disputes. That is, because growers would not have the terms and conditions offered to them as standard form contracts by processors, as would likely be the case under the counterfactual situation, but instead would be able to have effective input into the construction of their contracts, the likelihood of a grower disputing a contract to which they had a considerable contribution would be significantly reduced. This would result in a reduction in costly disputes by both parties.
- 11.22 The ACCC 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 ACCC 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, the ACCC does not consider the magnitude of any such savings is likely to be significant.

Increased competition

- 11.23 The Applicant claims that an important public benefit resulting from authorisation would be increased competition between processors for the services of chicken growers by having a common end date for all contracts. The Applicant states that under the current arrangements, and in a deregulated system, only the processor and the contracted grower are aware of the end date of their agreement. This lack of market information, the Applicant claims, impedes the capacity for processors to compete for the services of growers and for efficient growers to seek a better deal from an alternative processor, a situation which the Applicant claims decreases the incentive for innovation to improve efficiency and decreases the speed with which new technology is adopted.
- 11.24 As discussed in section 10 of this draft determination, the ACCC considers that there is some merit in the Applicant's argument that prescribed end dates for all Victorian chicken meat grower contracts would provide some increased competition for grower services by processor. However, the ACCC considers that any increased competition resulting from the VFF's proposed common end dates for contracts would need to be weighed against the potential decrease in competition from the prescribed nature of contract terms and conditions as

discussed in section 10 and the potential for more widespread industry disruption were boycotts to be permitted.

- 11.25 The ACCC considers that on balance, the inclusion of fixed contract periods across all Victorian processors as proposed by the Applicant would be likely to have a negative competitive effect.

Increased dynamic efficiency

- 11.26 The Applicant claims that increasing competition between processors for the services of chicken growers will promote dynamic efficiency gains within the growing industry. They claim that because efficient growers are currently growing chickens for non-preferred processors productivity gains are being stifled. The Applicant submits that reversing this situation and introducing competition into this market will lead growers to innovate in production efficiencies and invest in growing facilities, which will contribute to gains in overall industry performance.
- 11.27 The Applicant claims that in a deregulated market, dynamic efficiency gains in the growing industry will continue to be prejudiced by the monopsony or oligopsony power of processors. However, the granting of the VFF's authorisation would lessen the ability of processors to exploit this power. This will result in increased dynamic efficiency in the market compared to the counterfactual scenario.
- 11.28 As noted in paragraph 10.2, the ACCC considers that, generally speaking, collective bargaining in comparison with effective individual negotiations, is likely to reduce competition. However, as noted earlier in this section, in a situation where collective bargaining increase the ability for buyers and sellers to provide effective input into contracts, the ACCC accepts that this can lead to more efficient outcomes in the public interest. This principle equally applies to dynamic efficiencies that may be achieved. The Applicant's arguments under this heading do not advance their claimed public benefits beyond that accepted earlier in this section.

Return of monopsony gains

- 11.29 The Applicant submits that, at present, processors use their monopsony (or oligopsony) power to extract rents from growers. They claim that authorisation would provide for the return of some of those rents to growers through an increase in their growing fee. The Applicant claims the combined effect of processors earning supra-competitive profits and the constraints placed on them by retailers from increasing wholesale prices would result in any additional cost from increased growing fees being borne entirely by the processor and would not result in any additional costs to consumers.
- 11.30 The Applicant further submits that the level of vertical integration within the industry and the presence of substitutes will prevent growers from extracting rents from processors.

- 11.31 The ACCC considers that the Applicant has failed to provide conclusive evidence to support their claim that processors are earning supra-competitive profits. However, the ACCC has accepted earlier in this section that the proposed collective bargaining arrangements are likely to allow greater grower input into terms and conditions of chicken growing contracts, including growing fees. The ACCC considers that to the extent that growing fees are below the efficient level, this may be addressed by the collective bargaining arrangements. However, these arguments do not advance the claimed public benefit beyond those accepted earlier in this section.

Promote investment

- 11.32 The Applicant submits that in a deregulated environment, it is likely that investment in growing services will decline dramatically. This, they claim, would be a result of industry uncertainty, contract uncertainty and sub-economic returns. The Applicant claims that the result of such a reduction in investment is likely to be significant economic inefficiencies and potentially losses in overall consumer welfare. The Applicant argues that the opposite is likely to occur under the VFF proposed arrangements, with investment levels likely to increase which will result in more efficient production and increased consumer welfare in the long term.
- 11.33 Again, to the extent that collective bargaining arrangements allow greater grower input into the terms and conditions of supply, efficiencies may be realised including by optimising investment decisions. However, the Applicant's arguments under this heading do not advance the public benefits accepted earlier in this section.

Prevent grower exploitation

- 11.34 The Applicant submits that the authorisation will serve to prevent exploitation of growers and result in reduced tensions between processors and their respective growers. This, the Applicant claims, will allow both parties to focus on their respective roles in the supply chain and work towards obtaining further efficiencies in a cooperative manner.
- 11.35 The ACCC considers that many small businesses seeking to redress a perceived imbalance in bargaining power with a larger business argue that allowing them to collectively bargain will reduce the risk of the larger business imposing harsh, unfair or unreasonable terms in contract negotiations. While this argument has often been put to the ACCC, the ACCC has not generally accepted that a public benefit in the form of reduced risk of potential unconscionable conduct will result from collective bargaining arrangements.
- 11.36 The ACCC is of the view that there are provisions in the TPA which prohibit unconscionable conduct and, in particular section 51AC of the TPA prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

- 11.37 In this instance, the ACCC considers that whilst processors may have engaged in tough negotiations and conducted their businesses in such a way that is most advantageous to themselves, there is no specific evidence to suggest that processors have acted unconscionably in the past when dealing with growers or, assuming authorisation was not granted, that they would be likely to do so in the future.
- 11.38 Whilst the ACCC accepts that reducing the risk of businesses being treated unconscionably is a public benefit, it does not accept in this case that the proposed collective bargaining arrangements would in fact reduce the risk of unconscionable conduct occurring given the absence of any evidence provided in this authorisation process that processors have acted unconscionably their dealings with growers in the past.

Facilitate the transition to deregulation

- 11.39 The Applicant submits that allowing growers to collectively negotiate will provide stability to an industry which is currently operating in a partly deregulated state the result of which has been an erosion in confidence in the industry and an increase in impediments to grower investment.
- 11.40 The ACCC has, in the past, authorised various schemes in rural industries following deregulation. In assessing such schemes, the ACCC has accepted that there could be a public benefit in mechanisms that facilitate the transition from a regulated to a more competitive environment. The mechanisms, such as authorisation, may help to avoid a dislocation in the functioning in a market that would be caused by too sudden a movement in such transition. The ACCC nevertheless requires that industries demonstrate a clear commitment and movement towards operating in a more competitive environment.
- 11.41 As described in section 2 of this draft determination, the Victorian chicken meat industry has been highly regulated since the early 1970's. In 1999, however, a review of the legislation regulating the industry, conducted in accordance with NCP guidelines, concluded that the legislation should be repealed. The Victorian state government supported the NCP recommendation and disbanded VBINC, the body that was established by the legislation and which, amongst other things, arbitrated disputes and effectively set the growing fee.
- 11.42 The ACCC accepts that whilst the Victorian chicken meat industry was effectively deregulated in 2001 with the dissolution of the VBINC, the industry is only now beginning to make the transition from a regulated industry to a deregulated one. It considers that this is evidence by the fact that:
- most growers are still growing chickens on terms and contracts negotiated under VBINC and
 - in most instances, there have been no new successfully negotiated contracts.

- 11.43 The ACCC considers that the transition of the industry from a regulated environment to a deregulated environment has resulted in a situation where:
- processors have access to extensive information about growing costs and performance, information which new entrants to the industry would be unable to access
 - there are significant imbalances in bargaining power between individual growers and vertically integrated processors and
 - individual growers would be likely to lack the requisite skills and experience to engage in effective negotiation.
- 11.44 As a result, the ACCC considers that some growers may face considerable costs and difficulties in adapting to a fully deregulated market which may be exacerbated by the uncertainty about the terms and conditions under which they would operate and which growers would face while individual contract negotiation occurred.
- 11.45 The ACCC acknowledges that the Victorian chicken growing industry has been in the process of deregulating for a number of years and that there has been a degree of reluctance on the part of some parties to fully commit to the process. The ACCC considers that, to the extent that granting authorisation would facilitate all parties committing to the process of deregulation, this would constitute a public benefit.
- 11.46 The ACCC considers that these benefits would arise from: efficiencies created by minimising adjustment costs for growers moving from their current contractual state to a situation where they would be required to negotiate their growing contracts individually; efficiency savings from growers having a genuine contribution into their contract terms and conditions and; by providing for a more cohesive industry resulting in fewer costly disputes.
- 11.47 For these reasons, the ACCC considers that the proposed arrangements may assist in easing the transition from a regulated to a deregulated market and that this is likely to result in some benefits to the public. The ACCC, however, is not prepared to attribute great weight to this claim and notes that its life is limited to the period of transition.

Promote industry bodies and standards

- 11.48 The Applicant submits that growers participate and contribute to a number of industry bodies which have, amongst other things, assisted in reducing disputes between growers and their neighbours, has enabled the development of strong links with local government and has improved community acceptance of the industry.
- 11.49 The Applicant claims that growers also represent the industry at a number of levels to manage animal welfare, bio-security, and planning issues. The Applicant claims that all of these activities reduce costs to the community through the unpaid work of growers, and the expertise and knowledge they bring to industry committees and bodies.

- 11.50 The Applicant concludes that in a deregulated environment where growers are required to negotiate individually their ability to contribute to such industry groups might be limited and that grant authorisation will ensure that industry representation remains at the current level.
- 11.51 The ACCC considers that encouraging and promoting industry groups and associations is a valuable exercise, insofar as they facilitate the exchange and dissemination of information to industry parties and the wider community. The ACCC considers that this can lead to an increased awareness of industry issues which may then lead to a reduction to potential sources of conflict or dispute.
- 11.52 However, the ACCC generally considers that irrespective of whether authorisation were granted, these associations and industry groups would continue to play an important role within the industry and that any public benefits from their work would continue to flow.

Retain industry experience

- 11.53 The Applicant submits that having ongoing negotiations places considerable pressure on the grower representatives. It claims that the experience in South Australia and Victoria suggests that the leaders of the negotiating groups can be singled out by processors for unfair treatment. It submits that of the five growers leading the respective processor negotiating groups during the Marven authorisation three subsequently sold their farms and left the industry. The Applicant submits that this was in part due to the pressures placed on them during the course of negotiations with processors.
- 11.54 The Applicant submits that the proposed negotiating process with staged mechanisms to progress negotiations will encourage the negotiations to be conducted in good faith. In a deregulated environment the industry leaders, if seen by the processors to be causing trouble amongst growers, have very little opportunity to prevent victimisation.
- 11.55 The ACCC notes that there are some inconsistencies in the Applicant's claims in relation to the retention of industry knowledge. In particular, the Applicant states that a number of experienced grower group leaders exited the industry after being singled out by their processor during previous collective bargaining processes, a claim which seems to contradict the argument that collective bargaining will assist in the retention of industry knowledge.
- 11.56 Further, the ACCC considers that in a deregulated environment there would be no grower group leaders and therefore the potential for victimisation, of the sort described by the Applicant, to occur again would be significantly reduced.
- 11.57 However, as discussed earlier in this section, the ACCC accepted that the proposed collective bargaining arrangements would result in greater grower input into the

terms and conditions of growing contracts. They may also generate a greater degree of good faith between growers and processors and assist in retaining industry knowledge. These claims, however, by their very nature are anecdotal. The ACCC is not prepared to provide significant weight to the Applicant's claim in this regard.

Maintain biosecurity

- 11.58 The Applicant submits that maintaining and improving the standard of growing facilities, and continuous improvement of industry practices are important to ensure the occurrence of exotic disease outbreaks are minimised. The Applicant claims that if growers are exploited by processors and receive returns that do not reflect the full cost of operating a farm, it would be expected that maintenance of growing facilities and motivation of growers will be reduced. The Applicant claims that the authorisation will ensure that industry standards are maintained which will assist in the reduction of disease outbreaks, an outcome which will provide a substantial public benefit.
- 11.59 The ACCC considers that maintaining biosecurity standards and minimising diseases such as Avian Influenza and Newcastle disease are important to both the chicken meat industry and the community more generally. The ACCC is of the view that preventing such outbreaks is however in the interest of all parties in the chicken meat industry as any such outbreak would have as equally a damaging effect on all parties, including processors, as it would on growers.
- 11.60 The ACCC is of the view that as it is in the best interest of processors to continue to maintain an industry free of disease and other potential biosecurity risks, they will, with or without the authorisation, continue to seek to ensure that growers maintain biosecurity standards.
- 11.61 As such, the ACCC is of the view that the continued industry vigilance in relation to biosecurity matters is not dependent on growers having the right to collectively bargain and therefore, does not consider that granting the authorisation will provide any additional public benefits than would be produced under a deregulated environment.

12 Balance of public benefits and detriments

Collective bargaining

- 12.1 The ACCC considers collective bargaining agreements which set uniform terms and conditions (including fees) for independent growers are likely to lessen competition relative to a situation where each of the growers individually negotiates their own terms and conditions.
- 12.2 However, the ACCC considers that there are a number of industry specific factors which will serve to limit the effect on competition and any flow-on effect in the form of higher prices to consumers. These include:
- the current level of competition between members of the grower groups, with respect to those terms and conditions on which they are seeking to collectively bargain, is low
 - pressure from powerful downstream purchasers of processed chicken meat such as large retail chains (Coles, Woolworths) and fast food outlets (KFC and McDonalds) limit the processors' ability to pass on any fee increases and
 - the growing fee only constitutes approximately 6-8% of the retail price of chicken meat and consequently any increase in the growing fee is unlikely to materially change the retail price of chicken meat.
- 12.3 In addition, the ACCC considers that the effect of industry features such as large wholesale buyers and limitations on a grower's capacity to alternate between processors combined with the following factors will serve to further mitigate the potential anti-competitive effects of collective bargaining:
- existence of efficiency incentives (pool payment system) within grower groups
 - separation of growers into discrete grower groups
 - limited effect on barriers to entry caused by the arrangements
 - freedom of growers to negotiate individual contracts with processors and
 - competition from non-VFF growers.
- 12.4 The ACCC also considers that because of the high level of industry integration and the nature of the contract system, processors will continue to maintain a high degree of control over the growers with or without the collective bargaining arrangements.
- 12.5 Finally, the ACCC considers that the anti-competitive effect of the arrangements would be significantly lessened if the specific negotiation procedures proposed at annexure B of the application and the terms and conditions included in annexure C of the VFF's application were not fixed but were open for growers and processors to negotiate.

12.6 Therefore, for the reasons outlined above, the ACCC considers that the proposed collective bargaining arrangements would not result in any significant anti-competitive detriment provided those matters outlined in annexures B and C of the VFF's application, subject to some exceptions, were not mandatory.

Collective boycotts

12.7 The ACCC considers that granting growers immunity from the TPA to collectively boycott processors could significantly increase the anti-competitive effects of the proposed collective bargaining arrangements.

12.8 In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers as submitted by the processors. The ACCC is also particularly concerned with the potential for immediate impact associated with the possible need for destroying day-old chickens.

12.9 In considering the detriments that may arise from collective boycott activity, the ACCC notes certain features of the proposed arrangements and relevant markets that are likely to lessen any such detriment:

- the restraint which growers are likely to adopt in using boycotts as a last resort to avoid damage to their business and the poor relations that might arise with processors
- the ability to engage in collective boycotts only at the time of negotiating contracts and only following a seven month negotiating period
- the limited time for which a boycott activity might be sustained by growers to avoid damage to their business
- the ability, albeit limited, for processors to balance the reduction in production six weeks following boycott action through interstate production and
- the relative impact on the national market for the supply of chicken meat as a result of boycott activity being limited to one processor at any one time.

12.10 On balance, however, the ACCC maintains the view that the use of collective boycotts without further limitations would be likely to result in significant public detriments.

12.11 The ACCC considers that this detriment would, however, be further lessened if any grower group considering engaging in collective boycotts were required to provide processors with a notice of their intention to collectively boycott. The ACCC considers that a notice would allow processors to better prepare for such an occurrence by, for example: ceasing the incubation of eggs and consequently the hatching of day-old chicks; and finding alternative sources for their wholesaling needs to mitigate any impact on the supply of chicken meat in the short term.

- 12.12 The ACCC has been advised that eggs are placed in incubators for a period of 18 days followed by a three day hatching period. The ACCC considers, therefore, that a requirement of 21 days notice prior to grower groups engaging in any boycott activity would allow processors to avoid the loss of day-old chickens as well as providing them with an opportunity to make alternative short term arrangements to supply their wholesaling requirements.

Conclusion on collective bargaining and collective boycotts

- 12.13 The ACCC considers that the combined effects of these arrangement features and industry factors serve to mitigate the potential anti-competitive effects of collective bargaining and collective boycotts.
- 12.14 The ACCC considers that some public benefits are likely to arise from the proposed arrangements, the most significant of which arises from allowing greater grower input into terms and conditions of supply resulting in the potential for increased efficiencies in addition to reduced transaction costs.
- 12.15 Further, the ACCC considers that the proposed conduct provides some public benefit insofar as it facilitates the transition from a regulated to a deregulated environment.
- 12.16 The ACCC accepts that the extent to which granting grower groups the right to collectively boycott assists in securing these public benefits, such a right also brings with it a public benefit.
- 12.17 Following the arguments advanced by the Applicant and interested parties and despite the mitigating factors referred to above, the ACCC is not satisfied that:
- the public benefits likely to result from the proposed collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements or
 - the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.
- 12.18 However, by imposing certain conditions on the proposed collective bargaining and boycott arrangements, the ACCC considers the balance of public benefits and detriments will be shifted. In particular, the ACCC considers that conditions which:
- remove the prescriptive nature of the proposed contracts that may be negotiated under the proposed collective bargaining process and
 - better ensure that the effect of any collective boycott activity, particularly with regard to the supply of chicken meat to retailers and consumers, is minimised
- 12.19 With the imposition of such conditions, the ACCC would be satisfied that the public benefits of the proposed collective bargaining arrangements would outweigh their potential anti-competitive detriments and the proposed collective boycott

provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Proposed conditions

Proposed condition 1

- 12.20 As discussed in section 10, the ACCC is concerned that certain prescriptive elements included in the Applicant's application at annexure B may limit the flexibility of the proposed arrangements. As such, the ACCC proposes to grant authorisation on the condition that only the following aspects of the Contract Process, as outlined in annexure B, will be mandatory:
- There will be a six month bargaining period preceding each Contract Period.
 - The 'Contract Period' will be the term of the growing contract agreed between the grower group and the processor.
 - The six month bargaining period will automatically commence six calendar months before the expiry date of the contract.
 - If after the conclusion of the six month bargaining period agreement on growing contracts has not been reached, the grower group may invite the processor to participate in mediation with a suitably qualified and independent mediator.
 - If after twenty-eight days from the date the processor received their invitation from the grower group to participate in mediation, agreement on growing contracts has not been reached by the parties, the members of the grower group will have immunity under the TPA to engage in a collective boycott of the supply of chickens from the processor.
 - The first six month bargaining period will commence from the date the final determination in relation to the Applicant comes into effect.

All other aspects of annexure B will be open to the parties to negotiate.

Proposed condition 2

- 12.21 The ACCC considers that the inclusion of a defined trigger mechanism for collective boycotts to begin may mitigate their potential effect were they to be carried out.
- 12.22 As such, the ACCC proposes to grant the authorisation on condition that grower groups provide a notice in writing to their respective processor 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from their processor. Such a notice should include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. This notice may only be issued 7 days after the date the processor received their invitation from the grower group to participate in mediation.

Proposed conditions 3-6

- 12.23 Whilst the ACCC considers that the collective bargaining process will produce the most effective outcomes if it remains relatively flexible, the ACCC is of the view that there are a number of additional features of the process which are necessary to restrain the anti-competitive conduct, namely:
- that collective bargaining groups comprise only growers supplying or proposing to supply growing services to the same processor
 - that collectively bargaining and boycott conduct be limited to being between individual grower groups and their respective processor
 - that there not be any common representation of growing groups and
 - that the authorisation does not extend in any way to negotiations between processors.

Proposed condition 7

- 12.24 The ACCC also raised concerns in section 10 of this draft determination that the prescriptive nature of the contractual terms and conditions proposed by the Applicant in annexure C of their application were likely to increase the anti-competitive effect of the collectively bargaining arrangements.
- 12.25 In light of these concerns, the ACCC proposes to grant authorisation on the condition that all those matters described in annexure C to the current application will be open to negotiation between the parties and will not be mandatory.

Proposed condition 8

- 12.26 Whilst the Applicant has stated that any grower who is growing a batch of chickens at the beginning of any collective boycott action would complete the growing that batch, the ACCC considers that this issue is of significant importance to make such an assurance a condition of the authorisation. Therefore, the ACCC proposes to make it a condition of the authorisation that the growing of any batch of chickens held by a Victorian chicken grower at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.

13 Draft determination

The application

- 13.1 On 5 May 2004, the VFF on behalf of its member Victorian chicken meat growers (the Applicant) lodged an application for authorisation (A40093) with the ACCC.
- 13.2 The application was made pursuant to 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 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.²⁹
- 13.3 On 15 September 2004, the VFF lodged a further related application (A90931) for authorisation pursuant to section 88(1) of the TPA:
 - (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision 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 is, or maybe, an exclusionary provision within the meaning of section 45 of the TPA.
- 13.4 Specifically, the VFF seeks to allow the members of each VFF Chicken Meat Group to act collectively in:
 - negotiating the terms and conditions, including growing fees, of broiler chicken growing contracts
 - negotiating any necessary future amendments or adjustments to the growing fee or the broiler chicken growing contracts and
 - in relation to negotiations for the resolution of disputes which may arise between the grower group and their processor.
- 13.5 The VFF also seeks authorisation for each VFF Chicken Meat Group to collectively boycott supply of chickens by their processors where agreement as to a growing contract cannot be reached after a prescribed process.

²⁹ The application has also been considered as an application under the *Competition Code of Victoria*.

Statutory test

- 13.6 For the reasons outlined in this draft determination, the ACCC is not satisfied that:
- the public benefits likely to result from the proposed collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements or
 - the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.
- 13.7 However, by imposing certain conditions on the proposed collective bargaining and boycott arrangements, the ACCC considers the balance of public benefits and detriments will be shifted. In particular, the ACCC considers that conditions which:
- remove the prescriptive nature of the proposed contracts that may be negotiated under the proposed collective bargaining process and
 - better ensure that the effect of any collective boycott activity, particularly with regard to the supply of chicken meat to retailers and consumers, is minimised
- 13.8 With the imposition of such conditions, the ACCC would be satisfied that the public benefits of the proposed collective bargaining arrangements would outweigh their potential anti-competitive detriments and the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Conduct authorised

- 13.9 The ACCC therefore proposes to grant authorisation pursuant to section 88 of the TPA and the Competition Code, to applications A40093 and A90931 on the following terms:

The ACCC proposes to grant authorisation to allow individual VFF member chicken meat growers to form into grower groups, based on the VFF Chicken Meat Group with whom they are affiliated, and to act collectively in:

- negotiating the terms and conditions, including growing fees, of their broiler chicken growing contracts
- negotiating any necessary future amendments or adjustments to their growing fee or their broiler chicken growing contracts and
- negotiating for the resolution of disputes which may arise between the grower group and their processor.

The ACCC proposes to grant the authorisation subject to the following conditions:

1. Only the following aspects of the contract process, as outlined in annexure B of the application, will be mandatory:
 - There will be a six month bargaining period preceding each Contract Period.
 - The ‘Contract Period’ will be the term of the growing contract agreed between the grower group and the processor.
 - The six month bargaining period will automatically commence six calendar months before the expiry date of the contract.
 - If after the conclusion of the six month bargaining period agreement on growing contracts has not been reached, the grower group may invite the processor to participate in mediation with a suitably qualified and independent mediator.
 - If after twenty-eight days from the date the processor received their invitation from the grower group to participate in mediation, agreement on growing contracts has not been reached by the parties, the members of the grower group will have protection under the TPA to engage in a collective boycott of the supply of chickens from the processor.
 - The first six month bargaining period will commence from the date the final determination comes into effect.

All other aspects of annexure B will be open to the parties to negotiate.

2. Grower groups will provide a notice in writing to their respective processor 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from that processor. Such a notice should include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. This notice may only be issued 7 days after the mediation period has commenced.
3. Collective bargaining groups may only comprise growers supplying or proposing to supply growing services to the same processor.
4. Collectively bargaining and boycott conduct will be limited to being between individual grower groups and their respective processor.
5. There will not be any common representation of growing groups.
6. Authorisation does not extend in any way to negotiations between processors.
7. All those matters described in annexure C to the VFF’s application will be open to negotiation between the parties and will not be mandatory.
8. The growing of any batch of chickens held by a Victorian chicken grower at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.

- 13.10 The ACCC proposes to grant authorisation to A40093 and A90931 for a period of five years from the date the determination comes into effect. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 13.11 While the terms of the proposed authorisation differ to the current interim authorisation, granted to the Applicant on 9 June 2004, the ACCC does not propose to alter the interim authorisation. Those arrangements will continue to be protected from action under the TPA until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke or amend the interim authorisation.
- 13.12 The ACCC considers that to the extent that the Applicant, or any other party to whom immunity is provided by the proposed authorisation, acts outside of the authorised arrangements or does not comply with the proposed conditions of the authorisation, they will not have protection from the TPA in so doing. Furthermore, the protection afforded by the proposed authorisation is necessarily limited to protection under the relevant provisions of the TPA and does not extend to other causes of action that might exist, such as breaches of contract.