

Draft Determination

Application for Authorisation

lodged by

Bartter Enterprises Pty Ltd, La Ionica Operations Pty Ltd,
Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd,
Baiada Poultry Pty Ltd and consenting Victorian chicken growers

in relation to the collective negotiation of chicken growers'
contracts in Victoria.

Date: 17 November 2004

Commissioners:

Samuel
Sylvan
Martin
McNeill
King
Smith

Authorisation nos. A90901, A90902,
A90903, A90904 & A90905

Public Register no. C2004/38

Executive Summary

The application

On 19 December 2003, Bartter Enterprises Pty Ltd, on its own behalf and on behalf of nine of its contract chicken growers, lodged an application for authorisation with the Australian Competition and Consumer Commission (the ACCC). In addition, four related applications were received from La Ionica Farming Operations Pty Ltd (and one consenting grower), Baiada Poultry Pty Ltd, Inghams Enterprises Pty Ltd and Hazeldene Chicken Farm Pty Ltd (the Applicants). Various amendments have since been made to each of the applications.

In addition to seeking substantive authorisation for a period of five years, the Applicants also sought interim authorisation which was granted, in part, by the ACCC on 9 June 2004.

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 Applicants seek authorisation for their role in future collective bargaining with their contracted growers and, in some instances, the giving of effect to contracts already negotiated between individual processors and their growers acting collectively (Bartter and Baiada). The applications are also made on behalf of nine consenting Bartter growers and one consenting La Ionica grower for their role in collective bargaining with their processor.

The proposed collective bargaining process is anticipated to occur in accordance with a Code of Conduct which was submitted with the applications.

Validity of the processor applications

The ACCC considers each of the processor applications is valid but that given the absence of grower support for future collective bargaining arrangements in the majority of applications those arrangements are unlikely to be capable of being put in to practice.

The ACCC considers that authorisation could be granted to the continued giving of effect to arrangements entered into under the previously authorised arrangements (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). In respect of those La Ionica and Bartter growers who did not consent to the applications, they could still be authorised to collectively negotiate new arrangements with La Ionica and Bartter, provided at least one grower who has consented to the application is a party to any agreement between the growers to collectively negotiate.

The ACCC considers that in respect of the negotiation of future contracts by those processors that do not have any grower support (Hazeldene, Inghams & Baiada) the necessary precondition for collective negotiations to occur, namely an agreement between growers alone, would not be covered by any authorisation granted and if it did occur it would likely be in breach of the TPA.

Assessment of public benefit and anti-competitive detriment

Giving effect to existing contracts

The ACCC considers that granting authorisation in respect of the applications made by Bartter and Baiada to give effect to grower contracts entered into under the Marven authorisation would serve to provide contractual certainty to those contracts. This contractual certainty would, in the ACCC's view, have no identifiable anti-competitive effect and would result in a clear public benefit.

Future collective bargaining arrangements

With respect to the future collective bargaining arrangements proposed in the processor applications, the ACCC considers that these arrangements are likely to only occur between Bartter and its nine consenting growers. In respect of that application, the ACCC considers that there are several features of the proposed arrangements which limit the potential detrimental effect on competition of collective bargaining, including:

- the inclusion in the contract of a comparative performance scheme
- participation in the arrangements is voluntary for both growers and Bartter
- there is no proposed collective boycott activity and
- the negotiating group is effectively limited to a group of nine consenting growers.

In addition, the ACCC considers that there are a number of industry specific factors which will further 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 group, 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.

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

The ACCC accepts that some public benefits are likely to arise from the proposed arrangements. The ACCC considers the most significant of these 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.

The ACCC concludes that, with respect to the application by Bartter and its consenting contract chicken meat growers to collective bargain future growing contracts, the public benefits likely to result from those collective bargaining arrangements will outweigh the potential detriments of the arrangements.

The ACCC considers that in respect to the remaining aspects of the Inghams, La Ionica, Hazeldene and Baiada applications, because they do not, for the most part, have any grower support they are unlikely to result in future collective bargaining and therefore are unlikely to produce any of the claimed public benefits.

Draft determination

In relation to application A90901 (Bartter) and pursuant to section 88 of the TPA and the Competition Code, the ACCC proposes to grant authorisation to allow Bartter and its consenting chicken meat growers to continue giving effect to existing chicken growing contracts previously negotiated under the Marven authorisation. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

The ACCC also proposes to allow Bartter and its consenting chicken meat growers to collectively bargain future chicken growing contracts, in accordance with the Code of Conduct, and to give effect to contracts reached pursuant to those arrangements. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

In relation to application A90905 (Baiada) and pursuant to section 88 of the TPA and the Competition Code, the ACCC proposes to grant authorisation to allow Baiada to continue giving effect to existing chicken growing contracts previously negotiated under the Marven authorisation. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

The ACCC proposes to deny all other aspects of the processor applications.

The interim authorisation provided by the ACCC will remain unchanged and those aspects of the arrangements which were granted immunity 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.

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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 five applications for authorisation lodged with the ACCC by Bartter Enterprises Pty Ltd (A90901), La Ionica Operations Pty Ltd (A90902), Hazeldene Chicken Farm Pty Ltd (A90903), Inghams Enterprises Pty Ltd (A90904), Baiada Poultry Pty Ltd (A90905) and consenting Victorian chicken growers (the Applicants).
- 1.5 Once a draft determination is released the Applicants, 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. 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 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 decrease the 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 Applicants submit that chicken meat is sold predominantly 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 Additionally, the Applicants submit that the retailing sector and the fast food industry are the major market outlets for the industry. They submit that approximately 75% of chicken meat is sold through retail outlets with the remainder sold through the food service industry (fast foods, restaurants etc).
- 2.5 The Applicants submit that 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 Applicants further submit that 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, then 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.

Chicken growing services

- 2.7 The Applicants describe chicken growing services as an input into the production of chicken meat. Therefore, demand for chicken growing services is a derived demand heavily influenced by; chicken meat demand considerations; technology along the production chain; and the cost of all other inputs.
- 2.8 Growing services are typically outsourced as a way of conserving capital and of ensuring growing efficiency, however, growing farms tend to be located relatively close to the processing plant and associated feed mills to minimize transportation costs and ensure quality of finished birds. Other services such as the provision of breeders, cartage of chicks, live bird pick-up and delivery of product are also often outsourced through contracts by processors.⁵
- 2.9 The Applicants submit that 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 fees are a small component of product costs: The Applicant submits that the cost of growing contributes to approximately 6% of the retail price.
 - Capital investment: 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

- 2.10 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 to processors.

⁵ http://www.nswfarmers.org.au/policy/poultry/current_issues

- 2.11 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.
- 2.12 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.
- 2.13 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

- 2.14 The Applicants submit that approximately 2.3 million birds per week are grown and processed in Victoria, producing about 210,000 tonnes of chicken meat annually or 30 per cent of Australian production. The Applicants claim, however, that the industry is continuing to become nationally integrated with three of the integrated processors operating in Victoria having processing and distribution facilities in most states.
- 2.15 The Applicants submit that the distribution network has lowered the barriers to entry of interstate product, which with current technology may be shipped safely and economically anywhere in eastern Australia within 24 hours and has added to the competitive pressures across the Australian market. The Applicants claim that most Victorian production is, however, still consumed in Victoria, with around seven per cent sent interstate and three per cent exported.
- 2.16 The Applicants submit that the Victorian market is highly competitive at the production, wholesale and retail levels. They claim that product pricing is a major weapon employed by processors to gain and hold markets against other processors and competing products.
- 2.17 The Applicants submit that in Victoria, as in the rest of Australia, the retail sector (particularly supermarkets) and the food service industry (firms such as

McDonalds, KFC, Red Rooster) are the major wholesale purchasers of chicken meat. The Applicants state that only about 10 per cent of production is sold under a fixed contract with a fixed price. Accordingly, the Applicants claim, strong attention is focussed on price and production costs which are always under pressure.

- 2.18 The Applicants submit that the integrated processors Bartter, Inghams, La Ionica Operations Pty Ltd (La Ionica), Hazeldene Chicken Farm Pty Ltd (Hazeldene), and Baiada Poultry Pty Ltd (Baiada) provide all the day-old chickens for commercial operations in Victoria. Additionally, each of these processors, with the exception of La Ionica, also operates breeder farms and hatcheries.
- 2.19 The Applicants submit that the integrated firms process most of the chickens grown in Victoria themselves. The Applicants submit that Inghams has its processing plant at Somerville; Bartter at west of Geelong; Baiada at Laverton; La Ionica at Thomastown; and Hazeldene at Bendigo.
- 2.20 The Applicants state that other (non-integrated) Victorian processors such as Limnos, Crystal, and Cammorotto process live birds provided by the integrated processors or debone and further value add to product from other processors before selling to the wholesale market.
- 2.21 The Applicants submit that growing farms tend to be located relatively close to the processing plant and associated feed mills to minimise transportation costs and ensure quality of finished birds. Specifically, in Victoria, Inghams, Baiada and La Ionica all have farms on the Mornington Peninsula and in East Gippsland. Baiada also has farms to the north and west of Melbourne and into the Strathbogie Ranges. Bartter has growers in the surrounds of Geelong and to the west of Melbourne with Hazeldene having all of its growers in the Bendigo area.
- 2.22 The Applicants state that with the current planning criteria in effect through the Victorian Broiler Code, it is very difficult to obtain a permit to build or extend a chicken growing farm in certain established areas.

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 an authorised 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*

Current contractual arrangements

- 3.12 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.
- 3.13 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.
- 3.14 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.
- 3.15 **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.
- 3.16 **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.
- 3.17 **Bartter** collectively negotiated contract terms and conditions during the period of the Marven authorisation with nine of its contract growers. The remaining 21 Bartter growers who did not finalise contracts with Bartter during the Marven authorisation are currently still working under VBINC negotiated contracts.
- 3.18 **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.
- 3.19 **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.

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

VFF applications for authorisation

- 3.20 On 5 May 2004, the VFF on behalf of its member Victorian chicken meat growers lodged an application for authorisation (A40093) with the ACCC. On 15 September 2004, the VFF lodged a further related application (A90931).¹²
- 3.21 Essentially, the VFF is seeking 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.
- 3.22 The VFF has also sought 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.
- 3.23 On 9 June 2004, the ACCC granted the VFF's member chicken meat growers interim authorisation to collective bargain, on a limited basis, with their respective processors. In considering the VFF's request for interim authorisation the ACCC considered it necessary to further examine the potential effect of collective boycotts and the proposed right for grower groups to impose restrictions on processor's rights to offer more favourable contract terms and condition to non-VFF members.
- 3.24 The draft determination in respect of the VFF applications has been issued at the same time as the draft determination for the current processor applications.

¹² A copy of both VFF applications and their submissions in support are on the public register maintained by the ACCC.

4 The processor applications

- 4.1 On 19 December 2003, Bartter lodged an application for authorisation with the ACCC. The application was made by Bartter on its own behalf and on behalf of nine of its contract chicken growers who consented to the application.¹³
- 4.2 Four related applications for authorisation from Victorian chicken meat processors and one Victorian chicken meat grower were also lodged as related applications to the Bartter application. These included applications from:
- La Ionica on its own behalf and on behalf of Tarwood, a consenting chicken meat grower and
 - Baiada, Inghams and Hazeldene on their own behalves.
- 4.3 Each application was made pursuant to section 88(1) of the TPA for 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.¹⁴
- 4.4 In addition to seeking substantive authorisation for a period of five years, the Applicants also sought interim authorisation which was granted by the ACCC on 9 June 2004.
- 4.5 On 5 January 2004, the Applicants supplied five amended application forms in response to an ACCC request to clarify issues relating to the proposed conduct of the processors and the proposed conduct of those growers who had consented to the applications.
- 4.6 On 24 February 2004, the ACCC received a further amended application form from Baiada who sought to include a number of further growers as potential future parties to the arrangements.
- 4.7 On 1 April 2004, the ACCC received further amended application forms from Bartter and La Ionica who again sought to clarify the grower conduct for which authorisation was requested.

¹³ A list of consenting growers is marked as Annexure A to Bartter's application.

¹⁴ The application has also been considered as an application under the *Competition Code* of Victoria.

- 4.8 Copies of the applications and the submissions by the Applicants in support of their applications are on the public register maintained by the ACCC. The main issues are outlined below.

The proposed conduct

- 4.9 The processors seek authorisation 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 (Bartter and Baiada). 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.

- 4.10 Specifically, each of the five processors seeks authorisation to engage in the following conduct:

- 4.11 **Bartter** and its nine consenting growers seek authorisation to give effect to 10 growing contracts agreed in July 2001 under the Marven authorisation.

The nine consenting growers seek authorisation on their own behalf in respect of their own conduct to make arrangements between growers only and/or with Bartter to engage in the process of collective bargaining with Bartter in accordance with the Code of Conduct and to give effect to any such arrangements by entering into contracts pursuant to such arrangements.

Bartter seeks authorisation on their own behalf in respect of their own conduct to negotiate further contracts on a collective basis. The negotiations will be conducted by Bartter with the grower group(s) through a nominated representative or representatives.

The terms of the agreement will provide for a common fee to be paid to growers for the growing of chicken meat and the basis upon which such a fee is to be calculated.

- 4.12 **La Ionica** and Tarwood seek authorisation on their own behalf in respect of their own conduct to negotiate the terms of a chicken growing agreement between themselves and other growers, all of which growers will act on a collective basis.

Tarwood seeks authorisation on its own behalf in respect of its own conduct to make arrangements between growers alone and/or with La Ionica to engage in the process of collective bargaining with La Ionica in accordance with the Code of Conduct and to give effect to any such arrangements by entering into contracts pursuant to such arrangements.

La Ionica seeks authorisation on its own behalf in respect of its own conduct to negotiate further agreements with growers acting on a collective basis. The

negotiations will be conducted by La Ionica with the grower group(s) through a nominated representative or representatives.

The terms of the agreement will provide for a common fee to be paid to growers for the growing of chicken meat and the basis upon which such a fee is to be calculated.

- 4.13 **Baiada** seeks authorisation to give effect to 83 agreements for the growing of chickens, each of which agreements was negotiated by Baiada on a collective basis with the growers and entered into by those growers in April 2003.

Baiada seeks authorisation on its own behalf and in respect of its own conduct to negotiate future growing agreements with growers which agreements will be negotiated by Baiada with the growers on a collective basis.

Baiada will negotiate with grower group(s) through a nominated representative or representatives. The terms of the agreement will provide for a common fee to be paid to growers for the growing of chicken meat, and the basis upon which such fee is to be calculated.

No Victorian chicken growers have consented to Baiada's application for authorisation being on their behalf.

- 4.14 **Inghams** seeks authorisation on its own behalf and in respect of its own conduct to negotiate the terms of a proposed chicken growing agreement with growers on a collective basis.

Inghams will negotiate with grower group(s) through a nominated representative or representatives. The terms of the agreement will provide for a common fee to be paid to growers for the growing of chicken meat, and the basis upon which such fee is to be calculated.

No Victorian chicken growers have consented to Inghams' application for authorisation being on their behalf.

- 4.15 **Hazeldene** seeks authorisation (on its own behalf and in respect of its own conduct) to negotiate the terms of a proposed chicken growing agreement with growers on a collective basis.

Hazeldene will negotiate with grower group(s) through a nominated representative or representatives. The terms of the agreement will provide for a common fee to be paid to growers for the growing of chicken meat, and the basis upon which such fee is to be calculated.

No Victorian chicken growers have consented to Hazeldene's application for authorisation being on their behalf.

The proposed framework for the conduct

- 4.16 The Applicants submit that all chicken growing contracts to be given effect to, or to be negotiated in the future, will be in a similar form and cover matters set out in the guidelines for contracts which makes up part of the Code of Conduct (the Code). The Code is attached as Appendix A to Annexure D of the Applicants submission in support of their application, a copy of which can be found on the ACCC website. A summary is provided below.
- 4.17 It is anticipated by the Applicants that the Code will provide a framework for growers and processors to negotiate growing contracts but that the framework may vary according to individual requirements. The ‘Guidelines for Contracts’ section contains items that must be negotiated and set out in detail in each of the growing contracts.
- 4.18 The Applicants submit that the Code is based on similar Codes of Conduct developed in association with growers in South Australia,¹⁵ Tasmania,¹⁶ Queensland,¹⁷ New South Wales¹⁸ and with growers for the Marven authorisation in Victoria.

The proposed Code of Conduct

The grower arrangements

- 4.19 Growers who elect to negotiate collectively with their processor will be known as Participating Growers (PGs). The PGs will need to appoint from among themselves, growers who with processor representatives will form a Processor Negotiating Group (PNG) to negotiate the collective agreement.

Formation of Processor Negotiation Groups

- 4.20 Collective negotiations will be conducted through PNGs the formation of which will include the following steps:
- a secret ballot will be held at the request of any grower to determine if other growers wish to participate in the collective negotiations
 - all growers contracted to the processor will be given 14 days notice in writing of the ballot although they are not required to vote
 - the processor will play no part or exert any influence over any vote taken under clause except under certain circumstances
 - the processor will be free to attend the meeting at which the ballot is being held and to address the meeting if requested by a grower

¹⁵ Contained in authorisations granted to Inghams and its growers (A90595) and for Steggles and its growers (A30183).

¹⁶ Contained in authorisation granted to Inghams and its growers (A90659 & A90888).

¹⁷ Forms part of the statutory committee.

¹⁸ The Poultry Meat Industry Committee a Code (A90800).

- once a vote is held growers are free to form any PNG's they wish. Should a group of growers wish to form their own PNG independent of the remainder of the grower group, they are under no obligation to accept other growers into this PNG
- if a grower requests to join an existing PNG they may do so providing that a majority of existing growers represented by the PNG agree
- the processor will play no role in any decision by existing growers represented by a PNG to allow new members to join. Where a contract between a processor and a PG represented by a PNG has been signed, the processor is under no obligation to offer the same contract to new members who join that PNG after the contract is signed. However, any negotiation of new contracts or extensions of contracts previously signed with the PG's is to include new members of the PNG
- a PNG will be formed if forty per cent of contracted growers vote to negotiate collectively
- with the agreement of the processor, a PNG may be formed if the vote is less than forty per cent or more than one PNG may also be formed
- all contracted growers are eligible to be in a PNG and
- if a PNG is not formed then all negotiations will be on a one on one basis.

Function of PNG

4.21 Each PNG may agree its own functions, but they are to:

- negotiate the terms and conditions of the growing contract to be utilised by PGs including the operation of pooling and other joint incentive arrangements to be used for PGs
- negotiate the payments to be made to growers and the procedures for the regular review of such payments
- negotiate changes to operational procedures desired by either the PGs or the processor and where appropriate to negotiate financial consideration for such changes
- act as a mediator for the resolution of disputes between all PGs or any individual PGs and the processor
- take back to meetings of PGs (or individuals where appropriate) for decision the outcomes of negotiations or resolutions and
- make determinations or to take action on any other matters that the PNG agrees.

Composition of the PNG

4.22 The composition of each PNG may vary depending on the number of growers and what they agree with their processor but will include:

- grower representative numbers are to be decided between the PGs and the processor having regard to the size of the grower group but shall not normally be less than two or more than four and

- processor representative numbers are not to exceed the number of grower representatives.

Appointment of representatives/advisors

- 4.23 The following minimum conditions shall apply to each PNG in appointing representatives and filling casual vacancies:
- the processor will appoint processor representatives
 - PGs in a PNG will elect for an agreed term from among themselves their representatives
 - PGs may appoint advisers to assist them in preparations and ongoing negotiation matters and
 - a common advisor is not to be used across the industry nor is it envisaged that a common adviser would be used across PNGs with a single processor.

Meetings of the groups

- 4.24 The following guidelines shall apply to the meeting procedures of each PNG:
- meetings are to be called if requested by the processor or if more than 50 per cent of growers on the PNG request one
 - the PNG may appoint a Chairman, but the Chair has no casting vote
 - a quorum is to consist of one processor representative and at least two thirds of the grower representatives
 - matters can only be agreed if the processor representatives and a majority of the grower representatives agree and
 - costs incurred in carrying out any of the functions of the PNG are to be met equally by all PGs and the processor unless otherwise agreed.

Agreed resolutions of the PNG

- 4.25 An agreed resolution of the PNG will be notified to all PGs prior to a meeting called to consider the resolution.
- The PNG resolution shall be put to all growers in attendance at the meeting either by a show of hands or a secret ballot. The resolution shall become binding on all PGs if carried by the majority at the meeting.
 - If a resolution is not approved the meeting shall determine on a show of hands or on a secret ballot whether the matter be referred back to the PNG for further consideration or be determined in accordance with the dispute resolution/mediation procedures set out in the growing contract.
 - The agreed resolution of the PNG will be notified to the grower.
 - The grower will, within fourteen days, notify the PNG as to whether the resolution is accepted or if the matter is to be resolved in accordance with the dispute resolution/mediation procedures set out in the growing contract.

Matters not resolved by the PNG

- 4.26 The matter in dispute will be notified to all PGs prior to a meeting eligible to be attended by the processor and all PGs called to consider the matter.
- The processor and the grower representatives on the PNG will outline their positions to the meeting, which will consider the issues.
 - The matter shall be put as a resolution to the meeting either by a show of hands or a secret ballot among the PGs in attendance. A secret ballot may be requested by the processor or by the majority of grower representatives on the PNG.
 - The resolution will become binding if accepted by the processor and approved by a majority of PGs.
 - If the resolution is not approved, the matter will be resolved in accordance with the dispute resolution/mediation procedures set out in the Growing Contract.

Disputes/Mediation

- 4.27 The detail of dispute resolution/mediation procedures are to be set out in each growing contract. The guidelines emphasise agreement being reached through the offices of the PNG and if that's not possible then it is referred to mediation. Arbitration is only used as a last resort and then only in matters relating to monies payable unless agreed by both parties.
- The aggrieved party is to notify the matter in dispute in writing to the other party and to the PNG.
 - The PNG is to consider the matter and attempt conciliation.
 - If after ninety days of the serving of the written notice, the matter is not resolved between the parties and both parties agree, the matter can go for mediation to an agreed external mediator.
 - If after 28 days (or such time as agreed by the parties), mediation is not successful, the matter may go if agreed by both parties for arbitration.
 - In the case of amounts payable only, if after 28 days of the serving of the written notice, the matter is not resolved within the PNG or if mediation is agreed but not resolved within 28 days (or such time as agreed to by both parties), after appointment of a mediator, the matter is to be referred to arbitration.
 - The arbitrator is to be a person agreed to by both parties or if agreement is not forthcoming by an arbitrator appointed by the Institute of Arbitrators and Mediators Australia.
 - The costs of mediation or of arbitration are to be borne by each party and are to be determined by the mediator or arbitrator.

Meetings of growers

- 4.28 The grower representatives on the PNG may meet as and when required on their own, with PGs and with advisers.

Non participating growers

- 4.29 At the formation of a PNG or at the time the collective agreement with a PNG is due for renegotiation, a grower may elect to opt out and become a Non Participating Grower (NPG).
- A grower may at other times, with the processor's agreement, withdraw from the collectively negotiated contract by advising the PNG in writing.
 - An NPG may negotiate directly with the processor on any matter.
 - In matters of dispute, unless otherwise mutually agreed, a NPG will have the same access to resolution procedures and time periods as other growers.
 - Dispute procedures are to be set out in the contract.
 - An NPG will not be eligible to participate in ballots for election of representatives on the PNG, nor to attend meetings convened by the PNG.
 - An NPG at the end of the relevant contract period may elect to join the collective agreement by notifying the PNG in writing to that effect.

Guidelines for growers

- 4.30 The Applicants submit that the growing contract should be valid for a stated number of years, normally between two and five years and shall be similar to the existing contracts. The contracts should however be developed according to the needs and circumstances of growers and their processor.

Terms of the agreement

- 4.31 Terms will state the minimum period of the contract and include the commencement, expiry date and arrangements for notification of and response to intentions to enter into negotiations in relation to a new contract including:
- a clear statement of the inputs to be provided, their ownership and the standards to be maintained by the grower
 - the responsibilities of the grower regarding and including insurance coverage, record keeping, reporting and access to processor representatives and sanitation measures
 - the responsibility for all costs incurred is to be clearly stated
 - a clear statement of the requirements in relation to the rearing of birds is to be set out
 - all inputs and services which are to be provided, ownership and responsibilities for costs are to be clearly stated and
 - a notice of delivery and collection times are to be stated.

Terms of payment

- 4.32 The payment to be made for growing the chickens having due regard to processor requirements and the grower's investment and costs incurred in growing the chickens. The factors to be taken into consideration in negotiating the fee include but are not limited to:

- performance and throughput criteria
- processor requirements for the farm facility
- investments in land, shedding and equipment
- maintenance and running costs
- labour costs
- utility charges
- statutory/regulatory costs
- market conditions
- details of adjustments to payments to be made to any and all growers
- an agreed period over which the payment will apply and
- the payments are to be reviewed regularly at agreed intervals.

Guidelines for measuring the efficiency of growers

- 4.33 Factors include but are not limited to the following:
- efficiency measures such as FCR (feed conversion ratios), mortality, growth rates
 - production costs per batch (particularly feed usage) and
 - standards of quality.

Government compensation monies

- 4.34 Agreement to negotiate to apportion between the parties any relevant government compensation monies where such monies are received by the processor and include a payment relating to the growing fee due to the grower.

Dispute resolution/Mediation procedures

- 4.35 Dispute resolutions are to be developed based on the guidelines in the Code of Practice. Contracts are to specify those elements of the contract which constitute an amount payable.

Rights of assignment

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

5 Statutory provisions

- 5.1 Applications A90901, A90902, A90903, A90904 and A90905 were 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 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 tests that the Applicants must satisfy for authorisation to be granted are outlined in sub-sections 90(6) and 90(7) of the TPA.
- 5.3 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.
- 5.4 Under section 90(7) of the TPA, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5 In deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation.
- 5.6 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.¹⁹

¹⁹ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677

- 5.7 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.²⁰
- 5.8 The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 5.9 Under this test, the ACCC compares the public benefit and anti-competitive 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 predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.
- 5.10 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.
- 5.11 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 5.12 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

²⁰ ²⁰ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42683

6 The Applicants' supporting submission

- 6.1 The conduct for which authorisation is sought is described in section 4 of this draft determination.
- 6.2 The Applicants' submission supporting its application is summarised below. A complete copy of this submission is available on the ACCC's public register and website.
- 6.3 The Applicants submit that a major rationale advanced for legislation and regulation has been a perception of an imbalance of bargaining power between processors and growers. They claim, however, that the Victorian experience under authorisation, post-VBINC, has delivered outcomes that do not indicate that such perceptions are an issue.
- 6.4 The Applicants submit that this view is supported by the following outcomes:
- fees have increased from the VBINC 50.275 cents to between 53 and 55 cents
 - improved performance criteria have been agreed that have further increased the income of more efficient growers
 - individual agreements have been concluded which have attracted new farms and investment into the industry and
 - the value of farms has risen from around \$15 per bird in VBINC days to around \$20 per bird at present.
- 6.5 The Applicant submits that the processors recognise grower concerns about the perceived imbalance of bargaining power between the parties and have reservations about the practicality of individually negotiating contract terms and conditions with every grower.
- 6.6 The Applicants submit that growers should be able to continue to negotiate collectively, if they elect to do so, with their respective processor as collective negotiations:
- have worked in the past
 - are cost effective compared to parties individually negotiating
 - provide more relevant contracts than can be developed than under a regulated system and
 - provide contracts that better reflect the situation facing the parties.
- 6.7 The Applicants state that in order to provide more assurance to growers that relevant interests are being safeguarded, the processors will continue to use the Code as a framework within which growers can conduct negotiations.

- 6.8 The Applicants state that the Code is the product of discussions and negotiations with growers in a number of states and earlier versions are contained in previous ACCC authorisations. It also draws on arrangements in place under legislation in Queensland, legislation that has a similar effect as ACCC authorisation.
- 6.9 The Applicants claim that the longer term consequences of not granting authorisation will depend on what takes its place. They claim there are two potential counterfactual situations, legislation or full deregulation. The Applicants submit that the net benefits/costs to the community therefore depend on which counterfactual is utilised.
- 6.10 The Applicants submit that under legislation, the net public impacts depend on the particular contents of that legislation and the restrictions that it imposes. The concerns with legislation, however, are that once it is commenced it is subject to the lobbying endeavours of any vested interest groups and continues to be open to similar lobbying. However, the Victorian state government has not shown any intent to move back to a legislated system since the NCP review release in 1999 or whilst authorisation was a possibility.
- 6.11 Therefore the Applicants claim that the appropriate counterfactual for the ACCC to consider is one where there is full industry deregulation.
- 6.12 The Applicants claim that many growers do not have the experience and skills needed for the preparation of or the undertaking of individual negotiations with a processor. They claim that growers had no requirement to develop this business experience because the contract terms, conditions and fees were heavily regulated for many years through legislation and the operations of VBINC.

Public benefits

- 6.13 The Applicants submit that authorisation would end the short term difficulties that the industry is now facing following decision by the Federal Court to set aside the Marven authorisation.
- 6.14 The Applicant states that the genesis for benefits are already evident in the contract terms and conditions either concluded or nearly concluded under the Marven authorisation. The Applicants submit that the benefits are expected to flow through to the consumer because of the competitive nature of the industry.
- 6.15 The Applicants submit that there would be a number of other benefits from granting the authorisation including:
- an improved bargaining position for growers
 - reduced transaction costs for both growers and processors associated with seeking information, preparing negotiating positions and undertaking negotiations
 - a reduction in sources of conflict that could give rise to industrial unrest

- a mechanism for dealing with disputes which leads to greater industrial harmony and hence to a focus on productivity
- a more rapid adjustment to safety, environmental, planning and other issues impacting on the industry resulting in increased community benefits because of the negotiation of collective agreements as opposed to numerous individual negotiations
- an increase in competition between processors from differentiated contracts between grower groups
- increased consumer satisfaction due to an increased ability to adjust production to meet the needs of consumers
- processors will be able to specify the needs of their buyers (consumers) more clearly in contracts to groups of growers who are needed to produce chickens meeting those requirements
- increased productivity from more efficient matching and pricing of processor and grower capabilities
- improved incentives for capable growers
- a stronger Victorian industry (and hence employment in regional areas) which is better equipped to withstand interstate competition, competition from overseas imports and competition from other products and
- a more rapid growth rate.

Anti-competitive detriments

6.16 The Applicants submit that the major potential anti-competitive detriments from the conduct are:

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

7 Interested parties' submissions

- 7.1 The ACCC sought submissions from a wide range of interested parties. A total of 11 submissions were received from ten parties. The VFF lodged submissions on behalf of their members in relation to both the request for interim authorisation and the request for substantive authorisation. Seven Victorian chicken meat growers supplied separate submissions on their own behalf and two submissions were received from members of the Victorian Parliament.
- 7.2 Copies of submissions received are available on the ACCC's public register.

The VFF submissions

- 7.3 The VFF lodged a submission dated 4 May 2004 in relation to the request for interim authorisation and a further submission dated 26 May 2004 in relation to the substantive request for authorisation. Each submission is summarised below, however, where information was supplied in the 4 May 2004 submission and is reiterated in the 26 May 2004 submission, it is not repeated in this draft determination.

Submission of 4 May 2004

- 7.4 The VFF opposes the granting of interim authorisation to the processor applications because, the VFF claims, the processors cannot deliver the claimed public benefits and in fact the conduct will result in public detriment through reinforcing the market power held by the processors. Further, the VFF claims that the applications are unable to provide collective negotiations throughout the industry as they are flawed and growers will not become a party to the applications to enable those flaws to be overcome.
- 7.5 The VFF submit that the specific behaviour that is to be authorised has not been clearly identified and the application does not adequately cover the issues raised by the Jones decision.²¹
- 7.6 The VFF claim that at least three of the applications fail to address the full range of collective behaviours necessary to allow effective operation of the authorisations. The applications submitted by Hazeldene, Inghams and Baiada are without the support of any consenting growers and cannot provide a functioning collective arrangement.
- 7.7 The VFF submits that it also has concerns with the practicalities of the La Ionica application with the only consenting grower being a company owned farm.

²¹ *Jones v ACCC [2003] FCAFC 164;(2003) 200 ALR 234*

- 7.8 The VFF submits that the claimed public benefits of the proposed authorisations can only be obtained if growers make use of the authorisations. Members of the VFF Chicken Meat Group are opposed to the authorisation applications submitted by the five Victorian integrated chicken meat processors and no Chicken Meat Group member will be party to the proposed collective negotiations if the processor applications are granted interim authorisation. Therefore, the public benefits claimed to flow from the processor applications will not occur.
- 7.9 The VFF claims that the applications, if granted, would result in authorisations identical to the Marven authorisation in the respect that there is no mechanism to encourage both parties to reach agreement. This, the VFF claim, will lead to ongoing negotiations as processors use delaying tactics in order to increase the pressure on growers to accept processor dictated terms and conditions.

Submission of 26 May 2004

- 7.10 The VFF submits that the matter essentially requiring authorisation is the collective bargaining of contracts on the part of growers, and it is the growers who are the appropriate persons to apply for that authorisation. The VFF submits that as none of their members will consent to the relevant processor applications and none of the consenting growers for Bartter or La Ionica will be a party to the necessary collective discussions between non-consenting growers, additional authorisations will be required. The VFF submits that if the growers themselves obtain authorisation the need for processors to gain protection for themselves is removed and therefore no public benefits would flow from the current applications.
- 7.11 The VFF submits that aside from the technical issues associated with the applications, the claimed public benefits of the proposed authorisations can only be obtained if growers make use of the authorisations. The majority of Victorian growers are members of the VFF Chicken Meat Group and these members have indicated that they will refuse to operate under the collective arrangements as proposed in the processor applications.
- 7.12 The VFF submits that even if growers were to consent to operate under the framework proposed in the current applications, a framework essentially identical to that of the Marven authorisation, the experience is that agreements will not be reached, or growers will be forced, due to their inherent poor bargaining position, to accept terms and conditions which will ultimately result in a public detriment.
- 7.13 The VFF submits that their member growers attempted to negotiate agreements with processors under the framework provided by the Marven authorisation however they found it virtually impossible to make any progress in negotiating agreements. The claim that their member growers found that processors actively sought to exclude growers from entering the collective negotiations, and delay the negotiation process.
- 7.14 The VFF dispute the processors claim that there is only a perception of an imbalance in bargaining power between growers and processors.

- 7.15 Furthermore, the VFF submits, it is the contention of the VFF that this imbalance in bargaining power does result in a public detriment; and that the collective bargaining framework proposed in the processor applications, at best, does nothing to counter the imbalance, and based on previous experience, actually enshrines the weak position of growers.
- 7.16 The VFF submits that the market for the acquisition of growing services in Victoria is typified by the absence of competition. It states that it is claimed in the processor's application that most growers are located in proximity to a number of buyers, with the exception of growers located around Bendigo. The VFF suggests that most of the growers in the Geelong area are also an exception. However, the proximity to a number of processors is not indicative of the level of competition between processors for grower services. In fact it is the history of the industry that processors do not compete for the services of efficient growers.
- 7.17 The VFF submits that the Victorian market for growing services is typified by processor monopsonies based on geographic location, and processor specific facility requirements. They claim that at best the market can be categorised as two monopsony markets for growers in the Bendigo and Geelong areas, and an oligopsony market with the remaining growers having access to three processors. The VFF claims that in the absence of any desire by processors to compete for another processor's growers, each processor effectively operates a monopsony market for their particular growers.
- 7.18 The VFF does not dispute that improving the bargaining power of growers is a public benefit, however, it argues that the nature of the proposed authorisation will not result in growers being in a better position in relation to bargaining with processors. In fact, the VFF claim, it is more likely that the proposed structure will enshrine a set of rules imposed on the way in which growers bargain that further reduces grower bargaining power.
- 7.19 In addition, the VFF does not dispute that an appropriate authorisation could provide savings in transaction costs. However, the VFF claim, previous experience has shown that an authorisation as proposed will lead to protracted negotiations due to the mismatch in imperative to reach agreement. The VFF claims that as the negotiations will usually result in an increase in the growing fee, postponing those negotiations delays the introduction of any new fee the processors must pay.
- 7.20 The VFF submits that if growers are in no better bargaining position and processors delay negotiations to place more pressure on growers to accept terms and conditions they would not otherwise accept, it is likely that the authorisations will increase sources of conflict.
- 7.21 The VFF submits that the authorisations as proposed in the processor application will not create a stronger Victorian chicken growing industry. Grower confidence and willingness to invest will diminish as the market power of the processors will

be maintained, if not increased through an inappropriate code of practice, and a lack of any mechanisms to encourage bargaining in good faith.

- 7.22 The VFF claims that the history of authorisations, such as that proposed, is that they have failed to achieve sustainable outcomes in both the South Australian and Victorian chicken meat industries and have been used as a tool by processors to further disadvantage growers. The VFF on behalf of their member growers state that their application (A40093) is a more appropriate application and one which has broad support.

Further interested party submissions

- 7.23 The ACCC received seven submissions from Victorian chicken meat growers all of whom opposed the processors applications for authorisation on the basis that they do not have the wider support of Victorian chicken growers and that the preferred framework for negotiations is the one proposed in the VFF's application for authorisation (A40093).
- 7.24 Further, a number of growers noted that the public benefits claimed by the processors would not flow because the growers would not participate in the proposed arrangements.
- 7.25 The ACCC received submissions from the state member for South Barwon, Mr Michael Crutchfield MLA and the state member for Narre Warren North, Mr Luke Donnellan MP. Both Mr Crutchfield and Mr Donnellan oppose the processors applications.
- 7.26 They both identify the lack of support by growers for the applications and the framework proposed by the processors as the applications major failings. In addition, Mr Donnellan submits that there is a significant public policy issue with granting authorisation to a party with such significant market power.

8 ACCC assessment - Relevant markets

Market definition

- 8.1 The first step in assessing the competitive effects and the public benefit/detriment 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 anti-competitive 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 Steggle 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 growers²² 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

²² 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 Applicants submit that there are two markets of relevance relating to the current application:
- the Victorian market for chicken meat and
 - the market for chicken growing services.
- 8.8 As mentioned in section 2, the Applicants submit that the Victorian market for chicken meat is highly competitive at the production, wholesale and retail levels. However, the Applicants submit that whilst most chicken meat produced in Victoria is consumed in Victoria, current transportation technology means that fresh chicken meat can be transported safely and economically anywhere in eastern Australia within 24 hours.
- 8.9 The VFF has submitted in both its submission in relation to the current processor applications and its submission in support of its own applications for authorisation on behalf of its member chicken meat growers (A40093 and A90931) that the Victorian chicken growing market is divided into two regional monopsonies and a regional oligopsony. The VFF claims that these regions are delineated by a grower's access to a processor's facility.
- 8.10 The VFF 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.
- 8.11 In relation to the wholesale market for the sale of chicken meat, the VFF has submitted 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.

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 Applicants and the VFF 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 supply of chicken growing services, it is arguable that the market for those services in Victoria is, as the VFF 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 toward 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 hours 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.

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 anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 9.2 Under this test, the ACCC compares the public benefit and anti-competitive 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.
- 9.3 However before the ACCC can assess the future with-and-without test in this instance, it must firstly consider two issues that will impact on its decision. These are:
- the processor applications and
 - the proposed VFF authorisation

The processor applications

- 9.4 The ACCC considers that due to the lack of grower support for a majority of the processor applications and in light of the Jones decision (outlined in section 2), issues as to the validity of the processors applications arise.
- 9.5 A detailed explanation of the ACCC’s position as to the validity of the processor applications may be found in a discussion paper previously published on its website.
- 9.6 In short, The ACCC considers each application is valid but that given the absence of grower support for future collective bargaining arrangements in the majority of applications those arrangements are unlikely to be capable of being put in to practice.
- 9.7 The ACCC considers that authorisation could be granted to the continued giving of effect to arrangements entered into under the previously authorised arrangements (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). In respect of those La Ionica and Bartter growers who did not consent to the applications, they could still be authorised to collectively negotiate new arrangements with La Ionica and Bartter, provided at least one grower who has consented to the application is a party to any agreement between the growers to collectively negotiate.

- 9.8 The ACCC considers that in respect of the negotiation of future contracts by those processors that do not have any grower support (Hazeldene, Inghams & Baiada) the necessary precondition for collective negotiations to occur, namely agreements between growers alone, would not be covered by any authorisation granted and if it did occur it would likely be in breach of the TPA.

The proposed VFF authorisation

- 9.9 The ACCC is currently considering an application for authorisation from the VFF, on behalf of its member chicken meat growers, to allow those individual growers to act collectively in, amongst other things, negotiating the terms and conditions, including growing fees, of their broiler chicken growing contracts. The growers have also applied for the right to collectively boycott processors.
- 9.10 The ACCC has issued a draft determination in relation to the VFF's application for authorisation at the same time as issuing this draft determination. In the VFF draft determination, the ACCC proposes to allow VFF member chicken growers to collectively bargain with their respective processors.

Consideration of the counterfactual

Existing contracts

- 9.11 In relation to the applications from Bartter and Baiada, insofar as they seek protection for grower contracts negotiated under the Marven authorisation, the ACCC considers that absent authorisation, the parties are likely to continue using those contracts but will do so with uncertainty. While the parties may later avail themselves of individual or otherwise authorised collective bargaining arrangements, the counterfactual would be a period of continued contractual uncertainty.

Future arrangements

- 9.12 As discussed previously, the ACCC considers the applications in relation to future collective bargaining arrangements are significantly limited by the lack of grower support for the majority of processor applications.
- 9.13 The ACCC considers that the applications from Baiada, Inghams and Hazeldene in relation to future negotiations will not be able to be put into effect without first their respective growers also seeking protection for agreements between themselves. On this basis, the ACCC considers that with or without authorisation, future collective bargaining under these arrangements will not occur.
- 9.14 The proposed future arrangements the subject of the application from La Ionica, is capable of being put into place without the need for further authorisation of grower agreements in light of the support for the application given by Tarwood. In practice, however, the non-consenting La Ionica growers have submitted that they will not participate in any processor authorised arrangements. Indeed, those non-

consenting growers have sought authorisation for their own collective bargaining arrangements which the ACCC proposes to grant. On this basis, the ACCC again considers that with or without a processor authorisation, future collective bargaining under the proposed La Ionica arrangements will not occur.

- 9.15 The arrangements proposed in the Bartter application are different. They have the support of nine of their contract growers. Protection can therefore be afforded to agreements between these growers and indeed between any of these growers and non consenting growers. In practice, given their consent, the ACCC considers it likely that the nine consenting growers would participate in collective bargaining with Bartter. While the application is capable of extending to non-consenting growers who also might wish to participate, those non-consenting growers have also submitted that they will not participate in any processor authorised arrangements and have also applied for their own collective bargaining arrangements which the ACCC proposes to grant.
- 9.16 The ACCC considers, the likely counterfactual in relation to the Bartter application is one where the nine consenting Bartter growers would either operate under individually negotiated contracts or would join the VFF member collective bargaining groups.
- 9.17 The form that any individual negotiations might take is somewhat difficult to speculate given that collective negotiations, in one form or another, have apparently been occurring for over 20 years.
- 9.18 Absent authorisation, the processors would have two options available to them in offering contracts to the 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.
- 9.19 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.
- 9.20 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.

- 9.21 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.
- 9.22 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.
- 9.23 In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, 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.
- 9.24 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

- 9.25 For the reasons outlined above, the ACCC is of the view that the assessment of the effects on competition and the public benefits will be limited to an assessment of those aspects of the proposed arrangements that could work in practice, namely, the giving effect to existing contracts negotiated under the Marven authorisation (Bartter and Baiada) and the future collective negotiations of contracts by the nine consenting Bartter growers.

10 ACCC evaluation - 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.
- 10.2 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.

Giving effect to existing contracts

- 10.3 In relation to the applications made by Bartter and Baiada to give effect to grower contracts entered into under the Marven authorisation, the ACCC considers that given authorisation would simply provide contractual certainty to contracts legitimately entered into under that authorisation, there is no identifiable anti-competitive detriment from those aspects of the processor applications.

Future collective bargaining arrangements

- 10.4 As discussed in section 9, the ACCC considers that the only future collective bargaining arrangements proposed by processor that are likely to actually occur are those between Bartter and its nine consenting growers. The following discussion, therefore, is limited to the potential anti-competitive effects of those arrangements.
- 10.5 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.
- 10.6 In respect of the future collective bargaining arrangements proposed by Bartter the ACCC considers that there are three main areas where they may potentially have an anti-competitive effect:
- lost efficiencies resulting from collusion
 - reduced scope for new market entry and
 - increased potential for collective activity beyond that authorised.

Lost efficiencies resulting from collusion

- 10.7 A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price to be paid to the group and other terms and condition of supply or acquisition.

- 10.8 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.
- 10.9 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.
- 10.10 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.
- 10.11 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.²³
- 10.12 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.
- 10.13 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.
- 10.14 In this case, the Applicants submit that collective negotiations between the growers and the Bartter may lead to higher fees paid to growers and less flexible contracts than would be the case if the contracts were negotiated individually.
- 10.15 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following five 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 negotiate, is low
 - there is voluntary participation in the arrangements
 - there are restrictions on the coverage and composition of the bargaining group
 - there is limited capacity for any price rises to be passed on to consumers and
 - there is no boycott activity.

²³ Section 45A of the TPA

- 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), Bartter 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, absent authorisation, the level of competition between those parties seeking to collectively negotiate, with respect to those matters on which they are seeking to collectively negotiate, would be low. That is to say, the nature of the industry, and the relationship between processors and growers, is such that generally speaking, if individual negotiation was to occur, growers 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. While the proposed arrangements may result in a different set of standard terms being offered than would be the case if negotiations were to occur individually, by virtue of the increased bargaining power of the growers, they are unlikely to reduce competition between growers on negotiating those terms as such competition, were growers to negotiate individually, would still be limited.

2. Voluntary participation

- 10.21 As noted, the proposed arrangements are voluntary. Neither Bartter, nor individual growers, would be compelled to participate in the proposed arrangements. Each would remain free to individually negotiate either variations to the collectively

agreed contract or to negotiate individual stand alone contracts. To the extent that growers could, absent of the proposed arrangements, compete to provide growing services to processors, the voluntary nature of the proposed arrangement provides for such ongoing competition.

- 10.22 Growers who consider that they will be able to negotiate a more commercially attractive arrangement, most likely to be the most productive growers, either by variations to the collective agreement, or through negotiating individually, will remain free to do so. Consequently, incentives for growers to compete on price, to innovate, or to otherwise improve their quality of services, to the extent that they exist, will not be reduced by the proposed arrangements to the extent that they that they might otherwise be.
- 10.23 In this respect, the ACCC notes that collectively negotiated contracts will only be agreed and implemented where both growers and Bartter 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 inefficiency which may result from any reduced flexibility in contracts entered into.

3. Coverage and composition of bargaining groups

- 10.24 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, 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.
- 10.25 The coverage, composition and representation of the proposed bargaining group is somewhat restricted. The ACCC considers that whilst it is possible for non-consenting growers to participate in the arrangements it is more likely that only the nine consenting growers will participate because of the ACCC’s proposal to grant the non-consenting growers authorisation to collectively bargain under their own framework. In any case, the proposed bargaining group would, at its widest, consist only of those growers that supply Bartter.

4. Constraints on price rises

- 10.26 The ACCC considers that the effect of allowing Bartter growers to collectively bargain under the arrangements proposed by the Applicants may well be an increase in the growing fee paid to them by Bartter, however, the ACCC is of the view that the passing on of any increase to consumers by Bartter of costs from higher growing fees is likely to be constrained at the wholesale market level by large buyers with significant purchasing power.

- 10.27 The ACCC considers that, to the extent that any increased costs were passed on by Bartter, 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.

5. Boycott activity

- 10.28 It is not proposed that any collective boycott activity occur. While there are circumstances in which the ability to boycott may in itself generate a net public benefit, more generally, collective boycotts can significantly increase any anti-competitive effects of collective bargaining arrangements. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.
- 10.29 In light of the above four features, the ACCC considers 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 market entry

- 10.30 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.
- 10.31 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

- 10.32 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.

- 10.33 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.
- 10.34 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.

Features lessening barriers to entry

- 10.35 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.
- 10.36 The ACCC considers that the formation of long term contracts between Bartter and the participating 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.

Potential for collusive activity beyond that authorised

- 10.37 In considering collective bargaining arrangements in the past, the ACCC has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct.
- 10.38 Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 10.39 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA, as is generally the case in the ACCC's consideration of applications for authorisation.
- 10.40 Generally, the ACCC considers that there is no evidence to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the consenting parties to the application.
- 10.41 With respect to collective boycotts, as noted, authorisation has not been sought for any such activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

Conclusion on anti-competitive effect of the proposed arrangements

- 10.42 For the reasons outlined above, the ACCC considers the anti-competitive detriment generated by the proposed arrangement to be negligible. The ACCC considers that, even absent of the proposed arrangements, the right to supply growing services to Bartter would be likely to be subject to somewhat standard terms and conditions. The ACCC is of the view that the difference between the level of competition amongst growers over contract terms and conditions with or without the proposed arrangements would be small.
- 10.43 To the extent that, absent authorisation, there is scope for individual growers to vary the terms of growing contracts, the proposed arrangements will not reduce their scope to do so. Bartter 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.
- 10.44 In addition, the ACCC notes that, even where growers are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.

11 ACCC evaluation - Public benefits

- 11.1 In order to the 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.

Giving effect to existing contracts

- 11.2 In relation to the applications made by Bartter and Baiada to give effect to grower contracts entered into under the Marven authorisation, the ACCC considers that as authorisation would provide contractual certainty to contracts legitimately entered into under that authorisation, there would be a clear public benefit from authorising those aspects of the processor applications.

Future collective bargaining arrangements

- 11.3 The Applicants submit that granting authorisation for consenting growers to collectively negotiate their chicken growing contracts will result in a number of benefits to the public.
- 11.4 As discussed in section 9, the ACCC considers that the only future collective bargaining arrangements proposed by processor that are likely to actually occur are those between Bartter and its nine consenting growers. The following discussion, therefore, is limited to the claimed public benefits of those arrangements.

Increased grower input into contracts

- 11.5 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.
- 11.6 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.
- 11.7 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.
- 11.8 In respect of the proposed arrangements, the Applicants submit that allowing chicken meat growers to bargain collectively will assist in countering the perception that there is a power imbalance between processors and growers.

- 11.9 The ACCC considers that individual growers are in a comparatively weak bargaining position given the difficulties they would face in switching processors in the event that they were unable to negotiate a satisfactory agreement with Bartter. As noted, it could be expected that the consequence of such a bargaining power imbalance would be the offering of standard form contracts on a 'take it or leave it' basis with limited scope for variation of terms and conditions to be negotiated or for effective input by growers into the contractual terms and conditions.
- 11.10 In the current circumstances, the ACCC accepts that there is an imbalance in bargaining power between chicken meat growers and Bartter, which would, if growers were required to negotiate individually, limit their capacity to have effective input into contract terms and conditions.
- 11.11 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.
- 11.12 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.
- 11.13 The ACCC considers that the proposed collective bargaining arrangements would improve growers' bargaining position in negotiations with Bartter and provide a greater opportunity for growers to have more effective input into contracts terms and conditions and to the extent that this leads to efficiency gains, this outcome would give rise to public benefits.

Transaction cost savings

- 11.14 The Applicants submits that there will be some cost savings from allowing chicken meat growers to bargain collectively. 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 Applicants claim that Bartter would also have a reduction in their costs by conducting negotiations with the group rather than individually with growers.
- 11.15 In considering previous applications for authorisation, the ACCC has noted that, as claimed by the Applicants, 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 acquirer 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.

- 11.16 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.
- 11.17 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 their growing contracts individually.
- 11.18 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 for the most part, chicken meat growers have not 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 Bartter. The ACCC considers that because growers would have no mechanism to discuss their contracts with their growing group, these costs would be borne by each individual grower, costs which would not occur with the proposed collective bargaining arrangements in place.
- 11.19 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.
- 11.20 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.

Reduced industrial unrest through an agreed dispute resolution process

- 11.21 The inclusion of a fair and equitable dispute resolution process in any collectively negotiated agreement is likely to be beneficial to all parties to the agreement. However, the same is also true of many of the other, often essential, terms and conditions of any commercially negotiated agreement (for example provisions regarding price and other terms of supply). The mere inclusion of a dispute resolution process in a collectively negotiated agreement does not necessarily in itself generate a public benefit.
- 11.22 Rather, like many other terms and conditions of any commercial agreement, it serves to provide for a workable set of commercial arrangements between the parties to the agreement. Whether such dispute resolution processes are formalised within the terms of the agreement is essentially a commercial matter for the parties to the agreement.
- 11.23 The ACCC is not satisfied that the specific dispute resolution mechanism in respect of the proposed arrangements will provide for greater industrial harmony and productivity by formalising an agreed conflict resolution and mediation process.

Rapid adjustment to safety, the environment and planning issues

- 11.24 In previous determinations the ACCC has noted that the inclusion of provisions addressing issues such as safety, the environment and planning in grower contracts is not necessarily dependant on collective bargaining arrangement. Where there is a wish to incorporate such issues into grower contracts, the ACCC considers that this is equally capable of being achieved through individually negotiated contracts.
- 11.25 More generally, to the extent that these issues arise, they are capable of being dealt with through industry dissemination of information via publications, seminars and meetings without the need for collective bargaining.
- 11.26 Consequently, the ACCC does not accept these as public benefits resulting from the arrangements for which authorisation is sought.

Improved incentives for efficient growers

- 11.27 Having incentives for efficient growers built into contracts is likely to create a more competitive growing environment than having a flat rate fee for all growers.
- 11.28 As noted previously, the proposed growing agreements contain provisions, including a Pool Payment System, which the ACCC considers provides a significant incentive for growers to compete with one another and to continue improving and modernising their businesses.
- 11.29 However, the ACCC does not consider that incorporating such provisions into growing contracts is dependent on growers collectively bargaining with Barter.

Such provisions are equally able, if not more so, to be incorporated into contracts under a system of individually negotiated agreements.

Increased productivity

11.30 The Applicants submit that allowing Victorian chicken growers to collectively bargain will increase productivity by improving efficiencies for both processors and growers. As noted in section 10, the ACCC considers that, generally speaking, collective bargaining in comparison with effective individual negotiations, is likely to reduce competition.

11.31 However, as noted earlier in this section, in a situation where collective bargaining increases 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. The Applicant's arguments under this heading, however, do not advance their claimed public benefits beyond that accepted earlier in this section.

Create a stronger Victorian industry

11.32 The ACCC considers that any improvement in the competitiveness of the Victorian industry, which would be likely to be reflected in lower prices and higher quality of service, would be a public benefit. However, the ACCC is of the view that any efficiencies achieved from such competition, and therefore any resulting public benefits, have already been considered early in this section.

12 Balance of public benefits and detriments

Giving effect to existing contracts

- 12.1 The ACCC considers that, as discussed in sections 10 and 11, granting authorisation in respect of the applications made by Bartter and Baiada to give effect to grower contracts entered into under the Marven authorisation would serve to provide contractual certainty to those contracts. This contractual certainty would, in the ACCC's view, have no identifiable anti-competitive effect and would result in a clear public benefit.

Future collective bargaining arrangements

- 12.2 With respect to the future collective bargaining arrangements proposed in the processor applications, the ACCC considers, for the reasons outlined in section 9, that these arrangements are likely to only occur between Bartter and its nine consenting growers. Consequently, the discussion in section 10 which related to the anti-competitive effects of the proposed arrangements and in section 11 which related to the claimed public benefits of the arrangements, were limited to considering those arrangements.
- 12.3 In respect of the Bartter application, the ACCC considers that there are several features of the proposed arrangements which limit the potential detrimental effect on competition of collective bargaining, including:
- the inclusion in the contract of a comparative performance scheme
 - participation in the arrangements is voluntary for both growers and Bartter
 - there is no proposed collective boycott activity and
 - the negotiating group is effectively limited to a group of nine consenting growers.
- 12.4 In addition, the ACCC considers that there are a number of industry specific factors which will further 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 group, 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

- 12.5 The ACCC considers that the combined effects of these contract features and industry factors serve to mitigate the potential anti-competitive effects of collective bargaining.
- 12.6 The ACCC accepts that some public benefits are likely to arise from the proposed arrangements. The ACCC considers the most significant of these 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.
- 12.7 Consequently, following consideration of the arguments advanced by the Applicants and interested parties, the ACCC concludes that, with respect to the application by Bartter and its consenting contract chicken meat growers to collective bargain future growing contracts, the public benefits likely to result from those collective bargaining arrangements will outweigh the potential detriments of the arrangements.
- 12.8 The ACCC considers that in respect to the remaining aspects of the Inghams, La Ionica, Hazeldene and Baiada applications, because they do not, for the most part, have any grower support they are unlikely to result in future collective bargaining and therefore are unlikely to produce any of the claimed public benefits.

13 Draft determination

The application

- 13.1 On 19 December 2003, Bartter Enterprises Pty Ltd, on its own behalf and on behalf of nine of its contract chicken growers, lodged an application for authorisation with the ACCC. In addition, four related applications were received from La Ionica Farming Operations Pty Ltd (and one consenting grower), Baiada Poultry Pty Ltd, Inghams Enterprises Pty Ltd and Hazeldene Chicken Farm Pty Ltd.
- 13.2 Each application was made pursuant to section 88(1) of the TPA for 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.²⁴
- 13.3 Specifically, the Applicants seek authorisation for their role in future collective bargaining with their contracted growers and, in some instances, the giving of effect to contracts already negotiated between individual processors and their growers acting collectively (Bartter and Baiada). The applications are also made on behalf of nine consenting Bartter growers and one consenting La Ionica grower for their role in collective bargaining with their processor.
- 13.4 The proposed collective bargaining process is anticipated to occur in accordance with the Code of Conduct which was submitted with the applications.

Statutory test

- 13.5 For the reasons outlined in this draft determination, the ACCC is satisfied that, with respect to the application by:

Bartter and its consenting chicken meat growers:

- the giving effect to existing contract arrangements and
- the making of future contracts and the giving effect to the provisions of future contracts for which authorisation is sought under subsection 88(1) of the TPA:

- (a) would be likely to result in a benefit to the public and

²⁴ The application has also been considered as an application under the *Competition Code* of Victoria.

- (b) that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Baiada:

- the giving effect to existing contract arrangements:
 - (a) would be likely to result in a benefit to the public and
 - (b) that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Baiada, Ingahams, La Ionica and Hazeldene:

- the making of future contracts and the giving effect to the provisions of future contracts for which authorisation is sought under subsection 88 (1) of the TPA:
 - (a) would not be likely to result in a benefit to the public.

Conduct authorised

- 13.6 In relation to application A90901 (Bartter) and pursuant to section 88 of the TPA and the Competition Code:

The ACCC proposes to grant authorisation to allow Bartter and its consenting chicken meat growers to continue giving effect to existing chicken growing contracts previously negotiated under the Marven authorisation. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

The ACCC also proposes to allow Bartter and its consenting chicken meat growers to collective bargain future chicken growing contracts, in accordance with the Code of Conduct, and to give effect to contracts reached pursuant to those arrangements. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

- 13.7 In relation to application A90905 (Baiada) and pursuant to section 88 of the TPA and the Competition Code:

The ACCC proposes to grant authorisation to allow Baiada to continue giving effect to existing chicken growing contracts previously negotiated under the Marven authorisation. The ACCC proposes to grant authorisation for a period of five years from the date the final determination comes into effect.

- 13.8 The ACCC proposes to deny all other aspects of the processor applications.
- 13.9 The interim authorisation provided by the ACCC will remain unchanged and those aspects of the arrangements which were granted immunity 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.
- 13.10 The ACCC considers that to the extent that the Applicants, or any other party to whom immunity is provided by the proposed authorisation, acts outside of the authorised arrangements 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.