



Determination

Applications for Authorisation

lodged by

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

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

Date: 2 March 2005

Commissioners:

Samuel
Sylvan
King
Smith
Willet

Authorisation nos. A40093, A90931

Public Register nos. C2004/642, C2004/1364

Executive summary

The applications

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

The authorisation process

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

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

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

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

The proposed arrangements

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

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

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

Draft determination

On 17 November 2004, the ACCC issued a draft determination in respect of the VFF applications. In its draft determination the ACCC proposed to grant the VFF authorisation to allow its member chicken meat growers to collective bargain with their

respective chicken meat processors and, under certain conditions, to collectively boycott those processors.

Assessment of benefits and detriments

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

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

Collective bargaining

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

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

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

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

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

This said, the ACCC considers that the anti-competitive effect of the arrangements would also be significantly lessened if the specific negotiation procedures proposed at annexure B of the VFF applications and the terms and conditions included in annexure C of the applications were open for growers and processors to negotiate.

Collective boycotts

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

In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers. The ACCC also has concerns about the potential animal welfare issues associated with grower boycotts.

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

- the restraint which growers are likely to adopt in using boycotts as a last resort to avoid damage to their business and the poor relations that might arise with processors
- the ability to engage in collective boycott's only at the time of negotiating new contracts and only after complying with certain conditions
- the chicken meat production process is sufficiently flexible to allow, to a large extent, for alternative shedding and production arrangements to be made by processors and
- the relative impact on the national market for the supply of chicken meat as a result of boycott activity is likely to be limited.

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

Public benefits

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

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

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

Balance of public benefits and detriments

Following the arguments advanced by the Applicant and interested parties and despite the mitigating factors referred to above, the ACCC is not satisfied that, without the imposition of certain conditions:

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

However, by imposing certain conditions on the proposed collective bargaining and boycott arrangements, the ACCC considers the balance of public benefits and detriments will be shifted. The ACCC at section 13 of this determination, therefore, grants the authorisation on the following terms:

Collective bargaining

VFF member chicken meat growers may form into groups, based on the VFF Chicken Meat Group (grower group) with whom they are affiliated, and those grower groups may collectively bargain at any time during which this authorisation is in effect:

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

The ACCC grants the authorisation to the grower groups to collectively bargain subject to their complying with the following conditions:

1. All those matters described in annexure C to the VFF's application will be open to negotiation between the parties and will not be mandatory.
2. Grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their grower group.
3. Grower groups must not use common representatives or representation.

Collective boycott

In the context of collectively bargaining new chicken growing contracts, growers may collectively agree to withdraw supply of their growing services (collectively boycott) from the processor affiliated with their grower group subject to the grower group complying with the following conditions:

4. The grower group must contact their processor and advise them that they wish to begin collective bargaining new chicken growing contracts.

5. No sooner than six months after complying with the requirement described in condition 4 of this determination, the grower group must, before they will have protection under the TPA to engage in a collective boycott, invite their processor to participate in mediation with a suitably qualified and independent mediator.
6. The grower groups must, before they will have protection under the TPA to engage in a collective boycott, provide a notice (“notice of intention to boycott”) in writing to their processor a minimum of 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from their processor. Such a notice of intention to boycott must include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. The notice of intention to boycott may only be issued a minimum of 7 days after complying with the requirement described in condition 5 of this determination.
7. Any aspects of annexure B not encompassed by conditions 4, 5 and 6 of this determination will be open to the parties to negotiate.
8. A party authorised by this determination to participate in a collective boycott cannot do so if they have an existing chicken growing contract under which they are obliged to provide growing services.
9. The growing of any batch of chickens held by a party authorised by this determination to participate in a collective boycott, at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.

The ACCC is satisfied that the public benefits of the proposed collective bargaining arrangements on these terms would outweigh their potential anti-competitive detriments and the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Determination

Therefore, at section 13 of this determination, the ACCC grants authorisation pursuant to section 88 of the TPA and the Competition Code, on the terms described above, for a period of five years.

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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 Once a draft determination is released, the applicant, or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC's decision and provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.5 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and/or decrease the public detriment.
- 1.6 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.

The current applications

- 1.7 On 5 May 2004, the Victorian Farmers Federation (VFF) on behalf of its member Victorian chicken meat growers (collectively know as “the Applicant”) applied to the ACCC for authorisation to allow those member growers to collectively negotiate chicken growing contracts with their respective processor (A40093).
- 1.8 The VFF’s application sought to allow the members of individual grower groups to act collectively in:
 - negotiating the terms and conditions, including growing fees, of broiler chicken growing contracts
 - negotiating any necessary future amendments or adjustments to the growing fee or the broiler chicken growing contracts and
 - in relation to negotiations for the resolution of disputes which may arise between the grower group and their processor.
- 1.9 On 15 September 2004, the VFF lodged a further application for authorisation (A90931) with the ACCC which sought, under certain circumstances, to allow its member chicken meat growers to collectively boycott supply of chickens by their processor.
- 1.10 On 17 November 2004, the ACCC issued a draft determination in respect of the VFF applications. In its draft determination the ACCC proposed to grant the VFF authorisation to allow its member chicken meat growers to collective bargain with their respective chicken meat processors and, under certain conditions, to collective boycott those processors.
- 1.11 This document is the determination in relation to the VFF applications.

2 Industry background

The national processed chicken meat industry

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

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

² Ibid

³ Ibid

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

⁵ Ibid

Chicken growing services

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

Related authorisations

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

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

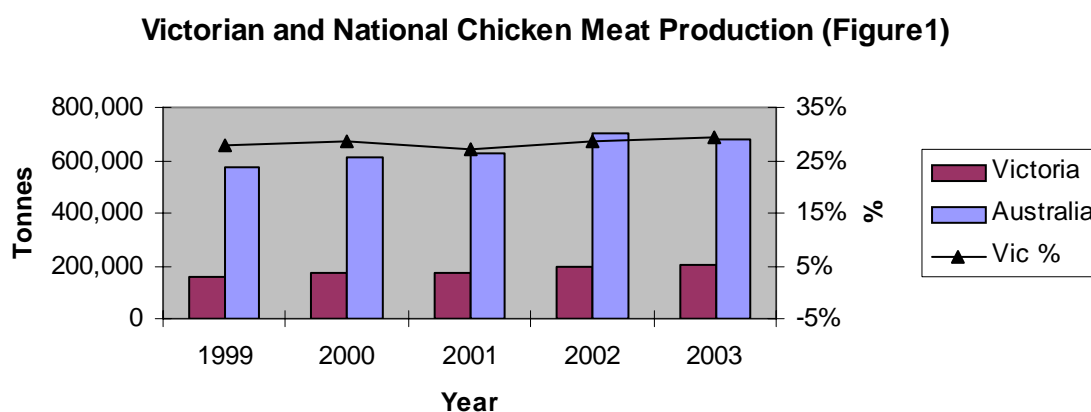
2.11 Authorisations granted by the ACCC in recent years to engage in similar collective bargaining arrangements to the current applications include:

- 9 April 1997- (A90595) Inghams was granted authorisation for its South Australian growers to collectively bargain.
- 20 May 1998- (A30183) Steggles Limited (now fully owned by Bartter) was granted authorisation for its South Australian growers to collectively bargain.
- 19 May 2004- (A90888) Inghams' Tasmanian chicken growers were granted authorisation to continue collectively negotiating chicken growers contracts.

2.12 On 8 October 2002, an application for authorisation lodged by New South Wales chicken meat processors (A90800) was denied by the ACCC primarily because of changes in that state's legislation relating to its re-regulation of certain aspects of the chicken industry.

Victorian industry

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



Source: Australian Bureau of Statistics

2.14 The Applicant claims that the contract growers who supply growing services to the industry are predominantly family owned and operated businesses. The individual farm size of the average VFF member is around 100,000 birds but can range from 25,000 to 400,000 birds.

2.15 The Applicant claims that there has been a trend for consolidation in the processing sector with Inghams, Bartter and Baiada Poultry Pty Ltd (Baiada) now controlling

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

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

3 Background to the applications

Regulation of the Victorian chicken meat industry

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

The Marven authorisation

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

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

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

⁸ Now fully owned by Baiada Poultry Pty Ltd

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

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

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

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

Current contractual arrangements

- 3.13 Notwithstanding the uncertainty in the industry, both the growers and the processors agree that, apart from some minor exceptions, all Victorian chicken meat growers have continued to receive supply of day-old chickens from processors. However, growers and processors do have differing views about the current status and validity of their growing contracts.

The current processor applications

- 3.14 In December 2003, the ACCC received five further applications for authorisation from Bartter (A90901), La Ionica (A90902), Hazeldene (A90903), Inghams (A90904) and Baiada (A90905) and some consenting growers (collectively known as ‘the processor applications’). The processor applications seek to allow the processors and consenting growers to engage in similar conduct, to that previously authorised by the Marven authorisation.
- 3.15 The processor applications were made by the processors for their role in future collective negotiations with their contracted growers and, in some instances, the giving of effect to contracts already negotiated between individual processors and their growers acting collectively. Nine Bartter growers and one La Ionica grower consented to the applications being made on their behalf for their role in collective negotiations with their processor. For the most part, however, the processor applications do not have the support of Victorian chicken meat growers.
- 3.16 The ACCC has issued a final determination in relation to the processor applications for authorisation concurrently with the VFF determination. In short, the ACCC has authorised the continued giving of effect to arrangements entered into under the Marven authorisation (the Bartter and Baiada contracts) and for the collective negotiation of future contracts by consenting Bartter growers. The ACCC has denied the remaining aspects of the processor applications.
- 3.17 A full copy of the determination in respect of the processor authorisation can be found on the ACCC’s website.

4 The VFF applications

- 4.1 On 5 May 2004, the VFF, on behalf of its member Victorian chicken meat growers, lodged an application for authorisation (A40093) with the ACCC.
- 4.2 The application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.¹¹
- 4.3 The Applicant also sought interim authorisation which was granted, to a limited extent, by the ACCC on 9 June 2004.
- 4.4 On 15 September 2004, the VFF lodged a further application (A90931) for authorisation pursuant to section 88(1) of the TPA:
- (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA and
 - (a) to give effect to a provision of a contract, arrangement or understanding, where the provision is, or maybe, an exclusionary provision within the meaning of section 45 of the TPA.
- 4.5 A copy of both VFF applications and their submissions in support are on the public register maintained by the ACCC. The main issues are outlined below.

The proposed arrangements

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

¹¹ The application has also been considered as an application under the *Competition Code* of Victoria.

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

The VFF and its members

- 4.8 The VFF submits that it is a company limited by guarantee arising out of a federation of primary production commodity groups which represents the interests of 23,000 farm members grouped together in 230 VFF branches based on the members’ main farming activity. The Chicken Meat Group is one of these commodity groups. Out of the 210 farmers providing chicken meat growing services in Victoria, 183 (86%) are members of the VFF Chicken Meat Group.
- 4.9 The members of the Chicken Meat Group are broiler chicken growers each of whom is contracted to one of the five companies¹² in Victoria which process chicken meat on a fully integrated basis for distribution and wholesale. The growers receive a growing fee for their services.
- 4.10 Membership of the VFF Chicken Meat Group is structured under a constitution on a branch basis, each branch comprising growers contracted to one of the five processors and being referred to as a group, with the result that there is an Inghams Growers Group, a Bartter Growers Group, a Baiada Growers Group, a La Ionica Growers Group and a Hazeldene Growers Group (collectively known as ‘the grower groups’).
- 4.11 The present members of each grower group are named in annexure D of the applications, a copy of which can be found on the ACCC’s website. The applications are also made on behalf of persons who may become VFF Chicken Group members in the future from time to time, and whose identities are not presently known.

The proposed contract negotiation process

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

¹² Bartter, La Ionica, Hazeldene, Inghams and Baiada.

- 4.13 The main aspects of the contract bargaining process as proposed by the Applicant are:
- A six month **bargaining period**¹³ preceding each **contract period**¹⁴ during which parties will collectively negotiate:
 - i. The base growing.
 - ii. A pool/comparative performance scheme.
 - iii. Facility standards and requirements to apply across the grower group.
 - iv. Other terms and conditions.
 - An annual review and adjustment of growing fees.
 - Growers may opt out of the collective negotiations at any time and negotiate on an individual basis with their processor if they so choose.
 - If contract negotiations are not successful after the six month bargaining period, the parties will submit to mediation by a mutually agreed mediator.
 - The mediation period will last for 28 days and if agreement has not been reached the grower groups will be entitled to collectively boycott the supply of day-old chickens from their processor. That is, growers may, if they so elect, refuse to accept supply of new chickens. However, they will continue to grow chickens they have already taken delivery of.
- 4.14 The Applicant submits that the ability to collective boycott will not extend to:
- disputes arising out of annual fee reviews (or the lack of a review) or
 - any contractual disputes in relation to contracts once entered into.
- 4.15 The Applicant submits that under the proposed arrangements, the period of the contracts which are entered into by members of a grower group would be geared to a cycle which contemplates the commencement of the bargaining period from the date when authorisation is first granted and a five year contract term (subject to minor variation depending when in the bargaining period the contract is entered into), the cycle ending five years and six months from the date of authorisation.
- 4.16 The Applicant states that it is intended there would be successive five year contract periods thereafter, as the last six months of each contract period would be the bargaining period for the next contract period. The Applicant proposes that a grower entering the industry during the contract period will receive a contract for the balance of that contract period.

¹³ To commence immediately following the VFF's applications being granted either interim or final authorisation by the ACCC.

¹⁴ The 'bargaining period' means the six months negotiation period immediately preceding the contract period and the 'contract period' means the five year period in which the contract is in effect

- 4.17 The Applicant states that during the contract term there would be reviews of the growing fee negotiated collectively by the grower group with their processor.
- 4.18 The Applicant submits that at the end of the five year period the process will be repeated with a bargaining period commencing six months before the end of the initial contract term.

Requirements for terms and conditions

- 4.19 In addition to the prescribed contract negotiation process, the Applicant submits that a number of specific provisions be included in the contracts, including:
- Processors not entering into a contract with any other grower the terms and conditions of which enable the other grower to be treated more favourably than those in the grower groups.
 - Individual growers having the option to suspend their contracts and withdraw their growing services if an acceptable growing fee increase is not agreed within the six month designated review and adjustment period.
 - A prescribed dispute resolution process.

The Applicant's supporting submission

- 4.20 The Applicant submits that there are a number of markets relevant to the applications for authorisation, most significant of which are the markets for:
- contract chicken growing services and
 - processed chicken meat.
- 4.21 The Applicant states that it disagrees with past ACCC considerations in which it has formed the view that the Australian chicken growing industry is effectively a state-based industry. The Applicant claims that the markets are actually separated into geographic markets (regions) as opposed to one state market.
- 4.22 The Applicant states that, typically, processors prefer to have their contract grower farms located within 80 kilometres of their processing facility which has resulted in there being three distinct geographic markets for growing services in Victoria:

Bendigo region- Hazeldene is the only processor in the region and growers operating in this area have no choice but to sell their services to Hazeldene.

Geelong Region- Bartter is the only processor in the region and the majority of growers are restricted to supplying this Geelong based processor.

Melbourne Region- The Melbourne region has three processors, Inghams, La Ionica, and Baiada although growers are still often limited in who they can supply.

- 4.23 The Applicant claims that this segregation of growers into distinct geographic regions is expected to continue.
- 4.24 The Applicant submits that from a processor perspective, the supply of chicken growing services is not restricted to Victoria or to any regional market therein. The Applicant claims that three of the five Victorian processors (Inghams, Bartter and Baiada) have access to contract chicken growing services in other states, including South Australia and New South Wales, where there is significant excess growing capacity.

Market factors: Barriers to entry, expansion and exit

- 4.25 The Applicant submits that the chicken growing industry is characterised by high barriers to entry and expansion which include:
- the high cost of building a new facility which can be in excess of \$5 million
 - shedding specification of particular processor
 - regulatory constraints and
 - limited access to industry information for growers.
- 4.26 The Applicant claims there are also barriers to exit in that a grower cannot simply sell the operational component of the business if they elect to exit the industry.

Market factors: Market dynamics

- 4.27 The Applicant claims that there are a number of significant market factors that the ACCC should consider in making its determination including:
- the acquisition of chicken growing services in Victoria is typified by the absence of competition between the processors
 - there is significant competition amongst growers
 - there are significant differences in supply and demand elasticities and
 - the potential for increases in efficiency in the market are stifled by the lack of competition between processors for growing services.

Other relevant markets

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

Genetic materials- The genetic stock from which a majority of chickens grown in Australia are based come from two breeds, the Cobb and the Ross. Bartter has the right to import Ross. Inghams and a consortium which includes Baiada have rights relating to Cobb.

Hatcheries- Inghams, Bartter, Baiada and Hazeldene own hatcheries in Victoria. La Ionica acquires their hatchery requirements from Baiada. Supplies from hatcheries are, however, not limited to Victoria.

Stock feed- Inghams and Bartter own and operate their own feed mills.

Horizontal arrangements- Processors have arrangements whereby they supply each other with services including their contract growers, eggs, day-old chickens, stockfeed and fully grown birds.

Wholesale and retail markets

- 4.29 The Applicant submits that the processors' wholesale operations transcend state boundaries. The Applicant claims that Victorian based processors export their production into other states. For example, La Ionica markets a significant proportion of its product into New South Wales, while Hazeldene sells product into the South Australian market.
- 4.30 The Applicant claims that demand for chicken meat is spread between a number of market channels. Supermarkets and major retailers, account for 75% of the retail trade in fresh poultry and 99.7% of the frozen poultry meat. Specialist chicken meat shops, butchers and delicatessens account for 24% of fresh meat sales.¹⁵
- 4.31 Further, the Applicant claims that there is a high degree of market concentration on the demand side. The Applicant submits that the two largest retailers account for 62% of the national retail grocery market, and 67% of the Victorian market.¹⁶ The Applicant suggests that it is this sector that is largely responsible for determining prices in the retail market, with processors unable to charge prices in other segments significantly higher than that paid by major retailers.

Sector returns

- 4.32 The Applicant claims that since 1996 the growing fee has fallen by 6% in real terms (Melbourne CPI indexed) and by significantly more in terms of actual returns to growers and return on assets. The Applicant submits that this has occurred for a number of reasons including:
- 4.33 The Applicant claims that since all the processors are private companies it is difficult to obtain figures in relation to their financial performance and therefore the performance of the processing sector more generally. However, the Applicant claims that ABARE figures show that in the period 1994 to 2000, gross operating surpluses in the poultry processing sector rose by 78%.

¹⁵ Australian Bureau of Statistics. Retail Industry, Commodity Sales

¹⁶ AC Nielsen 2003 Grocery Industry Report

Public benefits from the proposed arrangements

- 4.34 The Applicant submits that significant public benefits, both economic and non-economic, will flow from the proposed conduct. The Applicant submits that these will include:
- Transaction costs: Both growers and processors will save money and time as, amongst other things: negotiations for grower contracts will occur concurrently through a single grower group representative; there will be lower legal fees as a single contract will be constructed; and there will be an agreed dispute resolution process.
 - Increased competition between processors for grower services through the introduction of a common end date for all contracts.
 - Increasing competition between processors for the services of chicken growers will promote dynamic efficiency gains.
 - The proposed contract system may result in some of monopsony rents being returned to growers and a wealth transfer between processors and growers.
 - Recovery of deadweight losses: The authorisation would recover lost efficiencies and associated welfare (deadweight) losses.
 - Promote investment: The proposed five year contract term will ensure growers have sufficient incentive to continue to invest in new facilities and technology.
 - Prevention of grower exploitation.
 - Industry stability.
 - Capacity for growers to participate in industry bodies and to ensure standards.
 - The retention of industry experience and knowledge.
 - Maintaining biosecurity standards.

Anti-competitive detriments from the proposed arrangements

- 4.35 The Applicant submits that there will be limited anti-competitive detriment associated with the proposed arrangements, however, they acknowledge that there is some potential anti-competitive detriment associated with the proposed defined bargaining period and the ability of individual processor groups to boycott their processor should they not be contracted at the end of that bargaining period.

Interim authorisation

- 4.36 On 9 June 2004, the ACCC granted the Applicant interim authorisation on a limited basis.

5 Statutory provisions

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

The statutory test

- 5.3 In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that the Applicant must satisfy for authorisation is outlined in subsection 90(6) of the TPA.
- 5.4 Under subsection 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5 In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements where a provision of the proposed arrangements might be an exclusionary provision within the meaning of section 45 of the TPA, the relevant test that the Applicant must satisfy for authorisation is outlined in subsection 90(8) of the TPA.
- 5.6 Under subsection 90(8) of the TPA, the ACCC may grant authorisation in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision if it is satisfied that the proposed contract, arrangement or understanding would result or would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.
- 5.7 While there is some variation in the language between the test in section 90(6) and the test in section 90(8), the ACCC has until recently adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.¹⁷

¹⁷ *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

- 5.8 This view has now been reconsidered by the Australian Competition Tribunal (the Tribunal) and it has found that the two tests are not precisely the same.¹⁸ In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(8) was not so limited.

Benefits and detriments

- 5.9 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation.
- 5.10 If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 5.11 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁹
- 5.12 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.²⁰
- 5.13 The ACCC also applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 5.14 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

¹⁸ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

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

²⁰ *Ibid* at 42683.

Other relevant provisions

- 5.15 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.16 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 5.17 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

6 Submissions received prior to the draft determination

- 6.1 Prior to issuing its draft determination, the ACCC sought submissions from a wide range of interested parties in relation to the VFF applications for authorisation and the public benefit and public detriment claims made by the Applicant.
- 6.2 The ACCC received 11 submissions from nine interested parties.
- 6.3 The submissions received by the ACCC prior to issuing its draft determination are summarised below. Copies of all submissions received are available on the ACCC's Public Register.

The processor submissions

- 6.4 The processors state that fundamentally they are supportive of the growers' applications as far as they relate to their seeking to collectively bargain. However, the processors do have concerns with aspects of the applications and they would rather the applications seek to permit all growers, both present and future, to negotiate collectively regardless of their affiliation with the VFF.
- 6.5 The processors claim the Applicant's submission that a collective boycott of supply is the only way that agreement on contracts and fee reviews can be concluded is incorrect for the following reasons:
- contracts were successfully negotiated under the Marven authorisation
 - the VFF have sought to have the industry re-regulated and have actively opposed attempts to negotiate contracts and
 - contracts have been agreed elsewhere without the need for collective boycott.
- 6.6 The processors refute the Applicant's claim that day-old chickens could be placed interstate in the event of a boycott as Victoria accounts for some 30 per cent of Australian production. They claim that a boycott would result in an animal welfare issue.
- 6.7 The processors provided the following comments in relation to the public benefits claimed by the Applicant:
- The processors agree that public benefits would flow from collective negotiations by growers, however, the realisation of those benefits is not conditional upon collective boycotts or other restrictions.
 - Settling the current uncertainty in the industry by authorising growers to collective bargaining would provide a public benefit.
- 6.8 The processors claim that two likely effects of collective negotiations would be a higher growing fee and a possible retardation of productivity uptakes.

The Applicant's response to the processor submissions

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

Other interested party submissions

- 6.13 The ACCC received two submissions from Victorian chicken meat growers. Both growers supported the VFF applications and they both supported the Applicant's claims regarding the public benefits.
- 6.14 The ACCC also received two submissions from individual Victorian chicken meat processors. Essentially the processors reiterate the concerns relating to the proposed collective boycotts and common end dates for contracts which were detailed in the joint submission from processors.

7 Submissions received after the draft determination

- 7.1 The ACCC received three written submissions from the processors and two written submissions from the VFF in response to its draft determination. In addition, a number of oral submissions were received during a pre-determination conference
- 7.2 The written and oral submissions received by the ACCC after issuing its draft determination are summarised below. Copies of all submissions received are available on the ACCC's Public Register and its website.

Victorian Chicken Meat Council and processor submissions

- 7.3 The VCMC claim that a one day grower boycott would result in:
- up to \$240,000 worth of birds would have to be destroyed each day
 - processing plants would have to shut down costing up to \$75,000 per day and
 - a "hole" in the grow-out process that could not be filled resulting in possible shortages in supply 33 days after the boycott.
- 7.4 The VCMC claim that a grower boycott lasting more than one day would have further results such as:
- the potential closure of Quick Service Restaurants (KFC, Red Rooster and takeaway chicken shops).
 - a lack of supply to supermarkets and other retail outlets and
 - a reduction in discount chicken meat.
- 7.5 The processors claim that a grower boycott of greater than 1 or 2 days would create animal welfare issues as there would be no where to place the day old chickens. In addition, the processors claim that the quantities would be too large to be replaced by another processor or by interstate supply.
- 7.6 The processors submit that if the collective boycott exemption is to remain, then further conditions are needed. These may include:
- an agreement to negotiate does not necessarily mean that there is an obligation to finalise a contract
 - the mediation process and negotiations should continue whilst the notification period is in effect
 - a reasonableness test for a boycott should be instituted
 - the notice period should be increased from 21 days to 42 days and
 - the role of the VFF and common advisers needs to be clarified.

- 7.7 The processors submit that, contrary to VFF assertions, there is not the surplus shedding capacity in Victoria or in Australia to make up shortfalls from any meaningful grower boycott.
- 7.8 The processors claim that the calculations made by the VFF regarding excess potential shedding capacity across Australia makes no allowance for cycle times in other states, in distances involved and do not recognise the fact that shedding currently is at, or near, full capacity.
- 7.9 The processors claim that it is not feasible to bring birds on any sort of continual basis from interstate for processing.
- 7.10 The processors claim that negotiated outcomes can and have been achieved in Victoria without boycott provisions.

The VFF submissions

- 7.11 The VFF state that there is no evidence to support claims by processors that, were boycotts to be granted, growers would wait out the period until they were available and force processors to pay higher fees.
- 7.12 The VFF state that the proposed 21 day notice for any impending boycott action will allow sufficient time for adjustments to be made in processors' production schedules to prevent any impact on the market.
- 7.13 The VFF submit that the occurrence of shocks to supply are rare with the only recent event caused by an outbreak of Newcastle's disease in 1999 at Mangrove Mountain in New South Wales, removing 33 farms, equal to 2 million birds per batch capacity, for a period of up to 12 months without any warning.
- 7.14 The VFF claim that evidence from this disease outbreak demonstrates that even a supply side shock of this magnitude had no discernable impact on the consumer market for chicken meat.
- 7.15 The VFF claim that it is quite possible for the industry within Victoria to place all the day old chicks on farms for at least two weeks without the need for additional shedding and no adverse environmental impacts will occur.
- 7.16 The VFF submit that its applications are framed around a cyclical process so that all members of the grower groups would renew at the same time.
- 7.17 The VFF claim contracts could be negotiated at an enterprise level rather than at the industry level to alleviate ACCC concerns regarding industry wide contract periods.
- 7.18 The VFF submit the following in relation to the processors claims regarding the potential impact of a boycott:

- the figures provided by processors relating to the potential loss of grower income are incorrect
 - as growers are willing to supply any processor, a boycotting grower would be prepared to provide growing services to another processor and
 - reducing turnaround times between batches of non-boycotting growers would likely provide sufficient capacity within Victoria to negate a two-week boycott of Victoria's largest processor.
- 7.19 The VFF submits that if processors act competitively there will be no shortage in the supply of chicken meat into the wholesale market and consumers will suffer no detriment from a grower boycott.

Pre-determination conference of 13 December 2004

- 7.20 On 13 December 2004, the ACCC held a pre-determination in relation to its draft determination. The conference was called by the VCMC and was attended by processor and grower representatives along with other interested parties.
- 7.21 The following is a summary of the significant issues which were raised during the conference and which had not been raised previously. A record of the conference and a list of attendees are available on the ACCC website.
- 7.22 Processor representatives stated:
- any boycott action was likely to last weeks rather than days
 - processors had some capacity to make alternative arrangements for the placement of day old chicks but that most would have to be destroyed
 - processors needed up to 8 months to prepare for an alteration in the production cycle and began forecasting and making plans to alter their productions cycle 2-3 years in advance
 - if the initial negotiating period commenced concurrently for all grower groups, there was the potential for all processors to be boycotted simultaneously
 - during the period of the Newcastle outbreak referred to by the VFF there was surplus capacity because a much larger part of the market was for frozen chickens, a market which now almost does not exist and
 - the authorisation process, without the capacity to boycott, has worked in states such as Tasmania and South Australia where contracts had been successfully negotiated between the parties.
- 7.23 Grower representatives stated:
- growers would not support a reasonableness test and
 - growers operate in a market where there is no competition between processors for their services.

8 ACCC assessment - Relevant markets

Market definition

- 8.1 The first step in assessing the competitive effects and the public benefits and detriments of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 8.2 The ACCC may use market analysis to identify and measure the public benefit and detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

Previous ACCC determinations

- 8.3 As noted, the ACCC has considered five previous applications for authorisation from the Australian chicken meat industry including: the application by Marven in Victoria; the Steggles application in South Australia; the original application by Inghams on behalf of Tasmanian chicken meat growers and their subsequent application for revocation and substitution and; the application by New South Wales processors.
- 8.4 In considering these applications the ACCC has generally concluded that the primary markets of relevance are the:
- state based market for the provision of grower services to processors and
 - the market for the wholesale supply chicken meat.
- 8.5 The ACCC did, however, recognise in its recent determination for Inghams and their contract Tasmanian growers²¹ 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

²¹ 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 to strict quarantine conditions, imports and exports of chicken meat are limited.

Submissions on the relevant markets

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

ACCC assessment of the relevant markets

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

The market for chicken growing services

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

The market for processed chicken meat

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

- advancements in transport technology allows chicken meat to be shipped safely anywhere in the eastern Australia within 24 hours²² 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 applications 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.

²² Inghams Enterprises Pty Ltd application for revocation and substitution of A90659

9 ACCC assessment - Future with-or-without

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

Submissions on the counterfactual

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

Consideration of the counterfactual

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

the continued giving effect to Bartter and Baiada contracts entered into under the Marven authorisation and for future collective bargaining arrangements between consenting Bartter growers. The ACCC has denied the remaining aspects of the processor applications.

- 9.8 The ACCC considers that its decision in relation to the processor determination does not significantly alter the counterfactual for the VFF's applications. That is, the majority of the industry would, absent the VFF authorisation, still operate under individually negotiated contracts.
- 9.9 As for what form any individual negotiations might take, this is somewhat difficult to speculate given that collective negotiations, in one form or another, have apparently been occurring for over 20 years.
- 9.10 Absent authorisation, the processors would have two options available to them in offering contracts to growers. Either they could negotiate the terms and conditions of any contract arrangements individually with each grower or offer each grower a standard form contract with limited scope for variation of terms and conditions.
- 9.11 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.
- 9.12 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.
- 9.13 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.
- 9.14 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.

- 9.15 In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, VFF member growers are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.
- 9.16 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

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

10 ACCC assessment - Effect on competition

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

Collective bargaining

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

Lost efficiencies from collective negotiations

- 10.6 A major feature of most collectively negotiated arrangements is an agreement as to the price to be paid to members of the group and other terms and condition of supply or acquisition.
- 10.7 Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 10.8 This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 10.9 In particular, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.
- 10.10 This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.²³
- 10.11 Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 10.12 In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or reduced competition on other terms of supply, where there is capacity for any such increase to be passed on in the form of higher prices, less choice or lower quality of products offered to consumers, this could constitute an anti-competitive detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 10.13 In this case, the processors submit that collective negotiations between the growers and the processors may lead to higher fees paid to growers and a possible retardation of productivity uptakes than would otherwise be the case if the contracts were negotiated individually.
- 10.14 However, the Applicant contends that the proposed arrangements will have limited detriments.

²³ Section 45A of the TPA

- 10.15 The ACCC has previously accepted that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four features are present:
- the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to collectively bargain, is low
 - there is voluntary participation in the arrangements
 - there are restrictions on the coverage, composition and representation of the bargaining group and
 - there is limited capacity for any price rises to be passed on to consumers.
- 10.16 With respect to these four features, as they relate to the proposed arrangements, the ACCC notes the following.
- 1. Competition between growers absent of authorisation*
- 10.17 The ACCC notes that even businesses with a high degree of bargaining power are influenced by supply and demand forces in the manner in which they set their prices. In setting their prices (in this case growing fees), processors are likely to have regard to how much each grower is willing to accept. In this respect, growers do compete (at least to some extent) with each other.
- 10.18 This is not to say that such competition manifests itself in more overt forms such as bargaining or undercutting. At times it is hard to describe how this less overt form of competition exists. A simple way is to ask the question why processors do not set a lower growing fee. Surely processors would choose to save on processing costs where they could without reducing the number of growers willing to grow at a lower price. The answer is that the processors believe that by setting a lower growing fee, more growers will choose not to (or will not be able to) continue to grow. This is reflective of competition (albeit not necessarily high) between growers.
- 10.19 However, more generally, as discussed in section 9, absent authorisation, the level of competition between those parties seeking to collectively negotiate, with respect to those matters on which they are seeking to collectively negotiate, would be very low. That is to say, the nature of the industry, and the relationship between processors and growers, is such that generally speaking, if individual negotiation was to occur, growers in each grower group would most likely be offered standard form contracts with limited capacity for individual growers to vary the terms of the agreement. To the extent that there would be scope for individual growers to vary the terms of such contracts, the proposed arrangements will not reduce the scope to do so. Processors will still enter into individual contracts with each grower, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.

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

2. Voluntary participation

- 10.22 The proposed arrangements are voluntary and therefore growers who consider that they will be able to negotiate a more commercially attractive arrangement, most likely to be the most productive growers, will remain free to do so. Consequently, incentives for growers to compete on price, to innovate, or to otherwise improve their quality of services, to the extent that they exist, will not be reduced by the proposed arrangements to the extent that they might otherwise be.
- 10.23 In this respect, the ACCC notes that, generally, collectively negotiated contracts will only be agreed and implemented where both growers and their processor consider it in their commercial best interest to do so. That is to say, the arrangements will only be entered into where both parties to the proposed arrangement consider that they will generate sufficient efficiency gains to offset any inefficiencies which may result from any reduced flexibility in contracts entered into.
- 10.24 The ACCC notes that whilst the arrangement propose to allow grower groups to collectively boycott processors, an ability which may reduce the voluntary nature of the arrangements for processors (and therefore potentially increase the anti-competitive detriment of the arrangements), there are significant restrictions on when and under what circumstances these boycotts would be available, restrictions which would serve to mitigate their potential effects. The ACCC's full consideration of collective boycotts is provided later in this determination.

3. Coverage and composition of bargaining groups

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

trade directly affected and having regard to the competition provided by those suppliers outside the group. Further, where bargaining groups are limited in scope (by, for example, processor specific) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces anti-competitive effects associated with ‘one size fits all’ negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.

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

4. Constraints on price rises

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

Reduced scope for new entry

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

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

Pre-existing barriers to entry

10.35 The Victorian chicken meat industry has a number of pre-existing barriers to entry that may limit the ability of new growers to enter the market regardless of the presence of any collective bargaining arrangements. These include:

- the capital investment requirements are substantial and tied to the industry, once committed
- the extent of vertical integration in the industry
- the limited ability of growers to vertically integrate either upwards or downwards
- meeting the start-up requirements of the processors before entering into a growing agreement and
- increased government regulation especially in relation to land available for growing chickens.

10.36 In addition, the ACCC notes that the number of growers in Victoria has declined steadily over the last decade as a result of industry rationalisation which suggests that there is, absent of the proposed arrangements, limited scope for new entry into the market in any event.

10.37 Entry into the market at the processor level also has barriers due to the relatively high start-up costs and the uncertainty of gaining either new growers and/or growers from other processors.

Potential increase in barriers to entry

10.38 Barriers to entry may be increased by the proposed collective bargaining arrangements if the grower groups entered into a collectively bargained, long term agreement, with their processor. This may have the dual effect of making it more difficult for other prospective growers to enter the market, as the processor may have entered into long term agreements sufficient to satisfy all its processing needs, as well as make it more difficult for another processor to enter the market due to the scarcity of farmers able to compete to supply it.

10.39 The ACCC notes that the Applicant proposes that all of its member chicken growers have a common five year contract period. Generally, however, contracts in the Victorian chicken meat industry have been for shorter periods and would be likely to remain so, absent of the mandatory five year contract period. The ACCC considers that having a shorter contract period would result in contracts being negotiated on a more regular basis which would have the effect of providing increased opportunities for new growers to enter the market.

Features lessening barriers to entry

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

Annexures B and C of the applications

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

Collective bargaining process

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

Fixed duration of the contract term

- 10.46 Further, as part of their proposed collective bargaining framework, the Applicant has proposed that the duration of all grower contracts be fixed at five years. This, the Applicant claims, would result in all VFF member chicken growing contracts expiring at the same time and, as a consequence, all contract re-negotiations across all grower groups occurring simultaneously.
- 10.47 In its draft determination, the ACCC stated that whilst it accepts there may potentially be some pro-competitive effects from all VFF member chicken grower contracts expiring and being re-negotiated at the same time, the ACCC considers any benefit from common end dates would likely be countered by the potential anti-competitive effect of all, or a number of, grower groups failing to finalise new contracts negotiations which may result in more than one grower group collectively boycotting at any given time.
- 10.48 In response to the ACCC's draft determination, the Applicant reiterated its view that without some form of common contract period, the public benefits likely to flow from the authorisation will be reduced. This, the Applicant claimed, would result from processors diminishing the effectiveness of grower groups over time by only agreeing to sign contracts with new growers (or growers seeking to change their contracts) that have end dates which do not correspond with the existing grower group end dates. The Applicant claims that this would result in growers having contracts with many different end dates and therefore being unable to collectively utilise the proposed boycott provisions.
- 10.49 The Applicant submits that while they would prefer the authorisation include common end dates across the industry for all grower groups, they would accept an authorisation which provided common end dates at an enterprise, or individual processor level.
- 10.50 The ACCC remains of the view that the mandatory inclusion of common end dates in grower contracts, at any level, would both increase the anti-competitive detriment of the conduct and decrease the potential efficiencies gained from the collective bargaining process. The ACCC considers that this would occur primarily as a result of the inclusion of inflexibility (prescribed term) in what should be a flexible (collective bargaining) process.
- 10.51 For example, it may well be that, for circumstances unique to a particular processor or growing group that a four year contract provides greater efficiencies than the five years proposed by the Applicant. Under the arrangements proposed by the Applicant, however, it would not be possible for the growers and the processor to negotiate and agree to a term other than five years.
- 10.52 Furthermore, the ACCC considers that the most efficient outcomes with regards to matters such as the term of a contract are likely to result from a mutually beneficial agreement between the parties rather than unilaterally imposed conditions.

Other mandatory terms and conditions

10.53 In addition to seeking to mandate the length of contracts, the Applicant has also sought (in Annexure C of the applications) to mandate the inclusion of certain other terms and conditions in growing contracts including:

- conditions relating to the termination of contracts by either party
- the basis for the suspension of contracts by either party and
- a prescribed dispute resolution process.

10.54 As mentioned, the ACCC considers that the mandatory inclusion of prescriptive terms and conditions would be likely to generate greater anti-competitive detriment compared to a situation where growers and processors were free to negotiate such matters between themselves primarily because it places limitations on the ability of the parties to negotiate the most efficient contract.

10.55 The ACCC considers, however, that these concerns are unlikely to arise in relation to authorisations that provide a framework for proposed contracts that might arise but which otherwise allow the parties to negotiate a competitive outcome. For example, an authorisation that sets out the terms and conditions that may be negotiated (i.e. in the form of an indicative contract) would still allow the parties to negotiate which terms and conditions would ultimately be included.

Proposed restrictions on competitors

10.56 The ACCC is of the view that any proposed contract provision that seeks to restrict or impose conditions on the capacity of the target of the collective negotiations' to negotiate with competitors of the collective bargaining group is likely to have a significant anti-competitive effect.

10.57 Specifically, the ACCC has concerns with two proposed provisions in the VFF's applications, the first of which appears at paragraph 5 of annexure B of the Applicant's submission which states that:

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

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

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

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

- 10.58 The ACCC considers that such provisions whilst not specifically seeking to restrict the growing fee that a competitor might negotiate with a processor, would have the effect of restricting the capacity of a processor and a grower to freely negotiate on any contract terms and conditions they wished.
- 10.59 Further, the ACCC considers that restrictions of the type proposed by the Applicant would have the effect of removing incentives for more efficient growers to do better than their growing group. That is to say, where a grower is of the view that they could be more efficient and innovative than their grower group, there would be no incentive for that grower to negotiate individually with their processors as they would not be able to get better terms and conditions than the grower group they would be leaving. Consequently, the grower's incentive to innovate or become more efficient would be reduced.
- 10.60 In any event, notwithstanding the ACCC's concerns regarding the potential anti-competitive effect and lost efficiencies of including mandatory terms and conditions in an authorisation, the ACCC is of the view that the extent to which it could mandate the contractual terms which parties must enter is questionable.

Conclusion on collective bargaining

- 10.61 The ACCC considers that the collective bargaining arrangements proposed in the applications have the potential to result in some lessening of competition when compared to a situation where growers negotiate contracts individually with processors. In this instance, the potential anti-competitive effect of the arrangements is significantly increased by the proposed inclusion of certain mandatory processes and contract terms and conditions.
- 10.62 However, the ACCC considers that the effect of industry factors such as large wholesale buyers and limitations on a grower's capacity to alternate between processors combined with the:
- existence of efficiency incentives (pool payment system) within grower groups
 - separation of growers into discrete grower groups
 - limited effect on barriers to entry caused by the arrangements
 - freedom of growers to negotiate individual contracts with processors and
 - competition from non-VFF growers

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

- 10.63 The ACCC also considers that by virtue of the high level of industry integration and the nature of the contract system processors will continue to maintain a high degree of control over the growers with or without the collective bargaining arrangements.
- 10.64 Finally, the ACCC considers that the anti-competitive effect of the arrangements would be significantly lessened if the specific negotiation procedures proposed at annexure B of the applications and the terms and conditions included in annexure C of the VFF's applications were open for growers and processors to negotiate.

Collective boycotts

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

on those with whom they negotiate. As such, collective boycott activity can have significant economic consequences not only for the target of the collective boycott, but for other downstream and upstream businesses and the economy as a whole.

- 10.70 If used strategically, the ability to collectively boycott could also give a collective bargaining unit a degree of bargaining power that goes well beyond that necessary to address any imbalance in market power issues. In some such cases it could simply reverse any imbalance in bargaining power.

ACCC consideration of collective boycotts

- 10.71 Given that the ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements, it requires strong justification before allowing any conduct which involves collective boycott activity to be afforded immunity from the TPA.
- 10.72 Justification for collective boycott conduct will, ordinarily, rely on the proposition that absent the ability to collective boycott, the collective bargaining arrangements will be unlikely to succeed in realising the claimed public benefits.
- 10.73 Most often, applicants are likely to claim that, absent collective boycotts, there is either little incentive for the target of the bargaining process to participate in the arrangements, or that even where they do participate, there is little incentive for the target to agree to terms or conditions that differ from those they would have obtained absent the collective bargaining process.
- 10.74 Generally speaking, the target of collective bargaining arrangements is less likely to participate in collective bargaining arrangements (i.e. arrangements without the threat of collective boycott) and to agree terms and conditions different to those they may have obtained absent the collective bargaining process where their bargaining power, relative to the bargaining power of participants of the collective, is greater.
- 10.75 The ACCC considers that, in the context of the current applications, the processors hold significant bargaining power in comparison with chicken growers. Their bargaining power is derived from:
- the relative financial positions of processors and growers
 - the inability of chicken growers to supply their services to persons other than their processor particularly in the short term and
 - the degree of control employed by processors over the operations of growers.
- 10.76 The ACCC considers that the extent of the bargaining imbalance between processors and growers lends itself to the argument that absent the threat of collective boycott activity, the processors are less likely to participate in the collective bargaining arrangements or where they do, are less likely to agree to

terms and conditions different from those they would have achieved absent the collective bargaining agreement.

- 10.77 This, in itself, does not justify the authorisation of collective boycott activity. The ACCC must still weigh the detriment associated with the proposed conduct and the public benefits claimed to have been secured by the use of collective boycotts. The ACCC's consideration of public benefits is detailed in section 11 of this determination.
- 10.78 In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over:
- the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers as submitted by the processors and
 - the potential animal welfare issues resulting from a grower boycott.

Potential disruption to the supply of chicken meat

- 10.79 With respect to the potential for collective boycotts to cause a disruption in the supply of chicken meat, the ACCC has formed the view, based on the information before it, that the impact on the wholesale and retail markets for chicken meat of a short to medium term grower boycott would be mitigated as a result of the following five arrangement and industry features:

1. Sufficient notice of impending grower boycott

- 10.80 The ACCC notes the submissions by both the Applicant and processors outlined in section 7 that interruptions to the supply of chicken meat, in the form of disease, strikes, plant breakdowns and heat losses have occurred in the past with no or very little effect on the price of chicken meat paid by consumers. Accordingly, the ACCC accepts that the Victorian chicken meat industry has shown a capacity, in the past, to be flexible and adaptable.
- 10.81 The ACCC is of the view that whilst a grower boycott would differ from other forms of 'interruptions', the chicken meat industry would have appreciably more notice of an impending grower boycott than other forms of interruption have provided, and as such the industry would have more time to react to such a grower boycott and to prevent or mitigate any damage or loss occurring to individual businesses or to the supply of chicken meat.

2. Scope for adjustments

- 10.82 The ACCC accepts that an impending grower boycott would require a processor to make alternative shedding arrangements and adjustments to their processing schedule. The ACCC is satisfied, however, that were a grower boycott to occur:
- a processor is likely to have sufficient time to make alternative shedding arrangements (by, for example, reducing batch turnaround times) and

production arrangements (by, for example, reducing the number of eggs placed in incubation)

- that the chicken meat production process is sufficiently flexible to allow for such arrangements to be made and
- that the industry is likely to have sufficient capacity to contend with such a circumstance.

3. Response from non- boycotted processors

- 10.83 The ACCC considers that if a processor were under threat of a grower boycott, their competitors would be likely to have notice of such a threat and could adjust to increase productivity and therefore reduce any potential gaps in the market left by a reduction in supply by an individual processor.

4. Disparity in contract expiry dates

- 10.84 The ACCC considers that the disparity between the contract expiry dates of the five grower groups (and the disparity between the contract expiry dates of smaller groups within the five grower groups) coupled with the proposed condition prohibiting the use of a common negotiator, will serve to limit the likelihood of an industry-wide boycott or of more than one processor being boycotted at any given time.

5. The staggered nature of the 'batch' system

- 10.85 Finally, the ACCC considers that the staggered nature of the batch system, which involves contracted growers receiving batches of day-old chicks from their processor in-turn (as opposed to en masse), means that only a limited number of growers contracted to a particular processor would have the ability to refuse supply on any given day and, as a consequence, a grower groups capacity to engage in a simultaneous 'collective boycott' would be limited. The ACCC considers that this staggered allocation process serves, at least initially, to minimise the potential effect of a grower boycott compared to a situation where suppliers or acquirers could engage in a collective boycott simultaneously.

Potential animal welfare issues resulting from a grower boycott

- 10.86 The ACCC considers that the combination of the proposed restrictions on boycotts, provide the opportunity for processors to significantly mitigate, and even eliminate, the potential animal welfare effects of a grower boycott. The ACCC is of the view that processors could achieve this in a number of ways, including:

- finalising contract negotiations with growers who have notified of their intention to boycott
- electing, on receipt of a notice to boycott, not to place eggs for incubation
- removing more recently placed eggs and
- making alternative shedding arrangements for day-old chicks.

- 10.87 In addition, the ACCC considers that a condition in the determination which requires growers to complete the growing of any batch of chickens they hold at the time a boycott becomes available to them, would further reduce any potential animal welfare issues.

The proposed minimum 21 day notice of intention to boycott

- 10.88 As discussed earlier in this determination, the ACCC proposed, in its draft determination, to include a condition that a grower group provide a notice to their processor a minimum of 21 days prior to any grower in the grower group refusing to receive the supply of day-old chickens from their processor. The ACCC stated that it was of the view that the provision of such a notice would allow processors to better prepare for such an occurrence by, for example: ceasing the incubation of eggs and consequently the hatching of day-old chicks; and finding alternative sources for their wholesaling needs to mitigate any impact on the supply of chicken meat in the short term.
- 10.89 In responses to the ACCC's draft determination, the Applicant stated they were supportive of such a condition. The processors stated that if collective boycotts were to be granted by the ACCC and such a condition were to be included, the period should be increased from 21 days to 42 days in order to:
- provide processors with a reasonable opportunity to make alternative arrangements for shedding day-old chicks and
 - allow sufficient time for mediation to be effective.
- 10.90 The ACCC does not consider it necessary to extend the notice period beyond a minimum of 21 days and considers that doing so may, in fact, increase the potential detriment of the arrangements by increasing the period of uncertainty for the parties. In any case, the ACCC considers that the 21 days:
- would be a minimum notice period which could be extended by the grower group and
 - is a period which provides sufficient time for processors: to make alternative shedding arrangements for the growing of day-old chicks; to alter their production processes or; to finalise contracts with their growers.
- 10.91 With respect to the processor concerns about allowing sufficient time for the mediation process to be effective, the ACCC notes that there is nothing to prevent the parties from mutually agreeing to seek mediation to resolve contract differences at any time. That is to say, if the parties consider that a mediator may assist them in resolving issues and finalising contracts there is no restriction on them doing so. The 28 day mediation period which may follow six months after the collective bargaining of new contracts commences, has been included in the proposed collective bargaining process to ensure that such a step (mediation) is obligatory

prior to any boycott action but by no means precludes the parties from pursuing such a course at any time during the collective bargaining process.

- 10.92 Finally, in response to concerns raised by processors regarding negotiations between the parties ceasing during a grower boycott, the ACCC is of the view that the proposed authorisation would in no way prevent the parties from continuing contract negotiations in the event of a grower boycott.

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

Increased grower input into contracts

- 11.4 An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve their bargaining position relative to another, generally larger, business through a collective arrangement.
- 11.5 The ACCC does not consider a mere change in bargaining power is, in itself, a public benefit. Rather, the ACCC focuses on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 11.6 The ACCC recognises that there is a combination of factors which, in some circumstances, result in smaller businesses having very little bargaining power compared with larger businesses, particularly in a monopsony or oligopsony market.
- 11.7 In respect of the proposed arrangements, the Applicant has submitted that its member growers, as individuals, are always in a weak bargaining position relative to the large, well resourced processors and that growers do not have the skills required to deal with multi-national processors experienced in the negotiation process.
- 11.8 As discussed previously, the VFF submit, and the ACCC accepts, that individual growers are in a comparatively weak bargaining position in comparison to processors. This imbalance in bargaining power arises from:

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

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

Transaction cost savings

- 11.15 The Applicant submits that significant economic gains will be derived from the creation of an effective system of collective bargaining in the Victorian chicken growing industry. They state that in a deregulated environment each grower would need to negotiate individually with a processor to arrange new growing contracts which would result in indirect costs such as growers spending time away from their businesses and direct costs such as legal and accounting advice. The Applicant claims that processors would also have a reduction in their costs by conducting negotiations with the group rather than individually with growers.
- 11.16 The Applicant further argues that transaction costs will be saved in dispute resolution. They state that in the counterfactual environment where growers negotiate contracts on an individual basis, there are no easy, cost effective mechanisms for dispute resolution which will make it more likely that disputes will end in expensive arbitration or potentially litigation, a situation which will greatly increase transaction costs.
- 11.17 In considering previous applications for authorisation, the ACCC has noted that, as claimed by the Applicant, transaction costs are likely to be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquire or supplier must negotiate and implement agreements with every business with which it deals. Where these savings, such as legal and accounting fees, are likely to be passed on in the form of lower prices to consumers, the ACCC has accepted that this would constitute a public benefit.
- 11.18 However, in instances where, absent of authorisation, standard form contracts, with limited capacity for individual negotiation as to variations in those standard terms, are likely to be employed, significant transaction cost savings are unlikely to result from collective negotiations. That is to say, even where contracts are negotiated individually, in such circumstances there is likely to be little additional negotiating cost involved in doing so compared to a situation where a collective agreement is entered into.
- 11.19 In this instance, however, the ACCC considers that there is scope for transaction costs savings to occur from the proposed collective bargaining arrangements, relative to a situation where growers would have to negotiate the terms and conditions of the their growing contracts individually.
- 11.20 The ACCC considers that there would be some savings in the form of reduced legal, accounting and financial fees which each grower would be likely to incur were they to be required to negotiate on an individual basis. The ACCC is of the

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

- 11.21 The ACCC also considers that there would be some savings in the form of reduced cost resulting from disputes. That is, because growers would not have the terms and conditions offered to them as standard form contracts by processors, as would likely be the case under the counterfactual situation, but instead would be able to have effective input into the construction of their contracts, the likelihood of a grower disputing a contract to which they had a considerable contribution would be significantly reduced. This would result in a reduction in costly disputes by both parties.
- 11.22 The ACCC considers that some, albeit, limited transaction cost savings are likely to result from the proposed arrangements compared to a situation where each grower was required to negotiate contracts individually. To the extent that such savings do arise, the ACCC considers that the competitive pressures to which processors are faced are likely to ensure that at least some of these cost savings are passed on to consumers. However, the ACCC does not consider the magnitude of any such savings is likely to be significant.

Increased competition

- 11.23 The Applicant claims increased competition between processors for the services of chicken growers from having a common end date for all contracts would result in a public benefit.
- 11.24 As discussed in section 10 of this determination, the ACCC considers that there is some merit in the Applicant's argument that prescribed end dates for all Victorian chicken meat grower contracts would provide some increased competition for grower services by processor. However, the ACCC considers that any increased competition resulting from the VFF's proposed common end dates for contracts would be negated by the potential reduced efficiencies resulting from mandated contract terms and the increased likelihood of industry-wide grower boycotts.

Increased dynamic efficiency

- 11.25 The Applicant claims that increasing competition between processors for the services of chicken growers will promote dynamic efficiency gains within the growing industry. They claim that because efficient growers are currently growing chickens for non-preferred processors productivity gains are being stifled. The

Applicant submits that reversing this situation and introducing competition into this market will lead growers to innovate in production efficiencies and invest in growing facilities, which will contribute to gains in overall industry performance.

- 11.26 The Applicant claims that in a deregulated market, dynamic efficiency gains in the growing industry will continue to be prejudiced by the monopsony or oligopsony power of processors. However, the granting of the VFF's authorisation would lessen the ability of processors to exploit this power. This will result in increased dynamic efficiency in the market compared to the counterfactual scenario.
- 11.27 As noted in section 10, the ACCC considers that, generally speaking, collective bargaining in comparison with effective individual negotiations, is likely to reduce competition. However, as noted earlier in this section, in a situation where collective bargaining 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. This principle equally applies to dynamic efficiencies that may be achieved. The Applicant's arguments under this heading do not advance their claimed public benefits beyond that accepted earlier in this section.

Return of monopsony gains

- 11.28 The Applicant submits that, at present, processors use their monopsony (or oligopsony) power to extract rents from growers. They claim that authorisation would provide for the return of some of those rents to growers through an increase in their growing fee. The Applicant claims the combined effect of processors earning supra-competitive profits and the constraints placed on them by retailers from increasing wholesale prices would result in any additional cost from increased growing fees being borne entirely by the processor and would not result in any additional costs to consumers.
- 11.29 The Applicant further submits that the level of vertical integration within the industry and the presence of substitutes will prevent growers from extracting rents from processors.
- 11.30 The ACCC considers that the Applicant has failed to provide conclusive evidence to support their claim that processors are earning supra-competitive profits. However, the ACCC has accepted earlier in this section that the proposed collective bargaining arrangements are likely to allow greater grower input into terms and conditions of chicken growing contracts, including growing fees. The ACCC considers that to the extent that growing fees are below the efficient level, this may be addressed by the collective bargaining arrangements. However, these arguments do not advance the claimed public benefit beyond those accepted earlier in this section.

Promote investment

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

Prevent grower exploitation

- 11.33 The Applicant submits that the authorisation will serve to prevent exploitation of growers and result in reduced tensions between processors and their respective growers. This, the Applicant claims, will allow both parties to focus on their respective roles in the supply chain and work towards obtaining further efficiencies in a cooperative manner.
- 11.34 The ACCC considers that many small businesses seeking to redress a perceived imbalance in bargaining power with a larger business argue that allowing them to collectively bargain will reduce the risk of the larger business imposing harsh, unfair or unreasonable terms in contract negotiations. While this argument has often been put to the ACCC, the ACCC has not generally accepted that a public benefit in the form of reduced risk of potential unconscionable conduct will result from collective bargaining arrangements.
- 11.35 The ACCC is of the view that there are provisions in the TPA which prohibit unconscionable conduct and, in particular section 51AC of the TPA prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.
- 11.36 In this instance, the ACCC considers that whilst processors may have engaged in tough negotiations and conducted their businesses in such a way that is most advantageous to themselves, there is no specific evidence to suggest that processors have acted unconscionably in the past when dealing with growers or, assuming authorisation was not granted, that they would be likely to do so in the future.
- 11.37 Whilst the ACCC accepts that reducing the risk of businesses being treated unconscionably is a public benefit, it does not accept in this case that the proposed collective bargaining arrangements would in fact reduce the risk of unconscionable conduct occurring given the absence of any evidence provided in this authorisation

process that processors have acted unconscionably their dealings with growers in the past.

Facilitate the transition to deregulation

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

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

Promote industry bodies and standards

- 11.47 The Applicant submits that growers participate and contribute to a number of industry bodies which have, amongst other things, assisted in reducing disputes between growers and their neighbours, has enabled the development of strong links with local government and has improved community acceptance of the industry.
- 11.48 The Applicant claims that growers also represent the industry at a number of levels to manage animal welfare, bio-security, and planning issues. The Applicant claims that all of these activities reduce costs to the community through the unpaid work of growers, and the expertise and knowledge they bring to industry committees and bodies.
- 11.49 The Applicant concludes that in a deregulated environment where growers are required to negotiate individually their ability to contribute to such industry groups might be limited and that grant authorisation will ensure that industry representation remains at the current level.
- 11.50 The ACCC considers that encouraging and promoting industry groups and associations is a valuable exercise, insofar as they facilitate the exchange and dissemination of information to industry parties and the wider community. The

ACCC considers that this can lead to an increased awareness of industry issues which may then lead to a reduction to potential sources of conflict or dispute.

- 11.51 However, the ACCC generally considers that irrespective of whether authorisation were granted, these associations and industry groups would continue to play an important role within the industry and that any public benefits from their work would continue to flow.

Retain industry experience

- 11.52 The Applicant submits that having ongoing negotiations places considerable pressure on the grower representatives. It claims that the experience in South Australia and Victoria suggests that the leaders of the negotiating groups can be singled out by processors for unfair treatment. It submits that of the five growers leading the respective processor negotiating groups during the Marven authorisation three subsequently sold their farms and left the industry. The Applicant submits that this was in part due to the pressures placed on them during the course of negotiations with processors.
- 11.53 The Applicant submits that the proposed negotiating process with staged mechanisms to progress negotiations will encourage the negotiations to be conducted in good faith. In a deregulated environment the industry leaders, if seen by the processors to be causing trouble amongst growers, have very little opportunity to prevent victimisation.
- 11.54 The ACCC notes that there are some inconsistencies in the Applicant's claims in relation to the retention of industry knowledge. In particular, the Applicant states that a number of experienced grower group leaders exited the industry after being singled out by their processor during previous collective bargaining processes, a claim which seems to contradict the argument that collective bargaining will assist in the retention of industry knowledge.
- 11.55 Further, the ACCC considers that in a deregulated environment there would be no grower group leaders and therefore the potential for victimisation, of the sort described by the Applicant, to occur again would be significantly reduced.
- 11.56 However, as discussed earlier in this section, the ACCC accepted that the proposed collective bargaining arrangements would result in greater grower input into the terms and conditions of growing contracts. They may also generate a greater degree of good faith between growers and processors and assist in retaining industry knowledge. These claims, however, by their very nature are anecdotal. The ACCC is not prepared to provide significant weight to the Applicant's claim in this regard.

Maintain biosecurity

- 11.57 The Applicant submits that maintaining and improving the standard of growing facilities, and continuous improvement of industry practices are important to

ensure the occurrence of exotic disease outbreaks are minimised. The Applicant claims that if growers are exploited by processors and receive returns that do not reflect the full cost of operating a farm, it would be expected that maintenance of growing facilities and motivation of growers will be reduced. The Applicant claims that the authorisation will ensure that industry standards are maintained which will assist in the reduction of disease outbreaks, an outcome which will provide a substantial public benefit.

- 11.58 The ACCC considers that maintaining biosecurity standards and minimising diseases such as Avian Influenza and Newcastle disease are important to both the chicken meat industry and the community more generally. The ACCC is of the view that preventing such outbreaks is however in the interest of all parties in the chicken meat industry as any such outbreak would have as equally a damaging effect on all parties, including processors, as it would on growers.
- 11.59 The ACCC is of the view that as it is in the best interest of processors to continue to maintain an industry free of disease and other potential biosecurity risks, they will, with or without the authorisation, continue to seek to ensure that growers maintain biosecurity standards.
- 11.60 As such, the ACCC is of the view that the continued industry vigilance in relation to biosecurity matters is not dependent on growers having the ability to collectively bargain and therefore, does not consider that granting the authorisation will provide any additional public benefits than would be produced under a deregulated environment.

12 Balance of public benefits and detriments

Collective bargaining

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

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

Collective boycotts

- 12.7 The ACCC considers that granting VFF member growers immunity from the TPA to collectively boycott processors could significantly increase the anti-competitive effects of the proposed collective bargaining arrangements.
- 12.8 In considering the detriments associated with the collective boycott arrangements proposed by the Applicant, the ACCC is particularly concerned over the potential for such conduct to result in a disruption to the supply of chicken meat to retailers and ultimately to consumers. The ACCC also has concerns about the potential animal welfare issues associated with grower boycotts.
- 12.9 In considering the detriments that may arise from collective boycott activity, the ACCC notes certain features of the proposed arrangements and relevant markets that are likely to lessen any such detriment:
- the restraint which growers are likely to adopt in using boycotts as a last resort to avoid damage to their business and the poor relations that might arise with processors
 - the ability to engage in collective boycott's only at the time of negotiating new contracts and only after complying with certain conditions
 - the chicken meat production process is sufficiently flexible to allow, to a large extent, for alternative shedding and production arrangements to be made by processors and
 - the relative impact on the national market for the supply of chicken meat as a result of boycott activity is likely to be limited.
- 12.10 On balance, however, the ACCC maintains the view that the use of collective boycotts without further limitations would be likely to result in significant public detriments.
- 12.11 The ACCC considers that this detriment would, however, be considerably lessened if any grower group contemplating engaging in collective boycotts were required to provide processors with a notice of their intention to collectively boycott. The ACCC considers that a notice would allow processors to better prepare for such an occurrence by, for example: ceasing the incubation of eggs and consequently the hatching of day-old chicks; and finding alternative sources for their wholesaling needs to mitigate any impact on the supply of chicken meat in the short term.
- 12.12 The ACCC has been advised that eggs are placed in incubators for a period of 18 days followed by a three day hatching period. The ACCC considers, therefore, that

a requirement of 21 days notice prior to grower groups engaging in any boycott activity would allow processors to avoid the loss of day-old chickens as well as providing them with an opportunity to make alternative short term arrangements to supply their wholesaling requirements.

Conclusion on collective bargaining and collective boycotts

- 12.13 The ACCC considers that the combined effects of these arrangement features and industry factors serve to mitigate the potential anti-competitive effects of collective bargaining and collective boycotts.
- 12.14 The ACCC considers that some public benefits are likely to flow from the proposed arrangements, the most significant of which arises from allowing greater grower input into the terms and conditions of growing contracts resulting in the potential for increased efficiencies in addition to reduced transaction costs.
- 12.15 Further, the ACCC considers that the proposed conduct provides some public benefit insofar as it facilitates the continued transition from a regulated to a deregulated environment.
- 12.16 The ACCC accepts that the extent to which granting grower groups with the ability to collectively boycott assists in securing these public benefits, such an ability also brings with it a public benefit.
- 12.17 Following the arguments advanced by the Applicant and interested parties and despite the mitigating factors referred to above without imposing conditions, the ACCC would not be satisfied that:
- the public benefits likely to result from the proposed collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements or
 - the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.
- 12.18 However, by imposing certain conditions on the proposed collective bargaining and boycott arrangements, the ACCC considers the balance of public benefits and detriments will be shifted. In particular, the ACCC considers that this will be achieved through conditions which:
- remove the prescriptive nature of the proposed contracts that may be negotiated under the proposed collective bargaining process and
 - which better ensure that the effect of any collective boycott activity, particularly with regard to the supply of chicken meat to retailers and consumers, is minimised.

- 12.19 With the imposition of such conditions, the ACCC would be satisfied that the public benefits of the proposed collective bargaining arrangements would outweigh their potential anti-competitive detriments and the proposed collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Proposed conditions

Condition 1

- 12.20 The ACCC considers that the collective bargaining process will produce the most effective outcomes if it remains flexible and therefore, the ACCC proposes to include a condition which provides that:

- all those matters described in annexure C to the VFF's application will be open to negotiation between the parties and will not be mandatory.

Conditions 2 & 3

- 12.21 However, whilst the ACCC considers the process will produce the most effective outcomes if it is flexible, the ACCC is of the view that there are a number of additional features of the process which are necessary to restrain the anti-competitive conduct, namely:

- that collective bargaining groups comprise only growers supplying or proposing to supply growing services to the same processor and
- that there not be any common representation of grower groups.

Conditions 4,5 & 6

- 12.22 The ACCC considers that making it conditional for grower groups to notify their processors at certain times prior to their having protection under the TPA to engage in collective boycotts will serve to significantly mitigate the potential anti-competitive detriments of any grower boycott. As such, the ACCC intends to make it clear that grower boycotts would only be available at the time of negotiating new grower contracts and also include the following conditional process that growers must follow prior to their engaging in a collective boycott:

- the grower group must contact their processor and advise them that they wish to begin collectively bargaining new chicken growing contracts
- no sooner than six months after complying with this requirement, the grower group must, before they will have protection under the TPA to engage in a collective boycott, invite their processor to participate in mediation with a suitably qualified and independent mediator and
- the grower groups must, before they will have protection under the TPA to engage in a collective boycott, provide a notice ("notice of intention to

boycott”) in writing to their processor a minimum of 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from that processor. Such a notice of intention to boycott must include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. The notice of intention to boycott may only be issued a minimum of 7 days after complying with the requirement described in the previous dot point.

Condition 7

- 12.23 For the same reasons outlined in condition 1, the ACCC proposes to make all those matters described in annexure B to the VFF’s application, but not encompassed in conditions 4, 5 and 6 be open to negotiation between the parties.

Conditions 8 and 9

- 12.24 The ACCC considers that it is important to make it clear that authorisation in no way provides parties with immunity to breach their contracts.
- 12.25 In addition, whilst the Applicant has stated that any grower who is growing a batch of chickens at the beginning of any collective boycott action would complete the growing that batch, the ACCC considers that this issue is of significant importance to make such an assurance a condition of the authorisation. Therefore, the ACCC proposes to make it a condition of the authorisation that the growing of any batch of chickens held by a Victorian chicken grower at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.

Initial contract negotiation period

- 12.26 In their submissions, both the growers and the processors acknowledge that there is disagreement amongst some parties as to the status and validity of existing grower contracts and, as a result, a certain degree of confusion as to when the grower groups could begin collectively bargaining new contracts after the authorisation comes into effect.
- 12.27 The ACCC considers that these issues are addressed in the terms of the authorised conduct in section 13 of this determination.

13 Determination

The applications

- 13.1 On 5 May 2004, the VFF on behalf of its member Victorian chicken meat growers (the Applicant) lodged an application for authorisation (A40093) with the ACCC.
- 13.2 The application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.²⁴
- 13.3 On 15 September 2004, the VFF lodged a further related application (A90931) for authorisation pursuant to section 88(1) of the TPA:
- (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA and
 - (b) to give effect to a provision of a contract, arrangement or understanding, where the provision is, or maybe, an exclusionary provision within the meaning of section 45 of the TPA.
- 13.4 Specifically, the VFF seeks to allow the members of each VFF Chicken Meat Group to act collectively in:
- negotiating the terms and conditions, including growing fees, of broiler chicken growing contracts
 - negotiating any necessary future amendments or adjustments to the growing fee or the broiler chicken growing contracts and
 - in relation to negotiations for the resolution of disputes which may arise between the grower group and their processor.
- 13.5 The VFF also seeks authorisation for each VFF Chicken Meat Group to collectively boycott supply of chickens by their processors where agreement as to a growing contract cannot be reached after a prescribed process.

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

Statutory test

13.6 For the reasons outlined in this determination, the ACCC is not satisfied that:

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

13.7 However, the ACCC considers that by imposing certain conditions on the proposed collective bargaining and collective boycott arrangements, the ACCC would be satisfied that the public benefits of the collective bargaining arrangements would outweigh their potential anti-competitive detriments and the collective boycott provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to.

Conduct authorised

13.8 The ACCC grants authorisation pursuant to section 88 of the TPA and the Competition Code on the following terms:

Collective bargaining

VFF member chicken meat growers may form into groups, based on the VFF Chicken Meat Group (grower group) with whom they are affiliated, and those grower groups may collectively bargain at any time during which this authorisation is in effect:

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

The ACCC grants the authorisation to the grower groups to collectively bargain subject to their complying with the following conditions:

1. All those matters described in annexure C to the VFF's application will be open to negotiation between the parties and will not be mandatory.
2. Grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their grower group.
3. Grower groups must not use common representatives or representation.

Collective boycott

In the context of collectively bargaining new chicken growing contracts, growers may collectively agree to withdraw supply of their growing services (collectively boycott) from the processor affiliated with their grower group subject to the grower group complying with the following conditions:

4. The grower group must contact their processor and advise them that they wish to begin collective bargaining new chicken growing contracts.
 5. No sooner than six months after complying with the requirement described in condition 4 of this determination, the grower group must, before they will have protection under the TPA to engage in a collective boycott, invite their processor to participate in mediation with a suitably qualified and independent mediator.
 6. The grower groups must, before they will have protection under the TPA to engage in a collective boycott, provide a notice (“notice of intention to boycott”) in writing to their processor a minimum of 21 calendar days prior to any grower in that grower group refusing to receive the supply of day-old chickens from their processor. Such a notice of intention to boycott must include the names of those growers who intend to refuse supply and, as best as possible, the date on which they first intend to refuse supply. The notice of intention to boycott may only be issued a minimum of 7 days after complying with the requirement described in condition 5 of this determination.
 7. Any aspects of annexure B not encompassed by conditions 4, 5 and 6 of this determination will be open to the parties to negotiate.
 8. A party authorised by this determination to participate in a collective boycott cannot do so if they have an existing chicken growing contract under which they are obliged to provide growing services.
 9. The growing of any batch of chickens held by a, party authorised by this determination to participate in a collective boycott, at the time a boycott becomes available to them will be completed in accordance with the terms of their growing contract.
- 13.9 The ACCC grants authorisation for a period of five years from the date this determination comes into effect. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.

Other matters

- 13.10 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 13.11 This determination is made on 2 March 2005. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 24 March 2005. If an application is made to the Tribunal, the determination will come into force:
- (a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - (b) where the application is withdrawn – on the day on which the application is withdrawn.
- 13.12 While the terms of the authorisation differ to the current interim authorisation, granted to the Applicant on 9 June 2004, the ACCC does not propose to alter the interim authorisation. Those arrangements will continue to be protected from action under the TPA until the earlier of: the determination coming into effect; or the ACCC or the Tribunal (should the determination be reviewed) deciding to revoke or amend the interim authorisation.
- 13.13 The ACCC considers that to the extent that the Applicants, or any other party to whom immunity is provided by the authorisation, acts outside of the authorised arrangements (or do not comply with a condition) they will not have protection from the TPA in so doing. Furthermore, the protection afforded by the 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.