



**Australian  
Competition &  
Consumer  
Commission**

# **Determination**

## **Application for Authorisation**

**Lodged by**

**Inghams Enterprises Pty Ltd for itself and on behalf of NSW poultry  
meat processors**

**In respect of**

collective negotiations involving contract growers and their respective processors for  
standard growing agreements in accordance with a Code of Practice and Minimum  
Contract Guidelines

**Date: 8 October 2002**

**Application no. A90800**

**Public Register no. C2001/1305**

**FCS  
Jones  
Martin  
McNeil**

## SUMMARY

On 18 September 2001, Inghams Enterprises Pty Ltd (Inghams) on behalf of itself and seven other chicken meat processing companies operating in New South Wales (NSW)<sup>1</sup>, lodged an application for authorisation (A90800) with the Australian Competition and Consumer Commission (the Commission). Authorisation was sought to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the *Trade Practices Act 1974* (TPA). The application was expressed also to cover all current and future NSW growers contracted to the applicant pursuant to s 88(6) of the TPA. Authorisation was requested for a period of five years.

The application sought authorisation for an individual processor and its contracted growers to engage in collective negotiations for the purpose of negotiating standard growing agreements (including the agreement of a common fee), in accordance with a Code of Practice and Minimum Contract Guidelines, for which authorisation was also sought.

On 20 March 2002 the Commission issued a draft determination proposing to grant authorisation with conditions. A pre-decision conference was requested by several interested parties and was held on 13 May 2002 in Sydney.

On 29 May 2002 the NSW Minister for Agriculture introduced the *Poultry Meat Industry Amendment (Price Determination) Bill 2002* into the NSW Legislative Assembly. The Bill passed both Houses and received assent on 10 July 2002. The Bill amended the *Poultry Meat Industry Act 1986* with respect to the price to be paid to growers for certain kinds of poultry and also authorised certain things for the purposes of the Commonwealth *Trade Practices Act 1974* and the *Competition Code of New South Wales*.

The Commission has prepared this final determination in accordance with the statutory test set out in Part VII of the TPA. In essence, this test allows the Commission to grant authorisation (and therefore immunity under the TPA) if the public benefits flowing from the conduct are likely to outweigh the public detriments. In order to identify and measure the likely public benefits and detriments of the proposed arrangements, the Commission ordinarily applies the “future with-and-without test” first established by the Australian Competition Tribunal. This requires a comparison of the public benefits and detriments resulting from the position which would, or would be likely to, exist in the future if the authorisation were granted, with the position if the authorisation were not granted. The situation without the authorisation is termed the counterfactual.

In its draft determination, the Commission noted that there was widespread agreement (including by the Government) that the current industry arrangements may have involved a breach of the TPA. For this reason the Commission assessed the application against a counterfactual where the current industry arrangements were not in place (ie where the industry was deregulated).

In its draft determination, after applying the “future with-and-without test”, the Commission found that compared to a deregulated environment the benefits to the public of the proposed

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<sup>1</sup> The other processing companies are Bartter Enterprises Pty Ltd, Red Lea Chicken Pty Ltd, Cordina Chicken Farms Pty Ltd, Baiada Poultry Pty Ltd, Sunnybrand Chicken Pty Ltd, Narex Australia Pty Ltd (trading as Penrith Poultry) and Summertime Chicken Pty Ltd.

arrangements were likely to outweigh the detriments, if certain conditions were complied with. Thus the Commission proposed to grant conditional authorisation.

However following the amendments to the PMIA made by the *Poultry Meat Industry Amendment (Price Determination) Bill 2002* (particularly the statutory exemption from the application of the TPA) the Commission accepts that the NSW Parliament has indicated its clear intention that the industry will only operate under the arrangements contained in the PMIA. The PMIA provides that batch poultry will not be processed unless it was grown under a written agreement in a form approved by the Poultry Meat Industry Committee (PMIC). The PMIC is a statutory body comprising of six grower representatives, six processor representatives, two independent members and an independent Chairperson, all appointed by the Minister.

While there appears to be some scope for variations in the types of agreements approved by the PMIC, it is reasonable to assume that, in view of the Government's expressed intent, the arrangements for which authorisation is sought, with their Code of Practice and Guidelines are unlikely to ever eventuate.

Therefore the Commission considers that the likely outcome from applying the "future with-and-without test" to this application is that the claimed public benefits previously expected to arise would no longer be likely to flow. Accordingly the Commission dismisses this application for authorisation.

## **ABBREVIATIONS**

ADJR.....	Administrative Decision Judicial Review
AFFA.....	Department of Agriculture, Fisheries and Forestry – Australia
NCP.....	National Competition Policy
PMIA.....	<i>Poultry Meat Industry Act 1986</i>
PMIC.....	Poultry Meat Industry Committee
QCGA.....	Queensland Chicken Growers Association
TPA.....	<i>Trade Practices Act 1974</i>

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# 1. INTRODUCTION

- 1.1 Organisations who engage, or propose to engage, in certain anti-competitive business arrangements or conduct that could breach the *Trade Practices Act 1974* (the TPA), may apply to the Australian Competition and Consumer Commission (the Commission) for authorisation of such arrangements or conduct. When an application for authorisation is made, the Commission is required under the TPA to make a determination in writing, either granting or dismissing the application. It is also required to take into account submissions made to it in relation to the application.
- 1.2 The Commission is first required to issue a draft determination in writing. The applicant or any interested party dissatisfied with the draft may request that the Commission hold a conference with the applicant and interested parties. At the conference parties can discuss the operation and effect of the draft determination. After any such conference the Commission reconsiders the application, taking into account the comments made and further submissions received and publishes its final determination.
- 1.3 The Commission may grant authorisation where the public benefit of the subject arrangements or conduct outweighs the public detriment, including the anti-competitive detriment. If granted, an authorisation provides immunity from legal proceedings under the TPA in respect of the arrangements or conduct. This protection extends only from the time the authorisation is granted. Consequently, an organisation would not be protected from legal action under the TPA in respect of any business arrangements or conduct engaged in prior to the granting of authorisation of such arrangements or conduct.

## The Application

- 1.4 On 18 September 2001, Inghams Enterprises Pty Ltd, for itself and on behalf of the other seven chicken meat processing companies operating in New South Wales (NSW)<sup>2</sup> (the applicant), lodged application A90800 with the Commission. The application was purported to be made on behalf of all current and future New South Wales growers contracted to the applicants.
- 1.5 In addition to being made purportedly ‘on behalf of’ growers, the application has also been expressed to cover all current and future NSW growers contracted to the applicant pursuant to subsection 88(6) of the TPA. Authorisation has been requested for a period of five years.
- 1.6 There is an issue as to whether the applicant has standing to make the application in view of opposition by growers to the application being

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<sup>2</sup> The other processing companies are Bartter Enterprises Pty Ltd, Red Lea Chicken Pty Ltd, Cordina Chicken Farms Pty Ltd, Baiada Poultry Pty Ltd, Sunnybrand Chicken Pty Ltd, Narex Australia Pty Ltd (trading as Penrith Poultry) and Summertime Chicken Pty Ltd.

purportedly made on their behalf. For the reasons outlined at 9.4 below, the Commission considers that, while the application cannot be said to be made on behalf of those growers who oppose it, the applicant can be said to be a party to the conduct for which authorisation is sought, and pursuant to s 88(6), any authorisation granted can be extended to growers.

- 1.7 The application seeks authorisation for each of the eight individual processors and its contracted growers to agree on contract terms and conditions including a common fee. The growers and their processor will engage in collective negotiations for the purpose of negotiating standard growing agreements (including the agreement of a common fee) in accordance with a Code of Practice and Minimum Contract Guidelines.
- 1.8 Part of the conduct for which authorisation is sought involves appointing representatives from among Participating Growers within their Processor Negotiation Group to enter into negotiations with that Processor on a standard growing agreement and matters arising therefrom.
- 1.9 The application was made under subsection 88(1) of the TPA<sup>3</sup> for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of s 45 of the TPA.

### **Interim Authorisation**

- 1.10 The applicant also requested interim authorisation for the proposed arrangements on the grounds that interim authorisation was necessary, as it had received legal advice which found that in complying with the current legislated arrangements, individual processors and growers were at risk of contravening the TPA. The Commission sought submissions from interested parties on whether interim authorisation should be granted. None of the submissions received supported interim authorisation, mainly because authorisation *per se* was opposed, and/or it was felt that granting interim authorisation would conflict with the current legislative arrangements.
- 1.11 On 1 November 2001, the Commission denied the applicant's request for interim authorisation. At that time the Commission considered that it needed more time to consider the possible impact of the proposed arrangements. It also considered that if it were to grant interim authorisation, any agreements that were reached under the new arrangements may lead to significant changes in the industry, and it would be difficult to retract them if the Commission later decided to deny authorisation.
- 1.12 However, in denying interim authorisation, the Commission stated that it had not formed a view on whether the current arrangements actually breached the TPA. It also stated that while it was considering the authorisation application, it did not propose to consider taking action in relation to the current

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<sup>3</sup> The application has also been considered as an application under the Competition Code.

## **2. BACKGROUND TO INDUSTRY**

- 2.1 The Australian poultry meat industry is composed of breeders, hatcheries, growers, wholesalers and retailers. There is a high degree of vertical integration, with company ownership of breeding farms, multiplication farms, hatcheries, feed mills, some growing farms and processing plants.
- 2.2 The industry is comprised of two parts: the processed poultry meat industry and the poultry growing services industry.

### **National Processed Poultry Meat Industry**

- 2.3 Australian poultry meat consumption was 660 000 tonnes or 32.8 kg per head in 2000-01 and is forecast to grow by 5 per cent in 2001-02. Its GVP for 2000-01 was \$1 085 million. Poultry consumption in Australia is second only to beef consumption (36.6 kg per head). Chicken meat makes up over 90 per cent of poultry meat consumed<sup>4</sup>. The industry is domestically focussed, only exporting around 3 per cent of total production in 2000-01, being 21 000 tonnes with a value of \$25 million<sup>5</sup>.
- 2.4 Nationally, the industry is relatively concentrated with the two largest integrated companies, Bartter Enterprises Pty Ltd and Inghams Enterprises Pty Ltd, supplying about 75 per cent of day-old broiler chickens, and processing approximately 70 per cent of broiler chickens produced in Australia.
- 2.5 According to the applicant, the industry is the most efficient meat industry in Australia, if comparing real price reductions. A recent benchmarking study noted that the real price of chicken declined 4.7 per cent per year in the 15 years from 1974-75 compared with declines of 2.4 per cent for pork, 1.6 per cent for lamb and 1.3 per cent for beef<sup>6</sup>.
- 2.6 The major outlet for processed chicken is the retail sector, particularly supermarkets and food service outlets such as McDonalds, KFC and Red Rooster. The applicant claims that sales to the retail sector are highly competitive, with only a small percentage being sold under a contract with a set period, and only a few contracts having fixed prices. Accordingly, there is strong downward pressure on prices and production costs.

### ***Importation of chicken meat***

- 2.7 While imports of cooked chicken meat are permitted under strict quarantine conditions, they have not yet eventuated. The applicant claim that importation of raw chicken meat is likely, and if it occurs it will place more pressure on the domestic industry. For example, investigations conducted by processors in Victoria indicated that imported packaged breast meat could be imported at \$4

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<sup>4</sup> The Application, p. 11

<sup>5</sup> ABARE, 2001 as cited in AFFA's submission

<sup>6</sup> Instate Pty Ltd & Heilbron, S.G (1997) *The Australian Chicken Meat Industry; International Benchmarking Study*, commissioned by the Australian Chicken Meat Federation



per kilogram compared to local production costs of \$7 per kilogram. However, the claim that raw chicken imports are imminent was disputed in some of the submissions from other interested parties.

### **The NSW Processed Poultry Meat Industry**

- 2.8 NSW is responsible for 45 per cent of the chicken meat produced in Australia, being 330 000 tonnes annually. Of this, around 230 000 tonnes is consumed in NSW, with the remainder being exported to other states. There is also some importation of poultry meat from other states, particularly by national firms. Movement of product is increasing, with chicken meat being routinely sent interstate for marketing or further processing.
- 2.9 The NSW market is primarily supplied by eight processing companies (the applicants to this authorisation). Three companies (Inghams, Bartters and Baiada) supply around 74 per cent of the chickens in NSW between them.
- 2.10 The applicant has provided the following production share information, which has not been disputed by any interested party.

#### ***Production share of suppliers of chicken in NSW and numbers of contract growers in NSW***

<b>Company</b>	<b>Production share (%)</b>	<b>Contract growers</b>
Bartter	35.3	73
Inghams	18.3	61
Red Lea	9.1	50
Cordina	8.0	49
Baiada	19.5	44
Sunnybrand	4.4	14
Penrith Poultry	3.0	20
Summertime <sup>7</sup>	2.4	11
<b>Total</b>	<b>100</b>	<b>322</b>

Source: The application, p. 12

### **The Poultry Growing Services Industry**

- 2.11 The market for chicken growing services is derived from the demand for chicken meat, and accordingly will be influenced by conditions affecting chicken meat demand.

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<sup>7</sup> According to the applicant, Summertime Chicken Pty Ltd is a separate company controlled by Cordina Chicken Farms Pty Ltd

- 2.12 As is the case overseas, the vast majority of birds are grown by contract growers, although processors also grow some birds 'in-house' on large company owned farms. There are currently around 850 contract growers in Australia<sup>8</sup>, of which approximately 320 chicken growers and 60 turkey growers are located in NSW.
- 2.13 The contract growing system has existed for many years. Under the system, processors and growers enter into contracts, rather than growers being employed by the processors. The processors provide day old chicks, feed, technical and veterinary advice and other services to the contract growers, who then raise the poultry until they are ready for slaughter. The growers provide animal management services, labour, capital inputs such as shedding, land, water supply and equipment, and also meet running costs such as bedding, gas and electricity. Growers are generally restricted to working for a single processor at any point in time, and never own the chicks they rear.
- 2.14 Contract poultry growing is capital intensive, with the average investment in each poultry farm being around \$1.3 million<sup>9</sup>. Chicken growing sheds are highly specialised and have virtually no alternative use. In addition, they are totally non-portable. Thus, a reasonable degree of stability and predicability in growing arrangements is required to ensure future investment.
- 2.15 The growing fee is only a small component of the cost of production. A number of interested parties (including AFFA) quoted the growing fee as comprising around 6 per cent of the retail price.
- 2.16 Growers tend to be located relatively close to the processing plant and feed mills to minimise transportation costs of feed, day old chicks, pick up costs and to maintain the quality of finished birds.
- 2.17 Processing plants tend to be located within an 80km radius to major metropolitan centres. In NSW, plants are located near Sydney, in the Hunter Valley, the Central Coast, the Riverina, Tamworth and the North Coast.

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<sup>8</sup> From the Australian Chicken Meat Federation

<sup>9</sup> From the Australian Chicken Meat Federation

2.18 The applicant has provided the following distribution information, which has not been disputed by any interested party.

*Distribution of buyers and sellers of growing services, NSW*

Region	No. of growers	No. of buyers	Processors' names
Hunter Valley/ Newcastle	84	4	Bartter, Inghams, Red Lea, Penrith
Gosford/Wyong	64	3	Inghams, Red Lea, Cordina/Summertime
Sydney Basin & Southern Highlands	52	2	Inghams, Red Lea
Sydney Basin	90	4	Cordina/Summertime, Baiada, Penrith
Northern Slopes	18	1	Baiada
Richmond/Tweed	14	1	Sunnybrand

Source: the application, p. 13

### **3. BACKGROUND TO APPLICATION**

#### **Legislative arrangements**

- 3.1 The chicken meat industry in NSW is regulated by the *Poultry Meat Industry Act 1986* (the PMIA) and regulations. The PMIA provides for the establishment of the Poultry Meat Industry Committee (PMIC) to regulate contractual obligations and behaviour between growers and processors of poultry in NSW.
- 3.2 The PMIC comprises 15 persons appointed by the Minister, being:
- six processors representatives;
  - six grower representatives;
  - two independent members who in the opinion of the Minister have certain skills; and
  - an independent Chairperson chosen by the Minister.

#### ***Recent developments***

- 3.3 On 13 November 2001, the Premier of NSW announced in Parliament that:
- Some changes will need to be made to the Poultry Meat Industry Act to ensure that growers and processors entering into pricing agreements are not in breach of the Federal Trade Practices Act.*
- 3.4 The Commission wrote to the NSW Government on 16 January 2002 to seek clarification of the status of the review of the PMIA, and the comments the Premier made to Parliament. On 19 March 2002 the Commission received a response in which the Government indicated its intention not to deregulate the poultry meat industry.
- 3.5 On 29 May 2002 the Minister for Agriculture introduced the *Poultry Meat Industry Amendment (Price Determination) Bill 2002* into the NSW Legislative Assembly. The Bill's purposes are:
- to amend the *Poultry Meat Industry Act 1986* with respect to the price to be paid to growers for certain kinds of poultry; and
  - to authorise certain things for the purposes of the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales*.
- 3.6 The Bill was passed by both Houses and received assent on 10 July 2002.

#### **Related authorisations**

- 3.7 In June 2001 the Commission granted authorisation (A90750) for similar arrangements involving the collective negotiation of chicken growers'

contracts in Victoria. The application was lodged by Marven Poultry Pty Ltd for itself and on behalf of the other Victorian processors ('the Marven Poultry application').

3.8 The Marven Poultry application was in relation to a proposal by each of the six Victorian chicken meat processors<sup>10</sup> for the contracted chicken growers of each processor to engage in collective negotiations with their respective processor for standard growing agreements (including the agreement of a common fee) in accordance with a Code of Conduct.

3.9 The application was lodged in response to the National Competition Policy (NCP) review of the Victorian legislation, which recommended that the legislation be repealed, in addition to advice provided to the applicant which indicated that arrangements entered into pursuant to the Victorian legislation may contravene the TPA. At the time the Commission was considering the application, the Minister for Agriculture had communicated to grower and processor bodies that the Government's preference was to repeal the legislation and obtain authorisation from the Commission.

3.10 In granting authorisation, the Commission considered that the proposed arrangements represented a compromise between the then current legislated arrangements which involved industry wide agreements involving processors and growers and full deregulation. The arrangements authorised were less restrictive than those under the existing legislation as they did not provide for agreements between processors, but rather allowed individual processors to negotiate with their growers as a collective. It also considered that:

- while there was a possibility the arrangements may reduce the scope for competition over rates of payment and other terms and conditions between growers, the nature of the arrangements and industry structure significantly limited the extent of any anti-competitive detriment;
- the arrangements were likely to lead to transaction cost savings relative to a fully deregulated environment;
- the competitive pressure to which processors are subject were likely to ensure that at least some of these reductions in cost are passed on to consumers; and
- the arrangements might provide public benefit in facilitating the transition to deregulation.

3.11 This determination by the Commission was the subject of an application for an Administrative Decisions Judicial Review (ADJR) in the Federal Court lodged by the Victorian Farmers' Federation<sup>11</sup>. In its decision handed down on 27 August 2002, the Court dismissed the application of review. However, on

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<sup>10</sup> The six processors being Marven Poultry Pty Ltd, Inghams Enterprises Pty Ltd, Bartter Enterprises Pty Ltd, Eatmore Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd, and La Ionica Farming Operations Pty Ltd.

<sup>11</sup> Jones v Australian Competition and Consumer Commission [2002] FCA 1054 (27 August 2002)

18 September the Victorian Farmers Federation lodged an appeal of the Court's decision. The date for hearing the appeal is yet to be scheduled.

- 3.12 The Commission is currently considering application for authorisation A90825 by Inghams Enterprises Pty Ltd in relation to its chicken growing operations in South Australia (SA). The application was lodged on 3 April 2002. Inghams sought authorisation to permit its contract growers to continue to engage in collective negotiations with Inghams on a standard growing agreement or agreements and matters arising therefrom including the agreement of a common fee or fees in accordance with a Code of Practice and Minimum Contract Guidelines.
- 3.13 Inghams growers in SA have operated under authorised arrangements since 1997. That authorisation was granted for 5 years. This application was made for Inghams and its growers to continue to engage in conduct previously authorised. Interim authorisation was requested to ensure contracts could be renegotiated for periods beyond 30 June 2002 whilst the processes up to a final determination were followed. The Commission granted interim authorisation on 18 April 2002 while it considers the merits of the substantive application.

## **4. THE APPLICATION**

- 4.1 The application was made under subsection 88(1) of the TPA for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of s 45 of the TPA. The application has also been expressed to cover all current and future NSW growers contracted to the applicant and seven other processing companies pursuant to s 88(6) of the TPA. Authorisation has been requested for a period of five years.
- 4.2 Part of the conduct for which authorisation is sought is the appointing of representatives from among participating growers within their processor negotiation group to enter into negotiations with their processor on a standard growing agreement and matters arising therefrom.
- 4.3 The negotiations, minimum contract standards and dispute resolution procedures will be conducted under a Code of Practice (the Code) and Minimum Contract Guidelines (the Guidelines), for which authorisation is also sought. These are agreed to by all processors party to this application and by future processors who agree to the Code and Guidelines.
- 4.4 The application is also expressed to cover other contracts or proposed contracts that are made, or will be made, under similar terms. Under s 88(13) of the TPA the Commission may grant a single authorisation that extends immunity to the giving effect to the various growing agreements that may result from the collective negotiations through processor negotiating groups, in respect of each processor.
- 4.5 This application relates, and is limited to, negotiations between an individual processor and grower groups. The application does not extend to negotiations between processors or between growers of different processors (except to the extent to which the conduct involves the giving effect to the Code and the Guidelines which have been agreed by the processors).

### ***Recent developments***

- 4.6 The section below outlines the most recent Code and Guidelines received by the Commission. However the Commission notes the proposed amendments to the Code as suggested by the applicant following the pre-decision conference. These are discussed at paragraph 7.18, but have not been incorporated into an updated Code provided to the Commission.

### **The Code of Practice**

- 4.7 Under the Code, growers who choose to act collectively are defined as participating growers (PGs). They appoint from among their number, grower representatives to be members of a Processor Negotiating Group (PNG) along with representatives of the processor. The Code defines the conditions

applying to the formation of a PNG, and its functions, composition and procedures.

- 4.8 The Code sets out the procedures for the establishment, operation, conduct of negotiations and dispute resolution process between a processor and its contracted growers.
- 4.9 Those growers who choose to negotiate as individuals are termed non-participating growers. The Code also describes the rights and restrictions that apply to non-participating growers.

### ***Formation of a PNG***

- 4.10 Under clause 2 of the Code, all contracted growers are eligible to be a PG in a PNG. In order to form a PNG, a secret ballot must be held, with all growers given 14 days notice in writing of the ballot. It is not a condition that all growers vote.
- 4.11 The processor is not to play any part or exert any influence over its growers' vote on whether or not they choose to form a PNG except as provided by clause 2.7. The processor is free to attend the meeting at which the ballot is being held and address the meeting, provided they are requested to by a grower.
- 4.12 Clause 2.7 provides that a PNG will be formed if 40 per cent of contracted growers vote to negotiate collectively. However, with the agreement of the processor, a PNG may be formed if the vote is less than 40 per cent, or more than one PNG may be formed. If a PNG is not formed then all growers will negotiate individually with their processor.
- 4.13 Once a vote is held, growers are free to form any PNGs that they wish. If a group of growers form a PNG independent of the remainder of the grower group, they are not under any obligation to accept other growers into this PNG.
- 4.14 A grower may request to join an existing PNG, provided that a majority of existing growers in the PNG agree. The processor is not allowed to play a role in any decision by existing growers on whether or not to allow new members to join. Where a contract has been signed between a processor and growers in a PNG, the processor is under no obligation to offer the same contract to new members who join that PNG. However, new members will be included in any new contracts or extensions of contracts previously signed with growers in that PNG.
- 4.15 If the number of PGs falls below the agreed percentage (nominally 40 per cent) then all PNGs will lapse unless it is mutually agreed that they continue. A PNG must be reformed if a ballot of all growers contracted to that processor achieves the agreed percentage (nominally 40 per cent).



### ***Functions of a PNG***

- 4.16 Clause 1 of the Code sets out the functions of a PNG. These include to:
- negotiate the terms and conditions of the Growing Contract between all PGs and their processor, the growing fees to be paid to PGs, the procedure for reviewing fees and any changes to operations procedures desired by either the PGs or the processor, including financial considerations for such changes;
  - act as a mediator or negotiating body for the resolution of disputes between the processor and all PGs;
  - convene and conduct meetings of PGs, including administering voting procedures, keeping meeting records and placing before PGs for their final determination the outcome of any negotiations that relate to PGs collectively;
  - act as a mediating body for the resolution of disputes between the processor and an individual PG; and
  - notify an individual PG of any recommendation arising from negotiations which relates to them alone.

### ***Composition of a PNG***

- 4.17 Under clause 3 of the Code, the number of grower representatives in the PNG will be determined by the PGs in consultation with their processor, but will normally be no less than two and no more than four. The number and selection of the processor representatives will be determined by the processor but shall not exceed the number of grower representatives in the PNG.
- 4.18 Clause 4 outlines how the grower representatives should be elected. Grower representatives must be PGs themselves, and the term they are elected for should not be less than one year and not more than three years. Retiring grower representatives are eligible for re-election.
- 4.19 Grower representatives shall be elected by all PGs, and all PGs contracted to the processor at the time of the election shall be eligible both to nominate as a representative and to participate in the ballot. The ballot for electing grower representatives shall be conducted by a show of hands, or by secret ballot if requested by any PG. The ballot shall be convened and conducted by the PNG or an independent body at a meeting that all PGs are notified of in writing.
- 4.20 There is also provision for how the vote is to be conducted, proxy voting and for casual vacancies.

### ***Meetings of the PNG***

- 4.21 Meetings of the PNG shall be held if requested by either the processor, or at least half of the grower representatives. Two thirds of the grower representatives and one processor representative constitute a quorum.
- 4.22 Matters that are determined by the PNG shall be resolved in the affirmative only if the processor representatives present, and at least two-thirds of the grower representatives present, vote in favour. Costs incurred by the PNG in

carrying out its functions will be met equally by the processor and the PGs, unless otherwise agreed.

- 4.23 In carrying out any of its functions, the PNG may take such action and obtain such information as it resolves is necessary for that function. It may also, at the request of either grower or processor representatives, resolve to invite a suitably qualified person to a meeting to advise it on any matter.
- 4.24 PGs may appoint, at their own cost, advisers (subject to clause 5.7) to assist them in negotiation matters. Their adviser may, at the express wish of growers, negotiate directly with the processor contract terms and conditions on behalf of growers. However, clause 5.7 states that a common adviser is not be used across the industry.
- 4.25 Clause 6 outlines the process for a recommendation of the PNG when it is voted on by the PGs. The recommendation shall be determined by a two-thirds majority of all PGs voting at the meeting.
- 4.26 If the recommendation is not approved, the meeting shall determine by a simple majority whether the matter shall be referred back to the PNG for further negotiation or be determined in accordance with the dispute resolution provisions of the growing contract (see paragraph 4.34 – 4.37).
- 4.27 Under clause 7, should a PNG have a recommendation on a matter concerning an individual grower, they must notify that individual in writing. The grower shall then, within 14 days, notify the PNG in writing whether he/she accepts the recommendation or wishes to resolve the matter in accordance with the dispute resolution provisions of the growing contract.
- 4.28 Clause 8 covers matters for decision by all PGs not resolved within the PNG. Should a matter not be resolved by the PNG, a meeting of PGs shall be held, at which the processor and grower representatives on the PNG shall outline their positions on the issue, which will then be considered by the meeting. A final recommendation to resolve the matter, which must have the support of the processor, may be put to a vote by the PGs by a show of hands or by secret ballot if requested.
- 4.29 If the recommendation is approved by two thirds of the PGs voting, the recommendation shall be binding on all PGs. If the processor does not accept the recommendation, or the vote is not passed and all other avenues for resolution have been exhausted, the issue shall be determined in accordance with the dispute resolution provisions of the growing contract.

***Participating and non-participating growers***

- 4.30 An individual PG is bound to enter into a growing contract negotiated through the PNG but may discuss with the processor at any time the terms and conditions of his growing contract or any matter arising from it.
- 4.31 A non-participating grower cannot participate in the negotiation of growing contracts or growing fee arrangements through the PNG but must negotiate

separately and directly with the processor on all matters, including those not directly connected to the negotiation of growing contracts. A non-participating grower will not be eligible to participate in ballots for the election of grower representatives to the PNG or to attend meetings convened by the PNG.

- 4.32 At the formation of a PNG or at the time the collective agreement is due for re-negotiation, a grower may elect to leave the PNG and become a non-participating grower. A grower may also withdraw from the collectively negotiated contract at any other time by advising the PNG in writing, provided that the processor agrees.

### **Minimum Contract Guidelines**

- 4.33 All contracts negotiated between a processor and a PNG will need to consider at least the matters outlined in the NSW Minimum Contract Guidelines (the Guidelines) proposed by the applicant. These include:

- provisions for commencement, expiry, duration and renegotiation of the contract;
- a requirement to negotiate in good faith;
- arrangements for the use of agents in negotiations;
- arrangements for variations of the contract by mutual agreement of the parties;
- suspension of operation of the contract due to an unforeseen event (*force majeure*);
- termination of the contract in various circumstances;
- reasonable specified default provisions;
- equal treatment by the processor of all growers in a PNG;
- arrangements for delivery and collection of birds;
- dispute resolution procedures;
- the obligations of the grower and the processor in the supply of goods, facilities, services and veterinary advice;
- financial matters, including the determination and periodic adjustment of the growing fee, guidelines and criteria for assessing the performance of growers, and any associated incentives or penalties; and
- schedules to the contract, which may include farm facility, farming management or farm biosecurity standards.

### ***Poultry Advisory Committee***

- 4.34 Under the Guidelines, there is provision for a Poultry Advisory Committee (PAC) to be appointed by the Minister for Agriculture consisting of one representative each from the growers, processors, Government and an independent person.

### ***Dispute resolution procedures***

- 4.35 As outlined in clause 2.6 of the Guidelines, unless otherwise agreed by the parties, the dispute resolution procedures will include the following provisions:

- following notice of the matter from the aggrieved party to the other party, a requirement to endeavour to resolve the dispute by negotiation, including conciliation by the PNG; and
  - if the dispute is not resolved by this means within 90 days, a requirement to attempt settlement using mediation through an external mediator agreed to by the parties or suggested by the PAC or similar body.
- 4.36 If the dispute is related to an amount payable, and if the matter has not been resolved within 28 days of the appointment of the mediator or some other agreed time, a requirement to submit the dispute to external arbitration by a person agreed to by both parties who has not acted as the external mediator in the matter currently in dispute. Failing an agreement on a mediator, arbitration is to be through the Australian Commercial Disputes Centre.
- 4.37 In all other disputes if the matter has not been resolved within 28 days of the appointment of the mediator or some other agreed time, the matter if mutually agreed may be referred to external arbitration.
- 4.38 The apportionment between the parties of costs incurred in mediation and/or arbitration is to be determined by the mediator and/or arbitrator.

## **5. APPLICANT'S SUPPORTING SUBMISSION**

5.1 The applicant made three main submissions in support of their application. One was received at the same time as the application. Another was made in December 2001, which responded to some of the comments made in the publicly available submissions from interested parties. The applicant then made another submission in February 2002 responding to comments made in NSWFarmers' second submission.

### ***Current arrangements***

5.2 The applicant argued that the current arrangements have resulted, or are likely to result, in the following:

- growing fees that are more administered outcomes than the fees which would result in an open market situation;
- efficiency improvements being constrained to a level below that which would have otherwise occurred; and
- minimal investment in NSW processing facilities, with major expansions by the larger processors in recent years going to South Australia, Victoria and Queensland.

5.3 In addition, the applicant argue that a large and abrupt adjustment to the industry will occur at the end of the next statewide determined contract period (June 2004) as many adjustments have been postponed until that time. In particular, the applicant stated that some 70 Bartters and Inghams growers are not likely to have contracts operating beyond the 30 June 2004 expiration date of the current contracts. These growers account for over 20 per cent of all growers in NSW.

### ***Experiences in SA and Tasmania***

5.4 The applicant argued that the experience of South Australia (SA) under authorisation provides insights into what may occur in NSW. They stated that the poultry industry has just gone through a period of severe price discounting due to surplus chickens. However, growing fees in SA have been virtually unaffected. For instance, since 2000, the Steggles/Bartter fee has been increased or held with increased batch rates. In addition, there has been substantial investment in the industry by Inghams and also another local processing company. They contended that there is no evidence from either SA or Tasmania (where similar authorised conduct has also operated) that legislation is needed to protect growing fees.

### ***Desirability of legislation***

5.5 The applicant argued that contrary to the current arrangements in NSW, there is no reason to have legislation to enforce contracts or provide dispute resolution processes, and states that in South Australia, the industry has operated effectively without legislation. In particular, it stated that the recent decision of Bartter to close its South Australian processing plant had resulted in

a speedy adjustment by the industry, with 24 of the 25 affected growers already having new contracts.

- 5.6 It also argued that legislation is not a precondition to establishing industry committees or peak bodies, and stated that a Poultry Advisory Committee (PAC) may be established at the Minister's discretion. Among other things, the purpose of the PAC would be to keep the relevant Minister informed of developments in the industry, including any Commission authorisations.

### ***The proposed contracts***

- 5.7 The applicant also claimed that in relation to the proposed contracts:
- the proposed Code and Guidelines heavily draw on those which processors and government officials thought had been negotiated and agreed on by all three parties (growers, processors and the Government) in early 2000;
  - industry codes are enforceable under s 51AD of the TPA. This provision includes mandatory codes and any voluntary code which binds the corporation. (*The Commission notes that this provision only applies to codes that have been prescribed under the TPA. The proposed code which is the subject of this application is not a prescribed code*);
  - dispute resolution procedures including arbitration are set out in the Code of Practice and are to be included in contracts;
  - there are also other avenues for parties to seek redress, such as through the unconscionable conduct provisions of the TPA, plus additional detail on dispute resolution may be included in the contract if required; and
  - the current contracts are legally in force and will run to completion unless both parties agree to renegotiate them, and agree on new contract terms.

### ***Turkey growers***

- 5.8 The applicant argued that turkey growing is a separate industry to chickens, and has a different structure. There are fewer growers and only two processors. The applicant stated that the turkey industry may require authorisation to enable certain conduct to occur, but that chicken growing is the subject of this application.

### **Public Benefits**

- 5.9 The applicant stated that it considers the major issue is not the proportion of the growing fee that makes up the retail price, but the operation of the current system, and whether:
- this inhibits the adoption of new technology;
  - this inhibits the ability of contracting parties to develop more efficient arrangements; or
  - the growing fee paid under the current arrangements is higher than necessary.

In addition, it contended that it is the dynamic productivity factors and efficiency gains that drive the level of net public benefits.

- 5.10 The applicant claimed that the public benefits from the proposed arrangements include:
- 5.11 ***An ability to better tailor contracts*** to the circumstances facing particular processors and their growers, leading to an improved position for both growers and processors compared to the existing ‘one shoe fits all’ approach;
- 5.12 ***An improved bargaining position for growers*** to counter the perception of a power imbalance with processors. The applicant argued that while a change in bargaining power itself may not constitute a public benefit, perception of power imbalance appears to be a major rationale for the current restrictive legislation, and therefore addressing this issue removes the need for a legislative solution;
- 5.13 ***Reduced transaction costs*** for growers associated with seeking information, preparing negotiating positions and undertaking negotiations, and also reduced transaction costs for processors;
- 5.14 ***A mechanism for dealing with disputes*** which would lead to greater industrial harmony and hence to a focus on productivity. The applicant also argued that there would be a reduction in sources of conflict which could give rise to industrial unrest;
- 5.15 ***A more rapid adjustment to safety, environmental, planning and other issues impacting on the industry***. Processors do not own the sheds and have no power to ensure growers adjust or rectify any occupational health and safety issues apart from taking the strong actions of either reporting the grower to the appropriate authority or refusing to pick up birds. The applicant argued that authorisation would also provide the opportunity to include pre-emptive arrangements and codes that a processor may want to include, to differentiate itself from its competitors. In addition, the applicant argued that being able to do this within a processing group involves less administrative costs than individually negotiating these arrangements;
- 5.16 ***Increased competition*** by being able to more easily effect differential contracts with a group of growers. This will allow each processor to differentiate itself from another processor and increase competition;
- 5.17 ***Increased consumer satisfaction*** as processors would be able to adjust contracts to meet the production needs of their buyers; and
- 5.18 ***A stronger NSW industry*** will result which will be better equipped to withstand competition from other markets (including interstate and overseas). In addition, the applicant argued that there will be an increase in productivity and a more rapid growth rate. The applicant also claimed that there will be improved incentives for capable growers.
- 5.19 The applicant claimed that the level of technology (shedding standard) is the major determinant of productivity for both processors and growers, with a move from one technology to another resulting in quantum savings in costs. It argued that tunnel shedding is the technology currently applicable in NSW but