

a result of negotiation between the processors rather than competitive pressures in the market. However, the Commission considers the findings of the NCP Review particularly pertinent in this regard. The review concluded that the current arrangements:

restrict competition due to the fact that contract terms are fixed across the whole market. This severely constrains potential competition among processors. There is no incentive for processors to compete for growers, as they cannot vary contracts to attract the more efficient and higher quality growers. Equally, there is no incentive for growers to compete on services, quality or terms at the point of engagement.<sup>4</sup>

- 9.83 The Commission further notes the Review's analysis of the Victorian Chicken Meat Council's (VCMC) submission that the VCMC consider that under the existing legislation there is virtually no basis on which a processor could compete to entice a grower to change his/her contractual allegiance.<sup>5</sup>
- 9.84 The Commission recognises that regardless of the market structure in place there are a number of reasons why grower mobility may be limited to processors within their immediate geographic area. However, the Commission notes that the majority of growers are located close to at least two, and more generally four, processors who could potentially compete for their services provided legislative impediments on their incentive to do so were removed.
- 9.85 The Commission notes the prior history of grower movements between processors. Whilst it is generally the case that in the past grower movements have been with the consent of both processors involved, as discussed above, the Commission considers the lack of grower movements based on competitive market forces is to a large degree a result of the lack of incentives for more competitive bidding for growers' services under the current arrangements.
- 9.86 Therefore, whilst the Commission accepts the current lack of competition in the market for grower services, the Commission considers the current legislated arrangements a major impediment to such competition occurring in the future. The Commission considers that the removal of this impediment, with an authorisation in place, will greatly enhance the scope for competition among processors for growers' services.

#### ***Contract Stability to Enhance Grower Investment***

- 9.87 The Code of Conduct provides that growing contracts will be developed according to the needs and circumstances of participating growers and their processor. Under the Code it is envisaged that contracts will normally be of a duration of 2 to 5 years.

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<sup>4</sup> Department of Natural Resources and Environment, National Competition Policy Review of the *Broiler Chicken Industry Act 1978*, pg V

<sup>5</sup> Department of Natural Resources and Environment, National Competition Policy Review of the *Broiler Chicken Industry Act 1978*, pg 68

*Issues arising out of the draft determination*

- 9.88 Growers and the VFF argued that contract terms should be at least 10 years to permit the amortisation of investments and create a stable environment of new investment.
- 9.89 The Applicant argued that to the extent that specificity of assets employed by growers is a concern, contracts negotiated specifically at the PNG or individual level will be better able to take account of this.

*Commission evaluation*

- 9.90 As discussed above, chicken growing sheds are specialised, have virtually no alternative use, and are non portable. Investment decisions by growers to expand their operations or to buy new technology, or by potential growers to purchase existing farms, are thus much influenced by the perceived security of the contractual relationship with the processing company.
- 9.91 Growers have raised concerns that proposed contract terms do not provide sufficient security to promote future investment in the industry. The Commission notes that the Code of Conduct provides for contracts to be developed according to the needs and circumstances of growers and processors. The Commission considers that where new investment is contemplated, sufficient incentive, in the form of security of contractual terms, will need to be offered if such investment is to occur.
- 9.92 Consistent with its view in the Inghams and Steggles determinations in the South Australian chicken meat industry, the Commission accepts that the proposed arrangements are likely to enhance contract stability and grower investment should deregulation of the industry occur, and thereby produce public benefit. However, the Commission also believes that contract stability can be provided through alternative arrangements, such as individual contracts. Therefore, the Commission accepts, but does not place great weight on contract stability as a public benefit stemming from the proposed arrangements.

*Encouragement of Innovation and Technical Development*

- 9.93 The Applicant has proposed the establishment of a system of productivity and quality bonuses to be incorporated into grower contracts. The Applicant argues this will provide incentives to improve innovation and technology of farms and equipment, thereby increasing industry efficiency.

*Issues arising out of the draft determination*

- 9.94 No issues were raised by interested parties on this matter.

*Commission evaluation*

- 9.95 The Commission notes that while the proposed industry Code of Conduct contains guidelines to be used in measuring the efficiency of growers, these guidelines are very general and do not in themselves necessarily provide incentives to improve grower productivity. Any such incentive will come from the specific terms and conditions agreed to and included in grower contracts.

While the Commission considers that the opportunity to incorporate such incentives into growing agreements will be improved by industry deregulation, the Commission notes that the incentive for the implementation of such measures is no greater in the collective negotiating framework proposed than would be the case with individually negotiated contracts.

### ***Improvements in Environmental Management and Occupational Health and Safety***

- 9.96 The Applicant argued that the proposed arrangements would improve industry occupational health and safety standards through the establishment of processor specific OH&S standards in contrast to the current industry wide standards. The Applicant further argued that the proposed arrangements would ensure minimum bio-security standards are maintained.

### ***Issues arising out of the draft determination***

- 9.97 Growers argued that the Applicants claims in their supporting submission that the proposed arrangements would improve industry occupational health and safety standards were one line assertions with no supporting arguments.

### ***Commission evaluation***

- 9.98 The proposed Code provides that factors, such as occupational health and safety and bio-security, are to be taken into account in developing guidelines for measuring the efficiency of growers. However the Code contains no specifications about how such measures are to be incorporated into growing agreements, or the appropriate OH&S and bio-security standards that would need to be met. To the extent that OH&S issues in the industry are processor-specific, then negotiation on a processor by processor basis does have the potential to improve OH&S standards. However, the provisions in the Code in themselves provide no additional incentive for improvements in OH&S and bio-security standards. The Commission has not been provided with any information that would indicate that the standards negotiated would necessarily be any greater than those imposed either in the current regulated environment or in a deregulated environment. In fact, circumstances could arise where such standards could be lowered in the negotiation process to generate cost savings to both processors and growers.
- 9.99 In the previous related chicken determinations the Commission has noted that the specific inclusion of provisions addressing these issues into growers contracts does not necessarily depend on the collective negotiation arrangement. Where processors wish to incorporate higher standards into grower contracts the Commission considers they would be equally capable of doing so in individually negotiated contracts. Consequently, the Commission does not accept these as public benefits resulting from the proposed arrangements for which authorisation is sought.

### ***International Competitiveness and Export Potential***

### ***Issues arising out of the draft determination***

- 9.100 No issues were raised by interested parties on this matter.

### *Commission evaluation*

- 9.101 The Applicant contended that the proposed arrangements would improve the international competitiveness and export potential of the Victorian chicken meat industry. While industry competitiveness may be enhanced through general improvements in productivity and efficiency, the Commission does not consider that these benefits are exclusive to the collective negotiation arrangements and may be generated from other mechanisms. Furthermore, the Commission notes that the current market in Victoria has limited linkage to international markets with very low levels of exports, (approximately 2% of Victorian production).

### *Growing Contracts*

- 9.102 The Code of Conduct states that contracts will be similar to existing contracts.
- 9.103 Growers have raised concerns that the proposed Code does not specify the specific terms and conditions of growing contracts. In particular, growers note that the proposed guidelines for negotiation lack detail with regard to: pricing formulae, long-term stability and the proposed dispute resolution mechanism. Following concerns raised by the VFF on behalf of growers, the Commission requested the Applicants provide further details about the growing contracts and the terms of the Code.

### *Issues arising out of the draft determination*

- 9.104 The VFF argued that the basic inadequacy of the arrangements is the absence of any certainty in relation to contract terms. For example the arrangements contain no model for determining fees. They argued that the starting point for contract negotiations should be existing contracts which incorporate prescribed minimum terms and conditions similar to those under the BCI Act.
- 9.105 In response, the Applicant noted that the Code sets out guidelines for the establishment, operation, conduct of negotiations and dispute settlement and minimum content standards for contracts. The Applicant argued that it is not appropriate to pre-empt those negotiations by providing a detailed, prescriptive Code. They argued that to do so would result in de-facto industry wide negotiations.

### *Commission evaluation*

- 9.106 The Commission notes that authorisation is not sought for specific growing agreements but rather for a proposed arrangement under which growers can negotiate growing agreements collectively including price and contract terms, subject to certain criteria and minimum standards set out in the Code and give effect to these agreements. The Commission considers that the flexibility of the negotiating processes under the proposed arrangements is a significant improvement on current arrangements and consistent with moves from a regulated to deregulated industry.
- 9.107 The Commission notes that in the transition from a regulated to deregulated market, growing contracts will have to include new considerations including issues that were previously addressed in the legislation. This necessitates a

greater degree of flexibility and less prescriptive approach to contract terms and conditions. The Commission considers that the specific content of the proposed contracts are a matter for negotiation between growers and processors and that prescribing specific terms of contracts, such as how payment is calculated, would reduce the flexibility of the negotiation process. It may also result in a set of prescribed arrangements similar to those in place in the current regulated environment, which would go against the intent of industry deregulation. The Commission finds the conclusions of the NCP Review of existing legislation as particularly pertinent in this regard. The Review found that restrictions on processors' ability to offer favourable terms and conditions (different to the prescribed growing contract terms and conditions) severely restricted competition between processors in attracting efficient growers, as well as restricting competition between growers to 'put themselves on the market'<sup>6</sup>.

- 9.108 The Commission notes that, in relation to growing contracts, Clause 12.1 of the Code of Conduct reads:

All negotiations are to be conducted in good faith by both parties.

- 9.109 The clause should read "*be*" in good faith rather than "*by*" in good faith.

## Other issues

### *Formation of Processor Negotiating Groups*

#### *Issues arising out of the draft determination*

- 9.110 Clause 1.1 of the Code of Conduct reads:

A secret ballot will be held by the Chairman of the Growers Group of all Growers contracted to each processor as soon as practicable to determine if they wish to negotiate collectively.

- 9.111 The VFF argued that the Code's procedures for the formation of a PNG are confused and assume a structure which enables a secret ballot to be held, as well as assuming the existence of the 'Chairman of the Growers Group'. The VFF argued that PNGs formed under interim authorisation have not complied with Clause 1.1 of the Code.
- 9.112 The Applicant argued that growers are able to form any groups they choose and Clause 1.1 applies to those growers choosing to join a PNG.
- 9.113 The VFF also expressed concerns that some growers would be denied access to PNGs and be forced to become non-participating growers through processors exerting influence over who may or may not join a PNG.

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<sup>6</sup> Department of Natural Resources and Environment, National Competition Policy Review of the *Broiler Chicken Industry Act 1978*, pg 70

### *Commission evaluation*

- 9.114 The Commission notes the Applicant's assertions that Clause 1.1 of the Code applies to those growers choosing to join a PNG. However, the Commission notes that clause 1.1 clearly states that a vote is to be held of "all Growers contracted to each processor". The Commission's assessment of the public benefits and anti competitive detriments of the proposed arrangements is predicated on the assumption that negotiations under the proposed arrangements would comply with all clauses of the Code. The Commission would be concerned if PNGs were to be formed without all growers being given the opportunity to participate in the decisions regarding their formation. It is the Commission's view that processes for the formation of negotiating groups not formed in accordance with clause 1.1 would not be protected by interim or final authorisation.
- 9.115 The Commission understands that some grower negotiating groups have been formed under interim authorisation without a vote of all growers contracted to the processor taking place. The Commission has drawn to the parties' attention its concerns regarding such groups being formed without complying with clause 1.1. The Commission understands that no contracts have been signed as a result of negotiations with these groups. Further, the Commission understands that it is not intended that any contracts will be signed unless or until full authorisation is granted.
- 9.116 This authorisation is only in respect of those arrangements which are carried out in accordance with the Code of Conduct. Where a party has failed to comply with all clauses of the Code of Conduct any contract resulting from these negotiations is not protected by this authorisation. In effect contracts signed will not be protected by authorisation unless both parties to the contract comply with all clauses of the Code including the formation of PNGs, the negotiation process, the signing of contracts and dispute resolution.
- 9.117 The Commission considers that this will ensure the giving of effect to the arrangements authorised will be as envisaged by the Commission in its assessment of the public benefits and anti-competitive detriments of the proposed arrangements.
- 9.118 The Commission understands that it is the intention that where negotiating groups have already been formed outside of clause 1.1, these groups will be reformed once full authorisation is granted, with all growers given the opportunity to participate in any vote for their re-establishment.
- 9.119 The Commission notes the VFF's concerns regarding the ambiguity about how a vote of growers can occur under clause 1.1. As this clause is currently written, such a vote can not occur unless held by the Chairman of the grower group. While it is assumed that the Chairman of the grower group would mean the current elected representative of the VFF grower group of each processor, this is not specified in the Code. Further, the Commission notes that not all growers contracted to each processor are members of the VFF. Consequently, this representative cannot be said to be representative of all growers.

- 9.120 The Commission also notes that, effectively, as the Code is presently written, a PNG can only be formed if the Chairman of the Grower group agrees to hold a ballot. Consequently, a situation could arise where the majority of growers contracted to a processor wished to form a PNG, but are denied their right to do so if the Chairman of the grower group chooses not hold a ballot. The Commission therefore considers that the ambiguities in the Code regarding who can hold a ballot to form a PNG require clarification.
- 9.121 The Commission has imposed a condition of authorisation that any grower may call for a ballot of growers contracted to a processor to determine if they wish to negotiate collectively. While the Commission considers that any grower should have the right to call such a ballot, the Commission notes the VFFs concern that some growers may be denied access to PNGs. The Commission notes that clause 1.4 of the Code provides that all growers are eligible to be a participating grower in a PNG. However, the Commission has also imposed further conditions of authorisation explicitly providing that:
- a) all growers contracted to a processor be provided with a reasonable opportunity to participate in any ballot called to determine if growers wish to form a PNG in the first instance; and
  - b) processors are to play no part, or exert any influence over decisions by growers to join a PNG.
- 9.122 As a result the composition of grower groups will be at the sole discretion of participating growers without the influence of the processor.
- 9.123 As noted above more than one PNG may be formed with a processor if groups of growers consider that they have an advantage in collective negotiation in this way.
- 9.124 While the composition of grower groups is at the sole discretion of growers, where a group of growers wishes to form its own PNG independent of the remainder of the grower group, the Commission does not consider that growers should have an automatic right of entry to any grower group they choose. Should a group of growers choose to form a separate PNG, then, subject to the processor agreeing to deal with this group if the group contains less than 40% of all growers contracted to the processor, the Commission considers that they should have this right.
- 9.125 Therefore the Commission has imposed a further condition of authorisation to clarify that while the composition of grower groups is at the sole discretion of growers, no PNG is obliged to accept any other grower as a member of this group.
- 9.126 Where a PNG consists of less than 40 per cent of all growers contracted to the processor, under the Code of Conduct it is at the processor's discretion whether or not it wishes to form a PNG with growers.

### *Conditions of authorisation*

**C3** Section 1 of the Code of Conduct must be amended to incorporate the following:

- Clause 1.1 must be amended to read: “A secret ballot will be held at the request of any grower contracted to a processor of all growers contracted to that processor as soon as practicable to determine if they wish to negotiate collectively”.

Section 1 of the Code of Conduct must be amended to reflect the following:

- All growers contracted to the processor are to be given 14 days notice in writing of the ballot. It is not a requirement that all growers vote, but that all growers be given a reasonable opportunity to vote in the ballot, if they so choose. Growers are free to meet on their own and with advisers in accordance with section 10 of the Code of Conduct prior to the ballot being held.
- The processor is to play no part or exert any influence over any vote taken under clause 1.1, except as provided under clause 1.3.
- The processor is free to attend the meeting at which the ballot is held and address the meeting if requested by a grower.

**C4** Section 1 of the Code must be amended to reflect the following:

- Once a vote under clause 1.1 of the Code is held, growers are free to form any PNGs they wish. Should a group of growers wish to form their own PNG independent of the remainder of the grower group they are under no obligation to accept other growers into this PNG.
- Where a grower requests to join an existing PNG it may do so providing a majority of existing growers represented by the PNG agree.
- The processor is to play no role in any decision by existing growers represented by a PNG to allow new growers to join. Where a contract between a processor and a Participating Grower represented by a PNG has been signed the processor is under no obligation to offer the same contract to new members who join that grower group after the contract is signed. However, any negotiation of new contracts or extension of contracts previously signed with the Participating Growers is to include new members of the Grower Group.

9.127 This authorisation is only in respect of those arrangements which are carried out in accordance with the Code of Conduct. Where a party has failed to comply with all clauses of the Code of Conduct any contract resulting from these negotiations is not protected by this authorisation.

## **Rights of Non Participating Growers**

### *Issues arising out of the draft determination*

- 9.128 The VFF argued that the provisions relating to non-participating growers do not, as the Code suggests, provide growers with an option to opt out of the PNG and the collective arrangements. The VFF claimed that effectively this will be the choice of the processor. Additionally, the VFF stated that a grower may only withdraw from a PNG and become an NPG if the processor agrees.

### *Commission evaluation*

- 9.129 Section 11 of the Code of Conduct relevantly states:

- 11.1 At the formation of a PNG or at any time the collective agreement with a PNG is due for renegotiation, a grower may elect to opt out and become a Non Participating Grower.
- 11.2 A Grower may at other times, with the processor's agreement, withdraw from the collectively negotiated contract by advising the PNG in writing.
- 11.7 An NPG at the end of the relevant contract period may elect to join the collective agreement by notifying the PNG in writing to that effect.

- 9.130 Under section 11 of the Code growers have the option of opting out of collective negotiation both when the PNG is formed and at anytime when the PNGs collective agreement is up for renegotiation. Similarly, non-participating growers have the option of electing to join the collective agreement at the end of the relevant contract period.

- 9.131 Growers' rights to enter and exit the collective arrangements are restricted during the life of a contract negotiated, once signed. It is standard legal practice that both parties to a contract are bound to honour that contract unless both agree to rescind it. The Commission does not consider it appropriate for any party to have the option of relieving themselves of their legal obligation under a contract they choose to sign without the consent of the other party to the contract.

- 9.132 Section 11 of the Code of Conduct further states:

- 11.3 An NPG may negotiate directly with the Processor on any matter and engage such advisers as appropriate. (A common adviser across all NPGs within a processor group is not generally envisaged (Growers should seriously consider forming a PNG if they want that), nor is a common adviser across the whole industry).

- 9.133 The Commission notes that authorisation is sought to negotiate and give effect to collective negotiating agreements in accordance with the Code of Conduct. Accordingly, the Commission considers that the Code should not in any way relate to, or impose restrictions on, the activities of Non-Participating Growers and their negotiations with processors, except in relation to their participation to the collective arrangements.

9.134 The Commission has imposed a condition of authorisation requiring that clause 11.3 be amended to reflect this.

9.135 However, the Commission notes that while non participating growers are not prohibited from engaging common advisers or negotiators by the proposed arrangements (as authorised), the authorisation which the Commission proposes to grant does not protect them for this conduct. Consequently, if the result of non participating growers choosing to engage a common adviser, or an adviser who was also employed by an PNG, was a contract, arrangement or understanding which had the purpose or effect of fixing, controlling and maintaining prices, this conduct would not be protected by this authorisation.

#### *Condition of authorisation*

**C5 Clause 11.3 of the Code of Conduct must be amended to read: "An NPG may negotiate directly with the Processor on any matter."**

#### *Meetings/Decisions of Growers*

##### *Issues arising out of the draft determination*

9.136 The VFF argued that, under the Code, decision making by growers would become a processor influenced process. The VFF argued that growers should be free to reach decisions on matters without the processor being present.

9.137 Growers argued that the Code favours processors as:

- decisions of meetings of PNGs, where agreed by the majority of growers, can be vetoed by the processor; and
- where PNGs do agree on resolutions the processor must be present when such resolutions are put to participating growers;

9.138 Growers further argued that;

- where matters relating to all growers are not resolved by the PNG, growers should be able to meet independently of the processor to consider the matter, with a grower representative putting their preferred resolution to the processor.

9.139 The Applicant argued that negotiating groups are established to conduct negotiations between participating growers and the processor and therefore there must be agreement by both parties on agreed resolutions.

9.140 The Applicant further argued that section 10 of the Code provides for participating growers in PNGs to hold meetings amongst themselves and with advisers to discuss all relevant matters including terms and conditions of contracts to be negotiated.

#### *Commission evaluation*

9.141 Section 10 of the Code of Conduct states:

- 10.1 The grower representatives on the PNG may meet as and when required on their own, with PGs and with advisers to discuss relevant matters.
- 9.142 The Commission considers that this clause clearly establishes the right of growers to meet and discuss matters independently of the processor. However, so as to avoid any ambiguity about growers' rights to hold such meetings the Commission has imposed a condition of authorisation requiring that the words "to discuss relevant matters" be deleted. The effect of this amendment to the Code is to clarify that growers are free to meet amongst themselves to discuss any matter.
- 9.143 Growers argue that processors should not be able to veto decisions of meetings of PNGs where the majority of growers have agreed to the decision.
- 9.144 PNGs consist of both processor and grower representatives. The primary function of the PNG is to negotiate the terms and conditions of the growing contract to be utilised by participating growers. Once these terms and conditions are agreed at the PNG level they are put to all participating growers for approval by a vote.
- 9.145 The Commission does not see any value in growers voting on whether to accept terms and conditions which have not been agreed by the PNG (ie where the processor representatives and grower representatives are not in agreement), as such terms and conditions cannot be acted upon unless both the majority of growers and the processor agree.
- 9.146 Growers further argue that the processor should not be present when agreed resolutions of PNGs are put to growers as the processor may influence the decision making process. The Commission does not consider that the presence of the processor when agreed resolutions are put to growers will unduly influence the decision making process. The Commission notes that in such instances the processor and the majority of growers on the PNG are in agreement on the resolution being put to the grower group and consequently such issues are unlikely to be highly contentious. The Commission considers that the opportunity for all parties to the proposed agreement to be present when such resolutions are discussed will provide an opportunity for all points of view to be put and promote a greater understanding of the proposed resolution. The Commission notes that the growers' final decisions on an agreed resolution of a PNG will, at the request of the processor, or the majority of growers, be by way of a secret ballot.
- 9.147 Where matters are not agreed by the PNG, the matter in dispute is notified to all participating growers who then meet to decide the issue. Growers argue that where matters are not resolved by the PNG, growers should be able to meet independently of the processor to consider the matter with a grower representative putting the growers' preferred position to the processor.
- 9.148 The Commission notes that under the amended clause 10.1 growers are free to meet independently of the processor at any time to consider any matter they wish. However section 8 of the Code provides the processor must be present and

afforded an opportunity to outline their position on the issue at the meeting where the growers vote on the resolution.

- 9.149 Where matters are not agreed by the PNG it is likely to be as a result of disagreement between the processor and grower representatives of the PNG. Consequently, the Commission considers that, in the interest of growers making a considered and informed decision on the matter, both the processor and grower representatives on the PNG should be afforded the opportunity to outline their position on the issue in dispute.
- 9.150 Again, the Commission notes that the growers' final decision will, at the request of the processor, or the majority of growers, be by way of a secret ballot.
- 9.151 In conclusion, the Commission notes that under the Code, growers and their representatives are free to meet without the processor present at any time. Further, the Code clearly specifies that the decision to accept or reject agreed resolutions of PNGs and matters not resolved by the PNG are solely at the discretion of participating growers. While the processor has the right to be present and put its view when decisions are made, the processor plays no role in the decision making process which is a vote (secretly if the majority request) of growers only.

#### *Condition of Authorisation*

- C6 Clause 10.1 of the Code of Conduct must be amended to read: "The Grower representatives on the PNG may meet as and when required on their own, with PGs and with advisers."**

#### *Contract Confidentiality Clauses*

##### *Issues arising out of the draft determination*

- 9.152 Several growers raised concerns that processors negotiating under interim authorisation had sought to impose confidentiality agreements on growers seeking to enter into negotiations. They contended that it is further envisaged that confidentiality clauses will be written into future contracts.

##### *Commission evaluation*

- 9.153 The Commission notes growers' concerns that confidentiality clauses in contracts will weaken their negotiating position by isolating growers from each other and reducing the availability of market information including alternative contract proposals.
- 9.154 The Commission notes that the imposition of confidentiality agreements in the negotiation process is not addressed in the proposed Code of Conduct. However, imposition of such clauses in negotiations and contracts is not an uncommon commercial practice.
- 9.155 The Commission would be concerned if such clauses extended to restrict the free exchange of market information between participating growers in a grower group or between members of a grower group and their advisers. Any restriction

on members of a negotiating group exchanging information would negate the public benefits of the proposed collective negotiation arrangements, in effect, reducing negotiation to a one-on-one basis.

- 9.156 As noted above, individual growers have access to limited market information and in the case of new entrants to the industry, limited industry experience on which to rely. Further, there is a significant imbalance in bargaining power between individual growers compared to the vertically integrated processors. Finally, there is the possibility that individual growers lack the requisite experience to engage in effective negotiation.
- 9.157 In order to address these concerns the Commission has imposed a condition of authorisation that the explicit right to free exchange of market information, including the terms and conditions of contracts being offered, between members of a grower group and between grower groups and their advisers be written into the Code.
- 9.158 The Commission does not envisage that information concerning contract terms and conditions would be exchanged across growers contracted to different processors, or, where more than one PNG was formed with an individual processor, between groups of growers participating in competing PNGs. While the Commission considers individual PNGs as single negotiating entities requiring free exchange of information between those growers they represent to negotiate effectively, the Commission does not see a justification for requiring contract information to be exchanged with parties external to any agreement.
- 9.159 Where information about the terms and conditions of contracts signed is available to all growers in the industry, it is likely that, presuming these terms were favourable, all growers would seek to use such information as a defacto negotiating position. As noted, the consequence of this may be a set of identical prescribed contracts across the industry similar to those which operate under the current regulated system. Such an outcome would be inconsistent with the intent of industry deregulation, would reduce flexibility in negotiation arrangements and would negate the public benefits in easing the transition to a deregulated market identified by the Commission.
- 9.160 Similarly, exchange of contract information across participating growers in different PNGs of an individual processor is not envisaged. Where growers wish to have common terms and conditions across all growers contracted to a single processor, the mechanism to achieve this exists by way of the option to form a single negotiating group. However, as discussed above where an individual group of growers is able to negotiate separate terms based on its own production efficiencies the Commission considers they should be free to do so.
- 9.161 It would be expected that contracts negotiated would be tailored to the specific circumstances of each PNG. Because of the likely differences in structure of PNGs, terms and conditions negotiated for one PNG will not necessarily be applicable to others.

- 9.162 For these reasons the Commission does not consider it necessary for the terms and conditions of negotiations entered into or contracts signed to be freely available to parties external to the agreement. However, the Commission does note that parties to contracts are free to provide this information to other growers who supply a particular processor should both processor and grower agree.
- 9.163 Some growers have expressed concerns that while they wish to enter into negotiations, contracts which are being made available to other growers on a confidential basis, are not being made available to them, thereby jeopardising their negotiating position. The Commission considers that the clarifications it has made to the terms of entering a PNG and the availability of information within PNGs addresses these concerns.

#### *Condition of authorisation*

- C7 A new clause (10.2) must be inserted into the Code of Conduct to read “In meetings held under clause 10.1, grower representatives on the PNG, PGs and their advisers are free to discuss any and all matters relevant to contract negotiations. Any confidentiality agreement agreed between the processor and a PNG, or between the processor and PGs, is not to preclude discussion of proposed contact terms and conditions by PGs amongst themselves or with their advisers.”**

#### *Dispute Resolution*

- 9.164 The Commission notes that the Code of Conduct provides that the details of dispute resolution procedures are to be set out in each growing contract. The Commission understands that the procedures are to be employed in settling disputes over interpretation of the terms and conditions of contracts once negotiated. The Code's dispute resolution procedures are not intended to be used to negotiate or renegotiate contracts in the first instance.
- 9.165 The Code provides that disputes can be referred to mediation if both parties agree. In the case of amounts payable, matters are referred to arbitration if not resolved within the PNG or if mediation is agreed but not resolved within 28 days. Neither party can veto a dispute over amounts payable going to arbitration. In all other matters, a matter cannot proceed to arbitration without the agreement of both parties.

#### *Issues arising out of the draft determination*

- 9.166 The VFF argued that the proposed arrangements provide only for an expensive arbitration system and heavily restrict growers' rights to this system through the power to veto matters (other than amounts payable) going to mediation and/or arbitration. The VFF argued that the restriction of compulsory arbitration to matters involving disputes payable is a distinction that is impossible to apply with any degree of certainty as a range of issues could be construed as relating to amounts payable.
- 9.167 The Applicant noted that either party could veto a dispute going to mediation. The Applicant argued that mediation is based on the premise that both parties

are agreeable to reaching a resolution. The Applicant noted that while arbitration can be vetoed (on matters other than amounts payable) recourse to normal contractual dispute settlement is available.

9.168 The Applicant argued that compulsory arbitration on all matters could result in de-facto regulation through a series of arbitrated decisions or allow a series of frustrating issues to be taken to arbitration.

9.169 The Applicant contended that it is in the interest of both parties to keep the cost of arbitration down.

#### *Commission evaluation*

9.170 The Commission considers that all efforts should be made by the parties themselves to resolve a dispute before the Code's dispute resolution procedures are employed. The Commission notes that under the Code, disputes are first referred to the PNG. The PNG will then consider the matter and attempt conciliation. If conciliation at the PNG level is unsuccessful, mediation is available if both parties agree.

9.171 The Commission notes the Applicant's argument that mediation is based on the premise that both parties are agreeable to reaching a resolution. The Commission notes that compulsory mediation would only be employed where one party was not agreeable to the process in the first instance. The Commission considers that given the prior opportunity to resolve disputes through the PNG, mediation would be unlikely to provide a resolution to outstanding matters unless both sides are amenable to the reaching of a resolution through the mediation process.

9.172 The Commission notes that in the event that matters are not resolved by conciliation or mediation both parties retain the right to recourse to the legal system. The Commission considers that the possibility of disputes being ultimately resolved through the legal system provides all parties with incentives to ensure matters are resolved through the Code's dispute resolution procedures.

9.173 The Commission notes the concerns of the VFF regarding the distinction between amounts payable and other matters. The Commission considers that ambiguity about what constitutes an amount payable could prove problematic in the application of the Code's dispute resolution procedures. However, the Commission does not consider that it is appropriate for it to make the distinction between what would and would not constitute an amount payable in the circumstances outlined. Instead, the Commission proposes that this distinction be made by the parties to the arrangements who are in the best position to do so. The Commission has imposed a condition of authorisation that the distinction as to what constitutes an amount payable for the purposes of clause 9.5 of the Code be determined by parties in contract negotiations and inserted into contracts.

#### *Condition of authorisation*

**C8 A new clause, 18.2, must be inserted into the Code to read "Contracts are to specify those elements of the contract which constitute an amount payable for the purposes of clause 9.5 of the Code of Conduct."**

## *Status of Existing Contracts/Transition Issues*

### *Issues arising out of the draft determination*

- 9.174 The Applicant argued that existing contracts, signed under the VBINC system, will be honoured unless both parties agree to terminate them earlier.
- 9.175 The VFF noted that it is intended that existing contracts will run their course once authorisation is granted. However, the VFF argued that the Code does not address the issue of how current contracts and their supporting statutory framework will co-exist with these contracts, even if only on a transitional basis.

### *Commission evaluation*

- 9.176 The Commission notes that authorisation of the proposed arrangements does not alleviate any party of any obligation under the terms and conditions of existing contracts. As is the stated intent of processors, these contracts will be honoured unless both parties agree to their early termination with an alternative contract, negotiated under the proposed arrangements, in place.
- 9.177 Existing contracts are of three years duration. However, these contracts were not signed, and therefore do not expire, at a common point of time. The Commission understands that expiry dates for these contracts is spread relatively evenly over the next three years.
- 9.178 The Victorian Government has expressed concerns that as individual growers contracts expire they may be forced to individually negotiate a new contract with their processor should negotiations between the PNG and the processor fail to reach agreement on a new contract by this time.
- 9.179 The Minister for Agriculture requested in a letter to the Commission on 1 June 2001, that the Commission consider imposing a condition of authorisation that any grower whose contract falls due before 30 June 2002 should be offered the opportunity to have their legislated contract extended until that date by their processor. The Minister noted that the views of both the Applicant and the VFF CMG were sought on the proposal. While both parties acknowledged this concern the VFF believed the period should be 3 years so that all contracts could potentially fall due at the same time, whilst the processors believed that the period should be 6 months.
- 9.180 The Minister's letter stated that the Victorian Government believed that a compromise period of 12 months would allow enough time for the formation of PNGs and for the negotiation of new contracts. The Minister also noted that should however, such negotiations not reach a final conclusion within 12 months, sufficient time will have been provided to allow the negotiation groups to reach agreement of the process for handling growers whose contracts would fall due on 30 June 2002.
- 9.181 The Commission notes that processors subsequently agreed to this compromise. However, the VFF maintained that a 3 year period was necessary.

- 9.182 Subsequently, VBINC met on 14 June 2001, and resolved that any contracts presently expiring on a date prior to 30 June 2002, at the option of the grower, shall have an expiry date of 30 June 2002 in lieu of that expiry date presently existing. This resolution was supported by processors and opposed by the VFF.
- 9.183 The Minister for Agriculture again wrote to the Commission on 25 June 2001 noting that following the VBINC determination the Government had received delegations from broiler growers highlighting their concerns that 12 months would not provide enough time to enable collective negotiation of contracts with their processor. The Minister stated that the Victorian Government believed that a period of two and a half years would now more accurately represent enough time for the successful negotiation of new contracts between growers and their processor. This would give growers a longer period to adjust and provide fairness as all growers would have up to two and a half years to negotiate rather than some having six months and some three years.
- 9.184 The Minister therefore asked that the Commission consider a condition of authorisation that any grower whose contract falls due before 31 December 2003 should be offered the opportunity to have their legislated contract extended until that date by their processor. The Minister also requested that the Commission consider delaying the release of its final determination to consider this issue and allow another meeting of VBINC before the final determination was issued.
- 9.185 The Commission considers that where individual growers are, by consequence of the expiry of their legislated contract, left without a contract while collective negotiations take place, this could undermine the public benefits of the proposed arrangements. Specifically, where these growers are forced into individual negotiations this may undermine the public benefits identified by the Commission from easing the transition to a deregulated market and from transaction cost savings as a result of the collective negotiations.
- 9.186 However, the Commission considers that one year provides sufficient time for parties to negotiate new contracts under the proposed arrangements. The Commission granted interim authorisation to the proposed arrangements on 14 December 2000. Since then some processors have attempted to negotiate with growers under the proposed arrangements. The Commission understands that while some growers have engaged in negotiations and are ready to sign new contracts under the proposed arrangements, more generally growers favour retention of the existing legislated arrangements and are therefore reluctant to negotiate under the proposed arrangements. The Commission considers that difficulties in current negotiations are primarily as a result of this reluctance by growers to negotiate in the first instance.
- 9.187 The Commission notes that under the proposed Code of Conduct, which sets out minimum contract terms and conditions, it is envisaged that contracts will be similar to those currently in place under the legislated arrangements. The Commission considers that productive negotiation will occur once growers accept that these arrangements are in place and that existing regulated contracts will not be renewed. The Commission considers that imposing a deadline of 30

June 2002, on the roll over of existing contracts will provide an incentive to negotiate under the proposed arrangements. This incentive would be diminished if contracts were rolled over for a longer period.

- 9.188 The Minister for Agriculture has argued that a period of two and a half years would provide fairness as all growers would have up to two and a half years to negotiate rather than some having one year and some three years. The Commission considers that rolling over existing contracts as they fall due until December 2003 will weaken growers' negotiating position by splitting and isolating them into smaller negotiating groups. The Commission considers that those growers who have already entered into negotiations with processors, and are ready to sign contracts, will do so once final authorisation is granted. These growers are likely to be offered favourable terms by their processor meaning that remaining growers will be disadvantaged in later negotiations by both; having to negotiate in a smaller group and; only being offered contracts for any surplus of birds which growers who signed originally are unable take.
- 9.189 The Commission notes that those growers with more than a year to run on their existing contract can, if they choose, elect to replace that contract with a collectively negotiated contract under the proposed arrangements. As existing contracts will simply be rolled over the Commission considers there is a Commercial incentive for all growers to take steps to negotiate new terms and conditions either by joining/forming a PNG or by individual negotiation.
- 9.190 The Minister's original proposal to roll over existing contracts for one year was developed by the Government in conjunction with processors. However, processors have objected strongly to the Minister's most recent proposal. It is understood that the Victorian Government did not discuss this proposal with processors before putting it to the Commission. The Commission notes that processors are under no obligation to roll over existing contracts. Based on discussions with processors the Commission considers they would be extremely unlikely to roll over contracts that fall due for more than the one year as initially agreed to facilitate a transition from a regulated to deregulated environment. Instead, processors may opt to turn their back on the proposed arrangements and negotiate individually with growers or, as some have indicated, move their processing operations to South Australia where there is currently an excess of growing and processing capacity.
- 9.191 In summary, given that under the Code it is envisaged that contracts will be similar to those in place under the existing legislated arrangements, the Commission considers that one year provides sufficient time for new contracts to be negotiated. The Commission sees no justification for the assertion that such contracts would take two and a half years to negotiate, provided both parties are willing to negotiate. The Commission considers that rolling over existing contracts as they fall due until December 2003 will be counter productive to negotiation occurring. The Commission considers that rolling all existing contracts until December 2003 is only necessary where parties do not intend on negotiating in the short term.

- 9.192 Further, the Commission does not consider the rolling over of contracts as they fall due until December 2003 is a transitional measure. Rather, it is an attempt to maintain the current legislated arrangements. This option is open to the Government by other means if it wishes to progress down this route.
- 9.193 The Commission has therefore imposed a condition of authorisation that all contracts which have fallen or will fall due before 30 June 2002 be rolled over on their existing terms until this date, unless both parties agree otherwise. The Commission understands that approximately one third of current contracts fall into this category.
- 9.194 The Commission imposes this condition in order to facilitate a smooth transition from the current regulated environment to the proposed arrangements and promote certainty to those growers whose contracts fall due in this period.
- 9.195 The Commission considers that the 12-month window this provides for parties to negotiate new contracts under the proposed arrangements is an adequate time frame to allow for PNGs to form in accordance with the Code. Consequently, the Commission does not propose to provide any extension on this 12-month period.
- 9.196 The Commission understands that the six chicken meat processors will roll over contracts which expire before 30 June 2002 until this date, unless a mutually agreed alternative is negotiated. The Commission notes that this course of action has been agreed to by processors irrespective of any condition imposed by the Commission to this effect. The Commission notes that processors were under no obligation to reach such agreement and have done so in the interest of providing certainty to growers in the transition from a regulated to deregulated environment.

#### *Condition of authorisation*

- C9 This authorisation is granted on condition that any contract formed under the *Broiler Chicken Industry Act* falling due before 30 June 2002 is rolled over on its existing terms until that date, unless mutually agreed by the parties to the contract.**

#### *Existing Contracts and Dispute Resolution*

##### *Issues arising out of the draft determination*

- 9.197 Current VBINC contracts state that:

“Should any dispute arise pursuant to this contract...then that dispute may be referred to the committee (VBINC) by either party after first giving fourteen days notice in writing of said dispute to the other party”.

- 9.198 As part of the Victorian Government’s policy for managing the transition from the current legislated arrangements VBINC passed a resolution on 14 June 2001 that any contractual dispute referred to VBINC (ie a dispute in relation to an existing contracts signed under the current legislated arrangements), be resolved

using the dispute resolution process contained within the ACCC authorised Code of Conduct for the Victorian Broiler Industry.

#### *Commission evaluation*

- 9.199 The Commission notes that given the Victorian Government's intention that VBINC not meet to resolve disputes under existing contracts, as legal advice obtained by the Victorian Government indicates that to do so may be in breach of the TPA, an alternative dispute resolution procedure will need to be established.
- 9.200 The Victorian Government has indicated a preference that disputes arising out of existing contracts be resolved using the Code's dispute resolution process. The Commission considers that the means by which disputes in relation to existing contracts are resolved is a matter for the Victorian Government. However, given that any VBINC meeting called to resolve such disputes may be in breach the TPA, the Commission considers the Government's proposal a sensible compromise.
- 9.201 However, the Commission notes that Code's dispute resolution procedures differ depending on whether the dispute is over an amount payable or another matter. As noted above, there is some ambiguity in the Code about what constitutes a dispute over an amount payable. The Commission has imposed a condition of authorisation to clear up this ambiguity. However, this condition will not clear up any ambiguity regarding disputes under existing contracts referred to the Code's dispute resolution procedures. For this reason, and given that it is proposed that the Code's dispute resolution procedures only be used to settle disputes over existing contracts as an interim measure, whilst new contracts are negotiated, the Commission considers that all disputes referred by VBINC to the Code's dispute resolution procedures should be resolved using the Code's processes for disputes relating to amounts payable. That is, such disputes be referred to mediation and if not resolved by meditation then to arbitration, unless both parties agree otherwise.

#### *Consultation with Growers on the Proposed Arrangements*

- 9.202 The VFF has opposed the application on the grounds that growers were not consulted in the formulation of the proposed collective negotiation model and the proposed Code of Conduct. The Applicant argued that interested parties were given the opportunity to contribute to the processors' submission but that growers declined the opportunity to participate.

#### *Issues arising out of the draft determination*

- 9.203 The Applicant argued that growers were provided with copies of the proposed Code for comment. The Applicant argued that growers could have been involved in the development of the proposed arrangements but chose not to participate. The VFF argued that growers did not participate in the development of the Code as they were opposed in principle to the application for authorisation.

### *Commission Evaluation*

- 9.204 The Commission notes the concerns of growers regarding lack of consultation on the proposed arrangements. The Commission also notes the Applicant's assertion that growers were given the opportunity to comment on the proposed arrangements.
- 9.205 The Commission is not in a position to judge the adequacy of the consultation procedures followed in the drafting of the application. The Commission's consideration of the proposed arrangements is limited to consideration of the public benefits and anti-competitive detriments arising from the application before it.
- 9.206 However, the Commission does note that since the application was lodged it has actively encouraged growers' comments on the proposed arrangements. The Commission considers that its public consultation process in relation to this application has provided all interested parties with extensive opportunities to comment on the proposed arrangements. Accordingly, the Commission is satisfied that its assessment of the public benefits and anti-competitive detriments of the proposed arrangements has been conducted in full consideration of the views of all interested parties.
- 9.207 The Commission further notes that the proposed Code is not a comprehensive document, but rather an arrangement in the form of a framework to facilitate negotiation between growers and processors. There may be refinements and revisions to the Code in the event of future discussion on industry issues between growers and processors. If the parties propose revisions that might expose them to liability under the competition provisions of the TPA, consideration would need to be given to seeking further authorisation for those changes.

### *Proposed Ministerial Advisory Committee*

- 9.208 Under the Code it is proposed that a Ministerial Advisory Committee, consisting of representatives of processors, growers and the Victorian Government be established to keep the Minister for Agriculture informed of the operation of the proposed arrangements.
- 9.209 The Code notes that while the proposed committee has been suggested to the Minister, it is the Minister's prerogative to accept the suggestion and structure it as he sees fit.

### *Issues arising out of the draft determination*

- 9.210 The VFF argued that the Committee's terms of reference should be widened to include duties to report on:
- any breaches of the Code of Conduct;
  - any anti-competitive behaviour not specifically authorised; and
  - any conduct which may be deemed unconscionable.

- 9.211 The VFF argued that the Committee should report monthly in the first 12 months after final authorisation is granted and thereafter every three months.

*Commission evaluation*

- 9.212 The Commission notes that the Victorian chicken meat industry has been regulated by the BCI Act since the late 1970's. The Minister for Agriculture has indicated his preference for repeal of the existing regulations with an authorisation in place.
- 9.213 As discussed above, growers may face considerable difficulties in adapting to a deregulated market. Additionally, the Commission notes that it is likely that the proposed arrangements will operate in tandem with the existing regulated environment for at least some period of time once full authorisation is granted.
- 9.214 Given these facts, the Commission sees some merit in a mechanism whereby progress from the existing regulated environment to a deregulated market with an authorisation in place is monitored. Such a forum may prove useful, both in providing information on the progress of the collective negotiation process in its initial stages and in identifying issues for further consideration in assessing the future direction of the industry beyond the period of this authorisation.
- 9.215 The Commission notes the arguments of the VFF regarding the terms of reference of the proposed Committee. However, the Commission is mindful that the decision about whether to establish the Committee and its structure and terms of reference if established, will be a decision for the Victorian Government. The Commission does not have the jurisdiction to compel that such a committee be established or to dictate its terms of reference. The Commission would expect that, should the Minister decide to establish such a Committee, its structure and terms of reference would be mindful of the concerns of all parties.

*Period of Authorisation*

- 9.216 In its draft determination the Commission proposed to grant authorisation for a period of 4 years.

*Issues arising out of the draft determination*

- 9.217 Growers questioned why authorisation was proposed to be granted for 4 years when 5 years was applied for. Growers argued that a 4 year authorisation was not long enough. Some growers suggested that an authorisation of up to 10 years was necessary.

*Commission evaluation*

- 9.218 The Commission notes that the chicken meat industry is undergoing significant regulatory reform. The Commission accepts that there is a public benefit in easing this transition from a regulated to a deregulated market. The extent to which this public benefit will emanate in the future is very much dependent upon developments in the market over the initial period for which authorisation is granted.

- 9.219 The Commission also accepts that other public benefits such as transaction cost savings flow from the proposed arrangements. The extent to which public benefits flowing from the arrangements in the form of transaction cost savings will continue into the future is also dependent on developments in the market over the initial period for which authorisation is granted.
- 9.220 Consequently, the balance of public benefits and anti-competitive detriments may change over the period for which authorisation is granted. For this reason the Commission is of the view that the authorisation should be time limited.
- 9.221 Depending on developments over the period for which authorisation is granted, authorisation can be extended. However, assuming re-authorisation was sought, this assessment would be made based on the circumstances at that time.
- 9.222 The Commission notes grower concerns that contract periods need to be extended given the large level of investment required by growers. While under the proposed arrangements parties are free to negotiate contract terms, including contract durations, as they see fit, the Commission notes that under the Code it is envisaged that contracts will be of a duration of between 2 and 5 years. The Commission therefore proposes to grant authorisation for a period of 5 years.
- 9.223 The Commission expects that over the next 5 years growers will receive assistance and gain experience in contract negotiations. However, the Commission reiterates that it is open for an application for re-authorisation of the arrangements to be made at that time. Any decision to re-authorise these arrangements will depend on developments over this initial 5 year period of authorisation and the situation at the time of any further application for authorisation.

#### *Experiences in Other States*

- 9.224 The VFF has argued that the South Australian and Tasmanian experiences of deregulation and Commission authorisation of collectively negotiated contracts have not been beneficial for growers. The VFF notes that these growers have not received a review of grower fees in over 2 years.

#### *Issues arising out of the draft determination*

- 9.225 No issues were raised by interested parties on this matter.

#### *Commission evaluation*

- 9.226 The Commission sought information from South Australian and Tasmanian growers and processors in response to these claims. The Bartter negotiating group in South Australia provided information that they conducted a fee review in April 2000. The Inghams negotiating group in South Australia stated that they have conducted half-yearly fee reviews since the new arrangements have been in place and that a reduction in the growing fee has been negotiated by the growers and Inghams. The Commission understands that, in South Australia to date, there has been no request for arbitration or mediation in respect to the negotiated agreements. In Tasmania, collectively negotiated growing contracts

have only recently been agreed upon. Consequently, there is limited information on which to draw with respect to the operation of these arrangements.

### ***Conclusion***

- 9.227 For the reasons outlined the Commission considers that there are a number of public benefits arising from the proposed arrangements. In particular, the Commission considers that the proposed arrangements provide a public benefit through providing transaction cost savings and facilitating a smoother transition to a deregulated environment.

## **Balance of Public Benefit and Public Detriment**

- 9.228 The Commission considers that although the collective negotiation of grower contracts, particularly the collective negotiation of fees, may result in a lessening of competition relative to a situation where contracts are individually negotiated, there are a number of factors which limit the detrimental effect on competition and any flow-on effect in the form of higher prices to consumers. These include, first, the ability of existing growers and new entrants to negotiate terms and conditions different from those prescribed under collectively negotiated agreements; secondly, the fact that the growing fee constitutes a small proportion of the total cost of producing chicken; and thirdly, the proposed negotiation framework incorporates guidelines to incorporate productivity based growing fees. Additionally, while collective negotiation has the potential to limit competition between each individual processor's growers, the proposed arrangements will allow for greater competition between processors than has been the case under existing regulatory arrangements. While there is no guarantee based on the proposed arrangements that collective negotiation will occur, to the extent that the proposed arrangements do facilitate such negotiation, these factors would limit the detrimental effect on competition of the proposed arrangements. For these reasons the Commission considers the effects on competition as a result of the proposed arrangements are minimal. Consequently, it is unlikely that the arrangements constitute any significant detriment to the public.
- 9.229 As discussed above, the Commission notes the importance to growers of having the ability to individually negotiate and not participate in collective negotiations. This ability limits the anti-competitive detriment resulting from the proposed arrangements. The Commission would therefore be concerned if individual negotiation was not in fact a real alternative under the arrangements, or if processors were to refuse to negotiate individually.
- 9.230 Further, the Commission notes that while the proposed arrangements may result in a lessening of competition relative to a situation where contracts are individually negotiated, they do represent a move away from the current regulated environment.
- 9.231 The Commission accepts that there are a number of public benefits arising from the proposed arrangements. In particular, the Commission considers there is a

public benefit in the reduction in transaction costs, relative to a fully deregulated environment, as a result of the proposed arrangements. The competitive pressure provided by large chicken purchasers such as supermarket chains, is likely to force some of these reductions in costs to be passed on to consumers.

9.232 The Commission also considers that the proposed conduct provides some public benefit in facilitating the transition to deregulation.

9.233 Consequently, following consideration of the arguments advanced by the Applicants and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment, subject to certain conditions being complied with.

9.234 The Commission does not consider that these conditions of authorisation change the nature of the arrangements for which authorisation is sought, but clarify the intent of the Code of Conduct and assist in facilitating the transition from the current legislated arrangements, and therefore in facilitating the resulting net public benefits of the arrangements.

9.235 The authorisation that the Commission proposes to grant does not compel any party to participate in the negotiation process proposed by the Applicants. Nor does it preclude any party from developing alternative arrangements and seeking authorisation if necessary.

9.236 This authorisation relates to, and is limited to, negotiations between an individual processor and grower groups. This authorisation does not in any way extend to negotiations between processors or between growers of competing processors.

9.237 This authorisation is only in respect of those arrangements which are carried out in accordance with the Code of Conduct. Where a party has failed to comply with all clauses of the Code of Conduct any contract resulting from these negotiations is not protected by authorisation. In effect contracts signed will not be protected by authorisation unless both parties to the contract comply with all clauses of the Code including the formation of PNGs, the negotiation process, the signing of contracts and dispute resolution.

9.238 This authorisation is effective from the date that the Commission notifies the Applicant that it is satisfied that the Code of Conduct has been amended as necessary to meet the conditions of authorisation imposed by the Commission, subject to any review by the Australian Competition Tribunal.

9.239 On 14 December 2000, the Commission granted interim authorisation to the proposed arrangements until the Commission's final determination in this matter takes effect, or until the Commission decides to revoke interim authorisation. The interim authorisation granted on 14 December 2000 was not subject to conditions. As the Commission's final determination is subject to a number of conditions the interim authorisation granted on 14 December 2000 is revoked. In its place the Commission grants interim authorisation subject to conditions C1 to C9 outlined in section 10, until this determination comes into force, or until the Commission decides to revoke interim authorisation.

## 10. DETERMINATION

10.1 For the reasons outlined in section 9 of this determination, the Commission concludes that, subject to the conditions set out below, in all the circumstances, the arrangements for which authorisation is sought:

- are likely to result in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

10.2 The Commission therefore grants authorisation under section 88 of the TPA and the Competition Code, to application A90750, as amended on 20 November 2000, 4 April 2001, and 12 April 2001. This authorisation is subject to any application to the Australian Competition Tribunal for its review. Authorisation is granted subject to the following conditions.

**C1 Authorisation is granted on condition that all contracts executed under the negotiation framework provided in the Code of Conduct are available to the Australian Competition and Consumer Commission on request.**

**C2 Clause 4.3 of the Code of Conduct must be amended to read “PNGs may appoint advisers (subject to clause 4.4) to assist them in preparations and ongoing negotiation matters. Such advisers may, at the express wish of growers, negotiate directly with the processor contract terms and conditions on behalf of the growers they represent.”**

**C3 Section 1 of the Code of Conduct must be amended to incorporate the following:**

- **Clause 1.1 must be amended to read: “A secret ballot will be held at the request of any grower contracted to a processor of all growers contracted to that processor as soon as practicable to determine if they wish to negotiate collectively”.**

**Section 1 of the Code of Conduct must be amended to reflect the following:**

- **All growers contracted to the processor are to be given 14 days notice in writing of the ballot. It is not a requirement that all growers vote, but that all growers be given a reasonable opportunity to vote in the ballot, if they so choose. Growers are free to meet on their own and with advisers in accordance with section 10 of the Code of Conduct prior to the ballot being held.**
- **The processor is to play no part or exert any influence over any vote taken under clause 1.1, except as provided under clause 1.3.**
- **The processor is free to attend the meeting at which the ballot is held and address the meeting if requested by a grower.**

**C4 Section 1 of the Code must be amended to reflect the following:**

- Once a vote under clause 1.1 of the Code is held, growers are free to form any PNGs they wish. Should a group of growers wish to form their own PNG independent of the remainder of the grower group they are under no obligation to accept other growers into this PNG.
- Where a grower requests to join an existing PNG it may do so providing a majority of existing growers represented by the PNG agree.
- The processor is to play no role in any decision by existing growers represented by a PNG to allow new growers to join. Where a contract between a processor and a Participating Grower represented by a PNG has been signed the processor is under no obligation to offer the same contract to new members who join that grower group after the contract is signed. However, any negotiation of new contracts or extension of contracts previously signed with the Participating Growers is to include new members of the Grower Group.

**C5 Clause 11.3 of the Code of Conduct must be amended to read: "An NPG may negotiate directly with the Processor on any matter."**

**C6 Clause 10.1 of the Code of Conduct must be amended to read: "The Grower representatives on the PNG may meet as and when required on their own, with PGs and with advisers."**

**C7 A new clause (10.2) must be inserted into the Code of Conduct to read "In meetings held under clause 10.1, grower representatives on the PNG, PGs and their advisers are free to discuss any and all matters relevant to contract negotiations. Any confidentiality agreement agreed between the processor and a PNG, or between the processor and PGs, is not to preclude discussion of proposed contact terms and conditions by PGs amongst themselves or with their advisers."**

**C8 A new clause, 18.2, must be inserted into the Code to read "Contracts are to specify those elements of the contract which constitute an amount payable for the purposes of clause 9.5 of the Code of Conduct."**

**C9 This authorisation is granted on condition that any contract formed under the *Broiler Chicken Industry Act* falling due before 30 June 2002 is rolled over on its existing terms until that date, unless mutually agreed by the parties to the contract.**

**10.3 This authorisation is only in respect of those arrangements which are carried out in accordance with the Code of Conduct. Where a party has failed to comply with all clauses of the Code of Conduct any contract resulting from these negotiations is not protected by authorisation.**

- 10.4 This authorisation will remain in force for a period of five years from the date on which the authorisation comes into force. Authorisation is subject to the Commission notifying the Applicant that it is satisfied that the Code of Conduct has been amended as necessary to meet the conditions of authorisation imposed by the Commission.
- 10.5 The Commission has decided to revoke the interim authorisation granted on 14 December 2001. In its place the Commission grants interim authorisation subject to conditions C1 to C9, until this determination comes into force or until the Commission decides to revoke interim authorisation.
- 10.6 This determination is made on 28 June 2001. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 20 July 2001. If an application is made to the Tribunal, the determination will come into force:
- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
  - where the application is withdrawn – on the day on which the application is withdrawn.