- impose short term contracts;
- discourage cost of production modelling;
- transfer costs to growers without adequate compensation;
- create surplus shedding at growers' expense by means of batch rates, density rates and pricing.

8.19 Mr J Scott, Mr Robertson and Bob Vuka (Poultry Farmer, Marven Grower) argued that growers are at a distinct disadvantage in contract negotiations as processors have access to knowledge regarding grower incomes and a fair ability to predict growers' financial vulnerability in negotiations. Further, processors have full time office and financial staff and the wherewithal to engage consultants. In contrast, growers are disadvantaged financially, are somewhat isolated because of the requirements of running a farm, and limited in their ability to seek outside expertise.

8.20 Mr Acciarito stated that one processor (Bartter) had already made certain assertions to growers which were deliberately designed to make growers feel nervous and pressure them into negotiation under the proposed framework. Mr Acciarito stated Bartter management had implied that growers had little choice but to enter into the proposed arrangements. Mr Acciarito contended that Bartter management had made comments in relation to contracts they would be offering under the new arrangements, such as "first in best dressed". Further, they had stated that some growers were already negotiating and that those who did not act soon would only get what was left.

8.21 Mr Acciarito stated that under the proposed contracts there was no model and fees were determined by the processor. Further, growers entering into contracts were being forced to sign confidentiality clauses. In such circumstances Mr Acciarito questioned how growers would be able to determine whether or not they were getting a fair deal.

8.22 Ms Gis Marven (CEO, Marven Poultry) stated that proposed arrangements represented only a minor change from what currently occurred and were simply replacing one set of legislated arrangements with another.

8.23 Mr C Peel stated that growers needed the opportunity to negotiate, either collectively or individually, independently of the current system where they are obliged to accept what is offered by the VBINC process. Mr C Peel argued that the present system breeds apathy and a false sense of security among growers.

8.24 Mr C Peel argued that growers should have the right to negotiate their own contracts if they choose, including the right to negotiate long term contracts, which they are constrained from doing under the current system. Mr C Peel argued that this would enable better planning and development and facilitate the upgrading of facilities.

8.25 Mr C Peel noted that due to the range of farm sizes there was a range of cost differentials between growers. Mr C Peel noted that his farm was one of the

larger ones in the State with 315,000 birds. He argued that the efficiency gains achieved by larger scale operations needed to be able to be passed through to the industry.

8.26 Mr C Peel argued that individual negotiation or group contracts could make growers more accountable, for example if throughput could be negotiated then over expansion could be curtailed.

8.27 Mr C Peel argued that representatives of other processors should not be negotiating on contract terms and conditions between a processor and its growers as currently occurs under VBINC.

8.28 Ms Marven argued that the proposed arrangements were designed to protect growers and noted that the proposed arrangements included a Code of Conduct and provided a mechanism for the negotiation of longer term contracts.

Grower opposition to the application

8.29 The VFF noted that as the representative of 195 of the State's 210 chicken farmers they have consistently opposed authorisation and are working towards a different industry structure than that envisaged by the current application. The VFF stated that they have been in discussions with the Victorian government on a resolution to the issues raised by the NCP Review and argued that efforts to reach a resolution satisfactory to the majority of growers were undermined by having two systems of contract negotiation in operation. The VFF argued that the Commission's decision to grant interim authorisation to the application had eroded its ability to negotiate with the government to maintain the existing arrangements. The VFF and Mr Garry Wilson (Poultry Farmer, Inghams Group) argued that any decision to grant full authorisation would further undermine growers' ability to negotiate a safety net to protect minimum conditions for all Victorian growers. The VFF argued that the majority of growers favoured amendment to the BCI Act in the form of a Section 51(1) exemption from the TPA.

8.30 The VFF noted that it did consider not opposing the authorisation on the grounds that its members did not intend engaging in the conduct for which authorisation is sought. However, the VFF, for reasons of wishing to achieve a viable longer term solution for the industry and its members, wish to prevent authorisation being granted.

8.31 Mr J Scott stated that growers were not consulted in the development of the Code or asked to comment on it. Ms Marven stated that growers could have been involved with the development of the arrangements, that they had been provided with copies of all the relevant material, however, had chosen not to participate in developing the arrangements.

8.32 Mr P Scott stated that Eatmore Poultry had forwarded the Code to all its growers and tried to arrange meetings to discuss it but had received very little response, with growers indicating the VFF were handling the issue for them.

8.33 Ms Marven stated that since 1 February 2001, Marven and Bartter had met with their growers. Ms Marven stated that Marven had 8 growers prepared to negotiate contracts under the proposed collective arrangements. Patrick McCaffrey (Regional Manager, Bartter Enterprises) stated that Bartter had 15 growers who have indicated they are prepared to negotiate under the proposed collective arrangements. Mr McCaffrey noted that these 15 growers constituted more than half of Bartter's volume of growers (the 15 growers mentioned represented 60% of all birds grown for Bartter). Ms Marven said that other processors were still in the process of meeting with their growers.

8.34 Mr Acciarito argued that Bartter management had made statements to growers designed to make growers feel that they had no alternative but to negotiate (as discussed above). Mr Acciarito argued that growers who would not otherwise enter into such negotiations were doing so, because of the pressure applied by Bartter.

Dispute resolution procedures

8.35 Mr Robertson argued that the dispute resolution procedures set out in the Code of Conduct were unworkable. By example Mr Robertson cited a situation where a grower may borrow a considerable amount of money for farm development and then gets into dispute with the processor. Mr Robertson argued that under the proposed dispute resolution procedures the grower may have to wait up to 4 months before the dispute is resolved and he is paid. In the meantime the grower's loan still has to be serviced. In such circumstances, Mr Robertson argued, a grower would be under considerable duress and would probably just take what the processor was offering rather than engage in a protracted dispute resolution process before receiving his money. Mr Bannister argued that a cost-effective mechanism which could be accessed quickly by all parties, needed to be employed.

8.36 Mr Robertson, Mr Bannister and Mr J Scott also noted that disputes are only referred to mediation if agreed by both parties. Further, disputes are only referred to arbitration once mediation has failed. Therefore, parties could stymie the dispute resolution process by simply refusing mediation. Mr Robertson noted that agreement by both parties was unlikely given the adversarial nature of the grower/processor relationship as evidenced at the conference.

8.37 Ms Marven stated that for non monetary matters agreement of both parties was needed for arbitration to occur. Ms Marven argued this was reasonable to prevent parties constantly seeking outside advice.

8.38 In the case of amounts payable, Ms Marven said that arbitration would occur within 28 days of notification of a dispute, that neither party had the discretion to refuse arbitration and that she would clarify this point in a subsequent submission to the Commission. Ms Marven also stated that she would clarify that the dispute resolution procedures were only to be used to settle disputes in relation to contracts once signed and not as a mechanism for setting contract prices in the first instance.

8.39 The VFF contended that the proposal provides only an expensive arbitration system and heavily restricts growers rights to this system.

Other issues

8.40 Mr J Scott noted that the Applicant had claimed increased flexibility of production would flow from the proposed arrangements as the present VBINC arrangements do not provide incentives for more costly free range and Poussin production. However, Mr J Scott argued that the VBINC arrangements allow variations in fees for lower throughput both in batch numbers and lower stocking rates and for higher throughput. In the case of Poussin production, Mr J Scott argued that the basic rearing cost structure would be the same as all other bird production as the major costs (clean out, set up, gas, power and manual work) are incurred for the bulk of the year in the first 4 to 5 weeks of growing and only change considerably in the final 4 weeks, dependent on weather conditions.

8.41 Mr J Scott stated that he was unaware of any application by processors to vary fees to suit different production applications.

8.42 Mr J Scott further stated that the public benefits claimed by the applications in their supporting submission in relation to bio-security, and occupational health and safety were one line assertions with no supporting arguments. In particular, in relation to occupational health and safety, Mr J Scott contended that growers already have a legal obligation to follow legislative requirements.

8.43 Mr Glenn Bannister argued that with such large investments required in the industry contract periods needed to be extended to a minimum of 5 – 10 years. Mr Bannister argued that anything less would restrict investment in the industry. Mr Bannister also argued that for this reason a 10 year authorisation, rather than the 4 years the Commission was proposing, would be more appropriate.

8.44 The VFF argued that discussions carried out with growers by Bartter's may not have complied with clause 1.1 of the proposed Code of Conduct.

> Clause 1.1 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."

8.45 The VFF stated that Mr Acciarito was the elected representative of the Bartter Grower Group and that such a vote should be conducted through him.

8.46 Mr McCaffrey responded that PNGs do not need to be formed through Mr Acciarito, that growers can form any group they like, and such groups do not have to consist of all growers contracted to a processor. Mr McCaffrey stated that clause 1.1 applied to those choosing to join a PNG.

8.47 Mr Glenn Banister (President, Hazeldene Group) questioned why the Commission had granted authorisation for 4 years when 5 years had been applied for. Mr Banister noted that the Victorian Department of Natural Resources and Environment had discussed the possibility of a 10 year

authorisation. Mr Banister argued that a 4 year authorisation was not long enough.

8.48 The VFF questioned the rights of Non Participating Growers (NPGs) under the proposed arrangements. Mr Clarke stated he expected that a number of growers would opt to become NPGs and asked if there were any limitations on who could negotiate on their behalf?

8.49 A number of other issues were raised at the conference not directly related to the Commission's assessment of the public benefits and anti-competitive detriments of the application. These included, the existing legislative arrangements, potential future applications for authorisation by growers, the Commission's decision to grant interim authorisation to the proposed arrangements and procedural issues pertaining to the pre-decision conference.

8.50 During the pre-decision conference a number of growers indicated that they wished to make confidential submissions to the Commission without processors present. At the close of the conference the Commission heard a number of confidential submissions from growers. The Commission took a record of these submissions however, they are not included in the public record of the conference.

Post Pre-Determination Conference Submissions

8.51 After the pre-decision conference interested parties were provided with a further opportunity to provide submissions in relation to the Commission's draft determination. The following is a list of interested parties who provided further submissions.

- Victorian Farmers Federation (VFF) Chicken Meat Group
- Mr John Scott
- Mr Ernst Mueller

Victorian Farmers Federation

8.52 The VFF argued that a voluntary Code of Conduct has little value unless it has broad industry acceptance and unless there is a regulatory body able to oversee its operation. The VFF contended that growers fear that the Code will serve as a tool for the use of processors to strengthen their position and weaken that of growers. The VFF stated that this fear has already been given substance by Bartter's attempt to intimidate growers into signing under the proposed arrangements by threats that they will otherwise not be offered a contract. The VFF stated that this conduct is inconsistent with the procedures set out in the Code and indicated that the observance by Bartter's of their obligations under the Code is not a matter which they are concerned with. The VFF further argued that the imposition of confidentiality obligations on growers entering into negotiations was inconsistent with the assumptions as to competition made by the Commission in granting interim authorisation.

8.53 The VFF argued that in the event of breach of the Code the only sanctions available would be revocation of authorisation or the application of the unconscionable conduct provisions of the TPA. The VFF argued that neither of these courses provided a particularly flexible or immediate remedy.

8.54 The VFF raised concerns regarding the rights of growers under a voluntary Code if the processors' business changes hands. The VFF further contended that it is of concern that processors could, if they chose, unilaterally opt out of the whole system and impose one on one negotiation with their growers.

8.55 The VFF questioned the value of the Ministerial Advisory Committee proposed in the Code. The VFF argued that the Committee's terms of reference and powers should be widened to include duties to report on:

- any breaches of the Code of Conduct;
- any anti-competitive behaviour not specifically authorised;
- any conduct which may be deemed unconscionable.

8.56 The VFF contended that the Committee should report monthly for the first twelve months after final authorisation is granted and thereafter each 3 months.

8.57 The VFF argued that the basic inadequacy of the arrangements was the absence of any certainty in relation to contract terms. The VFF noted that the Code specifies only broad guidelines, in the form of a list of topics which should be dealt with, but that no indication is given as to the manner in which they should be dealt with or any framework.

8.58 The VFF contended that the starting point for contract negotiations should be existing contracts which incorporate minimum terms and conditions as prescribed under the BCI Act. The VFF argued that any contract developed should replicate these terms and conditions and contain:

- the prescribed terms and conditions or similar terms and conditions; and
- (at the option of the parties) additional terms and conditions not inconsistent with those prescribed.

8.59 The VFF argued that contract terms should be increased to 10 years with the possibility of options for a further 5 years to permit the amortisation of investments and create a stable environment for future investment. The VFF further contended that issues relating to productivity, quality and performance should be implemented on an agreed basis and that contracts should provide specific outcomes in the event of failure to reach agreement.

8.60 The VFF stated that the Code's procedures for the formation of PNGs is confused and assumes a structure which enables a secret ballot to be held and assumes the existence of 'the Chairman of the grower Group'. The VFF argued that the potential for multiple PNGs dealing with each processor is impractical in terms of obligations with respect of rotation of supply of birds between

contracted growers and pool and incentive schemes. The VFF argued that multiple PNGs also run counter to the assumption that the Code will provide reduced transaction costs.

8.61 The VFF argued that under the Code decision making by growers becomes a processor influenced procedure. The VFF stated that growers should be free to reach decisions on matters without the processor being present.

8.62 The VFF argued that the dispute resolution procedures of the Code are unsatisfactory. While the VFF did not object to a process directed towards resolution of disputes within the PNG or if necessary by mediation, they argued that many disputes would not be resolvable in this fashion. In the absence of agreement arbitration is to be by an arbitrator appointed by the Institute of Arbitrators and Mediators Australia, which the VFF argued is a process which is expensive and not readily and immediately accessible.

8.63 The VFF stated that the limitation of compulsory arbitration (where no resolution is otherwise reached) to matters involving amounts payable is a distinction which is impossible to apply with any degree of certainty. The VFF argued that there are a range of issues which affect payments and where there is ambiguity about whether a dispute in relation to such matters could constitute a dispute over amounts payable. The VFF stated that such issues include growing fee payments and periodic adjustments, pool payment and efficiency scheme adjustments, bird placement, density and adjustments, batch rate cycles, mortality and bird survival rates, changes in batch costs and processors' specified requirements, changes in fixed costs and/or government charges, and all other matters impacting on a grower's cost structure or annual income.

8.64 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 would be the choice of the processor. The VFF argued that on a renewal of a grower's contract, or upon entry of a new grower into the industry, whether or not a contact would be available is in the hands of the processor. The VFF stated that by extension, the terms of the contract which the processor is prepared to make available would also be in the hands of the processor. Additionally, the VFF stated that a grower may only withdraw from a PNG and become an NPG if the processor agrees.

John Scott

8.65 John Scott argued that the Code of Conduct is biased in the processors' favour as:

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

- Processors' power of veto in respect of matters going to mediation and or arbitration makes the dispute resolution provisions of the Code unworkable;

- the Code's provisions covering non-participating growers are unnecessarily restrictive.

Ernst Mueller

8.66 Ernst Mueller noted his opposition to deregulation of the Victorian chicken meat industry and the arrangements for which authorisation was sought.

Applicant's response to issues raised at the PDC and in subsequent submissions

8.67 The Applicant stated that the assertion that there is no effective market for grower services because there is no effective independence between growers takes no account of the market for genetic stocks, for feedstuffs nor the observed movements of growers among processors. The Applicant argued that there are several choices for input supplies of breeding stock and feedstuff. They argued that the fact that Marven and Eatmore choose to purchase some of their supplies from Inghams and Bartter is not evidence of a lack of independence among processors and then of a lack of a market for grower services, but rather an outcome of purely commercial decisions.

8.68 The Applicant contended that there is no history of efficient farms not having their contract renewed or being left without a processor to supply. The Applicant contended that when Marven started a growout program in the early 1980s, existing growers transferred to it and new growers were able to come in. The Applicant contended that similar situations prevailed in 1989 when Eatmore initiated a growout program and again in the last 2 years with La Ionica entering the market. Similarly in 1997 when Steggles (now Bartter) decided to relocate its growing capacity 20 growers (10% of industry capacity) were transferred from other processors. The Applicant contended that with the possible exception of growers around Bendigo, growers are located in close proximity to a number of processors (at least four in most cases).

8.69 The Applicant contended that to the extent that the specificity of assets employed by growers is a concern this should be addressed in the conditions of the growing contracts at the PNG or individual level. The Applicant argued that more specific contracts should better take into account both growers' circumstances and the processors' requirements. Further, collective negotiation on a processor basis provides growers with bargaining power on this issue.

8.70 The Applicant notes the findings of the NCP review that

> "There are frequent assertions by the VFF implying that exploitation of growers is inevitable, but there is no rigorous analysis provided of the economic outcomes of the removal of the Act's arrangements."

8.71 The Applicant argued that processors need growers as much as growers need processors and therefore that bankrupting growers through low fees is contrary to the economic self interest of processors. The Applicant noted the conclusion

of the NCP review that any imbalance between grower and processor is not so profound that only special legislation can address any resultant problems.

8.72 The Applicant argued that authorisation directly addresses the issue of any imbalance in bargaining power. The Applicant noted that under authorisation growers would be legally permitted to form PNG groups to negotiate on a collective basis with their processor. The Applicant argued that this would preserve the bargaining power of growers whilst allowing mutually agreed contracts to be developed which best suit market requirements. The Applicant stated that any mistreatment of growers would result in a transfer of growers from that processor.

8.73 Additionally the Applicant noted that unconscionable conduct by businesses in dominant positions in the acquisition of goods or services from another business is specifically prohibited under the TPA. The Applicant noted that this is in addition to common law remedies available to all parties.

8.74 The Applicant noted that under the Code both parties have equal power to call a meeting. Regarding grower concerns that processors can veto any agreed resolution of such meetings, the Applicant contended that negotiating groups are established to conduct negotiations between the two parties, namely participating growers and the processor and therefore there must be mutual agreement on agreed resolutions. The Applicant argued that it is not and cannot be the case that a simple majority carried resolutions.

8.75 In response to concerns that the proposed Code of Conduct does not provide specific details of terms and conditions of contracts that would operate under the proposed arrangements, the Applicant noted that the Code consists of guidelines which set out the procedures for the establishment, operation, conduct of negotiations and dispute settlement and minimum content standards for contracts. The Applicant noted that specific contracts are to be developed in negotiations between the processor and contracted growers. The Applicant argued that it is not appropriate to pre-empt those negotiations by providing a detailed, prescriptive Code. They stated that to do so would result in de-facto industry wide negotiations, which they argued, is contrary to the TPA.

8.76 A number of parties raised concerns at the PDC that processors were, under interim authorisation, negotiating with small groups of contracted growers in breach of section 1 of the Code (that a secret ballot will be held by the Chairman of the Growers Group of all growers contracted to each processor to determine if they wish to negotiate collectively). The Applicant noted that the Code provides protection to growers by allowing the formation of PNGs irrespective of processors' wishes provided 40% of growers agree to do so. The Applicant noted that more than one PNG could be formed and negotiations could also be held on a one on one basis. The Applicant contended that there was nothing in the Code which prevented a processor negotiating with individual growers or with groups of growers if they so desire.

8.77 With regard to the resolution of disputes that may arise during the validity of an agreed contract, the Applicants noted that as a result of concerns raised at the

PDC they have amended their application to explicitly state that 28 days is the maximum time period before which disputes with respect to amounts payable are referred to arbitration (unless both parties agree otherwise). The Applicant further noted that neither party is able to veto disputes with respect to amounts payable going to mediation/arbitration.

8.78 Additionally the Applicant noted that growers have expressed concerns that:

- mediation/arbitration is not compulsory in all matters;
- arbitration may be expensive; and
- processors have the right to veto mediation and/or arbitration (for matters other than amounts payable).

8.79 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 and that if either party were not agreeable to mediation, such mediation would not be of any use. The Applicant contended that while arbitration (with respect to matters other than amounts payable) could also be vetoed, in such instances, recourse to normal contractual dispute settlements is available.

8.80 The Applicant argued that compulsory arbitration might result in defacto re-regulation of the industry through a series of arbitrated decisions, or allow a series of frustrating issues to be taken to arbitration. The Applicant noted that before a dispute reached arbitration/mediation it would have been considered by the PNG, and if relevant to all growers, by a meeting of all participating growers. The Applicant argued that this procedure placed considerable pressure on the processor to resolve the matter satisfactorily.

8.81 The Applicant argued that it is in the interest of both parties to keep the costs of mediation and arbitration down. They contended that the approach outlined to dispute resolution in the Code could be varied in contracts negotiated by the PNGs if other mutually satisfactory arrangements were agreed.

8.82 In response to concerns that processors had been seeking to bind growers entering into negotiations under interim authorisation to confidentiality clauses, the Applicant argued that it was not uncommon commercial practice for both parties to agree confidentiality safeguards when a contract is negotiated.

8.83 The Applicant argued that section 10 of the Code provided for participating growers in a PNG to hold meetings amongst themselves or with advisers to discuss all relevant matters, including the terms and conditions of contracts being negotiated. The Applicant argued that processors currently seeking to negotiate under interim authorisation were encouraging information exchange within PNGs, but not outside the PNGs or the company.

8.84 The Applicant argued that they would be concerned if a common adviser such as the VFF were to be involved across a number of or all PNGs and processors. They argued that such involvement would be tantamount to industry wide

centralised negotiations and would increase the likelihood of anti-competitive behaviour.

8.85 In response to concerns raised regarding the status of existing contracts once the proposed arrangements were authorised, the Applicant stated that processors agreed that existing contracts would remain intact unless mutually agreed between grower and processor or until they expire.

Revised Code of Conduct

8.86 On 12 April 2001, the Applicant submitted several further revisions to the Code to address concerns raised at the pre decision conference and also later by the Victorian Minister for Agriculture. These changes, while not changing the nature of the conduct for which authorisation was sought did clarify the intent of the Code.

8.87 Specifically, the changes included:

- an explicit statement in the Code preamble and to be included in contracts, that all negotiation is to be conducted in good faith;
- an explicit statement in the Code preamble and the Code's dispute resolution procedures that all parties retain the right to legal redress;
- provision that the Code's dispute resolution procedures also apply to non-participating growers;
- provision that minimum contract terms will be explicitly stated in contracts;
- explicit provision for participating and non participating growers to appoint advisers to assist them in preparation and ongoing negotiation matters; and
- provision that a common adviser is not to be used across the industry. The Code was also amended to state that it is not envisaged that a common adviser would be used across PNGs with a single processor. The Applicant argued that common representatives across the industry could result in de facto industry wide negotiations, increase anti-competitive behaviour, and negate the benefits of authorisation. The Applicant further argued that should growers within one processor wish to use a common adviser then they should form a single PNG to do so.

Submissions in Response to the Revised Code of Conduct

8.88 The Commission provided interested parties with copies of the revised Code of Conduct and invited comments on the amendments made. The following is a list of interested parties who made comments on the revised Code of Conduct.

- Mr John Scott
- Mr Glenn Bannister

- Mr Anthony Acciarito
- Mr Paul Mannes
- Gary and Andra Robertson
- Victorian Farmers Federation (VFF) Chicken Meat Group
- Confidential Grower Submission

John Scott

8.89 John Scott argued that any public benefit flowing from transaction cost savings would be lost by the need for growers to engage consultants in negotiation with processors. Mr Scott argued that under the proposed arrangements processors would retain their negotiating expertise while growers will be expected to negotiate new contracts without the use of the currently available expertise of the VFF Chicken Meat Group CMG.

8.90 Mr Scott argued that growers should not be limited in choosing to employ common advisers across processors.

Glenn Bannister

8.91 Glenn Banister argued that growers would be severely disadvantaged if not allowed to employ a common adviser across the industry. Mr Bannister argued that the VFF have specific experience in negotiating and formulating contracts and that processors were attempting to divide growers into as many small groups as possible by denying them the right to industry wide VFF representation in negotiations.

8.92 Mr Bannister further agued that the imposition of confidentiality clauses in contracts would serve to further isolate growers from each other. Mr Banister noted that such clauses had only been alluded to at this stage and were not a specific requirement of the Code, but argued that contemplation of such clauses in contracts only strengthened the view that the processors' strategy was to weaken the position of growers.

Anthony Acciarito (President - VFF Bartter Growers)

8.93 Anthony Acciarito argued that even incorporating the amendments requested by the Victorian Minister for Agriculture, the Code was still biased towards processors. Specifically, Mr Acciarito argued that;

- meeting of a PNG should be able to be called if the processor and Chairman of the PNG agree. (Currently such meeting may be held if the processor or 50% of growers agree).
- It is not necessary to have the processor present when agreed resolutions of PNGs are voted on.
- 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.

- Neither party should have the right to veto matters going to arbitration.

Paul Mannes

8.94 Paul Mannes argued that section 4.4 of the Code (exclusion of a common adviser across the industry) should be removed. Mr Mannes stated that the expertise and knowledge required as an adviser on both legal and industry matters was extensive and that this knowledge should be allowed to be shared across PNGs. Mr Mannes argued that the cost to individual PNGs of obtaining this information would be extensive. Mr Mannes argued that proposed confidentiality clauses in contracts further disadvantaged growers in this respect.

Gary and Andra Robertson

8.95 Mr and Mrs Robertson argued that the exclusion of a common adviser across the industry denied growers a basic right afforded to any working member of the community. Mr and Mrs Robertson noted that most growers were members of the VFF and/or Australian Workers Union (AWU), and that these advisers, with expertise in the industry, should be available to all growers. Mr and Mrs Robertson argued that seeking professional advice from other sources would increase transaction costs. They further argued that where multiple PNGs were formed and others growers become non-participating growers, that in small regions like Bendigo the availability of professional advisers would not be sufficient to accommodate all parties unless common advisers were able to be employed.

8.96 Mr and Mrs Robertson argued that proposed confidentiality clauses in contracts would:

- weaken the growers' position;
- reduce the growers' rights to market intelligence;
- further isolate growers from each other;
- increase transaction costs;
- restrict growers from accessing other contract proposals; and
- seriously disadvantage new entrants to the industry.

8.97 Mr and Mrs Robertson argued that the possibility of multiple PNGs within a processor group would:

- isolate growers from each other;
- increase costs; and

- force some growers to become NPGs as they may be denied access to certain PNGs.

Victorian Farmers Federation

8.98 The VFF argued that the proposed changes to the Code, whilst addressing some concerns, also highlight that what is proposed to be authorised is a method of arriving at enterprise agreements rather than authorisation of agreements themselves. The VFF argued that the process is an attempt to capture and isolate growers into enterprise groups and then divide growers into various PNGs and NPGs within each group. The VFF argued that this could lead to unilateral, take it or leave it, processor standard contracts.

8.99 Specifically, the VFF argued that contract confidentiality clauses diminished growers' rights to access market intelligence and thereby increase transaction costs. The VFF argued that these clauses were anti-competitive and further restricted the already limited market for growing services by preventing growers from accessing alternative contract proposals.

8.100 The VFF contended that multiple PNGs within each processor group would dramatically increase transaction costs, including legal and commercial professional costs and dispute mediation and arbitration costs. The VFF also expressed concerns that some growers would be denied access to certain PNGs or may be forced to become NPGs. The VFF stated that they believed that this may already be occurring.

8.101 The VFF argued that exclusion of common professional advice to assist in contract negotiation is a serious retrograde step from earlier draft Codes and a further restriction on growers rights. The VFF contend that this is specifically designed to prevent the VFF CMG (or the AWU) from providing professional services to their respective membership. The VFF stated that this would further weaken growers who have in the past relied upon the VFF and VBINC to negotiate on their behalf. The VFF argued that this would also increase transaction costs as different professional consultants, who are unfamiliar with the industry, are inducted.

8.102 The VFF noted that the processors' submissions to the Commission following the pre-decision conference envisaged that existing contracts would remain in place while PNGs negotiated new contracts, provided both parties agree. However the VFF noted that the existing Code does not address the existence of current contracts or the manner in which the Code would co-exist with these contracts and their supporting statutory framework, even if only on a transitional basis. The VFF argued that negotiation of new contracts could take months, or even years if new conditions governing factors largely beyond the growers control such as market forces and bird quality were introduced.

8.103 The VFF noted that existing contracts rely on VBINC to set the growing fee and that this fee has been set until 30 June 2001. The VFF contended that if existing contracts are to remain valid beyond 30 June 2001, until such time as they are replaced by PNG negotiated contracts, then VBINC and the regulations

governing the industry must remain in place to allow a smooth transition. The VFF argued that the Commission should consider exempting VBINC from prosecution during this transition.

Other submissions received

8.104 The Commission also received one further confidential submission from a grower in support of the application.

9. COMMISSION EVALUATION

9.1 The Commission's evaluation of the application is in accordance with the statutory tests outlined in section 4 of this draft determination. As required by the tests, it is necessary for the Commission to assess the likely benefit and detriment, including the effects on competition, resulting from the proposed arrangements.

Role of the Commission

9.2 The Commission notes the findings of the NCP review of the BCI Act that the current legislated arrangements are likely to breach the TPA. The Commission is in agreement with the Review's findings in this respect. The Commission also notes the preference of the Victorian Minister for Agriculture for repeal of the BCI Act with an authorisation in place.

9.3 The VFF argued that the majority of growers favour amendment to the BCI Act in the form of a Section 51(1) exemption from the TPA. They argued that any decision by the Commission to grant authorisation to the proposed arrangements undermines growers' attempts to negotiate with the Victorian Government to maintain the existing arrangements.

9.4 The VFF further argued that, given that the BCI Act is still in place, it is not appropriate for the Commission to use full industry deregulation as the counterfactual in assessing the public benefits and anti-competitive detriments of the proposed arrangements.

9.5 Under section 90(1) of the TPA the Commission has a statutory obligation to make a determination in writing in respect of the Application for Authorisation made by Marven Poultry. The Commission is required by law to assess the public benefits and anti-competitive detriments of the proposed arrangements which are the subject of the application.

9.6 The Applicant has sought authorisation for a set of arrangements that might otherwise be in breach of the TPA. The Commission is required to assess the public benefits and detriments of the proposal before it, not the benefits and detriments of the existing legislation. The counterfactual situation that the Commission has to consider in assessing the application is one where the arrangements were not in place. Given all parties accept that the existing legislation is in breach of the TPA, the Commission does not consider it reasonable to use this legislation as the counterfactual situation in assessing the proposed arrangements.

9.7 Any decision on the future of the BCI Act will be made by the Victorian Government. The Commission's role in this process is limited by law to considering the application before it. The Commission notes that the Victorian Government is still to release its response to the findings of the NCP Review. The Commission has been assured on a number of occasions that a Government response is the Review is imminent. However, the Commission notes that the

Reviews findings were released in November 1999. Further, the Victorian Government has been aware of this application since at least September 2000.

9.8 The Commission again notes the Victorian Government stated preference for repeal of the existing legislation with an authorisation in place.

Validity of the Application

9.9 The Commission notes the argument by the VFF that the application is invalid on the grounds that the processors are third parties and not parties to the proposed conduct. The VFF submits that Marven Poultry is unable to seek authorisation for conduct to which Marven Poultry is not a party.

9.10 Section 88(1) of the TPA does not specifically require the applicant to be a party to the arrangements for which authorisation is sought (an application can be made on behalf of a party). Having said that, the Commission is of the view that the Applicant is a party to, and/or knowingly concerned in, the proposed arrangements. Authorisation is sought for growers to negotiate standard growing agreements with their respective processor. Authorisation is also sought to enable growers to appoint representatives to enter into negotiations with processors. It is proposed that the guidelines to be followed in electing representatives and in negotiation be set out in a Code of Conduct for which authorisation is also sought and to which both processors and participating growers (those who elect to engage in collective negotiation under the Code) will be parties. Authorisation is also sought to give effect to the collective growing agreements which result from negotiations. Both the processors and growers who elect to collectively negotiate will be parties to and/or knowingly concerned in the proposed arrangements which are the subject of the authorisation application.

9.11 The Commission notes that the Applicant has named present and future contract growers in the application as parties or proposed parties to the contract, arrangement or understanding for which authorisation is sought. Section 88(6) of the TPA states:

> An authorisation granted by the Commission to a person under any of the preceding provisions of this section to:
>
> (a) make a contract or arrangement or arrive at an understanding;
>
> (b) give effect to a provision of a contract, arrangement or understanding;...
>
> has the effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party to the contract, arrangement or understanding, or as a proposed party to the proposed contract, arrangement or understanding...

9.12 In effect, authorisation to engage in the proposed arrangements has the effect of authorising the Applicant and any other party named in the application as a party or proposed party to the proposed arrangements to also engage in the arrangements for which authorisation is sought.

9.13 Therefore, in accordance with its obligation under section 90(1) of the TPA, the Commission issues this determination in writing in respect of the Application for Authorisation made by Marven Poultry.

9.14 While it appears that there is opposition from a considerable number of growers who are also potential parties to the proposed arrangements, this does not entitle the Commission to avoid its statutory obligation in respect of an application for authorisation, to make a determination in writing either granting or dismissing the application. Further, authorisation does not require any person to engage in the conduct authorised.

The Relevant Market and its Features

9.15 As noted, the Commission has considered three similar applications for authorisation with respect to collective negotiations between growers and processors in the chicken meat industry. In considering these applications the Commission concluded that the relevant market was a state based market for the acquisition of broiler chickens from growers by processors and/or the service of growing chickens for processors by growers. In assessing the current application the Commission did not receive any information that would cause it to change this view of the market.

9.16 It is relevant to note some of the main features of the market. The Commission notes the following in regard to the supply of chickens:

- Growers are essentially unable, once committed to chicken growing, to use their sheds and farm equipment for other purposes. For example, growers are unable to readily switch from chicken growing to providing growing services relating to other types of poultry or meat.

- Growers often incur costs in adapting shedding to the processors' requirements if they switch to another processor.

- At the retail level, different brands of chicken appear to be highly substitutable.

- Direct competition between processors for the acquisition of growing services can occur before the growers commit themselves to company specific capital.

- However, the degree of specificity of such capital between different chicken processors is less than between chicken processors and other types of meat processors.

9.17 In regard to demand, the Commission notes that chicken processing plants are specific to the chicken industry, and processors are unable to process other types of poultry and meat at such plants. Consequently, processors are unable to readily switch production to processing other types of meat.

9.18 In regard to the geographic dimension of the market, the Commission notes that:

- Broiler production (growing and processing) is predominantly located close to areas of consumption.

- Approximately 90% of the chicken produced in Victoria is consumed in that state.

- Imports of chicken meat to Australia are not significant at this time.

Effect on competition

9.19 In general terms, collectively negotiating agreements which set uniform fees to independent contractors, such as chicken growers, covered by the agreement are likely to lessen competition relative to a situation where each of the contractors individually negotiates its own rates of payment. However, the extent of the detriment and the impact on competition will depend upon the specific circumstances involved.

9.20 While the introduction of a collective arrangement into a market where there is no such arrangement already in place might be regarded *a priori* as causing a reduction in competition in the relevant market, the implications for competition will depend on the terms and conditions of the agreement. For instance, if price is to be collectively negotiated under such an agreement, the associated anti-competitive detriment may be reduced if there are, for example, efficiency triggers within the agreement's provisions which encourage productivity, or if there is provision for individuals to opt out and negotiate outside the collective arrangements.

9.21 The Applicant has submitted that the proposed collective arrangements may, in comparison to a situation where growers negotiate individually with processors, possibly lead to higher fee outcomes and less flexible contracts. The Commission considers that collective negotiation between processors and contract growers in Victoria as provided by the proposed arrangements are likely to reduce the scope for competition over rates of payment (and other terms and conditions) between growers when compared to a deregulated industry. However, when compared to the present arrangements, the Commission considers there is more scope for inter-firm competition, that is between processors, and between groups of growers. This is discussed in more detail in paragraphs 9.24 – 9.26 below.

9.22 Collective negotiation has the potential to limit competition between each individual processor's growers. However the proposed arrangements will allow for greater competition between processors than has been the case under existing regulatory arrangements. The proposed arrangements may place upwards pressure on retail prices when compared to a fully deregulated environment. However the Commission considers that there are a number of factors which limit any anti-competitive detriment resulting from the collective negotiations. Contract growers have the option of negotiating individually with processors if they do not wish to be party to the collective negotiation process, and will be regarded by the processor as 'non participating growers'. To the

extent that some growers choose to negotiate individually this will increase the scope for competition over rates of payment and other contract terms. Additionally the Commission notes that the growing fee constitutes only a small component of the retail price of chicken meat (approximately 8.5%). Finally, the Commission considers that competitive pressures provided by powerful downstream purchasers such as retail chains and fast food outlets should limit chicken processors' ability to pass on any fee increases.

9.23 The Commission further notes that any anti-competitive effects from growers seeking to exploit their improved bargaining position as a result of the collective negotiation arrangements are likely to be far less in the chicken growing industry than in other industries where elasticities of supply are much higher. Capital investment in chicken growing, for example in land, shedding and equipment is large and highly specific to the occupation. This limits the ability of growers to supply different goods and services in response to changed market conditions or variations in contract terms offered. Consequently growers' ability to exploit any increase in bargaining power as a result of the proposed arrangements is also limited.

Scope of the Proposed Arrangements

9.24 Where collective agreements between competitors on rates of payment or supply conditions are industry-wide the scope for competition is lessened across all firms in an industry. Where agreements are firm specific the scope for competition between suppliers to that firm is lessened, although there may still be scope for inter-firm competition.

9.25 The Commission notes that the industry is presently subject to the BCI Act and *Broiler Chicken Industry Regulations* 1992 which provide for the collective negotiation of terms and conditions of chicken grower contracts on an industry-wide basis in Victoria. Measured against these current industry arrangements, the proposed arrangements would have a less detrimental effect on competition in the market. However, measured against complete deregulation of the industry, the proposed arrangements may lessen the ability of growers to switch from one processor to another, thereby lessening the scope for competition between suppliers to a particular processor, although the potential for inter-firm competition would still exist.

9.26 The Commission notes that, whilst in a deregulated industry and in the absence of the proposed arrangements, most growers would have at least a limited degree of choice of processors with whom to contract, such choice is already limited by the nature of the industry. The nature of the contract system for chicken growing is such that processors maintain a high degree of control over business inputs and the manner in which the chickens are reared. Consequently a considerable degree of the growers' capital investment is specific to supplying the particular processor. Therefore, even without arrangements limiting the ability of growers to switch between processors, the scope for competition between growers to service different processors would still be limited.

Scope for New Entry

9.27 The capacity for new entrants to compete for the rights to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected.

9.28 Difficulties faced by new growers entering the chicken industry include the extent of vertical integration in the industry, the limited ability of growers to vertically integrate either upwards or downwards, the capital investment requirements which are tied once committed, and meeting the start-up requirements of the processors before entering into a growing agreement.

9.29 Entry into the market at the processor level also has barriers due to the relatively high start-up costs (approximately $5 - 6 million) and the uncertainty of gaining either new growers and/or growers from other processors.

9.30 Collective negotiation between growers and their processor resulting in agreed fee levels and entry into long term agreements (agreements are expected to range between 2 and 5 years) may further reduce the likelihood of entry into both the chicken growing and chicken processing markets by potential competitors.

9.31 However, the Commission notes that the proposed arrangements are voluntary and allow the Non-Participating Growers (including new entrants) freedom to negotiate rates of payment and other conditions different to those determined under collectively negotiated agreements. This may limit the detrimental effects such agreements may have on the likelihood of new entry into the market at the growing level. Consequently, the Commission considers that while collective negotiation between growers and processors may increase barriers to new participants entering the industry, such barriers are not increased to such an extent as a result of the proposed arrangements to materially impact on new entry to the market.

Potential for Collusive Anti-competitive Conduct

9.32 In considering similar arrangements in the South Australian and Tasmanian chicken meat industries the Commission noted that collective negotiation between a processor and its contract growers may increase the potential for collusive anti-competitive conduct. The Commission noted, for instance, that there were allegations of anti-competitive conduct such as market sharing arrangements and price fixing in the South Australian chicken industry, being arranged at former Poultry Meat Industry Committee meetings in that state.

9.33 However, the arrangements proposed in this application are moving away from industry wide negotiations of this sort. A deregulated environment is likely to reduce the possibility of collusion and increase the likelihood of different cost structures arising in the processing companies. In addition, deregulation provides the opportunity for processors to treat growers differently. This may increase the likelihood of grower movement between processors (to the extent that this is possible) and significantly reduce the opportunity for collusive

behaviour. Furthermore, the Commission considers that competitive pressure at the retail level will act to limit the potential for any anti-competitive conduct.

Issues arising out of the draft determination

9.34 Growers argued that the denial, under the Code of Conduct, of industry wide VFF representation is a denial of a basic right afforded any working member of the community. They argued that the VFF has specific experience in negotiating and formulating contracts and that this knowledge should be allowed to be shared across the industry.

9.35 The VFF argued that the exclusion of a common adviser across the industry is specifically designed to prevent the VFF CMG from providing professional services to their members. The VFF argued that this would weaken the position of growers who have in the past relied on this expertise.

9.36 The Applicant argued that the use of a common adviser across PNGs and processors would be tantamount to industry wide centralised negotiations and would increase the likelihood of anti-competitive behaviour.

Commission evaluation

9.37 The Commission recognises that there is an imbalance in the bargaining power between individual chicken growers and processors. The proposed collective negotiation arrangements are designed specifically to address this concern. (See paragraphs 9.46 to 9.63). The Commission further notes that processors are at an advantage in contract negotiations due to their greater knowledge and expertise in the negotiation process. It is in recognition of this fact that the Code allows for growers to engage advisers to assist in negotiations.

9.38 While collective negotiation on an industry wide basis would provide growers with a greater degree of bargaining power, the Commission considers that such industry wide collective negotiation would also be likely to have a far greater detrimental effect on competition than the proposed arrangements. The Commission has consistently opposed industry wide collective negotiation across a number of industries due to concerns regarding the detrimental effect on competition of such arrangements.

9.39 The Commission considers that where a common adviser such as the VFF is permitted to represent all growers across the industry specifically in contract negotiations, there is a real likelihood that negotiations would result in a set of identical prescribed contracts across the industry, similar to those in place under the current regulated system. Common, industry wide representation would increase the potential for an industry wide price fixing arrangement and have a much greater detrimental effect on competition than would collective negotiation at the individual PNG level without a common industry negotiator. This outcome would also be inconsistent with the intent of industry deregulation and could negate the public benefits of easing of the transition to a deregulated market identified by the Commission (and as discussed in detail below).

9.40 Growers have argued that exclusion of a common industry adviser in contract negotiations is a denial of a basic right afforded any working member of the Community.

9.41 The Commission notes that contracted chicken growers are not employees of their processor. Rather, growers are independent contractors, contracted to carry out a specific process in the chicken meat production chain. It is common for small businesses to have a common industry representative body to facilitate exchange of information and discussion of issues common to participants in the industry. The Commission supports such representation, particularly in respect of small businesses. The Commission notes that nothing in the proposed Code of Conduct precludes this in the chicken meat growing industry. However, in other industries, such arrangements do not generally extend to the engaging of a common adviser across the industry who is given the role of specifically negotiating provisions in contracts that may have an anti-competitive purpose or effect (eg a common fee).

Conclusion

9.42 The Commission considers that the proposed arrangements, while having a less detrimental effect on competition in the market than the current industry arrangements, may result in some lessening of competition compared to full deregulation of the industry. However, for the reasons outlined, the Commission considers that the anti-competitive detriments as a result of the proposed arrangements are very limited.

9.43 The Commission notes that authorisation is sought to allow growers to collectively negotiate and give effect to standard growing contracts with their processor in accordance with minimum standards and conditions outlined in a proposed Code of Conduct. A core element of the proposed negotiations will be the fees that participating growers will charge their processor. This element of the negotiation is the central concern of the Commission.

9.44 For this reason the Commission has imposed a condition of authorisation requiring that all contracts signed under the arrangements for which authorisation is sought are available to the Commission on request.

9.45 The Commission does not intend to review each contract as it is executed. However, it considers that by requiring that all contracts are available to it on request the Commission will be better able to make any future assessment of the effects of those contracts on competition in the market.

Condition of authorisation

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.

Public Benefits

Increased Countervailing Power

9.46 The Applicant submitted that the enhancement of contract growers' countervailing or bargaining power through collective negotiation is a public benefit. The VFF however, submitted that the bargaining power of growers is inherently weak and that the proposed arrangements do nothing to address this imbalance.

9.47 Arguments based on increasing countervailing power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in countervailing power, raised in the authorisation context, typically involves one party attempting to improve its bargaining position relative to another, for example through a collective arrangement. The Commission does not accept that a mere change in the amount of countervailing power is, in itself, a public benefit. Rather, the Commission will focus on the likely outcomes resulting from the change in the bargaining position flowing from the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test. Generally the Commission would accept an argument about increasing countervailing power as a public benefit where it is satisfied that enhancing the bargaining power would benefit the broader community, for example, if a likely result of increasing a party's bargaining power was the lowering of prices for consumers.

9.48 In its draft determination the Commission noted the concerns of the VFF that the proposed arrangements do not address the bargaining power imbalance between growers and processors. However the Commission considered that the proposed arrangements provide Participating Growers with a stronger bargaining position than would be the case with individually negotiated contracts. Furthermore, the Commission noted that the proposed arrangements incorporate mechanisms for independent dispute resolution.

Issues arising out of the draft determination

9.49 Growers argued that they are at a distinct disadvantage in contract negotiations as processors have access to knowledge regarding farmers' incomes and a fair ability to predict growers' financial vulnerability in negotiations. Further, growers argued that processors have full time office and financial staff and the wherewithal to engage consultants. They argued that in contrast, growers are not only isolated but due to the requirements of running a farm, they are limited in their ability and opportunity to seek outside expertise.

9.50 The VFF argued that the proposed arrangements would allow collective negotiation on terms favourable to processors and detrimental to growers, and would fragment and isolate growers into processor groups under a processor dominated structure.

9.51 The Applicant argued that the proposed arrangements are designed to protect growers and noted that the proposed arrangements include a Code of Conduct governing the framework under which negotiations will take place. The

Applicant noted that under authorisation, growers would be legally permitted to form PNGs to negotiate on a collective basis. The Applicant argued that this would preserve the bargaining power of growers.

9.52 The VFF further argued that in the event of breach of the Code the only sanctions available would be revocation of the authorisation or application of the unconscionable conduct provisions of the TPA, neither of which, it argued, provide a flexible or immediate remedy.

Commission evaluation

9.53 The Commission recognises that there is a combination of factors which result in chicken growers having very little bargaining power compared with the chicken processors. For example, significant capital investment by growers leads to large debts and high sunk costs. In addition, processors own virtually all inputs in the chicken production process. This negates, to a large degree, growers' ability to switch to supplying different services or different geographical markets in response to variations in prices. This further negates the bargaining power of growers.

9.54 Growers have argued that processors are at a distinct advantage in contract negotiations due to their greater knowledge and expertise in the negotiation process. The Commission notes that the Code of Conduct provides that growers may engage advisers to assist them in preparation and ongoing negotiation matters. However, the Commission notes that the explicit wording of the relevant clause of the Code (4.3) is ambiguous on the point of whether advisers engaged by growers are able to negotiate directly on their behalf. Therefore, the Commission has imposed a condition on authorisation that the Code be amended to explicitly provide that representatives appointed by growers be able to negotiate directly with the particular processor to whom those growers supply on those growers' behalf.

9.55 The Commission also notes that clause 4.3 specifically identifies accounting and legal advisers as being able to be appointed to assist growers. The Commission considers that growers should, provided that clause 4.4 prohibiting the use of common advisers across the industry is followed, be free to employ any adviser they see fit. While clause 4.3 does not explicitly exclude other advisers beyond accounting and legal representatives from being engaged, the Commission proposes that, in order to avoid any ambiguity, to amend clause 4.3 to provide that growers are free to employ any advisers as they see fit (provided clause 4.4 of the Code is complied with).

9.56 The VFF argued that the proposed arrangements would fragment and isolate growers into PNGs under a processor dominated structure. The Commission notes that under the Code the establishment and composition of grower negotiating groups is to be decided by growers. The Commission has imposed a condition of authorisation to clarify this point (see paragraphs 9.110 to 9.126). The condition also establishes that processors are not to participate in decisions about the formation and structure of grower negotiating groups.

9.57 The Commission further notes that the proposed arrangements incorporate mechanisms for independent dispute resolution.

9.58 More generally, the Commission accepts that an imbalance in bargaining power between growers and processors exists. The Commission would be concerned if the imbalance in bargaining power between growers and processors was so disparate as to result in unconscionable contract terms. As stated in its draft determination, the Commission considers that the proposed arrangements provide participating growers with a stronger bargaining position than would be the case with individually negotiated contracts. The Commission considers that the condition of authorisation discussed above further strengthens the growers' bargaining position, reducing the likelihood of unconscionable contract terms.

9.59 Recent amendments to the TPA make it unlawful for persons or companies to engage in unconscionable conduct. The amendments to the TPA are specifically designed to help small businesses that find themselves victims of harsh or unfair behaviour by larger parties with which they have a commercial relationship. Section 51AC of the TPA specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

9.60 Factors which a court will take into account in considering whether a business has acted unconscionably include:

- the relative bargaining strengths of the parties;
- whether the target business could understand any documentation used;
- the use of any undue influence, pressure or unfair tactics by the stronger party;
- the terms and circumstances in which the weaker party could have engaged in a similar transaction with another party;
- the requirements of any applicable industry Code; and
- the extent to which each party acted in good faith.

9.61 Any business which is the subject of unconscionable conduct from another business has a private right of action against that party for compensation, declaring a contract void or varying a contract or arrangement. Additionally, the Commission may take action against a party that has engaged in unconscionable conduct. Remedies the Commission may seek include, written undertakings by a party aimed at improving its conduct, injunctions or redress on behalf of affected parties. It is important to note that authorisation does not provide any party with immunity from the unconscionable conduct provisions of the TPA.

9.62 The VFF argued that sanctions available in the event of a breach of the Code are inadequate. The Commission notes that authorisation does not compel any party to participate in the proposed arrangements. However, 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 (see paragraph 9.127). In effect, should a party fail to comply with any clause of the Code, contracts negotiated by that party would not be authorised.

Condition of authorisation

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."**

9.63 The Commission considers that a number of other public benefits are likely to result from the proposed conduct, particularly associated with transaction cost savings and facilitation of a smoother transition from a regulated to a deregulated market.

Transaction Cost Savings

9.64 In considering the related South Australian and Tasmanian applications the Commission noted that there are transaction costs associated with using the market as a mechanism for trade, and that collective bargaining can reduce such costs. In its draft determination the Commission accepted that collective negotiation of chicken growers' fees and conditions, while increasing transaction costs relative to the current legislated arrangements, will effect a more efficient use of resources than through the process of individually negotiating fees and conditions with each grower as would be the case in a deregulated market.

Issues arising out of the draft determination

9.65 Growers argued that the possibility of multiple PNGs within a processor group, the imposition of confidentiality agreements preventing exchange of information between PNGs, and the exclusion of common advisers across PNGs would increase transaction costs.

Commission evaluation

9.66 In its draft determination the Commission concluded that there was likely to be significant savings in terms of time and labour for both processors and growers if processors are able to negotiate growing fees and conditions through a PNG rather than individually. The Commission accepts that the possibility of multiple PNGs within a processor group has the potential to increase transaction costs relative to a situation where each processor negotiated with a single PNG. However, negotiation with more than one PNG will still result in transaction cost savings compared to the situation of a processor negotiating individually with growers, albeit, a lesser amount than if there were one PNG negotiating with each processor.

9.67 The Commission notes that decisions regarding the formation of PNGs are made by growers. Consequently, multiple PNGs within a processor group will only be

formed where groups of growers consider that they have an advantage in negotiation, due to production efficiencies or the ability to produce birds different from the standard, sufficient to outweigh any loss of bargaining power from being in a smaller group. Accordingly, the Commission considers that where multiple PNGs within a single processor group are formed, they may serve to produce other public benefits such as increased flexibility of production.

9.68 The Commission considers that while the proposed arrangements are likely to increase transaction costs relative to the current regulated system, there are likely to be significant savings in terms of time and labour for both the processors and growers if each processor is able to negotiate growers' fees and conditions through PNGs (be it a single or more than one PNG) rather than individually with, in some instances, up to 60 growers.

9.69 The Commission considers that, given the competitive pressures to which the chicken processors are subjected from each other and retail and fast food chains, processors would be likely to be forced to pass on some of the reduction in costs in the form of lower prices. Therefore, the Commission accepts that a public benefit is likely to arise from transaction cost savings in this instance.

Flexibility of Production

9.70 The Applicant argued that the proposed arrangements would increase flexibility of production, allowing processors to more closely match supply and demand of chickens.

9.71 In its draft determination the Commission considered that the introduction of collective growing agreements at a processor-specific rather than industry-wide level could be expected to introduce greater flexibility into grower contracts. For example, the Applicant submitted that the current arrangements discourage the growing of Poussin chickens and free range chickens which are more costly to rear but are subject to the same standard industry growing fee as all other birds.

Issues arising out of the draft determination

9.72 Growers noted that the Applicant has claimed increased flexibility of production would flow from the proposed arrangements as the present VBINC arrangements do not provide incentives for more costly free range and Poussin production. However, growers argued the VBINC arrangements allow variations in fees for lower throughput both in batch numbers and lower stocking rates and for higher throughput. In the case of Poussin production, Growers argued that the basic rearing cost structure would be the same as all other bird production as the major costs (clean out, set up, gas, power and manual work) are incurred for the bulk of the year in the first 4 to 5 weeks of growing and only change considerably in the final 4 weeks, dependent on weather conditions.

Commission evaluation

9.73 The Commission notes that under the present arrangements processors already have a high degree of control over inputs and rearing specifications. Nonetheless, standard grower fees across the industry, as imposed under the current legislated arrangements, could serve to reduce the range and quality of chickens, with higher cost birds less likely to be reared. Under the proposed arrangements, processors will have more incentive and flexibility to produce and market birds that are different from the "standard". This may increase product innovation and increase the range and quality of chicken available to the public. However, the Commission notes that while this increased flexibility provides a public benefit compared to the current arrangements, such an outcome may be equally achievable, if not more so, under a system of individually negotiated contracts.

Easing Transition from Regulated to Deregulated Market

9.74 The Commission has authorised various schemes in several rural industries following deregulation (including the chicken industry). In assessing such schemes, the Commission has accepted arguments that there would be a public benefit in mechanisms that facilitate the transition from a regulated to a deregulated environment. The mechanisms help to avoid a dislocation in the functioning of a market that would be caused by too sudden a transition. The Commission nevertheless requires, in these cases, that industries demonstrate a clear commitment and movement towards operating in a deregulated market.

9.75 For example, the Commission granted authorisation for a limited transition period to the winegrape industry to enable various groups in the industry to hold a series of meetings to reach an indicative price for winegrapes. Under previous legislation, prices for winegrapes had been fixed. In the Commission's view the process of reaching the indicative price enhanced public benefit by improving information exchange in the industry and helping growers to adjust to an environment where they had to negotiate their own prices. In contrast, the Commission denied authorisation to the tobacco industry for a scheme to replace various government market support schemes. The proposed scheme, in the Commission's view, was no different from the government marketing schemes it sought to replace. Such a scheme did not assist the industry to adapt to the new circumstances it would face in a deregulated environment.

Issues arising out of the draft determination

9.76 The VFF argued that the application is based on an incomplete understanding of the market for chicken meat growing services. The VFF argued that competition in the market is restricted by the dominance of the market of two processors, Inghams and Bartter. The VFF argued that this situation is exacerbated by technical limitations on grower mobility such as contract terms and conditions, farm location and types and age of shedding. The VFF argued that these limitations mean that when a grower's contract expires the number of processors potentially available to it is limited. The VFF argued that this situation is inconsistent with the competitive market assumed by the Commission to result from deregulation of the industry.

9.77 The Applicant argued that the fact that other processors choose to purchase some of their supplies from Inghams and Bartter is a purely commercial decision and not evidence of a lack of independence between growers. The Applicant contended that there was no history of efficient growers not having contracts renewed or being left without a processor to supply. The Applicant contended that, with the possible exception of Bendigo, growers are located in close proximity to a number of processors and have a number of choices in processors with whom to deal.

Commission evaluation

9.78 The chicken meat industry in Victoria has been regulated since the mid 1970s. The industry is in a transitory stage with deregulation dependent on the passage of the repeal of the BCI Act in the Victorian Parliament. However, the Minister for Agriculture has indicated his preference for the industry not to be deregulated unless there is a mechanism to ensure that growers are protected in the transitional stage. Processors argue that the proposed arrangements will provide this smooth transition.

9.79 In the short term, there are several reasons why growers may have difficulty adapting from a totally regulated system to one where each grower must negotiate individually with the processing company. First, processors have access to extensive information about growing costs and performance. By contrast, individual growers have access to limited information and in the case of new entrants to the industry, will have limited industry experience on which to rely. Secondly, there appears to be a significant imbalance in bargaining power between individual growers compared to vertically integrated processors. Finally, there is the possibility that individual growers lack the requisite experience to engage in effective negotiation.

9.80 As a result some growers may face considerable costs and difficulties in adapting to a deregulated market. These difficulties will be exacerbated by the uncertainty about the terms and conditions under which they will operate and which growers will face while individual contract negotiation occurs. There is a detriment to the operation of the industry if efficient growers have difficulty in operating because they do not have access to market information or lack the requisite experience to engage in effective negotiation.

9.81 The chicken meat industry has traditionally been highly regulated and growers have limited experience in commercial contract negotiation. For this reason the Commission is of the view that there is some public benefit in facilitating the transition to deregulation. This will help minimise the adjustment costs that could result from too precipitous a change from regulation. The proposed arrangements will also assist growers to acquire skills so that they will not only be able to produce efficiently but they will also be able to negotiate efficiently. The Commission considers that this also produces a public benefit in the form of a more cohesive and efficient industry.

9.82 The Commission accepts that competition amongst processors for grower services is currently limited. The Commission notes that under the current arrangements transfer of a grower from one processor to another is generally as