



**Australian  
Competition &  
Consumer  
Commission**

# **Determination**

## **Application for Authorisation**

lodged by

**Marven Poultry Pty Ltd  
for itself and on behalf of  
Victorian Chicken Meat Processors  
and Chicken Growers**

in respect of

**Collective negotiation arrangements between  
Growers and individual Processors in relation to  
growing contracts and associated Code of Conduct**

**Date: 28 June 2001**

**Application No: A90750  
File No: C2000/1464**

**Commissioners:** Fels  
Shogren  
Bhojani  
Martin  
Jones  
Cousins

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## *Executive Summary*

On 21 September 2000 Marven Poultry Pty Ltd. for itself and on behalf of five other chicken meat processing companies operating in Victoria, Inghams Enterprises Pty Ltd, Bartter Enterprises Pty Ltd, Eatmore Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd, and La Ionica Farming Operations Pty Ltd, and current and future contract growers to those processors, lodged an application for authorisation (A90750) with the Australian Competition and Consumer Commission (the Commission).<sup>1</sup> Authorisation was sought to make or give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the *Trade Practices Act 1974* (TPA).

The application relates to a proposal by Victorian chicken meat processors for the contracted chicken growers of each processor to engage in collective negotiations with their respective processor for standard growing agreements (including the agreement of a common fee), in accordance with a Code of Conduct.

Authorisation is sought to permit the contract growers of each processor to collectively negotiate standard growing agreements with their processor, to allow growers to appoint representatives from among their collective groups to enter into negotiations with their processor on the standard growing agreements and for the contracts which result from the negotiation process.

In addition to authorisation to make and give effect to collective growing agreements, authorisation is also sought for an industry Code of Conduct that would govern the collective negotiation process.

Currently the chicken meat industry in Victoria is regulated by the *Broiler Chicken Industry Act 1978* (BCI Act) and *Broiler Chicken Industry Regulations 1992*, under which the Victorian Broiler Industry Negotiation Committee (VBINC), amongst other roles, determines standard growing fees applicable across the industry.

A November 1999 National Competition Policy (NCP) review of the existing chicken meat industry legislation in Victoria considered that the conduct of processors and growers pursuant to the relevant legislative arrangements may be in breach of the TPA. In reviewing the existing legislation the review concluded that retention of the legislation was not established to be of net benefit to the community (in accordance with the principles of legislative review under National Competition Policy), and recommended its repeal.

The Victorian Government is still considering its response to the NCP Review. However, the Government has expressed its preference for an ACCC authorisation to allow collective negotiation at an enterprise level. The Minister for Agriculture has stated that the development of an Authorisation that will provide for the on-going

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<sup>1</sup> The application was originally lodged under the name "Victorian Chicken Meat Council (Processors)". The application was later amended to be in the name of Marven Poultry for itself and on behalf of the five other processors and current and future contract growers to those processors.

stability of the industry is a key plank of the Victorian Government's response to the NCP Review.

The current application is lodged in anticipation of industry deregulation. The proposed arrangements represent a compromise between the current arrangements and full industry deregulation. Under the proposed arrangements participating groups of contracted growers would be able to collectively negotiate with individual processors if growers so choose. Growers who choose not to negotiate collectively are able to opt out of the collective process and negotiate individually. The application does not seek authorisation for any form of industry wide negotiation (as currently occurs within the auspices of VBINC).

The Commission considers that while the proposed collective negotiating arrangements may reduce the scope for competition over rates of payment and other terms and conditions between growers, the nature of the arrangements and industry structure significantly limit the extent of any anti-competitive detriment. The Commission also finds that public benefits would flow from the proposed arrangements. In particular, the Commission concludes the arrangements are likely to lead to transaction cost savings, relative to a fully deregulated environment. The competitive pressures to which processors are subject are likely to ensure that at least some of these reductions in costs are passed on to consumers. The Commission also considers that the proposed arrangements provide public benefit in facilitating the transition to deregulation.

The Commission therefore concludes that the public benefits likely to result from the proposed arrangements would outweigh any anti-competitive detriment that may arise, subject to certain conditions being complied with. Accordingly, the Commission grants authorisation to application A90750 subject to the conditions outlined in section 10 of this determination. Authorisation is granted for 5 years.

Interim authorisation is granted subject to the same conditions as the final determination, until this determination comes into force.

# 1. THE APPLICATION

## *Introduction*

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

## *The Application*

- 1.3 On 21 September 2000, Marven Poultry Pty Ltd, for itself, on behalf of certain other processing companies operating in Victoria, and current and future contract growers, lodged application A90750 with the Commission. The application was made under subsection 88(1) of the TPA<sup>2</sup> for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of Section 45 of the TPA. Authorisation has been requested for a period of 5 years.
- 1.4 The application was originally lodged under the name "Victorian Chicken Meat Council, (Processors)" representing: Marven Poultry Pty Ltd, Inghams Enterprises Pty Ltd, Barter Enterprises Pty Ltd, Eatmore Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd and La Ionica Farming Operations Pty Ltd, on behalf of current and future contract growers of these processors. On 19 October 2000, the Commission received an amendment to the application, so that the application was lodged in the name of Marven Poultry Pty Ltd for itself and on

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<sup>2</sup> The application has also been considered as an application under the Competition Code.

behalf of the five other processors and current and future contract growers of those processors. The Commission received amendments to the application in the form of revisions to a proposed Code of Conduct (part of the arrangements for which authorisation was sought) on 20 November 2000, 4 April 2001, and 12 April 2001.

- 1.5 The application seeks authorisation for the growers of each processor to engage in collective negotiations with their respective processor for the purpose of negotiating standard growing agreements (including the agreement of a common fee), in accordance with a Code of Conduct. Authorisation is also sought to give effect to collective growing agreements negotiated.
- 1.6 Specifically, growers will appoint representatives from among Participating Growers within their Processor Negotiating Group (PNG) to enter into negotiations with their processor in relation to a standard growing agreement or matters arising from it. Authorisation is also sought for a Code of Conduct that outlines the negotiation procedures, minimum contract standards and dispute resolution procedures, under which the proposed collective arrangements are to be conducted.

#### ***Interim Authorisation***

- 1.7 The Applicant requested interim authorisation for the proposed arrangements on the grounds that interim authorisation was urgent and necessary given that the current fee structure was set to expire on 31 December 2000 and that the arrangements under which participants were operating were allegedly in breach of the TPA.
- 1.8 On 1 November 2000, the Applicant requested interim authorisation for the proposed arrangements. The Commission reached pursuant to the TPA that agreements which would change the industry from the current situation. The Commission felt it was appropriate to find a way forward and how they will operate in practice.
- 1.9 The Commission's decision on 1 November 2000, advising of its decision to grant interim authorisation for the proposed arrangements under which of the TPA and current arrangements. The Commission felt it appropriate to revisit the request for interim authorisation in 2000.

#### ***Draft Determination***

- 1.10 On 14 December 2001, the Commission released a draft determination proposing to authorise the proposed arrangements. The Commission considered that while the proposed arrangements may reduce the scope for competition over rates of payment and other terms and conditions between growers, the nature of the arrangements and industry structure were likely to limit the extent of any anti-competitive detriment. The Commission also considered that public benefits would flow from the proposed arrangements. In particular, the

Commission concluded the arrangements were likely to lead to transaction cost savings, relative to a fully deregulated environment. The Commission found that the competitive pressures to which processors are subject were likely to ensure that at least some of these reductions in costs are passed on to consumers. The Commission also considered that the proposed arrangements provided some public benefit in facilitating the transition to deregulation.

- 1.11 The Commission concluded that the public benefits likely to result from the proposed arrangements were sufficient to outweigh any anti-competitive detriment that may arise. Accordingly, the Commission proposed, subject to any request for a pre-decision conference, to grant authorisation in relation to the application for 4 years.
- 1.12 The Commission also decided to grant interim authorisation in respect of the proposed arrangements, effective until the Commission's final determination in this matter takes effect.
- 1.13 On 5 February 2001, the Victorian Farmers Federation (VFF) requested a pre-decision conference in relation to the draft determination. The pre-decision conference was held in Melbourne on 8 March 2001.
- 1.14 Following the pre-decision conference the Applicant submitted certain revisions to the Code of Conduct to the Commission. The revisions did not change the nature of the conduct for which authorisation was sought, but did clarify the intent of the Code (see paragraphs 8.86-8.87).



## 2. BACKGROUND TO INDUSTRY

### *National Chicken Meat Industry<sup>1</sup>*

- 2.1 The Australian chicken meat industry has grown rapidly over the past 30 years with per capita consumption of chicken meat now only exceeded by consumption of beef. It is estimated that by 2001/2002 per capita consumption of chicken meat in Australia will exceed that of beef.<sup>2</sup> Retail sales of poultry in Australia are currently estimated at \$2 billion annually. Virtually all product is produced domestically.
- 2.2 The chicken meat supply chain encompasses integrated enterprises engaged in hatching meat breed chicks, raising poultry for production of meat, batch processing of whole chickens and further value-added processing.
- 2.3 The chicken meat industry is characterised by a high degree of vertical integration, with company ownership of breeding farms, multiplication farms, hatcheries, feed mills, some growing farms and processing plants.
- 2.4 Around 80% of growing services are out-sourced to contract farms. This is due to the significant capital costs of establishing growing farms. However, processors maintain control over production to ensure cost minimisation and product consistency, such as the control on technical inputs, chicks, feed and technical advice.
- 2.5 The national market is relatively concentrated with the two largest integrated companies, Bartter Enterprises Pty Ltd and Inghams Enterprises Pty Ltd, supplying about 75% of the day-old broiler chickens, and processing approximately 70% of broiler chickens marketed in Australia. High quarantine standards restrict the level of imports from overseas.
- 2.6 Approximately 75% of chicken meat sold in Australia is through retail outlets, such as supermarkets, delicatessens, butchers and specialty shops. The remainder is sold through the food service industry: fast food outlets (KFC, Red Rooster, McDonalds), the hospitality industry and restaurants. A feature of the retail level of the market is the significant buying power exercised by the retail and fast food chains in the purchase of chickens.

### *Victorian Chicken Meat Industry*

- 2.7 The Victorian industry accounts for approximately 27% of the total production of chicken meat in Australia, with annual production valued at approximately \$300 million. However, chicken meat production is not particularly significant

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<sup>1</sup> Unless otherwise stated, much of the information in this section is sourced from the KPMG, *National Competition Policy Review of the Broiler Chicken Industry Act 1978*, Final Report November 1999 and National Farmers' Federation, 'Australian Agriculture', Sixth Edition 1997/98.

<sup>2</sup> ABARE, *Australian Commodities: Forecasts and Issues*, March Quarter 1999.

in the total Victorian economy, contributing about 0.2% of the Gross State Product and about 4% of total agricultural production. Approximately 10% of Victorian production is supplied interstate and 2% exported overseas.

- 2.8 The Victorian market is primarily supplied by six processing companies (the Applicants to this authorisation). As is the case nationally, the Victorian market is relatively concentrated. The top four processors have a combined market share of approximately 80%, and the top two processors comprise approximately 49% of the market. There is a small, but negligible, degree of importing of frozen and fresh chickens from New Zealand.
- 2.9 The Applicant has provided the following market share information.

**Market shares of suppliers of chicken in Victoria and contract farms in Victoria**

Company	Market Share (%)	Contract farms
Inghams Enterprises	29	54
Eatmore Poultry	20	62
Barter Enterprises	18	33
Marven Poultry	13	32
Hazeldene Chicken Farm	11	11
La Ionica	9	16
<b>Total</b>	<b>100</b>	<b>208</b>

- 2.10 As in other states, chicken meat in Victoria is predominantly sold through retail stores and to the food service industry.

***Chicken Growing Services Industry***

- 2.11 Demand for chicken growing services is derived directly from demand for chicken meat.
- 2.12 The chicken growing service industry plays an integral role in the chicken meat supply chain. Growing services are generally outsourced, with processors supplying broiler chickens in the form of day old hatchlings. Growers then raise the chickens from hatchlings to the broiler stage (over a period of seven to eight weeks) in shed buildings designed, in most cases, to house in excess of 60,000 broiler chickens.
- 2.13 Growers are typically located close to processors (generally within one hour's drive) in order to minimise transport costs, for both hatchlings and feed, and to maintain the quality of broiled chickens delivered back to the processor.
- 2.14 Throughout Australia approximately 850 growers produce about 80% of chickens under contract to processing companies. The balance is produced by a small number of large company-owned farms. The contract system of chicken

growing has been an intrinsic part of the chicken meat industry for 25 years. The characteristics of this system are:

- **Processor control of inputs and rearing specifications** – the processors control the genetic material for breeding chickens. They supply contract growers with day old chicks to be reared according to detailed specifications. The processor also provides other important inputs to the growing process including all feed and medications.
  - **Rearing of chickens under contract** – processors and growers enter into contracts, either on a batch to batch basis or on contractual terms of three years. Under these contracts, growers are independent contractors, not employees of the processor. The contract growers never own the chicks they rear.
  - **Rearing fee is a small component of product costs** – the cost of contract rearing contributes approximately 10.7% of the wholesale costs and 8.5% of the retail price.
  - **Significant equity contributions by growers** – growers contribute approximately 40% of the capital investment in the industry through ownership of farms, shedding and other facilities used in the growing of chickens.
  - **Capital investment** – the contract growing of chickens is extremely capital intensive. The average contract farm in Australia consists of three to four growing sheds, each with a floor area of 1200 square metres. The replacement cost of such sheds, with all internal equipment, is approximately \$230 per square metre. Chicken growing sheds are highly specialised and have virtually no alternative use. In addition, they are non-portable. Thus, a reasonable degree of stability and predictability in growing arrangements is required to ensure future investment.
  - **Contract terms** – Growers are restricted to working for a single processor at any point in time. They may be engaged on a batch by batch basis, or on contracts, with durations of between one and five years.
- 2.15 Victoria has approximately 200 contract grower farms; accounting for about 92 per cent of broiler chickens grown in the state, the remainder being grown on processor company owned farms.
- 2.16 Geographical market boundaries for growing services have generally been defined along state lines. While it is arguable that the necessity for growing services to locate in close proximity to processing plants, has lead to the development of smaller regional markets, most sellers in Victoria (the exception being those in the Bendigo region) are located in close proximity to a number of buyers (at least four in most cases), providing growers with some degree of choice of processors with whom to contract. The following table, taken from the

NCP Review, illustrates the distribution of buyers and sellers of growing services in Victoria:

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

<b>Region</b>	<b>Main Locations</b>	<b>No. of sellers</b>	<b>No. of buyers</b>	<b>Buyers</b>
Mornington Peninsula	Somerville Pearcedale Tyabb Hastings	90	5	Inghams, Eatmore, Marven, La Ionica
Cranbourne/South Gippsland	Cranbourne Five Ways Nar Nar Goon	50	4	Eatmore, Inghams, Marven, La Ionica
East Dandenongs	Cockatoo Emerald	5	3	Marven, Eatmore, La Ionica
Werribee/Bellarine Peninsula	Werribee Lara Moolap Lethbridge	35	2	Steggles, Eatmore
Bendigo	Marong Strathfield	10	1	Hazeldene

2.17 At present, the BCI Act regulates the chicken meat industry in Victoria. However, the NCP Review of the BCI Act has recommended its repeal. A proposal for the repeal of the BCI Act and deregulation of the industry is currently before the Victorian Government (see section 3).

### 3. BACKGROUND TO APPLICATION

#### *Existing Legislative Arrangements*

- 3.1 The chicken meat industry in Victoria is regulated by the BCI Act and the *Broiler Chicken Industry Regulations 1992*, as administered by the Victorian Department of Natural Resources and Energy (DNRE).
- 3.2 Under the Victorian legislation, a regulatory industry body, the Victorian Broiler Industry Negotiation Committee (VBINC), operates incorporating both grower and processor interests. VBINC consists of an independent Chairman, four Grower representatives, four processor representatives, and two independent members with commercial expertise.
- 3.3 VBINC is empowered to carry out the following functions:
  - determine the standard growing fee for broiler chickens across the industry;
  - recommend terms and conditions of contracts;
  - determine disputes between processors and growers, or recommend to the Minister to appoint an independent arbitrator on disputes; and
  - report to the Minister on issues affecting the industry.
- 3.4 In determining the standard growing fee, grower representatives confer to formulate a common position, as do the processor representatives. The independent members then determine the standard growing fee within the parameters set by the collective positions of the two representative groups.

#### *NCP Review of Victorian Legislation*

- 3.5 In November 1999, KPMG Consulting (KPMG), commissioned by the DNRE, completed a National Competition Policy Review of the Victorian legislation. The report recommended that the legislation be repealed.
- 3.6 The report suggested that the legislative arrangements, and the conduct of the growers and processors pursuant to the legislative arrangements, may be in breach of the anti-competitive provisions of the TPA. The concern specifically related to the conduct of growers and processors, who compete with one another, in meeting and determining a common position on price and on supply. It was concluded that such conduct may be in breach of sections 45 and 45A of the TPA (which essentially prohibit anti-competitive agreements).
- 3.7 The NCP Review found that the current arrangements may constitute a *prima facie* breach of the TPA, as the Victorian chicken legislation does not attract Crown immunity and is not specifically authorised in accordance with section

51(1) of the TPA. In particular, the review identified the following conduct as possibly in breach of the TPA;

- growers acting collectively to agree on a fee to be charged for their services;
- processors acting collectively to agree on fees to be paid for grower services;
- growers acting collectively to boycott the supply of services to one or more processors; and
- processors reaching an agreement to divide up the market for the purchase of growing services.

3.8 The NCP Review analysed whether the benefits to the community from any restriction in competition introduced by the legislation outweighed the costs to the public. Further, it examined whether such restrictions were necessary to achieve the legislative objectives. The report made the following conclusions in relation to the BCI Act:

- **Does not address market failure** - The review found that there was no substantial market failure that required legislation to redress. While there may be information asymmetry in the market, such as the resources available to individual growers in obtaining market information compared to an independent processor, these were not deemed as sufficiently profound to constitute market failure or a serious misallocation of resources.
- **Creates unnecessary restrictions on competition** – Two components of the legislation were identified as restrictive to competition: the prescribed industry contract and the determination of standard growing fees by VBINC. It was contended that the restriction on processors' ability to offer favourable terms and conditions (different to the prescribed growing contract terms and conditions) imposed by the legislation severely restricted competition between processors in attracting efficient growers, as well as, competition between growers to 'put themselves on the market'.
- **Imposes costs on the community likely to exceed benefits** – the review suggested that the efficiency loss to growers from lower economies of scale and lower levels of technological development were likely to outweigh the benefits arising from reductions in transaction costs and contract stability.
- **Changes power relations and income distribution** – the review found that while there were differences in bargaining strengths between processors and growers, the differences were not sufficiently profound to warrant the legislation to specifically favour growers.

### ***Current Situation***

- 3.9 The Commission agrees with the view in the report of the NCP review of the BCI Act that certain arrangements carried out pursuant to the Victorian legislation (eg collective negotiation of fees) may be at risk of breaching the TPA. Accordingly, the Commission is of the view that there is a need for some changes to occur to the existing arrangements in order to remedy this situation. The Commission has indicated to the Applicant that while it is in the process of considering this application, it does not propose to take action in respect of the current arrangements that may be in breach of the TPA to the extent that those arrangements are carried out in accordance with the BCI Act.
- 3.10 While the NCP Review was released in November 1999 the Victorian Government is still considering its response to the findings of the Review. The Minister for Agriculture has communicated to grower and processor bodies the Victorian Government's preference for the repeal of the existing legislation with an ACCC authorisation in place. The Minister has further stated in discussions with the industry his preference that the existing legislation not be repealed until there is an ACCC authorisation in place which provides adequate safeguards for growers to negotiate collectively.
- 3.11 Although the Victorian Government has not, as yet, formally responded to the NCP Review it has taken action to facilitate the transition from a current regulated environment to a deregulated environment with this authorisation in place.
- 3.12 In recognition of the Victorian Government's position that VBINC will not continue to operate as the industry's regulatory body (including setting the standard growing fee for existing contracts) on an ongoing basis once an authorisation is in place, VBINC passed a number of resolutions on 14 June 2001. These resolutions provide for contracts negotiated under the existing VBINC arrangements to continue for the duration of the contract unless a mutually agreed alternative is negotiated.
- 3.13 A further resolution was passed proposing that any contractual dispute in relation to existing contracts referred to VBINC, be resolved using the dispute resolution process contained within the Code of Conduct for which authorisation is sought.
- 3.14 VBINC also passed resolutions to address concerns regarding growers whose individual VBINC contracts expire prior to 30 June 2002, before new collectively negotiated contracts under the proposed arrangements are likely to be in place (see paragraphs 9.179 – 9.182)

### ***Related Authorisations***

- 3.15 The Commission has previously granted authorisation for similar arrangements regarding the collective negotiation of chicken growers contracts for Inghams Enterprises Pty Ltd (Inghams) in South Australia (A90595) and Tasmania

(A90659) and Steggles Limited (Steggles)<sup>3</sup> in South Australia (A30183). It should be noted however, that in contrast to the application under consideration, these applications sought authorisation for specific growing agreements rather than for the terms and conditions under which negotiation of such agreements would take place.

- 3.16 The applications by Inghams and Steggles in respect of their South Australian operations arose following the decision by the South Australian Government to deregulate the poultry meat industry. In these applications, the parties argued that authorisation of the collective negotiations would, among other things, provide a smooth transition from a regulated to a deregulated environment.
- 3.17 In assessing these applications the Commission identified the following public benefits of the proposed arrangements:
- Facilitation of a smooth transition from a regulated to a deregulated market, with as little disruption as possible and with minimal adjustment costs.
  - Reduction in negotiating costs for both growers and processors compared with one-on-one negotiations. The Commission considered that there would be significant savings in time and labour, and that competitive pressures applied by large retailers would result in some of these cost savings, however small, being passed on to consumers in the form of lower retail prices.
  - The Commission considered that the buying power of large retailers (eg supermarkets and fast food chains) would ensure that any market power generated for growers as a consequence of the arrangements would not be exploited.
- 3.18 The Commission also identified the following possible anti-competitive detriment of the proposed arrangements:
- Imposition of a potential barrier to new entry to the processing and growing markets, due to both the high level of vertical integration of the chicken meat industry and the tying effect of long-term growing contracts, of up to 5 year durations. The Commission considered however, that termination arrangements in growing agreements, allowing for individual growers to opt out of the collective arrangements, would limit the effect of contracts restricting new entry.
  - Limitations on the ability of growers to switch from one processor to another given contract durations.
  - Higher grower fees, compared to contracts negotiated individually, thereby placing upward pressure on retail chicken prices. The Commission noted

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<sup>3</sup> Steggles was recently acquired by Bartter Enterprises Pty Ltd



however that this effect was expected to be limited, particularly given that the grower fee represents a small percentage on total cost of the end product.

- Increased potential for collusive anti-competitive behaviour. However the Commission considered this to be mitigated by the more general movement from a regulated to a deregulated environment.

3.19 In assessing these applications the Commission concluded the public benefits in assisting a smooth transition to deregulation in the South Australian chicken meat industry were considerable. Furthermore, the Commission concluded there to be significant public benefit in providing chicken growers with greater equity in contract negotiations and in the possibility of lower retail chicken prices resulting from reduced production costs.

3.20 Based on this assessment the Commission concluded that the benefits of such arrangements outweighed any anti-competitive detriment. Consequently the proposed arrangements were authorised.

3.21 Although the Tasmanian chicken industry was not subject to regulation, Inghams lodged an application for authorisation in relation to similar arrangements involving its growers in Tasmania.

## **4. STATUTORY TEST**

- 4.1 Application A90750 was made under sub-section 88(1) of the TPA in respect of arrangements which may substantially lessen competition. The TPA provides that the Commission shall only grant authorisation if the applicant satisfies the relevant test in sub-section 90(6) of the TPA.
- 4.2 Relevantly, sub-section 90(6) provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that:
- the provisions of the proposed arrangements would result, or be 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 result, or be likely to result, from the proposed arrangements.
- 4.3 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements, the public benefits arising from the arrangements, and then weigh the two to determine which is the greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.
- 4.4 The Commission has released this final determination outlining its analysis and views on the application for authorisation according to the statutory assessment criteria set out in this section. A person dissatisfied with this determination may apply to the Australian Competition Tribunal for its review.

## **5. THE APPLICATION**

- 5.1 In contrast to previous authorisations in this industry the Applicant on this occasion is not seeking authorisation for a specific growing agreement between a processor and growers. Rather, authorisation is sought for arrangements which would enable groups of growers to collectively negotiate and give effect to growing agreements with individual processors, in accordance with minimum terms and conditions set out in a Code of Conduct. A copy of the Code is attached.
- 5.2 In particular, authorisation is sought to permit the contract growers of each processor to collectively negotiate and give effect to a standard growing agreement or agreements and matters arising therefrom with their respective processors, including the agreement of a common fee or fees.
- 5.3 Authorisation is also sought to enable growers to appoint representatives from among their collective groups to enter into negotiations with their processor on the standard growing agreement or agreements and matters arising therefrom.
- 5.4 In addition to authorisation to negotiate and give effect to collective growing agreements, authorisation is sought for an industry Code of Conduct that would govern the negotiation of individual contracts between a processor and collective groups of growers.
- 5.5 The application was made by Marven Poultry Pty Ltd, for itself and on behalf of five other chicken meat processing companies operating in Victoria, Inghams Enterprises Pty Ltd, Bartter Enterprises Pty Ltd, Eatmore Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd, and La Ionica Farming Operations Pty Ltd, and current and future contract growers to those processors.

### ***The Code of Conduct***

- 5.6 The negotiations, minimum contract standards and dispute resolution procedures for collective growing agreements will be conducted under a proposed Code of Conduct. While the Code consists of guidelines and contains minimum standards which will form part of the collectively agreed growing contracts, the details of individual agreements as agreed by the parties will be set out in each growing contract negotiated.
- 5.7 Growers who elect to negotiate collectively with their processor will be known as Participating Growers. The Participating Growers will appoint from among themselves, representatives who, with processor representatives, will form a Processor Negotiation Group (PNG) to negotiate a collective agreement between Participating Growers and the processor.
- 5.8 The Code sets out the procedures for the establishment, operation, conduct of negotiations and dispute settlements process between a processor and its contracted growers. These guidelines are a minimum and each PNG may decide on more detail as necessary.

5.9 The guidelines cover:

- formation, functions, composition, appointment of representatives and meetings of the PNG;
- how matters agreed, or not agreed, by the PNG are to be dealt with including matters related to individual growers;
- dispute/mediation mechanisms;
- rights of Non-Participating Growers; and
- standards to be included in collective contracts.

*Details of the Code of Conduct*

5.10 All growers contracted to each processor will decide (by way of a secret ballot) whether they wish to negotiate collectively with the processor through the establishment of a PNG. More than one PNG may be formed from within a group of growers and all contracted growers are eligible to be a participant grower in the PNG. If a PNG is not formed, all negotiation will be on a one on one basis.

5.11 Each PNG may agree on its own functions, but they are to include;

- Negotiation of terms and conditions of the growing contract to be utilised by Participating Growers, including the operation of pooling and other joint incentive arrangements to be used for Participating Growers.
- Negotiation of payments to be made to growers and the procedures for the regular review of such payments.
- Negotiation of changes to operational procedures desired by either the Participating Growers or the processor and where appropriate negotiation of financial consideration for such changes.
- Mediation for the resolution of disputes between all Participating Growers or any individual Participating Growers and the processor.
- Reporting to the Participating Growers (or individuals where appropriate) the outcomes of negotiations or resolutions considered by the PNG, for the decision of the Participating Growers.
- Making of determinations or taking action on any other matters that the PNG agrees.

5.12 At formation, or at any time that the collective agreement with a PNG is due for negotiation, a grower may elect to opt out and become a Non-Participating Grower. Growers may withdraw from the PNG at other times with the

agreement of the processor. Non-Participating Growers may, at the end of the relevant contract period, elect to join the collective agreement by notifying the PNG.

- 5.13 PNGs will vary in size depending on the number of growers, with grower representative numbers to be determined between the Participating Growers and processor. Processor representation will be determined by the processor, with processor representative numbers not to exceed the number of grower representatives.
- 5.14 Participating growers may engage advisers to assist them in preparation and ongoing negotiation matters. However, a common adviser is not to be used across the industry.
- 5.15 Non-Participating Growers will negotiate directly with the processor on all matters, engaging such advisers as appropriate.
- 5.16 The Code emphasises that all negotiations are to be conducted in good faith by both parties.
- 5.17 Meetings will be held as required, with matters to be agreed only if the processor representatives and the majority of grower representatives agree.
- 5.18 Costs incurred in carrying out any of the functions of the PNG are to be met equally by all Participating Growers and the processor, unless otherwise agreed.
- 5.19 Agreed resolutions of the PNG relating to all growers will be notified to all Participating Growers prior to a meeting of Participating Growers to consider the resolution. The PNG resolution shall be put to all growers in attendance (by secret ballot if requested by the processor or a majority of PNG grower representatives). Resolutions become binding on all Participating Growers if carried by the majority at the meeting. Resolutions not approved by a majority will, by the decision of a majority vote of growers present, be referred back to the PNG for further consideration or determined in accordance with the dispute resolution/mediation procedures set out in the growing contract (see paragraphs 5.23 - 5.28).
- 5.20 The Code's dispute resolution/mediation procedures are only to be used in relation to contracts between growers and processors once signed, and not for negotiating or renegotiating contracts in the first instance.
- 5.21 Agreed resolutions of the PNG relating to an individual grower will be notified to the grower, who has fourteen days to notify the PNG as to whether the resolution is accepted, or if the matter is to be resolved, in accordance with the dispute resolution/mediation procedures set out in the growing contract.
- 5.22 Matters relating to all growers not resolved by the PNG will be put to a vote at a meeting of Participating Growers called to consider the matter, with both the processor and grower representatives on the PNG given the opportunity to outline their position on the matter. The resolution will become binding if accepted by the processor and by a majority of Participating Growers.

- 5.23 The details of dispute resolution/mediation procedures are to be set out in each growing contract. The Code emphasises the reaching of agreement through the offices of the PNG and where this is not possible then through mediation. Arbitration is only used as a last resort and then only in matters relating to monies payable, unless agreed by both parties.
- 5.24 Where agreement on a matter can not be reached, the matter can go for mediation to an agreed external mediator if both parties agree to do so. If, after 28 days (or such time as agreed by the parties), mediation is not successful the matter may go to arbitration, if both parties so wish. For matters in relation to amounts payable the matter is automatically referred to arbitration after 28 days.
- 5.25 The arbitrator is to be a person agreed to by both parties, or if agreement is not forthcoming, appointed by the Institute of Arbitrators and Mediators Australia.
- 5.26 The cost of mediation or arbitration to be borne by each party is to be determined by the mediator or arbitrator.
- 5.27 In addition to the dispute resolution procedures outlined the Code acknowledges that all parties retain the right to full access to redress under the legal system.
- 5.28 NPG's have the same access to dispute resolution procedures as those specified for participating growers.
- 5.29 Under the Code, growing contracts negotiated with a PNG will include:
- the terms of the agreement including the minimum period of the contract, commencement and expiry dates and provisions for negotiation in relation to new contracts;
  - details of inputs to be provided by growers and grower responsibilities;
  - details of inputs to be provided by the processor and processor responsibilities;
  - terms of payment including factors to be taken into account in negotiating fees (performance and throughput criteria, processor requirements for the farm facility, investment in land, shedding and equipment, and grower costs), details of adjustments to payments to be made, agreed periods over which the payments will apply and provision for the review of payments at regular intervals;
  - guidelines for measuring the efficiency of growers and any adjustments based on those measures. Factors to be considered include efficiency measures such as feed conversion ratios, mortality and growth rates, production costs per batch and standards of quality (ie live bird quality, facilities, bio-security, environmental, occupational health and safety and quality assurance);

- provisions for the apportioning between parities of any relevant government compensation monies received by the processor;
- dispute resolution/mediation procedures;
- force majeure provisions;
- rights of assignment; and
- termination of contract/default conditions.

## 6. APPLICANT'S SUPPORTING SUBMISSION

### *Breach of the Trade Practices Act*

- 6.1 The Applicant contended that under the current legislative regime, growers and processors may be engaging in arrangements that are in breach of the anti-competitive provisions of the TPA. Specifically, the Applicant is concerned that the conduct of VBINC members, who may be deemed under the TPA to be in competition with each other, in meeting to determine a common position on price or conditions of supply may be in breach of section 45 (contracts, arrangements or understandings that restrict competition) and section 45A (contracts, arrangements or understandings in relation to prices) of the TPA.
- 6.2 The Applicant claimed this view is pursuant to the findings of the NCP Review and legal advice subsequently sought by them. Accordingly, the Applicant argued that changes to the arrangements under which the industry operates are necessary and that growers and processors cannot continue to participate in the current legislative arrangements for fear of prosecution under the TPA. The Applicant stated that, in the event that authorisation for the proposed arrangements is not granted, they intend to conduct individual negotiations with their growers.

### *Public Benefits*

- 6.3 The Applicant claimed the proposed arrangements provide public benefits both in comparison to the existing legislative arrangements and compared to a fully deregulated market.
- 6.4 Relative to the existing arrangements, the Applicant contended that the proposed arrangements would allow both parties to negotiate on significant industry issues that are inadequately addressed or not addressed at all, under the current legislation or in VBINC negotiations. It is contended that improvements will occur in relation to the following issues:
- **Occupational health and safety (OH&S)** – The Applicant argued that the current industry OH&S standards are not flexible enough to address the specific needs for each processor (and grower). The proposal would allow OH&S issues to be discussed and addressed in the same manner as currently occurs in processors factories and therefore ensure a higher level of workplace safety.
  - **Bio-security standards** – The Applicant stated that minimum standards of practices, as determined by the existing arrangements, are insufficient in ensuring diseases are fully contained. This may, they argue, affect product and export quality.
  - **Innovation and technology** – The Applicant argued greater incentives (which they claim will be built into negotiated agreements) would encourage innovation and lead to improvements in technological development of farms



and equipment, thereby increasing industry efficiency. The Applicant suggested the establishment of a system of productivity and quality bonuses in consultation with their growers.

- **Flexibility of production** – The Applicant contended that the proposed arrangements will increase flexibility for processors to match supply and demand of chickens. The Applicant argued processors would have an increased ability to match the needs of growers (such as batch rates, contract periods, densities) to the needs of buyers (such as differing bird weights, chicken types, numbers). This will lead to increased consumer satisfaction and product development. For instance, one processor claimed that the current arrangements discourage the growing of Poussin chickens, as they are generally smaller in weight. The standard fee is paid per bird and makes no allowance for differences in bird size/weight. Similarly, free-range chickens, with a slower growing cycle reduce growers' batch rate and effectively are more costly to grow, which is not reflected in the fees payable.
- **Other issues** – The Applicant argued that the proposed arrangements would also ensure compliance with the TPA (see paragraph 6.2), improve planning and environmental management, and increase the interstate competitiveness of the industry.

6.5 In comparison to a fully deregulated market, the Applicant contended that the proposed arrangements would generate the following public benefits:

- **Countervailing power for growers** – The Applicant claimed that the establishment of PNGs would improve the bargaining position of growers countering any power imbalance with processors;
- **Reduced transactional costs** – The Applicant argued that transaction cost savings would result from a reduction in the costs needed to negotiate contracts on a collective basis. The Applicant contended that the costs involved in negotiation, particularly in terms of time and labour, are significant, citing by example a recent processor - grower negotiation in South Australia which took up to 60 hours to complete.
- **Dispute resolution** – The Applicant argued that provision of an internal mechanism for resolving industry disputes through negotiation through the PNG in the first instance and by arbitration and mediation through an independent body in the event that arbitration is unsuccessful, will minimise industrial action on the part of growers and processors and promote industry harmony.

### *Effect on Competition*

6.6 The Applicant stated that the proposed arrangements may have detrimental effects on competition between growers. In comparison to individual negotiations, the proposed processor-by-processor negotiation arrangements

may lead to higher fee outcomes and less flexible contracts. The Applicant claimed, however, that in comparison to the current industry-wide arrangements, the proposal may have competitive benefits.

- 6.7 The Applicant argued that the proposed dispute resolution procedures will have a positive effect on competition, relative to existing arrangements. Under existing arrangements competing processors are permitted to sit in on commercial disputes between other processors and their growers. The Applicant argued that the proposed arrangements would ensure confidentiality of commercial matters by removing this right.

## **7. SUBMISSIONS BY INTERESTED PARTIES & APPLICANT'S RESPONSE**

7.1 The Commission sought submissions from a wide range of interested parties in relation to this application, including growers, processors, industry bodies, government and the retail sector. The following is a list of the interested parties who provided submissions:

- Marven Poultry Pty Ltd
- Inghams Enterprises Pty Ltd
- Bartter Enterprises Pty Ltd
- Eatmore Poultry Pty Ltd
- Hazeldene's Chicken Farms Pty Ltd
- Victorian Farmer's Federation (VFF) – Chicken Meat Group;
- Bartter Enterprises Grower Group;
- Eatmore Poultry Growers Group;
- Hazeldene Growers Group Bendigo;
- Victorian Farmer's Federation – Inghams Branch;
- Victorian Farmer's Federation – La Ionica Branch; and
- various chicken growers.

### ***Submissions from Processors***

7.2 The Applicant's supporting submission was submitted by Marven Poultry upon agreement with the other five processors. The Commission received additional submissions from processors with specific information in support of the application. Inghams Enterprises provided summaries of terms and conditions of a proposed growing contract and of the Code of Conduct in place in South Australia. Bartter Enterprises provided an account of their experience in the deregulated market of South Australia. Hazeldene's Chicken Farms provided information in relation to product development and cost structures as outlined in its submission to the NCP Review. Marven Poultry and Eatmore Poultry also provided further information in support of the application.

### ***Submission from Victorian Farmers' Federation (VFF)***

7.3 The VFF raised the following concerns regarding the proposed arrangements:

- 7.4 Legal Validity of the Application. The VFF argued that the application by Marven Poultry is not in compliance with section 88 of the TPA. The VFF questioned the legal validity of the application on the grounds that the Applicant and processors on whose behalf the application was made are not parties to the proposed arrangements. Instead, the VFF argued, the processors have lodged an application seeking authorisation for the contracted growers to collectively negotiate a standard growing agreement and to appoint representatives to enter into negotiations.
- 7.5 No Grower Input. The VFF 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 VFF stated that the processors have never raised the issue for discussion in the VBINC or Victorian Chicken Meat Council meetings.
- 7.6 No Market Failure. The VFF challenged the processors' claims of imminent market failure stemming from conflict between the Victorian legislation and the TPA. The VFF contended that the existing legislative arrangements and growing contracts formed under them can prevail in the short term given the ability of the Victorian Government to amend the legislation to exempt the current arrangements from for the provisions of the TPA.
- 7.7 Power Imbalance. The VFF contended that the bargaining power of growers is inherently weak given both the vertically integrated nature of the industry and the limited ability for growers to switch processors. The VFF claimed that the proposal does not address the power imbalance between growers and processors. In particular, the VFF argued the processor-specific structure of the PNGs will significantly reduce the market information available to growers, such as information on market demand for chickens. Other possible factors identified by the VFF as reducing growers' bargaining power included: the reluctance of growers to nominate PNG representatives, the allowance of more than one PNG per processor and the veto power of processors in relation to whether disputes are referred to arbitration or mediation. Accordingly, the VFF argued that an independent body should conduct any collective negotiations between the parties.
- 7.8 Vagueness of the Code of Conduct. The VFF expressed concerns that the proposed Code lacks detail on important elements of growing arrangements and contracts, including: growing contracts, density, facilities, pools, disaster events, pricing models and productivity adjustments. In particular, the VFF identified three vital issues lacking from the Code: pricing formulae for growers fees, contract duration and a disputes resolution system similar to that used by VBINC.
- 7.9 The VFF offered the following comments on the public benefits of the proposed arrangements identified by the Applicant:
- 7.10 The VFF claimed that there would be minimal public benefit from a reduction in growing fees given that growing fees constitute only a small component of the total retail price. It is argued that available savings (approximately 2 to 7 cents

per bird) would not be passed on to consumers. The VFF suggested that technological development and efficiency incentives would provide little increase in productivity relative to the current arrangements as the existing pooling system facilitates productive and technological efficiency.

- 7.11 The VFF disputed that the proposed arrangements would improve industry OH&S standards, arguing current legislative arrangements are satisfactory.
- 7.12 The VFF questioned whether the proposed arrangements will enhance export potential, noting that currently less than 3% of chicken production is exported. Similarly, the VFF questioned the significance of interstate trade, highlighting the substantial cost of transporting birds between South Australia and Victoria, which represents some 12% of the growing fee.
- 7.13 The VFF 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 claimed that these growers have not received a review of grower fees in over 2 years and are concerned that their bargaining power has been significantly reduced.
- 7.14 In the event that the existing legislation is repealed, the VFF has stated a preference for individual negotiations with the processors rather than via the proposed arrangements.

#### ***Applicant's Response to VFF submission***

- 7.15 The Applicant stated that interested parties were given the opportunity to contribute to the processors' submission of the proposal to the Minister for Agriculture, *A Partnership Forward*, but that the growers declined to participate. The Applicant reiterated the NCP Review findings that the current arrangements are in breach of the TPA and that the proposed conduct offers an alternate arrangement for those growers who choose to participate.
- 7.16 The Applicant stated that the formation of the PNGs redresses the power imbalance between growers and processors operating in a deregulated market. The Applicant stated that many of the features of the PNG are left to the discretion of the growers, including the number of growers in a PNG and the number of PNGs per processor.
- 7.17 The Applicant claimed that independent mediation and arbitration of any dispute requires the participation in good faith of both parties to be effective. Hence the requirement in the proposed Code for the expressed consent of both parties for mediation or arbitration to take place. The Applicant noted that the normal rights of parties to resolve disputes, such as litigation, are not extinguished by the proposed arrangements.
- 7.18 The Applicant noted that specific terms of growing contracts would be a matter of negotiation between growers and processors of each PNG. The Applicant claimed that this provides flexibility in the negotiation processes that is necessary to accommodate the differing needs of each PNG.

### ***Submission from Barter Enterprises Grower Group (BEGG)***

- 7.19 The BEGG opposed the application, expressing concern that the proposed structure of the PNGs will allow processors to dominate negotiations. In particular, the BEGG expressed concerns that arbitration for non-payment matters is only available under the Code if the processor agrees.
- 7.20 The BEGG also expressed concerns that the proposed Code lacks detail. The BEGG argued that the Code should stipulate minimum terms and conditions for growing contracts. The BEGG argued the stipulation of minimum durations for contracts would provide certainty to growers for their long-term capital investment decisions. Moreover, specific information and minimum standards of fees, fee review processes, batch rates and densities would provide growers with assurances of their long-term income.

### ***Submissions from Other Chicken Grower Groups***

- 7.21 VFF La Ionica Branch, VFF Inghams Branch, Eatmore Poultry Growers Group and Hazeldene Growers Group expressed their concern that they were not aware of the application prior to its lodgement and had not been consulted in the development process. Accordingly, the VFF La Ionica Branch, VFF Inghams Branch and Eatmore Poultry Growers Group did not support the application and Hazeldene Growers Group did not consider themselves in a position to comment on the merits of the application.
- 7.22 VFF Inghams Branch added that the proposed arrangements were unnecessary given the existing legislation. Additionally it argued that in the event of industry deregulation growers would develop their own set of arrangements and seek authorisation if necessary.

### ***Submissions from Contracted Chicken Growers***

- 7.23 The Commission received confidential submissions from 12 Victorian contracted chicken growers in conditional support of the application. These growers expressed support for processor-specific collective negotiations on condition that such negotiation provided the following: an ongoing contract with reasonable terms and conditions agreeable to both parties; no reduction in the per bird growing fee; a mechanism for fee reviews in the future; and adequate safeguards.

## **8. ISSUES ARISING OUT OF THE DRAFT DETERMINATION**

- 8.1 Before determining an application for authorisation the Commission is required to prepare a draft determination stating whether or not the Commission proposes to grant authorisation to the application and summarising its reasons. The Commission released a draft determination proposing to grant authorisation to application for authorisation A90750 on 14 December 2000. Copies of the draft determination were distributed to the applicant, all parties who made submissions and other interested parties.<sup>3</sup>

### *The Pre-Decision Conference*

- 8.2 Under section 90A of the TPA, a person may request the Commission to hold a pre-decision conference in relation to a draft determination. The Commission received a request to hold a conference from the VFF, on 5 February 2001.
- 8.3 A pre-decision conference was held in the Commission's Melbourne office on 8 March 2001. The conference was chaired by ACCC Commissioner, Dr David Cousins. The pre-decision conference afforded interested parties the opportunity to meet with the Commission to discuss the operation and effect of the application for authorisation. The conference was attended by approximately 50 people, representing growers, processors, and industry bodies. A copy of the record of the conference is available from the Commission's public register. Issues raised at the conference, both in discussions and in written submissions provided at the conference are summarised below.

### *The market for chicken meat growing services*

- 8.4 The VFF argued that the application is based on an incomplete understanding of the market for chicken meat growing services. The VFF stated that two companies, Bartter Enterprises and Inghams Enterprises dominate the Australian chicken meat industry supplying 75 per cent of day old chicks and approximately 70 per cent of broiler chickens marketed in Australia. The VFF contended that the smaller processing companies are dependent on the two national integrators for day old chicks, feed and technical backup.
- 8.5 The VFF argued that this situation is exacerbated by technical limitations on grower mobility such as:
- Contract terms and conditions (3 year duration but requiring 6 months notice of termination to prevent it rolling over for another 3 years).
  - Farm location. The VFF argued that because of farm locations Bendigo growers can only contract with Hazeldene, Geelong/Southwest growers

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<sup>3</sup> Copies of the Commission's draft determination are available from the Commission's website at [www.accc.gov.au](http://www.accc.gov.au).

with Barter, Werribee growers with Eatmore and Barter, East Dandenong growers with Marven and La Ionica, and Mornington Peninsula growers with Inghams, Marven, Eatmore and La Ionica.

- Types of shedding. The VFF argued that differences in shed ventilation requirements between processors limited growers' ability to move between them.
  - Age of sheds. The VFF argued that Inghams does not want older, smaller farms and is considering terminating the contracts of 15 growers.
- 8.6 The VFF argued that when a grower's contract expires the number of processors potentially available is limited for the above reasons. Additionally, any other processor which is potentially available is bound under contract to its growers, which will normally be supplying its shedding needs. The VFF, John Scott (Poultry farmer, Bendigo Group) and Anthony Acciarito (President, Barter Grower group) contended that as growers are usually located within one hour of the processor with which they deal and are generally employed as independent contractors, more often than not the only processor the grower has the option of dealing with is the processor to which it has been contracted. Further, in most cases, when a grower does in fact move from processor A to processor B the move is initiated by processor A. In the Bendigo region, where Mr J Scott's farm is located, he stated that only one processor was available and consequently growers had no choice of processor to deal with.
- 8.7 The VFF argued that this situation is inconsistent with the sort of competitive market place assumed by the Commission to result from deregulation of the industry, where processors compete for the services of growers and growers place themselves on the market.
- 8.8 The VFF and Gary Robertson (Poultry Farmer) contended that the BCI Act was originally designed, in the absence of a natural competitive market, to protect growers from exploitation of their weaker bargaining power. The VFF argued that the application does not address the causes of growers' weaker bargaining position and consequently is not supported by the majority of growers.
- 8.9 Colin Peel (Poultry Farmer, Bartter Group) stated that as a current Bartter grower he had 3 options in negotiating with processors, La Ionica, Eatmore and Barter. Peter Scott (Farming Manager, Eatmore Poultry) stated that Eatmore had had growers approach them wanting to move between processors. Mr P Scott noted that Eatmore had previously taken on Marven growers and was currently in negotiation with Barter growers. Mr P Scott argued that there was little restriction on growers' ability to move between processors.
- 8.10 Mr Acciarito argued that there was no evidence of other processors willing to take on growers in his area.
- 8.11 The VFF argued that the authorisation process was not one of evaluating the best solution for the broiler chicken industry, nor is it one of comparison between a regulated industry and a partly regulated or even fully deregulated system. It is a process, they argued, which assumes a starting point that full



deregulation is necessarily good and that if a proposal can be identified as accomplishing the process of transition, this becomes a public benefit of the proposal, and thus an argument in its favour.

- 8.12 The VFF stated that the Commission's position that, in the absence of authorisation, negotiation between processors and growers will be on a one on one basis has no regard for the existing legislation which remains in place. The VFF argued that it is not appropriate in assessing the public benefits and detriments of the application to adopt one of the polarised positions in the overall debate and then identify as a public benefit of the application that it may be conducive to this position.

*Relative bargaining power in negotiations*

- 8.13 Mr Robertson argued that there is a significant imbalance in bargaining power between individual growers compared to vertically integrated processors and that individual growers lack the requisite experience to engage in effective negotiation.
- 8.14 The VFF argued that the proposed authorisation allows collective negotiation on terms that are advantageous to processors and detrimental to the position of growers. The VFF stated that in comparison to both the present regulated system and a fully deregulated system, growers' ability to obtain fair and reasonable contract terms is undermined by the proposed arrangements.
- 8.15 The VFF argued the proposed arrangements would fragment and isolate growers into processor groups under a processor dominated structure. The VFF stated that growers who wish to collectively negotiate would be subject to what the processor dictates over the structure and processes of Processor Negotiating Groups (PNGs). For example, the processor must be present and allowed to address meetings when a matter is referred to the grower group for decision. The VFF and Mr J Scott noted that growers are bound by any decision arising from the group, but the processor is only bound if it agrees to accept that decision.
- 8.16 The VFF argued that, under the proposed arrangements, access of growers to market and industry information is restricted, which is anti-competitive. The VFF stated that processing companies are already seeking to bind growers by confidentiality clauses.
- 8.17 Further, the VFF contended the proposal provides only an expensive arbitration system and heavily restricts the grower's rights to this system.
- 8.18 The VFF argued that the dominance of processors which would result from the proposal and the provision of only vague guidelines in relation to contract terms, allow the processor to:
- create unfair pools and grower ranking systems;
  - marginalise individual growers by manipulating batch rates and density rates;