



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Victorian Potato Growers Council on behalf of its members

in respect of

collective bargaining with potato buyers

Date: 23 May 2007

Authorisation no.: A91048

Public Register no.: C2007/881

Commissioners: Samuel
Sylvan
King
Martin
McNeill
Willett

Summary

The ACCC proposes to grant authorisation to the Victorian Potato Growers Council to represent its current and future members in collective negotiations with potato buyers for five years.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

The VPGC applied for authorisation to:

- allow an agreement between current and future members of the VPGC to collectively negotiate the terms and conditions of contracts between VPGC members (potato growers) and potato buyers, including Snackbrands Australia (Arnott's Snackfoods), McCain Foods (Aust) Pty Ltd (McCain Foods), Smiths Snackfoods and Elders Limited as well as other unidentified potato buyers in the future, with or without the assistance of the VPGC
- allow the VPGC to seek mediation by the Produce & Grocery Industry Ombudsman for disputes arising between members of the VPGC and potato buyers in the event that a collectively negotiated agreement cannot be reached.

Assessment of public benefit and detriment

In its assessment, the ACCC treated the VPGC's proposal to seek mediation by the Produce & Grocery Industry Ombudsman in the event that a collectively negotiated contract cannot be reached as a component part of the collective bargaining arrangement envisaged by the VPGC.

While the proposed collective bargaining arrangement has the potential to result in some anti-competitive detriment, a number of features of the arrangement mitigate against this including:

- the current level of competition between growers is unlikely to be significantly affected
- the arrangements are voluntary for all parties and may be accessed by future VPGC members and potato buyers
- the arrangements do not include collective boycott activity.

The ACCC is satisfied that proposed collective bargaining arrangements will provide potato growers with a greater opportunity to provide input into terms and conditions with associated efficiency gains.

Overall, the ACCC considers that in all the circumstances, the likely public benefit generated by the proposal will outweigh the likely public detriment.

Draft determination

The ACCC proposes to grant authorisation for a period of five years to the VPGC to collectively negotiate on behalf of its current and future members the terms and conditions of contracts between VPGC members and Snackbrands Australia (Arnott's Snackfoods), McCain Foods, Smiths Snackfoods, Elders Limited and unidentified buyers of potatoes in the future.

This proposed authorisation extends to but does not mandate the dispute resolution process put forward by the VPGC which the ACCC considers is a component part of the collective bargaining arrangement.

The ACCC notes that transactions between potato growers and wholesale traders are subject to the requirements of the Horticulture Code, including requirements concerning mediation.

Interim authorisation

The ACCC also grants interim authorisation for the McCain Growers Group to commence collective negotiations with McCain Foods for the 2008 supply year. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

In making this decision, the ACCC was influenced by the voluntary nature of the arrangements, the absence of collective boycotts and the support of McCain Foods. The ACCC also considered that negotiations for the 2008 supply year would be unlikely to alter the market in the long term.

The next steps

The ACCC will now seek further submissions from the applicant/s and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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1. Introduction

Authorisation

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2. The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4. The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5. After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6. This document is a draft determination concerning application for authorisation A91048 lodged by the Victorian Potato Growers Council.
- 1.7. Once this draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.8. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

2. The application for authorisation

The applicant

- 2.1. The Victorian Potato Growers Council (VPGC) is a long established organisation that was formed to represent the interests of Victorian potato growing businesses. It is a commodity group that ‘stands alone’ within the Victorian Farmers Federation. The VPGC currently has 371 members. Members pay a yearly fee of \$330 and can choose to cancel their membership at any time.
- 2.2. The VPGC is comprised of the following constituent groups:
 - The McCain Growers Group
 - Seed Potatoes Victoria
 - Gippsland Certified Seed Grower Association
 - Ballarat Certified Seed Grower Association
 - Otways Certified Seed Grower Association
 - Portland Certified Seed Grower Association
 - Kinglake Certified Seed Grower Association
 - The Potato Crisping Research Group
 - The VFF Gippsland Potato Grower Group.
- 2.3. Each of these groups acts autonomously and convenes its own meetings, appoints its own office bearers and operates with the administrative support of an executive officer.

The application

- 2.4. On 23 April 2007 the VPGC lodged application for authorisation A91048 with the ACCC.
- 2.5. The VPGC has applied for authorisation to allow an agreement between current and future members of the VPGC to collectively negotiate the terms and conditions of contracts between VPGC members (potato growers) and potato buyers, with or without the assistance of the VPGC. The VPGC has applied for authorisation for collective negotiations to take place with four specific potato buyers (Snackbrands Australia (Arnott’s Snackfoods), McCain Foods, Smiths Snackfoods and Elders Limited) as well as other unidentified potato buyers in the future.
- 2.6. The VPGC has also applied for authorisation to allow it to seek mediation by the Produce & Grocery Industry Ombudsman for disputes arising between members of the VPGC and potato buyers in the event that a collectively negotiated agreement cannot be reached.
- 2.7. The proposed negotiation process is as follows:
 - A grower or grower group will contact a buyer (or vice versa) and indicate a desire to negotiate.
 - The negotiating sub-committee of the grower group will meet with the buyer’s representatives. A review of the past year’s supply will be made and discussion will

be had on features of the coming season that may affect price. An offer on price will be made.

- If the negotiating committee considers that the offer is reasonable and consistent with grower expectations, it will recommend acceptance of the offer to relevant growers via a meeting or newsletter.
- The buyer will then contact growers individually to secure acceptance and settle contractual details.
- If the negotiating committee considers that it cannot recommend the offer to growers, it will call a meeting of growers. A representative of the relevant buyer may attend the meeting. The purpose of the meeting is to advise growers of the offer and provide growers with as much information as possible. Growers will be asked to advise the negotiating committee as to the direction to be taken. The negotiation committee will convey the growers' position to the buyer.
- If an agreement can be reached, the negotiating committee will recommend acceptance of the offer to growers.
- If an agreement cannot be reached in the first instance, the negotiating committee may call another grower meeting to enable further discussion.
- If an agreement cannot be reached at all, the negotiating committee can recommend that individual growers consider their own position, having regard to the nature of the offer. The negotiating committee may suggest that growers negotiate individually with the buyer. Alternatively, mediation by the Produce & Grocery Industry Ombudsman may be sought by the negotiating committee.

2.8. The VPGC seeks authorisation for five years.

Interim authorisation

2.9. In addition to its substantive application, the VPGC also sought interim authorisation to allow its constituent grower body, the McCain Growers Group, to commence collective negotiations with McCain Foods for the 2007 supply year while the ACCC considers and evaluates the merits of its substantive application.

2.10. On 8 May 2007 the VPGC amended its request for interim authorisation so that interim authorisation is now sought for the McCain Growers Group to commence collective negotiations with McCain Foods for the 2008 supply year.

2.11. On 23 May 2007 the ACCC granted the VPGC's application for interim authorisation. In making this decision, the ACCC was influenced by the voluntary nature of the arrangements, the absence of collective boycotts and the support of McCain Foods. The ACCC also considered that negotiations for the 2008 supply year would be unlikely to alter the market in the long term.

The potato industry in Victoria

- 2.12. Potatoes are the largest vegetable crop in Australia, accounting for approximately 20% of total production. In 2005, 1.31 million tonnes of potatoes were produced with a gross value of \$480 million. 56% of these potatoes were sold as processing potatoes, 36% were sold as fresh (or ware) potatoes and 8% were sold as seed potatoes.¹
- 2.13. Processing potatoes are purchased by processing companies who transform the potatoes into a variety of food products. There are two main types of processing for potatoes – frozen or crisping. McCain Foods and Simplot Australia account for the majority of frozen processing of potatoes in Australia. Arnott's Snackfoods and Smiths Snackfoods account for the majority of crisping processing of potatoes in Australia.
- 2.14. It is estimated that there are over 400 potato growers in Victoria who produce approximately 130 000 tonnes of ware potatoes, 90 000 tonnes of processing potatoes, 70 000 tonnes of crisping potatoes and 54 000 tonnes of seed potatoes each year. Growers of ware potatoes are restricted in their ability to supply potatoes interstate by quarantine regulations.
- 2.15. Some of the potato varieties grown in Victoria are subject to Plant Breeder's Rights which are exclusive commercial rights to a registered variety.² A range of parties may control registered varieties including growers, processors, wholesalers of fresh produce (known as packers) and agribusinesses.
- 2.16. Production of seed potatoes involves complex forecasting and associated risk management, with the initial propagating material ordered many months, and potentially years, before the final seed potatoes are suitable for sale.
- 2.17. Growers of seed potatoes supply their product to both commercial growers and processors. When a processor acquires seed potatoes, it contracts with commercial growers to use the seed potatoes to produce a crop for the processor. While growers are expected to supply that particular crop to the processor exclusively, they are generally able to grow other potato crops for other purposes (including for other processors).
- 2.18. Packers may also contract with growers to produce crops of ware potatoes although generally contracts for ware potatoes are not made before the crop is planted. The VPGC submits that in Victoria, packers purchase approximately 85% of all ware potatoes and supply them to, for example, supermarkets, greengrocers and restaurants.
- 2.19. Growers of processing and crisping potatoes are located near processing factories. McCain Foods has a processing plant in Ballarat. Arnott's Snackfoods has processing plants in Melbourne and Shepparton.
- 2.20. Under the VPGC's proposed collective bargaining arrangement, negotiations concerning seed, processing and crisping potatoes will take place prior to the crops being planted

¹ *Australian Processing Potato Industry Strategic Plan 2006 – 2011* prepared on behalf on Horticulture Australia Limited and the Australian Processing Potato Industry by Strategic Business Development, 20 November 2006.

² Plant Breeder's Rights extend for 20 years from the date of being granted. Under Plant Breeder's Rights, the owner of the registered variety has exclusive rights to produce, reproduce, ready for propagation, sell, import and export propagating material of the registered variety.

while negotiations concerning ware potatoes will generally take place after the crop has been harvested.

Horticulture Code

- 2.21. On 14 May 2007 the mandatory Horticulture Code came into effect. The Horticulture Code aims to provide clarity and transparency in trade between growers and wholesaler traders of horticulture produce by clarifying the responsibilities of each. It applies to all horticulture produce agreements entered into on or after the 15 December 2006. The Horticulture Code does not apply to traders who are processors, exporters or retailers.
- 2.22. Under the Horticulture Code, the parties to a dispute concerning a horticulture produce agreement may refer the dispute to the Horticulture Mediation Adviser. When a dispute is referred in this manner, it is mandatory for the parties to the dispute to attend the mediation and try to resolve the dispute.

Chronology

2.23. The table below sets out the significant dates in the consideration of this application.

DATE	ACTION
23 April 2007	Application for authorisation lodged with the ACCC, including a request for interim authorisation.
8 May 2007	Request for interim authorisation amended.
9 May 2007	Closing date for submissions from interested parties in relation to the request for interim authorisation. Further opportunity was provided to McCain Foods to comment on the amended request for interim authorisation.
16 May 2007	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
23 May 2007	Draft determination issued and the ACCC granted interim authorisation to allow the McCain Growers Group to collectively negotiate with McCain Foods for the 2008 supply season.

3. Submissions received by the ACCC

- 3.1. The VPGC provided a supporting submission with its application for authorisation and subsequently provided further information regarding its application and the potato industry in Victoria.
- 3.2. The ACCC also sought submissions from twenty interested parties potentially affected by the application, including processors, industry associations, a government department and potato growers.
- 3.3. The ACCC received three submissions in support of the VPGC's request for interim authorisation from the:
 - Victorian Farmers Federation Horticulture Group
 - McCain Growers Group
 - McCain Foods.
- 3.4. The ACCC received six submissions in support of the VPGC's substantive application for authorisation from the:
 - Victorian Farmers Federation Horticulture Group
 - McCain Growers Group
 - McCain Foods (excluding the dispute resolution process)
 - Portland Potato Growers Association Inc
 - Seed Potatoes Victoria
 - Ballarat Certified Seed Grower Association.
- 3.5. The ACCC received one submission not in support of the VPGC's substantive application for authorisation from Elders Limited (Elders). Elders considers that:
 - if authorisation was granted, individual growers would face considerable pressure to join a collective bargaining group, rather than deal with buyers as an individual
 - the proposed collective bargaining arrangement will reduce the opportunity and flexibility of purchasers of seed potatoes to minimise their risk
 - dispute resolution processes are available to VPGC members without the need for authorisation
 - the proposed collective bargaining arrangement is described in broad terms and will not generate the public benefits identified by the VPGC.
- 3.6. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

4. The net public benefit test

- 4.1. The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91048

- 4.2. The VPGC lodged application for authorisation A91048 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 4.3. In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 4.4. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.³
- 4.5. However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁴
- 4.6. Consequently, given the similarity of wording between section 90(6) and (90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

³ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

⁴ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

Definition of public benefit and public detriment

- 4.7. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵

- 4.8. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

Future with-and-without test

- 4.9. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁷ Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation and conditions

- 4.10. The ACCC can grant authorisation for a limited period of time.⁸
- 4.11. The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.⁹

Future and other parties

- 4.12. Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to persons who become party to the contract, arrangement or understanding at some time in the future and persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁰

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁷ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

⁸ Section 91(1).

⁹ Section 91(3).

¹⁰ Section 88.

5. ACCC evaluation

- 5.1. The ACCC's evaluation of the proposed collective bargaining arrangements is in accordance with the net public benefit test outlined in Chapter 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed collective bargaining arrangements.
- 5.2. In its assessment, the ACCC will treat the VPGC's proposal to seek mediation by the Produce & Grocery Industry Ombudsman in the event that a collectively negotiated contract cannot be reached as a component part of the collective bargaining arrangement envisaged by the VPGC. The ACCC does not consider the mediation process put forward by the VPGC to be mandatory and it would be a matter for the parties as to whether they choose to enter into or complete any such mediation.
- 5.3. The ACCC notes that transactions between potato growers and wholesale traders are subject to the requirements of the Horticulture Code, including requirements concerning mediation.

The market

- 5.4. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.5. In considering this application, the ACCC has identified the following areas of competition:
 - the supply of seed potatoes
 - the supply of potatoes to processors
 - the supply of potatoes to retailers and food service industries.
- 5.6. With respect to the supply of seed potatoes, the ACCC notes that there is some capacity for growers to alter the composition and volume of crops grown from one season to another and to grow seed potatoes for more than one customer.
- 5.7. With respect to the supply of potatoes to Victorian processors, the ACCC notes that:
 - there is some capacity for growers to alter the composition and volume of crops grown from one season to another, including switching between processing and other types of potatoes, and to grow potatoes for more than one processor
 - Victorian processors may acquire potatoes from outside Victoria
 - while potato growing requires significant preparation and investment with little scope to make significant changes to planting schedules and crops within a season, growers may produce other crops (such as other vegetable crops) and there is some flexibility in the composition of their total production over time
 - the growing fee paid to the grower is a relatively small percentage of the end retail price of the product.

5.8. With respect to the supply of potatoes to retailers and the food service industry, the ACCC notes:

- potatoes are supplied to retailers and the food services industry as fresh vegetables and in processed forms
- the large supermarket chains are significant purchasers of both ware potatoes and processed potatoes with considerable buying power in their dealings with packers and processors
- quarantine regulations apply to ware potatoes grown in Victoria
- processed potato products from Victoria are sold throughout Australia
- imported processed potato products provide some constraint on locally processed products.

The counterfactual

5.9. As noted in Chapter 4 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.

5.10. In the absence of authorisation, it appears unlikely that growers would collectively negotiate contracts with buyers and the ACCC would expect that a potato grower would negotiate on an individual basis with a potato buyer. The ACCC notes that in reality, the extent to which a contract between a potato grower and a buyer is negotiated may be limited and it may well be that a grower will be offered a standard form contract.

5.11. On this basis, the counterfactual with respect to the proposed collective bargaining arrangement appears to be the situation in which each grower individually agrees to the terms and conditions of their contract with a buyer.

Public detriment

Submissions

5.12. The VPGC believes the proposed collective bargaining arrangement will generate little anti-competitive detriment because the growing fee paid to the grower represents around 14% of the retail price of potatoes. The VPGC submits that any increase to the fee paid to growers will have a minimal effect on the retail price of potatoes. The McCain Growers Group supports this view.

5.13. Elders has raised concerns that the proposed collective bargaining arrangements will result in pressure on individual growers to join a group and reduced flexibility for growers.

ACCC view

5.14. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.

- 5.15. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 5.16. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties on the matters that they seek to negotiate is low
 - participation in the collective bargaining arrangements is voluntary
 - there are restrictions on the coverage and composition of the bargaining group
 - there is no boycott activity.

Current level of negotiations between individual members of the VPGC and the counterparties

5.17. The VPGC has submitted that:

- almost all growers of processing and crisping potatoes are offered standard contracts by their buyers
- growers of seed potatoes are offered standard contracts by their larger buyers and a standard terms of trade document is also used. Growers of seed potatoes generally enter into verbal contracts with smaller buyers.
- the situation with respect to growers of fresh potatoes is not known although the VPGC would expect that contracts are entered into with large buyers.

5.18. On the basis of this information, the extent to which contracts between potato growers and large buyers such as McCain Foods are currently negotiated appears to be low. In general, growers seem to be offered standard form contracts by buyers and the capacity for individual growers to vary the terms of a contract is limited.

5.19. Given the current level of negotiation between individual members of the VPGC and larger potato buyers is generally low, the difference in the level of competition amongst growers with or without the proposed collective bargaining arrangements is likely to be small.

5.20. The situation between growers and other buyers not identified in the VPGC's application is less clear. It is possible that at the present time there is greater negotiation with smaller buyers.

Voluntary participation in the collective bargaining arrangements

5.21. The ACCC notes that participation in the proposed collective bargaining arrangement is voluntary. VPGC members may opt out of the collective negotiation process at any time, including at any time during a dispute resolution process, and negotiate individually with potato buyers.

- 5.22. Potato buyers may also choose not to participate in collective negotiations with VPGC, or choose to opt out of the collective negotiation process at any time, including at any time during a dispute resolution process.
- 5.23. The ACCC also notes that the application for authorisation is expressed so as to apply to any future VPGC members, providing those members with the opportunity to participate in the collective bargaining arrangements should they choose.
- 5.24. The voluntary nature of the arrangements is relevant to addressing Elders' concerns. In particular, there is no requirement for growers to join the collective or for buyers to agree to participate in collective negotiations.

Size/composition of bargaining groups

- 5.25. The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and to the competition provided by those suppliers outside the group.
- 5.26. Under the VPGC's proposal, negotiations will be conducted by sub-committees of the VPGC's various subgroups. Members of VPGC's sub-groups share a common business activity which is generally related to the type of potatoes they grow. For example, members of the Ballarat Certified Seed Grower Association grow and supply seed potatoes while members of the McCain Growers Group grow processing potatoes and supply them to McCain Foods.
- 5.27. The VPGC submits that there is some overlap in membership between the sub-groups which represent growers of seed, fresh and processing potatoes given that it is not uncommon for a grower to produce the three different types of potatoes. In contrast, growers who produce crisping potatoes generally do not belong to other sub-groups. Given the various sub-groups for growers of seed potatoes, there is more scope for growers of seed potatoes to belong to more than one sub-group.
- 5.28. While the size of the bargaining groups under the VPGC's proposal is restricted, the extent to which competition is provided by suppliers outside the various sub-groups may be limited. While the various sub-groups focussed on seed potatoes may have the potential to constrain each other, the ability of a seed potato sub-group to constrain the commercial behaviour of a processing potato sub-group may be limited. Similarly, it is unlikely that a sub-group made of up growers of processing potatoes would significantly constrain the commercial behaviour of a sub-group which produces fresh potatoes.

Boycott activity

- 5.29. In its recent decision of the VFF Chicken Meat Growers' Boycott Authorisation the Tribunal has stated in part:

The seriousness of the potential consequences of authorising the use of collective boycotts is beyond doubt: they can result in substantial commercial damage not only to the direct target(s) of them but also to the other upstream and downstream businesses and their employees. Consumers might suffer disruption to market supplies and possibly at least temporary price increases.¹¹

¹¹ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at para 381

5.30. The ACCC notes that the VPGC has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

Public benefit

Submissions

5.31. The VPGC submits that the proposed collective bargaining arrangement will result in the following public benefits:

- improved bargaining power for VPGC members
- transaction cost savings
- enhanced support and industry stability for VPGC members.

5.32. An assessment of the public benefits claimed by the VPGC follows.

ACCC view

Improved bargaining power for VPGC members

5.33. The VPGC submits that its members, as individuals, are in a weak bargaining position relative to the larger potato buyers and that growers do not have the skills required to deal with well resourced buyers. The VPGC submits that the proposed collective bargaining arrangement will improve the bargaining position of its members. The VFF supports this view.

5.34. McCain Foods submits that it is not always the case that individual potato growers are in a weak bargaining position. It considers that growers are able to switch their production to different crops if they do not consider potatoes to be a viable crop. McCain Foods also submits that when negotiations between itself and growers are protracted, the situation favours growers given that McCain Foods cannot risk not being able to meet its customers' orders.

5.35. The ACCC considers that collective bargaining arrangements can result in benefits to the public by facilitating improvements in the level of input a party has in their contractual negotiations. This improved input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example by addressing common contractual problems in a more streamlined and effective manner.

5.36. This improved input is a feature of increasing the bargaining power of the collective (by allowing them to aggregate their influence in the negotiation); of improving the individual's access to information and resources; and of providing a mechanism through which productive contractual discussions between the collective and the counterparty can be achieved.

5.37. In the context of the VPGC's application for authorisation, it would appear that the relative positions of individual potato growers and larger potato buyers such as McCain Foods limits the capacity of growers to have effective input into contract terms and conditions.

5.38. The ACCC considers that the proposed collective bargaining arrangement would provide greater opportunity for growers, through their representative committees, to provide input into contract terms and conditions. To the extent that this leads to efficiency gains, it gives rise to some public benefit.

Transaction cost savings

5.39. The VPGC argues that a collective bargaining arrangement provides an organised and cost effective method of settling contract prices and conditions for potato crops grown in Victoria. The VFF agrees with this position. McCain Foods submits that the proposed collective bargaining will result in small transaction cost savings.

5.40. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.

5.41. The information available to the ACCC suggests that potato growers are generally offered standard form contracts with little scope to vary terms and conditions. However, there may still exist costs associated with entering into such contract in the form of professional advice or obtaining the information necessary to make an informed choice. A collective may be able to consolidate and share such costs.

5.42. The ACCC considers that if transaction cost savings did arise from the proposed collective bargaining arrangements, they would be small.

Enhanced support and industry stability for VPGC members

5.43. The VPGC submits that the collective bargaining arrangement will provide support and industry stability for potato growers which will enable growers to keep up to date with technological and industry developments. The VFF and McCain Growers Group support this view.

5.44. The ACCC understands that the VPGC considers that industry stability will result from the contract certainty that collective negotiations will provide. Contract certainty will also encourage ongoing investment and commitment by growers in new technologies and other industry developments.

5.45. The ACCC considers that contract certainty is possible irrespective of whether contracts are individually or collectively negotiated. Additionally, contract certainty is likely to be enhanced by longer term contracts. No information has been provided to suggest that the contracts negotiated under the VPGC's proposed collective bargaining process will be for longer periods than those contracts currently in place.

5.46. As noted above, the ACCC does accept that the proposed collective bargaining arrangement will provide greater opportunity for growers to provide input into contract terms and conditions. This outcome in itself may provide growers with greater confidence with respect to industry stability and development.

Balance of public benefit and detriment

5.47. The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining arrangement is likely to result in a public benefit that will outweigh any public detriment. In the context of applying the net public benefit test at section 90(8)¹² of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹³

5.48. The ACCC considers that while the proposed collective bargaining arrangement has the potential to result in some anti-competitive detriment, a number of features of the arrangement mitigate against this including:

- the current level of competition between growers is unlikely to be significantly affected
- the arrangements are voluntary for all parties and may be accessed by future VPGC members and potato buyers
- the arrangements do not include collective boycott activity.

5.49. The ACCC is satisfied that the proposed collective bargaining arrangements will provide potato growers with a greater opportunity to provide input into terms and conditions with associated efficiency gains.

Unidentified future buyers of potatoes

5.50. The VPGC has applied for authorisation to allow it to collectively negotiate with unidentified buyers of potatoes. In many circumstances, the ACCC would consider the identity of all parties to a potentially anti-competitive arrangement to be necessary to assess the potential impact of the arrangement. As noted in the discussion above, some of the mitigating features of the proposed collective bargaining arrangements as well as their potential public benefit are less clear in the context of unidentified future buyers of potatoes.

5.51. However, the ACCC notes that the collective bargaining arrangements are voluntary for all parties, including future buyers of potatoes.

Length of authorisation

5.52. The VPGC seeks authorisation for five years. The ACCC proposes to grant authorisation to the proposed collective bargaining arrangement for a period of five years.

¹² The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹³ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

6. Draft determination

The application

- 6.1. On 23 April 2007 the Victorian Potato Growers Council (VPGC) lodged application for authorisation A91048 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. Application A91048 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to:
 - allow an agreement between current and future members of the VPGC to collectively negotiate the terms and conditions of contracts between VPGC members (potato growers) and potato buyers, including Snackbrands Australia (Arnott's Snackfoods), McCain Foods (Aust) Pty Ltd (McCain Foods), Smiths Snackfoods and Elders Limited as well as other unidentified potato buyers in the future, with or without the assistance of the VPGC
 - allow the VPGC to seek mediation by the Produce & Grocery Industry Ombudsman for disputes arising between members of the VPGC and potato buyers in the event that a collectively negotiated agreement cannot be reached.

The net public benefit test

- 6.3. For the reasons outlined in Chapter 5 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

Conduct for which the ACCC proposes to grant authorisation

- 6.4. The ACCC proposes to grant authorisation for a period of five years to the VPGC to collectively negotiate on behalf of its current and future members the terms and conditions of contracts between VPGC members and Snackbrands Australia (Arnott's Snackfoods), McCain Foods, Smiths Snackfoods, Elders Limited and unidentified buyers of potatoes in the future.
- 6.5. This proposed authorisation extends to but does not mandate the mediation process put forward by the VPGC which the ACCC considers is a component part of the collective bargaining arrangement.
- 6.6. The ACCC notes that transactions between potato growers and wholesale traders are subject to the requirements of the Horticulture Code, including requirements concerning mediation.
- 6.7. This draft determination is made on 23 May 2007.

Conduct not authorised

- 6.8. This proposed authorisation does not extend to any collective decision by current or future VPGC members to not deal with any potato buyer.

Interim authorisation

- 6.9. The VPGC requested interim authorisation for the McCain Growers Group to commence collective negotiations with McCain Foods for the 2008 supply year. The ACCC granted interim authorisation on 23 May 2007.
- 6.10. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 6.11. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.