

Commonwealth of Australia
Trade Practices Act 1974 — subsection 88 (1)
AGREEMENTS AFFECTING COMPETITION:
APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- o to make a contact 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 that
- o to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of Applicant:
(Refer to direction 2)

A91057

The South East Potato Growers Association, on behalf of its growers and its own behalf.

(b) Short description of business carried on by applicant:
(Refer to direction 3)

The South East Potato Growers Association is the peak potato grower representative organisation in South Australia.

(c) Address in Australia for service of documents on the applicant:

2. Contract, arrangement or understanding

(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

Arrangement between present and future members of the South East Potato Growers Association to collectively negotiate the terms and conditions of contract growing for buyers, with or without the assistance of the South East Potato Growers Association

(b) Description of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition:
(Refer to direction 4)

Please refer to the support submission

(c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

Please refer to the support submission

(d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

Please refer to the support submission

3. Parties to the proposed arrangement

(a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Please see Appendix A of support submission

(b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

Please see Appendix A of support submission

4. Public benefit claims

(a) Arguments in support of authorisation:

(Refer to direction 6)

Please refer to the support submission

(b) Facts and evidence relied upon in support of these claims:

Please refer to the support submission

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

Please refer to the support submission

6. Public detriments

(a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please refer to the support submission

(b) Facts and evidence relevant to these detriments:

Please refer to the support submission

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

(a) Is this application to be so expressed?

Yes.

(b) If so, the following information is to be furnished:

(i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)

Future members of the South East Potato Growers Association and future buyers of South Australian potatoes.

(ii) Where the parties to the similar term contract(s) are known— names, addresses and descriptions of business carried on by those other parties:

Please refer to the support submission

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(iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Please refer to the support submission

8. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

No

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable

9. Further information

(a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Laura Bowles
PO Box 571
Warragul Victoria 3820

Dated 2/7/07

Signed by/on behalf of the applicant

Laura Bowles
.....
(Signature)

Laura Bowles
.....
(Full Name)

N/A
.....
(Position in Organisation)

Submission in Support of Authorization

**By the South East Potato Growers Association
(SEPGA)**

Introduction

This submission is in support of the South East Potato Growers Association (SEPGA) application for authorization for collective bargaining pursuant to section 88(1) of the *Trade Practices Act 1974*.

The purpose of the SEPGA's application for authorization is to allow SEPGA to engage in collective bargaining negotiations on behalf of its members with:

- a. McCain Foods
- b. Safries (owned by McCain Foods)

Where required or authorized by members of SEPGA

Authorization is sought for 5 years.

No members will be required to enter into any agreement with a controlling body negotiated by SEPGA on behalf of its members. Members of SEPGA are, and will remain, entitled to negotiate individual agreement with any controlling body.

The South East Potato Growers Association (SEPGA)

The South East Potato Growers Association (SEPGA) is a processing grower representative body that is authorized under the South Australian Farmers Federation (SAFF). SEPGA is a (regional) sub branch of SAFF. Around 10 years ago SAFF offered branch status to the then independent potato association. SEPGA accepted the terms and conditions offered and became a sub branch of SAFF. The SEPGA was initially formed to represent the interests of South Australian processing potato growing businesses, and to provide a forum for discussions on matters of interest and to provide a vehicle by which potato growers may usefully discuss with Governments and other regulatory authorities any issues that are affecting them. There are currently 17 grower businesses that are members of the South East Potato Growers Association.

The objectives of the South East Potato Growers Association are;

- a. To provide a local forum for processing potato growers to have a voice to local, State and National governments.
- b. To promote an open and competitive international and domestic market
- c. To research and develop more efficient systems of potato farm management for processing growers.

Membership to the SEPGA is by a yearly subscription of \$25 and growers also contribute a 20 cents/tonne levy for Research and Development (R&D) projects that will benefit the processing industry in South Australia, and indeed the rest of Australia.

Target

The aim of the SEPGA in seeking authorization to collective bargain is to be able to allow its sub-groups and members to negotiate with the relevant buyers of their produce as a collective group. McCain Foods (Aust.) and Safries are the two companies which the SEPGA wish to be able to collectively bargain with. Though some of the growers supply other companies, this application is directed at negotiating with McCain Foods (Aust.) and Safries only.

Background

The SEPGA represents the interests of their potato growing members in their collective contract negotiations with potato processors, McCain Foods (Aust) and Safries. McCain Foods is a privately owned company based in Canada. Safries is also owned by McCain Foods. It is acknowledged and well understood within the potato industry that individual growers are generally in a weak bargaining position when dealing with large companies, especially those that compete on a global market

Individual growers can often find themselves confused and unsure of whether the contract they have been offered is fair. Both Safries and McCain Foods are willing to negotiate with growers in groups, however the South East Potato Growers Association will need an authorization before growers can conduct negotiations for the coming season.

Growers can generally choose which company they supply, and some growers grow for both companies, however other growers have no choice but to supply one company exclusively. This restriction is generally due to the location of the grower and what sort of contract tonnage he can grow.

The nature of the potato industry means that growers are required to invest considerable amounts in equipment, machinery, resources, land and water. Once the investment has been made they then become 'locked in' to growing potatoes and are vulnerable to company pressure which can be applied to growers who need contracts with companies to sell their produce. The companies know the pressure the growers are under to sell their produce and can use their situation against them.

Contracts between McCain Foods or Safries and growers are a commonly agreed option for both parties. Contracts ensure that the companies have the potatoes they it will need, and the grower is ensured a confirmed market for their produce. Contracts are essential in the processing market so that factories that rely on potatoes at various times of the year have a confirmed supply when needed. Contracts are generally signed before the potatoes are planted. However this is not always the case.

Members of the SEPGA contract approximately 95,000 tonnes with Safries and approximately 20,000 tonnes with McCain Foods on a yearly basis. There are approximately 400,000 tonnes of potatoes grown in South Australia, by approximately 70 potato businesses. There are 130,000 tonne of potatoes grown in the lower south east of South Australia alone.

Not all growers who grow potatoes in the lower south east of South Australia are members of the SEPGA and nor are they required to be.

Proposed Conduct

The conduct for which authorization is sought is ("proposed arrangements")

- a. the negotiation by the SEPGA member or member body of the SEPGA, of the terms and conditions of an agreement between McCain Foods and/or Safries and a member or member body of the SEPGA.
- b. The participation of the SEPGA in any dispute resolution mechanism in relation to disputes between controlling bodies of potato businesses and members of the SEPGA with regards to the supply of potatoes.

The SEPGA wishes to apply for authorisation on behalf of its potato grower members to:

- Allow an agreement between those members to collectively bargain terms and conditions of growing contracts with the potato buyers, McCain Foods and/or Safries. It is proposed that negotiations will be undertaken by grower representatives within the SEPGA.
- Allow the SEPGA to participate in any dispute resolution process between members of the SEPGA and McCain Foods and/or Safries concerning the contracts collectively negotiated.

Authorization Sought

Authorization is sought for the current and future members of SEPGA to collectively negotiate, through grower representatives, terms and conditions of growing contracts between potato growers and McCain Foods and/or Safries.

The proposed arrangements apply to all potato crops grown under contract for supply to the relevant buyers, McCain Foods and Safries.

Membership of the SEPGA is not compulsory, and growers are able to be members of an individual, or sub group only if they choose.

Parties to the Proposed Arrangements

The parties to the proposed arrangements are present and future members of the SEPGA and:

- McCain Foods
- Safries

Pursuant to sections 88(10) and 88(13) of the Trade Practices Act 1974 (ch), the authorization application applies to any collective bargaining group of SEPGA members, present or future, who wish to engage in the proposed arrangements.

Attached as Appendix A is a list of present members of the SEPGA as at 1st January 2007.

Attached as Appendix B is the contact details of McCain Foods and Safries as of January 1 2007

Interim Authorization

The SEPGA expects that if interim authorization is granted, SEPGA and Safries and the SEPGA and McCain Foods will be able to negotiate an appropriate price for the 2008 supply year.

The South East Potato Growers Association acknowledges that if the ACCC subsequently declines to grant the authorization, any arrangement negotiated with a potato marketing body will need to be negotiated by the individual members and will not be binding for the other members or the commercial body. The parties will be returned to the current status quo. The SEPGA therefore submits that granting and interim authorization does not prevent the parties from returning to the current status quo in the event the ACCC subsequently declines to grant the authorization.

The SEPGA is keen to commence meaningful negotiations with the controlling bodies on behalf of its members and is aware that the authorization process is likely to take some months. Accordingly, the SEPGA seeks interim authorization to immediately commence collective negotiations on behalf of its members with McCain Foods (Aust.) and Safries, with the understanding that there will be a 30 day wait for the ACCC to make a decision on whether interim authorization is granted after the application is lodged.

Details of Negotiation

Negotiation between growers and businesses over contracts has been an integral part of the National potato industry for many years now. Grower groups find that there is certainly strength in numbers and certain companies find that negotiating with groups of growers is often far more agreeable for both parties than holding negotiations with single growers throughout the season.

Though both McCain Foods and Safries contract may be negotiated with the growers by the same person, who represents both companies, the negotiations for each factory supply are done separately and treated like two separate companies with the possibility of separate prices for each factory being negotiated.

Both buyers and growers will generally aim to have contracts settled before the growing season to ensure supply for the buyers and farm planning for the grower. Contracts can be standard form contracts, or yearly negotiated contracts, depending on what the company requires at the time.

Once negotiations have commenced the negotiating sub-committee of the relevant grower group and the buyer representatives would meet and review the past years supply, and make assumptions about the coming season that may affect price. Discussions can be lengthy or quick depending on whether the buyer and the grower can agree on a fair supply price for the season. If the negotiating committee feels what is being offered is reasonable and in line with the knowledge they have of the grower expectations, they can recommend acceptance of this offer to the other growers via a meeting or newsletter. The company will then contact the growers to secure individual acceptance and settle contractual details.

If the committee feels that what is being offered is less than reasonable and/or unable to be recommended to growers, then a grower meeting is called. At this meeting growers will be advised of the conditions surrounding the company position and will be provided with as much

information as is able to be obtained by the grower group. The meeting will be asked to provide a directive to the committee about the grower price and conditions. The negotiation committee representatives will transfer this information to the company, generally at a meeting called for this purpose.

Sometimes representatives from the relevant company will attend a grower meeting to put their position. The representatives will then leave the meeting. The members will consider the information provided and advise the committee about the direction required to be taken. The committee will transfer this request to the company.

Once an agreement has been reached, the committee then recommends acceptance.

If the offer is not able to be accepted because it does not fit the understanding of what is desired, the committee may call another grower meeting, or, if there is a total impasse then the committee can recommend that individual growers consider their own position, having regard to the viability of the offer, etc.

The parties who participate in the negotiation process are grower representatives who are always elected from the commodity meetings. The committee members must be growers of the particular potato industry group being represented and be a levy paying member to the SEPGA for that potato industry group.

Dispute Resolution Process

The SEPGA only represents the members that choose to be a paid part of the SEPGA. Growers are not required to be members of the SEPGA.

The SEPGA has an elected group of growers who negotiate on behalf of the rest of the growers, on terms of price and the other contract conditions (tonnage, etc). The negotiating committee receives instruction from growers at meetings and when negotiating. If the majority at the meeting agrees to a price and conditions, the negotiating committee then instigates a negotiating meeting with the buyer. The negotiating committee keeps the growers informed of the progress until such time as agreement is reached. The negotiating group does not comment on individual grower contracts or tonnage.

There can be times when agreement between a representative negotiating committee and a company cannot be achieved. In this case the negotiating committee is likely to recommend that growers should consider their individual positions and suggest that growers negotiate individually with the company.

The possibility for mediation by the Produce and Grocery Industry Ombudsman is an option for contracts that cannot be agreed upon by the growers and the company, however the preference of the SEPGA is to not to involve a third party mediator.

The dispute resolution process does not reduce the scope for individual growers to negotiate variations on collectively negotiated arrangements or to negotiate with their processor individually outside of the authorised arrangements.

It should be noted that growers can supply various companies at various prices. Whilst the contracts may be similar for each supply, they are not necessarily the same, primarily because each buyer can have different product requirement or specification.

It should be noted that all transactions between growers and wholesale traders are subject to the requirements of the Horticulture Code, including requirements concerning mediation.

Other parties affected

Other parties likely to be affected or who might have an interest in the proposed arrangement, fall into three categories

Consumers

Potato industry organizations

Marketing/Buyers

Resellers (Supermarkets)

Consumers of potato products are best served by competitive and efficient markets. Growers groups will need to be able to compete with larger companies in regards to buying or selling their potatoes in fresh, processing and crisping markets.

Authorization is sought to allow negotiation for a sound foundation for doing business for the whole sector, and is not intended to protect or shield the operations of any particular business or the sector from competition. There is no foreseeable detriment to consumers in authorizing the SEPGA to undertake this bargaining process.

Other potato industry organizations within South Australia are unlikely to be affected by an authorization for the SEPGA to collectively bargain with McCain Foods and Safries, as the SEPGA is the only group of growers within South Australia who contract potatoes with these two companies.

Each member of the SEPGA retains the right to decide not to be part of any shared process conducted by SEPGA, but reach an agreement with companies or businesses independently and separately.

Public Benefits of the proposed arrangements

The test for authorization is:

- Whether the proposed arrangement would result, or be likely to result in a benefit to the public;
- or whether that benefit to benefits would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result from the proposed arrangement.

Growers as individuals are always in a weak bargaining position. Large companies use the might and power of their respective world wide resources and knowledge to achieve their aims. It is clear that some security is given to the growers though the use of the collective bargaining process.

The SEPGA considers the collective bargaining approach to be an organized and cost effective means to cover the issue of arranging contract prices and conditions for processing potato crops grown in South Australia.

Individual growers are seen to be in a weak bargaining position and could not be expected to have the negotiating or business skills required to deal with well resourced, international companies. It would not be practical, or economical, for growers to individually employ negotiators each time they wished to settle a commodity contract. There may be a small cost saving for growers and the companies by collective bargaining, and certainly the efficiency of negotiations will be increased on both sides.

Collective bargaining, though sometimes difficult between the negotiating parties, is intended to provide support and industry stability for grower. This transfers to South Australian growers being able to maintain pace with, and continue to adopt relevant technology. There is always a strong desire for growers to continue to adopt suitable technology for industry achievements and progress.

The practice and open consultation with each of the SEPGA members, by the negotiating committee ensures that a considered grower position is always adopted when the negotiating group meets with companies representatives.

Anti Competitive Detriment

It is unlikely that the activity of growers in collectively bargaining will have any significant effect on consumers.

The SEPGA estimate the grower share of the retail value of the products range from around 14%, depending on the specific potato crop. This means that any increase to the grower prices will only ever be small, relative to the consumer price.

For example, currently the members of SEPGA grow potatoes for McCain Foods and Safries at \$227.25 a tonne. On the retail market, for example, Safries sell boxes of fried (3 bags of 5kg product) for between \$16 and \$21 directly to their buyers (Restaurants and other food industry outlets mainly). This is approximately 3 times what growers are paid for the same product they supply.

In McCain Foods case, the delivered factory price being paid to growers of processing potatoes (McCain Foods) is currently around \$227 per tonne. The same potatoes when sold to consumers by a major restaurant in South Australia will have a value of around \$20000 per tonne. The growers therefore receive only around 1.5% of the retail value of the product.

Coles and Safeway supermarkets regularly offer discounts for frozen potato products. As at June 1st, Coles Supermarkets in South Australia sell 1kg bags of McCain healthy choice frozen chips for \$3.78, 1kg McCain Omega superfries (chunky steak) for \$4.65 and 500 grams of McCain popcorn fries \$3.25. Growers get less than 3.5% percent of these prices at farm gate sales.

It could also be argued that there is no immediate need for any price increase to be passed to consumers. The level of supermarket discounting which occurs almost on a weekly basis would indicate to the SEPGA and to the grower that there is much flexibility in the system.

It is the SEPGA's understanding that the processors are required to fund most, if not all of these discounts. Maybe this is a reflection of the buying power of the supermarkets, who are able to extract seemingly ridiculous discounts from the processors, most likely at the expense of the grower.

If South Australian growers and buyers are not able to achieve a realistic return on their investment then it would be expected that Australian consumers would have to perhaps pay more should product have to be imported, perhaps for a lesser quality product. The small grower share of the retail value of frozen potatoes clearly does not give consumers cause to blame the growers for the price they are asked to pay.

Term of Authorization

Most of the contracts with potato growers are based on seasonal supply. 1 year contract covers one growing season. However a lot of large contracting companies wish to secure their supply for more than one year at a time, and thus 2-5 year contracts have been offered to growers. The longer term contracts have price and conditions fixed for the contract period. The buyers usually reserve the right to adjust the tonnage, if listed on the contract, each year if necessary.

Longer term contract are generally acceptable to both growers and buyers as they provide some stability to the industry.

In order to allow for growers to negotiate longer term contracts where appropriate, and to provide greater certainty regarding the negotiation environment for those growers who negotiate year to year, authorization is sought for an initial period of 5 years.

Appendix A

Current members of the SEPGA and their contact details

BARAKOOLA NOMINEES PTY LTD	ROSS WITTWER	3 Shanks Street	PENOLA	5278
BUCKLEY J & F.L	TERRY BUCKLEY	BOX 215	MT GAMBIER	5290
CORLINGA PARTNERS	MARK PRIDHAM	RMB 738	BORDERTOWN	5268
FERGUSON FARMS	DON FERGUSON	BOX 58	KALANGADOO	5278
GARTNER DAVID P/L	DAVID GARTNER	RMB 67	PENOLA	5277
GLENROY PLAINS P/L	GREG GARTNER	PMB 1	PENOLA	5277
HEYSEN PARTNERS	TIM HEYSEN	BOX 10	KALANGADOO	5278
KUMARA	ANDREW WIDDISON	BOX 14	KALANGADOO	5278
MERRETT K.J & D.M	KEVIN MERRETT	BOX 164	PENOLA	5277
MICHELMORE DH&BA/SONS	STEVE MICHELMORE	RSD 549	LANGHORNE CREEK	5255
PARILLA PREMIUM POTATOES	MARK PYE	BOX 47	PARILLA	5303
ROGERS R.F & M.P	COLLIN ROGERS	BOX 80	KALANGADOO	5278
TERRA NOSTRA PRODUCE	BRUNO GASPARINI	BOX 8123	MT GAMBIER EAST	5291
TIPPETTS SCRUBHILL	JOHN TIPPETT	"WHROO"	KYALITE NSW	2734
TRANTER T.E & P.F	MICHAEL TRANTER	"MORGEN"	KALANGADOO	5278
WIDDISON C.G NOMINEES P/L	TIM / NICK WIDDISON	BOX 63	KALANGADOO	5278
YOUNG G.A & SONS	ROSS/FORREST YOUNG	BOX 90	KALANGADOO	5278

Appendix B

Major buyers of potatoes in South Australia that currently negotiate with growers about price.

McCain Foods

Contact: Tony Ford

Tel: 03 5339 2241

Address: Wendouree Head Office, Ring Rd Wendouree, VIC 3355

Safries

Tony Ford

Tel: 03 5339 2241

Address: Wendouree Head Office, Ring Rd Wendouree, VIC 3355