



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution of authorisation A40093

lodged by

**the Victorian Farmers Federation on behalf of
its member chicken meat grower groups**

in respect of

**collective bargaining by chicken meat grower groups
with their nominated processors in Victoria**

Date: 18 March 2010

Authorisation no.: A91214

Public Register no.: C2010/222

Commissioners:

Samuel
Kell
Schaper
Court
Dimasi
Walker
Willet

Summary

The ACCC proposes to revoke authorisation A40093 and grant authorisation A91214 in substitution for members of the VFF Chicken Meat Group to collectively bargain with the chicken meat processors they supply services to.

The ACCC proposes to grant authorisation for a further period of five years.

On 18 February 2010, the Victorian Farmers Federation (VFF) lodged an application for revocation and substitution on behalf of its Chicken Meat Group members.

The VFF is seeking re-authorisation to allow present and future members of the VFF's Chicken Meat Group to continue to collectively negotiate the terms and conditions of growing contracts with chicken meat processors to whom they supply growing services, namely, Baiada Poultry, Hazeldene Chicken Farm, Inghams Enterprises and Turi Foods.

The arrangements were first authorised by the ACCC in March 2005. That authorisation is due to expire on 24 March 2010.

The ACCC considers that the collective bargaining arrangements are likely to continue to result in public benefits.

The collective bargaining arrangements provide a greater opportunity for growers to have more effective input into contractual terms and conditions. This improved grower input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner.

The arrangements are also likely to generate some transaction cost savings for both growers and processors.

The ACCC considers that the public detriments generated by the collective bargaining arrangements are likely to be minimal having regard to the following:

- the level of negotiations between individual growers and processors is likely be low absent the collective bargaining arrangements
- the arrangements are voluntary for all parties
- growers are restricted to forming bargaining groups only with other growers who grow for the same processor and there is no common representation across bargaining groups
- the arrangements do not include collective boycott activity.

On balance, the ACCC considers that the likely benefits that will result from the arrangements will outweigh any public detriments and the ACCC proposes to grant re-authorisation for five years.

The ACCC has also decided to grant interim authorisation to the arrangements. Interim authorisation will remain in place until the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The ACCC is now seeking further submissions in relation to this draft determination prior to making its final decision. The VFF and/or any interested parties may also request that a conference be held to make oral submissions about the draft determination.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
Baiada	Baiada Poultry Pty Ltd
Hazeldene	Hazeldene Chicken Farm Pty Ltd
Inghams	Inghams Enterprises Pty Ltd
Turi Foods	Turi Foods Pty Ltd (owner of the La Ionica and Golden Farm brands)
NCP	National Competition Policy
Processors	Collectively Baiada, Hazeldene, Inghams and Turi Foods
The Act	<i>Trade Practices Act 1974</i>
The Code	The Victorian Code for Broiler Farms 2009
Tribunal	The Australian Competition Tribunal
VBINC	The Victorian Broiler Industry Negotiating Committee
VFF	The Victorian Farmers Federation

1. The application for authorisation

- 1.1. On 18 February 2010, the Victorian Farmers Federation (VFF), on behalf of its Victorian member chicken meat growers, lodged an application for the revocation of authorisation A40093 and its substitution with authorisation A91214 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). 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. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in [Attachment A](#). A chronology of the significant dates in the ACCC's consideration of this application is contained in [Attachment B](#).
- 1.3. Application A91214 was made under section 91C(1) of the Act. Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.
- 1.4. The VFF has requested that the application be assessed under the streamlined collective bargaining authorisation process. Under this process, the ACCC seeks to respond to requests for interim authorisation and issue a draft determination within 28 days of receiving the application, and issue a final determination within three months of receiving the application.
- 1.5. The VFF is seeking re-authorisation to allow present and future¹ members of the VFF's Chicken Meat Group to continue to collectively negotiate the terms and conditions of growing contracts with chicken meat processors to whom they supply growing services, namely, Baiada Poultry Pty Ltd, Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd and Turi Foods Pty Ltd.
- 1.6. VFF member growers are grouped into negotiating groups based on the processor they grow for. Re-authorisation is sought for each grower group to continue to collectively bargain with the processor they supply.
- 1.7. The arrangements were first authorised by the ACCC on 3 March 2005, subject to a number of conditions. This authorisation is due to expire on 24 March 2010.
- 1.8. The VFF seeks re-authorisation of the arrangements in the same terms as authorised in 2005, for a further five years.

¹ Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

Previous authorisations

- 1.9. On 5 May 2004 the VFF, on behalf of its various chicken grower groups, sought authorisation (A40093) to allow those groups to collectively bargain with the chicken meat processor to whom they supply growing services.
- 1.10. On 15 September 2004 the VFF lodged a further application for authorisation to collectively boycott chicken processors in certain circumstances (A90931).
- 1.11. The ACCC considered the applications together and on 3 March 2005 the ACCC granted authorisation, subject to a number of conditions, permitting collective bargaining with and, in certain circumstances, collective boycotts of chicken meat processors.
- 1.12. The collective bargaining arrangements were authorised subject to three conditions:
 - C1: That the matters described in the document titled *Requirements for Contractual Terms and Conditions* provided with the VFF's application (Annexure C to the application) be open to negotiation between the parties and will not be mandatory.
 - C2: Grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group.
 - C3: Grower groups must not use common representatives or representation.
- 1.13. With respect to condition C1, the *Requirements for Contractual Terms and Conditions* sought to mandate the length of contracts and the inclusion of certain terms and conditions in contracts including conditions in relation to the termination of contracts, the basis for suspension of contracts and a prescribed dispute resolution process. The effect of the condition imposed by the ACCC was that these terms and conditions would be open to negotiation between the parties.
- 1.14. The immunity granted to the collective boycott arrangements was reviewed by the Australian Competition Tribunal (the Tribunal) in 2005 at the request of the chicken meat processors. On 21 April 2006 the Tribunal released its decision denying authorisation to the collective boycott arrangements.
- 1.15. The ACCC's decision to grant authorisation to the VFF's collective bargaining arrangements was not reviewed by the Tribunal and is the subject of this application for re-authorisation.

The current application

- 1.16. Re-authorisation is sought, on the same terms as authorisation A40093, on behalf of each of the Baiada Growers Group, the Hazeldene Growers Group, the Inghams Growers Group and the Turi Foods (formerly La Ionica) Growers Group to:
 - continue giving effect to their existing chicken growing contracts previously entered into (existing contracts)
 - collectively bargain the terms and conditions, including grower fees, of their broiler chicken growing contracts
 - collectively bargain:

- periodic adjustments to growing fees and all matters relating to growing fees and payments under their broiler chicken growing contract (including existing contracts), and
- amendments and variations to the terms and conditions of their broiler chicken growing contracts (including existing contracts)
- collectively bargain for the resolution of disputes between growers and their processor arising out of their broiler chicken growing contracts (including existing contracts).

1.17. The present members of each grower group are named in Annexure C to the application, a copy of which can be found on the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter. The application is also made on behalf of persons who may become VFF Chicken Meat Group members in the future.

Similar arrangements

1.18. In addition to arrangements concerning collective bargaining by Victorian chicken meat growers the ACCC has considered collective bargaining arrangements proposed by chicken growers in a number of other states. Most recently, on 27 February 2009, the South Australian Farmers Federation lodged collective bargaining notification CB00070 on behalf of 18 South Australian chicken growers. The ACCC did not object to the notified arrangements.

Interim authorisation

- 1.19. On 22 February 2010 the VFF sought interim authorisation for the arrangements due to the pending expiry of the existing authorisation.
- 1.20. The ACCC has decided to grant interim authorisation to the arrangements to preserve the status quo, allowing VFF's Chicken Meat Group members to continue to give effect to existing chicken growing contracts and to engage in collective bargaining negotiations with processors in relation to new contracts while the ACCC considers the merits of the substantive application for revocation and substitution.
- 1.21. 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.

2. Background to the application

The national chicken meat industry

- 2.1. The VFF submits that between 1996 – 1997 and 2007 – 2008 Australian chicken meat production rose from 340.9 million chickens and 487,929 tonnes to 461 million chickens and 802,383 tonnes² and that the chicken meat industry's gross value of production in 2007-08 was \$1.637 billion. The Australian Chicken Meat Federation estimated the retail value of chicken meat in Australia to be \$3.5 billion.
- 2.2. The VFF submits that the per capita consumption of poultry is higher than any of beef and veal, lamb and mutton and pig meat. The VFF submits that the Victorian production of chicken meat is approximately 28 per cent of national production.
- 2.3. The retailing sector and the fast food industry are the major market outlets for the industry with approximately 75 per cent of chicken meat sold through retail outlets. The remainder is sold through the food service industry (fast food restaurants etc).
- 2.4. The largest processors are Inghams and Baiada Poultry. These two processors have operations in several states and supply the majority of processed chicken meat to large volume buyers such as the supermarket chains and fast food restaurants.
- 2.5. Six medium sized companies each supply approximately 3 – 9 per cent of the national market while a number of smaller processors supply the remainder of the market.³

The chicken growing industry

- 2.6. The VFF submits that processors operate vertically integrated businesses, in most cases involving production of day old chicks through to processing and sale of chicken meat. The VFF submits that for the most part the chicken growing phase of the processors' operations is outsourced to contract growers which involves the placing of batches of day old chicks with contracted growers, the supply of feed and medication to the growers and the progressive collection of grown chicks from the contracted growers' farms for processing.
- 2.7. The VFF submits that contract growers supplying growing services to processors are predominantly family owned and operated businesses, although there are a number of larger corporate businesses.
- 2.8. The VFF submits that the average cost of erecting a standard 40,000 bird shed is \$650,000.
- 2.9. The chicken growing stage commences when batches of day old chicks are placed by processors with broiler farms. As well as chicks, the processor supplies the farmer with feed and veterinary requirements.
- 2.10. Once the broilers are at slaughter weight, the processor transports the broilers to processing facilities. Processing facilities are often located on the outskirts of

² Australian Bureau of Statistics, Catalogue No. 7215.0 – *Livestock Products Australia*, Dec 2009

³ Australian Chicken Meat Federation, 3 March 2010 at www.chicken.org.au/page.php?id=2

metropolitan areas. Generally, the growers for the respective processor will be located within one to one and a half hours drive from the processing facilities.⁴ There are economic benefits to the processor from clustering growers in one area through lower transport and logistic costs.⁵ Processors endeavour to deliver the processed chicken meat to customers within one day of the chicken being processed at the plant.⁶

- 2.11. The farmer is paid a fee for raising day old chicks to slaughter weight. The period of raising/growing the chicks is usually five to eight weeks. IBISWorld reports that the fee paid to farmers for raising the chicks is approximately 17 per cent of the total cost of producing live chicken meat.⁷

The Victorian chicken meat industry

- 2.12. The VFF states there are approximately 220 contract growers in Victoria with farm sizes ranging from approximately 12,000 birds to 400,000 birds.
- 2.13. Until 2009 the Victorian processed chicken meat industry was characterised by three large, vertically integrated companies, Inghams Enterprises, Baiada Poultry and Bartter Enterprises, which owned breeding farms, multiplication farms, hatcheries, feed mills, some growing farms and processing plants. Inghams, Baiada and Bartter supplied about 80 per cent of Australia's broiler chickens.
- 2.14. In addition to Inghams and Baiada, the VFF submits that Turi Foods and Hazeldene grow and process chickens in Victoria only but sell some product interstate.
- 2.15. In July 2009 the ACCC decided not to oppose Baiada's acquisition of Bartter on condition that Baiada divested all of Bartter's Victorian assets to La Ionica Poultry (owned by Turi Foods).⁸ The Victorian operation of Bartter is now rebranded as Golden Farms.
- 2.16. The VFF submits that due to the recent acquisition by Baiada of a substantial portion of the Bartter business the number of processors to whom growers in Victoria can contract their services has been reduced from five to four.
- 2.17. The VFF submits the acquisition of Bartter has resulted in some degree of restructuring in the industry in Victoria with La Ionica (now called Turi Foods) acquiring the capacity to produce day old chicks and additional growing and processing capacity. As a result the VFF submits that a number of growers contracted to Bartter and to Baiada were transferred to Turi Foods.

The Broiler Chicken Industry Act 1978 (Vic)

- 2.18. Chicken growing services in Victoria were first regulated by the state government in 1974. The original legislation was soon replaced by the *Broiler Chicken Industry Act*

⁴ ACCC, *Public Competition Assessment: Baiada Poultry Pty Ltd – proposed acquisition of Bartter Enterprises Pty Ltd*, 27 February 2009.

⁵ South Australian Farmers Federation, *Collective bargaining notification CB00070*, Attachment 3, p.15.

⁶ ACCC, *Public Competition Assessment: Baiada Poultry Pty Ltd – proposed acquisition of Bartter Enterprises Pty Ltd*, 27 February 2009.

⁷ IBISWorld, *Poultry Meat Farming in Australia: A0141*, 11 December 2008, p. 27.

⁸ ACCC media release: *ACCC allows chicken processing merger after sale of Victorian assets*, 30 June 2009

1978 (*Vic*) (the Broiler Chicken Act) which, along with the Broiler Chicken Regulations 1992, regulated contract negotiations between Victorian chicken meat growers and Victorian chicken meat processors.

- 2.19. The Broiler Chicken Act established the Victorian Broiler Industry Negotiating Committee (VBINC) which was responsible for, amongst other things, arbitrating on:
- the standard, statewide, growing fee for broiler chickens and
 - disputes between growers and processors.
- 2.20. In November 1999, a review of the Broiler Chicken Act and its regulations, conducted under National Competition Policy (NCP) guidelines, concluded that the Broiler Chicken Act should be repealed. The review determined that retention of the legislation would not result in a net public benefit to the community (in accordance with the principles of legislative review under the NCP).
- 2.21. Whilst the Broiler Chicken Act was not (and has not yet been) repealed,⁹ the Victorian state government has supported the NCP recommendation to deregulate the industry and, as a consequence, VBINC has not met since 2000.¹⁰ The government was, however, concerned that some form of transitional process needed to be in place prior to full industry deregulation and so encouraged the parties to utilise the authorisation process available under the Trade Practices Act.

The VFF and its members

- 2.22. The VFF submits that it is a company limited by guarantee incorporating a federation of agricultural commodity growers, including the Chicken Meat Group.
- 2.23. The VFF submits that of the approximately 220 contract chicken meat growers in Victoria, 186 are members of the VFF Chicken Meat Group.
- 2.24. The members of the Chicken Meat Group are broiler chicken growers each of whom is contracted to one of the four companies in Victoria which process chicken meat on a fully integrated basis for distribution and wholesale.
- 2.25. Membership of the VFF Chicken Meat Group is structured under a constitution on a branch basis, each branch comprising growers contracted to one of the four processors and being referred to as a group, with the result that there is a Baiada Growers Group, an Hazeldene Growers Group, an Inghams Growers Group and a Turi Foods Growers Group.
- 2.26. Pursuant to the conditions of authorisation imposed by the ACCC in authorising collective bargaining in 2005, growers collectively negotiate only within their grower groups and common representation across groups is not permitted.

⁹ The Victorian government did not repeal the legislation at the time of the initial NCP review as existing grower contracts relied on the legislation and the regulations for their enforceability.

¹⁰ Subsequent to 2000, VBINC passed some resolutions which provided security for on-going contracts.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, the VFF submits that the collective bargaining system has worked well. The VFF submits that collective grower input into contractual terms and conditions provides growers with certainty of contracts and rates of return on investment thereby encouraging further investment in the industry by growers. Further, the VFF submits collective bargaining results in public benefits in the form of transaction cost savings and assists in retaining industry experience.
- 3.3. The ACCC sought submissions from 40 interested parties potentially affected by the application, including processors, growers, industry associations and government departments.
- 3.4. The ACCC received two public submissions, one from each of Baiada Poultry and Inghams Enterprises. Baiada Poultry submitted that it has no objection to re-authorisation of the arrangements. Inghams also submitted that it has no objection to re-authorisation provided that it is subject to the same conditions imposed on authorisation A40093.
- 3.5. The ACCC also received a submission from a chicken grower that was excluded from the public register at the grower's request. The chicken grower submitted that they would prefer that VBINC be reinstated but if this cannot occur they support the application for re-authorisation.
- 3.6. The views of the VFF are outlined in the ACCC's evaluation of the proposed collective bargaining arrangement in Chapter 4 of this determination. A copy of the VFF's, Baiada Poultry and Ingham's submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC evaluation

- 4.1. Broadly, under section 91C(7) the Act the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 4.2. The ACCC's evaluation of the conduct is in accordance with tests found in sections:
- sections 90(6) and 90(7) of the Act which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
 - sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- 4.3. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

- 4.4. 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.

The VFF's submission

- 4.5. The VFF submits there are two principal markets relevant to the application. The first is the market for contract chicken growing services, and the second is the market for processed chicken meat.

The market for chicken growing services

- 4.6. The VFF submits that it remains the case that there is a geographic nexus between the location of processors' processing plants and the location of growers because processors want their growers in particular areas proximate to their processing plants and are unwilling to service growers elsewhere.
- 4.7. The VFF submits that Hazeldene is located in the Bendigo region and nearly all its growers are located in that region. No other processors have growers in that region. The other two main growing regions in Victoria are the Geelong region and the Mornington Peninsula area.
- 4.8. The VFF contends that the recent industry rearrangement following the break up of the Bartter business has led to the blurring of the processors' territorial spheres of influence, with the Bartter growers in the Geelong region being transferred to Turi Foods as well as some Baiada growers in the Werribee and Mornington Peninsula areas resulting in Turi Foods and Baiada having growers scattered across the two regions.
- 4.9. The VFF argues that the *Victorian Code for Broiler Farms 2009* (the Code), which is incorporated into all planning schemes in Victoria, has caused growers to be more widely dispersed than in the past and is eroding the three main geographic markets for growing services.
- 4.10. The VFF submits that provisions in the Code that require certain distances between broiler farms/sheds and sensitive use areas have made it impossible to establish large new farms or expand existing farms on the Mornington Peninsula. This has resulted in new farms being established further away from the city in places such as South Gippsland and Nagambie.
- 4.11. Nevertheless, in the VFF's view there currently remains three main geographic markets for growing services – Bendigo, Geelong and the Mornington Peninsula, although growers are also located to the North West of Melbourne, such as Melton and Lethbridge and some in Nagambie, being mainly Baiada growers.

The market for processed chicken

- 4.12. In relation to the market for processed chicken meat, the VFF submits that due to Inghams and Baiada's national presence they have a greater flexibility to source and sell processed chicken meat interstate, while Hazeldene and Turi Foods sell some product interstate.
- 4.13. The VFF submits that with increased technology and the national integrated supply chain chicken meat can be safely and economically shipped anywhere in eastern Australia. Therefore, the VFF submits that at the wholesale level the eastern states of Australia are a single chicken meat market.

ACCC assessment of the relevant markets

- 4.14. As noted, the ACCC has previously considered a number of applications for collective bargaining arrangements concerning chicken meat growing services. The Tribunal has also previously considered an application by Victorian growers to engage in collective boycotts. In addition, the ACCC has recently considered Baiada Poultry's proposed acquisition of Bartter Enterprises.

4.15. In considering these matters it has generally been concluded that the primary markets of relevance are the:

- regional based markets for the provision of grower services to processors, and
- markets for the wholesale supply of chicken meat which have, in recent years, been moving from state based markets towards a national market.

The market for chicken growing services

4.16. The ACCC considers that the nature of the service provided by chicken growers (i.e. growing live chickens), limits the practical extent to which growers can provide those services and to whom they can provide them. Grower regions tend to be located proximate to processing facilities:

- to limit the cost of transporting day old chicks from hatcheries to broiler farms, chicken feed from feed mills to broiler farms and mature broilers from farms to processing facilities, and
- to facilitate the management of logistics/turnaround times for picking up the broilers and processing them at the relevant processing plant.

4.17. As a consequence, the majority of a processors' growers are located within 1 – 1.5 hours drive from the processing facility they supply. This equates to approximately 120 kilometers by road. Accordingly the ACCC considers that there is a series of regional markets in Victoria for chicken growing services bound by these geographical limits.

The market for processed chicken meat

4.18. Processors endeavour to deliver chicken meat to a customer's distribution centre or directly to its stores within one day of the chicken being processed at the plant so that shelf life of the product can be maximised. Although such shelf life can be theoretically met by processors with plants up to 1000km from a customer, most processors do not transport product for more than 12 hours for cost and logistical reasons.

4.19. This is reflected in interstate sales volumes. The ACCC market inquires in considering Baidia Poultry's acquisition of Bartter Enterprises found that most processors sell at least 60 per cent or more of their output in the state in which the processing plant is located. The ACCC found that for the most part the remainder of processors' sales take place in adjoining states. For instance, the ACCC found that:

- chicken processed in NSW that is not sold in NSW is sold mainly to Queensland and to a lesser extent Victoria
- Queensland processors sell a small amount of chicken in NSW, and
- in Victoria, chicken which is not sold within the state (relatively small volumes) is sold in NSW, South Australia and Tasmania.

4.20. The ACCC therefore considers that regional markets for the supply of processed chicken extend beyond state boundaries to adjoining states.

The counterfactual

- 4.21. 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 conduct for which authorisation has been sought.¹¹
- 4.22. 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’.

Consideration of the counterfactual

- 4.23. The ACCC notes that collective bargaining of some description has been occurring in the Victorian chicken meat industry for many years under either the VBINC arrangements or authorisations. However, given that such conduct would likely raise concerns under the Act, it is unlikely, absent the statutory protection provided by authorisation, that growers would be able to continue these collective bargaining arrangements in the future.
- 4.24. This would mean that, absent authorisation, each grower would be required to independently negotiate the terms and conditions of their contracts with their individual processor, or to accept standard form contracts.
- 4.25. The ACCC has previously considered numerous applications for small primary producers to collectively bargain with the processors to whom they supply. In its past consideration of these applications the ACCC has generally found that the most common situation in the absence of an authorisation to collectively bargain, or some form of industry regulation, is one where primary producers offering a common good or service in similar circumstances are offered essentially standard form contracts with little capacity to negotiate variations on those standard terms or conditions.
- 4.26. In respect of chicken growing services there is very little capacity for growers to expand their product offerings due to the specificity of their assets and the associated cost of adapting them for an alternative use. In addition, whilst growers do have some capacity to change processors, there are significant switching costs associated with doing this, costs which are generally borne by the grower.
- 4.27. These switching costs significantly limit the ability for growers to do anything other than continue to provide their service to their processor, at least in the short-term, even where unfavourable terms and conditions are offered. That is to say, failure to negotiate a mutually satisfactory agreement with an individual grower would not place the processors’ business at the same commercial risk as it would the growers.
- 4.28. In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, VFF member growers are, in general, small primary producers with often limited resources and expertise to

¹¹ *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.

engage in effective negotiation with businesses with the size and negotiating experience of the processors.

- 4.29. It could therefore be expected, in a situation where growers were required to negotiate contracts with processors individually, that the consequence of such an imbalance in bargaining positions would generally be the offering of standard form contracts by processors to each of their growers, with little input from the growers, or scope for them to vary the terms and conditions of such contracts.

Public benefit

- 4.30. 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.¹²

- 4.31. The VFF submits the previous authorisation has resulted in public benefits and the proposed collective bargaining arrangements will continue to deliver those public benefits, including:

- increased bargaining power, contract certainty and ongoing investment in the industry
- transaction cost savings.

Increased input into contracts

The VFF's submission

- 4.32. The VFF argues that there is an imbalance in bargaining power between processors and individual growers and that this imbalance is exacerbated by the large capital investments required to be undertaken by growers to provide chicken growing services.
- 4.33. The VFF submits that at the time authorisation was originally granted in 2005 there had been a period of instability in the Victorian industry following deregulation. The VFF states that over a period of five years only one grower group contracted to the (then) five processors had managed to reach agreement on contractual terms and conditions and in most cases there had been only sporadic, ad hoc and uneasy agreements about fee increases and other individual issues.
- 4.34. The VFF states that since authorisation was granted the Inghams and Baiada groups have completed negotiations of contractual terms and conditions covering extended periods and incorporating fee adjustment mechanisms. The VFF also states that negotiations with Turi Foods and Hazeldene are also close to completion.
- 4.35. The VFF submits that these contractual negotiations have for the most part proceeded in an orderly and reasonable manner and have been directed at putting in place overall

¹² *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.

contractual frameworks which will obviate the necessity for frequent negotiations in most cases. The VFF further notes that all contracts contain dispute resolution processes that are accessible to all.

ACCC view

- 4.36. Competition between buyers and sellers on terms and conditions of supply, through the process of negotiation, is likely to lead to an efficient outcome. In the past the ACCC has recognised that if buyers or sellers are constrained in their ability to provide input into those terms and conditions, the most efficient outcome may not be achieved.
- 4.37. Where this is the case, collective bargaining may help businesses by providing a mechanism through which they can provide greater input into contracts and be more commercially efficient.
- 4.38. The ACCC accepts that there is an imbalance in bargaining power between processors and individual growers. This imbalance in bargaining power arises from:
- the limited opportunity for growers to switch production from chicken growing given the significant capital investment and the specific nature of capital (in particular growing sheds)
 - the limited opportunity for growers to switch processors given the location of processors and the switching costs arising from the specific growing requirements of each processor
 - the direct control over growing operations by processors through the provision of day old chickens, growing specifications and the provision of other necessary inputs such as feed and veterinarian services
 - the reliance of growers on processors as their sole source of income, and
 - the often limited bargaining expertise of growers in comparison to generally larger and more experienced processors.
- 4.39. Such an imbalance in bargaining power is likely to be reflected in the terms and conditions of supply negotiated between the parties. In particular, the use of standard form contracts and the lower prospect of individual negotiations give rise to some barriers to effective input into contractual terms and conditions.
- 4.40. The ACCC considers that the proposed collective bargaining arrangements authorised to date have improved growers' bargaining position in negotiations with processors and provided a greater opportunity for growers to have more effective input into their contractual terms and conditions. The ACCC considers that improved grower input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner.
- 4.41. The ACCC considers, for the reasons outlined above, that the proposed arrangements are likely to result in a public benefit.

Transaction cost savings

The VFF's submission

- 4.42. The VFF submits that collective bargaining results in transaction cost savings even compared to a situation where growers are individually required to sign processors standard form contracts. The VFF argues that collective bargaining allows issues to be tackled, and agreement reached, through a single forum. Moreover, the VFF submits that some issues are of a group nature, such as pooling arrangements and productivity adjustments and are therefore not capable of individual negotiation.

ACCC view

- 4.43. 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 individual negotiating processes are necessary. The ACCC considers that to the extent that these transaction cost savings arise they are likely to constitute a public benefit.
- 4.44. As noted earlier, there appears to be an imbalance in the relative bargaining positions of processors and growers. In light of this, it is likely that if growers were to enter into individual contracts with processors the level of negotiation that would occur in respect of those contracts, and accordingly, the resource costs involved in doing so, would be low.
- 4.45. There would however still exist costs associated with entering into such contracts in the form of professional and/or legal advice or obtaining the information necessary for growers to make an informed choice. In this respect, most growers involved in the proposed arrangements have, by virtue of previous government regulation of the industry, never previously had to negotiate contracts directly with processors on an individual basis. Accordingly, the costs they would be likely to incur in doing so would likely be higher than ordinarily would be the case. These costs may be able to be consolidated and shared where growers negotiate collectively with processors.
- 4.46. The ACCC also considers that there would be some savings in the form of reduced costs resulting from disputes. As noted by the VFF there was considerable disharmony in the industry in the years following deregulation. As noted above, through collective bargaining growers would be more likely to have effective input into contractual terms and conditions. This would reduce the likelihood of disputes between individual growers and processors and the associated costs involved in managing disputes.

Public detriment

- 4.47. 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.¹³

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.48. 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.
- 4.49. 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.
- 4.50. 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 counterparty(s) on the matters to be negotiated is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage and composition of the bargaining group
 - there is no boycott activity.

Current level of negotiations

- 4.51. Where the current level of individual bargaining between members of the bargaining group and the target is low, the difference between the level of competition with or without the collective bargaining arrangements may also be low.
- 4.52. As noted, the ACCC considers that absent any form of collective negotiation, growers would be offered largely standard form contracts under which the capacity for individual members to negotiate the terms and conditions of the agreement would be limited.
- 4.53. Therefore, absent the collective bargaining arrangements the level of negotiation between growers and processors is likely to be low.

Voluntary participation in the collective bargaining arrangements

- 4.54. Collective bargaining is voluntary where members of the collective bargaining group are free to choose not to participate in the collective negotiations if they prefer to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements. Where participation is voluntary, those businesses who consider that they will be able to negotiate a more commercially attractive arrangement individually are free to do so. Consequently, incentives for businesses to compete on price, to innovate, or to improve their quality of service are not reduced to the extent that they otherwise might be.
- 4.55. Importantly in this respect, the authorisation of collective bargaining arrangements does not compel any party to participate in the collective bargaining process. Nor does it impact on any other arrangements between the parties unless the parties so choose.

- 4.56. The ACCC notes the participation in the current collective bargaining arrangements is voluntary for both processors and growers. Individual growers remain free to negotiate directly with their processor if that is their, or the processor's, wish and collectively negotiated contracts will only be entered into where both the growers and the relevant processor consider it to be in their best commercial interest to do so.

Coverage and composition of bargaining groups

- 4.57. The ACCC considers that where the size of the bargaining group 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.
- 4.58. In general, the ACCC considers that limiting bargaining groups (for example by geography, or the size of the counterparty) allows negotiations to better take into account the specific demand or supply characteristics of particular businesses. This significantly reduces the anti-competitive effects associated with 'one size fits all' negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 4.59. In the case of the current arrangements, pursuant to conditions of authorisation imposed by the ACCC when the arrangements were first authorised, grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group and there is no common representation across groups.
- 4.60. Authorisation is currently sought subject to the same conditions.
- 4.61. These restrictions on the competition and coverage of bargaining group allows for contracts to be tailored to suit the particular processor's needs and provides for a level of ongoing competition between grower groups and processors.

Boycott activity

- 4.62. The VFF 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 Act.

Increased fees

VFF's submission

- 4.63. The VFF submits that the proposed collective bargaining arrangements may result in a detriment by way of higher fees paid by processors to growers than if the processors individually negotiated with growers.
- 4.64. However, should this occur, the VFF contends that the increased grower fees are unlikely to be passed on to consumers given the significant purchasing power of the large buyers in the wholesale market. The VFF contends that this is particularly so because the growing fee constitutes a relatively small percentage of the retail price for chicken.
- 4.65. The VFF submits this argument is supported by the decline in the real price of chicken meat over a period of years despite the existence of collective negotiations in the chicken growing sector over many years, including under the previously regulated

system and a number of authorisations that have allowed collective bargaining in the chicken industry.

ACCC view

- 4.66. As discussed in considering the public benefits of the proposed collective bargaining arrangements, the ACCC considers that collective bargaining will provide growers with a greater opportunity to have more effective input into contract terms and conditions. This improved grower input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner.
- 4.67. However, while collective bargaining may improve growers' ability to have effective input into their contracts, it is not likely to change the bargaining power relativities between the parties to such an extent that any imbalance in bargaining power would be reversed.
- 4.68. In particular, as noted, it would still be open to processors to negotiate individually with growers if that is their preference. Further, even when negotiating with a processor collectively it remains the case that switching costs significantly limit the ability for growers to do anything other than continue to provide their service to their processor, at least in the short-term, even where unfavourable terms and conditions are offered. This, along with the fact that processors can still enter into individual agreements with growers if collective negotiations fail, limits the growers' countervailing bargaining power in negotiations with processors even when negotiating as a group.
- 4.69. In addition, the structure of the collective bargaining arrangements provide for a level of ongoing competition between grower groups, and with growers outside of the growing groups.
- 4.70. Therefore, the ACCC does not consider that the proposed collective bargaining arrangements will confer to growers a degree of bargaining power sufficient for them to exert significant pressure on processors for increased growing fees.
- 4.71. Rather, any increase in fees paid to growers as a result of the collective bargaining arrangements is likely to reflect either, growers having more effective input into contracts allowing them and processors to more effectively tailor contracts to both their needs (i.e. improved allocative efficiency), and/or the cost savings associated with negotiating as a group which, as noted, the ACCC considers to be public benefits.
- 4.72. As noted earlier, the ACCC considers that there is an imbalance of bargaining power between processors and growers, arising from the limited switching options available to growers. To the extent that this imbalance of bargaining power reduces prices below levels which would sustain efficient production in the long run and improved grower input into contract negotiations increases prices towards more efficient levels, any such price increase would improve allocative efficiency.
- 4.73. The ACCC does not consider that an increase in prices paid to growers that reflects improved allocative efficiencies, that is, price signals which assist in directing resources to their most efficient use, to be a public detriment.

Balance of public benefit and detriment

- 4.74. In general, 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, and that public benefit will outweigh any likely public detriment.
- 4.75. In the context of applying the net public benefit test in section 90(8)¹⁴ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁵
- 4.76. For the reasons outlined in this chapter the ACCC considers that some public benefits are likely to flow from the proposed arrangements. The collective bargaining arrangements provide a greater opportunity for growers to have more effective input into contract terms and conditions. This improved grower input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner.
- 4.77. The collective bargaining arrangements are also likely to generate some transaction cost savings for both growers and processors.
- 4.78. The ACCC considers that the public detriments generated by the collective bargaining arrangements are likely to be minimal having regard to the following:
- the level of negotiations between individual growers and processors is likely be low absent the collective bargaining arrangements
 - the arrangements are voluntary for all parties
 - growers are restricted to forming bargaining groups only with other growers who grow for the same processor and there is no common representation across bargaining group
 - the arrangements do not include collective boycott activity.
- 4.79. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B)) are met.

Length of authorisation

- 4.80. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁶ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

¹⁴ 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.

¹⁵ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

¹⁶ Section 91(1).

- 4.81. In this instance, the VFF seeks re-authorisation for five years.
- 4.82. No submissions were received in respect of the proposed length of authorisation.
- 4.83. The ACCC proposes re-authorise the collective bargaining arrangements for a further five years.

Variations to the arrangement

- 4.84. The ACCC notes that any amendments to the arrangement during the proposed term of this re-authorisation would not be covered by the proposed re-authorisation.

5. Draft determination

The application

- 5.1. On 18 February 2010, the VFF lodged an application for the revocation of authorisation A40093 and the substitution of authorisation A91214 for the one revoked.
- 5.2. Application A91214 was made under section 91C(1) of the Act. Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process. Relevantly, the ACCC may grant authorisation under:
- subsection 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.
 - subsection 88 (1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of the Act (other than a provision which would also be, or might be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.3. In particular, the VFF seeks authorisation to allow present and future members of its Chicken Meat Group to collectively negotiate the terms and conditions of growing contracts with the processor to whom they supply. That is, Baiada Poultry, Hazeldene Chicken Farm, Inghams Enterprises and Turi Foods.

The net public benefit test

- 5.4. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which the substitute 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 conduct.
- 5.5. The ACCC therefore proposes to revoke authorisation A40093 and grant authorisation A91214 in substitution. The ACCC proposes to grant authorisation for five years.

Conduct for which the ACCC proposes to grant authorisation

- 5.6. The authorisation proposed to be granted by the ACCC is for current and future VFF member chicken grower groups to:
- continue to give effect to their existing chicken growing contracts previously entered into (existing contracts)
 - collectively bargain the terms and conditions, including grower fees, of their broiler chicken growing contracts

- collectively bargain:
 - periodic adjustments to growing fees and all matters relating to growing fees and payments under their broiler chicken growing contract (including existing contracts), and
 - amendments and variations to the terms and conditions of their broiler chicken growing contracts (including existing contracts)
 - collectively bargain for the resolution of disputes between growers and their processor arising out of their broiler chicken growing contracts (including existing contracts).
- 5.7. Re-authorisation has been sought, and the ACCC proposes to grant re-authorisation subject to the same three conditions as authorisation A40093.
- Condition C1: That the matters described in the document titled *Requirements for Contractual Terms and Conditions* (which included matters that must be covered in a contract) provided with the VFF's application (Annexure C to the application) be open to negotiation between the parties and will not be mandatory.
- Condition C2: Grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group.
- Condition C3: Grower groups must not use common representatives or representation.
- 5.8. This draft determination is made on 18 March 2010.
- 5.9. The attachments to this determination are part of the draft determination.

Future Parties

- 5.10 The proposed re-authorisation extends to any grower that becomes a member of any of the VFF chicken grower groups in the future.

Interim authorisation

- 5.11 On 22 February 2010, the VFF requested interim authorisation for the arrangements. The ACCC has decided to grant interim authorisation.
- 5.12 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

- 5.13 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.

Attachment A — the authorisation process

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.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

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.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a 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.

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.

Attachment B — chronology of ACCC assessment for application A91214

The following table provides a chronology of significant dates in the consideration of the application by the VFF.

DATE	ACTION
18 February 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
5 March 2010	Closing date for submissions from interested parties in relation to interim authorisation and the substantive application.
18 March 2010	Interim authorisation granted and draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) is not so limited.¹⁷

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.¹⁸

Consequently, when applying either test, the ACCC can take most, if not all, public 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹⁹

Future and other parties

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 future²⁰

¹⁷ *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.

¹⁸ *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.

¹⁹ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²¹

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation²². It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.²³ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.²⁴

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.²⁵ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.²⁶

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²⁷ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²⁸

²⁰ Section 88(10).

²¹ Section 88(6).

²² Section 90(10A)

²³ Subsection 91A(1)

²⁴ Subsection 87ZD(1).

²⁵ Subsection 91B(1)

²⁶ Subsection 91B(3)

²⁷ Subsection 91C(1)

²⁸ Subsection 91C(3)