



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

**Western Australian Broiler Growers' Association on behalf of its
member chicken growers**

in respect of

**collective bargaining by chicken grower groups
with their nominated processor in Western Australia**

Date: 12 May 2011

Authorisation no.: A91262

Public Register no.:C2011/169

Commissioners: Samuel
Kell
Schaper
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation to the Western Australian Broiler Growers' Association for its member growers to engage in collective bargaining with the chicken meat processors to whom they supply growing services.

The ACCC proposes to grant authorisation for five years.

On 8 February 2011, the Western Australian Broiler Growers' Association (WABGA) lodged application for authorisation A91262 with the Australian Competition and Consumer Commission (ACCC).

The WABGA is seeking authorisation for its member broiler chicken growers to collectively bargain with their nominated processor - Inghams Enterprises Pty Limited, Baiada Poultry Pty Ltd or Finesse Foods (Aust) Pty Ltd.

The WABGA is a not for profit organisation, structured on a branch basis - an Inghams Growers Group (17 members), a Baiada Growers Group (14 members) and a Finesse Growers Group (5 members).

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. This improved grower input has the potential to reduce information asymmetry. The collective bargaining arrangements are also likely to generate some transaction cost savings.

The ACCC considers that the collective bargaining arrangements are unlikely to result in significant anti-competitive detriment. In particular it is noted that the level of negotiations between individual growers and processors is likely to be low absent the collective bargaining arrangements and that the arrangements are voluntary for all parties. Grower bargaining groups are also restricted – they may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group and will not involve common representation across bargaining groups. In addition to these factors the authorisation does not permit collective boycott activity.

On balance, the ACCC considers the public benefits that are likely to result from the conduct will outweigh any public detriments. Accordingly, the ACCC proposes to grant authorisation for five years.

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

On 23 February 2011, the ACCC granted interim authorisation to the WABGA for its member broiler chicken growers to collectively bargain with their respective processor. Interim authorisation will remain in place until the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

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List of abbreviations

ACCC	The Australian Competition and Consumer Commission
Baiada	Baiada Poultry Pty Limited
Broiler	A type of chicken grown especially for its meat
CMI Act	The Chicken Meat Industry Act 1977
ERAWA	Economic Regulation Authority of Western Australia
Finesse	Finesse Foods (Australia) Pty Ltd
Inghams	Inghams Enterprises Pty Limited
Processors	Collectively, Inghams, Baiada and Finesse
The Act	Competition and Consumer Act 2010
WABGA	Western Australian Broiler Growers' Association
WA DAF	Western Australian Department of Agriculture and Food

1. The application for authorisation

- 1.1. On 8 February 2011 the Western Australian Broiler Growers' Association (WABGA) lodged application for authorisation A91262 with the Australian Competition and Consumer Commission (ACCC).
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (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 A91262 was made under
 - Section 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 (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
 - Section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 1.4. The WABGA is seeking authorisation for its member broiler chicken growers to collectively bargain with their nominated processor - Inghams Enterprises Pty Limited, Baiada Poultry Pty Ltd or Finesse Foods (Aust) Pty Ltd.
- 1.5. Authorisation is sought for growers to form bargaining groups according to the processor for whom they provide growing services. Currently 17 growers grow for Inghams, 14 growers grow for Baiada, and 5 growers grow for Finesse Foods.
- 1.6. The application does not extend to common representation or sharing of information about contractual arrangements between bargaining groups.
- 1.7. The WABGA is structured along growing groups, with an Inghams, Baiada and Finesse growing group. It is proposed that each bargaining group will elect representatives to negotiate with the processor and that the outcome of negotiations will form a standard form contract with that processor. Individual broiler chicken growers will be able to accept these terms or seek to negotiate their own terms separately.

- 1.8. Participation in the bargaining group will be voluntary. Participants will be free to join the bargaining group at any time during negotiations and may cease to participate in the bargaining group at any time.
- 1.9. Authorisation is sought for a minimum period of five years.

Other parties

- 1.10. 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.
- 1.11. The WABGA has also sought authorisation to extend to future members.

Amendments to the application

- 1.12. In WABGA's original application there was a lack of clarity in relation to the intended scope of the proposed collective bargaining arrangements. WABGA provided a submission clarifying the intended scope of the arrangements on 18 February 2011 and formally amended its application on 7 March 2011 to reflect this clarification.
- 1.13. Specifically WABGA amended its application to clarify that
 - growers will form bargaining groups based on the processor for whom they grow, with collective bargaining to occur on a processor by processor basis
 - no participant in, or advisor to, any grower bargaining group will have any involvement with any other bargaining group in sharing knowledge about the bargaining process or outcomes and/or provide any other assistance in relation to contract negotiations to any other bargaining group
 - the matters set out in annexures A and B of WABGA's application, which include a contract negotiation process and details about contract terms and conditions, are intended to be indicative only. The WABGA has noted that all matters in relation to the manner in which collective bargaining will be undertaken and the form of any contracts will be open to negotiation between the parties and will not be mandatory.

Similar arrangements

- 1.14. The ACCC has considered applications for authorisation and notifications regarding collective bargaining from broiler chicken growers in other states. The applications and notifications include the following:
 - Collective bargaining notification CB00142 lodged by the Tasmanian Chicken Growers Association on 22 April 2010 in relation to six of its member broiler chicken growers for collective bargaining with Inghams Enterprises Pty Limited. The ACCC allowed this notification to stand on 6 May 2010.

- Collective bargaining authorisation A91241 lodged by the Victorian Farmers Federation on behalf Victorian broiler chicken grower groups on 18 February 2010 for an existing authorised collective bargaining arrangement to be revoked and substituted by a similar arrangement. The ACCC granted re-authorisation for 5 years on 21 April 2010.
- Collective bargaining notification CB00070 lodged by the South Australian Farmers Federation on 27 February 2009 in relation to 18 of its member broiler chicken growers for collective bargaining with Inghams Enterprises Pty Limited. The ACCC allowed the notification to stand on 26 March 2009.

Interim authorisation

- 1.15. The WABGA also sought interim authorisation for the proposed collective bargaining arrangements.
- 1.16. On 23 February 2011, the ACCC granted interim authorisation. The ACCC considered that granting interim authorisation would provide a mechanism for growers and processors to negotiate contract terms and conditions in the newly deregulated environment while the ACCC considers the substantive application.
- 1.17. In granting interim authorisation the ACCC had regard to the clarification about the scope of the proposed arrangements provided by WABGA on 18 February 2011, as summarised at paragraph 1.13 of this draft determination.
- 1.18. The interim authorisation will remain in place until the date of the ACCC's final determination comes into effect or until the ACCC decides to revoke the interim authorisation.
- 1.19. A copy of the ACCC's interim authorisation decision is available from the ACCC's website www.accc.gov.au/AuthorisationsRegister by following the links to this matter.

2. Background to the application

The applicant

- 2.1. The WABGA is a not for profit organisation with 36 full members. WABGA is a member of the Western Australian Chicken Meat Council (WACMC), which in turn is a member of the national body known as the Australian Chicken Meat Federation (ACMF). WABGA is also a member of the Australian Chicken Growers Council Limited.
- 2.2. The WABGA's primary objective is to provide its members with a representative body dedicated to the promotion and advancement of its members' interests with regard to chicken meat growing.

The Western Australian Chicken Growing Industry

Chicken Meat Industry Act 1977

- 2.3. The chicken meat industry in Western Australia until quite recently operated under the auspices of the *Chicken Meat Industry Act 1977* (CMI Act) and the *Chicken Meat Industry Act (Participation in Growth Expansion) Regulations 1978*. The purpose of the CMI Act was to improve stability in the chicken industry during a time of rapid expansion. The CMI Act established a forum designed to facilitate both collective negotiation and mediation, and improve the balance of bargaining power between growers and processors. The CMI Act provided for the gazettal of an average price to growers determined on the basis of a notional production model of an efficient broiler chicken growing operation and established the Chicken Meat Industry Committee to mediate and arbitrate disputes.¹ The Committee consisted of two grower representatives, two processor representatives and an independent chair.
- 2.4. In December 2010, the Economic Regulation Authority of Western Australia (ERAWA) released its report *'Inquiry into the Chicken Meat Industry Act 1977: Final Report'*. In its report, the ERAWA concluded that the CMI Act operated as a 'deterrent for future significant processing investment decisions'. Further, the ERAWA stated that the CMI Act worked against society's economic interests, with the main effect being a transfer of income from processors to growers and that over time the CMI Act would likely negatively impact on industry growth.
- 2.5. The ERAWA's report recommended that in the absence of legislation, collective bargaining would improve growers' position with chicken processors to the extent that it 'allows them greater input into the terms and conditions of their contracts'. Further, the ERAWA indicated that collective bargaining may result in a reduction in transaction costs. In this regard, the ERAWA states that growers would be likely to be granted authorisation for collective bargaining by the ACCC.

¹ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*.

- 2.6. The ERAWA report was released on 9 December 2010. On 29 December 2010, the Minister for Agriculture and Food wrote to the WABGA advising them that the CMI Act would expire on 31 December 2010.²

The characteristics of the Western Australian chicken growing industry

- 2.7. The WABGA submits that processors operate vertically integrated businesses, which include breeder farms, hatcheries, feed mills, processing plants and in some cases, chicken growing farms. Most stages in the production and processing of chicken meat are undertaken by the processors, apart from the outsourcing of the chicken meat growing phase to contract growers. The growing phase involves placing batches of day old chicks with contracted growers and supplying feed and medication until the chickens are ready to be collected by the processor.
- 2.8. Generally, the growers and their respective processor will be located within one to one and a half hours drive from the processing facilities,³ as there are economic benefits to the processor from clustering growers in one area though lower transport and logistic costs.⁴
- 2.9. Broiler chicks are generally grown in sheds that usually house up to 40,000 birds.⁵ A typical grower will have between three and eight sheds. Traditionally, Australian broiler sheds have been naturally ventilated, with the sides of the shed open to fresh air. Increasingly, chicken growing facilities are moving to tunnel sheds, which are fully enclosed and are ventilated by fans which blow air through the sheds to keep the air at an optimal temperature.⁶ Broiler growers own the sheds in which chickens are raised and assume responsibility for the growing of chickens from day old chicks to chickens ready for harvesting.
- 2.10. The grower is paid a fee for raising day old chicks ready for harvesting. The period of growing chickens varies from 30-35 days up to 55-60 days depending on the processor's need for light or heavy birds.⁷ Estimates of growing fees as a percentage of the total costs of production vary. On the one hand IBISWorld reports that the fee paid to growers for raising chicks is approximately 17 per cent of the total cost of producing live chicken meat.⁸ However, the ERAWA report includes two estimates of growing fees as a percentage of production costs; the WABGA estimates that growing fees are 10.7 per cent of production costs, while Inghams advises that growing fees are 18.7 per cent of their broiler production costs.⁹

² Section 29, *Chicken Meat Industry Act 1977*.

³ ACCC, *Public Competition Assessment: Baiada Poultry Pty Ltd – propose acquisition of Bartter Enterprises Pty Ltd*, 27 February 2009, p5.

⁴ South Australian Farmers Federation, *Collective Bargaining notification CB00070*, Attachment 3, p15.

⁵ Australian Chicken Meat Federation Inc - <http://www.chicken.org.au/page.php?id=6>.

⁶ Ibid.

⁷ Ibid.

⁸ IBISWorld, *Poultry Meat Farming in Australia:A0141*, 11 December 2008, p.27.

⁹ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p 68.

- 2.11. A typical family farm would house 100,000 to 150,000 broiler chickens and produce a total of 550,000 - 800,000 birds a year in several batches. The cost of establishing a new chicken farm, including land with a capacity of 150,000 birds is likely to cost in the vicinity of \$3.5m in terms of upfront investment.¹⁰
- 2.12. The chickens are usually collected by specialist contract pick up crews and transported to the processor's plant, where they are slaughtered and processed into chicken meat.¹¹ The meat may be sold to retailers, including supermarkets and fast food companies, or may be further processed into chicken meat products.¹²

Chicken meat processors

- 2.13. The structure of the processing industry in Western Australia reflects common characteristics found both in Australia and internationally.¹³ Chicken meat industries in other states of Australia, New Zealand, the United States and the United Kingdom are all characterised by a few large processors with vertically integrated business structures and the contracting out of chicken meat growing services to relatively small growing operations.¹⁴
- 2.14. The chicken meat industry around the world is characterised by significant economic barriers to entry, in particular
- large buyers (supermarkets and fast food companies) generally prefer to deal with large processors as their size and control over the stages of production facilitates the supply of high volumes of chicken meat as well as product that meets buyer specifications, at a lower price.¹⁵
 - there are significant set up and sunk costs in processing facilities. For example, the Australian Chicken Meat Federation estimates that a processing plant capable of producing 750,000 chickens per week (about 8% of current total production capacity of the Australian chicken meat industry) would require the following major components:¹⁶
 - a processing plant costs around \$45m
 - fertile egg production (breeder farms) represent an investment of the order of \$60m
 - a modern hatchery complex costs around \$25m
 - a feed mill costs about \$45m.
- 2.15. The two largest integrated companies (Inghams and Baiada) have headquarters in New South Wales, but have operations in all other states. A further two

¹⁰ Australian Chicken Meat Federation Inc - <http://www.chicken.org.au/page.php?id=6>.

¹¹ Australian Chicken Meat Federation Inc - <http://www.chicken.org.au/page.php?id=6>.

¹² Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 5.

¹³ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p10.

¹⁴ Ibid.

¹⁵ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 11.

¹⁶ Australian Chicken Meat Federation Inc - <http://www.chicken.org.au/page.php?id=6>.

major processors are located in the Sydney Basin; another processor is located in Byron Bay (NSW), one in Mt Cotton (QLD), one in Bendigo (VIC) and one in Thomastown (VIC).¹⁷

- 2.16. Inghams and Baiada process around 80 percent of chicken meat produced in Western Australia.¹⁸ Finesse and a number of smaller processors provide the balance of chicken meat processing in Western Australia.

Inghams Enterprises Pty Limited

- 2.17. Inghams is a family owned company, which began in Australia in 1918¹⁹, and is now the largest chicken meat producer in Australia.²⁰ Inghams is also the second largest producer in Western Australia and is a fully integrated business, with a processing plant north of Perth in Osborne Park, its own feed mill in Wanneroo, a hatchery and nine parent breeder farms.²¹ Inghams also has a chicken meat growing farm in Western Australia and imports some chicken meat from its processing plant in South Australia.²² Inghams has 17 contracted growers in Western Australia.

- 2.18. In the eastern states, Inghams owns 9 primary processing plants and 9 further processing plants, breeder farms and 10 feed mills.²³

Baiada Poultry Pty Ltd

- 2.19. Baiada is the largest chicken meat producer in Western Australia and the second largest in Australia.²⁴ In Western Australia, Baiada's business operations include the Steggles brand of chicken products (previously owned by Bartter) and a processing plant in Osborne Park. Baiada also imports chicken meat from interstate.²⁵ Baiada has 14 contracted growers in Western Australia.

- 2.20. In the eastern states, Baiada owns a feed mill in New South Wales, processing plants in Queensland, Victoria and 3 in New South Wales, breeding farms, hatcheries and protein recovery facilities.

¹⁷ Ibid.

¹⁸ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 6.

¹⁹ Inghams Enterprises Pty Limited – www.ingham.com.au/enterprises/sitedocument.aspx?docId=1097.

²⁰ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 6.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 6.

²⁵ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 6.

Finesse Foods (Aust) Pty Ltd

2.21. Finesse operates a chicken processing plant in Bunbury, an abattoir in Dardanup and produces raw, deboned poultry as well as cooked chicken meat. Finesse provides three different chicken ranges, namely Free Range Chickens, Barn Raised Chickens and Margaret River Chickens. Finesse has 5 contracted growers in Western Australia.

2.22. On 2 November 2010, receivers were appointed to Finesse Foods.²⁶

²⁶ *Receivers and Managers appointed to Finesse Foods*, media release, www.deloitte.com.

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. A summary of submissions received is provided below, copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/AuthorisationsRegister and by following the links to this matter.
- 3.2. Broadly, the WABGA submits that the proposed arrangements will produce the following public benefits
 - greater opportunity for collective grower input into their contractual terms and conditions
 - greater comparison of grower performance through the creation of benchmark and pool systems
 - reduction in information asymmetry from the growers' perspective in negotiating with processors to the extent that collective negotiations with growers may provide growers with greater access to relevant industry and market information
 - transaction and administrative cost savings for both growers and processors compared with the development and maintenance of individual contracts with each grower.
- 3.3. The WABGA submits that the public detriments generated by the arrangements are low because the current level of competition between members of the proposed bargaining groups is low and the proposed arrangements are voluntary.
- 3.4. Inghams provided two submissions, each stating that they support collective bargaining by their growers consistent with their arrangements in other states. Inghams did however raise a number of concerns with the WABGA's application. In particular Inghams submitted that proposed arrangements should not permit common advisors between groups; that the proposed collective bargaining process should be voluntary; that individual grower be permitted to 'opt out' of the collective bargaining process; that any authorisation granted should not endorse or require the adoption of prescriptive processes and terms and conditions as proposed by the WABGA in its application.
- 3.5. The Australian Chicken Growers' Council Limited (ACGC) provided a submission stating that they support the application for authorisation made by the WABGA. The ACGC stated that collective bargaining would significantly reduce transaction costs compared to any individual contract negotiations that would occur in the absence of authorisation by the ACCC.
- 3.6. The Western Australian Department of Agriculture and Food (WA DAF) provided a submission noting that it was supportive of the request for interim authorisation and that it considers authorisation to be an important step in an orderly transition to a deregulated environment.

4. ACCC evaluation

4.1. The ACCC's evaluation of the proposed collective bargaining arrangement is in accordance with test(s) found in the following sections of the Act:

- 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.
- 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.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The relevant areas of competition

4.3. The WABGA submits there are two principle markets relevant to its application. The first is the market for broiler chicken growing services in Western Australia, and the second is the market for processed chicken meat.

4.4. As noted in paragraph 1.14²⁷, the ACCC has previously considered a number of applications for collective bargaining arrangements in relation to chicken meat

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

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

- regional based markets for the provision of broiler chicken growing services to processors, and
- regional markets for the supply of processed chicken which extended beyond state boundaries to adjoining states.

The market for broiler chicken growing services

- 4.5. The ACCC notes that the nature of broiler chicken growing services places a number of practical limitations on the growing service. In practice broiler growing farms tend to be located proximate to a processor's 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.
- 4.6. As a consequence, the majority of a processor's growers are typically located within a 1-1.5 hour drive from the processing facility they supply. According to the WABGA the processing plants of Inghams and Baiada are located at Osborne Park while the processing plant operated by Finesse Foods is located at Bunbury. Broiler chicken growers in Western Australia providing growing services to Inghams are predominantly located north of Perth, while growers providing services to Baiada are predominantly located in the southern Serpentine area. WABGA notes that Finesse Foods draws its growing services from both the north and south of Perth.
- 4.7. In its Final Report ERAWA concluded that the Western Australian market structure for chicken meat growing services can be described as a number of regional monopsonies – that is, regional markets in which a large number of sellers (i.e. broiler growers) sell their services to a single buyer (i.e. the processing company to which the growers belong).²⁸ The ERAWA noted that this market structure is largely the result of economic factors that make it cheaper for chicken meat to be processed by a few large companies rather than by many processors.²⁹ In this respect the processing sector in Western Australia is dominated by Inghams and Baiada with over 80% of growers contracted to one of these companies.³⁰ It was also noted that switching opportunities for growers (between processors) are limited.³¹

²⁸ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, at page 31.

²⁹ *Ibid*, at page 33.

³⁰ *Ibid*.

³¹ *Ibid*.

The market for processed chicken meat

- 4.8. 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 the shelf life of the product can be maximised. Although such shelf life can be theoretically met by processors with plants up to 1,000 kilometres from a customer, most processors do not transport product for more than 12 hours for cost and logistical purposes.
- 4.9. The ACCC's market inquiries in considering Baiada 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 their processing plant is located.³² 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 to Victoria
 - Queensland processors sell a small amount of chicken in NSW
 - in Victoria, chicken which is not sold within the state (relatively small volumes) is sold in NSW, South Australia and Tasmania.
- 4.10. In considering Baiada Poultry's acquisition of Bartter Enterprises, the ACCC noted that all chicken processed in Western Australia and Tasmania is consumed within these states due to the smaller volumes produced and geographic isolation.
- 4.11. The ERAWA report notes³³ that Bartter Enterprises submitted that
- from 2008-2010, Western Australian processors imported approximately 14.0 per cent of all chicken meat consumed in Western Australia
 - the cost of transporting chicken from South Australia to Western Australia fell from over 40 cents per bird in 1975 to a 10 year average (from 2000 to 2010) of around 22 cents per bird.

The counterfactual

- 4.12. 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.³⁴
- 4.13. 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

³² ACCC, *Public Competition Assessment: Baiada Poultry Pty Ltd – propose acquisition of Bartter Enterprises Pty Ltd*, 27 February 2009.

³³ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 64.

³⁴ *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.

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

- 4.14. The ACCC notes that until recently the Western Australian chicken industry operated under the terms of the CMI Act. A report prepared by the ERAWA recommended that the CMI Act be repealed. The Minister for Agriculture and Food subsequently wrote to the WABGA advising that the CMI Act would be allowed to expire on 31 December 2010.³⁵
- 4.15. Absent the statutory protection provided by authorisation, it is likely that growers would seek to negotiate the terms and conditions of their contracts with their individual processor or accept standard form contracts.
- 4.16. The ACCC has previously considered numerous applications for small primary producers to collectively bargain with the processors for 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 and conditions.
- 4.17. In respect of chicken growing services there is very little capacity for growers to change the services they offer, for example from broiler growing to laying, due to the specificity of a growers assets and the associated costs of adapting these assets for an alternate use.
- 4.18. During their contract period growers will only provide growing services to their nominated processor.³⁶ The ACCC notes that there has been longer term switching between processors by growers in Western Australia - two growers for Finesse Foods were once Inghams growers and three are ex-Bartter growers. While noting this, the ACCC accepts that there are switching barriers which restrict a grower’s ability to change processors.³⁷
- 4.19. In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, the WABGA member growers are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.
- 4.20. 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

³⁵ Section 29, *Chicken Meat Industry Act 1977*.

³⁶ The ACCC understands that processors may on occasion ‘swap growers’. The ACCC understands such swaps do not occur during an active growing cycle.

³⁷ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 30.

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

4.21. 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.³⁸

4.22. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstances where there are market failures (for example, due to information asymmetries³⁹ or externalities⁴⁰), regulation and/or restrictions on competition may be required to deliver efficient outcomes.

4.23. Broadly, the WABGA submits that the proposed arrangements will produce the following public benefits

- greater opportunity for grower input into their contractual terms and conditions
- greater comparison of grower performance through the creation of benchmark and pool systems
- reduction in information asymmetry from the growers' perspective in negotiating with processors to the extent that collective negotiations may provide growers with greater access to relevant industry and market information
- transaction and administrative cost savings for both growers and processors compared with the development and maintenance of individual contracts with each grower.

Improving economic efficiency

4.24. As noted previously the Western Australian market for broiler chicken growing services can be described as a number of regional monopsonies. In these markets a large number of sellers (broiler growers) sell their services to a single buyer (the processing company). As the only purchaser of a good or service, a monopsonist may dictate terms to its suppliers. There are a number of market failures, or inefficiencies, which may arise in a monopsony market, including

- in a monopsony market production can be lower than the economically efficient level.

38 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.

³⁹ This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would.

⁴⁰ Negative externalities occur when the consumption or production of a good imposes additional costs on others that are not taken into account in purchasing or production decisions.

- a monopsonist may capture a greater share of the available returns or profits. The lower return provided to sellers in monopsony markets can result in lower than optimum investment by sellers.
- monopsony markets can feature ‘hold-up’ – which occurs when two parties would be better off working together cooperatively, but do not do so, because one party fears that by entering into the contract they will increase the bargaining power of the other party and potentially reduce their own profits. Hold-up can result in investment levels which are below the socially optimal level.

4.25. In the context of the WABGA’s application for authorisation two additional potential forms of market failure are relevant

- information asymmetry - is a common feature of markets and occurs when a market participant knows something that the other market participants do not. This information may be private in nature, for example how much a purchaser is willing to bid at auction for a particular good, or it may be available but only to those participants with sufficient financial resources to obtain it, for example complex cost/benefit analysis provided by expert advisers. As noted previously, in the Western Australian market for broiler chicken growing services the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, the WABGA member growers are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.
- transaction costs may result in markets failing to achieve efficient (optimal) outcomes. This is because transaction costs raise the cost to each participant of engaging in the transaction. By raising a buyer’s costs, or reducing the net price received by sellers, transaction costs lead to less exchange (trade) than would otherwise occur absent the transaction costs. In the Western Australian market for broiler chicken growing services transaction costs can deter grower participation in the negotiation process. These transaction costs reduce the level of input a grower has in developing their contracts with processors and result in less efficient outcomes.

4.26. In some circumstances anti-competitive conduct, such as the proposed collective bargaining arrangements, can help market participants to respond to market failures.

Greater input into contracts

- 4.27. 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 scope for growers to switch between processors
 - 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 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.
- 4.28. 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.
- 4.29. The ACCC considers that the proposed collective bargaining arrangements are likely to improve growers' bargaining position in negotiations with processors and provide 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.
- 4.30. In its submission Inghams has noted its opposition to the prescriptive processes and terms and conditions proposed by the WABGA as part of its authorisation application. In March 2010 the WABGA amended its application to provide that the matters set out in annexures A and B to its application are intended to be indicative only. It was noted that all matters in relation to the manner in which collective bargaining will be undertaken and the form of any contracts will be open to negotiation between the parties and will not be mandatory.

Information asymmetry

- 4.31. The WABGA argues that individual growers are disadvantaged in negotiating with processors by reason of information asymmetry as in most cases the majority of relevant industry and market information is held by processors. The WABGA submits that collective bargaining is likely to enable individual growers to share industry and market information for the benefit of the members of the grower bargaining group.
- 4.32. As noted previously, the ACCC accepts that information asymmetry may exist where processors as a result of access to larger resources may be more informed about market conditions and prices than growers. Through the pooling of their knowledge and utilising their elected negotiating representatives individual

growers may be able to reduce this information asymmetry, resulting in more efficient market outcomes and benefits to the public.

Transaction costs

- 4.33. The WABGA submits that collective bargaining results in considerable cost savings compared to arrangements involving negotiation of individual contracts. In particular, the WABGA states that collective bargaining will reduce transaction costs for both growers and processors, and reduce ongoing contract administration costs for processors.
- 4.34. The ACCC considers that, in the absence of authorised collective bargaining, it is likely that growers will seek to negotiate contracts with processors individually. The ACCC notes that a consequence of the imbalance in bargaining positions between the parties is likely to be the offering of standard form contracts by processors. In this environment growers are likely to have limited input into the terms and conditions of their contracts. There would however still be 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 the expiration of previous government regulation of the industry, never had to negotiate contracts directly with processors on an individual basis. Accordingly, the costs they would be likely to incur in doing so would be higher than ordinarily would be the case. These costs may be able to be consolidated and shared where growers negotiate collectively with processors.
- 4.35. The ACCC accepts that under the proposed collective bargaining arrangements, growers may be able to share and consolidate transaction and administration costs associated with contracting, relative to a situation where individual contract negotiations occur. To this extent, the ACCC accepts that the proposed arrangements may result in public benefits.

Promoting optimal levels of investment

- 4.36. The WABGA submits that collective bargaining is likely to lead to more effective grower input into the terms and conditions of their contracts, which may foster an environment for growers of greater contract certainty and in turn an incentive for growers to invest in their business with resulting gains in efficiency.
- 4.37. In its report the ERAWA noted that evidence provided to it as part of its inquiry suggested that Western Australian output is not expanding and is under significant pressure from interstate imports.⁴¹ The ERAWA concluded that, rather than being evidence of hold up, it was possible that there was a general reluctance to invest due to uncertainty about future production levels and returns. The issue of industry expansion was also noted by the WA DAF who noted that modest on-going increases in per capita consumption of chicken meat

⁴¹ Economic Regulation Authority of Western Australia, *Inquiry into the Chicken Meat Industry Act 1977: Final Report*, p. 36, 37.

coupled with a projected population increase of between 800,000 and 1.5 million by 2030 indicates that the state will need at least 40,000 tonnes of additional chicken meat annually. WA DAF notes that it is in discussions with processors about future investment.

- 4.38. The ACCC notes that the collective bargaining proposal, by providing a mechanism through which parties may address common contractual problems in a more streamlined and effective manner, could assist the industry in achieving optimal levels of investment.

Comparison of grower performance through the benchmark and pool systems

- 4.39. The WABGA submits that pool systems assume a group of growers providing services to the same processor under the same conditions, so that their performance can be compared. The WABGA argues that collectively negotiated arrangements readily lend themselves to comparing the performance of growers. The WABGA states that absent the collective agreements, growers would be on individual contracts which would need to be standard form contracts to facilitate the comparison of grower performances.

- 4.40. The ACCC considers that appropriate performance measures which promote efficiency can result in outcomes that are in the public interest, for example by incentivising optimal levels of investment. The ACCC notes that the proposed collective bargaining arrangements are voluntary and as such any performance measures will only be implemented with the agreement of both parties to the negotiation process.

ACCC conclusion on public benefits

- 4.41. The ACCC accepts that the collective bargaining arrangements are likely to result in the following public benefits:

- greater input into contracts
- potential reductions in information asymmetry
- potential reductions in transaction costs
- potential improvements in the level of industry investment.

Public detriment

- 4.42. 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.⁴²

- 4.43. 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.

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

- 4.44. 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.
- 4.45. In assessing the potential detriment of the proposed collective bargaining arrangements, the ACCC has considered the following three possible anti-competitive effects which are likely to occur in the primary areas of competition:
- reduced economic efficiencies
 - increased potential for collective activity beyond that authorised
 - effect on competitors outside the collective bargaining arrangement.

Reduced economic efficiencies

- 4.46. Where proposed collective bargaining arrangements involve only a small proportion of participants in relevant markets, there is likely to be little risk of anti-competitive detriment.
- 4.47. Where this is not the case, the ACCC considers the anti-competitive effects of collective bargaining arrangements are likely to be limited when the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties 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.
- 4.48. With respect to these four features as they relate to the WABGA's proposed collective bargaining arrangements, the ACCC notes the following:

Current level of negotiations

- 4.49. 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.
- 4.50. 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.

4.51. 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

4.52. 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.

4.53. Importantly in this respect, the grant of authorisation to the 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.

4.54. In their submissions both the WABGA and Ingham's have noted the importance of voluntary participation in reducing the potential detriments to competition that may arise under a collective bargaining arrangement. The ACCC notes that 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 their 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

4.55. The ACCC considers that where the size of the bargaining group is restricted, an 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.

4.56. Inghams has submitted that it is important for confidentiality and the competitive process that arrangements with one processor do not extend across the other negotiating groups. It has also noted that common advisers should not be permitted under any authorisation granted by the ACCC.

4.57. In general, the ACCC considers that limiting bargaining groups (for example by geography, or by 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.

4.58. In revising its application the WABGA has submitted that no participant in, or advisor to, any grower bargaining group will have any involvement with any other bargaining group in sharing knowledge about the bargaining process or

outcomes and/or provide any other assistance in relation to contract negotiations to any other bargaining group. In addition to this the grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group.

- 4.59. These restrictions on the composition and coverage of bargaining groups 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

- 4.60. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because a party, faced with the threat of withdrawal of supply/acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 4.61. The WABGA 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

- 4.62. The WABGA acknowledges that the proposed collective bargaining arrangements may result in higher fees being paid to growers than if individual negotiations were to occur. The WABGA argues that any increase in grower fees is unlikely to be passed onto consumers given the significant purchasing power of the large buyers in the wholesale processed chicken market. The WABGA contends that this is particularly so because the growing fee constitutes a relatively small percentage of the retail price for chicken.
- 4.63. 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.
- 4.64. 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.
- 4.65. In particular, as noted, it would still be open for 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 barriers limit the short term ability of growers change processors even where unfavourable terms and conditions are offered. These factors limit the growers' countervailing bargaining power in negotiations with processors even when negotiating as a group.

- 4.66. 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.
- 4.67. Rather, any increase in fees paid to growers as a result of the collective arrangements is likely to reflect either growers having more effective input into contracts (allowing growers and processors to more effectively tailor contracts to their needs), and/or the cost savings associated with negotiating as a group, and/or improvements in the level of grower investment.
- 4.68. As noted, 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 level 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 efficiency.
- 4.69. The ACCC does not consider that an increase in prices paid to growers that reflect improved 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

- 4.70. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.71. In the context of applying the net public benefit test in section 90(8)⁴³ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁴⁴
- 4.72. 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. This improved grower input has the potential to result in improvements in the level of industry investment and to reduce information asymmetry.
- 4.73. The collective bargaining arrangements are also likely to generate some transaction cost savings for both growers and processors.

⁴³ 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.

⁴⁴ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

4.74. The ACCC considers that the collective bargaining arrangements are unlikely to result in significant anti-competitive detriment having regard to the following:

- the level of negotiations between individual growers and processors is likely to be low absent the collective bargaining arrangements
- the arrangements are voluntary for all parties
- grower groups may only comprise growers supplying or proposing to supply growing services to the processor affiliated with their group
- the proposed arrangements do not permit common representation across bargaining groups
- the arrangements do not include boycott activity.

4.75. 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(5A)/90(5B) and sections 90(6)/90(7) are met.

Length of authorisation

4.76. The Act allows the ACCC to grant authorisation for a limited period of time.⁴⁵ 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.

4.77. The WABGA seeks authorisation for a minimum period of five years.

4.78. The ACCC proposes to grant authorisation to permit collective bargaining by the WABGA's processor grower groups, on behalf of their respective members, with the processor to whom they provide broiler chicken growing services for a period of five years.

⁴⁵ Section 91(1).

5. Draft determination

The application

- 5.1. On 8 February 2011, the Western Australian Broiler Growers' Association lodged application for authorisation A91262 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91262 was made using Form B Schedule 1 of the Competition and Consumer Act 2010. The application was made under:
 - Section 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 (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
 - Section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.3. The WABGA seeks authorisation for its member broiler chicken growers to form collective bargaining groups and engage in collective negotiations with their nominated processor, namely Inghams Enterprises Pty Limited, Baiada Poultry Pty Ltd or Finesse Foods Pty Ltd.

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 conduct for which authorisation is sought is 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.

Conduct for which the ACCC proposes to grant authorisation

- 5.5. The ACCC proposes to grant authorisation under section 88 of the Act to the WABGA for its current and future member broiler chicken growers to form collective bargaining groups and engage in collective negotiations with their nominated processor, namely Inghams Enterprises Pty Limited, Baiada Poultry Pty Ltd or Finesse Foods Pty Ltd.
- 5.6. In particular,
 - growers are authorised to form bargaining groups based on the processor for whom they grow, with collective bargaining to occur on a processor by processor basis
 - no participant in, or advisor to, any grower bargaining group will have any involvement with any other bargaining group in sharing

knowledge about the bargaining process or outcomes and/or provide any other assistance in relation to contract negotiations to any other bargaining group

- the matters set out in annexures A and B of the WABGA's application are open to negotiation between the parties and are not mandatory.

5.7. This draft determination is made on 12 May 2011.

5.8. The attachments to this determination are part of the draft determination.

Interim authorisation

5.9. At the time of lodging the application on 8 February 2011, the WABGA requested interim authorisation for the proposed collective bargaining arrangements. The ACCC granted interim authorisation on 23 February 2011.

5.10. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

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

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (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 A91262

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

DATE	ACTION
8 February 2011	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
17 February 2011	Closing date for submissions from interested parties in relation to the request for interim authorisation.
23 February 2011	The ACCC granted interim authorisation to the WABGA for its member growers to collectively bargain with their respective processor on contract terms and conditions in the newly deregulated environment while the ACCC considers the substantive application.
3 March 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
7 March 2011	Amended application received from the WABGA.
12 May 2011	Draft determination issued.

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

Competition and Consumer 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.⁴⁶

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.⁴⁷

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.⁴⁸

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 future⁴⁹
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁵⁰

⁴⁶ *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.

⁴⁷ *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.

⁴⁸ Section 91(3).

⁴⁹ Section 88(10).

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁵¹. 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.⁵² 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.⁵³

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.⁵⁴ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁵⁵

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁵⁶ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁵⁷

⁵⁰ Section 88(6).

⁵¹ Section 90(10A).

⁵² Subsection 91A(1).

⁵³ Subsection 87ZD(1).

⁵⁴ Subsection 91B(1).

⁵⁵ Subsection 91B(3).

⁵⁶ Subsection 91C(1).

⁵⁷ Subsection 91C(3).