



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of A91048 and substitution
of authorisation A91321

lodged by

the Victorian Potato Growers Council

in respect of

collective bargaining with potato buyers

Date: 5 November 2012

Authorisation number: A91321

Commissioners: Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to revoke authorisation A91048, granted in 2007, and grant authorisation A91321 in substitution. The proposed grant of authorisation is for five years, to permit Victorian Potato Growers Council (**VPGC**) members to collectively bargain with potato buyers. The ACCC does not propose to grant authorisation to VPGC members to set a recommended price for seed potatoes.

The ACCC proposes to revoke interim authorisation when the final determination is issued. However, interim authorisation will remain in place until revoked.

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The applicants to the authorisation and interested parties may also request a pre-decision conference be held to allow oral submissions on the draft determination.

The conduct

The VPGC is seeking authorisation for five years for an arrangement between present and future members of VPGC to:

- collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers
- permit VPGC to assist its members in their negotiations with processors and other potato buyers (including in relation to dispute resolution)

(the **Collective Bargaining Conduct**) and

- to establish a price recommendation for the supply of seed potatoes to other potato growers in Australia

(the **Seed Price Recommendation**).

Draft decision

The ACCC proposes to grant authorisation for five years to allow present and future members of VPGC to engage in the Collective Bargaining Conduct.

On the basis of the information before it, the ACCC has formed the preliminary view that the Collective Bargaining Conduct is likely to result in public benefit that would outweigh the likely public detriment constituted by any lessening of competition. In particular, the ACCC considers the proposed Collective Bargaining Conduct is likely to result in public benefits in the form of more efficient contracts and business operations, dynamic efficiencies and better informed markets in the potato industry.

The ACCC acknowledges the concerns raised by McCain's experiences under the previous authorisation. However, the ACCC considers it is unclear whether McCain's experiences have been a result of the collective negotiations or the difficulty of

negotiating an overall efficient outcome under adverse industry conditions. In particular, the ACCC considers the Collective Bargaining Conduct is unlikely to result in public detriment in the form of increased transaction costs, anti-competitive potato prices or increased industry instability.

The ACCC notes that participation in the Collective Bargaining Conduct is voluntary for both VPGC members and potato buyers. VPGC has not sought authorisation of any collective boycott arrangement.

The ACCC does not propose to grant authorisation to permit members of VPGC to establish the Seed Price Recommendation. On the basis of the information before it, the ACCC has formed the preliminary view that the Seed Price Recommendation is unlikely to result in public benefit that would outweigh the likely public detriment constituted by any lessening of competition. In particular, the ACCC considers the proposed Seed Price Recommendation is unlikely to lead to significant information sharing efficiencies above and beyond those likely to arise from Collective Bargaining Conduct by seed growers. In addition, the ACCC considers the Seed Price Recommendation is likely to result in significant public detriment from prices being set above the competitive level for Victorian produced seed potatoes.

Interim authorisation which was granted on 25 July 2012 permitted VPGC members to establish the Seed Price Recommendation. However, the ACCC proposes to revoke interim authorisation when it issues the final determination. Until it is revoked, interim authorisation remains in place.

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Abbreviations

2007 Authorisation	authorisation A91048, granted to the Victorian Potato Growers Council in 2007 in respect of collective bargaining conduct with potato buyers
ACCC	Australian Competition and Consumer Commission
The Act	the <i>Competition and Consumer Act 2010</i>
McCain	McCain Foods (Aust) Pty Ltd and Safries Pty Ltd
SEPGA	the South East Potato Growers Association
VPGC	the Victorian Potato Growers Association

The application for authorisation

Reauthorisation process

1. On 10 July 2012, the Victorian Potato Growers Council (**VPGC**) lodged an application for the revocation of A91048 and the substitution of authorisation A91321 (**reauthorisation**) with the ACCC under section 91C(1) of the *Competition and Consumer Act 2010* (the **Act**). The VPGC applied for reauthorisation for five years on behalf of itself and its current members (the **Applicants**) and also requested interim authorisation under section 91 of the Act.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹
3. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (reauthorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for reauthorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
4. Relevantly, the previous authorisation, that is A91048 (the **2007 Authorisation**), was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
5. Pursuant to section 177(2) of the Act, which came into force on 24 July 2009, authorisation A91048 is also deemed to have been granted on the basis that it was applied for 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).
6. The substitute authorisation A91321 is also made under section 88(1) and section 88(1A). The main changes of substance proposed by this application for reauthorisation are discussed under 'Conduct'.

¹ See the ACCC's Guide to Authorisation (available from the ACCC website) for details about the authorisation process.

Conduct

7. The VPGC has sought authorisation for five years for an arrangement between present and future members of the VPGC to:
 - a) collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers
 - b) permit VPGC to assist its members in their negotiations with processors and other potato buyers (including in relation to dispute resolution)

(the **Collective Bargaining Conduct**, covering all types of potatoes including ware, processing and seed). The Collective Bargaining Conduct is substantially the same as the conduct authorised under the 2007 Authorisation; and

- c) establish a price recommendation for the supply of seed potatoes to other potato growers in Australia

(the **Seed Price Recommendation**, covers only seed potatoes.) The Seed Price Recommendation was not authorised under the 2007 Authorisation.

Applicants

8. The VPGC is an umbrella group for various individual potato growing representative bodies in Victoria that represent growers of different varieties of potatoes. The VPGC's members are organised into four main sub-groups: the McCain Growers Group, the Potato Crisping Research Group, the Thorpdale Potato Growers Group and Seed Potatoes Victoria (including the Ballarat Seed Potato Growers Group, the Gippsland Seed Potato Growers Group, the Portland Seed Potato Growers Group, the Kinglake Seed Potato Growers Group, and the Otways Seed Potato Growers Group).
9. The VPGC is a member of the Horticulture Policy Council of the Victorian Farmers Federation. Membership of the Victorian Potato Growers Council is via a yearly levy, on top of a base fee required by the Victorian Farmers Federation for membership of that State body. Growers are not required to be members of the VPGC and can opt out at any stage. Currently around 290 potato growers are members of the VPGC out of over 300 individual potato growing businesses in Victoria.

Related application

10. On 12 July 2012, the South East Potato Growers Association (SEPGA) lodged an application for revocation of A91057 and substitution of authorisation A91322 with the ACCC under section 91C(1) of the Act. The SEPGA applied for reauthorisation for five years on behalf of itself and its current members on similar terms to VPGC's application for reauthorisation. Information received in response to the SEPGA application has also been considered, where relevant, in relation to the VPGC application.

Industry background

11. The types of potatoes to be supplied under the VPGC arrangements are seed potatoes, processing potatoes and ware (or fresh) potatoes.

Ware and processing potatoes

12. Ware potato varieties are suitable for sale to potato wholesalers (referred to as packers) or directly to restaurants and supermarkets. Victorian growers produce around 120,000 tonnes of ware potatoes per year. Most potatoes are grown and sold under contracts in which the potato growers bear significant financial risk if they are unable to supply contracted volumes.²
13. Generally, specific processing potato varieties are used for processed products, such as frozen potato chunks or crisps. VPGC members supply three substantial processing potato buyers: McCain, Arnott's Snackfoods and Smiths Snackfoods. Once processed, the potatoes are generally sold in frozen or crisp form to retailers (particularly supermarkets) and the food service industry. Victorian growers produce around 120,000 tonnes of processing potatoes per year (including crisping varieties).
14. A submission from McCain notes that the price of potatoes accounts for over half of McCain's costs of producing processed potato products in Australia and that Australian potato prices are relatively high. Manufacturers of processed potato products in Australia are substantially constrained by imports. The value of imported processed potato products has increased from around \$38 million in 2006/07 to around \$81 million in 2010/11 (around 18% of Australian consumption of processed potato products).³
15. With respect to the supply of potatoes, the ACCC notes that the following factors relating to the potato industry, found in relation to A91048, still apply:
 - a) while potato growing requires significant preparation and investment with little scope to make significant changes to planting schedules and crops within a season, growers may produce other crops (such as other vegetable crops) and there is some flexibility in the composition of their total production over time;
 - b) there is also some capacity for growers to alter the composition and volume of potato crops grown from one season to another, including switching between processing and other types of potatoes, and to grow potatoes for more than one Victorian processor, wholesaler or retailer;
 - c) Victorian processors may acquire potatoes from outside Victoria (although over the long term this may be less cost effective)⁴;
 - d) the fee a buyer pays to the grower for growing a certain quantity of potatoes is a relatively small percentage of the retail price of the final processed product; and

² SEPGA, Oral submission to ACCC staff, 18 September 2012

³ McCain, submission 10 August 2012, pg 9 based on figures from AUSVEG; Department of Primary Industries, Parks, Water and Environment *Potato Market Profile* May 2009 pg 1.

⁴ Depending on the location of the processor's plant and the transportation costs involved.

- e) imported processed potato products provide some competitive constraint on locally processed products.⁵
16. Importation of unprocessed potatoes for human consumption or processing is currently banned. The Department of Agriculture Fisheries and Forestry has released a draft report proposing to permit the import of potatoes for processing purposes from New Zealand, subject to strict phytosanitary requirements.⁶

Seed potatoes

17. Although many VPGC members do not grow seed potatoes for sale, growing seed potatoes (in particular certified seed) is a substantial proportion of VPGC members' businesses with around 70,000 tonnes produced per year. This is also reflected in the fact that 6 of the 9 subgroups within VPGC deal with certified seed potato growing. VPGC members are substantial suppliers of certified seed potatoes nationally with growers in the Thorpdale region alone producing around 25% of the national certified seed potato crop.⁷ Purchasers of potato seed include other potato growers, wholesale seed potato suppliers (which may supply to potato growers or to retail businesses such as nurseries) and end users of processing or ware potatoes (in the case of IP protected varieties).

Purpose and process of seed potato production

18. Potatoes are particularly susceptible to pathogens due to the very low level of genetic diversity within a crop and between varieties. Potato seed certification schemes provide commercial growers with low pathogen planting stock of guaranteed potato variety and assist in the development of new varieties. Accordingly, production of certified seed potatoes involves complex forecasting and associated risk management, with the initial propagating material ordered many months, and potentially years in advance, before the final seed potatoes are suitable for sale. Certified seed potato growing also involves highly specialised equipment and growing techniques, compared to commercial intensive growing of processing and ware potatoes.
19. As an alternative to certified seed potatoes, growers of ware and processing potatoes may multiply out their own seed potatoes or save smaller tubers from the previous year's commercial crop for use as seed potatoes. These may also be sold as uncertified seed potatoes to other growers (subject to intellectual property rights and biosecurity regulations regarding movement of potato material⁸). However, in Victoria, use of uncertified seed potatoes, even on the farm that produced them, is seen as likely to lead to a substantially greater risk of crop losses from pathogens (which may also infect nearby farms). Accordingly the practice is strongly

⁵ ACCC *Final Determination A91048 27 June 2007*, pg 9-10.

⁶ Department of Agriculture, Fisheries and Forestry *Draft report for the review of import conditions for fresh potatoes for processing from New Zealand* 3 July 2012.

⁷ Victorian Farmers Federation *Farming in the Thorpdale Irrigation District, Gippsland Socio-Economic Snapshot* June 2009.

⁸ Victorian Department of Primary Industries *Website – Potato cyst nematode* (<http://www.dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/pest-insects/potato-cyst-nematode>).

discouraged commercially by the Victorian Department of Primary Industries and stringent regulations exist regarding the movement of seed potato material.⁹

20. Potato pathogens present in Victoria (and other parts of Australia) may cause significant partial or total crop losses (whether from the pathogen itself or from the destruction of crops to control it). In addition, there are various pathogens that can contaminate and damage entire stores of potatoes post-harvest. Accordingly, potato buyers are generally reluctant to accept crops with any signs of disease and may require commercial growers to use certified seed potatoes in order to reduce their own risk.
21. The process of growing certified seed potatoes for supply to commercial growers of ware and processing potatoes involves a number of steps in order to minimise the risk of crop loss due to pathogens, broadly:¹⁰
 - a) a laboratory initially produces a new, disease free, seed lot using tissue culturing techniques;
 - b) the plant material needed to grow each variety is supplied to early generation growers (which may be attached to the laboratory) to grow into material suitable for sale to seed potato growers (generally mini-tubers). Early generation growing involves specialized planting and disease screening techniques and a greater investment in equipment such as greenhouses and screen houses as opposed to field planting machinery;
 - c) once sufficient quantities of mini-tubers have been produced, these are then supplied to seed potato growers to grow into larger sized seed potatoes in the field. This may take more than one year, in order to also substantially multiply the number of seed potato tubers. Seed potato growing requires field growing techniques and equipment with some similarities to those used by growers of ware and processing potatoes. However, there are variations due to the smaller size of the starting material, the emphasis on disease avoidance, the greater focus upon multiplication and the desirability of consistent but smaller sized tubers as an end product;
 - d) once sufficient quantities of seed potato are available, the seed potatoes are supplied to commercial growers of ware and processing potatoes.
22. The laboratories, early generation growers and seed potato growers are responsible for maintaining meticulous hygiene measures, testing and inspection in order to minimise the eventual seed potatoes' likelihood of pathogen contamination. The certification schemes are administered by independent bodies such as VICSPA (subject to rules and conditions approved by the relevant government minister).¹¹

⁹ Victorian Department of Primary Industries *Website – Potatoes – management strategies for pests and diseases* <http://www.dpi.vic.gov.au/agriculture/horticulture/vegetables/potatoes/potatoes-strategies-for-pests-and-diseases>.

¹⁰ University of Melbourne *Developing advanced seed potato technology* <http://www.agrifood.info/review/1995/Dowling.html>; Department of Agriculture and Food *Western Australian Certified Seed Potato Scheme Production Rules* http://www.agric.wa.gov.au/objtwr/imported_assets/aboutus/as/spp-1_wa_certified_rules.pdf.

¹¹ VicSPA is a not-for profit body located at the Victorian Department of Primary Industries (Potato Research Station) in Healesville. It certifies laboratories and growers to grow seed potatoes.

23. Most commercial ware and processing potato growers demand this level of disease certification in order to help minimise the risk of crop losses. Government phytosanitary regulations also apply to seed potatoes in most Victorian potato growing areas.¹²

Current process for setting the seed potato price recommendation

24. The current process of setting the Seed Price Recommendation (for varieties not subject to intellectual property protection (IP protected)¹³) is as follows:
- a) each year, all certified seed growers in an area are invited to their district seed group:
 - i) an appropriate price increase, or decrease in some cases, is discussed;
 - ii) factors taken into account include the previous year's fresh market, commercial market and seed market sales, the trends in the industry and the future viability of seed growers;
 - iii) the district group votes on the proposed price increase or decrease, with each member of Seed Potatoes Victoria (one of the VPGC sub-groups) having a vote;
 - b) the results of the district votes are then considered by the Seed Potatoes Victoria committee:
 - i) the committee considers district proposals and comments, the current market and other factors relevant to the seed price;
 - ii) the committee votes on the prices to be recommended; and
 - iii) the committee then publishes the recommended price list and distributes it amongst all members, buyers, merchants and other interested parties.
25. As part of this process (the **Seed Price Recommendation Process**), seed potato growers also coordinate production discussions to ensure that sufficient amounts of each variety of seed required will be produced and available to commercial growers. These discussions take into account expected seasonal variations and demand for various varieties from buyers of processing and ware potatoes.¹⁴
26. The Seed Price Recommendation Process was not authorised under A91048 but VPGC has sought authorisation for this process under A91321.
27. VPGC has stated that the Seed Price Recommendation is a recommendation only and that potato growers and buyers generally depart from the recommended price depending upon other terms and conditions negotiated, the costs faced by the grower or the size of the order. VPGC has also stated that Victorian seed potato

¹² Victorian Department of Primary Industries *Website – Potato cyst nematode* <http://www.dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/pest-insects/potato-cyst-nematode>.

¹³ The intellectual property in new potato varieties may be protected by a standard patent and/or by registration of Plant Breeders Rights. Plant Breeder's Rights extend for 20 years from the date of being granted. Under Plant Breeder's Rights, the owner of the registered variety has exclusive rights to produce, reproduce, ready for propagation, sell, import and export propagating material of the registered variety.

¹⁴ VPGC Submission 6 September 2012 pg 2.

prices are referred to by seed potato growers and buyers in other states when negotiating prices.

28. The ACCC notes that the Seed Price Recommendation Process occurs prior to any collective bargaining with buyers by seed growers. Once the seed price is established, small groups of seed growers may collectively bargain with a few particularly large buyers of seed potatoes which buy from a variety of seed growers. However, little collective bargaining is likely to occur with the majority of seed buyers.

Pricing of seed potatoes for IP protected varieties

29. As an alternative to the above process, seed potato growers may also be contracted to grow out and multiply IP protected seed potatoes by the IP owner. Owners of IP protected potato seed may include processors, supermarkets, wholesalers and agribusiness research facilities.
30. Where the IP owner is an intermediary in the potato supply chain, such as Elders, the IP owner will usually take responsibility for marketing the variety within the industry rather than the seed potato grower. The IP owner in this case generally sets a recommended price for the seed potatoes and takes a commission per ton of seed potatoes sold. Seed growers are free to deviate from the price recommended by the IP owner, including when selling to commercial growers approached by the IP owner. However, VPGC has stated that IP owners do consider VPGC's seed price recommendation when setting their own recommended prices.
31. IP protected potato seed may also be grown as part of a closed loop supply chain. In this situation, the owner of the IP rights selects particular growers to grow the variety, in seed and in commercial form, and then acquires all potatoes produced.

Submissions received by the ACCC

32. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from the main targets of the proposed collective bargaining including McCain Foods, Moraitis, Elders Limited, Smith Snackfoods and Arnott's Snackfoods.
33. In response to interested party consultations on the VPGC reauthorisation and the reauthorisation application by SEPGA, the ACCC received two submissions from McCain Foods (on behalf of itself and its subsidiary Safries, together **McCain**), which address the two applications together. In summary, McCain opposes the reauthorisation applications by VPGC and SEPGA on the basis of its experience of collective bargaining under VPGC's and SEPGA's previous authorisations. In particular, in relation to processing potatoes, McCain submits that the claimed efficiencies from collective bargaining have not arisen and the previously authorised conduct has led to detriment.
34. In addition, McCain notes that the blockading of its Ballarat factory by Victorian growers for four days (as a bargaining tactic by growers) indicates that participation in the collective bargaining process is not voluntary.

35. McCain also raises concerns regarding the likely anti-competitive effects of authorisation of the Seed Price Recommendation.
36. VPGC and SEPGA provided submissions in response to the issues raised by McCain, including a separate submission from the McCain Grower Group (a sub-group of the VPGC). In summary, VPGC submits that collective bargaining and the setting a recommended seed price has not led to detriment but has provided growers with better information about the industry and greater input into contracts.
37. The views of VPGC and McCain are considered in the ACCC's evaluation in this draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

38. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests¹⁵ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
39. In order to measure and assess the effect of the proposed collective bargaining arrangement and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

Applicants' submission

40. VPGC submits that the market relevant to its application is the Victorian potato industry, including buyers and sellers.

ACCC consideration

41. Taking into consideration information received in relation to the 2007 Authorisation and the current application, the ACCC has considered the VPGC application within the context of the following areas of competition:
 - a) the supply of processing potatoes to processors (which is most likely to occur from within geographic regions surrounding each processing facility);
 - b) the supply of ware potatoes to wholesalers, retailers and the food service industry (which, subject to state and territory phytosanitary regulations is national); and
 - c) the supply of seed potatoes to various buyers including other potato growers (which, subject to state and territory phytosanitary regulations is national).
42. In Victoria, large competitors to McCain for the acquisition of processing potatoes are Arnott's Snackfoods and Smiths Snackfoods. Significant buyers of ware

¹⁵ Sections 90(6), 90(7), 90(5A) and 90(5B) of the Act. The relevant tests are set out in full at Attachment A.

potatoes include Elders Limited and Moriatis Group (which are packers) and supermarkets. Elders also acquires large quantities of seed potatoes.

43. Overall, the ACCC does not consider it necessary to precisely define the markets in this instance, as the outcome of the assessment would not be affected.

The future with and without test

44. The ACCC applies a 'future with-and-without test' to identify and weigh the public benefit and public detriment generated by the conduct for which authorisation has been sought.¹⁶
45. 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.
46. VPGC submits that if the reauthorisation is not granted, growers will negotiate contracts for the supply of potatoes individually with processors and other buyers. These contracts will be largely standard form and may be provided to growers on a take-it-or-leave it basis. McCain submits that it will negotiate contracts with potato growers on an individual basis absent the reauthorisation.
47. The ACCC considers that if the reauthorisation is not granted, Victorian potato growers will continue to negotiate contracts and prices for the supply of potatoes individually with processors and other buyers.
48. Absent authorisation of the Seed Price Recommendation, the ACCC considers that VPGC members will not discuss prices for seed potatoes in accordance with the Seed Price Recommendation Process. The ACCC considers that they may still engage in price discussions within the context of the collective bargaining conduct. Further, the ACCC considers that IP owners of IP Protected varieties will continue to provide growers with a recommendation as to the price of these varieties. The ACCC considers it likely that these recommended prices and the collective bargaining negotiations over seed potato price will provide some price signalling to the market absent authorisation of the Seed Price Recommendation.

Public benefit

49. Public benefit is not defined in the Act. However, the Australian Competition Tribunal (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.¹⁷

50. In general, competition can be relied upon to deliver the most efficient market arrangements. However, in circumstances where there are market failures (for

¹⁶ *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.

¹⁷ *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.

example, high transaction and bargaining costs, market power or information asymmetries) regulation and/or restrictions on competition (such as collective bargaining arrangements) may be required to deliver efficient outcomes.

51. Collective bargaining often seeks to address market failures associated with high transaction costs, information asymmetries and/or bargaining power held by the target in the area of competition in which the collective bargaining takes place.
52. Horizontal agreements of the type proposed by VPGC in relation to seed potatoes, may seek to address uncertainty about future market conditions by providing more information about actual and expected demand and supply. By reducing uncertainty, growers may be better able to manage risk associated with unexpected price volatility and thus make more efficient production and investment decisions, including improvements in product quality.
53. The VPGC submits that the proposed Collective Bargaining Conduct will deliver a range of public benefits, including:
 - a) transaction cost savings;
 - b) the collective bargaining will address the weak bargaining position of individual growers in comparison to large potato buyers; and
 - c) the information and consultation involved in collective bargaining will permit growers to present a considered position to potato buyers.
54. VPGC notes that although some potato buyers will not be willing to deal with potato growers on a collective basis, growers would like the opportunity to go down this path if the companies decide differently in the future.
55. In relation to the Seed Price Recommendation, the VPGC submits that the public benefits include a reduction in the risk that commercial ware and processing potato growers will be unable to meet their contracted volumes, through better dissemination of market information and coordination between seed potato growers.
56. The ACCC's assessment of the likely public benefits from the Collective Bargaining Conduct and the Seed Price Recommendation follows.

Transaction cost savings

VPGC

57. VPGC submits that authorisation of the Collective Bargaining Conduct will generate public benefits from transactions cost savings from a single and considered view being presented to potential buyers. It submits that a single point negotiation on key contractual terms actually achieves efficiency in contract management rather than individually negotiating terms and then managing customised parameters on multiple contracts. In addition, the Collective Bargaining Conduct will permit potato growers to pool bargaining skills and access legal and management advice in a cost effective manner.

58. For example, growers have sufficient scale as a collective to enable them to access professional services through the Victorian Farmers Federation,¹⁸ including legal and management advice. These professional services contribute to the robustness and quality of the contracts negotiated.

McCain's submissions

59. McCain questions whether transaction cost savings are likely to arise as claimed by VPGC in relation to the Collective Bargaining Conduct. In particular, McCain submits that VPGC's model of collective negotiation has resulted in protracted negotiations, which have increased transaction costs. It submits that the terms of the collective negotiations are limited to the Russet Burbank Benchmark or **RBB Price**, meaning that additional negotiations with individual growers are still required on volume, potato varieties, planting timeframes etc.

60. Both McCain and VPGC submit that, ideally, processing potato contracts should be settled by September each year (before planting) in order to give certainty to both buyers and sellers of potatoes and to allow forward planning.

61. McCain submits that, since 2007, its parallel collective negotiations with SEPGA and VPGC have involved increasing delays even though the negotiations have commenced earlier every year. For example, in 2007, negotiations commenced in July and concluded in November. In 2010, negotiations commenced in May and concluded for SEPGA in September 2010. In March 2011, a group of growers blockaded McCain's Ballarat plant. To resolve the situation, McCain offered VPGC a higher price for the 2011 and 2012 seasons. McCain submits that SEPGA then demanded that McCain also offer this higher price to its growers. McCain agreed to this pay the higher price to SEPGA growers and contracts were ultimately finalised in May 2011.

62. In 2012, McCain chose not to participate in the collective bargaining process with either SEPGA or VPGC. It negotiated all terms with growers individually. These negotiations commenced in May 2012 and concluded the same month.

Response to McCain's submissions

63. The McCain Growers Group (MGG), a subgroup of the VPGC, submits that collective bargaining does not delay settlement of contracts. MGG submits it has always sought early commencement and rapid conclusion to the negotiations, and would also encourage more long term agreements to remove delays and improve supply chain certainty.

64. VPGC submits that the delays in the negotiation process have been caused by McCain and notes that growers have proposed a number of ways to improve negotiating efficiency but that these have not been implemented by McCain. It notes that, in contrast to McCain's approach, Simplot (the Tasmanian buyer) announced in February 2011 that it was increasing its prices to growers for two years to lock in contracts for supply.

¹⁸ The ACCC understands that the VFF offers these services as a volume service to groups of members rather than individual growers.

ACCC consideration

65. Each party to a contract negotiation will incur transactions costs. These costs will tend to rise with the complexity of the contract. Negotiation will cease when the transactions costs of continuing to negotiate exceed the benefits that are derived from continuing to seek mutually beneficial contractual arrangements. To the extent that collective bargaining reduces transactions costs, it will facilitate the extent to which the parties negotiate mutually beneficial arrangements and thus facilitate more efficient outcomes.
66. Collective bargaining usually takes place in the context of a large number of sellers (or buyers) negotiating with a smaller number (often one or two) of buyers (or sellers). By pooling their resources, the members of the bargaining group are able to reduce the cost of negotiating compared to that which would be incurred if each grower negotiated individually. This may enable the group to collectively negotiate a more efficient contractual arrangement than if each member of the group negotiated individually.
67. The ACCC notes also that each of the submissions from SEPGA and McCain regarding transaction costs reflects each party's own experience but does not fully take account of the impact of collective bargaining on the transaction costs incurred by others.
68. The ACCC accepts that for a target, collective bargaining may take longer and require more resources compared with a situation where, without collective bargaining, a standard form contract would be used where the terms of the contract are largely determined by the target.
69. The ACCC acknowledges that some potato growing businesses are likely to have the scale and experience to individually access legal, management and negotiation services, whether internally or from external sources. For such growers, transactions costs may not significantly impact their ability to negotiate effectively with buyers. However, these larger growers are still likely to benefit from transaction cost savings to the extent that they can share services related to contracting rather than each firm individually acquiring these services. Thus the ACCC considers that the Collective Bargaining Conduct is likely to lead to some transaction cost savings for larger growers.
70. The ACCC considers that, for smaller growers, transactions costs are likely to reduce the extent to which such growers are able to individually negotiate efficient contracts. The Collective Bargaining Conduct may significantly reduce transactions costs for such growers and facilitate their access to legal, bargaining and management services by reducing the individual cost of purchasing such services. To the extent that transactions costs are lower, this will facilitate the negotiation of more efficient contractual arrangements with buyers.
71. Regarding the Seed Price Recommendation, the ACCC considers it is possible that this conduct will generate transaction cost savings. However, no interested parties have made claims in relation to this point.

Conclusion

72. The ACCC considers that the proposed Collective Bargaining Conduct is likely to lead to transaction cost savings for VPGC members. To the extent that these

transactions costs savings improve the ability of the parties to negotiate more efficient contracts, this would be a public benefit. In addition, the ACCC considers it is unclear whether the greater overall length of the collective bargaining process over the last five years, as compared by McCain with individual negotiations, has been a result of the collective negotiations or the difficulty of negotiating an overall efficient outcome under adverse industry conditions.

73. The issue of efficiencies due to improved grower input into terms and conditions, which VPGC submits will be facilitated by grower access to transaction related services, is discussed in the following section.

Efficiencies from improved grower input into terms and conditions

VPGC

74. VPGC submits that the Collective Bargaining Conduct will result in more efficient contracts through the following mechanisms:

- a) due to an increase in bargaining power held by the growers, leading to greater grower input; and
- b) as discussed in the Transaction Cost Savings section, growers' ability to pool resources, provide support and security to each other, and access legal and other advice on a collective basis.

75. In relation to the first point, VPGC submits there is a clear imbalance of bargaining power between McCain, which is part of a multinational group of companies, and an individual potato grower in terms of access to specialist negotiation skills, legal and management services. VPGC also notes that potato growers have significant sunk investment in specialised potato growing equipment and skills. In addition, in many cases potato growers can only sell their potatoes to McCain, particularly if they are McCain's IP protected varieties, and have no ability to change crops once the potato crop is planted for the year.

76. VPGC submits that the reauthorisation of the conduct will result in public benefits as a result of redressing the imbalance in bargaining power between large potato buyers and individual potato sellers. In particular, VPGC growers will have more input into their contracts with large potato buyers.

77. In relation to the second point, as noted there are transaction cost savings from negotiating on a collective basis through creation of the economies of scale necessary to allow smaller growers to access legal and other professional services.

McCain's submissions

78. McCain submits that growers are not in a weak bargaining position compared to McCain since McCain is entirely dependent upon growers to supply potatoes of sufficient quality, at the right time and at acceptable cost. In addition, McCain has significant sunk investment in its factories and processes, which cannot be adapted to processing other vegetable types.

79. McCain submits that potato growers commonly grow a variety of other crops and agricultural products and can supply a variety of potato buyers, and are therefore

not locked into a relationship with McCain as a buyer. It further submits that potato growers are large, well informed and sophisticated businesses several of which McCain pays in excess of \$1 million per year. McCain considers that the growers are more than capable of individually negotiating supply contracts. Accordingly, McCain submits that lack of grower input into terms and conditions does not stem from a bargaining power imbalance.

80. In relation to VPGC's overall claim regarding greater grower input into contracts, McCain submits that growers have not attempted to collectively bargain over anything other than the price to be paid to growers. Collective price negotiations have been focused on a single reference price (the RBB Price) and did not result in increased input from individual growers into other aspects of pricing. For example, McCain submits its proposal for incentive payments for potato quality was rejected by VPGC. McCain considers that this did not reflect the interests of the more efficient growers.
81. McCain considers that, in its experience, there are benefits to adopting incentive clauses to facilitate improvements in quality and other areas. McCain considers that these types of provisions can be negotiated with growers on an individual basis and can be implemented in a manner that can be tailored to the particular characteristics and requirements of individual growers. Accordingly, McCain submits that reauthorisation of the Collective Bargaining Conduct is unnecessary in order to achieve contracts that have improved grower input.

Response to McCain's submission

82. VPGC refutes McCain's submission that the negotiating committees only negotiated the RBB. VPGC submits that its committee had significant input regarding terms such as adjusting the tolerance level clause for damaged and diseased potatoes and delivery times. VPGC also submits that the collective bargaining process facilitates growers' access to professional negotiation, legal and management services during the negotiation process. The robustness of negotiation and the growers' contractual arrangements are improved by access to these services.
83. VPGC states that there is disparity between McCain and individual growers and points to the 2012 annual negotiations as an example of the lack of input growers can have without collective bargaining. VPGC submits that McCain made offers on standard form contracts to individual growers on a 'take it or leave it' basis with considerably reduced tonnage offered at a predetermined price. It submits that McCain also reduced the number of contracts it offered to growers in 2012, as it has done at times during previous negotiations, without any recourse for the growers involved.
84. In addition, VPGC notes that the individual nature of the approaches made by McCain limited the growers' ability to access legal advice and other professional services in relation to their contracts due to the poor economies of scale involved. VPGC submits that a number of growers considered themselves to be negotiating at a disadvantage because they lacked access to specialist negotiation skills and market information.

ACCC consideration

85. In relation to the current balance of bargaining power, the ACCC does not consider that a mere change in bargaining power is in itself a public benefit. Rather, the ACCC will consider the likely outcomes resulting from the change in bargaining position arising from the proposed collective bargaining arrangement.¹⁹
86. The ACCC considers that the information provided by McCain, VPGC and SEPGA regarding the process of collective bargaining over the past five years indicates that the bargaining position of growers and buyers can change, at particular points in the production year. For example, if buyers have already entered into downstream contractual supply arrangements with customers, they have a strong incentive to minimise the potential for supply disruptions and thus are likely to be in a weaker bargaining position compared with the bargaining group. This may enable growers to negotiate a more favourable bargaining outcome than would otherwise be the case. This temporary shift in bargaining position is reflected in McCain's response to the blockading of its Ballarat factory for four days in March 2011 by growers (discussed below).
87. Nonetheless, the ACCC considers that, overall and in the long term, the information before it also indicates that large potato buyers are in a stronger bargaining position than individual potato growers. That is, large potato buyers have access to a greater level of information, resources, negotiation skills, legal and management services than the majority of individual potato growers. The ACCC considers that this reality is reflected in the outcome of contracting for the season following the blockade. At this time, McCain successfully reduced overall volumes sourced from Ballarat based VPGC members (as well as other potato growers in Victoria and Tasmania) and a number of members in the region were not offered contracts.²⁰
88. Therefore, despite the issue of the 2011 blockading of McCain's factory, the ACCC considers that the collective bargaining arrangements are likely to improve the bargaining position of potato growers relative to buyers. This is likely to enable growers to have more effective input into their contractual arrangements. The voluntary nature of the collective bargaining arrangements makes it unlikely that McCain (or any other target) would be worse off as a result of the change in relative bargaining strengths.
89. The ACCC notes McCain's submission about its dependence on growers to provide appropriate quality inputs and the nature of its relationship specific investments in plant and equipment. The ACCC considers that growers may also need to make relationship specific investments to achieve the desired product quality and quantities. Thus both buyers and sellers are potentially subject to 'hold-up' by the other party which may reduce the extent to which relationship-specific investments are made. Collective bargaining may reduce the potential for either party to 'hold-up' the other party by facilitating more efficient contractual arrangements, and thus promoting efficient relationship-specific investments.
90. The ACCC considers that participation in collective bargaining can result in benefits to the public by facilitating improvements in the level of input that growers have in

¹⁹ ACCC *Guide to Collective Bargaining Notifications* pg 33 (<http://www.accc.gov.au/content/index.phtml/itemId/776297>).

²⁰ Stock & Land *Ballarat anger at McCain potato contract cuts* 29 May 2012; The Australian *McCain's growers spitting chips* 9 June 2012, AusfoodNews *McCain cutbacks linked to Coles private-label deal with Simplot* 13 June 2012.

contractual negotiations with McCain and other potato buyers. In particular, increased input into contract terms and conditions are likely to result in terms and conditions that better reflect the bargaining group's circumstances compared to a standard form contract. Over the long term, in particular, this is likely to result in efficient levels of investment and other benefits.

91. In relation to VPGC's second point, the ACCC considers that under the proposed Collective Bargaining Conduct, VPGC members are likely to be able to achieve economies of scale in negotiating and thus lower transactions costs. This will facilitate greater potato grower input into the terms and conditions of their contracts with potato buyers. This applies to contract terms negotiated collectively and contract terms negotiated individually, which are likely to be influenced by input from the resources of the collective group where they have authorisation to engage in the Collective Bargaining Conduct.

Conclusion

92. The ACCC considers that, to the extent that there is a bargaining imbalance between potato growers and potato buyers, authorisation of the Collective Bargaining Conduct provides an opportunity to partly redress this imbalance. This is likely to provide growers with greater ability to influence the terms and conditions of their contracts, both the collective and individual aspects, facilitated by the growers' ability to pool negotiating resources. This in turn is likely to result in public benefits in the form of contracts that more closely meet the needs of growers and provide long term public benefits in the form of efficiency benefits. The voluntary nature of the authorised Collective Bargaining Conduct means neither party can be compelled to negotiate or agree on specific terms and conditions.

Information sharing efficiencies

VPGC

93. VPGC submits that through the proposed Collective Bargaining Conduct, growers can efficiently pool information, which allows them to:
 94. identify efficiency improvements across their businesses' operations (including increasing the sustainability of production); and
 95. reduce information asymmetries regarding overall supply, demand and market pricing, permits better pricing in the short-term and better planning in the longer-term.
96. The McCain Growers' Group (MGG) notes that in 2012 McCain offered only individual contracts to growers. MGG submits that these contracts required growers to sign non-disclosure agreements, which it considers prohibit growers from disclosing any aspect of any negotiation or arrangement with McCain to any person.
97. MGG submits these non-disclosure agreements are a significant impediment to growers' ability to readily access market information regarding supply, demand and price and enhance McCain's high degree of market power.²¹ It also submits that the non-disclosure agreements can inhibit grower innovation in agronomy practices

²¹ McCain Grower Group *Submission 7* September 2012 pg 3.

and technology. SEPGA supports this submission and notes that previous collective negotiations have provided forums for discussing agronomy projects and efficiency trials which may have been more difficult to arrange absent the authorisations.

McCain's submissions

98. In relation to VPGC's claim of efficiency improvements from pooling of information, McCain submits that there are a variety of forums in which growers can discuss industry information and sources of market information. McCain notes in particular:

- the wholesale prices of fresh potatoes are available to growers through industry groups;
- Simplot publically releases its potato prices; and
- there is detailed publicly available information on international prices for potatoes readily available online.

99. McCain rejects MGG's submission that it has sought to impede industry development and technology adoption by preventing communication within the industry. McCain submits that, to the contrary, it is a strong supporter of forums and initiatives such as Horticulture Australia Limited,²² that promote industry development and technology adoption.

100. McCain submits that efficiency and quality improvements are imperative to the ability of the Australian potato industry to continue to compete with imports of processed potato products. It submits that McCain's processing plants have implemented a number of significant efficiency programs and it is vital to the industry that growers should be encouraged to improve efficiency and quality in their production too.

101. McCain submits that VPGC has provided no specific examples of cases in which the prior collective bargaining arrangements have promoted or assisted productivity and efficiency improvements in the industry. McCain notes that the adoption of new developments in technology or measures to improve farm management have not been addressed in the collective bargaining process. Instead, as discussed above, McCain considers that this process has been focused on price alone. McCain submits that to date, no new technology has been introduced as a result of the collective negotiations.

102. McCain considers that authorisation of the Collective Bargaining Conduct has not led to efficiency improvements through the pooling of information. In addition, McCain submits that the process of collective bargaining is likely to impair productivity and quality improvements.

103. McCain submits that, in its experience, since opting out of the collective negotiation process and dealing with growers on an individual basis, potato growers have been more open to seeking quality improvements. It is concerned that there will be less

²² Horticulture Australia is a not-for-profit industry-owned company which also delivers Federal Government funding of industry initiatives, McCain is a participant through the Potato Processing Association of Australia.

focus on productivity and quality improvements if the collective negotiation process is allowed to recommence. It submits as an example, that a previous quality incentive proposal made under the collective bargaining process was rejected by VPGC.

Response to McCain's submission

104. VPGC reiterates its submissions (discussed above) that authorisation of the Collective Bargaining Conduct will lead to productivity and quality improvements. In particular, via facilitation of collaborative, open communication and transparent trialling and refinement of new technologies (as discussed above).

ACCC consideration

105. The ACCC notes that production decisions are typically made on the basis of prices that can vary considerably from season to season. Volatile prices can substantially increase the risk of investment and the possibility that expected investment returns will not be realised. Future pricing uncertainty can lead to inefficient investment decisions. The availability of accurate, up to date information can help to reduce uncertainty.

106. Furthermore, if negotiating parties have differing abilities to access information (commonly referred to as information asymmetry), it is likely that the party with relatively less information will negotiate less efficient contracts than if more information was available to it. The pooling of information by members of a bargaining group can help to address information asymmetries and thus improve the efficiency of bargaining.

107. The ACCC acknowledges that there are a number of forums and sources of information which serve the potato industry. Nonetheless, the ACCC considers that the proposed Collective Bargaining Conduct will increase the opportunities and ability of growers to pool their market information, disseminate research and identify future opportunities for business investment (either individually or in groups). Accordingly, the ACCC considers that this is likely to permit growers to identify business efficiencies, including investment opportunities, and is likely to also lead to a better informed market. The ACCC considers that efficiencies arising from these features of the Collective Bargaining Conduct are likely to be enhanced and supported by the growers' ability, through their representative committees, to provide greater input into contract terms and conditions.

Conclusion

108. The ACCC considers that the Collective Bargaining Conduct is likely to result in public benefit in the form of information sharing efficiencies and also lead to a better informed market. Reauthorisation by the ACCC should not prevent McCain from continuing to engage with growers on an individual basis in order to deal with productivity issues, as it submits that it has been doing. Alternatively, under the reauthorisation, McCain can discuss productivity and quality improvements with the collective bargaining group should this appear to be the more efficient course.

Public benefits of setting a recommended price on seed potatoes

VPGC

109. In relation to the Seed Price Recommendation, the VPGC submits that this conduct facilitates coordination of information demand for and supply of a wide range of seed potato varieties in a cost effective and efficient manner. VPGC submits that both seed growers and buyers suffer from a general lack of information about market trends which affect seed potato acquisition. Prior to the institution of recommended seed potato prices by Seed Potatoes Victoria, VPGC submits there was significant market confusion regarding seed prices and market instability from highly variable prices. VPGC submits the establishment of the recommended price for the season allowed all seed growers and buyers to have some idea of what they could expect to receive or pay for the crop of seed potatoes for that season. This allowed buyers and growers to plan ahead and gave the market confidence.
110. VPGC submits that discussions of seed prices (including the setting of the recommended seed price) occur between seed growers as part of a general coordination aimed at ensuring that sufficient seed will be produced of each variety to meet commercial growers' needs. This coordination helps to mitigate the risk that some commercial growers will be unable to meet contracted volumes due to a lack of seed.

McCain's submissions

111. McCain opposes authorisation of the Seed Price Recommendation because the cost of seed potatoes are an important input into the cost of potatoes generally. McCain considers that reduced competition in the price of seed potatoes may put upward pressure on this input cost, affecting McCain's ability to compete in downstream areas of the industry.

ACCC consideration

112. The ACCC considers that the Seed Price Recommendation and Seed Price Recommendation Process have the potential for information pooling opportunities similar to collective bargaining by seed growers, although to a lesser extent. The benefits of such information pooling may include greater ability for VPGC members to identify business efficiency improvements, as well as better informed markets. However, the ACCC considers that the Seed Price Recommendation Process and the Seed Price Recommendation lack communication and negotiation between buyers and the collective group/s, although the various seed growing groups do refer to general market information.
113. This may be contrasted with collective bargaining which implies a process of negotiation and consequential information exchange with all of the identified targets of the collective bargaining, as well as discussions within the collective bargaining group.²³ As a practical matter, given the large numbers of small seed potato buyers

²³ The ACCC considers that collective bargaining is an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can

(including interstate buyers) it is difficult to conceive of a method by which the Victorian seed growing groups could cost effectively collectively negotiate and discuss the Seed Price Recommendation and its basis with each identified buyer.

114. Accordingly, the ACCC considers that only small further information pooling benefits are likely to flow from the Seed Price Recommendation over and above those benefits which are likely to arise from the Collective Bargaining Conduct by seed growers on a piecemeal basis with buyers.

Conclusion

115. The ACCC considers that the Seed Price Recommendation is likely to lead to small additional information sharing efficiencies above and beyond those likely to arise from Collective Bargaining Conduct by seed growers.

ACCC conclusion on public benefits

116. The ACCC considers that authorisation of the proposed Collective Bargaining Conduct is likely to lead to public benefits in the form of more efficient contracts and business operations, dynamic efficiencies and better informed markets in the potato industry, leading to more efficient production and investment decisions.

117. The ACCC considers that authorisation of the Seed Price Recommendation is likely to lead to a small additional information sharing efficiency over those likely to arise as a result of authorisation of Collective Bargaining Conduct by seed growers.

Public detriment

118. 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.²⁴

119. VPGC submits that the proposed Collective Bargaining Conduct and the Seed Price Recommendation are unlikely to lead to any public detriment.

120. McCain submits that the Collective Bargaining Conduct and the Seed Price Recommendation will result in reduced industry viability due to:

- a) higher transaction costs, which will be passed on to consumers;
- b) impairment of productivity and quality improvements, leading to reduced industry viability;
- c) greater uncertainty leading to impaired productivity; and
- d) higher potato input costs, leading to reduced industry viability.

include price) with a supplier or a customer. <http://www.accc.gov.au/content/index.phtml/itemId/776296>.

²⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

121. The ACCC's assessment of the likely public detriments from the Collective Bargaining Conduct and the Seed Price Recommendation follows.

Higher potato prices due to anticompetitive conduct

VPGC

122. VPGC submits that it is unlikely that the activity of growers in collectively bargaining will have any significant effect on consumers. VPGC estimates the grower share of the retail value of the products ranges from 1% to 14%, depending on the specific potato crop. This means that any increase to the grower prices will only ever be small, relative to the consumer price. VPGC also submits that the high level of supermarket discounting indicates a significant flexibility in retail pricing, compared to prices paid to growers.

McCain's submissions

123. McCain rejects the VPGC's assertion that the price paid to potato growers does not affect the consumer price. To the extent that McCain must pay a higher price for its potato inputs, it is likely that it will need to seek to recover this from its customers despite efforts to improve its efficiency.²⁵ McCain notes that the price of potatoes accounts for over half of McCain's costs of producing processed potato products in Australia. In turn, McCain considers that its customers are likely to seek to pass these increased costs through to consumers.

124. McCain acknowledges that the prices of processed potato products in Australia are to some extent constrained by import competition. However, McCain notes that to the extent that imports constrain price increases for consumers, this compromises the viability of domestic processors which will either:

- a) continue to lose market share to imports if they seek to pass on these higher costs (the value of imported processed potato products has increased from around \$38 million in 2006/07 to around \$81 million in 2010/11); or
- b) become unprofitable if the processors seek to absorb the higher costs to remain price competitive with imports. In this regard, McCain notes that Australian growers receive \$100 per tonne more than New Zealand growers (where McCain also has processing facilities).

ACCC consideration

125. The ACCC considers that negotiation of the most efficient terms and conditions possible at all levels of the potato industry is important to its continued viability, particularly given the challenges of disrupted environmental conditions and greater import competition.

126. As noted above under the Public Benefits section, the ACCC considers that the Collective Bargaining Conduct is likely to provide greater opportunity for growers, through their representative committees, to provide input into contract terms and conditions. However, the ACCC considers it unlikely that potato growers will gain significant market power from the Collective Bargaining Conduct.

²⁵ McCain Foods *Submission* 10 August 2012 pg 8.

127. The ACCC considers that anti-competitive detriment and risk of increased coordination is unlikely to arise as a result of the Collective Bargaining Conduct. In particular, the ACCC considers that anti-competitive effects are likely to be limited by:

- a) participation in the collective bargaining arrangements being voluntary, by both members of VPGC and potato buyers;
- b) the fact that collective boycott activity is not proposed;
- c) the countervailing power of wholesalers and processors of potatoes;
- d) the additional potential downstream countervailing power of retailers for ware and processed potato products; and
- e) (in the case of processing potatoes) import competition downstream for processed potato products.

Conclusion

128. The ACCC considers it unlikely that the Collective Bargaining Conduct will lead to inefficiently high potato prices.

Increased industry instability

McCain's submissions

129. McCain submits that the late settlement of contracts and increased transaction costs also caused significant commercial uncertainty and difficulties for McCain, its customers and other industry participants. McCain considers that, in light of the blockade that occurred under the previous collective bargaining conditions and the flow on impact on the price sought by growers, reauthorisation is likely to reduce industry stability.

130. McCain notes that it generally negotiates contract terms for the upcoming years with its customers in September and October. If grower contracts are not finalised by this time, then McCain is forced to estimate the cost of its potato inputs when entering into customer contracts. If McCain underestimates the price, which is what occurred in 2010/11, then McCain must attempt to renegotiate higher prices with its customers. This places McCain at significant commercial risk and creates uncertainties and inefficiencies for its customers.

131. McCain notes that seed potato suppliers are also affected by uncertainties in processing potato negotiations.

Response to McCain's submissions

132. MGG submits that the collective bargaining conduct does not delay settlement of contracts and create supply uncertainty. Relevantly, MGG notes that as a significant volume of the processing potatoes planted by McCain's potato growers are licensed exclusively to McCain, they cannot be sold to any other processor or into the fresh market. Once the potatoes are planted, this licence mechanism guarantees supply of those potatoes (subject to normal agricultural risks) since there is only one potential purchaser.

ACCC consideration

133. As noted above, the ACCC considers that the late settlement of collective negotiations may reflect difficult industry conditions and instability due to external factors rather than inefficiencies in the bargaining arrangements.
134. The ACCC notes McCain's submission regarding the blockade of its factory in March 2011. The ACCC also notes that McCain's actions to reduce the quantity of potatoes contracted and the number of contracts offered to growers following the blockade action, combined with the fact that McCain is the only large buyer of processing potatoes for most of the growers involved, mean that VPGC growers are less likely to participate in any future action to disrupt supply to McCain.
135. The ACCC considers that if collective bargaining arrangements increase uncertainty and instability in a market this would be a public detriment as it is less likely that contractual arrangements would improve efficiency. However, as the arrangements are voluntary, the ACCC considers that any such outcomes are unlikely over the longer term. It is possible that in the short term there may be some inefficiencies associated with collective negotiation as bargaining processes are refined. However, over the longer term, the ACCC would expect that strategies would be devised to enable both buyers and growers to realise the potentially mutually beneficial efficiencies that collective bargaining may facilitate.

Conclusion

136. The ACCC considers that the potato industry has been characterised by significant instability in recent years. However, the ACCC considers that it is not evident that this instability is likely to be exacerbated by collective bargaining.

Setting a recommended seed potato price

VPGC

137. VPGC submits that authorisation of the Seed Price Recommendation is unlikely to lead to significant public detriment.

McCain's submissions

138. McCain submits that the cost of seed potatoes is an important input into the cost of potatoes generally and reduced competition in setting the price of seed potatoes may put upward pressure on the cost of processing potatoes, affecting McCain's ability to compete in downstream areas. McCain's arguments regarding the effects of increased potato prices are noted under the discussion regarding higher potato prices.

ACCC consideration

139. The ACCC considers that prices determined by suppliers in competition with one another are generally the best way to promote efficient market outcomes. The ACCC has consistently taken the view that recommended fee schedules and prices often occur in circumstances where the association expects many of its members, if not all, to follow or refer to the recommendation when setting prices. In the ACCC's experience recommended price schedules:

- a) generally cover a substantial number of members who are competitors for the purposes of the Act; and
- b) if operating in local geographic areas, significantly affect prices in such areas.²⁶

140. Against these considerations, if prices in the absence of the recommended schedule are based on incomplete information or previous market conditions which are unlikely to continue into the future, then production and investment decisions based on those prices may be suboptimal. In these circumstances, a recommended price based on more reliable and current information than is available to individuals may enable the market to function more efficiently.

141. The ACCC notes that Victoria is Australia's major producer of seed potatoes. There is an absence of evidence to indicate that VPGC seed growers deviate substantially from the Seed Price Recommendation, including when supplying smaller seed buyers. Further, information provided indicates that the Seed Price Recommendation is used as a reference price by competitors of VPGC seed growing members, including seed potato IP owners and interstate seed growers. These factors indicate that authorisation of the Seed Price Recommendation is likely to raise potato seed prices above the competitive level both in Victoria and nationally.

142. The ACCC considers that an artificially high seed price is likely to lead to various inefficiencies, particularly at lower industry levels, which will not necessarily be constrained by imports or strong processors, wholesalers or retail acquirers.

143. Accordingly, the ACCC considers that the Seed Price Recommendation is likely to result in a significant public detriment, notwithstanding that:

- a) the fee agreement consists of a 'recommended' or guideline price only;
- b) there is no obligation or undertaking to comply with the recommendations made; and
- c) there is no attempt to police or follow up the recommendations made.

Conclusion

144. The ACCC considers that, on the information currently available, authorisation of the Seed Price Recommendation is likely to lead to a public detriment due to seed potato prices higher than the competitive level. However, the ACCC invites all parties within the potato industry to provide more information on this issue.

ACCC conclusion on public detriments

145. The ACCC considers that it is unlikely that the proposed Collective Bargaining Conduct will lead to public detriment in the form of increased industry instability or higher potato prices. The ACCC considers that the Seed Price Recommendation is likely to lead to substantial public detriment from inefficiently high seed potato prices.

²⁶ ACCC Website – Professional Associations <http://www.accc.gov.au/content/index.phtml/itemId/277823>.

Balance of public benefit and detriment

146. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

147. In the context of applying the net public benefit test in section 90(8)²⁷ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²⁸

148. For the reasons outlined in this draft determination, in relation to the Collective Bargaining Conduct, the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result. In relation to the Seed Price Recommendation, the ACCC is not satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

149. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met in relation to the Collective Bargaining Conduct but not the Seed Price Recommendation.

Length of authorisation

150. The Act allows the ACCC to grant authorisation for a limited period of time.²⁹ 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. The ACCC proposes to grant authorisation to the VPGC for five years, as requested.

Draft determination

The application

151. On 10 July 2012, the VPGC lodged an application for revocation of A91048 and the substitution of a new authorisation A91321. The application was made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsections 88(1) and 88(1A) of the Act to:

- a) collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers
- b) permit VPGC to assist its members in their negotiations with processors and other potato buyers (including in relation to dispute resolution)

²⁷ 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.

²⁸ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²⁹ Section 91(1).

(the **Collective Bargaining Conduct**)

- c) establish a price recommendation for the supply of seed potatoes to other potato growers in Australia

(the **Seed Price Recommendation**)

152. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

153. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the Collective Bargaining 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.

154. For the reasons outlined in this draft determination, the ACCC is not satisfied that the Seed Price Recommendation 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.

155. The ACCC therefore **proposes to grant authorisation** to application A91321 in respect of the Collective Bargaining Conduct and **to not grant authorisation** in respect of the Seed Price Recommendation, including the Seed Price Recommendation Process or any similar process.

Conduct for which the ACCC proposes to grant authorisation

156. The ACCC proposes to grant authorisation to the VPGC and its current and future members to engage in the Collective Bargaining Conduct for five years. The ACCC notes that this includes Collective Bargaining Conduct in relation to seed potatoes.

157. This authorisation extends to but does not mandate the mediation process put forward by the VPGC which the ACCC considers is a component part of the Collective Bargaining Conduct.

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

159. This draft determination is made on 5 November 2012.

Conduct not proposed to be authorised

160. The proposed authorisation does not extend to permitting the VPGC and its current and future members to engage in the practice of setting a Seed Price Recommendation, including via the Seed Price Recommendation Process or any similar process.

Interim authorisation

161. At the time of lodging the application, the VPGC requested interim authorisation to engage in the Collective Bargaining Conduct and set the Seed Price Recommendation. The ACCC granted interim authorisation on 25 July 2012.
162. When the ACCC issues its final determination, it proposes to revoke its interim authorisation decision of 25 July 2012 in relation to its grant of interim authorisation to establish a price recommendation for the supply of seed potatoes by VPGC members to other potato growers in Australia. However, interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC revokes the interim authorisation.

Further submissions

163. The ACCC will now seek further submissions from interested parties. In addition, VPGC 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 - Summary of relevant statutory tests

Sections 90(5A) and 90(5B) provide 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) 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.

Section 91C(7) requires the Commission, in making a determination to revoke an authorisation and substitute another authorisation, to apply the tests in section 90(5A), (5B), (6), (7) (8), (8A), (8B), or (9) (as applicable) as if the authorisation were a new authorisation sought under section 88.