



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of A91057 and substitution
of authorisation A91322

lodged by

the South East Potato Growers Association

in respect of

collective bargaining with potato buyers

Date: 5 November 2012

Authorisation number: A91322

Commissioners: Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to revoke authorisation A91057, granted in 2007, and grant authorisation A91322 in substitution. The proposed grant of authorisation for five years is to permit SEPGA and its present and future members to collectively bargain with potato buyers. The ACCC does not propose to grant authorisation to SEPGA 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 SEPGA is seeking authorisation for five years for an arrangement between present and future members of SEPGA to:

- collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers
- permit SEPGA to participate in any dispute resolution mechanism relating to disputes between SEPGA members and potato buyers regarding collectively negotiated agreements

(the **Collective Bargaining Conduct**) and

- establish a price recommendation for the supply of seed potatoes by SEPGA members 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 SEPGA 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 any collective bargaining negotiations is voluntary for both SEPGA members and potato buyers. SEPGA has not sought authorisation of any collective boycott arrangement.

The ACCC does not propose to grant authorisation to permit members of SEPGA 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 a 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 due to its potential to facilitate coordination by and with VPGC members and lead to prices being set above the competitive level for Victorian produced seed potatoes.

Interim authorisation which was granted on 23 August 2012 permitted SEPGA 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 A91057, granted to the South East Potato Growers Association 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 12 July 2012, the South East Potato Growers Association (**SEPGA**) lodged an application for the revocation of A91057 and the substitution of authorisation A91322 (**reauthorisation**) with the ACCC under section 91C(1) of the Competition and Consumer Act 2010 (the **Act**). SEPGA 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 re-authorisation 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 A91057 (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 A91057 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 A91322 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 SEPGA is seeking authorisation for five years to:
 - a) collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers
 - b) permit SEPGA to participate in any dispute resolution mechanism relating to disputes between SEPGA members and potato buyers regarding collectively negotiated agreements

(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 by SEPGA members 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. SEPGA represents 17 grower businesses based in the lower southeast region of South Australia (out of approximately 70 potato growers in South Australia). This has not changed since the ACCC granted the 2007 Authorisation. SEPGA is a sub-branch of the South Australian Farmers Federation. It was formed to represent the interests of South Australian processing potato growing businesses, provide a forum for discussions on matters of interest and provide a vehicle by which potato growers may usefully discuss with Governments and other regulatory authorities any issues that are affecting them.
9. As in 2007, membership to SEPGA is by a yearly subscription of \$25 and growers also contribute a 20 cents/tonne levy for potato processing research and development projects. Membership is voluntary.
10. SEPGA growers produce and supply processing potatoes according to the requirements of McCain Foods, and its subsidiary Safries Pty Ltd, the growers' only significant purchaser (referred to as **McCain**). SEPGA members, as a group, do not currently produce significant quantities of ware (fresh) potatoes. SEPGA members are likely to have some ability to increase the production of ware potatoes, limited by soil type, access to a packing shed and the substantially lower prices available for ware potatoes.²
11. SEPGA submits that its members supply around 150,000 tonnes to McCain each year (80, 000 tonnes to Safries and 70, 000 tonnes to McCain Foods). Accordingly, in the southeast region of South Australia, SEPGA growers produce approximately 150, 000 tonnes of potatoes each year. By comparison, South Australian growers in total produce around 600, 000 tonnes of potatoes each year.

² Primary Industries and Resources SA, *State of Play in the South Australian Potato Industry*, December 2005 pg 6; Victorian Potato Growers Council *Application for authorisation* 10 July 2012 pg 20.

12. Most SEPGA members grow their own seed potatoes for planting to produce processing potatoes for McCain (generally as uncertified 'one-offs' in which the farmer starts with certified seed but multiplies this for one generation prior to planting the commercial crop in order to reduce seed cost). Some growers sell surplus seed potatoes (mostly the uncertified 'one-offs') to local growers who have not produced enough seed potatoes for their own needs. SEPGA growers may also source certified potato seed from Victorian seed potato growers, where the varieties are ones that they can sell to McCain and other buyers.

Related application

13. On 10 July 2012, the Victorian Potato Growers Council (**VPGC**) lodged an application for revocation of authorisation A91048 and substitution of authorisation A91321 with the ACCC under section 91C(1) of the Act. The VPGC applied for reauthorisation for five years on behalf of itself and its current members on similar terms to that as SEPGA. Where relevant, information received in response to the VPGC application has also been considered in relation to the SEPGA application.

Industry Background

14. The only substantial processing potato buyer that SEPGA members supply is McCain. SEPGA members produce specific varieties of processing potatoes for McCain, many of which are owned by McCain through patents and plant breeders rights. All other buyers of potatoes in the southeast region of South Australia are small scale buyers.

Processing potatoes

15. Few varieties are suitable for both processing and the ware potato market. In addition, specific processing potato varieties are used for different processed products, such as frozen potato chunks or crisps. Once processed, the potatoes are generally sold in frozen or crisp form to retailers (particularly supermarkets) and the food service industry.
16. McCain notes in a submission to the ACCC 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. It submits that 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
17. With respect to the supply of potatoes the ACCC notes that the following factors relating to the potato industry, found in relation to A91057, 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, over time, growers may be able to reallocate resources and

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.

adjust their processes to produce other types of crops (such as other vegetable crops);

- b) there is also some capacity for growers to alter the composition and volume of potato crops grown from one season to another, including by altering the varieties of potatoes grown, and growing potatoes for more than one processor, wholesaler or retailer;
 - c) processors that acquire potatoes from SEPGA members may acquire potatoes from alternative suppliers outside the southeast region of South Australia (for example, from 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
 - e) imported processed potato products provide some competitive constraint on locally processed products.⁵
18. 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

Purpose and process of seed potato production

19. 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. 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 (as opposed to multiplying seed potatoes as 'one-offs') also involves highly specialised equipment and growing techniques, compared to commercial intensive growing of processing and ware potatoes. This specialisation is due to the relatively small size of the planting material used and pathogen control and detection measures imposed by the certification schemes.
20. 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 material).

⁴ McCain, *Submission* 10 August 2012, pg 9 based on figures from AUSVEG.

⁵ ACCC *Final Determination A91057* 29 August 2007, pg 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.

21. The South Australian government appears to accept limited commercial use of uncertified seed potatoes under certain conditions, known as 'one-off seed potatoes'⁷. However, the long term viability of a potato grower is likely to depend upon access to certified seed potatoes in order to minimise disease risks. South Australia has not established its own certification scheme, instead relying upon ViCSPA (the independent body which administers the Victorian scheme).
22. 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:⁸
 - 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 all 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.

Current process for setting the seed potato price recommendation

23. The ACCC understands there is currently no process for establishing a seed price recommendation in South Australia. However, in Victoria, seed price recommendations, which are not authorised under A91048, are set each year (for varieties not subject to intellectual property protection (IP protected)⁹). The process

⁷ Primary Industries and Resources SA, *Website - Condition 18 – Potatoes* http://www.pir.sa.gov.au/biosecuritysa/planthealth/legislation/plant_quarantine_standard/conditions/condition_18_-_potatoes.

⁸ 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.

⁹ 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.

for setting this price recommendation (the **Seed Price Recommendation Process**) is as follows:

- a) each year, all certified seed growers in an area are invited to meet with their district seed group to:
 - i) discuss any appropriate change in the price recommendation;
 - ii) the factors affecting the price recommendation, including the previous year's fresh market, commercial market and seed market sales, the trends in the industry and the future viability of seed growers; and
 - iii) vote on the proposed price increase or decrease (each district group is a member of Seed Potatoes Victoria (a sub-group of the VPGC) and gets one vote on the price recommendation for that year.
 - b) The results of the district votes are considered by the Seed Potatoes Victoria committee in the context of the current market and other factors relevant to the seed price. The committee then votes on the prices to be recommended, publishes the recommended price list and distributes it to members, buyers, merchants and other interested parties.
24. As part of 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.¹⁰
25. 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

26. Seed potato growers may also be contracted to grow out and multiply IP protected seed potatoes by the IP owner (such as McCain). Owners of IP protected potato seed may include processors, supermarkets, wholesalers and agribusiness research facilities.
27. 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. In this case, the IP owner generally sets its own recommended price and takes a commission per ton of seed potatoes sold. Seed potato growers are free to deviate from the price recommended by the IP owner when selling to the buyers approached by the IP owner.
28. Finally, IP protected seed potatoes may be grown as part of a closed loop supply chain. In this situation, the owner of the IP rights selects particular growers to grow

¹⁰ VPGC Submission 6 September 2012 pg 2.

the variety, both in seed and in commercial form, and then acquires all potatoes produced.

SEPGA members' involvement in seed potato growing

29. Most SEPGA members do not grow seed potatoes for sale. One SEPGA member produces certified seed although the majority of South Australian certified seed is sourced outside South Australia. If SEPGA members have surplus seed potatoes, they may seek to sell these to other local growers. SEPGA submits that it has sought authorisation to establish a seed price recommendation to use as a reference price in future because such a recommendation would be likely to provide its members with more complete information about the market.
30. SEPGA has noted that any seed potato price recommendation that is established by its members will be only a recommendation and that potato growers and buyers may depart from the recommended price, as is the case with the seed price recommendation used in Victoria.

Submissions received by the ACCC

31. 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.
32. In response to interested party consultations on the SEPGA and VPGC reauthorisation applications, the ACCC received two submissions from McCain, which address the two applications together. McCain opposes the applications on the basis of its experience of collective bargaining under SEPGA's and VPGC'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 significant public detriment.
33. 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.
34. McCain also raises concerns regarding the likely anti-competitive effects of authorisation of the Seed Price Recommendation.
35. SEPGA provided two submissions in response to McCain's submission, including one combined response on behalf of SEPGA and the VPGC. In summary, SEPGA submits that collective bargaining has not led to public detriment but has provided public benefit in the form of better industry information for SEPGA members and greater input into contracts.
36. SEPGA submits that a seed price recommendation will give seed growers greater certainty of the price they will receive for their seed potatoes and that this confidence will enable seed potato growers to continue to invest in production of certified seed potatoes and to plan how many seed potatoes to produce.

37. SEPGA also submits that reauthorisation of collective bargaining would permit the necessary group negotiations between potato growers and seed growers that are required for each group to adjust to each other's production needs.
38. The views of the SEPGA 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

39. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests¹¹ 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 from the proposed conduct.
40. 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

The Applicants' submission

41. SEPGA submits that the market relevant to its application is the potato industry in southeast South Australia, including buyers and sellers.

ACCC consideration

42. Taking into consideration information received in relation to the 2007 Authorisation and the current application, the ACCC has considered the SEPGA 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); and
 - b) the supply of seed potatoes to various buyers including other potato growers (which, subject to state and territory phytosanitary regulations is national).
43. The ACCC considers there are no large competitors to McCain for the acquisition of processing potatoes in the southeast region of South Australia. SEPGA growers supply seed potatoes in small amounts (mainly leftovers from their own production) and for the non-certified seed only to other nearby growers.
44. 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.

¹¹ Sections 90(5A), 90(5B), 90(6) and 90(7) of the Act. The relevant tests are set out in full at Attachment A.

The future with and without test

45. 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.¹²
46. Under this test, the ACCC compares the public benefit and anti-competitive detriment likely to be generated by arrangements in the future if the authorisation is granted with those likely to be generated if the authorisation is not granted.
47. SEPGA 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.
48. The ACCC considers that if the reauthorisation is not granted, SEPGA members will continue to negotiate contracts for the supply of potatoes individually with processors and other buyers.
49. Absent authorisation of the Seed Price Recommendation, the ACCC considers that SEPGA 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

50. 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.¹³
51. In general, competition can be relied upon to deliver the most efficient market arrangements. However, in circumstances where there are market failures (for 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.
52. The market failures that collective bargaining often seeks to address are those associated with high transactions costs, information asymmetries and/or bargaining

¹² *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.

¹³ *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.

power held by the target in the area of competition in which the collective bargaining takes place.

53. Horizontal agreements of the type proposed by SEPGA 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.
54. SEPGA submits that the proposed Collective Bargaining Conduct will deliver a range of public benefits, including:
 - a) transaction cost savings;
 - b) increased input into processing potato supply contracts for SEPGA members; and
 - c) the ability for SEPGA members to present a more considered position to processing potato buyers as a result of the consultation and information sharing involved in collective bargaining.
55. SEPGA notes that participation in the Collective Bargaining Conduct is voluntary and, although some potato buyers will not be willing to deal with potato growers on a collective basis, SEPGA members would like the opportunity to pursue this option if potato buyers change their mind in the future.
56. In relation to the Seed Price Recommendation, SEPGA submits that the public benefits likely to flow from this conduct 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.
57. The ACCC's assessment of the likely public benefits from the Collective Bargaining Conduct and the Seed Price Recommendation follows.

Transaction cost savings

SEPGA's submission

58. SEPGA submits that reauthorisation of the Collective Bargaining Conduct will generate public benefits from transaction cost savings from a single and considered view being presented to potential buyers. It submits that a single point of negotiation on key contractual terms will facilitate more efficient management of contracts than would be possible from individually negotiating terms and conditions on multiple contracts. In addition, the Collective Bargaining Conduct will permit SEPGA members to pool their bargaining skills and access legal and management advice in a cost effective manner.

McCain's submission

59. In relation to the Collective Bargaining Conduct, McCain questions whether transaction cost savings are likely to arise as claimed by SEPGA. McCain submits that collective negotiations with SEPGA over the last five years have resulted in duplicative processes and protracted negotiations, which have each increased the

costs of transacting with potato growers. In particular, in the collective bargaining process, SEPGA appoints a negotiating committee to represent its members. This committee must consult members on each new proposal by McCain, resulting in protracted negotiations. As the terms of the collective negotiations have been limited to the Russet Burbank Benchmark or RBB Price, additional negotiations with individual growers are still required to discuss details such as volume, potato varieties and planting timeframes.

60. McCain submits that, ideally, processing potato contracts should be settled by September each year (before planting) in order to give certainty to both buyers and growers of potatoes and to allow forward planning. It 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.
61. 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 requested that McCain also offer this higher price to its growers. McCain agreed to 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 submission

63. SEPGA submits that delays in negotiations (and the associated increases in transaction costs) have come about because of difficult industry conditions, not because of the Collective Bargaining Conduct. It submits that it has always sought to commence negotiations as soon as practically possible – usually in February or March. It aims to have contract negotiations concluded by planting time (which begins in September for early supply and in October to mid-November for main season supply).
64. SEPGA submits that its members have not sought to delay negotiation processes and have no reason to do so because growers must plant their crops at a particular time of year and if they do not have supply contracts in place in time for planting, they risk planting too many or too few potatoes and, as a result, foregoing income from investing in potatoes that they are unable to sell or foregoing income from potatoes that they could have sold but did not plant.
65. SEPGA submits delays in collective bargaining processes in recent years have been a result of the fact that the last five years in the potato industry have been the most volatile in living history with regard to cost changes, market pressure from imported processed products and changes in the RBB Price.
66. SEPGA also rejects McCain's claims that SEPGA seeks to negotiate only the RBB Price in collective bargaining notifications. It submits that in the past its members have proposed a number of ways to improve efficiency but that McCain rejected these suggestions.

ACCC consideration

67. 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.
68. 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.
69. 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.
70. 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. In addition, the ACCC considers that the overall effects of the proposed conduct on transactions costs are relevant. A more prolonged and resource intensive negotiation process for the target may be a necessary consequence of achieving contracts that promote short run and dynamic efficiencies. Compared to a standard form contract, a collectively bargained contract may better reflect the needs of both sides to the negotiation and thus produce an overall more efficient commercial outcome.
71. Thus the ACCC considers that both buyers and growers may have the incentive to engage in collective negotiation if the benefits of doing so outweigh the overall costs of negotiation.
72. 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.
73. 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.

74. 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

75. The ACCC considers that the proposed Collective Bargaining Conduct is likely to lead to transaction cost savings for SEPGA 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.
76. The issue of efficiencies due to improved grower input into terms and conditions, which SEPGA 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

SEPGA's submission

77. SEPGA submits that the Collective Bargaining Conduct will result in more efficient contracts from greater grower input through the following means:
- a) due to an increase in the relative bargaining power of SEPGA potato growers, leading to greater grower input; and
 - b) as discussed in the Transaction Cost Savings section, SEPGA potato growers' ability to pool resources, provide support and security to each other, and access legal and other advice on a collective basis.
78. In relation 7777a) above, SEPGA submits there is a clear imbalance of bargaining power between McCain, which is part of a multinational group of companies, and individual potato growers in terms of access to specialist negotiation skills, legal services and management services. SEPGA also notes that potato growers have significant sunk investment in specialised potato growing equipment and skills. In many cases, potato growers are only able to sell their potatoes to McCain, particularly if they are McCain's IP Protected potato varieties, and have no ability to change crops once the potato crop is planted for the year. SEPGA submits that authorisation will provide public benefit by enabling SEPGA growers to increase their bargaining power and provide more input into contracts with large potato buyers.
79. In relation to 777b), SEPGA submits that negotiating as a collective will enable potato growers to share their skills and knowledge and access legal and other professional services, which will also enable them to provide greater input into contracts with McCain.

McCain's submission

80. McCain submits that growers are not in a weak bargaining position compared to McCain because McCain is dependent upon growers to supply potatoes of sufficient quality, at the required time and at acceptable cost so that McCain can meet fulfil its contracts with customers. In addition, McCain has significant sunk investment in its factories and processes, which cannot be adapted to processing other vegetable types.
81. McCain submits that potato growers commonly grow a variety of other crops and agricultural products and are therefore not locked into McCain as a buyer. Potato growers are also large, well informed and sophisticated businesses, several of which McCain pays in excess of \$1 million per year. McCain considers that potato 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.
82. In relation to SEPGA'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 have not resulted in increased input from individual growers into other aspects of pricing and supply (eg incentives for quality improvements).
83. Although SEPGA growers accepted the incentive payments program for potato quality proposed by McCain, McCain submits that collective bargaining conduct did not facilitate this. McCain considers that incentive clauses to facilitate improvements in quality and other areas 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 not necessary for achieving contracts with grower input.

Response to McCain's submission

84. Using the 2012 annual negotiations between individual SEPGA members and McCain as an example, SEPGA submits that potato growers are likely to have less input into contracts without collective bargaining. SEPGA submits that, as part of the 2012 annual negotiation, McCain made offers of standard form contracts to individual growers on a 'take it or leave it' basis with considerably reduced tonnage (compared to previous years) offered at a predetermined price. In addition, McCain 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.
85. To illustrate the extent to which SEPGA is dependent on McCain, SEPGA notes that, in the 2010 negotiations for the 2011 potato crop, SEPGA growers agreed to sell their potatoes to McCain for a price that was below the cost of production so that McCain, as their only significant purchaser, could remain competitive against cheaper imported product.
86. SEPGA refutes McCain's submission that the negotiating committees only negotiated the RBB Price. SEPGA submits that it had significant input regarding terms such as adjusting the tolerance level clause for damaged and diseased potatoes and delivery times.

ACCC consideration

87. The ACCC does not consider a direct transfer of bargaining power to be a public benefit in and of itself. Rather, the ACCC considers the likely effect of any such change in bargaining position arising from a proposed collective bargaining arrangement.¹⁴
88. The ACCC considers that the information provided in submissions from McCain, SEPGA and VPGC 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 action taken in March 2011 by a group of potato growers to blockade its Ballarat factory for four days]. McCain agreed to higher prices for SEPGA members (who weren't involved in the blockade) to match the higher prices to be paid to VPGC members.
89. Nonetheless, the ACCC considers that, overall and in the long term, large potato buyers appear to be in a stronger bargaining position than individual potato growers. In particular, large potato buyers have access to a greater level of information, resources, negotiation skills, legal services and management services than the majority of individual potato growers.
90. For example, the ACCC considers McCain demonstrated its long term bargaining power in contracting for the season following the blockade. These contract negotiations were conducted via individual negotiations and resulted in McCain offering contracts to fewer potato growers in the Ballarat region and reduced overall volumes of potatoes being sourced from Ballarat based VPGC members (as well as other potato growers in Victoria and Tasmania).¹⁵ The ACCC notes that the blockade itself did not involve SEPGA potato growers but the blockade did affect SEPGA members' supply contracts with McCain.
91. Therefore, notwithstanding the concerns raised by the 2011 blockading of McCain's Ballarat factory by certain potato growers, 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.
92. 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

¹⁴ ACCC *Guide to Collective Bargaining Notifications* pg 33 (<http://www.accc.gov.au/content/index.phtml/itemId/776297>).

¹⁵ 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.

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.

93. 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 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 more efficient levels of investment and innovation.
94. The ACCC also considers that, under the proposed Collective Bargaining Conduct, SEPGA 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

95. The ACCC considers that, to the extent that there is a bargaining imbalance between potato growers and potato buyers (particularly McCain), that the Collective Bargaining Conduct will provide an opportunity to redress this imbalance to some extent. This is likely to enable SEPGA members to have greater input into terms and conditions of collective and individual contracts with potato buyers, including McCain, which will be facilitated by the growers' ability to pool negotiating resources. The ACCC considers this will in turn result contracts that more closely meet the needs of growers and provide long term public benefits in the form of efficiency benefits. The ACCC notes that voluntary nature of the Collective Bargaining Conduct means neither SEPGA nor McCain can be compelled to collectively negotiate or agree on specific terms and conditions.

Information sharing efficiencies

SEPGA's submission

96. SEPGA submits that the Collective Bargaining Conduct will allow its members to pool information, enabling them to:
 - a) identify efficiency improvements across their businesses' operations (including increasing the sustainability of production); and
 - b) reduce information asymmetries regarding overall supply, demand and market pricing, permitting better pricing in the short term and better planning in the longer term.
97. SEPGA notes that, in 2012, McCain offered only individual contracts to SEPGA and VPGC potato growers. It submits that these contracts required growers to sign confidentiality agreements, prohibiting growers from disclosing any aspect of any negotiation or arrangement with McCain to any person.

98. SEPGA also supports a submission from the Victoria-based McCain Growers Group (**MGG**) in relation to the VPGC application for reauthorisation A91321, which submits that 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. MGG also submits that the non-disclosure agreements can inhibit grower innovation in agronomy practices and technology. SEPGA 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 submission

99. In relation to SEPGA's claim of efficiency improvements from pooling 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:
- a) the wholesale prices of fresh potatoes are available to growers through industry groups;
 - b) Simplot (a large buyer and on-seller of potatoes) publically releases its schedule of potato prices; and
 - c) there is detailed information on international prices for potatoes publically available online.
100. McCain rejects SEPGA'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,¹⁶ that promote industry development and technology adoption.
101. 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.
102. McCain submits that SEPGA has not provided specific examples of cases in which collective bargaining arrangement under the 2007 Authorisation have promoted or assisted productivity and efficiency improvements in the industry. McCain notes that the collective bargaining process has not sought to facilitate the adoption of new developments in technology or measures to improve farm management. Instead, as discussed above, McCain considers that previous collective bargaining processes have focussed on price alone.
103. McCain submits that, to date, no new technology has been introduced as a result of the collective negotiations. 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.

¹⁶ Horticulture Australia Limited 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.

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

Response to McCain's submission

105. SEPGA refutes McCain's submission that the negotiating committees only negotiated the RBB Price. SEPGA submits that it is always keen to discuss all terms and conditions of supply contracts with McCain. SEPGA submits that its committee had significant input regarding terms such as adjusting the tolerance level clause for damaged and diseased potatoes and delivery times. However, the growers committee that has represented SEPGA members in collective bargaining over the last five years stopped having input into incentive clauses a number of years ago at McCain's request. It was told there was going to be a new regional contract in place. However, SEPGA submits this contract has not yet been presented. SEPGA submits that its reduced input into productivity and quality improvement clauses in contracts with McCain has not been a result of the collective bargaining conduct.

ACCC consideration

106. 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.

107. 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.

108. 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 is likely to provide greater opportunity for growers to pool their resources and information and access professional services through the benefits of economies of scale. The ACCC considers that this is likely to permit growers to identify business efficiencies, including investment opportunities, and will 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

109. 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

SEPGA's submission

110. SEPGA submits that the Seed Price Recommendation and Seed Price Recommendation Process will facilitate coordination of demand for and supply of a wide range of seed potato varieties in a cost effective and efficient manner. It submits that both seed potato growers and buyers suffer from a general lack of information about market trends. Although SEPGA members are able to view the recommended seed potato prices set by Seed Potatoes Victoria, SEPGA submits there is significant market confusion regarding seed prices and market instability from highly variable prices across the southeast region of South Australia.
111. SEPGA submits the establishment of the recommended price for seed potatoes would provide seed potato growers and buyers with better information about what they could expect to receive or pay for a crop of seed potatoes for each season. SEPGA submits that this would enable seed potato buyers and growers to plan ahead and increase market confidence.
112. SEPGA submits that discussions of seed prices (including the setting of the Recommended Seed Price) could also 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 helps to mitigate the risk that some commercial growers will be unable to meet contracted volumes.

McCain's submission

113. 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

114. 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 SEPGA members to identify business efficiency improvements, as well as better informed markets. However, the ACCC considers that the Seed Price Recommendation and the Seed Price Recommendation Process lack communication and negotiation between buyers and SEPGA members.
115. 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.¹⁷ As a practical matter, given the large numbers of small seed potato buyers it is difficult to conceive of a method by which SEPGA members could cost effectively collectively negotiate and discuss the Seed Price Recommendation and its basis with each identified buyer.

116. 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

117. 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

118. 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.

119. 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

120. 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.¹⁸

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

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

- a) increased 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.

¹⁷ 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 include price) with a supplier or a customer. <http://www.accc.gov.au/content/index.phtml/itemId/776296>.

¹⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

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

Higher potato prices due to anticompetitive conduct

SEPGA's submission

124. SEPGA submits that it is unlikely that the activity of growers in collectively bargaining will have any significant effect on consumers. SEPGA estimates the grower share is around 1% of the retail value of McCain's processed potato products. This means that any increase to the grower prices will only ever be small, relative to the consumer price. SEPGA also submits that the high level of supermarket discounting indicates a significant flexibility in retail pricing, compared to prices paid to growers.

McCain's submission

125. McCain submits that the Collective Bargaining Conduct has the potential to increase the price of potatoes, which is already much higher than the price of potatoes in other countries. McCain submits that the price it pays for potatoes affects the price that it seeks to obtain from its customers despite efforts to improve its efficiency.¹⁹ In turn, any increased costs of inputs such as potatoes and seed potatoes that McCain can successfully pass on to its customers are likely to be passed through the supply chain on to consumers.

126. While McCain agrees that the price of processed potato products in Australia is, to some extent, constrained by import competition, it submits that it is unlikely that the industry will be able to continue to compete with imports in the long term if the price of potatoes and seed potatoes continues to rise. McCain submits that, if processors continue to seek to pass on increases in the cost of potatoes and seed potatoes, they will lose market share and if they instead seek to absorb the price increases, their operations will become unprofitable.

ACCC consideration

127. 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.

128. 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.

129. 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:

¹⁹ McCain Foods *Submission* 10 August 2012 pg 8.

- a) participation in the collective bargaining arrangements being voluntary, by both members of SEPGA and potato buyers;
- b) the fact that collective boycott activity is not proposed;
- c) the limited composition of the collective bargaining group, given that SEPGA members are only a proportion of South Australian potato growers (around a quarter) and not all potato growers in the south-east region of South Australia are members;
- d) the potential for downstream countervailing power of processors and retailers of processed potato products; and
- e) import competition downstream for processed potato products.

Conclusion

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

Increased industry instability

McCain's submission

131. McCain submitted in its two submissions 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.

132. 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.

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

SEPGA's submission

134. SEPGA submits that the Collective Bargaining Conduct does not delay settlement of contracts and create supply uncertainty. Relevantly, SEPGA notes that, because the processing potatoes grown by its members are generally licensed exclusively to McCain, these potatoes 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. SEPGA submits that, throughout the collective bargaining process, McCain was always assured of supply.

135. SEPGA submits that it had already finalised its contracts before the Ballarat blockade in 2011 and only sought to re-negotiate after considering the changing

market conditions and poor growing season. It submits that it has not renegotiated contracts on any other occasion and did not participate in the blockade.

ACCC consideration

136. 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. In addition, the ACCC notes that SEPGA growers were not involved in the blockade of McCain's Ballarat factory. The ACCC 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 SEPGA growers, means that SEPGA growers are less likely to participate in any future action to disrupt supply to McCain.

137. 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

138. 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

McCain's submissions

139. 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.

SEPGA's submission

140. SEPGA submits that the price currently paid for seed potatoes is a ratio that is linked to the contract price of potatoes. Having a ratio price gives seed growers confidence to start the process of growing seed potatoes for potato growers (which can take several years) and continue operating in the seed industry.

141. SEPGA submits that the intention of the Seed Price Recommendation is not to raise the price of seed potatoes but to provide better price signalling and access to market information. SEPGA notes that very few of its members are likely to sell seed potatoes, that they intend to primarily sell them to other local potato growers

(rather than large commercial buyers), and the quantity of seed potatoes to be sold is likely to be very small.

142. SEPGA notes that the industry is well aware that current market conditions mean that margins on seed potatoes are likely to be at much reduced levels for the foreseeable future and that the best way to remain competitive is via efficiency gains, not price rises.

ACCC consideration

143. The ACCC considers that prices determined by suppliers in competition with one another are generally the best way to promote efficient market outcomes. However, if such prices 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.
144. The ACCC notes that there are alternative suppliers of seed potatoes to potato growers in the south east region of South Australia. Most potato growers in this region source their seed potatoes from specialist growers and commercial suppliers in Victoria and the prices for these seed potatoes are currently set in reference to a recommended price that is set by Seed Potatoes Victoria, who would not be party to the Seed Price Recommendation under A91322. The ACCC understands that SEPGA members do not intend to produce seed potatoes on a large commercial scale and that supply is largely limited to the southeast region of South Australia.
145. Accordingly, the ACCC considers that, in SEPGA's case, the Seed Price Recommendation is unlikely to have a direct impact on the price of seed potatoes in the south east region of South Australia or nationally.
146. However, the ACCC considers that the Seed Price Recommendation may facilitate coordination by and with VPGC members. The ACCC notes its concerns regarding the significant public detriments likely to arise in relation to the VPGC members' proposed seed price recommendation and the ACCC's draft determination not to authorise this aspect of application A91321. The ACCC has concerns that any SEPGA Seed Price Recommendation may be used as a reference price for seed potatoes produced by VPGC members and may facilitate continued coordination by VPGC members over seed prices. Therefore, the ACCC has concerns that the Seed Price Recommendation may have a substantial anti-competitive effect due to indirect impacts.

Conclusion

147. The ACCC considers that the direct public detriment in the form of an increase in the price of seed potatoes produced by SEPGA that is generated by the Seed Price Recommendation is likely to be minimal. However, the ACCC is of the view that the public detriment associated with reference pricing by VPGC members is significant and that the potential for a SEPGA Seed Price Recommendation to facilitate coordination in these circumstances is likely to result in substantial public detriment.

ACCC conclusion on public detriments

148. 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. While the ACCC acknowledges that the direct detriment is likely to be minimal, the Seed Price Recommendation is likely to lead to substantial public detriment in the form of inefficiently high seed potato prices caused by the potential for coordination by and with VPGC members.

Balance of public benefit and detriment

149. 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.

150. In the context of applying the net public benefit test in section 90(8)20 of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²¹

151. 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. 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.

152. 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

153. The Act allows the ACCC to grant authorisation for a limited period of time.²² 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.

154. In this instance, SEPGA seeks authorisation for five years.

155. SEPGA submits that while most of the contracts SEPGA potato growers have with buyer are for one year only, sometimes large potato buyers prefer to secure their supply in contracts of 2-5 years. SEPGA submits that authorisation for five years will enable SEPGA potato growers to enter into contracts for longer periods of time

²⁰ 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.

²¹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²² Section 91(1).

if these contracts are available, providing stability to the industry. The ACCC proposes to grant authorisation for five years.

Draft determination

The application

156. On 12 July 2012, SEPGA lodged application for revocation of A91057 and the substitution of authorisation A91322 with the ACCC. Application A91322 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 SEPGA to participate in any dispute resolution mechanism relating to disputes between SEPGA members and potato buyers regarding collectively negotiated agreements

(the **Collective Bargaining Conduct**)

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

(the **Seed Price Recommendation**)

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

The net public benefit test

158. 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.

159. 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.

160. The ACCC therefore **proposes to grant authorisation** to application A91322 in respect of the Collective Bargaining Conduct and **to not grant** 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

161. The ACCC proposes to grant authorisation to SEPGA 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.

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

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

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

Conduct not proposed to be authorised

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

Interim authorisation

166. At the time of lodging the application, SEPGA requested interim authorisation to:

- a. collectively negotiate the terms and conditions of supply contracts with processors and other potato buyers;
- b. participate in any dispute resolution mechanism relating to disputes between SEPGA members and potato buyers regarding collectively negotiated agreements; and
- c. establish a price recommendation for the supply of seed potatoes by SEPGA members to other potato growers in Australia.

167. The ACCC granted interim authorisation on 23 August 2012.

168. When the ACCC issues its final determination, it proposes to revoke its interim authorisation decision of 23 August 2012 in relation to its grant of interim authorisation to establish a price recommendation for the supply of seed potatoes by SEPGA 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

169. The ACCC will now seek further submissions from interested parties. In addition, SEPGA 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.