



# Draft Determination

Application for authorisation AA1000527

lodged by

Ingham's Group Limited and its related bodies corporate

in respect of co-ordination between Victorian chicken meat processors to manage the impact of COVID-19 Stage 4 restrictions Authorisation

number: AA1000527

24 September 2020

Commissioners: Rod Sims, Mick Keogh, Delia Rickard, Sarah Court and Stephen Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable Ingham's Group Limited, Turosi Pty Ltd, Hazeldene's Chicken Farm Proprietary Limited, and the Australian Chicken Meat Federation, to coordinate to minimise the disruption that would otherwise be caused to chicken meat processing and supply by the Stage 4 restrictions imposed by the Victorian Government in response to the COVID-19 pandemic. The ACCC proposes to grant authorisation subject to reporting conditions.

The ACCC proposes to grant authorisation until 31 December 2020.

On 7 August 2020 the ACCC granted interim authorisation to enable the proposed arrangements to commence while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination before making its final decision.

### 1. The application for authorisation

- 1.1. On 6 August 2020, Ingham's Group Limited and its related bodies corporate (**Ingham's**) lodged application for authorisation AA1000527 with the Australian Competition and Consumer Commission (the **ACCC**). Ingham's is seeking authorisation for Ingham's, Turosi Pty Ltd and its related bodies corporate (**Turosi**), Hazeldene's Chicken Farm Proprietary Limited and its related bodies corporate (**Hazeldene**), and the Australian Chicken Meat Federation (**ACMF**) (together the **Parties**) to coordinate to minimise the disruption that would otherwise be caused to chicken meat processing and supply by the Stage 4 restrictions imposed by the Victorian Government in response to the COVID-19 pandemic. This application for authorisation AA1000527 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation to provide businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. Ingham's also requested, and on 7 August 2020, the ACCC granted under subsection 91(2) of the Act, interim authorisation to enable the Parties to engage in the proposed conduct while the ACCC is considering the substantive application. The request for interim authorisation is discussed further below.

### The Proposed Conduct

- 1.4. Ingham's is seeking authorisation, for the purpose set out in paragraph 1.5 below, to enable the Parties to discuss, enter into or give effect to any contract, arrangement or understanding, or engage in any conduct, between themselves which has the purpose of:
  - a. facilitating, coordinating or ensuring the production and processing of chicken and chicken meat products in Victoria in order to:
    - i. meet ongoing demand; and
    - ii. adequately deal with the supply of live chickens currently "on farm" without the need to euthanise flocks;

- b. sharing or coordinating the use of essential personnel, facilities and inputs (including chickens) in order to process as many chickens as possible by the Processors

(the **Proposed Conduct**).

- 1.5. Ingham's only seeks authorisation for the Parties to engage in the Proposed Conduct insofar as it is for the sole purpose of seeking to maximise the number of chickens that are able to be processed by Ingham's, Turosi and Hazeldene (together the **Processors**), so as to minimise to the extent possible the impacts that the COVID-19 crisis (discussed further in the Background section below) has, or may reasonably have, on the capacity of Processors to process chickens, and as a result, the associated impacts on growers and customers.
- 1.6. The Proposed Conduct will be developed and implemented by a special working group established by the Parties for the purposes of responding to the restrictions (**COVID Working Group**).
- 1.7. Ingham's submits that the Proposed Conduct will:
  - a. not involve collective decisions relating to the price at which the Processors acquire or supply goods or services;
  - b. not involve collective decisions relating to the arrangements between the Processors and their respective chicken growers, or the supply arrangements between the Processors and their respective customers;
  - c. not be compulsory; and
  - d. form a temporary response to the difficulties which the Processors face as a result of the COVID-19 crisis and associated restrictions.

## Interim authorisation

- 1.8. Ingham's also requested interim authorisation to enable the Parties to engage in the Proposed Conduct while the ACCC is considering the substantive application.
- 1.9. Given the then imminent introduction of the restrictions, on 7 August 2020, the ACCC granted conditional interim authorisation under subsection 91(2) of the Act.<sup>1</sup> Interim authorisation is conditional on the Parties:
  - providing the ACCC with weekly reports setting out each material decision made by the COVID Working Group, and
  - providing any further information that the ACCC reasonably requests.
- 1.10. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## 2. Background

- 2.1. The Processors produce or manufacture, and supply, chicken meat products in Victoria. Ingham's submits that, together, the Processors process and supply the majority of chicken and chicken meat products to millions of Victorians each week.

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<sup>1</sup> See ACCC decision of 7 August 2020 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/ingham-group-ltd-other-chicken-processors-and-the-australian-chicken-meat-federation>.

- 2.2. The ACMF is the peak coordinating body for participants in the chicken meat industry in Australia, its functions including the promotion and representation of the chicken meat industry.
- 2.3. On 3 August 2020, the Victorian Government announced that further restrictions would be imposed on Victorian businesses as a result of the COVID-19 pandemic, for a period of at least 6 weeks (**Stage 4 Restrictions**). The Stage 4 Restrictions include directions that a large number of Victorian businesses are to temporarily close. Businesses permitted to stay open are required to reduce the number of workers onsite. In the poultry industry a workforce reduction of 20% is required. The Stage 4 Restrictions came into effect at 11.59pm on 7 August 2020.
- 2.4. Ingham's advises that the Stage 4 Restrictions, in combination with other impacts from the COVID-19 pandemic and any further restrictions that may be imposed (the **Restrictions**), will significantly impact the capacity and output of the Processors, which could have disastrous consequences for the Processors and the community generally, including:
  - a. the culling of chickens that cannot be processed and the destruction of eggs to be used for growing future chickens to maintain supply;
  - b. job losses as a result of reduced output and/or supply chain interruptions;
  - c. a significant impact on any growers who are left with empty farms because the Processors do not have the capacity to process the chickens that would be grown;
  - d. shortages of chicken and chicken products in Victorian supermarkets, cafes, and restaurants; and
  - e. retail price increases for Victorian consumers of chicken and chicken meat products.
- 2.5. The Parties advise that the Proposed Conduct is intended to minimise the impacts of the Restrictions by facilitating coordination between the Processors to ensure that chickens can be processed in the most efficient way possible, while also complying with the Restrictions and ensuring the Processors employ all necessary precautions to address the health risks posed by the COVID-19 pandemic.
- 2.6. In particular, the Processors are seeking solutions that, in the context of complying with the Restrictions, to the extent possible:
  - a. avoid or reduce the need to cull chickens;
  - b. reduce the risk and magnitude of job losses;
  - c. minimise impacts on growers and other parts of the supply chain; and
  - d. ensure sufficient supply of chickens to meet Victorian demand.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties on the effect of the interim authorisation and the likely effect of the Proposed Conduct

including grower representatives, customers, state government, animal welfare associations and relevant industry associations or peak bodies.<sup>2</sup>

- 3.3. The ACCC received two submissions from interested parties in relation to the application. The Victorian Farmers Federation supports the application in principle, however notes that due to the breadth of the Proposed Conduct, regular oversight from the ACCC is necessary, and that Authorisation should be for as limited a period as possible. The Australian Food and Grocery Council (**AFGC**) also supports the application for authorisation, but similarly notes that the authorisation should only be in operation for the length of time necessary to ensure the continued supply of essential goods to Australians. The AGFC also supports the limits on the conduct pursuant to the Interim Authorisation.
- 3.4. Public submissions by Ingham's and interested parties are available from the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Ingham's has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted. The ACCC considers the relevant area of competition likely to be affected by the Proposed Conduct is the production, processing, distribution and sale of chicken meat in Victoria.

### Future with and without the Proposed Conduct

- 4.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.5. The rationale for the Proposed Conduct is closely linked with the impacts of the COVID-19 pandemic in Australia and in particular the Restrictions. The future likelihood and severity of those impacts is uncertain at this point in time.
- 4.6. The Proposed Conduct is currently permitted subject to conditional interim authorisation. However, as the Parties have not at the date of this Draft Determination engaged in the Proposed Conduct, the ACCC has not had the benefit of observing how the Proposed Conduct would operate in practice. Accordingly, the ACCC cannot rely on the Parties' actions pursuant to the interim authorisation to inform how the likely future with the Proposed Conduct would look if authorisation is granted in a final determination.

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<sup>2</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- 4.7. The ACCC considers that in the absence of the Proposed Conduct, the Processors would be likely to seek to address any disruptions caused to their chicken meat processing operations following the Restrictions and the COVID-19 pandemic individually, or through reliance on bilateral arm's length agreements between Processors. Individual or bilateral decisions by processors may not fully utilise all Victorian processing capacity, and may result in culls of birds if processing capacity were unavailable. This is more likely if capacity at the larger processing plant is impacted, because it would be harder for the smaller plants to individually provide sufficient additional capacity. Further, individual or bilateral decisions would likely be made more slowly.
- 4.8. In the likely future with the Proposed Conduct, the Parties would be able to co-ordinate through the COVID Working Group to address any disruptions to operations arising as a result of the Restrictions and the COVID-19 pandemic.

## Public benefits

- 4.9. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>3</sup>

- 4.10. The ACCC has considered the following public benefits :

- improved preparedness for adverse events during the Restrictions and COVID-19 pandemic; and
- increased number of chickens processed in Victoria.

## Improved preparedness for adverse events during the Restrictions and COVID-19 pandemic

- 4.11. In assessing the likely public benefits arising from the Proposed Conduct, the ACCC notes the continuing uncertainty around the impact of the COVID-19 pandemic and government measures intended to address the pandemic.
- 4.12. The Proposed Conduct will enable the Parties to be ready to respond quickly to address disruptions caused by the Restrictions and the COVID-19 pandemic. This ability to co-ordinate and move quickly improves the likelihood that the public benefits set out below would be realised in the face of a particular adverse event (such as an outbreak of COVID-19 at any of the Processors facilities, preventing workers from working or requiring facilities to be temporarily closed). The ACCC considers that the opportunity for the Parties to react utilising an established mechanism (being the COVID Working Group) in the circumstances of uncertainty surrounding the COVID-19 pandemic is likely to make that response more effective and is of public benefit.

## Improved efficiency in chicken meat processing in Victoria

- 4.13. The ACCC considers the Proposed Conduct is likely to increase the number of chickens processed in Victoria than would otherwise be the case without the Proposed

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<sup>3</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

Conduct in circumstances of adverse events arising from the Restrictions and the COVID-19 pandemic. The Proposed Conduct would allow the Parties to co-ordinate and share processing capacity in the event of disruptions caused by the Restrictions and the COVID-19 pandemic, which would:

- limit the need to cull chickens, which are not then processed for sale, and
- prevent reductions in placement of chicks with growers (in anticipation of reduced future processing capacity).

4.14. The Proposed Conduct is therefore likely to result in improved efficiency in chicken meat production in Victoria, through a reduction in waste and maximisation of the number of chickens able to be processed when compared with the occurrence of an adverse event where the Proposed Conduct is not engaged in, and consequent public benefits in the form of:

- Increased security of supply and maximisation of the supply of chicken meat to Victorian customers during the Restrictions. This benefit is likely to occur under the Proposed Conduct where Processors agree to send birds to each other's processing facilities when a Processor has insufficient capacity, preventing culls of chickens which are not then processed for sale.
- Reduced likelihood of price increases of chicken meat for Victorian customers during the Restrictions. As set out above, the Proposed Conduct is likely to maximise the supply of chicken meat to Victorian customers during this restrictions, which will reduce the likelihood of increased prices that would result from supply disruptions or lower levels of supply.
- Improved productive and allocative efficiency of chicken growers resulting from reduced likelihood of unnecessary reductions in placements of chicks than may occur absent the Proposed Conduct. This benefit is likely to occur as the Parties ability to co-ordinate and share processing capacity would lessen their need to reduce chick placements in anticipation of future reduced processing capacity. Reduced chick placements absent the Proposed Conduct may result in an under-utilisation of growers resources, reduced grower income, and may result in job losses of those employed by growers.
- Improved productive and allocative efficiency of Processors, and reduced risk of job losses than may occur absent the Proposed Conduct. This benefit is likely to occur as the Proposed Conduct allows the Processors to co-ordinate processing capacity, and workforce allocation. This minimises the risk that an adverse event at a single processing facility would result in unprocessed birds, lost revenue or significant job losses.

4.15. The ACCC therefore considers that the Proposed Conduct is likely to result in public benefit in the form of improved efficiency in chicken meat processing in Victoria, through reduced waste, maximising the number of chickens processed in Victoria during the Restrictions and COVID-19 pandemic than would otherwise be the case if the Proposed conduct does not occur, and as a result reduced likelihood of price rises, reductions of grower and processor income and job losses.

### **ACCC conclusion on public benefit**

4.16. Based on the information available, the ACCC considers that there are likely to be public benefits from the Proposed Conduct, including:



- improved preparedness for adverse events during the Restrictions and COVID-19 pandemic (due to the establishment of mechanisms for the Parties to co-ordinate in the event of an adverse event), and
- improved efficiency in chicken meat production in Victoria, through a reduction in waste and maximisation of the number of chickens able to be processed (due to the co-ordination or processing capacities and workforces under the Proposed Conduct).

## Public detriments

4.17. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.<sup>4</sup>*

4.18. The ACCC notes that coordination arrangements between competitors in relation to the services they provide inherently carry a risk of lessening competition compared to a situation where each business makes its own decisions. The ACCC also notes that the fact all Victorian processors would participate in the Proposed Conduct means that there is a risk of competitive distortion to the extent that contracts or arrangements negotiated between the Processors may influence future contracts and arrangements entered into after authorisation has ceased.

4.19. The ACCC notes the potential for public detriment resulting from the Proposed Conduct as a result of the Parties sharing strategic information or reaching agreements on price or supply agreements or arrangements. However, the ACCC considers that the likelihood for detriment is reduced by the fact that the Proposed Conduct:

- is voluntary in nature
- is subject to reporting conditions set out above, which improve the transparency of the Proposed Conduct
- does not extend to any agreements about the price at which the Processors will acquire or sell any goods or services
- does not involve collective decisions relating to the arrangements between the Processors and their respective chicken growers, or the supply arrangements between the Processors and their respective customers
- does not allow the Processors to share information regarding their respective arrangements with growers and customers, and
- is for a limited period of time.

4.20. The ACCC also proposes to impose conditions to provide improved transparency and mitigate this risk. The proposed conditions are the same as those imposed on the interim authorisation granted on 7 August 2020. The proposed conditions require the Parties to:

- provide the ACCC with weekly reports setting out each material decision made by the COVID Working Group, and
- provide any further information that the ACCC reasonably requests.

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



4.21. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.

## Balance of public benefit and detriment

4.22. The ACCC considers that the Proposed Conduct is likely to result in public benefits by improving the preparedness of the Parties to react to adverse events during the Restrictions and COVID-19 pandemic (due to the establishment of mechanisms for the Parties to co-ordinate in the event of an adverse event arising from the Restrictions or the COVID-19 pandemic), and by increasing the number of chickens processed in Victoria (due to the co-ordination or processing capacities and workforces under the Proposed Conduct).

4.23. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriments, for the reasons outlined above including as it is for a short time while the effects of the Restrictions are in place, is voluntary in nature, does not extend to any agreements about the price at which the Processors will acquire or sell goods or services or collective decisions regarding supply terms with growers and customers of the Processors, and does not allow information sharing regarding growers and customers.

4.24. For the reasons outlined in this draft determination the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the Public from the Proposed Conduct.

## Length of authorisation

4.25. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>5</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.26. In this instance, Ingham's seeks authorisation until 31 December 2020, and the ACCC proposes to grant authorisation until 31 December 2020.

4.27. Given the ongoing effects and uncertain duration of the COVID-19 pandemic in Victoria at the time of making this draft determination, the ACCC is seeking submissions from Ingham's and interested parties whether 31 December 2020 remains an appropriate period of authorisation.

## 5. Draft determination

### The application

5.1. On 6 August 2020, Ingham's lodged application AA1000527 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. Ingham's seeks authorisation for Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

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<sup>5</sup> Subsection 91(1)

## The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly the ACCC proposes to grant authorisation for the Proposed Conduct. For the reasons set out at 4.20, the ACCC proposes to impose the conditions at paragraph 5.14 below.

## Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant conditional authorisation AA1000527 to enable the Parties, through the COVID Working Group, to discuss, enter into or give effect to any contract, arrangement or understanding, or engage in any conduct, between themselves which has the purpose of:
  - a. facilitating, coordinating or ensuring the production and processing of chicken and chicken meat products in Victoria in order to:
    - i. meet ongoing demand; and
    - ii. adequately deal with the supply of live chickens currently “on farm” without the need to euthanise flocks;
  - b. sharing or coordinating the use of essential personnel, facilities and inputs (including chickens) in order to process as many chickens as possible by the Processors.
- 5.7. The ACCC proposes to grant conditional authorisation to the Parties, insofar as it is for the sole purpose of seeking to minimise to the extent possible the impacts that the COVID-19 crisis has, or may reasonably have, on the capacity of Processors to process chickens, and as a result, the associated impacts on growers and customers.
- 5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000527 until 31 December 2020.
- 5.10. This draft determination is made on 24 September 2020.

## Conduct which the ACCC proposes not to authorise

- 5.11. The proposed authorisation does not extend to conduct to enable the Parties to:
  - make agreements about the price at which the Processors will acquire or sell any goods or services
  - make collective decisions relating to the arrangements between the Parties and their respective chicken growers, or the supply arrangements between the Parties and their respective customers

- make collective decisions to override any of the contractual arrangements between individual Processors and growers,
- share information regarding the Processors' respective arrangements with growers and customers.

## Proposed conditions of authorisation

5.12. The ACCC may specify conditions in an authorisation.<sup>6</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>7</sup>

5.13. The ACCC may specify conditions where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.<sup>8</sup> The ACCC proposes to impose conditions to provide improved transparency and address the inherent risk of a lessening of competition arising from coordination arrangements between competitors in respect of the goods and services they provide.

5.14. The ACCC proposes to grant authorisation subject to the following:

### **(1) Reporting obligations**

The Parties provide a report to the ACCC on a weekly basis (or as otherwise agreed by the ACCC) setting out details of each material decision made by the COVID Working Group (as defined below) which involves or otherwise relates to the Proposed Conduct. The ACCC proposes to publish the report subject to the assessment of any confidentiality claim.

### **(2) Provision of further information**

The Parties provide any further information that the ACCC reasonably requests (through a contact person nominated by the Parties) about the Proposed Conduct being engaged in under the requested authorisation.

## 6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

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<sup>6</sup> Section 88(3) of the Act.

<sup>7</sup> Section 88(3) of the Act.

<sup>8</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].