



Australian
Competition &
Consumer
Commission

Draft Determination and Interim Authorisation

Application for authorisation

lodged by

South Australian Baiada Growing Group

in respect of

collective bargaining with
Baiada Poultry Pty Ltd

Date: 22 November 2017

Authorisation number: AA1000403

Commissioners:
Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation for 10 years to the South Australian Baiada Growers Group to collectively bargain the terms and conditions of chicken grower contracts with chicken meat processor, Baiada Poultry Pty Ltd.

The ACCC also grants interim authorisation to enable the Applicants to commence contract negotiations but not enter into agreements with Baiada. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC revokes interim authorisation.

Authorisation provides statutory protection from legal action for conduct that may contravene cartel provisions or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the *Competition and Consumer Act 2010*.

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

The application for authorisation

1. On 31 October 2017, the South Australian Baiada Growers Group comprising current and future members (the **Applicants**) applied for authorisation under subsections 88(1A) and (1) of the *Competition and Consumer Act 2010 (CCA)* for 10 years to engage in conduct that may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

The proposed conduct

2. The Applicants are seeking authorisation, on behalf of current and future members who provide growing services, to collectively bargain with the company that processes the chickens they grow, Baiada Poultry Pty Ltd (**Baiada**). The Applicants intend to collectively bargain in relation to:
 - a. growing fees and other terms and conditions of chicken growing contracts
 - b. adjustment and review of growing fees and other matters arising from time to time or in relation to terms of chicken growing contracts, and
 - c. resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between the processor and a grower or growers.

(the **Conduct**).

3. The Growers Group currently has 20 broiler chicken farmer members which provide chicken grow-out services to Baiada. The majority of the members of the Growers Group are small businesses. The Growers Group represents all chicken growers currently contracted to Baiada in South Australia.
4. The Applicants also submit that participation in the Growers Group is voluntary. Should growers choose to opt out of collective negotiations and negotiate

individually with the processor they would still be a member of the Growers Group.

5. Participation in collective bargaining is also voluntary for the processor: Baiada can choose whether or not to participate at any time.

Request for interim authorisation

6. The Applicants also requested interim authorisation to enable its members to engage in growing contract negotiations with Baiada while the ACCC is considering the substantive application.

Background

The processor

7. Baiada is a fully integrated chicken meat processor with processing operations in NSW, Western Australia, QLD and South Australia.¹
8. Baiada and its competitor Inghams Enterprises Pty Ltd supply more than 70 per cent of Australia's broiler chickens.²

Similar authorisations

9. The ACCC has considered a number of applications for authorisations and notifications regarding collective bargaining by chicken growers in other states:
 - The Victorian Farmers Federation is authorised to collectively bargain with their respective chicken meat processors until 16 June 2026.³
 - The Western Australian Broiler Growers' Association is authorised until 21 June 2026 for its chicken grower members to collectively bargain with the chicken processor they supply.⁴
 - New South Wales Farmer's Association is authorised until 17 June 2024 to form a series of common interest grower groups which will each collectively bargain the terms and conditions of grower contracts with the relevant poultry processor.⁵
 - South Australian Inghams chicken growers are authorised until 30 June 2022 to collectively bargain over certain terms and conditions with Inghams.⁶
 - The Queensland Chicken Growers Association is authorised until 14 February 2023 for its members to collectively negotiate with their Baiada.⁷
10. In each case, the ACCC allowed the collective bargaining arrangements on the basis that there was likely to be a net public benefit.

¹ Baiada Poultry, *Operations*, <https://www.baiada.com.au/our-expertise/poultry/operations>

² Australian Chicken Meat Federation Inc., *Chicken Meat Industry: Structure and Ownership*, <http://www.chicken.org.au/page.php?id=2>.

³ Victorian Farmers Federation - A91534, 16 June 2016.

⁴ Western Australian Broiler Grower Association Incorporated – Revocation and Substitution – A91527, 31 May 2016.

⁵ NSW Farmers' Association - A91417, 25 June 2014.

⁶ South Australian Inghams Chicken Growers - A91294, 14 June 2012.

⁷ Queensland Chicken Growers Association – A91347, 24 January 2013.

Consultation

11. The ACCC sought the views of Baiada, which stated that it does not oppose the grant of interim authorisation or substantive authorisation.
12. Baiada expressed the view that some of the Applicants' commentary in their submission on relative bargaining power, returns on investment, the level of competition and other market characteristics was 'flawed and in some cases is a misstatement of the true position.'
13. The ACCC has taken this submission into account in the assessment that follows. However, the ACCC notes that even if it is accepted that the Applicants' commentary is flawed, Baiada does not suggest that this is a reason to deny interim or full authorisation.
14. The ACCC will consult with interested parties and seek submissions in response to this draft determination.
15. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC assessment

16. On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.
17. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct 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 to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.⁸ In its assessment of the application, the ACCC has taken into account:
 - The application received from the Applicants and a submission made by the target, Baiada.⁹
 - Information available to the ACCC regarding similar previous matters.¹⁰
 - The likely future without the Conduct that is the subject of the authorisation. In Particular, the ACCC considers that absent the Conduct, it is likely that growers will individually seek to negotiate terms and conditions of their contracts Baiada, or accept standard form contracts.

⁸ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

⁹ Please see the ACCC's Public Register for more details, including a list of parties consulted.

¹⁰ Victorian Farmers Federation - A91534, 16 June 2016; NSW Farmers' Association - A91417, 25 June 2014; South Australian Inghams Chicken Growers - A91294, 14 June 2012; Queensland Chicken Growers Association – A91347, 24 January 2013.

- That no collective boycott activity is proposed and participation in the Conduct is voluntary for both chicken growers and processors.
- The relevant areas of competition likely to be affected by the Conduct, particularly competition to supply chicken growing services to South Australian chicken processors.
- The 10 year authorisation period requested.

Public benefits

18. The Applicants submits that the proposed conduct will result in public benefits from:

- improved bargaining power and transaction costs savings, particularly for smaller growers, and
- improved input into contracts from collective negotiations including access to sharing relevant industry and market information.

19. The ACCC considers that the Conduct is likely to result in a number of public benefits including:

20. Transaction cost savings: the parties to a negotiation will incur a number of 'transaction costs', including administrative costs, time spent negotiating, and/or the cost of obtaining professional expert advice. Collective bargaining will result in cost savings for both Baiada and members of the Growers Group, as the parties will only have to engage in a single collective negotiation process, rather than a series of separate individual negotiations. Members of the Growers Group may also be able to share the cost of a single negotiation, which may allow them to engage a professional advisor to assist them.

21. Improved input into contracts resulting in efficiencies: collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of both the Applicants and Baiada.

22. Collective bargaining is likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with processors to achieve more efficient outcomes.

23. Further, the Growers Group provides a mechanism for members to discuss innovations in production techniques which may result in improving productive and allocative efficiency.

Public detriments

24. The ACCC considers that the Conduct is likely to result in little, if any, public detriment. In reaching this view, the ACCC has had regard to the following factors:

- The Growers Group is relatively small and is unlikely to push prices above competitive levels as:

- it is difficult for growers to switch to supplying other chicken meat processors as chicken processors have specific facility and accreditation requirements
 - the recent fall in wholesale chicken meat prices suggests that the downstream market for chicken meat to consumers is competitive. Should growers seek to increase costs beyond competitive levels, Baiada would investigate sourcing its chicken meat from other chicken growers, and
 - participation in the Conduct is voluntary for both the Applicants and the target, Baiada.
- There is no proposed boycott activity.

Balance of public benefit and detriment

25. For the reasons outlined in this draft determination, the ACCC considers that the Conduct is likely to result in public benefit that would outweigh any public detriment, including from any lessening of competition.

Draft determination

The application

26. Application AA1000403 was made using a Form B, under subsections 88(1) and 88(1A) of the CCA seeking authorisation to engage in conduct to which certain provisions of Part IV of the CCA would or might apply.¹¹

27. The Conduct involves the Applicants collectively bargaining with Baiada in relation to:

- a. growing fees and other terms and conditions of chicken growing contracts
- b. adjustment and review of growing fees and other matters arising from time to time under/or in relation to terms of chicken growing contracts, and
- c. resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between the processor and a grower or growers.

The net public benefit test

28. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the Conduct for which authorisation is sought would result or be likely to result in a

¹¹ As noted in paragraph 16, changes to the authorisation provisions of the Act came into effect on 6 November 2017, a number of amendments to the CCA came into effect, which apply to applications for authorisation under consideration at or after that date, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

public benefit that would outweigh any detriment to the public that would result or be likely to result from the Conduct.¹²

29. Authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.¹³
30. Therefore the ACCC proposes to grant authorisation AA1000403 to the South Australian Baiada Growers Group to engage in the Conduct for a period of 10 years.
31. This draft determination is made on 22 November 2017.

Interim authorisation

32. The ACCC may grant interim authorisation pursuant to section 91(2) of the CCA.
33. At the time of lodging the application, the Applicants requested interim authorisation to conduct investigations in relation to reviewing Baiada's growing contracts and to commence contract negotiations with Baiada. The Applicants submit that this request is urgent due to structural changes in the industry including a fall in wholesale chicken meat prices which have prompted Baiada to restructure contractual arrangements with growers to reduce costs.
34. The ACCC considers that:
 - Commencing contract negotiations as soon as possible will assist parties in responding to market changes.
 - As the Applicants will not enter into any contracts, arrangements or understandings with Baiada, should the ACCC ultimately decide to deny authorisation, the market would be able to return to its pre-interim state.
 - For the reasons outlined above (paragraphs 19–25), the proposed conduct is likely to result in a number of public benefits, and is unlikely to result in any significant competitive harm.
35. Accordingly, the ACCC grants interim authorisation under subsection 91(2) of the CCA. Interim authorisation is granted to the South Australian Baiada Growers Group to commence collective contract negotiations with Baiada.
36. The ACCC does not grant interim authorisation to the Applicants to enter into any contracts, agreements or understandings with Baiada from any collective negotiations.
37. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation. The ACCC's decision in relation to the interim

¹² As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

¹³ The reference to "within the meaning of section 45 of the Act" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition. As former s4D of the Act on Exclusionary Provisions has been repealed pursuant to the amendments referenced above, references to exclusionary provisions have been excluded from the description of the proposed conduct.

authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Next steps

38. The ACCC now seeks submissions on the draft determination. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.