



**Trade &  
Investment**

Strategic Policy & Economics Branch

## ***Review of the Poultry Meat Industry Act 1986***

Report prepared for the NSW Department of Primary Industries

August 2013

## Executive Summary

This report provides a review of the *Poultry Meat Industry Act 1986*. The need for a review arose from amendments to the Act in 2005. As required under those amendments, a review of the Act was conducted during 2009. This statutory review recommended that a further review be undertaken to investigate whether the policy objectives of the *Poultry Meat Industry Act 1986* remain valid.

In early 2013, the NSW Department of Primary Industries requested a review to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain the most appropriate way of securing those objectives.

The NSW Government is committed under NSW2021 to reduce red tape and increase the competitiveness of doing business in NSW by ensuring that legislation remains appropriate and relevant to present circumstances. Also, under Council of Australian Governments (COAG) national reform principles, any 'restrictions on competition' must be reviewed at least once every ten years.

The review was undertaken by the Strategy Policy & Economics Branch of NSW Trade & Investment. The review included stakeholder public consultations and targeted consultations with key industry stakeholders.

The *Poultry Meat Industry Act 1986* partially regulates the first (poultry growing) stage of an industry supply chain that is worth around \$740 million to the NSW economy and provides for urban and regional employment of about 6,000 people across the State, directly employing about 1,000 people on farms and 5,000 in meat processing.

The NSW poultry industry is vertically integrated, with a strong mutual dependence between growers and processors in meeting the needs of consumers, and balancing meat demand and bird supply. The industry and in particular the relationship between processors and growers has been subject to regulation for over 30 years. The objective of the legislation has been to prevent the abuse of market power by regulating the relationship between the growers and processors of poultry meat.

The *Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Act 2005* shifted the focus of the *Poultry Meat Industry Act 1986*. The Act was amended to:

- remove the centralised price setting function of the Poultry Meat Industry Committee (PMIC);
- facilitate direct contract negotiations between growers and processors;
- authorise collective bargaining in contract negotiations between growers and processors for the purposes of the *Trade Practices Act 1974* (Cth);<sup>1</sup>
- reduce the PMIC membership from 15 to three and exclude direct industry representation on the Committee;
- establish the Poultry Meat Industry Advisory Group (PMIAG) as a forum for growers and processors; and

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<sup>1</sup> Now *Competition and Consumer Act 2010*.

- require a further review three years after commencement of the amendments.

The amendments wound back the extent to which the Government regulated the poultry meat industry in NSW and were designed to provide a transition to an open, unregulated market.

**The review has found that:**

- The potential for market power abuse by processors over poultry growers still exists and that the policy objective of preventing any such abuse remains relevant.
- Most functions of the PMIC and PMIAG specifically required under the Act have now been accomplished: (i) the industry Code of Practice and the Guidelines for Agreements have been completed; (ii) there has been minimal and only very intermittent demand for the PMIC dispute resolution function; and (iii) the NSW Minister for Primary Industries has no need to refer matters to the PMIC for enquiry and report.
- Collective bargaining by poultry growers with their processor is supported as a continuing mechanism for ensuring that the superior market power of processors over growers is not abused.
- The *Poultry Meat Industry Act 1986* is not the best mechanism to achieve this requirement in to the future. In this regard, it is considered that the best strategy is to transition the NSW industry to an arrangement under the *Competition and Consumer Act 2010* (Cth), which would put it on an equivalent footing to industry in Victoria and Queensland.
- NSW dominance of poultry meat production has declined in recent years. The less regulated jurisdictions of South Australia, Western Australia and Queensland are expanding poultry meat production faster than NSW and there is some evidence that government policy has influenced this phenomenon. It is also understood that grow-out fees paid by processors to contract poultry growers in those jurisdictions are higher than in NSW. Minimising regulatory barriers will assist in ensuring the NSW industry remains competitive.
- There is merit in seeking to continue the industry development activities in which the PMIC is currently engaged and has outlined for future attention. These functions are, however, more typically the roles of an industry representative body and it would therefore be desirable to determine industry interest in transferring responsibility for these activities to an appropriate organisation.

**The review recommends that:**

1. The Act be repealed with a sufficient transition period for the industry to apply for Australian Competition and Consumer Commission (ACCC) authorisation for collective negotiation under Part IV of the *Competition and Consumer Act 2010* (Cth).

2. Alternative arrangements be explored for industry-based delivery of the industry development tasks initiatives identified by the PMIC.

Consideration could potentially be given to whether there would be a useful role for a statutory body with poultry growing contract dispute resolution functions that could be established intermittently on an 'as needs' basis (a similar model to Local Land Boards). However, existing mediation services, such as that offered through the Office of the NSW Small Business Commissioner may be an equally effective alternative.

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# 1. Introduction

## 1.1 Context of this Review

In 2004, a review of the *Poultry Meat Industry Act 1986* (the Act) was conducted in accordance with NSW Government commitments under the 1995 Competition Principles Agreements. That review found that the then focus on price regulation could not be justified and recommended modified regulatory arrangements to provide safeguards against the abuse of market power whilst avoiding the use of centralized, compulsory price-fixing and contract approval mechanisms.

The 2004 review further recommended:

- a) the use of guidelines for the form and content of poultry growing agreements (PGAs);
- b) retaining contract dispute resolution processes, including mediation and arbitration;
- c) allowing for poultry growers to opt-out of the regulatory arrangements;
- d) continued statutory oversight of the arrangements; and
- e) a regulator without the direct involvement of industry participants.

The Act was subsequently substantially amended through the *Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Act 2005*. In addition to winding back the extent to which the NSW Government regulated the poultry meat industry in this State, the amendments made in 2005 included a requirement for a review within three years of the commencement of the new provisions. This statutory review was conducted in 2009, with the review report tabled in Parliament on 11 May 2010.

The 2009 statutory review recommended that a further review be undertaken to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain the most appropriate way of securing those objectives. In early 2013, the Department of Primary Industries (NSW DPI) requested that this review proceed.

## 1.2 Terms of Reference of the 2013 Review

The terms of reference for the review of the *Poultry Meat Industry Act 1986* were to:

1. identify the policy objectives of the legislation and assess whether they are still relevant; and in accordance with COAG National Reform Agenda Competition Principles, and
2. assess whether:
  - i. the objectives of the legislation can only be achieved by the provisions of the Act which regulate certain business arrangements (i.e., restrict competition) in the poultry meat industry;
  - ii. the existing restrictions on competition deliver net benefits to the community as a whole; and
  - iii. the existing restrictions on competition are the minimum required to achieve the objectives of the legislation.

### **1.3 The Review Process**

The review was undertaken by the Strategic Policy & Economics Branch (SP&E) of NSW Trade & Investment, as follows:

- i. an Information Paper was circulated to stakeholders in conjunction with advertisements in industry and regional newspapers calling for written submissions;
- ii. public meetings were held in the key production regions (Tamworth, Maitland, Mangrove Mountain, Penrith and Mittagong) to explain the review and encourage submissions from stakeholders;
- iii. targeted meetings were held with key industry stakeholders to explain the review, encourage submissions and receive relevant input, and
- iv. the principles of best regulatory practice as described by the NSW Better Regulation Office and the nationally agreed principles for efficiency in regulation, were applied.

The Poultry Meat Industry Committee (PMIC) and Poultry Meat Industry Advisory Group (PMIAG) were closely consulted in the course of the review.

Further information on key aspects of the review process is provided in Chapter 3.



## 2. Background

### 2.1 Industry Overview

Poultry meat production is a major industry in Australia, with the industry conservatively estimating that consumers currently spend around \$5.6 billion per annum on chicken meat (gross value at time of slaughter \$2.179 billion). The Australian Chicken Meat Federation<sup>2</sup> estimates consumption of chicken meat in 2010–11 at 43.9 kilograms per person and increasing (compared to 4.2 kilograms in the early 1960s).

More than 95 per cent of the chicken meat grown and eaten in Australia is produced by seven privately owned Australian processing companies. The two largest, Baiada Poultry and Inghams Enterprises, are nationally based companies that together supply more than 70 per cent of Australia's chicken meat, with five other companies each supplying 3–9 per cent of the Australian market.

Only four poultry meat processing companies operate in NSW, namely Baiada Poultry, Inghams Enterprises, Cordina Chicken Farms and Red Lea Chickens. The latter two companies are based in Western Sydney. The NSW share of national production is declining, but is still the largest at around one third. The next largest is Victoria with a 24 per cent share (Attachment 1).

In NSW, the industry employs about 1,000 people on farms and 5,000 in meat processing.<sup>3</sup> Work in the industry includes opportunities as diverse as farming, hatchery management, poultry processing, feed preparation, food processing, distribution, management, administration, quality control, research and development and veterinary services. Many people are direct employees of the poultry meat processing companies, but employment in this sector also includes contract roles in farming, transportation and other services that support the poultry industry.

Key features of the NSW industry include:<sup>4</sup>

- 284 contract growers and 50 company grow out facilities (see Figure 1)
- 40 contract and company breeder facilities
- 8 feed mills
- 7 hatcheries (birds also brought in from other states)
- 9 processing plants and rendering facilities
- 5 further processing plants.

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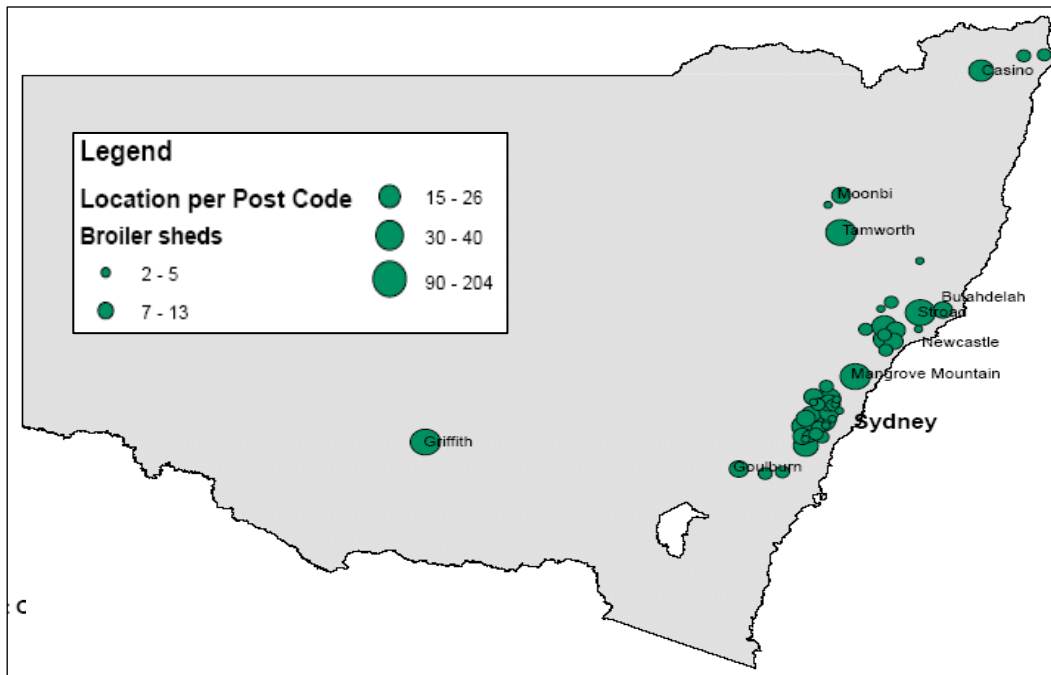
<sup>2</sup> *The Australian Chicken Meat Industry: An Industry in Profile*. ACMF Inc. 2011. <http://www.chicken.org.au/industryprofile/>.

<sup>3</sup> ABS 2006 Census figures. The PMIC submission reported direct employment of 6,000, and another 39,000 employed in service & supply, value adding, distribution and point of sale.

<sup>4</sup> Revised from 'NSW Poultry Industry 2008', Poultry Meat Industry Committee.

The poultry meat industry is vertically integrated and highly concentrated both industrially and geographically, with the key NSW production regions being the Sydney Basin, Central Coast, Hunter, Tamworth, North Coast and Riverina. In NSW, the four main poultry meat processing companies own and operate breeding farms, hatcheries, feed mills, processing plants and some growing farms. The industry in NSW is, however, characterised by having the majority of birds (90 per cent) grown under contract on independent farms.

**Figure 1: Geographic Location of the NSW Poultry Meat Industry**



In contract situations, processors provide the birds, feed, veterinary services, medication and animal husbandry advice, and undertake processing, marketing and distribution. The contract growers receive the day-old chicks and grow the birds to market weight, at which point the processor collects the birds and pays the farmer the agreed grow-out fee.<sup>5</sup>

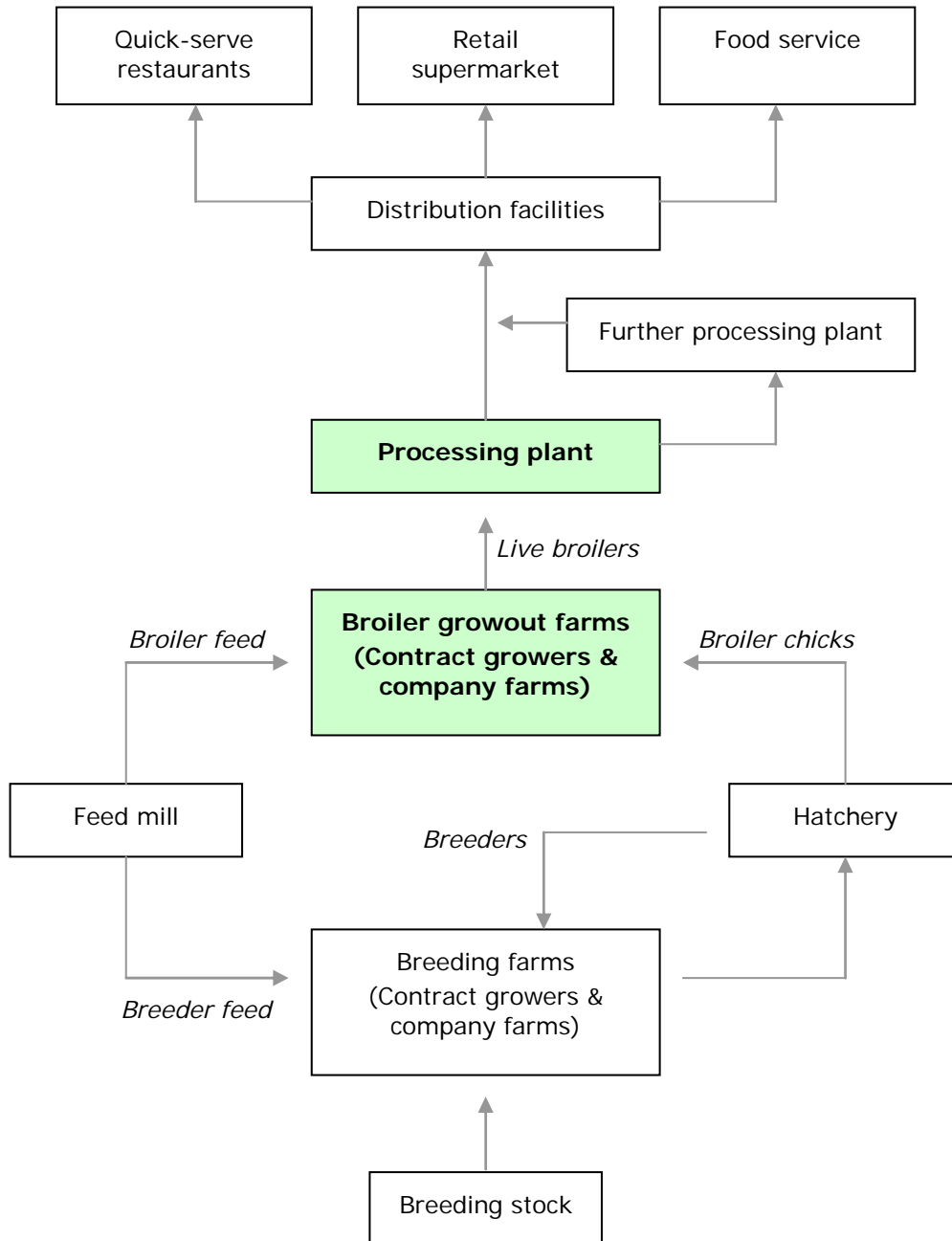
Growers provide animal management, capital inputs such as land, housing and equipment, some variable inputs, such as bedding, gas and electricity, and are responsible for waste disposal.

Growers traditionally work for the processor which operates in their region and in many cases have done so since the industry started in the region. It is typical for a grower to remain with the same processor for the life of their farm. Growers generally bargain collectively with their processor along regional lines.

<sup>5</sup> Five of the grower submissions to this review quoted prices ranging from 56-84 cents. Time series price & cost of production data is not available.

### The Poultry Meat Supply Chain - Vertical Integration

Globally vertical integration has been found to be the most efficient way of controlling costs and managing the decisions needed to supply the large volumes to service customers with a continual supply of consistent product. Integrated processors provide day old chicks, feed, technical and veterinary advice and other services to the contract growers. They also process, distribute and market the product.



Source: Review of the NSW Poultry Industry. RidgePartners, October 2004, p 10

Capital costs in the industry are high. A typical family farm would house 100,000 chickens and produce around 550,000 birds a year in several batches. The average investment in each poultry farm is around \$1 million, including land value.<sup>6</sup> For growers to finance and generate a return on such large capital outlays, ongoing processor demand for their services is required.

Establishment costs for processing plants are also high - in the order of \$50 - \$60 million – and profitability is dependent on on-going, near-capacity throughput. Hence, processors who do not maintain their own company farms are in turn dependent on the grow-out capacity and performance of contract growers. In addition, processing plants require access to significant supplies of water, have to deal with environmental issues associated with the disposal of waste and most significantly must have access to adequate supplies of labour.

## 2.2 History of the Act

When the *Poultry Meat Industry Act 1986* first commenced it provided for centralised price fixing by a 15-member Committee, which also had the role of approving the contracts between poultry growers and processors. The Act has subsequently been subject to four reviews: in 1999, 2001, 2004 and 2009.

The 1999 review was undertaken to fulfil the NSW Government's commitments under the national Competition Principles Agreements (CPA). The main policy aim of the CPA was to reduce the burden on the economy of unwarranted government regulation and provide a more competitive and efficient market framework for industry. CPA principles required that legislation should not restrict competition unless it was demonstrated that the benefits to the community as a whole outweighed the costs, and that the objectives of the legislation could only be achieved by restricting competition.

The 1999 review found that growers were potentially subject to market power abuse by processors and that the restrictions imposed on the industry by the Act were justified and delivered net public benefits. It consequently recommended that the Act be retained.

The 2001 review resulted in the following changes to the Act:

- the PMIC's price setting function was simplified by giving it the power to determine base fees paid to growers by processors for different classes of poultry;
- allowing consideration of shed types and geographical location in determining base rates for grow-out fees; and
- collective bargaining between growers and processors was expressly authorised for the purposes of the Commonwealth's *Trade Practices Act 1974* (now *Competition and Consumer Act 2010*).

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<sup>6</sup> Australian Chicken Growers Council. <http://www.acgc.org.au/>

The 2004 review was commissioned as a further independent review of the Act again to meet the State's obligations under the CPA. This review found that poultry growers remained in a weak bargaining position relative to processors in relation to the negotiation of prices and terms and conditions of supply.<sup>7</sup> However, the review recommended:

- reducing government regulation of the industry by shifting the focus of the Act from price setting to the development of contracts negotiated directly between the parties; and
- maintaining a statutory Committee to develop guidelines and a code of practice for contract negotiations, and to provide for the resolution of disputes.

In 2005, the Commonwealth Government threatened to fine the NSW Government on the basis that the PMIC's price setting powers were in breach of the CPA, that is, the Commonwealth considered these powers to be anti-competitive and unjustified. In response to this threat and to implement the recommendations of the 2004 review, the Act was amended to:

- remove the centralised price setting function of the PMIC;
- facilitate direct contract negotiations between growers and processors;
- authorise collective bargaining in contract negotiations between growers and processors for the purposes of the *Trade Practices Act 1974* (Cth);
- reduce the PMIC membership from 15 to three and exclude direct industry representation on the Committee;
- establish the Poultry Meat Industry Advisory Group as a forum for growers and processors; and
- require a further review three years after commencement of the amendments.<sup>8</sup>

As noted previously, the subsequent 2009 review recommended that a further review be undertaken to determine whether the policy objectives of the Act remained valid and whether the terms of the Act remained the most appropriate way of securing those objectives. This latest (2013) review process was also required to investigate issues which arose in the 2009 round of contract negotiations, apply the Competition Policy Test of the NSW Better Regulation Office and consider collective bargaining under Australian Competition and Consumer Commission (ACCC) arrangements.

### **2.3 Objectives and Key Provisions of the Legislation**

The relationship between poultry meat processors and growers is one of strong mutual dependence in meeting the needs of the marketplace and balancing meat demand and bird supply. That relationship, particularly as expressed in the grow-out contract, has been regulated in NSW since the mid-1970s. The proposition underpinning this government intervention has been that contract growers are in a

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<sup>7</sup> *Review of the NSW Poultry Industry: A review of the Poultry Meat Industry Act undertaken in accordance with National Competition Policy*, Ridge Partners, October 2004, p3.

<sup>8</sup> *Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Act 2005*.

weak bargaining position relative to processors and that a level of statutory protection (countervailing power) is required to prevent market power abuse.

To achieve this end, the current Act provides statutory authority for collective bargaining by poultry growers in their negotiations with poultry processors,<sup>9</sup> enables some contract terms to be mandated and establishes voluntary, low-cost mediation arrangements to facilitate dispute resolution. However, growers also have the freedom to choose whether they wish to participate in collective bargaining with their peers or whether they would prefer to negotiate independently with a processor (i.e., opt out).

The Act constitutes the PMIC, which comprises three people independent of the NSW Department of Primary Industries and industry participants. The selection of the members of the PMIC is at the discretion of the Minister for Primary Industries, however, at least one member must be a person skilled in mediation or arbitration.

Under the Act, the PMIC's primary roles are to:

1. establish a code of practice for negotiations between growers and processors to ensure they are conducted in an orderly manner and are fair and reasonable to both parties.

In the course of events, a Code of Practice was developed by the PMIC over several years and formally established in May 2011. While poultry growing agreements (PGAs) are expected to be negotiated in accordance with the Code of Practice, compliance is voluntary;

2. establish guidelines as to the matters that PGAs might address.

The PMIC addressed this issue in the immediate aftermath of the 2005 amendments and Guidelines for Agreements for the drawing up of PGAs between processors and growers were established in 2008. These Guidelines for Agreements are not mandatory but are provided to assist in the orderly development of agreements between processors and growers;

3. make recommendations to the Minister for Primary Industries regarding matters that should be mandated by regulation as matters that must be addressed in PGAs.

Section 11 of the *Poultry Meat Industry Regulation 2008* (the Regulation) prescribes matters that the PMIC has recommended in this regard. These matters include:

- the term of the agreement,
- the method for negotiating the price paid per bird,
- standards for poultry production facilities, and
- dispute resolution procedures.

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<sup>9</sup> The Act applies only to "designated poultry", defined as chickens and turkeys below certain ages.

The Act provides that if an agreement between a grower and processor does not meet the requirement to address a matter prescribed by the Regulation, the agreement is taken to include the standard provision;

4. facilitate the resolution of disputes between growers and processors;
5. inquire into, and make reports to the Minister on such matters relating to the poultry meat industry as the Minister refers to the Committee for inquiry and report; and
6. investigate such other matters relating to the poultry meat industry as the Committee considers appropriate for inquiry and report.

PMIC is required to seek the advice of the PMIAG, which is established under Part 2A of the Act. The PMIAG consists of seven persons appointed by the Minister, with the Chair being an independent person nominated by the Minister and the other members being three representatives each of growers and processors.

The Act and Regulation require processors to notify NSW DPI that they have entered into a contract with a grower. This provision was linked to disease control and ensured that the Department always had an up-to-date record of poultry farms and was thus well positioned to respond rapidly and effectively to disease incidents. The associated contract notification fee of \$300 per year also provides a stream of revenue to fund the costs of the PMIC and PMIAG.<sup>10</sup>

Part 5 of the Act authorises inspectors to search and inspect poultry growing premises for any records relating to the production of batch poultry and for agreements made for doing so for the purpose of ascertaining whether an offence against the Act or regulations has been committed. This part of the Act provides details regarding the:

- powers of the inspectors,
- questions that can be asked by the inspectors,
- search warrants, and
- obstruction of the inspectors.

The standard period of a PGA is five years. However, one year agreements may be entered into with the approval of the PMIC. Until June 2009, the majority of growers were operating under 5-year contracts based on the pre-2005 version of the Act.

PGAs should specify the interval at which the price paid per bird to growers should be renegotiated, with the default being renegotiation every 12 months. Under most agreements, however, the price is renegotiated every six months. Growers typically seek an increase in line with CPI to cover rising costs.

Attachment 2 contains a more detailed description of the contents of the Act and Regulation.

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<sup>10</sup> Secretarial support for the PMIC and PMIAG is provided through the NSW Department of Primary Industries.

## 2.4 Regulation in Other Jurisdictions

Apart from NSW, the Australian poultry meat industry primarily uses ACCC arrangements to authorise collective negotiations between growers and processors as a mechanism to ensure that grow-out agreements are competitive.

Only Victoria and Queensland currently have legislation similar to that of NSW for their poultry industries, and in both of those States the legislation is effectively inactive (see sections 2.4.1 and 2.4.2 below). South Australia and Western Australia previously had State-level regulations, which expired in 2009 and 2010, respectively. There is no poultry meat industry legislation in Tasmania, the Northern Territory or the Australian Capital Territory.

### 2.4.1 Victoria

In Victoria, ACCC authorisations date back to 2001, with the most recent being granted in April 2010 for a period of five years to cover Victorian Farmers Federation grower member groups.

However, while the industry is operating under an ACCC authorisation, the *Broiler Chicken Industry Act 1978*, has not been repealed. The objectives of this Act are:

- to create an environment and develop processes that facilitate agreements between growers and processors,
- to determine prices and recommend terms and conditions that would apply under fair and competitive market conditions, and
- to ensure that exploitation of growers does not occur.

This legislation established a Victorian Broiler Industry Negotiation Committee with two-year terms and the following functions:

- to make recommendations to the Minister with respect to the terms and conditions that should or should not be included in contracts generally or in any class of contract or in a particular contract,
- to determine disputes between processors and growers with respect to any matters relating to the broiler chicken industry (including disputes as to the assessment of any amount payable under a contract),
- to carry out the functions it is required to carry out under this Act, and
- to report to the Minister on any matter relating to the broiler chicken industry referred to it by the Minister or on any matter it considers necessary.

In addition, the Committee could make recommendations to the Minister regarding including in contracts provisions for:

- the duration and option of renewal of the contract between processors and efficient growers, including the varying rights of the parties according to the manner in which they have performed the contract, and
- the participation of efficient growers in the benefits of any growth expansion of a processor's output.



Under the *Broiler Chicken Industry Act 1978*, the Committee determined the standard price for broiler chickens to be paid throughout the broiler chicken industry by processors to growers who have entered into contracts with them. It also determined the circumstances under which the standard price may be varied, as well as the limits within which the price may be varied. Determinations of the Committee were binding on growers and processors.

The Committee had a mandatory role in dispute resolution. Where the Committee was unable to resolve a dispute, the matter had to then be reported to the Minister, who might then refer the matter to arbitration.

Regulations under the Act prescribed terms and conditions of contracts and required, from time to time, processors to send audited statements or statutory declarations to the Committee regarding the price paid or payable to growers for broiler chickens.

#### **2.4.2 Queensland**

Queensland recently obtained a 10-year ACCC Authorisation covering all growers belonging to Queensland Chicken Growers Association. This process reportedly took less than three months (pers. comm., Executive Officer, Australian Chicken Growers Council, 05 June 2013). Therefore, similar to Victoria, the industry is also operating under the Commonwealth legislation and the State legislation, which the following paragraphs describe, is effectively in abeyance.

The *Chicken Meat Industry Committee Act 1976* established the Chicken Meat Industry Committee (CMIC) and provided “industry stabilising” mechanisms, including:

- a requirement for written agreements between growers and processors, which must be registered with the CMIC,
- a special authorisation to allow for voluntary collective negotiations for making negotiated contracts, which would otherwise be an illegal activity under the *Competition and Consumer Act 2010* (Cth),
- a dispute resolution process, and
- an industry representation role for the CMIC.

The Queensland Government had previously accepted the recommendation of an independent 2009 review of all government boards, committees and statutory authorities to abolish the CMIC and transfer some of its functions to an industry-run committee. It was considered appropriate, however, to first identify the most appropriate options on how and where to place the current functions of CMIC in the future. With this in view, the Act was reviewed in 2011 and the findings from the assessment were:<sup>11</sup>

- there is no overwhelming case for government to retain a statutory body for the chicken meat industry; and

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<sup>11</sup> *Review of the Chicken Meat Industry Committee Act 1976: Final Report*, DEEDI, The State of Queensland 2011.

- the most economically efficient option for reform of industry was (i) legislation providing authorisation under Part IV of the *Competition and Consumer Act 2010* (Cth) to collectively negotiate; and (ii) transferring functions from the CMIC to a non-statutory industry.

### **2.4.3 South Australia**

The *Chicken Meat Industry Act 2003* expired on 21 August 2009. It provided for a Public Service Officer to be a Registrar to mediate disputes between growers and processors and prescribed the content of agreements and their compulsory registration. The Act also authorised collective bargaining and common pricing for grower services. On repeal, collective bargaining was authorised under an ACCC notification for chicken growers to collectively negotiate terms and conditions of growing contracts with Inghams Enterprises until 27 February 2012.

### **2.4.4 Western Australia**

The *Chicken Meat Industry Act 1977* expired on 31 December 2010. This Act authorised the setting of an average price (growing fee) to be paid by processors to poultry growers and the mediation of disputes over agreements by a Chicken Meat Industry Committee (CMIC). Additionally, it laid down criteria for establishing whether a grower was “efficient” and thereby determined their entitlements in an agreement with a processor. The Act also empowered the CMIC to approve, or otherwise, shed facilities used by growers.

On 25 February 2011, the ACCC granted an interim authorisation to allow Western Australian chicken growers to collectively bargain with processors. The interim authorisation in no way binds the ACCC in its consideration of a substantive application for authorisation.

The Western Australian Broiler Growers' Association has now applied for authorisation on behalf of its member chicken growers, to collectively bargain to establish new contractual terms and conditions with chicken processors. It is understood that grower bargaining groups will be formed based on the processor with whom they are affiliated.

### 3. The 2013 Review

The detailed terms of reference for the 2013 review are listed in section 1.2. In essence, the objectives of the review were to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain the most appropriate means of delivering those objectives.

In investigating these issues, the review team applied the NSW Better Regulation Office Competition Test (see figure below) and principles of best regulatory practice, being:<sup>12</sup>

- Principle 1: The need for government action should be established
- Principle 2: The objective of government action should be clear
- Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options
- Principle 4: Government action should be effective and proportional
- Principle 5: Consultation with business and the community should inform regulatory development
- Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered
- Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness,

and the nationally agreed principles for efficiency in regulation,<sup>13</sup> which include:

1. establishing a case for action before addressing a problem;
2. considering a range of feasible policy options, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
3. adopting the option that generates the greatest net benefit for the community; and
4. in accordance with the Competition Principles Agreement, not restricting competition through legislation unless it can be demonstrated that:
  - a) the benefits of the restrictions to the community as a whole outweigh the costs; and
  - b) the objectives of the regulation can only be achieved by restricting competition.

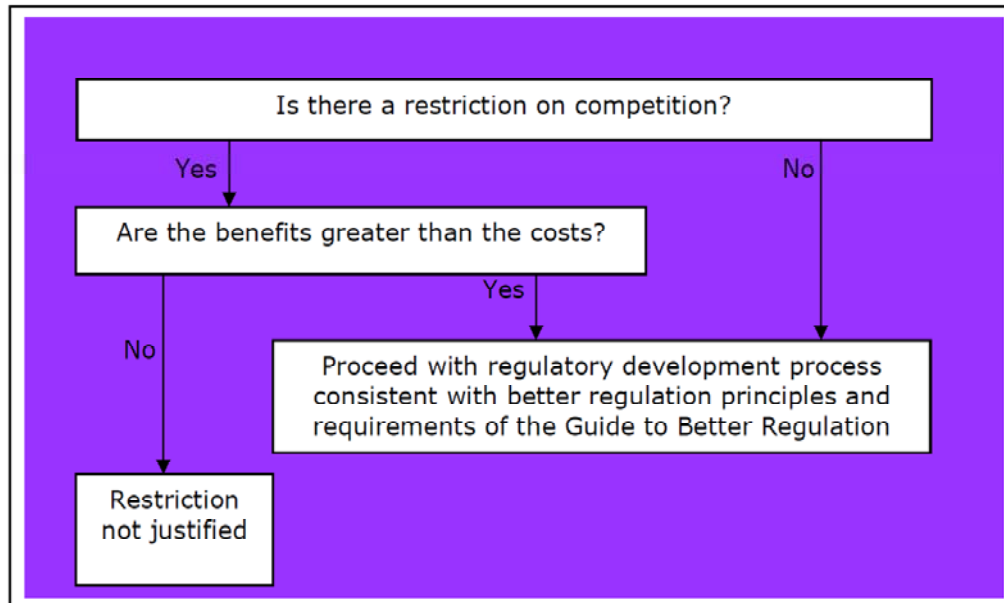
During the course of the review, information/data on the poultry meat industry in NSW and nationally was obtained from a number of sources, including the Australian Bureau of Statistics, the Australian Chicken Growers Council, the NSW Farmers Association, the PMIC and internal sources in the NSW Department of Primary Industries (NSW DPI). Research was also undertaken on current regulatory settings for the poultry meat industry in other jurisdictions in Australia.

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<sup>12</sup> [http://www.betterregulation.nsw.gov.au/gatekeeping/guide\\_to\\_better\\_regulation](http://www.betterregulation.nsw.gov.au/gatekeeping/guide_to_better_regulation)

<sup>13</sup> [http://archive.coag.gov.au/coag\\_meeting\\_outcomes/2007-04-13/docs/coag\\_nra\\_regulatory\\_reform.pdf](http://archive.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/coag_nra_regulatory_reform.pdf)

## NSW Better Regulation Office Competition Test



Source: <http://www.betterregulation.nsw.gov.au/>

As described in the following section, the review team also undertook broad industry and community consultation.

### 3.1 Industry and Community Consultation

#### 3.1.1 Information Paper

An Information Paper was developed and widely disseminated to facilitate public input to the review. The Information Paper contained a brief summary of the objectives of the Act, key provisions of the legislation, the focus of the review and details of the review process and how to make a submission. It also provided some direction on the types of issues that stakeholders might wish to comment on in their written submissions.

The Information Paper was publicly released on the NSW DPI website. The NSW Farmers Association (NSWFA) also posted the Paper on its website. The Information Paper and details of the schedule of public meetings were also advertised in relevant regional newspapers and circulated direct to poultry industry stakeholders by the Intensive Livestock Industry Development Unit of NSW DPI and by the NSWFA to its contract grower members.

#### 3.1.2 Public Meetings

Newspaper advertisements were placed in regional newspapers covering the five key production regions of Tamworth, Maitland, Mangrove Mountain, Penrith and Goulburn. These advertisements announced the review, carried the NSW DPI web link for accessing the Information Paper, indicated how to make a written submission, and also announced the relevant public meeting venue in that region. A public

meeting was held between 28 May and 30 May 2013 in each of these five production regions to further explain the review and encourage submissions from stakeholders.

<b>Meeting Location</b>	<b>Attendance</b>
Tamworth	12
Maitland (Beresfield)	14
Goulburn (Mittagong)	11
Mangrove Mountain	23
Penrith	9

Copies of a range of printed documents were made available at these public meetings. They included the Act, the Regulation, the PMIC Code of Practice and Guidelines for Agreements, the Information Paper and Answers to Frequently Asked Questions (FAQ). This FAQ was progressively developed during the course of the review and was also placed on the NSW DPI website.

### **3.1.3 Targeted Stakeholder Meetings**

In addition to the public meetings, the review team also offered the opportunity for key industry stakeholders to meet direct with them. Those stakeholders identified for this purpose were:

- the Poultry Meat Growing Committee representing the NSW Farmers Association and Australian Chicken Growers Council;
- the Australian Chicken Meat Federation;
- the NSW Chicken Meat Council;
- ProTen Ltd and Rural Funds Management (RFM), who are major poultry growers;
- the four NSW processors - Baiada Poultry Pty Limited, Inghams Enterprises, Cordina Chicken Farms Pty Ltd and Red Lea Chickens Pty Ltd; and,
- the PMIC and PMIAG.

Two such meetings were requested and arranged, with ProTen Ltd and with the PMIC/PMIAG.

ProTen Ltd expressed the view that the NSW Act and Regulation do not affect their business and held a neutral view on whether the regulation was justified and should continue.

The PMIC members observed that the Committee had been instrumental in a number of significant initiatives designed to retain and grow the poultry meat industry in NSW. Initiatives included undertaking an economic study of the industry in NSW, development of best practice management manuals and making representations on the industry's behalf to various NSW Government departments. The PMIC suggested that there was no alternative body to work with the NSW Government on poultry meat industry issues in a holistic way and that repeal of the Act would remove the only group that is effectively promoting the interests of the industry in NSW. It was argued by the PMIC that the Committee had a valuable ongoing role in this type of industry development activity.

The PMIC also sought advice from the review team on transitional issues, such as effects on current poultry growing agreements and alternate ways of raising an industry levy, in the event of repeal of the Act.

### **3.2 Summary of the Submissions**

A total of 66 submissions were received, comprising 64 submissions from individual growers and one each from the PMIC/PMIAG and NSW Farmers Association. It is notable that no processor made a submission to the review.

A complete list of the submissions received is shown at Attachment 3. While specific information and views drawn from the submissions are cited at relevant points in the analysis of issues in Chapter 4, following is a broad summary of key points expressed.

#### **3.2.1 Individual Growers**

Of the 284 contract poultry growers in NSW, 64 (23 per cent) made submissions to the review. Of these submissions, two did not give a clear indication of whether the legislation was supported or not, 57 supported the current Act and Regulation without any changes and the other five supported continuing regulation, but with changes suggested.

The changes sought involved:

- strengthening of the powers of the PMIC to include a base grow-out price mechanism and a price review function;
- contracts lasting for a minimum of five years;
- making the current voluntary Code of Practice for Contract Negotiations enforceable; and
- making the PMIC more transparent.

Around 80 per cent of the grower submissions argued that negotiating power between contract growers and processors is often not balanced and the industry has not changed sufficiently since the last review to justify removal of the Act. Continuation of collective bargaining was therefore supported, with a strong preference to remain under the Act. The alternative of an ACCC authorisation was not favoured, being seen as an unfamiliar, uncertain and costly process.

The PMIC was largely viewed as a grower initiative, funded by them and needed as an external party to assist with contract disputes.

#### **3.2.2 The PMIC and PMIAG**

The PMIC and PMIAG unanimously supported the continuation of the Act. Their submission argued that while the role of the PMIC/PMIAG changed significantly with the implementation of the 2005 amendments to the Act, that role is still a positive one for the NSW poultry meat industry, particularly in relation to influencing the environment in which contract negotiations are being undertaken, which assists growers. They suggested making the Code of Practice for the conduct of negotiations compulsory and amending the legislation to further strengthen the PMIC's role in this regard.

### **3.2.3 The NSW Farmers Association**

A submission was made to the review by the NSW Farmers Association Contract Poultry Meat Committee. This submission noted that Association is able to provide a collective voice for poultry growers, but only for those that are its members.

This Committee argued that there has been no substantial change to the industry structure since the last review and therefore supported retention of the Act. It was further considered that as it is self-funded by the industry the PMIC should be of negligible direct concern to “outsiders”. The Committee supported clauses in the Code of Practice relating to group contracting being made mandatory, and minimum 5-year contracts for industry certainty.

## 4. Analysis of Issues Against the Terms of Reference

### 4.1 The Objectives of the Act

The objectives of the *Poultry Meat Industry Act 1986* are identified in the long title of the Act as being:

- to constitute the Poultry Meat Industry Committee and to define its functions;
- to regulate and control the poultry growing industry;
- to repeal the *Chicken Meat Industry Act 1977*; and
- for other purposes.

While they give a broad overview of the nature of the legislation, these objectives do not expressly reveal the industry outcomes that the provisions of the Act are intended to achieve. These desired outcomes were, however, clarified in public statements made by the then NSW Government when the last major amendments were made to the Act in 2005 and primarily relate to ensuring that the contracts between processors and their growers are fair and reasonable.

Concerns that these contracts may not be fair and reasonable in the absence of government intervention have been based on the observation that poultry growers are in a relatively weak bargaining position compared to processors, both financially and through more limited access to retail and wholesale market information, and the premise that this imbalance of market power could be abused. Hence, the main objective of the Act was to prevent the abuse of market power by regulating the relationship between the growers and processors of poultry meat.

While the extent of market intervention has been progressively wound-back, previous Act reviews have concluded that some level of continued regulation to countervail the superior market power of processors would yield net public benefits. In declining order based on the extent of the restriction imposed on the market, the key remaining regulatory interventions under the Act are:

1. authorisation of collective bargaining by poultry growers with their processor;
2. the imposition of some mandatory conditions in PGAs; and
3. payment of a PGA notification fee to fund the PMIC/PMIAG.

Compliance with the Code of Practice and the Guidelines for Agreements developed by the PMIC and use of the dispute mediation service offered by the PMIC, are all voluntary matters and therefore do not comprise restrictions on competition except to the extent that an industry levy is required to fund them.

### 4.2 Are the Policy Objectives Still Relevant?

#### 4.2.1 Processor Market Concentration

During the last decade there was significant consolidation of ownership in the poultry meat processing sector in NSW. The process of consolidation saw Bartter Holdings Pty Limited acquire 50 per cent of Steggles Food Products Pty Ltd in 1999 and the



remaining 50 per cent in 2006. Also in 2006, Baiada Poultry Pty Limited successfully acquired Marven Poultry and Eatmore Poultry.<sup>14</sup>

Then, in July 2009, Baiada Poultry Pty Limited (the largest processor at that time) acquired Bartter Holdings (the second largest). These consolidations have now put more than 70 per cent of Australia's total market share in the hands of the industry's two largest poultry processors, Baiada Poultry Pty Limited and Inghams Enterprises.

#### 4.2.2 Poultry Grower Vulnerability

There are currently around 284 poultry growers in NSW who vary significantly in size and complexity of operation. Most are significantly financially exposed in that their capacity to continue to finance a large capital investment is totally dependent on maintaining a contract with a processor who may have several other supply options and therefore will generally not be equally dependent on any individual contract being maintained.

**NSW Contract Poultry Growers by Region and Processor**

	Inghams Enterprises	Baiada Poultry	Cordina Chicken Farms	Red Lea Chickens	Darwalla Poultry #	Total
Central Coast	25	14	20	5		64
Griffith		2 *				2
Goulburn	7			3		10
Hunter		76		5		81
Sydney	15	13	42	36		106
Tamworth		15 **				15
North Coast					6	6
Total	47	120	62	49	6	284

\* 2 large corporate growers, representing 14 farms

\*\* includes 1 large corporate grower with multiple farms

# Queensland based processor with 6 growers located in NSW

This suggests that there is a higher level of financial risk for poultry growers than there is for processors in terms of holding and renewing contracts and is reflected in the fact that growers rarely switch from one processor to another until their contract has expired. In fact in practice, most growers seem to have little realistic opportunity of switching and selling their services to a different processor. This is particularly the case in the regions in which only one processor operates. This puts the processor in

<sup>14</sup> Review of the authorisations for chicken meat industry collective negotiations in Queensland: Public Benefit Test Report, DEEDI, The State of Queensland 2011.

a monopsony position, a situation that has been exacerbated by the gradual withdrawal of Inghams Enterprises chicken meat operations from NSW.

Contract renewal negotiations are usually a challenging time, with price (or “grow fees”) the main point of contention. As noted in Chapter 2, most PGAs are for a term of five years. Most of the 5-year PGAs in NSW came up for renewal in the second half of 2009. It seems that these contract negotiations were particularly challenging for two main reasons:

- many growers had to negotiate price directly with processors for the first time because until 2006 the price paid per bird was set by the PMIC; and
- this contract renewal period coincided with the Baiada Poultry Pty Limited takeover of Bartter-Steggles enterprises. The takeover had major ramifications for the industry in NSW, which was previously characterised by longstanding contractual relationships between growers and the three former processors, complicating the negotiation of new agreements for those growers affected by the restructure of the industry. The Baiada Poultry Pty Limited processing plant in Sydney has now been closed and former Bartter Holdings Pty Limited growers in the Hunter now grow for Baiada Poultry Pty Limited.

Despite the above, most poultry growers have now signed new agreements. Four sets of growers were at times in dispute with processors in relation to their new contracts:

1. Cordina Chicken Farms Pty Ltd growers have signed new 5-year contracts, but have lodged a dispute in relation to the way price is calculated;
2. Baiada Poultry Pty Limited growers in the Hunter had commenced proceedings in the Supreme Court seeking recompense for contract breaches. After many years this matter reached a conclusion recently, with a decision handed down in favour of Baiada Poultry Pty Limited. The NSWFA submission reports concerns by the growers involved that they may now not be offered contracts;
3. Growers for Red Lea Chickens Pty Ltd are reportedly in dispute over payments arrears; and
4. Sunnybrand growers (taken over by Inghams Enterprises) on the North Coast had been in dispute for more than a year under the pre-2005 contract over price and the matter was referred to arbitration. This dispute spilled over into the 2009 negotiations and according to the NSWFA submission was never satisfactorily resolved.

One confidential submission reported a number of examples of alleged unfair and unreasonable behaviour by several processors against poultry growers, and three other confidential submissions directly claimed or implied that growers are sometimes subjected to bullying, intimidation and threat of bankruptcy.

Countering the above observations is the experience of ProTen Ltd, a very large poultry grower who has demonstrated capacity to secure their financial position through the successful independent negotiation of mutually agreeable long-term contracts with a processor. On their own admission, the Act has little relevance to their commercial operations.

### **4.2.3 Conclusion**

The ownership concentration at the processor level suggests that considerable market power still resides with these major industry players and that they have substantially stronger bargaining power than most individual contract poultry growers.

It is also still the case that most poultry growers are individually far more dependent on a processor than the processor is on them and, further, that they generally have little or no choice in the matter of which processor they will contract with. In contrast to the market for poultry meat, the market for contract grower services is limited to a specific geographic location. Further, at the individual operator level, contract growers are effectively tied to one processor at a time, or at least for the life of a contract.

It is concluded therefore that there is still potential for market power abuse by poultry processors over individual poultry growers and that the policy objective of preventing such abuse remains relevant.

## **4.3 Collective Bargaining**

### **4.3.1 What the legislation provides**

Part 3 of the Act authorises collective bargaining by contract poultry growers for the purposes of the *Trade Practices Act 1974* of the Commonwealth (now the *Competition and Consumer Act 2010*) and the Competition Code of New South Wales.

Contract poultry meat growers may collectively negotiate with their processor on the terms and conditions of growing contracts, including the agreed per bird grow-out fee. Negotiating groups operate independently of each other, and are aligned to the processor that they supply. Allowing collective bargaining over grower-processor agreements reduces competition and must be assessed to determine whether the benefits of the intervention are greater than the costs.

An important characteristic of the market for contract poultry grower services is that there are very few examples of growers changing processors or of processors enticing growers to switch processors. The nature of farm infrastructure and its specific purpose constrains growers from exiting the grower services sector and using their farm assets in alternative agricultural enterprises. These constraints allow growers little flexibility to bargain on terms and conditions of agreements with their processors. In contrast, the major processors generally have access to many suppliers of grower services.

### **4.3.2 Analysis**

Growing cost represent just 10 per cent of the retail price of poultry meat. Therefore, the restrictive impact of collective bargaining over grower-processor agreements on the retail price of poultry meat is likely to be minimal. Moreover, to the extent that collectively negotiated grower fees represent a more 'competitive' price than would

have been negotiated by growers acting independently, any increase in grower fees would be outweighed by efficiencies gained along the marketing chain.

Submissions to the review indicate that it is generally believed that the collective negotiation arrangements have facilitated a higher level of interdependence and goodwill between growers and processors than would otherwise be the case. It was further suggested to the review that collective negotiation has contributed to reduced transaction costs and a reduced likelihood of disputes, thereby increasing the efficiency of production and facilitating a decline in real prices paid by consumers for poultry meat over the last 10 years (ACMF 2011).

Previous reviews of the Act have consistently supported authorisation of collective bargaining as an effective and efficient means of countervailing the superior market power of processors and delivering net public benefits by ensuring that the imbalance of power is not abused. It is notable that the ACCC has reached the same conclusion in relation to the poultry meat industry in three other States and has authorised collective negotiation.<sup>15</sup>

### **4.3.3 Conclusion**

This review concludes that the potential for market power abuse by poultry meat processors over contract poultry growers remains and that government intervention to allow collective bargaining by growers with a processor is justified.

The review does not, however, agree with the submissions arguing for retention of collective negotiation under NSW legislation. Rather, it is recommended that the NSW poultry meat industry be transitioned to an arrangement under Commonwealth trade practices legislation. This would reduce red tape in NSW and promote broader national consistency and efficiency in the regulatory environment for the industry.

It is notable that while many grower submissions expressed the view that “ACCC granted collective bargaining is an unfamiliar, uncertain and costly process”, the same industry has in fact currently adopted exactly this model in Victoria and Queensland, and previously in South Australia. It seems reasonable to assume that the NSW industry could also quickly adjust to a process of collective bargaining under ACCC rules as practiced in the poultry meat industry in those jurisdictions.

## **4.4 PGA Mandatory Contract Terms**

### **4.4.1 What the legislation provides**

The Act requires that PGAs address the matters set out in the Regulation. If an agreement between a grower and processor does not meet the requirement to address a matter prescribed by the Regulation, the agreement is taken to include the standard provision for that matter.

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<sup>15</sup> See Attachment 4 for details of the ACCC's public interest test.

The matters prescribed in the Regulation that must be addressed by PGAs include:

- the term of the agreement;
- the method for negotiating the price paid per bird;
- standards for poultry production facilities; and
- dispute resolution procedures.

The standard period for a PGA is five years. However, one year agreements may be entered into with the approval of the PMIC. PGAs should also specify the interval at which the price paid per bird to growers is to be renegotiated, with the default being renegotiation every 12 months.

#### **4.4.2 Analysis**

A key question for the review is whether the matters to be addressed by agreements between growers and processors (and the standard provisions in relation to those matters) should continue to be set by Regulation or should now be negotiated directly between the parties.

The majority of the grower submissions and the NSW Farmers Association Contract Poultry Meat Committee submission argue for continued (in fact, stronger) regulatory intervention in contract negotiations. Their main contention is that industry conditions have not changed significantly in recent years and therefore there is no justification for removing the regulation. The merit of this argument, however, depends on the objective of the intervention.

The current set of standard terms and conditions was established in 2008 consequent to the Act amendments which also terminated the PMIC's role in formally reviewing and approving contracts. It seems clear that the intention at the time was to provide some protection and guidance to growers who at their next contract renewal would be for the first time negotiating terms and conditions without PMIC oversight. The combination of a mandatory requirement for the inclusion in grow-out contracts of a limited number of key terms and conditions and the simultaneous generation of broader guidelines on the matters that grow-out contracts should cover (released by the PMIC in 2008) was designed to ensure that critical matters were not overlooked and thereby limit the perceived potential for processors to abuse their superior market power.

In the passage of time, all current PGAs have been negotiated under these arrangements. It is arguable therefore that all contract poultry growers in NSW should now have some level of familiarity with contract negotiation, even if the process for them was managed collectively through a negotiation group or agent. To the extent that this is the case, the original objective of the arrangements has been achieved.

It is further observed that continuation of collective bargaining by growers, as this review recommends, would provide an avenue for collaborative consideration of appropriate contract terms and conditions firstly by growers and then in negotiation with their processor.

The review was advised that there have been long-held concerns about the impact of the NSW legislation on processor investment in the industry in this State. For example, in its submission to the 2009 review, Inghams Enterprises characterised the legislation as “cumbersome, inefficient and unnecessary in the business environment”. The PMIC/PMIAG submission to this review also reports that the two national processors have indicated a preparedness to move their operations to other States where they believe it is easier to do business and notes that Inghams Enterprises have already recently closed a significant part of its business in NSW (in May 2013).

#### **4.4.3 Conclusion**

This review concludes that continued regulatory intervention to mandate certain terms and conditions in PGAs is no longer justified and may in fact significantly impede investment in the industry in this State. Rather, the NSW poultry meat industry should be encouraged to continue to build on the progress made through the shift from PMIC contract oversight to proscribed contract terms and now transition to more competitive and flexible commercial arrangements. Continued authorisation of collective negotiation by growers with their processor would provide growers the opportunity to pool their knowledge and experience for this purpose.

### **4.5 PGA Notification Fee and Functions of the PMIC/PMIAG**

#### **4.5.1 What the legislation provides**

Processors are obliged to notify the NSW Trade & Investment when they enter into a PGA and to pay an annual notification fee of \$300 per agreement, with provision for 50% of this fee being passed on to the grower. These fees fund the PMIC and PMIAG to carry out their functions, which are detailed in section 2 of the Act.

#### **4.5.2 Analysis**

Industry contributions for the 2012-13 financial year totalled around \$88,000. Of this, \$55,000 funded the stipends for the three members of the PMIC. The remainder was used to cover PMIAG member sitting fees, meetings and travel costs and expenses for PMIC initiatives.

While they are relatively small in the scheme of things, these fees are an impost on the industry. In addition, the notification requirements and requirement for industry participation on the PMIAG impose both administrative and financial costs on growers and processors and are therefore a restriction on competition.

**Note:** NSW DPI provides executive support to the PMIC/PMIAG (40% of Industry Development Officer plus 15% of Manager Intensive Livestock), which is costed at about \$78,000 annually.

#### **Code of Practice and Guidelines for Agreements**

In 2008, the PMIC established Guidelines for Agreements for the drawing up of PGAs between processors and growers. Subsequently, a Code of Practice for negotiations between growers and processors was formally established in May 2011.

While the Guidelines and Code seek to ensure contract negotiations are conducted in an orderly manner resulting in fair and reasonable PGAs to both parties, neither is mandatory. It was hence clearly the intention of the legislators to not directly intervene in this process beyond the regulated terms and conditions but, rather, to encourage the poultry meat industry to be independent and self-deterministic when negotiating contracts. This would allow for maximum flexibility in contract arrangements and promote industry efficiency.

The NSWFA submission supports the Code of Practice:

*“...Processors in the poultry meat industry in NSW have been known to display threatening communication techniques and intimidation which could be described as ‘bullying’ toward growers. These methods of communication and negotiation are still strongly evident within the industry, and so the requirement for the Code and the role of the PMIC remains.”*

As voluntary industry instruments, neither the Code nor the Guidelines need the backing of a statutory body. That is, now that the PMIC role in developing these documents has been completed, maintenance of their currency and promotion of them within industry could be undertaken by any industry body, if there is interest in doing so.

Both the NSWFA and the PMIC have previously recommended that the Code of Practice be made mandatory and again in their 2013 submissions suggest the same. It is understood that Queensland is the only other jurisdiction to have a similar voluntary ‘Code of Conduct’ for contract negotiations between processors and growers in poultry meat industry.

Codes of conduct are generally intended to act as a guide in setting standards of behaviour. There are precedents, however, at the national level for compliance with an otherwise voluntary Code of Practice becoming mandatory for those businesses that choose to sign it. This is the approach followed under the Australian Wine Industry Code of Conduct. This Code of Conduct deals comprehensively with contract negotiations for the supply of wine grapes and includes a clearly defined dispute resolution procedure. Signatories are required to comply with the Code of Conduct and the terms of the Code of Conduct are imported into Agreements between signatory wine makers and those that supply them with wine grapes.

Protection from unconscionable and anti-competitive conduct is provided to contract poultry growers in NSW under both the *Competition and Consumer Act 2010* (Cth) and State arrangements such as the Office of the NSW Small Business Commissioner.

This review concludes that making the Code mandatory would represent a substantial unjustified increase in regulatory intervention and be counterproductive to increasing industry efficiency and competitiveness.

### **Dispute Resolution**

The dispute resolution function of the PMIC is designed to provide growers with access to low-cost, familiar and industry-specific mediation services. The Act requires that at least one of the three members of the PMIC must have dispute resolution skills and the Regulation provides that the PMIC may assist in the mediation or arbitration of disputes. However, consistent with the Competition Policy principles that underpinned the 2005 amendments, the PMIC is not permitted to mediate a dispute which relates to the “*amount of any fee payable under a poultry growing agreement*”.

Prior to the 2009 contract negotiations, the PMIC had mediated just one dispute in the previous four years. And, despite consistent reports of growers experiencing significant difficulties in negotiating and renewing contracts in 2009, evidence presented to the review is that very few formal disputes are lodged with the PMIC. The PMIC submission, for example, states:

*“...There were three formal disputes: one went straight to arbitration with no PMIC involvement and was never satisfactorily resolved (Sunnybrand); two went to mediation, neither being successfully resolved through the mediation process, but were subsequently resolved with facilitation assistance from the PMIC.”*

That the PMIC has received only three applications in eight years suggests that there is little demand within the NSW poultry industry for the specialist mediation services provided by the PMIC.<sup>16</sup> To the extent that disputes are arising, it would seem they are being dealt with through other mechanisms.

The NSWFA verbally submitted to the review that lodgement with the PMIC of a further dispute was imminent and that the upcoming round of 5-year contract renegotiations in 2014 could also give rise to demand for the PMIC’s mediation services. At this stage, however, this is a matter of conjecture.

The PMIC submission argues that there is a valuable ongoing role for the Committee in facilitating, rather than formally mediating or arbitrating, negotiations between processors and growers. This review observes that a service of this nature could be provided by a non-statutory industry body.

### **Investigation of matters on behalf of the Minister for Primary Industries**

The Act provides for the PMIC to undertake investigation of poultry meat industry issues at the request of the Minister for Primary Industries. The review understands that the Minister has never asked the PMIC to undertake any such investigation. Ministerial advice on poultry industry matters is provided through NSW DPI and any further industry consultation that might be necessary could happen through other forums, such as the Primary Industries Ministerial Advisory Council established by Minister Hodgkinson in 2012. The review concludes that this function is not required.

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<sup>16</sup> On 20 August 2013, the NSW Farmers Association advised that a further dispute may be lodged.



### ***Independent industry development activities of the PMIC***

Consistent with the provisions of the Act, the PMIC has unilaterally made several reports and submissions to the Minister on industry issues. However, the PMIC submission to the review indicates that the matters that have attracted its attention and which it sees as having considerable value for the industry are in fact outside its current statutory role.

The PMIC developed a 5-year strategic plan in 2009 which identified a broad range of industry development initiatives that could be undertaken. These initiatives include obtaining funding for a study of the economic value of the poultry meat industry to local NSW communities, revising farming guidelines (best practice management manuals), and liaising with other organisations in the poultry meat industry.

As these activities are outside its current statutory role, the PMIC has proposed change to the legislation to allow it to undertake them. In its submission the PMIC notes that *“While the PMIC focus is on regulatory issues, the Committee has played a significant role in industry development because there are no other industry groups providing this type of service to the poultry industry in NSW.”* The review observes, however, that the PMIC submission itself makes reference to a number of industry bodies working on industry development issues. These include the Poultry Industry Association (processors), the Australian Chicken Meat Federation (national body of processors and growers) and the NSW Chicken Meat Council (growers and processors).

The PMIC contends that these organisations do not have sufficient resources to undertake the functions the PMIC sees as necessary: *“Between them these bodies only have one executive officer with an almost overwhelming task with most of his time being taken up with biosecurity issues and marketing of the industry.”* Their submission goes on to say *“...the processors and growers, the two sectors of the industry, compulsorily fund the PMIC with little or no cost to government. Removal of this statutory funding is unlikely to see any industry organisation take its place as individual growers are loathe to provide funds for anything which they cannot see an immediate benefit to themselves.”*

The NSWFA submission makes it clear that it is also active in supporting its contract grower members.

It thus seems to this review that the NSW poultry meat industry in fact has a well-developed industry association sector. It also seems reasonable to conclude that the level of resources these organisations are prepared to commit to industry development and the matters they consider to be priorities should be matters for the industry itself to determine.

The PMIC has been vigorous and committed in its pursuit of the development of the poultry meat industry in NSW and it may be that there is an ongoing role for a further industry body to provide services to the poultry industry. This should, however, be decided by the industry.

Mandatory industry levies for industry development purposes have been imposed in circumstances where broader industry and public benefit outcomes would be

achieved. Examples of this include agricultural industry R&D levies under national legislation and, in NSW, the *Rice Marketing Act 1983* and the *Agricultural Industry Services Act 1998*. The latter Act provides for an industry to vote to impose on itself compulsory levies to fund delivery of a specified set of services. This avenue could potentially be pursued by NSW poultry meat producers.

#### **4.5.3 Conclusion**

Many of the functions defined for the PMIC under the Act have now been completed or are inactive:

- the Code of Practice and the Guidelines for Agreements have been publicly available for several years;
- there is minimal demand for the dispute resolution services of the PMIC;
- the Minister for Primary Industries has never found it necessary to refer any matter to the PMIC for enquiry and report; and
- the focus of the PMIC is on industry development activities that are outside its current statutory role.

The review concludes that there is no public interest justification for continued regulatory intervention for any of these purposes.

The industry would save \$88,000 annually through abolition of the notification fee, and the NSW Department of Primary Industries would save its in kind secretarial support to the PMIC/PMIAG costed at around \$78,000 annually.

#### **4.6 Database of Growers for Animal Health Safety Reasons**

Under the Act, processors are obliged to notify the Director General of NSW Trade & Investment when they enter into a PGA. The Poultry Notification Scheme was established to provide NSW DPI with a means of tracking growers for poultry industry disease management purposes.

Since these arrangements were established, effective alternative mechanisms have been identified and utilised through which the industry has provided the NSW Government with accurate information for disease management purposes when the need has arisen. While the Scheme provides the Government with a current register of NSW contract broiler growers, maintenance of this list by Government is not critical. Moreover, the register is not complete as it does not include company breeder and growing facilities. NSW DPI is confident that the industry is otherwise able to provide very detailed information as and when required.

#### **4.7 Mechanisms to Ensure Compliance with the Act**

Although not presently in use, Part 5 of the Act provides for the Minister to authorise inspectors for the purpose of ascertaining whether an offence under the Act or Regulation has been committed. Such inspectors have wide ranging powers to investigate breaches of the Act. For example, they have significant power to enter

and search non-residential premises for records, require persons found in such premises to produce records and answer questions and to seek warrants to search any premises to exercise the above investigations. These powers have never been, and seem unlikely to ever be, activated and could therefore be terminated.

## 5. Review Findings

Current trends suggest that the NSW poultry meat industry will be increasingly rationalised over the next decade to achieve greater efficiencies in both the growing and processing sectors and to accommodate the pressures of urban expansion and aging infrastructure. For growers, the clear long-term industry trend is toward larger, more intensive farms. This may lead to an increase in corporate farms, with fewer small contract farms. It is anticipated that natural attrition due to aging farm infrastructure, particularly in the Sydney Basin, will continue.

With regard to challenges facing NSW industry, Mr Stephen Carroll, Chair of the PMIC and PMIAG, made the following statement to the review:

*“...In recent years poultry meat processors have frequently drawn attention to NSW Government representatives their concerns with issues relating to the relative difficulty of doing business in NSW, and two of the national processors have indicated a preparedness to move their operations to other States where they believe it is easier to do business. Inghams closed a significant part of its business in NSW in May 2013 because of its concerns.”<sup>17</sup>*

As further stated in the PMIC/PMIAG submission:

*“...The NSW poultry industry is experiencing significant barriers to production resulting from the implementation of government policies and the actions of local government. As a result, poultry meat production is becoming less viable in certain areas, particularly the Sydney basin. Already one large processor (Inghams Enterprise) has closed its processing and hatchery operations in southern Sydney, with the loss of some 400 employment positions. Likewise, Baiada closed its Pendle Hill processing plant, moving its operations to other NSW and interstate plants with the loss of around 400 jobs in the Sydney basin.”*

There seems to be strong potential for national processors to increasingly locate their business in States where production and distribution networks function most efficiently and suffer the least regulatory costs. In addition, the construction of large “greenfield” sites with new technology in other States has attracted processors, which has resulted in NSW losing some of its dominance.

NSW share of poultry meat production has declined in recent years, with its share of national production falling from 39.4% in 2000-01 to 34% in 2010-11 (ACMF, 2011) and likely even lower now. The less regulated jurisdictions of South Australia, Western Australia and Queensland are expanding poultry meat production faster than NSW (Attachment 1) and there is some evidence that government policy has influenced this phenomenon. It is also understood that poultry grow-out fees are higher in these jurisdictions than NSW, though definitive evidence was not available to the review due to confidentiality reasons.

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<sup>17</sup> It is pertinent to note that in its submission to the 2009 review Inghams Enterprises characterised the NSW legislation as “cumbersome, inefficient and unnecessary in the business environment”.

Minimising regulatory barriers and ensuring the NSW industry remains competitive, will be necessary to ensure NSW is able to maintain its share of the market.

While the *Poultry Meat Industry Act 1986* has for many years been a legislative framework valued by contract poultry growers in NSW, the transitional provisions enacted in the 2005 amendments to meet Competition Policy requirements have now largely been completed or achieved their objectives. These amendments wound back the extent to which the poultry meat industry was regulated in NSW and were in significant part designed to provide a transition to an open, unregulated market.

The review has found that the potential for market power abuse by processors over poultry growers still exists and that the policy objectives of the Act are still relevant. It is considered, however, that the existing Act is not the best mechanism to achieve those objectives in to the future as:

- most functions of the PMIC and PMIAG under the Act have now been accomplished;
- the Code of Practice and the Guidelines for Agreements have been completed;
- the industry should be encouraged to move on from proscribed contract terms to more competitive and flexible commercial arrangements;
- for many years there has been minimal and only very intermittent demand for the PMIC dispute resolution function;
- emergency disease management does not depend on notification of PGAs; and
- the Minister for Primary Industries has no need to refer matters to the PMIC for enquiry and report.

Provision for collective bargaining by poultry growers with their processor is supported to continue. In this regard, it is considered that the best strategy is to transition the NSW industry to an arrangement under the *Competition and Consumer Act 2010* (Cth), which would put it on an equivalent footing to industry in other States including Victoria and Queensland.

Experience in other States demonstrates that the poultry meat industry is able to function without State regulation of the industry. With the majority of PGAs in NSW currently held by growers contracted to the two national processors, it is anticipated that experience in other States of ACCC authorisation and associated industry practice would translate directly to a large portion of the NSW industry.

Consideration could potentially be given to whether there would be a useful role for a statutory body with poultry growing contract dispute resolution functions that could be established intermittently on an 'as needs' basis (a similar model to Local Land Boards). However, the mediation service offered through the Office of the NSW Small Business Commissioner may be an equally effective, already existing, alternative.

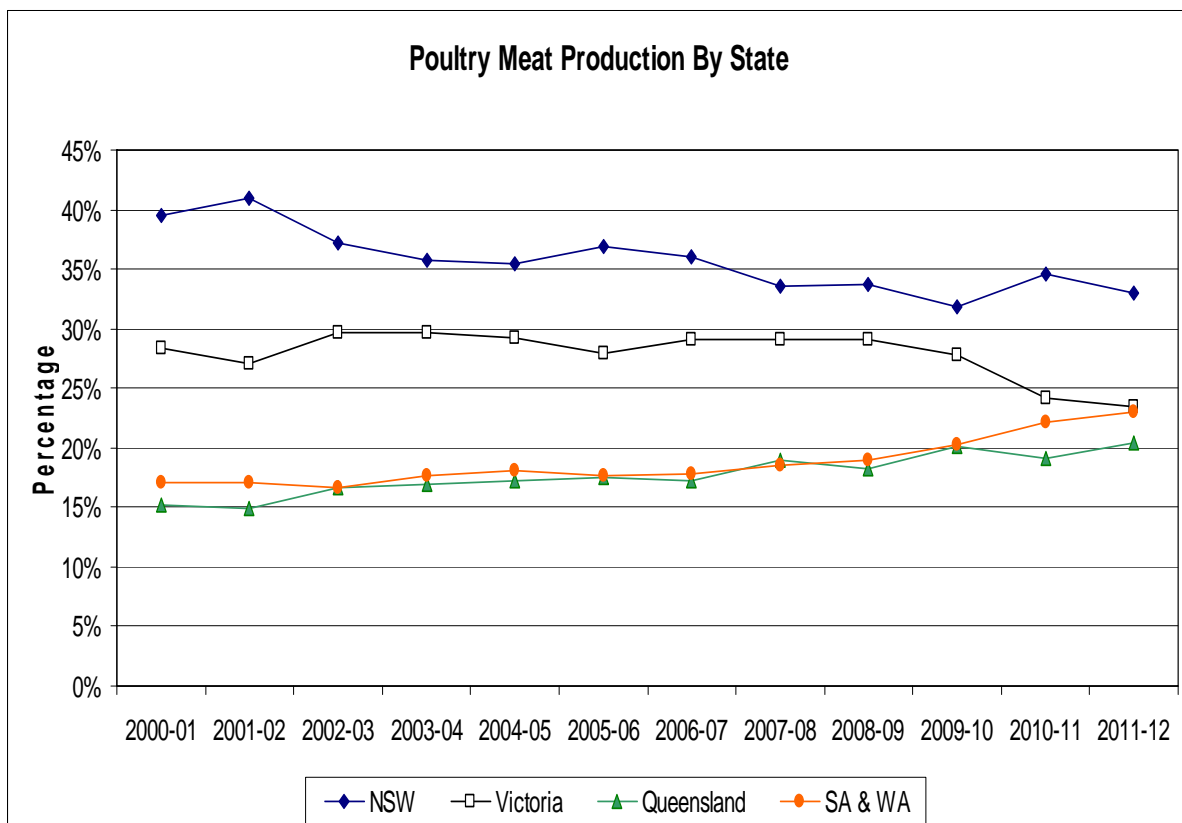
These reforms would reduce red tape and promote increased industry competitiveness, efficiency and productivity in the NSW poultry meat industry, and

potentially increase the attractiveness of retaining or investing in new processing capacity in this State.

There seems to be merit, however, in seeking to continue the industry development activities that the PMIC is currently engaged in and has outlined for future attention. These functions are, however, more typically the roles of an industry representative body and it would therefore be desirable to determine industry interest in transferring responsibility for these activities to an appropriate organisation.

## Attachment 1 – Poultry Meat Industry Statistics

Year	Australian Poultry Meat Production: Total & By State (in Tonnes)				
	Australia	NSW	Victoria	Queensland	SA & WA
2000-01	619,406	244,302	175,773	93,864	105,467
2001-02	667,471	273,444	180,993	99,317	113,717
2002-03	689,827	256,444	204,441	114,327	114,615
2003-04	693,603	247,754	205,349	117,889	122,611
2004-05	750,029	265,715	219,508	128,668	136,138
2005-06	772,613	285,293	215,448	135,649	136,223
2006-07	811,591	291,906	236,020	139,601	144,064
2007-08	797,280	267,333	231,401	151,372	147,174
2008-09	832,456	280,880	242,393	151,400	157,783
2009-10	834,409	265,856	231,711	167,638	169,204
2010-11	1,014,978	351,466	244,814	193,464	225,234
2011-12	1,030,131	340,257	241,793	210,620	237,461



Source: ABS 7215.0<sup>18</sup>

<sup>18</sup> The ABS does not publish poultry meat production data for South Australia and Western Australia for confidentiality reasons. Above table estimates production in these jurisdictions by subtracting NSW, Queensland and Victorian production from national production.

## **Attachment 2 – Poultry Meat Industry Act 1986 and 2008 Regulation**

### **A2.1. The NSW Poultry Meat Industry Act 1986**

The Act constitutes the Poultry Meat Industry Committee, establishes the Poultry Meat Industry Advisory Group, requires poultry growing agreements to address certain matters and for parties to agreements to notify the Director-General of each agreement. The Act also authorises inspectors to search and inspect poultry growing premises for any records relating to the production of batch poultry and for agreements made for doing so.

The Act applies only to “designated poultry”. Section 3 of the Act defines ‘designated poultry’ as “a chicken of the species *Gallus gallus* which is not more than 18 weeks old” and other species as the Governor declares by order published in the Gazette. The only other species declared as designated poultry is “a turkey of the species *Meleagris gallopavo* which is not more than 24 weeks old” (order published in Gazette 167 of 30<sup>th</sup> October 1987).

### **The Poultry Meat Industry Committee (PMIC)**

The Committee is constituted to be three persons, independent of Department of Primary Industries and of growers and processors. They are appointed by the Minister, one being the Minister’s own nominee, and at least one of the other two being a person skilled in mediation or arbitration. The Act requires the Committee to establish codes of practice for negotiations between growers and processors and contract guidelines. It is also required to report significant matters to the Minister and to facilitate the resolution of disputes between growers and processors.

### **The Poultry Meat Industry Advisory Group (PMIAG)**

This Committee consists of seven persons appointed by the Minister, the Chairman being an independent person nominated by the Minister and the others being three representatives of growers and three representatives of processors. PMIAG provides advice to the PMIC on codes of practice, contract guidelines and the content of poultry growing agreements.

### **Poultry Growing Agreements (PGAs) and Funding**

The Act requires agreements to address matters specified in the regulation, and requires processors to notify the Director-General of agreements that have been made within a month of their making. The administrative costs associated with the PMIC and PMIAG are recouped from growers and processors through the requirement to pay a “notification fee”.

### **Collective Bargaining**

The Act authorises two or more growers to enter in to a PGA with one processor for the purposes of the *Trade Practices Act 1974* of the Commonwealth.

### **Inspectors and Compliance**

The Act authorises the Minister to appoint inspectors for the purpose of examining records in poultry processing premises, for the purpose of checking that agreements have been made as required.



### **A2.2. The NSW Poultry Meat Industry Regulation 2008**

The Regulation specifies the required content of, and procedures in making, Poultry Growing Agreements (PGAs) and notification procedures. The Regulation also prescribes the PMIC's functions with respect to dispute resolution and the process for making nominations to the PMIAG.

#### **Standard provisions for Poultry Growing Agreements**

- **Terms of agreement:** PGA should specify date of commencement and date of expiry, which should be extended if the growing of a batch is not complete at that date;
- **Notification:** If the agreement is shorter than five years, both parties should notify the PMIC, or else the agreement is taken to be valid for five years, unless otherwise lawfully terminated. Either of the parties wishing to extend or renew the PGA should notify the other party in writing at least six months before expiry of the PGA.
- **Broiler Growers' Manual:** A PGA has no effect until the processor has supplied a copy of the manual, free of charge, to the grower, and the manual forms part of the agreement. The manual specifies procedure under which the grower shall raise the poultry, with the grower supplying the appropriate accommodation, facilities, labour and management.
- **Price negotiation:** PGAs should specify the interval at which price should be renegotiated, with the default being renegotiation every 12 months. If agreement cannot be reached, the parties should seek dispute resolution.
- **Payments:** All payments shall be made as specified in the PGA, and if not specified, a processor must pay the grower within 60 days of receiving back the birds. Interest can be charged on overdue payments, and advice must be given in writing by a processor of the reason for any non-payment. For the determination of payments due, the processor must count and weigh all poultry delivered to and received from the grower.
- **Quality issues:** The processor is to provide the grower with poultry stock and feed of a reasonable quality, and if they subsequently have grounds to doubt the quality, they must immediately inform the grower.
- **Quality assurance procedures:** The processor shall develop quality assurance procedures, with respect to food safety, environmental and animal welfare issues and biosecurity, and provide the grower with all relevant information on these matters. From this the grower shall also put in place quality assurance procedures.
- **Economic information** – The processor shall keep the grower informed of the state of the industry, production performance and the calculation of growing fees.
- **Animal health information** – The grower shall keep the processor fully informed as to the health of the poultry he is growing.
- **Collection and delivery** – It is the responsibility of the processor to collect and deliver all supplies, including stock and feed.
- **Abnormal losses, compulsory slaughter and disposal of dead stock** – An abnormal loss of stock is defined as more than 3% of stock in the first week, and 0.3% per day in any subsequent seven day period. If the loss is due to the actions of the grower, the processor can remove the stock and recover any expenses

they have incurred with that grower. If the loss is due to the actions of the processor, the processor bears the cost of disposal and pays the grower 50% of the growing fee for the first week, and, where the losses occur after the first week, an additional pro-rata percentage of the remaining fee based on the expected growing period. If the processor has been required to compulsorily slaughter the stock for biosecurity reasons and receives compensation for the loss, the processor “must pay the grower a proportion of that compensation that reflects the grower’s share of the loss”.

- **Dispute settlement** – One party must notify the other in writing of any dispute they have over the agreement, and then both parties must negotiate in good faith to try and resolve the dispute. If not resolved within 30 days, they must refer the dispute to arbitration and notify the PMIC.

### **The Committee’s functions in dispute resolution**

The Committee may assist in mediation or arbitration only if requested to do so in writing by both parties, and the Committee cannot assist when the dispute is over the amount of fees payable.

**Attachment 3 – List of Submissions Received**

Submission No:	Name
50	Abela, Vic
9	Apap, Peter
41	Attard, Marvick & Sharon
34	Bajada, Bertina
57	Barry, V & A
35	Bartolo, F
37	Bartolo, Matthew & Melissa
10	Basha, Ted
3	Bowen, Chris
61	Bowen, Ken & Edith
7	Brooker, Murray
31	Buttigieg, Edward & Pauline
33	Buttigieg, Frank
19	Buttigieg, John
21	Buttigieg, Luke & Stella
18	Camilleri, S.A.
43	Carraro, Graeme
12	Carroll, Stephen - Chair PMIC in consultation with PMIAG
4	Cashman, Peter (confidential)
5	Cashman, Peter
47	Charlie
8	Chelbn Pty Ltd
49	Cilia, Joseph
28	Cilia, Philip & Jane
48	Cla, Michelle
66	Collins, Ron & Kaye
54	Collison, Leigh
2	Edwards, John
55	Ekert, Gary
36	Grima, A & H
27	Grima, Joe & Pauline
64	Harvey, Ken
56	Lawrence, Damian & Jorome
40	Lichtenberger, Stephen
58	Mackaway, Leone J
29	Mackaway, Owen
24	McKelvey, BE & AM
65	Mexon, Mervyn & Joan
23	Mifsud, James
1	Murden, Eve
51	Pace, Anthony
30	Pace, Anthony & Alison
52	Pace, J & A
63	Pace, Joey & Renee
32	Pace, John & Sylvana
26	Pace, Matthew
60	Peen, Marianne & Watts, Mark
20	Rakus, David
42	Roach, Justin
11	Simson, Fiona - President NSWFA (for Contract Poultry Meat Committee members)
53	Spiteri, Joanne
38	Stevenson, Andrew
25	Szabo, Frank
59	Thompson, Robert & Rosemary
13	Vella, David & Rebecca
22	Vella, Joe & Anne
17	Vella, Joe & Sue
62	Vella, Ray & Rita
14	Vella, Victor & Joyce
44	Vrljic, Anthony
15	Whyte, Jeff & Yvonne
6	Wilkinson, John
39	Wilson, Lorraine
16	Wilson, Rodger
46	Wood, Malcolm
45	Woodgate, Daniel & Tanya

## **Attachment 4 – Collective Bargaining under ACCC Authorisation**

The *Competition and Consumer Act 2010* (Cth) generally requires businesses to act independently of their competitors when making decisions about pricing, with firms they do business with, and the terms and conditions of doing business. Competitors who act collectively in these areas are at risk of breaching the competition provisions of this Act.

In some circumstances, allowing collective arrangements may be in the public interest. For example, smaller businesses negotiating with a single large buyer of their products can face significant challenges and the outcomes from these negotiations may not be the most efficient or optimal for the economy. By acting together, such small businesses may have an opportunity to negotiate more competitive (efficient) arrangements than if they stay on their own. Collective bargaining is an arrangement where two or more competitors come together to negotiate with a supplier or a customer over terms, conditions and prices. A group of businesses may sometimes appoint a representative, such as an industry association, to act on its behalf in the negotiations.

The Act therefore allows for parties to be authorised to engage in anti-competitive conduct, including collective bargaining when there are public benefits that would outweigh the detriments to competition. There are two ways that businesses can obtain an exemption from the ACCC – Authorisation and Notification.

Though the application fee for Notification is less (\$1,000), it is not suitable for the poultry industry as the immunity is given only for three years from the date it was lodged and all the members of the collective bargaining group need to be identified to the ACCC. Authorisation (\$7,500 application fee) is a more appropriate mechanism, where immunity can be sought for more than three years and for ‘umbrella’ type arrangements for single or several bargaining groups or the variable membership of an industry association rather than specifically identified businesses.

The ACCC is able to waive or reduce lodgement fees in certain circumstances. Applicants may also request the ACCC consider their proposal under the 3-month streamlined authorisation process, including having a draft determination and potentially interim authorisation decision within 28 days.

The ACCC’s Guide to Authorisation<sup>19</sup> describes how to apply for Authorisation and also outlines the public benefit principles that underpin the authorisation process:

- Public benefit is not defined in the Act. However, the Tribunal has defined it to be “... *anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals*”

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<sup>19</sup> *Guide to Authorisation*, Australian Competition & Consumer Commission. Latest version: <http://www.accc.gov.au/publications/authorisation-guidelines-2013>.

*of efficiency and progress'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress'; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency".*

- The Tribunal noted in its decision on the Victorian Farmers Federation Chicken Meat Growers authorisation that it had previously taken a broad view of what is a benefit, stating that "...they have been taken to include anything which...increases...the well-being of members of society...Particular emphasis is placed on positive...consequences for the achievement of the goal of maximising economic efficiency (including dynamic efficiency leading to economic progress)".
- Public detriment is also not defined in the Act. The Tribunal 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...".