



Inghams Enterprises Pty. Limited

ABN 20 008 447 345

9 Baden Street, Osborne Park, WA 6017 Australia

PO Box 222, Mt Hawthorn, WA 6915 Australia

www.ingham.com.au Phone: +61 8 9441 4200

GS/ce
8 April 2010

Mr L Rowe
Chairman
Economic Regulation Authority
GPO Box 8469
Perth Business Centre
Western Australia 6849

Dear Mr Rowe

**Inquiry into The Chicken Meat Industry Act 1977 - Invitation for Public Submissions
on Issues Paper**

Thank you for your letter dated 31 March 2010 agreeing to a two week extension for lodging a submission.

Please now find attached our submission on behalf of Inghams Enterprises Pty. Limited.

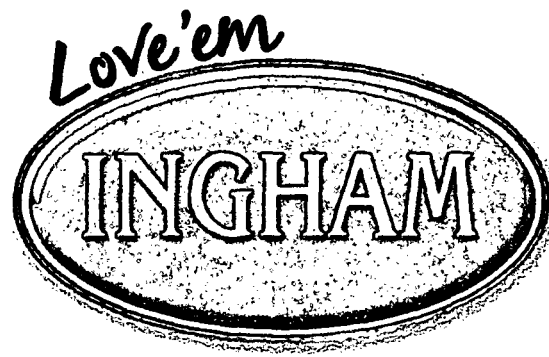
Yours sincerely

GREIG SMITH
General Manager Operations, WA

Attach 1

ceGeneral Manager/WACMA/CMIC/Review of Act.docx

Economic Regulation Authority 09 Apr 2010



The following submission is provided on behalf of Inghams Enterprises Pty. Limited. This submission is in response to an “Invitation For Public Submissions” from the Economic Regulatory Authority on its inquiry into the effectiveness of the operation of the Chicken Meat Industry Act 1977 (CMI Act).

Introduction

The following submission is provided on behalf of Inghams Enterprises Pty Limited. This submission is in response to an "Invitation For Public Submissions" from the Economic Regulatory Authority on its inquiry into the effectiveness of the operation of the Chicken Meat Industry Act 1977 (CMI Act).

The comments made in this submission have regard to the developments that have taken place within the poultry industry in recent years in both Western Australia and other States and also the ongoing requirements of the Australian Competition and Consumers Commission (ACCC) under the Trade Practices Act 1976 (Cth) (TPA).

The changes in the poultry industry in recent years will demonstrate the Western Australian Legislation to be outdated, contrary to current practice, anticompetitive and restrictive to a point that precludes commercial outcomes. It is a legislative framework which has and will continue to make Western Australia less attractive for investment and the cost efficient production of poultry and poultry products.

Structure Of The Chicken Meat Industry In Western Australia

There are two main Processors in Western Australia, both of whom have (until 31 October 2009) representation on the Chicken Meat Industry Committee (CMIC), namely Inghams Enterprises Pty. Limited and Baiada, who acquired the operation of Bartter / Steggles in July 2009.

Other Producers / Processors within the Western Australian Market are Mt Barker Free Range Chicken, Finesse Poultry (both of whom have their Growers on an individual non-collective growing contract and as such do not form part of the CMIC) and Prestige Poultry who process only. Further, Baiada's largest Grower is also on an individual non-collective contract (INCC).

Processor	Percentage of Broilers Processed in Western Australia
Baiada	42%
Inghams	38%
Mt Barker Free Range Chicken	9%
Finesse Poultry	8%
<u>Other</u>	<u>3%</u>
TOTAL	100%

The poultry industry has continued to develop since the CMI Act originally came into force. It is interesting to note that the trend in growing contracts in recent years has been overwhelmingly in favour of INCC contracts and away from the CMIC and the CMI Act, confirming recognition by both parties of a strong mutual independence between Grower and Processor.

While there remains a relationship of strong mutual dependence between Growers and Processors, it is important to note that those relationships have taken on a national character. Growers have networks nationally to allow them to be in a better bargaining position and

Companies such as Inghams are developing uniform contracts that encourage best practice on our part and the part of our Growers wherever they are located in Australia.

In the review of the Chicken Meat Industry (Nationally and in Western Australia) contained in the issues paper circulated by the Economic Regulation Authority dated 25 February 2010, there is a need to examine the Chicken Meat Industry in Western Australia in greater detail and in particular changes within Inghams Enterprises Pty. Limited that have occurred in the past 3 years.

a. Inghams Growers

	2007	Present
No. Of Growers	20	16
Total Growing Space (m2)	220 034	191 932

Representing a 12.8% decrease in the total growing space.

b. Bird Processing Numbers

	2007	2009	2010 (Planned)
No. Of Broilers Processed (000's)	21 172	18 103	17 277

This represents a 14.2% decrease between 2007 and 2009 and a further predicted decrease in processing numbers of 4.6% between 2009 and the end of 2010. A total decrease of 18.4% over the last 3 years. This decrease in processing numbers is not a result of decreasing sales but rather a result of the Company's move to invest and expand its operations in other States (Queensland, South Australia and Victoria) at the expense of Western Australia. The anticompetitive and restrictive Legislation within Western Australia is one of the factors contributing to the decision not to invest further in Western Australia.

This further demonstrates recognition by the poultry industry in Western Australia that the CMI Act is prohibiting investment due to its anticompetitive and restrictive nature and is preventing commercial outcomes being driven by market forces within Western Australia.

It is also necessary to record that with continuing improvements in relevant technology and in freight and transport systems, there is increasing substitutability between chicken meat products and the State of origin and ultimate supply.

The perception that the CMI Act (and in particular, its provisions relating to forms of contract and fees) is necessary so as to protect what has in the past been suggested to be a large number of small Growers also needs to be tested. It is clear that the dynamic of our industry is shifting, and has indeed in other States shifted faster than Western Australia, from small inefficient family owned farming operations to large sophisticated tunnel shedding operations which are well resourced and have ready access to quality legal and financial advisers.

In short, the Western Australian Broiler Growing Industry should not be and cannot be looked at in isolation from the rest of the Australian industry if it is to remain competitive.

Objectives Of The Legislation

The major objectives of the Legislation has always been to address a perceived imbalance of bargaining power and to promote equity between Chicken Meat Processors and Contract Growers. Legislation such as the CMI Act is a privilege that is not afforded to many other economic groups in similar situations within the Australian economy. There should be particularly strong and substantive reasoning to justify such use of Government power.

Ingham Contract Growers provide 91% of the broiler production capacity while in the case of Baiada, Contract Growers supply 100% of the broiler production capacity. This position has been the case for many years and as such it is no longer reasonable to argue that Contract Growers do not have substantial bargaining power.

Both the Processor and the Contract Grower have commercial pressures to conclude satisfactory negotiations and it is very much a question of mutual dependence. This mutual dependence combined with the dynamic of our industry shifting from small inefficient family owned farming operations to large sophisticated tunnel shedding operations with ready access to quality legal and financial advice ensures a balance in bargaining power.

Inghams has never failed to conclude Agreements in any State where it has ACCC authorisation. The fact that Inghams has had persons recently entering the industry or wanting to expand production in such states as Queensland and South Australia, clearly demonstrates terms that are acceptable to both parties are being reached in the absence of Legislation such as the CMI Act.

The Chicken Meat Industry is an industry that will continue to change for numerous reasons including:-

- Market place demands
- Customer demands
- Competition
- Advances in technology
- Farming practices
- Environmental policies
- Animal welfare policies

It is an industry that will attract both Processor and Grower investment where reasonable, consistent returns are achievable, where the business environment allows flexibility to accommodate change, where the State in question is not operating at a disadvantage to other States and where prices are not artificially determined.

In the past Western Australia has failed to address these legislative issues as was the case in the review of the CMI Act in 2003 where these concerns were clearly outlined. The result of this failure and the effect it has had on the Western Australian Broiler Industry can be clearly seen by the reduction in broiler growing space, broiler processing numbers and investment in Western Australia.

The Chicken Meat Industry Act 1977 (WA) And the Trade Practices Act 1976 (Cth)

Failure to address the aforementioned issues has also led to failure to meet the tests required under the ACCC and the Trade Practices Act 1976.

When considering the Chicken Meat Industry Act 1977 (WA) (“the CMI Act”) it is necessary to review this Legislation against the Trade Practices Act 1976 (Cth) (“the TPA”). The issues that arise from this consideration are:-

- a. Whether the conduct of the Chicken Meat Industry Committee (“CMIC”) in fixing the price to be paid by Processors to Growers for broiler chickens contravenes Part IV of the TPA and
- b. If the conduct of the CMIC does contravene Part IV of the TPA, what remedies are available.

At this point it is necessary to draw your attention to the CMI Act that provides that:

- a. *It is the function of the committee to make determinations pursuant to Section 16 (Section 15 Functions of Committee (1)(a))*
- b. *Section 16 Determination of Standard Price*
 - (1) *The committee may, from time to time, and at such times as it considers necessary, determine the average price that, subject to subsection (6), is to be paid by the Processor to Growers for broiler chickens.*
 - (4) *For the purposes of making a determination under this section the Committee shall compute the average price that, subject to subsection (6), is to be paid by Processors to Growers for broiler chickens in the prescribed manner.*
 - (6) *A determination made under this section –*
 - (a) *Is final; and*
 - (b) *Shall be notified in the Government Gazette and, when so notified, shall be binding on a processor and a grower to whom subsection (7) applies in relation to broiler chickens purchased or otherwise received pursuant to an Agreement referred to in that subsection until such time as a further determination is made under this section.*
 - (7) *This subsection applies to a processor and a grower between whom there is a written Agreement for the processor to purchase or otherwise receive broiler chickens from the grower –*
 - (a) *That is in or to the effect of the prescribed form of the Agreement; or*
 - (b) *That was, at the time it was entered into, in or to the effect of the form of the Agreement prescribed at that time.*

Legal advice obtained regarding the fixing and gazetting of the price to be paid by Processors to Growers for broiler chickens by the CMIC pursuant to the CMI Act indicates that this is prohibited conduct for the purposes of Part IV of the TPA.

Section 51 of the TPA provides that conduct in a particular State that would otherwise be prohibited and thus constitute a breach of Part IV of the TPA is to be disregarded if it is specifically authorised by an Act passed by the Parliament of that State. However, the relevant exception requires that the State Act expressly refer to the TPA (Section 51(1C)(a)). The CMI Act does not satisfy this requirement and thus, the protection that might have been afforded by Section 51 of the TPA is not available to the CMIC.

As such the relevant conduct of the CMIC pursuant to Section 16 of the CMI is therefore in breach of Section 45 of the TPA and, by virtue thereof, is also in breach of the Competition Policy Reform (Western Australia) Act 1996 (WA).

Conclusion

Against this background Inghams questions the fundamental premise of the Act (ie that it is necessary to protect the interests of Growers).

While there is still an element of collective negotiation in each State in relation to the general contractual terms of a Broiler Agreement, our Company has adopted a national form of contract and our Growers have accepted this approach. The principal variations in this form of contract from State to State relate to compliance with State based Legislation and the required criteria related to performance and productivity which varies by State as a result of the varying nature of the operations in each State.

In respect to fees, it is well recognised that the old and in some cases current system of pooling of payments inevitably results in the efficient Grower (who has generally made a significant financial investment in upgrading their farm and farming systems) subsidising the inefficient Grower. Inghams is therefore working with Growers to find payment systems that better reward the efficient Grower and encourage reinvestment in the industry. This has included individual contracts and individual fee payment arrangements.

That said, it must be emphasised that Inghams has not and does not oppose collective bargaining by Growers in relation to contract terms. To the contrary, Inghams and its Growers have been at the forefront of such arrangements.

However, it has consistently been and remains our position that such collective bargaining should take place under the auspices of an ACCC approved Collective Bargaining Authorisation or Collective Bargaining Notification. The principles for such an authorisation or notification are well established, are considered in the State and national context and have generally resulted in a relatively uniform process for collective negotiation across the various States in which they have been sought and approved.

Presently the ACCC has authorised collective bargaining arrangements between Processors and Growers in Victoria, South Australia and Tasmania.

Both Victoria and Tasmania no longer have Legislation. The Victorian broiler growing industry is presently deregulated with an ACCC authorisation in place for the period March 2005 to March 2010. The ACCC approved a draft Revocation Substitution Collective Approval for a further 5 years to March 2015. The Victorian Broiler Growers operate within this deregulated environment with their Processors and there have been no recorded disputes between Ingham and its Growers during this period. (Tasmania similarly had an ACCC authorisation in place until June 2010). A collective bargaining application with the approval of Ingham has been submitted.

The New South Wales and South Australian Governments have both undertaken a review of the poultry Legislation in their States and a decision is pending on whether these States will allow their Legislation to lapse, and in the New South Wales case, whether to even retain their current system which has no involvement in the fee setting process.

It should also be noted that in South Australia a Collective Bargaining Notification was recently approved by the ACCC for a period of 3 years to allow Inghams and its Growers to collectively negotiate. The ACCC Collective Negotiation Approval allows for:

1. Growers to have the opportunity for collective negotiation on a company basis on fees and contracts through elected delegates;
2. The provision for Growers and Processors to have the choice not to be part of the collective negotiation process; and
3. Inherent within the ACCC approval is, as we understand it from earlier authorisations, the expectation of mediation on contract terms during the contract period and mediation / arbitration on fees during the contract period.
4. All matters open to negotiation between the parties and are not mandatory;
5. Grower groups must not use common representatives or representation;
6. Grower groups may only comprise Growers supplying the Processor affiliated with their group.

The Western Australian Legislation which requires the setting of industry fees, the involvement of the CMIC in matters pertaining to fees and other matters is inconsistent with other States and the ACCC authorisation process. The Western Australian Act is therefore both uncompetitive and out of balance with the rest of the industry.

In Ingham's view any further authority for collective bargaining outside of that provided for in the Trade Practices Act and administered by the ACCC is unnecessary and only results in the need for cumbersome legislative provisions. Inghams would therefore request that the Chicken Meat Industry Act 1977 be repealed thus allowing market forces and the interdependence of Processor and Grower to decide the future of the Western Australian Broiler Industry.

Summary

The mix of collective bargaining and individual fee negotiation in which Inghams continues to engage with Growers encourages competition. More particularly, it has established a fair contract base and a flexible system of payment and reward for investment and efficiency in a way that has contributed positively to the continued viability of the industry.

This has been achieved under the auspices of the Trade Practices Act and the supervision of the ACCC. We also note the continued strengthening of the provisions of the Trade Practices Act dealing with, for example, unconscionable conduct.

In summary therefore, Inghams is of the view that the Western Australian Legislation (the Act) as it now stands contributes little if anything to the attainment of the objective to which the Legislation was said to be directed.

It is cumbersome, inefficient and unnecessary in the business environment in which we operate and having regard to the national regulation that applies by the operation of the Trade Practices Act.

We would therefore encourage the Government to repeal the Chicken Meat Industry Act 1977 in order for the Western Australian Broiler Industry to remain competitive and viable with other States.

Attached – Table comparing current position in each State.

Jurisdiction	Summary	Non-Legislative Authorisations
NSW <ul style="list-style-type: none"> • <i>Poultry Meat Industry Act 1986</i> • <i>Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Act 2005</i> 	<p>Content: Establishes Poultry Meat Industry Committee, grow out contracts required, PMIC advises on contract content, and performs a dispute resolution role.</p> <p>Restrictions on competition: Collective bargaining between a processor and its growers.</p>	<p>TPA Authorisation: Yes – section 9 PMIA</p> <p>Other: Amendment Act removed price setting and contract approval functions of PMIC. A non statutory application (A90800) to the ACCC in 2002 by NSW processors was denied, apparently due to seeking approval to fix prices in addition to collective bargaining.</p>
VICTORIA <ul style="list-style-type: none"> • None 		<p>TPA Authorisation: The ACCC has granted non statutory authorisations A90901 to A90905 for collective bargaining. Expiry date is March 2010. A draft Revocation & Substitution has been approved by ACCC for a further 5 years (A90988)</p>
SOUTH AUSTRALIA <ul style="list-style-type: none"> • <i>Chicken Meat Industry Act 2003</i> 	<p>Content: Registrar to administer Act, agreements to be in writing, collective bargaining for growers, compulsory mediation of disputes.</p> <p>Restrictions on competition: Collective bargaining, compulsory mediation</p>	<p>TPA Authorisation: Section 24</p> <p>Other: Compulsory arbitration was removed in 2004 from the Act to satisfy NCC. This Act was introduced 2003 notwithstanding a then existing non statutory ACCC authorisation (A90825 which subsequently expired in January 2008).</p>
WESTERN AUSTRALIA <ul style="list-style-type: none"> • <i>Chicken Meat Industry Act 1977</i> 	<p>Content: Establishes Chicken Meat Industry Committee which determines an average price, approves premises, handles disputes from agreements.</p>	
TASMANIA <ul style="list-style-type: none"> • None 		<p>TPA Authorisation: The ACCC has granted non statutory authorisation A90659 for collective bargaining. Expiry date is June 2010.</p>