



ACCC Perishable Agricultural Goods Inquiry

Submission

Victorian Farmers Federation

**Victorian Farmers Federation
Chicken Meat Group**

The Victorian Farmers Federation (VFF) – Chicken Meat

The Victorian Farmers Federation (VFF) Chicken Meat Group represents one of the commodities in the VFF, Australia's largest state farmer organisation and only recognised consistent voice on issues affecting Victorian farming. This submission is made by Victorian Farmers Federation with respect to the contractual relationships between Processors and Growers in the chicken meat industry.

The VFF Chicken Meat Group represents 80 to 85% of Victorian Chicken Growers contracted to Processors in the State of Victoria, and is a member of the Australian Chicken Growers Council. This submission is made on behalf of Victorian Growers.

Collective Bargaining Historically

Most Growers in Australia have had ACCC collective bargaining authorisations for a number of years, most of which have been granted since 2005 after Victorian Growers obtained authorisation following the dismantling of the State based regulated systems, which in most States had governed Grower Processor dealings, including periodic fee adjustments, disputes and contract terms and conditions. The statutory regulation of Processor Grower relationships in the States had recognised the imbalance of bargaining power between Growers and Processors and the potential industry instability which could result.

The regulated systems involved a degree of collective bargaining on an industry wide basis in the State, as most of these systems involved a statutory committee or board, including Grower and Processor representatives, and decisions, particularly relating to annual fee increases, would normally involve negotiations between Grower and Processor representatives.

When the National Competition Policy was implemented around the year 2000, the abandonment of the State regulated systems left something of a vacuum. Growers first sought to remedy the situation by persuading governments to modify the regulated system to be more compatible with the competition principles but governments and others urged Growers to obtain ACCC collective bargaining authorisations as a satisfactory alternative which would address the imbalance of bargaining power.

It seemed to be an assumption by both Growers and Processors, certainly in Victoria, that something needed to fill the void left by the dismantling of the regulated systems. The Processors sought to act pre-emptively in Victoria by applying on behalf of the Growers for an authorisation for the Growers to collectively bargain with the Processors within the constraints of a system designed by the Processors. The validity of the application for authorisation on this basis was contested by the Growers who were ultimately successful in the Full Federal Court. Victorian Growers then applied through the Victorian Farmers Federation for Grower groups contracted to each of Inghams, Bartter (then a national Processor), Baiada, La Ionica (later Turi and now

Turosi) and Hazeldene to bargain collectively with their Processor with respect to contract terms and conditions, fee reviews and adjustments and disputes. Authorisation was granted enabling the Growers in each of these Grower groups to collectively negotiate with their Processor with respect to these broad topics.

Growers in other States similarly obtained authorisations in the following years.

From a Grower perspective, for a number of years collective bargaining worked reasonably well in Victoria and other parts of Australia, in that the Processors accepted it and for the most part engaged in it, although varying situations across the States and different regions affects the universality of this proposition.

There appear to be several reasons why collective bargaining was generally accepted by Growers and Processors in these years. One reason was that it was a hangover from the regulated systems. Processors were accustomed to dealing with Growers collectively and did not really question the necessity for this, as evidenced by their attempt in Victoria to pre-empt the situation by obtaining on behalf of Growers an authorisation for collectively bargaining. Another reason was that pool system price adjustment mechanisms and related efficiency schemes, designed to provide performance incentives, continued to be incorporated in Grower's contracts after deregulation. Traditional pool schemes went hand in hand with collective bargaining and for effective and valid operation required Growers to be on a level playing field with respect to contract terms and conditions and growing fees. Because there was a standard fee payable by Processors to Growers under the regulated system, pools in effect redistributed the Growers' money, the total amount paid by the Processors being the amount which in any event the Processors had to pay the Growers. As a result there was an acceptance of an element of Grower ownership of pools, with Growers appointing representatives to scrutinize pool payment calculations and changes to the system normally requiring negotiation with Growers as a group.

However, it is contended that the most significant reason for the acceptance of collective bargaining through this period was that all the Processors, including the "nationals" had state based operations. Inghams, for example, grew and processed chickens in every state with a state management including a farming manager who for the most part dealt with the Growers and their representatives more or less on a daily basis. Contracts and fees were essentially negotiated with Growers on a state basis by state management. Similar situations necessarily applied in Victoria to Processors such as Turosi and Hazeldene who grew and processed chickens only in Victoria. In other States there were also some smaller regional Processors.

It is also to be noted that when Victorian Growers obtained authorisation in 2005 and for some years after that time, Inghams, Bartter, Baiada, La Ionica had contracted Growers in the same general area around Melbourne and its surrounding areas and around Port Phillip Bay. While there was not a lot of movement of Growers between Processors, Growers did have possible alternatives with respect to Processors, which is likely to have been a factor which entered into Processors' willingness to negotiate on a collective basis with Growers about contract terms and conditions.

Over a period of years the number of processor alternatives for Growers shrank in most States as Inghams and Baiada strengthened the national ambit of their businesses. In Victoria Baiada had entered the State as a Processor by acquiring firstly Marven and then Eatmore in the late 1990s. Baiada had acquired the Centenera processing business in South Australia. In 2009 Baiada acquired Bartter which had a multi state operation. In New South Wales, Inghams acquired Sunnybrand in 2011.

Inghams and Baiada as National Businesses

During this period the two national Processors, Inghams and Baiada, increasingly became businesses organised and operated on a national basis with mobility of production and products, moving away to a significant degree from the traditional state based models and the assumptions on which they were based of geographic proximity of hatcheries, growers, processing plants and markets.

A result of this mobility has been that Inghams and Baiada have shifted production to where they perceive it will be most advantageous for them to grow chickens under contract and to process the chickens. In 2015-16 Baiada elected to cease processing in Victoria and to not renew or terminate all its contracted Growers in the State, leaving 16 Growers without contracts. In 2017 Baiada similarly exited Southern Queensland leaving some 28 Growers without contracts. In 2016 Inghams ceased processing in New South Wales save for a small number of Growers in the northern part of the state who were serviced by Inghams' processing plant in Southern Queensland. In 2019 Inghams declined to renew the contracts of these Growers in Northern New South Wales.

Baiada has centred much of its production in Griffiths and Tamworth, although maintaining some production in South Australia and Western Australia. Inghams appear to have concentrated much of their production in Queensland and South Australia while maintaining varying levels of growing and processing of chickens in Victoria, Western Australia and Tasmania. Growers in each of the three latter States have had reason in recent years to think that their positions may be precarious.

This process of regionalisation of production on a national basis has tended to create growing hubs dedicated to one Processor without any processor alternative for Growers, the most obvious examples being Baiada Growers in Griffiths and Tamworth and Inghams Growers in Southern Queensland. Growers elsewhere in the less favoured production regions have little reason to believe either national Processor will be expanding production in their region.

While this may be evolutionary, the result has been that it is difficult to identify any state or region in Australia where it could be said that there is competition for growing services. Many of the second tier Processors have been acquired by either Inghams or Baiada and those that remain have been left with the wholesale secondary market and only slim pickings with respect to the supermarket duopoly and the fast food industry.

When Inghams and Baiada have ceased production in a state or region they have not vacated the market, creating an opportunity for the other national processor or a second tier processor to step into the gap with local production. Inghams and Baiada just supply their market from a different source. The history has been that when Baiada exited Victoria and Southern Queensland, a few farms, mostly the better farms, were picked up by Inghams, and when in the years leading up to 2019 Inghams would not renew the contracts of some 15 Growers in Victoria, a small number were picked up by Turosi, but they were reflected in the number of Growers which Turosi would not renew a short time later.

The absence of any competition for growing services by reason of these factors has very seriously exacerbated the imbalance of bargaining power which is inherent in the Grower Processor relationship. Growers contend that the Growers' increased vulnerability has in recent years been unfairly exploited by Processors in a number of instances.

Lack of Contractual Certainty

The central issue for Growers is lack of security of tenure. Growers provide the Processors with farms and purpose built shedding which are very expensive to establish, over \$1 million per shed, on top of land and other costs. This represents very substantial capital investment which the Processor would otherwise have to make to carry out the growing phase of its integrated process.

Historically there was an assumption, apparently shared by both Growers and Processors, that irrespective of the length of the initial contract term, contracts were for the most part ongoing, virtually indefinitely, subject to performance and the Grower's ability to keep the farm up to the Processor's facility standards. Even bad performance by the Grower to the point of formal inefficiency status under the Contract was normally dealt with by the Grower being given the opportunity to sell the farm.

Both Inghams and Baiada have for some time have had provisions in their contracts allowing the Processor to terminate the contract if the Processor ceases processing chickens in the state (as provided originally), although more recently the relevant clause in both contracts allows termination if the Processor ceases processing at the primary plant servicing the Grower, which by opening up the possibility of termination because of mere relocation of a plant, increases the Grower's risk. Baiada's exit from Victoria and Southern Queensland and Inghams' exit from New South Wales mean that Growers can no longer regard such events as an unlikely and theoretical possibility, which was how these clauses were generally regarded when they first appeared in contracts, at a time when Inghams and Baiada operated their businesses essentially on a state based model.

Coupled with this has been a waive of non-renewal of contracts, mainly by Inghams, which are not necessarily associated with cessation of processing at a particular plant. In Victoria most Inghams' Growers had contracts due for renewal in 2019. Inghams

worked through the list over a period of time notifying Growers whether or not new contracts would be offered. Although the position was obscured by different offers, some for only short periods, in effect 15 Growers were notified that they would not be offered new contracts.

The volatility and lack of permanence of Growers is underlined by the fact that Inghams some two years later have approached four of the Growers who were not renewed and told them that Inghams have now decided that they wish to place chickens on their farms. They have been offered new contracts in a form of contract which Inghams is currently wishing to introduce, although Growers have expressed considerable concerns about this contract. These Growers have felt that they had little choice but to accept these contracts.

The inability of Growers to secure contractual certainty to support their capital investment has become chronic in the industry in recent years. The insecurity of Growers' tenure has seriously undermined, if not removed, the ability of Growers to bargain in any effective manner with Processors, collectively or otherwise. When Inghams was introducing its new form of contract nationally in 2016, although they had stated that they would not engage in collective negotiations, representatives of Inghams' management met with Grower representatives in Victoria to discuss the new contract. Inghams had expressed the view that production costs in Victoria were too high, compared with other states and at that time had put a question mark over the future of the Victorian operation. Most Victorian Inghams' Growers were on the same five year contractual cycle with contracts due for renewal in 2019. Hoping to avoid any winding back of the Inghams' Victorian operation and to secure renewals for all or at least most Growers, Grower representatives agreed to recommend to Growers fees under the Inghams new fee structure which represented a significant decrease from their existing fee level. Inghams subsequently went through the process over an extended period of time offering new contracts to some but not all Growers which, as mentioned above, resulted in 15 Growers not being renewed. Growers offered new contracts were given short term dates to accept otherwise Inghams would move on and by implication offer the contract to another Grower.

What Inghams or Baiada do with respect to their contractual relationships with Growers seems to have a knock on effect with the second tier Processors. The majority of Turosi Growers in Victoria had contracts due for renewal at the beginning of 2020. Turosi announced that they would not be renewing a number of Growers and conducted negotiations with Growers for a new contract after advising that they would need to terminate more Growers if they were not able to achieve what they perceived they needed to with respect to the new contract. It was openly indicated that they must be able to match Inghams with respect to fees and other outcomes.

It is not just on contractual renewals that the lack of future contractual certainty is an issue for Growers in bargaining with Processors. It also applies with respect to issues under ongoing contracts. There is no doubt that when any issue with the Processor arises Growers, and particularly Grower representatives are extremely conscious of their own vulnerability with respect to their next contract renewal.

Although most Grower contracts include dispute resolution mechanisms it is difficult to recollect instances in recent years where Growers pursued these processes or other legal remedies with respect to fee reviews or other contractual issues. In Queensland there was an ill-fated attempt by Inghams' Growers, via their Grower group, to pursue a dispute resolution process with respect to their contractual status. The outcome of this attempt was the effective destruction of the Queensland Grower representative group.

In short, Growers' inability to collectively bargain with Processors in an effective manner, coupled with the absence of processor alternatives for Growers and the volatility of the contract situation in recent years with a history of non-renewals and terminations, result in Growers having no certainty about their long term future. The only certainty for a Grower is the balance of his existing contract term.

Absence of Effective Collective Bargaining

In contrast with previous years Inghams and Baiada in the last four or five years have ceased negotiating contracts with Growers in any meaningful way. For example, in 2008-09 Inghams' Grower representatives fully negotiated a contract with Inghams which was signed by nearly all Inghams' Victorian Growers. When this contract was due for rollover in 2014 Grower representatives negotiated some adjustments and the adjusted contract remained in place until 2019.

Over a period of approximately two years from 2016 Inghams rolled out a new contract nationally which introduced an entirely new fee structure, aspects of which were contentious. After difficulty with Growers in Queensland and to some extent in Western Australia Growers in other states fell into line one by one. On several occasions during this process Inghams indicated to Growers that they would not engage in collective bargaining with Growers about the new contract. In the new contract which Inghams is currently seeking to introduce all references to "Grower Representative" which appeared in their previous contracts have been deleted.

When Baiada Growers in Northern New South Wales were due for contract renewals in 2019-20 Baiada presented new contracts which provided for a fee which was among the lowest fees being paid anywhere in Australia, or possibly the lowest fee being paid anywhere in Australia. The contracts which were for a five year term required significant facility upgrades including installation of concrete floors. This is a major and costly requirement normally only seen in contracts relating to establishment of new farms or substantial rebuilding of farms, and apparently these upgrades had to be in place when the contract rolled over in a short time. The fee arrangements included provision for Batch Payments for gas, power and litter costs, but these were to remain fixed for the five year term, whereas under the Growers' previous contracts with Baiada these were adjusted annually in line with actual cost movements. In a variety of ways the new contract imposed obligations not seen in the previous contract and allowed many matters to be determined unilaterally by the Processor. This contract was presented on a take it or leave it basis, to be accepted by a specified short term date.

Increasingly Onerous Obligations

While each new edition of a Processor's growing contract tends to be more one sided and more rigorous than the last with respect to Grower obligations, the pace of this process has accelerated very sharply in recent years, and from a grower perspective to an alarming degree, as grower vulnerability and loss of bargaining power has increased.

Examples are as follows:

1. Shifting of Risk to Growers

Growing contracts have for some years contained force majeure clauses directed to disaster type events allowing a party to suspend and ultimately terminate the contract if events beyond the control of the party prevent performance of the contract. These clauses, as is normal, confer these rights on both parties. However, Inghams and Baiada have each introduced into clauses of this type provisions, allowing suspension or termination of the contract in the event of economic and market pressures which would apply only to the Processor. Initially some years ago Inghams and then the other Processors, despite Grower concerns, began inserting into these clauses importation of chicken meat into Australia as a force majeure event. Inghams' latest contract, yet to be widely introduced, includes in the relevant clause circumstances "which materially reduce demand for or restrict the supply of Inghams' products".

In contracts presented to Growers Baiada has included a clause allowing Baiada to give notice of termination if any legislation, regulation etc. is introduced which in the reasonable opinion of the Processor would materially affect matters governed by the contract, or would result in inconsistency between the legislation, regulation etc. and any part of the contract.

These provisions illustrate the Processors' short term commitments to Growers, governed by the ebbs and flows of commercial conditions, in contrast to the long term partnership necessitated by the capital investment required of Growers.

There have been increasing incidents of Processors, on the basis of difficult trading conditions, placing pressure on Growers to accept fees lower than the fees payable under the Growers' contracts, and/or placements at lower densities or reduced batch rates. Turosi endeavoured to push such a reduction through in recent months, as a measure necessary to save the company by reason of COVID-19 pressures, but abandoned this attempt when Growers resisted, largely because of the manner in which Turosi had gone about it.

Hazeldene, also on the basis of the difficult current conditions, has for some time entirely disregarded fees payable under the Growers' current contracts and has advised Growers of a new fee structure including a new incentive scheme with a Processor nominated benchmark figure. Hazeldene has advised Growers that it has

carried out a survey of industry fees and that the reduced fees Hazeldene is paying are competitive.

These events suggest that some Processors now consider that despite Growers' contracts, growing costs represent one cost which the Processors can control and reduce when trading conditions become difficult.

2. Grower Liability for Processor Losses

Historically under growing contracts there was an acceptance that growing chickens involved bird losses and from time to time that there will be events resulting in abnormal losses. While Growers might be liable for Processors' direct losses in some circumstances where fault was attributable to the Grower, loss of profits and indirect consequential loss were excluded. For example, in the case of abnormal bird losses attributable to the Grower, the Grower would be liable only for the Processor's cost of the day old chickens and feed supplied by the Processor with respect to the number of birds lost. However, it is increasingly the case that growing contracts are now placing increased liability for Processor losses on the Grower.

The Baiada contract requires the Grower to pay the Processor the amount of all of the Processor's losses arising from bird losses and a variety of other specified causes "or any other losses as determined by the Processor". While the cost of the day old chicks and feed is to be taken into account the obligation is to pay all of the Processor's losses and there is no exclusion of loss of profits or indirect or consequential loss.

The Inghams' contract has a provision excluding consequential loss, but in the event that the Grower has an RSPCA accreditation issue the payment to the Grower will be reduced by a 10% administrative charge, an amount determined by Inghams with respect to any additional processing cost and an amount determined by Inghams reflecting the limited market for a non-RSPCA chicken. The latter penalty appears to be loss of profit.

3. Compliance with Processor Facility Standards

Historically under growing contracts any obligation under which the Grower had to carry out upgrades to facilities (as distinct from maintenance and repairs) was set out in an agreed upgrade program attached to the contract at commencement with a timetable for the works to be carried out. Otherwise, upgrade requirements were addressed on the next renewal of the contract.

However, it is common for contracts to now include provisions requiring the Grower to comply with the Processor's facility standards from time to time during the term of the contract. As facility standards are entirely within the discretion of the Processor this may mean that the Grower is faced with costly upgrade works without the ability to recoup the cost during the balance of the contract term. In some cases, the contracts also contain provisions for the parties to renegotiate the fee in the event of changes required by the Processor which have impacts on costs including capital costs,

but this process has no required outcome or direct connection to the Grower's ability to recoup the capital outlay.

Turosi's most recent contract also has provisions imposing a suite of different fee reductions which will apply if specific facility requirements are not met. This contrasts with Inghams' 2014 contract which provided for a bonus payment per bird to Growers who installed tunnel installation as an incentive, i.e. an addition to the fee as against a reduction.

4. Pools

Pool system fee adjustments have moved away from the original model of grower involvement and redistribution of a standard fee and are now processor controlled systems, sometimes of a benchmark nature, the levels of performance being controlled by Processors determining an adjustment factor. In the latest contract presented by Inghams the performance level above and below which fee adjustments are made is set by reference to yet untested performance levels projected by the developers of the genetic stock.

Effectiveness of current legislation

Collective Bargaining Authorisations

In the current situation of the chicken meat industry, collective bargaining authorisations provide Growers with very little effective bargaining power in negotiations with Processors about contract terms and conditions, fee and other issues. The basic weakness of collective bargaining authorisations as a remedy is that they are only permissions to do something which would otherwise be unlawful, and they place no obligation on the other party to engage in the process.

On numerous occasions since 2016 Inghams have stated that they are not obliged to collectively negotiate and that they will not collectively negotiate with Growers. In fact they have dealt with Growers collectively when it has suited Inghams to do this.

Other Processors go through the motions of dealing with Growers collectively, but mostly on a take it or leave it basis, as for all the reasons mentioned above Growers for the most part have nowhere else to go and have no certainty about their long term contract futures. Insofar as in recent times collective negotiations have taken place with Processors, on some occasions negotiations have taken place in the face of a deadline for each Grower to accept the Processor's offer and on others in the knowledge that some Growers will not be renewed.

Boycott Authorisations

In 2005 Victorian Growers through the Victorian Farmers Federation obtained approval of the right to withhold supply in the course of negotiations with Processors, but subject to a number of conditions. This authorisation was hotly contested by the Processors and was eventually overturned in the Australian Competition Tribunal.

At the time Growers saw the boycott as a deterrent that would place pressure on Processors to reach agreement, given the potential for serious disruption of the Processor's business. The power to withhold supply under a boycott authorisation may well improve the Grower's bargaining power but Growers have doubts as to the practicality of the use of boycott authorisations for the same reasons as the effectiveness of collective bargaining authorisations to assist Growers has diminished. Growers' representatives would feel particularly vulnerable in threatening the Processor with a boycott which would potentially cause serious damage to the Processor's business.

Misleading and Deceptive Conduct and Unconscionable Conduct

These remedies predominantly address specific instances of conduct and it would appear from instances which have been raised in recent years that these remedies are difficult remedies to pursue. They are also impractical from a cost perspective for most Growers and do not assist in conducting negotiations, except possibly as an indirect deterrence.

Unfair Contract Terms

The legislation is likely to apply only to very few Growers because of the threshold requirements that the upfront price payable under the contract must be no more than \$1 million if the contract is for more than 12 months.

In the case of contracts which provide for a per bird fee it might be possible to argue that it is not possible to determine how many birds will be grown by the Grower over the life of the contract and that the per bird fee does not fall within the definition of upfront price, hence there is no upfront price which exceeds \$1 million over the life of the contract. However, this proposition is complicated by contract provisions setting target batch rates and density and mortality levels, and providing for productivity adjustments to the fee based on these.

Probably the majority of growing contracts now provide for payments most of which are ascertainable being based on an amount per square metre of shedding space. Under these contracts the component of the Grower payments which is made on a per bird basis is a minor proportion of the payment. It would also be likely that many larger modern farms employ more than 20 people.

On this basis the Unfair Contract Terms legislation would most likely be applicable only in the case of a small number of Growers, and for this reason does not present an effective solution for the industry issues canvassed in this submission.

In addition court action is required to pursue remedies under this legislation. The legislation seems to largely provide after the event remedies and it is difficult to see how it could be effective to assist Growers in contract negotiations, except in a very indirect way.

Conclusion

- Inghams and Baiada between them are responsible for over 70% of production in the chicken meat industry in Australia.
- The majority of Growers growing chickens under contract in Australia are contracted to Inghams or Baiada.
- The movement of Inghams and Baiada from state based operations to nationally operated businesses with production expanded in processor dedicated areas, together with the reduction in numbers of state based processors, have substantially removed all competition between Processors for growing services.
- The movement by Inghams and Baiada out of states and regions, leaving Growers without contracts, and the manner in which those Processors have dealt with Growers in recent years, have left Growers with no contractual certainty beyond the end of their current contracts. This has very significantly constrained the ability of Growers to effectively bargain with Processors either collectively or otherwise.
- The secondary state based Processors take their lead from Inghams and Baiada in dealing with Growers.
- Inghams do not accept any obligation to collectively bargain with Growers and when it has suited them to do so have specifically refused to collectively bargain. In the opinion of Growers, Baiada in recent times has not genuinely engaged in collective bargaining with Growers. In these circumstances collective bargaining authorisations which in the past were of assistance to Growers do not provide effective assistance to Growers in dealing with Processors.
- Growers contend that this situation has resulted in conduct on the part of Processors which is exploitative and which should be constrained on that ground alone, but also because of its potential to destabilise the chicken meat industry.
- Growers consider that the Processors need to be legally constrained in relation to contract terms and conditions, and if contract settings were appropriate and reasonable, this would resolve many of the issues in Processor/Grower dealings. Victorian Growers consider that an appropriately drafted mandatory code governing growing contracts is the best means of addressing the systemic issues which leave Growers with no effective bargaining power with Processors.

- Growers believe that to be effective a mandatory code must be coupled with an accessible and affordable dispute resolution process. Commercial litigation is not affordable by a large proportion of Growers and the courts are not appropriate means to deal with industry issues. Under the regulated systems which existed until approximately the year 2000, disputes were referred to the statutory committee or its delegates, allowing low level disputes or disputes not involving large amounts of money to be dealt with. Since deregulation there have been no effective dispute resolution processes under growing contracts. It is difficult for the parties to agree on an independent expert to adjudicate on disputes, as any person with expert knowledge almost always falls on one side of the Processor/Grower divide. Many contracts call for mediation or arbitration by a mediator or arbitrator nominated by one of the dispute resolution bodies in the absence of agreement by the parties, but this is normally no cheaper and not a great deal different from court proceedings. This obviously favours Processors.
- Ideally there would be a government entity dedicated to providing cheap and easily accessible dispute resolution for the chicken meat industry, or perhaps for all agricultural industries.