



**National Farmers'**  
F E D E R A T I O N

**National Farmers' Federation**

**Submission in response to the  
Small Business and Family Enterprise Ombudsman  
Discussion Paper – April 2014**

23 May 2014

## NFF Member Organisations



CANEGROWERS



CORPORATE  
AGRICULTURAL  
GROUP



*The Pastoralists'  
Association of  
West Darling*



**Ruralco**  
HOLDINGS LIMITED



WOOLPRODUCERS  
AUSTRALIA

## Introduction

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The National Farmers' Federation (NFF) welcomes the opportunity to make a submission in response to the Small Business and Family Enterprise Ombudsman Discussion Paper – April 2014.

The NFF was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The NFF's membership comprises all Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. Following a restructure of the organisation in 2009, NFF can now represent a broad cross section of the agricultural sector, encompassing the breadth and the length of the supply chain.

NFF has for almost 35 years consistently engaged in policy interaction with government regarding a range of issues of importance to the sector including workplace relations, trade, education, environment and innovation to name a few. The NFF represents the agriculture industry and provides high-level advice and guidance on issues of critical importance to the future of the Australian farm and agribusiness sector.

The NFF would be happy to expand on the issues raised in this submission.

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## **The Australian agriculture sector**

The Australian agriculture sector is a critical contributor to the Australian economy. In 2011–12, farm and fisheries production and processing accounted for approximately four percent of Australia's GDP and 11.5 percent of the total value of merchandise trade exports.

The sector provides economic, social and environmental benefits across the country and should be given a high level of priority within the government. The industry relies on an effective and responsive partnership with government across a range of important areas including workplace relations, trade and market access, biosecurity, natural resource management and research and development policies and programs.

There are approximately 135,000 farm businesses in Australia, 99 percent of which are family owned and operated. Each Australian farmer produces enough food to feed 600 people, 150 at home and 450 overseas. In 2009, Australian farms produced 93 percent of the total volume of food consumed in Australia. Recent data from the Australian Bureau of Statistics has found that the number of Australian farmers has fallen by 100,000 over the three decades from 1981, yet at the same time, the value of Australian agricultural exports has grown from \$8.2 to \$32.5 billion, and is today sitting at \$36.4 billion.

Australian farmers work to produce Australia's food and fibre needs in an increasingly variable climate and there are circumstances often out of farmers control that limit a farm businesses ability to make a profit. Australian farmers have long recognised the need for planning and business management skills that take into account the variation in climatic conditions. Farmers are constantly preparing for, managing through and recovering from droughts, all with minimal government intervention.

Australian farmers are environmental stewards, owning, managing and caring for 61 percent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 percent of Australian farmers actively undertaking natural resource management. At the same time, climatic and other impacts on agriculture and the environment can add additional pressure for farmers and land tenure security is under strain as other sectors such as mining and onshore petroleum are expanding into traditional farming areas.

Small businesses, including on-farm and businesses throughout the supply chain, have great difficulty attracting and retaining suitably qualified labour in an industry with chronic labour shortages. Legal obligations around the employment of staff are complex and multi-faceted. The penalties for non-compliance, even with minor regulatory requirements, are high. In general terms, the larger a business is, the greater their ability to absorb staff overheads. Once an employment relationship breaks down, this can be very costly for small business both in terms of cash flow and reputational damage. These disincentives are a major barrier to farm businesses looking to expand their workforces. This has flow on effects for the industry and the economy.

The role of government in a competitive agriculture industry cannot not be underestimated. Every piece of regulation adds to the compliance burden for farmers, who are overwhelmingly small and/or family businesses.

## Small Business and Family Enterprise in Agriculture

### Concierge for dispute resolution

What should the scope of the Ombudsman's own mediation service include? For example, small business disputes with Australian Government agencies or disputes under industry codes of conduct?

What powers should be conferred to the Ombudsman to resolve small business disputes?

Which types of dispute resolution services should the Ombudsman provide and what should be the model for providing these services? For example, should these services be outsourced or provided in-house?

There are already a number of government bodies established to assist in dealing with business and community disputes. The appointment of a Small Business Commissioner, followed by the proposal to transform this role into the Small Business and Family Enterprise Ombudsman with a particular focus on the resolution of disputes, suggests that these existing government bodies have not always been able to tailor their expertise or assistance in a way that is accessible to small business.

The Small Business and Family Enterprise Ombudsman should have the capacity to mediate in areas that are within the jurisdiction of another Government body if the business is having particular difficulties because of the size or family nature of its operation. If it does so, it should be resourced with sufficient knowledge of developments in the relevant area of law or custom and practice to ensure consistency of approach. A Small Business Commissioner network should be established through which the Ombudsman works collaboratively with state small business commissioners to reduce overlap and duplication. Where there are clearly identifiable areas or dispute types that are commonly dealt with by state small business commissioners, the Ombudsman should adopt a protocol of referring those matters on to the relevant commissioner rather than dealing with them itself. A similar approach should be adopted in relation to concerns about maladministration by Australian government bodies which should continue to be referred to the Commonwealth Ombudsman.

The Ombudsman should have the power to conduct conciliation and mediation and to make recommendations on application by a small business or family enterprise seeking assistance. Any such dispute resolution functions should be made available on an optional basis to preserve the capacity of small businesses to remain anonymous if they so choose. A similar approach has been adopted in negotiations for the draft Food and Grocery Prescribed Industry Code of Conduct (see clause 17 at [Attachment A](#)). Under the Code, entering into a formal dispute resolution process will be at the choice of the supplier and will not affect their capacity to simultaneously pursue remedies through the courts or make a complaint to the Australian Competition and Consumer Commission or other regulatory authority.

While a mediation service is strongly supported by the NFF, mediation should be neutral, needs based and facilitative in nature. Mediators should remain impartial and promote problem solving through an understanding of the respective needs of the parties and

barriers to resolution. The true value in mediation flows from the commitment of all participants to resolve their dispute. This commitment will not always be present, particularly where the balance of power means there is a strategic advantage in pursuing hard bargaining or litigation. Especially in such cases, the small or family business needs the assistance of an independent third party to redress the imbalance and give them a voice. The Ombudsman will require the capacity to influence negotiations through conciliation and to compel reluctant participants to attend conciliation. The Ombudsman should also have power to make recommendations following conciliation, either by consent or on request of a participant. This would make available a formally recorded, independent assessment of the dispute and how it could be resolved, which can then be used as a basis for further negotiations in circumstances where conciliation has failed.

To avoid actual or perceived conflicts of interest, mediation services should be outsourced to recommended and accredited private providers and should be provided free of cost. Conciliation should also be provided on a no cost basis and should be conducted in-house by experienced conciliators with a particular knowledge of the needs of small and/or family businesses.

| <b>Commonwealth-wide advocate</b>  |
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| How can the Ombudsman be a strong advocate to the Government? Are there particular practices that the Ombudsman should focus on?                                   |
| How can the Ombudsman be a strong advocate to larger businesses on the needs of small businesses?  |
| Should the Ombudsman be conferred powers to investigate allegations of practices in the public and private sectors that are negatively affecting small businesses? |

The NFF supports the proposal for the Ombudsman to report directly to the Minister and to directly engage with Government agencies to discuss the impact of their policies and practices on small business and by participating on relevant government committees, boards and panels. The value of advocating for small business at the earliest stages of policy development cannot be underestimated. Requiring the effect of government policy on small and family businesses to be taken into account in the developmental stages will go some way toward addressing the lack of practical, private sector experience within government departments and lead to better regulation and a reduced regulatory burden. The current government's emphasis on requiring the preparation of regulation impact statements should be strongly advocated and supported. Rushed regulation without proper consultation and policy development commonly hits small and family businesses hardest as they are caught up in a 'one size fits all' regulatory approach.

A role for the Ombudsman in advocating for the needs of small business to large businesses is worthy of consideration. The design of this role is crucial to its success. Large businesses will need to see the benefit of engaging on this issue with the Ombudsman for it to have any real impact. The development of best practice principles and industry recognition for businesses who promote 'fair play' in business could be aligned with the corporate responsibility of organisations.

The NFF supports an investigative role for the Ombudsman similar to the South Australian or New South Wales examples provided in the discussion paper. Care should

be taken not to unreasonably increase the regulatory burden on business through reliance on these powers. Requests for information should be targeted, easy to understand and only made where necessary to facilitate the resolution of disputes. Consideration should also be given to whether the Ombudsman requires additional powers to follow through on requests for information or the findings of any investigation.

#### **Contributor to Commonwealth laws and regulations**

How should the Ombudsman engage with small businesses and family enterprises to identify the regulatory burdens most affecting them?

What activities should the Ombudsman be tasked with in order to make Commonwealth laws and regulations more small business and family enterprise friendly?

Governments and regulators need to be transparent, efficient and consistent in the way they interact with farm businesses.

The Productivity Commission's September 2013 Research Report on Regulator Engagement with Small Business<sup>1</sup>, found that small businesses feel the burden of regulation more strongly than other businesses and almost universally, their lack of staff, time and resources present challenges in understanding and fulfilling compliance obligations. The report recommended that regulators adopt an approach that is more responsive to small business needs and capacities, including:

- tailoring information requirements around data already collected by businesses;
- greater use of industry associations to disseminate information;
- ensuring regulatory information can be readily found on websites; and
- enabling timely access to staff employed by regulators.

The NFF agrees with these recommendations and supports a collaborative approach through which the Ombudsman works closely with industry bodies such as the NFF to ensure sharing of information so that the Ombudsman understands the needs of small and family businesses in the agriculture sector and so that those businesses receive the information and resources they need when they need it.

In terms of activities the Ombudsman might undertake, a key issue for farm businesses is the difficulty of finding information about how regulations affect them and what they are required to do to comply. The single entry-point concept discussed below might assist in this regard. In addition, the Ombudsman should consider appointing suitably qualified staff with strong communication skills and knowledge of priority issues such as workplace relations, safety, immigration, tax, property rights and natural resource management. These staff should be available to assist with queries about how to deal with particular issues. The need for particular subject matter expertise could be refined over time as it becomes clear which areas require greater allocation of resources.

#### **A single entry-point agency**

What delivery channels should be used to provide the single entry-point? For example, a website, hotline or social media.

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<sup>1</sup> <http://pc.gov.au/projects/study/small-business/report>

What key information should the single entry-point provide?

In relation to the Ombudsman website, what is the best way to link with existing authoritative sources of information for small business? For example, would links to existing websites be sufficient?

In addition to providing information and initial support to small businesses, what other forms of small business engagement could the single entry-point offer?

Various delivery channels should be used to maximise opportunities for access. A website should focus on priority areas with links to issues that arise less frequently. The NFF suggests that relevant priority areas might be workplace relations, safety, immigration, tax, property rights and natural resource management.

To avoid duplication, the website should provide links to the original source information where possible rather than developing new information or fact sheets. Key information might include ‘hiring and firing’ documents (such as the Fair Work Information Statement, superannuation choice forms, tax declaration forms and the Unfair Dismissal Checklist) as well as information about regulations that are specifically targeted to small business. Separate pages for industries such as agriculture, which has a high proportion of small and family businesses, would be useful for industry specific information.

#### **Method of appointment**

How should the Ombudsman be appointed?

In our view, a statutory appointment for the Ombudsman is necessary to avoid any actual or perceived conflict of interest, bias or lack of independence. While statutory appointments can be administratively complex and may take longer to achieve, in this case it is likely to deliver the best outcome. Independence is crucial in ensuring effective engagement with stakeholders. For this reason, a contract for services arrangement is unlikely to be a viable option.

Employment under the *Public Service Act 1999* would render the Ombudsman subject to the APS Code of Conduct. In the NFF’s view, this could make the position untenable in the event that the Ombudsman sought to undertake a path that was not supported by government.



**Draft Food and Grocery Prescribed Industry Code of Conduct – ADR clause**

**17 Mediation or Arbitration**

- 17.1 Subject to clause 17.2 a Supplier may seek either mediation or arbitration of any complaint or dispute made or notified under this Code. Once a notice of dispute has been served in either a mediation or arbitration forum, a notice of dispute must not be lodged by that party in the other forum (ie the mediation or arbitration forum in which the notice of dispute has not been served) in respect of that particular conduct. (For example, if a notice of dispute has been served on a Retailer by a Supplier in a mediation forum, a notice of dispute must not be lodged by that Supplier in an arbitration forum in respect of the conduct that is the subject of the notice of dispute in the mediation forum.)
- 17.2 Where a Supplier has made a complaint under clause 15.1 or notified a dispute under clause 16.1, it may only seek either mediation or arbitration of the dispute under this clause 17 after the conclusion of the process contemplated by those clauses.
- 17.3 A matter may only be referred to either mediation or arbitration under this clause 17 where it relates to a complaint about dealings between a Supplier and Retailer in connection with a matter covered by this Code. Final Draft – 15 November 2013
- 17.4 Mediation or arbitration pursuant to this clause 17 is to be conducted in accordance with the Institute of Arbitrators & Mediators Australia Mediation Rules. If the mediator or arbitrator is not agreed by the parties within 10 business days of a Supplier referring a matter to either mediation or arbitration, then a mediator or arbitrator will be appointed by the Institute of Arbitrators & Mediators Australia in accordance with the Institute of Arbitrators & Mediators Australia Mediation Rules.
- 17.5 The parties to a dispute must attend any mediation or arbitration pursuant to this clause 17 and try to resolve the dispute in good faith. For the purposes of this clause 17.5, a party is taken to attend mediation or arbitration if the party is represented at the mediation or arbitration by a person who has authority to enter an agreement to settle the dispute on behalf of the party and will be taken to be trying to resolve the dispute in good faith if the party approaches the resolution of the dispute in a reconciliatory manner, including doing the following:
- (a) attending and participating at meetings that are arranged at reasonable times;
  - (b) at the beginning of the mediation or arbitration process, making it clear what the party is trying to achieve through the mediation or arbitration process;
  - (c) observing any obligation relating to confidentiality that applies during or after the mediation or arbitration process; and
  - (d) not taking or refusing to take action during the dispute, including refusing to supply or accept goods or to make payments, which has the purpose or effect of applying pressure to resolve the dispute outside the dispute resolution process.
- 17.6 All costs of any mediation or arbitration are to be determined pursuant to the Institute of Arbitrators and Mediators Australia Mediation Rules.
- 17.7 The ability to seek either mediation or arbitration under this clause 17 is in addition to any other dispute resolution procedures that may be otherwise initiated under the other clauses of this part of the Code or agreed between the relevant Supplier and Retailer and does not preclude any Supplier or Retailer from unilaterally pursuing rights and remedies by any other means including through the courts or by complaint to the ACCC or any other regulatory authority. For the avoidance of doubt, these other rights and remedies may be pursued in advance of, or concurrently with, the process set out in this Part.