



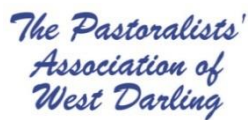
**National Farmers'**  
F E D E R A T I O N

**SUBMISSION**

**Extending Unfair  
Contract Term Protections to Small Businesses**

6 August 2014

NFF Member Organisations



Unfair Contract Terms Consultation Paper Small Business  
Competition and Consumer Policy Division  
The Treasury Langton Crescent  
PARKES ACT 2600

Dear Treasury

The National Farmers' Federation (NFF) congratulates the Coalition Government on its renewed focus on small business and welcomes the opportunity to make this submission in response to the Consultation Paper on Extending Unfair Contract Term Protections from Consumers to Small Businesses.

The NFF is the peak national body representing farmers and the agriculture sector 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. While our members address state-based 'grass roots' or commodity specific issues, the NFF's focus is representing the interests of agriculture and progressing our national and international priorities.

There are over 130,000 farm business in Australia with the majority of these being small and medium sized enterprises. The agricultural supply chain contains many primary producers but significantly fewer retailers/wholesalers 'up' the supply chain. While many small and medium producers have strong relationships with their buyers, the current supply chain structure commonly results in unfair outcomes for suppliers. This is the result of serious imbalances of power between supermarkets and producers, lack of transparency in contractual terms and concerns over the consequences of complaining about the conduct of dominant market participants.

#### *Imbalance of power*

Participation in the perishable commodities market is highly competitive and uniquely condensed. Primary producers are commonly dealt with on a 'take it or leave it' basis and have limited bargaining power or ability to negotiate alternative terms of trade to those offered by those in a dominant market position.

Many small agricultural producers experience:

- Fundamental inability to negotiate price with wholesalers (merchants or agents) and/or retailers;
- Unequal bargaining power because retailers can manipulate supply and demand of commodities (and therefore the market price);

- The prospect of commercial damage inflicted by retailers/wholesalers in response to complaints about contract terms or claims under contract (i.e.: most commonly, threatening to or actually refusing to buy from the producer in the future); and
- The perishable nature of most agricultural produce and tight time frames for supply being used as a negotiating tool by retailers to pressure unfavourable terms on producers.

This special set of circumstances suggests that additional protections are required.

Currently, there is no statutory relief available to producers or small businesses for contracts considered to be 'unfair' in the same context as applies to consumer contracts under the *Competition and Consumer Act 2010* (Cth). There is, however, significant precedent regarding the unenforceability of contracts made void, in part or completely, because of some primary defect in the composition of that agreement, for instance because of:

- uncertainty;
- absence of consideration;
- lack of authority; and/or
- there being no 'meeting of the minds'.

#### *Transparency of contract terms*

Many vulnerable primary producers do not fully understand the agreements they enter into or the ability of either party to rely on the terms of the agreement. It seems untenable then that, if in the same circumstances of certain consumers who may benefit from the current law, these vulnerable groups cannot have access to the same protections. Due to specific market conditions in the agricultural sector, contracts routinely used in the sector have the effect of being unfair, and would be held to be so under the law if it applied in a business-to-business context.

The competitive disadvantage faced by primary producers (who are often small to medium sized businesses) needs to be recognised by regulators. Primary producers are in a uniquely vulnerable position, due to the time pressures and logistical disadvantages in supplying perishable goods. The protection against unfair contract terms afforded to consumers should be extended to small to medium sized businesses who are primary producers of perishable commodities. This is necessary to ensure that primary producers can occupy the position of a reasonable commercial party engaging in routine negotiations.

Further consideration should also be given to extending unfair contract remedies to intermediary marketers or processors who are subject to unfair contracting caused by dominant market participants further up the supply chain. Where these intermediaries are faced with either lower receipts or higher costs of operation as a result of unfair contracting, this results in depressed farm gate revenues as a result of cost price pass

through. Examples of this may be seen in the alleged conduct of Coles that is currently the subject of prosecution by the ACCC.<sup>1</sup>

In summary, the NFF in principle supports Option 3 set out in the Consultation Paper. Legislative amendment is required to extend the existing unfair contract term provisions to contracts involving small businesses, in accordance with the Commonwealth Government's policy commitment. The NFF now calls on the Government to:

- Recognise that most primary producers in Australia are small to medium sized businesses who rely on relationships with wholesalers and retailers to get their perishable goods to market, placing them in a uniquely vulnerable position;
- Extend the protection against unfair contract terms afforded to consumers to small businesses (and in particular, primary producers); and
- Consider also extending unfair contract remedies to intermediaries in the supply chain where the effect of unfair contract terms are passed directly on to the farm gate.

For further information on this submission please contact:

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<sup>1</sup> Australian Competition and Consumer Commission, 'ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers' (Media Release, NR 102/14, 5 May 2014) <<http://www.accc.gov.au/media-release/accc-takes-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers>>.