

**To the attention of:
The Manager, Consumer Policy Unit
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600**

SUBMISSION by Professor Leanne Wiseman

**Treasury Consultation
Regulation Impact Statement
Enhancements to Unfair Contract Term Protections**

Introduction

Professor Leanne Wiseman is a Professor of Law in the Griffith Law School, Griffith University. She is also an Associate Director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) www.acipa.edu.au. She makes the following submissions on her own behalf.

Key Points

The **Treasury Consultation Paper on Enhancements to Unfair Contract Term Protections** noted that 'while the UCT regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using UCTs in their standard form contracts' (para 1.3).

The Consultation Paper outlines various reasons for this, including that UCTs are:

- not illegal and do not attract a penalty,
- do not provide adequate incentive for businesses to ensure their standard form contracts are free from UCTs,
- are not prohibited terms.

In addition, a term can be included in a contract even if a business is aware it is likely a UCT (see para 4.1)

It is noted in the Discussion Paper that the ACCC has listed Unfair Contract Terms in agriculture supply agreements and the viticulture sector as one of its focus areas for 2019.

I thank the Treasurer for the opportunity to make this submission on the operation and scope of the Unfair Terms and wish to do so with the focus on the unique position that our Australian farmers and their farming enterprises find themselves in with respect to their contractual relationships on farm.

Background

I have conducted research on a wide variety of legal issues arising out of the intersection between law and agriculture in Australia (and internationally) since 2000.

A particular focus of my research in the past 5 years has been on the impact of digitalisation on farmers and their farming enterprises. This review into Unfair Contract Terms is particularly relevant given the increasing use of standard form contracts (software licences) that accompany the new and emerging technologies and digital equipment that are now on Australian farms and within Australian Agriculture.

The Australian Government's then Department of Agriculture and Water Resources (now Department of Agriculture, Water and the Environment) as part of its Rural R&D for Profit program funded a research project in 2015-2016, into the digitalisation of Australian agriculture, and the challenges that was presenting to the Australian agricultural industries and their stakeholders: The *Accelerating Precision to Decision Agriculture (P2D)*¹ project. Led by Cotton Research Development Corporation (CRDC), the P2D project involved all 15 Rural Research and Development Corporations, and was focused on three main aims:

- Facilitating the development of digital technology in Australian agriculture.
- Fostering the establishment of appropriate legal frameworks, data systems and access to critical datasets.
- Identifying the data communications systems required to deliver the benefits of digital agriculture to the Australia farm and agribusiness sectors.
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As part of this project, six technical reports were produced and one, in particular, focussed on the legal dimensions of digital agriculture.² While a number of legal issues were investigated, one of the key concerns identified by farmers, was in relation to the technology (and data) licences that farmers were (sometimes unknowingly) entering into when adopting new digital technologies on farm:

“The data contracts currently in use in [new digital technologies in farming software, services and equipment] in Australian agriculture take the form of a data licence. A licence is the granting of permission for the use of content protected by copyright – for example, a data licence allows the use of the data but does not grant ownership rights in relation to the data. As with many

¹ *Accelerating Precision to Decision Agriculture (P2D)* <https://www.crdc.com.au/precision-to-decision>

² Wiseman, L. and Sanderson, J. (2017). The legal dimensions of digital agriculture in Australia: An examination of the current and future state of data rules dealing with ownership, access, privacy and trust. Griffith University, USC Australia and Cotton Research and Development Corporation, Australia. <https://www.crdc.com.au/sites/default/files/P2D%20Legal%20Dimensions%20-%20Griffith%20USC%20Final%20Report.pdf>

social media licences, the range of uses of data that is allowed can be so broad that they virtually operate as a transfer of ownership. Many data licences involve the use a 'click wrap' agreement (where the click of an 'I agree' icon signifies consent to the terms of a software licence), and this is often the way producers enter into and agree to data licences for agricultural technology. The data licences that are embedded in digital agricultural technologies are generally complex standard-form licence agreements that are generally non-negotiable and presented on a 'take it or leave it' basis when the technology is adopted. The terms of use of the technology are therefore agreed to either at the time of downloading an app or turning on a machine.”³

These technology licences are not unlike the social media licences that were subject to scrutiny as part of the recent ACCC's *Digital Platforms Inquiry*. *The final report of the ACCC's Digital Platforms Inquiry in 2019 highlighted the substantial market power that has arisen through the growth of digital platforms, and their impact on competition... and consumers.* While this Inquiry focussed on the impact of digital search engines, social media platforms and digital content aggregators, there are many similarities with the growth of digital content, agricultural data and powerful data aggregators in agriculture. Across the world, there have been a number of large mergers and consolidations within the agricultural technology providers, which has significantly impacted on the traditional relationships of farmers, their advisers and their technology and service providers.

While the introduction and expansion of the UCT legislation to small businesses (that could potentially cover farmers and their farming enterprises) were seen as a positive⁴, unfortunately the impact of these UCT reforms on current technology licensing practices with agriculture remains unseen. This can be attributed to a number of reasons.

It can be suggested that one of the reasons that 'there is limited data on how many standard form contracts have potentially unfair terms'⁵ is that the protections afforded by the expanded UCT scheme relies upon and places the onus upon an individual to raise the issue of a potential unfair term either through a legal process in a Court or to the attention of the ACCC.

Within agriculture, and certainly within certain specific industries with agriculture, farmers are not in a position to raise concerns in relation to potentially unfair terms due to the nature of the dependant relationship between the technology and service provider and the individual farmer or their farming enterprise. As suggested on p 10 of the Consultation paper, it is certainly the case that Regulators

³ Wiseman, L. and Sanderson, J. (2017). The legal dimensions of digital agriculture in Australia: An examination of the current and future state of data rules dealing with ownership, access, privacy and trust. Griffith University, USC Australia and Cotton Research and Development Corporation, Australia. <https://www.crdc.com.au/sites/default/files/P2D%20Legal%20Dimensions%20-%20Griffith%20USC%20Final%20Report.pdf>, p 12.

⁴ Wiseman, L., **Changes to contract laws could give small farming businesses more control of data and innovation**, <https://theconversation.com/changes-to-contract-laws-could-give-small-farming-businesses-more-control-of-data-and-innovation-69275>

⁵ Treasury, UCT Consultation Paper, p 9.

should be able to investigate potentially unfair licensing and contractual practices within industries as a whole, as this would relieve individual farmers from the expense and stress of single handedly taking on technology companies. There is significant power imbalance between farmers and large technology providers, and therefore such issues should be investigated by regulators rather than placing the onus on individual farmers.

In relation to the size of the business, for these UCT provisions, it is recognised within the Consultation paper that agricultural enterprises sit in a fairly unique position with the need for their seasonal workforce and hence are deserving of special recognition with respect to the operation of these provisions.

Lack of Transparency of Contractual Terms

One finding of the P2D empirical research, was the concern that farmers had in relation to the **lack of transparency** of the terms of the technology contracts that bind them⁶, once an agricultural machine or agricultural technology or software or adopted on turned on. Many farmers were unaware of the extent of the terms of these digital services and technologies, as no mention is made of them prior to adoption.⁷ Many of the terms of these technology contracts, particularly those that restrict the ability of the farmer to repair or access repair services for their equipment or devices, or those that relate to data ownership (restricting the ability of farmers to access their own farm data, for example) would satisfy the criteria of being 'unfair' under the UCT provisions.

To address this lack of transparency, it is suggested that, like other industries, such as credit and finance, that technology and software companies should be required to produce a one page, plain English version of any unusual terms, and that these summaries must be provided to potential customers and discussed at the time of purchase or sale of new digital technologies or equipment on farm. By requiring technology providers to provide information prior to the purchase of digital

⁶ Zhang, A., Baker, I., Jakku, E. and Llewellyn, R. (2017). Accelerating precision agriculture to decision agriculture: The needs and drivers for the present and future of digital agriculture in Australia. A cross industries producer survey for the Rural R&D for Profit 'Precision to Decision' (P2D) project. CSIRO and Cotton Research and Development Corporation, Australia.
<https://www.crdc.com.au/sites/default/files/P2D%20producer%20survey%20-%20CSIRO%20Final%20Report.pdf>

⁷ Zhang, A., Baker, I., Jakku, E. and Llewellyn, R. (2017). Accelerating precision agriculture to decision agriculture: The needs and drivers for the present and future of digital agriculture in Australia. A cross industries producer survey for the Rural R&D for Profit 'Precision to Decision' (P2D) project. CSIRO and Cotton Research and Development Corporation, Australia.
<https://www.crdc.com.au/sites/default/files/P2D%20producer%20survey%20-%20CSIRO%20Final%20Report.pdf>

technologies or services, this will enable farmers to be informed of the scope of the terms of the contracts and if unhappy, potentially negotiate with the technology provider. Currently, there is no incentive for technology or service providers to be forthcoming and transparent with potential customers about the terms of their technology contracts. Unless there are regulatory obligations placed upon the technology and service providers to be more transparent in relation to their contractual practices, this will not happen.

Instead of placing the onus under the UCT and small businesses to raise concerns or complaints about potentially unfair terms, the onus must be shifted to those companies who write the contracts to show that their terms are not unfair and that they are transparent and made known to small businesses prior to entry into their contractual relationships.

Farmers, their farming enterprises and businesses are deserving of special protections in relation to the contractual relationships that they enter. Given that farmers generally are excluded from Australian Consumer Law protections, given they are not 'consumers' under the ACL definition of 'consumer', it is important that regulator recognise the vulnerable position that our Australian farmers are placed in when trying to negotiate with international agricultural technology providers for services and technologies on their farms.

Canadian approach to Agricultural Machinery Contracts

It is useful at this point, to take heed of the approach taken to contracts for agricultural and farming equipment in Canada, as regulators there have heeded the unique situation that farmers are in with regards to their farming equipment. This is in stark contrast to some of the terms of the technology contracts that Australian farmers are faced with – many restrict the ability of farmers to engage in repair of their equipment or in accessing repair services outside the original equipment manufacturers. Not only does this legislation require spare parts to be made available but also for repair services to be made available to farmers. This more importantly, recognises the unique nature of contracts for agricultural machinery and services, by specifically regulating sales contracts for new and used agricultural implements.

In Canada, each province has an **Agricultural Implements Act**. This summary is from the province of Saskatchewan⁸, however each Province has similar legislation.

“The Agricultural Implements Act regulates the sale, lease and distribution of agricultural implements or parts in Saskatchewan. The Act works by legally requiring dealers to make available the parts and service that farmers need for their farming implements.

⁸ <https://www.saskatchewan.ca/business/agriculture-natural-resources-and-industry/agribusiness-farmers-andranchers/programs-and-services/regulations-and-guidance/agricultural-implements-act>

The Act regulates:

- *minimum terms of the warranty that farmers should receive from the ag dealer when farmers buy or lease new equipment;*
- *sales contracts for new and used agricultural implements;*
- *leasing of an implement from a financial institution;*
- ***guidelines for emergency parts and service;***
- *the means to obtain compensation for loss or damages because of **unavailability of parts or non-fulfilment of warranty;** and*
- *licensing of dealers and registering of distributors.*

If a farmer fails to receive parts and service in a timely manner, farmers may be awarded compensation through the Act.”

Agricultural Equipment Dealers can only be licenced if they can meet the terms of this Act. Dealers pay the compensation to the farmer if they fail to meet the terms of the Act.

I thank the Treasury for the opportunity to contribute this submission on the UCT consultation.

I am happy to provide any further detail or information, should it be sought.

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