

# Australian Chicken Growers' Council Limited



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20<sup>th</sup> September 2021

## RE: Strengthening protections against unfair contract terms

Dear Director,

The Australian Chicken Growers' Council (ACGC) is the peak national body representing contracted chicken farmers, many of whom are highly exposed to unfair contract terms (UCTs), largely due to the concentration of industry control into the hands of fewer processor companies. Where chicken growers were once able to assess contract offers from two or more processors, the merging of processor companies over the last two decades means that most Australian chicken growers can now expect to receive contract offers from just a single processor. Knowing that growers have nowhere else to go has tempted some processors to introduce UCTs.

For some time ACGC has campaigned for a mandatory Code of Conduct as the most effective step toward addressing this problem, recognising that UCT reform is also an important part of the solution. A Code is still the ultimate goal, but in the meantime the industry supports the Government's intention to strengthen legislation protecting against UCTs. However, ACGC feels that some of the proposed reforms may be improved, as outlined in the table below:

<i>New law</i>	<i>ACGC Comment</i>
The unfair contract term protections will apply to a small business contract if one party to the contract is a business that employs fewer than 100 employees or has a turnover for the last income year of less than \$10,000,000. Casual employees are excluded unless they are employed on a regular and systematic basis. Part time employees are to be counted as an appropriate fraction of a full-time equivalent.	The increase in turnover and employment thresholds for small business contracts is appreciated and will bring most Australian chicken growers into the category. Supported by ACGC.
A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term.	Supported by ACGC.
In addition to the current law, if a court has declared a term of a contract to be unfair, the court can make orders it considers appropriate to prevent or reduce loss or damage that has or may be caused by the unfair term. These orders can be made on application of a person or by the regulator on behalf of and with consent of a person.	Supported by ACGC.


<b>New law</b>	<b>ACGC Comment</b>
<p>In addition to the current law, if a court has declared a term of a contract to be an unfair contract term, the court can make orders it thinks appropriate to prevent or reduce loss or damage that has or may be caused by the declared term. These orders can be made in relation to any existing standard form contract that contains a similar term to the term that has been declared as unfair.</p> <p>These orders can be made on application of the regulator only.</p>	Supported by ACGC.
<p>In addition to the current injunction powers, the court can make orders injuncting a person from entering into any future contract that contains a term that is the same or similar in effect to a term that has been declared an unfair contract term.</p> <p>The court can issue an injunction to prevent a person from applying or relying on a term in any existing contract that is the same or similar in effect (to a term that has been declared unfair) whether or not that contract is before the court.</p>	Supported by ACGC.
<p>A contract term will be presumed to be unfair in a proceeding unless another party proves otherwise if that term is the same or similar in effect as a term that has been found to be unfair in another proceeding. The presumption only applies where the contract term subject to the proceeding is being proposed by the same person who proposed the term that was found to be unfair or the contract is in the same industry as the contract that contained the unfair term.</p>	Supported by ACGC.
<p>In addition to the current matters that must be taken into account when determining whether a contract is a standard form contract, a court must also take into account whether one of the parties has used the same or similar contract before.</p>	It is important to understand that chicken growers will usually sign contracts with UCTs when there is no choice of contracts, as for many the alternative will be bankruptcy. This means that a problem contract brought before the court may be similar to current or historic contracts.
<p>When determining whether one party was required to reject or accept the terms of a contract in the form in which they were presented, and whether another party was given an effective opportunity to negotiate the terms of the contract, the court must not consider:</p> <ul style="list-style-type: none"> <li>whether a party had an opportunity to negotiate minor or insubstantial changes to terms of the contract;</li> <li>whether a party had an opportunity to select a term from a range of options determined by another party; or</li> <li>the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.</li> </ul>	<p>This is useful, but note that Australian chicken growing contracts often include a clause advising growers to seek legal or expert advice before signing, but do not suggest that contract negotiations based upon such advice will ensue.</p> <p>A lawyer may advise that a proposed contract is unbalanced, but there is no obligation on the part of the processor to address the imbalance, and a grower will usually sign the contract anyway, since it will be the only contract offered.</p>

<b><i>New law</i></b>	<b><i>ACGC Comment</i></b>
In addition to the current exemptions to the unfair contract term provisions, contractual provisions that are taken to be included in a contract by operation of a law are also excluded. Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law, is exempt from the unfair contract term provisions.	Supported by ACGC.
The law refers to non-party to clarify the law applies to both consumers and small businesses.	Supported by ACGC
<p><b><i>General comment</i></b></p> <p>A major problem with the proposed legislative reform is that processors that are not concerned by the current penalties under UCT legislation will continue to ignore the new legislation, for these two reasons:</p> <ol style="list-style-type: none"> <li>1. Even with strengthened UCT provisions, grower-initiated court action is very unlikely. Processors are financially much better positioned than growers to manage the costs and time involved in court action. It will just be a matter of who runs out of money first, and that won't be the processor.</li> <li>2. Because most Australian growers are in the position where they may be offered a contract by just one processor, the grower will be very reluctant to initiate court action, knowing that even if such action is successful, the contract will not be renewed by the processor upon expiry as a retaliatory measure. In fact, if a grower takes a processor to court, it is likely that the processor will seek the early termination of the in-place contract prior to its expiry date.</li> </ol> <p>For these reasons, ACGC would like to see legislation that:</p> <ul style="list-style-type: none"> <li>- Makes it clear that UCT-focused court action may be initiated by authorities and agencies such as the ACCC; and</li> <li>- Under such circumstances court action can take place without identification of individual growers or (as far as practical) geographic zones; and</li> <li>- The court will protect growers from retaliation by processors where it can be reasonably demonstrated.</li> </ul>	

ACGC congratulates the Government on its efforts to strengthen this important legislation, and urges a small amount of fine-tuning in order to address the comments above.

ACGC looks forward to further involvement in this process and is available for consultation or clarification at all times.

Regards,

  
 Executive Officer,  
 Australian Chicken Growers' Council