



20 September 2021

Consumer Policy and Currency Unit
Market Conduct Division, Treasury
Langton Crescent
Parkes ACT 2600
Via email: UCTprotections@treasury.gov.au

To the Consumer Policy and Currency Unit,

Re: Strengthening protections against unfair contract terms

The National Farmers' Federation (NFF) welcomes the opportunity to provide a submission on the exposure draft legislation to strengthen protections against unfair contract terms.

The NFF and its' members are supportive of the proposed reforms set out in the draft legislation and explanatory documents. While we welcome the expansion of the income threshold for small businesses, we do not believe that turnover or revenue definitions are a suitable mechanism to limit business access to unfair contract terms (UCT) provisions, and may rule out farm businesses that are for all intent and purpose a small business.

While the principles underpinning these reforms are supported by the NFF, we feel that they are unlikely to fully address the issue of unfair contract terms in the Agriculture Industry, due to the need for enforcement action via court proceedings. To this end, the NFF recommends the establishment of alternate dispute resolution mechanisms to uphold rights found in unfair contract terms provisions. These mechanisms can and should be delivered through the introduction of codes of conduct to govern various agricultural supply chains.

Remedies and enforcement of the regime

The NFF is supportive of the proposed provisions in the draft legislation to strengthen the remedies and enforcement of the unfair contracts -remedies that provide courts with the power to impose a penalty for breaches in relation to the use of unfair contract terms.

The NFF also supports proposals to create a rebuttable presumption for terms that have been previously found to be unfair, and providing courts power to make orders to strike out these unfair provisions in existing contracts. This will increase the impact of any enforcement action under the UCT framework

The NFF's position has been put forward in greater detail in our previous submission to the UCT reforms.

Expansion of class of contracts covered

The NFF welcomes the move to expand the class of contracts that UCT provisions will cover. The proposals to increase the small business definition threshold and remove the contract value threshold are steps in the right direction.

However, the NFF believes that the income threshold proposal for small businesses is not well suited to farm businesses, where a high turnover is not necessarily indicative of a large profit margin. Under this expanded definition, some farm businesses with high turnover and low margins will end up being unfairly excluded under this expanded definition. The NFF does not believe that turnover is indicative of uneven bargaining power within contractual negotiations that may lead to the inclusion of unfair contract terms. The NFF recommends a higher turnover threshold of \$15 million to avoid arbitrarily excluding farm businesses who could benefit from the UCT provisions.

The need for alternate dispute resolution mechanisms

Currently, laws in place that regulate contract and other business practices are costly and hard for small businesses to use. Court action is often outside the realm of options for small businesses, with exorbitant legal costs and long timeframes making it difficult to justify for a small business. In monopoly/monopsony market situations, it is unlikely that a small business would take action, for the fear of retribution by the only pathway to market.

Need for industry codes

The lived experience of farm businesses has shown that legislation has been insufficient to combat the use of unfair contract terms and practices, and that unfair contract terms does not address all the perverse outcomes of uneven bargaining power between farmers and other supply chain stakeholders.

One such example is the Dairy Industry. Prior to the introduction of the Dairy Industry Code of Conduct, unfair contract terms were common and rarely challenged by farmers. The introduction of an industry code changed this, codifying the law and giving farmers an easy and risk-free process to raise issues and resolve contractual disputes.

Codes of conduct not only provide a robust enforcement pathway for UCT provisions, via alternate dispute mechanisms, they can address other anti-competitive and unfair/unconscionable conduct within the supply chain.

The NFF understands that voluntary industry codes are the preferred first step, however, a mandatory code will be required agricultural industries with a history of unfair and unconscionable behavior stemming from uneven bargaining power.

The NFF has particular concerns for the treatment of chicken growers at the hands of the processors. To ease the conflict and establish a fairer set of norms in the chicken meat supply chain, the NFF has sought to work with chicken growers and processors in the development of a voluntary code. To date, processors have explicitly stated their opposition to the development of any form of a voluntary code.

The history of voluntary codes is predicated on the offending industry initiating the code, usually in response to potential regulation. It is rare that an outside party, such as growers, have been able to draft a code that governs those further up the supply chain. As such, government action is required to mandate a code of practice, particularly for the most affected agricultural commodities, such as chicken meat.

The NFF would welcome the opportunity to discuss this matter further with you.

Yours faithfully

Tony Mahar
CEO
National Farmers' Federation