



James Jackson
President

24 September 2021

The Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
UCTprotections@treasury.gov.au

Re: Exposure Draft Legislation – Strengthening protections against unfair contract terms

The NSW Farmers' Association (NSW Farmers') welcomes the opportunity to comment on the Exposure Draft Legislation for strengthening protections against unfair contract terms. NSW Farmers' recognises this as an important step toward reform of Unfair Contract Terms (UCT).

NSW Farmers' is Australia's largest State Farming Organisation representing primary producers across all agricultural commodities. Farmers across New South Wales contribute significantly to the State and national economies with NSW food and fibre production representing around one quarter of Australia's annual total agricultural output.

NSW Farmers understands that the intent of the Bill is to expand the class of contracts covered by the unfair contract term provisions; and amend the Australian Consumer Law (ACL) and the ASIC Act. These will strengthen and clarify the existing UCT provisions and reduce the prevalence of unfair contract terms in consumer and small business standard form contracts.

Under the proposed amendments, Court powers are to be strengthened by:

- Improving definitions of small business;
- Introducing a new pecuniary penalty for applying or re-applying an unfair contract term;
- Applying orders as appropriate to prevent or reduce loss or damage by the unfair term;
- Issuing of injunctions to prevent a person from relying on a term in an existing contract if this has previously been declared unfair
- Presuming a contract term to be unfair if it has previously been deemed unfair in a prior contract with the same person

NSW Farmers provides in-principle support to the Bill, which has strong alignment with the NSW Farmers' position on unfair contract terms for primary producers. The intent to provide greater clarity and stronger court powers have the potential to strengthen deterrence, address current ambiguities, reduce uncertainty and minimise current compliance difficulties for small business.

NSW Farmers' recognises the intent of standard form contracts was to aid small business with limited resources for transaction and negotiation costs. However, it is our contention that over time, and without strong legal deterrence, those with greater market power have exploited this. It is our sincere hope that this Bill will lead to genuine reduction in the prevalence of UCTs in standard form contracts.

NSW Farmers' Association

ABN 31 000 004 651 PO Box 459 St Leonards NSW 1590 Level 4 154 Pacific Highway St Leonards NSW 2065
Member Service Centre 1300 794 000 T 02 9478 1000 F 02 8282 4500 www.nswfarmers.org.au

The Bill provides greater clarity regarding legal interpretation. However, it also assumes that small business has the capacity and resource reserves to initiate legal action to seek redress for UCTs.

However, NSW Farmers' is concerned that without accompanying provisions for cost effective arbitration for small businesses who have concerns about the impact of potential UCTs in their standard form contracts the amendments will be under-utilised.

The reliance on the court system undermines the primary intent to reduce the prevalence of UCTs. It also highlights the existing imbalance in monopoly/monopolistic market situations.

Inevitably, prolonged and expensive legal action will deter many small business owners from contesting their position. For those farmers in consolidated supply chains, such as poultry meat and horticulture, the risk of losing a crucial contract by raising concerns about potential UCTs may outweigh the benefit of holding the powerful, contract-issuing business to account.

There is also the very real concern for fear of potential retribution if the supply chain is very narrow or there is a specialist product under contract.


It is vital therefore, that low cost and effective dispute resolution for small business and farmers with UCT and competition related concerns also be included as a provision in the amendments as a precursor to legal action.

Codes of conduct have the capacity to ensure robust enforcement protocols for UCT provisions and can significantly reduce unfair or unconscionable conduct within the supply chain. NSW Farmers supports consideration of a mandatory code, as this provides for greater influence to deliver behaviour change.

For example, the Mandatory Code of Conduct for Dairy currently provides for arbitration and dispute resolution mechanisms. These basic but necessary provisions must be available to other farmers who are experiencing impacts due clear asymmetry of power.

Access to justice for small business and farmers is essential for the functioning of Australia's competition law. NSW Farmers' calls for the Government to introduce a low cost arbitration mechanism to protect farmers in uncompetitive markets and ensure UCTs are not present in standard form contracts.

Yours sincerely


President