

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
Treasury
Parkes ACT 2600

By email: consumerlaw@treasury.gov.au

To the Director,

RE: Submission in response to the Consultation Regulation Impact Statement (CRIS) – Protecting consumers from unfair trading practices

On behalf of the NFF Horticulture Council (the Council) and the wider national horticulture industry, thank you for this opportunity to make a submission as part of the consultation process concerning options to address unfair trading practices.

The Council is the preeminent forum for deliberating and forming policy concerning our national horticulture industry. It was established in 2017 and is now comprised of 21 national commodity and state peak horticulture bodies, who together represent the full breadth of an incredibly diverse industry, expected to reach just under \$18 billion in farmgate value this financial year.

The Council develops policy positions on common issues of national importance to the fruit, vegetable, nut, nursery and turf industries such as trade, workforce, farm business, climate change and sustainability, biosecurity, R&D, telecommunications and infrastructure.

As you might expect, a core priority for the Council is ensuring we have a fair and efficient domestic markets and competition settings that provide both protection for consumers and also an equitable return for producers.

Characteristics of the horticulture industry mean growers are at greater risk of being subject to unfair trading practices. We operate in markets that are far from being free or perfect, as those typified by a free flow of market information between buyers and sellers with equal bargaining power.

As the recent ACCC Perishable Agricultural Goods Inquiry¹ confirms, while there may be some exceptions, in general the fruit, nut and vegetable industry is characterised by a large number of farmgate producers in a given region for a given product. By contrast, there are typically fewer processors, wholesalers or

¹ ACCC, 'Perishable agricultural goods inquiry', <https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/perishable-agricultural-goods-inquiry-2020/final-report-to-treasurer>, (accessed 18 November 2023).

other intermediaries in that region. The major supermarkets generally account for a majority of supply to consumers. Nursery plant production is more diverse, happening in all parts of the country and ranging widely in scale whilst “big box stores” dominate the ornamental plant market in the same way that supermarkets do for food crops.

Given these characteristics, the Council fundamentally supports government regulation of trading practices, and as contemplated in this CRIS, supports reforms which addresses unfair trading practices that address harmful commercial practices not currently captured by existing protections in the Australian Consumer Law (ACL), such as misleading and deceptive conduct and unconscionable conduct.

In addition, the ACCC Perishable Agricultural Goods Inquiry² identifies a number of harmful trading practices by supermarkets and big box stores present in perishable goods markets, including those for horticultural products, including:

- Contract terms that inefficiently allocate risk, including unreasonable payment terms;
- Harmful use of bargaining power, including changing supply volumes for perishable products at very short notice after they had been agreed;
- Lack of transparency in relation to price and non-price factors, including no visibility over what supermarkets pay for their produce when sold through wholesale market agents;
- Producers making growing and investment decisions with no certainty, including concerning plantings with no forward price or contract;
- Commercial retribution by supermarkets and big box stores, including de-listing, contract termination, or reductions in volumes in response to supplier requests for price increases;
- Subjecting suppliers to disadvantageous terms if they elect not to use buyers’ own vertically integrated services such as freight;
- Requiring suppliers who negotiate a cost increase to invest in an unrelated cost offsets; and
- Requiring suppliers to disclose confidential financial information or intellectual property during cost increase negotiations.

In response to these harmful practices, it is the view of the Council of those options contemplated in the CRIS, that Option 4, the introduction of a combination of general and specific prohibitions on unfair trading practices, is the most suitable and effective. Specific prohibitions listed should include as a minimum those harmful practices already highlighted by the ACCC.

The Council offers the following reasons for supporting Option 4:

- It is the strongest of the options in protecting small businesses against unfair trading practices, which are prevalent across agriculture.

² ACCC, ‘Perishable agricultural goods inquiry’, <https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/perishable-agricultural-goods-inquiry-2020/final-report-to-treasurer>, (accessed 18 November 2023).

- In delivering this benefit, many of the costs would be borne by agents and large supermarkets and big box stores, who are in a position to pay given the profits derived from their market power. Conversely, often proportionally far smaller horticultural businesses operate on fine margins and are unable to absorb additional regulatory burdens.
- The specific prohibitions list will provide greater protection for agricultural businesses, as the courts have been shown to require a high threshold and are also a process that small businesses will be highly unlikely to use due to fear of retribution, low understanding of legislation compared to other larger businesses, and the high costs of undertaking court proceedings.
- The general prohibitions will provide flexibility.
- It aligns with international best practice, especially in the EU which even has specific legislation against unfair trading practices across agricultural supply chains.

While the Council supports Option 4, we would also recommend consideration be given to the following amendments in its framing:

- Expanding the definition of small businesses.
 - The EU legislation on unfair trading practices in agricultural supply chains recognises that practices which impact wholesalers and processors get passed on to agricultural producers. Therefore, enterprises larger than SMEs but with an annual turnover not exceeding EUR 350,00,00 are protected against unfair trading practices by larger businesses who they deal with.
- Greater thought and detail needs to be provided into the dispute resolution process.
 - As mentioned previously, producers are very reluctant to raise disputes for fear of retribution. There needs to be considerable thought into how to mitigate this issue and provide confidence to producers.

Further, the Council recommends there should be meaningful civil penalties attached to act as a deterrent against unfair trading practices. It would make sense to align penalties with those for unfair contract terms as much as possible.

Concerning penalties, we highlight that European Union (EU) legislation³ notes the existence of a deterrent, such as the power to impose, or initiate proceedings, for the imposition of, fines and other equally effective penalties, and to publish investigation results, including the publication of information relating to buyers that have committed infringements, can encourage behavioural changes and pre-litigation solutions between the parties, and should therefore be part of the

³ European Parliament, 'Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0633>, (accessed 29 November 2023).

powers of the enforcement authorities. Fines may be particularly effective and dissuasive.

In addition, an OECD report, *Pecuniary Penalties for Competition Law Infringements in Australia*⁴, found that penalties imposed by the Courts for competition law breaches were significantly lower than in other jurisdictions, especially for large firms or long-standing anti-competitive behaviour. Penalty rates would have to be increased by 12.6 times to be comparable with the level of the average penalty in other OECD countries. Fines and penalties should not be an accepted cost of doing business, but large enough to be a deterrent for anti-competitive behaviour.

Should you or your colleagues in the Treasury wish to discuss any of the above further, please be in contact with Richard Shannon, Executive Officer to the Council either by email at _____ or phone on _____.

Yours sincerely,

JOLYON BURNETT
Chair
NFF Horticulture Council

⁴ OECD, 'Pecuniary Penalties for Competition Law Infringements in Australia', <https://www.oecd.org/daf/competition/Australia-Pecuniary-Penalties-OECD-Report-2018.pdf>, (accessed 28 November 2023).