

7 April 2015

The Treasury  
Langton Crescent  
Parkes ACT 2600

### **Australian Small Business and Family Enterprise Ombudsman - comments on exposure draft legislation**

Thank you for the opportunity to comment on draft legislation establishing the Australian Small Business and Family Enterprise Ombudsman.

The National Farmers' Federation (NFF) welcomes the legislation. There are over 130,000 farm business in Australia, a majority of whom are small and medium sized enterprises. The agricultural supply chain contains many primary producers but significantly fewer retailers/wholesalers 'up' the supply chain. While many small and medium producers have strong relationships with their buyers, the current supply chain structure can result in unfair outcomes for small producers. This is the result of serious imbalances of power between supermarkets and producers, lack of fairness and transparency in contractual terms and fear of consequences in connection with complaints about dominant market players.

This is why we strongly support the recent focus on improving the position of small farm businesses in the marketplace. Addressing market distortions and unfair commercial dealings can significantly lift productivity in the Australian economy. We urge the Government to commit to delivery of recent small business policy initiatives, including establishment of the Ombudsman, implementation of recommendations made by the Harper Review of competition policy and a long term vision for Australian agriculture through the Agricultural Competitiveness White Paper. Together, these initiatives represent the opportunity for a co-ordinated and whole of government approach to fair and competitive markets.

Our brief comments in relation to proposed legislation are set out below:

#### 1. Definition of small business

Many Commonwealth statutes adopt varying definitions of 'small business', so that a business can be 'small' in one context and not in another. To the extent possible, efforts should be made to adopt a consistent definition of the term to promote simplicity and understanding. The NFF supports the proposed definition of the term in this draft legislation, and urges government to consider applying the same definition in other contexts, including in relation to new unfair contract arrangements for small business.

2. Alternative dispute resolution (ADR) processes

The NFF supports the principle of impartiality in relation to the Ombudsman's proposed ADR function and notes reliance on corporate responsibility as the mechanism to encourage participation in ADR processes. While we support a 'light touch' approach to regulation, it is notable that the Ombudsman will not actually have any role in ADR and instead will be able to recommend participation in such processes and publish a list of parties who choose not to do so. Given the level of reliance on the 'name and shame' function, we recommend a review of the effectiveness of the regime within 12-24 months after commencement.

Under the current proposal, there is no capacity for the Ombudsman to recommend any process that can, where the parties consent, bring disputes to finality (for example through expert determination or private arbitration). As long as the element of agreement is present, we see no reason why the Ombudsman could not facilitate participation in such processes and we submit that this should be further considered by government.

Finally, in our view, there is a risk that the absence of any rules as to the conduct of mediation and other similar processes will lead to unfair outcomes for small business. Minimum standards for the conduct of ADR should be prescribed. In particular, the default position should be that ADR costs are shared equally unless otherwise agreed, and costs obligations should apply regardless of whether the parties actually participate in an ADR process once it has been scheduled. Otherwise, small businesses who raise complaints and seek to have them dealt with in mediation may be left unfairly carrying the whole costs.

We look forward to implementation of this important initiative in the near future and hope that bi-partisan support can be secured on the issue for the benefit of small and family businesses across Australia.

Yours sincerely,



**TONY MAHAR**

**Deputy Chief Executive**