






Submission to the Consultation RIS on Enhancements to Unfair Contract Term Protections

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About NSW Farmers'

The NSW Farmers' Association is Australia's largest State farming organisation representing the interests of its farmer members. Our purpose is to build a profitable and sustainable New South Wales farming sector.

Farmers across New South Wales produce more than \$15 billion worth of food and fibre every year, representing around one quarter of Australia's total agricultural output. Our state's unique geography means a wide variety of crops and livestock can be cultivated and nurtured. NSW Farmers is Australia's only state-based farming organisation to represent the interests of farmers of all agricultural commodities – from avocados and tomatoes, apples, bananas and berries, through grains, pulses and lentils to oysters, cattle, dairy, goats, sheep, pigs and poultry.

Our focus is not just on issues affecting particular crops or animals – it extends to the environment, biosecurity, water, economics, trade and rural and regional affairs. We also have an eye on the future of agriculture; we are advocates for innovation in agriculture, striving to give our members access to the latest and greatest innovations in research, development and extension opportunities. Our industrial relations section provides highly specialised advice about labour and workplace matters.

Our regional branch network ensures local voices guide and shape our positions on issues which affect real people in real communities. Members are the final arbiters of the policies of the Association – through our Annual Conference and elected forums such as Executive Council, members can lobby for the issues which matter to them and their community to become Association policy. Our issue- and commodity-specific Advisory Committees are elected by members to provide specialist, practical advice to decision makers on issues affecting the sector. We are proudly apolitical – we put our members' needs first.

In addition, NSW Farmers has partnerships and alliances with like-minded organisations, universities, government agencies and commercial businesses across Australia. We are a proud founding member of the National Farmers' Federation.

Executive Summary

NSW Farmers' Association welcomes the opportunity to make a submission to the consultation process reviewing the Unfair Contract Term (UCT) protections for small businesses.

The UCT protections, as part of the Australian Consumer Law (ACL), were extended to cover business-to-business contracts in 2016.¹ The intent of this change was to protect small businesses from unfair contract terms in standard form contracts. This reform acknowledged that small businesses generally lack the bargaining power, time and expertise to negotiate or assess these contracts.

These reforms have been insufficient to properly protect farmer businesses from UCT. Farmer businesses are still exposed to UCTs in standard form contracts across many agricultural industries. NSW Farmers considers that a number of changes are required to help better protect our farmer small business operators against UCTs in standard form contracts.

First, there must be an effective deterrent to prevent issuing companies adopting UCTs. Currently, the inclusion of UCTs in standard form contracts is not a breach of the Australian Consumer Law. There is no pecuniary penalty for including UCTs in standard form contracts and compliance is proving very difficult without an incentive for contract-issuing businesses to remove the UCTs.² To be effective, the inclusion of UCT in standard form contracts must be a breach of the ACL and there must be significant penalties for contract-issuing businesses.

Second, the thresholds need to be lowered to recognise the impact on many small farming businesses. Amendments to the small business definition for UCT provisions are necessary to ensure that farm businesses are protected. The thresholds for the UCT provisions must be amended to acknowledge small businesses by expanding the current headcount and turnover thresholds, and removing the contract value requirement.

Finally, greater clarity is needed around what constitutes a standard form contract and the ability to effectively negotiate. It is not always clear if a contract is a standard form contract and throughout agricultural, particularly heavily consolidated fresh food supply chains, small farm businesses may not have a choice around accepting a contract. Under the current regime contract-issuing businesses have the opportunity to circumvent the UCT provisions by making minor amendments to contracts and indicating that they are providing an opportunity to 'negotiate'. UCT provisions must consider contracts containing 'repeat usage' clauses and further clarify the types of actions which do not constitute 'an effective opportunity to negotiate'.

¹ Treasury Consultation Regulation Impact Statement, December 2019.

<https://consult.treasury.gov.au/consumer-and-corporations-policy-division/enhancements-to-unfair-contract-term-protections/>

² ACCC Submission, December 2018.

<https://www.accc.gov.au/system/files/ACCC%20Submission%20to%20the%20Review%20of%20Unfair%20Contract%20Term%20Protections%20for%20Small%20Business.pdf>

Recommendations

NSW Farmers' makes the following recommendations for consideration to the Treasury:

1. Inclusion of UCTs in standard form contracts must be identified as a breach of the ACL. Breaches must attract sufficient pecuniary penalties to deter businesses from including UCTs in their contracts with small businesses.
2. The regulator of UCTs must have the ability to commence court proceedings on behalf of a class of small businesses.
3. Expand the threshold of the UCT provisions to include contracts where at least one party to the contract is a business that employs less than 100 employees OR has an annual turnover less than \$10 million.
4. Remove the contract value threshold of the UCT provisions.
5. Amend the UCTs to further clarify the types of actions which do not constitute an effective opportunity to negotiate and also to take into account 'repeat usage' of core contract terms.

Legality and Penalties

Farmers are at a substantial disadvantage in negotiating contracts, as they are small businesses entering into contracts with processors and retailers that exercise significant market power. The use of standard form contracts in these arrangements is common, as issuing companies seek to enter agreements for the delivery of products with a range of farmers. These standard form contracts often have terms that enable risk to be shifted from the issuing company onto the individual farmers' enterprise. These types of terms are most prevalent in highly consolidated fresh food supply chains, such as horticulture, dairy, and poultry meat. In these industries these unfair contract terms are skewed to benefit the issuer and provide unsatisfactory outcomes from the perspective of a small farming business. The type of potential UCTs used in standard form contracts in agriculture include, but are not limited to:

- Terms that allow the issuing business to unilaterally cancel or terminate an agreement;
- Terms that restrict selling produce to alternative buyers;
- Terms that allow the issuing business to unilaterally alter product requirements;
- Clauses that require farmers to make additional and substantial capital investment during the term of the contract without provisions to amortise expenditure;
- Clauses that transfer risk to the farming business and require them to indemnify the contract-issuing business under an unreasonably broad range of circumstances without provisions for reciprocal indemnity cover.

The negative impact of UCTs on small farming businesses is substantial. These terms allow for the issuing party to shift risk from their business to the small business they are engaging. Small businesses are less able to carry the risk compared to that of the issuing party and when these terms are relied upon it can result in financial and business opportunity losses to the detriment of the farming business. Farming businesses have reported that due to the risks created by these terms they have refrained from investing and growing their business, employing staff or have even exited the industry.

UCTs are most prolific in highly consolidated supply chains within the agricultural sector. In these industries, standard form contracts are issued by large processors and supermarkets. Owing to the lack of competition, farm businesses have no choice but to accept these contracts. The acceptance of contracts by our members that include potential UCT is common. Legal advice given to many farmers indicates that these contracts are skewed against their interests. However if there are no other options available to the farmer and therefore no ability to effectively negotiate, they are forced to agree to terms that they would not normally accept under other circumstances. This is particularly pertinent for small businesses with an asset base tied to a single industry or supply chain.

To guarantee there is adequate deterrent for contract-issuing businesses to use unfair contract terms in their standard form contracts, there must be clear penalties and greater enforcement activities. First, there must be significant pecuniary penalties for courts to impose on issuing businesses that continue to include UCTs. The penalties must be significant enough to provide a deterrent against this behaviour and cannot be set at a level where issuing parties will accept the penalties as a cost of doing business. Without sufficiently strong penalties small businesses will continue to be exploited by those in a position of power.

To ensure effective enforcement there is a need for regulators to be proactive and adequately resourced. The regulator must actively inspect contracts to ensure that they do not contain UCT and they must have the ability to commence court proceedings on behalf of a class of small businesses. Farming businesses often suspect that their contract terms are unlawful, however, the risks in undertaking court proceedings against their contracting partner are too great. There is a risk in terms of the time and expense in running such an action. A further risk is that they will damage their relationship with the issuing party and they fear the impact that this will have on their business, particularly whether they will be offered future contracts. Due to these risks for individual businesses, there is a pressing need for a proactive regulator to investigate contracts and commence proceedings if required. This would ensure that the responsibility rests with the contract-issuing business to draw up contracts without UCTs and in turn will minimise the compliance costs of the regulatory body.

RECOMMENDATION:

- 1. Inclusion of UCTs in standard form contracts must be a breach of the ACL. Breaches must attract sufficient pecuniary penalties to deter businesses from including UCTs in their contracts with small businesses.***
- 2. The regulator of UCTs must have the ability to commence court proceedings on behalf of a class of small businesses.***

Definition of a small business contract

The extension of UCT provisions to small businesses acknowledged that these businesses lacked the resources and capacity to protect themselves. The current definition of a small business in the UCT provisions does not effectively encompass small farming businesses, whom also require protection from UCT provisions.

Current Thresholds

The current definition of small business is not effective for recognising small farming enterprises. Farming operations that need protections from UCT are being excluded due to the current thresholds in operations.

The current contract value threshold (\$300,000 or \$1 million for contracts greater than 12 months) restricts many farmer businesses from accessing the protections of UCT provisions. Many agricultural businesses exceed the current value threshold yet are vulnerable to UCTs in their standard form contracts. Farmers generally operate with high value contracts with low margins. For example poultry meat growing contracts easily exceed the contract value threshold. The contract poultry meat industry is an example of a high value, low profit margin industry where farmers largely operate small businesses that would exceed the current UCT threshold. These contracts are difficult to negotiate and the terms enable for risk to be unfairly transferred from the contracting business to individual farmers. There is no capacity for the farmer to renegotiate these terms, due to the imbalance in market power between the contracting parties and farmers have no choice but to accept the terms of these contracts.

Additionally, the current headcount threshold of employing fewer than twenty persons at a time does not adequately protect a multitude of agricultural businesses that are vulnerable to UCTs in standard form contracts. Agricultural industries, particularly horticulture, hire seasonally to meet the demand of various activities including planting, pruning and picking. At these times, many horticultural businesses exceed the total headcount threshold that prevents them from receiving protections from UCTs.

Threshold Reforms

NSW Farmers' supports the option to consider small business contracts where at least one party to the contract is a business that employees less than 100 employees or has an annual turnover less than \$10 million. The preferable option would be to utilise the \$10 million annual turnover component as it is in line with the ATO definition of a small business.

It is appropriate to remove any threshold around the contract value. The risk of including a \$5 million dollar contract value may exclude farmers with long term contracts that seek the protections of UCTs. Although the value of these contracts can seem high, the opportunity to effectively negotiate the terms may still be limited for farmers who operate small businesses with high value, low profit contracts

The implementation of an appropriate threshold ensures that farming businesses, which would otherwise be in a weaker position to negotiate their contracts, would benefit from the protections of the UCT

provisions. The advantage of increasing the threshold in line with the ATO definition would also clarify the process for the contract-issuing business when issuing standard form contracts to small businesses.

RECOMMENDATION:

- 2. *Expand the threshold of the UCT provisions to include contracts where at least one party to the contract is a business that employs less than 100 employees OR has an annual turnover less than \$10 million.***
- 3. *Remove the contract value threshold of the UCT provisions.***

Standard Form Contracts

The asymmetry of power in negotiations across numerous agricultural supply chains is a reality for farming businesses. The need to clarify what constitutes a standard form contract in the UCT provisions is important. Careful consideration must be made to clarify ‘an effective opportunity to negotiate’.

Repeat Usage

In addition to the factors a court currently must take into account when determining if a contract is a standard form contract, including ‘repeat usage’ enhances the current law. The opportunity for small businesses to negotiate minor changes to their contracts without altering the fundamental elements does not constitute an effective opportunity to negotiate. Determining that core clauses in contracts are repeatedly used by a contract-issuing business is an important consideration for the courts to determine if a contract with a small business is a standard form contract.

Clarify ‘effective opportunity to negotiate’

In addition to considering repeat usage, amendments to the UCTs to further clarify the types of actions, which do not constitute an effective opportunity to negotiate, are supported in principle by NSW Farmers’.

Clarification around the wording “effective opportunity to negotiate” is essential to ensure that small businesses that deal with a contract-issuing business, where there is an imbalance of negotiating power, are protected by the UCT provisions. It is not always clear to small businesses that they are signing up to a standard form contract and additional provisions that clarify this are essential. It is also important to ensure that contract-issuing businesses do not circumvent the UCT provisions by making minor changes to contracts thus preventing the small business from qualifying for the UCT protections.

Other actions that may appear to be a ‘negotiation’ but often aren’t effectual are authorised collective negotiations. Collective negotiations can be ineffective due to undermining tactics such as staggering end dates of contracts, targeting representatives, rushing contract negotiations, not allowing extensions of contracts during negotiations, pressuring individuals within the group to sign, offering incentives to smaller groups within the larger group to sign, not providing contact details of potential members of a collective group, etc. These tactics reduce the ability for contracts to be effectively negotiated. The concern is that if a collective group sought protections under the UCTs provisions, they may be considered ineligible due to the apparent ability to negotiate where in reality they were never in a position to effectively negotiate.

RECOMMENDATION:

- 4. Amend the UCTs to further clarify the types of actions which do not constitute an effective opportunity to negotiate and also to take into account ‘repeat usage’ of core contract clause.***