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Unfair Contract Terms Review
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Parkes Act 2600

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TFGA Submission: Unfair Contract Term Protections – Legislative Review

The Tasmanian Farmers and Graziers Association (TFGA) is the leading representative body for Tasmanian primary producers. TFGA members are responsible for generating approximately 80% of the value created by the Tasmanian agricultural sector.

The TFGA appreciates the opportunity to make comment on the legislative review of Unfair Contract Term (UCT) Protections.

Farming enterprises are small businesses first and foremost that work the land and rear animals to remain viable. Contracts between processors and farming operations are important for farmers for the fact that there is a destination for their produce. Contracts detail the parameters of the agreement, describing the arrangement, responsibility of each party, payment, requirements and possible consequences to name a few.

This review from the Australian Competition & Consumer Commission (ACCC) provides an opportunity to raise issues that agricultural businesses have when entering into contracts. Being able to protect their interests so that farmers can remain farming and not placed in a vulnerable position.

One of the main points from the ACCC submission is to deter the use of UCT in contracts with Small Business Entities (SBE). The push to make UCT illegal in agricultural contracts is important to stop standard form contracts, while helping to clarify each parties' obligations in the contract. Recently there have been examples where producers have been significantly impacted through UCT, which has taken significant time to recover from, due to financial loss. These examples highlight where contracts have UCT and demonstrate the financial impact placed on farmers from facets out of their control.

The threshold definition for a 'small business' needs clarifying as currently many small businesses are being excluded under this definition. The threshold for an SBE is \$5 million turnover. In large agricultural operations this threshold is annually exceeded. SBE sections included in contracts compromises the terms of the contract as the entity that is entering into the agreement is not an SBE. Contracts inclusive of SBE specify terms for a specific entity, that does not relate to the respective party, which nullifies areas of the contract.

Providing clarity and more transparency in contracts is an area to be improved. ACCC highlighted in their submission that more clarification needs to be defined regarding what constitutes a standard form contract. Standard form contracts are contracts where it leads to one of the parties setting the

terms and conditions of the contract. Situations where one party is unable to negotiate more favourable terms provides an opportunity for UCT to become present in contracts, leading to a 'take it or leave it' situation.

In 2016, Fonterra and Murray Goulburn both retrospectively 'clawed back' funds from farmers. This was not clearly articulated in contracts farmers signed and had not defined that it was illegal. The dairy industry has since introduced a Mandatory Code of Conduct to combat this, but farmers have taken a substantial time to recover from the clawback. The ACCC also brought forward action regarding UCT with potato growers and Australia's largest potato wholesaler, Mitolo Pty Ltd. The UCT related to contracts with producers which did not specify the time for a price to be agreed. This allowed Mitolo Pty Ltd to vary the price Mitolo Pty Ltd paid for potatoes, varied contractual terms, declaring adequate potatoes as 'wastage' without proper review and prevented farmers from selling potatoes to alternative purchasers.

The contracts have different elements to it that enable unclear elements. Intellectual properties are one of those elements that enable uncertainty in contracts. Intellectual properties need maintaining so clearly defining who has ownership, outside of the farmer growing the produce is instrumental to this. Managing the risk in agricultural contracts for both farmer and processor are important. Clearly defining the parameters when growing or extracting the produce enable positive relations.

Processors have a Corporate Social Responsibility to the public, itself and stakeholders, showing they are acting in a positive nature when it comes to agreements they enter into. The UCT can be seen as an extension of a negative CSR and in both cases, of Mitolo Pty and the two milk processors, it displays that the contracts between farmers and processors were not entered into in good faith. The implications from UCT are considerable and need to be closely monitored.

The more monitoring of agricultural contracts can influence in creating a more balanced contract, should assist in not enabling standard form contracts to be prominent. Clearly defining where responsibility lies, who has ownership of intellectual property and if to remove standard form contracts can assist both parties. There needs to be an opportunity for negotiation, so that all parties benefit from the contract.

Please contact the TFGA if you have any questions concerning this submission.

Yours Sincerely,



Peter Skillern

Chief Executive Officer

3rd March 2020