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Submission to
Commonwealth Department of the Treasury
re Consultation Regulation Impact Statement
Protecting Consumers from Unfair Trading
Practices

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Introduction

1. eastAUSmilk is the industry body representing dairy farmers in New South Wales and Queensland.
2. Thank you for the opportunity to comment on the Consultation Regulation Impact Statement addressing Protecting Consumers from Unfair Trading Practices.

In Summary

3. eastAUSmilk supports, and urges that the Government support:
 - a. strengthening the capacity for prosecution for statutory unconscionable conduct, by reducing the barriers,
 - b. introducing a of general prohibition on unfair trading practices, which includes identification of specific prohibited conduct,
 - i. but without those listed prohibited conducts narrowing the general prohibition, and
 - c. effective resourcing of ACCC or another body to help small businesses pursue resolution of unfair trading claims.

The Circumstances of Dairy Farmers

4. Dairy farmers are nearly always price takers and cannot pass on additional costs.
5. While some dairy farm enterprises are large, with big herds and many employees, many are very small businesses with few, if any, employees. In many cases, the principal employee is the business owner, supported by additional family members.
6. Because many dairy farmers are only now beginning to recover from the financial and emotional impact of dollar-a-litre milk, and floods and droughts, and remain in debt, they cannot afford the additional impost – time off the farm, lost production, lawyer fees, accounting fees, needing to purchase replacements for dysfunctional products, losing money on sale of unsuitable products – of resolving unfair trading practices themselves.
7. For this reason and others, many dairy farmers fail to bother to pursue instances of unfair trading.
8. We refer you to the 2018 report of the Australian Competition and Consumer Commission on the operation of the dairy market in Australia, for background on how dairy farmers participate in the market – it provides very useful background, and, while introduction of the Dairy Industry Code moved towards making the market more fair, it is not at all a complete solution and many of the problems and unfair practices identified by the ACCC continue to this day.

Our Survey

9. eastAUSmilk surveyed members about their unfair trading experiences, and several patterns were revealed. Anecdotal evidence supports these propositions as well.
10. First, the perpetrator of the unfair practices was not necessarily domiciled or represented in Australia – equipment and supplies are sometimes purchased directly from overseas wholesalers and retailers. Even when dealing with interstate businesses, resolution has been difficult and expensive for the dairy farmers.
11. Second, in every instance of unfair trading, the dairy farmers have been out of pocket, with no prospect of reimbursement, in the course of pursuing their rights. Quite apart from the costs of their time away from farm work, there have been losses on re-sold equipment, travel costs, and legal and accounting fees, depending on the nature of the unfairness.
12. Third, several instances involved dairy processors or retailers mis-using their market power and financial resources in ways which are permitted by the existing dairy industry code – which reinforces the view of eastAUSmilk that the Code requires urgent and substantive review.
13. Fourth, examples provided to eastAUSmilk by members would not meet the tests for unconscionable conduct, but are extraordinarily unfair.
14. Fifth, many matters remain unresolved, even after several years – because unfair traders feel able to simply ignore, or reject without engaging substantively on, the representations made by farmers. They know there is no control over their unfair behaviour.
15. Sixth, the small size of dairy farming operations means the financial and personal/family/emotional burdens of pursuing their rights discouraging taking issues up or pursuing them effectively.

Implications

16. These results say to us that the current regime is insufficient to protect small businesses, in particular, from the unfair practices of others. Prohibiting unfair trading is necessary, to improve conduct in the market.
17. The high barrier for demonstrating 'unconscionable conduct', which does not protect against some of the unfairness reported by members, says both that the current framework is inadequate and that the barrier for unconscionable conduct itself needs to be lowered.
18. Reform to the definition or tests for unconscionable conduct alone will not be sufficient, because the entire concept of conduct having to be unconscionable creates a much higher barrier than unfairness – they are not the same, and the regulatory framework for one of them cannot be used to resolve the conduct issues rightly described by the other. Business operators will understand the application of an unfair conduct prohibition far better than they will unconscionable conduct.
19. It is also clear that the burden of resolving an unfair trading claim cannot be allowed to fall upon small businesses, as that will deter them from pursuing their rights. We are confident that proposition applies much more broadly than to merely the dairy industry.
 - a. External assistance for resolution of such matters will be essential, or legislative change will be tokenistic, toothless, and under-enforced.
20. We will continue to press for improvements to the Dairy Industry Code, but we know it will not be reviewed in the immediate, or indeed predictable, future, and the outcome of any review is quite uncertain. Hence, delays to the proposed changes to unfair trading law should not be contemplated on account of prospective code improvements.
21. As these stories circulate amongst dairy farmers – and they absolutely do – they are a disincentive to farmers to innovate, or take reasonable and appropriate business risks.

Queensland Farmers Federation

22. We have had the opportunity to review and comment on the submission of Queensland Farmers Federation, and commend it to you.

Examples from eastAUSmilk Members

23. A member purchased robotic dairy equipment from an interstate business for \$1.5M. It was not disclosed that there was a requirement for maintenance and operator training to be conducted by a particular and unsuitable business. The equipment was useless without commissioning and training, so was sold at a loss, with pursuit of compensation still ongoing after enormous stress for the farming family in question, across two years. Stress was so great that the business owner was hospitalised for a week.
24. A major retailer withheld payments from a dairy farmer after analysis revealed a bacto content issue, has now lost samples three times, and refuses to accept any obligation to resolve the issue or restore payments.
25. A major milk processor withheld payments and refused to properly discuss or try to resolve the issue.