National Farmers Federation

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: consumerlaw@treasury.gov.au

Dear Director

RE: Unfair Trading Practices – Consultation Regulation Impact Statement

The National Farmers' Federation (NFF) welcomes the opportunity to provide a submission to Treasury's consultation on the unfair trading practices (UTPs) consultation regulation impact statement (CRIS).

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain. The NFF represents Australian agriculture on national and foreign policy issues including taxation, economic policy, workplace relations, trade and natural resource management.

Competition issues aren't new for Australian agriculture. But the lack of competition across Australia's agricultural supply chains is a problem that's getting worse. For decades, market concentration across the Australian economy has increased[1]. As market concentration has increased in Australia, farmers have fewer places to buy inputs and fewer places to sell their products.

The Australian Competition and Consumer Commission (ACCC) has identified that in markets for perishable agricultural goods—such as meat products, eggs, seafood, dairy products, and horticultural goods—there are many farmers but few processors or wholesalers, and even fewer major retailers. This dynamic makes farmers especially vulnerable to unfair practices because they have little control over the terms of trade and prices for their products. The perishability of their goods further weakens their bargaining power, as they are often compelled to accept unfavourable terms to avoid product spoilage[2].

[1] https://e61.in/state-of-competition/
[2] https://www.accc.gov.au/media-release/new-fair-trading-law-needed-to-enhance-australias-perishable-agricultural-markets

Examples of harmful practices include unilateral variations of supply terms that can significantly impact farmers' incomes and commercial retribution against suppliers who seek a price increase or who raise concerns about the conduct of the buyer.

For Australian farmers, UTPs can result in economic harm, distortions in economic investment decisions, and misallocation of resources[3]. The increased adoption of data and technology in agriculture, while beneficial, also poses challenges related to data ownership, interoperability, and market consolidation, which could impact competition [5] .

The NFF acknowledges that the existing Australian Consumer Law does not have adequate protections against the full scope of unfair trading practices that are known to occur in Australia. As outlined in the CRIS, there are a number of examples that cause harm to businesses that are not captured under existing provisions in the ACL. These include practices that:

- are not misleading or deceptive but still distort consumer or business choice
- do not reach the threshold of unconscionable conduct
- may result in financial or other detriment but relates to:
    - matters that do not form part of a standard form contract, or
    - actions relating to entering into terms and conditions, rather than their content
- are not a specific practice currently prohibited by the ACL.

Because of this, the Australian Government must introduce new regulations that outlaw the use of UTPs to prevent the exploitation of market power in Australia's economy and concentrated supply chains.

<u>Unfair Contract Terms</u>
The NFF supports the Australian Government's recent changes to unfair contract terms (UCTs) prohibitions. This reform is an important action that signifies progress towards fair and competitive supply chain interactions. However, the introduction of UCT prohibitions is not sufficient to address anti-competitive behaviours in the agricultural supply chain or broader economy. This occurs for two clear reasons. First, UCTs are limited in their applicability to the contents of a contract and therefore cannot capture those behaviours that fall outside of the contract, including behaviour during contractual negotiations and behaviour that occurs once the contract is in force.

Second, UCTs do not protect against commercial retribution. Due to the regional monopsony conditions in many agricultural supply chains, farmers are unlikely to challenge UCTs due to their reliance on processor companies to provide them with ongoing contracts and supply agreements. As such, challenging UCTs exposes individual growers to commercial retribution through either not offering the farmer a future contract if they pursue legal action, or they may be terminated mid-contract. With no alternate processor in their region, this would have grave consequences for the farm business. This reinforces the need for the introduction

[3] https://www.allens.com.au/insights-news/insights/2021/06/current-emerging-and-future-issues-in-agribusiness/

of a new regulatory scheme that outlaws UTPs in the Australian economy to compliment .

Consumer focus on ACL

In developing the UTPs framework, it is essential that the Australian Government balance the regulation's focus between consumer and businesses. It is the NFF's view that the current competition regulations have too great a consumer-centric focus on market power provisions. This provides minimal protections to supply chain abuses and the manipulation of market power felt by small businesses. This is also reflected in the centric focus of fair-trading provisions.

The NFF recognises the importance of consumer protections and their role in the ACL. At the same time, the NFF believes that the ACL should place equal weight on both consumer and small business protections within any new UPT framework. This will ensure the ACL is fit-for-purpose and delivers long-term protection against the misuse of market power against

Policy Options

In the CRIS, Treasury outlines four different options to address UTPs in Australia. These options are:

i. Status quo
ii. Amend statutory unconscionable conduct
iii. Introduce a general prohibition on unfair trading practices
iv. Introduce a combination of general and specific prohibitions on unfair trading practices.

Option 1 – Status quo

The status quo is not an acceptable policy option. To date, increasing market concentration and the misuse of market power have shown that the ACL is ineffective at protecting against UTPs in the economy. This has especially been the case in protecting small businesses as suppliers to larger companies that hold greater market power.

To date, the ACL's unconscionable conduct provision has been the main avenue available for farmers and small businesses to address a misuse of market power. However, this provision is so narrowly defined that unconscionable conduct is notoriously difficult to prove, and there have been few successful prosecutions to date. This has rendered the provision of little use for small to medium sized businesses, such as farmers. In its current form, the unconscionable conduct requires a burden of proof that to date is too high to provide practical protection.

Additionally, as previously discussed, unfair contract terms are not suitable to protect against a misuse of market power and potentially leave small businesses vulnerable to commercial retribution. Additionally, the reliance on case law is too slow and costly for small businesses to address UTPs.

This demonstrates the need for a clear and effective UTP framework. A UTP framework will provide clear specification of activities that distort the market and result in economic harm across supply chains but do not meet the high bar of unconscionable conduct.

Option 2 – Amend statutory unconscionable conduct
Amending the statutory provisions for unconscionable conduct would be a positive action. This would increase the potential that supply chain actors with significant market power could be held to account for any misuse of market power. It would achieve this by providing greater clarity on what constitutes unconscionable conduct, reducing the existing high barrier. However, a reliance on case law to determine any new body of judicial precedent on the amended statutory unconscionable conduct would be slow and present a significant cost burden for small businesses that would seek to address under the scheme.

Option 3 – Introduce a general prohibition on unfair trading practices
The NFF supports the introduction of a general prohibition. However, this prohibition should align with legislation similar to that in the United States which applies the general prohibition unfair practices to business-to-business interactions.

The introduction of a general prohibition on unfair trading practices would be a positive addition to Australia's consumer law. A general prohibition on unfair trading practices will provide guidance on activities that are considered to be unfair trading practices. It will also provide consumers and small businesses with protection from a broad range of current and emerging UTPs.

A general prohibition on UTPs will provide a broad and flexible principles-based prohibition in line with the largely principles-based nature of existing consumer law. Additionally, it will allow the regulation to adapt to emerging issues that result from technological and commercial change. This should be achieved by including both an explicit definition of what constitutes a UTP as well as a norm of conduct that stems from the explicit definition. This will help to provide businesses with a better long-term understanding of how actions and practices will be interpreted under the UTP scheme.

Option 4 – Introduce a combination of general and specific prohibitions on unfair trading practices.

Building on Option 3, the introduction of specific prohibitions on UTPs will strengthen the UTP framework within the consumer law. This would be through the introduction of a list of specific instances of prohibited conduct that result in consumer and small business harm. The addition of a list of specific prohibited practices will ensure the consumer law is comprehensive and directly target practices known to be unfair and cause significant impact on consumers and small businesses.

This policy options provides a combined approach and derives benefits from both the general prohibition of UTPs and prohibition of specific activities known to be UTPs. It will provide the greatest level of clarity to business and consumers about what is a UTP and what actions can be taken to challenge the use of these practices.

The NFF believes that Option 4 is the most suitable option to effectively address UTPs across Australia's economy and in agricultural supply chains.

Agency Agreements

There are different types of commercial relationships that guide the sale and distribution of goods within the economy. One commercial relationship used in Australian supply chains are agency agreements where a engages a sales agent to sell its products or services to customers on the principal's behalf.

The use of agency agreements can help businesses source additional markets, drive growth, increase sales and promote the principal's goods or services. However, agency agreements can also reduce competition and increase prices, impacting farmers, businesses, and individuals.

The negative impact of agency agreements was most recently highlighted by the Cotton Seed Distributors Ltd use of potentially anti-competitive terms in its agreements with agents. Since 2018, CSD's agency agreements prohibited agents from applying an insecticide treatment to seed after purchase or assisting growers to do so. As a result, growers who wished to use seed that had been treated with cotton seed insecticide had little choice but to use a CSD-approved insecticide applied by CSD. It was the ACCC's view that this prohibition had the capacity to harm competition between CSD-approved suppliers and other suppliers of cotton seed insecticide.[4]

It is essential that in introducing any new UTP framework, Treasury ensure that the framework covers UTPs within agency agreements. This will ensure that there are no unintended loopholes that can be exploited in the supply chain to impose UTPs on consumers and small businesses in Australia.

Penalties for breaches of UTP framework

Regardless of policy option chosen, the Australian Government must include significant penalties to the use of unfair trading practices, in line with recent reforms of unfair contract terms. The reform process must ensure that these penalties should present significant civil and financial penalties. The introduction of financial penalties will allow courts and the Australian Government, through the ACCC, to take clear action against businesses that use UTPs.

Cost considerations of policy options

Understanding the costs and benefits is an important component of assessing the impact of each policy option. When assessing these options, it is important to compare the costs and benefits against the status quo. The NFF believes that in considering the additional costs and benefits of new regulation, Treasury should consider the broader social costs that stem from UTPs and other misuse of market power.

As it stands, UTPs are not effectively covered by consumer law. Without new regulations, UTPs are likely to continue with consumers and small businesses

[4] https://www.accc.gov.au/media-release/cotton-seed-distributors-removes-potentially-anti-competitive-restraints-in-agency-agreements

bearing financial and non-financial costs as a result of these practices, with no effective options for redress. This has broader impacts on businesses and society through reduced consumer and small business confidence and reduced incomes that can be reinvested in farm businesses. However, the impact of reduced farm incomes are often not seen because the impact is an absence of what would occur if farmers did not bear the financial and non-financial costs as a result of UTPs. This means that investment, jobs, resilience and productivity are lower than what they would be if farmers did not experience increased costs through the imposition of UTPs.

Australian farmers operate in a highly seasonal and cyclical environment. The highs of a good season provide financial support for the depths of the low season. While farmers have developed sophisticated tools to manage these fluctuations, reduced prices and incomes can lower their ability to manage changes in production across seasons. That is, lower incomes in a good year may mean a smaller financial buffer in the following bad year.

Reduced incomes also reduce money available for on-farm investment. Farmers consistently explore new options for on-farm investment that increase their productivity, resilience and sustainability. Often, investments provide multiple benefits to the farm. However, a reduced farm income can delay this investment, meaning new technologies and innovations are either foregone or adopted more slowly.

With climate change set to increase the frequency and severity of natural disasters, including droughts and floods, it is essential that farmers can adequately recover and prepare during good seasons. By reducing financial buffers and on-farm investment, farmers may be more susceptible to the business impacts of these natural disasters.

Reduced incomes can also impact broader regional communities. Lower incomes can reduce the number of farm employees and make jobs more susceptible to disruption. As a significant employer in regional communities, the number and security of agricultural jobs can have broader-reaching impacts on regional communities.

The NFF thanks Treasury for the opportunity to comment on the proposed UTP Framework. The policy contact for this matter is Kade Denton, General Manager, Trade & Economics via e-mail: or phone .

Yours sincerely

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Chief Executive Officer