NSW Farmers' submission to

Protecting consumers from unfair trading practices: Consultation Regulation Impact Statement

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About NSW Farmers

NSW Farmers is Australia's largest state farming organisation, representing the interests of its farmer members in the state. We are Australia's only state-based farming organisation that represents farmers across all agricultural commodities. We also speak up on issues that matter to farmers, whether it's the environment, biosecurity, water, animal welfare, economics, trade, workforce or rural and regional affairs.

Agriculture is an economic 'engine' industry in New South Wales. Despite having faced extreme weather conditions, pandemic and natural disasters in the past three years, farmers across the state produced more than $23 billion in 2021-22, or around 25 per cent of total national production, and contribute significantly to the state's total exports. Agriculture is the heartbeat of regional communities, directly employing almost two per cent of the state's workers and supporting roles in processing, manufacturing, retail, and hospitality across regional and metropolitan areas. The sector hopes to grow this contribution even further by working toward the target of $30 billion in economic output by 2030.

Our state's diverse geography and climatic conditions mean a wide variety of crops and livestock can be cultivated here. We represent the interests of farmers from a broad range of commodities – from avocados and tomatoes, apples, bananas and berries, through grains, pulses and lentils to oysters, cattle, dairy, goats, sheep, pigs and chickens.

We have teams working across regional New South Wales and in Sydney to ensure key policies and messages travel from paddock to Parliament. Our regional branch network ensures local voices guide and shape our positions on issues affecting real people in real communities. Our Branch members bring policy ideas to Annual Conference, our Advisory Committees provide specialist, practical advice to decision makers on issues affecting the sector, and our 60-member Executive Council makes the final decision on the policies we advocate on.

As well as advocating for farmers on issues that shape agriculture and regional areas, we provide direct business support and advice to our members. Our workplace relations team has a history of providing tailored, affordable business advice that can save our members thousands of dollars. Meanwhile, we maintain partnerships and alliances with like-minded organisations, universities, government agencies and commercial businesses across Australia. We are also a proud founding member of the National Farmers' Federation.

Key focus questions

Q1. Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper?

The general representation and scope of unfair trading practices is appropriate and fits a clear gap in Australian Consumer Law[1]. There is concern, however, that unfair trading practices in business-to-business interactions are given insufficient weight. This is even clear in the title where only consumers are mentioned as being protected, ignoring protections for small businesses.

Q2. How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?

The definition of unfair should cover practices that:

- Unilaterally impose something on one trading partner from another trading partner.
- Disproportionately transfer risk from one party to another.
- Impose a significant imbalance of rights and obligations on one trading partner.
- Decrease price transparency and information asymmetry which will provide an unfair advantage to one party over another.

Q3. Do you have any specific information, analysis or data that will help measure the impact of the problems identified?

There are approximately 55,000 small businesses in the agriculture, forestry, and fishing industries in NSW alone[2]. Many of these are exposed to unfair trading practices which lead to the following negative impacts:

- Inequitable distribution of profits across food supply chains, with processors and retailers retaining a greater share of profits rather than passing them onto producers.
- Producers facing undue risk, which deters investment and efficient levels of production.
- Producers making business decisions with uncertainty due to a lack of information and certainty. For example, some horticulture producers have no forward price or contract certainty, as contracts or supply agreements are usually negotiated after planting, meaning they grow crops without a guaranteed buyer or price.
- Producers and suppliers face commercial retribution if they seek a cost increase, let alone any sort of dispute resolution. This makes it very difficult to pass on any cost increases if their input prices increase.
- There are significant risks of stranded assets resulting from only have one buyer available, especially for intensive industries. If they do not accept the products of the farmer then infrastructure such as sheds and machinery lie idle.

All these factors ultimately lead to slower productivity growth of producers and inability to respond to future disruptions such as climate impacts and natural disasters. It is very difficult to quantify this impact in monetary terms, because the counterfactual situation where unfair trading practices do not occur does not exist to compare the current situation to. There is also the issue of attribution, as there are many factors

[1] Policy 4378: That the Australian Consumer Law be strengthened to:

- Provide equitable returns at the farm gate to better ensure future food security and encourage food and fibre production careers, and
- Ensure that contracts heavily weighted in favour of processors and retailers are identified and prohibited.

[2] NSW Small Business Commissioner (2014) *Small Business in NSW: Our Story*

which influence prices and investment decisions by farmers, isolating the impact of unfair trading practices very difficult. Thus, foregone investment and suboptimal business decision making are virtually impossible quantify at an aggregate scale.

One study by Russo et al.[3] investigated the role of collective bargaining in reducing the occurrence and intensity of unfair trading practices. Their data showed that membership in collective initiatives increases the probability that a farmer perceives a transaction as fair. This at least points to the presence of unfair trading practices qualitatively. Another study of dairy farmers in France, Germany, Poland and Spain found that, in the presence of unequal bargaining power, more detailed contracts increases the likelihood that farmers reporting their contracts involved unfair trading practices.

Most studies, however, focus on price movements as a proxy or indicator of market power imbalances and unfair trading practices. For example, according to data from Eurostat spanning the period January 2007 to July 2009, agricultural commodity prices reacted more strongly and more quickly to changing economic conditions during the GFC, compared to processor and retailer prices which changed more gradually and weaker. What is also often found in the literature is that the pass-through of price increases is different from the pass-through of price decreases. There is a lack of any detailed economic studies into asymmetric price transmission in food supply chains in the last 20 years, however.

Treasury should work with ABARES to look into the possibility of further analysis into price transmission in agricultural supply chains. Treasury should also work with the ACCC and DAFF to find more detailed information about the prevalence and impact of unfair trading practices on individual producers.

Q6. As a consumer or small business, have you suffered detriment from unfair trading practices? Please describe your experience and quantify the impact in monetary terms, if possible.

Our members were very reluctant to come forward with examples of their experience of unfair trading practices due to fear of retribution. Some examples, however, were provided:

- Prices and terms being offered on a take it or leave it basis. The decrease in price offered was then below their cost of production, and there was no justification for this price decrease in an inflationary environment.
- A buyer threatening to not ever accept the products being sold by one farmer ever again if they did not accept the price being offered.
- Payments based on a pool system, where payment is determined by a measure of performance. The performance, however, is determined by factors outside the growers control, such as the inputs they are provided by the processor. There is also often a lack of transparency in this process, with growers having no visibility of how their position in the pool system was determined. These payment systems are prevalent in the poultry meat industry.
- Growers have had their produce rejected by buyers when they have found out the grower has been sold their produce another buyer.
- Being lock into a certain buyer due to the need to adhere to different specifications and requirements across buyers. This is especially an emerging issue with sustainability and ESG standards, with each buyer having their own certification schemes. These are damaging in two ways; they put costs on producers to comply with them with no associated benefits, and they lock producers into one buyer as to switch buyers they would also need to overhaul their ESG reporting which would prove too costly and time-consuming.

Cleary unfair trading practices such as these jeopardise the viability of agricultural businesses, especially as there are very few buyers present, meaning agricultural small businesses have to accept these practices.

[3] Russo, C., Di Marcantonio, F., Cacchiarelli, L., Menapace, L., and Sorrentino, A. (2023) Unfair trading practices and countervailing power, *Food Policy* 119 (2023)

Q7. Have you experienced any difficulties with challenging or disputing a potentially unfair trading practice? Please provide any relevant details.

As mentioned previously, agricultural small businesses are very reluctant to even raise disputes when they have been treated unfairly due to the fear of retribution.

Q8. What is your preferred reform option, or combination of options? What are your reasons?

NSW Farmers prefers **Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices** for the following reasons:

- It is the strongest of the options in protecting small businesses against unfair trading practices, which are prevalent across agriculture.
- The specific prohibitions list will provide greater protection for agricultural businesses, as the courts have been shown to require a high threshold and are also a process that small businesses will be highly unlikely to use due to fear of retribution, low understanding of legislation compared to other larger businesses, and the high costs of undertaking court proceedings.
- The general prohibitions will provide flexibility.
- It aligns with international best practice, especially in the EU which even has specific legislation against unfair trading practices across agricultural supply chains.

Q9. Are there any alternative or additional reform options to those presented you think should be considered?

The following changes to Option 4 are proposed:

- Expanding the definition of small businesses. The EU legislation on unfair trading practices in agricultural supply chains recognises that practices which impact wholesalers and processors get passed on to agricultural producers. Therefore, enterprises larger than SMEs but with an annual turnover not exceeding EUR 350,00,00 are protected against unfair trading practices by larger businesses who they deal with.
- Greater thought and detail needs to be provided into the dispute resolution process. As mentioned previously, producers are very reluctant to raise disputes for fear of retribution. There needs to considerable thought into how to mitigate this issue and provide confidence to producers.

Option 4 consultation questions

4.1 Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?

There is disagreement with the finding that "Option 4 is likely to have the highest regulatory impact of all the options presented". This ignores the fact that a specific prohibitions list would provide the highest level of certainty and confidence to small businesses and consumers around what is covered by the new legislation. This will reduce compliance and training costs for businesses on both sides of the legislation. It would also reduce reliance on courts which could save costs to businesses and taxpayers.

It would also reduce the potential cost listed, which is acknowledged:

> *Businesses may be uncertain about what is unfair which may create an overly cautious commercial environment with potential impacts on business confidence and innovation. The use of a specific list of practices, however, could provide useful guidance to businesses and be easier to enforce.*

Compared to the Option 3, the level of enforcement and administration actions would be negligible. Enforcement would need to be completed regardless of the introduction of a specific prohibitions list, and it may even be more difficult to enforce Option 3 due to the need for courts to decide on the threshold for what is an unfair trading practice.

4.2 Are there any consequences or risks that need to be considered when pursuing this policy option?

There is a clear risk that the focus on consumers will leave insufficient attention to small businesses in the specific prohibitions list. It will be important that the skewed focus in the Consultation Paper on consumers does not carry forward to the proposed legislation.

There is the potential that legislation could eliminate practices which enhance efficiency of transactions and could even forego transactions that would otherwise occur. However, experience with Australian Consumer Law shows that the incredibly high threshold for punishment will unlikely deter normal business practices. The reluctance of farmers to bring forward disputes also means only the most egregious display of unfair trading practices will likely be pursued. Therefore, the risk is higher that the prohibitions will not be strong enough, rather than too strong.

One option would be to establish a Small Business and Farming Commissioner to investigate and control unfair competition practices, including a mechanism to provide small businesses with options to contest unfair or predatory arrangements[4].

4.3 Would this policy option place any additional financial or administrative burden on small businesses?

There will be a minor amount of burden on small businesses initially to understand the new legislation and their rights under it. Any assistance from the ACCC would be useful in this process. Ongoing burden will be minimal.

4.6 What types of unfair trading practices should be specifically prohibited? Should they be industry specific or economy-wide?

The following practices specifically covering the agricultural industry should be specifically prohibited:

- Payments later than 30 days for perishable agricultural and food products
- Payment later than 60 days for other agri-food products
- Short-notice cancellations of perishable agri-food products
- Risk of loss and deterioration transferred to the supplier
- Refusal of a written confirmation of a supply agreement by the buyer, despite request from the supplier
- Misuse of trade secrets by the buyer
- Commercial retaliation by the buyer
- Transferring the costs of examining customer complaints to the supplier
- Threatening to blacklist a supplier
- Refusal to negotiate prices by a buyer
- Using standards and specifications as a way to lock in suppliers
- Unilaterally requiring suppliers to adhere to standards with no compensation for the costs that they impose
- Unilaterally requiring suppliers to adhere to standards that are unreasonably onerous and divergent from broader industry standards

[4] Policy 2862: 2862: That the association lobby the Federal Government to establish a Small Business and Farming Commissioner to investigate and control unfair competition practices, including a mechanism to provide small businesses with options to contest unfair or predatory arrangements enforced through contracts imposed by larger parties.

4.7 Should civil penalties be attached to a combined prohibition on unfair trading practices? Please provide reasons for your response.

There should be meaningful civil penalties attached to act as a deterrent against unfair trading practices. It would make sense to align penalties with those for unfair contract terms as much as possible.

The EU legislation notes:

> The existence of a deterrent, such as the power to impose, or initiate proceedings, for the imposition of, fines and other equally effective penalties, and to publish investigation results, including the publication of information relating to buyers that have committed infringements, can encourage behavioural changes and pre-litigation solutions between the parties, and should therefore be part of the powers of the enforcement authorities. Fines may be particularly effective and dissuasive. [5]

AN OECD report, *Pecuniary Penalties for Competition Law Infringements in Australia,* found that penalties imposed by the Courts for competition law breaches were significantly lower than in other jurisdictions, especially for large firms or long-standing anti-competitive behaviour. Penalty rates would have to be increased by 12.6 times to be comparable with the level of the average penalty in other OECD countries. Fines and penalties should not be an accepted cost of doing business, but large enough to be a deterrent for anti-competitive behaviour.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0633