



National Farmers' Federation

Submission to Treasury

**Review of Unfair Contract Term Protections for Small
Business Discussion Paper**

21 December 2018

NFF Member Organisations



CANE GROWERS



Horticulture Council



The Pastoralists' Association of West Darling



WOOLPRODUCERS AUSTRALIA

About the NFF

The National Farmers' Federation (NFF) is the voice of Australian farmers.

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.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

Social

There are approximately 88,000 farm businesses in Australia, 99 per cent of which are wholly Australian owned and operated.

Economic

In 2017-18, the agricultural sector, at farm-gate, contributed 2.4 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2017-18 is estimated to have reached \$60.1 billion.

Workplace

The agriculture, forestry and fishing sector employs approximately 323,000 people, including full time (236,700) and part time employees (84,300).

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 26 per cent of the employed workforce is casual.

Environmental

Australian farmers are environmental stewards, owning, managing and caring for 51 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.4 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.

In 1989, the National Farmers' Federation together with the Australian Conservation Foundation was pivotal in ensuring that the emerging Landcare movement became a national programme with bipartisan support.

Introduction

The National Farmers' Federation (NFF) welcomes the opportunity to make a submission to Treasury's discussion paper *Review of Unfair Contract Term Protections for Small Business*. As the peak national body representing farmers and, more broadly, agriculture across Australia, the NFF is committed to advancing Australian agriculture by developing and advocating for policies that support the profitability and productivity of Australian farmers, including policies that improve competition in concentrated markets.

The NFF considers protections for small businesses against unfair contract terms (UCTs) in standard form contracts crucial to addressing the structural inequalities between small farm businesses and larger businesses that generally possess the resources and market power to secure contracts that reflect their preferences. To this end, the NFF recommends that breaches of section 23 of the Australian Consumer Law be enforced through infringement notices and civil penalties.

With a relatively high number of farmers compared to an increasingly concentrated number of buyers, there are frequently only one, two or three realistic buyers of food and fibre, particularly for perishable goods.¹ This leads to an imbalance in market power, with buyers having more alternative sources of produce than there are target buyers for growers. This reduces the leverage farmers have when seeking to alter terms in standard form contracts.

Thresholds

Farm businesses are heterogeneous, with horticulture businesses, for example, often employing more than 20 staff during harvest and chicken meat farmers frequently entering into contracts with processors that have a value higher than \$3 million per annum. Similarly, large irrigators commonly have turnovers greater than \$10 million per annum. It is important to note that most farm businesses in Australia are still small to medium in size, with only 4.34 per cent of the roughly 86,000 farm businesses having more than \$2 million turnover per annum².

Discussion question 1:

Does the headcount approach work in practice? If so, is an employee number of 20 appropriate to define a small business for the purpose of UCT protections? If not, what are alternative approaches and what would be the benefit of adopting them?

The NFF is concerned that the current headcount approach to determining eligibility for UCT protections excludes many farming operations from accessing these protections contrary to the intent of the legislation. Horticultural producers often will employ more than 20 staff at certain times of the year – for example during harvest – but in every other respect should be eligible for UCT protections. The NFF recommends adopting a single turnover-based definition for

¹ *Collective Bargaining in the Agricultural Sector* (2015), William van Caenegem et al., RIRDC. Accessed 14/12/2018: <https://www.agrifutures.com.au/wp-content/uploads/publications/15-055.pdf>

² See Australian Bureau of Statistics, 2016, Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016, cat. no. 8165.0.

small business of \$10 million aggregated turnover in line with the Australian Taxation Office's (ATO) definition of a small business entity for small business entity concessions³.

Recommendation 1:

That the headcount approach to determine eligibility of small businesses for UCT protections is abolished and replaced with a \$10 million aggregated turnover definition in line with the ATO's definition of a small business entity for small business entity concessions.

Discussion question 2:

Does the value threshold appropriately cover contracts that warrant UCT protections? If not, how should the thresholds be altered and why?

The NFF considers that the value threshold establishing eligibility for UCT protections is too low, particularly considering farmers often operate in a monopsony environment. For example, chicken growers usually sign an exclusive contract with one of only a handful of chicken processors. These contracts are often worth more than \$3 million per annum. The turnover of these businesses, however, would still firmly put them in the ATO's small business entity definition. The NFF therefore recommends introducing a different threshold approach, with small businesses needing to meet two out of the three following criteria:

- 1) Less than 20 employees;
- 2) Annual turnover of less than \$10 million; and/or
- 3) Value of contract less than \$3 million per annum.

Recommendation 2:

That the legal definition of a contract to be a 'small business contract' be changed and a new threshold approach be introduced, with small businesses needing to meet two out of the three following criteria to be protected by the unfair contract term legislation:

- 1) Less than 20 employees;
- 2) Annual turnover of less than \$10 million; and/or
- 3) Value of contract less than \$3 million per annum.

The NFF would also like to pose the question as to why section 23 of the *Australian Consumer Law* should only provide small businesses with protection from unfair terms in standard form contracts. The NFF considers that UCTs in standard form contracts should be prohibited regardless of the size of the businesses involved which would also eliminate the need to include a definition of a 'small business'.

Discussion question 3:

Do you have experience or are you aware of any contracting practices designed or undertaken to avoid the UCT protections?

The NFF is aware that several farmers in the horticulture sector have reported that the most common standard form contract used under the Horticulture Code of Conduct is based on a template developed with the express purpose of thwarting the objectives of the Horticulture

³ *Definitions of the terms used to explain small business entity concessions* (2017), Australian Taxation Office. Accessed 14/12/2018: <https://www.ato.gov.au/Business/Small-business-entity-concessions>

Code of Conduct. The NFF is concerned that the current Australian Consumer Law only triggers removal of offending clauses without consequences for the buyer. The NFF member organisation Growcom has provided a submission to Treasury regarding this issue to which the NFF refers those reviewing these provisions.

To better protect farmers against UCTs, the NFF recommends that unfair contract term law include stronger protections for businesses who fall victim to unfair terms in standard contracts. It is NFF's understanding that the ACCC is currently unable to enforce infringement notices and or impose civil pecuniary penalties when businesses fail to comply with the unfair contract term law. To strengthen the law and to protect our small businesses from unfair business conduct, the NFF recommends inclusion of civil penalties for breaches of unfair contract law.

Recommendation 3:

That the ACCC's ability to enforce unfair contract law is strengthened by amending the law to identify unfair contract terms as illegal, providing the ACCC with the power to impose a penalty on those who include unfair contract terms in their standard contracts, and empowering the ACCC to issue infringement notices for contract terms that are likely to be unfair.

Coverage

Discussion question 4:

In your experience, what factors and circumstances make it difficult to determine whether a contract is a standard form contract? What clarifications would assist with making this determination? Can you provide examples?

The NFF is concerned by the definition of standard contracts. It is our view that if the template contract contains UCT then these templates should not stand regardless of whether there is a claimed capacity for negotiation. The take it or leave it component is problematic as it can be one party's word against the other. In many cases agricultural producers will not contest the terms of a contract as they are concerned it will impact on future dealings with a purchaser.

Recommendation 4:

Expand the definition of "standard form contract" to include contracts that – while officially including clauses that allow for negotiation – cannot feasibly be negotiated by the small business party due to a fear of retribution should they seek amendments.

Examples of unfair terms

Discussion question 7:

Do you think the current UCT regime offers appropriate level of protections to small businesses?

The NFF regards the current UCT regime as deficient in the protection it provides to small businesses. Farmers face a challenging operating environment, highlighted by spiralling upward energy prices, increasing labour and input costs and pressure from supply chain consolidation. It has come to the NFF's attention that in this environment, some processors take advantage of farmers by providing farmers with standard contract terms that are overly

complex, ambiguous about long-term fee projections, and include scope to decrease fees into the future. Furthermore, the NFF is very concerned about the very short timeframes that processors often impose on farmers to sign standard contracts.

Discussion question 9:

Are there any other issues relevant to the Government's review of UCT protections for small business that impact on the effectiveness of the regime?

The ongoing downward pressure on fees paid by processors is continuing to place many growers in a precarious position, potentially jeopardising their ability to service financial commitments and their long-term sustainability. The NFF seeks a standard agreement process that includes a fair and reasonable timeframe to consider the provisions and a more transparent fee structure to provide growers with the confidence they need to remain in business and to plan production into the future. Moreover, farmers need to be able to negotiate contracts collectively in a monopsony environment. It is the NFF's view that it is not practical, nor reasonable, for growers to be isolated and compelled into agreeing to unclear terms on an individual basis without some over-arching framework through which these negotiations can take place.

The NFF considers that there is need for a legal definition of what a standard contract should contain. To this end, the NFF recommends that standard contracts should be monitored by the ACCC and a clear recommendation for what constitutes a fair contract should be given to provide small businesses with assurance that they will not be taken advantage of.

Recommendation 5:

That the ACCC provides a clear definition of a fair standard contract that includes, inter alia:

- minimum obligations for small businesses relating to supply agreements;
- a requirement for all parties to act lawfully and in good faith;
- a prohibition on businesses from threatening small businesses with business disruption or termination without reasonable grounds;
- minimum standards of conduct such as payment terms, standards and specifications for service/ goods; and
- a dispute resolution mechanism.