



National
Farmers
Federation

**Submission on the Enhancements to Unfair Contract
Term Protections Consultation Regulatory Impact
Statement**

6 April 2020

NFF Member Organisations





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.

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.

Statistics on Australian Agriculture

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

Social >

There are approximately 85,000 farm businesses in Australia, 99 per cent of which are wholly Australian owned and operated.

Economic >

In 2018-19, the agricultural sector, at farm-gate, contributed 1.9 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2018-19 is estimated to have reached \$62.2 billion.

Workplace >

The agriculture, forestry and fishing sector employs approximately 318,600 people, including full time (239,100) and part time employees (79,500).

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.

Executive Summary

The National Farmers' Federation (NFF) recommends that:

- Unfair contract terms (UCTs) be made illegal and courts given the power to issue civil pecuniary penalties where terms are found to be unfair;
- Prior use of UCTs be made an offence under Australian Consumer Law;
- Courts be empowered to issue remedies other than declaring a contract term void;
- The creation of a rebuttal presumption provision - where similar terms have been previously ruled unfair - be considered;
- UCT protections be made applicable to all standard form contracts, regardless of business size;
- The definition of a standard form contract be expanded to capture repeat usage and cases where the contract cannot feasibly be negotiated by the small business party due to a fear of retribution should they seek amendments. It should exclude contracts where instances of consultation, negotiation or amendment have been one-off and/or very limited; and
- Australian Consumer Law be amended to specify a standard negotiation/agreement process that includes a fair and reasonable timeframe to consider the provisions and a more transparent fee structure.

Introduction

The NFF welcomes the opportunity to provide a submission to The Treasury's 'Enhancements to Unfair Contract Term Protections' Consultation Regulatory Impact Statement (consultation RIS).

As the peak body representing agriculture across Australia, access to, and the scope and effectiveness of, unfair contract terms (UCTs) protections has implications for the viability of many farming businesses.

This submission builds on most of the recommendations from our submission to the initial discussion paper¹. These are:

1. That the headcount approach to determine eligibility of small businesses for UCT protections be abolished and replaced with a \$10 million aggregated turnover definition in line with the Australian Tax Office's definition of a small business entity;
2. That the ACCC's ability to enforce unfair contract law be 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.
3. That the definition of a 'standard form contract' should be expanded 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.
4. 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 services/goods; and
 - a dispute resolution mechanism.

These recommendations were made in consideration of the unique nature of agricultural supply chains, including the perishability of foodstuffs and the oligopolies which exist at the retailer level and, for many commodities, the processor level.

The following submission provides a general response to each topic and the options set out in the consultation RIS and then addresses the specific questions asked in the RIS that the NFF is able to respond to.

Legality and penalties

The NFF agrees the current regulatory framework dealing with UCTs does not effectively deter businesses from using UCTs in small business contracts. As such, the framework does not achieve its intended purpose.

¹ National Farmers' Federation 2018, *Submission to Treasury: Review of Unfair Contract Term Protections for Small Business Discussion Paper*

Additionally, the current provisions place a significant enforcement burden on the ACCC while providing little to no incentive for businesses to proactively assess their standard form contracts for fairness.

Of the four options proposed by Treasury for increasing the effectiveness of UCT protections, the NFF supports *Option 3 - making UCTs illegal and attaching penalties*. The NFF considers this option to be the most likely to promote proactive assessment of standard contracts and removal of unfair terms before contracts are issued.

The NFF seeks amendments to the current framework that materially reduce the instance of farmers being presented with contracts that include unfair terms.

1. Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.

The NFF is aware of a number of farming sectors where small farming businesses have been presented with contracts that include unfair terms. The circumstances generally involve small farming operations that have access to only one processing facility due to the perishability of the product they produce and/or prior contractual arrangements that have bound the farm business to a particular processor.

The kinds of unfair terms used include requirements to invest in farm infrastructure without compensation, the removal of fee negotiation, mediation and review processes, and contract terms that allow for the contract to be voided on minimum notice and or evidence.

The absence of any minimum standards Included in these contracts has seen contract fees reduced, reduced contract periods, and reduced contracted volumes.

2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.

The NFF is aware of a number of small farming businesses that have closed because they were unable to secure fair contract terms or their contracts were terminated.

5. Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.

The NFF considers an important channel for reducing the use of UCTs is to increase the education and awareness of small businesses subject to UCTs. There is significant opportunity to increase the awareness and understanding of small farming enterprises of UCTs and the options available to them to address TCTs.

The NFF welcomes the ACCC's efforts, via the Agriculture Consultative Committee, to keep industry informed of developments and competition law as it relates to the agriculture sector. We would suggest that agricultural industry associations are well placed to assist the Government and ACCC increase access to information and to help tailor relevant Information to make it easier to understand. The NFF, working in conjunction with its members, would be pleased to disseminate information on UCTs via our formal networks as well as our social media networks.

The National Heavy Vehicle Regulator conducts a grants program that enables industry associations to run tailored programs to increase awareness of road safety and other NHVR-related issues. The ACCC could be funded to conduct a similar kind of program in relation to competition policy.

6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.

The NFF considers making UCTs illegal and introducing financial penalties is the only realistic avenue for deterring businesses in dominant market positions from trying to impose UCTs on smaller businesses. The financial penalty is needed to counter the financial gain secured by transferring risk from the dominant firm to the smaller business.

8. What do you consider are the additional costs and benefits for each of the proposed options?

The NFF is aware of arguments against using courts to prosecute UCTs that are made illegal and come with a financial penalty. In place of courts, some have proposed tribunals be empowered to mediate UCTs because they are less costly, and administratively easier, for small businesses to access. The implication is small businesses are more likely to dispute UCTs if the vehicle for prosecuting cases is easier to access and less expensive.

The NFF's preference for court action is based on the view that a court process that delivers a heavier penalty is likely to have a stronger deterrent effect. As such, this is likely to encourage firms with dominant market positions self-assess contracts well before they are exchanged reducing the need for small firms to challenge contract terms in the first place. We are not aware of any farming business that has the time, energy or is keen to expend the resources to pursue contract issues either in a court or a tribunal. Our strong preference is for amendments to the law that are most likely to effectively deter UCTs.

Flexible Remedies

The NFF acknowledges that declaring unfair contract terms void may sometimes not be the best outcome for one or both parties. If the term in question is found to be unfair and therefore void but the contract still capable of operating, uncertainty may arise. Alternatively, if the entire contract is unable to operate when a particular term has been declared void, the impact on the small business (and possibly also the contract-issuer) may be detrimental; it may leave them in a worse position than if the contract had remained operational with the UCTs in place.

We note that the ACCC, in their submission to this inquiry, expressed that they have, in some cases, declined to take action against potential UCTs because the outcome would likely have put the small business in a worse-off position².

The NFF therefore accepts that the court should have the power to provide some remedy other than declaring a contract term void. We are supportive of Option 2 (5.4) - UCTs not automatically void. When a court declares a contract term to be unfair, that term should not be automatically void. The court should be given the power to determine an appropriate remedy, with one possible remedy being a declaration that the term is void. Careful consideration should be given to the process for deciding an appropriate remedy.

The NFF also provides tentative support for Option 4 (5.6) - UCTs used in similar circumstances. Creating a rebuttal presumption provision would have the positive consequence of encouraging businesses which issue standard form contracts to improve their awareness of court rulings on UCTs, thereby making them less likely to include UCTs in their standard form contracts. However, as the consultation RIS notes, this would require careful consideration of legal and practical implications.

10. If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.

As noted earlier, the nature of primary production markets means small farm businesses can have few if any choices with regard to the processors or purchasers they must deal with. For this reason, courts should be provided with the discretion to determine the appropriate remedy to enable it to take into consideration the particular circumstances of each case. Voiding a contract can deprive a primary producer from accessing the only viable purchaser of their product which, in effect, could close the business.

11. Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.

The NFF considers regulators should be able to commence court proceedings on behalf of a class of small business. The NFF's preferred outcome from amendment to the law is that small farming businesses do not need to carry the cost and administrative burden of prosecuting UCTs. If the regulator is empowered to prosecute the case this is likely to increase the deterrence of the measure as they are generally better placed to prosecute a case than a group of small farming businesses.

² Australian Competition and Consumer Commission 2018, *Review of Unfair Contract Term Protections for Small Businesses: ACCC Submission*

Similarly, and again reiterating the nature of many primary production markets, enabling the regulator to bring a class action is likely to dilute the negative impact on commercial relationships that many small farming businesses will continue to rely on after a case is concluded.

Definition of a small business contract

The NFF had proposed in its earlier submission that eligibility for UCT protections should depend on a business meeting at least two of the following three criteria:

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

We took this view because each single criterion has deficiencies, but also merits. For example, while the employee head count is often a reasonable proxy for business size, horticultural producers will often employ more than 20 staff at harvest time. At all other times and in all other respects they have the characteristics of a small business.

Also, chicken growers often enter into contracts with an annual value in excess of \$3 million. However, a single contract will often constitute their entire supply arrangement, and their annual turnover will be far below \$10 million.

We also posed the more fundamental question of why it is necessary to distinguish a small business from other, larger businesses. The NFF would like to see a blanket ban on UCTs in all standard form contracts, regardless of business size. In its submission to this inquiry, the ACCC point out that 'where a business can impose a contract on a 'take it or leave it' basis [i.e. a standard form contract], it demonstrates that the other business lacks countervailing bargaining power or any ability to effectively negotiate, such that the UCT protections should apply to that contract.' The NFF concurs with this reasoning.

Should the Treasury consider there is a need to restrict access to UCT protections to small businesses only, then the NFF considers the small business definition should be consistent with that used by the Australian Taxation Office - an individual, partnership, company or trust that run a business with less than \$10 million aggregated turnover.

Value threshold

Farming businesses tend to be capital intensive, with high revenue but low profit margins. The value of contracts for heavy farming equipment or supply of produce is normally higher than the current value threshold of \$300 000. Additionally, many agricultural sectors operate with an oligopoly at the processor level. This means that, while a farmer may enter into a contract worth over \$300 000 per annum, it is often the only supply agreement he or she will enter into.

Contracts in agriculture often contain provisions whereby the price paid for produce can vary based on market conditions, or the supply volume can itself vary. This can create uncertainty as to the annual (or total) value of the contract and, for this reason, whether the contract is eligible for unfair contract terms provisions.

As the consultation RIS points out, the increased threshold would reduce uncertainty for many small business contracts that do not have an upfront price payable and which are likely to exceed the current threshold. Eliminating the value threshold would do away with the problem entirely.

Clarity on standard form contracts

The lack of clarity on what constitutes a 'standard form contract' is problematic. We are inclined to take the position that one-off and very limited instances of consultation, negotiation or amendment should not affect the overall character of a contract as 'standard form'. If the definition of 'standard form contract' was interpreted in this way, it would be easy for parties to circumvent the UTC provisions.

For this reason, we support Option 3 (8.5) - clarifying 'effective opportunity to negotiate'. Amending the law to further clarify the types of action which *do not* constitute an effective opportunity to negotiate would be of benefit to our industry. The examples provided in the consultation RIS of action which *would not* constitute an effective opportunity to negotiate, namely:

- a. Opportunities for a small business to negotiate minor amendments to a contract, which are amendments that would not alter the intent and essence of the original term; and
- b. Opportunities for a small business to select, from a pre-existing list of possible terms, which term they would prefer, rather than an opportunity to actually negotiate the substance of the term

Are a reasonable start. The law should also specify a standard negotiation/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.

We also believe there to be merit in Option 2 - repeat usage. Ensuring that courts, when considering whether a contract is standard form, take into account whether a business has issued a contract with the same terms and conditions, or same core terms and conditions, to multiple parties, would make these judgements more likely to capture those contracts that are intended to be captured.

There is one further change to the definition of a 'standard form contract' which we believe would improve the efficacy of UCT provision. The oligopolies which operate at the processor level for many agricultural commodities leave many producers with few potential buyers. In these industries, a decision from any single processor to refuse to purchase from a farmer can impact on the viability of their enterprise. 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. In these cases, the fear of retributive action by the processor is an effective barrier to negotiations. The NFF is of the view that the definition of a 'standard form contract' should apply to 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.

22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.

The NFF is concerned that requiring 'repeat usage' to identify a 'standard contract' may reduce the ability of small farm businesses that sign multiyear contracts from challenging UCTs in those

contracts. Similarly, if a processor sources products from a small number of primary producers, and uses multiyear contracts, there might be limited evidence of 'repeat usage' if changed circumstances over time, or the unique offering of each small farm business, means different contracts are used but still include UCTs.

23. If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?

The NFF considers prescriptive guides on what actions constitute an 'effective opportunity to negotiate' would assist small primary producers with identifying UCTs. It is also likely to reduce the incidence of contracts including terms to do *not* provide for an effective opportunity to negotiate.

25. Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.

Please see response to question 5 above.

Minimum standards

On the question of whether minimum standards, which are inserted into a standard form contract as prescribed by state or territory law, should be exempted from UCT provisions we would note the following points:

1. The Law Society of Queensland has expressed the view that minimum standards do not require exemption because they are, as mandatory provisions, already protected by the law³;
2. The Law Council of Australia has expressed the view that there is a very low likelihood of minimum standards being ruled 'unfair' under UCT provisions⁴; and
3. Good legislative practice should involve state legislators undertaking the checks necessary to ensure their minimum standards do not contradict Commonwealth law.

We consider these points make a sound case for excluding state and territory mandated minimum standards from UCT provisions. That said, there are no guarantees that these provisions will meet the definition of what an 'unfair' term is and should be open to challenge regardless of the source of the terms.

Should you have any questions regarding this submission, please do not hesitate to contact Dr Prudence Gordon on 0404 670 434 or at pgordon@nff.org.au.

³ Law Council of Australia 2019, *Review of Unfair Contract Term Protections for Small Business: Supplementary Submission*

⁴ Law Council of Australia 2018, *Review of Unfair Contract Term Protections for Small Business: Submission*