

# Consultation Regulation Impact Statement: Protecting Consumers from Unfair Trading Practices

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This submission is provided to:

Director

Consumer Policy, and Product Safety Unit

Market Conduct and Digital Division

Treasury

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## Our members

- Canegrowers
- Cotton Australia
- Queensland Fruit & Vegetable Growers
- Nursery & Garden Industry Queensland
- eastAUSmilk
- Australian Cane Farmers Association
- Queensland United Egg Producers
- Turf Queensland
- Queensland Chicken Meat Council
- Pork Queensland
- Bundaberg Regional Irrigators Group
- Burdekin River Irrigation Area
- Central Downs Irrigators Ltd
- Fairburn Irrigation Network
- Mallowa Irrigation
- Pioneer Valley Water Co-operative Ltd
- Theodore Water Pty Ltd
- Eton Irrigation
- Queensland Oyster Growers Association
- Lockyer Water Users Forum

## About the Queensland Farmers' Federation

### **The Queensland Farmers' Federation (QFF) is the united voice of agriculture in Queensland.**

We are a member-based organisation representing the interests of peak agriculture industry organisations, both state and national. Through our members QFF represents more than 13,000 primary producers across the cotton, sugarcane, horticulture, dairy, nursery and garden, poultry, eggs, pork, and intensive animal industries.

We unite the sector to engage in a broad range of economic, social, environmental, and regional issues through advocacy, policy development, and project activity. We work with the government of the day on behalf of industry, farmers, and the community to provide powerful representation and contribution to the policy direction, sustainability, and future growth of Queensland's agriculture sector.

Our Council of member representatives and policy committees set the strategic priorities for policy development and advocacy, while our Executive Board ensures our corporate governance.

QFF draws on the expertise and industry knowledge of our members and through our commitment to collaboration and considered policy development, we lead Queensland's agriculture sector towards a strong future, ensuring our members are ahead of the game and have a voice at the table on the issues that matter to their members.

## Submission

QFF welcomes the opportunity to provide comment on the Treasury Australia's consultation on reforms to the Australian Consumer Law (ACL) to address currently unregulated unfair trading practices (UTPs).

We provide this submission without prejudice to any additional submission from our members or individual growers and producers.

### **Executive summary**

QFF has long expressed concerns about instances of unfair trading practices (UTPs) and imbalances in bargaining power within Queensland's agri-food supply chains. We acknowledge that the recent enhancements to the unfair contract term legislation recognises the urgency of the situation facing Queensland's growers and producers. This represents a crucial step in addressing unfair conduct in the agri-food supply chain, providing greater protection for growers and producers, and ultimately, end-consumers.

Despite the importance of this reform, QFF believes that further strengthening of Australia's consumer and competition law is necessary to establish a level playing field for our growers and producers. This would instil greater certainty and transparency for all market participants. Given that Queensland's agriculture sector is predominantly composed of regional, family-run SMEs, effective

competition policy is critical to prevent these growers and producers from tolerating larger businesses exploiting their market power to their own financial detriment.

In our submission, we have provided evidence of industry-specific instances of UTPs and the extent to which bargaining power imbalances can be financially detrimental to Queensland's growers and producers. It is our view that:

- The dairy and horticulture industries in particular face a number of challenges related to deregulation, power imbalances, and profitability concerns, despite attempts to address these issues through industry-specific codes of conduct.
- The imbalance in the agri-food supply chain is fuelled by concerns about dominance of retailer market power, as retailers possess not only longstanding vertical relationships but also the authority to impose punitive actions on non-compliant suppliers.
- A general prohibition on UTPs will be better able capture business practices that are predatory by design or implementation, as opposed to being problematic in their application to an individual consumer.
- There is sufficient existing evidence of UTPs in the agri-food supply chain to support genuine change to the ACL, as reflected in this submission.

Based on these conclusions and the evidence provided in this submission, we advise to Treasury Australia that:

- Continuing with the current approach will only perpetuate existing imbalances in bargaining power between trading partners and encourage consolidation, and therefore must be revised or supplemented with additional provisions.
- The Treasury consider supplementing the prohibition on unconscionable conduct with a general prohibition on conduct which is, in all circumstances, unfair. To any extent, this inclusion must remain reflective of the general prohibitions on such conduct in the EU.
- At the very least, the act of "exploiting imbalances in bargaining power within supply chain agreements, including the unilateral alteration of supply terms at short notice" must be explicitly prohibited. This specific prohibition will serve as a guide to the courts to prevent any misinterpretation of the general prohibition of UTPs and to mitigate the chilling effect this reform may have on all market participants.
- Any prohibition on UTPs must be complemented by suitably designed limits and a nuanced approach to enforcement. Education should be the primary regulatory strategy, providing clear guidance to growers and producers about when their actions might be in violation of the law. This is also crucial to minimise the potential chilling effect on consumers.
- The Federal Government must enhance its support of the ACCC's capacity to oversee fair commercial transactions and dealings for growers and producers within competitive markets.
- Introducing minimum and effective enforcement requirements that address the concerns of growers and producers would play a significant role in ensuring they have effective avenues for redress. This is crucial in alleviating the persistent fear factor for many growers and producers.
- QFF directs attention to the details contained within the National Farmers' Federation submission relating to civil penalties and requests consideration is given to the points raised.

## Overview

In August, Assistant Treasurer Stephen Jones had drawn attention to emerging harmful practices slipping through the gaps in the ACL, emphasising the need for reform.<sup>1</sup> While QFF notes that the ACL aims to promote ‘fair trading and provision for consumer protection,’ there is a noticeable shortfall in its ability to influence trader conduct and provide adequate redress for affected growers and producers.

Amongst growing concerns about food insecurity and increasing inflation at the farm level and throughout the supply chain, the call for competition reform has never been greater. Ongoing unease about market concentration in Australia’s retail sector and imbalances in bargaining power between suppliers and buyers have been a topic of sustained public debate and controversy in Australia for over a decade.

In recent years, the organisational structure and governance of agri-food supply chains have grown increasingly complex. Transactions are structured in various alternative arrangements, and there exist horizontal and vertical interdependencies among players along the supply chain. Moreover, policies and governance aimed at regulating individual supply chains also differ significantly across agricultural markets.

This complexity within the agri-food supply chain, coupled with retail market concentration and imbalances in bargaining power, occasionally leads to instances of UTPs. These concerns, among others, culminated in the ACCC’s 2020 inquiry into perishable agricultural goods (PAG inquiry) and led to the introduction of the Food and Grocery Code of Conduct (FGCC) in 2015.

The PAG inquiry, in particular, underscored the inadequacy of existing competition and fair-trading regulations in addressing issues related to bargaining power imbalances and market failures in PAG industries. In line with these findings, the ACCC proposed that a broad, economy-wide prohibition on UTPs in the ACL would enhance PAG industry codes of conduct and the overall economy of the agri-food supply chain.<sup>2</sup> QFF supports this proposal.

### **QFF’s preferred reform option**

Among the four options proposed by Treasury Australia to address currently unregulated UTPs, QFF views ‘Option 4’, the combined approach, as the most effective mechanism to resolve industry-wide instances of UTPs. This option includes a general principles-based prohibition against UTPs, supplemented by a list of specific prohibited practices.

Specifically, QFF emphasises that the act of “exploiting bargaining power imbalances in supply chain agreements, including by unilaterally varying supply terms at short notice” should be outrightly prohibited in the ACL. This would guide courts in avoiding any misinterpretation of the general prohibition of UTPs.

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<sup>1</sup> See: <https://www.claytonutz.com/knowledge/2023/september/fair-warning-federal-government-consults-on-proposed-law-to-ban-unfair-trading-practices>.

<sup>2</sup> Australian Competition and Consumer Commission (2020) Perishable Agricultural Goods Inquiry, p. xvii.

In principle, QFF maintains that Option 4 may better align with the modern realities of small business systems or practices that are predatory by their design or operation, as opposed to relying on the statutory prohibition on “unconscionable conduct”. QFF strongly believes that this option will be most effective to promote transparency and fairness within the agri-food supply chain. QFF maintains that this dual approach would also provide:

- A comprehensive and standardised solution within the agri-food supply chain, fostering fairness and transparency among traders.
- A consistent and standardised approach applicable to all agricultural sectors.
- Confidence and trust among growers and producers, relying on uniformly applied rules.
- A better intuitive understanding for small businesses on when to seek redress and for traders to gauge when their actions are repugnant.
- Simplified compliance efforts for downstream processors and retailers.
- Enhanced enforcement and monitoring of unfair trading practices, thereby empowering regulators to take a more proactive role.

QFF is of the firm belief that such a reform would effectively create a level playing field for all market participants in the agri-food supply chain, ensuring that all adhere to the same standards of fairness and ethical behaviour. We believe that this reform represents a significant step toward streamlining the regulatory landscape, bringing benefits to end-consumers, growers and producers, and regulators alike. It further guarantees consistent protection and fosters fair competition in the Australian food marketplace, instilling greater certainty to growers and producers and promoting community understanding among both end-consumers and traders.

## **Evidence of unfair trading practices in the agriculture sector**

In this section we provide the following overview of some industry-specific examples of unregulated UTPs for which there is presently no clear remedy, which might be captured by such a prohibition on UTPs.

### **Impacts to dairy**

The Australian dairy industry transitioned to a deregulated environment as federal support for milk prices and state-level regulations on drinking milk pricing and sourcing ceased. In this new landscape, farmers are exposed to low international prices, necessitating the implementation of highly efficient production systems. Deregulation led to various issues throughout the dairy supply chain, eventually prompting the implementation of the Dairy Industry Code of Conduct, effective from January 1, 2020.

This code regulates interactions between farmers and processors and extends to retailers when they purchase milk directly from farmers. Notably, in 2011, major retailers reduced prices for private label fresh milk, which had a severe impact, particularly in Queensland, where all dairy production goes into fresh milk. This situation led processors into price competition, affecting farmers and the overall supply chain. Moreover, power imbalances between processors, farmers, and retailers persist, with three major processors in Queensland aligned with retailers facing significant pressure.

The two-tier pricing structure further erodes brand differentiation for consumers. Despite the introduction of the Dairy Code of Conduct, substantial work remains to address excessive retailer control and unrealistic demands on processors and farmers. The industry's overall profitability is at stake, and declining production across Australia is a concern, threatening market stability.

### **Impacts to horticulture**

The release of the Hilmer Review in 1993 marked a turning point for Australia's horticulture industry, embracing the National Competition Policy to eliminate perceived market barriers. Despite the subsequent transformation into one of the least regulated sectors, concerns arose as remaining regulations failed to uphold fair practices in the intensely competitive free-market environment.

To address issues, a new Horticulture Code of Conduct, which is a mandatory industry code prescribed under the CCA, replaced outdated 2006 regulations on April 1, 2018, aiming to enhance transparency in trading relationships between growers and traders. However, persistent power imbalances persisted as large retailers exploited their market influence, dictating unfavourable terms to growers.

The absence of a government-supported market information service left growers uninformed, relying on agents without guarantees of good faith. Growers, as price takers, faced challenges from rising input costs, hindering productivity and innovation, particularly for those lacking resources.

A culture of silence further deterred growers from seeking resolution through available channels, such as the ACCC, fearing retribution. As a result, the horticulture industry struggled to rectify power imbalances, hindering fairness and transparency in trading relationships. Addressing these challenges is essential for the industry's sustainable development.

QFF directs attention to the details contained within the National Farmers' Federation submission relating to civil penalties and requests consideration is given to the points raised.

### **The limitations of existing ACL provisions**

We have presented evidence above that demonstrates the prevalence of UTPs in agri-food supply chains, which QFF believe fall significantly short of the protection Queensland's growers and producers expect and deserve. While we acknowledge that some of our members have successfully relied on existing fair-trade protections or industry codes of conduct in their commercial dealings or contractual arrangements, it is our view that the existing provisions within the ACL fail to address the industry examples illustrated above.

The high threshold set by section 21 of the ACL for what constitutes "unconscionable conduct" limits its effectiveness in addressing these commercial practices. Although the prohibition of statutory unconscionable conduct was originally intended to capture a broader category of conduct than the equitable doctrine of unconscionable conduct, Australian courts have interpreted the prohibition to

require conduct to meet a very high threshold of 'unconscionability' that goes well beyond accepted norms of unfairness.<sup>3</sup>

The CRIS further highlights the limitations of 'unconscionable conduct' by stating that<sup>4</sup>

"Statutory unconscionable conduct is limited in its ability to address unfair practices because it is not the same as unfair conduct and it requires a high threshold of misconduct to be met. As a result, there are cases where courts have determined that conduct falls short of the high threshold, even though that conduct would be considered by many as unfair and was likely to result in significant consumer detriment."

This has resulted in a prohibition of conduct that significantly contradicts notions of fairness and consumer expectations.<sup>5</sup> The ACCC case against Woolworths' 'Mind the Gap' scheme clarifies that the evidentiary test required to prove unconscionable conduct goes beyond just demonstrating unfairness or injustice. The determination involves a comprehensive evaluation of all circumstances and an assessment of alignment with industry norms and commercial relationships, which are established based on objective facts, devoid of personal notions of morality or what is notionally perceived as 'unfair'.

### **The 'Mind the Gap' case**

In 2016, the Federal Court dismissed the ACCC's case against Woolworths' 'Mind the Gap' scheme for unconscionable conduct.<sup>6</sup> The scheme was intended to reduce a significant half-year gross profit shortfall. Woolworths' category managers and buyers contacted many suppliers to ask for urgent payments ranging from \$4,291 to \$1.4 million.<sup>7</sup> The ACCC alleged that Woolworths' conduct in requesting the Mind the Gap payments was unconscionable.<sup>8</sup> It was alleged that Woolworths sought approximately \$60.2 million in Mind the Gap payments from the suppliers, and ultimately captured approximately \$18.1 million from these suppliers.<sup>9</sup>

Despite the court finding that Woolworths' conduct exerted undue pressure on suppliers, placed financial responsibility on suppliers for events that were not their fault or their responsibility to manage, and was retrospective in its application, this conduct did not fall under the scope of unconscionable conduct. Woolworths defended itself, claiming the scheme aligned with industry norms. The judgement noted the complex trading relationship between Woolworths and its suppliers, which is purportedly always under negotiation and constantly changing depending on circumstances.<sup>10</sup>

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<sup>3</sup> Treasury Australia (2023) Consultation Regulation Impact Statement ('CRIS'), p. 15 – 17.

<sup>4</sup> CRIS, p. 14.

<sup>5</sup> Australian Competition and Consumer Commission, 'Full Federal Court dismisses ACCC appeal against Medibank', (Press release, 20 December 2018); Australian Competition and Consumer Commission, 'Court dismisses appeals against Mazda judgment' (Press release, 23 March 2023).

<sup>6</sup> *ACCC v Woolworths Ltd* [2016] FCA 1472 (8 December 2016).

<sup>7</sup> See: <https://www.accc.gov.au/media-release/woolworths-mind-the-gap-scheme-not-unconscionable>.

<sup>8</sup> See: <https://www.accc.gov.au/media-release/accc-takes-action-against-woolworths-for-alleged-unconscionable-conduct-towards-supermarket-suppliers>.

<sup>9</sup> See above, n 8.

<sup>10</sup> See above, n 7.



While QFF understand that the court's decision was legally sound based on the current application of the prohibition of unconscionable conduct, it does highlight potential gaps in the existing legislation. If a general prohibition of UTPs were in place, Woolworths' conduct under the 'Mind the Gap' scheme might have been deemed unfair and therefore unlawful.

### **The 'status quo'**

It is our understanding that the term 'unconscionable' in its current usage tends to skew in favour of larger businesses within the agri-food supply chain. The stringency and costs associated with challenging the unconscionable conduct test often create an advantage for larger businesses, providing them with a stronger position in negotiations, mediation, and legal proceedings.

QFF is of the view that the prohibition of unconscionable conduct, while relevant, has fallen short in adequately protecting growers and producers from UTP and providing redress for consumers. The high threshold and the prerequisite of dominance, or the high level of 'moral obloquy', make it challenging to prove such conduct. This indicates a need for stronger competition laws.<sup>11</sup>

Similarly, the Preliminary Impact Analysis for Option 1 notes<sup>12</sup>

"the 'continuing costs' for allowing UTPs that are not currently covered by existing laws would mean that consumers and small businesses would bear the financial and non-financial costs as a result of instances of these UTPs, with no effective options for redress."

For these reasons, it is our belief that continuing with the status quo (no change) is an unrealistic option and is seemingly antithetical to the objectives of the ACL. It will only perpetuate existing UTPs and bargaining power imbalances between participants in the agri-food supply chain. This underscores the need for a more balanced and fair approach to address these issues effectively.

### **Introducing a general prohibition on unfair trading practices**

QFF has acknowledged the commendable progress the FGCC has made in enhancing business behaviour within the food and grocery sector. However, it has not been entirely successful in eliminating UTPs for some growers and producers. QFF has noted that many of the issues that initially led to introducing the FGCC still persist, as evidenced by the Independent Reviewer's 2021–22 Annual Report.<sup>13</sup>

For example, suppliers have reported instances of supermarkets cancelling contracts, relegating products to less visible shelf spaces, and delaying payments in response to requests for price

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<sup>11</sup> See: <https://www.gtlaw.com.au/knowledge/fair-shake-prohibiting-unfair-practices-australia>; Felstead, N. (2022). Beyond Unconscionability: Exploring the Case for a New Prohibition on Unfair Conduct. UNSW Law Journal, 45(1).

<sup>12</sup> CRIS, p. 22.

<sup>13</sup> Australian Government, Food and Grocery Code Independent Reviewer, Annual Report 2021-22, available at <https://grocerycodereviewer.gov.au/resources/annual-reports/2021-22-annual-report>, p. 16.

increases or complaints.<sup>14</sup> These instances highlight the ongoing presence of UTPs despite the improvements brought about by the FGCC.

The Horticulture Code of Conduct has also faced similar challenges. Breaches of this code include failure to deal in good faith, trading without a horticulture produce agreement, refusal to attend mediation, and failure to maintain records. These breaches underscore the need for further improvements to ensure fair trading practices within the horticulture sector.<sup>15</sup>

As illustrated above, UTPs in the dairy industry are a significant issue, particularly as the perpetrators are often not based or represented in Australia, making resolution challenging and costly for dairy farmers. These farmers have consistently incurred financial losses due to these practices, with costs ranging from time away from work to resold equipment losses, travel expenses, and legal and accounting fees. Furthermore, the current dairy industry code allows for the misuse of market power by dairy processors or retailers, necessitating an urgent review.

Some instances reported to our member, eastAUSmilk, while not meeting the criteria for unconscionable conduct, are still inherently unfair. Many of these issues remain unresolved for years, as unfair traders often dismiss the farmers' complaints without substantial engagement. The small scale of dairy farming operations compounds these challenges, making it financially and emotionally burdensome for farmers to pursue their rights and discouraging them from effectively addressing these issues.

### **QFF's recommendation**

The proposal to introduce a general prohibition on UTPs could be a significant step towards addressing these issues. This prohibition, designed to target conduct that is 'unfair or likely to be unfair', could more effectively combat practices that are predatory by design or implementation. This would create a comprehensive and standardised approach that can be applied across all agricultural markets, fostering grower and producer confidence and trust. Moreover, this reform would enhance the enforcement and monitoring of UTPs, empowering regulators to take a more proactive role in investigating and penalising businesses engaging in unfair practices.

The proposed reform to the ACL represents a significant step towards replacing the current patchwork of industry-specific codes with a unified and comprehensive system. This system would benefit suppliers, buyers, and regulators alike by simplifying compliance, ensuring consistent protection, and promoting fair competition. Ultimately, this reform would streamline the regulatory landscape and contribute to a more transparent and equitable marketplace in Australia.

### **European Union UTP modelling**

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<sup>14</sup> See: <https://www.abc.net.au/news/rural/2021-12-11/grocery-code-how-the-supermarkets-treat-farmer/100686518>.

<sup>15</sup> See: <https://www.accc.gov.au/business/industry-codes/horticulture-code-of-conduct/horticulture-code-enforcement-and-compliance-checks>.

While QFF acknowledges the value of deriving insights from international jurisdictions' responses to UTPs, such as the EU's UCPD,<sup>16</sup> we believe that the scope of these responses is insufficient. The majority of international responses outlined in Appendix A of the CRIS primarily focus on business-to-consumer commercial practices, which does not adequately address the urgency of the situation for our growers and producers.

Instead, we advise that the Treasury should draw insights from the EU's Directive on UTPs in the agricultural and food supply chain.<sup>17</sup> This directive provides a comprehensive framework for fair trading, addressing critical issues such as late payments, short-notice cancellations, unilateral contract changes, and commercial retaliation by the buyer. In contrast, Australia's current system lacks these fundamental principles.

The EU UTP rules focus on deterring and sanctioning unfair behaviour, addressing the relative bargaining power in supply chains rather than the structural imbalance of power. The directive takes a 'dynamic approach', providing protection to smaller operators only when they face UTPs from larger businesses.<sup>18</sup> This implies that smaller businesses will have protection against buyers from SMEs, and SME suppliers will be safeguarded against mid-range and larger buyers.

Incorporating provisions similar to those in the EU directive into the ACL would significantly enhance its effectiveness in tackling UTPs and the exploitation of imbalances in bargaining power in Australia's agri-food supply chains. Further, drawing insights from the EU Directive could aid Treasury Australia in creating a more robust and fair system, aligning with global best practices, and protecting the most vulnerable participants in the agri-food supply chain.

### **Retaining the statutory prohibition of unconscionable conduct**

As previously mentioned, a large number of our growers and producers have relied on existing competition law within their commercial dealings or contractual arrangements and have relied on the prohibition of unconscionable conduct to challenge unethical practices. Therefore, the statutory prohibition of 'unconscionable conduct' serves as a crucial deterrent against severe unethical behaviour. This high threshold preserves contractual freedom and upholds the principle of caveat emptor, or 'buyer beware'. However, this high bar often means that only the most egregious cases are captured.

To address this gap, a lower threshold, such as the general prohibition of conduct that is inherently unfair, must be introduced. This would capture conduct that undermines fairness and integrity, providing courts with a nuanced tool to address unfair practices that may not meet the high bar of unconscionability but nonetheless warrant legal intervention. Moreover, the 'Mind the gap' scheme underscores the need for a more comprehensive framework to capture a broader range of unfair practices, reinforcing the argument for a lower threshold for inherently unfair conduct.

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<sup>16</sup> CRIS, p. 33.

<sup>17</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on *unfair trading practices in business-to-business relationships in the agricultural and food supply chain*.

<sup>18</sup> See: <https://www.consilium.europa.eu/en/press/press-releases/2019/04/09/tackling-unfair-trading-practices-in-the-agricultural-and-food-supply-chain/>.

Together, these two laws provide a comprehensive legal framework that can effectively address a wide spectrum of unethical business practices. They complement each other, ensuring that both severe and less egregious but nonetheless unfair practices are adequately addressed. This dual approach enhances the overall effectiveness of the legal framework in promoting fair trading practices and protecting vulnerable market participants from exploitation. Therefore, it is crucial that both laws remain in effect to ensure a fair and equitable business environment.

### **Reinforcing the capacity of the ACCC**

The CRIS highlights the immediate and long-term impacts of UTPs, including financial losses. However, a significant impact for growers and producers is the persistent “fear factor,” where the weaker party hesitates to complain due to the risk of termination of the commercial relationship.

This became evident during the ACCC’s ‘Mind the Gap’ case when Rod Sims, the then chairman of the ACCC, stated that the regulator would need to compel suppliers to testify in court for further cases of unconscionable conduct against major companies.<sup>19</sup> Following this, the ACCC did not seek to appeal the decision. This issue is further compounded by confidentiality agreements, or non-disclosure agreements, made subsequent to any successful challenge.

Australia needs legislation that fortifies growers and producers’ faith in the system, which requires anonymity for those who wish to make complaints, enforcement of those complaints, and stricter civil penalties that deter UTPs. Public enforcement mechanisms, including actions by regulatory authorities like the ACCC, and anonymous complaints by market participants, should be integrated into any enforcement framework devised from the current reform. Any prohibition on UTPs should be accompanied by appropriately designed limits, and a nuanced approach to enforcement with education as the key regulatory strategy.

QFF reiterates the integral role of the ACCC and its Agriculture Unit, urging the Federal Government to increase its support to enhance the ACCC’s capacity in overseeing fair commercial dealings for growers and producers within competitive markets.

### **The exploitation of bargaining power imbalances in supply chains**

While market power can be a useful instrument for effective coordination, integration, and goal attainment within supply chain relationships, such that weaker participants in the chain may be predisposed to endure imbalanced relations so long as there are ample rewards, imbalances in bargaining power are prevalent within the agri-food supply chain. This can often result in financial detriment for Queensland’s growers and producers.

The 2015 paper on agricultural collective bargaining best highlights the predicament of Queensland’s and Australia’s growers and producers:

Most farms are small, with some consolidation in sectors like vegetables. These farmers may have a strong bargaining position, but most cannot guarantee the volume and quality that

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<sup>19</sup> See: <https://www.accc.gov.au/media-release/accc-wont-appeal-woolworths-unconscionable-conduct-decision>.

major buyers seek. With few buyers to switch between and the perishable nature of their products, farmers have limited negotiation options and are often price-takers. Their share of the surplus is squeezed due to constant downward pressure on food prices in retail markets.<sup>20</sup>

QFF holds the view that incorporating specific prohibitions of unfair conduct aligns favourably with the ACL's objective of influencing trader conduct in the market. In particular, QFF stresses that the act of "exploiting bargaining power imbalances in supply chain agreements, including by unilaterally varying supply terms at short notice" must be specifically prohibited to guide courts in determining what is inherently unfair in relation to the issue.

### **Concerns raised in the PAG inquiry**

The PAG Inquiry was initiated by the ACCC in August 2020.<sup>21</sup> The inquiry was a three-month investigation into bargaining power imbalances in supply chains for perishable agricultural goods in Australia. The inquiry examined trading practices throughout supply chains, including the relationships between farmers, processors, and retailers, and the extent to which any potential bargaining power imbalances in these relationships adversely impacted the efficient operation of these markets.<sup>22</sup> The inquiry also examined the ability of current laws and regulations to address the harmful effects of bargaining power imbalances.<sup>23</sup>

In terms of concerns relating to a firm in a stronger bargaining position exploiting a firm in a weaker bargaining position, the ACCC argued that the more perishable a product, the weaker the producer's position from which to negotiate favourable terms of supply with the buyers of their goods, making them more vulnerable to take-it-or-leave-it terms from buyers or exploitative conduct.<sup>24</sup> Moreover, hard bargaining between producers and processors removed value from that layer of the supply chain to the ultimate detriment of producers.<sup>25</sup>

This prompted a recommendation to amend the ACL to include a general prohibition of UTPs. This amendment is seen as vital to addressing these problematic practices, protecting consumers and small businesses, supplementing existing protections, and focusing on conduct causing significant financial detriment. The ACCC's concerns in the PAG inquiry covered exploitative conduct, concerns about the nature of competition, and concerns around inefficiencies caused by market failure.

### **QFF's recommendation**

QFF agrees with the statements provided by the option 4 Preliminary Impact Statement in that<sup>26</sup>

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<sup>20</sup> Rural industries Research and Development Corporation (2015) 'Collective Bargaining in the Agricultural Sector', Publication No. 15/055, p. iii.

<sup>21</sup> See: <https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/perishable-agricultural-goods-inquiry-2020>.

<sup>22</sup> See: <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>.

<sup>23</sup> See above, n 20.

<sup>24</sup> See above, n 20.

<sup>25</sup> See: <https://www.accc.gov.au/publications/dairy-inquiry-final-report>.

<sup>26</sup> CRIS, p. 28.

“Consumers and small business would be protected from the widest range of both current and emerging unfair trading practices. It would enable future and evolving unfair trading practices to be captured.”

“A combined prohibition on unfair trading practices may better meet community expectations for protecting consumers and small businesses under the ACL.”

Therefore, prohibiting the exploitation of bargaining power imbalances in supply chain agreements, including the practice of unilaterally varying supply terms at short notice, would not only protect growers and producers from exploitations of market power but also further uphold the ACL’s objective of promoting fair business practices.

This would provide a more effective and nuanced tool for regulators and the courts to address UTPs that may not meet the high threshold of unconscionability but nonetheless warrant legal intervention. This example of an UTP should be specifically prohibited to ensure a fair and balanced agri-food supply chain.

## Conclusion

Our submission provides evidence of industry-specific instances of UTPs and the extent to which bargaining power imbalances can be financially detrimental to Queensland’s growers and producers. It highlights the challenges faced by the dairy and horticulture industries, and the economic vulnerability of growers and producers due to external factors such as global supply disruptions, input cost fluctuations, infrastructure limitations, and the perishable nature of their goods.

QFF advises Treasury Australia to consider supplementing the prohibition on unconscionable conduct with a general prohibition on conduct which is, in all circumstances, unfair. Introducing a general prohibition of UTPs and a specific prohibition against “exploiting power bargaining imbalances in supply chains” would complement the existing high threshold for unconscionable conduct, which serves as a deterrent against the most egregious forms of unethical behaviour in business transactions.

QFF strongly advocates for a revision of the current approach to address existing bargaining power imbalances, the inclusion of a general prohibition on UTPs, and enhanced support for the ACCC’s capacity to oversee fair commercial transactions. These measures, complemented by suitably designed limits and a nuanced approach to enforcement, will ensure a more equitable and competitive market for Queensland’s agri-food supply chains.

Together, these measures would promote fairness and protect vulnerable growers and producers in the agri-food supply chain. This would instil greater certainty and transparency for all market participants and prevent larger businesses from exploiting their market power to the financial detriment of growers and producers.

Yours sincerely

Jo Sheppard  
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**This submission is provided by the Queensland Farmers' Federation**

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