

EXPLANATORY STATEMENT

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes – Dairy) Regulations 2019

Legislative Authority

The *Competition and Consumer Act 2010* (the Act) promotes competition and fair trading.

Section 172 of the *Competition and Consumer Act 2010* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with this Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 51AE of the Act provides that the regulations may prescribe an industry code under the Act. Section 51AE further provides that the regulations may declare the industry code to be a mandatory industry code or a voluntary industry code. Subsection 51AE(2) provides that if the regulations prescribe an industry code, the industry code may prescribe pecuniary penalties not exceeding 300 penalty units for civil penalty provisions of the industry code.

Purpose

Section 2 of the Act provides that the object of the Act is ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. One way it does this is by providing for the establishment of industry codes. An industry code is a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. Industry codes are co-regulatory measures, designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.

The *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (the Regulations) prescribes a Dairy Code of Conduct (the Code), which is a mandatory code. The Code is designed to set enforceable minimum standards of conduct for business practices between dairy farmers and processors of milk (including a retailer where they are the first purchaser of milk). The Code responds to the findings and recommendations from the final report following the Australian Competition and Consumer Commission (ACCC) Dairy Inquiry and the 2017 Senate Economics References Committee Australian Dairy Industry Inquiry.

Background

The Code is a response to market failures that have arisen from the structure of the dairy industry and the terms of contracts offered by processors to farmers, including:

- an imbalance in bargaining power between dairy farmers and processors;
- some standard industry practices deterring farmers from responding to market signals;
- and

- unfairness of some standard industry practices and unreasonable transfer of risk to farmers.

The Code does not regulate the relationship between processors of milk and retailers of milk. This relationship is covered by the voluntary *Competition and Consumer (Industry Codes-Food and Grocery) Regulations 2015*. Nor does the Code regulate the retail pricing arrangements for the sale of dairy products.

Impact and Effect

The Code sets out rules for business transactions between processors and farmers, including those that:

- require parties to deal with each other fairly and in good faith having due regard to the other party's legitimate business interests
- prohibit retrospective price step downs
- prevent unilateral changes to agreements by processors other than:
 - a variation is required to comply with legislative changes affecting the parties, which cannot then result in a change in the minimum price
 - if the variation reduces the minimum price for milk, certain exceptional circumstances exist and the processor satisfies other requirements, including notifying the ACCC and the farmer, who must be allowed to terminate the agreement if they wish to
- require that on 1 June each year processors publicly release a standard form agreement covering the terms of milk supply and a price (or prices) that cover the term of the agreement
- prohibit exclusive supply arrangements between farmers and processors in combination with either two-tier pricing (where the second tier is less) or volumetric limits by processors
- prohibit processors from withholding loyalty payments, howsoever named, to farmers if a farmer switches processors
- introduce a dispute resolution process for matters arising under or in connection with agreements; and
- make civil penalties available for certain provisions imposing obligations on parties to an agreement to allow the ACCC to issue infringement notices, recognising in penalty regimes the respective size of processors and farmers.

The Code contains clear rules to prohibit egregious business practices in the dairy industry, with the flexibility to support ongoing reform, innovation and diverse business models, as well as to allow farmers and processors to negotiate contractual terms that suit their individual circumstances and business models.

Consultation

The Department of Agriculture (the department) undertook extensive consultation on the Code with farmers, processors and industry groups over three separate periods of consultation (in November 2018, January – February 2019, and October – November 2019). The third round of consultation ran from 28 October 2019 until 22 November 2019 and included consultation on an exposure draft of the Code. Industry stakeholders were invited to comment on the exposure draft through a public submissions process, a tele-town hall and

teleconferences with industry members. Refinements to the Code were made following feedback received through consultation.

The department also consulted with government agencies including: the Department of the Prime Minister and Cabinet; the Treasury; and the ACCC. A Regulatory Impact Statement (RIS) was completed (Office of Best Practice Regulation ID: 24428).

Details / Operation

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 1 January 2020.

Other

The Regulations are compatible with the human rights and freedoms recognised or declared under Section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Details of the *Competition and Consumer (Industry Codes – Dairy) Regulations 2019*

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Competition and Consumer (Industry Codes–Dairy) Regulations 2019*.

Section 2 – Commencement

This section provides for the Regulations to commence on 1 January 2020.

Section 3 – Authority

This section provides that the instrument is made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Simplified outline of this instrument

This section provides a high level summary of the requirements under the Code.

Section 5 – Definitions

This section sets out the definitions of terms used throughout the Code.

For example, the definition of **farmer** is a person that produces, or that may produce, milk. This definition extends to persons in share farming arrangements.

The definition of **milk** is unprocessed milk within the meaning of the *Dairy Produce Act 1986* (the Dairy Produce Act). The Dairy Produce Act defines **milk** as the lacteal fluid product of the dairy cow.

The definition of **Processor** is a corporation that purchases, or that may purchase, milk from farmers, whether or not the corporation processes the milk. The definition is intended to cover first purchasers of milk and will extend to cooperatives, brokers and retailers where they are the first purchasers of milk.

Section 6 – Reviews

This section requires the Agriculture Minister to ensure two reviews are undertaken on the role, impact and operation of the Regulations. The first review must be commenced on or after 1 January 2021, and the second review must be commenced on or after 1 January 2023. Among other stakeholders, these reviews must include consultation with stakeholders in the dairy industry, government stakeholders such as the ACCC, and must also include consultation with consumer representatives to bring a broader perspective to the review.

The first review must specifically consider the role, impact and operation of the Code in relation to milk supply agreements entered into before 1 January 2020.

The Agriculture Minister must cause a written report of each review to be prepared and a copy given to the Treasurer, or whomever is administering section 51AE of the Act, on or before 31 December of the year the review commenced.

The reviews are intended to provide insight into the role, impacts and operation of the Code since it commenced and determine whether any amendments need to be made.

Part 2 – Dairy industry code

Division 1 – Introduction

Section 7 – Mandatory industry code in Division 2

This section provides that for the purposes of section 51AE of the Act, the industry code set out in Division 2 of Part 2 is prescribed for the purposes of Part IVB of the Act, and is declared to be a mandatory industry code. The effect of this is to replace the existing voluntary dairy industry code of practice.

Section 8 – Exception for processors that are small business entities

This section provides that certain requirements of the Code (such as the requirement to publish standard forms of agreements and the requirement to have milk supply agreements) do not apply to a processor in a financial year in circumstances where the processor is a small business entity for that financial year. Small business entities are still required to comply with the requirement in section 11 to deal in good faith.

A **small business entity** is defined in section 5 of the proposed Regulations. A processor is a **small business entity** for a financial year if the person is a small business entity within the meaning of the *Income Tax Assessment Act 1997* for the income year corresponding to the financial year (that is, with less than \$10 million turnover or otherwise defined by the *Income Tax Assessment Act 1997*).

The exception for processors that are small business entities is consistent with government policy about regulation of small business and recognises that the disparity of bargaining power between farmers and small business processors is less disproportionate than the disparity between farmers and large processors.

If a milk supply agreement is extended at a particular time, the exceptions for processors that are small business entities will also apply as if the extended agreement were a new agreement being entered into at that particular time. This has the effect of not allowing for agreements that are excepted from the requirements of the Code to be extended without complying with the Code when a processor is no longer eligible for the exception.

Section 9 – Obligations of farmers

This provision provides the legislative basis for the provisions in the Code which impose obligations on farmers to be enforceable.

Section 10 – Interaction with Food and Grocery Code of Conduct

This section provides that the Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2015 (the Food and Grocery Code) does not apply to the extent that it conflicts with Division 2 of this Part.

The Food and Grocery Code is a voluntary code that regulates the interactions between retailers and wholesalers who have signed on to that Code have with their suppliers. In some instances dairy farmers engage directly with retailers and will potentially be regulated by two separate codes. This Section provides that in that instance the mandatory Dairy Code of Conduct would apply and take precedence over the requirements of the voluntary Food and Grocery Code to the extent that they conflict.

Division 2 – Dairy industry code

Subdivision A – Processors and farmers must deal in good faith

Section 11 – Obligation to deal in good faith

This section provides that processors and farmers must deal with one another in good faith within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk. This includes in relation to negotiating or entering into a milk supply agreement, exercising rights, or performing obligations, under a milk supply agreement, dealing with or resolving complaints or disputes arising under or in connection with a milk supply agreement, and in varying or terminating a milk supply agreement.

Many of the interactions that occur as part of a business relationship between a processor and farmer occur beyond what is solely recorded in an agreement or are covered explicitly by the Code. As such, it is appropriate that the business relationship and dealings between farmers and processors should be measured by a broader principle such as good faith.

The section also provides guidance on what may be taken into account in determining whether the parties have acted in good faith in dealing with each other, including, for example, whether a party has acted honestly, whether the relationship has been conducted without duress and in recognition of the need for certainty regarding the risks and costs of supplying or purchasing milk.

Civil penalties are applicable for breaches of this Section. The civil penalty is 300 penalty units for processors or 100 penalty units for farmers and for processors who are small business entities (within the meaning of Section 5).

Subdivision B – Processors must publish standard forms of milk supply agreements

Section 12 – Requirement to publish standard forms of agreements each 1 June

This section requires that by 2pm by legal time in the Australian Capital Territory (ACT) on 1 June in a financial year corporations that are processors and intend to purchase milk during the next financial year publish one or more standard forms of milk supply agreement (SFA) that the processor is willing to enter into, on their website. The requirement that this be done

by 2pm ACT time effectively means by 2pm Australian Eastern Standard Time. To be clear, the intention is that processors' SFAs are available publicly.

Requiring processors to publish one or more SFAs on a set date each year improves the farmers' ability to compare prices and conditions across processors.

The published SFA or SFAs must be accompanied by a statement of the circumstances in which the processor would be willing to enter into a milk supply agreement in that form. For example, a circumstance could be that the SFA is for the supply of a certain volume of milk in a certain location or to cover a certain time period. This allows the published SFA(s) to account for regional pricing.

If the processor has no intention to negotiate on a published SFA then this must be outlined in the statement of circumstances.

A civil penalty of 300 penalty units for processors will apply to processors for a failure to comply with this requirement.

The processor must publish as many standard forms and statements as are necessary to ensure that the published statements cover every circumstance in which the processor intends to purchase milk in the financial year.

The published SFA(s) must have a supply period starting during the financial year and provide for a cooling-off period and subject to subsection 12(5) be a non-exclusive supply agreement.

Under section 23 of the Regulations, a *cooling-off period* is a period that:

- where an agreement is in writing – starts on the day the agreement was entered into and ends 14 days later;
- where an agreement is not in writing – starts on the day the (verbal) agreement was entered into and ends 14 days after the day the processor gave the farmer a written copy of the agreement.

The farmer may terminate the agreement during a cooling-off period with immediate effect without incurring any liability to the processor.

If a processor would enter into an exclusive supply agreement, subject to sections 31 and 32, then it must also publish a standard form of an exclusive supply agreement that the processor would enter into in those particular circumstances, and a standard form of a non-exclusive supply agreement the processor would enter into in those particular circumstances.

The processor must not remove or amend the SFA(s) published before the end of financial year starting at the publication deadline. A civil penalty of 300 penalty units applies to a processor who takes such action. However, the processor may publish SFAs at any other time in addition to the SFA(s) they must publish by 1 June each year.

Where a processor has met its requirements to source milk, such as reaching production capacity, it may place a new SFA on its website, noting the new conditions that the SFA is offering and that the prior SFA is no longer available as the previous conditions (that being available capacity) no longer exist. In this case, the new SFA may include a new price (with

pricing justification consistent with section 14) and new conditions noting that the processor would be willing to accept milk if capacity otherwise became available.

Section 13 – Published standard forms of agreements must comply with Code

This section requires that all published SFAs (whether or not as required by section 12) must comply with the Code.

Price related requirements for SFAs and other types of milk supply agreements are the same, and these minimum price requirements are set out in section 26 of the Code.

A civil penalty of 300 penalty units will apply to processors for breaches of this Section.

Section 14 – Published standard forms of agreements must include statements of justifications for minimum prices

This section provides that a processor must publish a statement justifying the prices offered in each standard form of a milk supply agreement that it publishes on its website.

This justification may include the factors that lead to the consideration of the prices offered but does not need to include commercial-in-confidence material such as algorithms of the specific level of weighting factors such as a currency's hedged value that may contribute to generate the offered price.

A civil penalty of 300 penalty units will apply to processors for breaches of this section.

Section 15 – Published standard forms must be genuine

This section provides that if a processor publishes a SFA on its website which provides that the processor would enter into a milk supply agreement in that form in specified circumstances, and while the SFA remains on the website and a farmer offers to enter into a milk supply agreement in that standard form and the specified circumstances exist, the processor must enter into the SFA in that form, otherwise the processor contravenes subsection 15(1).

A civil penalty of 300 penalty units will apply to processors for breaches of subsection 15(1).

Subdivision B does not prevent a processor entering into to a milk supply agreement that is not in the standard form published on the processor's website. For example, there is flexibility to negotiate terms on the basis of a different milk supply agreement, provided that it complies with the Code as required by section 17.

Subdivision C – Requirements for milk supply agreements

Section 16 – Requirement to have milk supply agreements

This section provides that milk must not be purchased from a farmer other than under a milk supply agreement.

A civil penalty of 300 penalty units applies for breaches of this Section.

Section 17 – Requirement for milk supply agreements to comply with Code

This section specifies that a processor must not enter into a milk supply agreement that does not comply with the Code. Subsection 17(2) provides that supply agreements must also not be unilaterally varied by the processor, or by the farmer and processor agreeing together to vary the agreement, if the variation then means that the agreement does not comply with this Code.

Under subsection 17(3), a farmer that is a party to a milk supply agreement must not unilaterally vary the agreement in circumstances where the agreement does not comply with the Code following the variation.

A civil penalty of 300 penalty units applies to processors for a contravention of subsection 17(2) and 100 penalty units to farmers for a contravention of subsection 17(3).

Section 18 – Written records of unwritten milk supply agreements

This section requires that the processor must make a written record of a verbal, or otherwise unwritten, milk supply agreement and provide a copy of the written record to the farmer no later than 30 calendar days after entering into a verbal milk supply agreement. If the supply agreement is for 90 days or longer, the processor must make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is a complete and accurate record of the contents of the verbal milk supply agreement.

The requirement to have written records of milk supply agreements will address issues in the industry where some farmers often do not have written milk supply agreements. Written milk supply agreements are intended to provide contractual certainty and protection to farmers and processors. They also improve business literacy and transparency around the terms and conditions being applied to the supply of milk.

The written record must record all matters that are required to be in a milk supply agreement in Subdivision D and subsections 43(1) and (3).

The written record must consist of a single document and be in plain English or contain a plain English overview of the agreement.

A processor also contravenes this section if they unilaterally vary the milk supply agreement (or all parties agree to vary the agreement), the variation is in writing and changes the minimum price under the agreement.

A civil penalty of 300 penalty units applies to processors for breaches of this Section.

Section 19 – Written records of unwritten variations of milk supply agreements

This section requires that where a verbal, or otherwise unwritten, variation is made to a milk supply agreement, the processor must, no later than 30 days after the variation is made, make a written record of the variation and give a copy of it to the farmer. If the supply period of the agreement is for 90 days or longer, the processor must make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is complete and accurate record of the verbal variation to the milk supply agreement.

Requiring written records of unwritten variations of milk supply agreements is intended to formalise verbal variations and provide contractual certainty and protection to farmers and processors.

Additional requirements regarding unilateral variations are covered in more detail in section 33.

The written record must consist of a single document and be in plain English or contain a plain English overview of the variation.

A civil penalty of 300 penalty units applies to processors for breaches of this section.

Section 20 – Written records of unwritten terminations of milk supply agreements

This section requires that where a milk supply agreement is terminated and the termination is not in writing, the processor must, no later than 30 days after the termination, make a written record of the termination and give a copy of it to the farmer. If the supply agreement is for 90 days or longer, the processor must make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is a complete and accurate record of the verbal termination of the milk supply agreement.

Requiring written records of unwritten terminations of milk supply agreements is intended to formalise verbal terminations and provide contractual certainty and protection to farmers.

Additional requirements regarding unilateral terminations of milk supply agreements are also covered in more detail in section 34.

A civil penalty of 300 penalty units applies to processors for breaches of this section.

Subdivision D – Contents of milk supply agreements

Section 21 – Purpose of this Subdivision

This section sets out the purposes of Subdivision D of the Code, which sets out the requirements for a milk supply agreement between a processor and a farmer.

Section 22 – Written milk supply agreements

Where the milk supply agreement is in writing, this section requires that the agreement must consist of a single document, and either be in plain English or contain a plain English overview of the agreement.

The requirement for a milk supply agreement to consist of a single document prevents other documents which are considered to be part of the agreement, such as handbooks, from being able to be changed unilaterally and provides processors and farmers with certainty regarding the contents of the agreements.

Section 23 – Cooling-off period

Under section 23 of the Regulations, a *cooling-off period* is a period that:

- where an agreement is in writing – starts on the day the agreement was entered into and ends 14 days later;
- where an agreement is not in writing – starts on the day the (verbal) agreement was entered into and ends 14 days after the day the processor gave the farmer a written copy of the agreement.

The farmer may terminate the agreement during a cooling-off period with immediate effect without incurring any liability to the processor. Note that the supply period of the milk supply agreement may begin at any time as agreed by the parties.

The cooling-off period allows the farmer to terminate the agreement during the cooling-off period with immediate effect without penalty or liability to the processor.

Section 24 – Supply periods

This section requires that milk supply agreements specify the first and last days that milk is to be supplied under the agreement. To avoid doubt, the agreement must identify the last day as a particular calendar date (for example, 30 June 2023).

Subsection 24(3) includes an exemption for the requirement to have end dates in milk supply agreements if the processor is a cooperative and the farmer is a member of the cooperative. This allows cooperatives to continue their membership arrangements where farmers continue to have their milk collected by a processor regardless of whether there is a milk supply agreement in place and which already provides farmers with the certainty which the requirement to have an end date was designed to ensure.

Section 25 – Quality and quantity of milk

This section sets out requirements for the quality and quantity of milk supplied under a milk supply agreement that must be included in such an agreement.

Milk supply agreements must specify any quantity or quality requirements the processor has for the supply of milk. This could include, for example, quality and quantity requirements such as milk solids, temperature, bulk milk cell count (BMCC). These quantity and quality requirements may be negotiated between the farmer and processor prior to entering into a milk supply agreement.

The section also requires the milk supply agreement to specify the sampling procedures and volume accuracy assurances that the processor may use in relation to the milk, that the processor provide the farmer written notice of the results of the test, and specify the actions that the processor may take if the milk does not meet the quality and quantity requirements specified in the milk supply agreement, including the circumstances in which the processor may reject the milk.

The milk supply agreement must also specify that if the processor rejects the milk the processor must give the farmer written notice stating the reasons for the rejection and the consequences for the farmer of the rejection.

The milk supply agreement must also require a processor to give the farmer at specified times written statements about the milk and specify information to be included in those statements. This includes information related to the milk's characteristics such as the somatic cell count on each relevant collection.

Section 26 – Minimum Price

This section requires that a milk supply agreement must specify the minimum price or prices to be paid for milk supplied in accordance with the agreement for the whole supply period, or a schedule of yearly minimum prices or a schedule of monthly minimum prices.

For example, if a milk supply agreement is not a whole number of years e.g. an agreement is for 2.5 years, the agreement may specify a schedule of yearly minimum prices and the price specified in the third year would apply to the .5 years of the supply period occurring in that year. To be clear, the minimum price is to be explicit to the farmer throughout the milk supply period of the milk supply agreement.

Under section 5, the *minimum price* under a milk supply agreement, for a period, means the lowest price a farmer would be paid for the supply of milk under the agreement for milk supplied during the period, disregarding loyalty payments, any possibility of a temporary reduction in price in accordance with section 28 and any fees payable by the farmer under the agreement.

Section 27 – Minimum price – retrospective step downs prohibited in all circumstances

This section specifies that milk supply agreements must not allow retrospective step downs. The section defines a *retrospective step down* as a variation of the milk supply agreement that reduces the minimum price for milk supplied under the agreement before the variation occurs.

Section 28 – Minimum price – unilateral prospective step downs prohibited except in limited exceptional circumstances

This section specifies that a unilateral prospective step down by the processor can only occur in limited exceptional circumstances involving an extraordinary event (such as an emergency or change in market conditions). Exceptional circumstances are limited to circumstances which are temporary and must involve an extraordinary event which is the result of causes located outside of Australia, has a highly significant effect on supply, demand or costs in the dairy industry and is not a result of decisions by processors.

This section means that in the event of, for example, an extreme emergency event that occurs outside of Australia, the domestic dairy industry processors could use a unilateral prospective step down as a 'release valve' in order to ensure the ongoing viability of the commercial relationship between processors and farmers. Exceptional circumstances do not include those that arise as a result of a processor's actions. It is not intended that a prospective step down would be a common event, rather that it would apply to rare occurrences such as 'trade shocks' and allow a processor and its farmers to absorb a temporary prospective adjustment of prices within the season.

This section requires the processor to provide the farmer and the Australian Competition and Consumer Commission (ACCC) with written notice no later than 30 days before the

stepdown is to take place. The written notice must outline the proposed stepdown, the exceptional circumstances, and the reasonable steps the processor has taken or will take to limit the impact of the step down on the processor, why the unilateral step down is unavoidable and the period to which the stepdown applies.

The ACCC can investigate a processor that unilaterally lowers a price other than as provided for in the agreement in accordance with this section using any relevant powers under the Act.

All milk supply agreements must allow the farmer to terminate the agreement within 21 calendar days after receiving written notice of the proposed unilateral stepdown, which commences from the day the stepdown takes effect, and allow the farmer to rescind a termination before the end of those 21 days. Where the farmer rescinds their termination notice, the processor cannot lower the new minimum price further. The farmer is also able to terminate the agreement with earlier effect than the end of the 21 days.

Section 29 – Fees for services

This section requires the milk supply agreement to specify the services (if any) the processor may or must perform for the farmer in relation to the milk supplied under the agreement, state whether the farmer is required to pay any fees for the services, and, if fees are payable, clearly specify the amounts of the fees for the first 12 months of the supply period of the agreement (or for the whole of the supply period, if that period is less than 12 months, in accordance with subsection 29(3)).

This is to ensure that farmers are provided with transparency regarding the fees being charged for those services.

If fees are payable and the supply period is for more than 12 months, the milk supply agreement must:

- specify how the fees for periods occurring after the first year will be set; and
- for each consecutive period of 12 months after the first year (including any extension of the supply period if allowed by the agreement and any final period, if the supply period does not consist of a whole number of 12 month periods):
 - require the processor to give to the farmer a written notice clearly specifying the fees for that period; and
 - specify the time by which the notice must be given.

The section further requires that the milk supply agreement must specify the fees for a service for a period by specifying either a single fee for a service that applies for that period, or a schedule of monthly fees for that period.

Section 30 – Transfer of ownership

The section requires that the milk supply agreement must specify when the processor becomes the owner of milk supplied under the agreement.

This is to give farmers flexibility to utilise new or emerging trading or marketing arrangements that may rely on specificity of milk ownership.

Section 31 – Combining exclusive supply and a maximum volume prohibited

This section requires that a milk supply agreement must not provide for both exclusive supply and a maximum volume. To be clear, if the milk supply agreement is an exclusive supply agreement and the agreement specifies a maximum amount of milk that the farmer may supply to the processor under the agreement during a period, the milk supply agreement will not be compliant with the Code.

This situation may occur where the farmer is prevented from supplying another processor milk in excess of the volume specified in the milk supply agreement, and if under the agreement the processor will only accept a maximum volume of milk.

Section 32 – Combining exclusive supply and tier pricing prohibited

This section requires that a milk supply agreement must not provide for both exclusive supply and tier pricing.

To be clear, if the milk supply agreement is an exclusive supply agreement and under the agreement, the minimum price payable for a specified amount of milk supplied during a period is greater than the minimum price for milk supplied in excess of that amount, the milk supply agreement will not be compliant with the Code.

This situation may occur where the farmer is prevented from supplying another processor milk in excess of the volume specified in the milk supply agreement, and if under the agreement milk supplied in excess of the volume specified in the agreement has a lower price than the minimum price.

Section 33 – Varying milk supply agreements unilaterally

This section requires the milk supply agreement to specify the circumstances (if any) in which the farmer may unilaterally vary the agreement. The Code does not restrict the types of circumstances under which a farmer may unilaterally vary the milk supply agreement, as long as those circumstances were previously specified within the milk supply agreement and following the variation, the agreement continues to comply with the Code.

This section further requires that milk supply agreements specify that milk supply agreements can only be unilaterally varied by processors in circumstances involving a change in Commonwealth, State or Territory law and only to the extent necessary to enable processor to comply with the changed law, but prohibits the variation resulting in a reduction of a minimum price under the agreement.

The agreement is not permitted to be varied to allow a retrospective step down.

This ensures the milk supply agreement does not prevent the processor from complying with other laws, which may change during the period of the milk supply agreement. For example, such changes as those made to domestic food and safety or work health and safety legislation.

This section also prevents processors unilaterally varying the milk supply agreement and creates certainty for farmers as to which of the milk supply agreement conditions will be applied within a contracting period.

The section requires the party to the milk supply agreement that makes the unilateral variation to give the other party written notice as soon as practicable of the variation, the reason for the variation and the day the variation takes effect.

Section 34 – Terminating milk supply agreements unilaterally

This section provides that the milk supply agreement must set out the circumstances (if any) in which the agreement may be unilaterally terminated by the processor and by the farmer, and processes for unilateral termination.

The circumstances must involve a material breach of the milk supply agreement by the farmer, if the processor is seeking to terminate the agreement.

The milk supply agreement must specify the processes by which the agreement may be unilaterally terminated and require the party terminating the agreement to give the other party, as soon as practicable after the termination, notice of the termination, the reason for the termination and the day the termination takes effect.

Section 35 – Loyalty payments

This section requires that milk supply agreements must not impose on a loyalty payment (if any) a condition that the farmer supply milk to the processor after the agreement has ended, that the farmer agree to extend the agreement or that the farmer enter into a new milk supply agreement with the processor in order to receive their loyalty payment.

The definition of *loyalty payment* means an amount payable to the farmer under a milk supply agreement between a processor and a farmer because the agreement is not terminated before the end of the supply period. This definition extends to payments of this kind whether or not they are referred to as loyalty payments in the agreement and whether or not they are subject to other conditions.

This section ensures that where farmers were entitled to a payment under their milk supply agreement that was dependent on them completing the agreement, they will still be entitled to a portion of it even if they switch processors, provided all of the conditions have been satisfied. It is intended to cover payments for milk already supplied under an agreement, and is intended to cover payments under the agreement if they are conditional on the farmer having supplied milk the previous season.

The milk supply agreement must also provide that, if the agreement is terminated before the end of the supply period, the farmer is entitled to a pro rata payment of the loyalty payment based on the proportion of time milk was supplied under the agreement (except in circumstances where the agreement has been terminated due to a material breach of the agreement by the farmer).

Section 36 – Extensions

This section provides that any milk supply agreement that is longer than 3 years must allow the farmer to extend that agreement by a single 12 month period. The milk supply agreement is not required to allow the farmer to postpone the end of the supply period more than once.

This provision ensures that farmers in markets with longer term milk supply agreements and less competition, such as in Western Australia or far northern Queensland, are provided with sufficient time to find a new processor or manage the transition of their business.

Subdivision E – Other matters relating to milk supply agreements

Section 37 – Other terms

This section allows milk supply agreements to include terms in addition to those required by the Code as agreed between the processor and farmer provided that any such additional terms are not inconsistent with the Code and are otherwise lawful. To avoid doubt, any other terms must not be inconsistent with the Code and be arrived at through conduct that meets the good faith requirement in section 11 of the Code.

Section 38 – Emerging trading and marketing arrangements

This section provides that to avoid doubt, the use of a particular type of trading or marketing arrangement by a farmer does not contravene this Code merely because that type of arrangement is new, emerging or not widely used in the industry.

The section makes it clear that farmers can otherwise still take advantage of alternative trading or marketing arrangements without contravening the Code.

For example, the section has the effect that a farmer engaging in alternative trading or marketing arrangements, such as a new and innovative way of doing business, would not, of itself, breach the obligation to deal in good faith. The obligation to deal in good faith continues to apply in accordance with the Code.

Section 39 – Penalties for retrospective step downs

This section provides for a civil penalty of 300 penalty units to be imposed on a processor in circumstances where a milk supply agreement allows for a retrospective stepdown of a minimum price payable under the agreement.

Section 40 – Penalties relating to unilateral variations and terminations

This section provides for a civil penalty of 300 penalty units to be imposed on a processor in circumstances where the processor unilaterally varies the agreement, or all parties agree to vary the agreement, the variation is in writing and is not in plain English or does not contain a plain English overview of the variation, and does not consist of a single document.

This section provides for a civil penalty of 100 penalty units to be imposed on a farmer who is a party to a milk supply agreement and who unilaterally varies the agreement in writing, where:

- the variation is not in plain English (or does not contain a plain English overview of the variation); and
- does not consist of a single document.

The section imposes a civil penalty on a processor of 300 penalty units who varies or terminates the agreement unilaterally other than as provided for by the agreement. The section

imposes a civil penalty on a farmer of 100 penalty units who varies or terminates the agreement unilaterally other than as provided for by the agreement.

Section 41 – Application of termination of agreement

This section provides that to avoid doubt, if a decision is made to terminate a milk supply agreement (including in accordance with provision for a cooling-off period) or as a result of a unilateral prospective price step down the agreement continues to apply to milk supplied under the agreement before the termination takes effect.

Section 42 – Penalties for withholding loyalty payments

This section imposes a civil penalty on a processor in circumstances where the agreement is terminated before the end of the agreement's supply period and the processor does not pay a pro rata payment of the loyalty payment based on the proportion of the supply period completed before the termination.

An exception applies in circumstances where the milk supply agreement is terminated in circumstances involving a material breach of the agreement by the farmer.

Subdivision F – Complaints and disputes

The function of the proposed dispute resolution process is to provide clear and industry-preferred pathways for lower cost dispute resolution (negotiation, mediation) rather than immediate escalation to the courts.

The Code intends for the dispute resolution process to support farmers or processors to address contractual issues that may arise, such as when either party has breached agreed terms.

The Code does not affect the right of a party to an agreement to bring legal proceedings, whether under the agreement or otherwise, or to submit a complaint to the ACCC.

Section 43 – Milk supply agreement must provide for complaint handling procedure and mediation and may provide for arbitration

This section provides that milk supply agreements must have a complaint handling procedure, and for processors who are parties to a milk supply agreement, an internal complaint handling officer. The section also provides that milk supply agreements must provide for mediation as a means for resolving disputes between parties to the agreement.

A milk supply agreement may provide for arbitration as a means for resolving disputes between parties to the agreement.

Section 44 – Mediation adviser and mediators

This section provides that the Agriculture Minister must appoint a mediation adviser for the purposes of Subdivision F of Division 2 of Part 2 of the Code. The mediation adviser must compile a list of persons who are to be mediators for the purposes of the Subdivision.

Section 45 – Arbitration adviser and arbitrators

This section provides that the Agriculture Minister must appoint an arbitration adviser for the purposes of Subdivision F of Division 2 of Part 2 of the Code. The arbitration adviser must compile a list of persons who are to be arbitrators for the purposes of the Subdivision.

Section 46 – Resolving complaints and disputes – general

This section allows for complaints or disputes in relation to a milk supply agreement to be dealt with or resolved either in accordance with the complaint handling procedure provided for in the agreement, or by mediation or by arbitration.

Arbitration will only be available where the milk supply agreement provides for arbitration or when the parties to the agreement have agreed in another written document to use arbitration to resolve the matter (that is, on a consensual basis).

If the matter concerns termination of a milk supply agreement, a party to the milk supply agreement includes a person who was a party to the agreement before it was terminated.

The dispute resolution procedures are intended to apply in relation to parties to a milk supply agreement and not to parties prior to entering into a milk supply agreement (for example, during the negotiation of a milk supply agreement).

Section 47 – Dealing with complaints in accordance with internal complaint handling procedure

This section sets out requirements for how an internal complaint handling procedure under a milk supply agreement should be conducted, including how a complaint may later be handled by mediation or arbitration.

Section 48 – Mediation

This section sets out procedures for how mediation should be conducted under the Code if a party to a milk supply agreement wishes to have a dispute resolved by that method.

The section sets out the procedures concerning the appointment of a mediator and the conduct of the mediation. The section also requires the parties to the dispute to attend the mediation and the mediator to give notice of a successful mediation (where applicable). This is to give transparency and certainty for the parties to the mediation.

Section 49 – Termination of mediation

This section sets out procedure relating to the termination of a mediation under the Code. A mediation may be terminated in circumstances where the mediator is satisfied that resolution of the dispute is unlikely to occur, or at the request of the party who requested the mediation.

Section 50 – Costs of mediation

This section requires that parties to a dispute which was the subject of mediation pay half the costs of the mediation (being all reasonable costs associated with the conduct of the mediation) unless the parties agree otherwise.

Each party must also bear their own costs of attending the mediation, unless the parties agree otherwise.

Section 51 – Arbitration

This section sets out procedures for how arbitration should be conducted if the parties to a milk supply agreement agree, in writing, to have the dispute resolved by arbitration.

The section sets out the procedures concerning the appointment of an arbitrator and the conduct of the arbitration. The section also requires all parties to attend the arbitration and the arbitrator to give notice of a successful arbitration (where applicable). This is to give transparency and certainty to parties to a dispute who have agreed to have the dispute resolved by arbitration.

Section 52 – Termination of arbitration

This section sets out the procedure relating to the termination of an arbitration. The arbitrator must terminate the arbitration in accordance with this section if the complainant requests the arbitrator to do so.

Section 53 – Costs of arbitration

This section requires that parties to a dispute which was the subject of arbitration pay half the costs of the arbitration (being all reasonable costs associated with the conduct of the arbitration) unless the parties agree otherwise.

Each party must also bear their own costs of attending the arbitration, unless the parties agree otherwise.

Section 54 – Confidentiality requirements

This section requires that parties to a complaint or dispute about a matter arising under or in connection with a milk supply agreement must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving the complaint or dispute.

Subdivision G – Records and reporting

Section 55 – Record-keeping requirements

This section provides that for milk supply agreements, processors and farmers must keep specified records relating to agreements, variations and terminations. The records must be kept for the period starting on the day on which the record is made or given, and ending on the last day of 6 years beginning on the day the agreement ends.

A civil penalty of 300 penalty units applies to processors and 100 penalty units for farmers for breaches of this Section.

Section 56 – Report on disputes

This section requires a processor who is a party to a milk supply agreement to prepare a report for the first reporting period (1 January 2020 – 30 April 2020) and for each later reporting period (the 12 months beginning on 1 May in a year) setting out information regarding that processor's dispute settlement statistics. The report is to be published on the processor's website by 2pm on 1 June (Australian Capital Territory time), which is the same deadline for the processor to publish SFA(s). Information about the nature and outcome of disputes should also be such as not to identify any parties to the dispute other than the processor. The processors should advise whether or not a matter has resolved, but do not have to disclose confidential terms of the resolution, such as the amount of financial payments made from one party to the other. To be clear, the intention is that a processor's report on disputes is available publicly.

A civil penalty of 300 penalty units applies to processors for breaches of this Section.

Part 3 – Application and transitional provisions

Division 1 – Application of this instrument

Section 57 – Milk supply agreements entered into before 1 January 2020

This section provides for a transition period of 12 months for which all milk supply agreements entered into before 1 January 2020 must be compliant with the Code.

The good faith requirements in Subdivision A of Division 2 of Part 2 do not apply in relation to anything done under the milk supply agreement during the transition period (that is, to anything done under a milk supply agreement entered into before commencement of the Code on 1 January 2020).

Requirements of the Code in Subdivisions C to G of Division 2 of Part 2 (other than the requirement in section 16 that processors must not purchase milk unless under a milk supply agreement) do not apply in relation to a milk supply agreement during the transition period (that is, to a milk supply agreement entered into before commencement of the Code on 1 January 2020).

The Section also imposes a civil penalty of 300 penalty units for processors if after the transition period the milk supply agreement entered into before 1 January 2020 does not comply with the Code.

Section 58 – No acquisition of property otherwise than on just terms

This Section provides that to the extent that the application of the instrument will amount to an acquisition of property from a person otherwise than on just terms the Code does not apply.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Codes - Dairy) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The objective of the *Competition and Consumer Act 2010* (the Act) is ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. One way it does this is by providing for the establishment of industry codes. An industry code is a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. Industry codes are co-regulatory measures, designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.

The *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (the Regulations) prescribes a Dairy Code of Conduct (the Code), which is a mandatory code. The Code is designed to set enforceable minimum standards of conduct for business practices between dairy farmers and processors of milk (including a retailer where they are the first purchaser of milk). The Code responds to the findings and recommendations from the final report following the Australian Competition and Consumer Commission (ACCC) Dairy Inquiry and the 2017 Senate Economics References Committee Australian Dairy Industry Inquiry.

Human rights implications

This Legislative Instrument may engage the following rights:

- Right to the enjoyment of just and favourable conditions of work in article 7 of the International Covenant on Economic Social and Cultural Rights
- Right to equality and non-discrimination in articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR)
- Right to an effective remedy in article 2(3) of the ICCPR
- Right to freedom of opinion and expression in article 19(2) of the ICCPR
- Right to privacy and reputation in article 17 of the ICCPR; and
- Right to presumption of innocence in article 14(2) of the ICCPR.

Right to enjoyment of just and favourable conditions of work

Article 7 of the International Covenant on Economic, Social and Cultural Rights provides for the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, a decent living for themselves and their families in accordance with the provision of the present covenant. The Code promotes this right for farmers by, among other things, ensuring that they receive a fair price for their milk from processors and limiting the opportunities for processors to engage in oppressive conduct towards farmers in the context of that commercial relationship.

Right to equality and non-discrimination

Articles 2(1) and 26 of the ICCPR provide that all individuals are equal before the law and entitled to the protection of the law. The law prohibits any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Code provides exceptions for processors that are small business entities from certain requirements of the Code which means it may discriminate on the basis of other status. This approach recognises that small businesses may not have the resources to be compliant with the Code. Processors that are small business entities will be required to comply with the requirement to act in good faith under the Code.

Right to an effective remedy

Article 2(3) of the ICCPR provides that all persons whose rights or freedoms are violated shall have an effective remedy and that a competent authority shall determine and enforce that remedy.

The Code regulates the conduct between dairy farmers and processors which may engage the right to an effective remedy. Non-compliance with certain provisions of the Code on the part of both processors and farmers will attract civil penalties and the Code provides for mediation and arbitration of disputes.

These measures do not limit the rights of farmers and processors who are subject to the Code from seeking effective remedies from the courts. Nor do they prevent farmers and processors from pursuing any other remedies against one another where necessary and appropriate.

Rather, the measures provide additional protections for both farmers and processors, by setting enforceable minimum standards of conduct expected of farmers and processors, and procedures for dispute resolution. This addresses a recommendation from the Australian Competition and Consumer Commission's (ACCC) 2018 Dairy Inquiry to establish a process for independent mediation and arbitration between processors and farmers.

Therefore, although the instrument may engage the right to an effective remedy, the instrument does not affect or limit this right.

Right to freedom of opinion and expression

Article 19(2) of the ICCPR provides that everyone shall have the freedom to seek, receive and impart information through any media of their choice.

The Code requires processors to publish standard forms of milk supply agreements that they would be willing to enter into on their websites. The instrument also requires a processor who is a party to a milk supply agreement to publish on their website reports containing certain details of any disputes to which they have been a party.

Civil penalties of 300 penalty units are imposed for failure to comply with these provisions. The instrument does not provide processors with alternative methods of publishing standard form agreements and details of disputes. Therefore, these provisions may limit the rights of processors in Article 19(2) of the ICCPR to impart information through any media of their choice.

This information empowers dairy farmers by enabling them to make informed decisions about the processors with which they may wish to contract, thereby assisting to address the imbalance of power between dairy farmers and processors. The measures give effect to the recommendations of the Australian Competition and Consumer Commission's (ACCC) 2018 Dairy Inquiry.

Therefore, although certain provisions of the instrument may limit the right of processors to freedom of opinion and expression, these limitations are necessary, reasonable and proportionate.

Right to privacy and reputation

Article 17 of ICCPR prohibits the arbitrary or unlawful interference with one's privacy, family, home or correspondence, and unlawful attacks on a person's honour and reputation. Article 17 further requires parties to the ICCPR to provide the right to the protection of the law against such interference or attacks.

The Code requires processors to retain records relating to milk supply agreements of 90 days or longer, including records of the agreements and records of variation and termination of the agreements. The records must be kept for the period starting on the day on which the record is made or given, and ending on the last day of 6 years beginning on the day the agreement ends. The instrument also requires a processor who is a party to a milk supply agreement to publish, on their website, reports containing certain details of any disputes to which they are a party.

These provisions may engage the right to privacy and reputation as they involve use, disclosure and publication of a processor's personal information, require the use of a processor's personal information for statistical purposes, and the reporting of information that could potentially damage the reputation of a processor.

The instrument imposes record-keeping requirements on processors specific to a milk supply agreements to improve the transparency in contracts between dairy farmers and processors, and to provide farmers with access to information that may inform their decision-making and deter egregious behaviour on the part of processors.

Therefore, although certain provisions of the instrument may limit the right of processors to privacy and reputation, these limitations are necessary, reasonable and proportionate.

Conclusion

The legislative instrument is compatible with human rights because it promotes certain human rights. To the extent that the legislative instrument may limit human rights, those limitations are necessary, reasonable and proportionate.

The Hon. Senator Bridget McKenzie
Minister for Agriculture