

## **EXPLANATORY STATEMENT**

Issued by Authority of the Minister for Agriculture, Fisheries and Forestry for the Assistant  
Minister for Competition, Charities and Treasury

*Competition and Consumer Act 2010*

*Competition and Consumer (Industry Codes—Dairy) Amendment (2023 Measures No.1)  
Regulations 2023*

### **Legislative Authority**

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

Section 51AE of the Act provides that the regulations may prescribe an industry code for the purposes of Part IVB of the Act. That section further provides that the regulations may declare the industry code to be a mandatory industry code or a voluntary industry code.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### **Purpose**

The purpose of the *Competition and Consumer (Industry Codes—Dairy) Amendment (2023 Measures No.1) Regulations 2023* (the Amendment Regulations) is to amend the *Competition and Consumer (Industry Codes – Dairy) Regulations 2019* (the Regulations) to implement recommendation 1 of the *Report on the first review of the Dairy Industry Code* (the First Review Report) to:

- revise the definition of ***minimum price*** under the Dairy Industry Code (the Code), to clarify that deductions related to milk quality will not contravene the minimum price requirements
- confer the roles of mediation and arbitration adviser under the Code on the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).

The Amendment Regulations also amends subsection 6(9) of the Regulations to extend the timeframe for a report to be provided to the Treasurer on the second review of the Code (the Second Review Report) by three years from on or before 31 December 2023 until on or before 31 December 2026.

## **Background**

The Regulations sets out the Code in Division 2 of Part 2. This is a mandatory industry code of conduct made under section 51AE of the Act. The Code was made in 2019 following the inquiry of the Australian Competition and Consumer Commission (ACCC) into the dairy industry and regulates the commercial relationship between dairy farmers and processors of milk who purchase raw milk from those farmers.

Subsection 6(1) of the Regulations provides that the Agriculture Minister must ensure that 2 reviews of this instrument are undertaken. Subsection 6(3) of the Regulations requires that a second review of the Code commence on or after 1 January 2023. The Agriculture Minister must, under subsection 6(9), give a copy of the report of the second review to the Minister administering section 51AE of the Act on or before 31 December 2023. Section 51AE of the Act is administered by the Treasurer.

Following completion of the first review, the then Department of Agriculture, Water, and the Environment (DAWE) released the Report on the first review of the Dairy Industry Code (the First Review Report) in February 2022.

The Prime Minister, the Treasurer and the Minister have agreed to the making of the Amendment Regulations to give effect to the findings of Recommendation 1 of the First Review Report. The Treasurer has agreed to extending the period for the provision of the Second Review Report from 31 December 2023 until 31 December 2026.

## **Impact and Effect**

The Amendment Regulations clarify the requirements concerning the minimum price of milk under a Milk Supply Agreement (MSA) and ensure mediation and arbitration processes under the Code are consistent with those in other industry codes. Extending the timeframe by which the Second Review Report must be provided to the Treasurer enables the Department to better evaluate the reforms arising from the First Review based on the practical experience of industry participants and provide more targeted focal points for the Second Review.

## **Consultation**

On 5 July 2021, the DAWE released a discussion paper and terms of reference for the First Review. A public consultation process was conducted to assess the role, impact, and operation of the Code. Twenty-eight submissions were received. The submissions informed the Recommendations made in the First Review Report.

In addition to public consultation, the DAWE established the Dairy Code Review Reference Group (DCRRG), comprised of key dairy industry stakeholders and an ACCC observer to assist the review process. The DCRRG was representative of the eight dairy regions and included key producer and processor stakeholders. The DAWE chaired six meetings of the DCRRG between June and September 2021. The Treasury, the ACCC, the ASBFEO, as well as peak industry bodies including the Australian Dairy Farmers (ADF), and the Australian Dairy Products Federation (ADPF) provided in-principle support for each of the recommendations in the First Review Report. Each of these stakeholders were consulted during the drafting of the Amendment Regulations and their comments and feedback have informed the formulation of key provisions.

On 26 October 2022, an exposure draft of the Amendment Regulations was released by the Department of Agriculture, Fisheries and Forestry (the Department) to Dairy Australia, the ADF, the ADPF (and their respective membership bases), the ACCC, the Treasury and the ASBFEO. Stakeholders were supportive of all measures contained in the Amendment Regulations, except for a provision on flexible pricing, which has since been omitted. The ADPF raised concerns about postponing the reporting date for the second review of the Code. The Department explained that a postponement to the reporting date does not affect the commencement of the review process (stakeholder outreach will begin early 2024) nor will it preclude the Second Review Report being presented to the Treasurer prior to 31 December 2026. The postponed reporting date will provide flexibility to ensure that the Department can acquire qualitative data and a greater empirical understanding of how the first tranche of amendments are operating in practice so as to enable responsive and targeted change.

A preliminary impact assessment for the Amendment Regulations was completed. The Office of Impact Analysis concluded that the measures would have minor regulatory impact such that an Impact Statement was not required (reference number OIA23-05241).

### **Details/ Operation**

Details of the Amendment Regulations are set out in [Attachment A](#).

### **Other**

The Amendment 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) Amendment (2023 Measures No.1) Regulations 2023**

Section 1 – Name

This section provides that the name of the Amendment Regulations is the *Competition and Consumer (Industry Codes—Dairy) Amendment (2023 Measures No.1) Regulations 2023*.

Section 2 – Commencement

This section provides for the Amendment Regulations to commence on the day after registration on the Federal Register of Legislation.

The note following subsection 2(1) specifies that the table only relates to the provisions of this instrument as originally made. The table will not be amended to deal with any later amendments to this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 contains relevant dates and details.

Section 3 – Authority

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

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

## **Schedule 1 – Amendments**

### **Part 1—Amendments relating to arbitration and mediation**

#### ***Competition and Consumer (Industry Codes—Dairy) Regulations 2019***

Sections 44 and 45 of Part 2 of the Regulations provide that the Agriculture Minister must appoint mediation and arbitration advisers. The mediation and arbitration advisers under the Code compile lists of mediators and arbitrators for the purposes of Subdivision F of the Code. The advisers then appoint a mediator or arbitrator to resolve a dispute between the parties to a MSA.

The amendments contained in Part 1 below support the conferral of mediation and arbitration adviser roles on the ASBFEO.

Conferring the mediation and arbitration adviser functions under the Code on the ASBFEO clarifies the dispute resolution pathways under the Code and provides greater consistency in mediation and arbitration procedures across industry codes under the Act.

#### **Item 1 – Section 5**

This item repeals the following definitions:

- definition of *arbitration adviser*
- definition of *arbitrator*
- definition of *mediation adviser*
- definition of *mediator*.

This amendment is consequential to the amendments by the other items of Part 1 of Schedule 1 of the Amendment Regulations (especially the repeal of sections 44 and 45 of the Regulations by item 4 of Schedule 1). It reflects that the functions currently performed by the mediation adviser and the arbitration adviser under the Code will be assumed by the ASBFEO.

#### **Item 2 – Section 5**

This item inserts a new definition of *Ombudsman* which means the Australian Small Business and Family Enterprise Ombudsman.

#### **Item 3 – After section 5**

This item inserts a new section 5A ‘Functions of the Ombudsman relating to the Code’.

The purpose of this new provision is to specify the role of the Ombudsman in relation to the conferral of this new administrative function.

Under new section 5A, the Ombudsman will have the following functions in relation to the Code:

- keeping lists of persons who can provide services of arbitration or mediation
- in accordance with the Code, appointing persons who can provide services of arbitration or mediation
- requesting and receiving information about disputes that are being, or have been, dealt with under the Code.

These functions will assist with general reporting and monitoring the effectiveness of the ASBFEO's dispute resolution services and ensure that they can be targeted to current issues and trends in the sector.

**Item 4 – Sections 44 and 45**

This item repeals these sections.

**Item 5 – Subsection 48(2)**

This item omits “mediation adviser” and substitutes “Ombudsman”.

**Item 6 – Subsection 48(3)**

This item omits “mediation adviser” (first occurring) and substitutes “Ombudsman”.

**Item 7 – Paragraph 48(3)(a)**

This item, after the existing phrase “appoint a mediator” inserts “from the list kept by the Ombudsman under paragraph 5A(a)”.

**Item 8 – Paragraph 48(3)(a)**

This item omits “mediation adviser” and substitutes “Ombudsman”.

**Item 9 – Subsection 48(6) (heading)**

This item omits “*mediation adviser*” and substitutes “*Ombudsman*”.

**Item 10 – Subsection 48(6)**

This item omits “the mediation adviser” and substitutes “the Ombudsman”.

**Item 11 – Paragraph 48(9)(c)**

This item omits “mediation adviser” and substitutes “Ombudsman”.

**Item 12 – Paragraph 49(4)(a)**

This item omits “mediation adviser” and substitutes “Ombudsman”.

**Item 13 – Subsection 51(2)**

This item omits “arbitration adviser” and substitutes “Ombudsman”.

**Item 14 – Subsection 51(3)**

This item omits “arbitration adviser” (first occurring) and substitutes “Ombudsman”.

**Item 15 – Paragraph 51(3)(a)**

This item, after the existing phrase “appoint an arbitrator” inserts “from the list kept by the Ombudsman under paragraph 5A(a)”.

**Item 16 – Paragraph 51(3)(a)**

This item omits “arbitration adviser” and substitutes “Ombudsman”.

**Item 17 – Subsection 51(6) (heading)**

This item omits “*arbitration adviser*” and substitutes “*Ombudsman*”.

**Item 18 – Subsection 51(6)**

This item omits “the arbitration adviser” and substitutes “the Ombudsman”.

**Item 19 – Paragraph 51(9)(c)**

This item omits “arbitration adviser” and substitutes “Ombudsman”.

**Item 20 – Paragraph 52(3)(a)**

This item omits “arbitration adviser” and substitutes “Ombudsman”.

**Item 21 – At the end of Part 3**

This item adds a new Division 2—Amendments made by the *Competition and Consumer (Industry Codes—Dairy) Amendment (2023 Measures No. 1) Regulations 2023* to Part 3 of the Regulations.

New section 59 provides that the application of amendments made by Part 1 of Schedule 1 of the Amendment Regulations applies in relation to a mediation or arbitration in respect of which the appointment of a mediator or an arbitrator is requested on or after the commencement of this section.

This provision recognises that the mediation or arbitration commences when a person requests mediation or arbitration. In some circumstances, the mediation or arbitration may not proceed, and there are many other important procedural steps which occur in the lead up to a dispute resolution process.

## **Part 2—Other amendments**

### ***Competition and Consumer (Industry Codes—Dairy) Regulations 2019***

#### **Item 22 – Section 5 (definition of *minimum price*)**

This item omits “supplied” and substitutes “that meets the processor’s milk quality requirements specified in the agreement and that is supplied” in the definition of *minimum price*.

The purpose of the amendment to this definition is to clarify that *minimum price* means the lowest price payable under a MSA for milk that meets the quality requirements of processors under section 25 of the Regulations.

Section 5 of the Regulations currently defines *minimum price* under a MSA, for a period, as meaning ‘the lowest price payable under the agreement for milk supplied during the period, disregarding: (a) loyalty payments; and (b) any possibility of a temporary reduction in a price in accordance with section 28 (minimum price–unilateral prospective step downs prohibited except in limited exceptional circumstances); and (c) any fees payable by the farmer under the agreement’.

The First Review Report concluded that the definition of *minimum price* could potentially be read to imply that the minimum price requirement means processors must specify the lowest possible price payable for milk under a MSA, including any deductions related to milk quality.

The amendment to the definition of *minimum price* clarifies that the term applies to the lowest price payable on milk which meets processors’ milk quality requirements as specified in a MSA. This provides greater certainty about what farmers can expect to be paid for their milk if they meet milk quality obligations.

#### **Item 23 – Subsection 6(9)**

This item omits “2023” from subsection 6(9) of the Regulations and substitutes “2026”.

This amendment extends the timeframe for the Agriculture Minister to give the Treasurer a copy of a report on the second review of the Code by three years from on or before 31 December 2023 until on or before 31 December 2026. This enables the Department to better evaluate the reforms arising from the First Review based on the practical experience of industry participants and provide more targeted focal points for the Second Review.

Notably, the commencement date for the Second Review of ‘on or after 1 January 2023’ contained in subsection 6(3) of the Regulations is not amended. This means that the Second Review may commence as soon as the government is satisfied that it has sufficient evidence to inform the scope and content of that review.



## **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) Amendment (2023 Measures No. 1) Regulations 2023*

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 Legislative Instrument**

The purpose of the *Competition and Consumer (Industry Codes—Dairy) Amendment (2023 Measures No.1) Regulations 2023* (the Amendment Regulations) is to implement recommendation 1 of the *Report on the first review of the Dairy Industry Code* (the First Review Report) to:

- revise the definition of ***minimum price*** under the Dairy Industry Code (the Code), to clarify that deductions related to milk quality will not contravene the minimum price requirements
- confer the roles of mediation and arbitration adviser under the Code on the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).

The Amendment Regulations also amends subsection 6(9) of the Regulations to extend the timeframe for a report to be provided to the Treasurer on the second review of the Code by three years from on or before 31 December 2023 until on or before 31 December 2026.

The Amendment Regulations commence on the day after they are registered on the Federal Register of Legislation.

### **Human rights implications**

The Amendment Regulations 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* (ICESCR)
- Right to an effective remedy in article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR)
- Right to privacy and reputation in article 17 of the ICCPR.

#### *Right to enjoyment of just and favourable conditions of work*

Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work. This right may be engaged where measures raise economic and resource issues that could have an impact on the realisation of the right to an adequate standard of living.

The Amendment Regulations may promote this right by collaterally improving the conditions of participation and standard of living for farmers and the conduct of their commercial relationships through understanding by farmers and milk processors of how minimum pricing of milk is determined for the purposes of the Code. Proposed amendments to section 5 to clarify the definition of minimum price of milk will improve price transparency for farmers and provide greater certainty to processors and farmers about the requirements for minimum prices of milk in Milk Supply Agreements (MSAs). Providing this clarity may mitigate disputes involving minimum price considerations arising under or in connection with a MSA, thereby supporting just and favourable working conditions and standards of living for farmers.

#### *Right to an effective remedy*

Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative, or legislative authorities or by any other competent authority provided for by the legal system of the State.

Proposed section 5A will promote procedural efficiency in the handling of mediation and arbitration processes by consolidating appointments of mediators and arbitrators within the ASBFEO. Proposed section 59 facilitates the crystallisation of the ASBFEO's role at the point of requests for mediation or arbitration and thereby ensures greater efficiency in the appointment of mediators and arbitrations within the ASBFEO's office.

Proposed sections 5A and 59 collectively engage and promote the right to an effective remedy because they serve to streamline the dispute resolution pathway, provide greater procedural certainty as well as consistency, and alignment, in procedures across industry codes.

Notably, the procedural changes do not alter the rights of parties to a dispute, including the right to commence court proceedings to have a dispute resolved nor change the fact that arbitration is voluntary under the Code, as is entry into any agreement reached at mediation.

#### *Right to privacy and reputation*

Article 17 of ICCPR prohibits the arbitrary or unlawful interference with one's privacy, family, home or correspondence. This includes the respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control dissemination of personal and private information.

To the extent that new paragraph 5A(c) enables the ASBFEO to request and receive information about disputes that are being, or have been, dealt with under the Code, which may relevantly include personal or identifying information, the right to privacy is engaged.

For the interference with privacy not to be 'arbitrary', any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the circumstances. Reasonableness, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances. To the extent that these provisions may limit the right to privacy, that limitation is reasonable and proportionate to the policy objective.

Use of information requested or received by the ASBFEO is only permitted to the extent necessary and appropriate for the purposes of performing the ASBFEO's functions under new section 5A.

Further, any personal information received about disputes that are being, or have been, dealt with under the Code is subject to the protections provided for personal information under the *Privacy Act 1988* or equivalent State and Territory legislation.

## **Conclusion**

The Amendment Regulations are 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* as they promote a number of human rights and, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

**Senator the Hon. Murray Watt**

**Minister for Agriculture, Fisheries and Forestry, on behalf of the Hon Andrew Leigh,  
the Assistant Minister for Competition, Charities and Treasury**