



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

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Mr Peter Carson
A/g Assistant Director
Dairy and Competition Team
Department of Agriculture, Water and the Environment
18 Marcus Clarke Street
Canberra ACT 2601

via email: *dairycode.review@awe.gov.au*

cc: *Peter.Carson@awe.gov.au*

Dear Mr Carson

Review of the Dairy Code of Conduct

We welcome the review of the Dairy Code of Conduct (the Code). Since the Code came into operation on 1 January 2020, our Office has administered disputes under the Code as well as many general enquiries about its operation. This firsthand experience along with industry consultation has helped inform our submission and identify areas for improvement.

In our experience, the intent of the Code is not always achieved successfully, namely to reduce power imbalances, provide greater transparency, ensure parties are acting in good faith and ensure effective dispute resolution processes are in place. The Code has been well received by some parties, however there appear to have been few examples of published disputes as required of processors under the Code. Communication from disputes that have come to our Office suggests there is still a power imbalance that impedes effective Code processes as well as an apparent lack of required transparency.

These power imbalances between processors and farmers are the biggest barrier to fair contract negotiation and dispute resolution. Reforms to the Code should focus on improvements to transparency and adopting effective dispute resolution processes from other industry codes, which will help ensure effective and consistent processes. As such, we suggest the following changes:

Improved disclosure documentation

Clear and simple documentation is key to understanding Milk Supply Agreements (MSAs). In order to effectively disclose the appropriate information and allow farmers to make fully informed decisions we suggest the following:

- 1. Inclusion of a key disclosure sheet:** This could be modelled on the Key Facts Sheet from the Franchising Code, which provides key information simply and in plain English. It should also disclose the number of disputes in the most recent reporting period.
- 2. Sign on-bonuses and up-front loans:** Clarity around sign-on bonuses is needed. Our Office is aware of loans and pre-payments that are included in MSAs that are defined as a sign-on bonus. As loans and pre-payments are to be repaid, the Code should clearly define loans, pre-payments and bonuses to provide greater clarity. Further, the conditions in which they can be paid or repaid must also be clearly defined in MSAs so that approaches like the use of loans are not adopted to unduly restrict the ability of farmers to move between processors.
- 3. Milk Supply Financial Projections:** Financial projections provided by processors to suppliers should provide clear, accurate and understandable projections of the financial and economic outcome for the total term of the MSAs. Further, this should indicate the conditions in which a base price may change. This will add to a farmer's ability to make a fully informed decision.

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- 4. Price comparisons:** It is very difficult for farmers to compare prices between different processors due to the regional diversity and complexity of milk prices. As such, the Code should require processors to provide regionally standardised price comparisons to farmers in order to allow them to compare the offers from different processors in a meaningful way.

Dispute resolution processes

It is important that dispute resolution processes are clear and consistent in order to reduce administrative burdens and ensure that disputes are resolved in a reliable and timely manner. In order to achieve the best results for dispute resolution, we suggest the following:

- 1. Time sensitive disputes:** Due to the nature of the industry, disputes will commonly involve perishable supplies. In these cases, time sensitive dispute resolution processes should be included in order to prevent supplies being wasted. While acting in good faith should ensure that disputes are responded to in a timely manner, this is not always the case. As such, the Code should provide greater clarity through prescribed timeframes, preferably three weeks to provide consistency with the Franchising and Horticulture Codes of Conduct. Further it should provide for an expedited process where there are time sensitive pressures. To achieve this, the Code could adopt a similar process to the Horticulture Code of Conduct, where assessors are appointed to help dispute resolution timeliness.
- 2. Mediation and Arbitration Adviser:** Currently, the Mediation and Arbitration Adviser role is appointed by the Agriculture Minister. Given that the role of the Adviser is to assist with dispute resolution and that this function is undertaken by the Australian Small Business and Family Enterprise Ombudsman, the Adviser should be appointed from within this Office.
- 3. Include conciliation and multi-party disputes:** For more robust dispute resolution capabilities, the Code should include conciliation and multi-party-dispute functions. Our Office already handles these types of disputes via the Franchising Code of Conduct and the Code would benefit from this flexibility and access to processes that are already well understood.

Improved termination guidance

Clear termination guidelines would provide clarity and certainty to both processors and farmers. As such, we suggest the following:

- 1. Unilateral terminations:** Currently termination clauses do not specify what circumstances are appropriate for a farmer to unilaterally terminate an agreement, causing confusion for both farmers and processors. The Code should clarify termination circumstances and include clear guidance concerning when notice must be provided to terminate an agreement.
- 2. Clear timeframes to terminate:** There are high capital costs to run a dairy farm and it is incredibly difficult to change processors after 1 July, particularly in concentrated markets. This should be recognised in MSAs and processors should be required to give a clear amount of time for mid-season termination to reflect these costs. As such, an addition to clause 43(2) could be made so that it reads as below:

(2) The milk supply agreement must clearly specify the circumstances (if any) and the timing in which the processor may unilaterally terminate an agreement.

This would allow all parties to enter into the agreement with increased levels of certainty and predictability regarding the MSA.

Milk Supply Agreements

MSAs are integral in establishing positive and effective relationships between farmers and suppliers. However, MSAs can be implemented within the Code's rules while not complying with the intent of the Code. As such, we suggest the following:

- 1. Clarity of entry into contracts:** We have instances of dairy farmers who supply for part years (such as in drier areas) not being able to enter into a part year agreement until they have milk ready to be picked up. For example, processor contracts that are not signed but are triggered only when the processor's truck first receives milk from the farm (ie. the contract is designed to trigger on collection). In these situations, some farmers intend to supply (and may have been in discussions with a processor) but by the time the milk is ready to be collected, the processor has already sufficient supply and refuses to collect. There is a clear need for contracts to be entered into prior to collection so that farmers can plan and there is clarity of entry into contracts and terms.
- 2. Clarity for part year supplier:** Similar to the above, the Code should acknowledge that farmers who only supply milk for part of the year should have certainty of supply. This could include a direct notification requirement for processors to clearly tell farmers (who may have registered with the processor) when and why they will not be collecting milk. This will help give farmers the ability to make an informed decision while also allowing the Code to acknowledge the regional diversity of the industry.
- 3. Clarity on long term contracts:** We understand that milk prices are difficult to predict long term, despite the Code seeking to require certainty of base prices. As such, the Code should require a long-term floor price that is consistent with the term of the contract. That floor price should be made subject to uplift.
- 4. Testing obligations:** Often the testing requirements and standards are dictated by the processor. We suggest that the Code include a section on testing obligations that provides clear guidelines around what should be tested, the timeframe for tests to be conducted and acceptable results for supply. This should include the ability of farmers to require third party independent milk tests in appropriate circumstances, such as where a farmer wishes to dispute a test.
- 5. Non-exclusive MSAs:** We have received industry feedback that it is difficult in some production areas to access non-exclusive supply arrangements that are economic to the farmer. Further, minimum volume requirements can mean that agreements for smaller farmers are effectively exclusive. There should be a review of the practices across the industry concerning non-exclusive arrangements with a view to the Code ensuring that any such arrangements are offered in good faith and are truly non-exclusive rather than perceived as a mechanism to push farmers to exclusive arrangements.

Further applications of the Code


The dairy industry has regional diversity and a vast range of businesses that operate within it. As such, while the Code needs to be clear and effective, there also needs to be flexibility built in around these different areas. The Code should be able to provide for the differing needs of its diverse parties, and as such we suggest:

- 1. Regional diversity:** The Code should acknowledge the unique nature of different regions. This means a one-size-fits-all approach will fall short of the Codes needs. For example, milk prices in some markets may remain relatively consistent whereas others are in flux more regularly. As such, consideration should be given to including region-specific approaches. This is a difficult task since minimum fair standards should be set as a floor across the entire industry. However moving forward, the Code could set different minimum requirements and allow for different regions to identify different (and more positive) parameters for, say, milk price changes. Allowing for regional diversity, in combination with increased transparency will allow for greater market efficiency and certainty for both processors and farmers.

- 2. Wider supply-chain:** The Department should continue to consider the possibility of including the wider supply chain into the Code, this could mean greater harmonisation and integration with the Food and Grocery Code.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr Luke Collins on 02 6213 7540 or at Luke.Collins@asbfeo.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bruce Billson', written in a cursive style.

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman