



Australian Government

Australian Government response to the review of the Dairy Industry Code

MARCH 2022

Introduction

The Australian Government welcomes the Report on the first review of the Dairy Industry Code (the report).

The Competition and Consumer (Industry Codes – Dairy) Regulations 2019 (the Code) commenced on 1 January 2020 to provide a mandatory framework establishing enforceable minimum standards in business practices which support fairer business relationships between dairy farmers and dairy processors.

The government established the Code following extensive consultation with dairy farmers, processors and industry groups in 2018 and 2019. It was designed to address significant imbalances in bargaining power between dairy farmers and processors, to increase the ability of farmers to respond to market signals, make standard industry practices fairer and ensure risks are borne by the appropriate party. The Code is designed to protect producers from unfair contracts, introduce greater transparency and set up a framework of regulation flexible enough to allow innovation and diversity in the dairy industry.

Since establishing the Code, the government has undertaken a suite of measures to complement the Code and assist dairy farmers, including implementing the Delivering Ag2030 plan, instigating the Australian Competition and Consumer Commission (ACCC) inquiry into perishable agricultural goods (PAG) industries and delivering a range of activities, such as:

- \$14.78 million to 2024-25 towards dairy export projects to identify the regulatory hurdles for domestic dairy manufacturers to become exporters, align food safety regulations and work towards reduced regulatory intervention through improved data collection.
- \$1.5 million total to Dairy Australia and Australian Dairy Farmers to increase business resilience, risk planning and financial and legal literacy for farmers, as well as investigate ways to provide farmers with more say over how they sell their milk.
- \$10 million to assist dairy farmers to upgrade or invest in energy efficient equipment to reduce their energy costs.
- \$8.1 million to the ACCC Agriculture Unit to boost its examination of competition and unfair trading issues, including the creation of a specialist role with specific responsibility for dairy.
- \$4.75 million in the Kids to Farms program to help educate children about agriculture through activities such as farm visits, virtual technology 'in-class' experiences and developing information resources for classrooms.
- \$3 million in grants to support farmer groups to set up farm cooperatives and other collective business models.
- \$20 million annually for eligible research and development activities for a more productive, profitable and sustainable industry.

In accordance with the Code, the Minister for Agriculture and Northern Australia was required to undertake a review to assess the role, impact and operation of the Code in 2021.

The Australian Government notes the release of the report and thanks the members of the Dairy Code Review Reference Group for supporting industry consultation for the review and their contribution in informing the report and associated recommendations.

The government also notes that a second review of the Code will be required on or after 1 January 2023.

Response

Recommendation 1

The Code should be amended to:

- a) clarify the definition of 'minimum price' under the Code, to explain that deductions related to milk quality will not contravene the 'minimum price' requirements
- b) allow, where agreed by both parties to a Milk Supply Agreement (MSA), an exemption from the minimum price requirements for a specified quantity of milk to enable participation in milk pricing markets
- c) confer the roles of mediation and arbitration advisor under the Code to the Australian Small Business and Family Enterprise Ombudsman.

The Australian Government supports the recommendation.

The Australian Government agrees to make the recommended amendments to the Code to improve its operation and enforcement.

Recommendation 1(a) will improve price transparency for farmers, provide greater certainty to processors about the requirements for minimum prices in Milk Supply Agreements (MSAs), and will assist the ACCC's enforcement of this provision.

Recommendation 1(b) will facilitate stakeholder participation in innovative and emerging markets, while maintaining the Code's ability to appropriately regulate the conduct of the commercial relationships between farmers and milk processors. The government recognises, however, that the minimum price requirement remains an important protection for farmers. Unless it is mutually agreed to exclude a specified volume of milk from the minimum price requirements under an MSA for the purpose of participating in trading markets, the minimum price protections must be maintained, obligations must continue to be clear to all stakeholders and compliance must be enforceable.

Recommendation 1(c) will enhance certainty for dairy industry stakeholders and streamline existing government services by conferring the functions of the mediation and arbitration advisors under the Code on the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). The ASBFEO currently provides these functions under the Franchising Code. As such, it is an appropriate and qualified entity to provide similar services to dairy processors and farmers. The Department of Agriculture, Water and the Environment will work with the ASBFEO to ensure it has a sound understanding of the dairy industry and the operation of the Code.

Recommendation 2

To support the operation of the Code, the Australian Government and the ACCC should:

- a) develop additional guidance material to assist compliance with the Code
- b) work with industry stakeholders to continue improvements to price transparency.

The Australian Government supports this recommendation.

The government's preferred approach is to update or develop new guidance material to clarify obligations and support industry compliance with the Code. Guidance material is preferred to introducing a rigid interpretation of the regulations, which may hinder the flexibility provided to innovate in the industry, reduce market competition, impose unintended regulatory burden or potentially alter the scope of the Code. The Department of Agriculture, Water and the Environment and the ACCC will each work to enhance existing guidance and develop new guidance to address the areas identified to improve the intended operation of the Code and will engage with dairy industry representatives to ensure guidance is meeting industry needs.

However, the government recognises that there is a limitation to the guidance that can be provided in some circumstances. Government guidance is of most use where there is ambiguity about how a particular department or regulator will exercise its discretion. Guidance cannot definitively resolve an underlying ambiguity in a legal provision, nor does it bind how third parties must behave under a code (which is relevant to private actions conducted under a code); only judgments of a Court can do that. If the Code's provisions cannot be adequately clarified in guidance materials, the need to amend the legislative instrument can be considered in the second review of the Code in 2023.

In regard to recommendation 2(b), the government has committed \$5.4 million to improving price transparency in perishable agricultural goods (PAG) industries in response to the ACCC's inquiry into PAG industries (released December 2020). Between August and November 2021, the Department of Agriculture, Water and the Environment completed 14 workshops with almost 120 participants from PAG industries – including the dairy industry – to explore price and market transparency issues and develop projects that will improve price and market transparency. The outcomes of the dairy industry workshops can be found at www.awe.gov.au/agriculture-land/farm-food-drought/food/perishable-ag-goods-industries. PAG industries that participated in the workshops will be able to apply for government funding through a grant opportunity. Grant funding will be provided to successful applicants in mid-2022 to develop and implement eligible price and market transparency mechanisms.

Recommendation 3

The Australian Government and industry stakeholders should investigate and gather further evidence to determine suitable solutions to:

- a) Extensions of three-year contracts
- b) Small business definition and exemptions
- c) MSA variation requirements
- d) Non-exclusive contract arrangements
- e) Multi-year contracts
- f) Multi-party dispute resolution and arbitration

The Australian Government supports the recommendation.

The Australian Government acknowledges the review's conclusion that the Code is working as intended to support fairer contract negotiations between dairy farmers and those buying their milk. However, it is also important for the Code to be able to adapt and respond to industry developments and support the industry's continued sustainability and profitability.

The Department of Agriculture, Water and the Environment will collaborate with farmers, processors and representative bodies to further explore and identify suitable solutions to the issues highlighted in this recommendation. The Department of Agriculture, Water and the Environment will establish a working group with key industry representative bodies to plan and progress this work ahead of the next review of the Code in 2023.