



**Small Business  
Commissioner**  
SOUTH AUSTRALIA

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Ms Sheridan de Kruiff  
Director  
Agricultural Unit  
Australian Competition & Consumer Commission  
Level 24, 400 George Street  
BRISBANE QLD 4000

T 08 8303 2026  
Toll Free 1800 072 722  
F 08 8303 0943  
E [sasbc@sa.gov.au](mailto:sasbc@sa.gov.au)  
GPO Box 1264,  
Adelaide SA 5001  
ABN 34 643 517 562  
[www.sasbc.sa.gov.au](http://www.sasbc.sa.gov.au)

**BY EMAIL:** [dairyinquiry@acc.gov.au](mailto:dairyinquiry@acc.gov.au)

Dear Ms de Kruiff

### **Submission to the Dairy Inquiry Interim Report**

I write to provide a submission to the Australian Competition & Consumer Commission's *Dairy Inquiry Interim Report* dated November 2016 (the report).

In general terms, I support the ACCC's interim findings and recommendations, particularly in relation to the imbalance of power within the industry and the introduction of a mandatory code.

I address the eight recommendations set out in your Interim Report below.

- 1. Processors and farmers should enter into written contracts for milk supply that are signed by the farmer.**

I agree with this recommendation as it is likely to increase the clarity and transparency of milk supply agreements between processors and farmers. I also agree that these contracts should be simplified for ease of understanding.

- 2. All processors should simplify their contracts where possible, including by minimising the number of documents and clearly indicating which documents contain terms and conditions of milk supply.**

I have been advised that an ongoing issue for farmers, producers and other small businesses in the industry is the complexity and one-sided nature of the contracts they enter into. If processors were to simplify their contracts (where possible) it would go some way to alleviating this problem.



3. **Milk supply contracts should not include terms which unreasonably restrict farmers from switching between processors.**

I agree with this recommendation.

I have been advised by industry stakeholders that the issue here relates to loyalty bonuses and retrospective step-ups. As noted at page 109 of the report, payment of loyalty bonuses and retrospective step-ups after the commencement of the new season creates a switching barrier.

I am pleased to note at page 113 of the report that changes to some 2017-18 contracts have been made following the implementation of the Voluntary Code, including the removal of loyalty payments that are contingent upon a farmer continuing to supply into the new season.

4. **The industry should establish a process whereby an independent body can administer mediation and act as a binding arbitrator or expert in relation to contractual disputes between farmers and processors.**

I agree with the finding that there is a need for an established, cost effective dispute resolution process in the industry. I also agree that contracts need to include a contractual obligation that if a dispute arises, it will be referred to a binding dispute resolution process.

However, feedback I have received from industry stakeholders suggests that the creation of a new independent body is not what the industry expects. It has been pointed out to me that there is no shortage of options available in terms of independent bodies administering mediation. One comment made by an industry association was that there is no need for further bureaucracy. On this basis, I recommend that a reference be made to an existing independent body in the mandatory code of conduct.

5. **Farmers should ensure that have properly considered the legal and financial implications of contracts with processors.**

I strongly agree with this recommendation.

I note at page 177 of the report that the Senate Inquiry raised concerns that individual farmers do not receive sufficient legal advice on contracts. I have discussed this issue with a farmer representative group, who confirmed that they offer members assistance in interpreting contracts. This is therefore possibly a matter of educating farmers in relation to the services available to them.

Related to this issue is the application of unfair contract terms laws. I am pleased to note that the ACCC is currently considering the extent to which milk supply contracts meet the business size and transaction value thresholds.

I have received advice that the average value of a supply contract in South Australia in 2016-17 was around \$918,000 based on an average herd size of 300 cows producing an average of 6,800 litres per annum and an average price of 45

cents per litre. This means that most South Australian dairy farmers would fall well outside the UCT laws value threshold of \$300,000 per annum, despite being small family businesses. As a result, these farmers are unable to access the protections afforded by the UCT laws.

I submit that the business size and transaction value thresholds of unfair contract terms laws should be extended across the board, but failing that, they should at least be extended in so far as they relate to the dairy industry.

**6. Processors should publish information identifying how their pricing offers apply to individual farm production characteristics to enable better farm pricing forecasts.**

I have been advised that some processors publish such information, but not all. I understand from industry stakeholders that the publication of pricing offers will assist in preventing abuse of the pricing mechanisms.

I note at page 87 of the report that:

*“Concerns have been raised with the ACCC in the course of this inquiry that processors do not actively compete against one another, but simply ‘follow-the-leader’ in respect of opening farmgate prices, thereby restricting price competition.”*

Similar concerns have been raised with me by industry participants. It has been pointed out that processors wait for other processors to release their farmgate prices just before the commencement of a contract and then post a similar price, which is just enough to keep farms marginal.

Better farm pricing forecasts would help address the imbalance of power affecting small businesses in the industry.

**7. The Voluntary Dairy Code should be strengthened.**

I support the strengthening of the Voluntary Code, pending the introduction of a mandatory code. As noted at page 187 of the report, aspects of the Voluntary Code’s design are likely to limit its effectiveness, particularly given that the Voluntary Code is not legally enforceable and there are no penalties for non-compliance.

**8. A mandatory code of conduct within the *Competition and Consumer Act 2010* should be considered for the dairy industry.**

I strongly support the introduction of a mandatory code for the dairy industry. I understand that other stakeholders in the South Australian dairy industry share the same view.

I strongly agree with the ACCC’s findings at page 190 of the report that:

*“The dairy industry’s problematic features primarily manifest through unbalanced risk sharing, potentially unfair contract terms, and communications about matters critical to farm production and income which are not transparent.*

*Processors have little incentive to make the changes to their contracting practices given their bargaining power advantages. This means that without intervention:*

- *Competition between processors will continue to be softened*
- *Farmers will continue to face excessive uncertainty and risk.*

*The history of bargaining and contracting in the industry since deregulation suggests that intervention is needed to address the identified market failures.”*

For the reasons stated above, it is imperative that a mandatory code be introduced to ensure that the code is binding on all industry participants and enforced by the ACCC. Processors would then be required to comply, and the financial penalties and infringement notices would act a deterrent.

### **Contracts in other parts of the dairy supply chain**

I take this opportunity to raise another issue which has not been considered in report.

It is my recommendation that a specific section be included in the mandatory code to ensure that contracts in other parts of the dairy supply chain (eg milk delivery contractors) are also covered.

If you have any queries or wish to discuss my submission in further detail, please contact me on 08 8303 0927 or [john.chapman@sa.gov.au](mailto:john.chapman@sa.gov.au).

Yours sincerely



John Chapman  
**SMALL BUSINESS COMMISSIONER**

8<sup>th</sup> February 2018