



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

12 December 2016

Mr Mark Laybutt  
Assistant Director  
Agriculture Unit  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

**By email:** [dairyinquiry@acc.gov.au](mailto:dairyinquiry@acc.gov.au)

Dear Mr Laybutt,

### **ACCC INQUIRY INTO THE AUSTRALIAN DAIRY INDUSTRY**

Thank you for the opportunity to submit comments on the Issues Paper of the above inquiry.

#### ***Our interest in the Australian Dairy Industry***

The role of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is to advocate for small business and family enterprise, assist with alternative dispute resolution and provide a voice to government for small business and family enterprise.

Small business and family enterprise plays a crucial role in the Australian dairy industry. The iconic family-owned farm is both a small business and a family enterprise. The definition of small business and family enterprise in our legislation (the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth)) is broad enough that many other types of business connected with the industry also fall within its scope.

Given the centrality of small business and family enterprise to the Australian dairy industry, our office has been involved in discussions about current and future challenges facing the industry. On 26 October 2016, Dr Craig Latham (Deputy Ombudsman) and Mr James Strachan of this office gave evidence to the Senate Economics Reference Committee hearings on the Dairy Industry. Their evidence was informed by our participation in the Dairy Symposium chaired by the Hon. Barnaby Joyce MP on 25 August 2016 and a follow-up workshop with State Farmer Organisation Presidents and Processors chaired by Mr John McQueen, Interim CEO of Australian Dairy Farmers Ltd, on 27 September 2016.

In our view, contracting practices (Issue 2 in the Issues Paper) are especially critical to the resolution of current issues in the dairy industry and to ensuring its long-term health and growth. Together with a lack of transparency (Issue 3), poor contracting practices and lack of certainty around price within supplier contracts and agreements have a significant and disproportionate impact on smaller players within the industry.

Progress is already being made on these issues. The purpose of the 27 September workshop was to improve contracting practices and balance risk along the supply chain.

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Participants commenced development of a Code of Best Practice on Contractual Relationships. We saw that meeting as very positive, with industry participants taking responsibility for dealing collaboratively with present and future challenges. The following comments are partially informed by discussion and progress at that meeting.

### ***Issues Paper – Issue 2: Contracting Practices***

Across the industry, there are issues with contracts not being openly negotiated and lacking flexibility and transparency. To achieve greater fairness and transparency, contracts should be redrafted to ensure they are clear, realistic and easily understood. Specific issues to be addressed include the ability for processors to unilaterally terminate milk collections and processing; loyalty payments unnecessarily locking farmers into particular processors; volume and exclusivity arrangements that limit farmer ability to sell excess milk to other processors; unreasonable notice of termination periods; and lack of notice, transparency and negotiation of contract variations.

To enable industry participants to deal with any disputes in an efficient, timely and low-cost manner, we recommend that alternative dispute resolution clauses be introduced into all agreements.

We also recommend that the inquiry consider how new unfair contract terms legislation applies to industry contracts. Unfair contract terms provisions in the Australian Consumer Law now apply to standard form sale of goods contracts entered into or renewed from 12 November 2016 where at least one of the parties is a small business and the upfront price payable is under \$300,000. Where milk prices are set on a daily basis the contract is arguably a series of separate standard form contracts entered into or renewed daily, each of which may fall within the \$300,000 limit. In that case, clauses such as those that provide for limited or no notice of price and service changes, contractual lock-in or unilateral contract variation could be made void due to unfairness.

On the specific issue of payment practices (Issues Paper p. 7): this office is currently undertaking an inquiry into payment times for small business and family enterprise. The results may enable a useful comparison of payment practices among different industries, including the dairy industry. We strongly encourage small businesses and family enterprises in the dairy industry to make a submission to this inquiry by the closing date (13 January).

As noted above, steps have already been taken within the industry towards the development of a *Code of Best Practice on Contractual Relationships*. These initial steps to address critical issues around contracting practices should be strongly encouraged and supported.

### ***Issues Paper – Issue 3: Transparency and price signals***

Across all dairy market segments (fresh milk versus milk solids, domestic markets with varying regional characteristics versus international markets), there is a need for greater clarity and certainty around price within supplier agreements and contracts. The present

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lack of clarity and certainty leads to risks being disproportionately borne by those least able to manage them.

To share risk appropriately along the supply chain, contracts should set out a clear price, pricing mechanism and/or price notification processes, including appropriate notification and transparency in retrospective price step-downs should they become necessary. It is also important to explore various mechanisms for resetting how risk is shared, such as hedging and improved contract practices.

Similarly, across all market segments within the dairy industry there is a need for price signalling that is visible and communicated across the industry so that trends and opportunities are clear and can be understood and managed by all participants. Greater pricing volatility makes this increasingly important.

Recognising this need, we understand that the dairy industry is currently working on an index to help communicate trends and facilitate informed business decisions. For small business and family enterprise, it would be helpful for the index to be accompanied by assistance in understanding and applying that price information.

### ***Final comments***

From the meetings we have attended, we believe the Australian dairy industry is motivated to improve the way that it operates both within the current structures and at a more strategic level.

In our view, where it is possible for these issues to be addressed by industry participants, this is the best approach because the solutions arrived at are more likely to be fit for purpose and 'owned' by the industry than if they were imposed by government. Hence, the moves that industry participants are already making to build on a history of working collaboratively to address challenges should be acknowledged and welcomed.

We hope these comments assist and we would be happy to discuss them further. Please feel free to contact Dr Craig Latham by telephone on 6263 1500 or by email at [craig.latham@asbfeo.gov.au](mailto:craig.latham@asbfeo.gov.au).

Yours sincerely

**Kate Carnell AO**

Australian Small Business & Family Enterprise Ombudsman

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