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24 September 2020

The Director
Perishable Agricultural Goods Inquiry
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: aginquiry@accc.gov.au

Dear Director,

I refer to the announcement by the Federal Treasurer, the Hon Josh Frydenberg MP, on 26 August 2020 regarding a 'price inquiry into the supply of perishable agricultural goods' to be undertaken by the Australian Consumer and Competition Commission (ACCC). Further to that announcement, Dairy Connect received a letter from Mick Keogh, Deputy Chair, ACCC dated 3 September 2020 inviting comment.

Dairy Connect values the opportunity to participate in this inquiry and is pleased to provide the following remarks and observations. We also support the intent and spirit of its terms of reference.

Introductory Remarks

By way of background, Dairy Connect is a unique agricultural advocacy membership body, focused on being the voice for the needs of the dairy industry value-chain. Under one advocacy umbrella, we represent a broad cross section of the Australian dairy industry, including dairy farmers, processors, milk vendors & supporting corporate partners around a shared dairy vision. We are committed to providing initiatives that will reinvigorate and propel the industry forward as well as provide support to the rural and regional communities that support dairy farmers and their dairy enterprises.

Dairy Connect has made a number of submissions to a range of dairy inquiries, during my tenure CEO, over the past years. This has included, for instance, the:

- Senate Economics References Committee into the dairy industry (which reported in 2017);
- ACCC inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry (which reported in 2018);
- NSW Legislative Council Committee inquiry into the sustainability of the dairy industry in NSW (which reported in 2018);
- Senate Standing Committee on Rural and Regional Affairs and Transport inquiry into the performance of Australia's dairy industry and the profitability of Australian dairy farmers since deregulation in 2000 (ongoing); and

- NSW Legislative Council Committee inquiry into the long-term sustainability of the dairy industry in New South Wales (ongoing).

The President of the Dairy Connect Farmers Group, Graham Forbes and I have appeared before these inquiries and provided oral evidence. Dairy Connect has also provided written submissions addressing their terms of reference. I am pleased to advise that a number of the recommendations arising from these committees are as a result of submissions put forward by Dairy Connect (and other dairy industry bodies).

However, I wish to indicate strongly our concern that while a number of the recommendations have been adopted by the Government of the day (especially through the recent reports of the ACCC which resulted in the introduction of the Dairy Mandatory Code of Conduct (Code) and which is the subject of review by this inquiry) many others have been ignored and only provided lip service. Dairy Connect considers this to be lost opportunities to address issues associated with, for example, continued market failure within the dairy industry since deregulation in 2000.

It is for this reason that Dairy Connect has called for the Government to support the introduction of a Royal Commission, with the powers that are associated with such a body, and to inquire into Australian dairy value-chain and make recommendations that will provide a holistic approach to address the issues within the Australian dairy industry. Attached hereto and marked annexure 'A' are draft Terms of Reference that Dairy Connect released in June 2020. These terms of reference provide, in the view of Dairy Connect, issues that need to be reviewed, considered and addressed to ensure a long-term and sustainable dairy industry in Australia for current and future dairy farmers.

Stopping or reversing trends that continue to have a negative impact on Australian dairy will require further bold approaches. It is hoped that this inquiry, which has a short time to report back to the Federal Government, may provide a way to assist in addressing these concerns.

How the relative bargaining power of farmers, processors and retailers involved in supply chains for dairy produce and other perishable agricultural goods affects trading practices which can, in turn, affect the efficient operation of these markets.

In considering the current position of perishable agricultural goods upon the Australian market, it is important to review the current circumstances that they are bound by with respect to the value-chain that they operate within. These issues are not new. They have been debated and considered over many years in terms of how perishable commodities operate within a framework that, by its own necessity, allows unconscionable bargaining power by those who are able to exercise control over the marketplace.

In many respects, the recent introduction of the Code has shone a light on other parts of the supply chain in other commodity areas. However, given the objectives and aims of Dairy Connect (as a dairy advocacy body), we will focus our attention upon the dairy value-chain. These comments may also be applicable to perishable agricultural goods generally.

Milk is a premium product with a short shelf life. It is also a food staple for the food basket. As a consequence, dairy farmers need to be assured by their processor that their milk will be collected daily and with no interruption to the collection of milk from their dairy enterprise. This in turn has a similar effect to processors within their relationship with supermarkets who in turn provide milk to their customers.

This statement alone illustrates the difficulty that a dairy farmer will find ensuring that their fresh milk is collected on a daily basis, resulting in them becoming a price taker as against a price maker. Furthermore, depending on where a farmer is located, they might only have one processor who has the ability (or will) to collect their milk. This will affect any negotiations that dairy farmers need to commence with their processor to enter into a milk supply agreement (MSA). In many ways, the dairy farmer as the supplier are beholden to the 'goodwill' of their processor.

It is clearly evident that the introduction of the Code will provide a platform from which openness, trust and transparency can be returned to the dairy marketplace, after a number of years where distrust was prevalent between those within the dairy value-chain.

However, cultural change will need to occur along the supply chain by all those impacted through the supply, collection, manufacture and distribution to ensure that the Code will enable an outcome that is positive to all.

There will need to be a rethink in the way in which processors and dairy farmers interact; as well as those dealings between processors and supermarkets. As stated above, a need for cultural change within the dairy industry will be a necessity for its long-term success.

In recent times (and after the commencement of the Code) Dairy Connect was approached by a dairy farmer whose processor had indicated that they would stop collecting their milk. The processor provided short notice as to this intention. To the detriment of the dairy farmer, there were not many other processors that collected milk within his region.

This form of reverse cartel placed the dairy farmer in an invidious position. The options available for his consideration were limited, with either another processor being found to collect his milk, or the farming enterprise would need to cease operations due to the financial impact of non-collection would have. The issue was about trust and transparency; and being provided with reasonable notice to find alternative outcomes. In this instance, Dairy Connect was able to assist in finding another processor who could collect the milk. As a consequence, the dairy farm is continuing to operate.

However, this highlights the peculiar situation a farmer can find himself in quickly, if the processor chooses to sever ties with little or no warning that they are about to do so.

In public comments regarding the announcement of this inquiry, Dairy Connect has stated:

"We believe dairy producers are in an invidious position at the bottom of the supply chain and any light that can be shone on attitudes and activities will be most welcome.

"The inquiry will also examine whether the Dairy Mandatory Code needs to be enhanced or

strengthened to ensure additional protection within the dairy supply chain.

"This will include whether an all-encompassing Agricultural Code may be required to ensure balance in the supply chains for a range of commodities."

Dairy Connect submits that consideration should be given by Government for other perishable commodities being afforded similar protection to that of dairy through the Code, if that is a policy position supported and adopted by the perishable food growers themselves after further consultation by Government and the ACCC.

This could be achieved by revising and making the Code in several parts (with general observations and common issues addressed in the first part and thereafter being tailored to different commodity areas as required). Alternatively, a separate Code could be developed for each commodity group as required. However, Dairy Connect favours the former option in relation to a common Code setting standard of behaviour applicable to other areas.

The relationship between processors and supermarkets has a marked impact upon the relationship between the dairy farmer as the supplier and their processor as against the supply chain relationship between the processor and the supermarket. In this regard, consideration should be given for the Code to be extended to take into account the value-chain between the processor and the supermarket, with reference to dairy.

The dairy cabinet in supermarkets needs to be considered in light of payments made to processors and manufacturers as well as price points as determined by supermarkets for the dairy produce to be consumed/purchased by the customer. This is particularly so with the continued importation of cheap dairy produce and sold at a reduced price in the dairy cabinet. In some instances, this produce is also falsely identified as 'Australian'. This needs to be regulated urgently and safeguards put in place. Extending the Code would be one mechanism to address this concern.

Dairy Connect has worked productively with Australian supermarket chains and it is submitted that we have achieved considerable and positive outcomes for the dairy enterprises by this positive and pro-active engagement. This has included, for instance, a much-needed shift away from the \$1/litre milk price, as well as temporary drought relief schemes that supermarkets have introduced. However, more needs to be done to review the market and bargaining power that can be exercised by supermarkets over processors.

In the past, this resulted in a situation in which the milk price was kept artificially low as a marketing strategy, pushing that pressure to effectively freeze production cost down the supply chain. This resulted in the cost of production for dairy suppliers being above the amount that they received as a farmgate price. As mentioned, this has unfortunately made dairy farmers price takers within the dairy value-chain.

While Dairy Connect acknowledges the 'Food and Grocery Code of Conduct' has had an impact on the supermarket sector, it has not provided sufficient benefits in the supply chain to processors and dairy farmers. It is submitted that its reach and impact are fairly limited and provides little tangible benefit.

Federal Perishable Foods and Dairy Commissioner

It has become apparent that the dairy value-chain requires external support. It is submitted that this could be achieved by the creation of a Federal Commissioner for Perishable Food and Dairy (or ombudsman). This position would be conduit to the relevant Minister(s) and the Federal Parliament on issues that continue to be raised by the Australian dairy industry on a regular and consistent basis.

Importantly, the role would be able to coordinate the differing States with their differing priorities and liaise with State counterparts (eg, in NSW that would be the NSW Dairy Advocate). This could extend to the establishment of a dairy council which the Commissioner would chair. The invitees would be the subject of further deliberation.

Such reports could, for instance, present an annual 'State of the Australian dairy industry' where information is provided to the Parliament as to the current position of the dairy industry in Australia (eg exports/milk production/imports such as cheese/etc).

The Commissioner, who would also be available to meet with those who are involved within the dairy value-chain (ranging from dairy farmers, processors, supermarkets and any other stakeholders or interest groups that the Commissioner would see as appropriate).

The position would be supported by a small secretariat based within the Federal Department of Agriculture (or similar agency) or alternatively, a small 'Milk Marketing Board' could be established. While it would be a matter for further consideration, it is not suggested that the Board would have any mandatory powers but rather be a point of contact for producers throughout Australia with issues that may arise with, for instance, their MSA.

This role would be differentiated from the functions of the ACCC. Where the ACCC would be providing oversight and compliance with the Code, the Commissioner would be taking a broader approach to the support to the dairy value-chain, beyond the Code. For instance, the role could include (as described in the NSW Parliamentary Report into the Sustainability of the NSW Dairy Industry):

- provide arbitration and dispute resolution support for farmers in negotiations with dairy processors;
- provide advice to farmers to engage in collective bargaining where appropriate;
- provide assistance to farmers in understanding and negotiating contracts for their milk supply; and
- conduct annual reviews into the state of the New South Wales dairy industry, including an assessment of farmgate milk prices in New South Wales regions in relation to the cost of production, and reporting on market issues raised by farmers.

This is a bold step that could be a major component of ensuring a sustainable and growing dairy market within Australia as well as providing further assistance to other perishable food commodity groups.

The effectiveness of existing regulation, including the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* in addressing bargaining power imbalances throughout relevant supply chains.

Dairy Connect continues to strongly support the Code within the relationship between the dairy farmer and their processor. It has started the process to restore trust, transparency and openness in the discussions between the differing parties and will assist in restoring a level playing field. This will be achieved over time as the Code is allowed to take effect within the value-chain and the cultural change (discussed above) takes hold.

However, there is no doubt that the Code has resulted in transparency in the negotiations between the processor and their dairy farmer as well as allowing a greater free market approach to the selling and purchaser of milk within the marketplace.

This is evident by the changes that processors have needed to adopt for their MSA. This has extended to, for example, MSA being in 'plain English', to be a single document, parties to act in good faith, prohibiting retrospective step-downs, amongst other positive and pro-active initiatives. It is submitted that this will start to correct the unfair bargaining position within the relationship between the farmer and their processor within the dairy value-chain.

These changes have only started to take effect upon the relationship between the dairy farmer and their processor. The Code must continue to remain in operation so as to enable its impact to be more appropriately assessed at a later time and therefore allow long term benefits to become more evident.

However, consideration should be given to reviewing the current mediation clauses and processes enunciated within the Code. It is submitted that there is an opportunity to enhance these provisions and entrench arbitration within the Code as well. In a previous submission to the ACCC, Dairy Connect supported the provisions as enunciated by Derek Minus, barrister and Principal, Dispute Resolvers. Dairy Connect suggests that these amendments should be examined with the intention to implement appropriate recommendations made by Mr Minus. For ease of reference, a copy of his previous letter is attached hereto and marked Annexure 'B'.

Another area that requires addition to the Code is to provide safeguards for suppliers in the milk testing, sampling and calibration. These tests determine what may be paid as a final farmgate price to the dairy farmer. Dairy Connect has been informed of significant differences in the testing procedures afforded by processors.

Prior to deregulation, testing guidelines were provided and overseen by government. It is strongly submitted that this should occur again and that the Code indicate that national standards must be implemented before the commencement of the next round of MSA negotiations and the MSA being made publicly available on the websites of processors in 2021.

While Dairy Connect acknowledges that the majority of processors comply with the Code and its provisions, there are still some that do not – and there are currently few ways to have these reviewed in the public light. The ACCC is bound by strict confidentiality and this

prohibits the use of 'name and shame' options for those who do not abide by the Code. This needs to be amended to allow public information to be made available.

Further, a public record of non-complicacy would give dairy farmers who are considering signing up with a different processor (or indeed to enter into an MSA with an additional processor) a valuable tool of evaluation of that processor. This is especially so given the livelihood of their farming enterprises dependent on correct and up-to-date information.

Dairy Connect acknowledges that it is stated in the terms of reference that government pricing policy is not to be reviewed as part of this inquiry. It must nevertheless be stated that this inhibits a full and comprehensive review of differing options to help increase the current levels of the farmgate price for dairy farmers.

Dairy Connect supports the referral for appropriate examination by the ACCC as to whether there would or should be any consideration of some form of a 'dairy floor price'. This referral was recently supported by the Senate Standing Committee on Rural and Regional Affairs and Transport inquiry into the performance of Australia's dairy industry and the profitability of Australian dairy farmers since deregulation in 2000. At that time, Dairy Connect stated:

"We agree with the Senate's call for the Australian Competition and Consumer Commission to investigate how the Government could or should regulate the farm-gate price paid for fresh milk by processors." and

"The concept deserves to be examined and the ACCC inquiry provides an opportunity for the idea to have some 'light shone on it'."

It is to be regretted that this is not to be covered by the Inquiry so a meaningful review could occur. Dairy Connect is not stating that a floor price should be implemented but rather all options should be considered in finding a way to ensure the long-term sustainability of the Aussie dairy industry.

We need to ensure a fair farm-gate price above the costs of production and thus providing a 'living wage' for dairy farmers and their families. This should have been examined as part of this inquiry.

The decision not to review all option reiterates our opinion that a Royal Commission is warranted urgently into the Australian dairy industry.

Concluding Remarks

In conclusion, there have been many dairy reviews since deregulation in 2000 but still there has been a continued reduction in the number of dairy farm and output. This number is continuing to diminish.

The recommendations that evolve from this Inquiry will provide a benchmark for the dairy industry within Australia and without the support of Government and Parliament it is likely that Australia will, one day, import its milk from outside of Australia. This may sound dire, but the industry is at crossroads and has a 'once in a generation' opportunity to ensure its

sustainability.

COVID-19 has only too well highlighted the need for a stable food supply and to ensure food security into the future.

Failure to do so may result in the decline of the dairy industry's importance to the economic vitality within Australia and elsewhere throughout the world where Australian dairy produce provides sustenance to growing nations.

Dairy Connect is pleased to have provided the above comments for the inquiry and looks forward to working with the ACCC to ensure a viable future for the production of perishable goods and dairy in Australia.

Yours Faithfully,

A handwritten signature in blue ink, appearing to read 'Shaughn Morgan', with a long horizontal flourish extending to the right.

Shaughn Morgan
Chief Executive Officer

**"ROYAL COMMISSION INTO THE AUSTRALIAN DAIRY INDUSTRY
TERMS OF REFERENCE**

The Australian dairy industry both nationally and internationally has encountered market failure since de-regulation in 2000. This is been illustrated by the decision of the major supermarkets to impose dollar a litre for private label milk in 2011. It was not until 2018 that there was any change in the price for this produce. Dairy farming enterprises have encountered severe financial hardships and found it difficult to remain profitable as the farm gate price continues to be below the cost of production. In more recent times this has been illustrated by the collapse of the export market, collapse of the dairy co-op Murray Goulburn in 2016 as well as the declining number dairy farming enterprises in Australia.

TERMS OF REFERENCE

A review of the dairy value-chain and the way in which the stakeholders (Supermarkets/processors/dairy farming enterprises) interact with one another in commercial and business arrangements.

Review the current market failure that has resulted from the deregulation of the dairy industry in 2000 and the ongoing market failure that the industry is continuing to experience with the collapse of the export and domestic markets.

A review of the prices/costs for dairy cabinet produce including fresh milk by the major supermarket chains, especially as to market share, import costs undercutting Australian dairy produce. This is illustrated by the low farm gate price that is paid to dairy farmers for their produce, particularly given the high price points (and profits) that supermarkets obtain and their relationship to their customer (purchaser) and processor (supplier) for the dairy produce/milk.

Review of 'truth in labelling', with reference to imported dairy produce (e.g. cheese) being marketed as 'Australian produce' and the resulting impact upon the Australian domestic market.

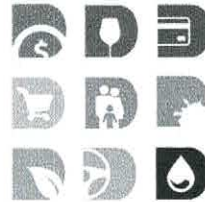
Review the powers that the ACCC with respect to organisations within the value-chain, ranging from supermarkets, (as currently regulated by the food & grocery code) as well as processors and dairy farmers (currently regulated by the mandatory code) and the lack of good faith between the parties and the unfair bargaining power by certain parties within the dairy value-chain.

Review the business efficiency of dairy farmers and support that could be obtained to ensure the viability and sustainability into the future.

Review the effectiveness of Dairy Australia's programs on delivering a return on the investment from the farmer's levy contributions, in particular the RD&E and marketing Programs and review alternatives to the current RD&E model.

Review the good faith, efficiency and effectiveness of industry advocacy by the national and state dairy farmer representative organisations and their relationship with other members within the dairy value-chain.

Review current water management practices at both a state and federal level including the Murray Darling Basin Plan, which are directly (e.g. dairy farms within the Basin area) and indirectly (e.g.: dairy farmers who purchase fodder from within the Basin to supplement feed livestock) impacting on dairy farmers.”



Shaughn Morgan
Dairy Connect

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8 November 2019

Annexure 'B'

'Exposure Draft' of the Dairy Code Regulations 2019

Dear Shaughn,

I have prepared this review of the problems contained within the dispute resolution procedures of the draft Dairy Code of Conduct.

Dispute Resolvers previously provided the management services for the dispute resolution functions of the Office of the Franchising Mediation Adviser, Office of the Horticulture Mediation Adviser and Office of the OilCode Dispute Resolution Adviser under Commonwealth Government contract.

As the former appointed Mediation Adviser to the Minister for Small Business, Minister for Agriculture and Minister for Environment and Energy, I have an in depth knowledge both of Code functions as well as the legislated dispute resolution processes. I provided detailed submissions on beneficial changes to the franchising industry Code of Conduct to the Senate Inquiry that were adopted and published in its report, '*Fairness in Franchising*'.

The 'Exposure Draft' of the *Competition and Consumer (Industry Codes— Dairy) Regulations 2019* (released 25 October 2019) has been written without apparent awareness of the various other Codes of Conduct that have been prepared to address commercial power imbalances in national industries, and the existing failings in those Code processes.

The draft Dairy Code as released, contains significant procedural flaws and will not achieve the stated aim of an independent, low-cost and effective dispute resolution system.

I have identified in the attached review, these problems with the Exposure Draft of the Dairy Code.

Dispute Resolvers is in the process of establishing private, commercial dispute resolution services for, and in conjunction with various industries, that will deliver effective resolution services for the disputes that do occur.

Your faithfully,

Derek Minus

Accredited Mediator | Barrister-at-law | Chartered Arbitrator





REVIEW-PROPOSED DRAFT DAIRY CODE OF CONDUCT

Introduction

1. Under s 51AE of the *Competition and Consumer Act 2010*, regulations may prescribe an industry code or specified provisions of an industry code and declare the industry code to be a mandatory industry or a voluntary industry code. There is a progression of Codes of Conduct that have been prescribed in this manner for a number of industries, including the:

- Franchising Code of Conduct
- Horticulture Code of Conduct
- Oil Code of Conduct
- Port Terminal Access (Bulk Wheat) Code of Conduct
- Sugar Code of Conduct
- Food and Grocery Code of Conduct
- draft Dairy Code of Conduct

2. Most of the current Codes are not 'fit-for-purpose' in that they have significant deficiencies, are underutilised (or not utilised at all) and do not provide an efficient or effective dispute resolution system.

For example:

3. The independent review of the **Horticulture Code of Conduct** was carried out by Mark Napper and Alan Wein in November 2015. They identified that [pp. 40, 41]:

"the current Horticulture Code dispute resolution process has become irrelevant, inappropriate and is largely not adopted by the parties in the wholesale horticulture sector. The current process is too cumbersome and does not address the immediate concerns of the primary dispute issues that arise in the wholesale horticulture sector.

This is largely because the current process fails to appreciate the dynamics of the wholesale horticulture sector. Concerns have been raised that an ad hoc dispute resolution process does not work due to the perishable nature of the produce, growers' distance from market and that the processes can be detrimental to ongoing relationships.

We believe that the dispute resolution processes under the Horticulture Code, need to be:

- *quickly convened*
- *accessible in market*
- *independently undertaken by an expert*
- *binding on all parties."*

4. The **Food and Grocery Code** was reviewed by Professor Graeme Samuel AC after 3 years of operation who published his final report in September 2018. The Food and Grocery Code was established to regulate standards of business conduct in the way supermarkets (also known as



retailers) do business with their suppliers within the grocery supply chain. The Code provides a supplier with three pathways for dealing with complaints relating to a matter covered by the Code:

- lodge a dispute for investigation by a retailer's internal Code Compliance Manager
- request either mediation or arbitration of the dispute (but not both in relation to the same dispute at the same time). A retailer must participate in mediation or arbitration if a supplier chooses to use the Code processes.

The Code Reviewer found that there had not been a single mediation or arbitration conducted:

The Review is not aware that any disputes have undergone mediation or arbitration since the introduction of the Grocery Code. It is understood that this is due to a fear of retribution associated with escalating complaints against retailers. The Review also heard there is a general lack of awareness by suppliers about the availability of mediation or arbitration as a dispute resolution option.

In relation to the Code Compliance investigation process:

The Review has identified a critical need for improving the current dispute resolution framework in the Grocery Code. In particular, there was strong stakeholder support for an independent entity, such as an adjudicator or ombudsman, to be able to hear supplier complaints and make binding decisions, including compensation orders for suppliers.

5. The **Franchising Code of Conduct** has been the subject of a year-long review by the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services which resulted in the publication of its report, *Fairness in Franchising* March 2019. Amongst numerous deficiencies which the Committee found, in relation to the dispute resolution process, it stated:

15.67 In terms of how the dispute resolution scheme for franchising could be enhanced, the overwhelming bulk of the evidence from a range of stakeholders strongly argued the Franchising Code be amended to include provision for binding arbitration. In this regard, the committee notes that more modern dispute resolution schemes under the Food and Grocery Code of Conduct and the AFCA both provide for binding arbitration.

The Committee identified the following changes to improve the dispute resolution functions of the Franchising Code of Conduct dispute resolution processes:

15.73 The committee recommends that the dispute resolution scheme under the Franchising Code of Conduct remain mandatory and be enhanced to include:

- *the option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful (does not exclude court action);*
- *require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed;*
- *restrictions on taking legal action until alternative dispute resolution is complete (along similar lines to those used by the Australian Financial Complaints Authority);*
- *immunity from liability for the dispute resolution body;*
- *to include a requirement that if a franchisor takes a matter straight to court, the franchisor must demonstrate to the court's satisfaction that the matter cannot be resolved through mediation, and if not the court should order the parties to mediation;*
- *the capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator).*



Division 2—Dairy Industry Code

6. The **draft Dairy Code** is a mandatory industry code [s 7(b)] that requires:
processors (corporations that purchases milk) to only purchase milk from a **farmer** (a person that produces milk) under a **milk supply agreement** (a contract between a processor and a farmer for the supply of milk) if the agreement is unwritten the processor must make a written record of the agreement.
7. Processors are required to publish a standard form of agreement that complies with the Code, which they are prepared to enter into, on 1 June of each calendar year [s 10]. Farmers can “theoretically” negotiate a milk supply agreement that is not in a standard form with a producer [s 12] but the chances of achieving that against the substantial negotiating position of the processor (often international corporations) is doubtful.
8. Farmers should be able (either individually or as a group) to negotiate the terms of their milk supply agreement. Any dispute as to terms can resolved in the same manner as utilised in the **Port Terminal Access (Bulk Wheat) Code**. If a dispute arises over the future terms to govern the relationship, either party can:
 - a. request senior representatives from each party meet and use reasonable endeavours to resolve the dispute [cl 14.3]
 - b. mutually agree to undertake mediation [cl 14.4]
 - c. refer the terms of the agreement to be determined by an independent arbitrator appointed by the parties [cl 15.1]

Good Faith

9. When dealing with or resolving complaints or disputes about a milk supply agreement, producers and farmers must deal with each other in good faith [s 9]. “Good Faith” is defined [s 5] to have the same meaning as “*in the unwritten law as in force from time to time*”.
10. Whilst this approach is consistent with that adopted in the Franchising, Horticulture and Food and Grocery Codes it has proved problematic. As the reviewer of the Grocery Code found:

[Page 27] *Stakeholders strongly support the need for the Grocery Code to mandate good faith in the industry. However, suppliers and others expressed a lack of confidence in the ability of the current good faith provision to address specific instances of alleged misconduct or unfair dealings by the signatories.*

In particular, suppliers raised concerns that the current good faith provision is too difficult to apply in practice. They noted that there is significant uncertainty in the industry regarding the meaning of good faith. The term is open to broad interpretation, which often leads to conflicting views among stakeholders.



[Page 28] Stakeholders noted that the current good faith provision does not contain enough definitions to assist in its interpretation or application. Stakeholders also felt that there was a lack of guidance material available to help them understand how the provision may be relevant in particular scenarios or could possibly be applied to their dispute.

[Page 30] During the debate on good faith and fair dealings, it is clear that stakeholders broadly support a Grocery Code that ensures that suppliers are afforded both fairness of process (good faith) and fairness in outcomes (fair dealings).

11. The Dairy Code should include a test of fairness and a list of guideline indicators such as clear references to equity, honesty, reasonableness, cooperation and other values that encapsulate fair dealing. The adoption of principles of "fair dealing" as recommended by the Grocery Code reviewer will ensure dispute resolution outcomes that "align with common sense and generally accepted community expectations."

Subdivision F—Complaints and Disputes

12. Any dispute between the parties to a milk supply agreement in relation to a matter arising under or in connection with the agreement is resolved according to **Subdivision F—Complaints and disputes**
13. The section provides for three methods of dispute resolution:
 - (a) in accordance with the internal complaint handling procedure in the milk agreement;
 - (b) by mediation in accordance with the Code or by any other appropriate mediation process;
 - (c) by arbitration in accordance with the Code or by any other appropriate arbitration process.
14. Compare this to the Horticulture Code **[s 38(1)]** which provides much more flexibility and power to the parties as:

"Growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them."

There is no reason to limit the various forms of dispute resolution that the parties can mutually choose to employ under the provisions of a Code of Conduct.
15. The Code does not explicitly provide that the right of a party to a milk supply agreement to bring legal proceedings, whether under the agreement or otherwise, is unaffected by engaging in a dispute resolution process which does not resolve the dispute. Even if a milk supply agreement provides for arbitration, it is not compulsory as both parties can agree to have the dispute determined by a court.



Internal Complaint Handling Procedure

16. The primary method for resolving disputes that occur between a processor and a farmer is the **Internal Complaint Handling Procedure [s 33(1)]**. There is no definition or standard contained in the Code as to what an “Internal Complaint Handling Procedure” is required to provide. It might involve nothing more than an investigation by the producer. The process does not need to be consistent with any standard such as the Australian Standard AS ISO 10002–2006 *Customer satisfaction— Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD).
17. In the case of the Grocery Code, the internal dispute resolution procedure involving Code Compliance Managers (CHM) was found to be unsatisfactory:
- The Review has found that very few suppliers elevated a dispute to a CCM. This is reflected in previous CCM reports provided to the ACCC, which show ‘a very low number of complaints made by suppliers to supermarkets, such as one complaint received or none at all’.*
- The Review heard that suppliers generally consider the CCMs will be biased towards the retailer when assessing a complaint and lacking the degree of independence, separation and authority necessary to adequately resolve their disputes. Some stakeholders were also concerned that the CCM could dismiss a supplier’s complaint if the CCM was satisfied that it is ‘vexatious, trivial, misconceived or lacking in substance’.*
- Further, a number of stakeholders considered the current framework ineffective as it did not guarantee an outcome of disputes. It was noted that while the Grocery Code requires the CCM to determine what action (if any) should be taken in response to the complaint, there is no requirement for the signatory to carry out the recommended action.*
18. Standard dispute resolution processes to be included in a milk supply agreement only **may** include mediation and arbitration [s 33] cf. *Port Terminal Access (Bulk Wheat) Code of Conduct* where mediation must be included [s 22(2)]. Both mediation and arbitration should be processes that **must** be included in any milk supply agreement.
19. Even though it is the Processor’s internal dispute resolution procedure, it applies mutually and equally to both parties so that either the farmer or the producer can be a complainant. Parties must first use the procedure in the complaint handling procedure in the milk supply agreement **before** taking action to resolve the complaint by mediation or arbitration. This can take up to 65 days as the “respondent” must acknowledge receipt of the complaint within 5 working days and then has up to 60 days to resolve the matter through the complaint’s procedure. Milk is a perishable product but the earliest a farmer can expect a response to a dispute that is lodged is 65 days (over 2 months).
20. There is no formal ‘negotiation’ process provided. In comparison the Franchising Code [cl 40] provides that parties must attempt to agree how to resolve the dispute within a 3 week period, before either party can refer the matter to a mediator. This allows the parties to resolve the dispute quickly and cheaply between themselves.



Mediation - section 38

21. Parties are restricted as to whom they can appoint as a mediator [s 38(2)]. This is contrary to the position of the ACCC, see *Fairness in Franchising* [para 15.55]:

The ACCC acknowledged that when it considered a dispute could be resolved by mediation, it referred parties to not just OFMA, but also ASBFEO and the various small business commissioners because they all offer similar services.

22. Parties should be given the opportunity to choose their own mediator as is common with other Codes, where certain individuals have significant experience of the code processes and industry practices. The Franchising Code, which has the most mediation activity with over 550 matters referred to mediation in 2017 and 2018, has a two-stage mediation process [s 40]:

40(3) If the parties cannot agree how to resolve the dispute within 3 weeks, either party may refer the matter to a mediator for mediation.

40(4) If the parties cannot agree on who should be the mediator, either party may ask the mediation adviser to appoint a mediator.

23. The Federal Attorney-General's office should be tasked with accrediting eligible mediators for ALL of the various Codes of Conduct and making the information publicly available. A similar system has been managed by the Federal Attorney-General's for Family Dispute Resolution Practitioners (FDRPs) for the past 10 years. See [Becoming a Family Dispute Resolution Practitioner](#) and [Family Dispute Resolution Register](#).

24. Mediation is restricted under the Code to single disputes. Experience with the Franchising industry (which would be similar to the dairy industry) is that disputes with producers/franchisors is mainly systemic involving multiple dairy farmers in a district. The ACCC recommended to the Franchising Inquiry the use of multi-party mediation, see *Fairness in Franchising* [para. 15.10]:

The ACCC observed that multi-party mediation has benefits such as:

- 1) assisting to shift the imbalance of bargaining power that exists between the franchisor and franchisee when resolving disputes; and*
- 2) creating a more efficient process and use of resources.*

25. The Senate Committee therefore recommended include [para. 15.73] that the dispute resolution scheme under the Franchising Code of Conduct be enhanced by:

the capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator).



Arbitration - section 39

26. Arbitration is a process of determination by an expert of a dispute referred by the parties. Whereas mediation provides flexibility of outcome as agreed by the parties, arbitration delivers certainty of outcome as determined by an arbitrator. Arbitration allows matters to be resolved fairly, quickly and inexpensively by a binding award.
27. The original "Complaint and Dispute Resolution Rules" prepared by a major law firm on behalf of the Australian Dairy Industry Council Inc provided a thorough if overly complex arbitration system. The arbitration procedure set out in the draft Code is best described as a "Claytons" arbitration system, as it talks about arbitration processes but does not deliver them, for these reasons:
 - a. Access to arbitration is restricted to whether an arbitration process is in the milk supply agreement. As identified earlier, arbitration does not need to be included **[s 33(3)]**.
 - b. If an arbitration process is not included in a milk supply agreement as a means for resolving disputes between parties, then a matter must not be resolved by arbitration **[37(2)(a)]**
 - c. the parties to a milk supply agreement may agree to use arbitration to resolve a dispute between parties to the agreement by arbitration by agreeing in another written document to use arbitration to resolve the matter **[41(1)]**. However, it is practically unheard of that parties who did not provide for the use of arbitration in their dispute resolution agreement, would later agree to have the matter determined by arbitration.
 - d. Perhaps the most surprising and naïve provision of the Code is contained in **s 42(1)** which provides that the arbitration can be terminated if any party to the dispute requests the arbitrator to do so. This type of provision is unknown and contrary to every Arbitration Act or institutional Rule. Parties agree to engage in arbitration to ensure finality of the dispute. This can only be assured by the Arbitrator having the power to deliver an award and the arbitration not being terminated by one party wanting to withdraw (possibly because it fears it will lose).
28. Parties are restricted as to whom they can appoint as the arbitrator **[s 41(2)]**. Parties should be given the opportunity to choose their own arbitrator as is common with other Codes.
29. Federal Attorney-General should be tasked with accrediting eligible arbitrators for ALL of the various Codes of Conduct and making the information publicly available.
30. Conducting an arbitration without specifying any Rules that are to apply would leave the parties without guidance as to how the arbitration is to proceed. Given that this is the third Code to specify arbitration as a dispute resolution procedure (with the Franchising Code recommended to be amended to also include an arbitration process) it would be appropriate for the ACCC to provide a schedule of Arbitration Rules to apply for the conduct of Code Arbitration processes.