The Hon. David Littleproud MP

Minister for Agriculture, Drought and Emergency Management
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MS20-000426

Senator the Hon Concetta Fierravanti-Wells
Chair Senate Standing Committee for Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

17 APR 2020

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 3 April 2020 concerning the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee's) concerns with the *Competition and Consumer (Industry Codes–Dairy) Regulations 2019* (Dairy Code) or (the Instrument).

Thank you for your advice that the matter concerning the publishing of Dairy Code reviews has been resolved by the Committee. The Committee has sought my further advice as to **"why it is considered necessary and appropriate to impose significant civil penalties for non-compliance with a term undefined by the written law in this instrument, when other industry codes have sought to promote honest and fair dealings with other parties without such provisions".**

The Dairy Code provides that processors and farmers must deal with one another in good faith within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk. The 'obligation to deal in good faith' provisions in the Instrument are intended to promote farmers and processors acting honestly and fairly in their dealings with one another. Deterring a party from acting dishonestly or failing to have regard to the legitimate interests of the other party, and penalising such conduct, is a foundational concept behind the Dairy Code and several other mandatory industry codes made under the *Competition and Consumer Act 2010*.

In the dairy industry, many of the interactions that occur as part of a business relationship between a processor and farmer happen beyond what is solely recorded in an agreement or what is covered explicitly by the Dairy Code. As such, it is appropriate that the business relationship and dealings between farmers and processors should be governed by a broader principle such as good faith.

Australia's dairy industry is geographically diverse and complex, with a variety of farmer production models, processor business models and end product markets. The Dairy Code has been designed, among other things, to prohibit egregious practices and behaviours that

have been previously applied by processors in their business relationships with farmers. These includes two actions that lead to wide-scale industry turmoil in 2016 with the largest processor applying a retrospective step down (a unilateral reduction of the price) for milk already supplied during that financial year by farmers, and the second largest processor unilaterally drastically reducing the future price it would pay to farmers for the remainder of the financial year. These two examples were the most significant but not the only instances of undesirable (and bad faith) business conduct in the industry. Provisions on dealing in good faith were subsequently considered necessary to include in the Dairy Code to restore confidence and good faith in the business relationships between farmers and processors as these were so badly impacted by the past poor conduct of processors.

The Dairy Code was developed to reflect the recommendations and findings of the ACCC's Dairy Inquiry (2018) and the identified shortcomings of the dairy industry's *voluntary code of practice for contractual arrangements between dairy farmers and processors in Australia (2017)*. The content of the Dairy Code was also tested through significant and widespread industry consultations.

The dairy industry previously developed a voluntary code. The voluntary code required the parties to act in good faith, but without any penalty for non-compliance. The ACCC (2018) considered the effectiveness of the industry's voluntary code of practice as part of its dairy inquiry. The ACCC found that the non-enforceability of the voluntary code is an inherent weakness. This included that signatories to a voluntary code can breach the code with little or no consequences.

The state of the relationship between farmers and processors as a result of poor processor behaviours, and the identified failures of the voluntary industry dairy code are the main reasons that the Dairy Code includes provisions requiring the parties to act in good faith with civil pecuniary penalties available. Shortcomings of the voluntary dairy code included that several processors refused to sign on to it, as well as concerns by farmers that there would not be repercussions for breaches by processors. For the Dairy Code to address the unique issues of the industry, the inclusion of penalties for breaching good faith was considered a fundamental component of re-establishing trust in the business relationships. Additionally, given the significant financial distress to farmers' businesses due to previous processor poor practices identified by the ACCC and Senate inquiries, a Dairy Code without financial consequence was not considered to be sufficient to address its policy objectives. This is because without civil penalties, a processing business may not have a direct financial incentive to behave appropriately.

With regard to the Committee's request for advice about how the matter of good faith is dealt with alternatively in other industry codes, I advise that all industry codes are contextualised and designed to meet the needs of that specific industry so to address that industry's unique market failures. Currently there are six codes which include provisions requiring parties to deal with each other in good faith – the Dairy Code, Horticulture Code, Franchise Code, Food and Grocery Code, Wheat Port Code and Sugar Code.

Prior to 2014, competition law did not allow for penalty provisions to be included under industry codes. The *Competition and Consumer Act 2010* was amended to allow pecuniary penalties to be included in industry codes through the *Consumer Amendment (Industry Code Penalties) Act 2014*. The Explanatory Statement addressed the importance of the

introduction of penalties into industry codes, noting, "Allowing a pecuniary penalty to be imposed will indicate to the industry that the government considers breaches of the Code to be serious matters that have consequences". Since this law was amended, three codes have included the ability to impose pecuniary penalties – the Dairy Code, Horticulture Code and Franchise Code. I note that to date all codes which have implemented civil pecuniary penalties and that contain good faith clauses have applied penalty provisions to the good faith clause.

In summary, without civil penalties being attached to a failure to comply with the 'obligation to deal in good faith' provisions, I believe that the Dairy code will not be effective in curtailing the egregious and bad faith behaviours the government is seeking to prevent re-occurring in the dairy industry, nor would it restore industry confidence that there will be good faith concepts incorporated in to their ongoing business relationships – which are the core objectives of the Dairy Code.

I would also like to reiterate my view, as stated in my previous response to this matter, about the benefit of not rigidly defining good faith in the Dairy Code. Good faith has and will continue to be developed through common law. The Dairy Code provides guidance about matters related to good faith without providing a comprehensive definition. This allows the Dairy Code to remain consistent with common law as it evolves as well as avoid the uncertainty that may exist where there is a disparity between the common law interpretations of good faith and the definition in the Instrument. Creating a definitive list of good faith in the Dairy Code may risk permitting conduct that may be considered 'not in good faith' by common law standards but which has not been specified in the Instrument. Such a misalignment may create confusion within the industry about which version of good faith the industry is operating under. This would run contrary to the Government's intent of supporting the conduct of business relationships within the industry.

I trust this information is useful for the Committee.

Thank you for raising this matter.

Yours sincerely

[redacted]

DAVID LITTLEPROUD MP

cc. The Treasurer, The Hon. Josh Frydenberg MP

The Hon. David Littleproud MP

Minister for Agriculture, Drought and Emergency Management
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MC20-000515

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

14 MAY 2020

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 3 April 2020 relating to the committee's concerns with the Export *Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019* (the Order). I appreciate the time you have taken to bring this matter to my attention. I apologise for the delay in responding.

I have considered the committee's concerns and to ensure clarity on these issues I have asked my department to prepare amendments to the Order in line with your comments, for consideration and action by the rule maker.

I understand my department is currently preparing an amendment to the Order to reflect changes to the tariff rate quota for sheepmeat and goatmeat to the European Union due to 'Brexit'. The amendment will be made by September, ahead of the end of the Brexit transition period on 31 December 2020. As part of the amendment the department has already requested changes to section 34 (Decisions made by computer) of the Order to have the wording align with section 126 of the *Export Control (Tariff Rate Quotas) Order 2019*. This wording would be consistent with the committee's request to explicitly rule out the use of computer programs for discretionary decisions. Given this, I would like to request the committee consider accepting an undertaking from my department to make the requested changes as part of this amendment. This would also be the most efficient and cost effective approach.

Thank you for raising this matter.

Yours sincerely

[redacted]

DAVID LITTLEPROUD MP

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Our Ref: MS20-000355

24 APR 2020

Senator the Hon Concetta Fierravanti-Wells
Chair, Senate Standing Committee for the Scrutiny of Delegated Legislation
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CANBERRA ACT 2600

Dear Senator Concetta,

Thank you for your letter of 3 April 2020 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's assessment of the Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 (Amendment Guidelines). I appreciate the time you have taken to bring this to my attention.

You have sought advice as to what characteristics of the determination of levy components justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *'What decisions should be subject to merit review'?* (ARC Guidance Document).

The determination of a HELP tuition protection levy (levy) imposed by the *Higher Education Support (HELP Tuition Protection Levy) Act 2020* (Levy Act) is not subject to external merits review by the Administrative Appeals Tribunal or other review body. In my view, the characteristics of the decisions that support the basis for determination of the levy are factually based and there is very limited scope for disagreement about whether or not the particular facts have occurred. Accordingly, I consider the decision is one which does not necessitate an external review process.

Chapter 3 of the ARC Guidance Document outlines decisions that are considered to be unsuitable for merits review, which include decisions that may be described as automatic or mandatory. That is, decisions made where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. The levy determinations can be classified as automatic or mandatory in nature, as the determinations are based on measurable factual data, such as student numbers, completion rates and compliance history. These are largely quantitative in nature and do not invite subject deliberation.

Automatic or mandatory decision

The calculation and total amount of the different components of the levy are based on a method prescribed in the Levy Act and legislative instruments made under that Act by the HELP Tuition Protection Director and by me as the responsible Minister. The statutory obligation to pay the levy is based on the factual circumstances of the provider and based on a formulaic calculation. In other words, there is no discretion exercisable around the factors relevant to the levy determination, which is based on categories of statistical and other data which must be considered when making a determination.

The automatic or mandatory character of the decision flowing from those facts, which is made by reference to clear targeted factors, means that any external review would necessarily be confined to ascertaining whether or not the relevant facts have occurred. As the facts are based on measurable data (such as student numbers, completion rates and compliance history) the decision-maker's discretion, to the extent it may be exercised, is strictly confined to an objective assessment of that data. Accordingly, the determination of the levy does not involve significant discretionary elements and therefore the decision is one which is characterised as automatic or mandatory.

Internal review process

Levy determinations are subject to internal review processes under section 2.10.25 (determination made by the HELP Tuition Protection Director) and section 2.10.30 (internal review of the determination) of the Amendment Guidelines. I consider that the internal review process in the Amendment Guidelines provides a robust and accountable mechanism for review of a levy determination through re-examination or recalculation of the levy amount.

Under section 2.10.35, higher education providers that receive a levy notice from the HELP Tuition Protection Director have the right to request a review of the determination of a levy component or components. This review is conducted by the HELP Tuition Protection Director, who may affirm, vary or set aside the levy determination in the levy notice, and, if the decision is set aside, may make a further decision. In requesting a review of a determination, a leviable provider may supply any further information or evidence it wishes the HELP Protection Director to consider. In addition, a leviable provider may lodge a complaint about the handling of the determination process with the Department of Education, Skills and Employment (the department) to investigate in accordance with its complaints policy and procedures. If a provider is not satisfied with the way the department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman.

Decisions made by the HELP Tuition Protection Director in relation to the levy determination were not made subject to independent merits review because the nature of those decisions are not such as would require an external tier of review.

Levy components

The levy is comprised of three components: the provider's administrative fee component, risk rated premium component and special tuition protection component for the year. The Levy Act prescribes that the Minister for Education is responsible for making the legislative instrument for the administrative fee component and the HELP Tuition Protection Director is responsible for making the legislative instrument for the risk rated premium component and special tuition protection component.

In setting an administrative fee component, I may determine a maximum amount for an administrative flat charge and also a per student amount. These amounts must not be higher than the upper limits set out in subsection 9(3) of the Levy Act. The Australian Government Actuary was closely consulted in setting these upper limit amounts. Subsection 9(3) gives providers transparency and certainty as to the maximum possible amounts that can be charged for the administrative fee component.

The risk rated premium component is calculated based on the provider's level of exposure under the Higher Education Loan Program (HELP), in terms of total student numbers and total HELP loan amounts, as well as the provider's risk of default based on certain risk factors, including course completion, student volatility, average loan size and non-compliance history. In setting the risk rated premium and special tuition protection components, the HELP Tuition Protection Director must have regard to the advice of the HELP Tuition Protection Fund Advisory Board and the sustainability of the HELP Tuition Protection Fund. Additionally, before the HELP Tuition Protection Director makes a legislative instrument, the Treasurer must approve the legislative instrument in writing. This provides an extra level of oversight, accountability and independent scrutiny of the legislative instrument. It also enables the quality and consistency of levy determination decisions to be closely monitored.

The legislative instruments that set the levy components are also subject to Parliamentary scrutiny and the disallowance process.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

[redacted]

DAN TEHAN

[redacted]

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-008280

24 April 2020

Senator the Hon Concetta Fierravanti-Wells
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Dear Senator

I refer to your letter of 3 April 2020 from the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting additional information concerning section 25 of the National Health (Take Home Naloxone Pilot) Special Arrangement 2019 (PB 97 of 2019) (Arrangement).

You have asked my Department to provide advice as to what evidence is available beyond the terms of section 100 of the *National Health Act 1953* (Act) to indicate that Parliament intended section 100 to provide legislative authority for the authorisation of private third parties to perform all of the powers and functions of the Secretary in administering special arrangements.

The Explanatory Memorandum for the originating bill, the Health and Ageing Legislation Amendment Bill relevantly provides:

> *Section 100 of the National Health Act 1953 provides an important mechanism to enable special distribution arrangements for pharmaceutical benefits where, in particular circumstances, the normal PBS supply arrangements are not convenient or efficient…*
>
> *These amendments will make it clear that these special arrangements can be used for the funding of particular medicines that are not available through the normal operation of the PBS.*

This demonstrates that at the time that section 100 of the Act was enacted, Parliament clearly intended that section 100 of the Act would provide for funding of medicines outside the normal operation of the PBS including, where it is necessary or convenient to do so, arrangements such as those provided for under this Arrangement.

As it is particularly relevant, I also draw your attention to ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 (16 May 2014), where the High Court of Australia indicated that Henry VIII clauses (such as that at section 100(1) of the Act) need not be construed strictly. The joint judgment of French CJ, Crennan, Kiefel JJ at [31] and Gageler J at [61] concluded that such provisions strike 'a legislated balance between flexibility and accountability in working out of the detail of replacing one modern complex statutory scheme with another'.

Consequently, it is clear that section 100 of the Act provides authority for the Secretary to authorise, qualified persons to perform any of the Secretary's functions, or exercise any of the Secretary's powers as are required for the purposes of the supply of pharmaceutical benefits as part of the Take Home Naloxone Pilot under section 25 of the Arrangement.

I trust this information is of assistance in clarifying your concerns.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt