



EXECUTIVE OFFICE

23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

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tel: (02) 6243 1111
fax: (02) 6243 1199

Senator Chris Ketter
Chair
Senate Economics References Committee

www.accc.gov.au

Sent electronically: economics.sen@aph.gov.au

Dear Senator

Inquiry into the Australian dairy industry

Thank you for the opportunity to provide a submission to the Senate Economics References Committee's inquiry into the Australian dairy industry.

The Australian Competition and Consumer Commission (ACCC) is currently undertaking work on a number of important issues in the dairy industry. The purpose of this submission is to update the Committee on these matters. The ACCC's work on these issues is continuing. In this context, the ACCC would be happy to provide further information at a later stage if it would be of assistance to the Committee, including through appearing at a public hearing.

The ACCC's submission covers three key areas:

1. the ACCC's continuing investigation of the conduct of Murray Goulburn and Fonterra Australia
2. the application of the upcoming business-to-business unfair contract term law to milk supply agreements
3. the ACCC's inquiry into the dairy industry.

Investigation of Murray Goulburn and Fonterra Australia

As the Committee is aware, dairy farmers have raised significant concerns about the impact of the cuts to the price paid to dairy farmers for milk solids announced by Murray Goulburn and Fonterra Australia in April and May 2016. The ACCC is conducting an investigation into the conduct of Murray Goulburn and Fonterra Australia surrounding these issues. These investigations are a priority for the ACCC.

The ACCC is responsible for enforcing compliance with the *Competition and Consumer Act 2010* (CCA), which contains the Australian Consumer Law (ACL). Where a particular provision of this legislation may have been breached, the ACCC can investigate and, where appropriate, take enforcement action.

The ACCC is investigating whether:

- Murray Goulburn has engaged in false, misleading or deceptive and / or unconscionable conduct in connection with its decision to 'step down' its Farmgate Milk Price in its Southern Milk Region late in the 2015-16 season, and 'claw back' what it considered to be overpayments made to suppliers since the beginning of the season.
- Fonterra Australia has engaged in unconscionable conduct in connection with its decision to step down its Farmgate Milk Price late in the 2015-16 season, disproportionately affecting those farmers supplying in May and June.

These are detailed investigations, which have required gathering and analysing information from a range of sources. The ACCC will publicly announce the outcome of these investigations in due course.

Business to business unfair contract term laws

From 12 November 2016, a new law will protect farmers and small businesses from unfair terms in standard form contracts. The law aim to address some of the power imbalances existing in business-to-business transactions.

Section 24 of the ACL provides that a term will be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

The law applies to standard form contracts where at least one of the businesses involved employs less than 20 people, and the price payable under the contract is no more than \$300 000, or \$1 million if the contract is for more than 12 months.

Application of this law to milk supply agreements

A standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it is offered on a 'take it or leave it' basis. It appears likely that milk supply agreements will be standard form contracts for the purpose of the law.

In determining the application of the new unfair contract terms law to milk supply agreements, a key issue will be whether a particular contract will fall within the financial thresholds set by the law (\$300 000 per year or \$1 million if the contract is for more than 12 months).

For the purposes of determining whether a contract falls under the relevant threshold to meet the definition of a 'small business contract', any amounts that cannot be calculated with certainty at the time the contract is entered are unlikely to be included in the calculation of the upfront price payable. Given the value of milk supply agreements typically cannot be calculated with certainty at the time of entering into the agreement, it is arguable that such agreements will fall within the scope of the law should other thresholds be met.

In deciding whether a term is unfair, consideration must be given to the transparency of the term, and the overall rights and obligations of each party. Further, the fairness of a particular term must be assessed in light of the contract as a whole.

In order for the ACCC to form a view on whether specific contract terms are unfair, the ACCC must undertake a detailed assessment of the specific contracts and all the surrounding circumstances. In recognising that, the ACCC has an open mind as to how the unfair contract provisions might apply in the dairy industry.

The ACCC is assessing milk supply agreements with respect to the upcoming unfair contract term law, including any retrospective elements of milk contracts. This process will be assisted by the additional information obtained through the ACCC's dairy inquiry.

ACCC Dairy Inquiry

On 25 August 2016, the Deputy Prime Minister and Minister for Agriculture and Water Resources, the Hon Barnaby Joyce MP, announced that the Government will request the ACCC to conduct an inquiry into the Australian dairy industry.

Through the inquiry, the ACCC will analyse the broader dairy industry to identify structural and behavioural issues that affect the industry's performance. The ACCC's inquiry will be far-reaching covering all product and geographical markets within the Australian dairy industry.

The ACCC's Agriculture Unit will conduct the inquiry. This Unit has been established to specifically focus on competition and fair trading issues in agriculture supply chains.

While the ACCC is yet to receive a terms of reference from the Treasurer, it is expected the ACCC inquiry will be conducted pursuant to section 95H(1) of the CCA. This will provide the ACCC with compulsory information gathering powers for the inquiry.

Issues expected to be considered in the inquiry include:

- the nature of competition between processors for the acquisition of raw milk
- the nature of retail pricing arrangements for milk and dairy products, and their impact down the supply chain (including the impact of \$1 milk and other private label products)
- the commercial relationships between dairy producers and processors, including the mechanisms used to determine the prices paid to producers
- the allocation of commercial risk across the dairy supply chain
- the role for collective bargaining in the dairy industry and its effectiveness
- the existence of, or potential for, anti-competitive conduct in the industry.

The ACCC will consult widely with the public and industry stakeholders during the inquiry. This will include requesting submissions and holding public forums in key producing areas across Australia.

It is currently expected that the inquiry will commence in November 2016, with the final report due to Government by November 2017.

The ACCC's work across these three areas will ensure the dairy industry is a significant focus for the agency in the immediate future.

Yours sincerely

Rod Sims
Chairman