



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

13 February 2020

The Hon David Littleproud MP  
Minister for Agriculture, Drought and Emergency Management  
Parliament House  
CANBERRA ACT 2600

Via email: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)

CC: [DLO-MO@agriculture.gov.au](mailto:DLO-MO@agriculture.gov.au); [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au);  
[CommitteeScrutiny@treasury.gov.au](mailto:CommitteeScrutiny@treasury.gov.au)

  
Dear Minister,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019  
[F2019L01610]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice about this matter.

***Matters of interest to the Senate***

Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which appear to be contrary to the intention of the enabling Act, instruments which amend primary legislation, instruments which have a significant impact on personal rights and liberties, and instruments which specify Commonwealth expenditure.

As a practical matter, the committee draws the Senate's attention to such instruments by including the matter in the *Delegated Legislation Monitor*, and alerting the relevant legislation or joint committee to the instrument in public correspondence. The committee may also draw the Senate's attention to the instrument on the floor of the chamber in tabling the *Delegated Legislation Monitor*.

**Noting that the instrument appears to implement significant elements of a regulatory scheme, and addresses matters which have been subject to a number of significant reviews, the committee has resolved to draw this instrument to the attention of the**

**Senate, and notify the Senate Rural and Regional Affairs and Transport Legislation Committee of the instrument.**

***Parliamentary oversight***

Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. Under this principle, the committee is concerned to ensure that legislative instruments promote appropriate levels of parliamentary scrutiny and oversight.

Section 6 of the instrument provides that the Agriculture Minister must ensure that two reviews of the instrument are conducted within the first five years of the instrument's commencement. Subsection 6(4) provides that 'each review must assess the role, impact and operation of the instrument'. Subsection 6(7) requires the Agriculture Minister to ensure that a written report of each review is prepared; however, the instrument does not appear to require the report to be tabled in Parliament or published online.

Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not tabled. Accordingly, the committee considers that instruments which provide for the review of significant matters should require the review report to be tabled in Parliament. Such reports should also be published online, in the interests of promoting transparency and accountability.

The explanatory statement to the instrument explains that 'the reviews are intended to provide insight into the role, impacts and operation of the Code since it commenced and determine whether any amendments need to be made'. However, it does not appear to explain why there is no requirement to table or publish the written reports of the review.

**Accordingly, the committee requests your advice as to why the instrument does not require the written reports of each review of the instrument to be tabled in Parliament and published online.**

***Unclear drafting; significant penalties***

Subsection 11(1) of the instrument provides that a processor 'must at all times deal with farmers in good faith, within the meaning of the unwritten law as in force from time, in relation to the supply of milk'. Failure to comply with this requirement attracts a civil penalty of 100 penalty units (\$21 000) for small business entities and 300 penalty units (\$63 000) for other entities. Subsection 11(2) imposes a similar obligation on farmers, with a civil penalty of 100 penalty units for failure to comply.

Subsection 11(4) provides a non-exhaustive list of factors which may be taken into account in determining whether a processor or farmer has acted in good faith. However, subsection 11(5) of the instrument clarifies that this list does not limit subsections 11(1) and 11(2).

The explanatory statement to the instrument notes that the civil penalty provisions in section 11 are justified on the basis that business dealings between processors and farmers 'should be measured by a broader principle such as good faith'. It also notes that section 11 provides guidance on determining whether parties have acted in good faith.

Whilst noting the policy rationale for these provisions, the committee is concerned that the instrument imposes significant civil penalties for failing to comply with a term that is not defined in the written law. In this regard, the committee draws your attention to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, which states that 'the scope of an offence should be clear on its face'. The committee acknowledges that these are civil penalty provisions rather than offences, and that subsection 11(4) may provide some guidance as to the meaning of the term 'good faith'. However, it is unclear to the committee how subsection 11(4) can, of itself, ensure sufficient clarity and certainty required of civil penalty and offence provisions, given the list of factors is non-exhaustive and the provision itself is non-binding.

**Accordingly, the committee requests your advice as to whether the instrument could be amended to ensure that the scope of the civil penalty provisions is limited by terms defined in the written law and, if not, why not.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.


Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **27 February 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation



**The Hon. David Littleproud MP**  
**Minister for Agriculture, Drought and Emergency Management**  
**Deputy Leader of the Nationals**  
**Federal Member for Maranoa**

Ref: MS20-000199

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

24 FEB 2020

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 13 February 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).

The Committee has raised concerns with two matters and my response to each follows.

**Advice as to why the Instrument does not require reports of reviews to be tabled or published online**

The Department of Agriculture, Water and the Environment (the department) has advised me that it will publish online the reports of the reviews of the Dairy Code, so as to ensure that all stakeholders have the opportunity to consider the findings and the recommendations from the reviews. The department has already done so for other industry code reviews undertaken on the *Competition and Consumer (Industry Codes – Sugar) Regulations 2017* (the Sugar Code) and the *Competition and Consumer (Industry Codes – Port Terminal Access (Bulk Wheat)) Regulations 2014* (the Wheat Port Code), which the department also administers. The department will advise industry stakeholders of the intention to publish the reports of the reviews as part of undertaking the reviews. Publishing the reports of the reviews online will promote transparency and accountability as well as ensure appropriate oversight of the review process. I do not consider that a requirement to this effect is needed in the Instrument.

The Instrument is not drafted to require tabling of the written reports of the reviews in Parliament because this is not a feature of other industry code review processes and because, as noted above, the department commits to publishing the written reports of the reviews online – which will of itself allow for transparency, accountability and appropriate public oversight of the review process. Not having a tabling requirement also allows for flexibility to be maintained on the timing of the public release of the reports when the review is completed.

**Advice as to whether the Instrument could be amended to ensure that the scope of the civil penalty provisions is limited by terms defined in written law, and if not, why not**

The department has advised me that it does not consider the Instrument can be amended such that the relevant civil penalty provisions are limited by terms defined in written law, in a way that maintains consistency with the objectives and purpose of the Instrument.

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 conducts, is a foundational concept behind the Dairy Code and other mandatory industry codes made under the *Competition and Consumer Act 2010*. For example, the *Competition and Consumer (Industry Codes—Franchising) Regulations 2014* (the Franchising Code) and the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (the Horticulture Code) also impose 300 civil penalty units for contravening the good faith obligation.

Good faith is a concept that has been developed through common law and which continually evolves through common law. Given that the common law continues to consider matters related to good faith, the list under section 11(4) of the Dairy Code is not framed as an exhaustive or comprehensive list, nor does it seek to expressly define its meaning. This allows the Dairy Code to remain consistent with common law as it evolves, and to avoid a situation where there is a disparity between the common law interpretations of good faith and the definition under the Dairy Code.

The list in section 11(4) was developed in consultation with industry stakeholders because of requests for greater clarity and certainty about the types of conduct that would be considered in assessing whether a party has acted in good faith. By providing a list of specific factors which could be taken into account, contextualised within the dairy industry, the Code provides guidance as to the meaning of 'good faith' whilst still allowing for some evolution should common law standards evolve.

By contrast, confining the relevant civil penalty provisions such that they only apply where certain defined circumstances, as set out in the Instrument, are met, would unduly restrict those provisions and risk permitting conduct that may be considered 'not in good faith' by evolving common law standards, but which has not been specified in the Instrument.

The approach adopted in the Dairy Code to defining the concept of good faith is consistent with that used in other industry codes such as the Franchising Code and Horticulture Code.

I trust this information is useful for the Committee.

Thank you for raising this matter.

Yours sincerely



**DAVID LITTLEPROUD MP**

cc. Treasurer, the Hon. Josh Frydenberg MP



3 April 2020

The Hon David Littleproud MP  
Minister for Agriculture, Drought and Emergency Management  
Parliament House  
CANBERRA ACT 2600

Via email: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)

CC: [Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)

Dear Minister,

### **Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

Thank you for your response of 24 February 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument. The committee considered your response at its private meeting on 1 April 2020.

At that meeting, the committee resolved to conclude its consideration of the first of the two scrutiny issues raised in its initial request, and seek your further advice about the second matter, outlined below.

#### ***Parliamentary oversight***

The committee sought your advice as why the instrument does not require written reports of reviews of the instrument to be tabled in Parliament and published online. In response, you advise that the Department of Agriculture, Water and the Environment (the department) will publish the reports of the reviews online 'so as to ensure that all stakeholders will have the opportunity to consider the findings and the recommendations from the reviews'. You also explain that it would not be appropriate to amend the instrument to require such reports to be tabled, as this is not a feature of other industry code review processes, and such a requirement might compromise the flexibility needed in relation to the timing of the public release of the reports.

In light of the department's intention to publish written reports of the reviews online, the committee has resolved to take no further action in relation to this matter. However, the committee reiterates its preference that instruments which provide for the review of significant matters should also require that such reports are tabled in Parliament, noting that this process alerts parliamentarians to the existence of the documents and provides opportunities for debate which are not available where documents are not tabled.

### ***Unclear drafting; significant penalties***

The committee also sought your advice as to whether the instrument could be amended to ensure that the scope of the civil penalty provisions is limited by terms defined in the written law. In response, you advise that the department considers that the instrument could not be amended as requested in a way that maintains consistency with the objectives and purpose of the instrument.

Your response explains that penalising dishonesty and the failure to have regard to the legitimate interests of other parties is a 'foundational concept' which underpins both this instrument and other mandatory industry codes under the *Competition and Consumer Act 2010*. In this regard, you identify two other instruments which also impose civil penalties of 300 penalty units for contravention of a good faith obligation. Whilst noting these examples, the committee does not consider that consistency with other laws is, of itself, a sufficient justification for potentially compromising the rule of law principle of legal certainty by imposing significant civil penalties for non-compliance with a standard undefined by the written law.

Moreover, the committee is aware of other industry codes which seek to promote honest conduct, and conduct which has regard to the legitimate interests of other parties, without imposing a civil penalty for the breach of such an undefined obligation. These include the Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015 [F2015L00242] and the Competition and Consumer (Industry Code – Sugar) Regulations 2017 [F2017L00387]. The committee is also aware of other industry codes which do not impose a general good faith obligation at all, such as the Competition and Consumer (Industry Codes—Oil) Regulations 2017.

Accordingly, noting that other industry codes have taken different approaches to promoting honest and fair dealings with other parties, it remains unclear to the committee why it is necessary to advance this objective in the present instrument in a way that undermines legal clarity and certainty by imposing significant civil penalties for non-compliance with a term undefined by the written law.

**The committee would therefore appreciate your 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 committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 April 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**





**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.

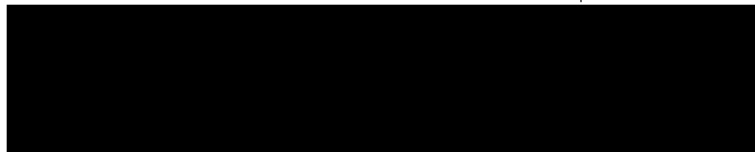
In summary, without civil penalties being attached to a failure to comply with the 'obligation to deal in good faith' provisions, I believe that the Dairy code will not be effective in curtailing the egregious and bad faith behaviours the government is seeking to prevent re-occurring in the dairy industry, 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



**DAVID LITTLEPROUD MP**

cc. The Treasurer, The Hon. Josh Frydenberg MP



21 May 2020

The Hon David Littleproud MP  
Minister for Agriculture, Drought and Emergency Management  
Parliament House  
CANBERRA ACT 2600

Via email: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)  
CC: [Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)

Dear Minister,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

Thank you for your response of 17 April 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instrument.

The committee considered your response at its private meeting on 20 May 2020. The committee remains concerned that the instrument imposes significant civil penalties for non-compliance with a term undefined by the written law.

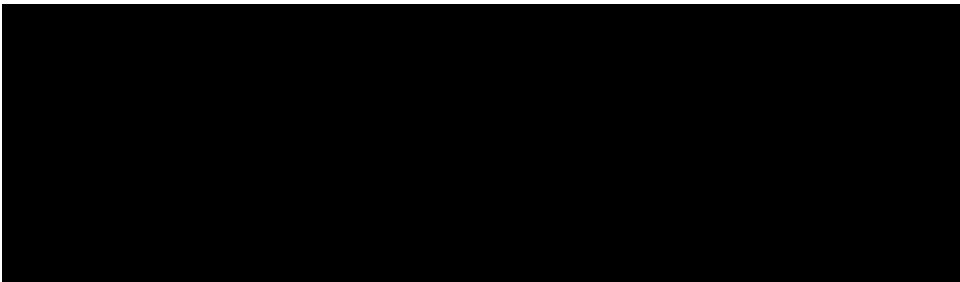
Accordingly, the committee resolved to seek a meeting with senior officials of your department, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns. In this regard, I request that the relevant officials please liaise with the committee secretariat to arrange a mutually convenient time to meet in the sitting fortnight commencing 10 June 2020.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation



12 June 2020

The Hon David Littleproud MP  
Minister for Agriculture, Drought and Emergency Management  
Parliament House  
CANBERRA ACT 2600

Via email: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)

CC: [Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[Rebecca.Steffan@awe.gov.au](mailto:Rebecca.Steffan@awe.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)

Dear Minister,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

Thank you for making senior officials of your department available earlier today to brief the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instrument.

Please find attached a list of questions arising from the private briefing. To assist the committee's timely consideration of the instrument, the committee requests that responses to these questions be provided by **19 June 2020**.

The committee will consider the information provided in response to these questions in deciding how to proceed in its scrutiny of the instrument, and in particular, whether to seek further advice from the Attorney-General and the Treasurer.

Finally, please note that, in the interests of transparency, this correspondence and the responses to the questions will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation

**Question no. 1**

Why is it considered necessary and appropriate to require farmers and processors to act in accordance with a term ('good faith') that is undefined and requires judicial interpretation and application?

**Question no. 2**

What consultation was undertaken in relation to the meaning of 'good faith' as set out in section 11 of the instrument, and the attachment of civil penalties for failure to act in 'good faith' as defined in the instrument? In particular, could you please outline the consultation undertaken:

- with farmers or their representatives; and
- within government, including with the Attorney-General's Department, the Treasury and the Office of Parliamentary Counsel.

**Question no. 3**

Could you please provide the committee with details of any relevant cases where the meaning of 'good faith' in an industry code has been considered?

**Question no. 4**

Could the instrument be amended to remove the general requirement that farmers and processors deal with each other in 'good faith within the meaning of the unwritten law', and instead provide that a farmer or processor has acted in good faith if they have complied with the specific factors set out in paragraphs 11(4)(a)–(h) of the instrument?

**Question no. 5**

Could the instrument be amended to remove the general requirement that farmers and processors deal with each other in 'good faith within the meaning of the unwritten law', and instead provide a definition of good faith by drawing on the guidance issued by the Australian Competition and Consumer Commission at <https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct/good-faith-under-the-dairy-code?>

**Question no. 6**

To what extent would the meaning of 'good faith' be developed through mediation and arbitration proceedings, noting that such proceedings are generally subject to confidentiality requirements?



**The Hon. David Littleproud MP**  
**Minister for Agriculture, Drought and Emergency Management**  
**Deputy Leader of the Nationals**  
**Federal Member for Maranoa**

Ref: MC20-004054

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

18 JUN 2020

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 12 June 2020 seeking advice about several matters arising from the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) meeting last week with senior departmental officials about the Competition and Consumer (Industry Codes–Dairy) Regulations 2019 (Dairy Code) or (the Instrument).

The Committee has sought advice about six questions related to the Dairy Code. I have sought advice from the Department of Agriculture, Water and the Environment, who have provided responses to these questions below, in addition to the information included in previous responses to the Committee. With the exception of question two, which falls primarily within the agriculture portfolio, answers to the other questions include additional material relating to questions of legal policy following consultation with the Attorney-General's Department and The Treasury. Given the widespread use of common law defined terms throughout legislation, legislative instruments, codes and various forms of guidance and therefore the potentially significant and wider ramifications of the matter being considered, the Committee may wish to seek a response from the Treasurer and Attorney-General.

**Question 1**

*Why is it considered necessary and appropriate to require farmers and processors to act in accordance with a term ('good faith') that is undefined and requires judicial interpretation and application?*

**Question 4**

*Could the instrument be amended to remove the general requirement that farmers and processors deal with each other in 'good faith within the meaning of the unwritten law' and instead provide that a farmer or processor has acted in good faith if they have complied with the specific factors set out in paragraphs 11(4)(a)-(h) of the instrument?*

**Question 5**

*Could the instrument be amended to remove the general requirement that farmers and processors deal with each other in 'good faith within the meaning of the unwritten law' and instead provide a definition of good faith by drawing on the guidance issued by the Australian Competition and Consumer Commission at [www.accc.gov.au/business/industry-codes/dairy-code-of-conduct/good-faith-under-the-dairy-code](http://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct/good-faith-under-the-dairy-code)?*

The Dairy Code requires all processors and farmers act in good faith towards the other party. It is the only obligation in the code that applies to all farmers and processors regardless of their size. Good faith is an important obligation to include in the Dairy Code as many of the interactions that occur between farmers and processors cannot all be reduced to terms recorded in an agreement or covered explicitly in the Dairy Code. As such the conduct between the parties will need to be measured at times by broader principles of trust, cooperation and fairness – referred to broadly as acting in ‘good faith’. Good faith particularly benefits dairy farmers by preventing forms of opportunistic conduct by processors.

During consultations on the Code, stakeholders were supportive of this obligation and associated penalties for breaches.

As you are aware, an obligation for the parties to an agreement to act in good faith has developed through the common law. This allows a party to the agreement to sue the other party for breach of contract if they believe the other party has not acted in good faith. The inclusion of good faith obligations in Codes fulfils a similar function by providing the regulator, the Australian Competition and Consumer Commission (ACCC), with the ability to take action for a breach of good faith within the meaning of the common law, such as where the aggrieved party submits a complaint to the ACCC.

The Dairy Code provides a list of factors that may be taken into account in determining if a party is acting in good faith. This provides a significant level of guidance in the written law for farmers and processors to understand their obligations. Good faith is an otherwise known concept within contract law and has been defined by the court. By contrast, codifying an exhaustive definition of good faith would lead to a range of disadvantages. For example, this would:

- introduce a bespoke definition of good faith in the Dairy Code, which may diverge from good faith principles established at the common law (and other industry codes);
- limit the good faith obligation to a set of behaviours that are foreseen and codified at the time of drafting, leaving scope for parties to find loopholes to circumvent meeting their obligations;
- create a parallel version of good faith that may confuse participants in an industry or cause them to believe that their common law rights have been displaced by the statutory definition.
- need to be updated regularly in order to minimise divergence from the parallel common law version of good faith (which would continue to evolve and have effect through contracts); and
- create confusion in terms of having different definitions in different industries, depending on when a code was implemented or last updated.

Good faith is not capable of a one size fits all meaning. It is arguable whether attempts to tightly define the meaning of good faith in the Dairy Code will increase certainty for farmers and processors. For example, if a new codified version of good faith is introduced it may need to be tested in court and require further judicial interpretation before it can be properly established in law and understood by the industry. This could take many years, during which time developments at common law on this principle may have also moved on.



The Committee has inquired whether the instrument could be amended to define good faith, potentially through reference to the matters that are referenced in the instrument or the guidance material issued by the ACCC. The guidance issued by the ACCC has been already been developed based on both common law principles as to what good faith encompasses and the specific factors set out in sections 11(4)(a) – (h) of the Dairy Code. This guidance is well publicised and easily accessible to farmers and processors alike and accordingly, there would be no need for farmers or processors to refer to Court judgements to understand the concept generally.

Both the instrument and guidance from the ACCC note the contextual consideration and circumstances that are needed to assess whether good faith has occurred. Additionally, some of the concepts incorporated in the factors listed at paragraphs 11(4)(a)- (h) and in the ACCC guidance are themselves also qualitative concepts 'undefined in the written law' – such as whether or not a party has acted 'reasonably', so this approach may not serve to provide any greater level of certainty. Further legal advice and consideration would be required to determine if adding consideration of the circumstances or contextual events (which by their nature are unable to be defined) to a specified list of actions would be beneficial or appropriate.

In practice, any offence or contravention that engages qualitative concepts such as 'good faith' or 'reasonableness' is imposing a penalty by reference to a term that is defined in the common law. This reflects the complementary operation of statute and common law, where judicial consideration provides guidance on, and to some extent determines, the practical operation and application of a provision.

If the Dairy Code included a specified definition it may be seen to encourage farmers or processors to seek to find ways around the defined requirements to gain advantage in their conduct with the other. Such an approach may embolden lawyers to argue to define the new terminology in the context of the dairy code, separate from any agreement or understanding that occurs in the ordinary meaning of terms that have been established in contract law: This would run counter to the intent of the Dairy Code which is to foster positive commercial interactions. A new definition of good faith may also result in a new set of jurisprudence for the terms in the Dairy Code. This would result in a level of confusion about what a dairy farmer's (or processor's) obligation would be depending on if the party believed that the Dairy Code or the requirements of broader contract law applied. This uncertainty would be increased where a business was party to more than one code – which may see it with a defined set of obligations under the Dairy Code that differ to those under the Competition and Consumer (Industry Codes– Food and Grocery) Regulation 2015 which differ again from its obligations arising to other parties to act in good faith in its other contracts.

I also draw to the attention of the Committee, that the *Competition and Consumer Act 2010*, the enabling legislation for industry codes, makes note in several clauses that conduct for particular matters is to occur in good faith. However, this Act, passed by Parliament, does not provide any further specificity of what that conduct constitutes.

## Question 2

*What consultation was undertaken in relation to the meaning of 'good faith' as set out in section 11 of the instrument, and the attachment of civil penalties for failure to act in 'good faith' as defined in the instrument? In particular could you please outline the consultation undertaken:*

- *with farmers or their representatives; and*
- *within government, including with the Attorney-General's Department, the Treasury and the Office of Parliamentary Counsel.*

The department undertook consultation on the dairy code in three rounds of public consultation between 31 October to 28 November 2018, 15 January to 15 February 2019 and 28 October to 22 November 2019. The department sought feedback during this time through a range of initiatives, including 18 public consultation meetings held in all dairy regions, multiple meetings with industry representative bodies including the Australian Dairy Farmers and State Dairy Farming Organisations, three tele-town hall meetings, as well as emails and calls from dairy farmers and other industry members.

At the start of each round of consultation, a document was released to support that round's consultation. In each of the three rounds, feedback on whether to include good faith and penalties was sought.

During consultation, most farmers believed good faith provisions should be included and that penalties for breaches were needed. Farmers believed breaches of good faith should have the largest penalty and that penalties should be properly scaled for larger processors to dissuade bad behaviour. Based on feedback in the third round of consultation (in response to the Exposure Draft of the Dairy Code), primarily from State Dairy Farming Organisations, the instrument's Good Faith provisions were applied to all processing businesses, with penalties scaled for larger businesses.

A full list of the locations and dates of these meetings, including the documents prepared for each round of consultation is available at the department's website at <https://haveyoursay.agriculture.gov.au/dairy-code-conduct>.

The department worked in consultation with the Treasury to develop the Dairy Code, including sharing feedback received about the Dairy Code from stakeholders. The Attorney-General's department was engaged as part of supporting government decision making processes. The Office of Parliamentary Counsel prepared the Instrument based on the provided drafting instructions (approved by the former Minister for Agriculture and Water Resources, Senator the Hon. Bridget McKenzie).

### Question 3

*Could you please provide the committee with details of any relevant cases where the meaning of 'good faith' in an industry code has been considered?*

Two cases are brought to your attention from 2019, in which the Federal Court considered the meaning of 'good faith' as contained in section 6(1) of the Franchising Code. Section 6(1) is drafted in similar terms to section 11 of the Dairy Code. Section 6(1) provides:

"Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:

- (a) the agreement; and
- (b) this code"

#### **Geowash Pty Ltd**

*Australian Competition and Consumer Commission (ACCC) v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3) [2019] FCA 72*, handed down on 8 February 2019, involved consideration of the obligation to act towards another party "in good faith" under the Franchising Code of Conduct.

The Court considered the issue of whether a franchisor who deals with franchisees in a manner that disregards the terms of the franchise agreement concerning when money is required and how it is to be applied (in particular in respect of establishment and fit-out costs) conforms to the requirement under clause 6(1) of the Code to act towards the franchisee 'with good faith, within the meaning of the unwritten law from time to time'.

The Court found the conduct of Geowash to have been in breach of clause 6(1) of the Franchising Code. In the Geowash case Justice Colvin was able to provide a clear summary of the current state of the unwritten law as to the meaning of good faith for the purposes of cl 6(1) of the Franchising Code, as at the date of that case (8 February 2019).

#### **Ultra Tune Australia Pty Ltd**

*ACCC v Ultra Tune Australia Pty Ltd [2019] FCA 12*, handed down in January 2019, in which Ultra Tune Australia Pty Ltd (Ultra Tune) was ordered to pay a pecuniary penalty of over \$2.6 million for breaching the Franchising Code of Conduct 2014 and sections 18 and 29(1) the Australian Consumer Law (ACL). Justice Bromwich in that case found that obligation of good faith is one that requires a franchisor to:

*not use the powers and opportunities available to it to the detriment of a franchisee in the absence of any objective legitimate interest in doing so; and must co-operate to the extent possible with a franchisee or potential franchisee, providing that such co-operation is not to the detriment of the franchisor.*

The good faith obligations were also taken to require 'consideration by the franchisor of the position and interests of the franchisee'. Justice Bromwich found that Ultra Tune had failed to meet the standards required by the Franchising Code of Conduct's good faith clauses by making numerous misleading statements and failing to provide all relevant information in a timely and accurate manner.

The Treasurer would be the relevant minister for any broader discussion of good faith provisions included in Industry Codes generally.

**Question 6**

*To what extent would the meaning of 'good faith' be developed through mediation and arbitration proceedings, noting that such proceedings are generally subject to confidentiality requirements?*

As mediation and arbitration proceedings do not create legal precedent, the common law jurisprudence in relation to the meaning of good faith is not expected to be developed through the alternative dispute resolution mechanisms of the Dairy Code.

I trust this information is useful for the Committee.

Thank you for raising this matter.

Yours sincerely



**DAVID LITTLEPROUD MP**

cc. The Treasurer, The Hon. Josh Frydenberg MP  
cc The Attorney-General, The Hon Christian Porter MP



22 July 2020

The Hon Josh Frydenberg MP, Treasurer  
The Hon David Littleproud MP, Minister for Agriculture,  
Drought and Emergency Management  
The Hon Christian Porter MP, Attorney-General  
Parliament House  
CANBERRA ACT 2600

Via email: [Josh.Frydenberg.MP@aph.gov.au](mailto:Josh.Frydenberg.MP@aph.gov.au)  
[David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)  
[Christian.Porter.MP@aph.gov.au](mailto:Christian.Porter.MP@aph.gov.au)

CC: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)  
[committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)  
[Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)  
[attorney@ag.gov.au](mailto:attorney@ag.gov.au)  
[DLO@ag.gov.au](mailto:DLO@ag.gov.au)

Dear Ministers,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019  
[F2019L01610]**

Since 13 February 2020 the committee has been corresponding with the Minister for Agriculture, Drought and Emergency Management about a technical scrutiny issue that the committee has identified in relation to the above instrument. The committee thanks Minister Littleproud and his department for their engagement with the committee on this matter.

The committee considered Minister Littleproud's most recent response at its private meeting on 15 July 2020. Whilst the information provided by Minister Littleproud has further assisted the committee in its consideration of the instrument, the committee retains some significant concerns regarding the instrument and industry codes of conduct more generally.

The committee therefore seeks further comprehensive advice about the issues outlined below from the Attorney-General (noting that the committee's concerns relate to a common law defined term that is prevalent in other Commonwealth delegated legislation)

and the Treasurer (noting that Treasury has overall responsibility for the industry codes framework).

***Unclear drafting; significant penalties***

As the committee has previously noted, its longstanding view is that offences and civil penalty provisions should be drafted with sufficient clarity to enable persons and entities to understand their obligations and the consequences of non-compliance. This is consistent with fundamental rule of law principles. In this regard, the committee is concerned that a significant civil penalty may be imposed on a farmer or processor if they breach the obligation in section 11 of the instrument to deal with each other in good faith 'within the meaning of the unwritten law as in force from time to time'. The committee considers that this obligation is unclear.

The committee notes that subsection 11(4) of the instrument is intended to provide guidance as to the meaning of 'good faith'. However, in the committee's view, this subsection does not provide the sufficient clarity and certainty required of civil penalty and offence provisions. The committee is particularly concerned noting that the factors listed in subsection 11(4) are non-exhaustive and the provision itself is non-binding.

The committee also considers that the instrument raises matters which have wider ramifications for the way good faith provisions are drafted in industry codes more generally, particularly where a penalty attaches to the failure to act in good faith as is the case in the Franchising and Horticulture Codes.

The committee acknowledges the policy rationale for the good faith provisions in this instrument. Nevertheless, since December 2019 the Senate has required this committee to scrutinise each legislative instrument as to whether its drafting is defective or unclear. Where the committee considers that an instrument does not comply with this principle, it will seek to engage with the relevant agency and minister to resolve the matter, and, if necessary, may recommend disallowance of the instrument to the Senate.

**In the interests of addressing these matters without recourse to disallowance, the committee considers that amendments should be made to the instrument to provide greater clarity as to the meaning of good faith and consideration should be given to how such provisions are included in delegated legislation more broadly.**

**Accordingly, the committee requests the Minister for Agriculture, Drought and Emergency Management's advice as to whether subsection 11(4) of the instrument could be amended to specify that the list of factors 'must' be taken into account in determining whether a processor or farmer has acted in good faith for the purposes of subsections 11(1) and (2).**

**In addition, the committee requests the Treasurer's and Attorney-General's comprehensive advice in relation to the matters outlined above, including whether urgent consideration can be given to improving the clarity of drafting of good faith obligations in all Commonwealth delegated legislation, particularly where a penalty may be imposed for breach of those obligations.**

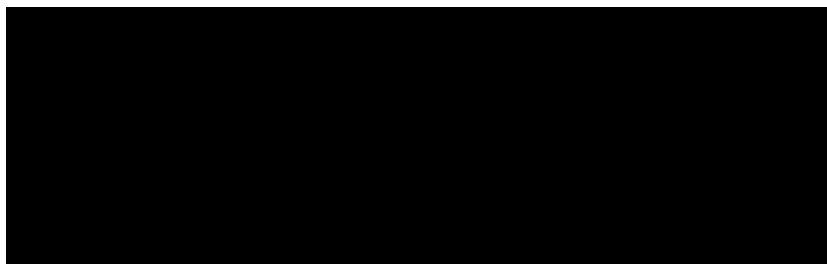
To facilitate the committee's consideration of the matters above, and noting that the notice of motion to disallow the instrument is due to be considered by the Senate on 3 September 2020, the committee would appreciate receiving a response by **29 July 2020**.

Finally, please note that, in the interests of transparency, this correspondence and the response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**The Hon Josh Frydenberg MP**  
**Treasurer**

**The Hon David Littleproud MP**  
**Minister for Agriculture, Drought and Emergency Management**

**The Hon Christian Porter MP**  
**Attorney-General**  
**Minister for Industrial Relations**

Ref: MS20-001572

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* [F2019L01610] (the Instrument).

In that letter, the Committee sought the advice of the Minister for Agriculture, Drought and Emergency Management, as to whether subsection 11(4) of the Instrument could be amended to specify that the list of factors ‘must’ be taken into account in determining whether a processor or farmer has acted in “good faith” for the purposes of subsections 11(1) and (2).

We consider that the current approach, namely the inclusion of a non-exhaustive list of factors, is appropriate. The Instrument provides a sufficient level of guidance in relation to factors that may be attributed to a party meeting their “good faith” obligations. Restricting the court to specified matters may risk divergence from “good faith” principles, and create uncertainty about the use of the phrase in other legislation. Therefore, it is arguable whether attempts to more tightly define the meaning of “good faith” in the Instrument would increase certainty for farmers and processors. In addition to this, an exhaustive list risks narrowing the provision, and ultimately therefore, the protection that the provisions are actually intended to provide.

The Committee also sought the advice of the Treasurer and the Attorney-General in relation to the matters outlined in the Committee’s letter, including whether urgent consideration can be given to improving the clarity of drafting of “good faith” obligations in all Commonwealth delegated legislation, particularly where a penalty may be imposed for a breach of those obligations.



As outlined in Minister Littleproud’s letter dated 18 June 2020, the phrase “good faith” has a well-understood common law meaning, both in criminal and civil contexts, and both as elements of an offence or civil penalty and as defences to offences and civil penalties.

We consider that adding more detail to legislation, as suggested by the Committee, risks unnecessarily increasing the complexity and length of legislation. This is particularly the case if the Committee’s underlying assumption is that other well-understood common law concepts are also ‘unclear’ and may require greater detail to be set out in an Act or instrument. Further, providing additional detail in an Act or instrument risks common law concepts diverging from the concepts as used in statute, creating the potential for further uncertainty.

Examples of where there is a “good faith” element in delegated legislation include subregulation 84A(3) of the *National Consumer Credit Protection Regulations 2010* and subsection 26(2) of the *Air Services Regulations 2019*.

Examples of where a “good faith” element is used in imposing positive obligations on people in civil and criminal contexts include sections 181 and 184 of the *Corporations Act 2001*, subsections 286(1) and 290A(1) of the *Fair Work (Registered Organisations) Act 2009*, subsection 631(2) of the *Biosecurity Act 2015* and subsection 417(2) of the *Export Control Act 2020*. Examples of where the expression is used in civil and criminal defences include section 265-20 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, subsection 25(3) of the *Corporations Act 2001*, and sections 71.15, 80.3, 82.10, 475.1A and subsections 122.5(5A), 273.9(5), 474.6(7), 474.24(4) of the Criminal Code.

Therefore, we consider that it remains appropriate that well-understood common law concepts like “good faith” continue to be elements of, or included as defences to, civil penalties and offences, without limitation, alteration or elaboration.

The Office of Parliamentary Counsel has been consulted in the preparation of this response and also supports this view.

Yours sincerely



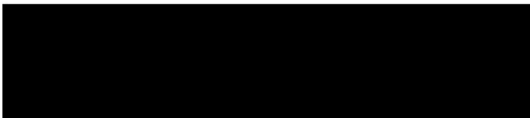
THE HON JOSH FRYDENBERG MP

18 / 08 / 2020



THE HON CHRISTIAN PORTER MP

18 / 08 / 2020



THE HON DAVID LITTLEPROUD MP

18 / 08 / 2020



AUSTRALIAN  
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**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

27 August 2020

The Hon Christian Porter MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Via email: [Christian.Porter.MP@aph.gov.au](mailto:Christian.Porter.MP@aph.gov.au)

CC: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)  
[Josh.Frydenberg.MP@aph.gov.au](mailto:Josh.Frydenberg.MP@aph.gov.au)  
[tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)  
[committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)  
[Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)  
[attorney@ag.gov.au](mailto:attorney@ag.gov.au)  
[DLO@ag.gov.au](mailto:DLO@ag.gov.au)

Dear Attorney-General,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

Thank you for your joint response of 18 August 2020 with the Treasurer and Minister for Agriculture, Drought and Emergency Management to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered the response at its private meeting on 26 August 2020. The committee's unresolved scrutiny concerns in relation to this instrument are detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, available on the committee's website at:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Monitor](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor)

In summary, in the absence of an undertaking to amend the instrument, the committee remains concerned that the civil penalty provisions in section 11 of the instrument lack the clarity necessary to enable persons and entities to understand their obligations and the consequences of non-compliance. In particular, the committee considers that it is important for farmers on the ground to be able to understand their rights and obligations by reading the text on the face of the instrument, without the need to also understand nebulous common law concepts of good faith. Whilst the response identifies a number of policy justifications for this approach, the Senate requires this committee to identify, and where necessary report on such technical scrutiny concerns in performing its technical legislative scrutiny role under standing order 23.

More broadly, the committee considers that the examples provided in the response of good faith obligations in other Commonwealth laws raise systemic concerns about the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty. Such concerns extend beyond the scope of this committee to the extent that they relate to primary legislation and matters of policy, rather than technical legislative scrutiny.

**Accordingly, noting that the instrument raises complex, systemic issues relevant to both delegated and primary legislation, the committee requests that you refer the codification of good faith obligations in Commonwealth legislation to the Australian Law Reform Commission for inquiry, with particular reference to:**

- **the importance of balancing legal clarity and certainty with regulatory flexibility; and**
- **how potential divergence between common law concepts of good faith and concepts used in statute could be resolved without compromising legal clarity and certainty.**

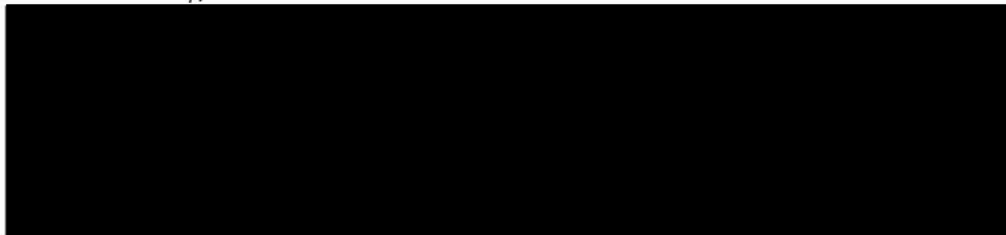
Your response will assist the committee in determining whether to withdraw the notice of motion to disallow the instrument, placed by the Chair on 14 May 2020, which must be considered by the Senate by 3 September 2020.

Noting this, the committee would appreciate your response by close of business **31 August 2020**.

Finally, in the interests of transparency, I note that this correspondence and your response will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns about this matter, please contact the committee's secretariat on (02) 6277 3066, or by email at [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

MC20-028479

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
[sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)

31 AUG 2020

  
Dear ~~Senator Fierravanti-Wells~~

Thank you for your letter of 27 August 2020 regarding the Competition and Consumer (Industry Codes—Dairy) Regulations 2019 (the Dairy Code). I appreciate the time you have taken to bring the Committee's concerns to my attention.

I understand that the Committee is concerned that the civil penalty provisions in section 11 of the Dairy Code lack the clarity necessary to enable persons and entities to understand their obligations and the consequences of non-compliance. I also note the Committee's concerns about 'the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty', and the request that I inquire into good faith obligations in Commonwealth legislation.

I appreciate the Committee's concerns about the issue, and agree that this is a matter which should be subject to further inquiry, subject to settling appropriate terms of reference. As you note, however, the matter raises complex, systemic issues, and the scope of the inquiry will need to be carefully examined. For instance, it will be necessary to consider whether the scope of the inquiry should extend to the duties of company directors under the *Corporations Act 2001*—or indeed the duties of officers of unions and employer organisations—and to draft terms of reference accordingly.

Such consideration necessarily takes time. Accordingly, while I consider the matter warrants inquiry, I do not anticipate I will be in a position to commence an inquiry by the date nominated in your letter. In the interim, I encourage the Committee to withdraw its disallowance motion, noting that disallowance of the Dairy Code could risk creating precisely the lack of clarity over the obligations of farmers and processors on the ground that your request seeks to avoid.

I have copied this letter to the Treasurer, the Hon Josh Frydenberg MP, and the Minister for Agriculture, Drought and Emergency Management, the Hon David Littleproud MP, given their responsibilities for the Dairy Code.

Thank you again for bringing the Committee's concerns to my attention.

Yours sincerely



**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

CC. The Hon Josh Frydenberg MP, Treasurer  
The Hon David Littleproud MP, Minister for Agriculture, Drought and  
Emergency Management



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SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

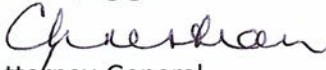
Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

3 September 2020

The Hon Christian Porter MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Via email: [Christian.Porter.MP@aph.gov.au](mailto:Christian.Porter.MP@aph.gov.au)

CC: [David.Littleproud.MP@aph.gov.au](mailto:David.Littleproud.MP@aph.gov.au)  
[Josh.Frydenberg.MP@aph.gov.au](mailto:Josh.Frydenberg.MP@aph.gov.au)  
[tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)  
[committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)  
[Minister.Littleproud@agriculture.gov.au](mailto:Minister.Littleproud@agriculture.gov.au)  
[DLO.MO@agriculture.gov.au](mailto:DLO.MO@agriculture.gov.au)  
[attorney@ag.gov.au](mailto:attorney@ag.gov.au)  
[DLO@ag.gov.au](mailto:DLO@ag.gov.au)

  
Dear Attorney-General,

**Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

Thank you for your response of 31 August 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meetings on 1 and 2 September 2020. The committee's comments are detailed in Chapter 1 of its *Delegated Legislation Monitor 10 of 2020*, available on the committee's website at:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Monitor](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor).

In summary, the committee welcomes your acknowledgment of the broad, systemic issues raised by good faith obligations in Commonwealth legislation and your undertaking to initiate an inquiry into this issue.

The committee also notes your advice that, given the complexity of issue and the need to carefully consider the scope of such an inquiry, you do not anticipate it will be possible to commence the inquiry prior to the expiry of the instrument's the disallowance period on 3 September 2020.

Noting that section 11 of the instrument is just one example of a complex, systemic issue, the committee considers that such an inquiry would be a more effective means of addressing the committee's concerns than pursuing the disallowance of the instrument alone.


Accordingly, the committee has resolved to withdraw its notice of motion to disallow the instrument. Instead, the committee will continue to pursue this matter by monitoring your undertaking and requests that you continue to liaise with the committee in the development of the inquiry terms of reference.

To foster greater consideration of this issue, I note that the committee has also resolved to request that the Australian Competition and Consumer Commission consider this matter as part of its ongoing inquiry into bargaining power in supply chains for perishable products.

Finally, in the interests of transparency, I note that your undertaking to initiate the inquiry will be recorded in the *Delegated Legislation Monitor* until implemented and this correspondence will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**