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To Whom It May Concern,

Australian Dairy Farmers (ADF) appreciates the opportunity to provide a submission to the Competition Policy Review (the Review).

ADF considers the Review is timely and of significant importance given the competition issues currently facing dairy farmers. We commend the Government for undertaking this comprehensive and necessary Review.

Rather than addressing all questions raised in the Review, ADF will concentrate on issues that are relevant to dairy farmers and the complex issues they face in both domestic and international markets.

ADF also has been heavily involved in working with the National Farmers' Federation (NFF) on their submission and strongly endorses the NFF submission and work from Minter Ellison that is attached to it.

If you wish to discuss this submission or require further information on this matter please do not hesitate to contact, ADF Senior Policy Manager, David Losberg on (03) 8621 4200.

Yours sincerely,



Natalie Collard
Chief Executive Officer

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Introduction

Australian Dairy Farmers (ADF) is a not-for-profit organisation that represents the interests of dairy farmers nationally. We are the collective voice to Government and the community on national issues affecting dairy farmers.

The ADF has a long history of successfully lobbying for the rights of dairy farmers on many fronts.

Australian dairy is a \$13 billion farm, manufacturing and export industry, with an extremely positive future. Dairy's value to the Australian economy, jobs on farms, in manufacturing and service sectors, the towns and communities it supports, as well as the ongoing health and wellbeing of Australian families, are a compelling basis for Government attention and policy support.

Australia's 6,400 dairy farmers produce around 9.2 billion litres of milk a year, with the potential to grow substantially over the next decade to meet growing international demand, particularly in South East Asia, China and the Middle East.

The industry directly employs 43,000 Australians on farms and in dairy processing, while more than 100,000 are employed in dairy service sectors.

Whole supply chain approach

The Australian dairy industry needs to be viewed as an integrated supply chain. Milk is a perishable product, which must be processed before it can be sold commercially. As a result, dairy production is integrated across the supply chain: dairy farmers cannot operate without domestic processing capacity, nor can processors survive without domestic farm milk supply.

Significant regional differences continue to characterise the Australian dairy industry – based on market and product mix, farmer confidence as well as current and future growth prospects.

Like the national economy, the dairy industry continues to be characterised by “two speeds” – growth and consolidation in exporting regions, contrasted with faltering confidence and contraction in domestic milk regions.

For most farmers in south-eastern Australia, international conditions determine prices and industry confidence. In Queensland, Central and Northern New South Wales, and Western Australia, however, the industry is geared toward domestic fresh milk supply.

Ongoing intensity in retail competition, unsustainable pricing of milk at \$1 per litre, disruptions caused by changes in private label supply contracts and uncertainty surrounding processor milk requirements have undermined farmer confidence and supply stability.

These regional differences affect the food system within regions, and, ultimately, the sustainability of a local fresh milk supply. Analysis at the national level fails to show this nuanced picture, particularly the de-linking of pricing in the ‘drinking milk’ states from international prices which is becoming apparent and is cause for concern.

Prices in Southern states are set in global markets due to the large amount of product exported (over 40% of production is exported).

The domestic market is a mature market and any substantial growth in the Australian dairy industry is going to come through the export market.

Dairy ranks fourth in agricultural exports—valued at almost \$3 billion—with a 5% increase in export volumes last year alone.

Key Points

Competition Law

- Changes to the Competition and Consumer Act as recommended at pages 9-12.
- A Mandatory Code of Conduct and Supermarket Ombudsman with teeth to balance the excessive market power of the major retailers.

Competition Policy for Global Industries

- ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (over 40% of dairy production is exported).
- An environment must be created in which the dairy industry can grow and expand, through consolidation of processors and investment, to compete on the global market and at a global scale.
- Existing competition laws do not take into account this global market and need for scale but rather have a narrow regional focus. There must be allowance for a global perspective and the realisation that for export-focussed industries prices are set globally, not on a region by region basis.
- There is a need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB and the ACT.
- The timeframes involved in various competitive regulatory processes should not have the unintended effect of advantaging one bid ahead of any other in acquisitions.

Competition Reform in Infrastructure Sectors

- The industry supports an integrated approach across jurisdictions that provides resolution to the infrastructure constraints faced by the dairy industry.
- The dairy industry encourages Government to examine the competitive settings around freight infrastructure such as ports that can often operate as monopolies and are able to charge/recover monopoly rents that are often passed on to others in the supply chain.
- The Murray Darling Basin accounts for approximately 25 per cent of Australian milk production. With the Basin Plan now in implementation phase, farmers need certainty in aspects of the Water Recovery Strategy if they are to plan and adapt.
- A confirmed 1500GL cap provides certainty for farmers to plan for a productivity challenge that is already very tough. The Government now needs to provide a clear plan on how this will be implemented, including through investment in water infrastructure that will contribute to meeting targets.
- Government has a critical role to play in regulating the energy sector to ensure that Australian regional industries can access reliable, secure energy supplies at prices that enable them to remain internationally competitive.

- State and Federal governments also play a critical role in ensuring that the development of new energy sources such as unconventional gas mining do not undermine the safety, sustainability and integrity of agricultural production, or the surface and groundwater on which they rely.
- The dairy industry wants to see a more competitive electricity market in regional areas, where farmers and manufacturers frequently have less choice in electricity suppliers than in urban areas, and are therefore limited in their capacity to switch supplies and negotiate better deals.
- The dairy industry is also seeking more transparency in pricing on electricity bills.

Dairy's Contribution to Prosperous Regional Communities

- A supportive Federal, State and Local regulatory environment that recognises the dairy industry's economic contribution to local communities and their economies, will continue to play a vital role in attracting capital and underpinning the confidence for dairy farmers to grow production
- There must also be ongoing investment in regional infrastructure and communities to ensure they are strong and viable.

Competition Law

Review Questions

- *Are government - provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?*
- *What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?*
- *Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?*

Key Points

- Changes to the Competition and Consumer Act as recommended at pages 9-12.
- A Mandatory Code of Conduct and Supermarket Ombudsman with teeth to balance the excessive market power of the major retailers.

Background

On 26 January 2011 Coles dropped the price of its home brand milk to \$1 per litre. This price is unsustainable.

The considerable amount of work, investment, planning and risk required to produce, transport, process, distribute and deliver a perishable product, fresh milk, on a daily basis is not reflected in the current discount price of milk by major retailers at \$1 per litre and is distorting the market.

If left unchecked, the actions of the major retailers in squeezing the supply chain ultimately will lead to a substantial lessening of competition in the market place, a significant impact on the viability of branded dairy products, less product variety on supermarket shelves, less choice for customers and in the long term, higher prices for consumers.

The supermarket duopoly in Australia benefits from unprecedented market share and market power. The unique nature of milk provides retailers with an effective means to grow their market share and power, however the consequences for the sustainability of the domestic fresh milk supply chain is significant.

Coles has continually tried to claim that farmers are not being impacted by the pricing of milk at an unsustainable \$1 per litre. This is simply not true. Dairy farmers in the key drinking milk markets are being affected.

A key claim of Coles' was that they were "fully absorbing the price cut", i.e., the cost of the discounting of milk to \$1 per litre.

Coles Video and Cartoon – contravention of Australian Competition Law

Recent Australian Competition and Consumer Commission (ACCC) findings that the 'Our Coles Brand Milk Story' video and cartoon are likely to have contravened Section 18 of the Australian Competition Law contradict Coles' key claim of "fully absorbing the price cut."

Section 18 prohibits misleading or deceptive conduct, and Coles has admitted it is likely to have contravened this part of the act.

The 'Our Coles Brand Milk Story' video and cartoon were a cynical exercise by Coles to convince consumers that farm gate prices had increased for dairy farmers when they had actually decreased.

The ACCC's investigation followed complaints from dairy farmer organisations, including ADF and the Queensland Dairyfarmers' Organisations (QDO), about the misleading nature of the video and cartoon; which was published on social media. Coles has also claimed that their own margins decreased on Coles-brand milk – something that the ACCC has said could not be substantiated.

The ACCC found that Coles had, in the video and cartoon, represented the farm-gate milk price increasing from 86 cents per two litre bottle of Coles-branded milk in 2010-11 to around 90 cents in 2011-12, when in fact this was an estimate with the final industry figures showing the 2011-12 farm-gate milk price actually decreasing to 84 cents.

The ACCC's ruling is an indictment of Coles and their key claim that they have absorbed the cost of \$1 per litre milk. Pleasingly, the ACCC has recognised this and compelled Coles to take action, including via social media, to correct the record and to avoid making misleading or deceptive claims around the retail price of milk in future.

As Coles themselves stated in their 'Corrective Notice on our Milk Story – Coles' video on YouTube: "We made representations about facts that were actually only estimates or opinions". In the corrective notice Coles also admitted that it has now only funded the "majority of the price cuts". ADF has, since January 2011, consistently said that milk priced at \$1 per litre is simply unsustainable and does not give a fair return for dairy farmers and others in the supply chain.

Another case of key interest is the recent announcement of ACCC Federal Court proceedings against Coles.

ACCC Federal Court proceedings against Coles

The ACCC announced in April that it will take Federal Court action against Coles for alleged unconscionable conduct towards 200 of its smaller suppliers. The commission will allege that Coles' alleged behaviour towards suppliers includes providing misleading information and taking advantage of their superior bargaining position.

The ACCC's decision to take this case to court is an important vindication of the concerns raised by ADF about the excessive market power of the major retailers and the ways in which they have exercised this power. ADF looks forward to the outcome of the court case given its strong advocacy to the ACCC on behalf of the industry since the introduction of \$1 per litre milk in 2011.

It is worth noting that a lack of complaints against the major retailers does not mean there is an absence of market failure but instead represents evidence of significant market failure as smaller suppliers are extremely reluctant to take action or give evidence.

ADF will continue to strongly lobby the Federal Government and advocate for a Mandatory Code of Conduct, including a Supermarket Ombudsman 'with teeth' to balance the extreme market power of the major retailers.

The ACCC's findings in relation to the Coles video and cartoon, the recent Federal Court proceedings, the excessive market power of the major retailers and their treatment of suppliers, both big and small, add up to a compelling case for a Mandatory Code of Conduct, including the establishment of an independent Supermarket Ombudsman with 'teeth', and changes to the Competition and Consumer Act to balance the excessive market power of the major retailers.

The United Kingdom situation

The United Kingdom has already experienced this sort of discounting and the ensuing impacts on farmers and processors. This led them to develop measures to bring about more fairness and transparency in the market.

ADF believes these measures, particularly the UK Groceries Supply Code of Practice (the Groceries Code) provide a good starting point for the basis of Australian legislation establishing a mandatory code of practice and an ombudsman or commissioner.

The United Kingdom Competition Commission (CC) has found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.

The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and published its final report on 30 April 2008. In the report the CC considered that a package of remedies consisting of the following key elements would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition:

- (a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
- (b) the establishment of a GSCOP Ombudsman (or Adjudicator) to monitor and enforce compliance with the GSCOP.

A major issue the report raised was that some practices by big supermarkets were still having an anti-competitive effect, harming the long term interests of consumers. The new UK Code of Practice (the Groceries Code) was designed to improve the relationship between big retailers and their suppliers by preventing certain practices from occurring.

The Groceries Code came into force on 4 February 2010 and applied to all retailers with an annual turnover of more than £1 billion in groceries in the UK (there are ten such retailers in the UK). It must be incorporated into contracts with suppliers.

Situation for Consumers

ADF's view that Coles is not absorbing the cost of this marketing tactic has been upheld by the result of the ACCC action against Coles over its video and cartoon claims, which were shown to be false and misleading.

It is clear that the major retailers are trying to take business and market share from corner stores, independent petrol stations and other small businesses. We believe when they have achieved their goal and cornered the market, they will raise the prices on milk again as there will be little or no competition.

If left unchecked, Coles' actions will lead to a substantial lessening of competition in the market place, a substantial impact on the viability of branded dairy products and are likely to lead to less product variety on supermarket shelves.

As mentioned above, this aggressive discounting has happened before in the UK and it is the ADF's belief that Coles' executives are intent on replicating that model here in Australia. It ultimately leads to less choice for consumers, higher prices on products that are not staples and unsustainable pressure on farmers and others in the supply chain. ADF believes that unless addressed this situation is inevitable in Australia.

Impact on processors

Coles and Woolworths between them have almost 80% of the market and this places processors in a 'catch 22' position. The major retailers are not only the largest sales avenue to consumers for the sale of processors own branded products but the supermarket 'home brand' milk tenders are now a major component of the overall domestic drinking milk market.

This means that processors are understandably cautious about pushing back on the major retailers due to their market power. It also means there are significant impacts down the supply chain with farmers bearing the brunt of reduced value in the supply chain and changes in contract supply requirements in different regions.

The value of branded products has fallen as processors have discounted their products to compete with the retailers' home brand products.

ADF Recommendations – Excessive Market Power of the Major Retailers

ADF's recommendations to the Competition Policy Review in relation to the excessive market power of the major retailers can be summarised as:

1. Reintroduce an Effects Test
2. Investigate Predatory Pricing
3. Definition of Unconscionable Conduct
4. Statutory Duty of Good Faith
5. Unfair Contract Terms
6. Collective Bargaining Changes
7. ACCC Divestiture Powers
8. ACCC Monitoring Powers
9. Mandatory Code of Conduct

It should be noted that ADF supports the work done by the National Farmers' Federation (NFF) in this area and endorses their submission and the attached work by Minter Ellison lawyers.

1. Reintroduce an Effects Test into the Competition and Consumer Act

The clear intent of the major retailers' strategy is to extract as much value as possible from the supply chain with consequent pressure on those at the start of the chain, namely farmers. They are also seeking to increase their own market share to the detriment of competitors and to increase the share of home brand products in store.

Given this it is important that the ACCC has the ability to examine the impact of such strategies in the longer term, with particular emphasis on the impact on consumer choice, farmer viability, the supply chain and future prices. It should also be noted that ADF is of the firm opinion that the ACCC must take a longer term view of market issues than it currently does on all issues and in all its investigations.

It must not only look at the impact of issues on the current market but examine potential future impacts – this is particularly the case for misuse of market power issues. The former Section 49 of the Competition and Consumer Act included an 'effects' test – does the conduct in question have the effect or the likely effect of bringing about a substantial lessening of competition?

ADF believes it is well worth reinstating this to assist the ACCC in taking a longer term view of issues and discovering the true impact for consumers, farmers and others of strategies undertaken by those with significant market power.

2. Investigate Predatory Pricing

That the relevant Federal Minister give direction to the ACCC to undertake an immediate investigation of Coles for a potential breach of section 46, of the Competition and Consumer Act 2010 in relation to predatory pricing, particularly in regional and remote areas.

In regional and remote areas of Australia such as Darwin, Kununurra and Broome milk cannot be sold at \$1 per litre on an ongoing basis without making a loss. ADF believes it is impossible to buy, transport, store and sell milk in these areas for \$1 per litre without selling below cost. In these same regional market areas processor proprietary brands have lost significant market share to discounted supermarket home brand milk.

3. Definition of Unconscionable Conduct

Greater certainty in the form of a legislative definition could assist farmers' access relief from unconscionable conduct. The exact meaning of 'unconscionable conduct' is not defined in the Act.

The Act lists several factors that the court considers when deciding if a party has acted unconscionably. However, the court is able to consider any other matters it believes are relevant.

Associate Professor Zumbo in his submission to the 2010 inquiry into Competition and Pricing in the Australian Dairy Industry recommended inserting a definition of the word 'unconscionable' into Section 51AC of the Act. Section 51AC of the Act was introduced in 1998 to address the problem of small businesses facing power imbalances while dealing with larger commercial entities.

Associate Professor Zumbo believes this would be an 'obvious way to provide clear statutory guidance as to what is meant by the term as used in Section 51' and 'would send a clear parliamentary signal to the Courts that the concept is not only broader than the equitable concept, but that s51AC is intended to promote ethical business conduct.' This is particularly important in a country where two dominant players have almost 80% of the market.

Such a definition would not interfere with the driving of a 'hard' bargain, but rather would provide clear statutory guidance as to what is considered unethical, set out a non-exhaustive benchmark for assessing conduct to determine whether or not it goes beyond what is reasonably necessary to protect the legitimate interests of the parties involved.

ADF believes that Coles' recent actions are certainly unconscionable, particularly when the intent of the actions is taken as a whole. Coles clearly means to damage other competitors and also put pressure on the dairy (and other commodity sectors) value chain.

ADF is of the view that anything that provides clarity for the courts and reduces the limitations of the current Act is worth pursuing. A possible definition as outlined by Associate Professor Zumbo is below:

'Unconscionable conduct includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.'

4. Statutory Duty of Good Faith

It is important in any commercial relationship that acceptable and ethical business be promoted and undertaken. It is ADF's belief that enacting a statutory duty of good faith in the Competition and Consumer Act will assist in ensuring this takes place.

ADF understands that recent case law has provided a framework upon which a statutory duty of good faith could be based.

- (1) Acting arbitrarily, capriciously, unreasonable or recklessly;
- (2) Acting in a manner that is oppressive or unfair in its result by, for example, seeking to prevent the performance of the contract or to withhold its benefits;
- (3) Failing to have reasonable regards to the other party's interests; and
- (4) Failing to act 'reasonably' in general.

In situations where a company with significant market power and vast resources uses its 'muscle' to damage an industry then it cannot be said to be acting in good faith. ADF believes the enacting of a statutory duty of good faith will assist in controlling such behaviour. ADF recommends that a statutory duty of good faith be enacted as part of the Act as soon as possible to provide an appropriate and accepted benchmark of standards of ethical conduct within the Australian dairy industry.

5. Unfair Contract Terms

The dairy industry seeks recognition of the competitive disadvantage faced by farmers (who are essentially small businesses) which places them in a uniquely vulnerable position. This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods.

The dairy industry acknowledges the recent release by the Minister for Small Business of a consultation paper on extending unfair contract term protections from consumers to small businesses and endorses this work.

It is essential that the protection offered to consumers in similar circumstances should be considered for small businesses in similarly vulnerable positions. Two further issues that warrant examination are briefly outlined below.

Dairy farmers generally supply one processor and in the northern markets (Queensland and NSW) have a contract in place with that processor. The contract specifies the minimum amount of milk the farmer will supply, with financial penalties for the under-supply of milk. When farmers produce more milk than specified in the contract they are prohibited from supplying over volume contracted amounts to a third party which may provide a higher price to the farmer – to other processors, other farmers or retailers.

This inability to supply a third party puts a cap on the future growth of dairy farming businesses which may affect the future viability and scale of their business.

The lack of the ability to have dual supply or sell their milk elsewhere limits farmers' ability to invest and grow and acts as a restraint on trade. This is particularly concerning given that the markets where this is taking place are experiencing an under-supply of milk. The above issue warrants further investigation by the Competition Policy Review.

In Queensland there is an issue that relates to contract timing and the alignment of these contracts. One processor contracts on a calendar year basis whilst the other contracts on a financial year basis.

As Queensland is a small market with only two major processors operating it is a particularly difficult issue.

Dairy farmers who wish to switch processors may face a significant period with no contract. They may also miss out on some incentive payments. ADF and QDO are in the process of further examining this issue.

6. Collective Bargaining Changes

The dairy industry seeks to improve the collective bargaining and boycott regimes, in particular to influence the following outcomes:

- a) relaxation of the 'public interest' test for boycott approvals, to consider the unique nature of agricultural markets;
- b) increase the ability for peak bodies to commence and progress collective bargaining and boycott applications, on behalf of their members.
- c) examining policy options for expanding the 'shared community interest' provision in the current ADF authorisation.
- d) broadening the scope of buyers in the market place able to negotiate with Collective Bargaining Groups so it is not just limited to processors, to include all buyers of milk e.g. brokers, wholesalers, retailers as well as other dairy farmers.

As part of the ADF and Queensland Dairyfarmers' Organisation (QDO) draft Mandatory Code of Conduct (which will be discussed in more detail - see point 9) a declared supermarket operator must not refuse to enter into a supply agreement with a supplier because that supplier is, or is not, a member of a collective bargaining group or because that supplier is entering into a supply agreement as a result of conduct or negotiations undertaken by a collective bargaining group.

A declared supermarket operator must not enter into any supply agreement with a supplier unless that supplier has been provided with a reasonable period within which to apply to join or take the benefit of conduct of a collective bargaining group.

7. ACCC Divestiture Powers

As discussed in the National Farmers' Federation submission, the clear potential reform in this area is for the ACCC to be vested with similar divestiture powers to the Competition Commission in the United Kingdom.

This would provide the ACCC with a much simpler process of divestiture. Appeals against divestiture orders may be made to the Federal Court, to ensure there is judicial oversight of divestiture powers, while reversing the onus of proof from the ACCC to the company in question.

8. ACCC Monitoring Powers

ADF has recommended, since January 2011 that the relevant Federal Minister give direction to the ACCC to:

- Use its price monitoring powers under section 95ZF of the Competition and Consumer Act 2010 to monitor prices, costs and profits relating to the supply of drinking milk.

It is appropriate that consideration be given to mandatory price monitoring or regular price surveillance across 'at risk' industries. The 'at risk' industries could include certain primary production industries most vulnerable to anti-competitive behaviour, such as perishable goods. The ACCC could conduct 'own motion' price monitoring under Part VIIA of the CCA.

9. Mandatory Code of Conduct

Given the sheer size of the supermarket duopoly and the disproportionate power they wield in the Australian market place the majority of Australian suppliers, particularly of fresh food produce and drinking milk, must have some sort of ongoing commercial relationship with them. It is important therefore that there is full transparency along the supply chain and that processors and farmers have access to timely and cost effective dispute resolution processes in their dealings with major supermarkets.

The only effective way to ensure this is to establish a Mandatory Code of Conduct covering the whole supply chain to balance the market power of the major retailers and appoint an Ombudsman with teeth to ensure compliance.

As mentioned above, ADF and QDO have developed a draft Mandatory Code of Conduct. The draft Code is attached at attachment 1. The draft ADF and QDO Code is intended to address, among other issues, market power issues and therefore only applies to retailers that account for at least 20% of the sales of one or more dairy items in Australia from supermarkets. The draft Code is currently called the Dairy Industry Code of Conduct but has been drafted to allow it to easily be adapted to cover all supermarket suppliers.

Given the market power of the major retailers and the reluctance of suppliers to take action or give evidence against them an important aspect of the draft code is the ability of industry organisations, federations or associations to make complaints on behalf of their members.

The draft ADF and QDO Code also includes an Ombudsman with the power to obtain information, documents and evidence, i.e. the Ombudsman can require a person to produce documents or appear before the Ombudsman, issue written public warnings to the public regarding the conduct of a supermarket and apply substantial financial penalties for those who transgress.

ADF and QDO are happy to discuss the draft Code and urge the Competition Policy Review Secretariat and Members to closely examine the draft document and its recommendations.

Competition Policy for Global Industries

Review Question

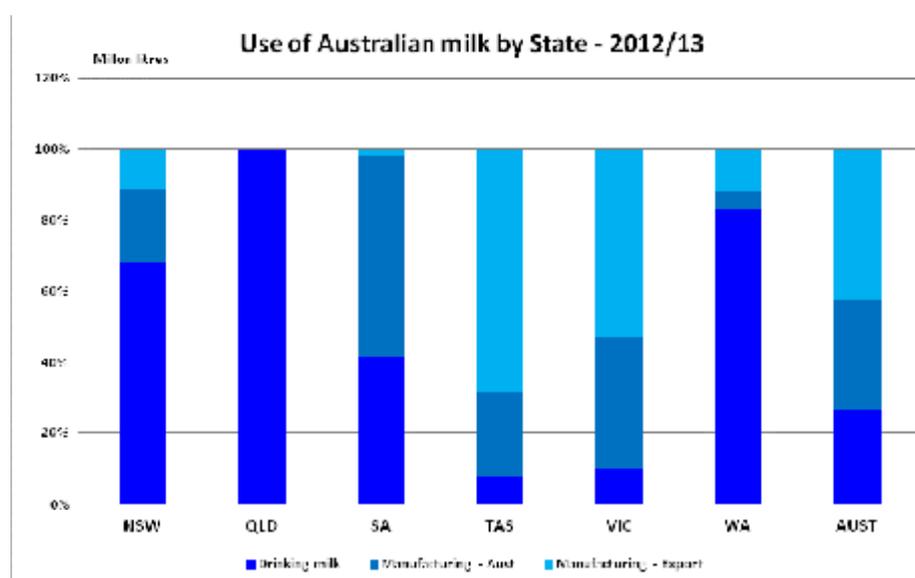
- *Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?*

Key Points

- ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (over 40% of dairy production is exported).
- An environment must be created with regulatory constraints in which the dairy industry can grow and expand, through consolidation of processors and investment, to compete on the global market and at a global scale.
- Existing competition laws do not take into account this global market and need for scale but rather have a narrow regional focus. There must be allowance for a global perspective and the realisation that for export-focussed industries prices are set globally, not on a region by region basis.
- There is a need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB, the ACCC and the ACT. The timeframes involved in various competitive regulatory processes should not have the unintended effect of advantaging one bid ahead of any other in acquisitions.

Background

It is worth noting that the Australian dairy industry has been deregulated since the year 2000. The key reason for pointing this out is to emphasise that for the majority of the Australian dairy industry, certainly in Victoria, Tasmania and South Australia, the farmgate milk price is fundamentally determined by international market prices. This point will be revisited further in this submission.



Source: Dairy Australia

As the above chart demonstrates, exposure to the domestic manufacturing, export and drinking milk markets varies significantly between dairying regions. Queensland, Northern New South Wales and Western Australia are now essentially drinking milk regions, with very limited involvement in the export market and limited opportunities for growth in the domestic market. South Australia also has a significant percentage of production dedicated to producing drinking milk. Victoria and Tasmania remain primarily manufacturing and exporting regions.

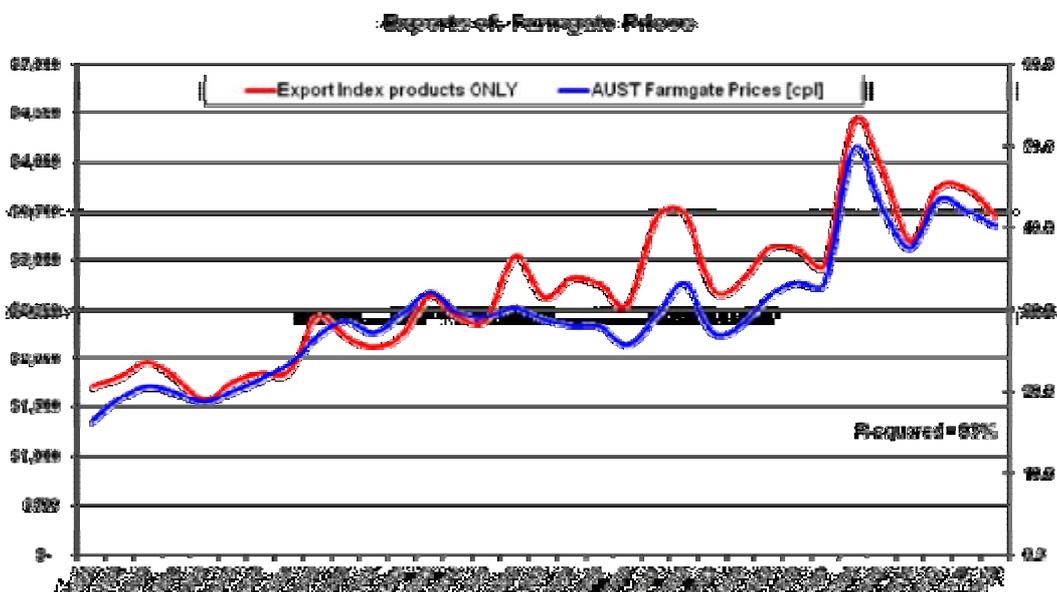
These differences in product and market mix give rise to regional differences in production systems, costs of production and farm gate price drivers. Drinking milk suppliers (particularly farmers operating in Queensland, Northern New South Wales and Western Australia) must operate year-round production systems with limited variation in monthly supply volumes.

This increases their production costs relative to producers of export milk who can operate more seasonal farm systems. In Queensland, Northern New South Wales and Western Australia retail sales of drinking milk are the key regional market and farm gate price driver, particularly since the introduction of \$1 per litre home brand milk pricing in January 2011.

On the other hand farm gate prices in Victoria, Tasmania, South-east South Australia and the Riverina region of New South Wales, where the majority of milk is used in the manufacture of dairy products, are closely aligned to returns from exported products. In fact the price paid by exporting processors collecting milk across Victoria and Tasmania is an equivalent price across all regions.

Given the large percentage of Australia's milk production which is exported (over 40%) and the limited returns available on the domestic market for some products, such as drinking milk due to the market power of the major retailers, the export market is of particular importance to the Australian dairy industry.

The chart below, which shows Australian farmgate milk prices (cents per litre) compared to international dairy market product prices, highlights this close alignment over the last thirty years.

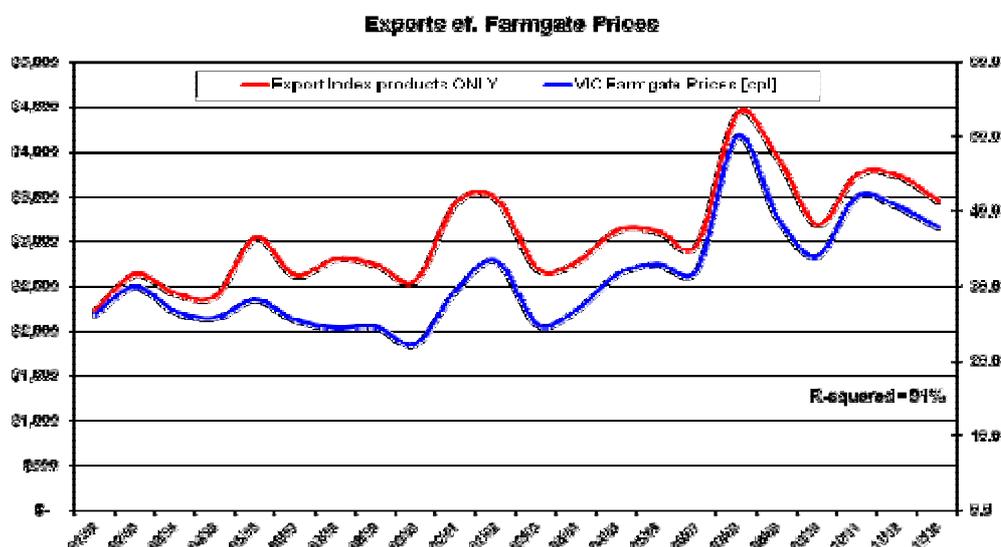


Source: Dairy Australia

This chart shows that international market prices clearly affect local industry returns and, hence, potential farm gate payments to dairy farmers for milk.

It is worth examining this link at a Victorian state level also. In the 2011-12 financial year dairy exports attributable to Victoria, as a percentage of Australian exports were estimated at approximately 60% by both volume and value.

The chart below, which shows Victorian farmgate milk prices (cents per litre) compared to international dairy market product prices, again highlights this close alignment over a period of twenty years.



Source: Dairy Australia

International dairy market product prices will continue to be the key determinant of farmgate milk prices at a regional, Victorian and Australian level for the vast majority of Australian milk.

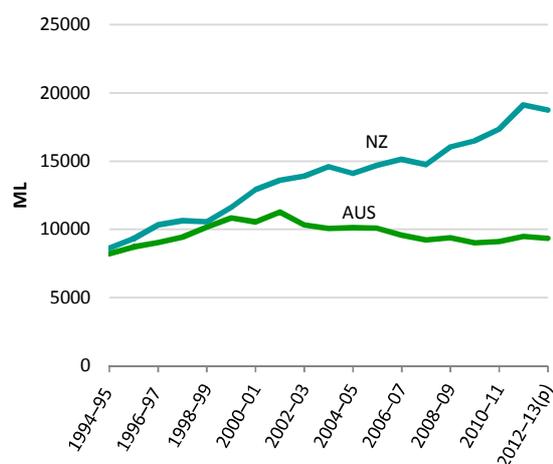
Milk production growth

Strong growth characterised the dairy industry through the 1990s, but that growth has stalled in the last decade. In the meantime, our major export competitor New Zealand has expanded significantly.

The industry has experienced a slow recovery from drought with rains returning in recent years replenishing storages and restoring irrigation levels. Milk production growth in 2011/12 of 4% was the strongest in a decade. However, 2012/13 saw a reduction of approximately 3%, and 2013/2014 is expected to achieve either a similar or slightly lower milk volume.

The dairy industry has made strong productivity gains in the last two or three decades but further improved gains on individual farms will rely on new technologies or techniques developed through R&D. As with New Zealand, conversion farms may be an option.

The outlook for 2013/14 is for relatively stable production, based on surveyed herd growth intentions, cow condition and assuming normal seasonal conditions offset limited fodder reserves. Southern exporting regions should lead growth given positive global prices. Production in domestic supply regions is likely to be flat in response to market signals, such as \$1 per litre milk, and uncertainty around supply contracts.



The domestic market is a mature market and any substantial growth in the Australian dairy industry is going to come through the export market.

Based on production intentions for three-year growth recorded in the 2013 National Dairy Farmer Survey and assuming reasonable seasonal conditions and prices, milk production could range between 9.8 and 10.2 billion litres by 2015/16. Further afield, ultimately profitability will be the key driver of growth for the Australian dairy industry.

Investment and the Australian dairy industry

It is well recognised that capital investment in the dairy sector can increase efficiency and productive capacity. Such investment contributes to incomes, infrastructure and employment, often in regional areas. It can also help Australia gain access to new export markets.

At the same time, many Australian dairy farmers have been struggling under the burden of increased debt levels and now find themselves unable to effectively capitalise on improved market conditions. Investment on-farm is needed and Australian dairy farmers are being increasingly exposed to alternative models of attracting capital into their businesses without merely increasing bank debt.

The Horizon 2020 project (a joint initiative of Dairy Australia and the Gardiner Foundation) also identified that there is a significant need for a capital injection into Australian dairy farming if we are to realise a profitable growth agenda towards 2020. It found that:

1. The Australian dairy industry is competing for capital, which would provide a potential spur to the growth of dairy farm production over time;
2. The Australian dairy industry has a relatively poor understanding of those opportunities and the investment models available to both farmers and potential investors; and that
3. Understanding the attributes of investment attraction will improve the effectiveness of industry promotion and capacity building efforts.

This is supported by figures adapted from the Greener Pastures report released by ANZ in 2012. This analysis found that for the Australian dairy industry to attain a level of growth equivalent to that experienced by New Zealand's dairy industry over the last decade (2002-2012), an additional \$10 billion of capital injection on-farm is required by 2020. Furthermore, this analysis found that for the Australian dairy industry to regain its share of global dairy trade lost since 2002, a further \$6 billion of capital injection on-farm is required by 2020.

Clearly with figures such as these, the Australian dairy industry, with the support of Government, needs to be proactive in driving the investment discussion and looking for ways to drive capital through a broad range of models, derived from both on and off-shore sources.

Competition in the dairy manufacturing sector

As in the farm sector, the milk processing sector is undergoing some rationalisation. This has resulted in improved factory capacity, as larger operations have improved their efficiency and economies of scale. The lack of growth in milk production over the past decade has relieved the pressure on Australian dairy companies to continue to invest in increasing processing capacity, at least in the short to medium term. Instead, the challenge has been to remove surplus capacity and to utilise the existing capacity as profitably as possible.

The Australian dairy manufacturing sector is diverse and includes some co-operatives as well as public, private, and multinational companies. Farmer-owned co-operatives no longer dominate the industry and now account for around 35% of Australia's milk production. The largest co-operative is Murray Goulburn accounting for nearly 33% of national milk output.

Other Australian dairy companies cover a diverse range of markets and products, from the publicly listed Bega Cheese Limited; to the privately owned Regal Cream (Bulla Dairy Foods), Burra Foods and Longwarry Food Park to name just a few; together with many highly specialised cheese manufacturers. Large multi-national dairy companies have operated in the Australian dairy industry for many years and currently include Fonterra (New Zealand), Kirin (Japan) and Lactalis (France).

Despite the fact that Australia is a relatively large player in terms of its share of international dairy trade, none of Australia's dairy companies are in the top 20 manufacturers in terms of milk processed and turnover. This has brought about renewed calls in the industry to bring about

further rationalisation within the Australian dairy processing landscape in order to obtain the scale necessary to compete with international giants such as Fonterra, Arla and Friesland Campina.

Seasonality of Milk Supply

Dairy manufacturing and processing efficiency depends on a reliable and constant supply of raw milk. The seasonality of milk supply (with peak season volumes in Victoria/Tasmania harvested between September-November) affects processing efficiency.

Outside of peak season, a significant part of the dairy manufacturing sector is forced to run at lower capacity: facilities with milk powder dryers run at lower capacity between January and August, and some are forced to shut-down given the high fixed cost associated with such capital intensive plant; most cheese facilities (and by extension whey) are run at more constant capacity levels; butter facilities also run at fairly constant capacity; drinking milk and other fresh (e.g. yoghurt) plants require constant supply but do not require as high a level of capital investment and are not required to operate at full capacity (24/7).

Scale

The seasonality of milk supply creates challenges for processors. The quote below from a recent ADIC submission to the Productivity Commission neatly sums up the response by processors in Australia:

“Historically, Australian processors have attempted to manage this milk supply challenge to efficiency through plant design: that is, by opting for smaller dryers (for example, combining at one manufacturing site, two 6 tonne per hour dryers instead of one 12 tonne per hour dryer) to enable shutdown during off-peak when milk supply is too low to maintain efficiency (a 20 hour operational day is required to run such plant efficiently). Australian supply conditions have made 4-6 tonne dryers the optimal size dryer.”

Source: ADIC submission to the Productivity Commission study, Costs of Doing Business: Dairy Product Manufacturing – May 2014

It is worthwhile comparing this scale with New Zealand where two factories (each) produce more milk powder than the whole of Australia.

An example is the world’s largest milk powder drier (30 tonnes) which began production in September 2013. The drier at Darfield is capable of producing 45 shipping containers of product per day.

The dairy industry funded *Horizon 2020: Future scenarios for the Australian Dairy Industry* report found the following in relation to scale and manufacturing:

“There is significant ongoing requirement for innovation in processing to keep pace with the demands of the evolving marketplace, and improve the sustainability and competitiveness of businesses.

Australian dairy factories lack the scale and possess aged technology that do not enable them to be cost-competitive with competitor installations in New Zealand, the US and Europe.

While further consolidation is possible it is unlikely to significantly change this fact in the next decade. While much of the world market growth is in the supply of commodities to developed world markets, market growth will also open up opportunities to cater for customer needs in more precise specifications, and as an alternative to large dominant dairy processors that sell ingredients as well as products in brands.

The scope for growth in value of exports comes from being agile, high quality suppliers with strong sustainability credentials.”

Source: Horizon 2020: Future scenarios for the Australian Dairy Industry

There is also a view in the industry that milk supply constraints have impacted either the processor capacity, or willingness, to invest:

“The lack of growth in milk production over the past decade has also relieved the pressure on Australian dairy companies to continue to invest in increasing processing capacity—at least in the short to medium term.

Instead, the challenge has been to remove surplus capacity and to utilise the existing capacity as profitably as possible.”

Source: Australian Dairy Industry in Focus 2013

“Milk supply constraints have resulted in under-investment in technology and scale in our dairy factories – as a result we are not cost competitive in our supply chain. The industry operates as a fragmented, competitive model, with small, high-cost plants by world standards, and limited integration into customers’ businesses.”

Source: Horizon 2020: Future scenarios for the Australian Dairy Industry

It is anticipated that there will be strong competition for milk to fill new processing infrastructure across the industry and ongoing industry change expected to result from competition for Australian resources and to secure supply for international markets.

This competition among processors for milk supply does not necessarily result in the innovation or investment necessary to grow the industry as outlined above.

The milk price in southern Australia is ultimately set by global markets, even at a regional level. More processors competing for milk does not necessarily mean higher milk prices and in the long-term can be detrimental to the industry as much-needed investment in processing capacity is not pursued to allow processors to compete on price in the short-term.

ADF recommends that the narrow focus of existing competition regulators and laws on regional competition be examined in relation to industries such as the dairy industry where prices are set in global markets due to the large amount of product exported (over 40% of dairy production is exported).

An environment must be created in which the dairy industry can grow and expand, through consolidation of processors and investment, to compete on the global market and at a global scale.

Existing competition laws do not take into account this global market and need for scale but rather have a narrow regional focus. There must be allowance for a global perspective and the realisation that for export-focussed industries prices are set globally, not on a region by region basis.

A further issue that relates to creating a dairy industry that can compete on a global scale is the recent experience of the acquisition of Warrnambool Cheese and Butter (WCB) by the Canadian dairy products company Saputo.

With Bega, Murray Goulburn (MG) and Saputo all bidding for WCB, it was essential the regulatory approval processes they were respectively subject to were seen to be fair and equitable.

By this, ADF means that the timeframes involved in the various regulatory processes, in this case the Foreign Investment Review Board (FIRB) and Australian Competition Tribunal (ACT) should not have the unintended effect of advantaging one bid ahead of its rivals.

ADF made this point in its submissions to the Australian Competition Tribunal (ACT) during the acquisition process of Warrnambool Cheese & Butter and would again like to reiterate the need for regulatory parity in the timing of approvals by different regulatory bodies such as the FIRB, the ACT and the Australian Competition and Consumer Commission (ACCC).

The timeframes involved in the various regulatory processes should not have the unintended effect of advantaging one bid ahead of any other. An even regulatory playing field is both desirable and necessary as competition for processing resources intensifies.

Competition Reform in Infrastructure Sectors

Review Question

- *Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?*

Key Points

- The industry supports an integrated approach across jurisdictions that provides resolution to the infrastructure constraints faced by the dairy industry.
- The dairy industry encourages Government to examine the competitive settings around freight infrastructure such as ports that can often operate as monopolies and are able to charge/recover monopoly rents that are often passed on to others in the supply chain.
- The Murray Darling Basin accounts for approximately 25 per cent of Australian milk production. With the Basin Plan now in implementation phase, farmers need certainty in aspects of the Water Recovery Strategy if they are to plan and adapt.
- A confirmed 1500GL cap provides certainty for farmers to plan for a productivity challenge that is already very tough. The Government now needs to provide a clear plan on how this will be implemented, including through investment in water infrastructure that will contribute to meeting targets.
- Government has a critical role to play in regulating the energy sector to ensure that Australian regional industries can access reliable, secure energy supplies at prices that enable them to remain internationally competitive.
- State and Federal governments also play a critical role in ensuring that the development of new energy sources such as unconventional gas mining do not undermine the safety, sustainability and integrity of agricultural production, or the surface and groundwater on which they rely.
- The dairy industry wants to see a more competitive electricity market in regional areas, where farmers and manufacturers frequently have less choice in electricity suppliers than in urban areas, and are therefore limited in their capacity to switch suppliers and negotiate better deals.
- The dairy industry is also seeking more transparency in pricing on electricity bills.

Freight infrastructure

Growth in the dairy industry relies on improved road, rail and port infrastructure, infrastructure to support efficient water use, a reliable and expanding power supply, infrastructure to support research, development and training, and infrastructure for supporting industries (for example, feedmills).

Road infrastructure examples relevant to the dairy industry include:

- Stock underpasses to assist in managing biosecurity risks;
- Maintenance of bridges identified as crucial for access to farms in an emergency;
- Rural road capacity to enable more efficient milk collection;
- Transport; and
- Expanded operation of B-triples to reduce truck traffic and improve efficiencies.

The dairy industry supports efforts to build the evidence base on food industry trends and market changes to inform infrastructure planning. The industry also supports an integrated approach across jurisdictions that supports resolution to the infrastructure constraints faced by the dairy industry.

The dairy industry also encourages Government to examine the competitive settings around freight infrastructure such as ports that can often operate as monopolies and are able to charge/recover monopoly rents that are often passed on to others in the supply chain. This can hamper the competitiveness of Australian dairy on international markets for which the industry depends.

Water

The dairy industry is a major water user for both irrigation and in the dairy. Across Australia, water availability, security and efficient use are critical drivers for agricultural productivity and food security.

Without careful natural resource management, dairy farmers do not achieve productive farming systems and profitability. Managing water use and land use is integral to farm management. The way Government regulates water availability and affordability will directly impact on the profitability and future of the Australian dairy industry.

Dairy farmers in both irrigated and dryland areas are steadily adapting their practices to produce more milk with less water. However, periods of drought or low water availability put pressure on production options, and milk production levels, and this has a flow-on impact on milk companies and regional economies. Regulation of water resources needs to be achievable, practical and cost-effective, while optimising social, economic and environmental outcomes. The Government needs to work with the dairy industry as part of adapting the wider community to reduced water availability.

A 2013 cost-benefit study looking at irrigation upgrades on ten dairy farms in Northern Victoria and NSW Southern Riverina, found that farm upgrades delivered environmental, social and economic outcomes. The report found that while farm upgrades cost the Government around \$3,700 a megalitre (ML) for water savings for the environment, at the same time this investment delivered gross productivity gains to farmers worth an average \$9,800/ML and that increased farm production generates additional regional economic activity worth \$6,200/ML.

There is a clear case for Government to continue support for investment in water infrastructure – both on-farm infrastructure and community infrastructure such as dams, covered waterways to reduce evaporation, and methods to improve water capture.

The Murray Darling Basin accounts for approximately 25 per cent of Australian milk production. With the Basin Plan now in implementation phase, farmers need certainty in aspects of the Water Recovery Strategy if they are to plan and adapt.

With a significant reduction in annual average water available for irrigation, trade and carryover (approximately 26 per cent), dairy farmers will need to boost their productivity by 20-25 per cent if milk production is to recover to pre-drought levels with this much less water.

The Government's confirmed 1500GL (or possibly lower) cap will provide certainty for farmers to plan for a productivity challenge that is already very tough. The Government now needs to implement the Water Recovery Strategy alongside a commitment to prioritise infrastructure investment. The Government's role in infrastructure is critical to deliver the outcomes under the Murray Darling Basin Plan for the environment and communities.

Energy

ABARES has identified that electricity accounts for 2.4% of total dairy farm operating costs, compared with 0.8% in livestock/cropping enterprises. This is because electricity is dairy farming's main energy source, not the transport fuels on which cropping, sheep and beef grazing rely.

Energy usage patterns and costs in dairies over time are highly complex, and highly individual to each farm business. They reflect factors such as:

- Size of the herd, and type of milking system (e.g. rotary milking platform or herringbone);
- Milk production systems, whether seasonal or milking all year around;
- Age and operating efficiency of plant such as milking machines and refrigeration;
- Seasonal conditions, which may affect the timing and number of cows milked;
- Seasonal conditions, which may affect the timing and extent of pumping for irrigation;
- Environmental policy decisions pushing dairy farmers to install new, more energy intensive irrigation technologies to reduce water use and increase environmental flows in rivers;
- Upgrades or efficiency measures undertaken to reduce consumption and therefore costs; and
- Renegotiation of tariffs or contracts with energy companies to reduce costs.

Analysis commissioned by Dairy Australia indicates that typical dairy farmers are now spending between \$20 and more than \$100 a day on electricity to power their dairies. Rising tariffs, environmental fees such as the carbon price and renewable energy incentives schemes and rising network charges have contributed to daily costs rising 33-100% for many farms since 2010. Large dairy farms with milking herds of more than 600 cows are paying between \$75 and \$300 a day for power for the dairy shed, up from between \$50 and \$150 in 2010. Daily energy consumption over the period has remained fairly steady.

The industry is also a large user of both electricity and gas in manufacturing. Dairy processing companies are among the top 300 energy users in Australia, and were therefore liable for the carbon tax. Their international competitiveness is highly sensitive to changes in energy costs, but also inadequate reliability of supply in regional areas where most factories are located. Dairy's manufacturing sector, many of which have no viable alternatives to gas power, are concerned about long term domestic gas supplies and prices as the momentum to export gas builds.

Power interruptions can cost companies dearly when they affect the processing of this perishable product. Power interruptions can cause product to be wasted during processing, and reduce output for sale. Unreliable power supplies also affect farmers, who can lose milk and therefore income if, for example, refrigeration is shut down and milk cannot be cooled to food safety standards.

With many dairy manufacturers now moving further down the path of plant automation and control systems, even a small disruption to power, in the milliseconds, can cause considerable down time, downgraded product as well as potential damage to electronics.

The cost of increased investment in network infrastructure is passed onto farm businesses, but the reliability of power supply in many regional areas remains inadequate. The dairy industry is seeking policy reform and investment to ensure that infrastructure upgrades are undertaken so that regional areas enjoy the same reliability of electricity supply as urban areas, without a price premium for a service that urban Australians take for granted.

The dairy industry wants to see a more competitive market in regional areas, where farmers and manufacturers frequently have less choice in electricity suppliers than in urban areas, and are therefore limited in their capacity to switch supplies and negotiate better deals.

The dairy industry has also sought more transparent pricing on electricity bills. Most bills opened by dairy farmers combine all charges – consumption, network, environmental fees, and the carbon price – into a single tariff. This has led to confusion among farmers as the different drivers behind their rising costs, and allowed power companies to confuse the extent to which repealing the carbon tax may result in lower energy costs. Rising energy costs are a constraint, as farmers are generally price takers and cannot pass additional costs to the consumer.

Government has a critical role to play in regulating the energy sector to ensure that Australian regional industries can access reliable, secure energy supplies at prices that enable them to remain internationally competitive.

State and Federal governments also play a critical role in ensuring that the development of new energy sources such as unconventional gas mining do not undermine the safety, sustainability and integrity of agricultural production, or the surface and groundwater on which they rely.

Unconventional gas mining

Unconventional gas mining may have implications for water quality and availability, the integrity of aquifers, and the integrity of waterways from which stock may drink. These potential implications arise from the mining techniques themselves, and the disposal of produced water.

In this context the dairy industry would be concerned about 'streamlining' approvals systems for new energy development that involve weakening requirements for baseline environmental monitoring on fugitive gases, surface and groundwater water quality and quantity, aquifer integrity and waterway health.

Similarly, the dairy industry would not support any move to reduce requirements for ongoing monitoring throughout the project life and a reasonable period afterwards. All data should be available on a national and publicly accessible environmental monitoring system to improve the understanding of unconventional gas mining's effects on farms and farming areas.

Farmers must also have the right to control access to their properties. Access agreements must ensure that landholders are not liable for incidents resulting from third-party access from mining and unconventional gas operations, and that land is rehabilitated to its original conditions when the mine is decommissioned.

Energy efficiency is a significant opportunity for reducing energy costs as well as greenhouse emissions in the dairy industry, as the industry is a large user of electricity on farm, and both electricity and gas in manufacturing. Some on-site energy generation technologies may also supplement energy efficiency (such as cogeneration or solar PV or solar thermal).

Dairy farmers are already embracing renewable energy technologies, with 40% of farms in 2012 having installed some form of renewable energy installation (such as heat pumps or solar water heating). Dairy farmers have also been quick to take up 1700 energy assessments co-funded through Dairy Australia and the Federal Government's Energy Efficiency Information Program. The audits are identifying many no or low cost energy efficiency and energy reduction opportunities, as well as options that are more expensive but have significant cost savings and greenhouse gas abatement.

But for all these opportunities, there are significant capital cost barriers. In many cases, federal and state rebate programs assisted farmers with the upfront capital costs, and thereby increased their participation.

Dairy manufacturers are also embracing new clean technology. For example, dairy manufacturing projects that were part of the Clean Technology Food and Foundries Investment Program in the 2012- 13 year included more than \$25 million investment in equipment upgrades including installing heat exchange, solar PV and/or gas alternatives for water heating and power, and equipment upgrades for refrigeration and lighting.

Investment in clean technology is expected to reduce emissions intensity at some dairy plants by up to 50%. Unfortunately this Clean Technology program is now closed and comparable investment in these types of projects is unlikely to continue.

The emerging question is how to finance large, up-front capital costs for equipment upgrades and renewable energy options in tight economic conditions. For example, installing heat recovery pre-heaters and variable speed drives on vacuum and milk pumps on dairy farms have an estimated capital cost of \$5000-\$17,000, with a 4 – 20 year payback period. Similarly, for a dairy manufacturer to upgrade to new energy efficient refrigeration or to switch to solar power could require a capital cost of several hundred thousand dollars with a payback period of 3 – 20 years. Dairy industry studies have shown that a payback period of less than 5 years is required for projects to be attractive to dairy farmers. Government support for investment in energy efficiency projects could result in significantly higher uptake with benefits in relation to energy use, security of supply, cost and greenhouse emissions.

Competition Policy and Regional Communities

Review Question

- *Are government - provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?*

Key Points

- A supportive Federal, State and Local regulatory environment that recognises the dairy industry's economic contribution to local communities and their economies, will continue to play a vital role in attracting capital and underpinning the confidence for dairy farmers to grow production
- There must also be ongoing investment in regional infrastructure and communities to ensure they are strong and viable.

Regional Communities

As opposed to many agricultural industries, the Australian dairy industry has a strong and vibrant manufacturing sector, particularly in regional communities, that value-adds raw milk into a wide range of healthy and nutritious dairy products for consumption both within Australia as well as to over 100 export destinations across the globe.

Dairy ranks fourth in agricultural exports—valued at almost \$3 billion—with a 5% increase in export volumes last year alone. Value-added processing activities delivered an agricultural industry with a wholesale value of dairy products in excess of \$13 billion a year.

With a farmgate value alone of \$4 billion, the Australian dairy industry enriches regional Australian communities, where 1 in 8 Australians live.

Rural and regional communities need to be attractive places to live as well as work. Infrastructure must be of a high standard, providing access to good road and rail transport links with cities and/or larger regional centres, high-speed internet access, reliable mobile phone coverage, and good quality health and education services for families. This basic infrastructure makes regional, rural and remote areas attractive places to invest for business, which then provides employment opportunities and in turn more money for local shires and councils to invest in community infrastructure such as parks, libraries and sports facilities.

Vibrant communities are an important factor in retaining a rural workforce. Opportunities for partners and family members often make or break the decision to stay. Access to hospitals, recreation facilities, casual and permanent employment off farm are all needed. An adequate dairy service sector is also important. This is an interdependent relationship - there must be a sufficient number of farms in a district to sustain a viable, well-serviced dairying community.

Dairy's contribution to the regions

As highlighted above, the Australian dairy industry makes an enormous contribution to regional economies. The table below demonstrated how this contribution can be further broken down against the eight major Australian dairy production regions.

The dairy industry is confident that the economic contribution made by the dairy industry will continue to grow as the industry capitalises on the immense opportunities that exist for the sector, particularly in overseas markets, such as the burgeoning Asian region. Ultimately, the ongoing profitability of the Australian dairy supply chain will underpin the industry's ability to grow, and in doing so, expand the economic contribution of the sector.

As mentioned previously, a supportive Federal, State and Local regulatory environment that recognises the dairy industry's economic contribution to local communities and their economies, will continue to play a vital role in attracting capital and underpinning the confidence for dairy farmers to grow production.

There must also be ongoing investment in regional infrastructure and communities to ensure they are strong and viable.

2012/13 Australian RDP Breakdown

		Sub-Tropical Dairy	Dairy NSW	Gipps Dairy	Murray Dairy	WestVic Dairy	Dairy SA	Dairy WA	Dairy TAS	AUST
Dairy farms	No.	683	490	1,400	1,516	1,930	263	163	437	6,900
Cows in milk & dry	000	115	150	422	383	350	72	65	140	1,766
People employed on farm	No.	2,000	2,250	4,907	5,840	5,503	2,500	250	1,500	24,750
People employed in processing	No.	1,250	4,250	3,321	3,953	3,725	750	750	1,000	19,000
People directly working in dairy	No.	3,250	6,500	8,228	9,793	9,229	3,250	1,000	2,500	43,750
Volume of milk produced	Million Lts	579	722	1,892	2,252	2,122	536	337	760	9,201
Share of National milk production		6.3%	7.8%	20.6%	24.5%	23.1%	5.8%	3.7%	8.3%	100%
Value of milk leaving farms	\$M.	\$310	\$335	\$715	\$852	\$803	\$205	\$151	\$305	\$3,677
Dairy farm contributions to economy	\$M.	\$246	\$266	\$572	\$661	\$622	\$154	\$121	\$244	\$2,941
Value of dairy products exported	\$M.	\$47	\$148	\$680	\$810	\$753	\$14	\$44	\$244	\$2,750
Share of National exports - value		2%	5%	25%	29%	28%	1%	2%	9%	100%
Volume of dairy products exported	000 tonnes	13	36	192	229	216	4	4	69	739
Share of National exports - volume		2%	5%	24%	29%	27%	0%	5%	9%	100%

**Dairy Industry (Dairy Industry Code of
Conduct) Regulations 2013**

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Dairy Industry Ombudsman (Dairy Industry Code of Conduct) Regulations 2013

1. Name of Regulations

These Regulations are the *Dairy Industry (Dairy Industry Code of Conduct) Regulations 2013*.

2. Commencement

These Regulations commence on [date].

3. Code of conduct

The Dairy Industry Code of Conduct is set out in Schedule 1.

Schedule 1 Dairy Industry Code of Conduct

Part 1—Preliminary

1 Name of regulations

This code is the Dairy Industry Code of Conduct .

2 Definitions

In this code:

Act means the *Dairy Industry Act 2013*.

approved auditor means a person declared by the Ombudsman as such in accordance with section 43 of the Act.

branded dairy products has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, *branded products* means dairy items that are not produced, processed or manufactured by or on behalf of a supermarket operator and which do not carry:

- (a) the name, trade mark or other insignia of a supermarket operator;
- (b) a name, trade mark or other insignia which is owned by a supermarket operator; or
- (c) a name, trade mark or other insignia which is licensed to a supermarket operator.

buying team means those employees of a supermarket operator from time to time whose role includes at least one of the following:

- (a) direct involvement in buying dairy items for resale;
- (b) (excluding the role of the Code Compliance Officer) the interpretation and application of the provisions of this code;
- (c) immediate management responsibility for any or all of those employees described in (a) and (b) above.

Code Compliance Officer means the person appointed from time to time in accordance with clause [7].

code dispute has the meaning given in clause [9].

code contravention includes:

- (a) a contravention of any provision of this code; and
- (b) a related contravention of any provision of this code.

collective bargaining group means a group of persons who have the benefit of collective bargaining conduct authorised or notified under the *Competition and Consumer Act 2010*

customer means a retail purchaser of dairy items.

declared supermarket operator has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, a *declared supermarket operator* means a supermarket operator declared as such under Part III of the Act and includes:

-
- (a) all subsidiaries, holding companies and related bodies corporate of the declared supermarket operator; and
 - (b) all directors, servants, employees and agents of the supermarket operator and its related bodies corporate.

dispute notice has the meaning given in clause [9].

dairy item has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, a **dairy item** is an item that:

- (a) is a dairy product
- (b) is intended for human consumption by the manufacturer or producer of the item; and
- (c) is sold for human consumption in a supermarket to a customer; and
- (d) is not meant for consumption at the retail premises at which it is sold to the customer.

dairy item market means a market in which dairy items are supplied or acquired by a declared supermarket operator.

get-up means the physical appearance and presentation of a dairy item or its packaging or labelling, including elements such as colour, shape, size, design, or any combination of these elements, which is intended to distinguish the dairy item from other items with which it competes.

house brand dairy products has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, **house brand dairy products** means dairy items that are produced, processed or manufactured by or on behalf of a supermarket operator and includes groceries which carry:

- (a) the name, trade mark or other insignia of a supermarket operator;
- (b) a name, trade mark or other insignia which is owned by a supermarket operator; or
- (c) a name, trade mark or other insignia which is licensed to a supermarket operator.

IAMA means the Institute of Arbitrators & Mediators Australia.

industry participants has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, **industry participants** means suppliers and supermarket operators, including declared supermarket operators, and industry participant shall be construed accordingly.

minimum range of dairy items has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, **minimum range of dairy items** means dairy items from all of the following dairy item categories:

- (a) milk;
- (b) yoghurt;
- (c) cheese;
- (d) milk-based dairy products; and
- (e) packaged food, other than food mentioned in paragraphs (a) to (d).

Ombudsman means a person appointed as the Dairy Industry Ombudsman under the Act.

payment or payments means any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms.

prescribed class of goods means a class of groceries prescribed under clause 21.

primary buyer means, in relation to any individual supplier, the employee or employees within a supermarket operator's buying team who are responsible from time to time for the day-to-day buying functions of the supermarket operator in respect of that individual supplier.

promotion means any offer for sale at an introductory or a reduced retail price, whether or not accompanied by some other benefit to customers that is in either case intended to subsist only for a specified period.

reasonable notice means a period of notice, the length of which will depend on the circumstances of the individual case, including:

- (a) the duration of the supply agreement to which the notice relates, or the frequency with which orders are placed by the supermarket operator for relevant dairy items;
- (b) the characteristics of the relevant dairy items including durability, seasonality and external factors affecting their production;
- (c) the value of any relevant order relative to the turnover of the supplier in question; and
- (d) the overall impact of the information given in the notice on the business of the supplier, to the extent that this is reasonably foreseeable by the supermarket operator.

related code contravention: a person commits a related code contravention if a person:

- (a) aids, abets, counsels or procures a corporation to contravene a provision of the code;
- (b) induces, whether by threats or promises or otherwise, a corporation to contravene a provision of the code;
- (c) is in any way, directly or indirectly, knowingly concerned in, or a party to, a contravention by a corporation of a provision of the code; or
- (d) conspires with others to effect a contravention by a corporation of a provision of the code.

require: a supermarket operator will "**require**" particular actions on the part of a supplier if the relevant supplier does not agree, whether or not in response to a request or suggestion from the supermarket operator, to undertake an action in response to ordinary commercial pressures. Where those ordinary commercial pressures are partly or wholly attributable to the supermarket operator, they will only be deemed to be ordinary commercial pressures where they do not constitute or involve duress (including economic duress), are objectively justifiable and transparent and result in similar cases being treated alike. The burden of proof will fall on the supermarket operator to demonstrate that, on the balance of probabilities, an action was not required by the supermarket operator.

senior buyer means, in relation to any individual supplier, an employee or employees within a supermarket operator's buying team who manage the primary buyer or primary buyers for that supplier (or is otherwise at a higher level than the primary buyer(s) within the management structure of the supermarket operator).

shelf space has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, *shelf space* means any space in a supermarket on which dairy items can be placed or to which dairy items can be attached that can be readily accessed by a potential customer, and includes without limitation:

- (a) shelves;
- (b) sub shelves or inter-shelf spaces
- (c) temporary or moveable shelves including those marked with banners or other forms of advertising
- (d) floor displays;
- (e) floors;
- (f) fridges;
- (g) freezers;
- (h) cold storage cabinets;
- (i) heated cabinets; and
- (j) counters.

shrinkage means losses that occur after dairy items are delivered to a supermarket operator or its nominee, and arise due to theft, the items being lost or accounting error.

supermarket has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, *supermarket* means a retail outlet that sells the minimum range of food-based grocery items to customers and which has a floor space of at least 240 square metres or if less than this area is a retail outlet that is owned or operated by a related body corporate or subsidiary of a declared supermarket .

supermarket operator has the meaning given in section 4 of the Act.

Notes:

- (1) Under section 4 of the Act, as in force when this code commenced, *supermarket operator* means a corporation that owns or operates a supermarket or has control over a supermarket, and includes a declared supermarket operator.
- (2) See section 6 of the Act which sets out the circumstances in which a supermarket operator will have control over a supermarket.

supplier has the meaning given in section 4 of the Act.

Note: Under section 4 of the Act, as in force when this code commenced, *supplier* means any person or persons (including any primary producer, processor, manufacturer, wholesaler, importer, distributor, broker, agent or collective bargaining group) who supplies or supply dairy items intended for ultimate resale in a supermarket.

supply agreement means any agreement with a supplier for the supply of dairy items for the purpose of ultimate resale in a supermarket in Australia, as well as any other contractual agreements or arrangements made under or in relation to that agreement.

wastage means dairy items which become unfit for sale subsequent to them being delivered to a supermarket operator or its nominee.

3 Compliance with code does not exclude application of Competition and Consumer Act 2010 and associated regulations

Compliance with this code does not, and should not be interpreted so as to, exclude any person from or restrict the application of the *Competition and Consumer Act 2010* or regulations made under that Act.

Part 2—Contracting Principles

4 Duty to incorporate Code in supply agreements

- (1) A declared supermarket operator must not enter into or perform any supply agreement with a supplier unless that supply agreement incorporates clauses 9 to 33 of the code and does not contain any provisions that are inconsistent with the code.
- (2) The inclusion in a supply agreement of a clause which makes provision for events of force majeure in terms which are not materially different from or more burdensome to the supplier than those set out in Annexure 1 to this code will not be inconsistent with the code.
- (3) The prohibition in subclause (1) above will not affect in any way any obligation of the declared supermarket operator to accept and pay for dairy items ordered prior to the date of commencement of the code or the rights of the declared supermarket operator to make any claim in respect of such groceries.
- (4) For the purposes of subclause (1), the clauses of the code required to be incorporated into a supply agreement pursuant to subclause (1) will have been incorporated into a supply agreement if they form part of the enforceable contractual terms of that supply agreement.

5 Collective bargaining group

A declared supermarket operator must not refuse to enter into a supply agreement with a supplier because that supplier is or is a member of a collective bargaining group or because that supplier is entering into a supply agreement as a result of conduct or negotiations undertaken by a collective bargaining group. A declared supermarket operator must not enter into any supply agreement with a supplier unless that supplier has been provided with a reasonable period within which to apply to join or take the benefit of conduct of a collective bargaining group.

6 Duty to provide information to suppliers

- (1) A declared supermarket operator must ensure that all the terms of any agreement with a supplier for the supply of dairy items for the purpose of resale in Australia are recorded in writing, as well as any other contractual agreements or arrangements made under or pursuant or in relation to that agreement.
- (2) A declared supermarket operator must not enter into a supply agreement with a supplier unless the supplier has a written copy of the supply agreement
- (3) Written terms of a supply agreement must be held by the declared supermarket operator for a period of 12 months after the relevant supply agreement has expired or otherwise come to an end.
- (4) All such records held by the declared supermarket operator in accordance with subclause (3) must be made available on request to the supplier to which they relate.
- (5) A declared supermarket operator must not enter into a supply agreement with a supplier unless it has first provided the supplier with a notice, distinct from the supply agreement, which sets out:
 - (a) the obligation on the declared supermarket operator not directly or indirectly to require actions by the supplier in relation to marketing costs, wastage,

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- payments, set off, promotions, changes to supply chain procedures, and tying, as more specifically set out in this code;
- (b) the identity and contact details of the senior buyer for that supplier;
 - (c) the declared supermarket operator's obligation under the code to allow a supplier to escalate a decision of a primary buyer (including a decision to de-list a supplier's product or products) to the senior buyer for review;
 - (d) the identity and contact details of the declared supermarket operator's Code Compliance Officer;
 - (e) the identity and contact details of the Ombudsman;
 - (f) a mechanism by which the supplier can provide feedback to the declared supermarket operator on the supplier's relationship with the declared supermarket operator's buying team and the declared supermarket operator's compliance with the code;
 - (g) the procedures relating to de-listing, as set out in clause [31]; and
 - (h) the dispute resolution procedure set out in clause [9].
- (6) The obligation in subclause (5) shall not apply in instances where a declared supermarket operator and a supplier have a relationship characterized by a number of separate and distinct supply agreements over a period of time, provided that:
- (a) the notice required by subclause (5) is provided to the supplier before the first such supply agreement is entered into after the code comes into force; and
 - (b) the declared supermarket operator provides the supplier with notice of any changes to any of the matters set out in subclause (5).
- (7) Where any subsequent agreements or arrangements made under or pursuant to a supply agreement are agreed orally between the supplier and a declared supermarket operator, the declared supermarket operator must confirm the terms of such arrangements in writing with the relevant supplier within three working days of such arrangements being agreed.

Part 3—Compliance obligations

7 Duty to train staff with respect to the code

- (1) Within 14 days of commencement of the code, a declared supermarket operator must provide to its buying team:
 - (a) a copy of the code; and
 - (b) training on the requirements of the code.
- (2) Any person who becomes part of a declared supermarket operator's buying team after the date of commencement of the code must be provided with:
 - (a) a copy of the code within one week of becoming part of the declared supermarket operator's buying team; and
 - (b) training on the requirements of the code within one calendar month of becoming part of the declared supermarket operator's buying team.

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- (3) With the exception of the year in which this code commences, a declared supermarket operator must provide retraining on the requirements of this code to all employees in its buying team at least once each calendar year.

7 Duty to appoint in-house Code Compliance Officer and the role of the Code Compliance Officer

- (1) A declared supermarket operator must appoint a suitably qualified employee as the Code Compliance Officer.
- (2) A declared supermarket operator must ensure that the Code Compliance Officer:
- (a) will be provided with all resources necessary for the fulfilment of his or her role, including access to all documentation relating to, and availability of the declared supermarket operator's buying team to discuss issues in connection with, the declared supermarket operator's obligations under this code;
 - (b) will be available as a point of contact for suppliers, the Ombudsman and any other authority or other body making enquiries in relation to this code;
 - (c) will be independent of, and must not be managed by, any member of the buying team of the declared supermarket operator; and
 - (d) will be available to discuss with the supplier the reason for any decisions made by the declared supermarket operator in relation to this code.

8 Compliance auditing

- (1) A declared supermarket operator must engage an approved auditor to prepare a compliance audit report in respect of each financial year.
- (2) A declared supermarket operator must provide the compliance audit report to the Ombudsman and the Minister within 90 days of the end of the financial year to which the compliance audit report relates.
- (3) The compliance audit report must:
- (a) be in a form approved in writing by the Ombudsman; and
 - (b) state that the approved auditor has prepared the compliance audit report; and
 - (c) address the declared supermarket operator's compliance with the provisions of the code; and
 - (d) in the event of non-compliance with the provisions of the code, specify the extent of such non-compliance; and
 - (e) provide information regarding any disputes between the declared supermarket operator and its suppliers regarding the terms of any supply agreement or the application of the code during the relevant period, including any code disputes, and the outcome of any such dispute; and
 - (f) state that the approved auditor has been given sufficient information and assistance in order to conduct the compliance audit; and
 - (g) include all other statements, information and supporting documentation required by the form to be included.

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- (4) The Minister may, by making a written determination modify the requirements in subclause (3), including by omitting, adding or substituting requirements.
 - (5) A summary of the annual compliance audit report described in subclause (1) must be included in the declared supermarket operator's annual company report. The summary must contain an overview of each of the matters set out in subclause (3) above. If the declared supermarket operator does not produce an annual company report, the summary of the annual compliance audit report must be published clearly and prominently on the declared supermarket operator's website within four months after the end of the financial year to which the compliance audit report relates.

Part 4—Dispute resolution

9 Dispute resolution scheme

- (1) A dispute (*code dispute*) will arise under the code when a supplier or declared supermarket operator gives the other written notice that:
 - (a) the first party believes that the other has not fulfilled its obligations under the code or has otherwise committed a code contravention; and
 - (b) the first party wishes to initiate the dispute resolution procedure set out in this clause 9.
- (2) The first party must provide a copy of the notice referred to in subclause (1) (*dispute notice*) to the other within 7 days of the date of the dispute notice. If the dispute notice is given by a supplier, the dispute notice must be provided to the Code Compliance Officer of the declared supermarket operator within the relevant 7 day period.
- (3) A declared supermarket operator must negotiate in good faith with a supplier to resolve a code dispute.

Arbitration

- (4) If any code dispute is not resolved by the parties within 28 days of the date of the dispute notice, the code dispute shall, at the request of either the supplier or the declared supermarket operator, be referred to and finally resolved by arbitration under the IAMA Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause (save to the extent that any part of the Rules conflict with this clause 9, in which case the provisions of this clause 9 shall prevail). The number of arbitrators shall be one and the seat, or legal place, of arbitration shall be Sydney or such other city within Australia as the supplier nominates in its request for arbitration.
- (5) Any request for arbitration made by the supplier or declared supermarket operator in accordance with subclause (4) must be made within five months of the date of the relevant dispute notice.
- (6) All costs of the arbitrator will be borne by the declared supermarket operator, unless the arbitrator decides that the supplier's claim was vexatious or wholly without merit, in which case costs will be awarded at the arbitrator's discretion. All other costs of the arbitration will be awarded at the arbitrator's discretion.
- (7) The decision of the arbitrator will be final and binding on both the declared supermarket operator and the supplier.

Option to Litigate

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- (8) Before an arbitrator has entered on the reference as arbitrator under Rule 9 of the Rules in relation to a code dispute, the supplier may, by notice in writing to the declared supermarket operator, require that the code dispute be heard by the Australian courts rather than referred to arbitration.

Miscellaneous

- (9) A declared supermarket operator must not take any form of retaliatory action against a supplier who exercises its rights under this clause 9.

Part 5—Fair Dealing

10 Principle of fair dealing

An industry participant must at all times deal with other industry participants fairly and lawfully. Fair and lawful dealing will be understood as requiring the industry participant to conduct its trading relationships with other industry participants in good faith, without duress and in recognition of suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

11 Abuse of market power

- (1) For the purpose of this section, a declared supermarket operator is deemed to have a substantial degree of power in the dairy item market.
- (2) A declared supermarket operator shall not take advantage of its power in the dairy item market for the purpose, or with the effect or likely effect, of:
- (a) eliminating or substantially damaging a competitor of the declared supermarket operator or of a body corporate that is related to that person in the dairy item market;
 - (b) preventing the entry of a person into the dairy item market;
 - (c) deterring or preventing a person from engaging in competitive conduct in the dairy item market.

11A Conduct deemed to be abuse of market power

The following conduct is deemed to constitute an abuse of market power in contravention of Section 11:

- (1) a declared supermarket operator discriminating between purchasers of dairy items of like-grade, quality and size in relation to:
- (a) the prices charged for the dairy items;
 - (b) any discounts, allowances, rebates or credits given in relation to the supply of the dairy items;
- on the basis that the dairy item is a house brand dairy product and not a branded dairy product.
- (2) Subsection (1) does not apply in relation to a discrimination if:

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- (a) the discrimination makes only reasonable allowances for differences in the cost or likely cost of manufacture, distribution, sale or delivery as between house brand dairy products and branded dairy products;
 - (b) the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the declared supermarket operator, provided that competitor is no itself a declared supermarket operator;
- (3) [a declared supermarket operator discriminating between suppliers of dairy items in the terms of acquisition of such items].

Part 6—Variation

11 Variation of supply agreements

- (1) Subject to subclause (2), an industry participant must not:
 - (a) vary any supply agreement retrospectively, without the consent of the supplier; or
 - (b) require a supplier to consent to retrospective variations of any supply agreement.
- (2) An industry participant may make an adjustment to terms of supply between it and another industry participant which has retroactive effect where the relevant supply agreement sets out clearly and unambiguously:
 - (a) any specific change of circumstances (such circumstances being outside the first industry participant's control) that will allow for such adjustments to be made; and
 - (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.
- (3) If an industry participant has the right to vary a supply agreement unilaterally, it must give reasonable notice of any such variation to the other party to the supply agreement. If reasonable notice is not given, the other party may, without limiting its other rights, terminate the supply agreement.

12 Changes to supply chain procedures

- (1) An industry participant must not directly or indirectly require a supplier to change significantly any aspect of its supply chain procedures during the period of a supply agreement unless:
 - (a) the industry participant gives reasonable notice of such proposed change to the supplier in writing; or
 - (b) subject to subclause (2), the industry participant fully compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the failure to give reasonable notice.
- (2) A supplier who has not been provided with reasonable notice of a change of the kind described in subclause (1), but consents to the change, may choose to waive its right to receive compensation under paragraph (1)(b).

Part 7—Prices and Payments

13 No delay in payments

An industry participant must pay a supplier for dairy items, delivered to that industry participant's specification in accordance with the relevant supply agreement, and, in any case, within a reasonable time after the date of the supplier's invoice.

14 Set off

- (1) Subject to subclause (2), an industry participant must not:
 - (a) set off any amount against a supplier's invoice unless the supplier has consented in writing to the set off of that specific amount from the relevant invoice; or
 - (b) require a supplier to consent to the set off of such amounts.
- (2) Subclause (1) does not prevent an industry participant from setting off against a supplier's invoice any rebates or discounts agreed under the supply agreement.

15 No obligation to contribute to marketing costs

Unless provided for in the relevant supply agreement between the supermarket operator and the supplier, a supermarket operator must not, directly or indirectly, require a supplier to make any payment towards that supermarket operator's costs of:

- (a) buyer visits to new or prospective suppliers;
- (b) artwork or packaging design;
- (c) consumer or market research;
- (d) the opening or refurbishing of a store; or
- (e) hospitality for that supermarket operator's staff.

16 No payments for shrinkage

A supply agreement must not include provisions under which a supplier makes payments to an industry participant as compensation for shrinkage.

17 Payments for wastage

An industry participant must not directly or indirectly require a supplier to make any payment to cover any wastage of that supplier's dairy items incurred by the industry participant unless:

- (a) such wastage is due to the negligence or default of that supplier, and the relevant supply agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the supplier; or
- (b) the basis of such payment is set out in the supply agreement.

18 Limited circumstances for payments as a condition of being a supplier

A supermarket operator must not directly or indirectly require a supplier to make any payment as a condition of stocking or listing that supplier's dairy items unless such payment:

- (a) is made in relation to a promotion with the prior agreement of the supplier; or

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- (b) is made in respect of dairy items which have not been stocked, displayed or listed by that supermarket operator during the preceding 365 days in 25 per cent or more of its stores, and reflects a reasonable estimate by that supermarket operator of the risk run by that supermarket operator in stocking, displaying or listing such new grocery products.

19 Compensation for forecasting errors

- (1) An industry participant must fully compensate a supplier for any cost incurred by that supplier as a result of any forecasting error in relation to dairy items and attributable to the industry participant unless:
- (a) the industry participant has prepared those forecasts in good faith and with due care, and following consultation with the supplier; or
 - (b) the supply agreement includes an express and unambiguous provision that full compensation is not appropriate.
- (2) An industry participant must ensure that the basis on which it prepares any forecast has been communicated to the supplier.

20 No tying of third party goods and services for payment

- (1) A supermarket operator must not directly or indirectly require a supplier to obtain any goods, services or property from any third party where that supermarket operator obtains any payment for this arrangement from any third party, unless the supplier's alternative source for those goods, services or property:
- (a) fails to meet the reasonable objective quality standards laid down for that supplier by that supermarket operator for the supply of such goods, services or property; or
 - (b) charges more than any other third party recommended by that supermarket operator for the supply of such goods, services or property of an equivalent quality and quantity.

Part 8—Prohibitions relating to allocation of shelf space to house brand products and placement of house brand products by declared supermarket operators

21 Products to which this Part applies

This Part applies to the following classes of dairy items and such other classes of groceries (however described) that may be prescribed by the regulations:

- (a) milk;
- (b) yoghurt;
- (c) cheese;
- (d) milk-based dairy products; and
- (e) packaged food, other than food mentioned in paragraphs (a) to (d).

22 Declared supermarket operator must not place house brand dairy products on more than 30 percent of shelf space occupied by dairy items in a supermarket

A declared supermarket operator must not cause or allow house brand dairy products to be placed on or attached to shelf space exceeding 30 percent of the total shelf space occupied by dairy items in a supermarket over which it has control.

Note: See section 6 of the Act which sets out the circumstances in which a supermarket operator will have control over a supermarket.

23 Declared supermarket operator must place branded dairy products on at least 70 percent of shelf space occupied by dairy items in a supermarket

A declared supermarket operator must cause branded products to be placed on or attached to at least 70 percent of the total shelf space occupied by dairy items in a supermarket over which it has control.

Note: See section 6 of the Act which sets out the circumstances in which a supermarket operator will have control over a supermarket.

24 Declared supermarket operator must not place branded dairy products on shelf space that is less prominent than the shelf space occupied by house brand dairy products

- (1) A declared supermarket operator must not cause or allow branded dairy products to be placed on or attached to shelf space that is less prominent than the shelf space occupied by house brand dairy products.
- (2) Without limiting the matters that may be taken into account for the purposes of subclause (1) in determining whether branded dairy products are placed on or attached to shelf space that is less prominent than the shelf space occupied by house brand dairy products, the following matters must be taken into account:
 - (a) whether branded dairy products are concealed or obscured in any way, including by house brand dairy products;
 - (b) whether branded dairy products are placed on shelf space that is not at the eye-level of potential customers;
 - (c) whether house brand dairy products are placed on shelf space that is at the eye-level of potential customers;
 - (d) whether house brand dairy products are placed in a different area of the supermarket to branded dairy products; and
 - (e) whether house brand dairy products are placed on shelf space that is different in appearance to the shelf space on which branded dairy products are placed.

Part 9—Labelling of house brand dairy products

25 House brand dairy products must display the name or logo of declared supermarket operator

- (1) House brand dairy products that are produced, processed, manufactured or supplied by or on behalf of a declared supermarket operator must prominently display the name or logo of the declared supermarket operator which produced, processed, manufactured or supplied the house brand dairy product or on whose behalf the house brand dairy product was produced, processed or manufactured or supplied.
- (2) A declared supermarket operator must not offer a house brand dairy product for sale unless it complies with subclause (1).

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- (3) A declared supermarket operator will be deemed to have produced, processed, manufactured or supplied a house brand dairy product for the purposes of subclause (1) where it offers dairy items for sale which carry:
 - (a) the name, trade mark or other insignia of the declared supermarket operator;
 - (b) a name, trade mark or other insignia which is owned by the declared supermarket operator; or
 - (c) a name, trade mark or other insignia which is licensed to the declared supermarket operator.
 - (4) Without limiting the generality of subclause (1), a name or logo of a declared supermarket operator will not be prominently displayed unless the name or logo appears on the front of the product in letters or symbols of at least 10mm in height.

26 Design, packaging and labelling of house brand dairy products

- (1) A declared supermarket operator must respect suppliers' investment and reputation in the get-up of branded dairy products, and must not seek to free-ride on that reputation in the design, development, packaging, labelling, advertisement, marketing, offer for sale or sale of house brand dairy products.
- (2) Without limiting the generality of subclause (1), a supermarket operator must ensure that the design, packaging and labelling of any house brand dairy product produced, processed, manufactured or supplied by or on behalf of the supermarket operator does not:
 - (a) imitate, mimic or adopt one or more of the distinctive elements of the get-up of a branded dairy product; or
 - (b) cause a customer to wonder whether the house brand dairy product:
 - (i) is manufactured, processed or supplied by a supplier of the branded dairy product; or
 - (ii) has the same quality or other characteristics as the branded dairy product which it calls to mind, if it does not.

Part 10—Promotions

27 No payments for better positioning of goods unless in relation to promotions

A supermarket operator must not directly or indirectly require a supplier to make any payment in order to secure better positioning or an increase in the allocation of shelf space for any dairy items of that supplier within a store unless such payment is made in relation to a promotion.

28 Promotions

- (1) A supermarket operator must not, directly or indirectly, require a supplier predominantly to fund the costs of a promotion.
- (2) Where a supermarket operator directly or indirectly requires any payment from a supplier in support of a promotion of one of that supplier's dairy items, a supermarket operator must only hold that promotion after reasonable notice has been given to that supplier in writing. For the avoidance of doubt, a supermarket operator must not require or request a supplier to participate in a promotion where this would entail a retrospective variation to the supply agreement.

29 Due care to be taken when ordering for promotions

- (1) A supermarket operator must take all due care to ensure that when ordering groceries from a supplier at a promotional wholesale price (whether calculated by way of discount, rebate, credit, allowance or otherwise), it does not over-order. If a supermarket operator fails to take such steps it must compensate that supplier for any dairy items over-ordered and which it subsequently sells it a higher non-promotional retail price.
- (2) Any compensation paid in relation to subclause (1) above will be the difference between the promotional wholesale price paid by the supermarket operator and the supplier's non-promotional wholesale price.
- (3) A supermarket operator must ensure that the basis on which the quantity of any order for promotion is calculated is transparent.
- (4) Once a supermarket operator has placed an order for dairy items with a supplier in connection with a promotion, it must not:
 - (a) cancel the order; or
 - (b) reduce the order by more than 10 percent;without the supplier's written consent, unless:
 - (i) reasonable notice is provided to the supplier of the cancellation or amendment; or
 - (ii) the supermarket operator fully compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the failure to give reasonable notice.

Part 11—Other Duties

30 Customer complaints

- (1) Whenever possible, a supermarket operator must attempt to resolve customer complaints in-store, and to minimise:
 - (a) the costs incurred by the supermarket operator in handling such complaints; and
 - (b) the losses suffered by the customer in connection with the complaint.
- (2) A supermarket operator must not directly or indirectly require a supplier to make any payment for resolving a customer complaint which is additional to the amount that may be recovered by the supermarket operator from the supplier under the Australian Consumer Law.

31 Duties in relation to de-listing

- (1) A supermarket operator must not de-list a supplier's product or products unless it has a genuine commercial reason for doing so. For the avoidance of doubt, the exercise by the supplier of its rights under any supply agreement (including this code) or the failure by a supermarket operator to fulfil its obligations under this code will not be a genuine commercial reason to de-list a supplier's product or products.
- (2) Without limiting subclause (1), prior to de-listing a supplier's product or products, a supermarket operator must:

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- (a) provide reasonable notice to the supplier of the supermarket operator's decision to de-list the product or products, including written reasons for the supermarket operator's decision. For the purposes of this clause "reasonable notice" will include providing the supplier with sufficient time to have the decision to de-list reviewed using the measures set out in paragraphs (b) and (c) below;
 - (b) inform the supplier of its right to have the decision reviewed by a senior buyer, as described in clause 32; and
 - (c) allow the supplier to attend an interview with the supermarket operator's Code Compliance Officer to discuss the decision to de-list the supplier's product or products.

32 Senior buyer

- (1) A supermarket operator's senior buyer will, on receipt of a written request from a supplier, review any decisions made by the supermarket operator in relation to this code.
- (2) A supermarket operator must ensure that a supplier is made aware, as soon as reasonably practicable, of any change to the identity and/or contact details of the senior buyer for that supplier.

33 Damage and shortfall claims

An industry participant must make any claims for damaged dairy items or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the dairy items to the industry participant or its nominee.

Annexure 1

Provision for force majeure

A force majeure clause may provide:

- that neither party to a supply agreement shall have any liability under or be deemed to be in breach of the supply agreement as a result of any delays or failures in performance which result from circumstances beyond the reasonable control of that party;
- that the party affected by the relevant circumstances will promptly notify the other party in writing when such circumstances cause a delay or failure in performance and when they cease to do so; and that
- if such circumstances continue for a specified continuous period either party may terminate the agreement by written notice to the other party.

DRAFT

Dairy Industry Bill 2013

No. , 2013

A Bill for an Act to establish the Dairy Industry Code of Conduct and the Dairy Industry Ombudsman and to confer functions and powers on the Dairy Industry Ombudsman to monitor and enforce compliance with the Dairy Industry Code of Conduct

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A Bill for an Act to establish the Dairy Industry Code of Conduct and the Dairy Industry Ombudsman and to confer functions and powers on the Dairy Industry Ombudsman to monitor and enforce compliance with the Dairy Industry Code of Conduct

The Parliament of Australia enacts:

Part I—Preliminary

1 Short title

This Act may be cited as the *Dairy Industry Act 2013*.

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Objects

The objects of this Act are to:

- (a) require industry participants to act fairly, honestly, reasonably and cooperatively in their commercial dealings;
- (b) ensure that suppliers are able to access supermarket shelf space on a "fair and equitable basis"; and
- (c) regulate the behaviour of industry participants in a manner which will allow for long-term consumer benefit in terms of both the price and choice of dairy items.

4 Definitions

In this Act:

branded dairy products means dairy items that are not produced, processed or manufactured by or on behalf of a supermarket operator and which do not carry:

- (a) the name, trade mark or other insignia of a supermarket operator; or
- (b) a name, trade mark or other insignia which is owned by a supermarket operator; or
- (c) a name, trade mark or other insignia which is licensed to a supermarket operator.

Code means the Dairy Industry Code of Conduct in Schedule 1 to the regulations.

collective bargaining group means a group of persons who have the benefit of collective bargaining conduct authorised or notified under the *Competition and Consumer Act 2010*.

contravening conduct includes:

- (a) conduct that constitutes a contravention of any provision of this Act; and
- (b) conduct that constitutes a related contravention of any provision of this Act.

corporation means a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

customer means a retail purchaser of dairy items.

Dairy Industry Ombudsman means the Dairy Industry Ombudsman appointed under section [8].

dairy item means an item that:

- (a) is a milk based or dairy product;

- (b) is intended for human consumption by the manufacturer or producer of the item; and
- (c) is sold for human consumption by a supermarket operator to a customer; and
- (d) is not meant for consumption at the retail premises at which it is sold to the customer.

declared supermarket operator means a supermarket operator declared as such under Part III of this Act and includes:

- (a) all subsidiaries, holding companies and related bodies corporate of the declared supermarket operator; and
- (b) all directors, servants, employees and agents of the declared supermarket operator and its related bodies corporate.

financial corporation means a financial corporation within the meaning of paragraph 51(xx) of the Constitution.

financial year means a period of 12 months commencing on 1 July.

foreign corporation means a foreign corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that is incorporated in an external Territory.

house brand dairy products means dairy items that are produced, processed or manufactured by or on behalf of a supermarket operator and includes dairy items which carry:

- (a) the name, trade mark or other insignia of a supermarket operator; or
- (b) a name, trade mark or other insignia which is owned by a supermarket operator; or
- (c) a name, trade mark or other insignia which is licensed to a supermarket operator.

industry participants means suppliers and supermarket operators, including declared supermarket operators, and **industry participant** shall be construed accordingly.

minimum range of dairy items means dairy items from all of the following dairy item categories:

- (a) milk;
- (b) yoghurt;
- (c) cheese;
- (d) milk-based dairy products; and
- (e) packaged food, other than food mentioned in paragraphs (a) to (d).

related body corporate in relation to a body corporate, means a body corporate that is related to the first-mentioned body by virtue of section [5].

related contravention: a person engages in conduct that constitutes a related contravention of the Act, if the person:

- (a) aids, abets, counsels or procures a corporation to contravene the Act; or
- (b) induces, whether by threats or promises or otherwise, a corporation to contravene the Act; or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the Act; or

-
- (d) conspires with others to effect a contravention by a corporation of the Act.

Remuneration Tribunal means the Remuneration Tribunal established under the Remuneration Tribunal Act 1973.

shelf space means any space in a supermarket on which dairy items can be placed or to which dairy items can be attached that can be accessed by a potential customer, and includes, without limitation:

- (a) shelves;
- (b) sub-shelves or inter-shelf spaces;
- (c) temporary or moveable shelves including those marked with banners or other forms of advertising
- (d) floor displays;
- (e) floors;
- (f) fridges;
- (g) freezers;
- (h) cold storage cabinets;
- (i) heated cabinets; and
- (j) counters.

supermarket means a retail outlet that sells the minimum range of dairy items to customers and which has a floor space of at least 240 square metres or if less than this area is owned or operated by a declared supermarket operator..

supermarket operator means a corporation that has control over a supermarket by virtue of section [6], and includes a declared supermarket operator.

supplier means any person or persons (including any primary producer, processor, manufacturer, wholesaler, importer, distributor, broker, agent or collective bargaining group) who supplies or supply dairy items intended for ultimate re-sale in a supermarket.

Territory means:

- (a) an internal Territory; or
- (b) the Territory of Christmas Island; or
- (c) the Territory of Cocos (Keeling) Islands.

trading corporation means a trading corporation within the meaning of paragraph 51(xx) of the Constitution.

5 Subsidiary, holding and related bodies corporate

- (1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:
- (a) that other body corporate:

- (i) controls the composition of the board of directors of the first-mentioned body corporate;
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or
 - (iii) holds more than one-half of the allotted share capital of the first-mentioned body corporate (excluding any part of that allotted share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- (b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's subsidiary (including any body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).
- (2) For the purposes of subsection (1), the composition of a body corporate's board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:
- (a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or
 - (b) a person's appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.
- (3) In determining whether a body corporate is a subsidiary of another body corporate:
- (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;
 - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
 - (i) by any person as a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or
 - (ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity;
 shall be treated as held or exercisable by that other body corporate;
 - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any allotment of such debentures, shall be disregarded; and
 - (d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

-
- (4) A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.
- (5) Where a body corporate:
- (a) is the holding company of another body corporate;
 - (b) is a subsidiary of another body corporate; or
 - (c) is a subsidiary of the holding company of another body corporate;
- that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

6 Control over a supermarket

For the purposes of this Act and the Code, a supermarket operator has control over a supermarket if:

- (a) it owns the supermarket;
- (b) it operates the supermarket;
- (c) a related body corporate of the supermarket operator owns the supermarket;
- (d) a related body corporate of the supermarket operator operates the supermarket;
or
- (e) it is in a position to exercise control over the day to day operation of the supermarket.

Part II—The Dairy Industry Ombudsman

DIVISION 1 – APPOINTMENT, RESIGNATION AND TERMINATION

7 Appointment

A Dairy Industry Ombudsman is to be appointed by the Governor-General by written instrument.

8 General terms and conditions of appointment

- (1) The Dairy Industry Ombudsman holds office for the period specified in the Dairy Industry Ombudsman's instrument of appointment. The period must not exceed 5 years.
- (2) The Dairy Industry Ombudsman is eligible for reappointment.
- (3) The Dairy Industry Ombudsman holds office on a full-time basis.
- (4) The Dairy Industry Ombudsman holds office on the terms and conditions (if any), in relation to matters not covered by this Act, that are determined by the Governor-General.

9 Restriction on outside employment

The Dairy Industry Industry Ombudsman must not engage in paid employment outside the duties of his or her office without the Minister's approval.

10 Remuneration

- (1) The Dairy Industry Ombudsman shall be paid such remuneration as is determined by the Remuneration Tribunal. If no determination of that remuneration by the Remuneration Tribunal is in operation, the Dairy Industry Ombudsman is to be paid the remuneration that is prescribed by the regulations.
- (2) The Dairy Industry Ombudsman shall be paid such allowances as are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

11 Leave of absence

- (1) The Dairy Industry Ombudsman has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Dairy Industry Ombudsman leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

12 Resignation

- (1) The Dairy Industry Ombudsman may resign his or her office by writing under his or her hand delivered to the Governor-General.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

13 Termination of appointment

- (1) The Governor-General may terminate the appointment of the Dairy Industry Ombudsman for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Dairy Industry Ombudsman if any of the following apply:
 - (a) the Dairy Industry Ombudsman:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors;
 - (b) the Dairy Industry Ombudsman is absent, except on leave of absence for 14 consecutive days or for 28 days in any 12 months;
 - (c) the Dairy Industry Ombudsman engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (d) the Dairy Industry Ombudsman fails, without reasonable excuse, to comply with section 15 (disclosure of interests).

14 Acting appointments

-
- (1) The Minister may appoint a person to act in the office of Dairy Industry Ombudsman:
 - (a) during a vacancy in the office of the Dairy Industry Ombudsman (whether or not an appointment has previously been made to that office); or
 - (b) during any period, or during all periods, when the Dairy Industry Ombudsman:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any other reason, unable to perform the functions of his or her office.
 - (2) A person appointed to act during a vacancy mentioned in paragraph (1)(a) must not act for more than 12 months.
 - (3) The Minister may terminate an appointment under subsection (1) at any time.
 - (4) The Minister may determine the terms and conditions of appointment, including remuneration and allowances, of a person appointed under this section.
 - (5) Where a person is acting in an office in pursuance of an appointment under this section, he or she has, and may exercise, all the powers, and he or she may perform all the functions, of the holder of that office.
 - (6) Anything done by or in relation to a person purporting to act under an appointment under this section is not invalid merely because of any of the following:
 - (a) the occasion for the appointment had not arisen;
 - (b) there was a defect or irregularity in or in connection with the appointment;
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

Note: See sections 20 and 33A of the Acts Interpretation Act 1901.

15 Disclosure of interests

The Dairy Industry Ombudsman must give written notice to the Minister of all interests, pecuniary or otherwise, that the Dairy Industry Ombudsman has or acquires and that conflict or could conflict with the proper performance of the Dairy Industry Ombudsman's functions.

DIVISION 2 - STAFF

16 Staff

- (1) The staff required for the purposes of this Act shall be persons engaged under the Public Service Act 1999.
- (2) For the purposes of the Public Service Act 1999:
 - (a) the Dairy Industry Ombudsman and the staff assisting the Dairy Industry Ombudsman together constitute a Statutory Agency; and
 - (b) the Dairy Industry Ombudsman is the Head of that Statutory Agency.

17 Consultants

The Dairy Industry Ombudsman may, on behalf of the Commonwealth, engage consultants to assist in the performance of the functions and the exercise of the powers of the Dairy Industry Ombudsman.

18 Delegation

The Dairy Industry Ombudsman may delegate any of the Dairy Industry Ombudsman's powers and duties under this Act to any member of staff.

DIVISION 3 – FUNCTIONS AND POWERS OF THE DAIRY INDUSTRY OMBUDSMAN

19 Functions of the Dairy Industry Ombudsman

The Dairy Industry Ombudsman has the following functions:

- (a) providing assistance and advice to industry participants to ensure that they satisfy their obligations under this Act and the Code;
- (b) conducting research, and providing information, advice, assistance, guidance and training to any person on matters relevant to this Act and the Code;
- (c) making recommendations to the Minister in relation to the declaration of declared supermarket operators under Part III, Division 1;
- (d) declaring certain persons to be approved auditors for the purposes of the compliance auditing provisions of the Code;
- (e) maintaining a public register of declared supermarket operators pursuant to section [30];
- (f) reviewing classes of dairy items in which branded products and house brand dairy products compete and making recommendations to the Minister in relation to the classes of dairy items that should be prescribed for the purposes of clause [21] of the Code;
- (g) maintaining a public register of compliance audit reports pursuant to section [46];
- (h) monitoring, investigating and reporting on compliance by industry participants with this Act and the Code;
- (i) initiating proceedings under Part VII in relation to alleged breaches of this Act;
- (j) taking other enforcement measures in accordance with Part VII in relation to alleged breaches of this Act;
- (k) issuing infringement notices under Part VIII in relation to alleged breaches of this Act;
- (l) referring matters to other relevant authorities, including the Australian Competition and Consumer Commission, for investigation and enforcement, where appropriate;
- (m) maintaining a public register of infringement notices pursuant to section 69;
- (n) promoting awareness and understanding of the Code, this Act and the role and functions of the Dairy Industry Ombudsman; and
- (o) reporting and making recommendations to the Minister on any other matter that relates to the Commonwealth Government's policy and practice with respect to the dairy industry.

20 Powers of the Dairy Industry Ombudsman

The Dairy Industry Ombudsman has power to do all things necessary or convenient to be done for or in connection with the performance of functions conferred on the Dairy Industry Ombudsman under this Division.

Part III—Declared Supermarket Operators

DIVISION 1 – RECOMMENDATION BY THE DAIRY INDUSTRY OMBUDSMAN

21 Person may request recommendation

- (1) The Minister, or any other person, may make a written application to the Dairy Industry Ombudsman asking the Dairy Industry Ombudsman to recommend that a supermarket operator be declared to be a declared supermarket operator for the purposes of this Act.
- (2) After receiving the application, the Dairy Industry Ombudsman:
 - (a) must tell the supermarket operator that the Dairy Industry Ombudsman has received the application; and
 - (b) must after having regard to the objects of this Act, recommend to the Minister:
 - (i) that the supermarket operator be declared to be a declared supermarket operator; or
 - (ii) that the supermarket operator not be declared to be a declared supermarket operator.
 - (c) The applicant may withdraw the application at any time before the Dairy Industry Ombudsman makes a recommendation relating to it.

22 Limits on the Dairy Industry Ombudsman recommending declaration of a supermarket operator

The Dairy Industry Ombudsman cannot recommend that a supermarket operator be declared to be a declared supermarket operator unless it is satisfied of all of the following matters:

- (a) that the supermarket operator is a corporation;
- (b) that the supermarket operator and its related bodies corporate (if any) account, either directly or indirectly, for at least 20 percent of the value of sales of one or more dairy items to customers in Australia from supermarkets;
- (c) that the supermarket operator sells house brand dairy products or is likely to sell house brand dairy products; and
- (d) that such declaration would not be contrary to the public interest.

23 Time limit for Dairy Industry Ombudsman recommendations

The Dairy Industry Ombudsman must make a recommendation on an application under section [21] within 60 days from the date on which it received the application.

24 Dairy Industry Ombudsman may invite public submissions on the application

Invitation

- (1) The Dairy Industry Ombudsman may publish, by electronic or other means, a notice inviting public submissions on an application under section 21 if it considers that it is appropriate and practicable to do so.

- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) In deciding what recommendation to make on the application, the Dairy Industry Ombudsman:
 - (a) must have regard to any submission made on or before the day specified in the notice; and
 - (b) may disregard any submission made after the day specified in the notice.

Dairy Industry Ombudsman must make submissions publicly available

- (4) The Dairy Industry Ombudsman must make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

25 The Dairy Industry Ombudsman must publish its recommendation

- (1) The Dairy Industry Ombudsman must publish, by electronic or other means, a recommendation under section [23] and its reasons for the recommendation.
- (2) The Dairy Industry Ombudsman must give a copy of the publication to:
 - (a) the applicant under section [21]; and
 - (b) the supermarket operator to which the application relates.

Timing

- (3) The Dairy Industry Ombudsman must do the things under subsections (1) and (2) on the day the Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

DIVISION 2 – DECLARATION BY THE MINISTER

26 Minister may declare a supermarket operator to be a declared supermarket operator

- (1) On receiving a declaration recommendation, the Minister must, within 30 days, either declare a supermarket operator to be a declared supermarket operator for the purposes of this Act or decide not to declare a supermarket operator to be a declared supermarket operator.
- (2) The Minister must have regard to the objects of this Act in making his or her decision.
- (3) The Minister cannot declare a supermarket operator to be a declared supermarket operator unless he or she is satisfied of all of the following matters:
 - (a) that the supermarket operator is a corporation;
 - (b) that the supermarket operator and its related bodies corporate (if any) account, either directly or indirectly, for at least 20 percent of the value of sales of one or more dairy items to customers in Australia from supermarkets;
 - (c) that the supermarket operator sells house brand dairy products or is likely to sell house brand dairy products; and
 - (d) that such declaration would not be contrary to the public interest.

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- (4) If the Minister declares the supermarket operator to be a declared supermarket operator, the declaration must specify the expiry date of the declaration.

27 Minister must publish his or her decision

- (1) The Minister must publish by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.
- (2) The Minister must give it copy of the publication to:
 - (a) the applicant under section 21; and
 - (b) the supermarket operator to which the application relates.

DIVISION 3 – DECLARATION DETAILS AND REVOCATION

28 Duration and effect of declaration

- (1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 21 days after the declaration is published.
- (2) A declaration continues in operation until its expiry date, unless it is earlier revoked.

29 Revocation of declaration

- (1) The Dairy Industry Ombudsman may recommend to the Minister that a declaration be revoked. The Dairy Industry Ombudsman must have regard to the objects of this Act in making its recommendation.
- (2) The Dairy Industry Ombudsman cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation, subsection 26(3) would prevent the Minister from declaring the supermarket operator to be a declared supermarket operator.
- (3) On receiving a revocation recommendation, the Minister must either revoke the declaration or decide not to revoke the declaration.
- (4) The Minister must have regard to the objects of this Act in making his or her decision.
- (5) The Minister must publish the decision to revoke or not to revoke.
- (6) If the Minister decides not to revoke, the Minister must give reasons for the decision to the supermarket operator when the Minister publishes the decision.
- (7) The Minister cannot revoke a declaration without receiving a revocation recommendation.

DIVISION 4 – REGISTER

30 Register of declared supermarket operators

The Dairy Industry Ombudsman must maintain a public register that includes the following details in relation to each declaration made under section 26:

- (a) the name of supermarket operator;
- (b) the date on which the declaration was made; and
- (c) the duration of the declaration.

Part IV—Core Prohibition

31 Contravention of the Code

A corporation must not, in trade or commerce, contravene any provision of the Code.

Part V—Investigations

DIVISION 1 – INITIATION OF INVESTIGATION

32 Dairy Industry Ombudsman may conduct investigations

The Dairy Industry Ombudsman may conduct investigations into compliance with this Act, including compliance with the provisions of the Code:

- (a) at its own motion; or
- (b) at the request of any person.

33 Confidential or anonymous investigation requests or information

A person may:

- (a) request that the Dairy Industry Ombudsman investigate alleged contravening conduct on a confidential or anonymous basis; or
- (b) provide information to the Dairy Industry Ombudsman on a confidential or anonymous basis which relates to alleged contravening conduct.

34 Supermarket operator must not take retaliatory action

A supermarket operator must not take any form of retaliatory action against a person who makes a request or provides information to the Dairy Industry Ombudsman in accordance with section 33, or who otherwise assists the Dairy Industry Ombudsman in the performance of its functions or exercise of its powers under this Act.

DIVISION 2 - INFORMATION

35 Power to obtain information, documents and evidence

- (1) If the Dairy Industry Ombudsman has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, contravening conduct, the Dairy Industry Ombudsman may, by notice in writing served on that person, require that person:
 - (a) to furnish to the Dairy Industry Ombudsman, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;
 - (b) to produce to the Dairy Industry Ombudsman, or to a person specified in the notice acting on the Dairy Industry Ombudsman's behalf, in accordance with the notice, any such documents; or
 - (c) to appear before the Dairy Industry Ombudsman, or before a member of the staff assisting the Dairy Industry Ombudsman and who is specified in the notice, at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

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- (2) If a notice under subsection (1) requires a person to appear before the Dairy Industry Ombudsman to give evidence, the Dairy Industry Ombudsman may require the evidence to be given on oath or affirmation. For that purpose, the Dairy Industry Ombudsman or the Dairy Industry Ombudsman's delegate may administer an oath or affirmation.
 - (3) If a notice under subsection (1) requires a person to appear before a member of the staff assisting the Dairy Industry Ombudsman to give evidence, the staff member may require the evidence to be given on oath or affirmation and may administer an oath or affirmation.
 - (4) The Dairy Industry Ombudsman may exercise, or continue to exercise, a power under subsection (1) in relation to a matter referred to in that subsection until:
 - (a) the Dairy Industry Ombudsman commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or
 - (b) the close of pleadings in relation to an application by the Dairy Industry Ombudsman for a final injunction in relation to the matter.
 - (5) This section does not limit the Dairy Industry Ombudsman's powers under any other provision of this Act.

36 Additional power to require corporations to provide information

- (1) This section applies if a corporation is required to keep, to generate or to publish information or a document under the Code.
- (2) The Dairy Industry Ombudsman may give the corporation a written notice that requires the corporation to give the information, or to produce the document, to the Dairy Industry Ombudsman within 21 days after the notice is given to the corporation.
- (3) The notice must:
 - (a) name the corporation to which it is given; and
 - (b) specify:
 - (i) the information or document to which it relates; and
 - (ii) the provisions of the Code which require the corporation to keep, to generate or to publish the information or document; and
 - (c) explain the effect of sections 37 to 39.
- (4) The notice may relate to more than one piece of information or more than one document.
- (5) This section does not limit the Dairy Industry Ombudsman's powers under any other provision of this Act.

37 Compliance with notices

- (1) A corporation that has been given a notice under section 36 may, at any time within 21 days after the notice was given to the corporation, apply in writing to the Dairy Industry Ombudsman for an extension of the period for complying with the notice.
- (2) The Dairy Industry Ombudsman may, by written notice given to the corporation, extend the period within which the corporation must comply with the notice.

- (3) A corporation that is given a notice under section 36 must comply with it within:
 - (a) the period of 21 days specified in the notice; or
 - (b) if the period for complying with the notice has been extended under subsection (2) the period as so extended.

38 False or misleading information

- (1) A person shall not:
 - (a) refuse or fail to comply with a notice given under section 35 or 36;
 - (b) in purported compliance with such a notice:
 - (i) knowingly give information that is false or misleading; or
 - (ii) knowingly produce documents that contain false or misleading information.
- (2) Paragraph (1)(a) does not apply to the extent that the person is not capable of complying with the notice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the *Criminal Code*.
- (3) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.
- (4) A person is not excused from furnishing information or producing a document in pursuance of section 35 or 36 on the ground that the information or document may tend to incriminate the person or expose the person to a penalty, but the answer by an individual to any question asked in a notice under section 35 or 36 or the furnishing by an individual of any information in pursuance of such a notice is not admissible in evidence against the individual in any criminal proceedings, other than:
 - (c) proceedings for an offence against this section; or
 - (d) proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this section.
- (5) This section does not apply to the production to the Dairy Industry Ombudsman of a document containing false or misleading information if the document is accompanied by a statement of the person who produces it that the information is false or misleading.
- (6) This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).
- (7) In this section:

legal professional privilege includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

39 Inspection of documents by Dairy Industry Ombudsman

- (1) The Dairy Industry Ombudsman may inspect a document produced in pursuance of a notice under section 35 or section 36 and may make copies of, or take extracts from, the document.
- (2) The Dairy Industry Ombudsman may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of a document produced in pursuance of a notice under section 35 or section 36 but the person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified to be a true copy by the Dairy Industry Ombudsman and the certified copy shall be received in all courts as evidence as if it were the original.
- (3) Until such a certified copy is supplied, the Dairy Industry Ombudsman shall, at such times and places as it thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorized by that person, to inspect and make copies of or take extracts from the document.

40 Protection of certain information

- (1) Subject to subsections (4) to (22), the Dairy Industry Ombudsman must not disclose any protected information given to the Dairy Industry Ombudsman under section 33 to any person without the consent of the person who provided the protected information, except when the Dairy Industry Ombudsman is required or permitted by:
 - (a) this Act or any other law of the Commonwealth; or
 - (b) a prescribed law of a State or internal Territory;to disclose the information.
- (2) The Dairy Industry Ombudsman must not disclose any other protected information to any person except:
 - (a) when the Dairy Industry Ombudsman official is performing its duties or functions; or
 - (b) when the Dairy Industry Ombudsman is required or permitted by:
 - (i) this Act or any other law of the Commonwealth; or
 - (ii) a prescribed law of a State or internal Territory;to disclose the information.
- (3) Subsection (2) does not allow the Dairy Industry Ombudsman to disclose protected information when performing its public education, research, advisory and law reform, or related, functions, or exercising associated powers.

Disclosure to Ministers

- (4) The Dairy Industry Ombudsman may disclose protected information to the designated Minister.
- (5) If protected information relates to a matter arising under:
 - (a) a provision of this Act; or
 - (b) a provision of another Act;

that is administered by a Minister other than the designated Minister, the Dairy Industry Ombudsman may disclose the protected information to the other Minister.

- (6) Subsection (5) does not limit subsection (4).

Disclosure to Secretaries

- (7) The Dairy Industry Ombudsman may disclose protected information to:
- (a) the Secretary of the designated Department; or
 - (b) an officer of the designated Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the designated Minister.

- (8) If protected information relates to a matter arising under:

- (a) a provision of this Act; or
- (b) a provision of another Act;

that is administered by a Minister other than the designated Minister, the Dairy Industry Ombudsman may disclose the protected information to:

- (c) the Secretary of the Department that is administered by the other Minister; or
- (d) an officer of that Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the other Minister.

- (9) Subsection (8) does not limit subsection (7).

Disclosure to a Royal Commission

- (10) The Dairy Industry Ombudsman may disclose protected information to a Royal Commission.
- (11) The Dairy Industry Ombudsman may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (10).
- (12) An instrument under subsection (11) is not a legislative instrument.

Disclosure to certain agencies, bodies and persons

- (13) If the Dairy Industry Ombudsman is satisfied that particular protected information will enable or assist any of the following agencies or bodies:
- (a) the Australian Competition and Consumer Commission;
 - (b) the National Competition Council;
 - (c) the Australian Competition Tribunal;
 - (d) the Director of Public Prosecutions;
 - (e) a State/Territory government body;

to perform or exercise any of the functions or powers of the agency or body, the Dairy Industry Ombudsman may disclose that protected information to the agency or body concerned.

- (14) The Dairy Industry Ombudsman may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (13), including a requirement that information provided to the Dairy Industry Ombudsman in confidence only be disclosed by the agency or body with the consent of the person who provided the information to the Dairy Industry Ombudsman, and in accordance with that consent.
- (15) An instrument under subsection (14) is not a legislative instrument.

Disclosure with consent

- (16) The Dairy Industry Ombudsman may disclose protected information that relates to the affairs of a person or may reveal the identity of a person if:
- (a) the person has consented to the disclosure; and
 - (b) the disclosure is in accordance with that consent.

Disclosure of publicly available information

- (17) The Dairy Industry Ombudsman may disclose protected information if it is already publicly available.

Disclosure of summaries or statistics

- (18) The Dairy Industry Ombudsman may disclose:
- (a) summaries of protected information; or
 - (b) statistics derived from protected information;
- if those summaries or statistics, as the case may be, are not likely to enable the identification of a person, including the identity of a person who provided protected information under section 33.

Disclosure authorised by regulations

- (19) The regulations may:
- (a) authorise the Dairy Industry Ombudsman to disclose protected information in specified circumstances; and
 - (b) provide that the Dairy Industry Ombudsman may, by writing, impose conditions to be complied with in relation to the disclosure of protected information in those circumstances.
- (20) An instrument under regulations made for the purposes of paragraph (19)(b) is not a legislative instrument.

Delegation

- (21) Without limiting section 18, the Dairy Industry Ombudsman may, by writing, delegate any or all of its functions and powers under:
- (a) this section; or

- (b) regulations made for the purposes of subsection (19);
to a member of its staff.

Definitions

- (22) In this section:

designated Department means the Department that is responsible for the administration of this Act.

designated Minister means the Minister who is responsible for the administration of this Act.

disclose means divulge or communicate.

information includes information in a document and information given in evidence.

protected information means:

- (a) the identity of a person who provides information to the Dairy Industry Ombudsman or requests an investigation under section 33;
- (b) information that:
 - (i) was given in confidence to the Dairy Industry Ombudsman, including information given in confidence to the Dairy Industry Ombudsman under section 33; and
 - (ii) relates to a matter arising under this Act or the Code; or
- (c) information that:
 - (i) was obtained by the Dairy Industry Ombudsman under this Act; and
 - (ii) relates to a matter arising under this Act or the Code.

Royal Commission has the same meaning as in the Royal Commissions Act 1902.

State/Territory government body means:

- (a) the government of a State or Territory; or
- (b) an agency or authority of a State or Territory.

41 Enforcement and recovery of certain fines

- (1) If:
- (a) a fine has been imposed on a person for:
 - (i) an offence against Part V, Division 2; or
 - (ii) an offence against section 149.1 of the *Criminal Code* that relates to Part V, Division 2; and
 - (b) the person defaults in payment of the fine;
- a Court may:
- (c) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or

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- (d) make an order, on the application of the Minister or the Dairy Industry Ombudsman, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.
- (2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.
- (3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:
- (a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and
- (b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.
- (4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:
- (a) on payment of the fine; or
- (b) if the fine is not paid - on full compliance with the order.
- (5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine shall be calculated at the rate of one day's imprisonment for each \$25 of the amount of the fine that is from time to time unpaid.
- (6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.
- (7) Subject to subsection (8), where:
- (a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
- (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

- (8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

- (9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).
- (10) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

42 Consideration of information

When carrying out an investigation or performing any of its other functions or exercising any of its other powers under this Act, the Dairy Industry Ombudsman may have regard to any information that it considers appropriate.

Part VI—Compliance Auditing for Declared Supermarket Operators

43 Determination of approved auditors

The Dairy Industry Ombudsman may, by determination published in the *Gazette*, declare certain persons to be *approved auditors* for the purposes of the Code and this Act.

44 Dairy Industry Ombudsman may inquire into correctness of compliance audit report

The Dairy Industry Ombudsman may make whatever inquiries it thinks necessary or desirable in order to determine whether or not a compliance audit report prepared under the Code in relation to a declared supermarket operator for a financial year correctly states the extent of the declared supermarket operator's compliance with the provisions contained in the Code for that period.

45 Dairy Industry Ombudsman must maintain a public register of compliance audit reports

The Dairy Industry Ombudsman must maintain a public register that includes the following in relation to each compliance audit report provided to it in relation to a declared supermarket operator in accordance with the Code:

- (1) the name of the declared supermarket operator which provided the compliance audit report;
- (2) the date on which the compliance audit report was provided to the Dairy Industry Ombudsman;
- (3) a copy of the report;
- (4) a copy of any statements, information and supporting documentation provided under subclause 9(3)(g) of the Code; and
- (5) if the Dairy Industry Ombudsman has made inquiries under section 44, the details of any findings made following such inquiries.

Part VII—Enforcement and Remedies

46 Interpretation

In this Part, unless the contrary intention appears, a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter.

47 Dairy Industry Ombudsman may issue public warning notice

- (1) The Dairy Industry Ombudsman may issue to the public a written notice containing a warning about the conduct of a person if:

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- (a) the Dairy Industry Ombudsman has reasonable grounds to suspect that the conduct may constitute contravening conduct;
 - (b) the Dairy Industry Ombudsman is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
 - (c) the Dairy Industry Ombudsman is satisfied that it is in the public interest to issue the notice.
- (2) A notice issued under subsection (1) is not a legislative instrument.

48 Civil penalties

- (1) If the Court is satisfied that a person has engaged in contravening conduct, the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part to have engaged in any similar conduct.
- (2) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed \$1.1 million for each act or omission to which this section applies.
- (3) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed \$220,000 for each act or omission to which this section applies.

49 Defence to proceedings under section 48

- (1) In proceedings against a person (the respondent) under section 48 in relation to alleged contravening conduct, it is a defence if the respondent establishes:
- (a) that the contravening conduct in respect of which the proceedings were instituted was due to reasonable mistake; or
 - (b) that the contravening conduct in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
 - (c) that:
 - (i) the contravening conduct in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the respondent's control; and
 - (ii) the respondent took reasonable precautions and exercised due diligence to avoid the contravening conduct.
- (2) In paragraphs (1)(b) and (c), *another person* does not include a person who was:
- (a) an employee or agent of the respondent; or
 - (b) if the respondent is a body corporate - a director or an employee or agent of the respondent;
- at the time when the alleged contravention occurred.

50 Civil action for recovery of pecuniary penalties

- (1) The Dairy Industry Ombudsman may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 48.
- (2) A proceeding under subsection (1) may be commenced within 6 years after the contravening conduct to which it relates occurred.

51 Injunctions

- (1) Where, on the application of the Dairy Industry Ombudsman or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute contravening conduct, the Court may grant an injunction in such terms as the Court determines to be appropriate.
- (2) Where an application for an injunction under subsection (1) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in contravening conduct.
- (3) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (4) The Court may rescind or vary an injunction granted under subsection (1) or (2).
- (5) Where the Dairy Industry Ombudsman makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

52 Actions for damages

- (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of this Act may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

53 Orders to redress loss or damage suffered by non-parties

Orders

- (1) If:
 - (a) a person engaged in contravening conduct; and
 - (b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and
 - (c) the class includes persons (*non-parties*) who are not, or have not been, parties to a proceeding (an *enforcement proceeding*) instituted under this Part in relation to the contravening conduct;

the Court may, on the application of the Dairy Industry Ombudsman, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the court may make include all or any of the orders set out in section 54.

- (2) An order under subsection (1) may be made against:
 - (a) the person mentioned in paragraph (1)(a); or
 - (b) a person involved in the contravening conduct.
- (3) The Court must not make an order under subsection (1) unless the court considers that the order will:
 - (a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.

Application for orders

- (4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.
- (5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

- (6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), the Court may have regard to the conduct of:
 - (a) the person; and
 - (b) the non-parties;in relation to the contravening conduct, since the contravening conduct occurred.
- (7) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:
 - (a) which persons are non-parties in relation to the contravening conduct;
 - (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order

- (8) If:
 - (a) an order is made under subsection (1) against a person; and
 - (b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and
 - (c) the non-party has accepted the redress, prevention or reduction;then:
 - (d) the non-party is bound by the order; and

- (e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and
- (f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

54 Kinds of orders that may be made to redress loss or damage suffered by non-parties

Without limiting subsection 53(1), the orders that the Court may make under that subsection against a person (the *respondent*) include all or any of the following:

- (1) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (a) to be void; and
 - (b) if the Court thinks fit - to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (2) an order:
 - (a) varying such a contract or arrangement in such manner as is specified in the order; and
 - (b) if the Court thinks fit - declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (3) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (4) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;
- (5) an order directing the respondent, at his or her own expense, to supply specified services to a non-party referred to in that subsection.

55 Conduct by directors, employees or agents

- (1) Any conduct engaged in on behalf of a body corporate:
 - (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

- (2) Conduct engaged in on behalf of a person other than a body corporate:
 - (a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or

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- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

56 Defences

If, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have engaged in contravening conduct but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

57 Non-punitive orders

- (1) The Court may, on application by the Dairy Industry Ombudsman, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
- (2) The orders that the Court may make in relation to the person are:
- (a) a community service order; and
 - (b) a probation order for a period of no longer than 3 years; and
 - (c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
 - (d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.
- (4) In this section:
- community service order**, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:
- (a) is specified in the order; and
 - (b) relates to the conduct;

for the benefit of the community or a section of the community.

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in contravening conduct, similar conduct or related conduct during the period of the order, and includes:

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations imposed by this Act; and

- (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations imposed by this Act; and
- (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

58 Punitive orders---adverse publicity

- (1) The Court may, on application by the Dairy Industry Ombudsman, make an adverse publicity order in relation to a person who has been ordered to pay a penalty under section 48.
- (2) In this section, an adverse publicity order, in relation to a person, means an order that:
 - (a) requires the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
 - (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.

59 Enforcement of undertakings

- (1) The Dairy Industry Ombudsman may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Dairy Industry Ombudsman has a power or function under this Act.
- (2) The undertaking must be expressed to be an undertaking under this section.
- (3) The person may withdraw or vary the undertaking at any time, but only with the consent of the Dairy Industry Ombudsman.
- (4) The Dairy Industry Ombudsman may, by written notice given to the person, cancel the undertaking.
- (5) The Dairy Industry Ombudsman may publish the undertaking on the Dairy Industry Ombudsman's website.
- (6) If:
 - (a) a person has given an undertaking under subsection (1); and
 - (b) the undertaking has not been withdrawn or cancelled; and
 - (c) the Dairy Industry Ombudsman considers that the person who gave the undertaking has breached any of its terms;
 the Dairy Industry Ombudsman may apply to the Court for an order under subsection (7).
- (7) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;

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- (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

Part VIII— Infringement notices

60 Purpose and effect of this Part

- (1) The purpose of this Part is to provide for the issue of an infringement notice to a person who has engaged in alleged contravening conduct as an alternative to proceedings for an order under section 48.
- (2) This Part does not:
 - (a) require an infringement notice to be issued to a person in relation to alleged contravening conduct; or
 - (b) affect the liability of a person to proceedings under Part VII in relation to alleged contravening conduct if:
 - (i) an infringement notice is not issued to the person in respect of the alleged contravening conduct; or
 - (ii) an infringement notice issued to a person in respect of the alleged contravening conduct is withdrawn under section 67; or
 - (c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

61 Issuing an infringement notice

- (1) If the Dairy Industry Ombudsman has reasonable grounds to believe that a person has engaged in contravening conduct, the Dairy Industry Ombudsman may issue an infringement notice to the person.
- (2) The Dairy Industry Ombudsman must not issue more than one infringement notice to the person for the same instance of alleged contravening conduct.
- (3) The infringement notice does not have any effect if the notice:
 - (a) is issued more than 12 months after the day on which the contravening conduct is alleged to have occurred; or
 - (b) relates to more than one instance of alleged contravening conduct by the person.

62 Matters to be included in an infringement notice

An infringement notice must:

- (a) be identified by a unique number; and
- (b) state the day on which it is issued; and

- (c) state the name and address of the person to whom it is issued; and
- (d) identify the Dairy Industry Ombudsman; and
- (e) state how the Dairy Industry Ombudsman may be contacted; and
- (f) give details of the alleged contravening conduct by the person, including:
- (g) the date of the alleged contravening conduct; and
- (h) the particular provision of the Code that was allegedly contravened; and
- (i) state the maximum pecuniary penalty that the court could order the person to pay under section 48 in relation to the alleged contravening conduct; and
- (j) specify the penalty that is payable in relation to the alleged contravening conduct; and
- (k) state that the penalty is payable within the infringement notice compliance period for the notice; and
- (l) state that the penalty is payable to the Dairy Industry Ombudsman on behalf of the Commonwealth; and
- (m) explain how payment of the penalty is to be made; and
- (n) explain the effect of sections 64 to 67.

63 Amount of penalty

The penalty to be specified in an infringement notice that is to be issued to a person in relation to an instance of alleged contravening conduct, must be a penalty equal to the amount worked out using the following table:

Amount of penalty		
Item	If the infringement notice relates to an alleged contravention or alleged related contravention of section 31, involving one of the following provisions of the Code	the amount is ...
1	subsections 4(1), 11(1), 11(3), 24(1), 25(1), 25(2), 26(1) and 26(2)	(a) if the person is a listed corporation – 600 penalty units; or (b) if the person is a body corporate other than a listed corporation – 60 penalty units; or (c) if the person is not a body corporate – 12 penalty units.
2	sections 10, 22 and 23	(a) if the person is a listed corporation – 600 penalty units; or (b) if the person is a body corporate other than a listed corporation – 60 penalty units; or (c) if the person is not a body corporate – 12 penalty units.
3	subsections 5(5), 5(7), 9(2), 9(3), 9(5), 9(9), 12(1), 14(1), 19(1), 28(1), 28(2), 31(1) and 31(2)	(a) if the person is a listed corporation – 300 penalty units; or

		<p>(b) if the person is a body corporate other than a listed corporation – 30 penalty units; or</p> <p>(c) if the person is not a body corporate – 6 penalty units.</p>
4	sections 13, 15, 16, 17, 18, 20, 27 and 33	<p>(a) if the person is a listed corporation – 300 penalty units; or</p> <p>(b) if the person is a body corporate other than a listed corporation – 30 penalty units; or</p> <p>(c) if the person is not a body corporate – 6 penalty units.</p>
5	subsections 5(1), 5(2), 5(3), 5(4), 6(1), 6(2), 6(3), 7(1), 7(2), 8(1), 8(2), 8(3), 8(5), 19(2), 29(1), 29(4), 30(1), 30(2) and 32(2)	<p>(a) if the person is a listed corporation – 100 penalty units; or</p> <p>(b) if the person is a body corporate other than a listed corporation – 10 penalty units; or</p> <p>(c) if the person is not a body corporate – 4 penalty units.</p>

64 Effect of compliance with an infringement notice

- (1) This section applies if:
- (a) an infringement notice for an instance of alleged contravening conduct is issued to a person; and
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 67.
- (2) The person is not, merely because of the payment, regarded as:
- (a) having engaged in the instance of contravening conduct described in the notice; or
 - (b) having been convicted of an offence constituted by the same conduct that constituted the alleged contravening conduct.
- (3) No proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Dairy Industry Ombudsman, in relation to:
- (a) the alleged instance of contravening conduct;
 - (b) an offence constituted by the same conduct that constituted the alleged contravening conduct.

65 Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice is issued to a person in relation to alleged contravening conduct; and

- (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
- (c) the infringement notice is not withdrawn under section 67;

the person is liable to proceedings under Part VII of this Act in relation to the alleged contravening conduct.

66 Infringement notice compliance period for infringement notice

- (1) Subject to this section, the ***infringement notice compliance period*** for an infringement notice is the period of 28 days beginning on the day after the day on which the infringement notice is issued by the Dairy Industry Ombudsman.
- (2) The Dairy Industry Ombudsman may extend, by notice in writing, the infringement notice compliance period for the notice if the Dairy Industry Ombudsman is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the person who was issued the infringement notice.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If the Dairy Industry Ombudsman extends the infringement notice compliance period for an infringement notice, a reference in this Part to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

67 Withdrawal of an infringement notice

Representations to the Dairy Industry Ombudsman

- (1) The person to whom an infringement notice has been issued in relation to an instance of alleged contravening conduct may make written representations to the Dairy Industry Ombudsman seeking the withdrawal of the infringement notice.
- (2) Evidence or information that the person, or a representative of the person, gives to the Dairy Industry Ombudsman in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Dairy Industry Ombudsman

- (3) The Dairy Industry Ombudsman may, by written notice (the ***withdrawal notice***) given to the person to whom an infringement notice was issued, withdraw the infringement notice if the Dairy Industry Ombudsman is satisfied that it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
 - (a) the name and address of the person; and

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- (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under Part VII of this Act may be started or continued against the person in relation to:
 - (i) the alleged contravening conduct; or
 - (ii) an offence constituted by the same conduct that constituted the alleged contravening conduct.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Dairy Industry Ombudsman must refund to the person an amount equal to the amount paid.

68 Register of infringement notices

The Dairy Industry Ombudsman may maintain a public register that includes details of each infringement notice issued.

Part IX—Miscellaneous

DIVISION 1 – REPORTING AND REVIEW OF PERFORMANCE

69 Annual report

- (1) The Dairy Industry Ombudsman must, as soon as practicable after the end of each financial year, prepare and give to the Minister a report on the operations of the Dairy Industry Ombudsman during that year.

Note: See also section 34C of the Acts Interpretation Act 1901, which contains extra rules about annual reports.

- (2) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the report is received.

70 Review of Dairy Industry Ombudsman performance

- (1) The Minister must review the Dairy Industry Ombudsman's performance for each review period.
- (2) The first review period is the period ending on the date 5 years after the date of commencement of this Act.
- (3) Subsequent review periods are each successive period of 5 years after the first review period.
- (4) In reviewing the Dairy Industry Ombudsman's performance, the Minister must assess how effective the Dairy Industry Ombudsman has been in enforcing the Code and performing its other functions under this Act.
- (5) As soon as practicable after a review period the Minister must:

- (a) publish a report of the findings of the review for that period; and
 - (b) lay a copy of the report before Parliament.
- (6) In carrying out a review, the Minister must consult:
- (a) the Dairy Industry Ombudsman;
 - (b) the declared supermarket operators;
 - (c) one or more persons appearing to the Minister to represent the interests of supermarket operators other than declared supermarket operators;
 - (d) one or more persons appearing to the Minister to represent the interests of suppliers;
 - (e) one or more persons appearing to the Minister to represent the interests of customers; and
 - (f) any other person the Minister thinks appropriate.
- (7) As a result of the findings of a review, the Minister may give guidance to the Dairy Industry Ombudsman about any matter relating to the Dairy Industry Ombudsman's functions.
- (8) The Dairy Industry Ombudsman must take account of the guidance in carrying out its functions.

DIVISION 2 – REGULATIONS

71 Regulations

The Governor-General may make regulations prescribing:

- (a) the Code and its content;
- (b) all matters required or permitted by this Act to be prescribed; and
- (c) all matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.