



AUSTRALIAN
SENATE

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

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

13 February 2020

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

Via email: David.Littleproud.MP@aph.gov.au

CC: DLO-MO@agriculture.gov.au; tsrdlos@treasury.gov.au;
CommitteeScrutiny@treasury.gov.au

Dear Minister,

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

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

Matters of interest to the Senate

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

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

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

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

Parliamentary oversight

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

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

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

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

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

Unclear drafting; significant penalties

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

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

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

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

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

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

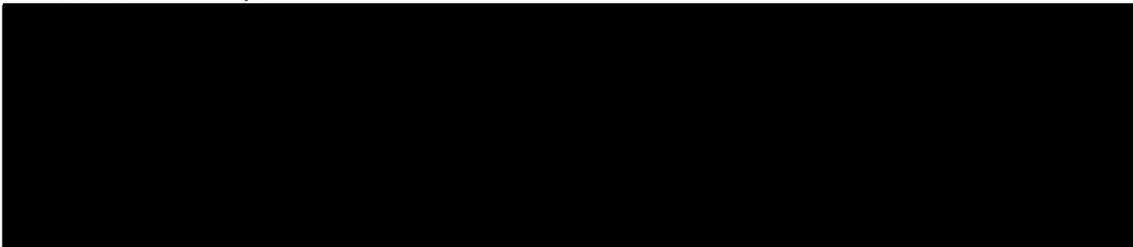
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **27 February 2020**.

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

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

Thank you for your assistance with this matter.

Yours sincerely,



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



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13 February 2020

Senator Susan McDonald
Chair
Senate Rural and Regional Affairs and Transport Legislation Committee
Parliament House
CANBERRA ACT 2600

Via email: rrat.sen@aph.gov.au

CC: The Hon David Littleproud MP, Minister for Agriculture, Drought and
Emergency Management, David.Littleproud.MP@aph.gov.au



Dear Chair,

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

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

The above instrument establishes a mandatory Dairy Code of Conduct that sets out a regulatory scheme for enforceable minimum standards of conduct for business practices between dairy farmers and processors of milk. In doing so, the instrument appears to implement significant elements of a regulatory scheme, and addresses matters which have been subject to a number of significant external reviews. I also note that the Rural and Regional Affairs and Transport References Committee is currently conducting an inquiry into the performance of Australia's dairy industry. Accordingly, the committee has resolved to draw this instrument to the attention of the Senate and your committee under standing order 23(4).

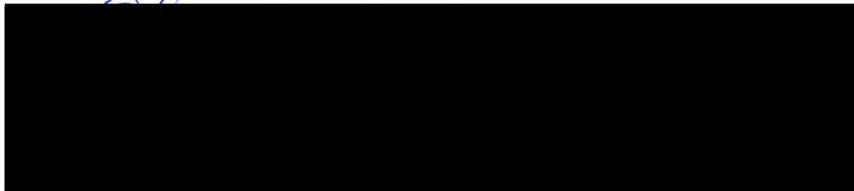
I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments made in the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine this instrument, I note the time for lodging a disallowance notice expires on 12 May 2020.

To assist in your committee's consideration of this matter, please find attached a copy of the instrument and its explanatory statement. These documents are also published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2019L01610>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,



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



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

Ref: MS20-000199

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

24 FEB 2020

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 13 February 2020 concerning the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee's) concerns with the *Competition and Consumer (Industry Codes–Dairy) Regulations 2019* (Dairy Code) or (the Instrument).

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

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

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

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

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

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

The 'Obligation to deal in good faith' provisions in the Instrument are intended to promote farmers and processors acting honestly and fairly in their dealings with one another. Deterring a party from acting dishonestly or failing to have regard to the legitimate interests of the other party, and penalising such conducts, is a foundational concept behind the Dairy Code and other mandatory industry codes made under the *Competition and Consumer Act 2010*. For example, the *Competition and Consumer (Industry Codes—Franchising) Regulations 2014* (the Franchising Code) and the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (the Horticulture Code) also impose 300 civil penalty units for contravening the good faith obligation.

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

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

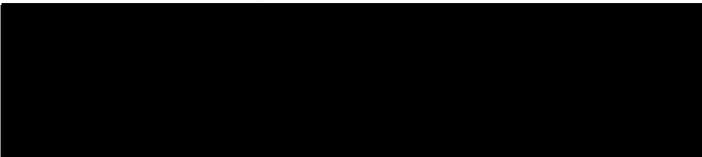
By contrast, confining the relevant civil penalty provisions such that they only apply where certain defined circumstances, as set out in the Instrument, are met, would unduly restrict those provisions and risk permitting conduct that may be considered 'not in good faith' by evolving common law standards,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

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

I trust this information is useful for the Committee.

Thank you for raising this matter.

Yours sincerely



DAVID LITTLEPROUD MP

cc. Treasurer, the Hon. Josh Frydenberg MP



3 April 2020

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

Via email: David.Littleproud.MP@aph.gov.au

CC: Minister.Littleproud@agriculture.gov.au
DLO.MO@agriculture.gov.au

Dear Minister,

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

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

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

Parliamentary oversight

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

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

Unclear drafting; significant penalties

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

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

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

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

The committee would therefore appreciate your further advice as to why it is considered necessary and appropriate to impose significant civil penalties for non-compliance with a term undefined by the written law in this instrument, when other industry codes have sought to promote honest and fair dealings with other parties without such provisions.

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

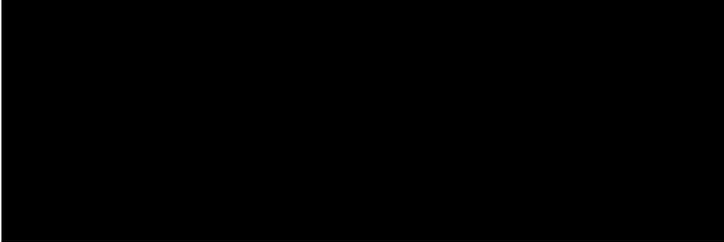
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 April 2020**.

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

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

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation