

Sustainable Queensland Dairy Production
(Fair Milk Price Logos) Bill 2016



Submission No. 001

EXECUTIVE OFFICE

16 December 2016

Research Director
Agriculture and Environment Committee

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Dear Sir / Madam

Re: Inquiry into the Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill 2006

Thank you for the opportunity to provide a submission to the Agriculture and Environment Committee's Inquiry into the *Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill 2006* (the proposed Bill).

The Australian Competition and Consumer Commission (ACCC) understands that the proposed Bill responds to concerns about the sustainability of dairy production in Queensland. We note that the Bill seeks to provide consumers with greater transparency and purchasing power to influence the farmgate price paid to dairy farmers across Queensland through voluntary fair milk price logos.

As you may be aware the ACCC is currently undertaking work on a number of important issues in the dairy industry, including an inquiry into the Australian dairy industry as detailed below.

The ACCC's work on these issues is continuing. In this context, the ACCC is not presently in a position to provide specific comments on the sustainability of milk prices for dairy farmers in Queensland and related matters. Accordingly, the purpose of the remainder of this submission is to update the Committee on these matters.

The ACCC's submission covers four key areas:

- The ACCC's inquiry into the dairy industry
- The ACCC's continuing investigation of the conduct of Murray Goulburn and Fonterra Australia
- The application of the business-to-business unfair contract terms law to milk supply agreements; and
- Application of the Australian Consumer Law (ACL) in light of the proposal to introduce penalties for an offence of selling milk bearing the fair milk price logo when a fair price has not been paid for that milk to the dairy farmer.

ACCC Dairy Inquiry

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

On 27 October 2016 the Treasurer, the Hon Scott Morrison MP, issued a notice requiring the ACCC conduct the inquiry pursuant to section 95H(1) of the *Competition and Consumer Act 2010* (CCA). The notice provides the ACCC with compulsory information gathering powers for the inquiry and sets out the matters to be taken into consideration in the inquiry:

- The nature of competition between processors for both the acquisition of raw milk and the supply of processed milk and dairy products
- The nature of retail pricing arrangements for milk and dairy products, and their impact up the supply chain
- The effect (direct or indirect) of domestic retail and export prices, and level of domestic and overseas demand, for Australian processed milk and dairy products on dairy producers and processors
- The nature of the commercial relationships between dairy producers and acquirers of raw milk and the impact of corporate structures adopted (including cooperative structures) upon those relationships
- The mechanisms used by acquirers of raw milk to determine prices paid when acquiring raw milk and the transparency of those mechanisms
- The availability, transparency and accessibility of market price information, and its effectiveness for forecasting movements in farm gate milk prices
- The terms on which raw milk is acquired from dairy producers and the means by which such terms are agreed
- The allocation of commercial risk across the dairy supply chain
- The role for collective bargaining in the dairy industry and its effectiveness
- The existence of, or potential for, anti-competitive conduct and the possible impacts of any such conduct on businesses within the dairy supply chain
- Any other factors affecting farm profitability.

Through the inquiry, the ACCC will analyse the broader dairy industry to identify structural and behavioural issues that affect the industry's performance. The ACCC's inquiry will be far-reaching covering all product and geographical markets within the Australian dairy industry. The ACCC's Agriculture Unit will conduct the inquiry. This Unit has been established to specifically focus on competition and fair trading issues in agriculture supply chains.

The ACCC will consult widely with the public and industry stakeholders during the inquiry. We have requested submissions and will hold public forums in key producing areas across Australia.

The inquiry formally commenced on 1 November 2016, with the final report due to Government by November 2017.

Investigation of Murray Goulburn and Fonterra Australia

As the Committee is likely aware, dairy farmers have raised significant concerns about the impact of the cuts to the price paid to dairy farmers for milk solids announced by Murray

Goulburn and Fonterra Australia in April and May 2016. The ACCC is conducting an investigation into the conduct of Murray Goulburn and Fonterra Australia surrounding these issues. These investigations are a priority for the ACCC.

Where a particular provision of the ACL may have been breached, the ACCC can, where appropriate, take enforcement action.

The ACCC is investigating whether:

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

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

Business to business unfair contract terms law

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

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

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

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

Application of this law to milk supply agreements

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

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

For the purposes of determining whether a contract falls under the threshold to meeting the definition of a 'small business contract', any amounts that cannot be calculated with certainty at the time the contract is entered are unlikely to be included in the calculation of the upfront

price payable. Given the value of milk supply agreements typically cannot be calculated with certainty at the time of entering into the agreement, it is arguable that such agreements will fall within the scope of the law should other thresholds be met.

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

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

The ACCC will assess milk supply agreements with respect to the unfair contract terms law, including any retrospective elements of milk contracts as part of the dairy inquiry.

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

Application of the Australian Consumer Law

We note the proposed Bill includes the introduction of penalties for the offence of selling milk bearing the fair milk price logo when a fair price has not been paid for that milk to the dairy farmer.

In this context we note that the ACL is the national law for fair trading and consumer protection. The ACL is administered by the ACCC and state and territory consumer protection agencies and is enforced by all Australian Courts and tribunals, including the courts and tribunals of the States and Territories.

It is arguable that sections 18 and 29 of the ACL would prohibit a person from engaging in misleading or deceptive conduct in relation to the use of a 'fair milk price' logo as proposed in the Bill.

In particular, section 18 of the ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct and applies across the economy. A breach of section 18 may result in an injunction being issued, a publication order being made, damages being awarded, or remedial orders being made.

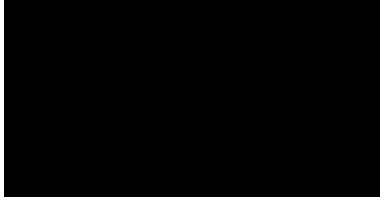
In addition, section 29 of the ACL provides specific protections which address identified forms of business conduct including provisions regarding certain false or misleading representations:

- that goods or services have sponsorship, approval, performance characteristics, accessories uses or benefits (29(1)(g)); or
- that the person making the representation has a sponsorship, approval or affiliation (29(1)(h)); or
- with respect to the price of goods or services (29(1)(i)).

A breach of any of the specific prohibited practices set out in section 29 can result in a fine or any of the remedies set out above in relation to section 18.

Should you wish to discuss this submission, please contact Ms Gabrielle Ford,
General Manager Agriculture Unit on [REDACTED]

Yours sincerely

A large black rectangular redaction box covering the signature of Rod Sims.

Rod Sims
Chairman