Australian Dairy Industry Council Inc.

Department of Agriculture and Water Resources
18 Marcus Clarke Street
Canberra ACT 2601

7 November 2018

Dear Sir/Madam

Re: Dairy Industry Mandatory Code of Practice

The Australian Dairy Industry Council (ADIC) is pleased to provide you with an industry-agreed draft set of clauses to facilitate development of a mandatory code of practice for the industry.

The *Draft Clauses for a Dairy Industry Code of Practice* has been developed as an outcome of the ADIC review of its voluntary code of practice in consultation with the Boards and Executive teams of Australian Dairy Farmers (ADF) and Australian Dairy Products Federation (ADPF). It is intended to address most of the recommendations and key findings arising from the Australian Competition and Consumer Commission's (ACCC) *Dairy Inquiry*, is consistent with the ACCC's *Guidelines for developing effective voluntary industry codes of conduct* and retains the strengths of the industry's current code. These are outlined in the attached *Rationale for key ADIC dairy code clauses.*

We are firmly of the view that these clauses will clarify and strengthen relationships between processors and farmers across all states of Australia. They address the information asymmetries that currently exist in the industry and strengthen bargaining power for farmers while respecting commercial realities and supporting innovation and market dynamics.

The *Draft Clauses for a Dairy Industry Code of Practice* is the result of a highly collaborative effort between processors and farmers. Overall, we have consensus on most items proposed, however areas of contention remain and these, highlighted in yellow in the document, are explained below.

Clause 6 (3) – This has been inserted in an effort to implement recommendations one, three and seven in the ACCC's *Dairy Inquiry*. While the clause will improve price and contract comparability and transparency and in turn farmer switch ability (i.e. bargaining power), we are concerned that it may compromise the ability of both farmer and processor to take advantage of innovative price and contract opportunities. It is requested that further analysis be undertaken, which should include industry consultation, to ensure resolving one issue does not create a new issue.

Clause 10 – There is agreement that a cooling-off period is appropriate for a Standard Form Agreement (greater than 90 days). However, we do not have agreement on how long this should be applied (the processors suggest three days whereas the farmers suggest 14 days) nor do we have clarity on whether the cooling off period should commence at time of signing or on 1 July (notional start date of contracts).

Clause 14 (5) – All parties recognise the undesirable nature of step downs and that should they occur it needs to be rational and justifiable. There is no such index as 'the world price' but several indexes do exist including the GDT Price Index (refer ACCC *Dairy Inquiry* p20), Chicago Mutual Exchange (CME) and a European index. The industry would like to see the most suitable option applied as a threshold limit for forward step downs in the future. Further consultation with industry on this is encouraged.

Clause 18 (3) – This has been inserted to provide a transition time for farmers with limited alternate supply options to seek alternate arrangements for their milk or exit farming after being informed their existing agreement will not be renewed or extended. The industry is yet to determine what an appropriate length of time should be.

Clause 24 – This seeks to implement recommendation five from the ACCC's *Dairy Inquiry*. Clause 24 (1) has been inserted for the processor to implement their own complaints' handling procedure, as the first step in an industry complaints management system. It has not been decided whether a standard complaints handling procedure e.g. ISO should be prescribed to all processors. While a generic standard ensures key processes are adhered to there are concerns about cost and compliance, particularly for smaller processors. Clause 24 (5) provides an independent mediation or arbitration process should the processor complaints system not resolve the issue. The reference to the *ADIC Dispute Resolution Rules* is highlighted as these are currently subject to stakeholder consultation.

The ADIC requests that in addition to these issues being resolved during the code development process, a Regulation Impact Statement be developed based on our draft clauses. This will help to inform which clauses should be retained, removed or modified.

It is important to note that the industry is considering options to implement recommendations two and six in the ACCC *Dairy Inquiry* which largely fall outside scope of a mandatory code. This includes exploring opportunities to provide low cost legal advice to farmers and promoting adoption of a standardised and simplified contract template to augment the contract management process.

If you have any questions or follow up in relation to the above or any elements of the *Draft Clauses for a Dairy Industry Code of Practice,* please contact the undersigned.

We look forward to working with you and your department on developing the code further.

Yours faithfully

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Draft clauses for a Dairy Industry Code of Practice

30 October 2018

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Part 1　Introduction

1.　Name

This Code is the *Dairy Code of Practice*.

2.　Purpose

The purpose of this Code is:

(a)　to facilitate trade in milk between farmers and processors to ensure transparency and clarity of transactions; and

(b)　to provide a fair and equitable dispute resolution procedure for disputes arising under this Code or a milk supply agreement.

The Code sets out good practice for milk supply agreements between farmers and processors. This Code has been agreed to address a number of issues with milk supply agreements under the Australian Consumer Law Unfair Contract Terms (Small Business Contracts) laws which came into effect on the 12th November 2016.

The aim of this Code is to address these issues in a way that is fair and effective for both farmers and processors.

3.　Application

(1)　The Code will apply to milk supply and standard form agreements between processors and farmers. The Code does not preclude a farmer from negotiating an individual agreement with a processor.

(2)　This Code is mandatory for and binding on Processors, brokers and their

suppliers of milk.

(3)　This Code applies to processors and registered dairy farmers.

4.　Definitions

In this Code:

ADIC means Australian Dairy Industry Council Inc

agreement means the following, whether written or oral:

(a)　a milk supply agreement; and

(b)　a standard form agreement

Code means the *Dairy Code of Practice*.

Collective Bargaining Group (CBG) means a group of farmers authorised under the *Competition and Consumer Act 2010* (Cth) to collectively bargain.

Compliance Officer has the same meaning as appears in the Dispute Resolution Rules**.**

farmer means a person who produces milk for sale.

dairy dispute means a dispute arising under an agreement or this Code.

Dispute Resolution Rules means the Dispute Resolution Rules published and administered by ADIC.

fundamental breach includes any breach of Part 3 of this Code and any breach of the terms and conditions of a milk supply agreement**.**

loyalty payments have the meaning in clause 15.

milk means a product derived from the mammary secretions of cows, obtained from one or more milkings for consumption as liquid milk or for further processing but excluding colostrum, or such a product with phytosterols, phytostanols and their esters added.

milk supply agreement means an agreement between a farmer and a processor.

Processor (and broker) means an entity that purchases raw milk from a farmer.

standard form agreement means the standard form agreement published on a processor's website pursuant to clause 6.

5.   Obligation to deal in good faith

(1)   A processor must at all times deal with a farmer in good faith within the meaning of the unwritten law as in force from time to time.

(2)   A farmer must at all times deal with a processor in good faith within the meaning of the unwritten law as in force from time to time.

(3)   In determining whether the processor or the farmer has dealt in good faith with the other, the following may be taken into account:

    (a)   whether the trading relationship between the processor and the farmer has been conducted without duress, coercion, force, pressure or other conduct reflecting a disparity between the parties;

    (b)   whether the processor or the farmer acted honestly and equitably.

(4)   Subclause (3) does not limit subclause (1) or (2).

(5)   A processor and a farmer must not enter into an agreement that contains a provision that limits or excludes the obligation to deal in good faith with each other and, if it does, the provision has no effect.

(6)   An agreement must not be varied to include a provision that limits or excludes the obligation to deal in good faith and, if it does, the provision has no effect.

Part 2   Agreements

6.   Standard form agreements

(1)   A processor must publish on its website a standard form agreement which complies with this Code.

(2)   On request by a farmer or as negotiated by both parties, a processor must agree to contract using that processor's published standard form agreement.

(3)   A standard form agreement must:

(a)   Be offered to a farmer by 1 June (or next working day, if 1 June is a Saturday, Sunday or Public Holiday at the place the farmer conducts his or her business) each year to come into effect from 1 July each year; and;

(b)   be in writing; and

(c)   include an opening price.

(4)   A milk supply agreement may contain such other terms and conditions (if any, including the ability of the processor to make innovative pricing offers at any time), provided that they are consistent with this Code as are agreed between the processor and the farmer.

(5)   If an agreement has not been signed during the re-contracting period, then the existing commitment for milk collection must continue with the new opening price.

7.   Requirement to have an agreement

(1)   A processor must not acquire milk from a farmer unless within 30-days of the supply the processor has entered into an agreement with the farmer that complies with this Code.

(2)   A farmer must not supply milk to a processor unless within 30-days of the supply the farmer has entered into an agreement with the processor that complies with this Part.

(3)   Farmers and processors are encouraged to engage in discussion on all elements of the standard form contract prior to signing.

8.   Matters to be specified in agreements

(1)   An agreement must specify:

(a)   any requirements the processor has in respect of delivery of milk to the processor by the farmer; and

(b)   any circumstances, for the purposes of clause 21(2)(b), in which the processor may reject milk delivered by the farmer; and

(c)   the period, for the purposes of subclause 21(3), within which the processor must give the farmer reasons for a rejection of milk delivered by the farmer; and

(d)   the process for varying the agreement; and

(e)   if the agreement is only to operate for a limited time—the term of the agreement; and

(f)   any quality and quantity requirements relating to milk covered by the agreement including sampling procedures and volume accuracy assurances; and

(g)   how the processor deals with milk, provided by the farmer under the agreement, that does not meet the quality or quantity requirements (if any) specified in the agreement; and

(h)   the payment period, for the purposes of clause 22, for the delivery of milk under the agreement; and

(i)   the contact details of the person that the processor should contact in the event of a dispute with the farmer under the agreement or this Code; and

(j)   the process for terminating the agreement.

(2)   The agreement must also specify pricing for milk in accordance with clause 12.

9.   Conflict between Code and agreements

(1)   If a term of an agreement conflicts with this Code, this Code prevails.

(2)   A term of an agreement does not conflict with this Code where it is more advantageous to a farmer.

10.   Cooling off period

(1)   If the term of an agreement is for a period of 90 days or more or is not specified, either party to the agreement may terminate the agreement, in writing, within:

(a)   3 or 14 days after the day on which the agreement is entered into (the initial cooling off period);

(2)   To avoid doubt, if an agreement is terminated during a period mentioned in subclauses (1)(a) or (b), any trade that has occurred under the agreement before the termination is governed by the terms of the agreement.

(3)   Subject to subclause (4), a party to an agreement who receives a payment (of money or other valuable consideration) for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement, must return the payment to the party who made the payment within 3 or 14 days after the day on which the agreement is terminated.

(4)   A party required to return a payment under subclause (3) may deduct, from the amount to be returned, reasonable expenses incurred under the agreement for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement.

Part 3   Essential Elements

11.   Transparency

The agreement must clearly and simply state the obligations of both farmer and processor.

12.   Pricing

(1)   Agreements between farmers and processors must set out:

    (a)   a clear price or schedule of prices that will apply to that farmer (based on elements such as volume, quality and composition), and/or a clear pricing mechanism (such as a formula), and/or;

    (b)   a price notification process (the process by which the processor notifies the farmer of the price),

such that at any given point in time, a farmer can be certain of the base milk price that will be paid for their milk over the agreement period.

(2)   Processors must negotiate agreements which;

    (a)   have a price or pricing mechanism that is negotiated and agreed between the farmer and the processor; and/or

    (b)   have a price, pricing mechanism, or price notification process that is at the processor's discretion.

(3)   Whether the processor offers agreements under either of these options, the agreements should at all times comply with the requirements of this Code for each of these options.

13.   Pricing Mechanisms

(1)   Where the agreement provides for a pricing mechanism (as opposed to a fixed price or a price notification process), such as a pricing formula, the agreement should specify:

    (a)   the exact pricing mechanism/formula to be used; and

    (b)   how any variations to the pricing mechanism/formula are to be dealt with.

14.   Contractual Variations e.g. Step-Ups and Step-Downs

(1)   The actual price paid to the farmer may be subject to adjustments, provided that such adjustments are compliant with this Code.

(2)   In all cases, a description of how any adjustments, including pricing (or adjustment calculations) desired by either party must be set out clearly in the agreement at the outset.

(3)   A farmer must be given at least 30-days' notice of any downward price adjustment (or adjustment calculations) including a statement of why the downward price adjustment has become necessary and the reasonable measures the processor has considered to avoid making the downward price adjustment.

(4)   For the avoidance of doubt, no downward price adjustment should be made retrospectively.

(5)   Processors will use reasonable endeavors to avoid downward price adjustments. If a downward price adjustment is required, it must not be lower than the most recent average % change in the world price for butter, cheese and milk powders (skim and whole).

(6)   Unless otherwise agreed, agreements must allow the farmer to terminate his or her contract with the processor without penalty on 30-days' written notice from the date of notification to the farmer (or shorter period where the contract is due to expire in less than 30 days) of any downward price adjustment(s). Such notice must be in writing and may be served by the farmer at any time within 30 days of receipt of notice from the processor of any downward price change.

15.   Loyalty Payments

(1)   An agreement may provide for a bonus payment to be made to a farmer at the end of the term of the agreement (**loyalty payment**).

(2)   Where an agreement contains provision for a loyalty payment, a farmer must be entitled to all accrued loyalty and other payments where they have supplied milk to the end of the term of the agreement irrespective of whether they remain a supplier after expiry of the term.

(3)   Where a farmer terminates an agreement under clause 19 for reason of fundamental breach by a processor, the farmer must be entitled to pro-rata payment of any loyalty payment.

(4)   An agreement may stipulate that a farmer's entitlement to any inventive or loyalty payment accrues pro-rata.

16.   Volume / Exclusivity Clauses

An agreement with a processor must not limit or prohibit a farmer from supplying to another processor unless otherwise agreed by both parties.

17.   Contract Duration

Agreements must be for a minimum of 12-months operating over a financial year or other term as agreed by both parties.

18.   Termination/Notice to Terminate

(1)   A processor must give a farmer 30-days' written notice of its intention not to renew or extend a fixed term agreement.

(2)   A farmer must give a processor 30-days' written notice of her or his intention not to renew or extend a fixed term agreement.

(3)   If there are no reasonable supply options, the processor must provide a farmer 12 months written notice of the company's intention not to renew or extend the fixed term agreement.

(4)   During the notice periods outlined in subclauses (1), (2) and (3) both parties are to agree on a debt repayment scheme which is aligned with terms of trade and/or usual business practice.

19. Termination on Fundamental Breach

An agreement must allow either party to terminate the contract with immediate effect for fundamental breach.

Part 4 Conduct generally

20. Non-discrimination

A processor must not discriminate against a Collective Bargaining Group or a member of a Collective Bargaining Group solely because it is a Collective Bargaining Group or he or she is a member of a Collective Bargaining Group.

21. Acceptance by processor of deliveries

(1) The processor must accept milk delivered under the milk supply agreement except as provided for in this clause.

(2) Within a timely manner consistent with industry best practice, receipt of the milk delivered the processor must provide the farmer with the results of a quality test in respect of the delivered milk.

(3) The processor may reject the milk if:

    (a) a circumstance arises in relation to the milk; and

    (b) the circumstance is specified in the agreement for the purposes of this clause as a circumstance in which the processor may reject milk.

(4) If the processor rejects the milk, the processor must, within 24 hours after the time at which the milk was rejected, advise the farmer in writing of the rejection, and the reasons for the rejection.

(5) Penalties resulting from milk test results must not be backdated prior to notification of results.

22. Time for payment

(1) The processor must give the farmer payment for milk delivered under the agreement by the 15th day of the next month from delivery.

(2) If the processor has not paid the full amount due for the delivery of milk due to the farmer within the payment period for that milk, the farmer may take one or both of the following actions:

    (a) suspend any further deliveries under the milk supply agreement until the amount owed is paid;

    (b) cancel the agreement.

(3) Before taking action under subclause (2), the farmer must give written notice to the processor of the farmer's intention to take the action.

23.   Processor must report to farmer

(1)   The processor must give the farmer a statement for the reporting period, specifying for the farmer's milk received by the processor during the reporting period:

(a)   the quality and quantity of the milk bought by the processor; and

(b)   the date or dates of the purchases; and

(c)   the price paid for the milk.

(2)   The **reporting period** is the period specified in the agreement as the period for which the processor must report to the farmer.

(3)   The statement must be given on the statement date.

(4)   The **statement date** is the date specified in the agreement as the date or interval in which a statement for a reporting period must be given.

24.   Resolving complaints and disputes

(1)   A processor must have an internal complaints handling procedure (**Complaints Procedure**) consistent with Australian Standard "Customer Satisfaction-Guidelines for complaints handling in organizations (e.g. ISO 10002:2004,MOD).

(2)   If a farmer or a processor believes that either party has not complied with its obligations under this Code they may bring a complaint under the Processor's Complaints Procedure.

(3)   A Processor is expected to have a complaints handling officer in its business to manage the process impartially and objectively and consistently with this Code.

(4)   The processor must acknowledge receipt of the complaint within 5 working days, including an indication of next steps, and has up to 60 days from acknowledgement to resolve the matter through its Complaints Procedure.

(5)   In instances where that complaint is unresolved either party can refer the complaint to the industry's independent dispute resolution process pursuant to the Dispute Resolution Rules.

(6)   Parties to this Code undertake to abide by any decision or determination arising from independent mediation or arbitration constituted in accordance with the Dispute Resolution Rules.

(7)   A maximum penalty of 300 penalty units will be imposed for every breach of the Good Faith provision (clause 5). Breaches of other provisions will be subject to the ACCC's financial penalties regime for monitoring Codes.

Part 5   Compliance, Monitoring and Reporting

25.   Record keeping

(1)   A processor must keep the original or a copy of the following records for the period mentioned in subclause (3):

(a)   a milk supply agreement entered into by the processor;

(b)   a written notice by the processor of the offer or acceptance of a milk supply agreement (see clause 6);

(c)   a written termination by the processor of a milk supply agreement (see clause 10);

(d)   a notice of the rejection of milk, and reasons for the rejection, given to a farmer under subclause 21(3);

(e)   a statement for a reporting period given to a farmer under clause 23.

(2)   A farmer must keep the original or a copy of the following records for the period mentioned in subclause (3):

(a)   a milk supply agreement entered into by the farmer;

(b)   a written notice by the farmer of the offer or acceptance of a milk supply agreement (see clause 21);

(c)   a written termination by the farmer of a milk supply agreement (see clause 23).

(3)   A record must be kept:

(a)   if the record relates to a milk supply agreement—for the period:

(i)   starting on the day on which the record is made or given; and

(ii)   ending on the last day of the period of 5 years beginning on the day the milk supply agreement expires; or

(b)   for any other record—for at least 5 years starting on the day on which the record is made.

26.   Processors must monitor and keep records of compliance

(1)   Processors will maintain the following information for reporting purposes;

(a)   Number of complaints made;

(b)   Number of complaints substantiated;

(c)   Length of time to resolve;

(d)   Number referred to dispute resolution;

(e)   Actions taken to resolve complaints;

(f)   Outcomes.

27.   Notice to Produce

(1)   The Compliance Officer or ACCC may at any time give a processor or farmer a Notice to Produce and the processor or farmer must comply with that notice.

(2)   A Notice to Produce requires the processor or farmer to produce documents or information which evidence compliance with this Code.

(3)   The Notice to Produce must be issued for the purpose of assisting the dispute resolution process.

28. Annual Code Compliance Report

    (1)   The Compliance Officer must publish an annual report as to industry compliance with the Code.

    (2)   That annual report must contain

        (a)   Aggregation of data supplied by Processors under clause 26;

        (b)   Reporting of dispute resolution throughput and actions;

        (c)   List of Processors and Farmers issued penalties;

        (d)   Any other matters of industry importance relating to the Code.

    (3)   The annual report will be provided to the industry bodies for review and improvement to the system by the end of October each year.

29. Code Review

    (1)   In consultation with industry, a review of the operation of this code will commence by the third anniversary of its commencement and be completed by an external, independent organisation.

Rationale for key ADIC dairy code clauses

ADIC code reference	ADIC clause	ACCC Dairy Inquiry (2018)	ACCC Voluntary Code Guidelines (2011)	ADIC Voluntary Code (2017)
(2) Purpose	Facilitate trade in milk between farmers and processors Ensure good practice for milk supply agreements Provide a fair and equitable dispute resolution process	Consistent with p162 which says the code should improve transparency and certainty in contracts, set minimum standards of conduct and provide a dispute resolution process	Consistent with p6 which requires a purpose statement	Consistent with Introduction
(3) Application	Milk supply and standard form agreements for all	Implements recommendation 8 which requires the code of conduct to be mandatory for all and p171 which recommends application	Consistent with p9 which requires wide coverage	
(4) Definitions	Various definitions provided		Consistent with p6 which requires a definitions section	
(5) Good faith	Obligation to deal in good faith with each other	Implements p173&174 recommendation for a good faith provision to be included	Consistent with p7 which requires rules to be specified	
(6) Standard for agreements	Processor must publish on its website Offered to a farmer by 1 June in writing with price for 1 July start Existing commitment for milk collection continues if unsigned	Implements recommendation 1 for agreements to be made in writing, recommendation 3 for all contractual documents to be provide simultaneously before the commencement of the dairy season, recommendation 7 for processors to publish pricing offers that allow farmers to make better comparisons and p173 for minimum 21 days switching period to be provided after opening price announcements		
(7) Requirement to have agreement	No milk supply unless agreement signed within 30 days			
(8) Matters for agreements	Milk supply process, quality, quantity, testing, rejection, pricing, payment and contact			Consistent with p11 in Addendum
(9) Code and agreement conflict	Code prevails over contracts			
(10) Cooling off	3 or 14 days for agreements more than 90 days			
(11) Transparency	Agreement must clearly and simply state the obligations	Implements recommendation 2 which requires contracts to be simplified		Adopted directly from (1)
(12&13) Pricing	Price actual, schedule, mechanism and/or notification process	Consistent with p52 which says processors should offer fixed and variable pricing		Adopted directly from (2)
(14) Variations	Price paid to the farmer may be subject to adjustments 30-days' notice of any downward price adjustment No retrospective downward price adjustment Farmer can terminate agreement with 30-days' written notice	Implements p53 which states that farmers should have the ability to exit the contract without penalty in the event of a price step down and p172 which recommends prohibiting retrospective step downs and adequate notice period for future step downs		Adopted directly from (4) less the 21-day cooling off period

(15) Loyalty payments	Agreement may provide for a bonus payment paid at end Pro-rata payment for fundamental breach termination	Consistent with p80 which permits loyalty payments on the provision that it is paid in addition to step ups and not forfeited if switching for acceptable reasons		Adopted directly from (5)
(16) Exclusive supply	Farmer can supply to any processor unless otherwise agreed	Consistent with p83&84 which recommends exclusive supply not be prohibited but 'first right of refusal' not be allowed		Consistent with (6) with first right of refusal removed
(17) Contract duration	Minimum 12 months unless otherwise agreed			Consistent with (7)
(18&19) Termination	30 days written termination notice 12 months written notice for farmers with no alternate supply options Immediate effect for fundamental breach			Relatively consistent with (8) and (9) although notice changed from 90 to 30 days to align with clause 6 Adopted directly from (9)
(20) Non-discrimination	Cannot discriminate against a Collective Bargaining Group	Responds to the issue that some processors refuse to negotiate with CBGs (p158)		Relatively consistent with (2-Addendum)
(21) Acceptance of deliveries	Report milk deliveries in a timely manner consistent with best practice Milk rejections reported within 24 hours with reasons and penalties	Satisfies p64 which requires early communication of price penalties		
(22) Time of payment	Paid by the 15th day of the next month from delivery Can suspend delivery and/or cancel agreement if not paid in full			
(23) Processor report	Report milk quality and quantity, purchase date and price paid			
(24) Complaints and penalties	Processor to attempt to resolve complaint within 60 days Referred to independent mediation or arbitration if unresolved Max. 300 penalty units for breach of good faith Other breaches subject to ACCC penalties regime Penalties agreed/determined via system binding	Implements recommendation 5 which requires ADIC to establish an independent body to mediate and arbitrate disputes and p170 which describes enforceable undertakings	Consistent with p9&10 which requires an effective complaints system including independent process if unresolved and p11 which requires sanctions for non-compliance	Substantial changes from (10) which only required contracts to have a dispute resolution clause
(25&26) Records	Retain written agreements, transactions and terminations for five years Processors to collect and report complaints data		Consistent with p12 which requires data collection on complaints	
(27) Notice to produce	Provide documents to assist with dispute resolution	Supports p170 which requires the ACCC to monitor compliance	Consistent with 9&10 which requires an effective complaints handling system	
(28) Compliance report	Annual report of compliance developed by 30 October		Consistent with p12 which requires an annual report	
(29) Code review	Every three years by independent external body		Consistent with p12 which requires a regular review schedule	Review period same as (11) but ADIC replaced to conduct review