Saving Australian Dairy Bill 2019

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Law and Bills Digest Section

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Date introduced: 2 December 2019
House: Senate
Portfolio: Private Senator's Bill - Senator Hanson
Commencement: the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at January 2020.
History of the Bill

The Protecting Australian Dairy Bill 2019 (the first Bill) was a Private Senator’s Bill introduced into the Senate on 16 October 2019 by Senator Hanson. A motion was moved that the first Bill be read a second time but the motion was rejected.¹ The first Bill did not proceed.

The Saving Australian Dairy Bill 2019 (the Bill) is a Private Senator’s Bill introduced into the Senate on 2 December 2019 by Senator Hanson. The terms of the Saving Australian Dairy Bill are similar, but not identical to, those in the Protecting Australian Dairy Bill.

Purpose and structure of the Bill

The purpose of the Saving Australian Dairy Bill 2019 (the Bill) is to amend the Competition and Consumer Act 2010 (CCA) to require the Australian Competition and Consumer Commission (ACCC) to establish a base or minimum price for the milk fat and protein content of milk produced on the farm in each milk region or specified area. The relevant amendments are contained in Schedule 1 to the Bill.

In addition, the Bill:

- proposes that the Productivity Minister (that is, the Treasurer)² requires the Productivity Commission to inquire into a divestiture regime which will apply to the food and grocery industry and
- requires the Minister to make regulations to prescribe a mandatory code of conduct for the food and grocery industry.

The relevant amendments are contained in Schedule 2 to the Bill.

Background

Current position

It has been reported:

The number of dairy farms has fallen from 20,000 in 1980 to fewer than 6000 today, while the nation’s share in the global dairy trade has fallen from 16 per cent in the 1990s to 6 per cent … a complex mix of issues had hurt the sector— from increased global competition, drought and soaring energy prices to ageing farmers leaving the sector and their younger counterparts finding better returns from other food items.³

All milk must be pasteurised before it can be sold for consumption to reduce potentially pathogenic bacteria to safe levels. Around 74 businesses participate in the Australian milk processing industry producing drinking milk … The industry is relatively concentrated with four processors, Fonterra Cooperative Group Ltd, Saputo Dairy Australia Pty Ltd, Parmalat Australia Pty Ltd and Lion Pty Ltd Milk expected to account for around 60 per cent of industry revenue in 2018–19.

Dairy manufacturing industries, such as butter and cheese manufacturing have similarly concentrated market shares, with the milk powder sector more highly concentrated with the top four manufacturers.

¹ Australia, Senate, Journals, 24, 11 November 2019, p. 740. The rejection of such a motion is an indication that the Senate does not wish the Bill to proceed at that particular time. Procedurally, therefore, the rejection of that motion is not an absolute rejection of the Bill and does not prevent the Senate being asked subsequently to grant the Bill a second reading. Source: Odgers’ Australian Senate Practice, pp. 311–312.
² See Administrative Arrangements Order, 29 May 2019, p. 43.
accounting for around 80 per cent of industry revenue in 2018–19.

The milk processing and dairy manufacturing industries are highly competitive. Australian milk processors compete against each other in the domestic market, with multiple brands competing at retail level...

From an export perspective, Australian dairy manufacturers are largely price takers in international markets and face strong competition from producers in other countries such as New Zealand. Competitive advantages in the milk processing and dairy manufacturing sectors mainly revolve around lower production costs, greater quality, branding, consistency of supply, product differentiation and innovation.  

The genesis of the current problems in the dairy industry has been documented in a number of reports, which are set out below.

**2009—Senate Economics Committee report**

On 10 September 2009, the Senate Economics Committee was requested to investigate the varying prices being paid to dairy farmers in different Australian states, and report on a range of matters including:

- the economic effect on the dairy industry of announced reductions in prices to be paid to producers by milk processors
- the impact of the concentration of supermarket supply contracts on milk market conditions and
- whether the CCA (then called the Trade Practices Act) is in need of review having regard to market conditions and industry sector concentration in this industry.

The Senate Economics Committee report describes the circumstances that led to the inquiry as follows:

Since its deregulation in 1999 the Australian dairy industry has evolved from a protected and regulated industry with many small farms, to one based on fewer but larger farms competing both nationally and internationally. During this period significant consolidation has also been occurring at the retail and processor levels, which are now dominated by two supermarket chains and a handful of (now mostly foreign owned) processors, placing the farmers at a competitive disadvantage. These structural changes were masked in the boom years. Indeed in 2007-08 Australia’s dairy farmers were receiving record high farm gate prices for their milk and confidence was high—there was overconfidence in some industry advisors. That changed more or less overnight with a fall in the international commodity price which was followed by processors announcing price step-downs. [emphasis added]

The Senate Economics Committee recognised that new pricing policies had arisen out of the Global Financial Crisis. The Committee made a number of recommendations, most particularly that:

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• the Government request the ACCC to use its information-gathering powers to provide more accurate estimates of the proportions of the retail price of milk that reflect both the costs and the profits, of farmers, processors and retailers

• the Government request the ACCC to undertake monitoring of the pricing practices within the dairy chain with a view to establishing whether predatory pricing or misuse of market power is occurring

• the Trade Practices Act 1974 (now known as the CCA) be amended to inhibit firms achieving market power through takeovers or abusing market power and that ‘market power’ be expressly defined so that it is less than market dominance and does not require a firm to have unfettered power to set prices and

• the ACCC conduct further study into the implications of increasing shares of the grocery market being taken by the generic products of the major supermarket chains.

Essentially then, the Senate Economics Committee recognised the need for substantial economic information-gathering and analysis, to create a benchmark against which the anecdotal evidence of dairy farmers and milk processors could be compared. This would allow sound evidence-based policy to be formed to solve sector-wide problems.

2011

By 2011 there was considerable concern within the farming community, and within the Parliament, about the low farm gate milk prices paid for the supply of drinking milk to the large supermarket chains, particularly Coles and Woolworths.

The ACCC inquired into whether the milk pricing policies of Coles supermarkets were anti-competitive, within the meaning of that term in the CCA. It found:

... there is no evidence that Coles has acted in breach of the Competition and Consumer Act 2010 (CCA).

The major impact of the reduction in milk prices since January seems to have been a reduction in the supermarkets’ profit margins on house brand milk. These price reductions have benefited consumers who purchase house brand milk...

As to the relationship between dairy farmers and milk processors, it is the case that some processors pay some farmers a lower farm gate price for milk sold as supermarket house brand milk. However on the evidence we’ve gathered over the last 6 months it seems most milk processors pay the same farm gate price to dairy farmers irrespective of whether it is intended to be sold as branded or house brand milk ...

2018—ACCC inquiry

A further inquiry by the ACCC was initiated by then Treasurer, Scott Morrison, in response to large and retrospective reductions in milk prices imposed by two major dairy processors in April 2016.

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8. Ibid., recommendation 3.
10. Ibid., recommendation 7.
11. Ibid., recommendation 8.
13. The Issues Paper, Terms of Reference and further information about the ACCC Inquiry is available on the [Dairy inquiry homepage](#).
The ACCC published the final report of its *Dairy Inquiry* in 2018.\(^{14}\) The ACCC acknowledged that some existing provisions of the CCA already operate to assist dairy farmers.

**First**, the collective bargaining provisions of the CCA can be an effective remedy to market failures caused by bargaining power imbalances, such as those identified in the dairy industry. Dairy Australia has published a *guide to collective bargaining for dairy farmers*.\(^{15}\) However, the final report also acknowledged:

... collective bargaining is less likely to be successful in the dairy industry because the perishability of raw milk and environmental laws prevent farmers from giving effect to a boycott by storing or dumping their milk. Dairy processors therefore have little incentive to engage with collective bargaining groups.\(^{16}\)

**Second**, unfair contract terms laws are an effective tool in some instances. This was the case, for instance, with Warrnambool Cheese and Butter (WCB) which was required by the ACCC to alter certain terms in its contracts with farmers that:

- allowed it to unilaterally vary the milk price and other milk supply terms, with the farmer unable to terminate the milk supply agreement early without incurring a financial penalty and
- placed restrictions on farmers selling their farm and required farmers to indemnify WCB for loss which could be avoided or mitigated by WCB.\(^{17}\)

However, the ACCC also acknowledged that the unfair contract terms laws cannot address the problem of information asymmetries that specifically apply in the dairy industry. Nor can they address the absence of dispute resolution provisions in contracts.\(^{18}\)

**Conclusions and recommendation**

The report recognised the significant imbalances in bargaining power at each level of the dairy supply chain and that market failures had resulted from the information asymmetry in farmer-milk processor relationships:

The dominant picture that has emerged is one of **significant imbalances in bargaining power** at each level of the dairy supply chain. This begins with the relationships between retailers and dairy processors, and progresses down to the relationship between processors and farmers. The ACCC has identified a range of market failures resulting from the strong bargaining power imbalance and information asymmetry in farmer-processor relationships. These features of the industry result in practices which ultimately cause inefficiencies in dairy production. Neither the existing provisions of the *Competition and Consumer Act 2010* (CCA), nor a voluntary code of conduct, sufficiently address these market failures. Therefore, the ACCC makes eight recommendations for improved transparency and allocation of risk in the commercial relationship between Australian dairy processors and farmers.\(^{19}\) \[emphasis added\]

Most significantly, the ACCC recommended that a mandatory code of conduct be introduced to address the market failures that had been identified.\(^{20}\) It is expected that it will provide dairy

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19. Ibid., p. xii.
farmers with an additional layer of protection, including by empowering the ACCC to take enforcement action. This would be in the form of civil penalties and court imposed fines.

Consistent with this recommendation, the Competition and Consumer (Industry Codes—Dairy) Regulations 2019 (the Dairy Code) was registered on 12 December 2019 and commenced on 1 January 2020.

The terms of the Dairy Code are discussed under the heading ‘Key issues and provisions—Schedule 2’ of this Bills Digest.

**End to discount milk**

In February 2019, Woolworths announced that it would stop selling $1-a-litre milk in a move to ‘help restore Australian dairy farmers’ viability’. According to the chief executive of Australian Dairy Farmers, David Inall:

> We know this isn’t the answer to all the problems in the industry—we have considerable anxiety and distress in the dairy-farming industry as we deal with rising costs of production. But this is a step in the right direction, and importantly it opens the conversation with retailers more broadly around bringing value back into the dairy case. Until the $1 milk issue was resolved, that was a difficult conversation to have.

The following month, Aldi and Coles made an equivalent move. It was reported:

Coles and German discounter Aldi, the second- and third biggest supermarket chains in the nation, will increase the price of their private-label milk from today to match the shift in pricing by Woolworths last month. The move comes as the supermarket heavyweights are under increasing pressure from politicians and the farming community to divert stronger returns to dairy farmers.

Coles announced last night it would lift the price of two-litre and three-litre milk by 20c and 30c respectively. Aldi’s increases are identical, and additional proceeds will be passed on to dairy farmers in full.

However it is likely that those dairy farmers who have borne the brunt of the artificially low prices and the devaluation of their product at the hands of the supermarkets will consider this to be too little, too late. In addition, there is no guarantee, at this point in time, that the sale of discount milk would not resume if the big supermarkets considered it was in their best interests in the future.

**Dairy outlook**

Dairy Australia has published its *Situation and Outlook Report* for October 2019. It summarises the current situation as follows:

In Australia, another warm and dry winter continued to play havoc on milk production, especially in northern regions. While Tasmania and southern Victoria bucked the trend, most regions are dry and water availability remains constrained. The Dairy Farm Monitor Project (DFMP) revealed how dry conditions in 2018–19 severely impacted farm profitability due to increased cost of production. In Victoria, costs on farm grew 20% in 2018–19 as a result of the higher price of irrigation water and feed.

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22. Ibid.
The cost of irrigated water has continued to increase in northern Victoria and southern New South Wales (NSW), and weather outlooks offer little reassurance for the balance of the year.

Grain and hay production is mixed, with southern areas faring better than northern counterparts. Prolonged drought conditions across northern Australia have seen grain crops fail and milk production contract further in Queensland and NSW. While some failed northern grain crops have been cut for hay, temporarily increasing fodder availability, feed supply is forecast to remain tight.25 [emphasis added]

Committee consideration

**Senate Standing Committee on Economics**

The Bill has been referred to the Senate Standing Committee on Economics for inquiry and report by 20 March 2020.26

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing this Bills Digest, the Senate Standing Committee for the Scrutiny of Bills had not commented on the Bill.

Financial implications

The Explanatory Memorandum to the Bill does not specify whether there would be any costs to the Commonwealth or to key stakeholders in the event that the Bill is enacted.27

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Bill contains a statement of its compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

Senator Hanson has stated that the Bill is compatible with human rights as it does not raise any human rights issues.28

**Parliamentary Joint Committee on Human Rights**

At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights had not commented on the Bill.

Key issues and provisions—Schedule 1

**Requiring a base milk price to be determined**

Item 1 of Schedule 1 to the Bill inserts proposed Part VIIB—Milk prices into the *CCA*. The purpose of the new Part VIIB is to empower the ACCC to determine a base milk price for a dairy season for a specified area.29

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26. The terms of references, submissions to the Senate Economics Committee and the Committee’s final report (when published) are available on the inquiry homepage.
28. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
29. *Competition and Consumer Act 2010* (CCA), proposed section 95ZRA.
For the purpose of new Part VIIIB, the term *dairy season* means the period that beings on 1 July in a year and ends on 30 June in the following year.\(^\text{30}\)

**Proposed section 95ZRB** of the CCA requires the ACCC to determine, by legislative instrument, a price per kilogram of raw milk solids for that season for each area specified.

In making that determination, **proposed section 95ZRC** provides that the ACCC must consider the following:

- the costs of collecting milk; processing milk; and selling dairy products
- the long-term food security of Australia
- the commercial viability of dairy farms, including small farms, in all states and territories and
- the commercial viability of milk processors in all states and territories.

**Key issue—no requirement to specify an area**

The definition of *specified area* is inserted in the CCA by **proposed section 95ZR**. The term *specified area* means an area specified in a determination made by the ACCC under **proposed subsection 95ZRB(1)**. However, there is no requirement to determine that an area is a specified area by legislative instrument. Whilst it is not fatal to the operation of the Bill, having such a requirement would add clarity to those processors who will be affected.

**Key issue—disallowable instrument**

Under the *Legislation Act 2003*, legislative instruments are disallowable by the Parliament.\(^\text{31}\) This means that the ACCC’s determination of the base price of milk in a season will be disallowable by the Parliament. The unintended consequence may be considerable uncertainty for milk processors.

It should be noted that section 17 of the *Legislation Act* provides that before a legislative instrument is made, the rule-maker must be satisfied that consultation with persons likely to be affected by the proposed instrument should be undertaken so long as the consultation is appropriate and reasonably practicable. In the event of such consultation, dairy farmers and milk processors would have the opportunity to provide input to the final determination of the base milk price by the ACCC before the relevant determination was made. Importantly though, the fact that consultation does not occur will not affect the validity or enforceability of a legislative instrument.\(^\text{32}\)

**Offence where paying less than the base milk**

A processor commits an offence under **proposed section 95ZRD** of the CCA if all of the following criteria are satisfied:

- the processor enters into an agreement for the purchase of raw milk during a dairy season
- the processor agrees to purchase the raw milk at a price (the *agreed price*) per kilogram of raw milk solids
- the raw milk was produced in a specified area and

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\(^{30}\) **CCA, proposed section 95ZR.**

\(^{31}\) *Legislation Act 2003*, sections 42 and 44. There are some exceptions to the general rule which are contained in the *Legislation (Exemptions and Other Matters) Regulation 2015.*

\(^{32}\) *Legislation Act*, section 19.
• the agreed price is lower than the base milk price for the dairy season for that specified area. The maximum penalty is 2,000 penalty units—being currently equivalent to $420,000.\textsuperscript{33}

**Key issue—constitutional limits**

**Proposed section 95ZRE** of the CCA sets out the Constitutional limits on the operation of new Part VIIIB. It will not apply in relation to a processor unless one of the following criteria is satisfied:

• the processor is a corporation
• the body from whom the processor acquires raw milk is a corporation or
• the sale of raw milk or processing of raw milk into dairy products is (or would be) in the course of, or for the purposes of, constitutional trade or commerce (within the meaning of Part IIIA of the CCA).\textsuperscript{34}

It is important to note that the CCA, and therefore the Saving Australian Dairy Act (when enacted), regulates corporations and trade across state borders. This means that the Saving Australian Dairy Act does not apply to unincorporated bodies where the processor and the dairy farmer are within the same state and both processor and the dairy farmer are unincorporated. However, if one of the parties to the transaction is incorporated, the Saving Australian Dairy Act will apply.

For instance, the final report of the ACCC’s Dairy Inquiry states ‘the industry has mostly transitioned away from cooperatives, with most major processors now multinational or listed companies’.\textsuperscript{35} As the transition away from cooperatives does not appear to be complete, the Saving Australian Dairy Act might not achieve coverage across the whole of the Australian dairy industry.

**Rationale for the Bill**

Speaking in relation to the Bill, Senator Hanson provided information about the measures in the Bill:

> Fonterra pays New Zealand dairy farmers a regulated farm-gate price which is often more than Australian dairy farmers receive, despite the fact New Zealand has lower costs of production. Regulation has helped New Zealand double its milk production since 2000 while in Australia the lack of regulation has seen milk production go backwards, with production falling 30% since 2000. This Bill provides a minimum level of regulation based on the New Zealand model ...

> The proposition that the Bill would offend the World Trade Organisation’s (WTO) Agricultural Agreement rules depends on whether we can expand our dairy industry to the point where world prices fall as a direct result. Time will tell but it seems highly unlikely given our milk production has fallen and demand in the world is rising.\textsuperscript{36}

**WTO rules**

Australia is a member of the World Trade Organisation (WTO). As a member of the WTO, Australia upholds legal trade disciplines in relation to its free trade agreements (FTAs) to ensure they support the international trading system. The Australian Government will not enter into trade

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33. **Crimes Act 1914**, section 4AA provides that a penalty unit is $210. The amount is subject to indexation.
34. **CCA**, section 44B (in Part IIIA) defines constitutional trade or commerce as any of the following: (a) trade or commerce among the States; (b) trade or commerce between Australia and places outside Australian; and (c) trade or commerce between a state and a territory, or between two territories.
agreements that fall short of the benchmarks set by the WTO.\textsuperscript{37} That being the case all of Australia’s FTAs comply with the overarching WTO rules.

Under the \textit{WTO agreements}, countries cannot normally discriminate between their trading partners — although there are some exceptions.\textsuperscript{38}

One of the WTO agreements is the \textit{Agriculture Agreement}.\textsuperscript{39} Within the Agriculture Agreement are specific rules about \textit{non-tariff measures}, such as:

- market access — various trade restrictions confronting imports
- domestic support — subsidies and other programmes, including those that raise or guarantee farm gate prices and farmers’ incomes and
- export subsidies and other methods used to make exports artificially competitive.\textsuperscript{40}

Relevant to this Bills Digest are the rules about domestic support. A key objective of those rules has been to reduce domestic support. The main complaint about policies which support domestic prices, or subsidise production in some other way, is that they encourage over-production and that this may have a distorting effect on the market for that product. Under the Agriculture Agreement, ‘measures with minimal impact on trade can be used freely’.\textsuperscript{41}

Senator Hanson is correct in her assessment that the measures in Schedule 1 to the Bill will not breach the Agriculture Agreement unless the base milk price has the effect of encouraging dairy farmers to significantly increase their milk production.

\textbf{Effect on trade with New Zealand}

According to the South Australian Dairyfarmers’ Association (SADA) the effect of the measures in Schedule 1 to the Bill may be to unintentionally:

- open up Australia to more imported milk products from New Zealand and
- undermine the benefits to the dairy industry which flow from the China Australia Free Trade Agreement (ChAFTA).\textsuperscript{42}

The SADA is concerned that setting a base price to be paid by processors to dairy farmers for their milk will drive up the price of dairy products produced in Australia — that is, there will be a consequential increase in prices to be paid by consumers. This may have the effect of encouraging an increase in imported milk products and cheese (including drinking milk) from New Zealand.\textsuperscript{43}

\textbf{Effect on ChAFTA}

The SADA states that ‘China is Australia’s largest market for dairy exports … worth $905 million in 2017 and growing’.\textsuperscript{44} Australia’s main competitors are New Zealand, the European Union and the United States.

\textsuperscript{37} Department of Foreign Affairs and Trade (DFAT), ‘\textit{About free trade agreements}’, DFAT website.
\textsuperscript{38} World Trade Organisation (WTO), ‘\textit{Principles of the trading system}’, WTO website.
\textsuperscript{39} WTO, ‘\textit{Agriculture: fairer markets for farmers}’, WTO website.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
ChAFTA is closing the competitiveness gap with New Zealand. Tariffs will be progressively eliminated across all Australian dairy products. Notably, New Zealand’s FTA with China contains restrictive safeguard measures on a wide range of dairy products, including liquid milk, cheese, butter and all milk powders (where China raises the tariff back to the higher normal rate when New Zealand exports exceed a certain volume).

By contrast, under ChAFTA, Australia only faces a discretionary safeguard on whole milk powders, with the safeguard trigger volume set well above 2017 trade levels and indexed to grow annually. For all other dairy products under ChAFTA Australia will receive unlimited preferential access. Given time the advantages of ChAFTA will tend to favour Australia ...

The effect of a protected Australian market would be to invite China to respond by restoring their tariff walls and retarding access to an increasingly lucrative market for Australian farmers.45

In effect, by creating a milk floor price the SADA is concerned that the Bill may operate to make Australian dairy products less internationally competitive and this could erode the gains made by better access to Chinese markets under ChAFTA.

Key issues and provisions—Schedule 2

Divestiture inquiry

Item 1 of Schedule 2 to the Bill inserts proposed section 46AA Misuse of market power—Productivity Commission inquiry into a divestiture regime into the CCA.

The proposed section operates as follows.

First, proposed subsection 46AA(5) introduces the term Productivity Minister which refers to the Minister administering the Productivity Commission Act 1998.46 The Productivity Commission Act establishes the Productivity Commission (PC) whose functions include holding inquiries and reporting to the Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister.

Second, proposed subsection 46AA(1) of the CCA requires the Productivity Minister to refer the following matters for inquiry the day after the commencement day of the Saving Australian Dairy Act:

• the effectiveness of the amendments to the CCA which are brought about by Schedule 1 to the Saving Australian Dairy Act

• whether a legislative regime that requires divestiture by corporations would encourage greater competition in the food and grocery industries and

• whether the legislative regime for divestiture orders provided by Part XICA (the Electricity Industry) of the CCA47 would be appropriate to apply to the food and grocery industries to encourage greater competition.

45. Ibid. See Article 2.14: Special Agricultural Safeguard Measures which provides that if during any give calendar year, the volume of imports by China from Australia of the originating product listed in Annex 2-B exceeds the trigger level as set out in that Annex, China may apply a special agricultural safeguard measure to the products in the form of an additional customs duty.

46. Currently, the relevant Minister is the Treasurer. See Administrative Arrangements Order, 29 May 2019, p. 43.

Proposed subsection 46AA(4) of the CCA has the effect that such an inquiry is deemed to be a matter relating to industry, industry development and productivity.

Third, proposed subsection 46AA(2) prescribes certain procedural requirements for the Productivity Minister when he, or she, is referring an inquiry—including but not limited to the time by which the PC must submit its report.

These requirements are consistent with the terms of subsection 11(1) of the Productivity Commission Act.

Divestiture under Part XICA

The Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019 (Energy Market Misconduct Act) sets out a complex and highly technical process for dealing with four types of conduct:

1. prohibited conduct in relation to electricity retail prices
2. prohibited conduct in relation to the electricity financial contract market
3. prohibited conduct in relation to the electricity spot market (basic) and
4. prohibited conduct in relation to the electricity spot market (aggravated).

Relevant to this Bills Digest, the Energy Market Misconduct Act provides that the Treasurer may respond to the most egregious conduct (type 4 above) by applying for a divestiture order from the Federal Court. 48 These provisions will commence on 10 June 2020.

The Court may make a divestiture order in relation to the body corporate if:

- the Court finds that the relevant conduct is type 4 conduct and
- the Court is satisfied that the order is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future. 49

The reason for the meticulous drafting of the Energy Market Misconduct Act is to avoid any allegation that a divestiture order breaches section 51(xxxi) of the Constitution which guarantees that property being acquired under Commonwealth legislation is acquired on ‘just terms’. To that end, section 153ZC of the CCA will, on commencement, provide that a divestiture provision has no effect to the extent that it would infringe section 51(xxxi) of the Constitution.

Other divestiture provisions

Section 50 of the CCA prohibits a corporation from acquiring shares of a body corporate or assets of a person if the acquisition would have the effect, or be likely to have the effect of substantially lessening competition.

The Federal Court of Australia may stop an acquisition of shares or assets which is likely to have the effect of substantially lessening competition in an Australian market. 50 The Court may also ‘undo’ such an acquisition by requiring the shares or assets to be divested if it, or the ACCC, has

49. CCA, subsection 153ZB(1) – see item 1 of Schedule 1 to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019.
50. CCA, section 80 allows for the grant of an injunction to stop a breach of a provision of Part IV.
not stopped the acquisition in time. Essentially then, the law operates at two points in time being either:

- at the time the acquisition is contemplated so that the ACCC can obtain a Court order to stop it going ahead or impose conditions on the merger or
- immediately after an unauthorised acquisition to require the corporation to divest only those assets which came into its possession as a result of that unauthorised activity so that it is returned to its previous position.

Section 81 of the CCA operates to unravel the contravening conduct to re-establish the competition that existed before the market was distorted by the acquisition.

Potential difficulties
There are two potential difficulties arising from the divestiture power in the Energy Market Misconduct Act:

- it is not clear that the powers must be used merely to establish (or re-establish) competition as with the merger provisions. In that case, the powers might be said to operate as a penalty similar to forfeiture
- there is no clear mechanism to address a circumstance where there is no buyer for the securities or assets which are the subject of a divestiture order or where the buyer is not considered a suitable buyer in accordance with the provisions of the Foreign Acquisitions and Takeovers Act 1975. This could lead to the Treasurer obtaining an order for divestiture under an Act and then making an order under a different Act that the proposed acquisition is prohibited.

When the PC conducts its inquiry it will need to consider these matters carefully given that proposed section 46AA is directed towards the food and grocery industry. Although the Explanatory Memorandum is silent on the matter, the PC may, in effect, be considering the manner and extent in which divestiture orders may be made against Coles, Woolworths and Aldi in order to ‘encourage greater competition’. This is a serious matter, and the short time limit in which the PC is to submit its report (by 1 January 2021) will very likely be insufficient for such a task.

Making a mandatory Code of Conduct
Item 2 of Schedule 2 to the Bill purports to insert proposed subsections 51AE(3) and (4) into Part IVB of the CCA. However, those subsections already exist.

Existing subsection 51AE(1) authorises the making of regulations to prescribe an industry code, and to declare the industry code to be a mandatory industry code or a voluntary industry code.

The Bill seeks by proposed subsections 51AE(3) and (4) to require the making of a mandatory industry code that relates to the food and grocery industry within six months of the commencement of the Saving Australian Dairy Act. Importantly, the Competition and Consumer

51. CCA, section 81.
54. They were inserted by item 6 of Schedule 2 to the Energy Market Misconduct Act.
(Industry Codes—Food and Grocery) Regulation 2015 (the Grocery Code), which has existed since 2015, is a voluntary, not mandatory, code.\footnote{Australian Competition and Consumer Commission (ACCC), ‘Voluntary codes’, ACCC website.}

**About the voluntary Grocery Code**

The Grocery Code governs certain conduct by the supermarkets (also referred to as retailers) and wholesalers in their dealings with suppliers, with the aim to improve standards of business conduct in the food and grocery industry. The Grocery Code was developed in response to public concerns about the conduct of retailers and wholesalers towards their suppliers.\footnote{S Mitchell, ‘Conduct-code plan a threat to retailers’, The Sydney Morning Herald, 21 October 2014, p. 23.} The Grocery Code is an industry-led initiative that was jointly developed by Coles, Woolworths and the Australian Food and Grocery Council (a supplier representative organisation).\footnote{S Mitchell, ‘Coles, Woolworths urged to sign grocery code of conduct’, The Australian Financial Review, 25 February 2015, p. 10.}

A signatory can also withdraw from the Grocery Code by writing to the ACCC.\footnote{Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Grocery Code), subsection 4(3).} Suppliers are automatically protected by the Grocery Code when dealing with a signatory. The three largest retailers, ALDI, Coles Supermarkets Australia Pty Ltd (Coles) and Woolworths Group Limited (Woolworths) have all become signatories to the Grocery Code.\footnote{S Mitchell, ‘Aldi comes to the party but Metcash still wavering’, The Age, 3 March 2015, p. 23.}

**Review of the Grocery Code**

The Grocery Code was independently reviewed in 2018.\footnote{Treasury, Independent review of the Food and Grocery Code of Conduct: final report, Treasury, Canberra, September 2018.} According to the final report of the review:

> The broad feedback from stakeholders is that the Grocery Code has contributed to a significant improvement in retailer-supplier relations over the last three years. Coles and Woolworths have taken positive action and made changes to implement the Grocery Code requirements. They have revised their Grocery Supply Agreements, employed code compliance teams, and engaged in extensive training in the Grocery Code for their buying teams.\footnote{Ibid., p. 16.}

And further:

> The Review found that generally the Grocery Code has contributed to a change in business culture within the major retailers, which has been led by senior management of both organisations. However, the Review did hear of allegations of continuing problematic behaviours occurring at the retailer’s buying level during their direct dealings with suppliers.\footnote{Ibid., p. 17.} [emphasis added]

To that end the review made 14 recommendations for improvement.\footnote{Ibid., pp. 3–5.} However it did not recommend that the Code become mandatory.

**About the Dairy Code**

As stated above, since the introduction of the Bill, the Competition and Consumer (Industry Codes—Dairy) Regulations 2019 (the Dairy Code) was registered and commenced on 1 January 2020. It is a mandatory code.
Who does it apply to?
The Dairy Code is directed towards processors which are defined in the Dairy Code as corporations that purchase, or that may purchase milk from farmers.

Who is excluded?
The Dairy Code specifically excludes a small business entity from having to comply with some of its terms. The term small business entity takes its meaning from section 328-110 of the Income Tax Assessment Act 1997. Essentially, a small business entity for an income year is an entity that carries on a business in that year and either or both of the following applies:

- the aggregated turnover of the business for the previous year was less than $10 million or
- the aggregated turnover for the current year is likely to be less than $10 million.

Requirement to act in good faith
The Dairy Code contains an overarching requirement that processors and farmers deal with one another in good faith.

Requirement to have a milk supply agreement
Milk supply agreements must comply with the Dairy Code. This means:

- a processor must not purchase milk from a farmer other than by a milk supply agreement
- if the milk supply agreement is not in writing, the processor must make a written record of the contents of the oral agreement and provide a copy to the farmer within 30 days
- if a variation to a milk supply agreement or the termination of a milk supply agreement is unwritten, the processor must make a written record of the variation or the termination and provide it to the farmer within 30 days.

Standard form agreements
The Dairy Code requires a processor to publish on its website, by 2 pm on 1 June in a calendar year (called the publication deadline), one or more standard forms of milk supply agreements that the processor is willing to enter into.

The requirements for publishing standard form agreements are as follows:

- the supply period must start on 1 July in that calendar year
- there must be a cooling-off period of 14 days

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64. The Competition and Consumer (Industry Codes—Dairy) Regulations 2019 (Dairy Code) defines milk by reference to section 3 of the Dairy Produce Act 1986 which states that milk means the lacteal fluid product of the dairy cow—that is, milk that is unprocessed.
65. Dairy Code, section 5.
67. Dairy Code, section 5.
68. Dairy Code, section 11.
69. Dairy Code, section 17.
70. Dairy Code, section 16.
71. Dairy Code, subsections 18(1) and (2).
72. Dairy Code, subsections 19(1) and (2) and subsections 20(1) and (2).
73. Dairy Code, subsections 12(1) and (2).
• a statement of the circumstances in which the processor would be willing to enter into a milk supply agreement in that form is to accompany the standard form agreement and
• a processor must not, before the end of the 12 months starting at the publication deadline, vary or remove standard forms published on its website.\(^{74}\)

However, the requirement to publish standard forms of agreement by the publication deadline does not apply to a small business entity.\(^{75}\)

**What a milk supply agreement must contain**

A milk supply agreement must, amongst other things:

• state the first and last day of the supply period\(^{76}\)
• specify the quality and quantity of the milk to be supplied\(^{77}\)
• specify the actions that the processor may take if the milk does not meet the quality and quantity requirements—including the circumstances in which the processor may reject the milk\(^{78}\)
• require the processor to give to the farmer, as soon as practicable after the processor rejects the milk, written notice setting out the reasons for the rejection and the consequences for the farmer\(^{79}\)
• specify the minimum prices under the agreement\(^{80}\)
• specify any fees payable by the farmer for any services the processor may or must perform\(^{81}\)
• provide for a 14 day cooling off period\(^{82}\) and
• set out any circumstances in which the agreement may be varied or terminated.\(^{83}\)

**Dispute resolution**

The Dairy Code requires a processor to have an internal complaint handling officer to manage complaints. In addition, parties to a milk supply agreement may choose to settle a dispute by mediation.\(^{84}\)

**Record keeping**

The Dairy Code imposes record-keeping requirements on both processors and farmers. The relevant documents must be kept for six years after the agreement ends.\(^{85}\)

\(^{74}\) Dairy Code, subsections 12(3)–(6).
\(^{75}\) Dairy Code, section 8(1).
\(^{76}\) Dairy Code, section 24.
\(^{77}\) Dairy Code, paragraph 25(a).
\(^{78}\) Dairy Code, paragraph 25(d).
\(^{79}\) Dairy Code, paragraph 25(e).
\(^{80}\) Dairy Code, section 26.
\(^{81}\) Dairy Code, section 29.
\(^{82}\) Dairy Code, section 23.
\(^{83}\) Dairy Code, sections 33 and 34.
\(^{84}\) Dairy Code, section 43.
\(^{85}\) Dairy Code, section 55.
Penalties for breach of the Code

The penalties for breach of the Dairy Code are civil penalties (that is, not criminal) and the maximum amount payable in relation to a breach is 300 penalty units. This is equivalent to $63,000. The amount of the penalty is consistent with other industry codes.

Concluding comments

There are three measures in the Bill which amends the CCA.

The first measure empowers the ACCC to establish a base or minimum price for the milk fat and protein content of milk produced on the farm in each milk region or specified area.

The second measure proposes that the Productivity Minister—being the Treasurer—will require the PC to inquire into a divestiture regime which will apply to the food and grocery industry. Whilst the requirement is consistent with the terms of the Productivity Commission Act, the time limit for producing its final report is short. As any divestiture regime is likely to apply to food and grocery retailers such as Coles and Woolworths, a longer period for consideration would be prudent.

The third measure in the Bill requires the Minister to make regulations to prescribe a mandatory code of conduct for the food and grocery industry within six months of the commencement of the Saving Australian Dairy Act. There are two matters to be noted in that regard:

• the Grocery Code has been in place since 2015. A review of the Grocery Code found that it contributed to a significant improvement in retailer-supplier relations over the last three years. Although there remained allegations of continuing problems they were not sufficient for the review to recommend that it should be made into a mandatory code. The mandatory code proposed by the Bill would require the repeal of the existing Grocery Code

• a new Dairy Code commenced on 1 January 2020. There has not been any time to evaluate the efficacy of the Dairy Code at the time of writing this Bills Digest.
Saving Australian Dairy Bill 2019

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