



## **Competition and Consumer (Industry Codes— Dairy) Regulations 2019**

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I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 12 December 2019

David Hurley  
Governor-General

By His Excellency's Command

Bridget McKenzie  
Minister for Agriculture  
for the Treasurer

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## Part 1—Preliminary

### 1 Name

This instrument is the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019*.

### 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	1 January 2020.	1 January 2020

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

### 3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.

### 4 Simplified outline of this instrument

Part 2 prescribes a mandatory industry code in relation to processors purchasing milk from farmers.

Under the Code:

- (a) processors and farmers must deal with each other in good faith (see section 11); and
- (b) processors must publish standard forms of milk supply agreements on or before each 1 June (see section 12); and
- (c) processors must only purchase milk under milk supply agreements that are in writing (or recorded in writing) and that comply with the requirements of the Code (see Subdivisions C and D of Division 2 of Part 2); and
- (d) retrospective step downs are completely prohibited and unilateral prospective step downs are permitted only in certain exceptional circumstances (see sections 27, 28 and 39); and

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- (e) processors may unilaterally vary milk supply agreements only to the extent necessary to comply with a change in the law (see section 33); and
- (f) complaints and disputes arising under or in connection with a milk supply agreement may be dealt with and resolved in accordance with the complaint handling procedure provided in the agreement or by mediation or arbitration (see Subdivision F of Division 2 of Part 2).

The Code, other than the obligation to deal in good faith, does not apply to processors that are small business entities (see section 8).

Note: Part VIIA of the Act empowers the Commission to monitor prices in those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.

## 5 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) Commission;
- (b) corporation;
- (c) trade or commerce.

In this instrument:

*Act* means the *Competition and Consumer Act 2010*.

*Agriculture Minister* means the Minister administering the *Dairy Produce Act 1986*.

*arbitration adviser* means the person appointed under subsection 45(1).

*arbitrator* means a person included in a list compiled under subsection 45(2).

*both exclusive supply and a maximum volume*: see subsection 31(2).

*both exclusive supply and tier pricing*: see subsection 32(2).

*Code* means the industry code set out in Division 2 of Part 2.

*cooling-off period*: see subsection 23(2).

*dispute* means a dispute between the parties to a milk supply agreement in relation to a matter arising under or in connection with the agreement.

Note: An example of a matter arising in connection with a milk supply agreement is the termination of the agreement.

*exclusive supply agreement* means a milk supply agreement between a farmer and a processor that prohibits the farmer supplying milk to another processor.

*farmer* means a person that produces, or that may produce, milk.

*Food and Grocery Code of Conduct* means Schedule 1 to the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015*.

*industry code* has the meaning given by subsection 51ACA(1) of the Act.

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**loyalty payment**, in relation to a milk supply agreement between a processor and a farmer, means an amount payable to the farmer under the agreement because the agreement is not terminated before the end of the supply period of the agreement (whether or not the agreement describes the amount as a loyalty payment, and whether or not the payment is subject to other conditions).

**mediation adviser** means the person appointed under subsection 44(1).

**mediator** means a person included in a list compiled under subsection 44(2).

**milk** means milk (within the meaning of the *Dairy Produce Act 1986*) that is unprocessed.

**milk supply agreement** means a contract between a processor and a farmer for the supply of milk.

**minimum price** under a milk supply agreement, for a period, means the lowest price payable under the agreement for milk supplied during the period, disregarding:

- (a) loyalty payments; and
- (b) any possibility of a temporary reduction in a price in accordance with section 28; and
- (c) any fees payable by the farmer under the agreement.

**non-exclusive supply agreement** means a milk supply agreement that is not an exclusive supply agreement.

**processor** means a corporation that purchases, or that may purchase, milk from farmers, whether or not the corporation processes the milk.

Example: Some cooperatives and milk brokers purchase milk from farmers but don't process milk.

Note: For the extended application of this instrument to processors who are not corporations, see section 6 of the Act.

**publication deadline**: see subsection 12(1).

**purchase** means purchase in trade or commerce.

**retrospective step down**: see subsection 27(2).

**small business entity**: a person is a **small business entity** for a financial year if the person is a small business entity (within the meaning of the *Income Tax Assessment Act 1997*) for the income year (within the meaning of that Act) corresponding to the financial year.

**supply** means supply (within the meaning of the Act) in trade or commerce.

**supply period**: see section 24.

**unilateral prospective step down**: see subsection 28(2).

**varying** a milk supply agreement has a meaning affected by subsection 36(5).

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### 6 Reviews

- (1) The Agriculture Minister must ensure that 2 reviews of this instrument are undertaken.

#### *Commencement of reviews*

- (2) The first review must commence on or after 1 January 2021.
- (3) The second review must commence on or after 1 January 2023.

#### *Conduct of reviews*

- (4) Each review must assess the role, impact and operation of this instrument.
- (5) Without limiting subsection (4), the first review must consider the role, impact and operation of the Code in relation to milk supply agreements entered into before 1 January 2020.

Note: For the application of the Code to milk supply agreements entered into before 1 January 2020, see section 57.

- (6) Each review must include consultation with stakeholders in the dairy industry, including the following:
  - (a) farmers;
  - (b) processors;
  - (c) industry representative bodies;
  - (d) government agencies;
  - (e) consumer organisations.

#### *Reports of reviews*

- (7) The Agriculture Minister must ensure that a written report of each review is prepared.
- (8) The Agriculture Minister must, on or before 31 December 2021, give a copy of the report of the first review to the Minister administering section 51AE of the Act.
- (9) The Agriculture Minister must, on or before 31 December 2023, give a copy of the report of the second review to the Minister administering section 51AE of the Act.

## **Part 2—Dairy industry code**

### **Division 1—Introduction**

#### **7 Mandatory industry code in Division 2**

For the purposes of section 51AE of the Act, the industry code set out in Division 2 of this Part:

- (a) is prescribed for the purposes of Part IVB of the Act; and
- (b) is declared to be a mandatory industry code.

#### **8 Exception for processors that are small business entities**

- (1) If a processor is a small business entity for a financial year:
  - (a) section 12 (requirement to publish standard forms of agreements) does not apply to the processor in relation to the publication deadline in the financial year; and
  - (b) Subdivision B of Division 2 (standard forms of agreements) (other than section 12) does not apply in relation to the processor in the financial year; and
  - (c) section 16 (requirement to have milk supply agreements) does not apply in relation to the processor in the financial year; and
  - (d) Subdivisions C to G of Division 2 (other provisions relating to milk supply agreements) (other than section 16) do not apply in relation to a milk supply agreement that the processor enters into in the financial year.

##### *Extensions of milk supply agreements*

- (2) If:
  - (a) a milk supply agreement is varied at a particular time; and
  - (b) the variation postpones the end of the supply period of the agreement;this section applies in relation to the agreement from that particular time as if it were a new agreement entered into at that particular time.

#### **9 Obligations of farmers**

A reference in subsection 11(2), 17(3), 40(2) or (4) or 55(2) to a farmer is a reference to a farmer that is a corporation.

Note: For the extended application of those provisions to farmers who are not corporations, see section 6 of the Act.

#### **10 Interaction with Food and Grocery Code of Conduct**

The Food and Grocery Code of Conduct does not apply to the extent that it conflicts with Division 2 of this Part.

## Division 2—Dairy industry code

### Subdivision A—Processors and farmers must deal in good faith

#### 11 Obligation to deal in good faith

- (1) A processor must at all times deal with farmers in good faith, within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk.

Civil penalty:

- (a) if the processor is a small business entity for the financial year in which the contravention occurs—100 penalty units; or  
(b) otherwise—300 penalty units.

- (2) A farmer must at all times deal with processors in good faith, within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk.

Civil penalty: 100 penalty units.

- (3) Without limiting subsections (1) and (2), those subsections apply in relation to the following:

- (a) negotiating or entering into a milk supply agreement;  
(b) exercising rights, or performing obligations, under a milk supply agreement;  
(c) dealing with or resolving complaints or disputes arising under or in connection with a milk supply agreement;  
(d) varying or terminating a milk supply agreement.

- (4) In determining whether a processor or farmer (the *first party*) has acted in good faith in dealing with a farmer or processor (the *other party*), the following may be taken into account:

- (a) whether the first party has acted honestly;  
(b) whether the first party has tried to cooperate with the other party to achieve the purposes of any relevant milk supply agreement;  
(c) whether the first party has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;  
(d) whether the first party has not acted in a way that constitutes retribution against the other party for past complaints and disputes;  
(e) whether the first party's relationship with the other party has been conducted without duress;  
(f) whether the first party's relationship with the other party has been conducted in recognition of the need for certainty regarding the risks and costs of supplying or purchasing milk;  
(g) whether the first party has undermined, or denied the other party, a benefit of any relevant milk supply agreement;

- (h) whether the first party has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the other party;
- (i) whether, in dealing with the first party, the other party has acted in good faith.

(5) Subsection (4) does not limit subsections (1) and (2).

## **Subdivision B—Processors must publish standard forms of milk supply agreements**

### **12 Requirement to publish standard forms of agreements each 1 June**

#### *Publication deadline*

- (1) This section applies in relation to a corporation that, at 2 pm (by legal time in the Australian Capital Territory) on 1 June in a financial year (the **publication deadline**):
- (a) is a processor; and
  - (b) intends to purchase milk during the next financial year.

#### *Requirement to publish standard forms of agreements*

- (2) The processor must, at or before the publication deadline, publish on its website in accordance with subsections (3) to (5):
- (a) one or more standard forms of milk supply agreements; and
  - (b) for each standard form the processor publishes under paragraph (a)—a statement of the circumstances in which the processor would enter into a milk supply agreement in that form.

Note: The circumstances may, for example, relate to:

- (a) the region in which the supply occurs; or
- (b) the quantity of milk to be supplied; or
- (c) the supply period; or
- (d) whether the processor has already entered into sufficient milk supply agreements to meet the processor's demand for milk.

Civil penalty: 300 penalty units.

- (3) The processor must publish as many standard forms and statements under subsection (2) as are necessary to ensure that the published statements cover the circumstances in which the processor intends to purchase milk in the financial year mentioned in paragraph (1)(b).
- (4) Each standard form published under paragraph (2)(a) must be a standard form of a milk supply agreement that:
- (a) has a supply period starting during the financial year mentioned in paragraph (1)(b); and
  - (b) provides for a cooling-off period of 14 days; and
  - (c) subject to subsection (5), is a non-exclusive supply agreement.

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- (5) If, in particular circumstances to which subsection (3) applies, the processor would enter into an exclusive supply agreement, the processor must publish under subsection (2):
- (a) a standard form of an exclusive supply agreement the processor would enter into in those particular circumstances; and
  - (b) a standard form of a non-exclusive supply agreement the processor would enter into in those particular circumstances.
- (6) The processor must not, after the publication deadline and before the end of the financial year mentioned in paragraph (1)(b), vary or remove from its website a standard form or statement published under subsection (2).

Civil penalty: 300 penalty units.

*Section does not prevent publication of other standard forms of agreements*

- (7) This section does not prevent a processor publishing, at any time, a standard form of a milk supply agreement that is not required by subsection (2).

### 13 Published standard forms of agreements must comply with Code

A processor must not publish on the processor's website a standard form of a milk supply agreement (whether or not as required by section 12) if, were the processor to enter into a written milk supply agreement in that form, the agreement would not comply with this Code.

Note: The standard form must specify all of the matters that this Code requires to be specified in, or provided for by, a written milk supply agreement, including a minimum price or minimum prices (see section 26).

Civil penalty: 300 penalty units.

### 14 Published standard forms of agreements must include statements of justifications for minimum prices

A processor contravenes this section if:

- (a) the processor publishes a standard form of a milk supply agreement on the processor's website (whether or not as required by section 12); and
- (b) the standard form does not include a statement of the processor's justification for each minimum price specified in the standard form.

Civil penalty: 300 penalty units.

### 15 Published standard forms must be genuine

- (1) A processor contravenes this subsection if:
- (a) the processor publishes on the processor's website (whether or not as required by section 12):
    - (i) a standard form of a milk supply agreement; and
    - (ii) a statement that the processor would enter into a milk supply agreement in that form in specified circumstances; and
  - (b) while the standard form remains on the website, a farmer offers to enter into a milk supply agreement with the processor in that form; and

- (c) the specified circumstances exist; and
- (d) the processor refuses to enter into a milk supply agreement with the farmer in that form.

Civil penalty: 300 penalty units.

- (2) To avoid doubt, this Subdivision does not prevent a processor from entering into a milk supply agreement that is not in a standard form published on the processor's website.

### **Subdivision C—Requirements for milk supply agreements**

#### **16 Requirement to have milk supply agreements**

A processor must not purchase milk from a farmer other than under a milk supply agreement.

Civil penalty: 300 penalty units.

#### **17 Requirement for milk supply agreements to comply with Code**

- (1) A processor must not enter into a milk supply agreement that does not comply with this Code.

Civil penalty: 300 penalty units.

- (2) A processor that is a party to a milk supply agreement contravenes this subsection if:

- (a) either:
  - (i) the processor unilaterally varies the agreement; or
  - (ii) all the parties to the agreement agree to vary the agreement; and
- (b) following the variation, the agreement does not comply with this Code.

Civil penalty: 300 penalty units.

- (3) A farmer that is a party to a milk supply agreement contravenes this subsection if:

- (a) the farmer unilaterally varies the agreement; and
- (b) following the variation, the agreement does not comply with this Code.

Civil penalty: 100 penalty units.

#### **18 Written records of unwritten milk supply agreements**

##### *Scope of this section*

- (1) This section applies if:
  - (a) a processor enters into a milk supply agreement with a farmer; and
  - (b) the agreement is not in writing.

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### *Requirement for processor to give farmer written record of contents of agreement*

- (2) The processor must, no later than 30 days after entering into the milk supply agreement:
- (a) make a written record of the contents of the agreement in accordance with subsections (3) and (4); and
  - (b) give a copy of the record to the farmer; and
  - (c) if the supply period of the agreement is 90 days or longer—make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is a complete and accurate record of the contents of the agreement.

Civil penalty: 300 penalty units.

- (3) Without limiting paragraph (2)(a), the record must:
- (a) cover all of the matters dealt with by Subdivision D and subsections 43(1) and (3); and
  - (b) in particular, record all of the matters that Subdivision D and subsections 43(1) and (3) require to be specified in, or provided for by, a written milk supply agreement.

Civil penalty: 300 penalty units.

- (4) The record must:
- (a) either:
    - (i) be in plain English; or
    - (ii) contain a plain English overview of the agreement; and
  - (b) consist of a single document.

## **19 Written records of unwritten variations of milk supply agreements**

### *Scope of this section*

- (1) This section applies if:
- (a) a milk supply agreement between a processor and a farmer is varied; and
  - (b) the variation is not in writing.

### *Requirement for processor to give farmer written record of variation*

- (2) The processor must, no later than 30 days after the variation occurs:
- (a) make a written record of the variation in accordance with subsection (3); and
  - (b) give a copy of the record to the farmer; and
  - (c) if the supply period of the agreement is 90 days or longer—make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is a complete and accurate record of the variation.

Civil penalty: 300 penalty units.

- (3) The record must:

- (a) either:
  - (i) be in plain English; or
  - (ii) contain a plain English overview of the variation; and
- (b) consist of a single document.

## **20 Written records of unwritten terminations of milk supply agreements**

### *Scope of this section*

- (1) This section applies if:
  - (a) a milk supply agreement between a processor and a farmer is terminated; and
  - (b) the termination is not in writing.

### *Requirement for processor to give farmer written record of termination*

- (2) The processor must, no later than 30 days after the termination occurs:
  - (a) make a written record of the termination; and
  - (b) give a copy of the record to the farmer; and
  - (c) if the supply period of the agreement was 90 days or longer—make all reasonable efforts to obtain from the farmer a written acknowledgement that the record is a complete and accurate record of the termination.

Civil penalty: 300 penalty units.

## **Subdivision D—Contents of milk supply agreements**

### **21 Purpose of this Subdivision**

For the purposes of Subdivision C, this Subdivision sets out requirements for a milk supply agreement between a processor and a farmer.

### **22 Written milk supply agreements**

If the milk supply agreement is in writing, it must:

- (a) either:
  - (i) be in plain English; or
  - (ii) contain a plain English overview of the agreement; and
- (b) consist of a single document.

Note: For agreements that are not in writing, see section 18.

### **23 Cooling-off period**

#### *Milk supply agreements must provide for cooling-off periods*

- (1) Subject to subsection (3), the milk supply agreement must provide for a cooling-off period that ends 14 days after:
  - (a) if the agreement is in writing—the day the milk supply agreement is entered into; or

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- (b) otherwise—the day the processor gives to the farmer a written record of the contents of the agreement under section 18.
- (2) A **cooling-off period** is a period:
  - (a) that starts on the day the milk supply agreement is entered into; and
  - (b) during which the farmer may terminate the agreement with immediate effect without incurring any liability to the processor.

### *Cooling-off periods not required for variations of milk supply agreements*

- (3) To avoid doubt, this section does not require the milk supply agreement to allow the farmer to terminate the agreement in response to a variation of the agreement.

## 24 Supply periods

- (1) The milk supply agreement must specify the first and (subject to subsection (3)) last days of the period (the **supply period**) during which milk is to be supplied under the agreement. The agreement must identify the last day as a particular calendar date (for example, 30 June 2023).
- (2) To avoid doubt, the supply period of the milk supply agreement must have a definite end date (subject to subsection (3)).

Note: In certain circumstances, the milk supply agreement must allow the farmer to postpone the end of the supply period by 12 months: see section 36.

### *Cooperatives may enter into open-ended milk supply agreements with their members*

- (3) If:
  - (a) the processor is a cooperative; and
  - (b) the farmer is a member of the cooperative;then:
  - (c) despite subsections (1) and (2), the milk supply agreement may specify that milk is to be supplied under the agreement until the agreement is terminated or the farmer ceases to be a member of the cooperative; and
  - (d) if the agreement does so—for the purposes of Subdivision C, the supply period of the agreement is taken to be 90 days or longer.

## 25 Quality and quantity of milk

The milk supply agreement must do the following in relation to milk supplied under the agreement:

- (a) specify the processor's requirements in relation to the quality and quantity of milk supplied;
- (b) specify:
  - (i) the sampling procedures; and
  - (ii) volume accuracy assurances;that the processor may use in relation to the milk;
- (c) require the processor to give to the farmer, as soon as practicable after the processor tests the milk, written notice of the results of the test;

- (d) specify the actions that the processor may take if the milk does not meet the requirements specified under paragraph (a), including the circumstances in which the processor may reject the milk;
- (e) require the processor to give to the farmer, as soon as practicable after the processor rejects the milk, written notice of the rejection, including:
  - (i) the reasons for the rejection; and
  - (ii) the consequences for the farmer of the rejection (including any fees payable by the farmer for matters arising as a result of the rejection);
- (f) require the processor to give to the farmer at specified times written statements about the milk;
- (g) specify the information to be included in those statements.

## 26 Minimum price

The milk supply agreement must clearly specify the minimum price or prices under the agreement, by specifying:

- (a) a single minimum price that applies throughout the supply period of the agreement; or
- (b) a schedule of yearly minimum prices; or
- (c) a schedule of monthly minimum prices.

## 27 Minimum price—retrospective step downs prohibited in all circumstances

- (1) The milk supply agreement must not allow retrospective step downs.
- (2) A *retrospective step down* is a variation of the milk supply agreement that reduces a minimum price for milk supplied under the agreement before the variation occurs.

## 28 Minimum price—unilateral prospective step downs prohibited except in limited exceptional circumstances

- (1) The milk supply agreement:
  - (a) must not allow for a unilateral prospective step down other than as mentioned in paragraph (b); and
  - (b) subject to subsection 33(4), must allow the processor to unilaterally vary the agreement in exceptional circumstances to which subsection (3) applies if:
    - (i) the variation is a unilateral prospective step down; and
    - (ii) the requirements of subsection (4) of this section are satisfied; and
    - (iii) the step down does not reduce a minimum price for milk supplied after the expected end of the exceptional circumstances.

### *Meaning of unilateral prospective step down*

- (2) A *unilateral prospective step down* is a unilateral variation of the milk supply agreement by the processor that reduces a minimum price for milk supplied under the agreement after the variation occurs.

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*Exceptional circumstances*

- (3) For the purposes of paragraph (1)(b), this subsection applies to exceptional circumstances that:
- (a) are temporary; and
  - (b) involve an extraordinary event (including an emergency or change in market conditions) that:
    - (i) occurs outside of Australia; and
    - (ii) has a highly significant effect on supply, demand or costs in the dairy industry; and
    - (iii) is not caused by decisions made by processors.

Example 1: A foreign country unexpectedly restricts the importation of Australian dairy products.

Example 2: There is a trade shock involving one of Australia's major trading partners.

*Other requirements relating to unilateral prospective step downs*

- (4) For the purposes of subparagraph (1)(b)(ii), the following are the requirements:
- (a) either:
    - (i) the processor has taken or will take all reasonable steps to prevent or limit the impact of the exceptional circumstances on the processor; or
    - (ii) there are no such steps the processor can take;
  - (b) because of the exceptional circumstances, the unilateral prospective step down is unavoidable;
  - (c) no later than 30 days before the step down occurs, the processor gives the farmer and the Commission written notice of the following:
    - (i) the step down;
    - (ii) the exceptional circumstances;
    - (iii) the reasonable steps (if any) the processor has taken or will take as mentioned in paragraph (a);
    - (iv) why the step down is unavoidable;
    - (v) the period to which the step down applies.
- (5) The milk supply agreement must:
- (a) allow the farmer to terminate the agreement, within 21 days after receiving notice of the unilateral prospective step down under paragraph (4)(c), with effect from the day the step down occurs; and
  - (b) allow the farmer to rescind a termination under paragraph (a) before the end of those 21 days.
- (6) Subsection (5) does not prevent the milk supply agreement from allowing the farmer to terminate the agreement with effect earlier than the end of the 21 days mentioned in that subsection.
- (7) To avoid doubt, the milk supply agreement must not allow a minimum price to be further reduced as a result of the farmer rescinding a termination as mentioned in paragraph (5)(b).
- (8) Paragraph (4)(c) does not limit subsections 33(5) to (7) (processes for unilateral variations).

## **29 Fees for services**

- (1) The milk supply agreement must:
  - (a) specify the services (if any) the processor may or must perform for the farmer in relation to milk supplied under the agreement; and
  - (b) state whether fees are payable by the farmer for the services; and
  - (c) if fees are payable—clearly specify the amounts of the fees for the first 12 months (the *first year*) of the supply period of the agreement (or for the whole of the supply period, if the supply period is less than 12 months), in accordance with subsection (3).
- (2) If fees are payable and the supply period is longer than 12 months, the milk supply agreement must:
  - (a) specify how the fees for periods occurring after the first year will be set; and
  - (b) for each consecutive period of 12 months after the first year (including any extension of the supply period if allowed by the agreement), and any final period if the supply period does not consist of a whole number of 12-month periods:
    - (i) require the processor to give to the farmer a written notice clearly specifying the fees for that period, in accordance with subsection (3); and
    - (ii) specify the time by which the notice must be given.
- (3) For the purposes of paragraph (1)(c) or (2)(b), the fees for a service for a period must be specified by specifying either:
  - (a) a single fee for the service that applies throughout the period; or
  - (b) a schedule of monthly fees for that period.

## **30 Transfer of ownership**

The milk supply agreement must specify when the processor becomes the owner of milk supplied under the agreement.

## **31 Combining exclusive supply and a maximum volume prohibited**

- (1) The milk supply agreement must not provide for both exclusive supply and a maximum volume.
- (2) The milk supply agreement provides for *both exclusive supply and a maximum volume* if:
  - (a) the agreement is an exclusive supply agreement; and
  - (b) the agreement specifies a maximum amount of milk that the farmer may supply to the processor under the agreement during a period.

## **32 Combining exclusive supply and tier pricing prohibited**

- (1) The milk supply agreement must not provide for both exclusive supply and tier pricing.

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- (2) The milk supply agreement provides for ***both exclusive supply and tier pricing*** if:
- (a) the agreement is an exclusive supply agreement; and
  - (b) under the agreement, the minimum price payable for a specified amount of milk supplied during a period is greater than the minimum price for milk supplied in excess of that amount.

### 33 Varying milk supply agreements unilaterally

#### *Unilateral variations by farmers*

- (1) The milk supply agreement must specify the circumstances (if any) in which the farmer may unilaterally vary the agreement.

#### *Unilateral variations by processors*

- (2) The milk supply agreement:
- (a) subject to section 28, must not allow the processor to unilaterally vary the agreement other than as mentioned in paragraph (b) of this subsection; and
  - (b) subject to subsections (3) and (4), must allow the processor, if there is a change in a Commonwealth, State or Territory law, to unilaterally vary the agreement:
    - (i) to the extent necessary to comply with the changed law; but
    - (ii) without reducing a minimum price under the agreement.

Note: This section applies to unilateral variations and does not affect the power of the processor and farmer to agree to vary the milk supply agreement, such as to increase a minimum price.

- (3) To avoid doubt, paragraph (2)(b) does not require or permit the agreement to allow a retrospective step down.

Note 1: Retrospective step downs are prohibited: see section 27.

Note 2: For the circumstances in which the milk supply agreement may allow for unilateral prospective step downs, see section 28.

#### *Varied agreements must comply with this Code*

- (4) The milk supply agreement must not allow the processor or farmer to unilaterally vary the agreement if, following the variation, the agreement would not comply with this Code.

#### *Processes for unilateral variations*

- (5) The milk supply agreement must specify the processes by which the agreement may be unilaterally varied.
- (6) The milk supply agreement must require a unilateral variation of the agreement to be in writing.
- (7) The milk supply agreement must require a party (the ***first party***) to the agreement to give to the other party, as soon as practicable after the first party unilaterally varies the agreement:
- (a) the variation; and

- (b) written notice of:
  - (i) the reason for the variation; and
  - (ii) the day the variation takes effect.

Note: See also section 40.

### **34 Terminating milk supply agreements unilaterally**

#### *Unilateral terminations by farmers*

- (1) The milk supply agreement must specify the circumstances (if any) in which the farmer may unilaterally terminate the agreement.

#### *Unilateral terminations by processors*

- (2) The milk supply agreement must specify the circumstances (if any) in which the processor may unilaterally terminate the agreement.
- (3) A circumstance specified under subsection (2) must involve a material breach of the milk supply agreement by the farmer.

#### *Processes for unilateral terminations*

- (4) The milk supply agreement must specify the processes (if any) by which the agreement may be unilaterally terminated.
- (5) The milk supply agreement must require a unilateral termination of the agreement to be in writing.
- (6) If a party (the **first party**) to the milk supply agreement may unilaterally terminate the agreement, the agreement must require the first party to give to the other party, as soon as practicable after the first party unilaterally terminates the agreement:
  - (a) the termination; and
  - (b) written notice of:
    - (i) the reason for the termination; and
    - (ii) the day the termination takes effect.

Note: For the effect of a termination, see section 41.

### **35 Loyalty payments**

- (1) This section applies if the milk supply agreement provides for a loyalty payment to the farmer.
- (2) The milk supply agreement must not impose on the loyalty payment a condition that the farmer:
  - (a) supply milk to the processor after the agreement ends; or
  - (b) agree to vary the agreement to postpone the end of the supply period; or
  - (c) enter into a new milk supply agreement with the processor.
- (3) The milk supply agreement must provide that, if the agreement is terminated before the end of its supply period, the farmer is entitled to a portion of the loyalty payment, calculated on the basis of the proportion of the supply period

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completed before the termination, (subject to any other conditions to which the loyalty payment is subject).

- (4) Subsection (3) does not apply if the milk supply agreement is terminated in circumstances involving a material breach of the agreement by the farmer.

### 36 Extensions

- (1) This section applies if the supply period of the milk supply agreement is longer than 3 years.
- (2) The milk supply agreement must allow the farmer to give to the processor a written notice postponing the end of the supply period by 12 months.
- (3) The notice must be given:
  - (a) no earlier than 30 days before the end of the supply period; and
  - (b) no later than 7 days before the end of the supply period.
- (4) This section does not require the milk supply agreement to allow the farmer to postpone the end of the supply period more than once.
- (5) A reference in this instrument to varying a milk supply agreement is taken not to include a reference to giving a notice in accordance with subsection (2).

### Subdivision E—Other matters relating to milk supply agreements

#### 37 Other terms

A milk supply agreement may include terms in addition to those required by this Code if the terms are:

- (a) lawful; and
- (b) not inconsistent with this Code.

Example: A term of a milk supply agreement is inconsistent with this Code if including the term contravenes the obligation to deal in good faith under section 11.

#### 38 Emerging trading and marketing arrangements

To avoid doubt, the use of a particular type of trading or marketing arrangement does not contravene this Code merely because that type of arrangement is new, emerging or not widely used in the dairy industry.

#### 39 Penalties for retrospective step downs

A processor that is a party to a milk supply agreement contravenes this section if there is a retrospective step down of a minimum price payable under the agreement.

Civil penalty:           300 penalty units.

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## 40 Penalties relating to unilateral variations and terminations

### *Written variations*

- (1) A processor contravenes this subsection if:
- (a) the processor is a party to a milk supply agreement; and
  - (b) either:
    - (i) the processor unilaterally varies the agreement; or
    - (ii) all the parties agree to vary the agreement; and
  - (c) the variation is in writing; and
  - (d) the variation does not comply with the following requirements:
    - (i) the variation must be in plain English or contain a plain English overview of the variation;
    - (ii) the variation must consist of a single document.

Civil penalty: 300 penalty units.

- (2) A farmer contravenes this subsection if:
- (a) the farmer is a party to a milk supply agreement; and
  - (b) the farmer unilaterally varies the agreement; and
  - (c) the variation is in writing; and
  - (d) the variation does not comply with the following requirements:
    - (i) the variation must be in plain English or contain a plain English overview of the variation;
    - (ii) the variation must consist of a single document.

Civil penalty: 100 penalty units.

### *Variations and terminations other than in accordance with agreement*

- (3) A processor that is a party to a milk supply agreement must not vary or terminate the agreement unilaterally other than as provided for by the agreement.

Note: For variations and terminations, see sections 27, 28, 33 and 34.

Civil penalty: 300 penalty units.

- (4) A farmer who is a party to a milk supply agreement must not vary or terminate the agreement unilaterally other than as provided for by the agreement.

Note: For variations and terminations, see sections 27, 28, 33 and 34.

Civil penalty: 100 penalty units.

## 41 Application of termination of agreement

To avoid doubt, if a milk supply agreement is terminated (including during a cooling-off period, or in response to a unilateral prospective step down as mentioned in paragraph 28(5)(a)), the agreement continues to apply to milk supplied under the agreement before the termination takes effect.

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### **42 Penalties for withholding loyalty payments**

- (1) This section applies in relation to a milk supply agreement between a processor and a farmer that provides for a loyalty payment to the farmer.
  - (2) The processor contravenes this subsection if:
    - (a) the agreement is terminated before the end of the agreement's supply period; and
    - (b) the processor does not pay to the farmer a portion of the loyalty payment, calculated on the basis of the proportion of the supply period completed before the termination, (and any conditions to which the loyalty payment is subject are satisfied, other than conditions prohibited by section 35).
- Civil penalty:           300 penalty units.
- (3) Subsection (2) does not apply if the milk supply agreement is terminated in circumstances involving a material breach of the agreement by the farmer.

### **Subdivision F—Complaints and disputes**

#### **43 Milk supply agreement must provide for complaint handling procedure and mediation and may provide for arbitration**

##### *Internal complaint handling procedure*

- (1) A milk supply agreement must provide for a complaint handling procedure for dealing with and resolving complaints by a party to the agreement about matters arising under or in connection with the agreement.

Note:           An example of a matter arising in connection with a milk supply agreement is the termination of the agreement.

##### *Internal complaint handling officer*

- (2) A processor who is a party to a milk supply agreement must have a complaint handling officer to manage complaints in accordance with the complaint handling procedure provided in the agreement.

##### *Mediation*

- (3) A milk supply agreement must provide for mediation as a means for resolving disputes between parties to the agreement.

##### *Arbitration*

- (4) A milk supply agreement may provide for arbitration as a means for resolving disputes between parties to the agreement.

#### **44 Mediation adviser and mediators**

- (1) The Agriculture Minister must appoint a mediation adviser for the purposes of this Subdivision.

- (2) The mediation adviser must compile a list of persons who are to be mediators for the purposes of this Subdivision.

#### **45 Arbitration adviser and arbitrators**

- (1) The Agriculture Minister must appoint an arbitration adviser for the purposes of this Subdivision.
- (2) The arbitration adviser must compile a list of persons who are to be arbitrators for the purposes of this Subdivision.

#### **46 Resolving complaints and disputes—general**

- (1) If a party to a milk supply agreement has a complaint or there is a dispute in relation to a matter arising under or in connection with the agreement, the matter may be dealt with or resolved:
  - (a) in accordance with the complaint handling procedure provided in the agreement; or
  - (b) by mediation; or
  - (c) subject to subsection (2), by arbitration.
- (2) The matter must not be resolved by arbitration unless:
  - (a) the milk supply agreement provides for arbitration as a means for resolving disputes between parties to the agreement; or
  - (b) all parties to the agreement have agreed in another written document to use arbitration to resolve the matter.
- (3) If the matter is the termination of a milk supply agreement, this Subdivision applies as if a reference to a party to a milk supply agreement included a reference to a person who was a party to the agreement before it was terminated.

#### **47 Dealing with complaints in accordance with internal complaint handling procedure**

- (1) The procedure set out in this section applies if a party to a milk supply agreement (the **complainant**) wishes to have a complaint in relation to a matter arising under or in connection with the agreement dealt with in accordance with the complaint handling procedure provided in the agreement.
- (2) The complainant must notify the other party to the agreement (the **respondent**), in writing, of the following:
  - (a) the nature of the complaint;
  - (b) that the complainant wishes the complaint to be dealt with in accordance with the complaint handling procedure provided in the milk supply agreement;
  - (c) the outcome the complainant wants.
- (3) Within 5 working days after receiving notice of the complaint under subsection (2), the respondent must give a written acknowledgement to the complainant stating:
  - (a) that notice of the complaint has been received; and

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- (b) the steps to be taken to deal with the complaint.
- (4) The complainant and the respondent must attempt to resolve the complaint in accordance with the complaint handling procedure provided in the milk supply agreement before taking action to resolve the complaint by mediation or arbitration.
- (5) If the complaint is not resolved in accordance with the complaint handling procedure provided in the milk supply agreement within 60 days after the acknowledgement was given to the complainant under subsection (3):
  - (a) either party may take action to have the complaint resolved by mediation;  
or
  - (b) the parties to the agreement may agree that the complaint is to be resolved by arbitration.
- (6) The complainant may, at any time, withdraw the complaint by notice in writing to the respondent.

### 48 Mediation

- (1) The procedure set out in this section applies if a party to a milk supply agreement wishes to have a dispute resolved by mediation in accordance with this Subdivision.

#### *Appointment of mediator*

- (2) The party must request the mediation adviser to appoint a mediator for the dispute.
- (3) The mediation adviser:
  - (a) must appoint a mediator within 14 days after receiving the request under subsection (2) unless the mediation adviser is satisfied that the complaint giving rise to the dispute:
    - (i) is frivolous or vexatious; or
    - (ii) has previously been the subject of another mediation; and
  - (b) must give the parties to the dispute, in writing, details of the mediator appointed.

#### *Conduct of mediation*

- (4) Subject to subsection (5), the mediator must decide:
  - (a) how the mediation is to be conducted (for example, by telephone or in meetings); and
  - (b) the time and place for the mediation; and
  - (c) the day the mediation commences for the purposes of this Subdivision.
- (5) The mediation must be conducted in Australia.

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*Mediator must notify mediation adviser that mediation has commenced*

- (6) Within 14 days after the mediation has commenced, the mediator must notify the mediation adviser, in writing, that the mediation has commenced and of the nature of the dispute.

Note: The mediator decides under paragraph (4)(c) when a mediation commences.

*Attendance at mediation*

- (7) Each party to the dispute must attend the mediation and attempt to resolve the dispute.
- (8) For the purposes of subsection (7), a party is taken to attend a mediation to attempt to resolve a dispute if the party is represented at the mediation by a person who has authority to enter into an agreement to settle the dispute on behalf of the party.

*Mediator must give notice of successful mediation*

- (9) If an agreement is reached in relation to the dispute, the mediator must, within 14 days after the agreement is reached:
- (a) set out, in writing, the terms of the agreement; and
  - (b) give a copy of the terms to each party to the dispute; and
  - (c) notify the mediation adviser that an agreement has been reached.
- (10) The party who requested the mediation may, at any time, withdraw the complaint that is the subject of the dispute by notice in writing to the other party to the dispute and the mediator.

## **49 Termination of mediation**

- (1) The mediator conducting a mediation of a dispute in accordance with this Subdivision:
- (a) may terminate the mediation at any time if the mediator is satisfied that a resolution of the dispute is not likely to occur; and
  - (b) must terminate the mediation if the party who requested the mediation requests the mediator to do so.
- (2) If a dispute that is the subject of mediation in accordance with this Subdivision is not resolved within 30 days after the mediation commenced:
- (a) the respondent to the mediation may ask the mediator to terminate the mediation; and
  - (b) the mediator must do so.

Note: The mediator decides under paragraph 48(4)(c) when a mediation commences.

- (3) If the mediator terminates a mediation under subsection (1) or (2), the mediator must issue a certificate stating:
- (a) the names of the parties to the mediation; and
  - (b) the nature of the dispute that was the subject of the mediation; and
  - (c) that the mediation has been terminated; and
  - (d) that the dispute has not been resolved.

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- (4) The mediator must give a copy of the certificate to:
  - (a) the mediation adviser; and
  - (b) each party to the dispute.

### 50 Costs of mediation

- (1) Each party to a dispute that was the subject of a mediation in accordance with this Subdivision must pay half the costs (if any) of the mediation (being all reasonable costs associated with the conduct of the mediation), unless the parties to the mediation agree otherwise.
- (2) Each party to a dispute that was the subject of a mediation in accordance with this Subdivision must pay that party's costs of attending the mediation, unless the parties agree otherwise.

### 51 Arbitration

- (1) The procedure set out in this section applies if the parties to a milk supply agreement agree, in writing, to have a dispute resolved by arbitration conducted in accordance with this Subdivision.

Note: The milk supply agreement may provide for arbitration to be used as a means of resolving disputes or, if the agreement does not provide for arbitration, the parties may agree in another written document to use arbitration to resolve disputes.

#### *Appointment of arbitrator*

- (2) The parties must request the arbitration adviser to appoint an arbitrator for the dispute.
- (3) The arbitration adviser:
  - (a) must appoint an arbitrator within 14 days after receiving the request under subsection (2) unless the arbitration adviser is satisfied that the complaint giving rise to the dispute:
    - (i) is frivolous or vexatious; or
    - (ii) has previously been the subject of another arbitration; and
  - (b) must give the parties to the dispute, in writing, details of the arbitrator appointed.

#### *Conduct of arbitration*

- (4) Subject to subsection (5), the arbitrator must decide:
  - (a) how the arbitration is to be conducted (for example, by telephone or in meetings); and
  - (b) the time and place for the arbitration; and
  - (c) the day the arbitration commences for the purposes of this Subdivision.
- (5) The arbitration must be conducted in Australia.

*Arbitrator must notify arbitration adviser that arbitration has commenced*

- (6) Within 14 days after the arbitration has commenced, the arbitrator must notify the arbitration adviser, in writing, that the arbitration has commenced and of the nature of the dispute.

Note: The arbitrator decides under paragraph (4)(c) when an arbitration commences.

*Attendance at arbitration*

- (7) Each party to the dispute must attend the arbitration.
- (8) For the purposes of subsection (7), a party is taken to attend an arbitration if the party is represented at the arbitration by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party.

*Arbitrator must give notice of successful arbitration*

- (9) If the dispute is resolved, the arbitrator must, within 14 days after the dispute is resolved:
- (a) set out, in writing, the terms of the resolution; and
  - (b) give a copy of the terms to each party to the dispute; and
  - (c) notify the arbitration adviser that the dispute has been resolved.

## **52 Termination of arbitration**

- (1) The arbitrator conducting an arbitration of a dispute in accordance with this Subdivision must terminate the arbitration if the complainant mentioned in section 47 requests the arbitrator to do so.
- (2) If the arbitrator terminates an arbitration under subsection (1), the arbitrator must issue a certificate stating:
- (a) the names of the parties to the arbitration; and
  - (b) the nature of the dispute that was the subject of the arbitration; and
  - (c) that the arbitration has been terminated; and
  - (d) that the dispute has not been resolved.
- (3) The arbitrator must give a copy of the certificate to:
- (a) the arbitration adviser; and
  - (b) each party to the dispute.

## **53 Costs of arbitration**

- (1) Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay half the costs (if any) of the arbitration (being all reasonable costs associated with the conduct of the arbitration), unless the parties to the arbitration agree otherwise.
- (2) Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay that party's costs of attending the arbitration, unless the parties agree otherwise.

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## 54 Confidentiality requirements

The parties to a complaint or a dispute about a matter arising under or in connection with a milk supply agreement must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving the complaint or dispute.

## Subdivision G—Records and reporting

### 55 Record-keeping requirements

- (1) A processor that is a party to a milk supply agreement with a farmer must keep the originals, or copies, of the following records for the period mentioned in subsection (3):
  - (a) if the agreement is in writing—the agreement;
  - (b) if the agreement is not in writing:
    - (i) the record of the contents of the agreement made under paragraph 18(2)(a); and
    - (ii) the acknowledgement (if any) obtained from the farmer under paragraph 18(2)(c);
  - (c) if the agreement is varied in writing—the variation;
  - (d) if the agreement is varied other than in writing:
    - (i) the record of the variation made under paragraph 19(2)(a); and
    - (ii) the acknowledgement (if any) obtained from the farmer under paragraph 19(2)(c);
  - (e) if the agreement is terminated in writing—the termination;
  - (f) if the agreement is terminated other than in writing:
    - (i) the record of the termination made under paragraph 20(2)(a); and
    - (ii) the acknowledgement (if any) obtained from the farmer under paragraph 20(2)(c);
  - (g) any notice given to the farmer under the agreement as mentioned in paragraph 25(e);
  - (h) any statement given to the farmer under the agreement as mentioned in paragraph 25(f);
  - (i) any notice given to the farmer under the agreement as mentioned in subsection 28(4)(c);
  - (j) any notice of fees given to the farmer under the agreement as mentioned in paragraph 29(2)(b);
  - (k) any extension notice given by the farmer under the agreement as mentioned in subsection 36(2).

Civil penalty: 300 penalty units.

- (2) A farmer who is a party to a milk supply agreement must keep the originals, or copies, of the following records for the period mentioned in subsection (3):
  - (a) if the agreement is in writing—the agreement;
  - (b) if the agreement is not in writing—the record of the contents of the agreement given under paragraph 18(2)(b);
  - (c) if the agreement is varied in writing—the variation;

- (d) if the agreement is varied other than in writing—the record of the variation given under paragraph 19(2)(b);
- (e) if the agreement is terminated in writing—the termination;
- (f) if the agreement is terminated other than in writing—the record of the termination given under paragraph 20(2)(b).

Civil penalty: 100 penalty units.

- (3) A record, or a copy of a record, must be kept for the period:
  - (a) starting on the day on which the record is made or given; and
  - (b) ending on the last day of the 6 years beginning on the day the milk supply agreement ends.

## 56 Report on disputes

- (1) For the purposes of this section:
  - (a) the first reporting period is the period beginning on 1 January 2020 and ending on 30 April 2020; and
  - (b) a later reporting period is a period of 12 months beginning on 1 May in a year.
- (2) A processor who is a party to a milk supply agreement must prepare a report for the first reporting period, and each later reporting period, stating the following:
  - (a) the number of disputes arising under or in connection with the agreement that were the subject of a mediation that commenced or ended in the reporting period;
  - (b) information about the nature of the disputes referred to in paragraph (a);
  - (c) the number of mediations conducted in the reporting period to resolve the disputes referred to in paragraph (a) and the average time taken to resolve the disputes;
  - (d) information about the outcome of the disputes referred to in paragraph (a);
  - (e) the number of disputes arising under or in connection with the agreement that were the subject of an arbitration that commenced or ended in the reporting period;
  - (f) information about the nature of the disputes referred to in paragraph (e);
  - (g) the number of arbitrations conducted in the reporting period to resolve the disputes referred to in paragraph (e) and the average time taken to resolve the disputes;
  - (h) information about the outcome of the disputes referred to in paragraph (e).
- (3) The report must not:
  - (a) name, or otherwise specifically identify, a farmer or any other person (other than the processor) who was involved in the disputes covered by the report; or
  - (b) include any other information that would be in contravention of section 54.
- (4) The processor must publish the report on the processor's website before 2 pm (by legal time in the Australian Capital Territory) on 1 June immediately after the end of the relevant reporting period.

Civil penalty: 300 penalty units.

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- (5) If the processor is required to publish a report under subsection (4) before 2 pm on a day in a financial year, the processor must not, after that 2 pm and before the end of the next financial year, vary the report or remove it from the processor's website.

Civil penalty:           300 penalty units.

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## **Part 3—Application and transitional provisions**

### **Division 1—Application of this instrument**

#### **57 Milk supply agreements entered into before 1 January 2020**

- (1) This section applies in relation to a milk supply agreement entered into by a processor before 1 January 2020.
- (2) The *transition period*, in relation to the milk supply agreement, is the period:
  - (a) starting on 1 January 2020; and
  - (b) ending on the earlier of:
    - (i) the day the agreement is first varied on or after 1 January 2020; and
    - (ii) 31 December 2020.
- (3) Subparagraph (2)(b)(i) does not apply to a variation of the milk supply agreement if the only effect of the variation is to increase a minimum price under the agreement.

*Code does not apply during transition period*

- (4) Subdivision A of Division 2 of Part 2 (obligation to act in good faith) does not apply in relation to anything done under the milk supply agreement during the transition period.
- (5) Subdivisions C to G of Division 2 of Part 2 (other than section 16) do not apply in relation to the milk supply agreement during the transition period.

*Agreement must comply with Code after end of transition period*

- (6) Subsections (7) and (8) apply if the milk supply agreement is in force immediately after the end of the transition period.
- (7) To avoid doubt, after the end of the transition period:
  - (a) Subdivision A of Division 2 of Part 2 (obligation to act in good faith) applies in relation to anything done under the milk supply agreement in the same way as that Subdivision applies in relation to anything done under a milk supply agreement entered into on or after 1 January 2020; and
  - (b) Subdivisions C to G of Division 2 of Part 2 apply in relation to the milk supply agreement.
- (8) The processor contravenes this subsection if, immediately after the end of the transition period, the milk supply agreement does not comply with the Code.

Civil penalty: 300 penalty units.

*Section does not affect agreements entered into on or after 1 January 2020*

- (9) To avoid doubt, this section does not affect the application of this instrument in relation to a milk supply agreement entered into on or after 1 January 2020.

**Part 3** Application and transitional provisions

**Division 1** Application of this instrument

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**58 No acquisition of property otherwise than on just terms**

This instrument does not apply to the extent that its operation would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph).