



Australian Government
Department of Agriculture,
Water and the Environment

Report on the first review of the Dairy Industry Code



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Acknowledgement of Country

We acknowledge the Traditional Custodians of Australia and their continuing connection to land and sea, waters, environment and community. We pay our respects to the Traditional Custodians of the lands we live and work on, their culture, and their Elders past and present.

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Summary

The dairy industry is Australia's third largest rural industry, with a farmgate value of milk of \$4.7 billion in 2020-21. Over 4,600 dairy farms are spread across Australia's 8 dairy regions, from far north Queensland to Tasmania and Western Australia, and are primarily small, family owned and operated businesses. The industry is distinct due to the highly perishable nature of milk, which requires collection every 24 to 48 hours for transportation to processors. The perishable nature of milk, and limited choice of processors, means farmers generally have limited bargaining power. It was for this reason, and following the recommendation of the 2018 Australian Competition and Consumer Commission (ACCC) inquiry into the Australian dairy industry, that the government introduced the Competition and Consumer (Industry Codes – Dairy) Regulations 2019.

On 25 May 2021, the Hon David Littleproud MP, Minister for Agriculture and Northern Australia, announced the first review of the Code would commence. This follows the requirement that a review of the Code is undertaken on or after 1 January 2021. Reviewing the operation of the Code ensures that requirements and responsibilities under the Code are operating as intended.

A second review of the Code is required to be undertaken on or after 1 January 2023.

Key findings of the review

In considering all the information presented in public submissions and through consultation, the review concludes that the Code is working as intended. Substantial evidence was presented during the review that supports this position. Nonetheless, while the general sentiment of the comments received were highly supportive of the Code, areas for improvement were identified. The following recommendations are made in this report to improve the operation of the Code:

Recommendation 1

The Code should be amended to:

- a) clarify the definition of 'minimum price' under the Code, to explain that deductions related to milk quality will not contravene the 'minimum price' requirements
- b) allow, where agreed by both parties to a Milk Supply Agreement (MSA), an exemption from the minimum price requirements for a specified quantity of milk to enable participation in alternative milk pricing markets
- c) confer the roles of mediation and arbitration adviser under the Code to the Australian Small Business and Family Enterprise Ombudsman.

Recommendation 2

To support the operation of the Code, the Australian Government should:

- a) develop additional guidance material to assist compliance with the Code
- b) work with industry stakeholders to continue to make improvements to price transparency.

Recommendation 3

The Australian Government and industry stakeholders should investigate and gather further evidence to determine suitable solutions to address the following areas for potential improvements to the Code:

- a) Extensions of 3-year contracts
- b) Small business definition and exemptions
- c) MSA variation requirements
- d) Non-exclusive contract arrangements
- e) Minimum price in multi-year contracts
- f) Multi-party dispute resolution and arbitration.

While all issues and suggested solutions raised in submissions were considered, not all the issues are addressed within the report's recommendations. Issues were considered based on a variety of factors including, but not limited to, the level of evidence presented, whether the issue was within the scope of the Terms of Reference and the regulatory impact of the proposed solution (refer to the Review method). The absence of a recommendation to an issue raised in this report does not preclude it being revisited in the Code's second review scheduled in 2023.

1 Background

Dairy industry snapshot and code history

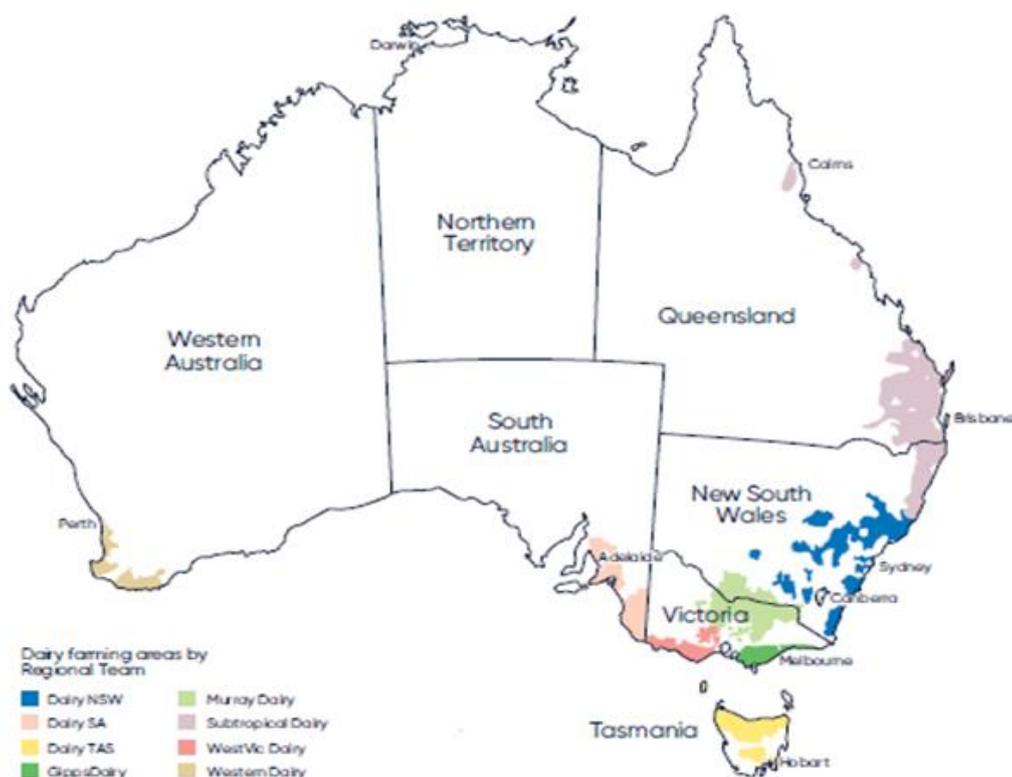
The Australian dairy industry is a \$15.7 billion farm, manufacturing and export industry with a farm gate value alone of \$4.7 billion. The industry consists of around 4,600 dairy farms which produce approximately 8.8 billion litres of milk a year. It is estimated to directly employ approximately 37,400 people on farms and in factories, while more than 100,000 Australians rely on dairy for their livelihoods, including vets, scientists, mechanics, and feed suppliers.

Dairying in Australia occurs across 8 key regions in Australia (Map 1) with over 100 processing plants situated across these regions. Most dairy production occurs in Victoria which accounts for about 64% of total production (2019–20). New South Wales (12%) and Tasmania (11%) are the next largest dairy production areas.

The northern regions and Western Australia predominantly supply milk for processing to the domestic fresh drinking milk market, while the southern regions are more export orientated, focussing on producing milk for manufacturing into products such as cheese, butter, milk powder and yoghurt for domestic and export markets. Of the 8.8 billion litres of milk produced nationally in 2019–20, about 28% was consumed as fresh drinking milk.

The regional nature of dairying makes it a critical economic contributor to many rural and regional economies, and approximately 98% of dairy farms are family-owned businesses.

Map 1 Australia’s 8 dairy regions



In 2015-16, retrospective step-downs in milk prices by Australia's then two largest milk processors had wide-ranging implications within the industry. Following this, industry came together to develop a voluntary code of conduct to address amongst other things, transparency of milk pricing, bargaining power and sharing of price risk across the supply chain.

On 14 September 2016, the Australian Senate referred an inquiry into the dairy industry to the Senate Economics References Committee and on 27 October 2016, the then Treasurer issued a notice requiring the Australian Competition and Consumer Commission (ACCC) to hold an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry.

The ACCC found significant imbalances in bargaining power at each level of the dairy supply chain. It identified that the voluntary code that had been established by industry in 2017 was insufficient to address market failures and required strengthening in a number of areas. The establishment of a mandatory code for dairy was a recommendation of the ACCC's 2018 Dairy Inquiry Final Report.

The Department of Agriculture, Water and the Environment held extensive consultation with dairy farmers, processors and peak industry bodies on the issues identified in the ACCC's report. This included consultation on policy options that would address the market failures, and options to improve transparency and trust between farmers and processors. Following consultations, including an exposure draft consultation period in late 2019, the Code was introduced, coming into effect on 1 January 2020.

The Code is a mandatory industry code, prescribed under section 51AE of the *Competition and Consumer Act 2010*.

2 Code review

Under the Code, the Agriculture Minister was required to undertake a review of the Code on or after 1 January 2021. The review was required to assess the role, impact and operation of the Code.

On 25 May 2021, the Minister for Agriculture and Northern Australia, the Hon David Littleproud MP, announced the commencement of the first review of the Code to ensure that the requirements and responsibilities under the Code are operating as intended.

The department managed the review process on behalf of the Minister for Agriculture and Northern Australia and prepared a draft review report for the minister's consideration. As required under the Code, the minister is required to provide a copy of the review report to the Treasurer by 31 December 2021, as the minister administering section 51AE of the *Competition and Consumer Act 2010*.

A second review of the Code is required to be undertaken on or after 1 January 2023.

Review terms of reference

Under clause 6 of the Code, the first review was required to assess the role, impact and operation of the Code. The review's terms of reference, approved by the Minister for Agriculture and Northern Australia, stipulated it would:

- examine the effectiveness of the Code in meeting its purpose, including improving market transparency and addressing the perceived market failure in the dairy industry due to an imbalance in bargaining power and information asymmetry in farmer-processor relationships
- examine the role, impact and operation of the Code in relation to milk supply agreements entered into before 1 January 2020
- consider any further issues to improve the operation of the Code.

The terms of reference for the review are purposefully broad to enable stakeholders to raise any matters that they feel are relevant to the effective operation of the Code.

Review consultation

The public submission period for the review commenced on 5 July and closed on 29 August 2021. This timeframe included an extension to the public submission period for the review to accommodate the potential impacts of the COVID-19 lockdowns across the country.

In addition to a public consultation process, the department established the Dairy Code Review Reference Group (DCRRG), comprised of key dairy industry stakeholders and an ACCC observer to assist with the review process.

The DCRRG was representative of the 8 dairy regions and included key producer and processor stakeholders. The department chaired 6 meetings of the DCRRG between June and September 2021.

The DCRRG provided industry the opportunity to:

- Participate in consultation
- Support dissemination of information about the review
- Encourage their constituents to engage with and lodge submissions to the review
- Discuss and provide commentary on the results of public consultation
- Provide other contributions as requested by the Chair.

Review inputs

The department established a Have Your Say page to provide stakeholders with information on the review and make written submissions. The department analysed the submissions in preparing a report for the minister.

The department received 28 submissions. As part of the review's submission process, it was a requirement to clarify whether a submission agreed to be published on the department's website. Those submission that agreed to be published are available on the review's Have Your Say page at haveyoursay.awe.gov.au/dairy-code-of-conduct-review.

Existing material was also considered in the review process, including the outcome of the ACCC's *Initial observations on compliance with the Dairy Code* and the Senate Inquiry into the *Performance of Australia's dairy industry and the profitability of Australian dairy farmers since deregulation in 2000*.

Review method

All information and comments made in submissions were considered in developing the review's report. Additional consultation was undertaken with the DCRRG to identify potential risks, and to determine the scale of industry support and/or concern with issues, as well as seeking opinions on potential solutions.

Issues were considered based on a variety of factors, including:

- whether the issue is within scope of the Terms of Reference
- whether it is an issue resolvable by industry without amendments to the Code
- whether there is enough information to determine an appropriate outcome
- cost/benefit of potential solutions
- impacts to the supply chain
- degree of regulatory burden
- ability and cost for enforcing compliance
- complexity of undertaking legislative amendments, including time and risk.

In developing the recommendations, the department considered the following options for each issue raised:

- Amendment is required
- Maintain status quo – additional evidence is required (e.g. the extent of the issue is not well documented or understood, further data is required)
- Maintain status quo –additional support/communication required (e.g. there may be existing resources that could be better targeted to address the issue)
- Maintain status quo – no additional activity required.

3 Findings of the review

Purpose of the code

The Code was introduced to regulate the minimum conduct required in the commercial relationships between farmers and milk processors. It aims to improve the clarity and transparency of trading arrangements between dairy farmers and those buying their milk and establishes dates for key commercial parameters. The Code requires processors and farmers to act in good faith in their dealings with each other and to meet certain minimum requirements in relation to price disclosure and relationship management.

Comments received on the operation of the Code

In the submissions received, there was general agreement that the Code was doing what it was intended to do and there had been improvements in the trading arrangements and price transparency since its introduction.

'The Dairy Code has been an effective intervention for protecting dairy farmers from price step downs and rectifying the power imbalance that existed for many years between farmers and processors' – United Dairyfarmers of Victoria.

'We are of the view the Dairy Code has resulted in greater uniformity and an improved process in the transactional relationship between dairy farmers and processors, facilitating a feeling of improved cooperation and transparency throughout the dairy industry' – Australian Dairy Products Federation.

'The Code has, in the main, been considered successful ... it has synchronised and stimulated competition in pricing and market offerings' – Australian Dairy Farmers.

'We have formed the considered view that (the Code) provides an outcome for Australian dairy farmers that is the best outcome that dairy farmers have had since deregulation' – Farmer Power.

While comments received from stakeholders were largely supportive of the Code, suggestions to improve the operation of the Code were raised with varying degrees of urgency and concern.

Issues raised in submissions were diverse, although largely able to be grouped under these themes:

- Milk Supply Agreements (MSAs)
 - Clarity of definitions, including sign-on payments and contract start dates
 - Provisions around non-exclusive MSAs, including milk volumes and capacity
 - Provisions around multi-year contracts
 - Duration of the cooling-off period
- Price
 - Standardised metrics for milk prices
 - Flexible pricing models to enable access to hedging systems
 - Region-specific approaches to milk pricing

- Compliance and enforcement
 - Penalties for non-compliance
 - Timeliness of enforcement activities
- Cooperatives & collective bargaining groups
 - Definition of cooperative and collective bargaining groups and their obligations
 - Negotiations with collective bargaining groups
- Publication
 - Publication of prices on or before 1 June
 - Publication of variations to an MSA
- Mediation and arbitration
 - Ability to undertake arbitration
 - Multi-party dispute resolution, timeframes, and cost sharing
 - Mediator/arbitrator appointments
 - Compulsory arbitration
- Other
 - Imbalance of power to negotiate contract conditions
 - Timing of the second review
 - Scope of the Code to include retailers

Milk Supply Agreements prior to 1 January 2020

In accordance with the terms of reference, the review examined the role, impact and operation of the Code in relation to milk supply agreements entered into before 1 January 2020. Noting that all MSAs signed prior to 1 January 2020 had 12 months to become code-compliant, and that the transition period had concluded when the review of the Code commenced, the ACCC stated the following in their submission:

The ACCC received a small number of complaints relating to MSAs entered into before the commencement of the Code. These were considered in accordance with its Compliance and Enforcement Policy and the ACCC did not identify any breaches of the Code or the *Competition and Consumer Act 2010 (Cth)* arising from these complaints. The transitional period is now finished, and the ACCC is not aware of any ongoing transitional issues that raise concerns under the laws administered by the ACCC.

4 Recommendations

In considering all the information presented, the report concludes that the Code is working as intended. Substantial evidence was presented to the review that supports this position. The recommendations provide an opportunity to enhance the operation of the Code, through amending certain clauses, providing clarity to address any uncertainty or further investigating areas where an agreed solution could not be identified by stakeholders.

While all issues and suggested solutions raised in submissions were considered, not all the issues are addressed within the report's recommendations (for example, the cooling off period and compulsory arbitration). Issues were considered based on a variety of factors including, but not limited to, the level of evidence presented, whether the issue was within the scope of the Terms of Reference, and the regulatory impact of the proposed solution (refer to the Review method).

The absence of a recommendation to an issue raised during consultation does not preclude it being revisited in the Code's second review, scheduled in 2023.

4.1 Recommendation to amend the Code

The following recommendation is based on industry support, substantial evidence and/or a clear and beneficial outcome by amending the Code.

Recommendation 1

The Code should be amended to:

- a) clarify the definition of 'minimum price' under the Code, to explain that deductions related to milk quality will not contravene the 'minimum price' requirements
- b) allow, where agreed by both parties to an MSA, an exemption from the minimum price requirements for a specified quantity of milk to enable participation in milk pricing markets
- c) confer the roles of mediation and arbitration adviser under the Code to the Australian Small Business and Family Enterprise Ombudsman

Clarify definition of minimum price

The Code defines minimum price (section 5) and requires that a milk supply agreement must clearly specify the minimum price or prices under the agreement (section 26).

The ACCC's submission to the review noted that, when seeking to specify the minimum price payable for milk under an MSA, processors have commonly specified the lowest price payable for standard quality milk, rather than the lowest price payable for the lowest quality milk. The department considers that publishing the lowest price payable for standard quality milk is consistent with the intent of the Code, as this provides a more meaningful indication of what farmers can expect to be paid for their milk if they meet their milk quality obligations.

However, this provision could potentially be read to imply that the minimum price requirement means processors must specify the lowest possible price payable for milk under an MSA,

including any deductions related to milk quality. If processors were required to publish a minimum price that accounts for lower quality milk, this would reduce published minimum prices, providing less certainty to farmers and allowing processors a greater capacity to step-down prices without triggering the protections in the Code. The ACCC noted this ambiguity creates challenges in terms of enforcing this provision in a manner that is consistent with the transparency objectives of the Code.

Participation in milk pricing markets

The review received several submissions supporting amending the Code to allow for greater flexibility in pricing mechanisms that would enable a specified quantity of milk to be priced using a pricing mechanism that uses timely, transparent and competitive milk price discovery (such as pricing via physical milk auctions) where parties mutually agree.

Section 38 of the Code – Emerging trading and marketing arrangements – notes the use of a particular type of trading or marketing arrangement does not contravene the Code merely because that type of arrangement is new, emerging or not widely used in the dairy industry. However, the Australian Milk Price Initiative (AMPI) submitted that a key barrier to the development of their model is the requirement in section 26 of the Code for an MSA to specify the minimum price or prices under the agreement. The AMPI stated that the physical price of the hedging milk (i.e., the auction price for the specified volume of milk being sold under this arrangement) must be free to move to the same degree as the financial hedging settlement mechanism so that the two sides of the transaction can converge.

Submissions recommended that farmers and processors be given the option of mutually agreeing to the use of flexible pricing arrangements for a specified volume of milk, which would be exempt from minimum price requirements. Submissions noted that allowing milk to be priced in this way would support the operation of risk management tools, such as price hedging. This would be consistent with the aim of the Dairy Code to retain the flexibility to support ongoing innovation and diverse business models.

Amending the minimum milk pricing requirements will allow, where agreed by both parties to an MSA, an exemption from the minimum price requirements for a specified quantity of milk that is to be priced by way of timely, transparent and competitive milk price discovery mechanisms. Any exemption to the minimum price requirements would not extend to undermine the protections given to farmers by section 26 of the Code in relation to the rest of their milk supply.

Role of ASBFEO as providing dispute resolution assistance in the Code

Some submissions pointed out that the Code does not identify who is to be appointed to the role of mediation/arbitration adviser, making it difficult to determine who is responsible for these roles. Others commented that sections 44 and 45 of the Code clearly states that the Agriculture Minister must appoint mediation and arbitration advisers so this is known.

There was significant commentary and support for the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to take on the role of the mediation and arbitration adviser under the Code (noting that it currently provides assistance services to the Code's mediation and arbitration adviser).

Appointing the ASBFEO as responsible for the role previously delivered by the mediation and arbitration adviser in the Code will clarify the dispute resolution pathway and provide greater consistency in procedures across industry codes. The department notes that under recent amendments to the Franchising Code, the ASBFEO undertakes a similar role.

4.2 Recommendation to support the Code’s operations

The following recommendations propose improvements to support the Code’s operation without amending the legislative instrument.

Recommendation 2

To support the operation of the Code, the Australian Government and the ACCC should:

- a) develop additional guidance material to assist compliance with the Code
- b) work with industry stakeholders to continue improvements to price transparency.

Develop guidance material

Several issues raised in submissions to the review sought more information to clarify the intent of certain provisions in the Code. The review and development of guidance material will assist the effective communication of provisions in the Code and, if required, it will inform the need to amend the legislative instrument in the second review of the Code in 2023.

Stakeholders should be aware that there is a limitation to the guidance that can be provided without further legal definition. Government guidance is of most use where there is ambiguity about how a particular department or regulator will exercise its discretion. Guidance cannot definitively resolve an underlying ambiguity in a legal provision, nor does it bind how third parties must behave under a code (which is relevant to private actions conducted under a code); only judgments of a Court can do that.

Submissions argued that the following topics should be clarified in improved guidance material (Table 1).

Table 1 Topics for review and development of guidance material

Topic	Clarification
Single documents	Clarify the scope of ‘single document’ to address uncertainty raised by stakeholders. For example, clarify whether pricing letters are within the definition of a single document
Cooperatives	Provide further guidance on the definition of a cooperative and clarify their concessions under the Code. Given a cooperative may enter into an open-ended supply agreement with their members, clear parameters are sought on eligibility of these concessions
Collective bargaining group	Clarify any concessions and requirements specific to collective bargaining groups that engage with the Code
Termination (material breach)	Provide further guidance and examples of what would constitute a ‘material breach’. While processors can address conditions through contractual terms, further clarification is sought on the types of breaches that activates an express termination right in an MSA

Topic	Clarification
Loyalty payments	Clarify conditions for loyalty payments to address uncertainty about the application of loyalty payments, including how the pro-rata period is defined and applied
Unsigned MSAs	Clarify conditions for milk supply and collection in circumstances where an MSA is not signed or a detailed unwritten agreement has not been arranged
Price variation	Clarify milk pricing variations in multi-year contracts, in particular minimum pricing requirements during the term of the MSA

Improve price transparency

Under section 12(2), the Code requires processors to publish a standard form agreement and minimum price or prices by the publishing deadline to enable farmers to compare prices and contractual conditions. This is to ensure farmers have access to reliable pricing signals to inform their business decisions before the commencement of a dairy season. While this section has improved transparency in the industry, submissions said more could be done to improve the transparency of the terms offered by processors.

General feedback from farmers and farming representatives is that there is a need for greater clarity on the total milk price a farmer will receive, and that pricing information should be readily available in a convenient format.

Although the Code requires processors to ‘clearly specify’ the minimum price in the MSA, the ACCC noted processors have specified the minimum price with varying degrees of clarity. For example, some processors specify the minimum price up front in a ‘key terms’ section of the document, or an appendix to the document. Others specify the minimum price in the body of the MSA. Queensland Dairyfarmers’ Organisation noted similarly inconsistent practices that prevented farmers from easily comparing MSAs.

Another issue raised in submissions is that opening prices announced are not accurately representative of the expected price an individual farm receives. These comments were particularly critical on the use of a ‘weighted average price’, with several submissions claiming the calculation was skewed by large dairy farms that misrepresented the true price many smaller farmers would be expected to receive in the region.

There is an opportunity for industry and government to work together to improve the way pricing information is presented through MSAs and other industry tools, and to enhance communication and education about the pricing information available to producers.

4.3 Issues for further consideration

A number of submissions noted the short time the Code has been in operation, which makes it difficult to draw definitive conclusions about the value of amending certain clauses at this point in time. Such matters would be best addressed through gathering further information, developing proposals for potential reform, and consulting with stakeholders in lead up to the 2023 review of the Code. There is a legitimate opportunity to improve the Code’s operation through addressing the issues raised in submissions, but more work is required to develop the best response, particularly where amendments to the Code may be required.

Recommendation 3

The Australian Government and industry stakeholders should investigate and gather further evidence to determine suitable solutions to:

- a) Extensions of 3-year contracts
- b) Small business definition and exemptions
- c) MSA variation requirements
- d) Non-exclusive contract arrangements
- e) Multi-year contracts
- f) Multi-party dispute resolution and arbitration

Extensions of 3-year contracts

Section 36 allows a farmer with a MSA longer than 3 years to postpone the end of the supply period by 12 months. This avoids the situation where farmers are without a buyer for their milk and may subsequently be forced to quit dairy farming in some circumstances.

According to a number of submissions, a consequence of section 36 is that it deters some processors from offering 3-year MSAs due to the potential for a farmer to extend the contract price for an extra year beyond an existing MSA. Longer term contracts are important for security of supply in the domestic fresh milk markets, particularly for farmers in WA and northern Queensland, so this disincentive may act to the detriment of farmers. According to submissions, section 36 also poses risks and uncertainty for processors. The ADPF noted that the unplanned collection of milk for another year extends the risk throughout the processor's business and could adversely affect the processor and their remaining milk suppliers. For example, a company with multiple contracts greater than 25 million litres could have significant effects on the business if these contracts were extended and required the processor to accept a substantial volume of milk in excess of the anticipated contracted supply.

While there was broad support in submissions to amend section 36 of the Code, the proposed amendments diverged based on the perceived risk posed to stakeholders in the supply chain. The department recognises the potential risk may deter processors from offering 3-year contracts. However, until there is an adequate solution for managing extensions of 3-year contracts, section 36 should maintain a degree of security for those circumstances where protections are needed.

Small business definition and exemptions

Under section 8 the Code, milk processors that are small business entities (meaning a business with an annual turnover of less than \$10 million) are exempt from most of the Code's requirements, with the exception of the requirement to deal with farmers in good faith.

In its submission, the ACCC noted that there are several processors that deal with as few as one farmer but do not qualify for the small business exemption. The ACCC considered the Code's requirements for these smaller processors to publish their standard form MSAs may pose an unnecessary administrative burden.

While there are benefits in reducing regulatory oversight of low-risk factions, further evidence is needed to assess and determine the potential impact of imposing additional exemptions. Accordingly, section 12 (and related sections) should remain unchanged until a further assessment of the regulatory burden of the Code on smaller processors is undertaken.

MSA variation requirements

Section 12(6) of the Code prohibits a processor from varying or removing an MSA from their website after the publication deadline and before the end of the financial year to which it applies. Where multiple changes occur, particularly in relation to price increases, this can result in numerous MSAs being published and maintained on a processor's website.

Currently, processors are required to redraft and send out MSA variations in writing, including for any increase in the minimum milk price. Submissions noted that many of these variations concerning price rises were inconsequential or advantageous to farmers, therefore not providing any commercial risk. According to the Australian Dairy Products Federation (ADPF), variation of an MSA requires negotiation and written permission from the farmer, which imposes onerous and costly processes for all parties involved. This means that frequent variations based on an increase to the milk price can present an administrative burden to both processors and farmers. On the other hand, it is critical that all parties to an agreement have an accurate written record of the agreement.

There is an opportunity to review the variation requirements under section 12 (and related sections) of the Code, with an objective to remove any unnecessary administrative burden while maintaining appropriate protections for producers.

Non-exclusive contract arrangements

The Code outlines arrangements for offering non-exclusive MSAs. Submissions from both processors and dairy farmer representatives indicated that the management of and provisions for non-exclusive MSAs are not meeting industry needs.

Farmers raised concerns about the significant price reductions that were being applied to non-exclusive supply contracts, making them economically unviable. From the perspective of the farmers, these could not be considered as genuine offers. Submissions noted that some non-exclusive contracts may effectively be exclusive depending on the total volume capacity of the farmer and the total volume to be supplied to the processor. The ACCC (2020a) made similar comments in their report:

‘non-exclusive MSAs should be truly non-exclusive so that farmers are not in practice prevented from supplying milk to any other processors. For example, the ACCC considers MSAs containing a minimum volume clause may not be a non-exclusive MSA if the minimum volume clause results in the farmer not being expected to have the capacity to supply another party’.

Australian Dairy Farmers (ADF) raised similar issue about non-exclusive supply contracts being offered on a percentage rather than volume basis, which can be difficult to interpret and can change during the operation of the contract if the farmer increases or decreases their milk production. This was also raised in the Senate Inquiry into the Performance of Australia's dairy industry and the profitability of Australian dairy farmers since deregulation in 2000. Additionally, processors submitted that the requirement to offer non-exclusive contracts may

pose commercial inefficiencies and administrative costs for processors, as well as limit their ability to manage business activities.

While it is not the role of the Code to ensure particular types of contracts are used, it is evident that some of the arrangements for non-exclusive supply could be improved to ensure that non-exclusive contracts remain a viable and appropriately regulated contractual option for processors and producers.

Minimum pricing requirements in multi-year contracts

Section 26 requires processors to set minimum prices for the duration of an MSA, including multi-year MSAs. The provision to clearly specify the minimum price in multi-year MSAs can provide contractual certainty over prices and supply within a contract period that benefits both dairy farmers and processors.

However, during public consultation, some submissions that indicated the minimum pricing requirements in multi-year MSAs posed uncertainty that deterred processors from offering such contracts, while other submissions indicated that prices offered beyond the first year were too conservative. Noting these risks were considered before the Code commenced (ACCC, 2018), further investigation into the minimum pricing requirements for multi-year arrangement should be undertaken to ensure that the Code is achieving the right balance between offering minimum price protections to farmers, while providing enough pricing flexibility in multi-year contracts that is acceptable to both farmers and processors.

Multi-party dispute resolution

Subdivision F of the Code outlines requirements for dispute resolution between producers and processors. Submissions noted the potential benefit of having a multi-party dispute resolution process for dairy farmers with the same complaint against a single processor. The Code is silent on whether parties with the same issue may enter dispute resolution together.

The Franchising Code has recently been amended to include new provisions regarding multi-party dispute resolution processes. Under the Franchising Code: if multiple franchisees have similar disputes with a single franchisor, they can seek to resolve their disputes together. This can take place either by agreement with the franchisor, by request of the ASBFEO, or by referral to an alternative dispute resolution practitioner. When deciding whether to do so, franchisees are allowed to discuss their disputes with each other even if there are any confidentiality obligations in their agreements. This applies to franchise agreements that are entered into, extended or renewed from July 2021.

There is merit in exploring a similar arrangement under the Code to provide a more efficient, process to achieve a resolution. However, further investigation is required to explore the specific requirements of a multi-party dispute resolution arrangements for the dairy industry and review the effectiveness of the new provisions under the Franchising Code.

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