

Livestock Section
Department of Agriculture, Fisheries and Forestry

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Friday 5 April 2024

Re: Discussion Paper on the Operation of the Dairy Industry Code

On January 15, 2024, the Department of Agriculture, Fisheries and Forestry (DAFF) published the Discussion Paper on the Operation of the Dairy Industry Code (Dairy Code), to better understand if the Dairy Code is operating as intended, considering key issues identified from the first review held in 2021.

The outputs from the Discussion Paper will help shape the second review – which is now due on or before December 31, 2026, noting that the second review will consider the Dairy Code in its entirety.

On behalf of our members, the Australian Dairy Products Federation (ADPF) appreciates the opportunity to provide comment on the Discussion Paper and the eight topics, offering a comprehensive analysis of the current operating environment and the implications, risks and opportunities for the dairy processing sector aligned with each.

The eight topics (16 questions) are:

1. Extensions of three-year contracts
2. Small business definitions and exemptions
3. MSA variation requirements
4. Non-exclusive contract arrangements
5. Minimum price in multi-year contracts
6. Multi-party dispute resolution and arbitration
7. Cooling off periods, and
8. Unsigned contracts.

We also note that one item remains outstanding from the proposed legislative amendment to the first review of the Dairy Code, as further information, options and recommended legislative changes are being worked through. That item being:

To 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.

The ADPF is the national peak policy and advocacy body representing the post farmgate members of the Australian dairy supply chain, including processors, traders, and marketers of Australian dairy. Our members process more than 90% of Australian milk volumes and work across rural and regional Australia to transform perishable, raw milk into safe and nutritious dairy products for domestic and export markets, every day of the year.

Background

Since its introduction in January 2020, Australian dairy processors have entered the Dairy Code of Conduct in good faith and worked diligently to comply with the requirements, and to ensure their farmers are well educated on them.

ADPF supports the efforts to improve industry confidence and believes that the Dairy Code has resulted in greater uniformity and an improved process in the transactional relationship between dairy farmers and processors. It has facilitated a feeling of improved cooperation and transparency throughout the dairy industry.

However, dairy processors needs and concerns were not adequately considered in the development of the Dairy Code.

Nor did the Dairy Code foresee the impact on pricing and Australia's competitiveness against imports and in export markets.

In attempting to improve the situation, the first review was unfortunately not comprehensive and considered minor issues only.

The delay of the second review has occurred amid a period of commercial uncertainty, with a disconnect between market demand and Australian farmgate milk prices under a structurally rigid Dairy Code.

It is important to remember that 71% of Australia's total milk production in FY2022/23 (close to 6 billion litres) was trade exposed¹, and influenced by global commodity markets (fat and protein) and exchange rates – meaning that those dairy products compete with imports in Australia or exports around the world.

The Dairy Code's goal was to create certainty for both dairy farmers and processors to confidently plan and invest in the industry, and it is clear this is yet to be achieved.

The certainty provided by the Dairy Code comes with an inability to respond appropriately to the commercial realities of a volatile global market, resulting in the cost of Australian dairy products not being competitive with imports.

At a time when New Zealand was responding to global commodity prices, with farmgate milk prices adjusted twice from their seasons opening milk price – Australian farmgate milk prices stayed the same and hit a 30% higher differential (or AUS\$3.00 per kilogram of milk solids) between the farmgate milk price paid in Australia versus New Zealand. This resulted in supermarkets and food service replacing Australian dairy products with cheaper imported dairy cheese and butter products, as evidenced by a 17% increase on our supermarket shelves and in cafes².

Australia's dairy industry has dropped its export competitiveness from 36% to 30% (FY23)³ not only due to lower supply availability but also due to price competitiveness. We imported over 2.1 billion litres (milk equivalents) in the past year.

Unlike New Zealand and other competing nations, no other commodity market in the world requires dairy processors to announce farmgate milk prices 13-months out from the seasons end, risking their viability in a market where the costs of Australian products are not competitive with imports.

¹ Dairy Australia In Focus 2023 – The Australian dairy Industry.

² Dairy Australia In Focus 2023 – The Australian dairy Industry.

³ Dairy Australia In Focus 2023 – The Australian dairy Industry.

Dairy processors act as price takers in the global market, where commodity prices dictate the prices for customers. As a result, processors have limited ability to mitigate the fluctuations in their input costs. This limitation means that processors are unable to secure sales contracts at a fixed long-term milk price, to offset the long-term milk costs that are a requirement of the Dairy Code.

The Dairy Code restricts processor's ability to respond, and this disconnect between dairy farmers and dairy markets affects clear market signals and price transparency needed amongst businesses for planning, investment, and industry confidence.

For dairy processors, margins are being significantly reduced and squeezed, impacting their ability to invest in capital, people, technology, and innovation, and affecting industry confidence.

Since the introduction of the Dairy Code, it is clear, a market equilibrium is yet to be achieved, with dairy processors carrying an unsustainable amount of price risk and commercial risk.

Off the back of COVID, floods and biosecurity threats, dairy processors have also been contending with a 30-year low in raw milk production volumes of 8.1 billion litres per annum (down 5% from the year prior); persistent rises in input costs; a decline in global dairy prices; and a 17%⁴ surge in import competition (FY23 versus FY22).

For dairy processors, those pressures are compounded even further, not just with the pressure to remain viable, but to maintain jobs for workers and keep the doors open, as well as to minimise flow on cost inflationary pressures to consumers – with many at breaking point to remain in business.

Many dairy processors continue to assess their manufacturing footprint – a reality we have witnessed in the past 18 months, with the closure of ten dairy processing businesses that have been publicly announced:

- Betta Milk Burnie Tasmania (Bega) – February 2024
- Sara Lee – (administration announced) November 2023. New ownership announced February 2024
- Gundowring ice-cream – announced in October 2023 it will close in the new year.
- Tamworth's Peel Valley Milk – October 2023
- Margaret River Dairy Company – September 2023. New ownership announced January 2024
- Made by Cow – May 2023.
- Country Valley – April 2023
- Saputo Maffra – February 2023
- Bega Canberra Milk – February 2023
- Camperdown Dairy (fresh milk production) – August 2022.

We are also aware of several other dairy processing factories that have suspended operations, and other companies that have announced significant impairments on their dairy asset value, writing down hundreds of millions of dollars over the last couple of years.

Unless change is installed to rebalance the value chain, there will be major implications on domestic supply and Australian exports. Significant transformation and reduction in long term capacity will lead to job losses, reduced investment in regional communities, and impact farmers who currently benefit from having dairy manufacturing assets in their region.

⁴ Dairy Australia: total imports up 17% (FY23 vs FY22).

Whilst we appreciate a second review of the Dairy Code will commence in September of this year, genuine and comprehensive consultation must occur, and a refined and more commercially efficient Dairy Code completed as a priority.

We expand on this below.

Specific comments to the eight topics (16 questions) DAFF are seeking feedback on:

1. Extension of three-year contracts

- Section 36 applies to a contract longer than three years – whereby a farmer can give the processor written notice to extend the supply period by 12 months, with notice given:
 - No earlier than 30 days before the end of the supply period; and
 - No later than 7 days before the end of the supply period.
- In reviewing the Explanatory Statement, we understand this section was included so that farmers in markets with multi-year MSAs and less competition (such as WA or Northern QLD) are provided with sufficient time to find a new processor or manage a transition in their businesses.
- We note this extension exists only for farmers, and not for processors.
- As we understand, **no** other mandatory industry codes regulated by the ACCC provide for a similar right.
- We note, current arrangements in the Dairy Code allow for review and negotiation of contracts prior to their termination, and as such if ‘12 months’ notice is given by both parties and agreed to in a contract, why is section 36 needed?
- The ADPF thereby questions the practical application of this section versus the implications and risk.
- For dairy processors, section 36 creates uncertainty and significant risk as to whether a contract longer than three-years may be extended by a farmer – including what pricing mechanism applies for that ‘extension’.

Guaranteeing a minimum price for multi-year contracts is already challenging and the notion of needing to set that for a further 12-months, notably escalates that risk. Not only that, being forced to collect a farmer’s milk for another year extends the risk throughout the processors business as they adapt to this change, including their remaining farmers. Consider the implications for a company with multiple contracts greater than 25 million litres – if these were extended beyond their control, it could have damaging effects on the business and their remaining farmers.

- The ADPF believes that deleting section 36 is the best outcome for both parties, relying on other requirements in the Dairy Code to fulfil its intent. For example, the Dairy Code would still allow for multi-year contracts to be agreed between parties.

- The ADPF is supportive of multi-year agreements which give both farmers and dairy processors reasonable certainty as to pricing and milk supply. Longer term agreements, with appropriate balancing of risks, would have the dual benefits of allowing the processor to invest with the farmer to increase their dairy herd size while at the same time giving the processor a reasonable return on its investment. Adopting such an approach is not possible under the Dairy Code, which currently provides the farmer with disproportionate rights that do not allow a balancing of additional investment and risk by the processor. The inability to be innovative in supply arrangements, including through longer term and exclusive supply agreements to allow an appropriate return on processor investment, is one factor that has contributed to a decline in dairy herd size in Australia.

ADPF Recommendation:

Section 36 of the Dairy Code and the ability for farmers to extend contracts longer than three-year by another 12 months, is deleted. The inclusion of this section creates more risks than benefits and fails to meet any policy objectives. Other requirements in the Dairy Code can fulfil its intent.

2. Small business definitions and exemptions

- Section 8 provides exceptions for processors that are small business entities – that is a business with an aggregated turnover of less than \$10 million for a financial year (ATO).
- This includes exemptions related to publishing standard forms of agreement, to have a milk supply agreement, and extensions of milk supply agreements.
- This means that a farmer who supplies a small business is potentially at greater risk to one under the full protection of the Dairy Code.
- Aligned with the provision to operate within ‘good faith’, we propose that the Dairy Code is more explicit in encouraging voluntary compliance for those within the small business definition.

ADPF Recommendation:

Section 8 of the Dairy Code is amended to encourage voluntary compliance for those within the small business definition.

This aims to optimise dairy farmers protection and capture the lowest common denominator.

3. Milk Supply Agreement – variation requirements

- The concept of ‘variation’ appears in sections 12, 33 and 57 of the Dairy Code, and it is important to distinguish between ‘publish’ versus ‘variation’:
 - section 12 (**Requirements to ‘publish’ SFAs**)
 - i. section 12 (2) requires a **standard form of MSA (SFA) to be published by 1 June** each year, including each statement of circumstances you would enter into that SFA for that year (e.g., regions, milk characteristics, volumes).

- ii. section 12 (6) prohibits **‘variations’ to published SFAs and statements published with the SFAs within 12 months from the publication deadline** [noting other SFAs can be published].
 - section 33 (**Varying**) – provides that an MSA must **specify the circumstances and process by which an MSA may be unilaterally ‘varied’** by a farmer or processor.
 - section 57 (**Application of Instrument**) – the Dairy Code will apply to any MSA which is entered into before 1 January 2020 and ‘varied’ afterwards (except for where the change is an **increase to minimum price only, as this will not be regarded as a ‘variation’**).
- As we understand, this means that any ‘variation’ to an existing SFA would result in a new SFA and set of circumstances needing to be published on the dairy processor’s website – whilst retaining the originals on the company’s website for that year.
- It means that **every change** to an SFA, minor or immaterial, is considered a ‘variation’ and requires a new SFA to be published.
- That is, any agreed unilateral variation by a processor to an MSA for example, requires written notice to a farmer – even for a variation that is for an increase in farmgate milk price.
- We note that the Dairy Code [Regulation Impact Statement](#) 2019 (RIS) (section 5) provides that ‘the department’s objective for any regulatory reform developed through this RIS is to:
 - *‘ensure regulatory intervention **does not impose unnecessary compliance costs on regulated businesses and individuals, while helping to rebalance the level of commercial risk that farmers face.**’*
- The management of variations within the Dairy Code is an inefficient, onerous, and costly process, both administratively and in lengthening the time for parties to negotiate changes to an MSA.
- In the context of section 12(6), we propose that only ‘material’ variations to SFAs should be subject to the publishing requirements under the Dairy Code.
- For ‘slight’ or minor variations – one that we would consider as low risk and having no impact on minimum price – we support the proposal to maintain a publicly available list of variations for the current seasons milk supply agreement. Clarifying what information is required in the list of variations should be through guidance provided from the ACCC.
- Further, and in the context of section 33, we think it should be made clear that an **increase** in farmgate milk price, which results from pre-agreed mechanisms, will not be regarded as a ‘variation’ – particularly given the prevalence of price changes that can occur during the term of an MSA.

ADPF Recommendation:

The Dairy Code reviews what is defined as a ‘material’ variation and the associated publishing requirements.

For ‘slight’ or ‘minor’ variations, maintaining a publicly available list of variations for the current seasons milk supply agreement fulfils the needs of transparency to the dairy farmer whilst minimising the administrative burden on processors.

A variation which is a price increase (based on a pre-agreed mechanism) should be excluded from the definition and administrative requirements of a 'material' variation to an MSA.

4. Non-exclusive contract arrangements

- Section 12 (5) outlines the requirements for both exclusive and non-exclusive MSA. That being, if the processor would enter into an exclusive supply agreement, the processor must also offer a non-exclusive supply agreement the processor would enter into in those particular circumstances.
- Both types of contracts are permitted under the Dairy Code, providing the necessary choice for dairy farmers and processors, aligned with their business models.
- It is also important for farmers to understand that the Dairy Code does permit different terms and conditions (for negotiation) under exclusive and non-exclusive contracts, remunerated accordingly based on their perceived value.
- However, to offer an exclusive MSA, a 'genuine' non-exclusive agreement must also be published, unless agreed otherwise – that is, a non-exclusive MSA is the **default** [section 12(5)]
- This creates unnecessary commercial inefficiencies, costs and risks, as well as an artificial state of affairs that could be detrimental to the industry:
- **Inefficiencies:** in that, two 'genuine' contracts need to be developed and published – which is time intensive, administrative rich and costly.
- **Artificiality:** by requiring a processor to factor in two scenarios and forced to offer up both, when one may best service their needs, as well as the farmers – which can create complexity and confusion. Whilst the farmer can choose the contract to best suits their business model, for processors, the choice of which contract best suits their business model and ability to fulfil their commercial obligations is lost.
- We note that **no** other industry codes provide for a similar exclusive/ non-exclusive framework.
- Exclusive supply can be efficient for both farmers and processor, such as by assuring farmers all milk will be collected and providing volume certainty for all processors.
- Dual supply is not common but does happen and needs to be provided for. Larger farmers who can support dual supply are most likely to be able to negotiate non-exclusive MSAs.⁵ In this respect, it would appear that the Dairy Code creates an artificial state of affairs that does not represent the behaviours in the market.
- Companies have noted no material change in the uptake of exclusive or non-exclusive agreements since the introduction of the Dairy Code.

ADPF Recommendation:

The requirements for exclusive contracts under the Dairy Code are reviewed and the default to a non-exclusive contract is deleted, to allow for a fairer, more practical, and workable Dairy Code best suited to business practices and the sustainability of the dairy industry.

⁵ Dairy Inquiry Final Report (April 2018), 4.6.2.

5. Minimum price in multi-year contracts

- **Background:** As per Section 26, a milk supply agreement must specify the minimum price/s that apply throughout the supply period of the contract by specifying a single minimum price, or a schedule of monthly or yearly minimum prices.
- By 2pm on 1 June each year, a minimum price and price justification are required to be published by all processors.
- This is true for a one-year contract, or a multi-year contract.
- As has always been available, a farmer can contact a dairy processor and ask for a cash flow statement or an income estimate (based on milk components), to receive more detailed payment information relative to that farm, beyond the milk supply agreement.
- Since November 2020, farmers can also access the [Milk Value Portal](#), which provides information about how Australian farmgate milk prices are calculated, and the markets for raw milk both within and outside of Australia. The Milk Value Portal and a key resource within – the [Farmgate Milk Value Tool](#) – assist users with addressing the information asymmetry in the dairy industry and is farmer-friendly. As an example, a farmer could use the Milk Value Portal and Farmgate Milk Value Tool to keep aware of milk values while signed up to a multi-year contract; to understand the value of raw milk in an alternative dairy production region or the 3-year trend of farmgate milk price in my region; or what processor pays a premium for Organic milk?
- There are two fundamental issues with the current pricing structure under the Dairy Code:
 1. The definition of an exceptional circumstance, that may objectively validate a prospective step down or reduction in minimum price.
 2. Establishing minimum pricing for subsequent years of a multi-year contract, i.e., year 2 or 3.

Dairy farmers need to have a greater understanding of the significant pricing issues and risk at play and the consequences to the whole of the dairy industry. Government also needs to acknowledge this and be prepared to make changes to the Dairy Code to allow for a more commercially and workable document, to foster greater planning, investment, and innovation across the dairy industry.

For dairy processors, profit margins are being reduced, impacting their ability to invest in capital, people, technology, and innovation, and impacting industry confidence. And this will continue if not addressed.

Each of these in detail:

A. [The definition of an ‘exceptional circumstance’:](#)

Problem: there is no objective reference for determining an ‘exceptional circumstance’ under the Dairy Code of Conduct, validating a prospective step down or reduction in minimum price.

Whilst minimum price increases are permitted, a unilateral prospective step-down to reduce the minimum price is only permitted in limited ‘exceptional circumstances’, that being:

Section 28 (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.

The processor needs to have demonstrated every effort has been made to avoid this circumstance, providing the farmer 30-day written notice prior to a reduction in minimum price, and it must also allow for a farmer to terminate a contract after 21 days of receiving that written notice – along with the ability of the farmer to rescind that termination.

Determining an exceptional circumstance is at the discretion of an individual processors. A processor may risk loss of supply (already operating in an environment marked by the lowest raw milk production volumes in 30 years), loss of a customer contract/s, reputational risk, and inevitably ACCC prosecution if they get this decision wrong.

Considering COVID-19, to the geopolitical uncertainty created by Russia and the Ukraine, or from China retracting from global trade, the volatility and impact on local and international markets has been profound, further exacerbating processors' risk. Any of these could have been deemed an 'exceptional circumstance' – but the risk was considered too great for a processor to pursue and instead bore the consequences.

The Dairy Code requires dairy processors to announce farmgate milk prices 13-months out from the seasons end. Unlike New Zealand and other competing nations, this requirement is unique to Australia. No other commodity market in the world requires this, risking processors viability in a market where the costs of Australian products are not competitive with imports – as evidenced by the influx of lower priced imported dairy cheese and butter products on our supermarket shelves.

At a time when New Zealand was responding to global commodity prices, with farmgate milk prices reduced twice from their opening seasons milk price – Australian farmgate milk prices stayed the same and hit a 30% higher differential (or AUS\$3.00) between the farmgate milk price paid in Australia versus New Zealand – evidenced by the surge of cheaper imported dairy cheese and butter products on our supermarket shelves. Today there continues to be a 23% of AUS\$2.15 price differential.

ADPF Recommendation:

A Benchmark Milk Value (BMV) be established and maintained as an objective and evidenced measure of the wholesale market value of milk in the southern Australian manufacturing regions and in major fresh milk regions, informing the definition of an exceptional circumstance, i.e., once this benchmark or threshold falls to a significantly lower level than the minimum farmgate milk value.

This would trigger a decision from an Independent Arbiter (which could be the small business ombudsmen [ASBFEO] as an example – as per the dispute resolution process) – and involve the parties to the milk supply agreement.

If an exceptional circumstance was enacted, the price reduction would apply until the end of the season, or the differential between the BMV and farmgate milk price was reduced (i.e., 10% or 20%) – whichever came first.

Explanation:

- The BMV would be an agreed, objective, fact-based measure of wholesale market conditions. It increases the transparency of supply chain returns which will be translated into a relevant farmgate milk price equivalent measure.
- The measure needs to be credible, and the calculation and reporting process must be robust and transparent drawing on established industry experience and commercially relevant market intelligence and analysis infrastructure – such as the Milk Value Portal.
- The BMV would offer projected comparison between contracted milk prices and commodity returns.
- This BMV could be compared with minimum farmgate milk prices being paid on average across those regions to illustrate significant in-season differentials that would inform a definition of an exceptional circumstances.
- Changes in the BMV throughout the season are retained for comparison, enabling a starting differential to be contrasted to an improving or worsening market outcome.
- The extent of the difference between BMV and farmgate milk price would be highlighted – using a traffic system approach – for complete visibility.
- A significant and sustained differential between the BMV and prevailing farmgate milk prices (i.e., a BMV 10% or 20% lower than the farmgate milk price) would indicate a need for a prospective milk price reduction, triggering a decision from an Independent Arbiter – and involve the parties to the milk supply agreements.
- If an exceptional circumstance was enacted, the price reduction would apply until the end of the season, or the differential between the BMV and the farmgate milk price was reduced (i.e., 10% or 20%) – whichever came first.
- **Refer to the Appendix for further detail on the BMV and how this would work as an extension of the dairy industry's Milk Value Portal.**

B. Multi-year contracts:

Problem: there is no objective reference for determining the minimum farmgate milk price in subsequent years (i.e., year 2 or 3) of a multi-year contract under the Dairy Code of Conduct.

It is generally acknowledged that multi-year term contracts provide benefits to both dairy farmers and processors through secure milk supply and financial protection, to plan and invest.

Importantly, multi-year contracts also create an opportunity to build valued partnerships, with support from processors to help with on farm quality issues, sustainable farming and rebates to encourage investment – noting that both parties must take on some of the risk in exchange⁶.

However, the challenge and risk to processors to be able to offer multi-year contracts is their ability to guarantee a minimum price for the duration of that contract – in addition to balancing the complexities of customer requirements, with market fluctuations.

The current requirement is that the minimum price is set at the outset and holds for the duration of that contract – there is an ability to increase this price, but again no ability to prospectively reduce it aligned with evidenced market conditions.

The Dairy Code Exposure Draft allowed for the following:

- *For a supply period >12 months the milk supply agreement must specify ‘how’ the minimum price/s after the first year are set, and the processors must provide the farmer written notice specifying the minimum price/s for that period and the time that notice is given.*

Alternatively, the Benchmark Milk Value outlined above, could also be used to objectively validate a price reduction in subsequent years of a multi-year contract.

ADPF Recommendation:

For multi-year contracts a more flexible pricing arrangement is needed for determining the minimum milk price in subsequent years, i.e., years 2 and 3. This could be through:

- ***For a supply period >12 months the milk supply agreement must specify ‘how’ the minimum price/s after the first year are set, and the processors must provide the farmer written notice specifying the minimum price/s for that period and the time that notice is given.***
- ***Adopting the Benchmark Milk Value (BMV) for objectively validating a reduction in farmgate milk price in subsequent years of a multi-year contract (i.e., year 2 or 3), aligned with evidenced market conditions.***

6. Multi-party dispute resolution and arbitration

- The Discussion Paper seeks feedback on whether the negotiation and arbitration costs be based pro rata on turnover to give each party a fairer deal in the expensive legal process. And of the risks and benefits to allowing a multi-party dispute resolution.
- Subdivision F of the Dairy Code outlines the provisions for the complaint-handling and dispute resolution process.
- A milk supply agreement (contract) must provide for both an internal complaint handling procedure and a mediation process, with the option of an arbitration process.
- In December 2023, as per the legislative amendments to the Dairy Code, the roles of mediation and arbitration adviser conferred onto the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) – meaning the ASBFEO is now the point of contact for resolution of disputes.

⁶ Dairy Inquiry Final Report 3.7.3.

- Processors are required to report on the disputes annually.
- Whilst ADPF acknowledges there are costs involved for both parties involved in mediation (and arbitration) – which are currently equally shared (unless agreed otherwise) – we do not support a move towards this being based on pro-rata turnover to apportion the costs and supposedly enable a fairer deal. This proposal yet again places unrealistic and disproportionate expectations on the dairy processor.
- To our understanding, no disputes have progressed to mediation, signifying alternate paths for resolving a complaint are being effectively pursued.
- The appointment of the ombudsmen provides both dairy farmers and processors with an independent and impartial body empowered to investigate complaints confidentially, to foster a transparent and equitable trading environment – which is aligned with best-practice internationally.
- We also understand that local government funding is available for dispute resolution should funding be a barrier.
- On the matter of allowing a multi-party dispute resolution, this option is supported as a means of more efficient engagement.

ADPF Recommendation:

The ADPF does not support negotiation and arbitration costs being based on pro-rata turnover to supposedly give each party a fairer deal. We purport the current mechanism for complaint handling is working, with the ombudsman available to provide adequate resolution.

The ADPF supports the option of allowing a multi-party dispute resolution.

7. Cooling off periods

- Section 23 refers to Milk Supply Agreements (MSA) needing to have a **14-day cooling off period**, and a **farmer being able to terminate the agreement with immediate effect ‘without incurring any liability’ to the processors [23 (2) b]**.
- We understand the intent of the cooling off period is to ensure the farmer (supplier) agrees to and is comfortable with the terms and conditions in an MSA and has adequate time to consider their obligations under an MSA.
- The ACCC provides that a cooling-off period is a safeguard designed to give consumers the opportunity to *change their minds* about a purchase or agreement they have made⁷.
- Consumer Affairs Victoria (2009) explains a cooling off period ‘allows a consumer to reconsider a decision *made in haste, under pressure, or without the information needed to make a good choice*’⁸.
- The Dairy Code was intended to assure a more proportionate distribution of risk between dairy farmers and processors and create greater certainty for both to plan and invest.
- ADPF considers the current 14-day cooling off period in the Dairy Code creates inefficiencies in process, unnecessary risk and an extended period of uncertainty, and shifts the negotiation balance

⁷ <https://www.accc.gov.au/consumers/contracts-agreements/entering-into-a-contract>

⁸ <https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/cooling-off-periods-in-victoria-their-use-nature-cost-and-implications-2009.pdf>

too far towards the farmers. Both parties have operated in ‘good faith’, negotiated, and agreed to a contract. But only a farmer can terminate during the cooling off period, with the processor potentially left with commercial damages.

- The result could be catastrophic – as one company explained, losing one 20 million litre farm on day 13 or 14 of the cooling off period would result in 15% of milk volumes being lost and 30% of their revenue. A second company experienced a farmer signing and leaving a contract on day 14 of the cooling-off period, with the lost milk volumes unable to be replaced. Not all processors are large and able to carry this risk.
- Whilst processors shoulder the main implications, this has consequences along the supply chain – transport companies, ingredient suppliers, customers, as well as to other farmers – and the potential inability to pay a step-up.
- Year on year, the likelihood of farmers (suppliers) terminating during the cooling off period will increase, in turn increasing the commercial implications for processors.
- If we liken this to a farmer and their purchase of hay, their estimated milk yield and quality (and in turn farmgate milk price) is based on that available feed type. If the seller, decides not to provide that farmer with the hay at the last minute, the implications and consequence could be detrimental.
- Under the Dairy Code, the farmer has three key protections to consider their MSA:
 - the Dairy Code which mandates certain terms in a MSA (with prior year contracts available to review if they choose);
 - the publication mechanism (1 June requirements); and
 - then the 14-day cooling off period.
- With the majority of contracts due for renewal by 1 July each year, this provides the farmer with **at least 30 days to consider the published contract**.
- The combination of these mechanisms is novel compared to other industry codes.
- The status of cooling off periods for other industries:
 - Dairy farmer purchasing grains – nil.
 - Food and Grocery Code of Conduct – nil.
 - Franchising Code of Conduct – originally 7 days, recently amended to 14 days (noting there is no month-long period beforehand).⁹
 - Private purchase of a house: between 2-5 days (Tas/WA – none).
 - Horticulture Code of Conduct:
 - specifies a 14-day cooling off period for contracts >90 days or not specified, OR
 - **the cooling off period can be negotiated between parties (of no less than 7 days).**

⁹ The recent amendments to the cooling off period in the Franchising Code of Conduct. There was great uncertainty about when the cooling off period started, and so franchisees often experienced short timeframes for decision making. This is different to the Dairy Code context, where farmers have at least 30 days to consider published SFAs, and then has the cooling off period once the farmer enters into an MSA.

ADPF Recommendation:

The cooling off period in the Dairy Code is reduced to a maximum of 7 days, to comply with common commercial practice, minimise inefficiencies and create a fairer process across the dairy supply chain.

A clause is inserted into the Dairy Code to allow both parties to negotiate the length of a cooling off period, of 7 days or less.

In either of these circumstances, we propose the cooling off period does not apply:

- ***if a contract is signed on or after the 30 June and milk is collected.***
- ***from the first day of milk collection (if that falls within the June period).***

8. Unsigned contracts.

- Section 16 of the Dairy Code states that a dairy processor must only purchase milk under an MSA, either written or unwritten, with a civil penalty to apply if this does not occur.
- There is no reciprocal obligation under the Dairy Code that states the farmer (supplier) can only provide milk under an MSA, nor a penalty for not adhering to this.
- The process for ensuring all suppliers execute a new agreement each supply period can be practically challenging, e.g., a four-week negotiation period and processors competing at the one time, in addition to the physical restrictions and limitations of COVID-19 as are being experienced throughout Australia.
- Sometimes, a farmer (supplier) receives the written agreement but does not execute it before initiating the supply of milk to a processor.
- The unwritten contract regime is potentially confusing and impracticable to implement when there are such strict formal requirements under the Dairy Code in respect of what should be an informal verbal arrangement:
 - As per section 18 (2) and (2)(c): *Written record of unwritten agreement* – the processor must no later than 30 days after entering into the MSA make a written record of the contents of the agreement, and if a supply period of the agreement is greater than 90 days, make all reasonable efforts to obtain from a farmer written acknowledgement that the record is complete and accurate.
- In order to best manage the milk collection process for an agreed period within the Dairy Code (even when a contract is not signed or a detailed unwritten agreement is entered), ADPF presents the following options for consideration by the DAFF:
 - a) The Dairy Code could include reference to a ‘grace period’ that would allow a processor to collect milk without a signed written agreement, or before any unwritten agreement is entered into with a supplier, and not incur a penalty.
 - b) The Dairy Code could provide ‘deemed acceptance’ by a supplier. For example, once a supplier receives a written agreement but does not execute it, deemed acceptance applies from the time the milk is collected – *preferred position*.
 - c) Section 16 could be rewritten to apply to both a dairy farmer and processor, including the civil penalty – placing accountability on both parties for the transaction of milk (e.g., a farmer must only provide milk under an MSA, either written or unwritten).

ADPF Recommendation:

The Dairy Code is reviewed to best allow for collection of milk in accordance with the Dairy Code – without any penalty to either party. This could be through the introduction of a grace period, a ‘deemed acceptance’ period, or amending section 16 to apply to both a farmer and processor, including the civil penalty.

The ADPF recommends ‘deemed acceptance’ as the preferred approach.

The ADPF welcomes further discussion on this.

Conclusion

The ADPF appreciates the work undertaken to date and seeks further opportunities to work collaboratively with the government and other dairy industry partners, to refine the Dairy Code into a fairer and more commercially efficient and workable document that supports confidence in the viability and sustainability of the Australian dairy industry.

A genuine and comprehensive second review of the Dairy Code must occur, with a revised Dairy Code completed as a priority to avoid any further unintended consequences.

We are available to discuss any of our responses in more detail.

Regards,



President
Australian Dairy Products Federation



Executive Director
Australian Dairy Products Federation



Appendix

Benchmark Milk Value

The problem: There is no objective reference to determine what ‘extreme circumstances’ under the Dairy Code of Conduct means and how it can be objectively determined and/or evidenced.

The proposal: A **Benchmark Milk Value** (BMV) be established and maintained as an objective measure of the wholesale market value of milk in the southern Australian manufacturing regions and major fresh milk regions.

This is similar to other sectors with benchmark indices that have successfully operated for years, such as in beef – and the Eastern Young Cattle Indicator – grains, wool and cotton. Mercantile provides another example.

The BMV would be an agreed, objective, fact-based measure of wholesale market conditions. It increases the transparency of supply chain returns which will be translated into a relevant farmgate milk price equivalent measure.

The measure needs to be credible, and the calculation and reporting process must be robust and transparent.

The calculation platform should draw on established industry experience and commercially relevant market intelligence and analysis infrastructure.

This could build on the Milk Value Portal established in 2020 to improve the transparency of current milk contracts. The BMV would offer projected comparison between contracted milk prices and commodity returns.

Previous failed attempts at transparency have suffered from a lack of deep knowledge of dairy supply chain operations and have failed to translate into meaningful milk value measures and a form relevant to farmers.

They lacked credibility and timeliness and as a consequence were ineffective.

How could it be used? This BMV could be compared with minimum farmgate milk prices being paid on average across those regions to illustrate significant in-season differentials that would inform a definition of an exceptional circumstance.

It would be maintained as a projected full season BMV using appropriate actual and forward product prices, which would be compared to the projected average announced farmgate milk price on a quarterly and annual basis.

Changes in the BMV throughout the season are retained for comparison – enabling a ‘starting differential to be used as a comparison to an improving or worsening market outcome.

The extent of the difference between the BMV and farmgate milk price would be highlighted – using a traffic light system approach.

A significant and sustained differential between the BMV and prevailing farmgate milk prices (i.e., a BMV 10% or 20% lower than the farmgate milk price) would indicate a need for a prospective milk price reduction, triggering a decision from an Independent Arbiter – and involve the parties to the milk supply agreement.

If an exceptional circumstance was enacted, the price reduction would apply until the end of the season, or the differential between the BMV and farmgate milk price and was reduced (i.e., 10% or 20%) – whichever came first.

How is it calculated? The BMV would be calculated to take account of the following factors:

1. Wholesale prices that reflect the conditions to which the product mix is exposed, including spot commodity, estimated wholesale prices and relevant forward price intelligence using SGX futures and GDT contracts.
2. Currency exchange rates
3. Australia's manufacturing product mix
4. Product yields from major manufacturing processes
5. Conversion costs
6. Profit retention/margin

The BMV would be reported as a weighted average as well as individual product streams.

How would it operate? The BMV would be an extension to the existing Milk Value Portal resource, which was developed by the Australian Dairy Products Federation and is currently maintained by Freshagenda.

The BMV would be calculated weekly, utilising existing data streams and modelling capabilities.

External validation of the calculation assumptions and process would be an important feature in the implementation of the BMV to establish credibility and buy-in from stakeholder and dairy supply chain participants.