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Submission to Consultation on Operation of the Dairy Industry Code of Conduct

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Introduction

1. eastAUSmilk is the voice of dairy farmers in New South Wales and Queensland. It was formed from the amalgamation of Dairy Connect in New South Wales, and Queensland Dairyfarmers' Organisation.
2. We thank you for the opportunity to make a submission to the 2024 Consultation on Operation of the Dairy Industry Code of Conduct, and thank you too for accepting our submission slightly late.
3. Our submission follows submissions made to the following inquiries:
 - a. Review of the Food and Grocery Code of Conduct 2023-4 (Emerson review)¹²,
 - b. Senate Select Committee on Supermarket Prices 2024³, and
 - c. the Australian Competition and Consumer Commission Supermarkets inquiry 2024-25⁴.
4. Dairy farmers, daily, are in contact with milk processors and supermarkets: their staff and contractors, and, often enough, their managers. eastAUSmilk frequently has contact with a similar range of people. In many of those conversations, issues are raised, and things said, which processors and supermarkets will not say publicly. Much of those three submissions, and part of this submission, is based on those conversations.
 - a. Those individuals (farmers, and staff and contractors of processors and supermarkets) would be most reluctant to make even an anonymous submission to any inquiry, for the same reason as their reluctance to make public comment: certainty and fear of retaliation.
 - b. We are also told that historically, supermarkets find it far too easy to find out what has been said when their suppliers or farmers talk with public servants or Members of Parliament – confidentiality is often promised but not always delivered, so the risk of even confidential submissions or discussions is too great.
 - c. Some of our discussions are with senior staff of processors – we are not simply repeating the kind of gossip which might flow between under-informed and more junior staff.
 - d. We have consequently addressed the issue of retaliation in some depth.
5. We have attached to this submission each of our submissions so far to these inquiries/reviews, and would like you to consider them as part of this consultation process.

¹ <https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review-2023>

² The Emerson Review has released their Interim Report on 8 April 2024. While the Interim Report is not addressed in our submission, eastAUSmilk regards the Interim Report, at first glance, as a very positive start.

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Supermarket_Prices/SupermarketPrices

⁴ <https://www.accc.gov.au/inquiries-and-consultations/supermarkets-inquiry-2024-25>

6. While there is significant overlap between those submissions and this, the focus of each is different and in this submission we address the Dairy Industry Code in more detail.

The Circumstances of Dairy Farmers

7. Dairy farmers are nearly always price takers and cannot pass on additional costs.
8. While some dairy farm enterprises are large, with big herds and many employees, many are very small businesses with few, if any, employees. In many cases, the principal employee is the business owner, supported by additional family members.
9. Many dairy farmers are only now beginning to recover from the financial and emotional impact of dollar-a-litre milk, and floods and droughts, and remain in debt. Many are only, just recently, able to begin to reduce that accumulated debt.
 - a. This drives a lack of confidence, and a wariness about investment.
 - b. That wariness extends to borrowings big and small, and consequently inhibits uptake of business, and modernisation, opportunities.
10. The dairy industry is extraordinarily variable across the nation, and this includes:
 - a. Breeds of cattle,
 - b. Farm size,
 - c. Production systems,
 - d. Production cycles, including breeding timing, often dictated by processors,
 - e. Productions costs,
 - f. Production risks, including climate,
 - g. Farm profitability, and
 - h. Proximity to processors.
11. This means it is wrong to regard the industry as homogenous, when making policy decisions or drawing conclusions, and entirely wrong to rely on averages or industry wide trends.
 - a. Yet governments of every stripe are advised by their public servants to do just that.
 - b. Regional needs and place-based solutions are effectively ruled out, and other initiatives are often built to fail, because of the refusal to accommodate regional differences.
12. We urge that in considering this submission you must take into account the vastly differing circumstances of dairy farms and dairying regions, and the consequent need for different policies and solutions from one place to another.
 - a. There should be no presumption that the Dairy Industry Code must have uniform provisions across the entire nation, where it is demonstrated that circumstances and needs differ.
 - b. Three examples:
 - i. There are parts of Victoria where multiple milk processors genuinely compete for milk supply from dairy farms, and this is an utterly different

market than Far North Queensland where there is one processor option only, for dairy farmers, and no competition.

1. In many locations, there are only three or fewer processors seeking milk supply, and this ensures a lack of competition and market failure.
- ii. While there is much complaint from some processors that Australian farmgate milk prices need to be driven by international milk markets, when the proportion of exports varies enormously from one region to another, yet it is the highest-exporting state which trucks milk to Far North Queensland when there is a supply shortfall.
- iii. While in many regions processors accept peaks and troughs in supply from each individual contracted farm, across Queensland and parts of New South Wales processors demand flat supply across the whole year. This imposes significant costs and constraints on the way a dairy farm operates, and in particular the calving and fodder cycle, and this processor decision – not a farmer decision – makes the economics of dairy farming in those regions significantly more precarious.
- c. Therefore, proposals to address uncompetitive or otherwise malfunctioning markets may need to be tailored to the needs of, and apply in, specific regions only.

Dairy Industry Code

13. The Dairy Industry Code commenced on 1 January 2020, and applied to milk bought and sold from 1 January 2021. It is mandatory, binding on dairy farmers and processors.
14. The Code arose from an Australian Competition and Consumer Commission inquiry (2016-8, <https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/dairy-inquiry-2016-18>) which reported on 30 April 2018, recommending, *inter alia*, a mandatory code.
 - a. The Terms of Reference of this inquiry, and disingenuous analysis provided to the ACCC, ensured the report and code were much more about the relationship between processors and dairy farmers, than the role of the retail sector.
15. As is noted on the Australian Competition and Consumer Commission website, the code aims to promote fair trading in the dairy industry by imposing minimum standards of conduct on farmers and processors.
16. These minimum standards of conduct were supposed to account for the imbalance in bargaining power between dairy farmers and processors, and address longstanding industry practices which were seen to be unfair or had the effect of deterring farmers from responding to market signals.
17. The 2018 report made many findings adverse to the behaviours of milk processors, and other features of the operation of the market, including⁵:
 - a. There is a large imbalance in bargaining power and information that exists between dairy farmers and processors.
 - b. Processors could impose milk prices and other terms of milk supply contract terms that are heavily weighted in their favour. Some milk supply contracts also contain terms that restrict farmers' ability to change processors for a better offer.
 - c. Dairy production efficiency and the effectiveness of competition between processors is thereby harmed.
 - d. A voluntary code would be inadequate to address the issues, and a mandatory code would improve the quality of information and price signals available to dairy farmers, enable fairer allocation of risk and enhance competition by removing switching barriers.
 - e. The retail price for milk is set by retailers arbitrarily and has no direct relationship to the cost of production for the supply of milk.
 - f. Because almost all contracts for the supply of private label milk allows processors to pass through movements in farmgate prices to supermarkets, there is no direct relationship between retail private label milk prices and farmgate prices.

⁵ <https://www.accc.gov.au/media-release/accc-calls-for-regulatory-reform-to-assist-dairy-farmers>

- g. If supermarkets agreed to increase the price of milk and processors received higher wholesale prices, processors would still not pay farmers any more than they have to secure milk.
 - h. Increases in the supermarket price of private label milk are unlikely to increase the farmgate prices received by farmers, unless farmers have improved bargaining power in their negotiations with processors.
 - i. Introducing the code won't fully correct the bargaining power imbalance, but will reduce some of the negative consequences.
18. The Commonwealth government has modified the dairy code to modify the requirement for a review of the Code to be completed by 31 December 2023, and that review must now be completed by 31 December 2026.
19. eastAUSmilk is exceptionally disappointed by this deferral, as we are of the view that many changes to the Code are now necessary and urgent, in light of the experience of dairy farmers with its operation over, now, three years.
- a. Even at its making, the ACCC noted it would not fully correct the bargaining power imbalance, but would merely reduce some of the negative consequences.
 - b. This assessment also underpins their 2021 submission to the review of the dairy code⁶.
20. Department of Agriculture, Fisheries and Forestry recommended this deferral to Government, knowing full well eastAUSmilk had significant issues we wanted to raise about the operation of the Code, knowing full well eastAUSmilk proposed to discuss those issues at an appropriate time, and without bothering to ask what those issues were.
- a. They need to bring to this review a significantly improved level of respect for stakeholders and the issues we raise.
21. We note that some of the consultation questions posed in the DAFF issues paper could be answered in many different ways. Some of the responses could propose to shift risk back onto farmers. Given that the whole purpose of the Code has been to rebalance bargaining power, and shift risk away from those least able to bear it – dairy farmers – any such proposals would:
- a. Undermine the entire purpose of the code,
 - b. Carry an exceptionally heavy burden of proof of necessity, before they could be considered,
 - c. Conflict with the finding of the ACCC that the code won't fully correct the bargaining power imbalance, but will reduce some of the negative consequences – the Code clearly needs to be strengthened rather than weakened.

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https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Dairy%20Code%20of%20Conduct%20Review_0.pdf

Dairy Farmers, Processors, and Supermarkets

22. Most dairy farmers sell their product to milk processors, who collect the milk from farms via tanker, and then process and package it according to the instructions they receive from
- their own brands, where milk processors provide their branded dairy products to retailers for them to sell, and
 - retailers, who sell under the retailer's own brands to the public, called 'private label' products.
23. Some dairy farmers sell their milk directly to retailers, with milk processors receiving that milk on behalf of the retailers, and processing and packaging it for the retailers, while at no stage owning the milk. All of this milk becomes a private label product, and this arrangement is called tolling.
24. The proportion of milk bought and sold as private label dairy products varies by region, and an analysis can be found in the annual *In Focus* report produced by Dairy Australia⁷.
25. The volume of private label milk consumed in Australia far exceeds the volume of branded milk, and hence the pricing of private label milk (and other private label dairy products) can exert a powerful influence over the pricing of branded dairy products.
26. Supermarkets show a clear preference for very large dairy farms, and we expect very large suppliers of other perishable goods, too, for their private label products, and they often attract such suppliers by paying a more attractive price. This practice has multiple impacts and implications:
- The supermarkets, because of their greater knowledge of supply chain costs and their complete control over their private label margins, can attract particular suppliers by paying a better price.
 - Their suppliers can be more positive about their relationship with the supermarkets, than others in the sector.
 - Milk processors and wholesalers must then access and contract with smaller suppliers. There is a relationship between supplier size and their capacity to see the cost and efficiency benefits arising from larger scale production/operation. This can mean the supply cost is higher than via the tolling route.
27. In their 2018 Report, the ACCC said
- “Evidence obtained by the ACCC under our information gathering powers demonstrated that almost all contracts for the supply of private label milk have clauses that allow processors to pass-through movements in farmgate prices to supermarkets. As a result, there is no direct relationship between retail private label milk prices and farmgate prices. For this reason, changes to the retail price of private label milk are unlikely to result in any changes in the farmgate milk price received by farmers,

⁷ <https://www.dairyaustralia.com.au/industry-statistics/industry-reports/australian-dairy-industry-in-focus>

because processor profits on private label milk are not influenced by whether farmgate prices are high or low.

“This suggests that measures to improve the bargaining power of farmers in their interactions with processors are a more appropriate mechanism to ensure the pricing policies of retailers do not cause undue long-term harm to the industry.”⁸

28. This proposition, while reflecting what was provided to the Australian Competition and Consumer Commission, does not reflect the real world.
29. Evidence being seen in public⁹ and provided, or to be provided, to the three inquiries referenced at paragraph 3 above makes clear that whether their relationship with producers is direct, or via distributors/processors, the market power of the major supermarkets sees them exert enormous influence on farmgate prices, and the margins applied at each stage of the supply chain.

⁸ Page xxi, summarising material elsewhere in the Australian Competition and Consumer Commission 2018 report.

⁹ E.g. the Four Corners program referenced at paragraph 43 of this submission.

Processors, Suppliers, and Supermarkets

30. The relationship between dairy processors and supermarkets is in part addressed by the unenforceable, optional, and penalty-free, Food and Grocery Code of Conduct.
31. Staff of processors, including senior staff, tell us they have never looked at the Code, nor been trained in it – it is treated as irrelevant to their business. To the extent their work routines are influenced by the Code, they are unaware of that.
32. Many reviews have recommended making that code mandatory, but successive governments have been too afraid of the power of the big supermarkets to take that action.
33. Reviewers and reviews have probably also been advised that the market functions well and it would be wrong to intervene – the standard (and often wrong) advice from ideology-driven economists – and governments have been able to cite that advice as the reason for not intervening.
34. We note that the current cost of living crisis across Australia is, in part, the consequence of that timidity.
35. We also note that the current lack of confidence in supermarkets has driven multiple inquiries aimed at pressuring those supermarkets to moderate their profits.
 - a. If they do so voluntarily and such a tactical and cynical moderation is seen as making it unnecessary to regulate their behaviour, then the Government will have let down the community.
36. The members of eastAUSmilk have frequent contact with milk processor companies at the local level and upwards, and we also actively engage with processors at more senior levels.
37. Every last one of those processors, and many other suppliers to supermarkets, has horror stories to tell about being bullied by supermarkets, but they will not tell those stories. They tell our members, who tell us, or the processors tell us directly, but they will not speak up for fear of supermarkets taking action to impair their business.
38. They know that if they are identified as the source of a negative story about a major supermarket, there are a myriad of ways, small and large, their business will be made to suffer.
 - a. Their products will no longer be at eye level on shelves, or within easy reach.
 - b. It might take hours to restock their products on shelving, once sold out.
 - c. The proportion of shelf space devoted to private label products can increase by reducing the shelf space for branded products.
 - d. Supermarkets can, in some circumstances, place their tolling and plain label processing with other processors.
 - e. Supermarkets wanting to punish a processor will reduce their take, while at the same time paying a higher price to take milk from another processor, and reducing their margin, temporarily.

- f. The pass-through of farmgate price increases can be consciously delayed whenever a supermarket feels like it. Not all contracts specify timeliness, and even if they did the payments can be delayed by inventing queries about paperwork.
 - g. Equivalent practices to those raised by Queensland Fruit and Vegetable Growers association in recent media can also be used in relation to dairy processors.
39. eastAUSmilk members and processor staff/contractors have in many cases a low opinion of the overall integrity of larger supermarkets and will mention such examples as
- a. misleading labelling of “specials”,
 - b. misleading advertising (Hillview Cheese, packaged in green and gold but made overseas is mentioned),
 - c. focussing in labelling on weight when convenient, and volume when convenient, to encourage under-informed buying,
 - d. local supermarkets using cross-subsidised predatory pricing to eliminate local competition, and then raise prices again,
 - e. promising and then avoiding additional shelf space¹⁰,
 - f. use of fonts so small as to be unreadable when notifying price per kilogram and other required or legitimate comparisons on labels/tags, and
 - g. misleading labelling more generally.
40. It is a normal requirement, but very wrong, that supermarkets require suppliers to invest in promotional and marketing activity.
- a. Failure to so invest leads to reduced or less preferential shelf space.
 - b. There is pressure to increase it every year.
 - c. The demand can include to take advertising in, or directly subsidise, the supermarket's own marketing channels.
 - d. Supermarkets treat this impost as simply yet another income stream.
 - e. In reality, it is suppliers subsidising supermarkets.
41. We have also been advised of examples of supermarkets reducing the retail price of a product, and then attempting to share the pain down their supply chain by looking to suppliers or producers to match the price cuts by subsidising other supermarket activities such as advertising.
42. Supermarkets can be quite paranoid when it comes to relations with suppliers. They have been known to accuse suppliers of being “in bed” with competitors, when competitor prices don't increase in the same pattern as their own when supplier prices have been increased.

¹⁰ We have in mind, here, a recent and partly public example.

43. Having reviewed the mechanisms for taking revenge on suppliers, detailed in the *Four Corners* program of 19 February 2024 called *Super Power: The cost of living with Coles and Woolworths*¹¹, eastAUSmilk agrees that these, and other similar tactics, are what processors and our members have described to us.
44. Pass-through clauses, referenced above, are activated only if a processor chooses, and activated in full only if a processor chooses to seek to pass through the whole increase.
45. Given what we know of the fear of retribution from big supermarkets amongst some processors, they will resist farmgate price increases regardless of need or equity whenever they can – as they did for the whole of the period of dollar a litre milk. They have form, regardless of whether the ultimate pressure came from within, or from supermarkets.
46. Were processors prepared to speak up, even privately and confidentially, it would be clear to the Review and the government that the ACCC's rejection of interfering with retailer power, in their 2018 Dairy report, was quite wrong-headed.
- a. It is entirely ridiculous to suspect supermarkets were able to maintain a dollar-a-litre price for the private-label milk they sold because processors voluntarily, and to an extent unanimously, kept prices down.
 - b. Processors kept farmgate prices down because supermarkets pressured them to do so. The absence of public evidence for this is disappointing, and a testament to the willingness of processors to be pressured, but in no way diminishes the truth of the assertion.
47. While supermarkets have abandoned their dollar-a-litre milk pricing, this was not done after a change of heart about the ethics of the practice, nor a new-found concern for the sustainability of dairy farmers.
- a. They did not update their codes of behaviour or ethical requirements of staff, because they decided they were operating consistent with them – what they were doing, they felt, was consistent with their ethical obligations.
 - b. There is no reason to suspect a similar level of ruthlessness will not be applied to future dealings with wholesalers and suppliers.
48. Making the grocery code mandatory will go some way to re-balancing the relationship between supermarkets and wholesalers, a better balance in bargaining power, and a better functioning (while still imperfect) market.
49. Senior officers of processors have said to us unequivocally that the voluntary and unenforceable nature of the Fruit and Vegetable Code makes it entirely ineffective.
50. What governs the relationship between milk processors and supermarkets is not that Code, but processor fear of retaliation. That fear has supplanted the Code as the principal regulatory instrument.

¹¹ <https://www.abc.net.au/news/2024-02-19/super-power-the-cost-of-living-with-coles-and-woolworths/103486508>

51. The grocery market does not function efficiently and will not improve sufficiently while the Food and Grocery Industry Code is voluntary – that's the basis for the ACCC's past advice that the grocery code should be mandatory. As is the case with the experience in the dairy sector, making the Grocery Code mandatory would not fully correct the power imbalances in the grocery sector, but would reduce some of the negative consequences.
52. What all of this adds up to, for Australia's dairy farmers, is that it is a critical counterpart to improving the Dairy Industry Code as we propose in this submission, that the Food and Grocery Industry Code be made mandatory and not watered down.
53. Analysis by Australian Dairy Farmers shows that much of the content of the mandatory dairy code is similar to or the same as the content of the voluntary grocery code.
- a. Major supermarkets which purchase milk directly from farmers are already bound by the mandatory terms of the Dairy Industry Code, as well as their voluntary commitment to abide by the similar terms of the Food and Grocery Code.
 - b. They cannot, therefore, be said to be unreasonably burdened by a mandatory Food and Grocery Code in terms similar to the current Code.
54. In particular, as we propose in our submission to the Emerson Review of the Food and Grocery Industry Code, the Code must find a way to ensure big supermarkets do not retaliate against their suppliers. We see this as vital to ensuring effective markets in the food and grocery sector.
55. We address the relevance of the retaliation issue to the Dairy Industry Code, below.

Supply Chain Margins

56. When the dairy industry was regulated, farmgate prices were prescribed, processor margins were reported, and retailer prices were public information.
57. We are not herein advocating a return to those days or systems, but current margins need to be considered in the context of historic margins, as part of testing whether price-gouging is happening at any point in the supply chain.
58. We have made these points below as part of our submission to the Emerson Review of the Food and Grocery Industry Code, but believe they apply equally to the margins in those parts of the dairy industry supply chain which are not covered by that Code.
59. In April 2021, ACCC reviewed the impact of deregulation on Australian milk industry prices, margins, costs and profits.
60. They found¹²:

“From the June quarter to December 2000 quarter the gross margin on aggregate milk sales in supermarkets declined by 19 per cent with retail prices falling at a greater rate than wholesale prices. Despite sales volumes increasing by around six per cent, substantial reductions in per litre revenue led to an overall decrease in aggregate revenue derived from supermarket milk sales during this period.

“The average net profit margins of Australian milk processors decreased by around 12 and 18 per cent respectively on a per litre basis for the September and December 2000 quarters relative to the June 2000 quarter. As the total volume of milk sold in Australia was relatively constant over this period, the overall profitability of milk processors decreased following deregulation. Although price discounting of branded milk products fell away in the December 2000 quarter, net profit margins remain considerably lower than for periods before deregulation.”

61. We are advised of one recent example where a supermarket set their price with processors on the basis of a 42 percent margin between their shelf price and what they would pay a processor. We doubt they will acknowledge that, publicly.
62. eastAUSmilk firmly believes that supermarket margins are excessive, and contribute to cost of living pressures.
63. Sunlight is the best disinfectant, and we believe that the government, perhaps via the Australian Competition and Consumer Commission, should continue to monitor the milk product margins of the major supermarkets.
- a. This will help ensure any behaviour change arising from current reviews of supermarket profit-making is embedded and not fleeting.
 - b. Some form of public reporting will be necessary.
 - c. Supermarkets and dairy processors have the technology to report this information for all product lines, easily, and in almost real time.

¹² <https://www.accc.gov.au/media-release/big-gains-to-consumers-from-dairy-deregulation>

64. Supermarkets and processors will reject this as undermining a competitive market, but the way major supermarkets acquire and sell product is not a properly competitive market but more a duopoly, so that argument rests on a false presumption. In many instances, too, a properly competitive market is not in place for the purchase by processors of milk, and that argument again rests on a false presumption.
65. In addition, as noted above and directly at odds with findings by the Australian Competition and Consumer Commission in 2018, because of the way they use their market power, the big supermarkets have a massive impact on the prices and margins at all points along their supply chains.
66. They will also claim such an obligation is unduly burdensome, but this is simply not correct.
67. There are several options open to Government in addressing this proposition via modifying the Dairy Industry Code:
- a. No monitoring of margins, as at present
 - b. Monitoring of margins on a confidential basis by a trusted government entity such as Australian Competition and Consumer Commission,
 - c. Monitoring of margins on a confidential basis by a trusted government entity such as Australian Competition and Consumer Commission, with some level of external validation, and
 - d. Monitoring and publishing of margins by a government entity.
68. We believe this is warranted because supermarkets, demonstrably exploiting the community to make excessive profit, are rapidly losing their social license to operate as they do.
69. This loss of confidence amongst the community, of the integrity and *bone fides* of supermarkets, as a driver for such an intervention, ensures this cannot be seen as policy overreach nor a precedent for other industries.
70. However, a further issue would need to be addressed: ensuring that supermarkets do not seek changes to supply contracts designed to make up what had been lost through reduced margins.

Retaliation

71. In our submission to the Emerson Review of the Food and Grocery Industry Code, we addressed the important issue of retaliation at some length, because this goes to the heart of the capacity of the big supermarkets to subvert the business-like relations between them and their suppliers which are critical to effective competition and an effective market.
72. We also addressed what might be the components of a best-practice approach to eliminating fear of retaliation from food and grocery supply chains.
73. We raised, addressed, and stressed, these issues in our submission to the Emerson Review of the Food and Grocery Industry Code because it became clear to us in our discussions with processors that they feared to raise them themselves. We were doing what they would not.
74. The same retaliation behaviours seen between supermarkets and suppliers are reported to eastAUSmilk by members as also being present from time to time between processors and farmers.
75. In the case of supermarkets, this is seen as pervasive, and a product of a bad culture driven from the top.
76. In the case of milk processors, retaliatory and bullying behaviour is currently seen as less pervasive and less driven by organisational culture within processors, as is the case with the big supermarkets
77. For that reason, and because we have raised it substantively in the Review of the Food and Grocery Industry Code, we do not propose at this time to press for the Dairy Industry Code to be modified to address this issue.
78. We will instead wait to see what comes out of the Review of the Food and Grocery Industry Code, but note that if dairy processors fear bullying and retaliation from supermarkets directed at them (and they do!) then they should be entirely enthusiastic about eliminating this behaviour in their own ranks.
79. We ask that this issue be identified as potentially needing attention at the next review of the Dairy Industry Code, but we reserve the right to raise it further in the current review of the Code, if members escalate their reporting of incidents to us before this review concludes. We also reserve the right to raise it with individual processors, or Australian Dairy Products Federation separately to a review of the code.

Issues Previously Raised with Department of Agriculture, Fisheries and Forestry by eastAUSmilk

80. eastAUSmilk has previously provided the following list of issues to Department of Agriculture, Fisheries and Forestry, on the basis that these are the issues we had identified up to that point, as requiring resolution in the next review of the Dairy Industry Code. We have not yet had a substantive discussion with DAFF about this list.
- a. Some processors are not being honest and are misleading farmers re income estimates, including average expected payout for suppliers.
There should be an obligation to make this information public, and calculate it diligently and truthfully. Farmers need to be advised of the assumptions underpinning it.
 - b. In addition to disclosing average expected payout to existing farmers on 1 June processors also must do a reconciliation of each year's actual payout vs. average estimated payout.
Discrepancies need to be identified and explained.
 - c. All signed contracts are to be released publicly. At present, only contracts proposed by 1 June are disclosed but those contract terms nearly always change and the public version can be very different from the one ultimately signed by farmers.
 - d. The current Code does not envisage the power wielded by a retailer who is also a processor.
Further discussion is needed about how that power can be constrained in order to ensure competition, and no market manipulation.
 - e. Need to prohibit collusive behaviour by prohibiting processors from disclosing prices to anyone before 1 June.
 - f. Cooperative concessions which relate to long term contracts and roll over clauses should be removed.
 - g. In long term contracts, the minimum price proposed for years after year 1 must be at least the year 1 price.
 - h. All milk swaps must be prohibited in the code. This is used by processors as a way of colluding to suppress farm gate milk price. The role of milk brokers should also be reviewed.
 - i. Suppliers should be secured creditors, under the dairy industry code.
 - j. Small processors should be brought under the code.
81. It is our view that this range of issues can be accommodated within the Consultation Questions posed in the issues paper circulated by DAFF. To the extent our issues are judged to go outside or beyond the issues paper, we will be pressing them as priorities to be addressed in the course of this Review. Each is addressed briefly below.

Income Estimates

82. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

Some processors are not being honest and are misleading farmers re income estimates, including average expected payout for suppliers. There should be an obligation to make this information public, and calculate it diligently and truthfully. Farmers need to be advised of the assumptions underpinning it.

83. The Dairy Industry Code should be modified to require diligence and good faith in the preparation and presentation by processors of income estimates, and to clearly and separately list all of the assumptions underpinning the estimate.

84. Such an obligation should not have to be stated so explicitly, and should go without saying, but sadly that's not the case, noting that estimates are almost always an over-estimate rather than under. That pattern itself suggests lack of proper attention to assumptions and risks, but also a lack of interest in providing accurate information. This lack of interest or lack of proper attention is based in the market power of the processor and information asymmetry in the market.

85. The multiple components involved in the calculation of payments, used by some processors, means it is in many instances impossible for farmers to calculate their income estimates without substantial assistance from the processors.

86. Inaccurate or misleading income estimates, once discovered, are rarely pursued by farmers with the vigour warranted, because of a fear of major damage to the business relationship, but is a major impediment to business efficiency.

87. Farmers who rely on bad information to plan their year, particularly over-estimates of income, are invariably making wrong decisions about every element of their business, including investment, throughput, breeding, stocking, and feed planning.

88. While we are not saying – because it is very difficult to prove – that inaccurate estimates are provided to attract milk supplies, inaccurate estimates do distort the market by attracting suppliers who might have gone elsewhere.

Payout Reconciliation

89. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

In addition to disclosing average expected payout to existing farmers on 1 June processors also must do a reconciliation of each year's actual payout vs. average estimated payout. Discrepancies need to be identified and explained.

90. The Dairy Industry Code should be modified to require an annual reconciliation of income estimates vs. actual income, with identification and explanation of discrepancies.

91. It is in the interests of the efficient operation of an individual farm, and the industry as a whole, that income estimates are well-founded and accurate, and also that both farmers and processors can adjust their operations to maximise efficiency and profitability. Such an exchange of information as is proposed could be a significant contributor to that objective.

92. Processors, with their much greater resources together with the fact that is their decisions upon which farm income rests, are in a much better position to provide this analysis and information.

93. As noted above, the multiple components which can be involved in the calculation of the farmgate price can make it is impossible for farmers to calculate their own income estimates, and the reconciliation therefore can only be done by processors.

94. This is an important step to ensure the claims made by processors to attract suppliers are matched by actual prices paid, and that inflated estimates do not have to be dealt with in hindsight, not in an adversarial manner.

Make Signed Contracts Public

95. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

All signed contracts are to be released publicly. At present, only contracts proposed by 1 June are disclosed but those contract terms nearly always change and the public version can be very different from the one ultimately signed by farmers.

96. The Dairy Industry Code should be modified to require public disclosure of the full terms of signed contracts, and variations or supplementary agreements thereto.

97. We address some of the issues surrounding this proposal in our responses to various consultation questions, below.

98. It is ridiculous, misleading, and market-distorting that the initial proposals are the only public disclosure of the terms of MSAs between processors and farmers.

99. Because they are drafted by processors as a public document, they bear no relation to final terms, in their most important respects, but rather will often reflect an ambit claim.

100. This opacity creates confusion and uncertainty about the true content of contracts, promotes gossip and rumours about contents, and provides a powerful advantage to processors by ensuring information asymmetry between processors and farmers not party to the given contract.

101. We are advised by members and processors that there are many special deals done for individual suppliers, by the way of higher prices or up-front payments, and this is hidden from other suppliers, processors and the ACCC. This ensures a complete lack of transparency and makes it very difficult for other processors to compete for milk, and quite impossible for farmers to assess whether the offer they have been made is consistent with or behind the true market.

a. Clearly, the use of undocumented or secret components to a contract preserves the information asymmetry which is a feature of and supports the superior bargaining power of processors.

102. In addition, it is clear that in some instances the public initial proposals have been drafted not to inform the market, but to set the tone and manage expectations for the negotiations to come. Documents drafted on such a basis mislead, rather than inform, the market.

103. National companies have a history of publishing just one contract nationally, which is entirely misleading as different prices are paid in different dairying regions.

104. Processors doing sweetheart deals are distorting the market, and this should be known and reduced, in the interests of market efficiency and also equity between farmers, but also so that all farmers are better informed about the true market price for milk when they negotiate, and levels the playing field for the next round of negotiations.

105. Under-the-table deals cause a great deal of tension between farms, and between farms and processors, and introduce an element of distrust into business relationships, and all dealings in the market.

106. The same logic underpinning the government policy, now legislated, that employers cannot impose secrecy between employees on salaries and wages¹³, applies to the true pricing under MSAs. At the very least, the Code should be modified to prohibit price secrecy, and to allow farmers to share price information, and ask about price information.
107. Market efficiency is impaired by increased uncertainty, and creating new dimensions/factors of uncertainty; removing this uncertainty will improve the capacity of famers and processors alike to plan and invest appropriately.

¹³ Via the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

Addressing Vertical Integration

108. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

The current Code does not envisage the power wielded by a retailer who is also a processor. Further discussion is needed about how that power can be constrained in order to ensure competition, and no market manipulation.

109. We believe the outcome of the Emerson Review of the Food and Grocery Code may provide guidance on how best to address this issue, and propose to raise concrete suggestions after the interim or final report of that review.

110. In the meantime, we propose to further discuss the issue with Department of Agriculture, Fisheries and Forestry.

Prohibition on Early Pricing Disclosures

111. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

Need to prohibit collusive behaviour by prohibiting processors from disclosing prices to anyone before 1 June.

112. The Dairy Industry Code should be modified to prohibit processors disclosing proposed prices to anyone before 1 June, or before the start of MSA negotiations if this review of the Code results in earlier commencement of negotiations.
113. Some processors have purposely leaked their intentions before 1 June. This has proved very effective in encouraging other processors to reduce the prices they offer on 1 June and driving the price down for the whole negotiating round.
114. This constitutes a barrier to effective competition, as it establishes an environment in which price offers can be reduced by some processors to a price below what they would have otherwise offered, and effectively sets the market price, to the disadvantage of farmers.
115. Some players in the dairy industry have been actively lobbying to water down price negotiation elements of the Code since they believe that farmgate prices are too high and do not represent an appropriate price given international prices.
116. They want to see Australian farmgate prices set with reference to international milk markets, which is exactly the same as the arguments we see from time to time before industrial tribunals seeking to set Australian wages and conditions with reference to competitor nations' employment conditions.
117. Such a proposition has been rejected on every occasion it has been advanced, in other tribunals, and is opposed by the government.
118. This argument is fundamentally at odds with the Code and with competition policy. Instead of repairing a market which is not functioning properly, and in which negotiating power imbalances are a feature, such proposals would embed even worse negotiating power imbalances in the Australian dairy industry, together with a subservience to the worst elements of overseas markets.

Need to Remove Cooperative Concessions

119. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

Cooperative concessions which relate to long term contracts and roll over clauses should be removed.

120. The Dairy Industry Code should be modified to remove provisions about long-term contracts and rollover clauses which apply to cooperatives.

121. There is no need at present to provide this business advantage to co-operatives, as they increasingly demonstrate they wish to operate in the same manner as processors which are commercially-driven, and as the operation of the milk market drives them in that direction.

122. Maintaining such an exemption is not consistent with competition policy generally, and it is not appropriate for the Dairy Industry Code to facilitate practices which would be prohibited under general competition policy.

Future Year Pricing Under Contracts

123. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

In long term contracts, the minimum price proposed for years after year 1 must be at least the year 1 price.

124. The Dairy Industry Code should be modified to require that an MSA for longer than 12 months must apply not less than the year one price to the second and subsequent years.

125. This issue has been addressed sufficiently in our responses to Consultation Questions, below.

Prohibit Milk Swaps and Review Brokers

126. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

All milk swaps must be prohibited in the code. This is used by processors as a way of colluding to suppress farm gate milk price. The role of milk brokers should also be reviewed.

127. The Dairy Industry Code should be modified to prohibit milk swaps, except in very limited circumstances.

128. DAFF should seek submissions in the course of this review specifically about the legitimacy of the role of milk brokers in a regime where milk swaps are severely limited or prohibited.

129. Processors in some locations do not truly compete with each other because they know they can undertake milk swaps with other processors if they do not secure the milk they require at the price they are offering. If they could not undertake swaps or make other arrangements, they would compete harder for milk and force the farmgate price up - which is why they do not compete.

130. The ability of processors to undertake swaps and make other arrangements between processors creates an unregulated secondary market for milk so processors can trade between themselves.

131. This secondary market is often conducted at a significant premium beyond the farmgate price, and demonstrates how processors have not fully competed for milk. This current behaviour causes a direct transfer of wealth from farmers to processors which is why processors are so resistant to changing this practice.

Suppliers as Secured Creditors

132. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

Suppliers should be secured creditors, under the dairy industry code.

133. The Dairy Industry Code should be modified to require that milk supply agreements must be underpinned by legally enforceable instruments making suppliers secured creditors.
134. Farms almost always supply exclusively, or predominantly, to one processor. This benefits processors by securing reliable milk volumes. Farms are paid in arrears, so the risk of not being paid rests entirely with dairy farmers.
135. Because most processors require exclusive, or nearly exclusive, supply from each farm, any dairy farm which is not a secured creditor will lose any capacity to sell their product, for perhaps a lengthy period, if a processor cannot pay them.
136. While another processor may fill the gap in supply to retailers caused by collapse of a processor, that may take a while to organise, and farms can be entirely without income for a period. If other processors which might step in are already close to full production capacity, the hole in the milk supply market can take much longer to fill.
137. It could easily be the case that a dairy farm can lose several weeks of income in this situation, which could constitute their profit for an entire year.
138. While little can be done about milk which is produced in the period after a processor stops taking fresh milk and before an alternative processor takes the extra milk, it is reasonable to expect that farmers are paid for milk already taken by processors, and which has in most cases been on-sold.

Apply Code to Small Processors

139. eastAUSmilk has previously advised Department of Agriculture, Fisheries and Forestry:

Small processors should be brought under the code.

140. The Dairy Industry Code should be modified to so that the exemption for smaller processors is tightened or eliminated. We suggest a \$3M turnover threshold or having more than one supplier.

141. This issue has been addressed sufficiently in our responses to Consultation Questions, below.

Responses to Consultation Questions

1: Extension of 3-year contracts

Question 1.1: What are the anticipated tensions that could arise when the end of a MSA supply period is postponed?

Provided the postponement is made through a genuine and unpressured agreement, then the only tensions which should/could arise would come from unforeseen circumstances ... and every MSA carries that same risk. That's a risk which cannot be eliminated.

However, if the superior bargaining strength of a processor, or their failure to disclose important information, leads to postponement, then ultimately it is a postponement imposed on an unwilling party, and an abuse of market power.

One example of the latter situation would be the attempt to embed automatic rollover provisions in a MSA, which always interferes with the operation of an effective and efficient market. In the absence of an industry Code, such a provision would be found anti-competitive and unenforceable, we believe, and there is no reason it should be allowed merely because of the existence of the Code.

Question 1.2: How can the risk of 3-year MSA extensions be better balanced between all parties?

Four changes to the code would reduce the risk of farmers being pressured to agree to a postponement, and tend to balance the risks for all.

- The Code should be modified to require bargaining in good faith, and full disclosure of information material to the contract. This burden should apply to both parties, and provides protections to all involved. If such an obligation was applied to all bargaining under the Code, then it would go a long way towards reducing the asymmetry of power and knowledge between the parties, reduce risks to each party, and promote a more efficient market. Such a bargaining obligation would not be novel: many bargaining processes covered by Commonwealth legislation impose equivalent obligations.
- The Code should be modified to ban automatic rollover provisions in MSAs.
- The Code should be modified to require that, if the expiry of an MSA is postponed, then the milk price to be paid during the extension period is no less than the highest price paid under the MSA.
- Extension of a MSA can be seen as anti-competitive, as the milk is no longer available in a free market, so the Code could be modified to specify the circumstances in which the expiry of an MSA can be postponed, and/or impose limits on the postponement.

2: Small business definitions and exemptions

Question 2.1: Should the small business exemption be expanded to include processors purchasing milk from a limited number of farmers? What threshold would be appropriate (e.g., processors purchasing from fewer than five farmers)? What risks would arise from expanding this exemption?

The small business exemption should be narrowed, rather than expanded. We would like some dialogue about the parameters of such a narrowing but suggest a smaller number like 2 farmers or \$3M turnover would be more appropriate, if there is to be any exemption.

There is no reason we can identify for the Code to not apply to smaller processors – it would not impose an unreasonable burden on them, and in an environment where there are multiple processors competing for milk supply, a small processor must be voluntarily applying most or all of the provisions of the Code, or farmers would not feel safe contracting with them.

Even a small processor can enjoy and use a significantly stronger bargaining position than a farmer, because the comparative strengths of the two sides arises in part from the number of processors competing for the same milk.

We are advised that many, but not all, small processors generally apply the terms of the Code, or at least those which they can easily apply. To continue with the exemptions as they are, is to deprive some dairy farmers of the protections of the Code, and continue to protect some processors from the rigours of a better-functioning market, and a fairer bargaining power balance.

The current threshold is seen as relatively high, and we have seen a number of smaller processors fail, causing issues for farmers, so want to press for them to receive appropriate protections.

If there is to be an ongoing exemption for smaller processors, regardless of the cutoff point, then there should be exemptions only from those provisions of the Code demonstrated to be unduly burdensome, not an exemption from the whole Code.

3: MSA variation requirements

Question 3.1: Rather than publishing all MSAs (including the superseded MSAs), what are the risks or benefits with a processor maintaining a complete list of variations alongside the current MSA? Can the risks be mitigated?

eastAUSmilk strongly opposes this proposition. Rather, we propose that the Code be modified so that all signed MSAs and all agreed variations must be published, in a way which makes clear what is current and what is superseded.

Properly documenting contract terms is good business practice and is not an unreasonable administrative burden.

The current system provides inadequate transparency, since signed contracts are not public, and will often bear little relationship to the original proposals. This

opacity creates confusion and uncertainty about the true content of contracts, promotes gossip and rumours about contents, and provides a powerful advantage to processors by ensuring information asymmetry between processors and farmers not party to the given contract.

National companies have a history of publishing just one contract nationally, which is entirely misleading as different prices are paid in different dairying regions.

Processors doing sweetheart deals are distorting the market, and this should be known and reduced, in the interests of market efficiency and also equity between farmers, but also so that all farmers are better informed about the true market price for milk when they negotiate, and levels the playing field for the next round of negotiations.

Under-the-table deals cause a great deal of tension between farms, and between farms and processors, and introduce an element of distrust into business relationships, and all dealings in the market.

The same logic underpinning the government policy, now legislated, that employers cannot impose secrecy between employees on salaries and wages¹⁴, applies to the true pricing under MSAs. At the very least, the Code should be modified to prohibit price secrecy, and to allow farmers to share price information, and ask about price information.

4: Non-exclusive contract arrangements

Question 4.1: How can processors reduce the inefficiencies and administrative costs of non-exclusive MSAs?

Member feedback in relation to this question is that while they have strong views about the terms to be included in a non-exclusive MSA, and the need for this option to remain, they don't see any real or substantive inefficiencies and administrative costs in such MSAs. Their belief is that the alleged inefficiencies and administrative costs are based on the desire of processors to reduce flexibilities and options open to farmers, hence binding them more closely to the single processor, rather than improve business efficiency.

Question 4.2: How can the risks of non-exclusive MSAs be better balanced between both parties?

Member feedback in relation to this question, again, is that the purported risks are negligible, non-existent, or invented for other purposes.

Processors insist on contracting for a specific volume only, and should have no say whatsoever about what a farmer might do with any surplus. That is a free market in operation.

Because each circumstance where a non exclusive MSA is required will be unique, and requires good faith on both sides, we repeat our earlier proposal: The Code

¹⁴ Via the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

should be modified to require bargaining in good faith, and full disclosure of information material to the contract. If such an obligation was applied to all bargaining under the Code, then it would go a long way towards reducing the asymmetry of power and knowledge between the parties, reduce risks to each party, and promote a more efficient market.

It needs to be acknowledged and perhaps supported by government that where a non exclusive MSA is required, and negotiations are proving difficult, Australian Competition and Consumer Commission or Department of Agriculture, Fisheries and Forestry could assist with engagement of a facilitator to assist the negotiation process.

5: Minimum pricing requirements in multi-year contracts

Questions 5.1: What mechanisms can be implemented to ensure price protections on multi-year MSAs for both the farmer and processor?

We strongly believe the Code should be modified to require that the first year pricing must be the minimum for the duration of the contract, and that this must include price, quality payments, penalties/bonuses and everything else of benefit to farmers.

Some processors have a history of demanding farmers sign multi-year contracts which have substantially reduced prices for the second and/or future years. There can be no clearer sign that the processor is attempting to misuse their market power to bully farmers into accepting a deficient document. It is an extraordinarily short-term and counter-productive perspective.

Market efficiency is impaired by increased uncertainty and creating new dimensions/factors of uncertainty; removing this uncertainty will improve the capacity of farmers and processors alike to plan and invest appropriately.

In particular, it will help both processors and farmers in their financial forecasting and negotiations with financial institutions, and help them secure more appropriate finance solutions.

Processors who object to this on the grounds that it inhibits their flexibility to reduce prices must be required to demonstrate that such flexibility is ever appropriate or used in reality. While price reduction proposals have been used to bully farmers in the bargaining process, as far as we are aware they have not been implemented in the life of the Code.

Objections to this proposal on the grounds that it will inhibit the willingness of processors to offer and sign multi-year MSAs are engaging in fantasy. Processors and farmers want the stability and certainty of multi-year contracts, and while processors never want to be paying lavish prices, they understand that in reality this proposal is a protection for them as it provides certainty. It is a trade-off, but one which ultimately benefits processors as much as farmers. It ensures that price uncertainty does not drive a dairy farmer out of the industry, thus imperilling a processor's milk supply, during the life of an MSA.

If farmers want the advantages of a longer contract and processors are not willing to offer at the same price as year one, then a lower first year price can be mutually agreed upon.

We can envisage no scenario in the foreseeable future in which it will be appropriate, necessary, or even desirable, for the milk price to be reduced in the later years of any MSA. We see the only movement in milk prices in the later years of a multi-year MSA as being upward, for the foreseeable future.

Question 5.2: Do multi-year MSAs provide enough pricing flexibility to respond to changing markets? If not, how can this be achieved?

The content of an MSA is between a processor and a farmer, subject to the Code. If processors or farmers feel more flexibility is needed, they can propose and negotiate an appropriate term in their agreement.

Australian Competition and Consumer Commission could consider drafting a model provision for the guidance of parties.

If processors are concerned with or anticipate significant future year fluctuations, then they would only offer one year contracts. Both parties agree to longer contracts to provide security, and this cannot be unilateral.

If processors are adamant that they need the capacity to reduce milk prices over the life of a multi-year MSA, then you would have to wonder whether they are investing sufficiently in market forecasting and evaluation.

Question 5.3: Should there be a defined process to determine what meets the requirements of an exceptional circumstance?

Any determination of an exceptional circumstance needs to be agreed between processor and farmer including agreement about duration, needs to be scrutinised in all cases by the Australian Competition and Consumer Commission, and must involve bargaining in good faith, and full disclosure of information material to the contract and exceptional circumstance.

Both farmer and processor should be able to initiate declaration of an exceptional circumstance – that is, it needs to work both ways.

6: Multi-party dispute resolution and arbitration

Question 6.1: Should negotiation and arbitration costs be based pro rata on turnover to give each party a fairer deal in expensive legal processes? If not, can you suggest a fairer solution?

The deep, pockets of processors, compared to dairy farmers, must be acknowledged. Processors are much better positioned to pay the costs of negotiation and arbitration. They will incur costs in such a process which dairy farmers cannot and will not because of lack of capacity to pay – for example, professional, research, and advocacy/representation, charges are utterly beyond the means of most dairy farmers, but well within the means of most processors, particularly the larger processors.

Therefore, in participating in such processes, processors are choosing to ramp up their costs, with the overhanging threat to farmers that they may have to bear the costs they could not afford to invest in for themselves.

There should be no obligation to pay the other party's costs in arbitration and negotiation processes, unless it is determined that the other party's costs were unreasonably increased as a result of bad faith participation. In that event, a pro-rata system based on turnover would be appropriate, but the barrier to determining bad faith must be substantial, and not take into account the mistakes made by a self-represented or under-advised farmer. In addition, delays, cost inflation, process padding, and other tactics used by processors to intimidate farmers, should eliminate the capacity of processors to seek costs.

Comments made elsewhere in this submission about retaliation are very relevant. Many dairy farmers will not take up issues with processors because of a fear of retaliation, and the capacity of processors to disguise and deny retaliation activity.

Question 6.2: What are the risks and benefits to both the farmer and processor of allowing multi-party dispute resolution? How can any risks be mitigated?

Comments made elsewhere in this submission about retaliation are very relevant. Retaliation is a real risk for farmers, but this risk is reduced when there are more farmers involved in the dispute resolution process.

Some of the risks raised in response to question 6.1 apply equally or more so to a multi-party process which, by its very nature, may take longer to resolve than a two-party process.

As with all such processes, many of the risks are mitigated when it is an obligation for all parties to bargain in good faith, with full disclosure of information material to the dispute.

Given that the principle purpose of the Code is to reduce the disparities in bargaining power which exist between farmers and processors, it would be against the entire purpose of those Code, and undermine its credibility, if multiple processors could be involved in the one negotiation. This should be an option for farmers only.

7: Contract cooling off period

Question 7.1: Could MSAs be negotiated earlier to allow time for farmers to assess the financial and legal circumstances before the beginning of the season?

Members generally would support an earlier commencement to MSA negotiations, but there would need to be some conditions around any such change.

For example:

- There would have to be a set date (e.g. 1 May) for all announcements, rather than giving flexibility to processors. Multiple dates would set off a processor competition to be last, or later, so they could gain information from competitors before making announcements.

- The cooling off period would need to be longer for any value arising from earlier negotiations to be realised – otherwise farmers simply will be under pressure at a different time,
- There should still be a ban on announcing agreed prices early, as this would distort all later negotiations, and the market overall,
- Farmers would need plenty of notice (e.g. at least two months) that negotiations are to start earlier, because many are small businesses and the negotiation process is a major drain on time and resources which needs to be planned for,
- The deadline for completion should not change – it will not suit some farmers at all to commence negotiations early and they should be allowed to adhere to the current timeframes by default,
- One suggestion made has been to set a rigid date for the expiry of the cooling off period e.g. 7 July, so that there is a reduced prospect of market rumours and price settlements infecting later negotiations.

Question 7.2: How can the cooling off period be implemented in a way that more equitably balances risk and not significantly disadvantage either party?

The fact is that the cooling off period is itself a mechanism for balancing the risks of the parties to negotiations. It is critical to understanding that the risks are very much resting with the farmers at this point in the process, because of information asymmetry – processors know what they are offering other farmers in the area and elsewhere, while farmers must subsist on rumour and gossip.

The only risk for processors in an extended cooling off period is that their final offer might be found to be unfair and unreasonable and behind the market.

The current cooling off period is fair to both parties and gives both farmers and processors time to adjust offers if their original contract is not competitive.

If processors claim the cooling off period creates a whole 10 days of business uncertainty, then this might be overcome by including provisions in the contract for them to match the market if it is higher than their offer.

Any attempt to advance the proposition that farmers use the cooling off period as a process through which they juggle multiple MSAs and pressure processors to improve their offer is just laughable. If it happens that farmers are considering two competing MSAs at the one time, it is exceptionally rare.

If cooling off period is removed, it would mean that many farmers would not sign proposed contracts with processors until the end of July, when all final contracts are widely known, and they can assess whether what they have been offered is consistent with the rest of the market. This would create even more uncertainty for processors.

8: Unwritten or unsigned contracts

Question 8.1: Should verbal MSAs be allowable at any point during the lifetime of the MSA?

There is significant resistance to the idea of verbal agreements, and they are opposed except in circumstances where they are urgent, and are to be written down right away.

Any agreements over and above the written MSA, or modifying the MSA, must be reduced to writing urgently. One of the reasons for haste is to minimise disputes, but another reason is simply that memories are tricky and the sooner what was agreed is written and endorsed by all parties, the more it is likely to reflect exactly what was agreed.

Any agreement not in writing is unsafe for all parties and is merely the opinion of two individuals about what has changed. This provides enormous scope for dispute and unfairness.

The inconvenience of having to record an agreement in writing and modify the MSA is more than fully balanced by the certainty a written agreement provides to both businesses.

A written and signed/approved MSA can be enforced, which is the whole point of them. An unwritten agreement is so much harder to enforce and wastes business resources in pursuit of enforcement.

The circumstances in which such an agreement can and cannot be made need to be tightly controlled, and must not be able to result in a reduced price. For example, it is in both parties' interests if a farmer can provide additional milk when needed by the processor (provided this is not done to harm the interests of another farmer) but the obligations of each party need to be made clear in writing. There should be a time limit for seeing the agreement in writing.

Question 8.2: What are the risks and benefits of enforcing written MSAs, signed by both parties?

An unwritten agreement is not worth the paper it is printed on.

The MSA is the most important foundation of the business of the farmer. It is extraordinarily dangerous for the business if such a foundational component of the business is not clearly defined.

An agreement which is not written out in full is merely the opinion and recollection of two individuals. What if one of them moves away, leaves their job/farm, or dies? Who clarifies then what the agreement is? It is then the opinion of one person only, which could be quite unfair to the other party.

Human recollections are imperfect, and human minds change, and a written contract is essential to ensure those lapses, or changed circumstances, do not operate to create disputes or unfairness.

One of the most important things sought by all businesses is certainty about the future, and only a written MSA provides the necessary level of certainty.

MSAs can be varied, and if the business relationship between the parties is mature and honest, agreement about variations will be reached and documented.

The important thing is that the MSA is agreed by the parties, and such an agreement is unambiguous and in writing. The agreement itself does not need to be signed, although we understand the formal signing provides a degree of comfort to farmers and processors alike. Signing of the actual agreement ensures there is no debate about which version of a document has been agreed.

Comments made in response to question 8.1 are also relevant.

Question 8.3: Should a signed MSA be in place before the commencement of the milk supply?

Given what we have said above in response to questions 8.1 and 8.2, eastAUSmilk obviously has a strong preference for milk supply to happen only once an MSA is signed. However, we recognise that either or both parties to an MSA might have circumstances which mean an MSA is finalised only at the end of the previous agreement, and we acknowledge that the current one-month period of grace can operate to the advantage of farmers.

The one-month grace period allows farms and processors to work through individual details, and personalised conditions and arrangements which may be unique or complex, without unreasonably stressing those negotiations with a deadline.

If the grace period was removed, farmers would be forced to dump milk given that inevitably some will not be able to meet the extremely tight one month timeline, especially if key people are away during June.

The current one-month grace period allowing supply without a contract should stay, and as far as we have been made aware works well for both parties.

Summary of Proposals from eastAUSmilk

1. Government should accept that while a uniform Code is desirable, that principle does not mean the Dairy Industry Code may have elements which apply in some regions only.
2. Government should accept – as they seem to in some of their public comments already – the proposition that the market power of the major supermarkets sees them exert enormous influence on farmgate prices, and the margins applied at each stage of the supply chain.
3. Making the Food and Grocery Code mandatory is an important component of ensuring the whole of the supply chain in the dairy industry operates as effectively as possible.
4. It is in the best interests of the community, the government, and the dairy industry that margins in the supply chain for supermarkets are monitored.
5. Government should ensure via the Food and Grocery Code that big supermarkets take steps to eliminate retaliation and bullying against suppliers and producers will improve the functioning of markets, and is also in the best interests of the community, the government, and industry.
6. Government should note and accept that the issue of retaliation against farmers may be an issue to be addressed later in the course of this review of the Dairy Industry Code, or at the next review.
7. The Dairy Industry Code should be modified to require diligence and good faith in the preparation and presentation by processors of income estimates, and to clearly and separately list all of the assumptions underpinning the estimate.
8. The Dairy Industry Code should be modified to require an annual reconciliation of income estimates vs. actual income, with identification and explanation of discrepancies.
9. The Dairy Industry Code should be modified to require public disclosure of the full terms of signed contracts, and variations or supplementary agreements thereto.
10. Government should commit to discussing with the dairy industry the anti-competitive potential of vertical integration in the industry, with a view to identifying appropriate policy and program responses.
11. The Dairy Industry Code should be modified to prohibit processors disclosing proposed prices to anyone before 1 June, or before the start of MSA negotiations if this review of the Code results in earlier commencement of negotiations.
12. The Dairy Industry Code should be modified to remove provisions about long-term contracts and rollover clauses which apply to cooperatives.
13. The Dairy Industry Code should be modified to require that an MSA for longer than 12 months must apply not less than the year one price to the second and subsequent years.
14. The Dairy Industry Code should be modified to prohibit milk swaps, except in very limited circumstances.

15. DAFF should seek submissions in the course of this review specifically about the legitimacy of the role of milk brokers in a regime where milk swaps are severely limited or prohibited.
16. The Dairy Industry Code should be modified to require that milk supply agreements must be underpinned by legally enforceable instruments making suppliers secured creditors.
17. The Dairy Industry Code should be modified to so that the exemption for smaller processors is tightened or eliminated. We suggest a \$3M turnover threshold or having more than one supplier.
18. The Dairy Industry Code should be modified to require bargaining in good faith, and full disclosure of information material to the contract.
19. The Dairy Industry Code should be modified to ban automatic rollover provisions in MSAs.
20. The Dairy Industry Code should be modified to require that, if the expiry of an MSA is postponed, then the milk price to be paid during the extension period is no less than the highest price paid under the MSA.
21. The Dairy Industry Code could be modified to specify the circumstances in which the expiry of an MSA can be postponed, and/or impose limits on the postponement.
22. The Government should consider whether, where a non exclusive MSA is required, and negotiations are proving difficult, Australian Competition and Consumer Commission or Department of Agriculture, Fisheries and Forestry could assist with engagement of a facilitator to assist the negotiation process.
23. Australian Competition and Consumer Commission should scrutinise all usage of the exceptional circumstances provisions in the Code, to ensure the circumstances truly are exceptional.
24. Allocation of negotiation and arbitration costs should be consistent with our proposals in response to consultation question 6.2.
25. The Dairy Industry Code should not be modified in a way which allows multiple processors to participate in multi-party dispute resolution.
26. If the Dairy Industry Code is modified to allow an earlier start to MSA negotiations, the start date needs to be prescribed and consistent for all processors in a region, and be subject to the other conditions we propose in our response to consultation question 7.1.
27. The cooling off period allowed by the Dairy Industry Code should be preserved as it is.
28. The one-month grace period, for sale/purchase of milk without an agreed contract, allowed by the Dairy Industry Code should be preserved as it is.